

## COMMENTS

### COMFORTING THE COMFORT WOMEN: WHO CAN MAKE JAPAN PAY?

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#### 1. INTRODUCTION

In 1932, the Japanese military established its first “comfort station” in Shanghai.<sup>1</sup> For the next decade, the government built countless more brothels in and around its military stations all over Asia, euphemistically calling these dens of government-licensed rape “comfort stations” and their victims *jūgun ianfu*, or “military comfort women.”<sup>2</sup> Approximately 200,000 girls and women were forced to serve as the sexual slaves of the entire Japanese military,<sup>3</sup> but less than thirty percent of them are still alive.<sup>4</sup> Astonishingly, Japan has never been held accountable for its unspeakable crimes in any court of law.<sup>5</sup> In fact, the government initially denied any involvement with the comfort stations and claimed that they were

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<sup>1</sup> YOSHIMI YOSHIKI, *COMFORT WOMEN* 43 (Suzanne O’Brien trans., Columbia University Press 2000) (1995).

<sup>2</sup> *Id.* at 23.

<sup>3</sup> Women’s International War Crimes Tribunal 2000 for the Trial of Japan’s Military Sexual Slavery [hereinafter *Women’s Tribunal*], at <http://home.att.ne.jp/star/tribunal/jedgement-e.html> (last visited Mar. 6, 2003).

<sup>4</sup> Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in the United States Federal Court*, 16 *BERKELEY WOMEN’S L.J.* 174, 180 (2001).

<sup>5</sup> See discussion *infra* § 4.

privately-operated brothels.<sup>6</sup> For years, Japan was able to sustain this lie because it had destroyed or concealed evidence that would reveal the truth.<sup>7</sup> Only after irrefutable documents surfaced exposing the government's role in the recruitment, establishment, and operation of the comfort stations, did Japan accept moral responsibility.<sup>8</sup> Deplorably, Japan has yet to accept legal responsibility, and no court has vindicated the comfort women by imposing it.

On September 18, 2000, fifteen former comfort women brought their struggle against Japan to the United States, hoping that the District of Columbia ("D.C.") District Court would finally hold Japan liable for its crimes against humanity. However, with the Bush Administration's support, Japan prevailed; the case was dismissed.<sup>9</sup> This Comment provides an overview of the comfort women's plight for justice and their recent attempt to find it in the United States. Section 2 provides a brief history of the comfort station system. Section 3 examines the dishonest and inconsistent responses of the Japanese government regarding its role in creating this system of military sexual slavery. It also discusses the positions of other States regarding comfort women's issues and Japan's reaction to the international community. Section 4 analyzes the violations of international law Japan committed by establishing the comfort station system. Section 5 reviews the minimal comfort women's litigation to date, and Section 6 details *Hwang v. Japan*,<sup>10</sup> the case that brought the comfort women's claims to the federal courts of the United States. In particular, it reviews the plaintiffs' claims, Japan's defenses, and the Bush Administration's support of Japan's motion to dismiss. The U.S. State Department urged the D.C. District Court to dismiss the comfort women's complaint against Japan, asserting that it presented a political question that precluded adjudication.<sup>11</sup> Though this Comment does not dispute that foreign policy is constitutionally outside the bounds of the judiciary's scope, it does question the State Department's position that past treaties settled the comfort women's claims against Japan and suggests that U.S. economic interests, not adherence to international law, motivated the Bush Administration's support.

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<sup>6</sup> See discussion *infra* § 3.1.

<sup>7</sup> See *infra* text accompanying and sources cited notes 71-72.

<sup>8</sup> See *infra* text accompanying and sources cited notes 78-83.

<sup>9</sup> See discussion *infra* § 6.2.

<sup>10</sup> *Hwang v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001).

<sup>11</sup> See discussion *infra* § 6.2.

## 2. THE COMFORT STATION SYSTEM

For the Japanese military, sex was as much a necessity as munitions or food. Superstitiously, the military believed having sex before combat worked as a “charm against injury.”<sup>12</sup> Furthermore, sex served as a relief from the stress of combat and as a source of liberation from the strict confines of military service,<sup>13</sup> since soldiers were stationed in fields far from home for long periods of time, mistreated by their commanding officers, and granted inadequate vacation time.<sup>14</sup> Conversely, sex became a major problem for the Japanese military as well. Soldiers became infected with sexually transmitted diseases with increasing frequency after visiting brothels, causing entire troops to be immobilized by illness at times.<sup>15</sup> They also raped local women in the territories they occupied, a fact the Imperial Army found to be embarrassingly harmful to its reputation.<sup>16</sup> To serve as the solution to these problems, the military created comfort stations in and around their bases. The stations enabled the military to control the soldiers’ sexual activities and partners and provide medical examinations and treatment to the comfort women for sexually transmitted diseases before they could infect the soldiers. Additionally, using comfort women to satisfy soldiers’ sexual needs would, in theory, curb the incidence of rape.<sup>17</sup>

After starting with a few stations in China, in the late 1930s the Japanese military began expanding the comfort station system throughout its territories, including Manchuria, Taiwan, Borneo, the Philippines, Singapore, Burma, Indonesia, Japan, and Korea,<sup>18</sup>

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<sup>12</sup> GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 32 (1994).

<sup>13</sup> *See id.* at 32-33 (noting that Japanese troops endured particularly savage discipline).

<sup>14</sup> YOSHIKI, *supra* note 1, at 72-73.

<sup>15</sup> *See id.* at 65-72 (discussing the two main goals in creating the comfort stations: to curb the rampant looting and raping committed by the troops in the occupied territories, and to prevent the spread of sexually transmitted diseases that threatened the health of soldiers).

<sup>16</sup> *See id.*

<sup>17</sup> *Id.* at 65-68. This logic assumes that rape is caused by frustrated sexual desire or a lack of sexual activity and fails to recognize rape as a crime of violence and an assertion of power.

<sup>18</sup> *See* Arakawa, *supra* note 4, at 177-78 (noting the locations of comfort stations and the rationale of the Japanese government for the comfort system); Susan Jenkins Vanderweert, Comment, *Seeking Justice for “Comfort” Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese*

and, for a small fee, provided soldiers with the right to rape more than 200,000 women over the course of the next decade.

### 2.1. Recruitment and Service

Comfort women were usually very young girls between the ages of fourteen and eighteen.<sup>19</sup> They were generally uneducated and from poor rural families.<sup>20</sup> Eighty percent of the comfort women were Korean,<sup>21</sup> but Taiwanese, Chinese, Southeast Asian, Filipina, and European women were also used in the stations.<sup>22</sup> Japanese women served in the stations as well; but this was rare, and they were usually older, working prostitutes.<sup>23</sup> The government frowned upon the use of Japanese women in comfort stations because they were the potential mothers of Japan's future loyal subjects.<sup>24</sup> In addition, the government assumed soldiers would lose trust in the State and the army if they discovered that their sisters, wives, or female acquaintances were on the battlefields as comfort women.<sup>25</sup> Therefore, women in Japanese-occupied territories, who presented no such issues and often did not need to be

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*Army May Find Their Best Hope of Success in U.S. Federal Courts*, 27 N.C. J. INT'L L. & COM. REG. 141, 149 (2001) (describing the development of the system).

<sup>19</sup> See Vanderweert, *supra* note 18, at 150 (describing the age range and social status of the "women"); Rita M. Gerona-Adkins, *Demonstrators Bash Bush Support for Japan in 'Comfort Women' Suit*, ASIAN FORTUNE (stating that some comfort women were girls as young as ten years old), available at <http://www.asianfortune.com/Sept01/Comfort%20women.htm> (last visited Mar. 4, 2003).

<sup>20</sup> Vanderweert, *supra* note 18, at 150.

<sup>21</sup> Chunghee Sarah Soh, *The Comfort Women Project*, at <http://online.sfsu.edu/~soh/comfortwomen.html> (last visited Mar. 6, 2003). It is likely that Korean women comprised the largest percentage of comfort women because they were preferred by the soldiers over women of other ethnicities. This is partly due to the fact that as part of its colonization of Korea, Japan imposed Japanese as the official language, so Korean comfort women could understand the Japanese soldiers. Also, since the Japanese government controlled Korea, it could more easily get cooperation from local Korean officials and police in rounding up girls. YOSHIKI, *supra* note 1, at 107-08, 121.

<sup>22</sup> Arakawa, *supra* note 4, at 178; Vanderweert, *supra* note 18, at 150.

<sup>23</sup> Because Japan was a signatory to an international treaty that forbade the selling and trafficking of women and children, police regulations specified that Japanese women had to be over the age of twenty-one and a prostitute to be taken overseas as a comfort woman. YOSHIKI, *supra* note 1, at 100.

<sup>24</sup> See Arakawa, *supra* note 4, at 178 (describing Japan's racial and ethnic attitudes and motivations).

<sup>25</sup> YOSHIKI, *supra* note 1, at 155.

transported far distances, became the logical target for the military's recruitment efforts.

Some comfort women were prostitutes that volunteered to serve in the comfort stations. They accepted the military's offer to continue their work on military bases in exchange for relief from debts and to obtain secure wages.<sup>26</sup> But as the War in the Pacific progressed and Japan intensified its efforts by adding more soldiers to the fields, the small number of actual prostitutes could hardly meet the sexual needs of the entire Imperial Army. The military initially amassed its supply of sex slaves by using deception to recruit women under the pretext that they would receive high wages from jobs in factories or military bases and have access to education.<sup>27</sup> Extreme poverty coupled with a general devaluation of women even led some parents and husbands to sell their daughters or wives to procurers working for the military.<sup>28</sup> However, when even these measures failed to yield a sufficient number of women, the government took more drastic measures to replenish the comfort stations' inventory. With the help of local schoolteachers, officials, and police, the Japanese military raided villages and abducted unaccompanied young girls or kidnapped them from their homes.<sup>29</sup> Families who tried to prevent the kidnapping of their daughters were violently overpowered.<sup>30</sup> In extreme cases, soldiers raped girls in front of their families, knowing that raped

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<sup>26</sup> In order to recruit Japanese prostitutes or geishas, the military paid off the women's debts to their brothel owners and treated the comfort women as civilian employees. *Id.* at 101. "There was also a psychological bonus: women who were usually despised were now admired for their courage in moving to a war zone, enabling them to think of themselves as patriotic." HICKS, *supra* note 12, at 39.

<sup>27</sup> See HICKS, *supra* note 12, at 49 (pointing out that poverty and scarcity of jobs in rural areas made "deceptive offers of well-paid work [sound] attractive and provided sufficient lure"); YOSHIKI, *supra* note 1, at 103-04 (stating that cases of deception were most common in Korea where poor, uneducated girls were easily lured by the appeal of money and education).

<sup>28</sup> See YOSHIKI, *supra* note 1, at 105-06 (detailing cases in which women testified to being sold by their parents or their husbands to Japanese procurers or an "employment agency").

<sup>29</sup> See Arakawa, *supra* note 4, at 178-79 (describing Japanese slave raids).

<sup>30</sup> *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. ESCOR, 52nd Sess., Provisional Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996) [hereinafter *Coomaraswamy Report*], available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/b6ad5f3990967f3e802566d600575fcb?OpenDocument> (last visited Mar. 6, 2003).

daughters were less desirable to the families, and they would therefore be less likely to resist their abductions.<sup>31</sup>

A document entitled "Matters Concerning the Recruitment of Women to Work in Military Comfort Stations" issued on March 4, 1938, by the Ministry of War confirms that the Japanese government was not only involved in the recruitment of comfort women, but was completely aware of the illegal tactics often used in the process.<sup>32</sup> This document, drafted by the Military Administration Section of the Military Administration Bureau, states:

In recruiting women domestically to work in the military comfort stations . . . it is feared that some people have claimed to be acting with the military's consent and have damaged the honor of the army, inviting the misunderstanding of the general public . . . . There have also been instances where a lack of proper consideration resulted in the selection of inappropriate people to round up women, people who kidnap women and are arrested by the police. There are many things [about the rounding up of comfort women] that require careful attention. In the future, armies in the field will control the recruiting of women and will use scrupulous care in selecting people to carry out this task. This task will be performed in close cooperation with the military police or local police force of the area. You are hereby notified of the order [of the Ministry of War] to carry out this task with the utmost regard for preserving the honor of the army and for avoiding social problems.<sup>33</sup>

Here, the Ministry of War does censure the "rounding up of women" by means of kidnap. However, its concern is not for the human rights of the women being kidnapped or the illegality of the acts involved. This notice seems to be prompted only by the desire to curb negative publicity. In assigning control over the recruitment of comfort women to the military, it is important to notice that the final order is to preserve the army's honor and avoid public problems. It does not actually prohibit kidnapping or illegal

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<sup>31</sup> *Id.* para. 16.

<sup>32</sup> YOSHIKAWA, *supra* note 1, at 58-59.

<sup>33</sup> *Id.*

acts; it merely suggests that such behavior must remain undetected in order to maintain the army's image. If the Ministry's aim was to stop the kidnappings themselves, then surely the order would have stated so, and 1938 would have marked the end of forced recruitment. Instead, the military, with the help of local police and civilians, continued to use violence and kidnapping to round up women,<sup>34</sup> suggesting that the Ministry's underlying message was, "don't get caught, and we won't ask."

Once the comfort women arrived at the stations, they quickly realized the type of "work" they would be required to perform. Many women had to serve sixty to seventy men per day.<sup>35</sup> In addition to raping the comfort women, soldiers often beat, stabbed, or subjected comfort women to other torturous acts for no apparent reason,<sup>36</sup> and any attempt to escape from the stations or resist the soldiers usually resulted in severe physical torture.<sup>37</sup> The military controlled every aspect of the comfort women's lives, including their ability to die by removing suicide from their options. The army deterred suicide and secured submission by threatening to injure the comfort women's families if they disobeyed commands or tried to kill themselves.<sup>38</sup>

Officers and soldiers were required to pay station operators for comfort women's services according to a system of fees devised by the military, and, in theory, station operators were to pay the women for their labor from these fees.<sup>39</sup> Instead, operators charged the women for their upkeep and deducted these fees from the

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<sup>34</sup> See generally *id.* at 98-115 (describing the various means used to recruit and forcefully abduct young girls and women to serve in the comfort stations).

<sup>35</sup> Coomaraswamy Report, *supra* note 30, para. 34.

<sup>36</sup> See HICKS, *supra* note 12, at 62-63 (quoting the testimony of one comfort woman whose client "drew his sword and began tracing its point on her flesh"); Carlin Meyer, *Crimes Against Humanity Women: The Uncomfortable Stories of "Comfort Women"*, 17 N.Y.L. SCH. J. HUM. RTS. 1019, 1025 (2001) (book review) ("Displeased 'customers' beat, stabbed and otherwise injured the women with impunity.").

<sup>37</sup> See Arakawa, *supra* note 4, at 179 (describing physical scars attributed to beatings and torture for attempts to resist or escape).

<sup>38</sup> When comfort women protested to soldiers by saying they would rather die than submit, the Japanese responded by threatening to make their families suffer. HICKS, *supra* note 12, at 62. Whether soldiers would have actually carried out these threats or not, the comfort women knew firsthand the violence of which they were capable and unwillingly submitted.

<sup>39</sup> See HICKS, *supra* note 12, at 83-85, 91 (detailing the varying systems of payments and fees at different comfort stations and stating that the fees differentiated both for military rank and for nationality of the women).

earnings or refused to issue payments to them.<sup>40</sup> The women who did receive payment often deposited the cash in military savings accounts, only to have their money confiscated by the Japanese government at the end of World War II.<sup>41</sup> Not surprisingly, most comfort women saw little or none of the earnings; they were de facto slaves.

## 2.2. Government Regulation of Comfort Stations

Although there are few remaining records about the recruitment of comfort women,<sup>42</sup> much documentation about the management and operation of the comfort stations survived. These records indicate that the comfort stations were strictly regulated by the government and, initially, directly operated by the military.<sup>43</sup> As stations became more established, the trend became one in which private operators were responsible for the internal operations of comfort stations, while the military retained overall supervision through an elaborate system of regulations and provided transport and health services.<sup>44</sup>

The military determined each comfort station's rules regarding hygiene, hours of operation, payments for sexual service, use of condoms, and prohibition of alcohol and weapons.<sup>45</sup> The government also administered medical services for women at all the stations, including routine exams, treatment for sexually transmitted diseases and pregnancy, and provision of contraceptives.<sup>46</sup> Finally, the military provided security for the comfort stations to prevent

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<sup>40</sup> See *id.* at 92 (explaining that operators charged exploitative rates for upkeep and were generally deceptive or callous in keeping comfort women's earnings); *Coomaraswamy Report*, *supra* note 30, para. 36 ("Though in nearly all cases the women were supposed to have been paid for their 'services' and collected tickets in lieu of the pay they were due, only very few saw any 'earnings' at the end of the war.").

<sup>41</sup> HICKS, *supra* note 12, at 92.

<sup>42</sup> See HICKS, *supra* note 12, at 49 (stating that the Japanese systematically destroyed all documentation about the recruitment process for comfort stations and confidential material that could be used as evidence in war crime trials at the end of the war); *Coomaraswamy Report*, *supra* note 30, para. 19 (attributing the lack of remaining or disclosed documentation to why it has been difficult to write an account of the recruitment for the comfort stations).

<sup>43</sup> HICKS, *supra* note 12, at 46-47.

<sup>44</sup> *Id.*

<sup>45</sup> *Coomaraswamy Report*, *supra* note 30, para. 128.

<sup>46</sup> Arakawa, *supra* note 4, at 180.



women from escaping and unauthorized men from entering.<sup>47</sup> Despite the detailed regulations, the spread of sexually transmitted diseases, violence, and alcohol use in the stations indicate that there was little attention paid to the enforcement of rules.<sup>48</sup> After having forced so many women into service, the military never created laws for their protection<sup>49</sup> and the mere posting of informal rules on the doors of the comfort stations had little impact. The existence of this extensive scheme of regulations is important, though, in that it is persuasive evidence that comfort women were an integrated part of the Japanese military and “subjected to the totalitarian ‘national defence [sic] state.’”<sup>50</sup>

### 2.3. *Disposed and Discarded After the War*

It is estimated that less than thirty percent of all the comfort women are still alive today.<sup>51</sup> Many women died in the comfort stations. If the brutality of their work did not kill them, the violence of war on the front lines, illness, or soldiers angered by disobedience did. More died at the end of the war when the Japanese soldiers killed themselves and forced the comfort women to also commit suicide rather than submit to enemy capture.<sup>52</sup> Of the comfort women that survived the stations and the war, only the Japanese women were returned to their native land.<sup>53</sup> Women from other countries generally were abandoned wherever their stations were located.<sup>54</sup> Although freed from the stations, being stranded in remote areas of Southeast Asia, vulnerable to the elements and without means of returning home, was no salvation.<sup>55</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> See HICKS, *supra* note 12, at 90 (quoting a police report sent to warn comfort station operators to improve their standards: “Many managers are interested in nothing but their own profit and do their job with no other purpose. They exhibit no concern for the welfare of the *geisha* . . .”).

<sup>49</sup> YOSHIKI, *supra* note 1, at 151.

<sup>50</sup> HICKS, *supra* note 12, at 90.

<sup>51</sup> Arakawa, *supra* note 4, at 180.

<sup>52</sup> See *id.* at 180; HICKS, *supra* note 12, at 153 (explaining that an honorable death was considered better than a dishonorable life, so troops with this belief preferred that their women share such a death by committing suicide).

<sup>53</sup> YOSHIKI, *supra* note 1, at 192.

<sup>54</sup> Coomaraswamy Report, *supra* note 30, para. 21.

<sup>55</sup> See HICKS, *supra* note 12, at 156 (describing how the abandoned comfort women had no suitable clothing and had to live off and eat what they could find in the jungle, including palms, lizards, and dead bodies). Because Korea was not an active war zone, military presence there was minimal and, correspondingly, so

A considerable number of women returned home or tried to start new lives in new locations, but the trauma of living in the comfort stations was replaced by the unending physical and psychological trauma of having survived them. Aside from the physical injuries that may have eventually healed, former comfort women have been diagnosed with the long-term effects of sexually transmitted diseases: sterility and infertility, complications from hysterectomies, insomnia, nervous diseases, and mental illnesses such as severe post-traumatic stress disorder and depression.<sup>56</sup> Moreover, healing psychologically proved to be a much harder task than healing physically. Instead of receiving sympathy and support, Asian society's patriarchal views of chastity and morality<sup>57</sup> further oppressed the comfort women. Many women felt forced to remain silent about their experiences, believing they would be ostracized or possibly beaten to death by family members if they revealed the truth.<sup>58</sup> This belief was reasonable in light of the fact that families who knew their daughters and wives had been comfort women did reject and torment them.<sup>59</sup> Consequently, silence perpetuated the women's pain by precluding the possibility of "find[ing] release in an open acknowledgement of the wrong done to them."<sup>60</sup> Thus, having survived the comfort stations and the war, some women were unable to face their own shame and took their own lives upon returning home.<sup>61</sup>

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was the number of comfort stations. However, since most of the comfort women were Korean, they comprised the largest group that was displaced after the war. HICKS, *supra* note 12, at 48.

<sup>56</sup> See HICKS, *supra* note 12, at 165 ("Sometimes they had been sterilised [sic] by the operations done on them to eliminate menstruation, keeping them always available."); YOSHIKI, *supra* note 1, at 193; Arakawa, *supra* note 4, at 180 (describing the long-term psychological, physiological, and emotional damage sustained by the women).

<sup>57</sup> See HICKS, *supra* note 12, at 165 ("The view that a raped woman is a defiled woman dies hard everywhere in Asia.").

<sup>58</sup> YOSHIKI, *supra* note 1, at 196.

<sup>59</sup> See *id.* at 196 (quoting the testimony of comfort women who said that their families called them "filthy" and treated them as if they had a "contagious disease").

<sup>60</sup> HICKS, *supra* note 12, at 165.

<sup>61</sup> See Arakawa, *supra* note 4, at 180 (describing the ostracism of comfort women and resulting suicides during and after the war).

### 3. RESPONSES TO THE COMFORT WOMEN'S MOVEMENT

Given that eighty percent of the comfort women were Korean, it would have been reasonable to expect the North or South Korean government to seek redress from Japan for establishing the comfort station system and injuring its nationals. However, when the Allied Forces and South Korea negotiated treaties with Japan to end the war and settle matters of compensation for wartime suffering following World War II and the Korean War,<sup>62</sup> the issue of comfort women never made it to the bargaining tables.<sup>63</sup>

With a series of military men at the helm of repressive regimes, and the Korean War to deal with in the 1950s and 1960s, comfort women were not a priority. The fact that many of the Korean women pressed into sexual service by the Japanese came from the poorer lower classes possibly made the issue insignificant to the ruling elite.<sup>64</sup>

When the Korean governments failed to demand justice on their behalf, comfort women did not then take matters into their own hands. They felt silenced by Asian cultural norms,<sup>65</sup> and this prevented them from suing the Japanese government on their own. Filing a suit would require a former comfort woman to publicly admit to having been a sex slave. The lack of civil litigation against Japan following the war indicates that this was not something that any comfort woman was willing to do. Thus, when the South Korean government neglected to raise the comfort women issue in its treaty negotiations with Japan in 1965, the matter was effectively tabled.<sup>66</sup>

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<sup>62</sup> Although Korea was not a party to the 1951 San Francisco Peace Treaty, which ended the war between the Allies and Japan, this treaty did restore Korean sovereignty. Finally, in 1965, the Japanese-South Korean Basic Treaty was signed, giving the South Korean government the right to handle wartime compensation. HICKS, *supra* note 12, at 169-70.

<sup>63</sup> *Id.* at 171-72.

<sup>64</sup> *Id.* at 172.

<sup>65</sup> See *supra* text accompanying notes 57-59.

<sup>66</sup> See HICKS, *supra* note 12, at 172-73 (explaining that the low status of women and the acceptance of rape as a part of war were responsible for the failure to address the comfort women's abuse until the 1980s).

### 3.1. Japan Denies Establishing Comfort Stations

In the late 1980s, influenced by feminist thought, South Korean women's groups began to take action on the comfort women issue.<sup>67</sup> Activists demonstrated, traveled to Japan in order to gather more information about the comfort station system, and demanded an apology from Japan.<sup>68</sup> However, without the initiation of legal action by comfort women or the release of conclusive evidence of the government's involvement in the comfort stations, the activists made little impact.<sup>69</sup> The Japanese government denied involvement in the comfort station system. Insisting that they were privately-operated brothels, it refused to disclose any information about the stations or accept responsibility.<sup>70</sup> Unfortunately, this was difficult to refute due to the lack of official documents that supported surviving comfort women's accounts of coercive recruitment and forced sexual labor.<sup>71</sup> Most records had been destroyed and the Japanese government had not disclosed that there were any documents remaining in its possession.<sup>72</sup> Thus, survivors' narratives comprised the bulk of the body of evidence regarding the comfort stations.<sup>73</sup> Quite literally adding insult to injury, "the government also dismissed the testimonies of survivors recounting kidnapping, coercion, and forced transport by Japanese military personnel as uncorroborated and therefore insufficient evidence of military participation."<sup>74</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> See *id.* at 177-78 (describing investigative trips made to Japan and women's groups' actions).

<sup>69</sup> See *id.* at 186 ("[T]he Japanese reply was that there was no evidence of the forced draft of Korean women. So no public apology, disclosures or memorial were forthcoming.").

<sup>70</sup> See Arakawa, *supra* note 4, at 181 (describing the Japanese government's response to the comfort women issue).

<sup>71</sup> See HICKS, *supra* note 12, at 49 (explaining that it has been difficult to get a clear picture of the recruitment process in Korea due to "the shortage of official records of draft procedures," which is the result of systematic destruction by the Japanese of all confidential material that could have been used as evidence in war crimes); Coomaraswamy Report, *supra* note 30, para. 19.

<sup>72</sup> Suzanne O'Brien, *Translator's Introduction to YOSHIMI YOSHIAKI, COMFORT WOMEN 1, 7* (Suzanne O'Brien trans., Columbia University Press 2000) (1995).

<sup>73</sup> Coomaraswamy Report, *supra* note 30, para. 19.

<sup>74</sup> O'Brien, *supra* note 72, at 7.

### 3.2. *Japan Unwillingly Admits the Truth but Denies Responsibility*

In the early 1990s, two important events catalyzed Japan's eventual admission of involvement in the comfort station system and the investigation by international bodies into the system. First, in 1991, Kim Hak-sun announced her willingness to testify publicly about her experiences as a comfort woman and became the first surviving comfort woman to initiate formal legal action against the Japanese government.<sup>75</sup> Her decision was prompted by Japan's denials of responsibility and her lack of immediate family;<sup>76</sup> she would testify only because there was no one left in her life that would have to suffer the shame that would result from the revelation of her past. Soon after Kim Hak-sun went public, two other former comfort women, who chose to remain anonymous, agreed to join her suit against Japan.<sup>77</sup>

The second major event occurred when Professor Yoshiaki Yoshiaki, a Japanese history professor, provided the comfort women with the gift of irrefutable proof of the military's direct role in establishing and running the comfort stations.<sup>78</sup>

Deeply moved by the courageous testimony of Korean comfort station survivor Kim Hak-sun, in January 1992 Yoshiaki returned to the Japanese Self-Defense Agency archives, where he had previously come across documents pertaining to the comfort station system. There he located wartime documents attesting to the fact that the Japanese military planned, constructed, and operated comfort stations.<sup>79</sup>

On January 11, 1992, Professor Yoshiaki published these documents in the *Asahi Shimbun*, a major Japanese newspaper.<sup>80</sup> That day, Japan's Chief Cabinet Secretary Koichi Kato responded by apologizing for the first time on behalf of the government for the military's involvement in the comfort stations, but refused to pay

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<sup>75</sup> HICKS, *supra* note 12, at 188.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 190.

<sup>78</sup> *Id.* at 197.

<sup>79</sup> O'Brien, *supra* note 72, at 7.

<sup>80</sup> *Id.*

damages.<sup>81</sup> His apology, however, was tenuous at best. He admitted that the military had constructed the stations, conducted medical examinations, and overseen the management of the comfort facilities, but he claimed civilians, and not the military, had recruited and transported the comfort women,<sup>82</sup> denying the alleged use of coercion or force. According to Kato, the women were voluntary prostitutes, not sexual slaves, thus the system was not illegal and Japan had no legal liability.

Finally in 1993, in response to mounting evidence of the military's role in the recruitment and transportation of comfort women, Japan again reversed its position by admitting that the military had been officially involved in the comfort station system and that the women had indeed been coerced by deceit and intimidation into forced sexual labor.<sup>83</sup> Nevertheless, Japan refused to acknowledge any legal responsibility, claiming that war treaties and agreements barred liability and waived reparations.<sup>84</sup>

Subsequently, in an attempt to appease former comfort women and international critics, Japan established the Asian Women's Fund ("AWF") in 1995 with "the aim of expressing a sense of national atonement from the Japanese people to the former 'comfort women' and to work to address contemporary issues regarding the honor and dignity of women."<sup>85</sup> The \$1 billion program is allegedly privately-financed and managed by the Japanese Red Cross Society to undertake cultural and vocational projects and to pro-

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<sup>81</sup> Arakawa, *supra* note 4, at 181.

<sup>82</sup> O'Brien, *supra* note 72, at 7. Professor Yoshiaki explains how these documents were spared from destruction:

They were among a group of documents . . . that had been stored in an underground warehouse . . . to protect them from U.S. air raids. They were scheduled for incineration in the final days of the war, but the arrival of the Allied Forces preempted that plan. The documents were seized by the Allied Forces and brought to the United States, then later returned to the Self-Defense Agency's National Institute for Defense Studies Library. No one knew that this collection contained documents relating to the comfort women, so they were overlooked.

YOSHIAKI, *supra* note 1, at 35.

<sup>83</sup> Meyer, *supra* note 36, at 1030-31.

<sup>84</sup> Arakawa, *supra* note 4, at 182.

<sup>85</sup> See Chunghee Sarah Soh, *Human Rights and Humanity: The Case of the "Comfort Women,"* (1998) [hereinafter Soh, *Human Rights*] (Institute for Corean-American Studies, Inc. Lecture No. 98-1204-CSSb) (quoting statements from the Asian Women's Fund), at <http://www.icasinc.org/lectures/css/1998.html> (last visited Mar. 20, 2003).

vide lump sum “tokens of apology” of up to \$10,000 to former comfort women.<sup>86</sup> The emphasis on private-financing is significant because substantial government contributions would, in effect, convert AWF funds into disguised reparations, and this would undermine Japan’s position that comfort women are not entitled to reparations. While the government states that it will limit its contribution to the nominal costs of public relations and clerical expenses,<sup>87</sup> one report claims that it also contributes directly to the AWF under the name of a ghost company.<sup>88</sup>

### 3.3. *International Criticism of Japan*

In general, the AWF has drawn more criticism than acclaim. Japan created the AWF to improve its public image regarding its position on comfort women’s issues, but the AWF has had the opposite effect. By stressing that the funds are private contributions and refusing, at least publicly, to make substantial State contributions, Japan has only further angered comfort women advocates. For them, the central issue is not one of money, but of justice and atonement, neither of which are achieved by Japan’s offering of “private” funds. The AWF functions as a means for the State to officially reject legal responsibility and not pay reparations while attempting to appease.<sup>89</sup> Thus, many former comfort women, leaders of the comfort women movement, and governments have rejected AWF money and asked Japan to withdraw the AWF.

In Taiwan, for example, movement leaders and the government have officially rejected the AWF, asking instead for Japan’s formal apology and legal compensation for the violations of the comfort women’s human rights.<sup>90</sup> Similarly, the North Korean government has requested that Japan accept full responsibility under international law for the comfort stations, formally apologize, pay com-

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<sup>86</sup> Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT’L L.J. 528, 529-30 (1995).

<sup>87</sup> *Id.*

<sup>88</sup> Soh, Human Rights, *supra* note 85.

<sup>89</sup> *Id.* See Yu, *supra* note 86, at 530 (stating that critics are troubled by the fact that by not making direct compensation, the Japanese government avoids assuming legal responsibility); Coomaraswamy Report, *supra* note 30, para. 134 (“[T]he Special Rapporteur sees the Fund, as created, as an expression of the Japanese Government’s moral concern for the fate of ‘comfort women.’ However, it is a clear statement denying legal responsibility . . . and this is reflected in . . . the desire to raise funds from the private sector.”).

<sup>90</sup> Soh, Human Rights, *supra* note 85.

pensation to each individual surviving woman, and identify and prosecute under national law all those involved in establishing the comfort station system.<sup>91</sup> It has further requested the release of all remaining documents and materials about the comfort women and the modification of Japanese history books to accurately reflect the government's crimes.<sup>92</sup>

The South Korean government has taken a more cautious approach. Although it has conceded that its 1965 treaty with Japan only settled claims for property damages incurred during the war and did not address military sexual slavery, it has withheld harsh criticism, stating that the treaty aimed to normalize diplomatic relations between the two countries.<sup>93</sup> In not making official demands for financial compensation,<sup>94</sup> the South Korean government has prioritized the normalization of its vulnerable relations with Japan above retribution for crimes against its nationals.<sup>95</sup> Despite the South Korean government's official position, many politicians, academics, non-governmental organizations, and former comfort women have been much stronger advocates for the comfort women and have made demands similar to those of the North Korean government.<sup>96</sup>

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<sup>91</sup> *Coomaraswamy Report*, *supra* note 30, para. 67.

<sup>92</sup> *Id.* para. 72. Currently, Japanese middle school and high school textbooks for history and civics only contain one- to two-sentence references to comfort women, and, still, there is a movement to have these inadequate references expunged. O'Brien, *supra* note 72, at 16.

<sup>93</sup> *Coomaraswamy Report*, *supra* note 30, para. 78.

<sup>94</sup> *Id.*

<sup>95</sup> *See id.* para. 79 (stating that high-ranking officials in the South Korean Ministry of Justice and the Office of the Public Prosecutor said it was difficult to determine whether the Government of Japan actually had legal responsibility to compensate for crimes committed fifty years ago).

<sup>96</sup> *Id.* para. 86. Korean women's groups issued a joint statement demanding the following from the Japanese government:

1. [T]he Japanese government acknowledge the fact that [the military] forced Korean women to accompany troops as comfort women;
2. the Japanese government issue an official apology for these practices;
3. the Japanese government disclose all acts of brutality [committed by the government or military];
4. a memorial to the people victimized be erected;
5. survivors or their families be compensated; and
6. in order to prevent the recurrence of these wrongs, the facts be taught as a part of history education.



Regardless of such international pressure and evidence indicating that the Japanese Imperial Army was responsible for the establishment and control of the comfort stations, the Japanese government has continued to reject all legal obligations towards former comfort women.<sup>97</sup> It has, however, accepted moral responsibility and some Japanese officials have issued apologies.<sup>98</sup>

#### 4. VIOLATIONS OF INTERNATIONAL LAW

Japan firmly contends that it is not legally liable for the comfort station system, but there is both treaty law and customary international law contradicting this position. In fact, the Special Rapporteur of the United Nations Commission on Human Rights concluded that the Japanese government has both a legal and a moral obligation toward the comfort women.<sup>99</sup> As a signatory to the International Agreement for the Suppression of the White Slave Traffic of 1904, the International Convention for the Suppression of the White Slave Traffic of 1910, and the International Convention for the Suppression of Traffic in Women and Children of 1921,<sup>100</sup> Japan violated its international treaty obligations by establishing a system of military sexual slavery. Furthermore, the existence of these international agreements, along with the Convention Respecting the Laws and Customs of War on Land of 1907,<sup>101</sup> denotes that there was widely accepted customary international law in effect, at that time, prohibiting the human rights violations perpetuated by the comfort station system.

##### 4.1. *Violations of International Treaty Law*

The precautions taken by the Japanese government in recruiting and transporting Japanese women to work in comfort stations indicate that it was well aware of its duties under international

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YOSHIKI, *supra* note 1, at 34 (citing YUN JONG-OK, ET AL., *CHŌSENJIN JOSEI GA MITA "IANFU MONDAI"* [THE "COMFORT WOMAN" ISSUE FROM THE PERSPECTIVE OF KOREAN WOMEN] 255 (1992)).

<sup>97</sup> Coomaraswamy Report, *supra* note 30, para. 92.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* para. 102.

<sup>101</sup> Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV].

law.<sup>102</sup> The International Convention for the Suppression of White Slave Traffic of 1910 made it criminal to traffic under-aged women for prostitution, regardless of consent, and to traffic adult women for prostitution by fraudulent or coercive means.<sup>103</sup> In addition, the International Convention for the Suppression of the Traffic of Women and Children of 1921 not only banned the trafficking of women and children but also imposed the affirmative duty to prevent it.<sup>104</sup> Both treaties, which Japan ratified, included provisions that permitted countries from excluding their colonies from the scope of these laws;<sup>105</sup> these are the loopholes that Japan has attempted to utilize to avoid legal liability.

Japan denies all liability for trafficking in comfort women from its colonized territories, such as Korea and Taiwan, invoking Article 14 of the 1921 Convention which excludes colonies from the scope of the Convention.<sup>106</sup> However, these treaties were clearly enacted to eliminate the precise conduct that the comfort station system encouraged—human trafficking, rape, and slavery. The loopholes in the treaties were most likely created to exempt the colonies from the application of certain insignificant or irrelevant provisions, and, admittedly, they should have been more carefully worded. However, a reading of these oversights as “colonial ‘safe harbors’ for the sexual slave trade is a perverse one that altogether violates the spirit of the [1921] Suppression Convention”<sup>107</sup> and the 1910 Convention. Even assuming that the colonial exemptions applied in this situation, Japan still violated the treaties. Because the ships of a State are considered to be equivalent to State territory itself,<sup>108</sup> Japan may exempt the kidnappings and coerced recruit-

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<sup>102</sup> See YOSHIKI, *supra* note 1, at 58-59 (describing Japan’s awareness of the inappropriate recruitment methods).

<sup>103</sup> *Id.* at 156 (quoting Article 1 and Article 2 of the International Convention for the Suppression of White Slave Traffic of 1910).

<sup>104</sup> Yu, *supra* note 86, at 531.

<sup>105</sup> Article 11 of the 1910 treaty requires the signatory to submit, in writing, its desire to apply the treaty’s law in its colonies, and Article 14 of the 1921 treaty permits a signatory to opt out of the treaty as it applies to its colonies. YOSHIKI, *supra* note 1, at 157.

<sup>106</sup> *Id.* See Coomaraswamy Report, *supra* note 30, para. 102 (stating that Japan’s claim that Korean women are exempt under Article 14 implies that all non-Korean comfort women would have the right to claim that Japan had violated its obligation under this Convention).

<sup>107</sup> Yu, *supra* note 86, at 531.

<sup>108</sup> For a discussion of the status of a State’s ships, see *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (1927), available at <http://www.worldcourts.com/pcij>

ments that occurred on colonial soil, but as the comfort women boarded Japanese ships, the exemptions were lost.<sup>109</sup> Finally, Japan relies heavily on Article 14 to justify the acts that occurred in its colonies, but this only reinforces the argument that military capture and transport of comfort women from all non-colonized Japanese territories, such as the Philippines, were indeed violations of the 1921 Convention.<sup>110</sup>

#### 4.2. *Violations of Customary International Law*

By 1932, the year Japan created its first comfort station, the international community had already established extensive customary law prohibiting slavery and the other human rights violations committed by Japan. The 1904, 1910, and 1921 treaties for the Suppression of the White Slave Traffic and Traffic in Women and Children prohibited the trafficking of comfort women, and the 1926 Slavery Convention, which Japan never ratified, prohibited the practice of slavery and created the duty to prohibit the slave trade.<sup>111</sup> These agreements serve dual purposes—they are treaty law among the nations that ratified them, and irrespective of Japan's ratification, they are codifications of the existing customary international law that condemned any form of slavery and human trafficking. The core elements of the comfort station system—coercive recruitment, forceful abduction, unspeakable violence used against resistance or attempts to escape, forced sexual labor

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/eng/cases/lotuslaw.htm. The opinion states:

[A] ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so . . . a ship is placed in the same position as national territory . . . it follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.

*Id.* See also YOSHIKI, *supra* note 1, at 159 (stating that Japanese ships can be considered equivalent to Japanese territory under international law).

<sup>109</sup> The International Commission of Jurists ("ICJ") stated that once Korean women were removed from the Korean peninsula to Japan, the 1921 Convention became applicable to them as well. *Coomaraswamy Report*, *supra* note 30, para. 102. "The ICJ also points out that many former comfort women testified that when they were transported from Korea by ship, the ships made a stop on the Japanese mainland." YOSHIKI, *supra* note 1, at 159-60. The stops on the mainland would also destroy Article 14's exemption, because Japan transported women directly from its territory.

<sup>110</sup> Yu, *supra* note 86, at 531.

<sup>111</sup> *Id.* at 531; YOSHIKI, *supra* note 1, at 160-61.

without compensation—comprise what can only be deemed a system of sexual slavery. Japan challenges this characterization, stating that the women were not slaves because the government did not exercise powers of ownership over them.<sup>112</sup> It is unclear how Japan defines slavery, but authorities on human rights and international law properly reject this objection and maintain that Japan violated customary international laws by making comfort women their sexual slaves.<sup>113</sup>

The Convention Respecting the Laws and Customs of War on Land, signed at the Hague in 1907, is another source of customary international law that protects “family honour and rights [and] the lives of persons.”<sup>114</sup> Although Japan ratified the treaty in 1911, the treaty stipulated that if all the parties in a conflict were not signatories at the time of the conflict, then none would be bound by it.<sup>115</sup> Such was the case during World War II, but the Convention’s provisions were nevertheless applicable to Japan because by 1939, the Convention was “recognized by all civilized nations and . . . recognized as being declaratory of the laws and customs of war.”<sup>116</sup> The broad language of the 1907 Hague Convention leaves little room

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<sup>112</sup> See *Coomaraswamy Report*, *supra* note 30, para. 7 (citing the 1926 Slavery Convention’s definition of slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”).

<sup>113</sup> The Special Rapporteur of the United Nations Commission on Human Rights disagrees with Japan’s position and “holds the opinion that the practice of ‘comfort women’ should be considered a clear case of sexual slavery and a slavery-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms.” *Coomaraswamy Report*, *supra* note 30, para. 8. See Yu, *supra* note 86, at 531-32 (stating that the International Agreement for the Suppression of the White Slave Traffic and the Slavery Convention “suggest the existence of general principles and state practice condemning sexual slavery that may have acquired the force of custom before World War II”).

<sup>114</sup> Hague IV, *supra* note 101, Annex, art. 46, 36 Stat. 2277.

<sup>115</sup> Hague IV, *supra* note 101, art. 2, 36 Stat. 2277.

<sup>116</sup> Yu, *supra* note 86, at 532 (quoting Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 HASTINGS INT’L & COMP. L. REV. 497, 516 (1994)). “The International Military Tribunal at Nuremberg concluded that the provisions of the Hague Conventions [of 1907] are customary international law.” LINDA A. MALONE, *INTERNATIONAL LAW* 159 (2d ed. 1998). The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 is additional evidence that the 1907 Hague Convention was accepted as customary law, in that it is considered to be a reiteration of the customary law principles found in the Hague Convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 75 U.N.T.S. 287. See also *Coomaraswamy Report*, *supra* note 30, para. 98 (pointing out that Article 27 of the Fourth Geneva Convention emphasizes the principle that rape during times of war is an international war crime).

for debate as to whether Japan violated customary international law. Kidnapping and coercing daughters, sisters, and wives away from their families to be raped and murdered by the military was disrespect of the grossest kind for family honor and human life and undoubtedly constituted war crimes that violated customary international laws.

Not only should Japan be held liable under international law for its crimes against individual comfort women, it should also be held liable for attempting to conceal the true nature of its role in creating and operating the comfort station system. "International law places affirmative duties on states to investigate and prosecute grave violations of human rights,"<sup>117</sup> and Japan failed to uphold this duty. First, not only did Japan make no attempt to prosecute the civilian procurers and station operators that sustained the comfort station system, it actually encouraged and employed them, making them agents of the State. Second, destroying documents about the comfort stations greatly discouraged or prevented the State and any other potential plaintiffs from investigating criminal behavior and prosecuting responsible parties. The Japanese government's recent reluctance to formally investigate the matter and its complete denial of legal responsibility constitute a breach of the duty to investigate and prosecute. Finally, the destruction of records about the comfort station system is also a telltale sign of Japan's guilty conscience. If the system would not have imposed any liability and Japan was truly confident that it had not violated international laws, what reason could there have been to conceal or destroy records?

#### 4.3. *Violations of Jus Cogens Norms*

The most serious offense Japan committed by creating the comfort station system is the violation of *jus cogens* norms. *Jus cogens* are peremptory norms of general international law that are "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 in-

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<sup>117</sup> Yu, *supra* note 86, at 533. The International Convention for the Suppression of the Traffic in Women and Children of 1921, the Slavery Convention of 1926, and the Convention Respecting the Laws and Customs of War on Land of 1907 placed an affirmative duty on the state to prosecute prohibited acts as well not commit them. See *supra* text accompanying notes 104, 111, and 115.

ternational law having the same character."<sup>118</sup> "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."<sup>119</sup> Due to the controversy regarding how to identify *jus cogens*, there are few norms that have reached the status of *jus cogens*.<sup>120</sup> Entrenched in natural law theories, the concept of *jus cogens* assumes that some acts do not require treaties to be banned because they are universally considered to be the gravest injuries and, likewise, no treaties are necessary to prosecute wrongdoers. For example, enslavement has been accepted as a *jus cogens* violation, regardless of who commits it. Rape and sexual slavery can be considered torture, a *jus cogens* violation, but international law also recognizes sexual slavery and sexual violence as *jus cogens* war crimes themselves.<sup>121</sup> With the exception of Japan, the international community declares that the comfort station system was systematized sexual slavery,<sup>122</sup> and, thus, a violation of *jus cogens* norms. Having committed what the international community considers to be the most heinous kind of crime, how can Japan continue to shrug off its legal responsibilities to its victims?

#### 4.4. Japan Denies Obligations Under International Law

In denying legal responsibility for creating the comfort station system, Japan contends that irrespective of whether it violated international law, former comfort women cannot pursue legal remedies because international law applies only to States and not to individuals.<sup>123</sup> This assertion, however, fails to recognize the progress that has been made in international human rights law.

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<sup>118</sup> Vienna Convention on the Law of Treaties (1969), May 23, 1969, art. 53, 1155 U.N.T.S. 331.

<sup>119</sup> Arakawa, *supra* note 4, at 185.

<sup>120</sup> See MALONE, *supra* note 116, at 37 (explaining that there are few rules which are generally accepted as peremptory norms due to the difficulty in identifying them). Given differences in values and social norms amongst all the different cultures and countries, it is understandably difficult for the international community to identify norms that are held universally.

<sup>121</sup> Arakawa, *supra* note 4, at 185-86.

<sup>122</sup> See *Japan Shrugs Off Sex Slave Ruling*, AGENCE FRANCE-PRESSE, Dec. 5, 2001 [hereinafter *Sex Slave Ruling*] (stating that the members of the mock tribunal that held Japan guilty of forcing women to work as sex slaves included a coalition of women's groups, human rights campaigners, and international legal experts), available at 2001 WL 25078857.

<sup>123</sup> Yu, *supra* note 86, at 533-34.

While the traditional role of international law was to govern the relations between states, the current prevailing view is that the international law of human rights applies to individuals, regardless of their nationalities, whether they are seeking protection or being prosecuted.<sup>124</sup> Japan's claim that comfort women cannot avail themselves of international law is clearly wrong.

Japan further argues that, even if legitimate, suits brought by former comfort women cannot be adjudicated because prior treaties have settled all war claims against the State. Japan relies heavily on the 1951 San Francisco Peace Treaty, between Japan and the Allied Powers, and the 1965 Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and South Korea.<sup>125</sup> However, Japan's argument that these treaties bar claims for reparations is not substantiated by the content of them, nor by international law authorities, for several reasons.<sup>126</sup> First, at the time of the San Francisco Peace Treaty, South Korea was still a colony of Japan and, therefore, not a signatory barred from bringing subsequent action.<sup>127</sup> Second, neither the San Francisco Peace Treaty nor the 1965 treaty with South Korea were intended to cover individual claims against Japan resulting from war crimes or crimes against humanity.<sup>128</sup>

According to United Nations Special Rapporteur Gay McDougall, the San Francisco Treaty barred the Allied nations from making any future claims for reparations, but it did not prohibit the nationals of Allied nations from doing so.<sup>129</sup> Regardless, since South

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<sup>124</sup> See MALONE, *supra* note 116, at 116-17 (providing a brief history of the evolution of international law as applied to individuals). Malone attributes the modern concept of international human rights law to the world's reaction to the Holocaust and other Nazi war crimes. The establishment of the Nuremberg Tribunal demonstrated that human rights were a matter of international concern not to be left solely to individual states. *Id.* See, e.g., Coomaraswamy Report, *supra* note 30, paras. 110-11 (stating that international conventions define the rights of the individual vis-à-vis the state and, therefore, are further evidence that individuals are both subject to international law and entitled to its protection); Yu, *supra* note 86, at 533-34 (discussing the application of international law to individuals, particularly in the area of human rights).

<sup>125</sup> Coomaraswamy Report, *supra* note 30, paras. 106-07.

<sup>126</sup> See *id.*, para. 107 ("The International Commission of Jurists . . . states that the treaties referred to by the Japanese Government never intended to include claims made by individuals for inhumane treatment.").

<sup>127</sup> HICKS, *supra* note 12, at 170.

<sup>128</sup> Coomaraswamy Report, *supra* note 30, para. 108.

<sup>129</sup> Arakawa, *supra* note 4, at 189.

Korea was not an Allied nation at that time, using the San Francisco Treaty as a defense against South Korean comfort women's claims is entirely irrelevant. There is a bilateral treaty between South Korea and Japan settling war-related claims. However, the 1965 Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation, as the name indicates, is limited in scope to economic and property claims between the two governments.<sup>130</sup> This agreement was not intended to settle issues of human rights violations or claims brought by individuals. The documents that South Korea presented during its negotiations with Japan specifically excluded claims for personal injuries resulting from international law violations committed by Japan,<sup>131</sup> demonstrating that the issue was left open.

##### 5. HISTORY OF COMFORT WOMEN LITIGATION

In March 1948, the Batavia Military Tribunal convicted eleven out of thirteen charged defendants—Japanese officers and comfort station operators—for committing war crimes against Dutch women forced to work in comfort stations in the Dutch East Indies.<sup>132</sup> The Dutch military court found seven officers and four civilian comfort station operators guilty.

Three of the officers were convicted of rounding up women for the purpose of forced prostitution. Four officers and all of the comfort station operators were convicted of coerced prostitution. Four officers, including the commander of the Southern Army's Officer Candidate Corps, were convicted of rape. The fact that the women were raped at the comfort stations was acknowledged . . . . The major who was in charge of setting up the comfort stations was given the death penalty (execution by firing squad) . . . . The colonel who was considered to have played a central role in the planning of the comfort stations returned to Japan, but

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<sup>130</sup> *Coomaraswamy Report*, *supra* note 30, para. 104.

<sup>131</sup> *Arakawa*, *supra* note 4, at 188-89.

<sup>132</sup> See *YOSHIKI*, *supra* note 1, at 163, 171-73 (describing the details of the ruling of the Batavia Military Tribunal in the case of the Semarang comfort stations). Semarang is on the island of Java in the Dutch East Indies, which is now Indonesia. *Id.* at 163.



upon learning that he was being pursued by the Dutch, he committed suicide in January 1947.<sup>133</sup>

The Batavia trials received very little international attention, because the names of both the victims and the accused were to remain sealed until 2025, but in 1992, details of the case finally became public.<sup>134</sup> The significance of the Dutch court's ruling is not to be underestimated. The convictions were an unambiguous message to Japan that enforced prostitution, or rape, and the forcible recruitment of women for the purpose of prostitution were war crimes under international law that called for the harshest of penalties. The outcome of this case also indicates that there was sufficient evidence, at least at that point, to hold that the military was in control and was responsible for the crimes committed to further the comfort station system; this was definitely not a civilian operation as Japan had claimed.

Forty-three years later, on December 6, 1991, arguments began in a Tokyo court in the first comfort women's case brought in Japanese courts.<sup>135</sup> Three Korean former comfort women, led by Kim Hak-sun, brought claims against Japan and finally brought international attention to the comfort women's plight.<sup>136</sup> Since then, more survivors have come forth to file suits in Japanese courts, but none have been successful thus far.<sup>137</sup> Given Japan's firm position that it bears no legal responsibility for the comfort station system, it is unlikely that its courts will rule against the interests of the State in the future.

In December 2000, four judges aiming to compensate for the Allied Powers' failure to prosecute Japan after the war convened as

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<sup>133</sup> *Id.* at 173.

<sup>134</sup> HICKS, *supra* note 12, at 168. The *Asahi Shimbun*, a Japanese newspaper, acquired the court documents and published them in detail in 1992, and the Dutch government, while not releasing court documents, did publish a report entitled, "Report of a Study of Dutch Government Documents on the Forced Prostitution of Dutch Women in the Dutch East Indies During the Japanese Occupation." YOSHIAKI, *supra* note 1, at 163-64.

<sup>135</sup> See HICKS, *supra* note 12, at 199 (describing the first comfort women's case in Japan, which later became formally known as the Asia-Pacific War Korean Victims Compensation Claim Case).

<sup>136</sup> Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 44-46 (2000).

<sup>137</sup> See Vanderweert, *supra* note 18, at 160-63 (discussing cases that have been brought in Japanese courts only to be dismissed or ruled against).

the Women's International War Crimes Tribunal 2000 for the Trial of Japan's Military Sexual Slavery to hear the case of *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*.<sup>138</sup> Because it was not created by a state or intergovernmental organization, the judgment of this mock war crimes tribunal is not legally binding,<sup>139</sup> but the "power of the Tribunal, like so many human rights initiatives, lies in its capacity to examine the evidence and develop an enduring historical record."<sup>140</sup> Applying the international laws in effect from 1937 to 1945, the tribunal found Emperor Hirohito and nine named officials guilty of rape and sexual slavery.<sup>141</sup> It also found the Japanese government liable for harms inflicted by creating, building, managing, and promoting the comfort station system and for engaging in organized attempts to hide the system.<sup>142</sup> The judgment called for a formal apology, adequate victim compensation, creation of a memorial in honor of the comfort women, and the establishment of mechanisms for thorough investigation of the comfort station system.<sup>143</sup> This panel of international jurists, like other international law authorities that have investigated the comfort station system, also rejected Japan's position that postwar treaties settled all war claims. Specifically citing the San Francisco Peace Treaty and the Agreement on the Settlement of Problems Concerning Property and Claims Between Japan and the Republic of Korea, among others, "the Tribunal [found] that the Peace Treaties [were] not applicable in the current context as states cannot agree by treaty to waive the liability of another state for crimes against humanity."<sup>144</sup> Although it is unenforceable, the Tribunal's decision gives the comfort women's claims indisputable legitimacy. The "result was what might be called the giving of final notice by the international

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<sup>138</sup> Women's Tribunal, *supra* note 3.

<sup>139</sup> *Sex Slave Ruling*, *supra* note 122.

<sup>140</sup> Women's Tribunal, *supra* note 3, para. 6.

<sup>141</sup> Ceres P. Doyo, *Judgment in The Hague—Stepping Into 'The Breach,'* PHILIPPINE DAILY INQUIRER, Jan. 3, 2002, available at 2002 WL 7069808.

<sup>142</sup> *Id.*; *Japanese Gov't Urged Not to 'Pass Historical Baggage to Posterity,'* WORLD NEWS CONNECTION, Dec. 6, 2001 [hereinafter *Historical Baggage*], available at 2001 WL 31644456; *Sex Slave Ruling*, *supra* note 122.

<sup>143</sup> Doyo, *supra* note 141; *Historical Baggage*, *supra* note 142; *Sex Slave Ruling*, *supra* note 122.

<sup>144</sup> Women's Tribunal, *supra* note 3, para. 29.

community with the demand that the Japanese government take action to make amends."<sup>145</sup>

## 6. HWANG V. JAPAN: SEEKING JUSTICE IN THE UNITED STATES

### 6.1. *Comfort Women Bring Suit in U.S. Court*

On September 18, 2000, fifteen former comfort women from South Korea, China, the Philippines, and Taiwan filed a class action lawsuit against Japan in the United States District Court for the District of Columbia.<sup>146</sup> In *Hwang v. Japan*, the plaintiffs alleged that the Japanese military tortured and forced them into sexual slavery.<sup>147</sup> They demanded the disclosure of all documents and records related to the comfort station system, as well as compensatory and punitive damages.<sup>148</sup> The former comfort women argued that, by establishing a system of sexual slavery, Japan committed torts in violation of the Law of Nations and international and domestic laws against forced prostitution and rape.<sup>149</sup> The comfort women, who are all foreign nationals, were able to file suit in a U.S. federal court by claiming a cause of action under the Alien Torts Claim Act ("ATCA"), which states: "The district courts shall have original jurisdiction of 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."<sup>150</sup>

Although the ATCA had been enacted in 1789, foreign nationals rarely used U.S. courts as a forum to sue other foreign nationals or sovereigns due to jurisdictional restrictions. The ATCA had become near-dead letter law, having been invoked in only a few cases, until *Filartiga v. Peña-Irala*<sup>151</sup> rescued the statute from obscurity in 1980. In this seminal case, Joel Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Peña-Irala, the former Inspector General of Police of Paraguay, for the kidnap, torture,

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<sup>145</sup> *Historical Baggage*, *supra* note 142.

<sup>146</sup> Pl.'s Compl., *Hwang v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) [hereinafter *Hwang Complaint*] (No. 00-CV-2288, renumbered No. 00-CV-2233), available at <http://www.cmht.com/casewatch/cases/comfortwomen-cmpl.pdf>.

<sup>147</sup> *Hwang*, 172 F. Supp. 2d at 54.

<sup>148</sup> *Hwang Complaint*, *supra* note 146, at 33.

<sup>149</sup> *Id.* at 32.

<sup>150</sup> Alien Torts Claim Act, 28 U.S.C. § 1350 (2001).

<sup>151</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

and murder of his son.<sup>152</sup> Here, the Second Circuit used the ATCA to hold that federal jurisdiction was appropriate because "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."<sup>153</sup> Since *Filar-tiga*, federal courts have adopted this broad reading of the ATCA and foreign nationals have successfully adjudicated claims against human rights violators in U.S. courts.<sup>154</sup>

Unfortunately for plaintiffs attempting to sue a foreign sovereign in U.S. courts, like those in *Hwang*, what the ATCA gives with one hand, the Foreign Sovereign Immunities Act<sup>155</sup> ("FSIA") often takes away with the other. The FSIA provides presumptive immunity for foreign States from the jurisdiction of U.S. courts unless the plaintiff can prove that the State is not entitled to immunity under one of the FSIA's enumerated exceptions.<sup>156</sup> In *Argentine Republic v. Amerada Hess*,<sup>157</sup> the Supreme Court explained the relationship between the FSIA and ATCA. The Court held that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts.<sup>158</sup> This severely undercuts the applicability of the ATCA, because it can be used to confer jurisdiction to foreign states only under the limited circumstances in which they are not granted immunity by the FSIA. Thus, in *Hwang*, the D.C. District Court could only properly adjudicate the suit against Japan if the comfort women could prove that the FSIA did not apply.

In *Hwang v. Japan*, the comfort women urged the court not to grant Japan immunity based on the first two exceptions of the FSIA.<sup>159</sup> Under these exceptions, a foreign State will be subject to

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 876.

<sup>154</sup> See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 96 (1996) (asserting torture claims against an official of the Ethiopian government by former Ethiopian prisoners); *Kadic v. Karadzic*, 74 F.3d 232 (2d Cir. 1995) (using the ATCA to exercise jurisdiction and find liability in a case involving war crimes and crimes against humanity); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (asserting a wrongful death claim by a Philippine citizen for the torture death of her son).

<sup>155</sup> 28 U.S.C. § 1602 et seq. (2001).

<sup>156</sup> See 28 U.S.C. §§ 1605-07 for the list of enumerated exceptions to presumptive immunity.

<sup>157</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

<sup>158</sup> *Id.* at 434.

<sup>159</sup> The plaintiffs also invoked the noncommercial tort exception of the FSIA, which bars immunity in cases in which money damages are sought against a for-

the jurisdiction of the courts of the United States or of the states in cases:

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; [or]

(2) in which the action is based on a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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.<sup>160</sup>

According to the plaintiffs, Japan had explicitly waived immunity by signing the Potsdam Declaration after World War II. Specifically, the plaintiffs submitted the following language from the Potsdam Declaration as Japan's explicit waiver:

We do not intend that the Japanese shall be ensla[v]ed as a race or destroyed as a nation, but [stern] justice shall be [meted] out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. The freedom of speech, of religion, and of thought

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eign state for personal injury or death occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of the state while acting within the scope of his office or employment. 28 U.S.C. § 1605(a)(5) (2001). The court refused to consider this, however, because the plaintiffs raised the noncommercial tort exception for the first time during the oral argument on Japan's motion to dismiss. *Hwang*, 172 F. Supp. 2d. at 57 n.2.

<sup>160</sup> 28 U.S.C. § 1605(a)(1)-(2) (2001).

as well as respect for the fundamental human rights shall be established.<sup>161</sup>

Because the Supreme Court has construed the Potsdam Declaration as Japan's acquiescence to be subject to criminal trials for violations of the law of war, the plaintiffs argue that Japan has also waived immunity for civil suits in U.S. courts.<sup>162</sup> The plaintiffs also posited that violations of *jus cogens* norms constitute an implied waiver of sovereign immunity.<sup>163</sup>

In the alternative, the plaintiffs asserted that the comfort station system fell within the FSIA's commercial activity exception. The plaintiffs reasoned that the comfort stations were commercial activities because they were revenue-generating, State-supervised brothels.<sup>164</sup> Furthermore, these commercial activities had direct effects upon the United States because: 1) stations were established in Guam and the Philippines, which were United States territories at the time; 2) after World War II, Japanese territories occupied by the United States military became a part of the United States; and 3) United States servicemen also used the comfort women after the war.<sup>165</sup>

#### 6.2. *With the Bush Administration's Support, Japan's Motion to Dismiss Is Granted*

Japan responded to the comfort women's complaint by moving to dismiss it on the following grounds:

- 1) that Japan enjoys sovereign immunity; 2) that the court lacks personal jurisdiction over Japan; 3) that this action presents a political question; 4) that even if jurisdiction exists this case should be dismissed on the grounds of forum nonconveniens; 5) that the international comity of nations

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<sup>161</sup> Potsdam Declaration, July 26, 1945, para. 10, available at <http://list.room.ne.jp/~lawtext/1945Potsdam-English.html>. See also *Hwang*, 172 F. Supp. 2d at 59 (citing the same language relied upon by the plaintiffs as Japan's explicit waiver).

<sup>162</sup> See *Hwang*, 172 F. Supp. 2d at 59 (quoting the Supreme Court's reading of the Potsdam Declaration in *In Re Yamashita*, 327 U.S. 1 (1946)).

<sup>163</sup> See *id.* at 60 (analyzing the plaintiffs' contentions of *jus cogens* violations).

<sup>164</sup> See *id.* at 61 (noting the court's analysis of the plaintiffs' contention that the comfort stations qualified under the commercial activity exception).

<sup>165</sup> See *id.* (positing that post-war usage qualifies as having a direct effect on the United States).

requires dismissal; 6) that the statute of limitations has expired; and 7) that under the ATCA these claims should be dismissed.<sup>166</sup>

Japan's motion challenged the legal sufficiency of the plaintiffs' claims; however, it did not challenge the factual basis of the allegations themselves.<sup>167</sup> Instead, Japan focused on persuading the court that the plaintiffs' claims presented a nonjusticiable political question because, first, war reparations claims are nonjusticiable as a matter of law and, second, individuals may not assert war-related claims except as authorized by a treaty of peace.<sup>168</sup>

Although it is not the position of the United States that war reparations claims are *per se* nonjusticiable, on April 27, 2001, the U.S. State Department did issue a Statement of Interest advising the court to dismiss the case, arguing that it involved a political question that rendered the plaintiffs' claims nonjusticiable.<sup>169</sup> The United States stated that, in this case, past treaties, namely the San Francisco Peace Treaty and the 1965 treaty between Japan and Korea, addressed and were aimed at settling all war claims against Japan.<sup>170</sup> Taking its cue from the executive branch, the court granted Japan's motion to dismiss on October 4, 2001, holding that Japan was entitled to sovereign immunity under the FSIA and that the plaintiffs' claims presented a nonjusticiable political question.<sup>171</sup>

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<sup>166</sup> See *id.* at 55 n.1 (detailing Japan's grounds for a motion to dismiss).

<sup>167</sup> See *id.* at 56 (stating that the court assumed the allegations were true for purposes of determining the applicability of FSIA exceptions, since Japan only challenged their legal sufficiency at that stage).

<sup>168</sup> See *id.* at 64 n.9 (providing Japan's arguments for dismissal).

<sup>169</sup> *Id.*; Nelson Chung, *Demonstration Held in Support of 'Comfort Women's' Suit*, CENTRAL NEWS AGENCY, July 24, 2001, available at 2001 WL 2896967.

<sup>170</sup> The court blindly accepted the State Department's Statement of Interest, which stated that the "Treaty of Peace with Japan resolved *all* 'claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals . . .'" *Hwang*, 172 F. Supp. 2d at 67 (emphasis added) (quoting the Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, art. 14(b), T.I.A.S. No. 2490). Furthermore, while acknowledging that comfort women may not have been mentioned in subsequent treaties between Japan, Korea, and China, the court claims "the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan." *Id.*

<sup>171</sup> *Hwang*, 172 F. Supp. 2d at 67.

### 6.2.1. *The Court Grants Japan Sovereign Immunity Under the FSIA*

In its decision, the court granted immunity to Japan, rejecting the plaintiffs' argument that either the waiver or commercial activity exceptions applied. In first addressing the waiver exception, the court explained that an explicit waiver will be found only if a foreign state issued a clear, intentional, and unambiguous waiver of immunity or intention to subject itself to civil suits in U.S. courts.<sup>172</sup> However, there is nothing in the Potsdam Declaration that amounts to such a specific waiver, and the court refused to find an explicit waiver in it. This could not have been an unexpected result for the comfort women in light of the Supreme Court's reading of the waiver exception in *Amerada Hess*. In that case, responding to the claim that entering into international treaties with the United States created an explicit waiver, the Supreme Court stated that it did not "see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."<sup>173</sup>

Case law also unquestionably undermines the comfort women's argument that Japan implicitly waived immunity by committing *jus cogens* violations. In *Princz v. Federal Republic of Germany*, the plaintiff sought to recover money damages for the injuries he suffered and the slave labor he performed while a prisoner in Nazi concentration camps.<sup>174</sup> The D.C. Circuit held that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)."<sup>175</sup> While acknowledging *Princz*, the plaintiffs failed to offer any contrary case law, but asked the court to simply disregard the D.C. Circuit's holding.<sup>176</sup> The court understandably refused and upheld precedent.

Finally, the court agreed with Japan and the United States that the comfort women's claims did not arise in connection with a commercial activity<sup>177</sup> and held that none of the exceptions to the

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<sup>172</sup> *Id.* at 59.

<sup>173</sup> *Amerada Hess*, 488 U.S. at 442-43.

<sup>174</sup> *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

<sup>175</sup> *Id.* at 1174.

<sup>176</sup> *Hwang*, 172 F. Supp. 2d at 60.

<sup>177</sup> *Id.* at 63.



FSIA were applicable. Using the Supreme Court's explanation of commercial activity as provided in *Republic of Argentina v. Weltover, Inc.*,<sup>178</sup> the court focused on whether the comfort stations involved the type of transactions used by private parties for commerce. Even though the comfort station system generated revenues and involved private entrepreneurs, the court held that the conduct of the Japanese military was "unquestionably barbaric, but certainly . . . not commercial in nature."<sup>179</sup> The court reasoned that the comfort station system depended on government resources and that private players in the market, who generally do not have access to such resources, could not have engaged in the conduct of the Japanese military in creating and operating its system of military sexual slavery. Ultimately, the "challenged conduct 'boils down' to an abuse—albeit an extremely outrageous and inhumane one—of Japan's military power, an activity that is 'peculiarly sovereign in nature.'"<sup>180</sup> Having concluded that the comfort station system was not a commercial activity within the meaning of the FSIA, the court declined to determine whether it caused a direct effect in the United States.<sup>181</sup>

#### 6.2.2. *Comfort Women's Claims Held Nonjusticiable*

After determining that none of the FSIA exceptions applied and that Japan was entitled to immunity, the court agreed with Japan and the United States that the case required dismissal because it involved a nonjusticiable political question.<sup>182</sup> Despite the fact that alien plaintiffs have brought successful suits against foreign government officials for violating human rights in the past,<sup>183</sup> the court stated that it is:

well-established that '[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of

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<sup>178</sup> See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (explaining that the issue is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce'").

<sup>179</sup> *Hwang*, 172 F. Supp. 2d at 63.

<sup>180</sup> See *id.* at 64 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993)).

<sup>181</sup> *Id.* at 64 n.8.

<sup>182</sup> *Id.* at 64.

<sup>183</sup> See *supra* note 154 and accompanying text.

the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.<sup>184</sup>

However, the court admitted that not all cases implicating foreign relations present political questions, e.g., the judiciary *does* have the authority to construe treaties and executive agreements.<sup>185</sup> Using this authority would not have been unreasonable in this case given that the State Department asserted the plaintiffs' claims were nonjusticiable relying primarily on the notion that past treaties resolved the comfort women's claims. Explaining that it did not have the expertise or the means to adjudicate the case,<sup>186</sup> the court chose not to exercise its authority to interpret treaties and dismissed the comfort women's complaint.

### 6.3. Trade Relations Motivate the Bush Administration's Support for Japan

What is especially troubling about the Bush Administration's rationale for supporting the dismissal of the comfort women's claims in *Hwang v. Japan* is its claim that past treaties, signed after World War II, were addressed and aimed at settling all war claims against Japan. Though the D.C. District Court may have accepted this argument, experts on international law disagree.<sup>187</sup> In 1998, the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities reported that Japan's

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<sup>184</sup> See *Hwang*, 172 F. Supp. 2d at 65 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

<sup>185</sup> *Id.* at 65 (citing *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229 (1986)).

<sup>186</sup> The court justifies its dismissal by stating that resolution of the plaintiffs' claims would be hindered by a "lack of judicially discoverable and manageable standards for resolving it" and the necessity of moving beyond its judicial expertise. *Id.* at 66 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>187</sup> Gay J. McDougall, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. ESCOR, 50th Sess., Provisional Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter *McDougall Report*], available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/7fba5363523b20cdc12565a800312a4b/3d25270b5fa3ea998025665f0032f220?OpenDocument> (last visited Feb. 24, 2003).

attempt to escape liability through the operation of [the 1952 San Francisco Peace Treaty and the 1965 Settlement] fails on two counts: (a) Japan's direct involvement in the establishment of the rape camps was concealed when the treaties were written, a crucial fact that must now prohibit on equity grounds any attempt by Japan to rely on these treaties to avoid liability; and (b) the plain language of the treaties indicates that they were not intended to foreclose claims for compensation by individuals for harms committed by the Japanese military in violation of human rights or humanitarian law.<sup>188</sup>

Assuming the Special Rapporteur's report is a more objective reading of the treaties at issue, the Bush Administration's reading is simply wrong; its Statement of Interest was not based on an interest in upholding international treaty law.

The more plausible grounds for the Bush Administration's position can be found in its statement that "finding Japan liable could interfere with U.S.-Japanese relations."<sup>189</sup> The economic relationship between the United States and Japan is considered to be one of the most important and complex in the world.<sup>190</sup> Given Japan's recent financial difficulties, the United States has taken a very active role in attempting to promote Japanese economic reform and growth through compliance with existing bilateral agreements.<sup>191</sup> For example, the White House released a statement outlining the structure of the U.S.-Japan Economic Partnership for Growth, which has the objective of promoting

[s]ustainable growth in both countries as well as the world by addressing such issues as sound macroeconomic policies, structural and regulatory reform, financial and corporate restructuring, foreign direct investment, and open

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<sup>188</sup> *Id.* at app. para. 55.

<sup>189</sup> Gerona-Adkins, *supra* note 19.

<sup>190</sup> Kristin Leigh Case, *Prevention and Settlement of Economic Disputes Between Japan and the United States: Part I: General Legal and Institutional Framework: An Overview of Fifteen Years of United States - Japanese Economic Relations*, 16 ARIZ. J. INT'L & COMP. L. 11 (1999).

<sup>191</sup> *See id.* at 26-27 (explaining that the Japanese recession prompted the U.S. to pressure Japan to revitalize its economy and focus on bilateral economic reforms).

markets and by providing a structure for cooperation and engagement on bilateral, regional and global economic and trade issues.<sup>192</sup>

The Bush Administration is undoubtedly nervous that allowing its economic partner to be dragged into its courts and be held liable may hinder the growth of this relationship. Coincidentally, or not, on the same day the State Department issued its Statement of Interest to the D.C. District Court, it also released a statement on increasing American foreign direct investment in Japan.<sup>193</sup>

Developing fruitful economic relations with Japan is not an unwarranted goal for the Bush Administration. Nor is it inaccurate to say that trade relations with a foreign state involve political questions which the judiciary lacks expertise in answering. However, the Administration could have, and should have, made it clear that it was invoking the political question doctrine because the foreign relations at stake were economic relations with Japan and not because the comfort women's claims were invalid. By concluding that past treaties settled all war claims against Japan, the United States completely discredited the comfort women's plight. The State Department focused its position on the jurisdictional issue,<sup>194</sup> but one can infer from its interpretation of past treaties that it has adopted the Japanese view that comfort women are not legally entitled, even if they are morally entitled, to compensation.

## 7. CONCLUSION

Even if it were possible for federal courts to establish jurisdiction and adjudicate *Hwang v. Japan*, or any other comfort women's case, the question remains as to whether an American court could provide the desired remedies. Comfort women plaintiffs have

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<sup>192</sup> Press Release, The White House, White House on U.S.-Japan Economic Partnership for Growth (June 30, 2001), at <http://usembassy.state.gov/tokyo/wwwhus0030.html> (last visited Feb. 24, 2003).

<sup>193</sup> Department of State, Washington File: Text: Larson Says More Foreign Direct Investment Would Help Japan (Apr. 27, 2001), available at <http://www.usis-australia.gov/hyper/2001/0427/epf504.htm> (last visited Feb. 24, 2003).

<sup>194</sup> See Bill Miller, *U.S. Resists 'Comfort Women' Suit*, WASH. POST, May 14, 2001, at A19 (quoting an unnamed State Department official as saying "the United States government position . . . is that the court does not have jurisdiction and may not hear the case").

sought non-monetary remedies in addition to reparations, including "Japan's acknowledgement of its moral and legal culpability, a formal apology, full disclosure of all facts, and accurate revision of Japanese history textbooks to reflect Japan's conduct during World War II."<sup>195</sup> These are remedies even Japanese courts would have difficulty providing, as they would probably require legislative action.<sup>196</sup> Regardless of how U.S. courts or international tribunals rule on comfort women's cases, cooperation from the Japanese government would be necessary to effectuate the remedies comfort women seek. Having consistently denied legal responsibility, however, it is improbable that Japan will readily cooperate with any court that finds it liable for war crimes related to the comfort station system, irrespective of that court's jurisdiction.

What is especially frustrating for sympathizers of comfort women is Japan's callous lack of genuine remorse. The AWF appears to be an attempt to buy comfort women's silence and end negative publicity for the state, not an act of sincere atonement or an admission of culpability. Even today, Japanese history textbooks, which are screened by the Japanese Education Ministry, continue to distort or omit facts relating to atrocities committed by Japan during World War II, including the comfort station system.<sup>197</sup> Until the government is willing to make full admission of guilt and offer an earnest apology to former comfort women, no court will be able to provide justice to them.

Accordingly, U.S. courts may not be the proper forum for the comfort women to seek justice. However, it is not inconceivable for the United States to censure such crimes against humanity, in general, and Japan's comfort station system, specifically. In fact, until the Bush Administration's recent support for Japan, comfort women have received bipartisan support from U.S. legislators and state legislators.<sup>198</sup> This Comment does not suggest that the executive branch was not entitled to dictate foreign policy and request the *Hwang* court to dismiss the case. However, it does find fault

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<sup>195</sup> Yu, *supra* note 86, at 537.

<sup>196</sup> See *id.* (explaining that Japanese courts do not have the equitable powers of common law courts to fashion such non-monetary remedies, but other branches of government might).

<sup>197</sup> *Id.* at 539.

<sup>198</sup> Gerona-Adkins, *supra* note 19 (discussing two resolutions introduced to the U.S. House of Representatives and one that passed in the California State Assembly asking Japan to issue a formal apology and pay reparations to comfort women).

with the Administration's reasoning in requesting dismissal of the case. The State Department could have submitted a Statement of Interest proposing dismissal of the suit based solely on the application of the FSIA. It is clear from the court's opinion that, even if *Hwang* had not involved a political question, it would have granted immunity to Japan and dismissed the case because neither the waiver nor commercial activity exceptions applied. Instead, the Statement of Interest also claimed that the plaintiffs presented a nonjusticiable political question because past treaties addressed and settled all war claims against Japan, and the court dismissed the case based on these grounds.

The assertion that those treaties settled all war claims against Japan holds no weight when measured against the consistent position of international jurists and organizations that postwar treaties neither addressed nor settled the comfort women's claims. For the Bush Administration to suggest otherwise is disconcerting, because it implies that comfort women's claims are invalid not only in U.S. courts, but in *all* courts.

The United States is not obligated to protect the human rights of foreign nationals at the cost of its economic interests and trade relations with Japan. If holding Japan liable in U.S. courts would do so, then granting immunity may have been the proper answer to the question of judicial jurisdiction, and this would have sufficiently protected the United States' relationship with Japan. The Bush Administration, however, needlessly and erroneously went too far. Instead of concluding that the United States should not hear the comfort women's claims, it asserted that no one else should either, and in doing so, the Bush Administration joined Japan in its vile mission to silence the voice that comfort women have struggled for so long to find.

What is especially tragic is that many comfort women will remain unknown, whether it is because they are now dead or because they are unwilling to shed their veil of anonymity by expressing their outrage and demanding justice from the Japanese government. The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery commented:

There are no museums, no graves for the unknown 'comfort women,' no education for future generations, and no judgment days for the victims of Japan's military sexual slavery. Many of the women who have come forward to

fight for justice have died unsung heroes. While the names inscribed in the history's pages are often those of the men who commit the crimes, rather than the women that suffer then [sic] . . . the survivors that took the stage to tell their stories . . . put wrong on the scaffold and truth on the throne.<sup>199</sup>

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<sup>199</sup> Doyo, *supra* note 141 (quoting the Tribunal's judgment).