

THE COMFORT WOMEN CASE IN THE UNITED STATES:

A NOTE ON QUESTIONS RESOLVED AND UNRESOLVED
IN *HWANG v. JAPAN*, THE FIRST LAWSUIT BROUGHT BY
ASIAN WOMEN AGAINST JAPAN FOR WAR CRIMES

MAKOTO NISHIGAI*

No matter how I look at it, this conduct on the part of the Imperial State was about the severe violation of women's dignity and was carried out with the involvement of the military. The Japanese government hereby apologizes and shows its remorse to those who were subjected to such great suffering as a result, and are still suffering from the mental, as well as physical, scars.¹

I. INTRODUCTION

On September 18, 2000, fifteen Asian women who had been subjected to sexual servitude by the Japanese imperial military during World War II filed a class action lawsuit against Japan in the federal district court in Washington, D.C.² It was the first suit filed in a United States court directly against the Japanese government for war crimes.³ The fifteen

* B.A., Carleton College, 1997; LL.B., Chuo University (Japan), 1998; J.D., University of Wisconsin Law School, Class of 2002. Special thanks to Emiko and my parents for their love and support. Sincere thanks to Professor Satoru Osanai for his encouragement and guidance.

¹ The "Comfort Women" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan, 8 PAC. RIM. L. & POL'Y J. 63, 102 (Taihei Okada trans., 1999) (statements made by Yohei Kono, the then-cabinet secretariat of Japan, on August 4, 1993, quoted in the judgment of April 27, 1998, of the Yamaguchi Prefectural Court, Shimonoseki Branch, Japan).

² Lesley McKenzie, *WWII "Comfort Women" File Suit: Seek Compensation for Serving as Sex Slaves in the Army*, WASH. TIMES, Sept. 19, 2000, at A17; Bill Miller, "Comfort Women" Sue Japan in U.S.: Damages Sought by WWII Sex Slaves, WASH. POST, Sept. 19, 2000, at A18; 15 Women Sue Japan for Sexual Slavery During World War II, CHI. TRIB., Sept. 19, 2000, at 8 [hereinafter 15 Women Sue Japan].

³ Norman Kempster, *WWII-Era Sex Slaves Sue Japan*, L.A. TIMES, Sept. 19, 2000, at A15. "Previously, suits were brought against Japanese companies for their use of slave labor during the war." *Id.* See also Miller, *supra* note 2, at A18. As of November 1998, the following seven suits have been filed in Japanese courts by former comfort women against the government of Japan:

a) December 6, 1991, Tokyo District Court, by three South Korean women, joined by six more in April, 1992, pending; b) December 25, 1992, Yamaguchi District Court, Shimonoseki Branch, by three Korean women, judgment in favor of plaintiffs returned on April 27, 1998, on appeal to the Hiroshima High Court; c) April 2, 1993, Tokyo District Court, by 18 woman from the Philippines, joined by 28 more in September 1993, dismissed October 1998, appealed to the Tokyo High Court; d) April 5, 1993, Tokyo District Court, by one South Korean woman residing in Japan, pending; e) January 24, 1994, Tokyo District Court, by one Dutch woman, pending; f) August 7, 1995, Tokyo District Court, by four Chinese women, joined by two more in February

named plaintiffs were among an estimated 200,000 women and girls, euphemistically called "comfort women," who had been abducted or deceived into sexual slavery by the Japanese military in Asia including Korea, Taiwan, China, Burma, Indonesia and the Philippines.⁴ Less than thirty percent of them survived the war.⁵ The plaintiff class sought to be certified included a few thousand of those survivors who were still alive.⁶

The complaint, containing graphic details of the women's plight,⁷ was filed under the Alien Tort Claims Act (ATCA). Enacted as part of the First Judiciary Act passed in 1789, the ATCA, now codified in 28 U.S.C. § 1350, grants the federal district courts "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."⁸ By invoking the ATCA, the women alleged, among other things, that Japan committed war crimes and crimes against humanity in violation of international treaties and customary international law.⁹ Based upon these allegations, the plaintiffs sought compensatory and punitive damages.¹⁰

The Japanese government responded by stating that "all issues related to compensation were already settled by postwar treaties."¹¹ Expectedly, Japan sought to dismiss the complaint.¹² In its motion to

1996, pending; g) October 30, 1998, Tokyo District Court, by nine former comfort women and one relative of a victim, pending.

Etsuro Totsuka, *Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*, 8 PAC. RIM. L. & POL'Y J. 47, 49 n.5 (1999).

⁴ *15 to Sue Japan in U.S. over Sex Slavery*, N.Y. TIMES, Sept. 16, 2000, at A5; McKenzie, *supra* note 2, at A17; Miller, *supra* note 2, at A18; Kempster, *supra* note 3, at A15; *15 Women Sue Japan*, *supra* note 2, at 8.

⁵ David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Military: Japan Eschews International Legal Responsibility?*, 32 COLUM. J. TRANSNAT'L L. 533, 542 (1995).

⁶ See, e.g., *15 to Sue Japan*, *supra* note 2, at 5 ("The coalition estimates the number of camp survivors alive today at 1,000 to 10,000."); Kempster, *supra* note 3, at A15 ("It [is] estimated that as many as 200,000 women were victims from 1931 through the end of the war but that only about 1,000 are still alive."). Although class certification is a relevant and very interesting aspect of the present case, the court did not address the issue; therefore, the issue falls outside the scope of this article. See, e.g., Ralph G. Steinhardt, *Fulfilling the Promise of Filatiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 301, 316-17 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (discussing difficulties involving class certification in a mass human rights tort action).

⁷ Class Action Complaint ¶¶ 7-21, *Hwang v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (No. CA 00-2233), available at <http://www.cmht.com/casewatch/index.html> [hereinafter COMPLAINT]. See also Kempster, *supra* note 3, at A15.

⁸ 28 U.S.C. §1350 (1994). See Steinhardt, *supra* note 6, at 302-03.

⁹ COMPLAINT, *supra* note 7, ¶ 77.

¹⁰ *Id.* ¶ 82.

¹¹ McKenzie, *supra* note 2, at A17 (quoting a Foreign Ministry official in Tokyo); Miller, *supra* note 2, at A18 (quoting Kazuo Kodama, a spokesman for the Japanese Embassy).

¹² *Hwang v. Japan*, 172 F. Supp. 2d 52, 55 n.1 (D.D.C. 2001).

dismiss, Japan asserted, among other grounds for dismissal, that it should enjoy sovereign immunity and, alternatively, that the action presented a political question.¹³

On October 4, 2001, the court granted Japan's motion to dismiss.¹⁴ After hearing oral arguments which he limited to the question of whether Japan should be entitled to sovereign immunity,¹⁵ Judge Henry H. Kennedy, Jr. held that the plaintiffs' claims presented nonjusticiable political questions, thus finding it unnecessary to rule on the question of sovereign immunity.¹⁶ In the court's opinion, "prudential concerns together with the court's lack of expertise strongly militate in favor of dismissal."¹⁷

Thus, at least temporarily, the district court's exercise of judicial self-restraint saved Japan from the further embarrassment of having to publicly deny, yet again, its legal responsibility for the wrongs suffered by the war victims. However, the court's ruling consequently left some important questions unresolved.¹⁸ This Note examines two of those unanswered questions, namely, whether Japan enjoys sovereign immunity and whether postwar treaties necessarily preclude individual victims' claims for reparation. In examining these questions, this Note first discusses the plaintiffs' cause of action in Part II. It then analyzes the parties' oral arguments at the motion hearing in Part III and the court's opinion in Part IV, focusing on the questions the court did resolve. Finally, Part V addresses the two unresolved questions and concludes that because Japan's human rights violations occurred within the United States' territories, Japan may not enjoy sovereign immunity. Part V also concludes that by virtue of established international legal principles, under certain circumstances, postwar treaties may not always bar individual war victims' claims. This conclusion suggests that the two unresolved questions, if further explored, will rekindle the pursuit of justice in Asia and attract the attention that it deserves from a larger community in the United States.

¹³ In addition to sovereign immunity and political question, Japan asserted, as grounds for dismissal, (1) lack of personal and subject matter jurisdiction, (2) *forum non conveniens*, (3) international comity, and (4) statute of limitations. *Id.*

¹⁴ *Id.* at 55.

¹⁵ Transcript of Motions Hearing at 4, *Hwang v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (No. CA 00-2233), available at <http://www.cmht.com/casewatch/civil/comfort.html> [hereinafter TRANSCRIPT].

¹⁶ *Hwang*, 172 F. Supp. 2d at 58.

¹⁷ *Id.* at 66.

¹⁸ As of the writing of this Note, the district court's ruling is on appeal. See Cohen, Milstein, Hausfeld & Toll, P.L.L.C., *Lawyers for Former "Comfort Women" File Immediate Appeal of Today's Court Ruling*, at <http://www.cmht.com/casewatch/cases/cwcomfort6.htm>.

II. CAUSE OF ACTION

On September 18, 2000, the complaint was filed in the federal district court in the District of Columbia under the Alien Tort Claims Act "on behalf of women who were taken from their homes in countries occupied by Japan and who, pursuant to a premeditated master plan, were forced into sexual slavery, enduring repeated rapes, harsh treatment, torture and beatings, but who have never received compensation from Japan for their suffering."¹⁹ This filing marked the commencement of the first lawsuit in history where non-U.S. citizens sued the government of Japan in a U.S. court.

A. ALIEN TORT CLAIMS ACT

Under the Alien Tort Claims Act, "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."²⁰ As indicated above, the ATCA was originally adopted as a provision of the Judiciary Act of 1789.²¹ Initially, the ATCA was very rarely invoked by plaintiffs.²² In fact, during the period of more than two centuries after its enactment, courts had sustained jurisdiction under the ATCA only on two occasions.²³ The ATCA finally came into prominence in 1980 when the Second Circuit sustained jurisdiction under it in the landmark case of *Filartiga v. Peña-Irala*.²⁴

In *Filartiga*, Dr. Joel Filartiga, a prominent opponent of the Stroessner regime in Paraguay, and his daughter brought a wrongful death action in federal district court under the ATCA.²⁵ The plaintiffs charged a former Paraguayan police official, Peña-Irala, who was then in the United States, with having tortured Dr. Filartiga's son to death while in police custody in Paraguay.²⁶ The district court dismissed the action for lack of

¹⁹ COMPLAINT, *supra* note 7, ¶ 1.

²⁰ 28 U.S.C. § 1350 (1994).

²¹ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (1994)). The Judiciary Act was entitled "An Act to establish the Judicial Courts of the United States." Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, in THE ALIEN TORT CLAIMS ACT, *supra* note 6, at 176 n.7, 179 n.28. The Act is also called the "Alien Tort Statute." See, e.g., *id.* at 175.

²² *Id.* at 176.

²³ *Id.* at 176-77 n. 16 (citing *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrell*, 3 F.Cas. 810 (D. S.C. 1795)).

²⁴ 630 F.2d 876 (2d Cir. 1980). See Randall, *supra* note 21, at 225.

²⁵ 630 F.2d at 878-79.

²⁶ *Id.*

subject matter jurisdiction.²⁷ The Second Circuit Court of Appeals reversed, holding that the ATCA provided federal jurisdiction and "that deliberate torture perpetrated under color of official authority violated universally accepted norms of the international law of human rights, regardless of the nationality of the parties."²⁸

The *Filartiga* decision established that the ATCA "confers federal subject-matter jurisdiction when the following three conditions are present: (1) an alien sues (2) for a tort (3) committed in violation of the laws of nations."²⁹ More significantly, despite the federal circuit and district courts' confusion over the scope of the ATCA in the absence of the Supreme Court's clear guidance,³⁰ *Filartiga* and its progeny have firmly established that the ATCA is not a dead letter at all.³¹ In fact, today, federal courts generally recognize that the ATCA "confers both a forum and a private right of action to aliens alleging a violation of international law."³²

B. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides an exception to the general applicability of the ATCA to foreign governments.³³ The FSIA "entitles foreign states to immunity from the jurisdiction of courts in the United States... subject to certain enumerated exceptions"³⁴ and "to existing international agreements to which the United States is a party at the time of the enactment of"³⁵ the FSIA. Thus, "[s]overeign immunity shields a [foreign] state from liability altogether, and once successfully invoked, prevents the suit from proceeding."³⁶

In *Argentine Republic v. Amerasia Shipping Corp.*, the Supreme Court unequivocally held that the FSIA "provides the sole basis for

²⁷ *Id.* at 880.

²⁸ *Id.* at 878.

²⁹ *Kadic v. Daradzic*, 70 F.3d 232, 238 (2d Cir. 1995).

³⁰ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court.").

³¹ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.").

³² *Id.*

³³ 28 U.S.C. §§ 1330, 1332(a)(2)-(3), 1391(f), 1441(d), 1602-11 (1997).

³⁴ *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

³⁵ 28 U.S.C. § 1604.

³⁶ Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, in THE ALIEN TORT CLAIMS ACT, *supra* note 6, at 96.

obtaining jurisdiction over a foreign state in federal court."³⁷ Thus, as Chief Justice Rehnquist, writing for the Court, explained, the ACTA does not confer upon the federal court jurisdiction over a foreign government:

We think Congress' decision to deal comprehensively with the subject of foreign immunity in the FSIA, and the express provision of § 1604 that "a foreign state shall be immune from the jurisdiction of the courts of the United States and the States except as provided in sections 1605-1607," preclude a construction of the Alien Tort Statute that permits the... suit. The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.³⁸

Given this holding of the Supreme Court, the FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity."³⁹ These exceptions include cases involving (1) the express or implied waiver of immunity,⁴⁰ (2) commercial activity occurring in the United States or causing a direct effect in this country,⁴¹ (3) property expropriated in violation of international law,⁴² (4) inherited, gift, or immovable property located in the United States,⁴³ (5) noncommercial torts occurring in the United States,⁴⁴ (6) the enforcement of arbitration agreements,⁴⁵ (7) acts of terrorism committed by certain designated foreign states,⁴⁶ (8) maritime liens,⁴⁷ and (9) the foreclosure of a certain preferred mortgage.⁴⁸ In light of *Amerada Hess*, a plaintiff suing a foreign state must show that the state's conduct giving rise to its claim falls under any one of these statutory exceptions in order to maintain a lawsuit in federal district court.

³⁷ 488 U.S. 428, 439 (1989). This holding has consistently been followed by both the Supreme Court and lower courts in subsequent cases. See, e.g., *Nelson*, 507 U.S. at 355; *Prinz v. Fed. Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992).

³⁸ *Amerada Hess Shipping Co.*, 488 U.S. at 438 (citation omitted).

³⁹ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

⁴⁰ 28 U.S.C. § 1605(a)(1).

⁴¹ *Id.* § 1605(a)(2).

⁴² *Id.* § 1605(a)(3).

⁴³ *Id.* § 1605(a)(4).

⁴⁴ *Id.* § 1605(a)(5).

⁴⁵ *Id.* § 1605(a)(6).

⁴⁶ *Id.* § 1605(a)(7).

⁴⁷ *Id.* § 1605(b).

⁴⁸ *Id.* § 1605(d).

C. COMPLAINT

In their complaint, the plaintiffs alleged that the mass rape and torture committed by the Japanese imperial military against them constituted torts actionable under the Alien Tort Claims Act.⁴⁹ The plaintiffs further argued that Japan was not entitled to immunity from the district court's jurisdiction because Japan's actions fell under several exceptions under the Foreign Sovereign Immunities Act.⁵⁰ Based on these allegations, the plaintiffs sought, among other things, compensatory and punitive damages.⁵¹

The complaint contained factual allegations with graphic details, describing at length the ordeal of each named plaintiff.⁵² The plaintiffs alleged that most of the women had been fifteen or sixteen years of age, and some as young as thirteen, when they were deceived or abducted away from home to the "comfort stations."⁵³ At the comfort station, which was described as "a group of huts hastily built with palm tree leaves, with a total of about sixty rooms,"⁵⁴ these "women were forced to service thirty to forty soldiers on an average day and even more on Sundays and holidays."⁵⁵ The unsanitary condition of the comfort stations and malnutrition made many of the women sick.⁵⁶ "Women who got sick three times were taken away by the soldiers and never returned."⁵⁷ Those who survived have suffered physically, mentally and socially as a result of those abuses to which they were subjected.⁵⁸ In addition to permanent injuries to their reproductive organs, they still suffer other effects of those abuses, including insomnia and recurring nightmares.⁵⁹ Moreover, many have been socially ostracized and "had to live with the stigma of being considered a prostitute and traitor to her country."⁶⁰

Based upon these allegations, the plaintiffs sought "compensation for the suffering and injuries they experienced as a result of the inhumane conditions inflicted upon them."⁶¹ The victims asserted that, by subjecting the women to sexual slavery, Japan "committed war crimes and crimes

⁴⁹ COMPLAINT, *supra* note 7, ¶¶ 4, 79.

⁵⁰ *Id.* ¶ 5.

⁵¹ *Id.* ¶ 82.

⁵² *Id.* ¶¶ 7-21.

⁵³ *Id.*

⁵⁴ *Id.* ¶ 10.

⁵⁵ *Id.* ¶ 7.

⁵⁶ *Id.* ¶¶ 7-21.

⁵⁷ *Id.* ¶ 7.

⁵⁸ *Id.* ¶¶ 7-21.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 8.

⁶¹ *Id.* ¶ 3.

against humanity, and violated international treaties and customary international law."⁶² Specifically, they argue:

The following treaties, among others, are evidence of *jus cogens* prohibitions against 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 [*sic*] Charter and Control Counsel Law No. 10, and Charter of the International Military Tribunal for the Far East in Tokyo.⁶³

The plaintiffs asserted that the actions of the Japanese military during World War II violated these conventions and treaties and thus constituted torts actionable under the ATCA.⁶⁴

The plaintiffs further asserted that, because its actions violated *jus cogens*, Japan should not be allowed to invoke the defense of sovereign immunity.⁶⁵ According to the plaintiffs' theory, by participating in the atrocious acts, Japan has waived its immunity.⁶⁶ Alternatively, the plaintiffs argued that Japan's involvement in "the planning, establishment and operation of a network of 'comfort houses'"⁶⁷ constituted a commercial activity not subject to sovereign immunity under the FSIA.⁶⁸ Therefore, according to the plaintiffs, Japan should not enjoy sovereign immunity.

III. ORAL ARGUMENT

On August 1, 2001, Judge Kennedy heard oral arguments on the question of whether Japan should be entitled to sovereign immunity.⁶⁹ Present at the motion hearing were the counsel for the plaintiffs and the

⁶² *Id.* ¶ 77.

⁶³ *Id.* ¶ 27 n.3.

⁶⁴ *Id.* ¶ 79.

⁶⁵ *Id.* ¶ 23. See *infra* note 97 for the definition of *jus cogens*.

⁶⁶ *Id.*

⁶⁷ *Id.* ¶ 5.

⁶⁸ See *infra* Part IV. Subsection A for more detailed discussions of the Foreign Sovereign Immunities Act.

⁶⁹ TRANSCRIPT, *supra* note 15, at 1.

defendant, joined by the United States which filed a statement of interest supporting Japan.⁷⁰

Japan argued that it should enjoy sovereign immunity because foreign states were granted absolute immunity under the law at the time of the alleged conduct during World War II.⁷¹ Even if the FSIA applied, Japan would still be entitled to immunity because the alleged conduct did not fall within any of the exceptions provided in the FSIA.⁷² Specifically, Japan never explicitly waived its immunity.⁷³ Moreover, pertinent D.C. Circuit precedent holds that a violation of *jus cogens* does not constitute an implied waiver of immunity.⁷⁴ Nor does the alleged conduct constitute a commercial activity directly affecting the United States.⁷⁵

The plaintiffs contended that there was precedent supporting their position that the FSIA is retroactively applicable.⁷⁶ Deeming the FSIA so applicable, the plaintiffs raised yet another exception to sovereign immunity based on where the alleged conduct took place.⁷⁷ Specifically, Japan operated comfort stations on the islands of Guam and the Philippines, which were American territories at the time.⁷⁸ This part of Japan's operation constituted noncommercial torts occurring in the United States under § 1605(a)(5) of the FSIA.⁷⁹ Having committed human rights violations within the United States territories, Japan should not be entitled to sovereign immunity.⁸⁰

The United States argued that the court need not decide on the issue of sovereign immunity.⁸¹ Instead, "given the context of the treaties that are in play in this case, some of which are between foreign countries, we think that this case properly belongs in the diplomatic arena and not in a U.S. courtroom."⁸²

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 4.

⁷² *Id.*

⁷³ *Id.* at 9-10.

⁷⁴ *Id.*

⁷⁵ *Id.* at 10-13.

⁷⁶ *Id.* at 19-22.

⁷⁷ *Id.* at 25-29.

⁷⁸ *Id.*

⁷⁹ 28 U.S.C. § 1605(a)(5).

⁸⁰ TRANSCRIPT, *supra* note 15, at 19-25.

⁸¹ *Id.* at 14.

⁸² *Id.*

IV. COURT'S OPINION

The *Hwang* court agreed with the United States. Judge Kennedy held that the case presented nonjusticiable political questions.⁸³ Having so held, the court found it unnecessary to resolve the issues of whether Japan should be entitled to sovereign immunity⁸⁴ and whether postwar treaties should necessarily preclude individual victims' claims for reparation.⁸⁵ However, the court did resolve the questions regarding the waiver and commercial activity exceptions under the FSIA, even supposing that the FSIA applied.⁸⁶

A. RESOLVED QUESTIONS

The court held that Japan never explicitly waived immunity in the Potsdam Declaration or in any other international agreement signed after World War II.⁸⁷ Nor did Japan implicitly waive immunity by violating international norms recognized as *jus cogens*.⁸⁸ Furthermore, Japan's involvement in the establishment and operation of the comfort stations did

⁸³ *Hwang*, 172 F. Supp. 2d at 67 ("[E]ven if Japan did not enjoy sovereign immunity, plaintiffs' claims are nonjusticiable and must be dismissed."). The court explained the reasons for finding the case nonjusticiable as follows:

[A]s presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States.... The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tortfeasors is too indefinite. The procedure sought -- adjudication of some two hundred thousand claims for multifarious damages inflicted [sixty to seventy] years ago... by a government then in power -- is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

Id. at 66 (citing *Kelerbine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966)). See also *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370 (D. N.J. 2001) (holding plaintiffs' claims present nonjusticiable political questions); *Burger-Fischer v. DeGussa A.G.*, 65 F. Supp. 2d 248 (D. N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D. N.J. 1999). But see K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277 (2001) (criticizing courts' application of political question doctrine to claims of international human rights violations); Nancy S. Williams, *Political Question or Judicial Query: An Examination of the Modern Doctrine and Its Inapplicability to Human Rights Mass Tort Litigation*, 28 PEPP. L. REV. 849 (2001). Though much remains to be explored on this issue, the political question doctrine is beyond the scope of this Note.

⁸⁴ *Hwang*, 172 F. Supp. 2d at 58.

⁸⁵ *Id.* at 64 n.9.

⁸⁶ *Id.* at 58-64.

⁸⁷ *Id.* at 58-60.

⁸⁸ *Id.* at 60-61.

not constitute a commercial activity outside the United States that had a direct effect inside the United States.⁸⁹

Section 1605(a)(1) of the FSIA provides that a foreign state is not immune in a case "in which the foreign state has waived its immunity either explicitly or by implication."⁹⁰ In applying this provision, "courts rarely find that a nation has waived its sovereign immunity... without strong evidence that this is what the foreign state intended."⁹¹ In fact, the Supreme Court stated in *Amerasia Hess* that no express waiver would be found unless a foreign state is a party to an international agreement containing an explicit waiver provision or making available a cause of action in the United States.⁹² Moreover, in *Siderman de Blake v. Republic of Argentina*, the Ninth Circuit Court of Appeals went so far as to hold that the "existing international agreements"⁹³ of the United States to which the FSIA is subject do not "include non-binding resolutions of the General Assembly of the United Nations,"⁹⁴ such as the Universal Declaration of Human Rights.⁹⁵ In light of the foregoing precedent that "requires that an explicit waiver must be unambiguous and intentional,"⁹⁶ the absence of Japan's clear expression of such intent in any of its international agreements left Judge Kennedy with no alternative but to reject the plaintiffs' claim of explicit waiver.

Similarly, in *Princz v. Federal Republic of Germany*, the District of Columbia Circuit Court of Appeals rejected the argument that a foreign state impliedly waives immunity by violating *jus cogens* norms.⁹⁷ In *Princz*, the

⁸⁹ *Id.* at 61-64.

⁹⁰ 28 U.S.C. § 1605(a)(1).

⁹¹ *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (citation omitted). See also *Princz*, 26 F.3d at 1173 ("With respect, we do not think that the waiver exception to the FSIA can be read so broadly."); *Siderman de Blake*, 965 F.2d at 720 ("The FSIA's waiver exception is narrowly construed.") (citation omitted).

⁹² 488 U.S. at 442-43.

⁹³ 28 U.S.C. § 1604.

⁹⁴ *Siderman de Blake*, 965 F.2d at 719.

⁹⁵ G.A. Res. 217A, U.N. GAOR, 3rd Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

⁹⁶ *Hwang*, 172 F. Supp. 2d at 60.

⁹⁷ 26 F.3d at 1173. Citing *Princz*, the *Hwang* court explained the concept of *jus cogens* as follows:

A *jus cogens* norm is a principle of international law that is accepted by the international community of States as a whole as a norm from which no derogation is permitted. ... Such peremptory norms are "nonderogable" and enjoy the highest status within international law, they prevail over and invalidate international agreements and other rules of international law in conflict with them, and they are subject to modification only by a subsequent norm of international law having the same character.

According to one authority, a state violates *jus cogens*, as currently defined, if it: practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f)

plaintiff, a Holocaust survivor, brought suit against the Federal Republic of Germany to recover damages for the injuries he suffered and the slave labor he performed while imprisoned in Nazi concentration camps.⁹⁸ Dismissing Mr. Princz's claims for lack of subject-matter jurisdiction, the court expounded three "examples of implied waiver set forth in the legislative history of § 1605(a)(1)."⁹⁹ First, the courts have found implied waivers in cases where a foreign state has agreed to arbitration in another country.¹⁰⁰ Second, a foreign state is deemed to have waived immunity by implication when it has agreed that the law of a particular country should govern a contract.¹⁰¹ Finally, an implied waiver would also be found in a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.¹⁰²

While implied waivers are ordinarily found only in these three situations, there is a fourth waiver exception applicable in cases where written agreements are involved.¹⁰³ In *Siderman de Blanke*, the Ninth Circuit Court of Appeals explained "that where a written agreement entered into by a foreign sovereign contemplates adjudication of a dispute by the United States courts, we will find the sovereign to have waived its immunity."¹⁰⁴

However, as the Seventh Circuit Court of Appeals observed in *Frolova v. Union of Soviet Socialist Republics*, "[s]ince the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity."¹⁰⁵ The Court of Appeals for the District of Columbia explained the policy reasons behind this reluctance as follows:

systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Hwang, 172 F. Supp. 2d at 60 n.4 (citing *Princz*, 26 F.3d at 1173) (internal citations and quotation marks omitted). According to the *Hwang* court, three circuit courts have agreed with the *Princz* court's rejection of the implied waiver argument, namely, the Seventh Circuit in *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), the Second Circuit in *Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193 (2d Cir. 1999), *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996), and the 9th Circuit in *Siderman de Blake*, 965 F.2d at 719. *Id.* at 60.

⁹⁸ *Princz*, 26 F.3d at 1168.

⁹⁹ *Id.* at 1174.

¹⁰⁰ *Id.* See *Siderman de Blake*, 965 F.2d at 721.

¹⁰¹ *Princz*, 26 F.3d at 1174. See *Siderman de Blake*, 965 F.2d at 721.

¹⁰² *Princz*, 26 F.3d at 1174. See *Siderman de Blake*, 965 F.2d at 721.

¹⁰³ *Siderman de Blake*, 965 F.2d at 721.

¹⁰⁴ *Id.*

¹⁰⁵ 761 F.2d 370, 377 (7th Cir. 1985).

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day -- unless disrupted by our courts, that is.¹⁰⁶

This policy concern counseled against the court's recognition of subject-matter jurisdiction in *Princz*, even though the court acknowledged "that this suit may represent Mr. Princz's last hope of reparation."¹⁰⁷ The court emphasized the absence of any claim "that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities."¹⁰⁸ Without such indication, the court could not "responsibly make the inferential leap that would be required in order to provide him with the federal forum he seeks."¹⁰⁹ Therefore, the court concluded, "[w]e have no warrant... for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA."¹¹⁰ Given this holding and the factual similarity in *Princz*, the *Hwang* court "conclude[d] that Japan's *jus cogens* violations do not constitute an implied waiver under § 1605(a)(1)."¹¹¹

Nor does Japan's operation of comfort stations constitute a commercial activity outside the United States having a direct effect within the United States.¹¹² Under § 1605(a)(2) of the FSIA, a foreign state's immunity will be denied in a case where "the action is based 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."¹¹³ Applying this section to the facts in *Hwang*, the court

¹⁰⁶ *Princz*, 26 F.3d at 1174 n.1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1174.

¹⁰⁹ *Id.* at 1174 n.1.

¹¹⁰ *Id.* at 1174.

¹¹¹ 172 F. Supp. 2d at 61.

¹¹² *Id.* at 61-65.

¹¹³ 28 U.S.C. § 1605(a)(2).

held that Japan's conduct "is unquestionably barbaric, but certainly is not commercial in nature."¹¹⁴

In *Saudi Arabia v. Nelson*, the Supreme Court held that "a state engages in commercial activity ... where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns... [or] where it acts in the manner of a private player within the market."¹¹⁵ Justice Souter, writing for the Court, provided two primary reasons for this distinction. First, § 1603(d) of the FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."¹¹⁶ The section further provides that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."¹¹⁷

Second, the FSIA codifies the "restrictive" theory of foreign sovereign immunity.¹¹⁸ "Under the restrictive, as opposed to the 'absolute,' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)."¹¹⁹ Based upon these reasons, Justice Souter explained:

Because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of the actions by which a private party engages in "trade and traffic or commerce."¹²⁰

Under this standard, wrongful arrest, imprisonment, and torture by the police in a foreign state do not constitute a commercial activity because such conduct is essentially an abuse of governmental power.¹²¹ Nor is hostage taking commercial in nature, for the FSIA is "obviously designed to prevent the foreign sovereign from casting a governmental purpose, which always

¹¹⁴ 172 F. Supp. 2d at 63.

¹¹⁵ 507 U.S. at 360 (citation omitted).

¹¹⁶ 28 U.S.C. § 1603(d).

¹¹⁷ *Id.*

¹¹⁸ *Nelson*, 507 U.S. at 359-60. See 28 U.S.C. § 1602.

¹¹⁹ *Nelson*, 507 U.S. at 359-60.

¹²⁰ *Id.* at 360-61 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)) (citation omitted) (emphasis in original).

¹²¹ *Id.* at 361-62.

can be found as a cloak of protection over typical commercial activities, not to reach out to cover all sorts of alleged nefarious acts."¹²²

Similarly, in *Hwang*, "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."¹²³ Having concluded that the defendant's operation of comfort stations did not constitute a commercial activity within the meaning of the FSIA, the court held that the commercial activity exception was inapplicable.¹²⁴ Having so held, the court found it no longer necessary to determine whether Japan's alleged conduct had a direct effect in the United States.¹²⁵

B. UNRESOLVED QUESTIONS

While the precedent provided the court with an opportunity to resolve the foregoing questions, the political question doctrine allowed the court to avoid the remaining three difficult questions. First, the court left unresolved the question of the FSIA's retroactive applicability to war crimes committed during World War II.¹²⁶ In addressing the question, Judge Kennedy noted that the FSIA codified the restrictive theory of sovereign immunity adopted by the Department of State in 1952 with the issuance of the famous Tate Letter, stating that immunity would be granted from that point forward only in cases involving a foreign state's noncommercial public acts.¹²⁷ Thus, "it is generally accepted that the FSIA applies to all events occurring from 1952 to the present. The controversy lies in whether the FSIA can be applied to events that occurred before 1952."¹²⁸ However, the court found it unnecessary to "decide whether the FSIA applies to pre-1952 events in order to resolve this case."¹²⁹

A second unresolved question is whether Japan's operation of comfort stations on the islands of Guam and the Philippines falls within the noncommercial tort exception under § 1605(a)(5) of the FSIA, depriving Japan of immunity from the court's jurisdiction.¹³⁰ The court simply refused to address this question "because the noncommercial tort exception was

¹²² *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994).

¹²³ *Hwang*, 172 F. Supp. 2d at 64 (citing *Nelson*, 507 U.S. at 362) (internal quotation marks omitted).

¹²⁴ *Id.*

¹²⁵ *Id.* at 64 n.8.

¹²⁶ *Id.* at 57-58.

¹²⁷ *Id.* at 57.

¹²⁸ *Id.*

¹²⁹ *Id.* at 58 (citing *Prinz v. Fed. Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994)).

¹³⁰ *Id.* at 57 n.2.

raised for the first time at oral argument."¹³¹ Judge Kennedy found it fatal that the plaintiffs failed to mention the exception in their complaint and the papers filed in response to the defendant's motion to dismiss.¹³²

Finally, the court also left unanswered the question of whether postwar treaties should necessarily preclude individual victims' claims for reparation.¹³³ Judge Kennedy refused to determine whether postwar treaties render individual victims' claims for reparation nonjusticiable as a matter of law.¹³⁴ Instead, the judge held that "based on the specific circumstances of this case... plaintiffs' claims are nonjusticiable."¹³⁵ Relying solely on the United States' statement of interest, Judge Kennedy concluded that "the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan."¹³⁶ However, the court's opinion lacked any analysis of the specific circumstances under which the postwar treaties had been concluded other than the mere acknowledgement that "the claims of the 'comfort women' might not have been specifically mentioned in these treaties."¹³⁷

V. ANALYSIS OF UNRESOLVED QUESTIONS

A. FSIA'S RETROACTIVE APPLICATION & SOVEREIGN IMMUNITY

The Supreme Court has yet to decide specifically on the retroactive applicability of the Foreign Sovereign Immunities Act.¹³⁸ However, the Court has recently clarified the standard to be applied generally in determining whether a statute is retroactively applicable. In *INS v. Enrico St. Cyr*, the Court applied a two-prong test under which the first inquiry asks whether Congress has directed with statutory language so clear as to sustain only one interpretation of the statute in question that it be applied retroactively.¹³⁹ If the statutory language is not so clear that congressional direction may be disputed, then further inquiry must be made to determine

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 64 n.9.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 67.

¹³⁷ *Id.*

¹³⁸ *Crist v. Republic of Turkey*, 995 F. Supp. 5, 10 (D.D.C. 1998).

¹³⁹ 121 S. Ct. 2271, 2288 (2001). See TRANSCRIPT, *supra* note 15, at 7. At oral argument, Japan argued that the FSIA should not be retroactively applicable under the first prong of the standard but failed to discuss the second prong. *Id.*

whether the statute attaches new legal consequences to events occurring prior to its enactment.¹⁴⁰ That is, the statute at issue "has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."¹⁴¹

Under the first prong, those courts which have grappled with the issue seem to have been unable to agree on whether Congress authorized the retroactive application of the FSIA. As the *Hwang* court noted, in earlier cases, the Second and Eleventh Circuits held against retroactive application.¹⁴² For example, in *Schmidt v. Polish People's Republic*, the Second Circuit Court of Appeals found that "[w]hile the Act indisputably enhances a party's capacity to obtain personal jurisdiction over a foreign state... nothing in its language or legislative history indicates that... wholesale reactivation of ancient claims was intended."¹⁴³

In contrast, other courts have recently held otherwise. For instance, the Court of Appeals for the District of Columbia stated in *Princz*:

Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA, but based upon pre-FSIA facts, the implication is strong that all questions of foreign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA.¹⁴⁴

In *Creighton v. Catar*, the D.C. Circuit again concluded that § 1605(a)(6) of the FSIA may be applied retroactively.¹⁴⁵ Following this precedent, the district court in Washington, D.C., has twice held that in light of "a plain reading of the statutory language and legislative history of the FSIA, this court is satisfied that Congress intended the FSIA to be applied

¹⁴⁰ *Enrico St. Cyr*, 121 S. Ct. at 2290.

¹⁴¹ *Id.* at 2290-91 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)) (internal quotation marks omitted).

¹⁴² *Hwang*, 172 F. Supp. 2d at 58 (citing *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986)).

¹⁴³ 742 F.2d 67, 71 (2d Cir. 1984).

¹⁴⁴ 26 F.3d at 1170. See Adam K.A. Mortara, *The Case Against Retroactive Application of the Foreign Sovereign Immunities Act of 1976*, 68 U. CHI. L. REV. 253, 265 n.94 (2001) (listing cases upholding retroactive application of the FSIA).

¹⁴⁵ 181 F.3d 118, 124 (D.C. Cir. 1999).

retroactively."¹⁴⁶ At least two other district courts have agreed with this holding.¹⁴⁷

Given the disagreement among the courts, the FSIA's retroactivity must be further analyzed under the second prong. Under this prong, the FSIA should be held retroactively applicable because it is a jurisdictional statute. Expounding the rule in *Landgraft v. USI Film Products*, the Supreme Court stated that it

regularly applies intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.... Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than the rights or obligations of the parties.¹⁴⁸

In light of the Supreme Court's clear guidance, if the *Hwang* court had not avoided the question, it would have had to apply the FSIA retroactively. Had the FSIA been so applied, two questions would have naturally followed: (1) whether the court's jurisdiction properly lies under any of the exceptions to sovereign immunity under the FSIA, and if jurisdiction is found (2) whether Japan should still be found liable to individual victims for its war crimes, given the postwar treaties.

B. NONCOMMERCIAL TORT EXCEPTION & SOVEREIGN IMMUNITY

The court could properly have exercised jurisdiction in *Hwang* under the noncommercial tort exception. Section 1605(a)(5) of the FSIA provides that a foreign state is not immune to federal jurisdiction in cases "in which money damages are sought against a foreign state for personal injury

¹⁴⁶ *Crist v. Republic of Turkey*, 995 F. Supp. 5, 9 (D.C.C. 1998). See also *Cicippio v. Iran*, 18 F. Supp. 2d 62, 68-69 (D.D.C. 1998) ("Congress expressly directed that the statute [§ 1605(a)(7)] be given retroactive application."). But see *Lin v. Japan*, No. CA 92-2574, 1994 U.S. Dist. LEXIS 6061, at *2 (D.D.C. May 6, 1994); *Djordjevich v. Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993); *Slade v. Mexico*, 617 F. Supp. 351 (D.D.C. 1985).

¹⁴⁷ See *Haven v. Rzeczpospolita Polska* (Republic of Poland), 68 F. Supp. 2d 943, 945-46 (N.D. Ill. 1999) (applying the FSIA retroactively to events during World War II); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 n.1 (S.D.N.Y. 1978) (applying the FSIA retroactively to action in 1976).

¹⁴⁸ 511 U.S. at 274.

or death... occurring in the United States and caused by the tortious act."¹⁴⁹ Section 1603(c) defines the United States as including "all territory and waters, continental or insular, subject to the jurisdiction of the United States."¹⁵⁰ At oral argument, the plaintiffs argued that this exception should apply because Japan operated comfort stations on the islands of Guam and the Philippines, which at the time were territories under the jurisdiction of the United States.¹⁵¹

The territorial question concerning the Philippines seems to have been settled by the Supreme Court. In *Barber v. Gonzales*, the Court stated that "[f]rom the Spanish cession in 1898 until final independence in 1946, the Philippine Islands were American territory subject to the jurisdiction of the United States."¹⁵² Spain ceded the Philippine Islands to the United States at the close of the Spanish-American War on December 10, 1898, by the treaty known as the Treaty of Paris.¹⁵³

By the same treaty, Spain also ceded Guam to the United States.¹⁵⁴ However, the Supreme Court seems to have treated Guam somewhat differently from the Philippines. In *Ngiraingas v. Sanchez*, the Supreme Court described Guam as:

an island of a little more than 200 square miles located in the west central Pacific, [which] became a United States possession at the conclusion of the Spanish-American War by the Treaty of Paris.... Except for the period from December 1941 to July 1944, when Japan invaded and occupied the island, the United States Navy administered Guam's affairs from 1898 to 1950, when the Organic Act was passed. Among other things, the Act provided for an

¹⁴⁹ 28 U.S.C. § 1605(a)(5).

¹⁵⁰ 28 U.S.C. 1603(c).

¹⁵¹ TRANSCRIPT, *supra* note 15, at 25-29. See also Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Declaratory Judgment That Japan Cannot Claim Sovereign Immunity in Defense of Claims of Systematic Sexual Slavery During World War II at 35, *Hwang v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (No. CA 00-2233), available at <http://www.cmht.com/casewatch/civil/comfort.html> [hereinafter MEMORANDUM]. In the Memorandum, the plaintiffs raised this argument under the commercial activity exception to sovereign immunity under the FSIA but failed to do so under the noncommercial tort exception. *Id.*

¹⁵² 347 U.S. 637, 640 n.1 (1954).

¹⁵³ *Rabang v. INS*, 35 F.3d 1449, 1450 (9th Cir. 1994) (citing Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. III, 30 Stat. 1754, 1755).

¹⁵⁴ *Pearcy v. Stranahan*, 205 U.S. 257, 263 (1907) (citing Treaty of Peace between the United States of America and the Kingdom of Spain, art. II, 30 Stat. at 1755). See also *Rabang*, 35 F.3d at 1450 n.1 (same).

elected governor and established Guam as an unincorporated Territory.¹⁵⁵

Similarly, in reviewing the history of the island, the district court of Guam opined that the political status of Guam between 1898 and 1950 was "anomalous."¹⁵⁶ During that period, neither the Constitution nor the laws of the United States were extended to Guam.¹⁵⁷ Instead, the island was administered directly by the President as Commander in Chief of the United States Army and Navy.¹⁵⁸ Absent any statutory definition or judicial precedent, it is not entirely clear whether Guam, a United States possession at the time, should be treated in the same way as the Philippines, a United States territory, under the FSIA.

The fact remains, however, that the Philippine Islands were clearly an American territory within the meaning of the FSIA and Guam was under the established military control of the United States when Japan evaded them on December 7, 1941.¹⁵⁹ Given this fact, had the *Hwang* court granted the plaintiffs the opportunity to show that Japan operated comfort stations on those islands,¹⁶⁰ the noncommercial tort exception under the FSIA would have deprived Japan of immunity to the court's jurisdiction. Had the court been willing to hear arguments on the merits, Japan would have been forced to deny its responsibility to individual victims for war crimes based on the postwar treaties.

C. POSTWAR TREATIES

The Japanese government has long maintained that it "does not intend to pay individual compensation because it has sincerely dealt with the issue of reparations, property and claims related to the war under the San Francisco Peace Treaty, bilateral peace treaties and other arrangements."¹⁶¹

¹⁵⁵ 495 U.S. 182, 186 (1990) (emphasis added) (citation omitted).

¹⁵⁶ *U.S. v. Angcoog*, 190 F. Supp. 696, 699 (D. Guam 1961) (citing 25 Op. Att'y. Gen. 292 (1904)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 80-81 (1991) (describing that on December 7, 1941, Japan launched a surprise attack not only on Hawaii, but also on Malaya, Hong Kong, Guam, the Philippines, Wake Island, and Midway).

¹⁶⁰ See MEMORANDUM, *supra* note 151, at 35 ("While there, the Japanese military established and ran 'comfort stations' for occupying soldiers.").

¹⁶¹ Ministry of Foreign Affairs of Japan, "Comfort Women": *Q. Shouldn't the Japanese government pay individual compensation to former "comfort women"?*, at http://www.mofa.go.jp/j_info/japan/viewpoint/q40.html (last visited Nov. 17, 2000). See also Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT'L L.J. 528, 534 (1995); McKenzie, *supra* note 2, at A17.

In fact, Article 14(b) of the 1951 Treaty of Peace between Japan and the Allied Powers provides:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.¹⁶²

In relation to the victimized Asian countries, Japan paid reparations to the Philippines and Vietnam in the amounts of \$550 million and \$39 million, respectively, under the San Francisco Peace Treaty.¹⁶³

Moreover, in Article 2(1) of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation, Japan and Korea did "confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals... and concerning claims between the Contracting Parties and their nationals... is settled completely and finally."¹⁶⁴ China also acknowledged its relinquishment of all war reparation claims against Japan in a joint declaration issued in 1972,¹⁶⁵ which was reaffirmed in a 1978 treaty between the two nations.¹⁶⁶ With Burma, which did not participate in the San Francisco Peace Conference, Japan concluded an agreement in 1954 under which it paid \$200 million over a ten-year period.¹⁶⁷ Japan also agreed to additional financial assistance to Burma.¹⁶⁸ With Indonesia, which signed but did not ratify the Treaty, Japan concluded an agreement in 1958, in accordance of which Japan paid \$223 million over twelve years.¹⁶⁹ Furthermore, Japan agreed to additional loans to the foregoing four countries

¹⁶² Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. This Treaty is generally known as the "San Francisco Peace Treaty."

¹⁶³ *A v. Japan*, 1028 HANREI TAIMUZU 92, 107 (Tokyo District Court, Sept. 22, 1998). From 1945 to 1971, the Japanese yen was in fixed parity with the United States dollar at U.S. \$1 = 360 yen. Library of Congress, *Glossary--Japan*, at http://memory.loc.gov/frd/cs/japan/jp_glos.html. Thus, for instance, Japan paid 198 billion yen to the Philippines and 14,040 million yen to Vietnam. *A v. Japan*, 1028 HANREI TAIMUZU at 107. The amounts shown herein in U.S. dollars are approximations converted from the original amounts in yen using this exchange rate.

¹⁶⁴ Agreement on the Settlement Concerning Property and Claims and on Economic Co-operation, June 22, 1965, art. 2(1), Japan-Korea, 583 U.N.T.S. 258. See also *A v. Japan*, 1028 HANREI TAIMUZU at 108-109.

¹⁶⁵ *A v. Japan*, 1028 HANREI TAIMUZU at 109.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 107.

¹⁶⁸ *A v. Japan*, 1028 HANREI TAIMUZU at 107.

¹⁶⁹ *Id.*

to assist them in economic development.¹⁷⁰ With Cambodia and Laos, both of which relinquished their right to damages, Japan concluded economic assistance agreements under which it provided financial assistance to these nations in the amounts of \$4.2 million and \$2.8 million, respectively.¹⁷¹ These treaties and agreements, if interpreted to have resolved Japan's World War II reparation issues once and for all, may preclude the war victims' claims against Japan.

However, Japan could have been precluded from raising the existence of these treaties and agreements as a defense under the Vienna Convention on the Law of Treaties,¹⁷² which is now considered to represent rules of customary international law on treaties.¹⁷³ Under Article 62 of this Convention, which codifies the doctrine of *rebus sic stantibus*, a fundamental change of circumstances or the emergence of new facts may undermine the necessary foundation of the agreements in question and may thus render them terminable.¹⁷⁴

Japan's concealment or denial of its human rights violations at the time of the conclusion of the reparation treaties and agreements raises a

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷³ BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 113 (3rd ed. 1999). Moreover, Japan is a signatory to this Convention. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 49 (1999-2000 ed. 1999).

¹⁷⁴ Yu, *supra* note 161, at 535-36. Article 62 of the Vienna Convention on the Law of Treaties provides:

Article 62. Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - (a) the existence of those circumstances constituted an essential basis for the consent of the parties to be bound by the treaty;
 - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty;
 - (a) if the treaty establishes a boundary; or
 - (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Vienna Convention on the Law of Treaties, § 62, *supra* note 174.

serious question as to the genuineness and meaningfulness of the consent of the victimized countries. As one author argues in reference to the 1965 agreement between Japan and Korea:

[T]he gross violations human rights committed against comfort women surfaced after the conclusion of the Settlement Agreement. At the time the Settlement Agreement was signed in 1965, Japan did not acknowledge any involvement in creating or operating comfort stations. The government's subsequent admission of involvement should be considered a substantially new factual situation not covered by the Settlement Agreement.¹⁷⁵

Japan's intentional concealment of "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty"¹⁷⁶ under Article 62(1)(a) of the Vienna Convention.

Japan's current economic prosperity further justifies the application of the doctrine of *rebus sic stantibus*. The San Francisco Peace Treaty was concluded on the premise that Japan would not be able to fully compensate the Allied Powers because of its poor economic status in the wake of the war. In fact, Article 14(a) of that Treaty provides:

It is recognized that Japan should pay reparations to the Allied Powers for the damages and suffering caused by it during the war. Nevertheless, it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time met its other obligations.¹⁷⁷

Given the economic prosperity that Japan enjoys today, a compelling argument can be made that Japan's unrivaled economic recovery after the war constitutes "[a] fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties."¹⁷⁸ Now that Japan is financially able to make adequate reparations, Japan should be prevented

¹⁷⁵ Yu, *supra* note 161, at 535.

¹⁷⁶ Vienna Convention on the Law of Treaties, § 62(1)(a), *supra* note 174.

¹⁷⁷ Treaty of Peace with Japan, § 14(a), *supra* note 162.

¹⁷⁸ Vienna Convention on the Law of Treaties, § 62(1), *supra* note 174.

from invoking the postwar treaties and agreements as a defense and thus be required to complete reparation for the victims.

The Vienna Convention on the Law of Treaties offers yet even stronger arguments in favor of the war victims. Article 64 of the Convention provides that "[i]f a new peremptory norm of the general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."¹⁷⁹ Interpreting the post-war agreements and treaties to bar the individual claims of the victims of human rights violations would run afoul of *jus cogens*.¹⁸⁰ No matter what norms of international law existed when these agreements and treaties were concluded, the peremptory norms of international law today protect the rights of individuals to seek remedies when their human rights have been violated.¹⁸¹ Thus, "[a]ny agreement that purports to preclude individual human rights claims would... be invalid."¹⁸² Therefore, at least to the extent that they deny individual victims of reparations in violation of *jus cogens* today, the postwar treaties and agreements in question should be found null and void. Given this analysis, had the *Hwang* court considered the specific circumstances under which the postwar treaties were negotiated and signed, it could have concluded that they should not necessarily preclude the individual plaintiffs' claims for reparation.

V. CONCLUSION

The foregoing analysis suggests that Japan should not take for granted the protection purportedly provided by the FSIA or the postwar treaties. The FSIA may no longer confer sovereign immunity on Japan if its human rights violations are proven to have occurred within the territory of the United States. Similarly, the postwar treaties will not necessarily bar individual victims' claims against Japan for reparations under the established international law principles governing treaties. The political question doctrine seems to provide no more assurance than the FSIA or the postwar treaties, for innovative lawyers will predictably find ways to pursue justice in any court of law accessible and sympathetic to their clients' claims.¹⁸³

¹⁷⁹ *Id.* § 64, *supra* note 174. See Yu, *supra* note 161, at 536.

¹⁸⁰ Yu, *supra* note 161, at 536.

¹⁸¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 cmt. e, f, g, § 102 cmt. k. See Yu, *supra* note 161, at 536.

¹⁸² Yu, *supra* note 161, at 536.

¹⁸³ See, e.g., Boling, *supra* note 5, at 551-76 (discussing various possible grounds for war victims' claims against Japan). See also Susan Jenkins Vanderweert, *Seeking Justice for "Comfort" Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts*, 27 N.C.J.

In *Hwang*, the district court's exercise of judicial self-restraint saved Japan from the embarrassment of having to deny in court its legal responsibility for the wrongs suffered by the war victims. However, perhaps most embarrassing is the fact that the fifteen women had to come all the way from Asia to the United States to ask an American court for redress. After all that has taken place, the ultimate embarrassment would be for the Japanese government to idly wait and hope that its mistakes will somehow pass into oblivion.

INT'L L. & COM. REG. 141, 148 (2001) (arguing that "in the absence of an International Criminal Court (ICC), U.S. courts provide the only forum capable of providing justice to these disregarded victims of World War II").