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Seeking Justice for Comfort Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts

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Seeking Justice for “Comfort” Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts

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The comfort system consisted of the legalized military rape of subject women on a scale—and over a period of time—previously unknown in history.¹

— GEORGE HICKS, THE COMFORT WOMEN

Many have asked me whether I am still angry with the Japanese. Maybe it helped that I have faith. I . . . learned to accept suffering. I also learned to forgive . . . . Half a century had

passed. Maybe my anger and resentment were no longer as fresh. Telling my story has made it easier for me to be reconciled with the past. But I am still hoping to see justice done before I die.\footnote{Maria Rosa Henson, former military sex slave (1928–1997)}

– Maria Rosa Henson, former military sex slave (1928–1997)

I. Introduction

Historically, humanity viewed the rape of women during war as an acceptable by-product of armed conflict, a traditional reward to the victors, rather than as a criminal act.\footnote{Susan Brownmiller, Against Our Will: Men, Women, and Rape 28 (1975) (providing a 200-year chronology of wartime rape incidents); see also Sexual Violence and Armed Conflict: United Nations Response, WOMEN2000 (U.N. Div. for the Advancement of Women) at Part 2, 2.1 (Apr. 1998), at http://www.un.org/womenwatch/daw/public/cover.htm (Apr. 1998) [hereinafter WOMEN2000] (discussing the steps taken by the U.N. to address the situation of women subjected to sexual violence during armed conflict since World War II). WOMEN2000 is an annual newsletter published online by the U.N. Division for the Advancement of Women (DAW) to promote the goals of the Beijing Declaration. In this issue, the DAW stated: Deeply entrenched... is the idea that women are property—chattel available to victorious warriors. Sexual violence may also be looked upon as a means of troop mollification. This is particularly the case where women are forced into military sexual slavery. Another reason that sexual violence occurs is to destroy male, and thereby community, pride. Men who have failed to “protect their women” are considered to be humiliated and weak. It can also be used as a form of punishment, particularly where women are politically active, or are associated with others who are politically active. Sexual violence can further be used as a means of inflicting terror upon the population at large. It can shatter communities and drive people out of their homes. Sexual violence can also be part of a genocidal strategy. It can inflict life-threatening bodily and mental harm, and form part of the conditions imposed to bring about the ultimate destruction of an entire group of people. Id.} In recent years, however, international organizations, such as the United Nations (U.N.), and non-governmental organizations (NGOs)\footnote{NGOs are independent supranational groups that are unaffiliated with any one country. They provide support to nations and international organizations like the U.N.} have sought to classify rape as a legitimate war crime.\footnote{Secretary-General’s Report on Aspects of Establishing an International Tribunal}
verdicts in the U.S. District Court for the Southern District of New York against Bosnian-Serb warlord Radovan Karadzic, as well as others, for war crimes such as rape and genocide, bring further acknowledgment that, at least in the United States, wartime rape is a prosecutable violation of international law. Despite the United


Rape and sexual assault are crimes under international criminal law. See M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 555–89 (1996) (describing the historical and legal developments supporting the inclusion of rape as a crime against humanity within the ICTY’s jurisdiction). Regarding the prosecution of rape as a war crime, see generally, Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 Am. J. Int’l L. 424 (1993), advocating increased recognition of rape as a war crime or grave breach under international humanitarian law.

6 Doe v. Karadzic, No. 93 Civ. 878, 2001 U.S. Dist. LEXIS 12928 (S.D.N.Y. Aug. 27, 2001) (reaching verdicts against Karadzic, but plaintiffs’ motions for attorney’s fees denied). Juries awarded verdicts of $745 million on August 10, 2000, and $4.5 billion on September 25, 2000, against Karadzic for violating the Alien Tort Claims Act (ATCA). Elizabeth Amon, Coming to America: Alien Tort Claims Act Provides a Legal Forum for the World, NAT’L L. J., (Oct. 19, 2000), at http://www.nigerianlawyers.org/bbs/messages/26.html (last visited Oct. 11, 2001) (The National Law Journal, a weekly online publication, does not post issues more than a year old. Thus, Amon’s article is no longer available on their website, but it can be found on the online message board of the Nigerian Lawyers Association, posted by John Ukegbu, Esquire, a member of that organization). The Karadzic complaint was first filed in 1993 for two separate class actions (the “Kadic” plaintiff class and the “[Jane] Doe” plaintiff class), but they were litigated together as one case called Kadic v. Karadzic. See Kadic v. Karadzic, Nos. 93 Civ. 1163 and No. 93 Civ. 878., 1993 U.S. LEXIS 13428 (S.D.N.Y. Sept. 23, 1993). The following year, in Doe v. Karadzic (which was the same case, but with the other plaintiff’s name appearing first), Karadzic’s motion to dismiss all plaintiffs’ claims for lack of personal and subject matter jurisdiction was granted. 866 F. Supp. 734 (S.D.N.Y. 1994).

Nevertheless, the U.S. Court of Appeals for the Second Circuit reversed this decision, thus reinstating the action. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). But from that point on, although the case had begun as Kadic v. Karadzic, the actual litigation was going by the name of Doe v. Karadzic, while still including both sets of plaintiff classes. In a surprising twist, the “Kadic” class of plaintiffs filed a motion to
States' leadership in enforcing human rights standards around the world, U.S. courts have not, until recently, sought to exercise jurisdiction over extraterritorial violations of international law.


8 International law recognizes five theories of jurisdiction under which a country is permitted to exercise extraterritorial criminal jurisdiction: (1) territorial jurisdiction—both subjective and objective—based on the location where the offense is committed or the effects of the act; (2) nationality jurisdiction, based on the nationality of the offender; (3) protective jurisdiction, based on the protection of the nation's interest, security, and integrity; (4) universal jurisdiction, which amounts to physical custody of the offender; and (5) passive personal jurisdiction, based on the nationality of the victim. See United States v. Smith, 680 F.2d 255, 257–58 (1st Cir. 1982); Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967); see, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW [hereinafter RESTATEMENT] § 402 (1987). A state has jurisdiction to prescribe law with respect to: (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has, or is intended to have, substantial effect within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests. Id.

However, any nation may take universal jurisdiction when a heinous crime is involved. According to RESTATEMENT, supra, § 404, all nations have jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain
Since 1980, however, the Alien Tort Claims Act (ATCA), a 200-year-old law, has been invoked to give U.S. federal courts original jurisdiction over cases like Karadzic.

In September 2000, a class action complaint on behalf of fifteen Asian women was filed in the U.S. District Court for the District of Columbia. The complaint alleged that the Japanese Imperial Army used the plaintiffs as sex slaves during World War II. The Japanese euphemistically referred to these women as *ianfu*, which translates in English to “comfort women.” Estimates indicate that the Japanese military used force or deceit to induce between 100,000 and 200,000 women and girls to leave
their homes.\textsuperscript{15} Often, the abductors promised their victims paying jobs as nurses or factory workers;\textsuperscript{16} instead, the women were held captive in miserable conditions and forced to provide sexual services to soldiers and officers of the Japanese Imperial Army.\textsuperscript{17}

\textsuperscript{15} SCHMIDT, supra note 1, at 2.

\textsuperscript{16} Id. at 16.

\textsuperscript{17} Id. at 12; see also Coomaraswamy Report, supra note 14, detailing specific testimony by former sex slaves, including the testimony of Chong Ok Sun, who was abducted by Japanese soldiers at the age of thirteen while on her way to the village to fetch water:

I was taken to the police station in a truck, where I was raped by several policemen. When I shouted, they put socks in my mouth and continued to rape me. The head of the police station hit me in my left eye because I was crying. That day I lost my eyesight in the left eye.

After 10 days or so, I was taken to the Japanese army garrison barracks in Heysan City. There were around 400 other Korean young girls with me and we had to serve over 5,000 Japanese soldiers as sex slaves every day—up to 40 men per day. Each time I protested, they hit me or stuffed rags in my mouth. One held a matchstick to my private parts until I obeyed him. My private parts were oozing with blood.

One Korean girl who was with us once demanded why we had to serve so many, up to 40, men per day. To punish her for her questioning, the Japanese company commander Yamamoto ordered her to be beaten with a sword. While we were watching, they took off her clothes, tied her legs and hands and rolled her over a board with nails until the nails were covered with blood and pieces of her flesh. In the end, they cut off her head. Another Japanese, Yamamoto [sic], told us that 'it's easy to kill you all, easier than killing dogs'. He also said 'since those Korean girls are crying because they have not eaten, boil the human flesh and make them eat it.'

One Korean girl caught a venereal disease from being raped so often and, as a result, over 50 Japanese soldiers were infected. In order to stop the disease from spreading and to 'sterilize' the Korean girl, they stuck a hot iron bar in her private parts.

\textsuperscript{14} Id. at para. 54. When she was seventeen years old, Hwang So Gyun, the second daughter of a day laborer, was promised a well-paying job in a factory if she would leave home:

I was taken to the railway station in a Japanese truck where 20 or so other Korean girls were already waiting. We were put on the train, then onto a truck and after a few days' travel we reached a big house at the River Mudingjian in China. . . . Each girl was assigned one small room with a straw bag to sleep on, with a number on each door. After two days of waiting, without knowing what was happening to me, a Japanese soldier in army uniform, wearing a sword, came to my room. He asked me 'will you obey my words or not?,' then pulled my hair, put me on the floor and asked me to open my legs. He raped me. When he left, I saw there were 20 or 30 more men waiting outside. They all raped me that day. From then on, every night I was assaulted by 15 to 20 men.
In 1993, the Japanese government announced its official role in establishing and organizing the comfort stations.\(^8\) Although Japan has apologized through statements made by Japanese prime ministers to the surviving military sexual slaves,\(^9\) Japanese courts

We had to undergo medical examinations regularly. Those who were found disease-stricken were killed and buried in unknown places. One day, a new girl was put in the compartment next to me. She tried to resist the men and bit one of them in his arm. She was then taken to the courtyard and in front of all of us, her head was cut off with a sword and her body was cut into small pieces.

*Id.* at para. 55. Kum Ju Hwang described conditions inside the camps:

> We were also given “606-shots” so that we would not get pregnant or that any pregnancies would result in miscarriage. We only received clothes two times per year and not enough food, only rice cakes and water. I was never paid for my “services.” I worked for five years as a “comfort woman,” but all my life I suffered from it. My intestines are mostly removed because they were infected so many times, I have not been able to have intercourse because of the painful and shameful experiences. I cannot drink milk or fruit juices without feeling sick because it reminds me too much of those dirty things they made me do.

*Id.* at para. 56.


> Dear Madam,

> On the occasion that the Asian Women’s Fund, in cooperation with the Government and the people of Japan, offers atonement from the Japanese people to the former wartime comfort women, I wish to express my feelings as well.

> The issue of comfort women, with an involvement of the Japanese military authorities at that time, was a grave affront to the honor and dignity of large numbers of women. As Prime Minister of Japan, I thus extend anew my most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women.

> We must not evade the weight of the past, nor should we evade our responsibilities for the future. I believe that our country, painfully aware of its moral responsibility, with feelings of apology and remorse, should face up
have been unwilling to provide reparations.\textsuperscript{20}

This comment provides a general background to the Japanese military's sex slave system of World War II.\textsuperscript{21} It then provides an overview of the legal efforts made to date on behalf of the military sexual slaves to seek redress in Japanese, U.S., and international forums.\textsuperscript{22} The comment then analyzes the political and legal barriers, as well as opportunities that exist in each forum,\textsuperscript{23} concluding that, in the absence of an International Criminal Court (ICC), U.S. courts provide the only forum capable of providing justice to these disregarded victims of World War II.\textsuperscript{24}

II. Background

A. Implementation of the Ianfu System

The policy of coercing women to serve as prostitutes for the Japanese military began in the early 1930s.\textsuperscript{25} The Japanese

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{20} SCHMIDT, supra note 1, at 4.
\item \textsuperscript{21} See infra notes 25–68 and accompanying text.
\item \textsuperscript{22} See infra notes 69–126 and accompanying text.
\item \textsuperscript{23} See infra notes 127–218 and accompanying text.
\item \textsuperscript{24} See infra notes 219–229 and accompanying text.
\item \textsuperscript{25} TRUE STORIES OF THE KOREAN COMFORT WOMEN v (Keith Howard ed., Young
\end{enumerate}
\end{footnotesize}
military sex slave system:

was unique in world history. The stations were strictly and exclusively for the use of soldiers. They were systematically planned, established and controlled by the Japanese imperial government and they were set up almost wherever military units were stationed. Most of the comfort women were supplied by Japanese colonies. The women were drafted by force, they were not treated as human beings but merely as military necessities.\(^{26}\)

The Japanese military usually established and managed the comfort stations, although sometimes they delegated responsibility to civilians.\(^{27}\) In an effort to eliminate the spread of venereal disease and the indiscriminate raping of local women,\(^{28}\) only soldiers and military employees were permitted, under Japanese military regulations, to visit the military-run brothels.\(^{29}\) The Japanese government also provided the comfort stations to maintain the soldiers' morale.\(^{30}\)

\(^{26}\) Chin Sung Chung, Korean Women Drafted for Military Sexual Slavery by Japan, in TRUE STORIES, supra note 25, at 25. The first groups of military sexual slaves shipped from Nagasaki to Shanghai were listed on the shipping manifest as “war supplies.” Women typically arrived with, or before, essential war equipment like ammunition. Hicks, supra note 1, at xvi.

\(^{27}\) Chung, supra note 26, at 16 (enumerating three types of stations: those that were established by the Japanese military; those that were established by civilians and licensed by the Japanese military; and existing private brothels, requisitioned by the Japanese military).


\(^{29}\) Chung, supra note 26, at 14. It was deemed safer for Japanese soldiers to use military-run brothels rather than private prostitutes or civilians because the women at the military-run brothels received condoms and regular medical check-ups. Id. But see Coomaraswamy Report, supra note 14, at para. 35 (reporting that the health checks were conducted for venereal disease and “little notice was taken of the frequent cigarette burns, bruises, bayonet stabs and even broken bones inflicted on the women by soldiers”).

Sources estimate that eighty to ninety percent of military sexual slaves were Korean. The Army recruited women and girls by manipulation, threats of violence, violence, false promises of employment, and abduction. One Japanese military record states, "personnel in charge of drafting women [were to] be selected with great care to minimize commotion during the process." Although the legal age for prostitution was eighteen in Japan and seventeen in Korea, the military often recruited younger girls for use at comfort stations. Abductees were usually uneducated females from poor farming families.

The military comfort stations were organized according to strict rules, although actual adherence to the regulations varied between stations. Rules established hours of operation, fees, sanitation standards, and times when different ranks of soldiers and officers could visit the stations. Men were usually allowed

looting and raping of villagers).

31 Chung, supra note 26, at 16 (citing a military document disclosed by the Japanese government in 1993; documents on the Manchurian army as reported by the Seoul-based Fact Finding Committee for Coercively Drafted Koreans; and a medical report from the Mixed 14th Brigade Command Office, stating thirty-five out of thirty-eight women were Korean).

Interestingly, the only Caucasian women conscripted into sexual service by the Japanese were thirty-five Dutch women in Dutch Indonesia. USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN: AN UNFINISHED ORDEAL—REPORT OF A MISSION 135 (International Commission of Jurists, 1993) [hereinafter DOLGOPOL REPORT]. A Netherlands tribunal in 1947 found the Japanese soldiers guilty of war crimes for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill treatment of prisoners. Id. at 135, 136. One Japanese officer was sentenced to death, eight officers went to prison, and one committed suicide as a result of the Dutch trials. Hicks, supra note 1, at 128–29.

32 Chung, supra note 26, at 18–19.

33 Id. at 19.

34 Id. at 17. In some cases, younger girls did menial work at the comfort stations until they reached the age of fifteen or sixteen, at which time they were required to provide sexual services. Id.

35 Id. at 18 (speculating that the Japanese government took working class women to minimize public scrutiny and criticism). Rural Korean girls from poor families were eager to take these paying jobs from the Japanese because Korean culture did not encourage, or provide many opportunities for, daughters to work outside the home. Hicks, supra note 1, at 22–28.

36 Chung, supra note 26, at 20; Hicks, supra note 1, at 20–21.

37 Chung, supra note 26, at 20.
thirty minutes to an hour with a woman. Fees charged to the men varied according to rank, time spent, and in at least one case, the nationality of the woman providing sex. Additional fees were charged to men who visited after regular hours or stayed overnight. Military sexual slaves did not generally receive any of the fees paid.

B. Why No Suits WereFiled Until the 1990s

In 1990, the Research Association on the Women Drafted for Military Sexual Slavery by Japan, a Korean group, began researching the comfort station phenomenon. That same year, several members of Japan's Upper House requested for the first time that the Japanese Diet make official inquiry into the issue of the military sexual slaves. In November 1991, the Korean Council for Women Drafted for Military Sexual Slavery by Japan was formed. By 1992, a number of Japanese military documents were uncovered in America and Japan. While the Japanese government made repeated denials of responsibility, victims and perpetrators finally began coming forward with testimony.

38 Id.
39 Id. at 21. At that station, a Japanese woman was supposed to get two yen for serving a non-commissioned officer, a Korean woman would receive 1.54 yen, and a Chinese woman would earn one yen. Id. (quoting Battlefield Diary 2d Company, Independent Assault Artillery, Jan. 1 – Apr. 30, 1938).
40 Id. at 20 (quoting Battlefield Diary 35th Company, Independent Defence Infantry, Apr. 1 – June 30, 1942).
41 Id. at 21.
42 Id. at 12.
43 SCHMIDT, supra note 1, at 22 (noting that the Diet is the highest legislative authority of the Japanese government).
44 Chung, supra note 26, at 12.
45 Id. One such document, entitled “Regarding the Recruitment of Women for Military Brothels,” which bore the personal seal of the Japanese Army high command, was discovered in the library of Japan’s Self-Defense Agency. SCHMIDT, supra note 1, at 32–33.
46 SCHMIDT, supra note 1, at 22–24 (noting that even though several Upper House members called for an official investigation, the Japanese Labor Minister and Minister of Foreign Affairs responded publicly that comfort stations were run privately and had no official connection to the Japanese military).
47 Chung, supra note 26, at 12 (explaining that telephone hotlines were set up in Korea and Japan to encourage victims and perpetrators to report their experiences).
Until the early 1990s, three factors combined to keep the sexual slavery relatively unknown: (1) subterfuge by the Japanese government,\textsuperscript{48} (2) the status of women in Asian cultures and related Asian norms regarding sexual purity and defilement,\textsuperscript{49} and (3) lack of international pressure on Japan.\textsuperscript{50}

In August 1945, as Japan was about to surrender, Japanese commanders sent encrypted messages to their expeditionary forces ordering them to disguise the sex slaves as auxiliary nurses.\textsuperscript{51} After World War II, the Japanese military systematically destroyed all records relating to the abduction, housing, and use of sex slaves.\textsuperscript{52} When the war ended, sex slaves who were still in Japanese military camps were abandoned, murdered by Japanese troops, or forced to commit suicide with the Japanese soldiers.\textsuperscript{53} Only about twenty-five percent of these women are said to have survived the end of the war.\textsuperscript{54}

By the end of 1991, only three Korean women had admitted publicly that they had been sex slaves of the Japanese military during the war.\textsuperscript{55} Asian society expects and requires chastity of its

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\textsuperscript{48} See infra notes 51–54 and accompanying text.

\textsuperscript{49} See infra notes 55–62 and accompanying text.

\textsuperscript{50} See infra notes 63–68 and accompanying text.

\textsuperscript{51} Hicks, supra note 1, at vii–viii.

\textsuperscript{52} Schmidt, supra note 1, at 15.

\textsuperscript{53} Chung, supra note 26, at 23; Schmidt, supra note 1, at 18 (noting documented testimonies of military sexual slaves being herded into caves and dynamited, shot, set on fire, and blown up with grenades).


\textsuperscript{55} Keith Howard, Introduction to TRUE STORIES, supra note 25, at vi.
unmarried women.\textsuperscript{56} Sex before marriage is considered shameful and a woman who engages in it is considered permanently defiled.\textsuperscript{57} Therefore, a victim would lose her opportunity to marry and have a family if she admitted what had happened to her during the war.\textsuperscript{58} The lack of openness about sex in Asian cultures made it even more difficult for its female victims to recover emotionally from their ordeals.\textsuperscript{59} Also, Asian societies value women based on their ability to produce healthy babies.\textsuperscript{60} Many surviving sex slaves were sterile due to disease, rough treatment, and the drugs and operations they were given to keep them functional during their enslavement.\textsuperscript{61} In Korea, during Roh Tae Woo’s presidency (1988–1994), the social climate finally relaxed enough to allow former military sexual slaves to come forward without being ostracized.\textsuperscript{62}

Until the early 1990s, the South Korean government’s desire to normalize relations with Japan led it to insist that no documentary evidence existed of Japan’s use of Korean women as military sexual slaves.\textsuperscript{63} Furthermore, America and its allies wanted Japan’s support and strength on their side during the Cold War.\textsuperscript{64}

\begin{footnotesize}
\begin{enumerate}
\item HICKS, supra note 1, at 124–27; SCHMIDT, supra note 1, at 16–17.
\item HICKS, supra note 1, at 125; SCHMIDT, supra note 1, at 16.
\item HICKS, supra note 1, at 125.
\item Id.
\item Id.
\item Id.
\item Howard, supra note 55, at 3 (postulating that the confluence of several factors in Korea allowed former military sexual slaves to come forward: the fledgling women’s movement in Korea; a revision of family law; enough economic independence to speak out against Japan’s cultural imperialism; and finally, that the former sex slaves were old enough to feel that they had nothing left to lose by telling their stories).
\item Howard, supra note 55, at vi.
\item Id. at vii; see also HICKS, supra note 1, at 228 (stating that Allied forces knew about the existence of military sexual slaves, were involved in repatriating many of them, and had been known to take advantage of their services).
\item In the last decade, the United States has also come under attack for its treatment of Korean women. According to a report given in 1993 at a meeting of the Coalition Against Trafficking in Women, approximately 18,000 prostitutes were serving 43,000 U.S. Army personnel stationed throughout Korea at more than forty bases. Military Prostitution in Korea, COALITION REPORT (The Coalition Against Trafficking in Women), Summer 1993, at http://www.uri.edu/artsci/wms/hughes/catw/kormil.htm. (The Coalition Against Trafficking in Women (CATW) periodically puts out a
\end{enumerate}
\end{footnotesize}
Winston Churchill stated at the time, "Our policy should henceforth be to draw the sponge across the crimes and horrors of the past—hard as that may be—and look, for the sake of all our salvation, towards the future." Therefore, for a time, America and its allies appeared to ignore what Japan had done, or at least to focus their attention on other issues.

Even though a war crimes tribunal for the Far East was established (the International Military Tribunal for the Far East, or IMTFE), the United States and General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), primarily focused on demilitarizing and democratizing Japan with political, educational, and land reforms. Thus, not one Class "A" war criminal was charged with crimes of sexual slavery at the IMTFE and no former military sexual slaves testified.

The report identified this practice as a continuation of Jungshindae, or the "comfort women" practice during World War II. Several U.S. soldiers have been arrested and tried for sexual violence against Korean females. In December 1991, Charles Eugene Birchard was sentenced to three years in prison for kidnapping, beating, and sexually assaulting three Korean schoolgirls. More recently, Kenneth Markle was arrested for the rape, torture, and murder of a Korean prostitute.

Class "A" war criminals brought before the IMTFE were charged with: murdering, maiming and ill-treating prisoners of war (and) civilian internees . . . forcing them to labor under inhumane conditions . . . plundering public and private property, wantonly destroying cities, towns and villages beyond any justification of military necessity; (perpetrating) mass murder, rape, pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries.

The IMTFE was established by a special proclamation of Gen. Douglas MacArthur, SCAP, January 19, 1946, implementing the Potsdam Declaration of China, the United States, and the United Kingdom, July 26, 1945, as accepted by the Japanese signatories of the Instrument of Surrender, September 2, 1945, that war criminals would be brought to justice; and acting on the authority to issue all orders implementing the Japanese surrender terms,
C. Official Japanese Responses

In July 1992, at the conclusion of a six-month study by the Japanese Defense Agency and other departments, the Japanese government officially acknowledged for the first time that it had organized the comfort stations. The report did not silence critics of the government, however, because the report found no evidence that women were recruited by force and the government did not offer an official apology. But in March 1993, the Japanese government agreed for the first time to hear testimony from former sex slaves. Supporters of the former sex slaves, however, were angered four months later when the incoming Prime Minister, Morihiro Hosokawa, announced that the 1951 San Francisco Peace Treaty and other bilateral agreements had absolved Japan of the responsibility to pay reparations. Under increasing international scrutiny, in August 1993, Japan again acknowledged

accorded to SCAP by a declaration of the foreign ministers of the United Kingdom, the United States, and the USSR, issued from Moscow, December 27, 1945.

National Archives and Records Administration (NARA), National Archives Collection of World War II War Crimes Records 238.7, at http://www.nara.gov/guide/rg238.html#238.7 (last modified Apr. 5, 2001) (The NARA is an independent federal agency which oversees the management of all federal records, thus preserving the history of the United States). The IMTFE heard cases against twenty-eight defendants. Judgments were rendered against twenty-five defendants, with seven sentenced to death, sixteen to life imprisonment, one to twenty years' imprisonment, and one to seven years' imprisonment. Id.

As further evidence that the United States chose to overlook Japanese wartime atrocities, Schmidt suggests that the United States gave immunity to Japanese officers who ran the notorious Unit 731, where medical experimentation was conducted on POWs, in exchange for the Unit's scientific data. The basis for his speculation is that a copy of the original Unit 731 report was uncovered under the U.S. Freedom of Information Act in the U.S. Army's possession. SCHMIDT, supra note 1, at 14–15.

69 SCHMIDT, supra note 1, at 48.

70 Id. at 48–49.

71 Id. at 66.

72 Id. But see McDougall Report, supra note 54, app. at para. 55 (stating that Japan's attempt to escape liability through these treaties fails because Japan concealed its involvement in the comfort stations when the treaties were written, and because the plain language of the treaties indicates they did not intend to preclude individual claims for compensation for violations of human rights or humanitarian law). The funds provided by Japan under the Settlement Agreement were intended only for economic restoration and not individual compensation for the victims of Japan's atrocities. Id.
the Japanese government’s role in establishing and managing comfort stations, and in forcibly recruiting women. The statement was made at a meeting of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Japanese Prime Minister Tomiichi Murayama announced in August 1994 that Japan would not pay reparations to its former military sexual slaves, but requested that Japanese citizens donate “gifts of atonement” to the victims. And in 1995, the Japanese government set up the “private” Asian Women’s Fund (AWF), to solicit private donations to compensate former military sexual slaves. Most victims, however, have refused to accept monetary reparations in lieu of an official government apology.

73 Schmidt, supra note 1, at 67. On the same day, a statement was made by the Chief Cabinet Secretary. McDougall Report, supra note 54, app. at para. 2. The Chief Cabinet Secretary stated that “[t]he Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.” Press Release, Japanese Ministry of Foreign Affairs, Statement by the Chief Cabinet Secretary, at http://www.mofa.go.jp/policy/women/fund/state9308.htmI (Aug. 4, 1993).

74 Etsuro Totsuka, Military Sexual Slavery by Japan and Issues in Law, Appendix to True Stories, supra note 25, at 195. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities called for concerned governments, academics and social scientists, and international non-governmental organizations to undertake social science research projects to investigate all aspects of slavery and slavery-like practices and find ways to end the practices. Id.

75 Id. at 199.

76 Yuki Tanaka, Introduction to Henson, supra note 2, at xx; see also Schmidt, supra note 1, at 68–69 (noting that the original government plan proposed that each surviving former sex slave would receive compensation and an individual letter of apology from the Japanese prime minister). But see Asian Women’s Fund, Activities of the Asian Women’s Fund, at http://www.awf.or.jp/index_e.html (last updated May 2000) [hereinafter AWF Homepage], which states that, as programs of atonement are implemented, the fund will provide two million yen (approximately $16,000 U.S. dollars) to each victim from the Republic of Korea, the Philippines, and Taiwan. In the Philippines, a five-year application period was completed on August 12, 2001. Furthermore, the Fund intends to fund medical and welfare projects totaling approximately 700 million yen (approximately $5.7 million U.S. dollars) to the Republic of Korea, the Philippines, and Taiwan. These projects will provide housing improvements, medical treatment, and pharmaceuticals. AWF Homepage, supra.

77 Tanaka, supra note 76, at xx; see also Schmidt, supra note 1, at 69 (explaining that although some women accepted money, sixty-nine former sex slaves refused to accept funds from the AWF, demanding that the Japanese government apologize and pay them directly).
Notwithstanding Japan’s reluctant acknowledgements, a recent U.N. report maintains that Japan has yet to fulfill its international legal obligations to the former military sexual slaves.\textsuperscript{78}

\textbf{D. Responses from International Organizations}

In August 1992, the U.K.-based international human rights organization, Liberation, demanded that Japan compensate the surviving victims of its forced sex and labor camps.\textsuperscript{79} Liberation maintained that Japan had violated the International Labor Organization’s (ILO) 1930 Forced Labour Convention, which Japan signed in 1932.\textsuperscript{80} In 1996, an ILO panel of experts also declared that Japan’s use of comfort stations violated its Forced Labour Convention.\textsuperscript{81} In August 1994, the U.N. Sub-Commission

\begin{quote}


\textsuperscript{79} \textit{SCHMIDT, supra} note 1, at 55.

\textsuperscript{80} \textit{Forced Labour Convention, adopted} June 28, 1930, 39 U.N.T.S. 55. This Convention was ratified by 156 countries, including Japan in November 1932. \textit{Id.} Pertinent clauses include:

\begin{itemize}
\item Article 8 [No.] 1. The responsibility for every decision to have recourse to forced or compulsory labour shall rest with the highest civil authority in the territory concerned.

\item Article 11 [No.] 1. Only adult able-bodied males who are of an apparent age of not less than 18 and not more than 45 years may be called upon for forced or compulsory labour.

\item Article 25. The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties . . . are strictly enforced.

\textit{Id.}

\textsuperscript{81} \textit{SCHMIDT, supra} note 1, at 55.
\end{itemize}
\end{quote}
on Prevention of Discrimination and Protection of Minorities recommended that Special Rapporteurs study and report back on the issues of sexual slavery and forced labor during wartime.\textsuperscript{82} Sub-Commission expert Linda Chavez was asked to conduct research on wartime slavery.\textsuperscript{83}

In November 1994, the International Commission of Jurists released a report recommending, \textit{inter alia}, that Japan provide an administrative forum in which victims' claims could be settled within six months, or, in the alternative, that Japan enact legislation to expedite suits tried on their merits by waiving objections of jurisdiction and limitation.\textsuperscript{84} The International Commission of Jurists noted that the international community, especially the Allied Forces of World War II,\textsuperscript{85} had a special obligation to exert pressure on the Japanese government since no attempt was made to hold Japan responsible for its actions when the war ended.\textsuperscript{86}

In 1995, U.N. Special Rapporteur on violence against women, Radhika Coomaraswamy, visited Korea and Japan to research a report for the U.N. Commission on Human Rights.\textsuperscript{87} According to Coomaraswamy's report, the comfort women situation constituted a clear case of sexual slavery and a slavery-like practice prohibited under international law.\textsuperscript{88} The report noted that the U.N. Working Group on Contemporary Forms of Slavery previously had recommended that Japan set up an administrative tribunal to review and resolve the situation.\textsuperscript{89} Victims indicated to the Special


\textsuperscript{83} \textit{Id.} at 195 (quoting \textit{Minority Report}, at 24). Totsuka noted that Chavez, Special Rapporteur on the situation of systematic rape, sexual slavery, and slavery-like practices during periods of armed conflict, submitted a preliminary report in July 1996. \textit{Id.}

\textsuperscript{84} \textit{DOLGOPOL REPORT}, \textit{supra} note 31, at 204, recommendation 1(b).

\textsuperscript{85} \textit{Id.} at 203 (stating that the Allied Powers had full knowledge in 1945 of the comfort station system).

\textsuperscript{86} \textit{Id.} at 203–04.

\textsuperscript{87} \textit{Coomaraswamy Report}, \textit{supra} note 14.

\textsuperscript{88} \textit{Id.} at para. 9. Coomaraswamy noted that the Japanese government does not consider the "comfort women" situation covered under article 1(1) of the 1926 Slavery Convention, or other existing provisions of international law. \textit{Id.} at para. 7.

\textsuperscript{89} \textit{Id.} at para. 9. The Special Rapporteur detailed the concrete demands made by the
Rapporteur that monetary reparation was not as important to them as what it symbolized.\textsuperscript{90} Victims further requested that the U.N. pressure Japan to offer a suitable settlement, suggesting the matter be raised in the International Court of Justice (ICJ) or the Permanent Court of Arbitration, if necessary.\textsuperscript{91}

In 1998, U.N. Commission on Human Rights Special Rapporteur Gay McDougall submitted an analysis of Japan's legal liability for operating its comfort women stations.\textsuperscript{92} McDougall recommended that nations enact legislation incorporating international human rights and criminal law standards into their own legal systems, and specifically provide universal jurisdiction for violations of \textit{jus cogens}\textsuperscript{93} norms such as slavery, crimes against

\begin{itemize}
\item former “comfort women,” which included: individual apologies to the victims from the Japanese Diet; recognition by the Japanese government that its systematic recruitment of women for sexual slavery during World War II “should be considered a crime against humanity, a gross violation of international humanitarian law, and a crime against peace, as well as a crime of slavery, trafficking in persons and of forced prostitution;” acceptance of moral and legal responsibility for these crimes; and compensation from the government to the surviving victims. \textit{Id.} at para. 61. It was suggested that the government of Japan should enact special legislation so as also to enable a settlement of individual claims for compensation through civil law suits in Japanese municipal courts. \textit{Id.} at para. 61(e).
\item \textit{Id.} at para. 62.
\item \textit{Id.} at para. 65; \textit{see also} \textit{TRUE STORIES}, \textit{supra} note 25, at 198 (noting that in May 1994, the U.N. Working Group on Contemporary Forms of Slavery recommended the parties seek resolution through the Permanent Court of Arbitration).
\item The legal analysis contained in the appendix to the McDougall Report, \textit{supra} note 54, will be discussed \textit{infra} notes 119–126 and accompanying text.


\item \textit{Jus cogens} principles of international law are those that are so fundamental that no nation may ignore them or attempt to contract out of them through treaties. Vienna Convention on the Law of Treaties, \textit{opened for signature}, May 23, 1969, art. 53, 1155 U.N.T.S. 331 (entered into force, Jan. 27, 1980); \textit{see also} \textit{RESTATEMENT}, \textit{supra} note 8, \S 102, cmt. k & Reporter’s Note 6 (1987) (adopting Vienna Convention’s definition of \textit{jus cogens}). \textit{See infra} notes 135–149 and accompanying text for more discussion on \textit{jus cogens}.
\end{itemize}
humanity, genocide, torture, and other international crimes.\textsuperscript{94} Specifically, the report stated that domestic law should criminalize slavery and sexual violence as grave breaches of the Geneva Conventions, war crimes, torture, and constituent acts of crimes against humanity and genocide.\textsuperscript{95} The Report further recognized the need for such investigations and prosecutions to proceed in the ICC under the guidelines provided by the Statute of the ICC.\textsuperscript{96}

III. Analysis

A. Results to Date in Japanese Courts

In December 1991, forty former military sexual slaves from South Korea brought the first suit in Japan.\textsuperscript{97} The women were represented by the Association of Pacific War Victims and Bereaved Families.\textsuperscript{98} Almost ten years later, on March 26, 2001, the Tokyo District Court rejected the demands for compensation, which led to a massive protest only a few days later by a group called Lolas Kampanyera Para Sa Kapayapaan at Kumpensasyon, or ‘LOLAS,’ comprised of over one hundred military sexual slave


\textsuperscript{95} McDougall Report, supra note 54, at para. 79; see also Chung, \textit{supra} note 26, at 15 (stating the comfort station system supported Japan’s genocidal goal of obliterating the Korean race). Chung writes: “The system did not recruit Japanese prostitutes, but forcibly took Koreans, most of whom were to die on the battlefield, while those who survived would be unable to rear children.” Chung, \textit{supra} note 26, at 15.

\textsuperscript{96} McDougall Report, supra note 54, at para. 86.

\textsuperscript{97} Totsuka, \textit{supra} note 74, at 193; \textit{Military Sexual Slavery: Mixed Success for Transnational Campaigns}, TRACES, (Jan.–Mar. 2001), at http://www.transcomm. ox.ac.uk/traces/iss13pg1.htm [hereinafter Transnational Communities]. TRACES is an online news digest service provided by the Transnational Communities Programme, aimed at educating people on globalization and transnationalism.

\textsuperscript{98} Transnational Communities, \textit{supra} note 97.
survivors.  

In December 1992, another group of former South Korean sex slaves filed suit with the Shimonoseki Branch of the Yamaguchi District Court in Fukuoka, Japan, asking for an official apology and $2.3 million U.S. dollars in compensation. In a surprising decision, the court ruled in favor of the women in April 1998 and ordered the Japanese government to pay 300,000 yen (about $2,300 U.S. dollars) to each plaintiff. The court found the Japanese government responsible for violating the fundamental human rights of these “comfort women by forcing them into sexual slavery.” In addition, the court held that the failure of the Japanese Diet to compensate the women violated Japanese statutory and constitutional law. However, the Hiroshima High Court recently overturned this decision, holding that the Japanese


Parties dissatisfied with the decision of the court of first instance may appeal to a higher court and, if still dissatisfied, lodge a second appeal. Each court renders independent judgment. The decision of a superior court binds lower courts in the case concerned. The Supreme Court sits in Tokyo, with eight High Courts in six branch offices immediately subordinate. The next level of jurisdiction below the High Courts is divided in half between the Family Courts, fifty in all, and the District Courts, which also number fifty. Finally, there are 438 summary courts, which are inferior to the District Courts.

The District Courts are primarily the court of general original jurisdiction, and they handle most cases in the first instance. These courts also have appellate jurisdiction over appeals of Summary Court judgments in civil cases. District Court cases are handled either by a single judge or a collegiate body of three judges.

100 Schmidt, supra note 1, at 59–60.

101 Id. at 171; McDougall Report, supra note 54, app at paras. 50–51. Although the favorable decision pleased advocates of the former military sexual slaves, the amount awarded was considered “measly” and “an insult to women.” Schmidt, supra note 1, at 171–72.

102 McDougall Report Update, supra note 78, at para. 75.

103 Id.
government was not legally required to apologize to or compensate the women.\textsuperscript{104}

In April 1993, eighteen\textsuperscript{105} former military sexual slaves from the Philippines filed suit in Tokyo District Court, seeking twenty million yen per plaintiff (about $160,000 U.S. dollars) from the Japanese government.\textsuperscript{106} The suit claimed, \textit{inter alia}, that Japan violated Article 46 of the Hague Convention of 1907,\textsuperscript{107} which requires occupying forces to respect civilians' reputations, family rights, and individual lives.\textsuperscript{108} The suit further charged the Japanese government with "crimes against humanity" as codified in Article 6 of the International Military Tribunal Charter\textsuperscript{109} and the Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{110} In October 1998, the Tokyo District Court dismissed the action,\textsuperscript{111} ruling in part that "crimes against humanity" were not an established norm of international law.\textsuperscript{112} Seven of the


\textsuperscript{105} The number of plaintiffs eventually grew to forty-six. Tanaka, \textit{supra} note 76, at xviii.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.} (referring to the Hague Convention IV - Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention]).

\textsuperscript{108} \textit{Id.} (noting that rape and sexual abuse of women are clear violations of Article 46 of the Hague Convention, especially in countries where family honor and reputation are reflected in a young woman's sexual purity).


\textsuperscript{111} \textit{Id.} at xix; McDougall Report Update, \textit{supra} note 78, at para. 76.

\textsuperscript{112} Tanaka, \textit{supra} note 76, at xix. However, Japan is a signatory to the Rome
Filipina plaintiffs died during the five-year trial. The surviving plaintiffs are appealing this decision to the Tokyo High Court.

Undaunted by the unlikelihood of winning cases in Japanese courts, suits continue to be filed in Japan by women from China, the Philippines, and the Republic of Korea. In July 1999, nine Taiwanese women filed suit in the Tokyo District Court, seeking compensation and an official apology. Due to loopholes in Japanese law, however, it is unlikely that any more suits will be successful in Japanese courts. For example, the Japanese civil code imposes a twenty-year time limit for filing suits against perpetrators of torture.

In addition, the Japanese Government denies legal liability for the use of military sexual slaves. Japan contends that even though individual rights were not infringed by war settlement treaties, individuals do not have legitimate standing under international law before the courts. In response to the

Statute, which seeks to establish an ICC. See infra notes 166–68 and accompanying text. Because Article 23 of the Rome Statute states that crimes against humanity are manifestly unlawful, Tanaka, supra note 76, at xix, it seems unjust for Japanese court to deny these women's claims since Japan was a signatory to the Statute.

113 McDougall Report Update, supra note 78, at para. 76.
114 Id.
115 Id. at para 74. In fact, in June 2000, about fifty lawsuits were pending against Japan by those seeking compensation for war-related injuries. Id. Several of these suits include plaintiffs who were military sexual slaves. Id.
116 Id.
117 Totsuka, supra note 74, at 193.
118 Id.
119 McDougall Report, supra note 54, app. at para. 4.
120 The Japanese contend that all claims between Japan and Korea were resolved when the two countries signed a treaty agreement on June 27, 1965. Totsuka, supra note 74, at 198.
121 Id. at 193 (noting that Article 98(2) of the Japanese Constitution allows courts to apply international law directly, regardless of domestic legislation); see also McDougall Report Update, supra note 78, at n.102 (stating that the Tokyo District Court held that individuals had no right to claim compensation against a State for violations of international law). But see McDougall Report, supra note 54, app. at para. 44, which pointed out that

[B]y the late 1920s, international law recognized that when a State injured the nationals of another State, it inflicted injury upon that foreign State and was therefore liable for damages to make whole the injured individuals. Moreover, international law recognizes that individuals . . . [have] rights conferred and
Coomaraswamy Report, the Japanese Government denied legal liability on the following grounds: (a) "recent developments ... in international criminal law may not be applied retroactively," (b) the comfort station system did not involve the crime of slavery, and even if it did, the prohibition of slavery was not a customary norm of international law at that time; (c) rape was not prohibited during wartime by either the Hague Convention or by customary norms of international law; and (d) in any event, since Korea was annexed to Japan during World War II and therefore not an adversary, the laws of war are inapplicable to Korean nationals.

B. Reactions to Date in International Forums

1. U.N. Finds That Japan’s Military Sex Slave Activities Violated International Law

Several U.N. studies have determined that Japan clearly violated international law established by treaty and custom. For duties imposed by international law.

Id.

122 McDougall Report, supra note 54, at para. 4.

123 Id. See also id. app. at paras. 26–27 (noting that Japan’s claims are easily refuted because rape and slavery were clearly prohibited by customary norms of international law during World War II; in fact, such prohibitions were part of Japan’s Charter, which codified customary international law).

124 Id. at para. 4. See also id. app. at para. 13 (noting that Japan had prohibited the slave trade since at least 1872, when it convicted some Peruvian traders of the crime of slavery); id. app. at para. 14 (noting that the 1926 Slavery Convention, developed by the League of Nations, was “clearly declaratory of customary international law by the Second World War”). In fact, the Japanese government has admitted that “the women were ‘deprived of their freedom’ and ‘recruited against their own will,’” id. app. at para. 22, experiences that fall under the Slavery Convention’s definition of slavery. Id. See infra notes 132–34 for more on customary international law.

125 McDougall Report, supra note 54, at para. 4. See also id. app. at para. 28 (stating that the “family honour” language in the Hague Convention No. IV of 1907 prohibited the kind of rapes perpetrated against the female sex slaves and represented a binding rule of international law during the Second World War).

126 Id. app. at para. 4; see also id. app. at para. 30 (stating that slavery is also prohibited during peacetime as a crime against humanity, so customary international norms on slavery did apply to Korean women, regardless of whether they lived in occupied territory).

127 Totsuka, supra note 74, at 195–98.
example, Japan has been found to have breached several multilateral agreements to which it is a signatory, including the ILO 1930 Forced Labour Convention, the International Agreement for the Suppression of the "White Slave Traffic," and Article 15(2) of the International Covenant on Civil and Political Rights [hereinafter Covenant].

Customary international law prohibits crimes against

128 Id.

129 Id. at 195–96 (citing Art. 2 which prohibits the forced labor of women, and Art. 24 which states that forced labor is a penal offense). The ILO Convention Concerning Forced Labour was adopted in 1930 and ratified by Japan in 1932. Id. See also supra notes 80–81 and accompanying text.

130 International Agreement for the Suppression of the "White Slave Traffic," Mar. 18, 1904, arts. 1, 2, 1 L.N.T.S. 83, 86; see Totsuka, supra note 74, at 196 (citing Art. 1 which states solicitation of juvenile women by any means should be punished, and Art. 2 stating coercion of adult women should be punished). The Convention was adopted in 1910 and acceded to by Japan in 1925. Id.

131 International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 15, sec. 2, 999 U.N.T.S. 171, 177; see Totsuka, supra note 74, at 197. Japan appears to have ignored its commitments to this agreement, which allows the trial and punishment of anyone whose act or omission, when committed, "was criminal according to the general principles of law recognized by the community of nations." Id. The Covenant was adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of December 16, 1966 and entered into force March 23, 1976. Id. According to the Office of the U.N. High Commissioner for Human Rights, Japan signed the Covenant on June 21, 1979. OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, at http://www.unhchr.ch/pdf/report.pdf (last visited Oct. 13, 2001).

Although Japan is normally bound to treaty provisions that have been adopted by its government, Japan considers its constitution supreme law, superseding international agreements like the Covenant. Japanese Ministry of Foreign Affairs, Fourth Periodic Report by the Government of Japan under Article 40 Paragraph 1(b) of the International Covenant on Civil and Political Rights, 1. General Comments, at http://www.mofa.go.jp/policy/human/civil_rep4/index.html (last visited Oct. 13, 2001). Furthermore, because the Japanese Supreme Court interprets the Constitution as "covering the same range of human rights as that of the Covenant ... there can be no conflict between the Constitution and the Covenant." Id.

132 The Statute of the International Court of Justice (ICJ) identifies "international custom" as evidence of a general practice accepted as law." Statute of the ICJ, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 6 L.N.T.S. 391, 405. Section 102(2) of the RESTATEMENT states that customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT, supra note 8, § 102(2). Customary international law is the general practice of states, which eventually becomes binding law. See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4–11 (4th ed. 1990).
humanity, including enslavement, deportation, inhumane acts, and persecutions on political or racial grounds.\textsuperscript{133} Furthermore, no statute of limitations exists on violations of customary international law.\textsuperscript{134}

The use of military sexual slaves breaks several \textit{jus cogens} norms in customary international law.\textsuperscript{135} Enslavement is an international crime regardless of whether it is committed by states or private individuals.\textsuperscript{136} According to Special Rapporteur Gay McDougall,

The “comfort stations” that were maintained by the Japanese military during the Second World War . . . and the “rape camps” that have been well documented in the former Yugoslavia . . . are particularly egregious examples of sexual slavery.\textsuperscript{137} [Characterizing such] acts as international crimes of slavery, crimes against humanity, genocide, grave breaches of the Geneva Conventions, war crimes or torture is also essential. These crimes have particular legal consequences as \textit{jus cogens}

\textsuperscript{133} Karen Parker & Jennifer F. Chew, \textit{Compensation for Japan’s World War II War-Rape Victims}, 17 HASTINGS INT’L & COMP. L. REV. 497, 510 (1994) (stating that the Charter of the International Military Tribunal and the Charter of the IMFTE describe Japan’s acts upon the military sexual slaves as crimes according to customary international law, justifying criminal sanctions).


\textsuperscript{135} McDougall Report, supra note 54, at paras. 28, 30. The Vienna Convention on the Law of Treaties, in Article 53, defines \textit{jus cogens} norms as those “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.” Vienna Convention on the Law of Treaties, \textit{opened for signature}, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 (entered into force, Jan. 27, 1980).


\textsuperscript{137} McDougall Report, supra note 54, at para. 30.
crimes that are prohibited at all times and in all situations.\textsuperscript{138} Under international law, any state may prosecute \textit{jus cogens} violations even if no other basis of jurisdiction exists.\textsuperscript{139} Included under \textit{jus cogens} norms are crimes against humanity, slavery, genocide, torture, and certain war crimes.\textsuperscript{140} States, including successor governments, are obligated to prosecute violators or extradite them for prosecution in other states.\textsuperscript{141} Slavery is recognized as a \textit{jus cogens} crime against humanity.\textsuperscript{142} Genocide is considered a \textit{jus cogens} offense and a crime against humanity.\textsuperscript{143} Under the Genocide Convention, acts of rape, sexual slavery, or other sexual violence can also be considered crimes of genocide.\textsuperscript{144} Rape and serious sexual violence during armed conflict can be considered torture, another \textit{jus cogens} violation.\textsuperscript{145} Finally, international law recognizes sexual slavery and sexual violence as \textit{jus cogens} war crimes in some cases.\textsuperscript{146}

\begin{itemize}
  \item \textsuperscript{138} \textit{Id.} at para. 8 (citations supplied).
  \item \textsuperscript{139} \textit{Id.} at para. 36.
  \item \textsuperscript{140} \textit{Id.} at para. 37 (citing Bassiouni, \textit{supra} note 94, at 68).
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{143} \textit{McDougall Report, supra} note 54, at para. 48 (citing the Advisory Opinion of the ICJ on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28, 1951) [hereinafter Genocide Convention]).
  \item \textsuperscript{144} \textit{Id.} at paras. 48-49 (noting that attacking female members of a protected group constitutes genocide according to Article II of the Genocide Convention).
  \item \textsuperscript{145} \textit{Id.} at para. 53.
  \item \textsuperscript{146} \textit{Id.} at para. 59. Article 27 of the Fourth Geneva Convention states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” \textit{Id.} (quoting Fourth Geneva Convention, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306). Article 76 (1) of Additional Protocol I states that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” \textit{Id} (quoting Additional Protocol I to the Fourth Geneva Convention, Dec. 12, 1977, art. 76, 16 I.L.M. 1391, 1425. According to the Nuremberg Tribunal, the Regulations annexed to the Hague Convention No. IV of 1907 attained customary international law status by at least 1939. \textit{McDougall Report, supra} note 54, at para. 60 (citing the Judgment of the Nuremberg Tribunal, \textit{reprinted in} 41 AM. J. INT’L L. 172,
cogens violations “are prohibited regardless of the nature or level of the hostilities.” According to the McDougall Report, states that violate jus cogens norms should not be able to escape liability on mere technicalities. Furthermore, the Report recommends that states drop treaty-based defenses in the interest of fairness and justice.

If they are feasible, national prosecutions of human rights violations are preferable to prosecution before international tribunals, according to the McDougall Report. However, McDougall notes that an international tribunal might be the only venue that can reflect the magnitude of the harm done if the violations are of a particularly outrageous nature or if they occurred on a massive scale, particularly when senior political or military leaders are indicted. McDougall recommends that the ICC statute be broadly interpreted to require international prosecution of crimes within the scope of its jurisdiction whenever the individual states involved are unwilling to investigate or prosecute the crimes, or whenever a states’ laws are inadequate to obtain justice for the parties. If justice cannot be served in Japanese courts, the McDougall Report suggests that the military sexual slaves seek redress in other countries’ courts that have jurisdiction over these offenses. The ATCA grants the United States such jurisdiction. McDougall stresses that “[t]his avenue should be vigorously pursued by the ‘comfort women’ as a potential forum for redress.”

218–19 (1947)).

147 Id. at para. 56.
148 See McDougall Report, supra note 54, at para. 108.
149 See id.
150 Id. at paras. 91–92.
151 Id. at para. 93.
152 Id. at para. 98.
153 McDougall Report, supra note 54, app. at para. 52. For an international suit to legitimately stand, “enabling national legislation” must be in place. Id. app. at para. 38 (emphasis added). For example, Canada has enabling legislation in its criminal code that allows the prosecution within Canada of anyone who has committed a universally condemned crime, regardless of where the crime was actually committed. Id. See Regina v. Finta, [1994] 1 S.C.R. 701.
154 McDougall Report, supra note 54, app. at para. 52 (emphasis added).
2. Impact of the ICTY's \textsuperscript{155} and ICTR's \textsuperscript{156} Recent Holdings on Wartime Rape as a Violation of International Law

In 1996, the U.N. ICTY made the historic decision to define rape as a war crime when it indicted Bosnian Serb military and police officers for the rapes of Muslim women during the Bosnian war.\textsuperscript{157} A spokesperson for the court said the indictment was historic because it focused exclusively on sexual assaults, rather than treating rape as a secondary offense.\textsuperscript{158}

The ICTR, organized in November 1994, went even further in addressing crimes of sexual violence. In addition to listing rape as a crime against humanity, "the Rwanda Statute also expressly referred to 'rape, enforced prostitution and indecent assault' as violations of Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II."\textsuperscript{159} Even so, no indictments charging sexual violence were issued until 1997, when one indictment was secretly issued.\textsuperscript{160} Inadequate witness protection constrained the


\textsuperscript{157} U.N. Court Defines Rape as a War Crime, 4 COALITION REPORT 1, (The Coalition Against Trafficking in Women) 1997, at http://www.uri.edu/artsci/wms/hughes/catw/warcrim.htm. See supra note 64 for more on CATW.

\textsuperscript{158} Id. Some feminist scholars suggest, however, that the ICTY's prohibition of rape only applies to extreme cases of ethnic cleansing and is not a general condemnation of rape as a weapon of war. Liz Philipose, The Laws of War and Women's Human Rights, 11 HYPATIA: J. OF FEMINIST PHIL. 46, 46 (1996).

\textsuperscript{159} See WOMEN2000, supra note 3 (noting that because Rwanda was classified as an internal conflict, Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II specifically applies).

\textsuperscript{160} Id.
willingness of women to testify before the ICTR.\(^{161}\) Although the procedural rules were the same for the Rwanda and Yugoslav tribunals, NGO reports suggest that many survivors of sexual violence in Rwanda feared making themselves known to local authorities.\(^{162}\)

During the conflict in Rwanda, thousands of women were subjected to acts of sexual violence, including rape, mutilation, sexual slavery, and being bought and sold among collective militia groups.\(^{163}\) Since its establishment, however, the ICTR has only arrested forty people, and handed down only seven judgments.\(^{164}\) Even though the number of prosecutions is minimal, one of those sentenced, Jean-Paul Akayesu, was the first person ever convicted of rape as an act of genocide.\(^{165}\)

3. Effect of Installation of the ICC

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.

– Kofi Annan, U.N. Secretary-General\(^{166}\)

\(^{161}\) Id.

\(^{162}\) Id.


\(^{164}\) Id.


Negotiations are currently underway for the establishment of a permanent international criminal court.\textsuperscript{167} In 1994, the International Law Commission delivered its proposed Draft Statute for an International Criminal Court, and the statute was adopted during an international conference in Rome in July 1998.\textsuperscript{168} Sexual violence is expressly included within the jurisdiction of the ICC.\textsuperscript{169} Under Article 5, the ICC's jurisdiction is limited to the most serious crimes of concern to the international community: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.\textsuperscript{170} In Article 7, crimes against humanity expressly include enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.\textsuperscript{171} In Article 8, war crimes over which the ICC has jurisdiction include grave breaches of the Geneva Conventions of August 12th, 1949, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence.\textsuperscript{172}

\textsuperscript{167} Id. Although the four Geneva Conventions of 1949 codified many of the laws of war and established responsibility for grave breaches of those laws, no international mechanism existed to enforce those principles; the ICC was conceived to prosecute such breaches. Id.


\textsuperscript{169} Rome Statute, supra note 168, art. 7, at 7, reprinted in OPPENHEIM 69 (as corrected by the proces-verbaux of 10 November 1998 and 12 July 1999).

\textsuperscript{170} Id., art. 5, at 6, reprinted in OPPENHEIM 69.

\textsuperscript{171} Id., art. 7, at 7, reprinted in OPPENHEIM 69.

\textsuperscript{172} Id., art. 7, at 8, reprinted in OPPENHEIM 69–73.
In November 1997, a U.N. Expert Group on Gender Persecution met in Toronto, Canada to make recommendations on how the Rome Statute should define sex-based crimes. The group agreed that sex crimes should not be explicitly defined, so that their legal meanings could be informed over time by the progressive interpretation of international law.

The ICC would serve to enforce the laws of war and prosecute all violators of human rights. Japan’s use of women as military sexual slaves would be prosecutable as a crime against humanity and a breach of the Geneva Convention’s prohibition on sexual violence. Unfortunately, even when the Rome Statute is ratified by the requisite sixty nations, the International Criminal Court will only be authorized to deal with crimes committed after its creation, so it will not benefit the survivors of Japan’s military brothels.

C. Results to Date in U.S. Courts

Victims of crimes committed under color of a nation’s law face enormous difficulties in bringing suit. Usually, victims are unable to sue in the state where the crimes occurred; however bringing suits in the courts of other countries is also problematic for political, diplomatic, and jurisdictional reasons.

In the early 1980s, U.S.-based human rights groups used the ATCA to establish U.S. federal jurisdiction to charge and

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173 WOMEN2000, supra note 3.
174 Id.
175 Rome Statute, supra note 168, art. 24, at 21, reprinted in OPPENHEIM, at 82.
176 Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 106 (2d Cir. 2000), cert. denied, 121 S. Ct. 1402 (2001) (reversing the district court’s dismissal on forum non conveniens grounds due to, inter alia, the U.S.’s interest, “as expressed in the . . . Torture Victim Protection Act of 1986 (TVPA), in providing a forum for the adjudication of claims of torture in violation of the standards of international law”). Wiwa, 226 F.3d at 92. The Nigerian victims in this case were allegedly imprisoned, tortured and killed by the Nigerian government at the defendant international oil company’s behest for opposing the defendant’s coercive appropriation and pollution of their land for oil exploration. Id.
177 Id. at 106 (citing Congress’ statement in passing the TVPA that condemnation of human rights abuses “provides scant comfort to victims if no other forum exists to provide them a remedy,” H.R. REP. NO. 102–367, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85.
178 Wiwa, 226 F.3d at 106.
successfully prosecute a former Paraguayan police chief accused of torturing and killing a seventeen-year-old boy in Paraguay.\footnote{Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that intentional torture conducted under the color of law, regardless of the nationality of the parties, violates customary standards of international human rights law, and therefore constitutes a violation of the domestic law of the United States). Under these circumstances, an ATCA claim arises whenever the perpetrator is properly served within U.S. borders. \textit{Id.}} However, in dicta, the Second Circuit construed the ATCA “not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”\footnote{Filartiga, 630 F.2d at 887.} The Second Circuit also noted that the ATCA had rarely been used as the basis for asserting federal jurisdiction over foreign plaintiffs and defendants because earlier Courts were reluctant to hear cases that did not assert clear violations of the law of nations.\footnote{Id. at 887–88 (stating that the ATCA has rarely been used to support jurisdiction in the past, and only recently has the use of the ATCA become more common). \textit{See e.g.}, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (alleging torture of Ethiopian prisoners); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (alleging torture, rape, and other abuses orchestrated by Serbian military leaders) (see \textit{supra} notes 6, 9–10 and accompanying text for a detailed analysis of Karadzic); \textit{In re} Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by the former president of the Philippines); Xuncax v. Gramajo, 886 F. Supp. 162 (Mass. Dist. Ct. 1995) (alleging abuses by Guatemalan military forces).} Nevertheless, the Second Circuit held that \textit{Filartiga} involved well-established, universally recognized norms of international law.\footnote{Filartiga, 630 F.2d at 887–88.} Since \textit{Filartiga}, most courts have interpreted the ATCA’s language as providing both a

The plaintiffs, Joel Filartiga and his daughter, Dolly Filartiga, were citizens of the Republic of Paraguay and political opponents of the government. \textit{Id.} at 878. The action was brought against another citizen of Paraguay (who was, at the time, the Inspector General of Police in Asuncion, Paraguay) for killing Dr. Filartiga’s seventeen-year-old son, Joelito. \textit{Id.} Joelito Filartiga was kidnapped and tortured to death, and his corpse was displayed to his family. \textit{Id.} When Dr. Filartiga tried to bring a criminal action in the Paraguayan courts against the police for the murder, Filartiga’s attorney was allegedly arrested, threatened with death, and later disbarred. \textit{Id.}

The cause of action was stated as arising under “wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against . . . Torture, and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations.” \textit{Id.} at 879. The Filartigas won a $10.4 million judgment, but to date have been unable to collect. Bill Miller & Christine Haughney, \textit{Old Law Creates Forum for War-Crimes Trials}, \textit{The Toronto Star}, Aug. 13, 2000, at WAB, available at LEXIS, Academic Universe.
private cause of action and a federal forum where aliens may seek redress for violations of international law.\textsuperscript{183}

Adding more leverage to the ATCA's new usage, Congress passed the Torture Victim Protection Act of 1986 (TVPA)\textsuperscript{184} to provide that serious violations of international law also violate U.S. domestic law.\textsuperscript{185} The court in \textit{Wiwa v. Royal Dutch Petroleum Co.} noted that passage of TVPA expressed congressional policy favoring adjudication of such suits in the United States.\textsuperscript{186}

\textsuperscript{183} See, e.g., \textit{Karadzic}, 70 F.3d at 236 ("[The] Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture."); \textit{Hilao}, 25 F.3d at 1474–75 (concluding that the section "creates a cause of action for violations of specific, universal and obligatory international human rights standards"); \textit{Xuncax}, 886 F. Supp. at 179 (stating "§ 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action").


\textsuperscript{186} See \textit{supra} notes 176–178 and accompanying text; \textit{Wiwa v. Royal Dutch Petroleum Co.}, 226 F.3d 88, 106 (2d Cir. 2000). The court noted that the TVPA indicates a congressional policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business. The TVPA in our view expresses a policy favoring our courts' exercise of the jurisdiction conferred by the ATCA in cases of torture unless the defendant has fully met the burden of showing that the Gilbert factors tilt strongly in favor of trial in the foreign forum.

\textit{Id.} (quoting \textit{R. Maganlal & Co. v. M.G. Chem. Co.}, 942 F.2d 164, 167 (2d Cir. 1991)).

In \textit{Gulf Oil Corp. v. Gilbert}, the Supreme Court set out the analysis for the common-law doctrine of \textit{forum non-conveniens} that federal courts now follow. 330 U.S. 501 (1947); \textit{superseded by} 28 U.S.C. § 1404(a) \textit{on other grounds, as explained in Quackenbush v. Allstate Ins. Co.}, 517 U.S. 706, 722, 116 S. Ct. 1712, 1724 (1996). \textit{Forum non-conveniens} gives courts the discretion in rare instances to dismiss a claim even if the court meets appropriate venue and jurisdiction requirements. \textit{Gilbert}, 330 U.S. at 507. To decide whether such a dismissal is appropriate, courts apply a two-step analysis. First, they decide whether an adequate alternative forum exists. \textit{See id.}, 330 U.S. at 506–07. If there is another forum, courts must weigh the private interests of the parties and any public interests. \textit{Id.}, 330 U.S. at 508–09. While the defendant has the burden to establish that an adequate alternative forum exists, \textit{R. Maganlal}, 942 F.2d at 167, "[t]he plaintiff's choice of forum should rarely be disturbed." \textit{Gilbert}, 330 U.S. at 508. In fact, the U.S. Supreme Court now recognizes the \textit{forum non-conveniens} doctrine only "in 'cases where the alternative forum is abroad.'" \textit{Quackenbush}, 517 U.S. at 722 (quoting \textit{American Dredging Co. v. Miller}, 510 U.S. 443, 449 n.2 (1994)).
addition to supporting such litigation procedurally, Congress expressed direct substantive support of Japanese comfort women in July 1997 when the U.S. House of Representatives resolved that the Government of Japan should issue a formal apology for its World War II war crimes and pay immediate reparations to the victims.  

As noted earlier, a class action complaint on behalf of fifteen Asian women was filed in September 2000 in the U.S. District Court for the District of Columbia, alleging that the Japanese Imperial Army used the women as sex slaves during World War II. In March 2001, the Government of Japan filed a motion to dismiss and the plaintiffs filed a Motion for Declaratory Judgment as to whether Japan can claim sovereign immunity. 

According to the Motion for Declaratory Judgment, Japan’s conduct regarding the comfort stations falls within three exceptions to the Foreign Sovereign Immunities Act (FSIA).

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187 Schmidt, supra note 1, at 166–69.

188 See supra notes 11–12 and accompanying text; infra notes 215–217 and accompanying text. According to Ryuichiro Yamazaki, a spokesman for the Japanese Foreign Ministry, the suit did not affect Japan’s position on the comfort women issue. Reuters News Service, Japan Stands Firm on U.S. Suit by “Comfort Women,” Sept. 19, 2000, at http://english.sohu.com/20000920file380,244,100009.html (last visited Oct. 13, 2001). Yamazaki stated that “[i]t is our position that this has been solved legally by the San Francisco Peace Treaty (of 1951, settling claims for war compensation) and other related treaties and documents.” Id.


190 Id. at 24.

191 28 U.S.C. §§ 1602–11 (2000); Memorandum, supra note 189, at 24–45. Customary international law indisputably holds that states are immune from the jurisdiction of the courts of another state. 28 U.S.C. §§ 1602–11 (2000). However, states are not immune from suits arising out of activities of the kind that may be carried on by private persons. Id. In the U.S, a foreign state’s immunity is determined by judicial authorities. Id. Sovereign immunity is an affirmative defense, so the burden of establishing it lies with the foreign state. 28 U.S.C. § 1604; see also H.R. Rep. No. 1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6616.

Under 28 U.S.C. § 1605, there are exceptions to immunity in certain situations: those “in which the foreign state has waived its immunity either explicitly or by
The Motion claims that because

Japan explicitly waived its immunity for war crimes committed during World War II, and because, in the alternative, Japan engaged in a commercial activity which had a direct impact in the United States and committed war crimes constituting an implicit waiver, this Court has jurisdiction over Japan for its systematic sexual enslavement of "comfort women" in state-supervised brothels during World War II.192

In support of this Motion, the Memorandum notes that Japan was on notice that it would be prosecuted for violations of the law of war193 and that several international treaties existed contemporaneously which prohibited sexual slavery and the trafficking of women and children.194 The Memorandum suggests that Japan’s efforts to focus on Korean women195 and to conceal its conduct are further evidence of its awareness that its conduct constituted prosecutable war crimes.196

According to the Memorandum, the U.S. Supreme Court

implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect,” 28 U.S.C. § 1605(a)(1), and those

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.


193 Id. at 26–27 (citing Declarations issued by President Roosevelt and Prime Minister Winston Churchill of Great Britain).

194 Id. at 27 (citing the Hague Convention, see supra note 107, and the International Convention for the Suppression of the Traffic in Women and Children of 1921, opened for signature Sept. 30, 1921, 9 L.N.T.S. 415 [hereinafter Convention]).

195 Some commentators have suggested that one of the reasons why “comfort women” were “recruited” from occupied territories was because Japan had signed the 1921 Convention, relevant provisions of which were inapplicable to colonies. According to the Memorandum, Japan was exercising “a morally and legally questionable loophole [in] international law [that] condemned the trafficking of women and children for sexual purposes.” Id. at 27–28.

196 Id. at 28 (noting that Japan’s acts of concealment include the mass murder of “comfort women” at the end of the war and the destruction of official documents on the comfort stations).
determined in 1946\(^{197}\) that, when Japan signed the Potsdam Declaration in 1945 at the close of World War II, it acquiesced to prosecution by Japanese courts for its war crimes.\(^{198}\) Thus, the Memorandum contends that Japan consented to the jurisdiction of Allied Courts over its war crimes when it signed the Potsdam Agreement, waiving its sovereign immunity.\(^{199}\) The Memorandum further states that because Japan collected money for the use of its comfort stations all over Southeast Asia, including the U.S. territory of Guam, it engaged in commercial activities of the type in which a private party can engage, which fall under the commercial activity exception to sovereign immunity.\(^{200}\)

The Memorandum also states that Japan’s sexual enslavement of women violates *jus cogens* principles of international law, and should be considered an implied waiver of sovereign immunity under the FSIA.\(^{201}\) The international community’s view of slavery has been recognized as a *jus cogens* norm by United States courts.\(^{202}\) Thus, Japan’s actions in forcing women and girls into

\(^{197}\) *Id.* at 29 (citing *In re* Yamashita, 327 U.S. 1, 10, 66 S. Ct. 340, 345 (1945), a case in which the Court sanctioned trials of alien enemies for offenses against the law of war).

\(^{198}\) One of the terms of the Declaration of Potsdam reads as follows:

We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

*Potsdam Declaration, July 26, 1945, U.S.-U.K.-China, para. 10, E.A.S. No. 493, 3 Bevans 1251.* Japan unconditionally accepted the terms of the Potsdam Declaration and surrendered to the Allies, further stating in its Instrument of Surrender, “We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith . . . .” *Instrument of Surrender, Sept. 2, 1945, at para. 6, 59 Stat. 1733, 3 Bevans 1251; Memorandum, supra note 189, at 28–29.*


\(^{200}\) *Id.* at 31–38.

\(^{201}\) *Id.* at 38; *see* discussion of *jus cogens* norms, *supra* notes 93, 135–149 and accompanying text.

sexual slavery for the Japanese military violate *jus cogens* norms as recognized by international law.

There are frightening similarities between the Japanese army’s comfort stations in World War II and the Serbian forces’ rape centers during the civil war in the former Yugoslavia. In *Kadic v. Karadzic*, a case brought against Bosnian-Serb leader Radovan Karadzic, the Second Circuit recognized that “acts of murder, rape, torture and arbitrary detention of civilians have long been recognized as violations of ‘the most fundamental norms of the law of war’ and direct violations of international law.”

The Memorandum notes that *jus cogens* norms do not depend on the consent of any individual state for their validity. The Memorandum argues that allowing a nation to use its sovereign immunity to avoid responsibility for *jus cogens* violations amounts to letting a state opt out of the most fundamental international standards of conduct.

Additionally, the Memorandum argues that *jus cogens* violations operate as implied waivers of sovereign immunity under 28 U.S.C. § 1605(a)(1), even though U.S. courts have delivered opposing positions. The Memorandum concludes that “the only way to reconcile the FSIA’s presumption of foreign sovereign
immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.\textsuperscript{207} The Memorandum also notes international outrage at the reported rapes and sexual slavery that occurred in the East Timorese-Indonesian conflict in 1999.\textsuperscript{208} This outrage demonstrates once again that the United States and other nations must hold other nations responsible for their actions, and that sovereign immunity does not apply to *jus cogens* violations.\textsuperscript{209} The foreign state claiming immunity has the burden of proving by a preponderance of the evidence that the exceptions do not apply.\textsuperscript{210}

One final consideration in deciding whether U.S. courts have jurisdiction over the Japanese military sex slave cases is whether the political question doctrine applies. A court will apply the doctrine and decline to rule on a case if it decides that the issue should be resolved by the political branches.\textsuperscript{211} Although the Supreme Court has made sweeping statements that all foreign relations matters are political questions, it stated in *Baker*\textsuperscript{212} that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."\textsuperscript{213}

\textsuperscript{207} Memorandum, *supra* note 189, at 42 (citing a Greek decision against the Third Reich which stated "[w]hen the acts of a state violate *jus cogens* rules, it cannot bona fide expect that it will be granted immunity privileges . . . . The acts of a state that violate *jus cogens* norms do not have the character of sovereign acts"). *Id.* at 44; see *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (stating that *jus cogens* norms only trump sovereign immunity when there is an express (via treaty) or implied (via conduct) waiver of immunity, and holding that Argentina implicitly waived its sovereign immunity by availing itself of U.S. courts to prosecute Siderman); see also *R. v. Bow Street Metro. Stipendiary Magis. Ex parte Pinochet Ugarte (No.1)*, 4 Eng. Rep. 897 (H.L. 1998).

\textsuperscript{208} Memorandum, *supra* note 189, at 45.

\textsuperscript{209} *Id.*

\textsuperscript{210} *Id.* at 25 (citing Aquamar S.A. *v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1290 (11th Cir. 1999)).

\textsuperscript{211} *Baker v. Carr*, 369 U.S. 186, 211 (1962) (noting that political questions often may defy the application of judicial standards, require executive or legislative discretion, or "uniquely demand single-voiced statement of the Government's views").

\textsuperscript{212} *Id.* at 211.

\textsuperscript{213} *Id.* (noting that the justiciability of a "political question" requires courts to make a delicate, case-by-case inquiry to decide "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of
Addressing foreign affairs explicitly, the Court stated that cases in this field seem invariably to show a discriminating analysis of the particular question, posed in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. 214

On October 4, 2001, as this Comment went to print, the U.S. District Court for the District of Columbia dismissed the “comfort women” suit. 215 In a memorandum opinion, U.S. District Judge Henry H. Kennedy, Jr., held that plaintiffs’ claims were barred by sovereign immunity and presented a nonjusticiable political question. 216 Plaintiffs’ attorneys immediately appealed and plan to

214 Id.
216 Court Opinion, supra note 215, at *40. The court did not decide whether the FSIA applies retroactively, holding that even if the FSIA did govern plaintiffs’ claims, none of FSIA’s exceptions apply in this case. Id. Specifically, the court decided that Japan’s operation of “comfort stations” was not a commercial activity within the meaning of the FSIA, and therefore that the commercial activity exception to sovereign immunity was not applicable. Id. at 16. Even if Japan was not entitled to sovereign immunity, the court held that plaintiffs’ claims still would be dismissed as nonjusticiable.

Id.

Judge Kennedy opined that Japan had not waived its sovereign immunity either explicitly or implicitly. Id. at *20. Noting that case law requires an explicit waiver of immunity to be unambiguous and intentional, the court concluded that Japan’s agreement with the terms of the Potsdam Declaration did not constitute an explicit waiver under § 1605(a)(1). Id. The court further held that jus cogens violations do not constitute an implied waiver under § 1605(a)(1). Citing the D.C. Circuit’s earlier decision in Princz, as establishing binding precedent, the court noted, “[a]n implied waiver depends upon the foreign government’s having at some point indicated its amenability to suit.” 26 F.3d at 1174; see discussion of Princz case, supra at note 206.

Finally, the court held that the court system was not the appropriate forum for discussions of war claim settlements. Id. at *39. The court stated “[j]ust as the agreements and treaties made with Japan after World War II were negotiated at the government-to-government level, so too should the current claims of the ‘comfort women’ be addressed directly between governments.” Id. Recently, several other district court decisions have declined to resolve issues regarding reparations for victims of the Nazi government. In re Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d 370 (D.N.J. 2001) (dismissing plaintiff’s claims as nonjusticiable political questions, holding that the Court should decline to exercise jurisdiction in the interests of international comity, and further noting that “the magnitude of World War II has placed
Even though the legal basis exists to hear such cases under the ATCA and TVPA, U.S. courts have legitimate concerns that such rulings might increase diplomatic tensions, heighten international resentments, and cause other political backlash.

IV. Conclusion

The youngest military sex slave is probably now in her early seventies, and it can take as many as twenty years to get a case before the Japanese Supreme Court. Furthermore, in all but one instance, Japanese legislative and judicial authorities have steadfastly maintained that Japan is immune from suit. Although an international criminal court would be an ideal place for the claims such as [plaintiff’s] beyond the province of this Court, and into the political realm.” Id. at 389; Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (holding “serious foreign policy concerns” are involved in allocating reparations, and reparations are not the subject of judicial discretion) “For a court now, in the light of the diplomatic history of the last fifty-five years, to structure a reparations scheme would be to express the ultimate lack of respect for the executive branch which conducted negotiations on behalf of the United States and for the Senate which ratified the various treaties which emanated from these negotiations.” Id. at 284. “One need only consider the damage which would be created if foreign nations negotiating with the United States were confronted with a situation in which a solemn pact reached with the Executive Department and ratified by the Senate could be undone by a court.” Id. at 285. See also Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 483 (D.N.J. 1999) (dismissing plaintiff’s claims on the ground that forced labor claims arising out of World War II raise nonjusticiable political questions).


218 Miller & Haughney, supra note 180, at WAB (noting that the District of Columbia Circuit Court of Appeals, the same court which will rule on the comfort women motion, refused to hear an ATCA claim in a 1984 case involving the Palestine Liberation Organization and an Israeli bus attack). The District of Columbia appellate panel included Robert Bork, who is now a senior fellow with the American Enterprise Institute. Id. Bork believes U.S. courts should be wary of injecting themselves into international disputes because “[t]he prosecution of such cases certainly has the potential to interfere with United States foreign policy.” Id.

219 Totsuka, supra note 74, at 198. For a discussion of Japanese court structure, see supra note 99.

220 See supra notes 115–126 and accompanying text (describing Japan’s defenses to suits by former sex slaves on the grounds of sovereign immunity and absolution through peace treaties).
victims to seek reparation, the ICC, even when ratified, cannot hear cases arising from acts that occurred before it was created.\footnote{221} If the cases are triable in the United States under the ATCA, should they be so tried? Jennifer Green, an attorney at the Center for Constitutional Rights, has been involved in nine of the thirteen cases brought by the Center under the ATCA.\footnote{222} Green believes using the ATCA to prosecute human rights violations in the United States is key to developing an international system of accountability.\footnote{223}

Others are critical of the ATCA because it allows courts to apply international laws that have not been ratified by Congress. Jack Goldsmith, a University of Chicago international law professor, stated that international laws are ""being made by U.S. federal courts and they're making [them] on the basis of treaties, resolutions and the writings of academics, to which the U.S. has not consented. And even if it has consented, [they] ha[ve]n't been made part of [U.S.] domestic law.""\footnote{224}

According to Anne-Marie Slaughter, a Harvard professor of international law, the newest cases applying the ATCA, such as the comfort women case, are going to be very important ""because there is a real tension between human rights and diplomacy, especially when you have the sitting heads of state.""\footnote{225} Slaughter warns that if the United States rejects international courts and tries foreigners at home, global tension will increase.\footnote{226} Slaughter takes seriously ""the likelihood that we will see reciprocal action in foreign courts.""\footnote{227}

According to David Scheffer, a former U.S. Ambassador at Large for War Crimes Issues, an international criminal court is in the best interests of the United States.\footnote{228} Shaffer believes that the

\footnote{221} Rome Statute, supra note 168, art. 24, at 21, reprinted in \textit{Oppenheim}, at 82.
\footnote{222} Amon, supra note 6.
\footnote{223} Id.
\footnote{224} Id.
\footnote{225} Id.
\footnote{226} Id.
\footnote{227} Id.
long-term vision of the United States should be prevention “through effective national law enforcement joined with the deterrence of an international criminal court.”229 An international criminal court could ensure that crimes like Japan’s military sex slavery are punished without compromising America’s global position. In the absence of an effective international criminal court, U.S. courts, although reluctant to serve in this capacity, may well be the best forum to hear the cases of the Japanese comfort women.

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229 Id. Scheffer also pointed out that

The rule of law, which the United States has always championed, is at risk again of being trampled by war criminals whose only allegiance is to their own pursuit of power. We believe that a core purpose of an international criminal court must be to impose a discipline of law enforcement upon national governments themselves to investigate and prosecute genocide, crimes against humanity, and war crimes; failing that the permanent court will stand prepared to undertake that responsibility. Just as the rule of extradition treaties is “prosecute or extradite,” the rule governing the international criminal court must be “prosecute nationally or risk international prosecution.” That discipline on national systems to fulfill their obligations under international humanitarian law has been and will continue to be central to the U.S. position.

Id.