

COMFORT WOMEN DURING WWII: ARE U.S. COURTS A FINAL RESORT FOR JUSTICE?

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INTRODUCTION

On September 18, 2000, a group of fifteen former “Comfort Women”¹ filed a class action lawsuit against Japan in the United States District Court for the District of Columbia (“District Court”), seeking monetary compensation and a declaration of crimes against humanity by Japan.² The group of women³ alleged that the Japanese military kidnapped, coerced, or deceived them into sexual slavery for Japanese soldiers during the 1930s and 1940s.⁴ Although the women are not citizens of the United States, they were able to file the suit in

1. See Kyeyoung Park, Comment, *The Unspeakable Experience of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567, 568-69 (2000) (explaining that the term “Comfort Women” is a Japanese euphemism for sex slaves of Japanese soldiers and refers to those women recruited by the Japanese military for that purpose).

2. See Elizabeth Amon, *Coming to America*, 23 NAT'L L.J. NO. 9, Oct. 23, 2000, at A1 (reporting that on September 18, 2000, a group of women filed a class action lawsuit against the Japanese government alleging that they were sex slaves of Japanese soldiers during World War II).

3. See *Last Battle of WWII*, KOREA HERALD, May 19, 2001, available at 2001 WL 20828504 [hereinafter *Last Battle*] (stating that the group of women includes six South Koreans, four Chinese, four Filipinos, and one Taiwanese).

4. See Bill Miller, *U.S. Resists 'Comfort Women' Suit*, WASH. POST, May 14, 2001, at A19 (reporting that, according to the group of women, the Japanese military forced them into sexual slavery). They were kept in inhumane conditions, raped, physically abused, and tortured by the Japanese soldiers. *Id.* See also Tong Yu, Comment, *Recent Development: Reparations For Former Comfort Women Of World War II*, 36 HARV. INT'L L.J. 528, 528 (1995) (estimating that one-hundred thousand to two-hundred thousand women were mobilized from Korea, China, the Philippines, and other Asian countries by force or deceit to provide sexual services to Japanese soldiers). See generally Timothy Tree, Comment, *International Law: A Solution Or A Hindrance Towards Resolving The Asian Comfort Women Controversy?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 461, 466-68 (2000) (providing background regarding Japan's use of Comfort Women during WWII). The Japanese military was extensively involved in the mass mobilization of Comfort Women, victimizing two-hundred thousand women from several Asian countries during the 1930s and 1940s. *Id.*

the District Court under the Alien Tort Claims Act (“ATCA”),⁵ which allows foreigners to bring claims against each other in United States courts.⁶

In May of 2001, the Bush Administration asked the Department of Justice to file an *amicus curiae* brief urging the District Court to dismiss the class action lawsuit.⁷ In its brief, the United States government explicitly supported Japan’s motion to dismiss the case stating that Japan is entitled to sovereign immunity under the Foreign Sovereign Immunities Act (“FSIA”).⁸ Thus, under the FSIA, United States courts cannot establish jurisdiction over the lawsuit filed by the former Comfort Women.⁹ The United States government further warned that if the District Court asserted jurisdiction over the Comfort Women’s suit, it may adversely affect relations between the

5. See Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) [hereinafter ACTA] (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). See generally Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350), Providing for Federal Jurisdiction Over Alien’s Action for Torts Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, 398-400 (1993 & Supp. 2000) [hereinafter *Construction & Application*] (discussing the scope and background of the ATCA under the federal jurisdiction of the United States).

6. See Miller, *supra* note 4 (explaining that the ATCA is a federal law granting foreigners the right to file federal lawsuits); see also Katha Pollitt, *Cold Comfort*, NATION, June 11, 2001, available at 2001 WL 2132649 (reporting that under the ATCA, aliens can file a lawsuit against one another in the United States courts for human rights violations).

7. See Miller, *supra* note 4 (reporting that the Bush administration has intervened with the Comfort Women’s class action lawsuit by filing a statement of interest urging the court not to hear the case).

8. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994 & Supp. 1999) [hereinafter FSIA] (providing that a foreign state is immune from jurisdiction of the courts of the United States unless the action of the foreign state is subject to one of the exceptions set forth in sections 1605 and 1607 of the FSIA, notwithstanding existing international treaties to which the United States is a party at the time of the enactment of the statute).

9. See Miller, *supra* note 4, at A19 (reporting that lawyers for the United States government argued that the District Court lacked jurisdiction over the case because Japan is entitled to sovereign immunity). The United States government also expressed its concerns that if the court decided to hear the case, it would open the door to potential lawsuits against the United States government in other countries. *Id.*

United States and Japan.¹⁰ On October 4, 2001, the District Court dismissed the suit for lack of jurisdiction over Japan under the FSIA.¹¹ In light of this decision, however, the Comfort Women should appeal and could possibly prevail by restructuring their arguments to overcome the hurdles imposed by the FSIA.¹²

This Comment reviews the legal merits of the class action lawsuit filed by the former Comfort Women in the District Court.¹³ Part I of this Comment briefly discusses the development of Comfort Women lawsuits outside of the United States that left these women no alternative but to seek relief in United States courts.¹⁴ This section discusses the history and future prospects of Comfort Women lawsuits in Japan¹⁵ and examines the possibility of success of existing Comfort Women lawsuits in international tribunals.¹⁶ Part II discusses the general construction of the ATCA and the FSIA by reviewing the statutes and related case law. This section then

10. *See id.* (reporting that court action regarding the Comfort Women in the United States would damage U.S.-Japan relations). *But see* Pollitt, *supra* note 6 (criticizing the United States government for failing to comprehend the significance of the Comfort Women case as a critical step to achieving human rights development while blatantly pursuing self-interests in U.S.-Japan relations).

11. *See* Joo v. Japan, Civ. A. 00-02233, 2001 U.S. Dist. LEXIS 15970, at *1 (D.D.C. Oct. 4, 2001) (citing Japan's successful motion to dismiss the Comfort Women's complaint).

12. The court's opinion on the hearing for Japan's motion to dismiss was not available when this Comment was being written. Thus, the legal analysis in this Comment is based on the parties' pre-trial motions and precedents.

13. *See* discussion *infra* Part III (analyzing the merits of the class action lawsuit in light of the FSIA and ATCA).

14. *See generally* Tree, *supra* note 4, at 475-80 (discussing the plaintiffs' constant defeat in Japanese domestic courts and the difficulty of bringing successful claims in the international adjudication system); *see also* Park, *supra* note 1, at 587-91 (identifying the prior lack of successful Comfort Women lawsuits in Japanese courts, and the extreme difficulty of bringing successful lawsuits in the future); Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 43-44 (2000) (stating that although Japan conceded its use of the Comfort Women system during and before World War II, it still vigorously defended the lawsuits filed by the former Comfort Women).

15. *See* discussion *infra* Part I.A (discussing the history and potential for success of Comfort Women lawsuits in Japan).

16. *See* discussion *infra* Part I.B (discussing the history and the future prospect of Comfort Women lawsuits in international tribunals).

discusses the applicability of the FSIA in relation to the construction of the ATCA.¹⁷ Part III discusses the legal merits of the lawsuit by focusing on whether the plaintiffs can obtain jurisdiction in United States courts despite Japan's claim of sovereign immunity under the FSIA.¹⁸ Part IV of this Comment discusses how the plaintiffs can better utilize the factual and legal allegations in their claims to convince the Court of Appeals or Supreme Court to deny Japan sovereign immunity under the FSIA by recommending alternative legal arguments that the plaintiffs can assert on appeal.¹⁹

17. See Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2129 (1995) (noting that the ATCA should not be interpreted in isolation, rather it should be examined in connection with the FSIA).

18. Although Japan raised several other issues in its motion to dismiss the complaint, they are not relevant to this Comment. See Japan's Motion to Dismiss at 1-2, *Joo v. Japan*, 2001 U.S. Dist. LEXIS 15970 (D.D.C. Oct. 4, 2001) (Civ. A. 00-02233) [hereinafter Motion to Dismiss] (arguing that there are at least seven reasons to bar the plaintiff's complaint). Those reasons are:

[F]irst, Japan is entitled to sovereign immunity; second, Japan lacks the minimum contacts required to assert personal jurisdiction over it; third, the issue of World War II reparations is a non-justiciable political question that has been entrusted to the political branches of this and other nations to be resolved through government-to-government negotiations; fourth, adjudication of those claims would disrupt the comity of nations; fifth, the complaint should be dismissed under the doctrine of *forum non conveniens*; sixth, plaintiffs' claims are time-barred; and seventh, plaintiffs have no private right of action under the Alien Tort Claims Act or federal common law to enforce customary international law.

Id.; See also Statement of Interest of the United States of America at 6-21, *Joo v. Japan*, 2001 U.S. Dist. LEXIS 15970 (D.D.C. Oct. 4, 2001) (Civ. A. 00-02233) [hereinafter Statement of Interest] (arguing extensively that Japan is entitled to sovereign immunity under the FSIA, thus, the case should be dismissed for lack of jurisdiction). See generally William F. Webster, Comment, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109, 1109-48 (1988) (listing the limitations that govern the application of the ATCA in relation to the FSIA).

19. See discussion *infra* Part IV.A (recommending alternative legal arguments for obtaining jurisdiction over Japan in the United States courts under the FSIA).

I. BACKGROUND

A. COMFORT WOMEN LITIGATION IN JAPAN

Since three former Comfort Women from Korea filed a landmark lawsuit against the Japanese government in the Tokyo District Court in December 1991,²⁰ many other Comfort Women from several different countries have sought an opportunity to appear before Japanese courts to seek compensation from the Japanese government.²¹ Despite the increasing number of cases filed in Japanese domestic courts and various alternative claims brought under different legal authorities in Japan over the past ten years, none of the Comfort Women seeking redress from the Japanese government have been successful in Japanese courts.²²

In fact, the only suit that ruled in favor of the Comfort Women was later overturned by Japan's High Court.²³ In 1998, one Japanese court ruled against the Japanese government for the first time in history by ordering a monetary award to the plaintiffs, but at the same time refusing to order the government to make an official apology.²⁴ Furthermore, the monetary award was deemed a punitive

20. See Park, *supra* note 1, at 587-88 (stating that three former Korean Comfort Women broke their decades of self-imposed silence by revealing their experiences in Japanese Comfort Women stations during World War II and filing an unprecedented lawsuit against the Japanese government for damages incurred during their sexual enslavement).

21. See *id.* (stating that since the first lawsuit in 1991, Comfort Women have filed more than fifty lawsuits).

22. See Fisher, *supra* note 14, at 46 (concluding that the plaintiffs' litigation efforts in Japan have been unsuccessful to date).

23. Compare Taihei Okada, *The Comfort Women Case: Judgment of Apr. 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan*, 8 PAC. RIM. L. & POLICY J. 63, 63 (1999) (stating that the Yamaguchi District Court decided in favor of the Korean Comfort Women and awarded them monetary damages); with *High Court Reverses Ruling Favoring Comfort Women*, DAILY YOMIURI, Mar. 30, 2001, at 1 (reporting that the Hiroshima High Court reversed the ruling, which ordered the Japanese government to pay three hundred thousand yen to each of the three plaintiffs by holding that the Japanese government is not legally obliged to apologize or pay monetary compensation in connection with the military's use of Comfort Women).

24. See Okada, *supra* note 22, at 63 (explaining that while the lower Japanese court awarded monetary damages to the Comfort Women, it dismissed their

fine imposed on the public officers for breach of their official duties rather than compensatory damages for the women's suffering during the sexual enslavement.²⁵ The Hiroshima High Court eventually vacated this decision and reversed the ruling that awarded monetary damages to the plaintiffs.²⁶

In addition, the future prospects of Comfort Women lawsuits in Japanese courts do not seem promising.²⁷ Unlike Germany in its post-war reparation efforts,²⁸ Japan has yet to enact new legislation requiring the Japanese government to compensate victims of its war crimes.²⁹ Furthermore, plaintiffs can hardly expect Japanese courts to

demands for an official apology).

25. See Fisher, *supra* note 14, at 45 (explaining that the court awarded three hundred thousand yen to each plaintiff based on the fact that the Diet failed to enact a necessary law to correct the past violation of human rights within a reasonable time period after the Japanese government, in 1993, admitted that the Imperial state was involved in the use of the Comfort Women system during World War II). The court held that the Diet's failure to enact a necessary law violated the State Liability Act, which states that if a person is injured by the omission of public officers' professional duty, that person is entitled to compensation. *Id.*

26. See *High Court Reverses Ruling Favoring Comfort Women*, *supra* note 22, at 1 (noting that the High Court reversed the decision by holding that the Japanese government is not legally obliged to apologize or pay monetary compensation when the use of the Comfort Women was mainly attributed to the military). A government official informed the Court that compensation should only be paid when constitutional guarantees have been breached, and that such instances are rare. *Id.*

27. See Tree, *supra* note 4, at 475-76 (predicting that Comfort Women lawsuits in Japanese courts will never be successful due to the frustratingly slow legal procedure of the Japanese legal system where a party can appeal twice to the Supreme Court of Japan). Time is the biggest enemy to the Comfort Women who are already elderly and may not live long enough to see their claims finally settled in Japanese courts. *Id.*

28. See Yu, *supra* note 4, at 537-38 (stating that Germany admitted its obligation to compensate war crime victims after World War II, and passed several measures to make fifty billion dollars in post-war reparations). The German government also adopted a program to compensate individual victims of Israel in the Luxembourg Treaty. *Id.*

29. See *id.* at 538-39 (criticizing Japan for paying less than one-and-a-half billion dollars in reparations to its war victims and for not adopting an official reparation program). The Japanese government continues to deny that it has an obligation to directly compensate individual victims, however, it did propose a privately funded reparation program managed by the Japanese Red Cross. *Id.* at 539. See also Tree, *supra* note 4, at 474 (noting that in order to deny any form of

be impartial in their rulings³⁰ and they often face insurmountable technical barriers to establish standing in Japanese domestic courts.³¹ As a result, successful resolution of lawsuits in Japanese domestic courts during the lifetimes of the former Comfort Women is almost impossible, unless the Japanese government takes legislative or executive action regarding reparations for the former Comfort Women.³²

B. THE COMFORT WOMEN'S CLAIMS IN INTERNATIONAL TRIBUNALS

Considering the apparent impenetrability of the Japanese judicial system to successful lawsuits, the Comfort Women have few alternatives in obtaining reparations from the Japanese government in their lifetimes.³³ One of the alternatives listed under the United Nations Charter is to request the arbitration of these claims.³⁴

legal responsibility toward the Comfort Women, the Japanese government explicitly clarified that the Asian Women's Fund is not a government institution).

30. See Fisher, *supra* note 14, at 36 (stating that Japanese courts have been extremely hostile toward the plaintiffs in Comfort Women lawsuits, apparently foreclosing any possibility of real judicial relief in Japan); see also Tree *supra* note 4, at 476 (questioning whether plaintiffs can trust Japanese judges to be fair and impartial considering the *de facto* impunity by the Japanese judicial system).

31. See Yu, *supra* note 4, at 536 (explaining that the lawsuits filed in Japanese courts will fail on procedural grounds because the statute of limitations for civil claims is twenty years); see also Park, *supra* note 1, at 591 (providing that the Japanese prosecutor's office rejected a complaint requesting a criminal investigation by the twenty seven former Korean Comfort Women on the grounds that the statute of limitations expired and that the insufficiency of the complaint relating to details about the perpetrators). *But see* Yu, *supra* note 4, at 537 (identifying that the German legislature, in its post-war restitution efforts, suspended the statute of limitations for prosecuting the most serious kind of offenses).

32. See Yu, *supra* note 4, at 536 (emphasizing that in spite of the legal merits of the former Comfort Women's lawsuits, they will not be able to obtain adequate remedies under the current Japanese judicial system unless the lawsuits are supported by legislative or executive action).

33. See Tree, *supra* note 4, at 476 (noting that the former Comfort Women have few alternatives available for relief due to the seemingly unpromising resolution of their case in the Japanese judicial system).

34. See U.N. CHARTER art. 33, para. 1 (providing several methods for settling disputes between states such as negotiation, mediation, arbitration, and judicial settlement), available at <http://www.icj->

Accordingly, in July 1994, the Korean Council for the Women Drafted for Military Sexual Slavery by Japan (“Korean Council”) announced that it would file a complaint in the Permanent Court of Arbitration in The Hague (“Permanent Court of Arbitration”).³⁵ Under the system of the Permanent Court of Arbitration, both Parties must voluntarily agree to attend the arbitration and accept the eventual resolution.³⁶ The Japanese government officially rejected the Korean Council’s demand to agree to the arbitration.³⁷ Therefore, absent a change in position by the Japanese government, the Comfort Women are not entitled to arbitration under the jurisdiction of the Permanent Court of Arbitration.³⁸

Another possible alternative for the Comfort Women is to bring the suit before the International Court of Justice (“ICJ”).³⁹ However, under the ICJ’s jurisdiction, individual plaintiffs do not have standing to file suit against a State.⁴⁰ Accordingly, even though an

[cij.org/ijwww/ibasicdocuments/ibasictext/ibasicunchart.htm](http://www.icj-cij.org/ijwww/ibasicdocuments/ibasictext/ibasicunchart.htm) (last visited Aug. 11, 2001).

35. See *Tree*, *supra* note 4, at 476-77 (stating that the Korean Council tried to obtain declaration under the power of the Permanent Court of Arbitration by declaring that Japan was obliged to pay reparations to the individual women who were subjected to forced prostitution).

36. See *id.* at 477 (stating that the Permanent Court of Arbitration would be able to resolve the dispute if the Japanese government ever agrees to bring the Comfort Women case to the jurisdiction of the Court).

37. See *id.* (reporting that the Japanese government formally rejected the Korean Council’s demand for arbitration on January 24, 1995).

38. See *id.* (explaining that the Permanent Court of Arbitration would be able to rule only if the Japanese government ever agreed to hear this issue under the Court’s jurisdiction).

39. See *International Court of Justice 1946-1996: Foreword*, (describing that the charter of the United Nations created the International Court of Justice, which acts as a world court and is the principal judicial organ of the United Nations), at <http://www.icj-cij.org/ijwww/igeneralinformation/ibook/Bbookframepage.htm> (last visited Oct. 15, 2001).

40. See Statute of the I.C.J., June 26, 1945, arts. 34, 59 Stat. 1055, 33 U.N.T.S. 993 (declaring that only states can be parties to a suit under ICJ’s jurisdiction), available at <http://www.icj-cij.org/ijwww/ibasicdocuments/Basetext/istatute.htm> (last visited Oct. 14, 2001) [hereinafter ICJ]; see also *International Court of Justice 1946-1996: The Parties* (emphasizing that, however well founded a case may be, the ICJ cannot entertain cases filed by individuals because it must operate within its constitutional limits), at <http://www.icj-cij.org/ijwww/igeneralinformation/ibook/Bbookframepage.htm> (last visited Oct.

individual party may establish a cause of action under international law,⁴¹ the individual party cannot independently bring a case to the ICJ, unless a State presents the case on the individual's behalf.⁴² The feasibility of the ICJ hearing a particular case is largely contingent on the State's willingness to take up the case for its citizen.⁴³ Thus, regardless of the merits of the Comfort Women's case, the women would have to obtain representation from their respective States before the ICJ would even consider hearing their claims.⁴⁴

Even if the Comfort Women's governments agreed to bring their cases before the ICJ, the Comfort Women are still likely to face

17, 2001) [hereinafter *The Parties*].

41. See *Tree*, *supra* note 4, at 480-91 (articulating the legal merits of the Comfort Women cases under international law). The Comfort Women should be able to show that Japan violated various international agreements such as the International Labor Organization Convention 29, which prohibits forced labor, the 1921 Trafficking Convention that prohibits trafficking in women and children for prostitution, and customary international law concerning slavery and slave trade. *Id.* See also Statute of the I.C.J. June 26, 1945, art. 38, para. 1, 59 Stat. 1055, 33 U.N.T.S. 993 (providing that under the ICJ's jurisdiction, international law can be derived from international conventions, international custom generally accepted as law, "general principles of law recognized by civilized nations," and lastly, "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."), available at <http://www.icj-cij.org/icjwww/basicdocuments/Basetext/istatute.htm> (last visited Oct. 15, 2001).

42. See *The Parties*, *supra* note 39 (distinguishing that unlike institutions that can hear claims of individuals such as the Court of Justice of the European Communities in Luxembourg or the European Court of Human Rights in Strasbourg, the ICJ cannot hear a case unless both parties are States).

43. See *id.* (emphasizing that, in claims regarding private interests, the ICJ can establish jurisdiction over such claims only if a State represents its nationals and brings a suit against another State, therefore, the dispute between an individual and a state effectively becomes a dispute between the two States). *But see Tree*, *supra* note 4, at 478-79 (identifying that Korea is unwilling to bring a lawsuit against Japan before an international forum because of the uncertain outcome). Korea would be subject to counter lawsuits by Japan on other contentious issues arising between the two countries. *Id.* at 479. *Cf.* Takuji Kawada, *Kim Says Apology Sought: More than Compensation*, DAILY YOMIURI, Feb. 22, 1993, at A2 (reporting that the South Korean Kim Young Sam administration of South Korea announced that the Korean government would not seek monetary compensation from Japan for the Comfort Women, however, the Korean government would insist that Japan make a comprehensive formal apology).

44. See *supra* notes 39-41 and accompanying text (describing the burdens an individual plaintiff faces in bringing a suit to the ICJ).

another legal obstacle.⁴⁵ When Japan ratified the charter of the ICJ, it expressly included the reservation that it would not be subject to any claims arising from events prior to ratification.⁴⁶ In fact, the vast majority of the ICJ's signatory members ratified the court's charter with certain reservations, thereby undermining the power of the ICJ to effectively resolve international disputes.⁴⁷ Since the Comfort Women face the additional burden of overcoming the ICJ's lack of subject matter jurisdiction over claims arising from Japan's actions that predated its ratification of the ICJ's charter,⁴⁸ it is unlikely that the ICJ will hear the Comfort Women claims.

In summary, the Comfort Women have exhausted all of the legal options available to them outside the United States. As discussed above, the unfeasibility of various alternatives both in Japanese courts and in international tribunals leaves the Comfort Women with no other choice but to resort to United States courts for relief.

II. FEDERAL STATUTES RELEVANT TO THE CLASS ACTION LAWSUIT

Since the Comfort Women brought the lawsuit under the ATCA, and Japan's entitlement to sovereign immunity under the FSIA is at issue, it is critical to first review these statutes.

A. THE ATCA: MODERN STATUTORY SCHEME

The ATCA provides that "[t]he district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United

45. See *infra* notes 45-47 and accompanying text (discussing the reservations of immunity of several signatories to the ICJ Charter, which undermined the authority of the ICJ).

46. See *Tree*, *supra* note 4, at 478 (identifying that Japan expressly included the reservation so that it would be sheltered from any liability related to World War II). Since Japan ratified the charter of the ICJ after World War II, the ICJ lacks jurisdiction over any claims arising from Japan's use of the Comfort Women system during World War II. *Id.*

47. See *id.* (stating that the ICJ members' reservations have led to the ineffective enforcement of international law in the ICJ, thereby putting the Court's ability to resolve international disputes in doubt).

48. See *supra* note 45 and accompanying text.

States.”⁴⁹ The ATCA was initially a provision of the Judiciary Act of 1789, enacted by the first United States Congress, but Congress only codified the ATCA in 1948.⁵⁰ In recent years, the ATCA’s primary function has been to provide a forum in the United States for cases involving fundamental human rights violations such as torture by state officials.⁵¹

Establishing jurisdiction under the ATCA is subject to various limitations. In general, the district courts have held that the ATCA does not create an independent cause of action.⁵² The ATCA merely grants the courts jurisdiction to adjudicate alien’s suits arising from already existing causes of action under the law of nations or a treaty of the United States.⁵³ Accordingly, the Second Circuit Court of

49. 28 U.S.C. § 1350 (1994).

50. See *Construction & Application*, *supra* note 5, at 399 (stating that the Judiciary Act of 1789 provided the district courts of the United States with jurisdiction over alien torts claims arising from the violation of an international treaty or the law of nations). The authority for the promulgation of the ATCA can be found under section 2 of Article III of the United States Constitution, which authorizes Congress to grant federal jurisdiction over cases arising under international treaties to the district courts. *Id.* at 400. See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (stating that providing aliens with access to the United States district courts is a valid exercise of congressional power, and therefore denying aliens this access violates the jurisdictional provisions of Article III of the Constitution).

51. See, e.g., *Hilao v. Marcos*, 25 F.3d 1467, 1473 (9th Cir. 1994) (holding that United States courts had jurisdiction under the ATCA to adjudicate claims brought by family members of Philippine citizens allegedly tortured, kidnapped, and executed); see also *Filartiga*, 630 F.2d at 889 (allowing for the adjudication of a claim arising from human rights violations involving torture).

52. See *Construction & Application*, *supra* note 5, at 407 (identifying that at least five circuit courts have explicitly or implicitly stated that the ATCA does not create new causes of action).

53. See, e.g., *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992) (reasoning that the ATCA is only a jurisdictional statute and does not create a cause of action); *Goldstar S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (explaining that courts have interpreted the ATCA as a jurisdictional statute only); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989) (stating that the ATCA serves only as an entrance to federal courts and does not provide plaintiffs a cause of action); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1378 (W.D.N.Y. 1985) (expressing that the ATCA’s provisions are merely jurisdictional and do not create a cause of action); *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 545 (D.D.C. 1981) (holding that in order to seek relief under the ATCA, the plaintiff must prove that a cause of action exists under

Appeals has suggested that courts should more closely review the merits of each case in the preliminary stages to determine whether the plaintiff can meet the ATCA's jurisdictional requirement.⁵⁴ Furthermore, many circuits have held that in order to establish jurisdiction under the ATCA, the case must present such "extraordinary circumstances" that it shocks the court's conscience, in addition to adequately demonstrating the violation of international law or a treaty.⁵⁵

As for subject matter jurisdiction, the courts have held that the ATCA invokes jurisdiction only for conventional tort claims seeking monetary damages.⁵⁶ These claims are distinguished from claims arising under contract or seeking injunctive relief.⁵⁷ The courts are, however, divided in construing the phrase "violation of law of nations"⁵⁸ in the ATCA.⁵⁹ For example, the District Court for the District of Columbia has consistently held that international law must

the law of nations or in the treaties of the United States). *But see* Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (pointing out that some courts have interpreted the ATCA to create both a jurisdictional basis and a cause of action); *Hilao*, 25 F.3d at 1475 (stating that it is not necessary that the international law in question provide a plaintiff with a specific right to sue, thus, all that is required to invoke the ATCA is a violation of the laws of nations).

54. *See Filartiga*, 630 F.2d at 887 (stating that "the paucity of suits successfully maintained under the [ATCA] is readily attributable to the statute's requirement of alleging a 'violation of the law of the nations' at the jurisdictional threshold.>").

55. *See Construction & Application*, *supra* note 5, at 409 (identifying that several courts have required that the plaintiff demonstrate the "extraordinary circumstances" of the case so that the plaintiff's allegation must shock the conscience of the court); *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (holding that the ATCA applies only to cases where a plaintiff alleges shockingly egregious violations of customary international law).

56. *See generally Construction & Application*, *supra* note 5, at 410-11 (identifying that relief sought in district court is limited to monetary damages and that, in general, injunctive relief will can only be granted where the defendant's actions resulted in a tortious violation of international law as specified in the ACTA).

57. *Id.*

58. 28 U.S.C. § 1350 (1994).

59. *See generally Construction & Application*, *supra* note 5, at 412-13 (stating that courts have differed in their interpretation of the ATCA's "violation of the law of nations" language).

expressly provide for a private right of action.⁶⁰ Under this view, a mere violation of international law by the commission of a tortious act would not be sufficient to invoke jurisdiction. Instead, the plaintiff would have to demonstrate that the international law at issue expressly provides for a private right of action.⁶¹ However, in recent cases, more courts have either expressly held or implied that the international law in dispute need not provide an express private right of action in order for plaintiffs to invoke jurisdiction in alien tort actions.⁶² These courts maintain that the violation of a standard of international law inherently violates human rights, which, if proven, creates standing for private individuals.⁶³

Persons or entities who are not citizens or nationals of the United States have no right of action under the ACTA.⁶⁴ Furthermore, the courts have held that plaintiffs have standing to bring a suit under the ATCA if they can prove that the defendant's violation of human rights caused them injury.⁶⁵ Lastly, the plaintiff must be personally

60. *See, e.g.,* *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 545 (D.D.C. 1981) (holding that in cases brought under ATCA, the plaintiff must prove that the international law in question expressly provides a private right of action); *Pauling v. McElory*, 164 F. Supp. 390, 393 (D.D.C. 1958) (dismissing a case where the international laws that the plaintiff relied on provided only sovereigns, not individuals, a legal right of action).

61. *See Tel-Oren*, 517 F. Supp. at 547-48 (stating that the plaintiff could not invoke jurisdiction under the ATCA, because he had failed to show that the international laws in question provided for private rights of action).

62. *See Construction & Application, supra* note 5, at 413 (identifying that at least seven different circuit courts have held that it is not necessary for the international law in question to contain an express provision for the United States courts to assert jurisdiction under the ATCA).

63. *Id.*; *See, e.g. Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (holding that plaintiffs need not prove that international law provides an express private right of action because no international law clearly creates or defines civil action, and to require such an express provision under international law would nullify the ATCA's jurisdiction over tort suits involving the law of nations).

64. *See Miner v. Begum*, 8 F. Supp. 2d 643, 644 (S.D. Tex. 1989) (holding that non-alien plaintiffs cannot invoke federal jurisdiction under the ATCA regardless of the allegation's merits); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (explaining that it must be established that the plaintiff is an alien before a court in the United States may assume jurisdiction over the claim).

65. *See Construction & Application, supra* note 5, at 448 (stating that a plaintiff has standing to sue under the ATCA where he or she alleges personal

injured and must bring the suit on their own behalf.⁶⁶

For those subject to suit under the ATCA, courts have consistently held that torts committed by private actors do not constitute international torts under the ATCA.⁶⁷ Therefore, private actors cannot be sued under the ATCA.⁶⁸ The rationale for this is that only torts committed by state actors are significant enough to threaten the stability of the international community.⁶⁹ However, while only state actors can be named as defendants in suits seeking jurisdiction under the ATCA, the courts have faced questions as to which state actors are immune from civil liability under the notion of sovereign immunity and thus not subject to jurisdiction under the ATCA.⁷⁰

injury); *see also* *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 369 (E.D. La. 1997), *aff'd*, 197 F.3d 161, 167 (5th Cir. 1999) (holding that an Indonesian citizen had standing under the ATCA to bring claims for human rights violations and cultural genocide, where the plaintiff alleged that he had been personally injured by human rights abuses). *Cf. Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 10 (D.D.C. 1998) (holding that a non-governmental organization seeking to promote human rights of Algerian women could be allowed as a plaintiff because the organization was able to show injury in fact and because the presence of the organization-plaintiff would not cause prejudice).

66. *See Pauling v. McElroy*, 278 F.2d 252, 254 (D.D.C. 1960) (stating that the plaintiff's standing to sue could not arise from general and indefinite allegations of injury, but rather the plaintiff must show that he has sustained direct injury as a result of defendant's tortious conduct); *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 192 (D. Mass. 1995) (holding that under the ATCA, alien plaintiffs could not bring a suit on behalf of their relatives who were allegedly tortured or arbitrarily detained).

67. *See Rabkin, supra* note 17, at 2127-29 (stating that the courts have consistently held that torts committed by private actors do not constitute a tort within the meaning of the ATCA). *But see Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995) (arguing that the defendant, who allegedly committed acts of genocide and violated the laws of war codified in four Geneva Conventions, could be sued under the ATCA regardless of whether the defendant was a state or private actor).

68. *See Rabkin, supra* note 17, at 2127-29.

69. *See id.* at 2127 (explaining that even though murder may be unlawful in every nation, murder committed by one civilian against another does not jeopardize the stability of the world community); *see also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (9th Cir. 1987) (stating that torture committed by a private actor would not invoke jurisdiction under the ATCA, because at present, the international community does not recognize that acts of torture committed by private actors violate the fundamental principles of international law).

70. *See discussion infra* Part II.B (discussing the construction of the FSIA).

Accordingly, the following section discusses the FSIA and how it limits application of the ATCA.

B. THE FOREIGN SOVEREIGN IMMUNITIES ACT

The history of granting immunity to foreign sovereigns in the United States traces back to a case decided by the Supreme Court in 1812.⁷¹ In *Schooner Exchange v. McFadden*, the Court held that France was immune from suits in the United States courts under the notions of grace and comity between nations.⁷² Foreign sovereigns and their agencies continued to enjoy absolute immunity from suits in the United States until the State Department adopted a new restrictive sovereign immunity standard in 1952.⁷³ Subsequently, in 1976, Congress enacted the FSIA to codify this restrictive standard.⁷⁴ Congress' promulgation of the FSIA was a response to the problems caused by the Executive Branch's discretionary grant of absolute immunity to foreign sovereigns.⁷⁵ The purposes of the FSIA were threefold. First, the act sought to empower the Judiciary Branch, rather than the Executive Branch, with the ability to determine whether a foreign state should receive sovereign immunity. Secondly, the FSIA attempted to restrict absolute sovereign immunity given to foreign states under the prevailing common law. Lastly, the FSIA established a procedural standard by which personal jurisdiction over foreign sovereigns can be obtained.⁷⁶

71. See *Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (explaining that granting sovereign immunity to France was not based on a rule of law but on the common practice of nations).

72. *Id.*

73. See Rabkin, *supra* note 17, at 2132 (stating that immediately following the *Schooner* decision, courts consistently held that foreign sovereigns were entitled to sovereign immunity out of deference to the Executive Branch). However, in 1952, Jack Tate, the acting Legal Adviser of the State Department, announced the State Department's adoption of the new restrictive sovereign immunity standard. *Id.* Under this standard, a foreign sovereign is immune from suits with respect to its public acts, but not its commercial activity. *Id.*

74. *Id.*

75. See Webster, *supra* note 18, at 1111 (identifying that the State Department's exercise of discretion in granting immunity to foreign sovereigns was often subject to diplomatic pressure from sovereigns seeking immunity from suits in the United States).

76. See *id.* (providing that the FSIA's legislative history indicates three

Generally, the FSIA provides sovereign immunity to foreign states and their officials.⁷⁷ Specific exceptions exist to this general grant of immunity, which are provided in Section 1605.⁷⁸ These exceptions include, but are not limited to, the implicit or explicit waiver exception⁷⁹ and the commercial activity exceptions.⁸⁰ Accordingly, courts have consistently held that the FSIA is the sole basis for determining whether or not immunity is granted and courts have denied sovereign immunity only when one of the exceptions under the FSIA was met.⁸¹ Such holdings are consistent with the Act's legislative history.⁸²

purposes including the codification of restrictive sovereign immunity, empowering the judicial branch, and providing procedural rules).

77. See 28 U.S.C. § 1604 (1994 & Supp. 1999) (“Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”).

78. See 28 U.S.C. § 1605 (1994) (listing the specific exceptional circumstances for which the grant of sovereign immunity will be denied).

79. See 28 U.S.C. § 1605(a)(1) (1994) (providing that the grant of sovereign immunity shall be denied in cases “in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver”).

80. See 28 U.S.C. § 1605(a)(2) (1994) (providing the commercial activity exception). Foreign states shall not be immune from suits in the United States in cases

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.

Id.

81. See *e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria.*, 461 U.S. 480, 488 (1983) (holding that the FSIA is the sole basis for determining whether sovereign immunity should be granted to foreign state).

82. See H.R. REP. NO. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 (indicating that the FSIA is the sole and exclusive standard for resolving questions of sovereign immunity); *see also* 28 U.S.C. § 1602 (1994) (stating that sovereign immunity should be decided in accordance with principles set forth in this chapter).

In *Amerada Hess Shipping Corp. v. Argentine Republic*⁸³ (“*Amerada Hess I*”), however, the Second Circuit Court of Appeals broke from the majority view regarding sovereign immunity under the FSIA⁸⁴ and held that the FSIA would not warrant granting the Argentine Republic sovereign immunity from a suit brought under the ATCA.⁸⁵ First, the court held that attacking a neutral ship in international waters without proper cause is a clear violation of international law.⁸⁶ The court then argued that the FSIA should be construed to deny sovereign immunity only in cases where Congress’ intent is clear.⁸⁷ The court examined the FSIA’s legislative history and concluded that Congress did not specifically intend to preempt the ATCA’s jurisdictional grant over cases arising from a violation of international law.⁸⁸ Finally, the court dismissed the Argentine Republic’s argument that the FSIA was the sole means to obtain jurisdiction over foreign states, notwithstanding the ATCA.⁸⁹

83. 830 F.2d 421, 428-29 (2d Cir. 1987), *rev'd*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that the FSIA did not preempt the jurisdictional grant of the ATCA).

84. *See supra* note 81 and accompanying text (stating that the FSIA is the sole source of law that a court should use in determining the granting of sovereign immunity in any given case).

85. *See Amerada Hess Shipping Corp.*, 830 F.2d at 428-29 (holding that although the FSIA is generally the sole ground from which foreign sovereigns can obtain immunity, Congress has granted subject matter jurisdiction through the ATCA in cases where an alien sues a foreign sovereign for a cause of action arising from a violation of international law).

86. *See id.* at 424 (stating that the right of a neutral ship to passage on the seas free from attack is a longstanding rule of customary international law).

87. *See id.* at 426 (supporting the proposition that, when possible, a United States statute should not be interpreted such that it conflicts with international law). Therefore, explicit congressional intent to contradict the international legal norm of denying immunity in these circumstances is necessary for the FSIA to grant such immunity. *Id.*

88. *See id.* at 427 (concluding that Congress did not focus on international law violations outside of the commercial context). It would be illogical to conclude that Congress intended to broaden the scope of sovereign immunity for violations of international law by enacting a statute designed to narrow the scope of sovereign immunity. *Id.*

89. *See id.* at 426 (asserting that the court would construe the FSIA to grant sovereign immunity only if Congress had clearly expressed such an intent, particularly in cases where international law would deny the grant of sovereign immunity).

The Supreme Court later reversed the Second Circuit's decision in *Argentine Republic v. Amerada Hess Shipping Corp.* ("Amerada II").⁹⁰ The Court firmly established that the FSIA is the sole basis for obtaining sovereign immunity in United States courts.⁹¹ The Court determined that the language of the FSIA prohibits jurisdiction under the ATCA in cases where a State is named as the defendant, unless the case falls within one of the exceptions under the FSIA.⁹² The Court emphasized that the FSIA does not preempt the ATCA in its entirety, but rather that the FSIA limits jurisdiction under the ATCA when a foreign state is named as a defendant.⁹³ In other words, under the ATCA, plaintiffs can obtain jurisdiction over foreign sovereigns only if they can show that their case warrants one of the exceptions proscribed in the FSIA.⁹⁴

Although the Supreme Court, in *Amerada Hess II*, clarified the general construction and application of the FSIA in relation to the ATCA, the Court has not yet articulated under which circumstances the exceptions in the FSIA might be satisfied so as to deny foreign states sovereign immunity.⁹⁵ For example, disputes recently arose as to whether violations of *jus cogens* norms⁹⁶ of international law

90. 488 U.S. 428, 443 (1989).

91. *See id.* at 443 (holding that the FSIA is the sole grounds for obtaining jurisdiction over a foreign state in United States courts, and that the decision of the Second Circuit should be reversed because none of the exceptions enumerated in the FSIA applied to this case).

92. *See id.* at 438 (stating that Congress' comprehensive treatment of foreign sovereign immunity when enacting the FSIA and the express provision in Section 1604 of the FSIA preclude a construction of the ATCA as permitting jurisdiction in a case where a foreign state is named as a defendant).

93. *See id.* (clarifying that the ATCA still provides jurisdiction over claims brought against defendants other than foreign states).

94. *See id.* at 434-35 (stating that Section 1330(a) of the FSIA permits jurisdiction to be exercised over a foreign sovereign only if one of the exceptions to foreign sovereign immunity is met).

95. *See* *Prinz v. Federal Republic of Germany*, 513 U.S. 1121 (1995) (denying a petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, where the Court of Appeals held that no exceptions under the FSIA applied to Germany so as to deny it sovereign immunity).

96. *See* *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.D.C. 1994) (defining a *jus cogens* norm as "a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted'" (quoting Committee of U.S. Citizens in

should constitute an implicit waiver, one of the exceptions enumerated in the FSIA.⁹⁷

The following section scrutinizes the legal merits of the class action lawsuit according to the current constructions of the FSIA and the ATCA as discussed in this section.

III. *JOO V. JAPAN*⁹⁸

A. ISSUES RELEVANT TO THE LAWSUIT

In their Complaint, the Comfort Women raised several questions of fact and law for consideration by the District Court.⁹⁹ The first issue is whether the Japanese government or its agents implemented a sexual slavery system (“Comfort Women system”) that injured the plaintiffs and members of their class.¹⁰⁰ The second issue is whether the Japanese government’s use of the Comfort Women system constitutes a series of war crimes and crimes against humanity.¹⁰¹ The third issue is whether such conduct gives rise to liability under the ATCA.¹⁰² The final issue is whether the plaintiff Comfort Women and their class are entitled to exemplary or punitive damages.¹⁰³

Nicaragua v. Reagan, 859 F.2d 929, 940 (D.D.C. 1988)).

97. See *Princz*, 26 F.3d at 1171 (stating that Section 1605(a)(1) of the FSIA provides an exception in cases where a foreign state has either implicitly or explicitly waived its immunity). Although the court in *Princz* held that violations of *jus cogens* norms did not constitute an implicit waiver under the FSIA, Judge Wald rigorously disputed the majority’s opinion in the lengthy dissenting opinion. See *id.* at 1176-85 (Wald, J., dissenting). He argued that it is appropriate to conceive that violations of *jus cogens* norms of international law as an implicit waiver in light of both the current public policy of the United States and the history of granting foreign states sovereign immunity. *Id.*

98. Civ. A. 00-02233, 2001 U.S. Dist. LEXIS 15970 (D.D.C. Oct 4, 2001).

99. See Plaintiff’s Class Action Complaint, para. 30, *Joo v. Japan*, 2001 U.S. Dist. LEXIS 15970 (D.D.C. Oct. 4, 2001) (Civ. A. 00-02233) [hereinafter Complaint] (presenting to the court that relevant legal and factual issues ought to be resolved).

100. *Id.* ¶ 30 at 21.

101. *Id.*

102. *Id.*

103. *Id.* This final question is outside the scope of this Comment and will not be

The plaintiffs alleged that Japan planned, ordered, established, and controlled the Comfort Women system.¹⁰⁴ The plaintiffs also argued in detail that Japan's use of the system directly injured them and the members of their class.¹⁰⁵ They asserted that they were the victims of multiple rapes and physical abuses and that they are currently suffering from serious health problems as a direct result of their ordeal under the Comfort Women system.¹⁰⁶

The plaintiffs cited various sources to support their claims¹⁰⁷ including a report of the United Nations Special Rapporteur that officially confirmed the Japanese government's involvement in the operation of the Comfort Women system during the 1930s and 1940s.¹⁰⁸ Japan does not dispute this allegation in its Motion to

discussed.

104. See *id.* paras. 50-57 (describing in detail the Japanese military's monitoring of the Comfort Women system). See generally Radhika Coomaraswamy, *Report of the Special Rapporteur on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. Economic and Social Council, 52nd Sess., Agenda Item 5(a), at 5, U.N. Doc. E/CN.4/53/Add.1 (1996) [hereinafter *Special Rapporteur*] (recommending that the Japanese Government should accept legal responsibility for violating international law by establishing comfort stations, should pay compensation to individual Comfort Women, should make a public apology to those women, and should identify and punish those who established the comfort stations), available at <http://www.umn.edu/humanrts/commission/country52/53-add1.htm>, cited in Complaint, *supra* note 98, at 20 n.2.

105. See Complaint, *supra* note 98, at paras. 58-64 (alleging that plaintiffs were beaten, tortured, mutilated and sometimes even murdered during the War and faced social ostracism after the War).

106. See *id.* paras. 58-64 (alleging that plaintiffs suffer from permanent damage to their reproductive organs and urinary tracts and suffer from insomnia and fearful nightmares caused by their subjection to physical abuse and sexually transmitted diseases).

107. See, e.g., USTINIA DOLGOPOL & SNEHAL PARANJAPE, *COMFORT WOMEN: AN UNFINISHED ORDEAL, REPORT OF A MISSION* (International Commission of Jurists 1994); GEORGE L. HICKS, *COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (W.W. Norton & Co. 1995); DAVID ANDREW SCHMIDT, *IANFU – THE "COMFORT WOMEN" OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR: BROKEN SILENCE* (Lewiston: The Edwin Mellon Press 2000).

108. See *Special Rapporteur*, *supra* note 103, at 5, quoted in Complaint, *supra* note 99, para. 51 (stating that "[t]he fact that [a number of Korean Comfort Women] were sent from Japan implicates not only the military but also the Home Ministry, which controlled the governors and the police who were later played a

Dismiss the Complaint.¹⁰⁹ In fact, in 1993, the Japanese government admitted that its military was directly involved in the operation of the Comfort Women system before and during World War II.¹¹⁰ Thus, major disputes between the parties arose regarding whether the Comfort Women system constituted war crimes or crimes against humanity and whether Japan is liable for such acts.

Given that a foreign sovereign is a named defendant, these disputes should be addressed in the context of the construction of the ATCA in relation to the FSIA.¹¹¹ Thus, the court should first consider whether the FSIA prevents the application of the ATCA to this lawsuit before it reviews the applicability of the ATCA in the current case.¹¹² Accordingly, the following section reviews both parties' arguments regarding sovereign immunity.

significant role in collaborating with the army in forcibly recruiting women.”).

109. *See* Motion to Dismiss, *supra* note 18, at 12 (arguing that the alleged tortious activity by the Japanese army does not constitute commercial activity under the FSIA).

110. *See* Tree, *supra* note 4, at 473 (stating that, in August 1993, Japanese Prime Minister Kiichi Miyagawa officially admitted that the Japanese military forced the Comfort Women to serve as prostitutes for its soldiers during World War II); *see also* Fisher, *supra* note 14, at 43-44 (identifying that in 1993, Japan finally admitted to its forced use of Comfort Women after five decades of constant denial).

111. *See supra* notes 93-94 and accompanying text (discussing the construction of the ATCA in relation to the FSIA when a foreign state is named as defendant).

112. *See* Order, *Joo v. Japan*, 2001 U.S. Dist. LEXIS 15970 (D.D.C. July 25, 2001) (Civ. A. 00-02233) (ordering that during the hearing on defendant's motion to dismiss, the parties focus their argument on the issue of foreign sovereign immunity); *cf.* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Declaratory Judgment that Japan Cannot Claim Sovereign Immunity in Defense of Claims of Systematic Sexual Slavery During World War II at 23-24, *Joo v. Japan*, No. 00-CV-2233 (D.D.C. filed Mar. 5, 2001) [hereinafter Motion for Declaratory Judgment] (acknowledging that whether or not Japan is entitled to sovereign immunity under the FSIA is a threshold question to be answered in order for the lawsuit to proceed further). Both Japan and United States, in their respective motions, focus heavily on Japan's entitlement to sovereign immunity under the FSIA. *See* Motion to Dismiss, *supra* note 18, at 2. In its motion to dismiss, Japan claimed that it was entitled to sovereign immunity under applicable law. *Id.* *See also* Statement of Interest, *supra* note 18, at 6-8 (arguing that Japan would be immune from suit regardless of whether pre-FSIA law or current FSIA provisions were applied to the case).

B. LIMITATIONS UNDER THE FSIA

Both Japan and the plaintiffs agree the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in United States courts.¹¹³ They further agree that a foreign state shall be immune from suit in the United States unless one or more of the exceptions enumerated in section 1604 applies.¹¹⁴ However, the parties are in dispute over two issues regarding the applicability of the FSIA. First, they disagree as to whether the FSIA applies retroactively to events occurring prior to 1952, so as to govern the present case.¹¹⁵ Second, the parties disagree as to whether the court should find any of the exceptions under Section 1604 applicable in order to deny sovereign immunity to Japan if the FSIA is, in fact, determined to apply retroactively to events occurring before 1952.¹¹⁶

1. Retroactive Application of the FSIA

Japan argues that the FSIA cannot be retroactively applied to its use of the Comfort Women system that took place before its

113. See Motion for Declaratory Judgment, *supra* note 112, at 24 (stating that the FSIA regulates subject matter jurisdiction over foreign states); Motion To Dismiss, *supra* note 18, at 7 (reiterating that the FSIA provides foreign states immunity from the jurisdiction of United States courts).

114. See Motion for Declaratory Judgment, *supra* note 112, at 24 (explaining that the FSIA provides that a foreign state is not immune from United States court proceedings when its conduct falls within certain exceptions); Motion to Dismiss, *supra* note 17, at 7 (arguing that if no exception to the FSIA applies, a foreign sovereign has complete immunity under the Act).

115. See Motion to Dismiss, *supra* note 18, at 2-7 (arguing that Japan is entitled to absolute sovereignty because the FSIA was enacted in 1976 and cannot be applied to its use of the Comfort Women system that took place in the 1930's and 1940's). *But see* Plaintiffs' Opposition To Defendant's Motion to Dismiss, at 6-8, *Joo v. Japan*, 2001 U.S. Dist. LEXIS 15970 (D.D.C. Oct. 4, 2001) (Civ. A. 00-02233) [hereinafter Plaintiffs' Opposition] (arguing that the FSIA should be applied to pre-1952 events because Congress intended such an application of the FSIA).

116. See Motion to Dismiss, *supra* note 18, at 8 (arguing that none of the exceptions enumerated in the Section 1605 of the FSIA would be satisfied so as to deny sovereign immunity to Japan in United States courts); Motion for Declaratory Judgment, *supra* note 112, at 25 (arguing that the Court should deny sovereign immunity to Japan because Japan's use of the Comfort Women system potentially meets at least three of the exceptions enumerated in Section 1605 of the FSIA).

enactment.¹¹⁷ Japan's legal arguments against retroactive application of the FSIA are twofold. First, Japan argues that the court should not apply the FSIA retroactively because Congress' enactment of the FSIA clearly showed its intention to bar such applications.¹¹⁸ Moreover, retroactive application of the FSIA in this case is impermissible since such an application would impose new legal consequences on Japan.¹¹⁹

The United States Supreme Court ruled on retroactivity of federal statutes in *Landgraf v. USI Film Products*.¹²⁰ The Court provided an appropriate standard to analyze the retroactivity of the FSIA by resolving the tension between previous rules.¹²¹ When a case implicates a federal statute enacted after the event in question occurred, the court must determine whether Congress has clearly expressed the statute's proper reach.¹²² If Congress' intent regarding the retroactivity of the statute is unclear, the deciding court must

117. See Motion to Dismiss, *supra* note 18, at 2-4 (arguing that the codification of the restrictive theory of sovereign immunity in the FSIA in 1976 precludes retroactive application of the statute). In support of this argument, Japan emphasized that nearly every court that has addressed the issue of the retroactive application of the FSIA has determined that it does not apply to event that occurred before 1952). *Id.* at 3. In sum, Japan argued that it is entitled to absolute immunity and the court should dismiss the plaintiffs' complaint. *Id.* at 2.

118. See *id.*, at 5 (arguing that the "statutory language and legislative history of the FSIA provide no support for the retroactive application of the Act to transactions occurring before 1952.") (quoting *Slade v. United States of Mexico*, 617 F. Supp. 351, 357 (D.D.C. 1985)).

119. See Motion to Dismiss, *supra* note 18, at 6 (explaining that the D.C. Circuit has held that a statute interfering with sovereign immunity would impose unforeseen liability on a foreign sovereign and may not be applied to events that occurred before its enactment).

120. 511 U.S. 244, 280 (1994).

121. See *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974) (holding that the court must apply the law in effect at the time it renders its decision, unless such application would result in clear injustice or "there is statutory direction or legislative history to the contrary."). *But see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that a statute should not be applied to an event occurring before its enactment unless Congress has clearly required its retroactive application).

122. See *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (stating that if Congress has indeed expressly indicated the statute's scope, the court need not determine the retroactivity of the statute).

determine the statute's proper reach by using judicial default rules.¹²³ Accordingly, retroactive application of the FSIA in the present case can be analyzed under the *Landgraf* standard.

First, Japan argues that Congressional intent regarding the retroactive application of the FSIA is clear in that neither statutory language nor legislative history provides any support for the retroactive application of the FSIA to events occurring before 1952.¹²⁴ Thus, the FSIA cannot be applied retroactively according to the traditional presumption against retroactive use of a statute,¹²⁵ absent Congressional intent.¹²⁶ However, a recent trend of the District of Columbia Circuit's interpretation regarding retroactive application of the FSIA disfavors Japan's argument.¹²⁷ For instance, in *Princz*, the Court of Appeals for the District of Columbia Circuit noted in *dicta* that the language of the FSIA¹²⁸ suggests that it can be

123. See *id.* (explaining that absent express Congressional intent, a court must examine whether a statute's retroactive effect would impair the rights of the party at the time he or she acted, would increase a party's liability for the past actions, or would impose new duties for past actions in determining whether or not the statute should have retroactive effect).

124. See Motion to Dismiss, *supra* note 18, at 5 (citing numerous cases in support of the proposition that the language of the FSIA is expressly prospective); see, e.g., *Slade v. United States of Mexico*, 617 F. Supp. 351, 357 (D.D.C. 1985); *Jackson v. People's Republic of China*, 596 F. Supp. 386, 388 (N.D. Ala. 1984), *aff'd* 794 F.2d 1490 (11th Cir. 1986); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323, 336-37 (S.D.N.Y. 1988), *aff'd* 841 F.2d 26 (2d Cir. 1987).

125. See *Union Pac. R.R. Co. v. Laramie Stock Yard Co.*, 231 U.S. 190, 199 (1913) (explaining that "a retroactive operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislation.'" (citation omitted)).

126. See Motion to Dismiss, *supra* note 18, at 4 (arguing that all federal statutes are presumptively non-retroactive in the absence of Congress' clear expression to the contrary); see also *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842-44 (1990) (articulating that presumption against retroactive legislation is deeply rooted in American jurisprudence, and has been recognized as a legal doctrine for centuries).

127. See, e.g., *Crist v. Turkey*, 995 F. Supp. 5 (D.D.C. 1998) (holding that the language can be interpreted to allow for retroactivity); see also *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1170 (D.D.C. 1994) (stating in *dicta* that the FSIA can be applied retroactively).

128. See 28 U.S.C. § 1602 (1994) (declaring "[c]laims of foreign states to

applied retroactively to events occurring even before 1952.¹²⁹ Moreover, in a later decision, the District Court for the District of Columbia followed the *dicta* of the *Princz* court to hold that Congress intended the FSIA to be applied retroactively.¹³⁰ Thus, in the District of Columbia Circuit, the plaintiffs seem to have strong legal authority in support of their argument that Congress intended the FSIA to be applied retroactively.

Alternatively, Japan argues that even if the court finds that Congressional intent regarding the retroactive application of the FSIA is unclear,¹³¹ it should still find that the FSIA does not retroactively apply by the judicial default rule.¹³² In the absence of clear Congressional intent, the court should determine whether retroactive application of the FSIA would have a “retroactive effect” on the parties.¹³³ Japan argues that application of the FSIA would

immunity should *henceforth be decided* by courts of the United States and of the States in conformity with the principles set forth in this chapter”) (emphasis added).

129. See *Princz*, 26 F.3d at 1170 (explaining that legislative history of the FSIA strongly suggests that “all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA.”).

130. See *Crist*, 995 F. Supp. at 9 (holding that a plain reading of the statutory language of the FSIA and legislative history show that Congress intended the FSIA to be applied retroactively).

131. See Motion to Dismiss, *supra* note 17 at 7-8 (arguing that the FSIA “cannot be applied retroactively because Congress did not ‘clearly’ intend that result.”); see also *Brown v. Sec’y of the Army*, 78 F.3d 645, 648 (D.D.C. 1996) (noting that the Court of Appeals for the District of Columbia once stated, determination of retroactivity of a statute is a “matter of statutory construction”). Moreover, it is possible that the court may find that Congress’ intent is not clear, since the circuit courts disagreed in construing the meaning of the statutory language, “henceforth be decided” in the FSIA. Compare *Jackson v. People’s Republic of China*, 596 F. Supp. 386, 388 (N.D. Ala. 1984) (holding that the language of the FSIA, “henceforth be decided” is expressly prospective, therefore, the FSIA governs claims arising or accruing after its enactment), with *Princz*, 26 F.3d at 1170 (stating that a plain reading of the language of the FSIA suggests it “is to be applied to all the cases decided after its enactment, i.e. regardless of when the plaintiff’s cause of action may have accrued”).

132. See *infra* note 133 and accompanying text (stating that courts should not allow retroactive application of statutes if it finds that such application would entail retroactive effects on the parties).

133. See *Landgraf*, 511 U.S. at 280 (articulating that a statute would have “retroactive effect” if the statute “would impair rights a party possessed when he

have a “retroactive effect” because it would attach new legal consequences to the use of the Comfort Women system completed before its enactment.¹³⁴ Accordingly, relying on *Lin v. Japan*,¹³⁵ Japan further argues that applying the FSIA retroactively to events occurring before 1952 would result in a substantive change of Japan’s legal obligations by affecting its right to absolute immunity when it operated the Comfort Women system, and therefore, the FSIA should not be applied retroactively under judicial default rules.¹³⁶

On the other hand, the plaintiffs argue that the FSIA is a jurisdictional statute that merely affects procedural rights of the parties as opposed to substantive legal rights in connection with the

acted, increase a party’s liability for past conduct, or impose new duties with respect to transaction already completed.”).

134. See *Landgraf*, 511 U.S. at 270 (1994) (explaining that the deciding court must determine “whether the new provision attaches new legal consequences to events completed before its enactment.”). The *Landgraf* court held that if Congress’ intent as to retroactive application of a statute is not clear, the deciding court must determine whether the statute in question would have “retroactive effect” if applied to events occurring prior to its enactment. *Id.* at 280. Thus, the deciding courts must determine whether the statute would have “retroactive effect” rather than whether or not the statute should be applied retroactively *per se* in the absence of Congress’ clear intent. *Id.* If the court finds that the statute would have a “retroactive effect”, the court has to deny application of the statute to events occurring before its enactment. *Id.*

135. No. 92-2574, 1994 WL 193948 (D.D.C. 1994).

136. See *id.* at *2 n.4 (stating that if the FSIA is applied retroactively, plaintiffs have a valid cause of action and can potentially recover millions of dollars, which is nothing but a radical substantive change); see also *Carl Marks & Co v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1987) (holding that a retroactive application of the FSIA would adversely affect a foreign state’s settled expectation of immunity from suits in United States courts); *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986) (stating that applying the FSIA retroactively to pre-1952 events would undermine antecedent rights of foreign nations). But see *Altman v. Republic of Austria*, 142 F. Supp. 2d 1187, 1201 n.15 (C.D. Cal. 2001) (arguing that the *Lin* decision is not persuasive because it is not a published opinion, and thus lacks precedential value under the District of Columbia Circuit’s rule 28(c) that prohibits citation to unpublished cases, and secondly, because the *Lin* decision was decided before the *Princz* and *Creighton* decisions, in which the Court of Appeals for the District of Columbia Circuit applied the *Landgraf* standard by stating that retroactive application of the FSIA to pre-1952 events is appropriate).

primary conduct of the parties.¹³⁷ When the statute in question is a statute either conferring or ousting jurisdiction¹³⁸ or affecting procedural rules,¹³⁹ the United States Supreme Court has regularly held that its application was not retroactive because it did not affect the substantive rights of the parties, but simply affected the power of the deciding court to hear the case.¹⁴⁰ In fact, in recent decisions, the United States Court of Appeals for the District of Columbia Circuit explicitly held that the FSIA is a jurisdictional statute affecting only procedural rules at trial.¹⁴¹ In addition, the history of granting sovereign immunity in the United States also favors the plaintiffs' argument that the FSIA is a jurisdictional statute rather than one affecting substantive rights.¹⁴² Moreover, the mere fact that

137. See *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 124 (D.D.C. 1999) (holding that the FSIA does not affect the primary conduct of the parties but merely affects the question as to which tribunal should hear the case); see also *Landgraf*, 511 U.S. at 274 (suggesting application of a new jurisdictional rule primarily affects the authority of a court to hear a case, rather than the substantive rights of the parties).

138. See, e.g., *United States v. Alabama*, 362 U.S. 602, 604 (1960) (holding that the district court had jurisdiction under authority conferred upon the court by the Civil Rights Act of 1960 to hear an action against the state of Alabama regarding voting rights); see also *Stephens v. Cherokee Nation*, 174 U.S. 445, 491 (1899) (upholding as constitutional a statute that included as one of its provisions, a prohibition of the authority of courts of the United States to hear claims arising from the laws of Indian tribes or nations).

139. See, e.g., *Ex parte Collet*, 337 U.S. 55, 71 (1949) (holding that 28 U.S.C. § 1404(a) was applicable to the transfer of an action that began prior to the enactment of the statute).

140. See *Landgraf*, 511 U.S. at 274 (instructing that the United States Supreme Court regularly applied jurisdictional statutes irrespective of whether a court had jurisdiction at the time the act occurred or when the suit was instituted). Procedural rules can also be applied in suits arising before their enactment without raising concerns about retroactivity because rules of procedure do not adversely affect the primary conduct of the parties. *Id.* at 275.

141. See *Creighton*, 181 F.3d at 124 (holding that application of the FSIA to events occurring before its enactment would not be retroactive because the FSIA is a jurisdictional statute); see also *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.D.C. 1994) (arguing, though not deciding, that application of the FSIA to pre-1952 would not be retroactive because it "would not alter Germany's liability under the applicable substantive law in force at the time, i.e. it would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under that law.").

142. See *Webster*, *supra* note 18, at 1110 (citing *Schooner Exch. v. M'Faddon*,

application of the FSIA would be disadvantageous to Japan¹⁴³ may not be enough to persuade a court to rule against the application of the FSIA to Japan's use of the Comfort Women system.¹⁴⁴ Therefore, the plaintiffs' argument regarding the retroactivity of the FSIA is strong and is likely to be accepted by the court. Accordingly, the next inquiry is whether the current case falls within one of the exceptions under the FSIA.

2. *Exceptions to Sovereign Immunity Under the FSIA*

The plaintiffs argue that the court should deny foreign sovereign immunity to Japan under the FSIA for its involvement of the Comfort Women system because such conduct satisfies the exceptions enumerated in Section 1605 of the FSIA.¹⁴⁵ The plaintiffs articulate three different exceptions applicable to their case: 1) that Japan explicitly waived sovereign immunity for war crimes committed during World War II when it accepted the terms of the Potsdam Declaration;¹⁴⁶ 2) that Japan's use of the Comfort Women

11 U.S. 116, 136 (1812)) (explaining that sovereign immunity was not a right compelled by law, but rather foreign states were granted sovereign immunity based on notions of grace and comity between nations); *see also* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (stating that foreign sovereign immunity is not a restriction imposed by the Constitution and historically granting immunity to foreign nations was within the discretion of political branches such as the Executive Branch).

143. *See, e.g., Lin*, 1994 WL 193948, at *2 n.4 (stating that before 1952 and the enactment of the FSIA, plaintiffs would not have been able to sue Japan in the United States courts, thus, if the FSIA is applied to events occurring before 1952, it would put Japan in a situation where plaintiffs can recover millions of dollars).

144. *See Landgraf*, 511 U.S. at 275 n.28 (stating that although the *Ex Post Facto* Clause restrains the United States Supreme Court from upholding statutes that create or amplify punishment after the fact, the Court has upheld statutes that merely change procedural rules, even if they may operate to the disadvantage of a party).

145. *See* Motion for Declaratory Judgment, *supra* note 111, at 25 (arguing that the district court has jurisdiction over Japan for its "systematic sexual enslavement" of the Comfort Women because Japan either explicitly or implicitly waived its sovereign immunity, and the use of the Comfort Women system constitutes commercial activity).

146. *See id.* at 25-30 (arguing that Japan accepted the terms of the Potsdam Declaration while knowing that it would be held liable for the use of the Comfort Women system); *see also* 28 U.S.C. § 1605(a)(1) (1994) (providing that "[a] foreign state shall not be immune from the jurisdiction of courts of the United

system meets the commercial activity exception to the FSIA;¹⁴⁷ and 3) that Japan implicitly waived its sovereign immunity when it violated *jus cogens* norms by committing crimes against humanity.¹⁴⁸

a. The Explicit Waiver Exception

Section 1605(a)(1) provides that a foreign state shall not be entitled to foreign sovereign immunity if the state has explicitly waived its sovereign immunity.¹⁴⁹ The plaintiffs concede that an explicit waiver must indicate an “intentional and knowing relinquishment of the legal right.”¹⁵⁰ Accordingly, the plaintiffs’ argument regarding the explicit waiver exception includes both elements.¹⁵¹ First, they argue that Japan knew that its use of the Comfort Women system would violate existing international law because it deliberately recruited most of the Comfort Women from Korea in order to evade legal recourse under the International Convention for the Suppression of the Traffic in Women and

States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication . . .”).

147. See Motion for Declaratory Judgment, *supra* note 111, at 30-38 (arguing that the Comfort Women system constitutes commercial activity that took place in the territories of the United States or had direct impact in the United States); see also 28 U.S.C. § 1605(a)(2) (1994) (stating commercial activities exceptions under the FSIA). Section 1605(a)(2) provides that sovereign immunity shall not be granted to foreign states in cases where the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside of 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. *Id.*

148. See Motion for Declaratory Judgment, *supra* note 111, at 38-44 (maintaining that Japan violated *jus cogens* norms by enslaving the Comfort Women, which constitutes an implied waiver of sovereign immunity under section 1605(a)(1) of the FSIA).

149. See 28 U.S.C. § 1605(a)(1) (1994) (providing guidelines for granting foreign states immunity).

150. See Motion for Declaratory Judgment, *supra* note 111, at 25 (agreeing to the notion that explicit waiver can be found only when the foreign state knowingly waived its sovereign immunity) (quoting *Good v. Aramco Servs. Co.*, 971 F. Supp. 254, 260 (S.D. Tex. 1997)).

151. See *id.* at 26-27 (explaining the plaintiff’s two step argument for finding a waiver of immunity).

Children of 1921 (“1921 Trafficking Convention”).¹⁵² Japan’s attempts to conceal the use of the Comfort Women system by destroying the evidence of the system during and after World War II further prove Japan’s awareness of its commission of a crime.¹⁵³ Second, while possessing this knowledge, Japan accepted the Potsdam Declaration,¹⁵⁴ in which it acknowledged that it would be subject to war crime litigation.¹⁵⁵ Therefore, Japan explicitly waived its sovereign immunity by intentionally and knowingly relinquishing this legal right.¹⁵⁶

Although this argument of the plaintiffs is not without merit,¹⁵⁷ they may face difficulty in persuading the Court that Japan explicitly waived its sovereign immunity by accepting the terms of the

152. *See id.* (arguing that Japan violated several international treaties including the 1921 Trafficking Convention prohibiting trafficking in women and children). The 1921 Trafficking Convention, however, was not applicable to occupied territories of signatory states. *Id.* Therefore, Japan deliberately recruited the Comfort Women from Korea, a Japanese colony at the time, in order to exercise a morally and legally questionable loophole of the Convention. *Id.* Japan was thus cognizant of its commission of a crime when it operated the Comfort Women system. *Id.*

153. *See id.* at 27 (arguing that in order to conceal the evidence of the Comfort Women system, Japan committed mass murder of the Comfort Women and destroyed documents related to the use of the Comfort Women at the time of Japan’s surrender). Such concealment efforts prove that Japan was obviously aware of its commission of crimes against humanity. *Id.*

154. *See* Potsdam Declaration, July 26, 1945 (presenting terms under which the allied powers would halt their war against Japan), *available at* <http://www.isop.ucla.edu/eas/documents/potsdam.htm> (last visited Oct. 8, 2001).

155. *See id.* (“[B]ut stern justice shall be meted out to all war criminals . . . [t]he Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people.”).

156. *See* Motion for Declaratory Judgment, *supra* note 112, at 29 (concluding that Japan’s awareness of its commission of crimes and efforts to conceal those crimes, prove that Japan intentionally and knowingly waived its sovereign immunity by accepting the terms of the Potsdam Declaration); *see also* Application of Yamashita, 327 U.S. 1, 13 (1946) (holding that Japan, by its acceptance of the Potsdam Declaration and its surrender, has consented to the jurisdiction of Allied courts over its war crimes).

157. *See infra* Part IV.B.2.c (indicating that the Comfort Women may be able to argue that Japan’s acceptance of the Potsdam Declaration constitutes a waiver by implication under Section 1605(a)(1) of the FSIA).

Potsdam Declaration.¹⁵⁸ As Japan pointed out in one of its pre-trial motions, the Potsdam Declaration contains no mention of a waiver of sovereign immunity in civil litigation in United States courts.¹⁵⁹ Courts have held that an explicit waiver of immunity can be found only when the State clearly relinquished its immunity in an international treaty, agreement, or contract.¹⁶⁰ For instance, in *Amerada Hess II*, the United States Supreme Court strongly implied that a foreign state cannot waive its immunity merely by entering into an agreement unless the agreement contains provisions of a waiver.¹⁶¹ Additionally, in *Good v. Aramco Services Co.*,¹⁶² the court complied with the *Amerada Hess II* decision by holding that the explicit waiver exception under Section 1605(a)(1) of the FSIA requires an express statement of intentional and knowing relinquishment of sovereign immunity.¹⁶³

Thus, the mere fact that Japan acknowledged potential criminal

158. See *Good v. Aramco Servs. Co.*, 971 F. Supp. 254, 261 (S.D. Tex. 1997) (holding that unless an agreement to which a foreign state is a party expressly provides that the foreign state is subject to lawsuits in the United States, entering into an agreement cannot constitute an explicit waiver exception under the FSIA). But see *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (Blackmun & Marshall, J.J., dissenting) (disagreeing with the majority's opinion that none of the exceptions of the FSIA applied to the case). Deciding whether any of the exceptions applied to the case is inappropriate because a determination regarding the FSIA's exceptions was not presented to the Court for certiorari. *Id.* Thus, the Court did not receive a full briefing on that issue. *Id.*

159. See Reply in Support of Motion of Government of Japan to Dismiss Complaint at 6, *Joo v. Japan*, 2001 U.S. Dist. LEXIS 15970 (D.D.C. Oct 4, 2001) (Civ. A. 00-02233) [hereinafter Reply in Support of Motion of Japan] (showing that the Potsdam Declaration does not contain any kind of waiver of Japan's sovereign immunity to suits in the United States or the availability of a cause of action).

160. See, e.g., *Argentine Republic*, 488 U.S. at 442 (stating that the Court would not consider a foreign sovereign to have waived immunity under Section 1650(a)(1) by signing an international agreement that does not contain an explicit provision constituting a waiver of immunity in United States courts); see also *Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (requiring waivers to include clear relinquishments of a states' immunity).

161. See *Argentine Republic*, 488 U.S. at 442.

162. 971 F. Supp. 254 (S.D. Tex. 1997).

163. See *id.* at 261 (stating that since there was no express provision that Saudi Aramco is subject to suit in the United States, the explicit waiver exception under the FSIA was not applicable to the case at bar).

litigation by accepting the terms of the Potsdam Declaration would be insufficient to prove that Japan explicitly waived its sovereign immunity in United States courts, absent an express provision.¹⁶⁴

b. The Commercial Activity Exception

Section 1605(a)(2) of the FSIA provides that sovereign immunity shall not be granted to a foreign state when “the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”¹⁶⁵ To this end, the plaintiffs contend that Japan’s use of the Comfort Women system satisfies all three prongs of the commercial activity exception.¹⁶⁶ First, the use of the Comfort Women system occurred outside the territory of the United States.¹⁶⁷ Second, Japan’s use of the system took place in connection with a commercial activity.¹⁶⁸ Third, such behavior caused direct effects in the United States.¹⁶⁹ It is clear that Japan operated the Comfort Women system outside the territory of the United States,¹⁷⁰ therefore, the disputed issues are whether the use of the Comfort Women system can be considered in connection with a commercial activity and whether such action had a direct effect in

164. See *supra* notes 157-163 and accompanying text (stating that unless the court finds explicit provision of a waiver, the explicit waiver exception under the FSIA does not exist).

165. See 28 U.S.C. § 1605(a)(2) (1994) (explaining that a foreign state is not immune from legal action when its act is commercial in nature, committed outside of the United States, and has direct effects in the United States).

166. See Motion for Declaratory Judgment, *supra* note 112, at 30 (explaining that when invoking jurisdiction under the third clause Section 1605(a)(2), the court must determine whether (1) the plaintiff’s action is based on an act occurring outside the territory of the United States; (2) the act was carried out in connection with a “commercial activity” of defendant; and (3) the act caused a “direct impact” in the United States (citing *Adler v. Nigeria*, 107 F.3d 720, 724 (9th Cir. 1997)).

167. See *id.* at 30-31 (providing that Japan’s use of the Comfort Women system took place all over Southeast Asia).

168. See *id.* at 31-34 (arguing that the Comfort Women system constitutes a “commercial activity” within the meaning of the FSIA, since operating a brothel is not an activity that is sovereign in nature).

169. See *infra* notes 197-213 and accompanying text (discussing the plaintiffs’ argument regarding the “direct effect”).

170. See *supra* note 167 and accompanying text.

the United States.

First, the plaintiffs argue that Japan's use of the Comfort Women system constitutes a "commercial activity"¹⁷¹ under the FSIA because the system was a state-supervised brothel through which Japan collected money from soldiers using the system.¹⁷²

In *Saudi Arabia v. Nelson*,¹⁷³ the United States Supreme Court provided a statutory interpretation of a "commercial activity" defined in Section 1603(d) of the FSIA.¹⁷⁴ First, the Court explained that a State engages in commercial activity within the meaning of the FSIA only when it acts in the manner of private citizens within the market.¹⁷⁵ Second, in order to determine whether a State acted in the manner of a private citizen, the court must evaluate the nature of the activity rather than the purpose or motivation behind the activity.¹⁷⁶

Under this interpretation, the plaintiffs argue that Japan acted in the manner of a private citizen when it operated the Comfort Women system – a brothel – because private citizens could have operated

171. See 28 U.S.C.A. § 1603(d) (West 1994) (defining a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act"). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*

172. See Motion for Declaratory Judgement, *supra* note 112, at 32-33 (explaining that military personnel who visited the "comfort stations" were required to pay for their use).

173. 507 U.S. 349 (1993).

174. See *id.* at 360 (defining "commercial activity" as acts that private citizens could take part in, rather than acts that are typically sovereign).

175. See *id.* at 360 (quoting *Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)) ("[A] state engages in commercial activity under the [FSIA] where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'") In other words, a state engages in commercial activity only when "it acts 'in the manner of a private player within' the market." *Id.*

176. See *id.* (quoting *Weltover*, 504 U.S. at 614) (affirming that "whether a state acts 'in the manner of a private party' is a question of behavior, not motivation"). Determination of the commercial character of an act is based on the nature of the act in question. *Id.* Therefore, the question is not "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." *Id.* Rather, the court must look into "whether the particular actions that the foreign state performs are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* at 360-61.

it.¹⁷⁷ They further argue that the Comfort Women system is analogous to private prostitution practices because money was exchanged for sexual services.¹⁷⁸ On the other hand, relying upon the *Nelson* decision,¹⁷⁹ Japan argues that the plaintiffs' claims involve abuses of military and government powers during an armed conflict, which cannot constitute a "commercial activity" within the meaning of Section 1605(a)(2).¹⁸⁰ Japan further argues that the plaintiffs' own description¹⁸¹ of Japan's active involvement in the Comfort Women

177. See Motion for Declaratory Judgment, *supra* note 112, at 33 (arguing that operating a brothel is not an activity peculiarly sovereign in nature, but one in which private citizens often engage). Thus, it is obvious that exchanging money for sex constitutes a commercial activity not reserved for state use. *Id.* For instance, operating a brothel in Nevada is a legal activity in which private parties may engage. See NEV. REV. STAT. § 201.354 (Michie 1999).

178. See Motion for Declaratory Judgment, *supra* note 112, at 32-33 (alleging that Japanese military personnel using the Comfort Women system were required to pay for their use of the system). The soldiers paid with "army tickets", equivalent to a certain amount of Yen. *Id.* at 33. In addition, the plaintiffs argue that the legislative history of the FSIA supports the notion that the Comfort Women system constitutes commercial activity under Section 1605(a)(2) because it provided sexual laborers for the Japanese military. *Id.* at 32. That history indicates that commercial activities under the FSIA include a "foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or engagement of laborers..." *Id.* at 32 (citing H.R. REP. NO. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615).

179. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (ruling that the commercial exception did not apply). In *Nelson*, the plaintiff sued the Saudi Government alleging that it wrongfully arrested, imprisoned, and tortured him while he was an employee of a government hospital in Saudi Arabia. *Id.* at 353-54. The Court held that although the plaintiff was initially hired through a regular hiring process in the United States, which led to the conduct that eventually injured him in Saudi Arabia, the cause of action did not arise from regular business activities but from tortious conduct of the Saudi government. *Id.* at 358. The alleged conduct of the Saudi government "boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the [FSIA] as peculiarly sovereign in nature." *Id.* at 361. Thus, the commercial exception under the FSIA does not apply to the plaintiff's case. *Id.* at 363.

180. See Motion to Dismiss, *supra* note 18, at 12 (arguing that Japan's use of the Comfort Women system does not constitute a commercial activity under the FSIA because it was not the type of action which can be carried out by a private party in the course of commerce).

181. See Complaint, *supra* note 98, para. 50 (alleging that the Comfort Women system was "planned, ordered, established, and controlled by Japan"); see *id.*

system suggests that its use of the system is peculiarly sovereign in nature.¹⁸²

Although the decision in *Nelson*, at first glance, seems to squarely support Japan's argument,¹⁸³ a close examination of that court's opinion demonstrates that the plaintiffs' case is distinguishable from *Nelson*.¹⁸⁴ First, unlike the plaintiff in *Nelson*,¹⁸⁵ the plaintiffs attempt to invoke jurisdiction under the third clause of Section 1605(a)(2), which confers jurisdiction over acts occurring outside the territory of the United States that have a direct effect in the United States.¹⁸⁶ Second, the plaintiffs' causes of action do not rest solely upon acts of Japan, which are peculiarly sovereign in nature.¹⁸⁷ Rather, their

paras. 26, 53 (alleging that perpetration occurred in places "appropriated by the Japanese military" or "built by the army," and that "Comfort Women were recorded on Japanese military supply lists under the heading of 'ammunition.'").

182. See Motion to Dismiss, *supra* note 18, at 12-13 (arguing that since the plaintiffs' claims entirely rests upon acts peculiarly sovereign in nature, the commercial activity exception cannot be invoked even though Japan's use of the Comfort Women system may have some connection with commercial activity); see also *Nelson*, 507 U.S. at 358 n.4 (concluding that when plaintiff's claim is based entirely upon acts "sovereign in character," the commercial activity exception under Section 1605(a)(2) of the FSIA will not be satisfied "regardless of any connection the sovereign acts may have with commercial activity.").

183. See Motion to Dismiss, *supra* note 18, at 11-12 (arguing that the *Nelson* analysis clearly applies to the current case because the plaintiffs' claims arose solely from Japan's abuses of military and governmental power, which are entirely sovereign in nature).

184. See *Nelson*, 507 U.S. at 363 (holding that the plaintiff's action was not based on a commercial activity, under Section 1605(a)(2)).

185. See *Nelson*, 507 U.S. at 356 (stating that the plaintiff attempted to invoke a commercial activity exception under the first clause of Section 1605(a)(2)); see also 28 U.S.C. § 1605(a)(2) (1994) (providing that foreign sovereign immunity shall not be granted to a foreign state in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state") (emphasis added).

186. See 28 U.S.C. § 1605(a)(2) (1994) (providing that foreign sovereign immunity shall not be granted to a foreign state in any case "in which the action is based . . . upon an act *outside the territory of the United States in connection with a commercial activity* of the foreign state elsewhere and that act causes a direct effect in the United States") (emphasis added).

187. See Motion for Declaratory Judgment, *supra* note 112, at 33 (arguing that the operation of a brothel is not an act uniquely sovereign in nature and is often practiced by private parties). *Contra Nelson*, 507 U.S. at 357 n.4 (stating that the court's conclusion only applies to a case where the plaintiff's claim rests solely

claims rest on various Japanese acts including illegal trafficking in women and forced prostitution, which the court may find not peculiarly sovereign in nature.¹⁸⁸ Thus, *Nelson* was a narrow holding regarding the first clause of section 1605(a)(2) and is therefore not directly applicable to the current case.¹⁸⁹

Instead, the Ninth Circuit Court of Appeals, in *Adler v. Federal Republic of Nigeria*,¹⁹⁰ provides a proper standard directly applicable to the current case because this case addressed jurisdiction under the third clause of Section 1605(a)(2).¹⁹¹ According to the holding in *Alder*,¹⁹² the Comfort Women must show that their causes of action are grounded upon Japan's conduct taken *in connection with* its "commercial activity" as opposed to *based upon* a "commercial activity" itself as specified in the second clause of Section 1605(a)(2).¹⁹³ Thus, if the plaintiffs convince the court that the Comfort Women system constitutes a commercial activity, they only have to show that their causes of action are founded upon Japan's

upon uniquely sovereign activities of a foreign state).

188. See Complaint, *supra* note 99, paras. 76-82 (listing the causes of action).

189. See *Nelson*, 507 U.S. at 358 n.4 (holding that when a claim rests solely upon activities sovereign in nature, the commercial activity exception in the first clause of Section 1605(a)(2) does not apply "regardless of any connection the sovereign acts may have with commercial activity."). Furthermore, the Court clearly expressed that its conclusion was limited to the construction of the first clause. *Id.* Thus, the Court did not address the case where a claim is based on *both* commercial and sovereign elements. *Id.*

190. 107 F.3d 720 (9th Cir. 1997).

191. See *id.* at 724 (providing the standard of inquiry for cases in which plaintiffs seek a commercial activity exception under the third clause of Section 1605(a)(2)).

192. See *id.* (holding that when the third clause of Section 1605(a)(2) is at issue the deciding court must determine: (1) whether the foreign state engaged in a commercial activity; and (2) whether the foreign state's conduct giving rise to the cause of action was made in connection with that commercial activity).

193. See *id.* at 725 (*citing* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 n.10 (9th Cir. 1992)) (holding that "FSIA does not require that every act by the foreign state be commercial for the third clause of the commercial activity exception to apply.") Rather, the foreign state's acts "must merely be made 'in connection with' a commercial activity." *Id.* Cf. *Nelson*, 505 U.S. at 358 (stating that Congress intended to distinguish between a suit 'based upon' commercial activity and one based upon actions 'in connection with' such activity). "The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity." *Id.*

acts, such as trafficking of women, rape, and physical abuses, taken *in connection with* that commercial activity.¹⁹⁴ However, the plaintiffs' motion fails to clearly separate Japan's act upon which their claims are based from Japan's alleged "commercial activity."¹⁹⁵ Thus, the court is not likely to find that the plaintiffs' claims are based upon Japan's acts taken in connection with its "commercial activity."¹⁹⁶

The second issue under the commercial activities exception of Section 1605(a)(2) is whether use of the Comfort Women system had "direct effects" in the United States. Regarding the "direct effects" requirement embodied in the third prong of Section 1605(a)(2),¹⁹⁷ the plaintiffs' argument is twofold.¹⁹⁸ First, the island of Guam and the islands of the Philippines, where Japan operated the Comfort Women system, were under the jurisdiction of the United States at the time the Comfort Women system operated.¹⁹⁹ Operation of the Comfort Women system in the territories of the United States²⁰⁰ constitutes a

194. *See supra* notes 177-81 and accompanying text (explaining how the Comfort Women system may constitute a "commercial activity" under the FSIA).

195. *See Motion for Declaratory Judgment, supra* note 112, at 34 (arguing that the Comfort Women's claims arise "directly from a concerted course of commercial conduct by Defendant Japan.").

196. *See, e.g.,* Complaint, *supra* note 99, para. 53 (stating that if seen as a whole, the Comfort Women system seems to have the characteristics of a military activity uniquely sovereign in nature rather than a "commercial activity").

197. *See infra* notes 203-05 and accompanying text (stating that the "direct effects" in the United States must be shown to satisfy the "commercial activity" exception under the third clause of Section 1605(a)).

198. Although the plaintiffs' argument, concerning "direct effects" is not organized in this manner, a close examination of their argument shows that it is basically twofold. *See Motion for Declaratory Judgment, supra* note 112, at 34-37.

199. *See id.* (arguing that the island of Guam and the islands of the Philippines became territories of the United States after the Spanish-American War in 1898). Japan invaded Guam and the Philippines in 1941 and began operating the Comfort Women system in those regions. *Id.* at 35. The main island of Japan also fell under the jurisdiction of the United States when Japan surrendered to the Allied power, and Japan continued to operate the Comfort Women system for the American soldiers. *Id.* at 36-37.

200. *See Motion for Declaratory Judgment, supra* note 112, at 34 (defining the term "United States" as "all territory and waters, continental or insular, *subject to the jurisdiction of the United States*") (emphasis added). The plaintiffs argue that any territories subject to the jurisdiction of the United States should be considered

“direct effect” within the meaning of the FSIA.²⁰¹ Alternatively, the United States’ burden of providing welfare for the Comfort Women after Japan’s surrender satisfies the requisite “direct effects in the United States” under Section 1605(a)(2).²⁰²

The first argument concerning the islands of Guam and the Philippines may be problematic because it is not consistent with the statutory construction of the third clause of Section 1605(a)(2).²⁰³ The “direct effects” requirement is only relevant when the acts in question occurred outside of the territory of the United States.²⁰⁴ Therefore, the plaintiffs mistakenly emphasize the fact that Japan operated the Comfort Women system in the territories of the United States such as Guam and Philippines.²⁰⁵ This reasoning seems contradictory as far as the “commercial activity” exceptions under Section 1605(a)(2) are concerned.²⁰⁶ Therefore, the plaintiffs may undermine their own contention that they are seeking the “commercial activity” exception under the third clause of Section

“the United States” within the meaning of the FSIA under Section 1603(c). *Id.*

201. *See id.* at 35, 37 (arguing that operating a military brothel has the “direct effects” in the United States needed to satisfy the requirements of the commercial activity exception in the FSIA).

202. *See id.* at 36 (arguing that the task of providing medical care, shelter, clothing, and food fell to the United States military). Some of the Comfort Women were debriefed and detained by the United States as prisoners of war or refugees in camps under the control of the United States. *Id.*

203. *See* 28 U.S.C. § 1605 (a)(2) (1994) (giving three exceptions to FSIA, one of which pertains to acts outside the United States, in connection with commercial activity of the foreign state, which has a direct effect in the United States). As explained above, the plaintiffs’ argument regarding the commercial activity exception is built on the premise that the use of the Comfort Women system took place outside the territory of the United States. *See* Motion for Declaratory Judgment, *supra* note 112, at 30.

204. *See* 28 U.S.C. § 1605 (a)(2) (1994) (providing only one exception that involves “direct effects” and where the act must have occurred outside the United States).

205. *See Motion for Declaratory Judgment, supra* note 112, at 35 (arguing that Japan operated “comfort stations” inside United States territories).

206. *See id.* (arguing that the plaintiffs’ claims are based upon Japan’s acts *outside* the territories of the United States in connection with commercial activity, i.e. the Comfort Women system) (emphasis added). *But see id.* at 35 (arguing that Japan operated the Comfort Women system *within* the territories of the United States) (emphasis added).

1605(a)(2).²⁰⁷

In addition, the plaintiffs' second argument²⁰⁸ may not be sufficient to satisfy the "direct effects" prong within the meaning of Section 1605(a)(2) although it appears to be the correct approach for showing the existence of the "direct effects."²⁰⁹ Courts have held that the "direct effects" must be an *immediate* consequence of the foreign state's activity, while such effects do not have to be foreseeable or substantial.²¹⁰ The plaintiffs argue that after Japan surrendered, the United States' burden of caring for the abandoned women was an immediate consequence of Japan's use of the Comfort Women system.²¹¹ However, courts' have interpreted "immediate consequence" much narrower than the plaintiffs' argument.²¹²

207. See Reply in Support of Motion of Japan, *supra* note 159, at 19 (discrediting the plaintiffs' argument by pointing out that if Japan used the Comfort Women system in the territories of the United States, their reliance on the third clause of section 1605(a)(2) would not be possible). The third clause of section 1605(a)(2) provides an exception to sovereign immunity where the causes of action are based upon "an act outside the territories of the United States in connection with a commercial activity of the foreign state elsewhere." See 28 U.S.C. § 1605(a)(2) (1994).

208. See *supra* note 202 and accompanying text (stating that the United States' burden of caring for the women constituted the "direct effect" in the United States).

209. See *supra* note 197 (stating that a commercial activity by a foreign state occurring outside the United States must have a "direct effect" on the United States); see also *supra* notes 199-202 and accompanying text (stating the plaintiffs' showing for this second element). The existence of "direct effects" is shown by demonstrating that an act occurring outside of the United States caused certain effects in the United States, rather than by demonstrating that an act caused "direct effects" in the United States because it occurred in the United States. *Id.*

210. See *Voest-Alpine v. Bank of China*, 142 F.3d 887, 893 (5th Cir. 1998) (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 607 (1992)) (stating that an effect is direct when the effect follows "as an immediate consequence of the [foreign state's] activity" although it is not required that the effect be "foreseeable" or "substantial"). An effect in the United States is sufficient to satisfy the commercial activity exception under the FSIA so long as it is "direct – with no other modifying adjectives." *Id.*

211. See Motion for Declaratory Judgment, *supra* note 112, at 36 (arguing that as an immediate consequence of the Comfort Women system, the United States had to spend substantial sums of money and use other resources to deal with the victims of the system).

212. See, e.g., *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172-73 (D.D.C. 1994) (explaining how a plaintiff tried to satisfy the "direct effects"

Accordingly, the court is likely to find that – although Japan’s use of the Comfort Women system may have placed a financial burden on the United States – there was an interruption between these two events when Japan surrendered and the United States decided to help the victims.²¹³ Therefore, the plaintiffs’ “commercial activity” exception is most likely to be rejected.

c. The Waiver by Implication Exception

In general, courts have narrowly construed the waiver by implication exception under the FSIA.²¹⁴ In doing so, courts defer to the legislative history of the FSIA in which Congress provided three specific examples of implicit waiver.²¹⁵ Accordingly, unless the

element but was denied due to the “immediate consequence” element). The plaintiff argued that his claims satisfied the requisite “direct effect” in the United States because: (1) his forced labor as a slave for the German firm directly supporting the Nazi war effort against the United States had a “direct effect” in the United States; (2) the current German government’s use the United States’ bank system in connection with reparations program for the victims of the Nazi Rule constitutes a “direct effect”; and (3) his personal injuries suffered in Germany became a “direct effect” in the United States following his return to America. *Id.* The court rejected all three arguments by holding that the plaintiff’s alleged “direct effects” do not present an “immediate consequence” of the defendant’s acts since there was an interruption or time delay between the defendant’s acts and the alleged “direct effects”. *Id.*

213. *See id.* at 1172 (citing *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff’d mem.* 607 F.2d 494 (D.C. Cir. 1979)) (holding that “[a] ‘direct effect’ however, ‘is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.’ ”).

214. *See Saudi Arabian Airlines Corp. v. Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999) (stating that the courts have consistently held that the waiver by implication provision of Section 1605(a)(1) of the FSIA must be construed narrowly, and the implicit waiver did not exist unless there was strong evidence supporting the existence of the implicit waiver by the state); *see, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (holding that the implicit waiver exception must be construed narrowly). *Cf. Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993) (stating that the implicit waiver under the FSIA has been rarely accomplished while the explicit waiver has been more frequently recognized).

215. *See Saudi Arabian Airlines Corp.*, 176 F.3d at 278 (citing H.R. REP. NO. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617) (identifying that Congress listed three examples of implicit waivers in the FSIA: 1) “a foreign state has agreed to arbitration in another country”; 2) “a foreign state has agreed that a contract is governed by the law of a particular country”; and 3) “a foreign state has filed a responsive pleading in a case without raising the defense of

courts find that the situation in question resembles one of these three examples, the courts will find that an implicit waiver does not exist.²¹⁶

The plaintiffs do not contend that their case resembles any of the three examples.²¹⁷ Rather, they solely focus on the argument that Japan's use of the Comfort Women system violated *jus cogens* norms²¹⁸ and that this type of violation should constitute an implied waiver of sovereign immunity under the FSIA.²¹⁹ Although the rationale of this argument may be well-founded,²²⁰ it may not be

sovereign immunity.”).

216. See *Frolova*, 761 F.2d at 377 (stating that under the construction of the FSIA, courts have been reluctant to expand the findings of implicit waiver beyond the three examples set forth in the legislative history); see also Statement of Interest, *supra* note 18, at 9-13 (arguing that neither the FSIA itself nor the legislative history of the FSIA supports expansive application of the implicit waiver exception).

217. See Motion for Declaratory Judgment, *supra* note 112, at 38-39 (discussing the failure to address applicability of the three examples).

218. See *id.* at 38-39 (arguing that “Japan’s abduction and sexual enslavement” of Asian women in its Comfort Women system violated *jus cogens* norms of international law); see also *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (recognizing rape, torture, and arbitrary detention as violations of “the most fundamental norms of the law of war,” which in turn constitute direct violations of international law); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.D.C. 1994) (stating that a state violates *jus cogens* norms when it “practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.”) (emphasis added).

219. See Motion for Declaratory Judgment, *supra* note 112, at 39-44 (arguing that both international and domestic public interests favor the recognition of violations of *jus cogens* norms as the implicit waiver under the FSIA).

220. See *Princz*, 26 F.3d at 1183-84 (Wald, J., dissenting) (arguing that recognition of violations of *jus cogens* norms as an implicit waiver is appropriate because a close examination of the legislative history supports such argument); see also *International Law – Foreign Sovereign Immunities Act – D.C. Circuit Holds that Violation of Peremptory Norms of International Law Does Not Constitute an Implied Waiver of Sovereign Immunity Under the Foreign Sovereign Immunities Act. – Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), 108 HARV. L. REV. 513, 516 (1994) [hereinafter *Peremptory Norms of International Law*] (arguing that broadening the scope of the waiver provision under the FSIA is consistent with the growing willingness of the international community’s recognition of nonderogable *jus cogens* norms to limit individual state power).

sufficient to persuade the court because it is grounded in public policy and lacks judicial authority in the United States.²²¹ First, in *Princz v. Federal Republic of Germany*, the District of Columbia Circuit squarely rejected the proposition that violations of *jus cogens* norms should constitute an implicit waiver of sovereign immunity by a foreign state within the meaning of the FSIA.²²² Second, courts have determined that the legislative history of the FSIA clearly limits the findings of implicit waiver to cases in which the nation implied its amenability to suit in the United States at some time.²²³ Moreover, the courts further held that such implication can only be found when the facts of the case resembles one of the three examples stated in the statute's legislative history.²²⁴

Given this background, the court is most likely to reject the plaintiffs' current argument regarding the implicit waiver exception, which is based solely on the violation of *jus cogens* norms of international law. On appeal, the plaintiffs may be able to make a more persuasive argument by fitting their factual allegation into one of the three examples given in the FSIA's legislative history.²²⁵ Assuming Japan is denied its sovereign immunity, the following section reviews the construction of the ATCA.

221. See Motion for Declaratory Judgment, *supra* note 112, at 39-44 (showing that the Comfort Women relied heavily on the international community's attitude favoring the recognition of violations of *jus cogens* norms as a waiver of sovereign immunity while citing Judge Wald's dissenting opinion in *Princz* as the sole judicial authority supporting their position).

222. See *Princz*, 26 F.3d at 1174 (stating that in the absence of a clear warrant from the legislative history of the FSIA, the court cannot accept violations of *jus cogens* norms as the implicit waiver in the FSIA).

223. See *Foremost McKesson Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (stating that courts rarely find that a foreign state implicitly waived its sovereign immunity unless there is strong evidence that the foreign state indicated its amenability to suit in the United States).

224. See *Princz*, 26 F.3d at 1174 (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (stating that "[s]ince the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity.")).

225. See discussion *infra* Part IV.A. (recommending alternative arguments for the plaintiffs).

C. CONSTRUCTION OF THE ATCA

In order to obtain jurisdiction under the ATCA, the Comfort Women must show that Japan's use of the Comfort Women system constituted a tort committed in violation of international law or a treaty of the United States.²²⁶ Accordingly, the plaintiffs argued that Japan violated customary international law as well as international conventions or treaties in existence at the time of the alleged tort.²²⁷ They further alleged that such conduct constituted crimes against humanity.²²⁸

At the time Japan operated the Comfort Women system,²²⁹ there were several international treaties preventing trafficking in women and children.²³⁰ In particular, the International Convention for the Suppression of the Traffic in Women and Children of 1921 ("1921 Trafficking Convention")²³¹ underscored the global community's

226. See 28 U.S.C. § 1350 (1994) (stating that district courts have jurisdiction for civil actions brought by aliens or tort claims).

227. See *id.* (stating that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the *law of nations or a treaty of the United States.*") (emphasis added). Japan's recruitment of Comfort Women from occupied territories clearly violated the 1921 Trafficking Convention and customary international law. See Yu, *supra* note 4, at 531-36. See generally Tree, *supra* note 4, at 481-921 (articulating how Japan's use of the Comfort Women system violated international conventions, treaties, and customary international law).

228. See Complaint, *supra* note 99, para. 77.

229. See Tree, *supra* note 4, at 467 (reporting that Japan forced up to two-hundred thousand women into sexual slavery between 1931 to 1945).

230. See, e.g., Motion for Declaratory Judgement, *supra* note 111, at 26 (citing five international treaties that prohibited sexual slavery and the trafficking of women and children at the time the Comfort Women system was established such as the 1933 International Convention on the Suppression of Traffic in Women of Full Age, the Convention to Suppress the Slave Trade and Slavery of 1926, the International Convention for the Suppression of the Traffic in Women and Children of 1921, the Hague Convention Respecting the Laws and Customs of War on Land and Regulations annexed thereto of 1907, and the International Labor Organization Convention No. 29 of 1930).

231. See Tree, *supra* note 4, at 486 (identifying that the 1921 Trafficking Convention, among others, excluded occupied territory of a nation from its coverage). Thus, Japan deliberately carried out systematic recruitment of women from Korea, which was a Japanese colony, to evade legal responsibilities under the 1921 Trafficking Convention. *Id.* Japan may still be held liable for its use of

commitment to prevent trafficking in women and children.²³² Moreover, signature parties²³³ to the conventions have duties not only to punish offenses contrary to these conventions but also to take affirmative steps necessary to prevent such offenses.²³⁴ To this end, Japan manifestly violated these conventions by actively operating the Comfort Women system.²³⁵

In addition, the court may find that the Comfort Women system violated customary international law.²³⁶ Customary international law may not only be found in the actual practice of law by States, but may also be inferred from treaties or conventions.²³⁷ Treaties and conventions are usually intended to codify preexisting customary international law as it is practiced by States.²³⁸ Furthermore, customary international law, unlike treaties and conventions, is applicable to States that are not signatories to a particular treaty or convention.²³⁹ Thus, the codification of the above mentioned

Korean Comfort Women because many of the Korean women were taken to Japan before they were shipped out to various countries. *Id.* Once the women landed in Japan, they were protected under the 1921 Trafficking Convention. *Id.*

232. *See id.* (stating that these Conventions expressly stated that a female of any age cannot be taken by force for means of immoral purposes).

233. *See Tree*, *supra* note 4, at 481 (reporting that International Labor Organization Convention No. 29 of 1930 (“ILO Convention No. 29”) entered into effect for Japan in 1933); *see also id.* at 485 (reporting that Japan ratified the 1921 Trafficking Convention in 1925).

234. *Id.* at 486.

235. *Id.* *See also* Motion for Declaratory Judgment, *supra* note 112, at 26 (arguing that at the time that Japan established the Comfort Women system, at least five international treaties existed, which prohibited sexual slavery and trafficking in women and children).

236. *See* MICHAEL AKEHURST, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 39 (Peter Malanczuk ed., Routledge 7th rev. vol. 1997) (stating that customary international law can be found in general practice and *opinio juris* of states).

237. *See id.* at 37 (stating that when nations agree about rules of customary law, they codify such rules through treaties).

238. *See Tree*, *supra* note 4, at 489 (arguing that the Fourth Geneva Convention of 1949 was created in order to formalize customary international law which already existed before World War II). Thus, the Convention did not create a new law, but it merely codified then existing customary law regarding war crimes and crimes against humanity. *Id.*

239. *See id.* (stating that customary international law has much broader

conventions can be considered evidence that customary international law condemning sexual slavery and trafficking in women existed prior to Japan's use of the Comfort Women system.²⁴⁰ Therefore, the Comfort Women have a strong argument that Japan violated international customary law. In fact this position has been supported by the International Commission of Jurists who stated that Japan's use of the Comfort Women system clearly violated international law, which in turn constituted war crimes and crimes against humanity.²⁴¹ In addition, the Second Circuit in *Kadic v. Karadzic*,²⁴² manifested that the United States has long recognized torture and rape as a clear violation of international law.²⁴³

The plaintiffs, however, must still overcome the unfavorable precedent of the District of Columbia Circuit.²⁴⁴ In *Tel-Oren v. Libyan Arab Republic*, the court held that the international law or treaty in question must expressly provide a private right of action in order for the individual plaintiffs to gain standing under the ATCA.²⁴⁵ In other words, the District of Columbia Circuit has

applicability than treaties and conventions). *Cf.* AKEHURST, *supra* note 237, at 40 (stating that if a multilateral treaty was intended to codify international customary law, it can be used as evidence of customary law even against non-signatories to the treaty).

240. *See supra* notes 237-238 and accompanying text (explaining that the existence of various Conventions condemning sexual slavery and trafficking of women is evidence that prohibition of such acts was part of customary international law prior to Japan's establishment of the Comfort Women system).

241. *See Tree, supra* note 4, at 487 (citing FEDERATION OF KOREAN TRADE UNIONS, COMFORT WOMEN: MILITARY SEXUAL SLAVERY BY JAPAN, 10 (1997)) (stating that the International Commission of Jurists declared that Japan's use of the Comfort Women system violated international customary law prohibiting enslavement and trafficking in women and children, which constituted war crimes and crimes against humanity).

242. 70 F.3d 232 (2d Cir. 1995).

243. *See id.* at 242 (holding that the United States has recognized acts of murder, rape, torture, and arbitrary detention of civilians as direct violations of international law).

244. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 549 (D.D.C. 1981) (holding that unless international law in question generally provides a private right of action, the plaintiff cannot invoke jurisdiction under the ATCA); *see also Pauling v. McElory*, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.D.C. 1960) (explaining that the District of Columbia has recognized that the ATCA grants jurisdiction, but not a private right of action).

245. *See Tel-Oren*, 517 F. Supp. at 546; *see also Pauling*, 164 F. Supp. at 393

construed the ATCA as granting jurisdiction but not creating a private right of action.²⁴⁶

In the Plaintiffs' Opposition to Defendant's Motion to Dismiss, the plaintiffs tried to dispute the private right of action requirement by arguing that the ATCA itself provides a private right of action.²⁴⁷ They argued that the vast majority of circuit courts have held a view contrary to the District of Columbia Circuit regarding whether the ATCA independently provides a private right of action.²⁴⁸

For instance, the Eleventh Circuit Court of Appeals held that plaintiffs only have to show a violation of international law in order to create a private right of action under the ATCA.²⁴⁹ This is true particularly when the alleged perpetration involved a tortious violation of international law such as a human rights violation.²⁵⁰ For example, in *In re Estate of Marcos*, the Ninth Circuit Court of Appeals held that the ATCA provided a private right of action because the torture committed by the defendant violated a

(holding that the plaintiff in a case brought under the ATCA must prove that the treaty in question expressly vests the plaintiff with a private right of action for relief).

246. See *Tel-Oren*, 517 F. Supp. at 549 (holding that the ATCA serves merely as an entrance to the district courts and does not provide an independent cause of action to any plaintiff). The plaintiffs must establish cause of action somewhere in international law or international treaties. *Id.*

247. See Plaintiffs' Opposition, *supra* note 115, at 42-43 (arguing that the ATCA provides a private right of action, a position which almost every circuit court accepts). The plaintiffs further argue that their position is supported by Congress' enactment of the Torture Victims Protection of 2000 that reaffirmed the authority of federal district courts to hear alien tort claims arising from violations of international law. *Id.*

248. *Id.* See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996) (requiring that a mere allegation of a violation of international law is sufficient to create a private right of action under the ACTA); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (stating that the ACTA provides for a remedy for the plaintiffs' charges of genocide, war crimes and official torture).

249. See *Abebe-Jira*, 72 F.3d at 847-48 (concluding that the ATCA creates a federal forum for violations of international law allowing for domestic common law remedies).

250. See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (holding that the ACTA provides for a private right of action for alleged violations of *jus cogens* norms).

“fundamental and universal standard,” or *jus cogens* norm.²⁵¹ In a later decision, the Second Circuit Court of Appeals further clarified the *Marcos* decision by identifying specific conduct that would violate *jus cogens* norms.²⁵² The Court held that the ATCA provided a private right of action when the alleged violation was related to genocide, war crimes, or official torture.²⁵³ This line of reasoning is also consistent with the view of many courts that the preliminary requirement plaintiffs must show is that their case presents “extraordinary circumstances” that shock the conscience of the court.²⁵⁴

In addition, the plaintiffs may further argue that international laws generally do not provide an express private right of action. Thus, the requirement that an international treaty confer a private right of action would nullify the ATCA’s jurisdiction over most, if not all, alien tort claims arising from violations of international law.²⁵⁵ Despite the plaintiffs’ sound argument supporting their position, however, it remains to be seen whether the District of Columbia Circuit would ultimately overrule the *Tel-Oren* decision that requires that plaintiffs point to an express provision in a treaty providing for a private right of action.

Given that the plaintiffs face difficulty in most of their arguments the following section suggests ways of improving the plaintiffs’ legal arguments.

251. *See id.* (stating that “the right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*.”). *But see* *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that violation of the First Amendment right of free speech does not amount to the level of a universally recognized right invoking a private right of action under the ATCA).

252. *See Kadac*, 70 F.3d at 239 (stating that a state may be held liable for action considered *hostis humani generis* (an enemy of all mankind) because such actions take place without public authority, such as piracy or slave trade).

253. *See id.* at 236 (finding that subject-matter jurisdiction existed).

254. *See Construction & Application*, *supra* note 55 and accompanying text (stating that the court should first determine whether the case is extraordinary in nature so as to shock the conscience of the court).

255. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (holding that it is not necessary for plaintiffs to show that the international law in question expressly provides for a private right of action because no international law clearly creates or defines a civil action).

IV. RECOMMENDATIONS

A. ALTERNATIVE ARGUMENTS TO DENY JAPAN IMMUNITY UNDER THE FSIA

As the Comfort Women indicate in their Motion for Declaratory Judgment, denying Japan foreign sovereign immunity under the FSIA is the first threshold they need to surpass in order for the class action suit to proceed.²⁵⁶ The plaintiffs unquestionably face the difficult task of persuading the court that Japan is not entitled to sovereign immunity under the FSIA because the court is likely to reject the plaintiffs' arguments that Japan's actions fit within the exceptions specified under the FSIA.²⁵⁷ Given the current factual allegations, however, the plaintiffs may be able to make more persuasive arguments by seeking relief under the non-commercial tort exception of the FSIA²⁵⁸ or by modifying their argument regarding the "waiver by implication" exception.²⁵⁹ Accordingly, the plaintiffs may consider the following recommendations on appeal.

1. The Noncommercial Torts Exception

There is an exception under the FSIA for a plaintiff who is seeking monetary damages against a foreign state based on torts committed by that state in the United States.²⁶⁰ When examining the

256. See Motion for Declaratory Judgment, *supra* note 112, at 23-24 (stating that determination of Japan's immunity is critical because if Japan is entitled to immunity, the case cannot proceed).

257. See discussion *supra* Part III.B.2 (showing that the plaintiffs' arguments regarding the explicit waiver, commercial activity, and implicit waiver exceptions under the FSIA will likely fail).

258. See discussion *infra* Part IV.A.1 (recommending that the plaintiffs seek noncommercial tort exception under Section 1605(a)(5)).

259. See discussion *supra* Part III.B.2 (demonstrating that the court will most likely reject the plaintiffs' arguments for the explicit waiver and commercial activity exceptions based on their factual and legal allegations).

260. See 28 U.S.C. § 1605(a)(5) (1994 & Supp. 1999). This section provides that

[a] foreign state shall not be immune from the jurisdiction of the courts of the United States or of the states in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or

applicability of Section 1605(a)(5) to a case, courts consider whether the foreign state committed a noncommercial tort and whether the tortious acts occurred in the United States.²⁶¹ Courts would not, however, apply the noncommercial tort exception under this section if the causes of action were based upon a foreign states' exercise or failure to exercise its discretionary function.²⁶² Although the plaintiffs did not raise this argument in their motions, the facts of the plaintiffs' case seem to satisfy Section 1605(a)(5).

First, the plaintiffs seek monetary damages against Japan's tortious acts.²⁶³ Although legislative history shows that Congress may have intended Section 1605(a)(5) to govern traffic accidents, the legislative history's language clearly included "other noncommercial torts."²⁶⁴ Moreover, the Supreme Court of the United States, in *Amerada Hess II*, applied Section 1605(a)(5) to attacking a

loss of property, occurring in the United States and caused by the tortuous act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment...").

Id.

261. See, e.g., *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40 (1989) (stating that liability under Section 1605(a)(5) is limited by the fact that the act must have occurred "*in the United States.*") (emphasis added); *Leteleir v. Republic of Chile*, 488 F. Supp. 665, 672 (D.D.C. 1980) (inquiring the applicability of the exception under Section 1605(a)(5) by scrutinizing whether the alleged tortious acts of the foreign state occurred in the United States within the meaning of that section).

262. See 28 U.S.C. § 1605(a)(5)(A)-(B) (1994 & Supp. 1999) (stating that section 1605(a)(5) is not applicable to "any claim based upon the exercise or performance or failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.>").

263. See Complaint, *supra* note 99, para. 82 (seeking compensatory and punitive damages arising from Japan's tortious acts). See H.R. REP. NO. 94-1487, at 21 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6620 (stating that section 1605(a)(5) was designed to govern suits against foreign state).

264. See *Argentine Republic*, 488 U.S. at 439-40 (stating that the primary motive underlying the inclusion of Section 1605(a)(5) in the FSIA was to eliminate a foreign states's immunity for traffic accidents and other torts otherwise provided for by law); see also *Leteleir*, 488 F. Supp. at 672 (stating that the language of the legislative history of the FSIA clearly indicates that applicability of Section 1605(a)(5) was not limited to actions arising from traffic accidents).

commercial vessel in open waters.²⁶⁵ Thus, plaintiffs will likely be able to show that Japan's acts, such as torture and physical abuse, constitute a tortious act within the meaning of Section 1605(a)(5).

Secondly, the plaintiffs may also be able to show that Japan's tortious acts occurred on the Island of Guam, a territory of the United States.²⁶⁶ Section 1603(c) of the FSIA defines "United States" as including all territory and waters subject to the jurisdiction of the United States.²⁶⁷ Although neither the statutory language nor the legislative history of the FSIA expressly states whether "all territory" in Section 1603(c) includes the Island of Guam,²⁶⁸ the Immigration Act of 1917 defines the term "United States" to include the Island of Guam.²⁶⁹ This definition clearly shows that the United States considered the Island of Guam within its territory during the 1940s when Japan operated the Comfort Women system. Therefore, it is reasonable to conclude that the Island of Guam is the territory of the

265. See *Argentine Republic*, 488 U.S. at 439-40 (relating section 1605(a)(5) to a tort action arising out of military aircraft attacks on a commercial ship but not actually applying Section 1605(a)(5) because the tortious acts did not occur in the United States); see also *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921-23 (D.D.C. 1987) (holding that Peru violated local zoning laws constituting a tortious act under section 1605(a)(5), but the court held that Peru was not liable under section 1605(a)(5)(A) due to the "discretionary function"); *Mckeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (stating that the clear language of Section 1605(a)(5) makes it applicable to every tort action for money damages not included by the 1605(a)(2), commercial activity exception).

266. See Motion for Declaratory Judgment, *supra* note 112, at 34-35 (arguing that Guam became a part of the United States territories resulting from the Treaty of Paris following the Spanish-American war in 1898). Japan invaded Guam in 1941 and occupied a portion of Guam for thirty-one months. *Id.* At that time, Comfort Women were stationed in Guam, a United States territory. *Id.*

267. See 28 U.S.C. § 1603(c) (1994 & Supp. 1999) (defining the United States to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States.>").

268. See H.R. REP. NO. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614 (stating that Section 1603(c) "defines 'United States' as including all territory and waters subject to the jurisdiction of the United States.>"). The legislative history of the FSIA does not provide any more details than the statutory text. *Id.*

269. See 8 U.S.C. § 1101(38) (1994) (providing that the "term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, *Guam*, and the Virgin Islands of the United States.") (emphasis added).

United States within the meaning of the FSIA. Finally, the exceptions in subsection (A) and (B) of Section 1605(a)(5) do not bar the application of the noncommercial tort exception to the plaintiffs' claims. Rape and torture committed by Japan, is not considered within the discretionary function of a foreign state.²⁷⁰ In sum, by showing that Japan committed tortious acts in the United States, the plaintiffs will likely be able to deny Japan sovereign immunity under Section 1605(a)(5).

2. *The Waiver by Implication Argument*

Although construing violations of *jus cogens* norms under international law as an implicit waiver exception under the FSIA has been strongly advocated in recent years,²⁷¹ it is critical that the plaintiffs make arguments complying with the statutory construction of the FSIA adopted by the courts.²⁷² In addition to arguing that violations of *jus cogens* norms constitute an implicit waiver, the plaintiffs may argue that Japan's acceptance of the terms of the Potsdam Declaration constitutes the "implicit waiver" in Section 1605(a)(1). The problem with using the Potsdam Declaration provisions as evidence of an "explicit waiver" is that the Potsdam Declaration contains no express provisions of Japan's waiver of immunity in civil suits.²⁷³ Out of the three examples of the implicit waiver set forth in the legislative history of the FSIA,²⁷⁴ the first

270. See *Leteleir v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (maintaining that state actions that violate the very basic precepts of humanity such as the assassination of individual(s), is not among legitimate policy choices available to a state). Cf. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 923 (D.D.C. 1987) (holding that "[t]o fit within the discretionary function exception, implementing acts must themselves involve the exercise of policy judgment" regarding social, economic, and political policy).

271. See *Peremptory Norms of International Law*, *supra* note 220, at 513, 516 (advocating a public policy argument that violations of *jus cogens* norms of international law should be recognized as a FSIA exception).

272. See *Princz*, 26 F.3d at 1174 (stating that the implicit waiver exception is rarely satisfied unless one of the three examples stated in the legislative history is met).

273. See *supra* notes 159-160 and accompanying text (explaining that absent an express provision of a waiver, courts will not find the "explicit waiver" exception under the FSIA).

274. See *supra* note 215 (listing three examples proscribed in the legislative

example provides that the implicit waiver by a foreign state can be found when the “state has agreed to arbitration in another country.”²⁷⁵ Japan agreed to potential trials for its war crimes by accepting the terms of the Potsdam Declaration, but Japan did not expressly waive its sovereign immunity.²⁷⁶ While Japan argues that agreeing to criminal trials does not imply that Japan waived sovereign immunity in civil trials,²⁷⁷ the legislative history of the FSIA does not indicate any distinction between the waiver of civil or criminal immunity.²⁷⁸ Furthermore, if a state can implicitly waive its sovereign immunity from suit by merely agreeing to an arbitration, the plaintiffs may be able to argue that Japan implicitly waived its sovereign immunity by agreeing to criminal litigation in the United States through Potsdam Declaration. The Comfort Women should be able to argue that Japan implicitly waived its sovereign immunity by agreeing to criminal litigation in the United States. In fact, courts have not required an exact match between an example of an implicit waiver as specified in the FSIA’s legislative history and the situation in question, holding that a similarity between the two will suffice.²⁷⁹ In sum, the plaintiffs will likely have a better chance to persuade the court on appeal if they argue Japan’s acceptance of the Postdam Declaration and violation of *jus cogens* norms both constitute an implicit waiver under Section 1605(a)(1), and therefore the court should deny Japan sovereign immunity under the FSIA.

history of the FSIA).

275. See H.R. REP. NO. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617 (stating than an implicit wavier may be found when a foreign state agrees to another country’s law governing contract matters).

276. See Motion for Declaratory Judgment, *supra* note 112, at 27-28 (arguing that Japan knew it would be held accountable in a future criminal trial by accepting the Potsdam Declaration).

277. See Motion to Dismiss, *supra* note 18, at 8 (rebutting the explicit waiver exception by arguing that Japan’s immunity from civil liabilities cannot be inferred from the waiver of immunity for criminal liabilities).

278. See H.R. REP. NO. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617 (failing to distinguish between civil and criminal immunity).

279. See *Saudi Arabian Airlines Corp. v. Tamimi*, 176 F.3d 274, 279 (4th Cir. 1999) (indicating that the situation at hand needs to bear some resemblance to one of the three examples set forth in the legislative history of the FSIA).

B. ROLE OF THE UNITED STATES GOVERNMENT

The filing of a statement of interest in the Comfort Women suit is not unusual, since the United States government has done so in numerous cases, especially when foreign sovereigns were parties to the suits and human rights violations were at issue.²⁸⁰ The United States, however, in the statement of interest regarding the Comfort Women, ignored the human rights protection policy that it advocated in previous cases by urging the court not to hear the case.²⁸¹ In other words, the United States has failed to demonstrate consistency in its policy regarding human rights protection and comity of nations²⁸² in the past. Rather, it seems that arbitrary self-interests have dictated the United States' opinions in its statements of interest depending on the defendant state and its relationship with that state.²⁸³ It is now time to reshape the United States' long-term policy regarding human rights

280. See, e.g., Webster, *supra* note 18, at 1143 (identifying that in *Filartiga* the Departments of Justice and State filed an *amicus curiae* brief urging the court to hear the case).

281. Compare Statement of Interest, *supra* note 18, at 21-35 (stating that the United States is not the proper forum to try this case for public policy reasons) and Pollitt, *supra* note 6 (stating that the United States argues that its relations with Japan will be seriously undermined if the Comfort Women's case is heard in the United States) with Webster, *supra* note 18, at 1143 n.187 (citing *Amicus Curiae* Brief by the United States Department of Justice and State, at 22-23, *Filartiga v. Pena-Irala*, 620 F.2d 876 (2d Cir. 1980) (stating that the United States, in its statement of interest, argued that to refuse to recognize the plaintiff's private right of action would seriously undermine the credibility of the United States' commitment to human rights protection, where a clear violation of international law was shown)).

282. See Motion to Dismiss, *supra* note 18, at 29-30 (arguing that judicial action for Comfort Women would disrupt the comity of nations doctrine that requires domestic courts to abstain from exercising jurisdiction over cases affecting interests of foreign states). But see Webster, *supra* note 18, at 1143 (indicating that extending sovereign immunities to foreign states based on the notion of comity would imply the lack of commitment of the United States to international law). Such an extension of sovereign immunity to foreign states would adversely affect the relations with nations condemning the kind of perpetration committed by the defendant state. *Id.*

283. See Pollitt *supra* note 6 (stating that the self-interests of the United States outplayed consideration of human rights protection); see also Barry A. Fisher & Iris Chang, *Japan Shatters Its Past*, TULSA WORLD, Aug. 5, 2001, at 3 (claiming the United States deters Asian victims from seeking relief and criticizes the United States for its double standard of refusing to help World War II Asian victims, but supporting European victims in comparable lawsuits).

protection.²⁸⁴ Moreover, the United Nations Human Rights Committee's recent decision to vote the United States off the Committee compels immediate action from the United States regarding human rights protection policy.²⁸⁵

Further, as legal scholars and historians have noted, the United States deliberately ignored the issue of reparation for the Asian Comfort Women after World War II while pursuing its self-interests with Japan.²⁸⁶ Thus, the United States also has a moral responsibility to pursue reparations for the Asian Comfort Women, thus bolstering its record on human rights in the eyes of the international community.

CONCLUSION

The Comfort Women face the difficult task of overcoming jurisdictional obstacles under the FSIA in their effort to adjudicate their claims. The plaintiffs should restructure their arguments on appeal. Failure to have their case heard in the United States could mean that their claims may never be resolved in their lifetimes.²⁸⁷

284. See Fisher & Chang, *supra* note 283, at 3 (arguing that in order for the United States to be a true human rights advocate it must support Comfort Women in this lawsuit).

285. See Harold Hongju Koh, *A Wake Up Call on Human Rights*, WASH. POST, May 8, 2001, at A23 (warning that because the United States was voted out of the U.N. Human Rights Commission, deference to the United States is no longer automatic). Withdrawal from the Commission will not only undermine the United States' role as a leader in worldwide human rights issues, but will also make the United States a target of the Commission. *Id.*

286. See Tree, *supra* note 4, at 465-69 (criticizing that the Tokyo War Crimes Trials led by the United States did not charge any Japanese for their crimes against two-hundred thousand Asian Comfort Women, while Japanese officers were prosecuted for violations against thirty-five Dutch women). The United States' disparity of treatment between Germany and Japan is a significant reason for the delayed disclosure about Comfort Women. *Id.* at 469. Furthermore, the United States was lenient on Japan due to its desire for capitalism in that region. *Id.* See also Michael Dobbs, *Lawyers Target Japanese Abuses; WWII Compensation Effort Shifts From Europe to Asia*, WASH. POST, Mar. 5, 2000, at A1 (stating that many historians attribute the lack of Japanese criminal prosecutions and post-war reparation efforts to the deliberate decision of the United States government to treat Japan leniently because Japan was a democratic ally against the Soviet Union during the Cold War era).

287. See Pollitt, *supra* note 6 (concluding that because many of the Comfort

While interests of both the United States and the international community are consistent with the resolution of the Comfort Women lawsuit in the United States,²⁸⁸ it is unknown whether the United States court will serve as the last resort for the plaintiffs and members of their class.

Women do not have descendents and are elderly, the United States' lawsuit may be their only hope for reparations).

288. See *Peremptory Norms of International Law*, *supra* note 220, at 516 (stating that the international community is moving toward protecting human rights by recognizing violations of *jus cogens* norms in order to limit powers of an individual states). Since international law is incorporated into domestic American law, courts should interpret domestic law in a manner that is consistent with international standards. *Id.*