AMNESTY INTERNATIONAL'S SUBMISSION TO THE HONORABLE JUDGES OF THE SEOUL CENTRAL DISTRICT COURT CONCERNING THE CASE OF KWAK YE-NAM ET. AL. V. JAPAN (2016 GA-HAP 580239)

THE NON-APPLICABILITY OF THE SOVEREIGN IMMUNITY, THE WAIVER OF CLAIMS VIA TREATY AND/OR THE STATUTE OF LIMITATIONS TO THE COMPENSATION CLAIMS FOR THE "COMFORT WOMEN" SYSTEM OF MILITARY SEXUAL SLAVERY BY THE GOVERNMENT OF JAPAN AS GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHT LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AMOUNTING TO ACTS OF CRIMES AGAINST HUMANITY AND WAR CRIMES IN VIOLATION OF PEREMPTORY NORMS (*jus cogens*) OF GENERAL INTERNATIONAL LAW AND OBLIGATIONS *erga omnes*, ESPECIALLY IN THE ABSENCE OF OTHER EFFECTIVE FORMS OF REDRESS:

1. INTRODUCTION

The case of *Kwak Ye-Nam et. al. v. Japan* (2016 Ga-Hap 580239)[1] presents a unique historic opportunity to establish the legal characterization and consequences of Japan's military sexual slavery before and during World War II, euphemistically known as "comfort women". The United States Congress and the European Parliament have recognized that 'the Government of Japan officially commissioned the acquisition of young women for the sole purpose of sexual servitude to its Imperial Armed Forces' and that 'the "comfort women" system of forced military prostitution by the Government of Japan, considered unprecedented in its cruelty and magnitude, included gang rape, forced abortions, humiliation, and sexual violence resulting in mutilation, death, or eventual suicide in one of the largest cases of human trafficking in the 20th century'.[2] As will be seen below, even the Government of Japan had recognized "abduction of girls and women for the purpose of enforced prostitution" as an international crime during the post-World War I peace talks in 1919.[3]

As a global movement of more than 7 million people in over 150 countries and territories who campaign to end abuses of human rights, Amnesty International has long condemned crimes of sexual violence, including rape, used as a weapon of war against women in war zones all over the world. In its report "Still Waiting After 60 Years: Justice for Survivors of Japan's Military Sexual Slavery System" of 28 October 2005, Amnesty International referred to the system of institutionalized enforced military prostitution used by the Japanese Imperial Army before and during World War II as "the most compelling example of the crime of sexual slavery and denial of justice to victims" and set out an in-depth analysis of the "comfort women" system as a crime under international law and the right of its survivors to claim reparations, which the Japanese government and courts, as well as the international community, have thus far failed to provide.[4]

The plaintiffs in this case were subjected to sexual slavery that was clearly unlawful under the applicable international law at the time. As victims of gross violations of international human rights law and serious violations of international humanitarian law, they have the right to a remedy and reparation that must not be hindered by procedural hurdles such as the sovereign immunity, the waiver of claims via treaty or the statute of limitations. The legal characterization and consequences of the "comfort women" system of military sexual slavery by the Government of Japan as gross violations of international human right law and serious violations of international humanitarian law amounting to acts of crimes against humanity and war crimes in violation of peremptory norms (*jus cogens*) of general international law and obligations *erga omnes*, without other effective forms of redress, only reinforce this conclusion.

While it is common to first address the questions of procedural law and then the questions of substantive law, the order is reversed in this submission. This is because the legal consequences of the non-applicability of the sovereign immunity, the waiver of claims via treaty and the statute of limitations follow from the legal characterization of the "comfort women" system of military sexual slavery by the Government of Japan as gross violations of international human right law and serious violations of international humanitarian law.

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[1] Filed before the Seoul Central District Court on 28 December 2016

[2] H.R. Res. 121, 110th Cong. (2007), https://www.congress.gov/bill/110th-congress/house-resolution/121/text; Resolution on Justice for the "Comfort Women" (Sex Slaves in Asia Before and During World War II), Eur. Parl. Doc. B60525/2007 (Dec. 13, 2007), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0632+0+DOC+XML+V0//EN. In addition, the legislatures of South Korea, Taiwan, the Philippines, Canada, the Netherlands as well as a number of Japanese local legislative councils and the state legislatures of California, New York and New Jersey have passed resolutions on the "comfort women".

[3] See II.4 below.

[4] AI Index: ASA 22/012/2005. https://www.amnesty.org/en/documents/asa22/012/2005/en

2. THE LEGAL CHARACTERIZATION OF THE "COMFORT WOMEN" SYSTEM OF MILITARY SEXUAL SLAVERY BY THE GOVERNMENT OF JAPAN UNDER INTERNATIONAL LAW

The gross violations of international human rights law and serious violations of international humanitarian law perpetrated under the "comfort women" system of military sexual slavery by the Government of Japan have been extensively discussed by the United Nations independent experts[5], the International Labour Organization (ILO)[6] and international human-rights NGOs over the past 30 years.[7] Not only do these grave violations constitute intentional or negligent unlawful act for the purpose of article 750 of the South Korean Civil Code[8], but the reference to the violations of well-established peremptory and *erga omnes* norms of customary and conventional international law, including acts of crimes against humanity and war crimes, without other effective forms of redress, as grounds for recognizing the plaintiffs' claims in this case may have greater persuasive power to the Japanese government and public, as well as the international community, than the sole reliance on the South Korean domestic law.

2.1 THE PROHIBITION OF SLAVERY AND SLAVE SYSTEM

The prohibition of slavery and slave trade, currently enshrined in article 4 of the Universal Declaration of Human Rights and article 8 (1) of the International Covenant on Civil and Political Rights, dates back to the dawn of modern international law in the 19th century. A series of bilateral and multilateral treaties since the Congress of Vienna (1815) first banned slave trade and later the institution of slavery itself.[9] Article 1 of

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[5] U.N. ECOSOC, Comm'n on Hum. Rts, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) (prepared by Radhika Coomaraswamy), https://undocs.org/E/CN.4/1996/53/Add.1; U.N. ECOSOC, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Report of the Special Rapporteur on Systematic Rape, P6, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. McDougall), https://undocs.org/E/CN.4/Sub.2/1998/13.

[6] Comm. of Experts on the Application of Conventions and Recommendations [CEACR], Int'l Labour Org., Individual Observation concerning Convention, 1930 (No. 29), Japan (ratification: 1932), ILO Doc. 061996JPN029 (1996); 061997JPN029 (1997); 061999JPN029 (1999); 062001JPN029 (2001); 062002JPN029 (2002); 062003JPN029 (2003); 062004JPN029 (2004); 062005JPN029 (2005); 062007JPN029 (2007); 062008JPN029 (2008); 062009JPN029 (2009); 062011JPN029 (2011).

[7] Ustinia Dolgopol & Snehal Paranjape, Comfort Women, an Unfinished Ordeal: Report of a Mission (International Commission of Jurists, 1994); Judgment of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery (2000); Amnesty Int'l, Still Waiting After 60 Years: Justice for Survivors of Japan's Military Sexual Slavery System (2005).

[8] "Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom." https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG

[9] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd revised edition), p. 197.

the 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" and slave trade as including "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves".[10] These definitions, declaratory of customary international law, still enjoy wide usage.

Although Japan has not ratified the 1926 Slavery Convention, there is no doubt that the prohibition of slavery and slave trade has become part of customary international law by the early half of the 20th century. Indeed, during the María Luz Incident of 1872, the Japanese court freed Chinese indentured labourers aboard a Peruvian vessel harboring in Yokohma and, when Japan in turn was accused of indentured prostitution, the Japanese government hurriedly ordered emancipation.[11]

In 1996, the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities concluded that the experience of "comfort women" amounted to slavery as defined by the 1926 Slavery Convention after weighing the overwhelming body of oral and documentary evidence.[12] Amnesty International has endorsed and cited the Special Rapporteur's finding in 2005 and continues to support this conclusion as sound interpretation and application of international law.[13] It therefore appears beyond doubt that the "comfort women" system of military sexual slavery by the Government of Japan violated the prohibition of slavery and slave trade under international conventions and customary law.

2.2 THE PROHIBITION OF FORCED LABOUR

In the restive period that followed the end of World War I, the victorious nations gathered at the Paris Peace Conference in 1919, including Japan which was one of the four principal allied powers, agreed to create the International Labour Organization (ILO) in the Versailles Peace Treaty to set labour standards, develop policies and devise programmes promoting decent work for all women and men.[14] The Convention concerning Forced or Compulsory Labour (Forced Labour Convention), 1930 (No. 29), which remains one of the ILO's eight fundamental conventions, defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (art. 2 (1)).[15] The ILO has spearheaded the international efforts to eradicate forced or compulsory labour, also stated in article 8 (3) of the International Covenant on Civil and Political

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[10] https://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx

[11] Douglas Howland, "The Maria Luz Incident: Personal Rights and International Justice for Chinese Coolies and Japanese Prostitutes" in Susan L. Burns and Barbara J. Brooks ed. Gender and law in the Japanese imperium (Honolulu : University of Hawaii Press, 2014), pp. 21-47.

[12] E/CN.4/Sub.2/1998/13, para. 22. https://undocs.org/E/CN.4/Sub.2/1998/13

[13] Still Waiting After 60 Years, p. 20.

[14] Part XIII. Labour (Arts. 387–427) of the Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919. The identical provisions were inserted in the four other peace treaties concluded at the Paris Peace Conference. Part XIII. Labour (Arts. 332–372) of the Treaty of Peace between the Allied Powers and Austria, Saint-Germain-en-Laye, 10 September 1919; Part XII. Labour (Arts. 249–289) of the Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27 November 1919; Part XIII. Labour (Arts. 315–355) of the Treaty of Peace between the Allied and Associated Powers and Hungary, Trianon, 4 June 1920; Part XII. Labour (Arts. 374–414) of the Treaty of Peace between the Allied Powers and Turkey, Sèvres, 10 August 1920.

[15] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029

Rights, including through the effective enforcement and supervision of the Forced Labour Convention.

As a result of its ratification of the ILO Forced Labour Convention in 1932, Japan was legally bound to "suppress the use of forced or compulsory labour in all its forms within the shortest possible period" in accordance with article 1 (1) thereof.[16] While article 2 (2) (a) and (d) excludes "any work or service exacted in virtue of compulsory military service laws for work of a purely military character" and "any work or service exacted in cases of emergency, that is to say, in the event of war" from the definition of forced or compulsory labour, military sexual slavery cannot be justified as "work of a purely military character" or as wartime necessity.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR), comprising 20 eminent jurists appointed by the ILO Governing Body to provide an impartial and technical evaluation of the application of international labour standards in ILO member States, has been examining the issue of the "comfort women" since 1995.[17] In response to the observations of the Osaka Fu Special English Teachers' Union (OFSET; 大阪府特別英語教員組合), dated 12 June 1995, concerning the application of the ILO Forced Labour Convention during the years prior to the Second World War, and during that war, the CEACR noted that "the Convention was in force for during that period" before adding that "[t]he allegations refer to gross human rights abuses and sexual abuse of women detained in so-called military "comfort stations", a situation which falls within the prohibitions contained in the Convention" and recognizing that "such conduct should be characterized as sexual slavery in violation of the Convention".

With respect to the article 2 (2) (a) and (d) exemptions, the CEACR considered that the said provision is "no blanket license for imposing - on the occasion of war, fire or earthquake - any kind of compulsory service but can only be invoked for service that is strictly required to counter an imminent danger to the population" and concluded that the "comfort women" case does not fall within the said exemptions and "clearly therefore there was violation of the Convention by Japan". The CEACR also referred the Government of Japan's obligation to ensure adequacy and strict enforcement of criminal penalties for the illegal exaction of forced or compulsory labour under article 25.[18]

For these reasons, the "comfort women" system of military sexual slavery by the Government of Japan clearly contravened the prohibition of forced labour under customary and conventional international law.

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[16] https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102729

[17] NGO alternative report to the periodic report of Japan to the UN Human Rights Committee, submitted by Women's Active Museum on War and Peace and Peace (WAM), on the issue of Japan's Military Sexual Slavery May, 2014, APPENDIX No. 2. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR): Observation on the "Comfort Women" Issue, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_CSS_JPN_17434_E.pdf

For the more recent Observations (CEACR) - adopted 2015, published 105th ILC session (2016) and adopted 2018, published 108th ILC session (2019), see ILO, Search comments by the supervisory bodies, https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::

[18] In response to communications concerning some 700,000 Korean and 40,000 Chinese conscripted labourers "made to work under private-sector control in mines, factories and contructions sites" in deplorable conditions during World War II, the CEACR also found that "the massive conscription of labour to work for private industry in Japan under such deplorable conditions was a violation of the Convention". Observation (CEACR) - adopted 1998, published 87th ILC session (1999), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2172187

2.3 THE PROHIBITION OF TRAFFICKING WOMEN AND CHILDREN

Trafficking in women and children for prostitution attracted sufficient public interest and alarm in the early 20th century to result in the conclusion of two "white slavery" treaties, namely the 1904 International Agreement for the Suppression of the "White Slave Traffic"[19] and the 1910 International Convention for the Suppression of "White Slave Traffic".[20] Article 23 (c) of the Covenant of the League of Nations, inserted in the post-World War I peace treaties like the provisions concerning the ILO, specifically entrusted the League with the general supervision over the execution of agreements with regard to traffic in women and children.[21] Under the auspices of the League of Nations, the 1921 International Convention for the Suppression of the Traffic in Women and Children[22] and the 1933 International Convention for the Suppression of the Traffic in Women of the Full Age[23] were concluded and adopted.

According to articles 1 and 2 of the 1910 International Convention for the Suppression of the "White Slave Traffic", for "a woman or girl under age", procuring, enticing or leading her away for immoral purposes to gratify the passions of another person, regardless of her consent, and for "a woman or girl over age", the same act "by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion" is subject to punishment. The Final Protocol, which forms an integral part of the Convention, expresses the understanding of the signatories that the "woman or girl under age, woman or girl over age" in articles 1 and 2 refer to women or girls under or over twenty completed years of age. Japan acceded to the 1910 Convention and, by virtue of the operation of article 11 thereof, concomitantly acceded to the 1904 Agreement.[24]

In articles 2 and 3 of the 1921 International Convention for the Suppression of the Traffic in Women and Children, the Contracting Parties took a step further by agreeing "to take all measures to discover and prosecute persons who are engaged in the traffic in children of both sexes and who commit offences within the meaning of [article 1 of the 1910 Convention] … to secure the punishment of attempts to commit, and, within legal limits, of acts preparatory to the commission of, the offences specified in [articles 1 and 2 of the 1910 Convention]".

Japan ratified the 1921 International Convention for the Suppression of the Traffic in Women and Children on 15 December 1925, but excluded Chosen [Korea], Taiwan, the leased Territory of Kwantung, the Japanese portion of Saghalien Island and Japan's mandated territory in the South Seas, exercising its discretion under article 14 thereof.[25] However, article 14 was envisaged as a temporary measure to allow the gradual phasing-out of local custom in colonial territories, such as the payment of dowry and "bride price", not to permit the creation or proliferation of human trafficking.[26] To shirk responsibility for

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[19] http://hrlibrary.umn.edu/instree/whiteslavetraffic1904.html

[20] http://hrlibrary.umn.edu/instree/whiteslavetraffic1910.html

[21] Article 23 (a) of the Covenant also required the Members of the League to "endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend" according to "the provisions of international conventions existing or hereafter to be agreed upon".

[22] https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-united-nations/1921-international-convention_en

[23] http://hrlibrary.umn.edu/instree/women-traffic.html

[24] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-10&chapter=7

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-8&chapter=7

[25] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-3&chapter=7&lang=en Japan did not ratify the 1933 Convention.

[26] International Commission of Jurists (ICJ), "Comfort women: an unfinished ordeal" (1 December 1994), pp. 157-158.

infringements under the article 14 exclusion must be considered an act of extraordinary bad faith.

More importantly, the planning and oversight of the "comfort women" system of military sexual slavery by the officials of the Government of Japan, which constitutes attempts or preparatory acts to commit trafficking in women and children for the purpose of articles 2 and 3 of the 1921 Convention occurred in Tokyo in the metropole. Hence, the failure to take any measures to secure the punishment thereof engages state responsibility under the international customary and treaty norms concerning the prohibition of human trafficking, as they stood in the first half of the 20th century.

2.4 THE ACT OF HUMANITY AND WAR CRIMES

The 1899 and 1907 Hague Peace Conferences witnessed the international codification of the laws and customs of war that had developed from the celebrated Lieber Code, proclaimed by President Lincoln as General Order No. 100 for the Union armies in 1863 during the American civil war, in the shape of the 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land and Its Annex (Regulations Concerning the Laws and Customs of War on Land) and the slightly revised 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex (Regulations Concerning the Laws and Customs of War on Land).[27]

In 1946, the International Military Tribunal (IMT), sitting in Nuremberg, held that "[t]he rules of land warfare expressed in the [1907 Hague Convention] undoubtedly represented an advance over existing international law at the time of their adoption … but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the [IMT Charter]".[28]

In addition, the UN General Assembly in unanimously adopting Resolution 95 (I) on 11 December 1946, following the IMT judgment of 1 October 1946, took note of the IMT Charter and "of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946", and affirmed "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgments of the Tribunal".[29]

According to Professor Antonio Cassese, by "affirming" those principles, the General Assembly clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out, either explicitly or implicitly, by the IMT. Translated into law-making terms, this approval and support meant that the world community had robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community.[30]After World War I (1914-1918), the triumphant Allied and Associated Powers, including Japan, created the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which arrived at a non-exhaustive list of 32 crimes "against the

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https://www.icj.org/comfort-women-an-unfinished-ordeal-report-of-a-mission

[27] Japan ratified the 1899 Hague Convention (II) in 1900 and the 1907 Hague Convention (IV) in 1911 while Korea acceded to the 1899 Hague Convention (II) in 1903. https://ihl-databases.icrc.org/ihl/INTRO/150 https://ihl-databases.icrc.org/ihl/INTRO/195

[28] https://avalon.law.yale.edu/imt/judlawre.asp

[29] https://undocs.org/en/A/RES/95(I)

[30] "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I), New York, 11 December 1946" by Antonio Cassese, President of the Special Tribunal for Lebanon, available at http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html

laws and customs of war and of the laws of humanity" that included: (1) Murders and massacres; systematic terrorism. (2) Putting hostages to death. (3) Torture of civilians. (4) Deliberate starvation of civilians. (5) Rape. (6) Abduction of girls and women for the purpose of enforced prostitution. (7) Deportation of civilians. (8) Internment of civilians under inhuman conditions. (9) Forced labour of civilians in connection with the military operations of the enemy.[31]

The Commission also recommended the creation of "a high tribunal" to try charges, *inter alia* "[a]gainst such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal hereafter referred to".[32]

In the eventual peace treaties with the defeated Central Powers, their governments "recognize[d] the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war".[33] Article 230 of the Peace Treaty with Turkey (Treaty of Sèvres), which never came into effect as Turkey refused to ratify it, obligated Turkey to surrender those "responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on 1 August 1914" to the tribunal designated by the Allied Powers or created by the League of Nations, largely in reaction to the deportation and massacre of the Armenian population under Ottoman rule.

Although the implementation of these treaty provisions to prosecute acts of crimes against humanity and war crimes quickly unraveled in the ensuing political turmoil, it must be noted that special domestic courts in Germany and Turkey did try and convict a handful of war criminals to assuage Allied pressure before summarily releasing them in the face of domestic opposition.[34] The post-World War I discussion and affirmation of the principle of international criminal law set important legal precedents to which the Government of Japan gave its stamp of approval as a principal Allied Power.

While the explicit criminalization of violence against women in international treaties first appears in article 27 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War ("Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"), the duty to respect "family honour and rights" in article 42 of

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[31] The rest were: (10) Usurpation of sovereignty during military occupation. (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory. (12) Attempts to denationalize the inhabitants of occupied territory. (13) Pillage. (14) Confiscation of property. (15) Exaction of illegitimate or of exorbitant contributions and requisitions. (16) Debasement of the currency, and issue of spurious currency. (17) Imposition of collective penalties. (18) Wanton devastation and destruction of property. (19) Deliberate bombardment of undefended places. (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments. (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew. (22) Destruction of fishing boats and of relief ships. (23) Deliberate bombardment of hospitals. (24) Attack on and destruction of hospital ships. (25) Breach of other rules relating to the Red Cross. (26) Use of deleterious and asphyxiating gases. (27) Use of explosive or expanding bullets, and other inhuman appliances. (28) Directions to give no quarter. (29) Ill-treatment of wounded and prisoners of war. (30) Employment-of prisoners of war on unauthorized works. (31) Misuse of flags of truce. (32) Poisoning of wells. "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities", American Journal of International Law, Vol. 14 (1920), pp. 95-154, pp. 114-115.

[32] Id. pp. 121-122.

[33] Article 228 of the Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919; article 173 of the Treaty of Peace between the Allied Powers and Austria, Saint-Germain-en-Laye, 10 September 1919; article 118 of the Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27 November 1919; article 157 of the Treaty of Peace between the Allied and Associated Powers and Hungary, Trianon, 4 June 1920; article 226 of the Treaty of Peace between the Allied Powers and Turkey, Sèvres, 10 August 1920.

[34] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, N.J. ; Chichester : Princeton University Press), 2002.

the 1907 Hague Regulations has long been interpreted to encompass protection against rape and enforced prostitution.

In the International Military Tribunal for the Far East (IMTFE)'s view, the evidence presented before it established that "from the opening of the war in China until the surrender of Japan in August 1945, torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy".[35] The IMTFE referred extensively to the evidence of widespread rape and violence against women in China and other parts of Asia and in fact describes the existence of the "comfort women" system of forced military prostitution with striking accuracy in this remarkable passage: "During the period of Japanese occupation of Kwelin, they committed all kinds of atrocities such as rape and plunder. They recruited women labour on the pretext of establishing factories. They forced the women thus recruited into prostitution with Japanese troops".[36]

It is worth noting that the Chinese and Dutch military courts that tried the lesser Japanese war criminals in the Asia-Pacific relied on special codes that incorporated the list of 32 crimes formulated by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in 1919 including rape and enforced prostitution.[37] The Dutch courts in fact tried and convicted "a Japanese hotel-keeper who ran a club-restaurant in Batavia [Jakarta]" for enforced prostitution of Dutch women.[38]

The IMT and IMTFE Charters also referred to a number of crimes incidental to the "comfort women" system of military sexual slavery.[39] Article 6 (b) of the IMT Charter provides that war crimes include "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, … killing of hostages" while article 6 (c) of the IMT Charter and article 5 (c) of the IMTFE Charter give "murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war" as examples of crimes against humanity. Article 2 (1) (c) of the Control Council Law No. 10, applied in the Allied occupation zones of Germany, expands the enumerated list of crimes against humanity to "murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts".[40]

Japan "declare[d] its intention … in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights" in the preamble to the 1951 San Francisco Peace Treaty and "accept[ed] the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan" in article 11 thereof. It is difficult for the Government of Japan to shirk its legal liability for the acts of crimes against humanity and war crimes it perpetrated.

While the Government of Japan has maintained that international humanitarian law is inapplicable vis-à-vis Korea during the period in question because of the former's depredation of the latter's sovereignty under the 1905 protectorate and 1910 annexation treaties, the legality of these treaties is questionable at best. Contemporary French international lawyers cited Japan's coercion of Korean officials and contradiction with its obligation to secure Korean sovereignty in preceding international agreements as grounds for illegality

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[35] Judgement, p. 1001. http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html

[36] Id., p. 1022.

[37] United Nations War Crimes Commission ed., Law Reports of Trials of War Criminals (Buffalo, N.Y. : W.S. Hein & Co., 1997) [LRTWC], vol. 11, pp. 87-103.

[38] Trial of Washio Awochi in LRTWC.

[39] https://avalon.law.yale.edu/imt/imtconst.asp

http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A5.html

[40] https://avalon.law.yale.edu/imt/imt10.asp

and their analysis has been followed by leading authorities in international law.[41]

The 1935 Harvard Research Draft and a 1963 report by the UN International Law Commission (ILC) cited the 1905 Treaty as a treaty invalidated by the use of coercion against the state delegates as opposed to the state.[42] As the Polish participation in the post-World War I peace process, including the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and the proposed "high tribunal", despite the disappearance of an independent Polish state for 123 years (1795-1918) demonstrates, Korea's absence in the post-World War II peace settlement was a result of political considerations rather than any legal principles.[43]

The absence of actual criminal prosecutions for the acts of crimes against humanity and war crimes committed against Koreans under the "comfort women" system of military sexual slavery cannot be taken to mean that such acts did not constitute crimes under international law at the time. The Allied failure to bring the criminally responsible individuals to justice only strengthens the case for this court to hold the Government of Japan accountable for its civil liability to correct this grave miscarriage of justice.[44]

2.5 THE PEREMPTORY(*JUS COGENS*) AND *ERGA OMNES* NATURE OF THE VIOLATED NORMS

Many national legal systems, including in Japan and South Korea, distinguish between *jus dispositivum*, which parties may exclude the application thereof in their contracts, and *jus strictum*, which they must

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[41] Francis Rey, La Situation Internationale de la Coree, 13 Revue Generale de Droit International Public [R.G.D.I.P.] 40, 53-58 (1906) (Fr.); Jean Perrinjaquet, Coree et Japon: Annexion de la Coree au Japon.-Traite du 22 ao t 1910 et ses Consequences, 17 Revue Generale de Droit International Public [[R.G.D.I.P.] 532, 536 (1910) (Fr.). A comprehensive list of later works also mentioning the 1905 Treaty as an example of coercion against state representatives can be found in Sasagawa Norikatsu, Dentouteki Kokusaihou Jidai ni Okeru Nikkan kyuu Jyouyaku [The Old Japan- Korea Treaties in the Period of Traditional International Law (1904-1910): The Points of Legal Disputes Concerning the Treaty Coercion], in Kokusai Kyodo Kenkyu Kankoku Heigo to Gendai: Rekishi to Kokusaiho Kara No Saikento [Joint International Study on the Annexation of Korea and Modern Times: Reappraisal from History and International Law] 494-95 nn.35 & 36 (Sasagawa Norikatsu & Yi Tae-jin eds., 2008) (Japan). The notable American works include Charles G. Fenwick, International Law (3d ed. 1948) ("Violence or intimidation used against the person of the sovereign or of his diplomatic agent, as in the case of . . . the pressure exerted against the King of Korea by Japan in 1905 to accept a protectorate, would, of course, invalidate the agreement signed under such duress."); Gerhard von Glahn, Law Among Nations: An Introduction to Public International Law 437 (1st ed. 1965) ("Another well-known instance in which pressure was brought to bear on the person of a sovereign was that of the King of Korea, in 1905, forced to accept an obviously invalid agreement under which Korea became a Japanese protectorate.").

[42] Article 32. Duress, 29 Am. J. Int'l L. 1148-49, 1157 (Supp. 1935). In article 32 (Duress) of his 1935 draft Convention on the Law of Treaties, Professor Garner referred to the 1905 treaty as invalidated by coercion against the "ratifying authorities." The 1963 ILC report identified Japan's coercion of the Korean emperor and his cabinet for the 1905 Treaty as one of the "alleged instances of the employment of coercion against not only negotiators but members of legislatures in order to procure the signature or ratification of a treaty" that "will necessarily justify the State in repudiating the treaty" along with the U.S. military's 1915 siege of the Haitian parliament for treaty ratification and Hitler's tactics in obtaining a protectorate treaty with Czechoslovakia in 1939. Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, U.N. Doc. A/CN.4/156 and Add.1-3 (1963), reprinted in [1963] 2 Y.B. Int'l L. Comm'n 50, U.N. Doc. A/CN.4/SER.A/1963/ADD.1. Waldock cited the aforementioned Harvard Research Draft.

[43] Kang Seung-Mo, Great Britain's Postwar Insecurity and the Question of South Korean Participation in the Japanese Peace Treaty, 28 Seoul J. Korean Studs. 153 (2015). Consider also the case of Italy's 1936 annexation of Ethiopia, which was declared illegal by the Allied Powers during World War II notwithstanding its pre-war recognition by most states, resulting in Ethiopia's taking part in the 1947 Peace Treaty with Italy as a victorious Allied Power.

[44] See the recommendations contained in Judgment of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, para 1086. See also, Thomas M. Franck, "Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?", 6 Wash. U. Global Stud. L. Rev. 567 (2007).

comply with lest their contracts become null and void. On the international plane, the concept of *jus cogens*, originally developed in the context of treaty law, has come to refer to fundamental norms that do not permit derogation and take precedence over other conflicting norms.

Article 53 of the 1969 Vienna Convention on the Law of Treaties, to which Japan and South Korea are states parties, defines a peremptory norm (*jus cogens*) of general international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (art. 53) and, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates (art. 64).

Although there is no treaty that comprehensively lists the non-derogable *jus cogens* norms, the UN International Law Commission (ILC) has recognized as such the prohibition of aggression, the prohibition of torture, the prohibition of genocide, the prohibition of crimes against humanity, the prohibition of apartheid and racial discrimination, the prohibition of slavery, the right to self-determination and the basic rules of international humanitarian law.[45] The ILC also cited as strong candidates: the prohibition of enforced disappearance, the right to life, the principle of non-refoulement, the prohibition of human trafficking, the right to due process (the right to a fair trial), the prohibition of discrimination, environmental rights, and the prohibition of terrorism.[46]

As mentioned by the ILC,[47] the UN Working Group on Arbitrary Detention (WGAD) has also held that conventional and customary prohibition of arbitrary deprivation of liberty has been authoritatively recognized as a peremptory norm (*jus cogens*) of international law in light of paragraph 11 of the UN Human Rights Committee's general comment No. 29 (2001) on states of emergency, as well as the Restatement (Third) of the Foreign Relations Law of the United States, which is cited as authoritative interpretation of international law by United States courts.[48]

In a similar vein, the International Court of Justice (ICJ) held in the *Barcelona Traction* case in 1970 that: "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[49] The ICJ suggested that such obligations derive "from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[50]

While peremptory norms (*jus cogens*) and obligations *erga omnes* are distinct concepts with apparently

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[45] Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, 31 January 2019, pp. 24-54, http://legal.un.org/docs/?symbol=A/CN.4/727

[46] Id. at 54-62.

[47] Id. at 60, FN 408.

[48] WGAD Opinion No. 61/2018, *Leila Norma Eulalia Josefa De Lima v. Philippines*, Adopted on 24 August 2018, A/HRC/WGAD/2018/61, Para. 76. Restatement (Third) of the Foreign Relations Law of the United States (Washington, D.C., American Law Institute, 1987), § 702, comment n, and §102, comment k, lists (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; and (f) systematic racial discrimination as definitive peremptory norms.

[49] Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, para. 33.

[50] Id. para. 34.

separate origins, the two are closely interrelated and overlapping. As in the case of the prohibition of aggression, genocide, slavery and racial discrimination, it is hardly a logical stretch to assume that obligations *erga omnes* will accompany peremptory norms and vice versa.

The "comfort women" system of military sexual slavery by the Government of Japan entailed the violations of, *inter alia*, the prohibition of torture, the prohibition of crimes against humanity, the prohibition of slavery, the basic rules of international humanitarian law, the prohibition of enforced disappearance, the right to life, the prohibition of human trafficking, the right to due process (the right to a fair trial) and the prohibition of arbitrary deprivation of liberty—the representative customary and conventional norms of peremptory (*jus cogens*) and *erga omnes* nature.

2.6 THE ABSENCE OF OTHER EFFECTIVE FORMS OF REDRESS

The victims of the "comfort women" system of military sexual slavery by the Government of Japan have sought redress through political and legal means over the past three decades to no avail. The Korean, Taiwanese, Filipino, Chinese and Dutch "comfort women" and other victims of Japan's wartime sexual violence have filed 10 lawsuits against the Government of Japan in the Japanese courts since the 1990s. However, except for one judgment by the court of first instance in 1998, which was reversed on appeal, all the cases have been dismissed by the Japanese courts.[51] The decisions by the Japanese Supreme Court on 27 April 2007 that World War II-era wartime victims of sexual violence and forced labourers have lost the legal capacity to bring their claims before a court of law as a result of the 1951 San Francisco Peace Treaty and other bilateral claims agreements have effectively shut the door for future litigation.[52]

In 2000, fifteen "comfort women" survivors from China, Taiwan, South Korea and the Philippines sued the Government of Japan in the United States federal court under the Alien Tort Statute (ATS). However, the appellate court initially dismissed the claims by the application of sovereign immunity in 2003[53] and when the supreme court returned the case on remand following its decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) that restricted the applicability of sovereign immunity, the appellate court again rejected the claims based on the doctrine of non-justiciable political question in 2005.[54]

Earlier, in 1994, there were also attempts to settle the matter through binding arbitration before the Permanent Court of Arbitration (PCA) in The Hague, but the Government of Japan refused to respond to the requests by the "comfort women" survivors.

The legislative efforts to provide redress for the "comfort women" system of military sexual slavery have also failed to make progress. In 2000, the Japanese opposition lawmakers introduced the Promotion of the Resolution for Issues concerning the Victims of Wartime Sexual Coercion Bill (戦時性的強制被害者問題の

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[51] In the so-called kanpu case (関釜裁判), the Yamaguchi District Court, Shimonoseki Branch (山口地方裁判所・下関支部) delivered a judgment of partial victory for the plaintiffs on 27 April 1998, but the Hiroshima High Court (広島高等裁判所) dismissed all claims by the plaintiffs in its judgment on appeal on 29 March 2001.

[52] For the Chinese claims, see the Japanese Supreme Court's judgments in Nishimatsu Construction Co. v. Song Jixiao et al, Supreme Court (2d Petty Bench), 27 April 2007 and Ko Hanako et al v. Japan, Supreme Court (1st Petty Bench), 27 April 2007. For the South Korean claims, see the judgment of the Nagoya High Court on 31 May 2007 and the judgment of Nagoya High Court, Kanazawa Branch on 8 March 2010.

[53] *Hwang Geum Joo v. Japan*, 357 U.S. App. D.C. 26, 332 F.3d 679, 681 (D.C. Cir. 2003).

[54] *Hwang Geum Joo v. Japan*, 367 U.S. App. D.C. 45; 413 F.3d 45 (2005).

解決の促進に関する法律案) in the Diet which won the endorsement of the victims' group and the National Assembly in South Korea.[55] However, the successive bills died in the Diet and there is little prospect for its passage.

[55] Resolution 162110, introduced on 18 February 2003 and adopted on 26 February by the National Assembly entitled "Resolution Urging the Enactment of the Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion Bill by Japan" , available at http://likms.assembly.go.kr/bill/billDetail.do?billId=023533 [in Korean]

3. THE RIGHT TO A REMEDY AND REPARATION UNDER INTERNATIONAL LAW MUST NOT BE DENIED BY PROCEDURAL HURDLES

Articles 8 and 10 of the Universal Declaration of Human Rights and articles 2 (3) and 14 (1) of the International Covenant on Civil and Political Rights guarantee the right to a fair trial and the right to an effective remedy for violation of rights as human rights for all. The right to equal and effective access to justice and to adequate, effective and prompt reparation takes on added importance for the victims of gross violations of international human rights law and serious violations of international humanitarian law.

According to principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005, the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes, inter alia, the duty to: "(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice … irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation".[56]

Article 3 of the 1907 Hague Convention (IV), to which the Regulations Concerning the Laws and Customs of War on Land are annexed, requires that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[57] During the lawsuit brought against the Government of Japan by Allied prisoners of war (POWs) in the Japanese courts in the 1990s, four eminent international lawyers submitted expert opinions in support of the victims' right to make direct compensation claims under article 3 of the 1907 Hague Convention (IV).[58]

Professor Christopher Greenwood, a former judge of the ICJ, has stated thus: "It is my opinion, therefore, that Article 3 of the Hague Convention, the Hague Regulations and customary international law of war confer rights upon individuals, including tights [sic] to compensation, in the event of a violation, which the individual can assert against the State of the wrongdoer. The right exists under international law. While it is obviously a matter of Japanese law ... whether the Japanese courts have jurisdiction to give effect to that right, for them to do so would clearly be in accordance with international law and would enable the Japanese State to comply with its obligations under international law."[59]

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[56] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para. 3, https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx See also, para. 11 and below.

[57] https://avalon.law.yale.edu/20th_century/hague04.asp

[58] See the expert opinions of Fritz Kalshoven, Eric David, Christopher Greenwood and Akira Kotera in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagao (eds.), War and Rights of Individuals: Renaissance of Individual Compensation (Tokyo: Nippon Hyoron-sha Co., 1999).

[59] Id. at 69

While the Japanese courts in that case regrettably rejected these arguments in a summary manner, the South Korean courts are in no way bound by such precedents and in fact may display greater respect for international law. The victims of the "comfort women" system of military sexual slavery certainly deserve as much to see their right to compensation under article 3 of the 1907 Hague Convention (IV), in conjunction with article 46 of the Hague Regulations, vindicated.

Similarly, with respect to the 1930 ILO Forced Labour Convention, the CEACR noted that "the abuses referred to fell within the absolute prohibitions contained in the Convention" and that "such unacceptable abuses should give rise to appropriate compensation, since the Convention had provided, even for forms of compulsory service that could be tolerated under Article 1(2) during a transitional period after its coming into force, that the persons called up for such service were to be paid compensation and entitled to disability pensions under Articles 14 and 15" while adding that "under the Convention and the Committee's terms of reference, it did not have the power to order the relief sought".[60]

It is also worth noting the UN WGAD's observation in its jurisprudence that: "The domestic political and judicial organs are under a positive obligation to ensure an effective remedy and reparation for violations of [peremptory and *erga omnes* norms, such as the prohibition of arbitrary detention,] by removing the statute of limitations, sovereign immunity, *forum non conveniens* doctrine or other domestic procedural obstacles to redress in such cases through legislative or judicial action".[61]

As explained below, the sovereign immunity, the waiver of claims via treaty and the statute of limitations were legal devices created to address everyday lawsuits before the development of universal human rights or the rule of law as core values in the international legal system. They certainly were not designed with the prospect of civil actions brought by the victims of gross violations of international human rights law and serious violations of international humanitarian law or acts of crimes against humanity and war crimes in mind. Their mechanical application in this case, especially in the absence of other effective forms of redress, would be contrary to human rights and social justice.

3.1 THE NON-APPLICABILITY OF THE SOVEREIGN IMMUNITY

Sovereign immunity refers to the jurisdictional immunity enjoyed in a national court by foreign governments under international law. The doctrine of sovereign immunity finds its origin in the old legal maxim that "the king can do no wrong". Under the feudal tradition, it was unfathomable for the sovereign to be subjected to the judicial process like others at home or abroad. Since then, the sovereign immunity in the domestic jurisdiction has decidedly gone out of fashion as the rule of law substitutes the rule of men.

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[60] NGO alternative report to the periodic report of Japan to the UN Human Rights Committee, submitted by Women's Active Museum on War and Peace and Peace (WAM), on the issue of Japan's Military Sexual Slavery May, 2014, APPENDIX No. 2. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR): Observation on the "Comfort Women" Issue, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_CSS_JPN_17434_E.pdf

[61] *Ahmad Khaled Mohammed Al Hossan v. Saudi Arabia*, WGAD Opinion No. 22/2019, Adopted on 2 May 2019, A/HRC/WGAD/2019/22, para. 81, available at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_22.pdf

See also Id. para. 77, FN 19; *Abdallah Sami Abedalafou Abu Baker and Yasser Sami Abedalafou Abu Baker v. UAE*, WGAD Opinion No. 28/2019, Adopted on 3 May 2019, A/HRC/WGAD/2019/28, para. 69, FN 30; *Essam El-Haddad and Gehad El-Haddad v. Egypt*, WGAD Opinion No. 42/2019, Adopted on 14 August 2019, A/HRC/WGAD/2019/42, para. 80, FN 22; *Nizar Zakka v. Iran*, WGAD Opinion No. 51/2019, Adopted on 16 August 2019, A/HRC/WGAD/2019/51, para. 68, FN 22; *Abbas Haiji Al-Hassan v. Saudi Arabia*, WGAD Opinion No. 56/2019, Adopted on 16 August 2019, A/HRC/WGAD/2019/56, para. 87, FN 21 and para. 97, FN 27.

This is the case of South Korea which explicitly granted citizens the right bring compensation claims against the government in article 27 of its first Constitutions in 1948 and promulgated the State Compensation Act in 1951 in the years after the end of colonial rule by Japan.[62]

By contrast, sovereign immunity in public international law has endured since its first recorded usage in the case of *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) before the United States Supreme Court in 1812 on the basis of "perfect equality and absolute independence of sovereigns" to the benefit of Napoleon I, the emperor of the French.

Not surprisingly, there have been constant moves from the late 19th century to restrict the application of sovereign immunity to minimize the grave injustice done to the rights of the individuals with claims against foreign governments. Beginning with the Italian court's *Guttieres v. Elmilik* in 1886, the Belgian, Austrian and French courts as well as the Egyptian mixed courts began to entertain claims against foreign states concerning commercial activities.[63] In 1951, Professor Hersch Lauterpacht, the brains behind the drafting of the Nuremberg ad Tokyo IMT Charters and later a judge of the ICJ (1955-1960), openly questioned the existence of a "rule of international law which obliges states to grant jurisdictional immunity to other states" in light of the lack of uniform state practice.[64] Today, the restrictive theory of sovereign immunity that incorporates the commercial and tort exceptions have become the norm, including in South Korea with its supreme court's landmark decision in 1998.[65]

The sovereign immunity, far from written in stone, is a continuously evolving doctrine[66] especially when it comes to its applicability on human-rights litigation.[67] While the right to judicial remedies under articles 8 and 10 of the Universal Declaration of Human Rights and articles 2 (3) and 14 (1) of the International Covenant on Civil and Political Rights[68] may be subject to some legitimate restrictions, those restrictions must conform to the principle of necessity and proportionality. When considering whether the application of the sovereign immunity would be proportionate in a given case, the standard of review must be the strictest if the suit at hand concerns gross violations of international human rights law and serious violations of international humanitarian law amounting to acts of crimes against humanity and war crimes in violation of

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[62] The Constitution of the Republic of Korea, Constitution No. 1, enacted and went into effect on 17 July 1948, available at http://www.law.go.kr/lsInfoP.do?lsiSeq=53081 [in Korean]; State Compensation Act, Act No. 231, enacted and went into effect on 8 September 1951, available at http://www.law.go.kr/lsInfoP.do?lsiSeq=4266 [in Korean].

[63] Amnesty International, "Germany v. Italy: The right to deny state immunity when victims have no other recourse" (2011), p. 3.

[64] Hersch Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 BRIT. Y.B. INT'L L. 220, 228 (1951), cited in Amnesty International, "Germany v. Italy: The right to deny state immunity when victims have no other recourse" (2011).

[65] Supreme Court decision 17 December 1998, 97 Da 39216. See also Kim Do-Hyoung, "Practices on State Immunity at Korean Courts", *Seoul International Law Journal* Vol. 22, No. 2, pp. 115-157 (December 2015).

[66] Amnesty International, "Germany v. Italy: The right to deny state immunity when victims have no other recourse" (2011), p. 2.

[67] For the relevant works in South Korea, see Yi, Seong-Deog, "*Jus Cogens* and State Immunity: With Special Reference to the Jurisdictional Immunities Case", *Chung-Ang Law Review* Vol. 14, No. 4, pp. 205-248 (December 2012); Kang Pyoungkeun, "Tort Claims Actions on the Basis of Serious Human Rights Violations and Their Implications on the Development of International Law", *The Korean Journal of International Law* Vol. 58, No. 1, pp. 21-40 (March 2013); Lee Youngjin, "A Study on "State Immunity"—In re the claim for damages of the "Comfort Women" victims", *Study on the American Constitution* Vol.25 No.3, pp. 321-412 (December 2014); Young Sok Kim, "A Review on the Irrelevance of official capacity and State Immunity under the Statute of the International Criminal Court", *Ewha Law Journal* Vol.20 No.1, pp. 279-298 (September 2015); Hwang Myoung-jun, "Recent Discourse on Overcoming Sovereign Immunity: Focusing on the Italian Constitutional Court Decision No. 238(2014) and subsequent discussions thereof", *Seoul International Law Journal* Vol. 25, No. 1, pp. 1-26 (June 2018).

[68] See also the right to a speedy trial by qualified judges under article 27 (1) and (3) of the Constitution of the Republic of Korea.

peremptory norms (*jus cogens*) of general international law and *erga omnes* norms.

Indeed, it appears rather incongruous to hold that the application of the sovereign immunity for grave human rights violations is necessary and proportionate in the public interest of upholding the principle of sovereign equality while the same policy consideration has posed no obstacle to its non-application in commercial or tort cases. It defies reason that victims of sexual slavery, human trafficking, torture and arbitrary detention cannot seek justice in court because it unsettles international relations while it is perfectly acceptable for multinational corporations to sue a foreign government for contract disputes or for the unfortunate victims of traffict accidents with injury claims to do the same.

Unsurprisingly, a series of judgments and decisions worldwide concerning the human rights exception to the sovereign immunity over the past 30 years show slow but unmistakable movement toward the recognition of this changed reality and perception. Even the case-law upholding the sovereign immunity for grave human rights violations explicitly leaves open the possibility of future developments in the contrary direction.

Judge Patricia Wald's dissenting opinion in the split 2-1 decision of the *Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993), concerning the claims of a United States national detained with his family and ended up being the lone survivor in the Nazi genocide against the Jews, argued that "[b]ecause the Nuremberg Charter's definition of "crimes against humanity" includes what are now termed *jus cogens* norms, a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated. … *Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity."[69]

The Greek Court of Cassation (*Areios Pagos*) in its landmark 7-4 judgment of 4 May 2000 in the Distomo massacre case, concerning the massacre of over 300 inhabitants of the village of Distomo by the German occupation forces in June 1944, while conceding that the sovereign immunity was applicable for lawful conducts of war resulting in civilian damages, held that Germany had tacitly waived its sovereign immunity "since the acts for which it was being sued were carried out by its organs in contravention of the rules of *jus cogens* (Article 46 of the Regulations on the Laws and Customs of War Annexed to the Fourth Hague Convention of 1907) and did not have the character of acts of sovereign power".[70]

On 11 March 2004, the Italian Supreme Court of Cassation followed with its historic judgment in the *Ferrini* case, where it held that while the wartime conduct of hostilities in general is not subject to judicial review, states cannot enjoy the sovereign immunity for international crimes such as "deportation to forced labour" under article 6 (b) of the IMT Charter and subsequent practice.[71]

It is true that the International Court of Justice (ICJ) in its 12-3 judgment of 3 February 2012 in *Jurisdictional Immunites of the State* (Germany v. Italy: Greece intervening) case, dismissed the Italian argument for the non-application of the sovereign immunity in the *Ferrini* case by reasons of (1) grave violations of international human rights and humanitarian law, (2) violations of the peremptory norms (*jus cogens*) and (3) the lack of alternative forums for redress. However, the ICJ clearly leaves room for future

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[69] Note also Judge Stanley Sporkin's earlier memorandum opinion and order in Princz v. Federal Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992), holding for Hugo Princz that "a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to have his claim heard by a U.S. court."

[70] Prefecture of Voiotia v. Federal Republic of Germany, 4 May 2000, http://www.internationalcrimesdatabase.org/case/3247

[71] FERRINI v. FEDERAL REPUBLIC OF GERMANY (Decision No 5044/2004) Italy, Court of Cassation (Plenary Session). 1 1 March 2004 (Carbone, President) in International Law Reports, vol. 126, p. 659.

development by grounding its decision on "customary international law *as it presently stands*" (para. 91, emphasis added).[72]

It is also worth noting that Judge Abdulqawi Yusuf, who is currently serving as the President of the ICJ (2018-2021), in his dissenting opinion in the case sharply criticized the majority's reasoning for its failure to even consider "the obligation to make reparations for damages suffered as a result of breaches of humanitarian law is enshrined in Article 3 of the 1907 Hague Convention IV" (para. 13) and the victim's right to "equal access to an effective judicial remedy as provided for under international law" in principle 12 of the 2005 UN Reparation Principles and Guidelines (para. 31).

Judge Yusuf makes the reasonable observation that: "Immunity is not an immutable value in international law. Its adjustability to the evolution of the international society, and its flexibility, are evidenced by the number of exceptions built gradually into it over the past century, most of which reflect the growing normative weight attached to the protection of the rights of the individual against the State, be that as a private party to commercial transactions with the State or as a victim of tortious acts by State officials" (para. 35).

Indeed, it appears difficult to dispute Judge Yusuf's balanced conclusion that "in those exceptional circumstances where immunity may prevent the victims of international crimes from obtaining an effective remedy or where no other means of redress is available, such immunity should be granted or set aside by domestic courts" (para. 56) as "humanitarian law would be better enforced and the human rights-based values of the international community as a whole would be better protected" by so doing (para. 57).[73]

In the aftermath, Italy acceded to the UN Convention on Jurisdictional Immunities of States and Their Property and took legislative measures requiring Italian judges to comply with the ICJ's judgment in the *Jurisdictional Immunites* case, but the Florence court rehearing the case referred the case to the Italian Constitutional Court to decide on the constitutionality of these measures in so far as they deprived its jurisdiction to hear the claims.[74]

The Italian Constitutional Court duly noted that "the fundamental principles of the constitutional order and inalienable human rights constitute a "limit to the introduction … of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, para. 1 of the Constitution"" citing its case-law (para. 3.2) before concluding that the law of sovereign immunity "has not entered the Italian legal order and, therefore, does not have any effect therein" due to the apparent contrast "between international law, as defined by the ICJ, and Articles 2 and 24 of the Constitution [the recognition and guarantees of the inviolable rights of the person and the right to bring cases before a court of law in order to protect their rights]" (para. 3.5).[75] The legislative and executive measures to implement the ICJ's judgment were accordingly declared unconstitutional.

In another interesting development, the United States Supreme Court rejected - in its 6-3 decision in *Republic of Austria v. Altmann*, - the Austrian government's jurisdictional immunity claims for the Nazi-era confiscation of Klimt paintings for falling under the commercial exception after holding that the Foreign Sovereign Immunity Act (FSIA) of 1976, the domestic legislation codifying the restrictive theory of sovereign

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[72] https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf

[73] https://www.icj-cij.org/en/case/143

[74] https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238 [original judgment in Italian]; https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf [English translation]

[75] Reflecting upon the history, the Constitutional Court also observed that "the transition from the absolute theory of sovereign immunity to the relative one in the first half of the 20th century was "progressively established mainly thanks to Italian judges … and to Belgian judges [in] the so-called 'Italian-Belgian theory'" (para. 3.3).

immunity, is applicable to all post-1976 cases "regardless of when the underlying conduct occurred" in light of its language, overall structure and the principal purpose.[76] Aside from confirming that the applicable standards and rules concerning sovereign immunity must be those in force at the time of litigation instead of at the time of the alleged acts which gave rise to it, the *Altmann* decision also opens the intriguing possibility for the "comfort women" system of forced military prostitution to fall under the rubric of commercial exception as a case of the Government of Japan engaging in illegal business activity as the state sponsor of human trafficking.

The perennial legal dispute over the application of sovereign immunity for World War II-era acts of crimes against humanity and war crimes demonstrates that even now the matter is still far from settled as this court considers the claims of victims of the "comfort women" system of military sexual slavery by the Government of Japan. The mutability and uncertainty of the law concerning sovereign immunity is also apparent in the cases concerning more contemporary violations of human rights.

In *Al-Adsani v. United Kingdom*, the European Court of Human Rights, as Judge Ferrari Bravo lamented in dissent, missed "a golden opportunity to issue a clear and forceful condemnation of all acts of torture" when it upheld the sovereign immunity by a tantalizingly close 7-6 vote.[77] The joint dissenting opinion of Judge Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, urged finding a violation of article 6 of the European Convention on Human Rights, which guarantees the right of access to court reasoning that "[t]he prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere" as the latter is "a hierarchically lower rule".

In another important contemporary development, the UN Committee against Torture (CAT) observed in its concluding observations on Canada in relation to civil actions brought against the Government of Iran in Canadian domestic courts by victims of torture and/or sexual violence suffered at the hands of the Iranian authorities that article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (to which Japan and South Korea are parties) requires a state party to ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim, including by restricting the application of sovereign immunity.[78] As a state party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, it is natural for the state organs of South Korea to give due weight to the authoritative interpretation of article 14 thereof by the Committee against Torture.

While the UN Convention on Jurisdictional Immunities of States and Their Property was adopted in 2004, it has yet to enter into force, which requires the deposit of 30 instruments of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.[79] The Convention's silence on the human-rights exception to the application of sovereign immunity has been the subject of criticism and has generated specific calls to amend or complement the Convention with a protocol to specify the human-rights

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[76] *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). See also the examples of "terrorism exception" to the application of sovereign immunity in the legal actions against the State Department-designated "state sponsors of terror" in *Massie v. Gov't of Democratic People's Republic of Korea*, 592 F. Supp. 2d 57 (D.D.C. 2008); *Kilbum v. Islamic Republic of Iran*, 699 F. Supp. 2d 136, 152 (D.D.C. 2010); *Kaplan v. Hezbollah*, 715 F. Supp. 2d 165, 167 (D.D.C. 2010); *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044 (D.C. Cir. 2014); *Warmbier v. Democratic People's Republic of Korea*, 356 F. Supp. 3d 30 (D.D.C. 2018).

[77] Al-Adsani v. United Kingdom (Application no. 35763/97), Judgment, 21 November 2001, https://hudoc.echr.coe.int/eng?i=001-59885

[78] CAT/C/CAN/CO/6; CAT/C/CAN/CO/7

[79] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en

exception.[80]

It is also worth noting that six of the 22 states that have thus far ratified or otherwise formally accepted the said Convention have lodged reservations to the effect that its current interpretation and application should be in accordance with the principles of international law concerning the protection of human rights from serious violations (Italy) or that it is without prejudice to any future international legal development in the protection of human rights (Finland, Lichtenstein, Norway, Sweden and Switzerland).

Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property codifies the tort exception by excluding the application of sovereign immunity in proceedings concerning "pecuniary compensation for death or injury to the person, or damage to or loss of tangible property" in the forum state. As the plaintiffs in this case suffered injuries from the "comfort women" system of military sexual slavery by the Government of Japan, starting with the initial recruitment by force or deceit, that occurred within the territory of Korea, their compensation claims may be covered by article 12 of the Convention.[81]

Interestingly, when it comes to the domestic legal status of sovereign immunity, opposite to the traditional/stereotypical dichotomy, the leading common law jurisdictions have enacted legislation for the comprehensive codification while the continental civil law jurisdictions have largely left the matter to their courts to settle through case-law.[82] The countries with civilian legal tradition that codified sovereignty immunity, notably Japan and Italy, did so in reaction to their ratification of the UN Convention on Jurisdictional Immunities of States and Their Property.

Since South Korea is unlikely to ratify the UN Convention on Jurisdictional Immunities of States and Their Property or to codify the sovereignty immunity through legislation in the near future, its doctrinal development will remain under the purview of courts. It is interesting to note that the only known mentions of sovereign immunity in the legislative bills in the South Korean National Assembly thus far are its strict curtailment in the claims arising from grave human rights violations under international law.[83]

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[80] Christopher Keith Hall, "UN Convention on State Immunity: the Need for a Human Rights Protocol", International & Comparative Law Quarterly, Volume 55, Issue 2, April 2006, pp. 411-426.

[81] Note also that Switzerland and Lichtenstein in their respective interpretative declarations considered that article 12 thereof "does not govern the question of pecuniary compensation for serious human rights violations which are alleged to be attributable to a State and are committed outside the State of the forum".

[82] Among the common law jurisdictions, the United States took the lead with the Foreign Sovereign Immunity Act of 1976 followed in quick succession by the United Kingdom's State Immunity Act 1978, Singapore's State Immunity Act 1979, Canada's State Immunity Act 1982 and Australia's Foreign States Immunities Act 1985.

[83] Bill 2020090, introduced on 1 May 2019 in the National Assembly, entitled "Resolution urging the realization of the truth-finding and victim-centered realization of justice and human rights for Japanese aggression, colonial domination and atrocities in celebration of the 100th anniversary of establishment of the Provisional Assembly and Provisional Government of the Republic of Korea (by 18 members including Chun Jung-bae)", ("The National Assembly of the Republic of Korea, in consideration of the historical failure to realize judicial justice for crimes against humanity and war crimes in the process of Japanese aggression and colonial domination after World War II, urges that the exercise of the universal rights to remedy and reparation of the victims of grave human rights violations under international law must not be restricted on account of procedural hurdles such as the statute of limitations and sovereign immunity.", available at http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Y1V9X0L5K0T1Y1S0V1Y5Q5Z6S8E3Z1

Bill 2023394, introduced on 31 October 2019, entitled "Bill for the Protection of All Persons from Enforced Disappearance (by 13 members including Park Jeung)", ("Article 17. … (3) In lawsuits currently pending or in lawsuits to be brought in the future for compensation claims for damages arising from enforced disappearance, a foreign government and its property shall not enjoy jurisdictional immunity", available at http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_J1W9F1G0H3O1D1V4S4V9U3K1I4C0M4; Bill 2023013, introduced on 25 October 2019, entitled "Bill for Basic Law on the truth-finding and realization of justice and human rights for Japan's aggression, colonial domination and grave human rights violations in the Korean peninsula (by 17 members including Chun Jung-bae" ("Article 2. ... (1) This Law ... assumes the fundamental principle that victims of grave human rights violations have

The South Korean courts have thus far never had a chance to rule on the applicability of the sovereign immunity for claims based on gross violations of international human rights law and serious violations of international humanitarian law amounting to acts of crimes against humanity and war crimes in violation of peremptory (*jus cogens*) and *erga omnes* norms, especially in the absence of other effective forms of redress. As the Italian and Belgian courts took the lead in carving out the commercial exception a century earlier, the South Korean courts now have the historic opportunity to play a pioneering role in the establishment of the human rights exception.

3.2 THE NON-APPLICABILITY OF THE WAIVER OF CLAIMS VIA TREATY

The settlement of claims in the post-conflict or decolonization period through lump-sum agreements between the concerned governments on behalf of their citizens became popular in the second half of the 20th century. Given the thousands of claims that needed to be resolved in the aftermath of the often violent and abrupt geopolitical changes, inter-state payment of funds to be distributed to the individuals at the state discretion was not a wholly unreasonable arrangement. However, the broad discretion of states to dispense the property, rights and claims of its citizens create problems raises the question of the due process requirement under domestic constitutional law as well as international human-rights law.[84]

The Supreme Court of Korea definitively held in its landmark judgment of 30 October 2018 in the case of *Yeo Woon-Taek et. al. v. New Nippon Steel Corporation* (2013 Da 61381) that "the forced-mobilization victims' solatium claims vis-à-vis Japanese corporations predicated upon acts of crimes against humanity by Japanese corporations with direct links to the Government of Japan's unlawful colonial rule of the Korean peninsula and waging of war of aggression"[85] cannot fall under "the problems concerning property, rights, and interests" that "have been settled completely and finally" in accordance with article 2 (1) of the 1965 Japan-Republic of Korea Claims Agreement[86] when the general rule of treaty interpretation set out in article 31 of the Vienna Convention on the Law of Treaties is applied.

The Supreme Court's precedent is no doubt in line with the emerging right of the victims of gross violations of international human rights law and serious violations of international humanitarian law to: (a) equal and effective access to justice; and (b) adequate, effective and prompt reparation for harm suffered, as set forth in the 2005 Basic Principles and Guidelines. It is also supported by article 148 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War ("No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches].").[87]

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universal right to truth, realization of justice and reparation that shall not be restricted by the statute of limitations, sovereign immunity, etc."), available at http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Y1O9S1X0M2O5T1K1V1K4O4C7K7F3V6.

[84] Roland Bank, Friederike Foltz, "Lump Sum Agreements" in Max Planck Encyclopedias of International Law.

[85] The Supreme Court referred to "the forced mobilization victims' right to claim solatium against Japanese companies, premised upon the Japanese corporations' unlawful acts against humanity directly related to the Japanese government's unlawful colonial domination of the Korean Peninsula and waging of war of aggression" in its judgment.

[86] Agreement between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Co-Operation https://www.jstor.org/stable/20690013

[87] The grave breaches are defined in article 147 as: "those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected

In light of the Supreme Court's judgment excluding the compensation claims of the wartime forced-labour victims from the application of the waiver via the 1965 Claims Agreement, the compensation claims of the survivors of the "comfort women" system of military sexual slavery by the Government of Japan must *a fortiori* be accorded the same treatment because: (1) the Government of Japan's callous denial of its involvement in the planning and regulation until confronted with incontrovertible documentary evidence in 1991; (2) the greater physical and psychological damages resulting from sexual exploitation and violence in addition to labour exploitation; and (3) the subsequent secondary victimization in the traditional Confucian social more and stigma prevalent in post-war Korean society.

The separate opinion of Justices KIM So-young, LEE Dong-won and NOH Jeong-hee that the 1965 Claims Agreement was applicable to the forced labourers' compensation claims but that only the South Korean government's right to exercise diplomatic protection, rather than the individual claims *per se*, was waived in light of the vague reference in article 2 (1) thereof that "problems concerning property, rights, and interests … and the claims … have been settled completely and finally" is also supported by international law.

It is well-known that the Government of Japan had maintained until 2001 that the San Francisco Peace Treaty and other post-war claims agreements did not waive the claims of the individuals *per se* but merely the state's right to exercise diplomatic protection on their behalf.[88] As forced labour victims began to bring lawsuits against the Japanese corporations in United States courts, the Government of Japan abruptly changed its decades-long position to argue that the claims have been waived by the post-war treaties after all in line with the statements filed by the United States government advising the courts to reject the claims.

During the negotiations for the San Francisco Peace Treaty, Japanese Prime Minister Yoshida Shigeru assured Dutch Foreign Minister Dirk Stikker in an exchange of letters that "the Government of Japan does not consider that the Government of the Netherlands by signing the Treaty has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the Treaty comes into force these claims would be non-existent".[89]

The Government of Japan continued to rely on this distinction to oppose the compensation claims against it by the Japanese nationals whose property or claims have been *de facto* expropriated through the claims-waiver clause in the post-war treaties. In 1991, Yanai Shunji, the director-general of the treaties bureau of the foreign ministry who is currently serving as a judge at the International Tribunal for the Law of the Sea (ITLOS), stated at the Diet that "the issue of claims between the two countries was finally and completely settled by so-called "The Japan-Korea Agreement on Right of Claims." What this means is that all claims that had existed between Japan and South Korea, including nationals' claims, were settled-meaning that both Japan and South Korea renounced the right of diplomatic protection they retained as states. Therefore, it does not mean that so-called individual rights themselves were extinguished in the sense of domestic law. It means that neither government can raise this issue as an exercise of the right of diplomatic protection".

While the Government of Japan has been arguing since 2001 that the claims have been waived by the 1965 Claims Agreement, it has by its conduct precluded itself from doing so, by reason of estoppel. Even the Japanese Supreme Court's Nishimatsu decision in 2007 that struck down the claims of Chinese forced

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person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[88] Kinue Tokudome and Azusa K. Tokudome, "Individual Claims: Are the Positions of the U.S. and Japanese Governments in Agreement in the American POW Forced Labour Cases," 21 Pacific Basin Law Journal 1, 4-16 (2003).

[89] Cited in the Judgment of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery.

labour survivors on the basis of article 5 of the 1972 Joint Communique fell short of holding that that the claims *per se* were waived or extinguished; the provision merely deprived the Chinese plaintiffs of their right to present claims before Japanese courts.

From the perspective of international law, the statements by Yanai Shunji and other ranking officials before and after him may be considered unilateral declarations that bind the Government of Japan. As the ICJ opined in the *Nuclear Tests Case* (Australia v. France), "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding". The Yanai statement certainly appears to fit the requirement for unilateral declarations as described the ICJ in its case-law.[90]

The decades-long understanding between Japan and South Korea that inter-state claims agreements only waive the states' right to exercise diplomatic protection may also qualify as binding local custom for the two governments. In 1960, the ICJ in the case of *Right of Passage over Indian Territory* (Portugal v. India) held that "[w]here … the court finds a practice clearly established between two states which was accepted by the parties as governing the relations between them, the court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations".[91] Given that the South Korean Government also maintained this distinction between the waiver of individual claims and the state's right to espouse them since the 1990s, such distinction may be said to have become the local custom that binds Japan and South Korea.[92]

The waiver of claims by treaty may not directly result in the violation of the peremptory norms (*jus cogens*) such as the prohibition of slavery. However, waiver of compensation claims for sexual slavery may violate the right not be subjected to slavery since States are under the obligation to respect, protect and fulfil all human rights and fundamental freedoms of all persons.[93] It is therefore necessary to be cautious in construing the waiver provision in a treaty to be applicable to compensation claims for *jus cogens* violations.

It is also worth noting that the United Nations independent experts[94] and international human-rights NGOs[95] have consistently argued that the 1965 Claims Agreement cannot bar the claims of the victims of the "comfort women" system of military sexual slavery by the Government of Japan. Even the ILO CEACR, while stating that "it has no mandate to rule on the legal effect of bilateral and multilateral international treaties", expressed "its hope the Government will take measures in the future to respond to the claims of

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[90] See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Frontier Dispute Case (Burkina Faso/Mali), and Armed Activities (Congo v Rwanda).

[91] Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, at 44.

[92] Kim Chang-Rok, "What is the 'Right' which was settled by the Agreement on the Settlement of Problems Concerning Property and Claims between the Republic of Korea and Japan?", Kyungpook National University Law Journal Vol. 49, pp. 791-835, at 827 [in Korean].

[93] General Assembly resolution 72/180, preambular para. 5;

[94] U.N. ECOSOC, Comm'n on Hum. Rts, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) (prepared by Radhika Coomaraswamy); U.N. ECOSOC, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Report of the Special Rapporteur on Systematic Rape, P6, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. McDougall).

[95] Ustinia Dolgopol & Snehal Paranjape, Comfort Women, an Unfinished Ordeal: Report of a Mission (International Commission of Jurists, 1994); Judgment of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery (2000); Amnesty Int'l, Still Waiting After 60 Years: Justice for Survivors of Japan's Military Sexual Slavery System (2005).

these victims".[96]

Therefore, this court has the opportunity to not only reconfirm the Supreme Court's holding in in the case of *Yeo Woon-Taek et. al. v. New Nippon Steel Corporation* (2013 Da 61381) that the 1965 Claims Agreement cannot waive compensation claims for acts of crimes against humanity but to reinforce it and contribute to the development of relevant international norms by referring to the legal effect of gross violations of international human rights law and serious violations of international humanitarian law amounting to acts of crimes against humanity and war crimes in violation of peremptory (*jus cogens*) and *erga omnes* norms, especially in the absence of other effective forms of redress.

3.3 THE NON- APPLICABILITY OF THE STATUTE OF LIMITATIONS

As it has come to be widely accepted that no statute of limitations is applicable to criminal prosecutions for genocide, war crimes and crimes against humanity, there have been corresponding calls that civil claims arising from grave human-rights violations should not be time-barred.[97] This natural extension of the non-applicability of criminal statutory limitations to compensation found support at the 1992 Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms and in subsequent U.N. instruments.[98]

The 2005 Basic Principles and Guidelines explicitly provides that "[w]here so provided for in an applicable treaty or contained in other international legal obligations", no statutes of limitations should apply to "gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law" (Principle 6). That this is not limited to criminal prosecutions but also includes civil actions can be inferred from the stipulation in paragraph 7 that "[d]omestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive".[99]

The Supreme Court of Korea rejected the timeliness defence citing the good faith principle in its judgment of 30 October 2018 in the case of *Yeo Woon-Taek et. al. v. New Nippon Steel Corporation* (2013 Da 61381) in line with its case-law.[100] The Supreme Court's holding certainly appears to be in harmony with

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[96] "Observation (CEACR) - adopted 2002, published 91st ILC session 2003" cited in NGO alternative report to the periodic report of Japan to the UN Human Rights Committee, submitted by Women's Active Museum on War and Peace and Peace (WAM), on the issue of Japan's Military Sexual Slavery May, 2014, APPENDIX No. 2. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR): Observation on the "Comfort Women" Issue, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_CSS_JPN_17434_E.pdf

[97] Article 29, Rome Statute of the International Criminal Court, to which both Japan and South Korea are parties. See also ICTY, Prosecutor v. Furundzija, IT-95-17/1, Trial Chamber, Judgment, 10 Dec. 1998, para. 157.

[98] Conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, ¶ 27, Maastricht, Netherlands, Mar. 11-14, 1992; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para. 18, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at 7 (Mar. 29, 2004).

[99] See also Committee Against Torture, Mrs. A v. Bosnia and Herzegovina, Communication No. 854/2017, Views of 22 August 2019, UN Doc. CAT/C/67/D/854/2017, para. 7.5.

[100] Supreme Court [S. Ct.], 2009Da72599, June 30, 2011 (S. Kor.) (Ulsan Massacre of Aug. 1950); Supreme Court [S. Ct.], 2009Da66969, Sept. 8, 2011 (S. Kor.) (Mungyeong Massacre of Dec. 24, 1949). See also, Supreme Court [S. Ct.], 2010Da28833, Jan. 13, 2011 (S. Kor.); Supreme Court [S. Ct.], 2010Da35572, Jan. 13, 2011 (S. Kor.); Supreme Court [S. Ct.], 2010Da53419, Jan. 13, 2011 (S. Kor.); see Supreme Court [S. Ct.], 2009Da103950, Jan. 13, 2011 (S. Kor.); Supreme Court [S. Ct.], 2010Da78852, Jan. 27, 2011 (S. Kor.); Supreme Court [S. Ct.], 2010Da6680, Jan. 27, 2011 (S. Kor.); Supreme Court [S. Ct.], 2010Da21726, Jan. 27, 2011 (S. Kor.).

the requirement of the international norm that the application of statute of limitations in such cases "should not be unduly restrictive".

In 2006, the Seoul High Court held in the compensation case of the late Professor Tsche Chong-kil, who died under suspicious circumstances while being interrogated by intelligence agents in 1973, that "the non-application of criminal statute of limitations for grave human-rights violations such as crimes against humanity, war crimes and torture" in international law should apply to civil actions as well.[101] The reference to the international trend favoring the abolition of criminal statute of limitations for international crimes may indeed bolster the case for doing the same for civil statute of limitations.

Again, the United Nations independent experts[102] and international human-rights NGOs[103] have consistently argued that the claims of the victims of the "comfort women" system of military sexual slavery by the Government of Japan should not be time-barred. This court therefore has the opportunity to reiterate and bolster international and domestic legal grounds for the non-application of statute of limitations for crimes under international law and grave human rights violations.

[101] Seoul High Court [Seoul High Ct.], 2005Na27906, Feb. 14, 2006 (S. Kor.).

[102] U.N. ECOSOC, Comm'n on Hum. Rts, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) (prepared by Radhika Coomaraswamy); U.N. ECOSOC, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Report of the Special Rapporteur on Systematic Rape, P6, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. McDougall).

[103] Ustinia Dolgopol & Snehal Paranjape, Comfort Women, an Unfinished Ordeal: Report of a Mission (International Commission of Jurists, 1994); Judgment of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery (2000); Amnesty Int'l, Still Waiting After 60 Years: Justice for Survivors of Japan's Military Sexual Slavery System (2005).

4. CONCLUSION

In 2000, the Women's International War Crimes Tribunal vindicated the rights and wishes of the surviving victims of the "comfort women" system of military sexual slavery by not only trying and convicting Japan's wartime leaders for crimes against humanity but also finding the Government of Japan legally liable after explicitly rejecting the procedural hurdles posed by the sovereign immunity, the waiver of claims by the 1965 Claims Agreement or the statute of limitations. Now, the plaintiffs in this case have the opportunity to see a court of law of their country, South Korea, do the same.

Amnesty International is of the view that the constitutionality of the application of sovereign immunity, waiver of claims via treaty and/or the statute of limitations in this specific case or in general for claims arising from gross violations of international human right law and serious violations of international humanitarian law amounting to acts of crimes against humanity and war crimes in violation of peremptory norms (*jus cogens*) of general international law and obligations *erga omens*, especially in the absence of other effective forms of redress, in light of article 27 (1) and (3) of the Constitution, may be a matter worth seeking adjudication by the Constitutional Court.[104]

Given the advanced age of the few remaining survivors, the last realistic chance to vindicate their right to justice, truth and reparation rests in the hands of the honorable judges, and your judgment may prove to be their best legal remedy. Leaving aside the merits of their case, the plaintiffs should not be barred from presenting them before this court on procedural grounds. To do so would be a grave injustice on its own that negates the fundamental human rights and freedoms under international law and the Constitution of the Republic of Korea.

[104] Constitutional Court Act [Enforcement Date 20. Mar, 2018.] [Act No.15495, 20. Mar, 2018., Partial Amendment], http://www.law.go.kr/LSW//lsInfoP.do?lsiSeq=202763&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR ("Article 68 (Grounds for Request)(1) Any person whose fundamental rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the governmental power, excluding judgment of the courts, may request adjudication on a constitutional complaint with the Constitutional Court … ")