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Comments

Justice for “Comfort Women”: Will the Alien Tort Claims Act Bring Them the Remedies They Seek?

I. Introduction

The International Law Commission recognizes five crimes under international law: aggression, genocide, crimes against humanity, crimes against United Nation personnel, and war crimes.¹ Although these crimes are internationally recognized, it is often difficult for individual victims to get any redress.² One option that the United States offers for victims of international law violations is the Alien Tort Claims Act (ATCA).³ It grants foreigners the opportunity to sue in a United States District Court for tortious conduct that violates international law or a treaty with the United States.⁴ In recent years, the two-hundred-year-old statute has been

1. Beth Stephans, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights and Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?* 60 ALB. L. REV. 579, 581 (1997).

2. *Id.*

3. 28 U.S.C. § 1350 which provides: “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.”

4. *Id.*

used with more frequency.⁵ Most recently, the statute has been used to bring a class-action lawsuit against Japan for the institution of thousands of Asian women into sexual slavery during World War II.⁶

During the war, the Japanese government forced thousands of Korean, Phillipina, Chinese and Indonesian women into sexual slavery, calling them "comfort women."⁷ These women were institutionalized into sexual slavery under which they were to endure prison like living quarters where they suffered numerous abuses at the hands of their captors.⁸ Ironically, the Japanese Government theorized that the maintenance of "comfort stations" in which sex slaves would be available to the soldiers would decrease the amount of wartime rape around army camps.⁹ By permitting such atrocities to occur, the Japanese government effectively ruined the lives of thousands of women. Currently, these women have been left with no successful redress or remedy.¹⁰ Lawsuits have been filed within Japan, the U.N. has issued resolutions, and several United States leaders have urged action by the Japanese Government, all to no avail.¹¹ The plight of these women grows more serious as many of them continue to grow older and many more have died since the war, leaving little time for a satisfactory result.

On September 19, 2000, fifteen comfort women filed a lawsuit against the Japanese government under the Alien Tort Claims Act.¹² Their lawsuit was filed in the United States District Court in Washington D.C., and the women claim that the wartime rape,

5. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984); and *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

6. Bill Miller, "Comfort Women" Sue Japan in U.S., WASH. POST, Sept. 19, 2000 at A18.

7. Korean Council for Women Drafted for Military Sexual Slavery by Japan, *UN Resolution on Comfort Women*, available at <http://www.witness.peacenet.or.kr/kindex.htm> (last visited Oct. 16, 2000).

8. *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., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

9. *Id.*

10. Chang Rok Kim, *Possible Legal Solutions in the Issue of the Japanese Army's Comfort Women: From the Perspective of One of the Victimized Countries (Korea)*, available at <http://www.witness.peacenet.or.kr/symekor.htm> (last visited Oct. 16, 2000).

11. Korean Council for Women Drafted for Military Sexual Slavery by Japan, *UN Resolution on Comfort Women*, available at <http://www.witness.peacenet.or.kr/kindex.htm> (last visited Oct. 16, 2000).

12. Miller, *supra* note 6, at A18.

slavery and torture that they endured at the hands of Japanese Soldiers are all violations of international law.¹³ The class of comfort women is seeking compensation and reparation from the Japanese government, along with an apology for the torture that they suffered.¹⁴ The Alien Tort Claims Act (ATCA) was enacted in 1789, and provides "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."¹⁵ This act has been utilized in other lawsuits against leaders of nations, companies, and countries, but never against Japan.¹⁶

This comment will analyze the effectiveness of the Alien Tort Claims Act in context of the other attempts that have been undertaken by the Asian comfort women to gain recognition, reparation and an apology from Japan. Also, this comment will discuss the international implications of a verdict in favor of the comfort women in a United States court. Japan alleges and maintains that the San Francisco Peace Treaty of 1951 and several other treaties waived all wartime claims against them, barring any further lawsuits.¹⁷ If the treaty does in fact waive claims against Japan, then the United States District Court will have to obey the treaty because Article VI of the U.S. Constitution upholds treaties as the "supreme law of the land."¹⁸ If the court does not find that the treaty waives the claims of the comfort women, then it must consider how relations between Japan and the United States could be adversely affected.¹⁹ As of April 2001, the U.S. State Department under the Bush administration issued a statement of interest that urges the court to dismiss the lawsuit.²⁰ The United States

13. *Id.*

14. *Id.*

15. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) provides that "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."

16. Miller, *supra* note 6, at A18.

17. San Francisco Peace Treaty, Sept. 8, 1951, Ch. 5, Art. 14.

18. U.S. CONST. art. VI which provides: "This constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

19. See *Filartiga v. Pena-Irala*, 577 F.Supp. 860 (district court considers at length what affect the judgment will have on relations between United States and Paraguay).

20. See Bill Miller, *U.S. Resists "Comfort Women" Suit; Japan's War Actions Are Covered by Treaties, Officials Say*, WASH. POST, May 14, 2001 at A19. Although the U.S. officials state that they have "deep sympathy" for the comfort

District Court heard arguments on the motions to dismiss in August 2001, but as of the date of this publication, no decision has been made.²¹ Also, this comment will consider what remedies are available in light of the lack of cooperation of Japan. A consideration that will play an important part in this case is how the United States will uphold international law while maintaining strong ties with Japan.

II. History and Background

A. *The Alien Tort Claims Act: Background and Prior Usage*

The language of the Alien Tort Claims Act (ATCA) does little to explain its application, but case law serves to clarify its uses and limitations. It would certainly be unrealistic to impose penalties and action against foreign countries in certain situations, because of the necessity of strong international relations. The case law on the Alien Tort Claims Act is particularly important in the lawsuit against Japan because of the history of strong international trade relations between Japan and the United States. The decision to exercise jurisdiction will not be an easy one as the following cases illustrate, in particular when the alleged offenses are clearly recognized by the international community. The ATCA requirements are that 1) an alien sues, 2) for a tort, and 3) that the tort has been committed in violation of the law of nations or in violation of a treaty with the United States.²² The court's analysis of the San Francisco Peace Treaty of 1951 will be essential to this case, as it has been cited by Japan as their defense.

International law is not explicitly stated and requires that courts determine the law based on practice, norms and custom. Without a set of bound rules to follow, courts often draw the law out of treaties, practices of nations and customs and understood implicit rationale. The Restatement (Third) of the Foreign Relations Law of the United States provides that "individuals may

women, the Statement maintains that Japan is entitled to sovereign immunity and that all wartime activities were handled by treaty agreements.

21. See Transcript of Motions Hearing, Hwang Geum Joo et. al. v. Japan, at <http://cmht.com/casewatch/cases/comf-transmda.pdf> (last visited Sept. 28, 2001). After hearing arguments from the United States, Japan and the plaintiffs, Judge Henry H. Kennedy, Jr. of the United States District Court took the decision under advisement.

22. Alan Frederick Enslin, "Commentary: *Filartiga's Offspring: The Second Circuit Significantly Expands The Scope of The Alien Tort Claims Act With Its Decision in Kadic v. Karadzic*", 48 ALA. L. REV. 695, 704 (1997).

be held liable for offenses against international law, such as piracy, war crimes and genocide.²³ In this case, it will probably be easy for the court to decide that war crimes were committed because the international community does not condone institutionalized sexual slavery, as demonstrated by the stance of the United Nations and other international organizations.²⁴ These organizations have recognized that Japan's actions during WWII constituted war crimes against humanity.²⁵

By providing access to U.S. courts through the ATCA, the United States fears that its courts will become overburdened by international cases.²⁶ The U.S. must also be cautious not to have the actions of its judiciary viewed as interference in international activities.²⁷ This concern is particularly relevant in this case, as we have relations with Japan that are heavily tied to economic trade, and the effect this decision may have on that relationship should be considered by the court.

The following cases illustrate how the ATCA has been utilized by the courts, and the limits, and procedure that is involved.

1. *Filartiga v. Pena-Irala: When Should Jurisdiction Be Exercised?*—*Filartiga v. Pena-Irala* involved a wrongful death action filed under the ATCA by the family members of a Paraguayan citizen who was killed in retaliation to Dr. Filartiga's opposition to President Alfredo Stroessner's government.²⁸ The *Filartiga* court decided that "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," and thus permits the exercise of jurisdiction under the ATCA.²⁹ The court considers in this case whether accepting jurisdiction would be appropriate, especially when the outcome of the lawsuit could adversely offend the Paraguay government and affect relations with the United States.³⁰ Jurisdiction is exercised because as it has been recognized by the Supreme Court, "the greater the degree of codification or consensus concerning a

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

24. *Speech on War Rape*, U.N. Commission on Human Rights 51st session, Agenda Item 11, available at <http://www.webcom/hrin/parker/c-95-11.html> (last visited Oct. 20, 2000).

25. *Id.*

26. Enslin, *supra* note 22, at 728.

27. *Id.*

28. *Filartiga*, 577 F. Supp. at 861.

29. *Id.* at 861.

30. *Id.* at 862.

particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.”³¹ Recognizing that even Paraguay accepts and considers torture against the law, jurisdiction was exercised and damages were assessed against the defendants.³²

In the comfort women lawsuit, it cannot be denied that rape during wartime and instituted slavery is not a violation of international law. It has been a consensus for some time that rape is a crime that should be compensated for.³³

2. *Kadic v. Karadzic: Is State Action Necessary?*—A monumental case decided under the Alien Tort Claims act, the second circuit in *Kadic v. Karadzic* applied the use of the ATCA in cases against private individuals.³⁴ Karadzic was accused of genocide, torture, rape and summary execution with the specific intent of destroying ethnic-religious groups in Bosnia.³⁵ The court opined that other alleged “atrocities” were valid ATCA claims. For instance, the claims were valid “to the extent that they were committed in pursuit of genocide or war crimes” which are considered universal international violations. Also, the claims were valid “to the extent that Karadzic is shown to be a state actor.”³⁶ Although not a leader of a recognized nation, the Court held that Karadzic’s actions were violations of international law since his directives were issued in the color of the authority of the former Yugoslavia.³⁷ The United Nations recognized his actions as violations of international law and crimes against humanity.³⁸ The court determined that international law is drawn from the historical law and not a specific point in time.³⁹ The *Kadic v. Karadzic* decision also relied on the norms and customs that make up international law to determine if Karadzic’s actions violated universal international law.⁴⁰ The Second Circuit expanded the application of the ATCA further than any other case by applying

31. *Id.* at 862 (quoting and discussing *Banco Nat’l de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

32. *Id.* at 866.

33. *Speech on War Rape*, U.N. Commission on Human Rights 51st session, Agenda Item 11, available at <http://www.webcom/hrin/parker/c-95-11.html> (last visited Oct. 20, 2000).

34. *Kadic v. Karadzic*, 70 F.3d 232.

35. *Id.* at 236.

36. Enslin, *supra* note 22, at 723.

37. *Karadzic*, 70 F.3d at 239.

38. *Id.* at 241.

39. Enslin, *supra* note 22, at 721.

40. *Id.* at 722.

the *Kadic* holding to nonstate actors who commit universal violations of international law.⁴¹ It has yet to be seen whether the courts will expand the application of the ATCA in order to allow actions against private individuals, especially when the violations involved are not as egregious as those in *Kadic v. Karadzic*.⁴²

In the recent outcome of this case, punitive damages were imposed on Karadzic for the war crimes and atrocities he committed.⁴³ Recovery of the damages that were assessed will be more difficult than in municipal law cases because Karadzic is not within the United States, nor does he own any property or assets within reach of his victim creditors.⁴⁴

3. *Application of the Alien Tort Claims Act in the suit against Japan.*—Two necessary requirements must exist to establish jurisdiction under the Alien Tort Claims Act: (1) a tortious violation of international law; or (2) a violation of a treaty that involves foreign citizens.⁴⁵ It has long been recognized by the United Nations and most civilized nations that instituted slavery and rape are war crimes and atrocities that will not be tolerated by international law.⁴⁶ In fact, rape as a war crime had been recognized well before World War II or before Japan instituted comfort women into sexual slavery.⁴⁷ All of the women in the class action lawsuit are foreign citizens of Korea, China and the Philippines and are alleging atrocities that occurred in various parts of Asia during World War II. Therefore, unless the treaty bars this case, these women meet the jurisdictional requirements of the ATCA. The San Francisco Peace Treaty will be analyzed to test the veracity of Japan's defense later in this comment, but first the history and context of the comfort women should be considered to understand the importance and magnitude of this case.

41. *Id.* at 724.

42. *Id.*

43. *Kadic v. Karadzic*, 90 Civ. 0878, 878-79 (S.D.N.Y. 2000).

44. Steve Kuan, *Alien Tort Claims Act—Classifying Peacetime Rape as an International Human Rights Violation*, 22 HOUS. J. INT'L L. 451 (2000).

45. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

46. *Speech on War Rape*, U.N. Commission on Human Rights 51st session, Agenda Item 11, available at <http://www.webcom/hrin/parker/c-95-11.html> (last visited Oct. 20, 2000), stating "the early scholars Belli (1563), Gentili (1612) and Grotius (1625) all indicate that war rape was a war crime. The post World War I Versailles Commission listed rape as a war crime. Control Counsel Law No. 10, defining war crimes and listing crimes against humanity for the Nuremberg and Tokyo Charters, includes war rape."

47. *Id.*

B. The History of Comfort Women and Prior Attempts for Reparation

The institutionalization of comfort women into slavery began as early as 1932 and lasted until the end of World War II in 1945.⁴⁸ Although the numbers vary, it is estimated that as many as 200,000 women were forced into sexual slavery during the war.⁴⁹ The women were coerced into slavery by various methods, many lured in with promises of reputable well paying jobs as workers in restaurants or laundries, and many more were forcibly abducted from their families with the threat or actual violence against their loved ones.⁵⁰ These coercion tactics were particularly successful because the Japanese government was able to gain the persuasive power of local schoolteachers, police and village authorities to help convince women to take seemingly promising job opportunities during the war.⁵¹ The promising job opportunities were in reality, positions of sexual slavery. The specific methods by which the Japanese recruited comfort women has been the most difficult to ascertain, because the Japanese only began official documentation when women arrived at the comfort stations.⁵²

Documentation of daily life within the camps was quite extensive including the hygiene of the women, working hours, rules of conduct and pay each woman was to receive.⁵³ The comfort stations were run military style with rules and regulations to keep order, for example the following prototype of comfort station rules were typical:

Entry to this comfort station permitted only to Army and Paramilitary personnel. Visitors must pay at reception and obtain a ticket and condom. The ticket is valid only for this occasion and if not entering, a room can be refunded. There is no refund once it has been handed to a hostess. On obtaining a ticket, the visitor is to enter the room with the number shown.

48. *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., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

49. Kuan, *supra* note 44, at 451.

50. *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., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

51. *Id.*

52. *Id.*

53. *Id.*

The time allowed is 30 minutes. The hostess is to be handed the ticket on entry. Drinking alcohol in the room is prohibited. Visitors must leave immediately after their business is completed. Any who fail to observe the regulations or who infringe military discipline are to be ejected. Contact without the use of the condom is prohibited. Entry times: 10-5 p.m. for men, 1-9 for NCOs.⁵⁴

The rules help validate institutionalized slavery and the appearance of a legitimate business. The time constraints on each visit demonstrate the frequency with which women were to perform.⁵⁵ History of these events has had to be reconstructed by the testimony of comfort women who still live to tell their stories and of course, without official government documentation of recruitment procedures, Japan has attempted to demonstrate that these women voluntarily succumbed to life as sex slaves.⁵⁶

The Japanese government has legitimized the institution by keeping meticulous records of daily life within the comfort stations.⁵⁷ These records were released in 1992 when Japan officially started to admit the existence of comfort women and comfort stations.⁵⁸ Often comfort women endured long days of forced sexual activity with as many as sixty to seventy men a day, and contrary to Japanese accounts received little if no pay at all.⁵⁹ The Japanese have justified the comfort stations and comfort women slavery by theorizing that the establishment prevented more rapes and spread of sexual disease from occurring around where armies were stationed.⁶⁰ It was also acceptable to demoralize the comfort women because it was believed that they came from racially inferior countries.⁶¹

The soldiers were given condoms to prevent pregnancy and the spread of disease, while often the women were injected with

54. GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 83-84* (W& W Norton Company, Inc. 1994).

55. *Id.*

56. Korean Council for Women Drafted for Military Sexual Slavery by Japan, *UN Resolution on Comfort Women*, available at <http://www.witness.peacenet.or.kr/kindex.htm> (last visited Oct. 16, 2000).

57. *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., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

58. *Id.*

59. *Id.*

60. *Id.*

61. HICKS, *supra* note 54, at 93-94.

“salvarsan or terramycin, either as a prophylactic or treatment.”⁶² These injections later lead to the infertility of many women and are often referred to as drug “606.”⁶³ The battle to prove the occurrence of these tortious events has been quite difficult, as Japan has only recently admitted to the existence of comfort women, comfort stations and the widespread victimization of women during WWII.⁶⁴ This admission came in 1992, and the admission only extended to creating a moral obligation by Japan to mend the situation, even now, the Government admits no legal obligation to remedy the situation or make reparations.⁶⁵ The sole proof that has existed since WWII is the testimony of comfort women who have lived to tell their stories.⁶⁶

1. *Class Action by Asian Comfort Women.*—The class complaint filed by the comfort women in September of 2000 details the atrocities that each of the fifteen plaintiffs endured at the hands of an army of Japanese soldiers.⁶⁷ Although each story is unique, several common themes emanate from the voices of these women: most if not all are unable to have children; their lives have been drastically altered mentally, socially and physically; and as the years have past the horrific memories remain.⁶⁸ One former comfort woman narrates her experience before a night of rapes and torture:

We washed ourselves as if it could wash away all that had happened to us. I dared not go back to the dining room and decided to hide myself. . . . My whole body was shaking with fear. “Not again, I can’t go through this again,” I thought. After a while the angry voices and footsteps came closer, and I was dragged out of my hiding place. The night was not over yet, there were more Japanese waiting. The terror started all over again. I never realized suffering could be so intense as this. And this was only the beginning.⁶⁹

62. *Id.*

63. *Id.*

64. Chang Rok Kim, *Possible Legal Solutions in the Issue of the Japanese Army’s Comfort Women: from the Perspective of One of the Victimized Countries (Korea)*, available at <http://www.witness.peacenet.or.kr/symekor.htm> (last visited Oct. 16, 2000).

65. *Id.*

66. See Testimony from Former “Comfort Women,” available at <http://www.cmht.com/casewatch/cases/cwcomfort4.htm> (last visited Sept. 1, 2001).

67. Complaint for Comfort Women Lawsuit, available at <http://www.cmht.com/casewatch/cases/comfortwomen-cmpl.pdf> (last visited Jan. 21, 2001).

68. *Id.*

69. HICKS, *supra* note 54, at 93-94.

Testimony such as this demonstrates the intense pain and suffering that was part of life in the comfort station, even during times when the woman was not being raped, she feared what was to come. Unfortunately, the above story of one women's experience is not unique or unusual.

The Comfort Women's complaint justifies jurisdiction in the United States under the allegation that violations of international law have occurred and that the court has authority to decide the case under the ATCA, 28 U.S.C. § 1350.⁷⁰ The women also argue that Japan has waived sovereign immunity under 28 U.S.C. § 1605(a)(1) because violations of *jus cogens* waive any rights a nation has to sovereign immunity.⁷¹ *Jus Cogens* is a "mandatory norm of general international law from which no two or more nations may exempt themselves or release one another."⁷² The complaint clearly lays out that there are several treaties including the Hague convention and the International Convention for the Suppression of the Traffic in Women and Children of 1921, both of which prohibit sexual slavery and establish norms of international law.⁷³ The complaint charges that the Japanese government "committed, conspired to commit, furthered, and aided and abetted others who committed war crimes and crimes against humanity," as well as enslaving "female civilians that were under its control."⁷⁴ The case is a class action suit representing the hundreds of thousands of women who were comfort women during the war despite the harsh truth that only 25% to 30% of the women even survived the war.⁷⁵ Comfort women died from lack of medical treatment, botched abortions, disease and malnutrition, and during beatings, while others committed suicide.⁷⁶ Although the lawsuit

70. Complaint for Comfort Women Lawsuit, *available at* <http://www.cmht.com/casewatch/cases/comfortwomen-cmpl.pdf> (last visited Jan. 21, 2001).

71. *Id.* at 4.

72. BLACK'S LAW DICTIONARY, 864 (7th ed. 1999).

73. Complaint for Comfort Women Lawsuit, *available at* <http://www.cmht.com/casewatch/cases/comfortwomen-cmpl.pdf> (last visited Jan. 21, 2001) (the complaint which delineates that several treaties prohibit sexual slavery, Hague Convention Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 1907, International Convention for the Suppression of the Traffic in Women and Children of 1921, Convention to Suppress the Slave Trade and Slavery of 1926, ILO Convention No. 29 on Forced Labor (1930), 1933 International Convention on the Suppression of Traffic in Women of Full Age, Geneva Convention Relative to the Protection of War Victims of 1949, Nuremberg Charter and Control Council Law No. 10, and Charter of the International Military Tribunal for the Far East in Tokyo).

74. *Id.* at 1.

75. *Id.* at 27.

76. *Id.* at 27.

begins with only fifteen plaintiffs, attempts have been made to expand the participants and strengthen the case.⁷⁷ The class action attempts to hold Japan jointly and severally liable for their actions during WWII.⁷⁸

Although several lawsuits have been filed in Japan to gain recognition and redress for the comfort women, none have yielded a satisfactory remedy and thus it was decided to file the case in the United States.⁷⁹ The comfort women have always sought an apology, reparations, and the punishment of those who are responsible.⁸⁰ Several lawsuits filed in Japan have done little more than achieve an admission of wrongdoing and help to set up an Asian Women's Fund, which collects private donations to give reparation to comfort women.⁸¹ The Japanese government has done nothing to accept legal responsibility for the problem, and thus the comfort women who still survive have had to seek action from the United Nations, and the United States through the Alien Tort Claims Act.

In November 2000, a mock trial was held in Tokyo to challenge the Japanese government and push for the Japanese government to act. The trial was arranged by the Women's International War Crimes Tribunal on Japan and many former soldiers. Comfort women and witnesses confronted the Japanese government with the history of atrocities during WWII.⁸² The trial was "a landmark in Japanese democracy because it is the first guilty verdict against Hirohito, who was declared a divine ruler and head of the Japanese military, which was an aggressive colonizer until Japan's defeat in WWII."⁸³ The trial also served to debunk the image that the Emperor created by giving the comfort women to Japanese soldiers as "gifts from the emperor."⁸⁴ Although only a mock trial, the case was a step forward for comfort women to tell their story and be

77. Leslie Casimir, *Koreans Raise Painful Issue Woman Wants Justice for Japan's WWII Sex Slaves*, MIAMI HER., Nov. 2, 2000, at S2.

78. Complaint for Comfort Women Lawsuit, available at <http://www.cmht.com/casewatch/cases/comfortwomen-cmpl.pdf> (last visited Jan. 21, 2001).

79. Chang Rok Kim, *Possible Legal Solutions in the Issue of the Japanese Army's Comfort Women: From the Perspective of One of the Victimized Countries (Korea)*, available at <http://www.witness.peacenet.or.kr/symekor.htm> (last visited Oct. 16, 2000).

80. *Id.*

81. Kuan, *supra* note 44, at 451.

82. Suvendrini Kakuchi, *Japan-Asia: Wartime Sex Slaves Get Justice at Mock Trial*, INTER PRESS SERVICE, Dec. 12, 2000, available at LEXIS, News Library, Combined Newspapers.

83. *Id.*

84. *Id.*

heard. It has been a long goal of the women who endured sexual slavery to teach and tell their stories to gain understanding that as “women that we can fight for justice against a system that condones these horrible acts of violence.”⁸⁵ The women hope that by vocalizing and speaking out about their history, that their stories will be incorporated into history lessons and textbooks, especially in Japan where the atrocities occurred.

There have been several other lawsuits filed around the world in attempts to gain recognition of atrocities that affected men and women during the war. Other lawsuits have attempted to reveal the torture of the Japanese army unit that performed inhumane experiments on human subjects.⁸⁶ Trials in cases involving Chinese men who were forced to work in Japanese factories during the war have also begun, several of them being brought forth in the United States.⁸⁷ All of these lawsuits can attempt to fracture and weaken Japan’s chief argument that the San Francisco Peace Treaty of 1951 waived all wartime claims of all the victims no matter what the offense.⁸⁸ Aside from the recent surge of trials, there have also been actions taken by various international organizations.

2. *International Efforts to Urge Japan to Make Reparations.*

—Thus far, the international efforts to bring about justice have been little more than persuasive. The United Nations has brought forth resolutions and reports on the matter that recognize the existence of sexual slavery and those reports have declared that instituted sexual slavery and war time rape is not to be tolerated by international law.⁸⁹ The United Nations has also recognized that wartime rape is a war crime that is deserving of compensation.⁹⁰ These reports and resolutions have done little more than publicize the issue on a global level and perhaps urge Japan to act to remedy the situation.

Within the United States, two lawmakers have attempted to get the Executive Branch to place pressure on Japan to act, but

85. *Id.*

86. Howard French, *Japanese Veteran Testifies in War Atrocity Lawsuit*, N.Y. TIMES, Dec. 21, 2000, at A3.

87. *Id.*

88. *Id.*

89. Speech on War Rape, U.N. Commission on Human Rights, 51st session, Agenda Item 11, available at <http://www.webcom.com/hrin/parker/c-95-11.html>, (last visited Oct. 20, 2000).

90. *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., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

again the actions have done little more than publicize the issue. The Honda Resolution put forth in the California Legislature by Representative Honda, requests that Japan make an official apology for the war crimes, immediately pay reparations to the victims, and calls upon Congress to adopt a similar resolution that “would urge the President of the United States to take all appropriate action to bring about a formal apology and reparations by the Government of Japan.”⁹¹

91. Honda Resolution A.J. Res. 27, 1999 Assem., Reg. Sess. Ca. 1999)
Excerpts from the Resolution:

This measure would urge the Government of Japan to finally bring closure to concerns relating to World War II by formally issuing a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II and immediately paying reparations to the victims of those crimes. This measure would also call upon the United States Congress to adopt a similar resolution and would urge the President of the United States to take all appropriate action to bring about a formal apology and reparations by the Government of Japan. . . .

WHEREAS, The Japanese military enslaved millions of Koreans, Chinese, Filipinos, and citizens from other occupied or colonized territories during World War II, and forced hundreds of thousands of women into sexual slavery for Japanese troops; and WHEREAS, The International Commission of Jurists, a nongovernmental organization (NGO) in Vienna, Switzerland, ruled in 1993 that the Government of Japan should pay reparations of at least \$40,000 for the “extreme pain and suffering” caused to each woman who was forced into sexual slavery by the Japanese military (referred by the Japanese military as “comfort women”), yet none of these women have been paid any compensation by the Government of Japan; now, therefore, be it Resolved by the Assembly and Senate of the State of California, jointly, That the Legislature of the State of California urges the Government of Japan to finally bring closure to concerns relating to World War II by doing both of the following: (1) Formally issuing a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II. (2) Immediately paying reparations to the victims of those crimes, including, but not limited to, United States military and civilian prisoners of war, the people of Guam and the Marshall Islands, who were subjected to violence and imprisonment, the survivors of the “Rape of Nanking” from December 1937 until February 1938, and the women who were forced into sexual slavery and known by the Japanese military as “comfort women”; and be it further Resolved, That the Legislature of the State of California calls upon the United States Congress to adopt a similar resolution that follows the spirit and letter of this resolution calling on the Government of Japan to issue a formal apology and pay reparations to the victims of its war crimes during World War II; and be it further Resolved, That the Legislature of the State of California requests that the President of the United States take all appropriate action to further bring about a formal apology and reparations by the Government of Japan to the victims of its war crimes during World War II; and be it further Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the Japanese Ambassador to the United States, the

In a floor debate in Congress, Representative Lane Evans addressed the concerns of comfort women and again called for action by Congress and the Executive branch.⁹²

President of the United States, the President of the Senate, the Speaker of the House of Representatives, and each California Member of the Senate and the United States House of Representatives.

92. 106th Cong. Rec. E2307 (extension of remarks, Nov. 8, 1999). (Statement of Representative Lane Evans in regards to the comfort women and a need for a remedy that includes international support.) The following are excerpts from Representative Evan's speech:

- During World War Two, the Japanese military forced hundreds of thousands of women to serve as sexual slaves. Euphemistically known as "comfort women," they were predominantly Korean women and girls abducted from their homes and forced to serve Japanese soldiers. This government-sanctioned program created untold numbers of comfort stations or military brothels throughout Japanese-occupied territories in the Pacific Rim.
- For decades after the war, the Japanese government denied the existence of "comfort women" and the comfort stations, but in 1994, their position changed. The Japanese government admitted that "the then Japanese military was directly or indirectly involved in the establishment and management of comfort stations and the transfer of "comfort women [and] that this was an act that severely injured the honour and dignity of many women". . .
- Mr. Speaker, the Japanese government has a legal as well as moral responsibility to face its history. To continue to indignantly brush away these women's claims adds insult to injury.
- Stripped of their dignity, robbed of their honor, most of them were forced to live their lives carrying those horrific experiences with them covered under a veil of shame. I don't think they should do so any longer.
- I believe the Japanese government must do whatever can be done to restore some dignity for these women. . . .
- That is why, in the strongest possible terms, I call upon Japan to formally issue a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II and offer reparations no less than \$40,000 for each of the "comfort women". The surviving women are advanced in age, and time is of the essence. They have waited so long. They should wait no longer. . . .
- Even today, we sometimes turn a blind eye to human rights. We sometimes take them for granted. We sometimes stay silent. But we shouldn't. . . .
- Mr. Speaker, I strongly believe we have a duty. We have a duty to help those who need our help. We have a duty to stand up for those who cannot stand up on their own. We have a duty to speak up for those who have no voices and to do what is just and what is right.
- So, let us do what is just and what is right for the "comfort women" and other victims. Let us speak out for them. Let us stand up for them. Let us lend them our strength.
- We must act and we must speak out, because in the end, people will remember not the words of their enemies, but the silence of their friends.

Representative Evans requests that the United States stand up for comfort women and for the crimes against humanity that have occurred. Hon. Lane Evans stated:

We have a duty to help those that need our help. We have a duty to stand up for those who cannot stand up on their own. We have a duty to speak up for those who have no voices and do what is just and what is right. So, let us do what is just and what is right for the “comfort women” and other victims. Let us speak up for them. Let us stand up for them. Let us lend them our strength. We must act and we must speak out, because in the end, people will remember not the words of their enemies, but the silence of their friends. We must not remain silent.⁹³

The United Nations resolutions and the move by lawmakers in the United States to publicize and remedy the matter have helped place pressure on Japan, but as of yet, Japan has failed to resolve its mistakes. The filing of a lawsuit on the Alien Tort Claims Act may be a first international step of binding Japan to a remedy, but the implications of this are important to consider.

III. Implications of the Current Lawsuit Filed Under the Alien Tort Claims Act.

Although the lawsuit may qualify to proceed under the ATCA, the repercussions the lawsuit could have on the relationship between the United States and Japan needs to be considered. Japan first defends and dismisses the suit by contending that the San Francisco Peace Treaty of 1951, which purports to waive all wartime claims against Japan, bars the action. The analysis of this treaty will be crucial in determining if the comfort women can succeed and receive compensation.

A. *How Should the District Court Analyze the Treaty?*

The Vienna Convention sets out how a treaty should be interpreted.⁹⁴ Article 31 specifically provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁹⁵ Article 32 specifically provides for

• We must not remain silent.

93. *Id.*

94. Vienna Convention, The Law of Treaties, May 23, 1969, art. 31-32, 1155 UNTS 331.

95. *Id.* at art. 31.

the inclusion of material that may have surrounded the formation of the treaty including, “the preparatory work of the treaty and the circumstances of its conclusion,” in order to make clear ambiguities and to avoid unjust and absurd results which may occur if the treaty is strictly construed.⁹⁶ Thus, following the guidelines of the Geneva Convention, the District Court will have to weigh other factors besides the plain meaning of the statute.

B. Were Claims Waived Under the San Francisco Peace Treaty?

The San Francisco Peace Treaty of 1951 was entered into after World War II in an effort to settle claims for reparation, but the treaty itself gives no direct focus to the claims of comfort women.⁹⁷ In fact, the treaty was entered into in order to deal with property claims after the war; no mention was ever made concerning the rights of women.⁹⁸ It is argued that the treaty should not be read as waiving the claims of the comfort women, when they were not even considered when the treaty was formed.

Specifically, Chapter V, Article 14 of the San Francisco Peace Treaty of 1951 deals with the issues of war claims and provides for payment to the allied powers and those countries that were occupied by Japan during the war.⁹⁹ The treaty then specifies what assets can be used for payment and what is exempted. For instance, Article 14(b) states that

[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.¹⁰⁰

In analyzing this and other treaties, which may serve to waive the claims of the comfort women, it will be necessary for the court to decide if the Treaty serves to waive the claims of individuals or waives only rights of states. The interpretation of the above language will be essential to the outcome of the case. Certainly it can be hypothesized that Japan’s actions were taken in the course of prosecution of the war as the comfort stations were operated,

96. *Id.* at art. 32.

97. San Francisco Peace Treaty, Sept. 8, 1951, Ch. 5, art. 14.

98. French, *supra* note 86, at A3.

99. San Francisco Peace Treaty, Sept. 8, 1951, Ch. 5, art. 14(a)(1).

100. *Id.* at art. 14(b).

managed and utilized by the Japanese Armed Forces during the war, but the intent of the parties who have signed the treaty is important in deciding whether the signatories intended to include the rights of individuals who were subject to war crimes to have their rights waived.

It has been theorized and argued in other cases, and will certainly be argued in the present case, that the claims of the comfort women were not waived because the San Francisco Peace Treaty of 1951 was entered into in order to deal primarily with disputes over property, not the lives of women who were instituted into sexual slavery as comfort women.¹⁰¹ Also, after WWII during the international tribunal that prosecuted Japan's leaders for war crimes, war crimes against women were not even brought into consideration, thus should not be covered now under the San Francisco Peace Treaty.¹⁰² The Special Rapporteur of the United Nations Report on Human Rights found that the San Francisco Peace Treaty and other bilateral treaties were not concerned with Human Rights violations at the time and thus should not waive rights now.¹⁰³ Also, the International Commission of Jurists in its report in 1994 agrees that crimes against humanity were not included in the treaty and that the word "claims" in the treaty did not cover tort claims.¹⁰⁴ Both the United Nations report and the report of the International Commission of Jurists agree that the San Francisco Peace Treaty of 1951 does nothing to negotiate the violations of individual rights resulting from war crimes and crimes against humanity.¹⁰⁵ Certainly, the court will have to delve further into the intent of the Peace treaty and the purpose and object of its establishment; but with the supporting opinion of several prominent international organizations who find that the San Francisco Peace Treaty does not waive their claims, the court may have the support with which to allow the case to continue. It seems that also in accordance with Article 32 of the Vienna Convention, the court will have to realize that if the intent and the purpose of the San Francisco Peace treaty did not mention, encompass or include comfort women, then it would be an unjust and absurd

101. French, *supra* note 86, at A3.

102. *Id.*

103. *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., Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

104. *Id.*

105. *Id.*

result to say that the words of the treaty effectively waive the rights of these women.¹⁰⁶

1. *Demands of the Comfort Women.*—The Comfort women demand that Japan issue an official apology and admission to the events that took place during WWII. Also, the women are asking for compensation for the atrocities that they were forced to endure that the hands of Japanese Soldiers. As previously mentioned however, these demands have been requested before and consistently denied by the Japanese Government. The Comfort Women continue to age and fewer women live to fight for the reparations and the wrongs committed against them. It is inherent that this case and others like it progress at in a timely manner, so that the charges can be addressed and actual reparations can be made. The most important compensation that can be given will be in the form of educating the future generations, and in fact, one of the many requests of the comfort women is that Japanese history and that of other nations reflects and tell the story of the comfort women.¹⁰⁷ It is thought that through history, future mistakes can be prevented.

IV. Possible Solutions and Appropriateness of the ATCA Action.

There has been concern that the claims brought under the ATCA are inappropriate as the United States is attempting to adjudicate international issues that would perhaps be handled more effectively by an international court or resolved in the originating country. Also, ATCA claims have the possibility of making already overcrowded courts even more crowded should the Courts continue to grant jurisdiction for foreign citizens to sue under the ATCA.¹⁰⁸ Certainly the United States has always been conscious and concerned with its international role. Its intention is not to be viewed as an international police officer. Perhaps after all of the international efforts that have occurred, the United States is in the best position to send a message to Japan that past war crimes will not be tolerated. A full and complete trial in this country could provide a forum that would be accessible to the world to hear the stories of comfort women and to help put international pressure on Japan to act.

106. Vienna Convention, The Law of Treaties, May 23, 1969, art. 32, 1155 UNTS 331.

107. Korean Council for Women Drafted for Military Sexual Slavery by Japan, *UN Resolution on Comfort Women*, available at <http://www.witness.peacenet.or.kr/kindex.htm> (last visited Oct. 16, 2000).

108. Enslin, *supra* note 22, at 695.

It is unclear however, how a verdict against Japan would operate. A verdict that Japan was liable to the comfort women it institutionalized would be a strong action in itself, but the monetary compensation that is sought may be difficult to retrieve and the United States may be unwilling to strain relations with such a strong trade partner. Assets can be attached, but this is a strong move for the United States to make, and it would be the first enforcement effort in attempts to get Japan to react and acknowledge the institution that it established during WWII. As the case is just in the beginning stages, the topic of viable remedies would be an appropriate topic to research and undertake in a future comment, after the trial has commenced, and perhaps the direction of the court becomes clearer.

V. Official Stance of the State Department

The State Department of the United issued a Statement of Interest calling for the dismissal of the comfort women's lawsuit in April 2001.¹⁰⁹ The Bush Administration has sided with Japan stating that reparations were made under the San Francisco Peace Treaty of 1951. A hearing was heard on the motions to dismiss the case on August 1, 2001.¹¹⁰ A decision was not made prior to publication. The court is considering arguments made by the plaintiffs, the U.S. government and Japan. Several protests have occurred subsequent to the release of the statement urging the U.S. government to reconsider. Without the support of the U.S. government, there is little hope that the case will continue. The U.S. government does not want to burden the courts with a surge of cases that would result if this case were to continue.

VI. Conclusion

The lawsuit against Japan should proceed in its entirety, if nothing else, to pressure Japan to act in repairing the consequences of institutionalizing women in the comfort stations. There is a benefit to having a trial, it will publicize the issue and allow others to learn from the atrocities that occurred. Unfortunately, although there was a recent mock trial victory in Japan, there were attempts made to suppress media coverage, limiting the amount of Japanese who new about the proceedings. As seen in previous cases, the

109. Miller, *supra* note 20, at A19.

110. See Transcript of Motions Hearing Before Judge Henry H.Kennedy, Jr., available at <http://cmht.com/casewatch/cases/comf-transmda.pdf> (last visited Sept. 1, 2001).

likelihood of actual monetary compensation is slim, and although attachment of assets remains a viable option, it serves to strain the relationship between the United States and Japan. This lawsuit and the condemnation of the actions of the Japanese government will only help to further place a burden on the Japanese to accept responsibility both morally and legally.

Nathalie I. Johnson

