

# State Immunity as applied to Colonial Racism and the Japanese Military as Purchaser and Joint Tortfeasor: Case of Korean “Comfort Women”

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*The redress and reparation efforts for the “comfort women” of the Japanese military during the Pacific War have been hampered in their home countries by the state immunity doctrine. In this article, we first evaluate the current state of jurisprudence on state immunity doctrine, especially as expressed in the seminal 2012 ICJ decision in Ferrini. We find there that the concept of “armed forces” has been commandeered to bolster the strict application of state immunity and evaluate such usage of the categories such as “armed conflicts” and “armed forces.” We note that full legal analysis under the state immunity doctrine, namely, that of the putative exception of “territorial torts,” was cut short by the court upon their findings on the elements of “armed conflicts” and “armed forces.” For subject matter relevance, the less well-known 2007 Hwang Geum Joo decision of a US court that applied similar reasoning to the “comfort women” in interpreting the American codification of the state immunity doctrine, is also evaluated against the pre-existing U.S. jurisprudence on “commercial activities.” We find that the Ferrini decision and the current jurisprudence of customary international law as informed by the relevant American precedent carefully circumscribes itself and thereby leaves intact the potential availability of two actus jure gestionis exceptions to state immunity—“private civil or commercial act”—for the “comfort women”: “territorial torts” and “commercial activity.”*

*The Japanese military, as the end-customer of “comfort services,” solicited, procured, and paid for ‘comfort services’ to reduce the cost of the war. These private legal acts incentivized the private contractors into recruiting Korean women, already impoverished under colonial racism, by deceit, and into treating the Korean women thus recruited harshly and inhumanely during the “comfort services.” Throughout the relevant periods, despite the Japanese military’s acts of “armed forces during an*

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*armed conflict” or any other sovereign act or governing act with respect to “comfort women,” it is undeniable that it set the specifications of the services to be delivered, exercising its prerogative as the end-customer and primary contractor. It is in this role as a joint tortfeasor in the “territorial tort” of fraudulent human trafficking and as a purchaser in the “commercial activity” of purchasing “comfort services” that the modern Japanese government should be held accountable in a Korean court of law in line with the exceptions to state immunity doctrine.*

Introduction .....	150
I. Current status of Japanese military "comfort women" issues .....	149
II. State Immunity doctrine.....	153
III. Application to "Comfort Women".....	157
A. Precedential Scope of “Armed Forces/Armed Conflict”	
Reasoning .....	157
B. “Territorial Tort” exception and colonial racism .....	158
C. Commercial activity exception.....	161
D. Colonial racism and the ‘comfort women’ system .....	164
Conclusion.....	167

## INTRODUCTION

Racism often has colonial origins. The conquest of a nation often has resulted in debilitating oppression and the enslavement of its people, as well as economic forces and social constructs legitimizing the oppression. Some of these “conquests” took place in relatively modern eras before the World Wars, or immediately after as today’s nation-states began forming, leaving the present generations with legacies of racism that straddle national borders and blur the distinctions between international hostilities and racism.

Today’s descendants of the colonizers and the colonized, who are now separated into different nations (though at times not harmoniously along racial or ethnic lines), must often resort to law for redress and reparations for past colonial atrocities in what becomes essentially an effort to settle accounts on the histories of international racism. Redress and reparations through legal venues have been hampered by the state immunity doctrine in the very jurisdiction where it is most politically feasible to obtain them: the home country of the colonized. This is often the only politically feasible judicial venue because many of these past “conquests” were sponsored by the home country of the former colonizers, where the judiciary is limited by that country’s laws and policies and, even worse, sometimes by racial discrimination against the citizens of the former colonized.

The “comfort women” of the Japanese military during the Pacific War were victims of such colonialism, and the redress and reparation efforts in their home countries have been hampered by the state immunity doctrine. In this article, we first evaluate the current state of jurisprudence on state immunity doctrine, especially as expressed in the seminal 2012 *Ferrini v. Federal Republic of Germany*

International Court of Justice (ICJ) decision. We find that the concept of “armed forces” has been commandeered to bolster the strict application of state immunity, and we evaluate such usage of the categories discussed in the decision, such as “armed conflicts” and “armed forces.” We note that full legal analysis under the state immunity doctrine, namely, the putative exception of “territorial torts,” was cut short by the court upon the court’s findings regarding “armed conflicts” and “armed forces.” For subject matter relevance, the less well-known 2007 *Hwang Geum Joo* decision of a U.S. court that applied similar reasoning to the “comfort women” in interpreting the American codification of the state immunity doctrine, will be also exposed and evaluated against the pre-existing U.S. jurisprudence on “commercial activities.” We find that the *Ferrini* decision and the current jurisprudence of customary international law as informed by the relevant American precedent carefully circumscribes itself and thereby leaves intact the potential availability of two *actus jure gestionis* exceptions—“private civil or commercial act”—to the “comfort women”: “territorial torts” and “commercial activity.”

We then take a deep dive into the facts about Korean “comfort women” and find that most of them, unlike the ones captured in conflict zones in China, Southeast Asia, and the Pacific Islands, were recruited by fraud actively committed by private contractors, maintained in captivity, and forced into sexual slavery by private contractors for the benefit of the prime contractor, as the Japanese military knowingly assisted in these actions. Therefore, the harms arose out of fraudulent contracts between private contractors and “comfort women” where the Japanese military was the sole end-customer and primary contractor. Therefore, the question should be whether the Japanese military’s action of issuing procurement orders for “comfort women” and receiving the services of these women constitutes a private legal act such as “territorial tort” or “commercial activity” and is therefore not subject to state immunity.

We are not arguing that the “comfort women” atrocities were private parties’ actions. We are focusing on the Japanese military’s *own* actions of procuring and consuming the services, which constitute *acta jure gestionis* and would therefore be free from the strictures of state immunity. In this sense, our argument is also different from the *Hwang Geum Joo* plaintiff’s argument, which focused on the Japanese military’s actions *as a sex trafficker and supplier*, which was rejected by that district court. In our narrative, the Japanese military operated as *the end customer* and therefore the *primary contractor* of the “comfort women” system operated by private contractors.

The Japanese military, fully knowing the fraudulent and involuntary nature of the comfort women’s stint, also assisted their subcontractors by sometimes transporting, imprisoning, and disciplining women with the worst forms of corporeal punishment involving outright rapes, grievous bodily harms, and deaths. Unfortunately, these atrocious features are often pointed to both as evidence of the immunity-triggering sovereign nature of their actions and evidence of the immunity-lifting *jus cogens* violations. However, our argument does not depend on them at this jurisdictional stage. It suffices that the Japanese military purchased indirectly and

consumed the services of “comfort women” and such actions were private legal acts within the meaning of state immunity jurisprudence. The gravamen of the claims then becomes that the comfort women were not properly compensated for the on-the-job damage that they suffered during their slave labor, and therefore, the claims for compensation are not subject to state immunity. The atrocious features of the consumptive actions of the Japanese military can be taken into account in proving harms and damages.

#### I. CURRENT STATUS OF JAPANESE MILITARY “COMFORT WOMEN” ISSUES

As the Ramseyer fiasco shows,<sup>1</sup> attempts at revisionism of the Japanese military’s WWII actions against women confined in “comfort stations” are failing. Revisionism, however, is not limited to extremist fringes. One of the reasons is because legal settlement is far from over and has not taken place at the level that the Nazis’ actions were settled: the living victims of the “comfort women” system have not been legally redressed.<sup>2</sup> This is so even after the Japanese government has already admitted and apologized for their involvement as early as 1993 (see below). It is worth going into detail about the existing evidence and discourse on the issues to give proper context for this Article’s purpose.

In 1992 the Japanese historian Yoshiaki Yoshimi, Professor at Chuo University, discovered military archives at the Defense Institute Library which implicated the Japanese military and government in the “comfort stations,” including record of instructions to set up “comfort stations.”<sup>3</sup> Five pieces of irrefutable documentary evidence attracted attention upon initial disclosure by Professor Yoshimi<sup>4</sup> (emphasis added in the following text):

A notice from the War Ministry dated 4 March 1938 to the North China Expeditionary Forces:

As the recruitment of comfort women has been entrusted to unsuitable agents, who used the Army’s name but engaged in abductions which brought police investigations, the Expeditionary Force is to exercise great care in selecting agents and maintain close co-ordination with civil and military police [*kempetai*] to preserve the dignity of the Forces.

A circular from North China Headquarters to units under its command dated 27 June 1938: “Illegal acts including rape are antagonising

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1. See Jeannie Suk Gersen, *Seeking the True Story of Comfort Women*, NEW YORKER (Feb. 25, 2021), <https://www.newyorker.com/culture/annals-of-inquiry/seeking-the-true-story-of-the-comfort-women-j-mark-ramseyer>.

2. See Ethan Hee-Seok Shin & Stephanie Minyoung Lee, *Japan Cannot Claim Sovereign Immunity and Also Insist that WWII Sexual Slavery Was Private Contractual Acts*, JUST SECURITY (July 20, 2021), <https://www.justsecurity.org/77492/japan-cannot-claim-sovereign-immunity-and-also-insist-that-wwii-sexual-slavery-was-private-contractual-acts>.

3. AIKO YOSHIOKA, ANALYSING REPRESENTATIONS OF THE COMFORT WOMEN ISSUE: GENDER, RACE, NATION AND SUBJECTIVITIES 14 (1997) (citing YOSHIKI YOSHIMI, JUGUN IANFU SHIRYOSHU [DOCUMENTS ON MILITARY COMFORT WOMEN] 3–5 (1992)).

4. *Id.* at 15 (citing GEORGE HICKS, THE COMFORT WOMEN 164–65 (St. Leonards 1995)).

the local population so that they co-operated with Communist guerrillas. To remedy this situation, discipline is to be strengthened and **sexual comfort** quickly provided.”

A 2nd Army situation report referring to the Hankow area garrison, dated 10 December 1938: “To avoid a repetition of previous disorder [referring mainly to the Rape of Nanking a year earlier], garrison troops are allowed to leave barracks only in organised parties or to visit **comfort stations**, which have been established from 25 November, a ticket system being used to avoid congestion or unseemliness.”

A routine report for mid-April 1939 to the War ministry by the 21st Army, based in Canton. It contains a table covering 854 **comfort women** under Army control in its area, broken down by unit and locality, with the percentages affected by disease. It adds that there were another 150 under private management brought by units from their home localities, as well as some local women in forward areas. It adds that comfort stations had declined with the increase in other types of locally managed facilities.

A general circular, dated 18 June 1942, to overseas areas, regulating the supervision of **comfort stations** and the inspection of returning troops for the purpose of preventing venereal disease.

The reasons for setting up the “comfort stations” were three-fold, as demonstrated by the documents.<sup>5</sup> First, the second document from the above five titled “Notes for Military Personnel in Relation to Citizens in the Area” issued by the Chief of Staff, Naozaburo Okabe on June 27, 1938, confirmed that the Japanese military set up “comfort stations” to prevent rape. The Chinese people responded with violence to rapes caused by Japanese soldiers. Okabe proposed to set up sexual comfort facilities. Most famously, international attention on the “Rape of Nanking” committed by Japanese troops also led to the rapid installation of “comfort stations” in China.<sup>6</sup> The second reason was for soldiers’ morale according to Special Symptoms in the Battlefield and its Counter Measures written by Surgeon First Lieutenant Torao Hayao in June 1939. Lt. Hayao stated there that commanding officers at the front permitted rape by soldiers tacitly thinking it is necessary to make soldiers vigorous. The third reason was concerns about sexually transmitted diseases. The use of private brothels would spread sexually transmitted disease.

As the evidence mounted and the motives were ascertained, on August 4, 1993, Japan’s Chief Cabinet Secretary Yohei Kono announced the following statement, which we present in fuller detail than necessary for easy access by the readers not familiar with the “comfort women” issues<sup>7</sup>:

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5. *See id.* at 17–18.

6. *Id.* at 1.

7. *Statement by the Chief Cabinet Secretary*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Aug. 4, 1993), [https://www.mofa.go.jp/a\\_o/rp/page25e\\_000343.html](https://www.mofa.go.jp/a_o/rp/page25e_000343.html).

The Government of Japan has been conducting a study on the issue of wartime "comfort women" since December 1991. I wish to announce the findings as a result of that study.

As a result of the study which indicates that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women. **Comfort stations were operated in response to the request of the military authorities of the day. The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women.** The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere.

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Undeniably, this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women . . . .

We shall face squarely the historical facts as described above instead of evading them, and take them to heart as lessons of history. We hereby reiterate our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history.

By 1996, all government-accredited textbooks for junior high school students in Japan were to include the comfort women issue.<sup>8</sup> However, justice was not quickly administered due to a thorny legal question of whether the previous international legal relationship abolished all legal claims.

At the end of the Pacific War, the Allied Forces and Japan had concluded a treaty to resolve the issue of post-war compensation in San Francisco in 1951, which left "the disposition . . . of claims . . . of [the] authorities and residents of the former occupied territories] against Japan and its nationals *shall be the subject of special arrangements between Japan and such authorities*" (emphasis added).

Then fourteen years later, Japan and Korea did make such a special arrangement, the Treaty on the Basic Relations between the Republic of Korea and Japan, and its supplementary treaty, the Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation between the

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8. YOSHIOKA, *supra* note 3, at 7.

Republic of Korea and Japan (hereinafter the “Claims Agreement”), on June 22, 1965, according to which “[the] problem concerning claims between the Contracting Parties and their nationals, including those provided for in [the 1951 San Francisco Treaty] is *settled completely and finally*” (emphasis added).

Therefore, even after the 1993 Kono statement, this 1965 Claims Agreement continued to become a source of the Japanese government’s continual delays and refusals to be forthcoming in redress and reparation, which later resulted in a private fund for the compensation of former comfort women initiated by the Japanese government, Asian Women’s Fund. According to its own report<sup>9</sup>:

In July 1995, the Asian Women’s Fund was established as a way to offer the atonement of the Japanese Government and people through projects conducted in cooperation between the Japanese Government and the people. By September 2002, the Asian Women’s Fund had completed projects in the Netherlands, the Philippines, the Republic of Korea, and Taiwan, offering the atonement of the Japanese Government to victims who had been forced to become comfort women. The women also received a letter from the Japanese Prime Minister, expressing feelings of apology and remorse and the determination to ensure that such a tragedy would never occur again . . . .

However, the fund has been criticized internationally because the government itself did not take responsibility to provide the compensation and failed to acknowledge legal responsibility as opposed to moral responsibility.<sup>10</sup> Additionally, many “comfort women” did not accept compensation. Twenty years later, Japan and Korea entered into another agreement on December 28, 2015, to “take measures with *Japan’s own budget* to heal the psychological wounds of all the former ‘comfort women.’”<sup>11</sup> More specifically, the treaty stated that the Government of the Republic of Korea will establish a foundation to provide assistance to the former “comfort women.” Japan will contribute from its government budget a lump sum funding to this foundation. The governments of Korea and Japan will cooperate to implement programs to restore the honor and dignity and to heal the psychological wounds of all the former “comfort women.”

However, this agreement has been rejected by a majority of the surviving former “comfort women” for a reason that they were not consulted in the negotiation between Japan and Korea and also that the fund does not constitute legal compensation.<sup>12</sup> The more important reason is that Shinzo Abe’s neo-conservative administration leaked several statements from high officials denying Japan’s legal responsibility for “comfort women” issues, especially as regards

9. ASIAN WOMEN’S FUND, THE “COMFORT WOMEN” ISSUE AND THE ASIAN WOMEN’S FUND (2003), <https://www.awf.or.jp/pdf/0170.pdf>.

10. *Id.* at 14, 44, 74.

11. *Announcement by Foreign Ministers of Japan and the Republic of Korea*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Dec. 28, 2015), [https://www.mofa.go.jp/a\\_o/na/kr/page4e\\_000364.html](https://www.mofa.go.jp/a_o/na/kr/page4e_000364.html).

12. Shannon Tiezzi, *South Korea’s ‘Comfort Women’ Reject Deal with Japan*, THE DIPLOMAT (Dec. 30, 2015), <https://thediplomat.com/2015/12/south-koreas-comfort-women-reject-deal-with-japan>.

coercion, thus contending that it does not constitute a war crime.<sup>13</sup> Some argue that the Korean civil society’s exaggerated narratives built around the element of kidnapping have aggravated and triggered the Japanese extreme right’s backlashes; however, it is not clear how inaccuracies in privately constructed narratives should lead to absolution of the Japanese government’s responsibility. The Japanese government’s own Asian Women’s Fund acknowledges as much, stating that Korean women were coerced into going to “comfort stations” by private contractors assisted by the colonial police “by deceit or force,” contrary to the government rule against such coercion, and also that Indonesian and Dutch women were “raped” by soldiers repeatedly for a sustained period of time in confinement on the Southeast Asian front.<sup>14</sup>

In the end, an effort to find a clear legal remedy led to the filing of suits in Korean courts, the first of which accepted the claims allowing a *jus cogens* exemption from the state immunity doctrine,<sup>15</sup> but the second of which was dismissed on the grounds of the state immunity doctrine.<sup>16</sup> The first court found that Japan’s actions constituted a violation of *jus cogens* and therefore an exemption from state immunity. The second court found that international customary law has not clearly recognized a *jus cogens* exemption and faithfully followed the *Ferrini* ICJ decision’s “armed forces” reasoning, reinforcing it with the following reasoning of its own:

(a) an armed conflict is when one state uses military force to defend its interests or claims against another state, meaning that it is one of the strongest acts of state sovereignty, so should be viewed as an area where the need to respect state sovereignty is most strongly demanded of individual states, and

(b) when an armed conflict occurs, “wartime international law” applies instead of peacetime international law, so the issue of damage compensation should also be governed by wartime international law, including personal damages caused in the course of an armed conflict.

## II. STATE IMMUNITY DOCTRINE

Under the state immunity doctrine of customary international law, domestic courts cannot exercise jurisdiction over suits against foreign states which also shall

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13. See Norimitsu Onishi, *Japan Again Denies Role in Sexual Slavery*, N.Y. TIMES (Mar. 26, 2007), <https://www.nytimes.com/2007/03/26/world/asia/26cnd-japan.html>.

14. ASIAN WOMEN’S FUND, *supra* note 9, at 6–7.

15. Christine Chinkin, *The “Comfort Women” in the Courts of the Republic of Korea: The Last Throw of the Dice?*, in INTERNATIONAL CONFERENCE ON WOMEN’S RIGHTS AND PEACE 2021: CONFERENCE PROCEEDINGS 43, 49–54 (2021), [https://www.icwrp2021.com/download/proceedings\\_ICWRP2021\\_korean-english.pdf](https://www.icwrp2021.com/download/proceedings_ICWRP2021_korean-english.pdf) (including an unofficial English translation of portions of Seoul Central District Court [Seoul Dist. Ct.], Jan. 8, 2021, 2016Gahap505092 (Compensation for Damage (Others) (S. Kor.)).

16. *Id.* at 50–54 (including an unofficial English translation of portions of Seoul Central District Court [Seoul Dist. Ct.], Apr. 21, 2021, 2016Gahap580239 (Compensation for Damage (Others) (S. Kor.)).

not be compelled to foreign jurisdiction over their actions and properties.<sup>17</sup> The state immunity doctrine is derived from the international law principle that all states are equal and independent from each other, or the principle of *par in parem non habet imperium* (equals do not have authority over one another).<sup>18</sup> Given that the very concept of law among nations will be impossible without some sort of equality among the subjects of the law, the state immunity doctrine is central to the very existence of international law. As such, the doctrine has been widely supported for reasons such as the need for international amity.<sup>19</sup>

However, since the end of the 19th century, many countries have established domestic laws or have signed treaties stating that state immunity does *not apply to private legal acts and commercial activities*<sup>20</sup> for the practical reasons that many actions of the states are not necessarily the exercises of their sovereign powers, and respecting their independence is not necessary for the sustenance of international law and order. Also, on another front, academic theories arguing that state immunity should not be recognized when a lawsuit is filed for *crimes against humanity or human rights* have also emerged.<sup>21</sup> Especially, the recently amended FSIA Article 1605A sets up an exemption from immunity when the state actor is a sponsor of terrorism.<sup>22</sup> Since then, many domestic and international courts have had to face the question of whether to recognize exceptions. In this article, we will just introduce the following two examples that we will discuss in further detail later:

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17. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), Judgment, 2012 I.C.J. 99, 152 ¶ 130 (Feb. 3); Sir Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 198–99 (1980).

18. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 134 (1812).

19. *Jones v. United Kingdom*, 2014-II Eur. Ct. H.R. 188, <https://hudoc.echr.coe.int/fre?i=002-9248>.

20. The European Convention on State Immunity (hereinafter the “European Convention”) of May 16, 1972, listed the following reasons for which states cannot claim immunity, summarized: 1. a contract to be discharged in the forum State, 2. a contract of employment between the State for work to be performed in the forum State, 3. participation in a company, association or other legal entity having its seat, registered office or principal place of business on the forum State, 4. An entity engaging in an industrial, commercial or financial activity in the forum State, 5. intangible property rights in the forum State, 6. tortious acts in the forum State, 7. the validity of arbitration agreements in forum State. The United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter the “UN Convention”) of December 2, 2004 listed the following reasons for which states cannot claim immunity, summarized: 1. commercial transactions, 2. contracts of employment, 3. death, physical injuries and damage to property “caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission”, 4. ownership, possession, and use of property, 5. intellectual and industrial property rights, 6. participation in companies or other collective bodies, 7. ships owned or operated by a State, 8. effect of an arbitration agreement.

21. C.K. Hall, *UN Convention on State Immunity: The Need for a Human Rights Protocol*, 55 INT'L & COMPAR. L.Q. 411, 426 (2006); Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 EUR. J. INT'L L. 955, 969 (2007); Seoul Central District Court [Seoul Dist. Ct.], Jan. 8, 2021, 2016Gahap505092 (Compensation for Damage (Others)) (S. Kor.); Ferrini v Federal Republic of Germany, Italian Court of Cassation, 11 March 2004, n. 5044/4, 128 ILR 659.

22. Terrorism exception to the jurisdictional immunity of a foreign state, 28 U.S.C. § 1605A (2008) (excepting foreign “state sponsor of terrorism”).

A U.S. federal district court<sup>23</sup> interpreting the American codification of the international-legal doctrine of state immunity, the Foreign Sovereign Immunity Act (FSIA),<sup>24</sup> ruled that Japan’s activities against the “comfort women” are not commercial activity. The court wrote that the conduct was an abuse of Japan’s military power that was “peculiarly sovereign in nature,” citing the language frequently used by the U.S. Supreme Court in upholding the sovereign immunity.<sup>25</sup> This decision was made in regards to the plaintiff’s argument that “comfort women,” including Hwang Geum Joo, were “taken” from Korea, which was occupied by Japan, and that “pursuant to a premeditated master plan,” which “was planned, ordered, established, and controlled by Japan for the benefit of its soldiers and certain others,” the plaintiffs resided in buildings that “were either appropriated by the Japanese military or makeshift constructions built by the army specifically to house “comfort women” to force them into sexual slavery for the Japanese military.<sup>26</sup>

Also, in *Jurisdictional Immunities of the State (Ger. v. It., Greece intervening) Judgment*,<sup>27</sup> the International Court of Justice shut down quickly engagement with the restrictive theory of state immunity as they found the nexus to “armed conflicts,” concerning an Italian, who was arrested by German soldiers on August 4, 1944 and forced to labor at a German munitions factory until April 20, 1945. Italy claimed that states could not benefit from immunity in respect of (1) acts occasioning death, personal injury, or damage to property in the territory of another state (the so-called “territorial tort” principle), or (2) acts carried out in violation of peremptory norms of international law (*jus cogens*). The ICJ rejected these arguments. By reference to state practice, it concluded that customary international law continues to require that a state be accorded immunity in proceedings for torts allegedly committed on the territory of another state “by its armed forces in the course of an armed conflict.” According to the ICJ, the acts in question were clearly

23. *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (2001).

24. The United States enacted the Foreign Sovereign Immunities Act (FSIA) in 1976, which stipulates that foreign states shall not be immune from jurisdiction in cases related to commercial activities, proceedings related to property taken in violation of international law, proceedings related to rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States, cases in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious 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, and cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state.

25. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993).

26. On appeal, the case was affirmed, but the issue became moot as the higher courts disposed of the claim on a wholly different ground closely related to the American constitutional doctrine of justiciability of political question. We are interested solely on the FSIA “commercial activity” aspect of the district court’s reasoning, which will have an analogue in international-legal reasoning to the extent that FSIA is a codification of the international-legal doctrine of state immunity.

27. *Jurisdictional Immunities of the State (Ger. v. It., Greece intervening)*, Judgment, 2012 I.C.J. 99, 154–155, ¶ 139 (Feb. 3), <https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-BI.pdf>.

sovereign acts (*acta jure imperii*) because they were done by “armed forces” in the course of “an armed conflict” and so attracted sovereign immunity. Furthermore, a state is not deprived of immunity by reason of the gravity or seriousness of the violations of which it is accused, and this was true even if the proceedings involved violations of peremptory or fundamental (*jus cogens*) norms. The ICJ noted the contrast in this regard between the rules applicable to states and those applicable to criminal proceedings<sup>28</sup> against state officials, whereby immunity may not apply to acts of officials that violate international criminal norms.

While the ICJ itself started out from the question “whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a state, especially private and commercial activities (*jus gestionis*)” (para. 60), the inquiry quickly narrows when the Court says, “the most pertinent State practice is to be found in those national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces *in the course of an armed conflict*” (para. 73) (emphasis added). The Court narrows the inquiry as such on the force of Article 31 of the European Convention, which states, “Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State” and state practice interpreting it from Belgium, Ireland, Slovenia, Greece, and Poland (para. 68). The Court also draws from the International Law Commission’s commentary<sup>29</sup> on the text of Article 12 of the U.N. Convention on “territorial tort” exception, which states that that provision does not apply to “situations involving armed conflicts.” Finally, and most importantly, citing decisions from France, Slovenia, Serbia, Poland, Belgium, and Brazil (Para. 74-75), the Court determined that “State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. (Para. 77).”

The aspect of *Ferrini* discussed most was its failure to recognize a *jus cogens* exception. The Court did so mainly by citing the prevailing state practice.<sup>30</sup> Others have pointed out that the Court was restricted by the fact that none of the treaties

28. Reg. v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147 (appeal taken from Eng.); *Jones v. Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 (appeal taken from Eng.).

29. Rep. of the Int’l Law Comm’n on the Work of its Forty-Third Session, U.N. Doc. A/46/10, at 46 (1991).

30. *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1154–55 (7th Cir. 2001); *Smith v. Libya*, 101 F.3d 239, 245 (2d Cir. 1996); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); *Siderman de Blake v. Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992); *Jones v. Saudi Arabia* [2006] UKHL 26 (appeal taken from Eng.); *Bouzari v. Iran* (2004), 71 O.R. 3d 675 (Can. Ont. C.A.); *Areios Pagos* [A.P.] [Supreme Court] 6/2002 (Greece); *A.A. v. Germany*, Constitutional Court, UP-13/99 (2001), 13-14 (Slovenia); *Natoniewski v. Germany*, IV CSK 465/09 (2010) (Poland); *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., Dec. 16, 2003, Bull. civ. I, No. 02-45961 (Fr.).

or national laws have made such an exception even when they had opportunities to do so.<sup>31</sup> The closest thing is the U.S. FSIA’s terrorism exception, but it is not very useful for strengthening the state practice in the direction of promoting human rights’ precedence over immunity because it is municipal law and its operation depends upon the U.S. executive branch’s declaration of “sponsor of terrorism.” It is not clear how ICJ may rule on the validity of the FSIA terrorism exception under international customary law. Also, the argument for *jus cogens* exception has to confront a rebuttal that actions of such criminal nature should be handled by criminal proceedings instead of unavoidably civil proceedings against the state itself.<sup>32</sup> Such rebuttal is unfortunately backed up by the European Court of Human Rights’ review of three UK cases<sup>33</sup> where the claims were denied due to state immunity and the court found no violation of right to access to a remedy.<sup>34</sup>

### III. APPLICATION TO “COMFORT WOMEN”

#### A. Precedential Scope of “Armed Forces/ Armed Conflict” Reasoning

*Ferrini*, now the seminal decision on the issue at hand, does not engage straightforward with what really constitutes an immunity-triggering sovereign activity<sup>35</sup> and relies heavily on national decisions on “armed forces/armed conflicts” situations. The decision is “hard carried” by the element of “armed forces involved in the course of armed conflicts” as the January 2021 Seoul court acknowledges,<sup>36</sup> avoiding what should have been a full analysis of whether the “territorial tort” exception is even part of customary international law. What is more importantly lacking is any substantive justification for why all activities of “armed forces in the course of armed conflicts” are so unambiguously *jure imperii* as opposed to *jure gestionis*. It was so lacking that even the April 2021 Seoul district court, following *Ferrini*, tried to come up with its own supplementary reason (see above).

It is natural to think that armed conflicts are quintessential exercises of sovereignty under which the state parties are equal and independent combatants. Armed conflicts themselves are actions hostile and antagonistic to (and even often aiming to annihilate part or all of) the sovereignty of the enemy state. Forcing one state into its enemy state’s jurisdiction will be simply an extension of hostility that

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31. J. Craig Barker, *Negotiating the Complex Interface Between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in Germany v. Italy*, 15 INT’L CMTY. L. REV. 415 (2013).

32. Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT’L L. 1151 (2015).

33. *McElhinney v. Ireland*, App. No. 31253/96, Eur. Ct. H.R. (2001), [http://www.hudoc.echr.coe.int/eng/search\\_for/McElhinney\\_v.\\_Ireland](http://www.hudoc.echr.coe.int/eng/search_for/McElhinney_v._Ireland); *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. (2001), [http://hudoc.echr.coe.int/eng/search\\_for/Al-Adsani\\_v.\\_United\\_Kingdom](http://hudoc.echr.coe.int/eng/search_for/Al-Adsani_v._United_Kingdom); *Fogarty v. United Kingdom*, App. No. 37112/97, Eur. Ct. H.R. (2001), [http://hudoc.echr.coe.int/eng/search\\_for/Fogarty\\_v.\\_United\\_Kingdom](http://hudoc.echr.coe.int/eng/search_for/Fogarty_v._United_Kingdom).

34. Marius Emberland, *McElhinney v. Ireland App. No. 31253/96; Al-Adsani v. United Kingdom App. No. 35763/97; Fogarty v. United Kingdom App. No. 37112/97*, 96 AM. J. INT’L L. 699 (2002).

35. Alexander Orakhelashvili, *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, 106 AM. J. INT’L L. 609 (2012).

36. Seoul Central District Court [Seoul Dist. Ct.], Jan. 8, 2021, 2016Gahap505092 (S. Kor.).

will further threaten international peace. Therefore, despite the emergence of the restrictive jurisprudence of state immunity, actions taken in furtherance of armed conflicts will be deemed an extension of hostile exercise of one state's sovereignty against the enemy state and therefore subject to state immunity. Indeed, it is significant to note that all the national decisions cited by the ICJ, which are thought to be the most important reasons for the decision, concern the physical damage inflicted by armed forces while exercising their physical force, ranging from forced deportation,<sup>37</sup> house burning and injuries,<sup>38</sup> and ship sinking.<sup>39</sup>

However, it is not clear that these reasons or our own supplementary reasoning apply to the “comfort women” case. Unlike the “comfort women” captured in war areas in Southeast Asia, Korean “comfort women” neither were captured “when one state uses military force to defend its interests or claims against another state,”<sup>40</sup> nor suffered “personal damages in the course of an armed conflict . . . [covered under] ‘wartime international law,’” as the April 2021 Seoul district court claims to have found. There might have been other reasons behind the finality or determinative force of the element of “armed forces in armed conflicts” that the ICJ did not spell out. But the ICJ’s such failure reduces the scope of its precedential force anyway, especially for the “comfort women” case because the latter did not involve hostile actions by armed forces against “comfort women” as the potential members of the adversaries, as we shall explain. Therefore, one possibility of the forum’s jurisdiction over the “comfort women” issues is left untouched by *Ferrini*: “territorial tort.”

#### B. “Territorial Tort” exception and colonial racism

Both at the time of *Ferrini* or presently, it is true that the “territorial tort” exception was not part of general state practice,<sup>41</sup> but the ICJ did not decide whether such exception is part of customary international law. The ICJ engaged in neither a careful balancing of competing interests such as “sovereign equality vs. territorial sovereignty,”<sup>42</sup> the key to the viability of the “territorial tort” exception, nor an exhaustive survey of the relevant state practice. Instead, the ICJ rather quickly reduced the inquiry to whether state practice exists for exempting immunity for the activities of “armed forces in the course of an armed conflict.” As the ICJ mentions, the European Convention and the UN Convention, the two treaties mentioning the

37. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 16, 2003, Bull. civ. I, No. 02-45961 (Fr.); cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 2, 2004, Bull. civ. I, No. 03-41851 (Fr.); cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 3, 2006, Bull. civ. I, No. 04-47504 (Fr.); A.A. v. Germany, Constitutional Court, UP-13/99 (2001), 13–14 (Slovenia).

38. *Natoniewski v. Germany*, IV CSK 465/09 (2010) (Poland).

39. *Barreto v. Fed. Republic of Germany*, Federal Court, Rio de Janeiro, No. 66-RJ, 07.09.2008 (Braz.) (holding Germany immune in proceedings regarding the sinking of a Brazilian fishing vessel by a German submarine in Brazilian waters).

40. Seoul Central District Court (April 2021), *supra* note 16.

41. Andrew Dickinson, *Germany v. Italy and the Territorial Tort Exception: Walking the Tightrope*, 11 J. INT'L CRIM. JUST. 147, 166 (2013).

42. *Id.* at 147–66.

“territorial tort” exception, are not even signed by many states. Then again, the ICJ relies on none other than the European Convention’s Article 31 and the UN Convention’s Commentary as the basis of assuming (and refusing to prove) that sovereign equality takes precedence over territorial sovereignty in “armed conflicts” cases and that immunity should be recognized, touting the two treaties that the ICJ slighted. It is safe to say that there is no positive proof that the “territorial tort” exception is not part of customary international law.

This is important in relation to the “comfort women” because women were taken “by deceit and force” from the forum state Korea which can qualify as “territorial torts.” It is true that the most atrocities took place at the “comfort stations” outside Korea but:<sup>43</sup>

Logic and common sense (if not current state practice) suggest that the territorial tort exception, if recognized in international law, should apply where the tortious course of conduct involving the claimant’s person or property, having begun in the forum state, continues outside that state as a result of the removal by force, or other coercive means, of the claimant or his or her property by the agents of the defendant state.

As we shall argue below, the Japanese military actions against “comfort women” are actually domestic actions born of colonial racism and are qualitatively different from the actions of the armed forces in those state practice cases that formed the hard core of the *Ferrini* holding. It is only incidental that the slavery labor of “comfort women” was served to the military forces as the documents show, some of the “comfort stations” were patronized by non-military personnel as well.<sup>44</sup>

By colonial racism, we mean the system of discrimination and exploitation that the empire administers against its colonial subjects. That colony may have been acquired by violent conquest. However, once the colonial administration is in stable iteration, the discriminatory and exploitative actions taken by the empire against its own colonial subjects, often of different ethnicity or race, need not be considered part of armed conflicts.

Korea was part of the Japanese empire for 36 years, and it had been 28 years and counting by the time “comfort stations” began to be set up and women recruited. Many Koreans spoke Japanese, adopted Japanese names, and collaborated with Japan’s military efforts in World War II while a significant minority did exactly the opposite, and the vast majority were locked into the tacit and grudging acquiescence with the war efforts as follows<sup>45</sup>:

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43. *Id.* at 150.

44. Hyein Han, Asia Peace & Hist. Inst., Japanese Military Comfort Women as an Exception of the System, (May 21, 2021) (on file with author) (presented at the Korea University School of Law and UC Irvine School of Law event, “Setting the Record Straight: Primary Sources and Evidence on ‘Comfort Women’ Issues,” <https://www.amlaw.center/single-post/5-21-21-ku-uci-setting-the-record-straight-primary-sources-and-evidence-on-comfort-women-issues>).

45. Bang-Soon L. Yoon, *Sexualized Racism, Gender and Nationalism: The Case of Japan’s Sexual Enslavement of Korean “Comfort Women”*, in 4 RACE AND RACISM IN MODERN EAST ASIA, 459, 466–80 (Rotem Kowner & Walter Demel eds., Brill 2015).

Japan adopted a series of reform policies in Korea that included very specific integration policies, such as pushing intermarriages between Koreans and Japanese in 1937 with a view to diluting the strength of the Korean ethnic identity. The “Policy of Korean-Japanese Oneness” of 1938 (not found in Taiwan) forced Koreans to become citizens of imperial Japan, and thus forced to obey Japan’s Emperor and practice the Japanese *Shinto* religion. A highly regimented public school system was an important socialization venue in which students were taught how to be good imperial citizens of Japan as well as such practices as students starting their day by bowing to the East (where the Japanese emperor’s palace is located) and singing the Japanese national anthem, etc. Japan’s bold 1939 policy of “assimilation” forced Koreans to abandon the Korean language and to adopt the Japanese language (in both their public and private lives), as well as to change their Korean names into Japanese names.

Only after Korea has become an independent state and the post-colonial transition mucked up the distinction between racism and international animosity, “comfort women” are now deemed the actions taken by Japan as a nation against her “rival state,” Korea. However, if we reverse the time back to the 1930s through 1940s, Koreans were Japanese nationals albeit treated as second class. As you will see below, the actions taken against Korean “comfort women” in Korea were not actions taken against the enemy but against the Japanese empire’s own citizens to provide logistical support for the military operation in China, Southeast Asia, and the Pacific Islands. Recruitment of “comfort women” did not involve Japanese military operations: it was done by private contractors who were paid by and cooperated with the colonial administration upon the military’s request and budget.<sup>46</sup> For the purpose of this Article, it was only incidental that the slavery labor of “comfort women” was supplied to the soldiers, as opposed to, for instance, factory workers.

The “comfort women” system was concocted as a scalable albeit racially discriminatory solution to replace the previous military “sex comfort” business supported by Japan’s licensed prostitution system. As you shall see, provision of the slave labor force was facilitated by the exploitation and deprivation of the occupied territories and the availability of poor women there vulnerably ready to be coaxed into false promises of remote job opportunities. Unlike the plaintiffs in *Ferrini* who were captured by German military forces at gun point, it was not militaristic action that provided the compulsion necessary for forcing the victims into slavery. For the “comfort women,” it was the socio-economic colonial conditions of colonial racism and the Japanese military’s procurement call for their “comfort stations” that took advantage of those conditions. In that setting, the Japanese military is a joint tortfeasor for the private legal act of “territorial tort” taking place within Korea.

Although the observation in itself does not lift the “comfort women” issue out of state immunity, it at least makes the “armed forces/armed conflict” characterization and consequently the early shut-down of the inquiry inappropriate,

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46. See *infra*, chapter 4.

for instance, by the April 2021 Seoul district court (and even by the Hwang Geum Joo district court). The “armed conflicts” narrative is based on the idea that international animosities or their manifestations through armed conflicts are not justiciable in the courts of the warring independent states. But the sufferings were not part of the war or any militaristic operation that would have excluded the “territorial torts” exception.

Now, whether “territorial tort” exception exists in customary international law has not been resolved. Assuming that it is, at least the *Ferrini* decision should not bar its applicability to the “comfort women.” Of course, there still remains the much more formidable task of establishing the existence of customary international law embracing such exception, which goes beyond the scope of this article. We are satisfied that such possibility remains viable despite the *Ferrini* decision because, upon close examination, colonial racism that made possible the “comfort women” does not fit the armed forces/armed conflicts narrative anchoring the *Ferrini* decision.

Finding lack of military involvement in the recruitment process opens up a new possibility for the state immunity exception: whether the Japanese military’s role as the primary contractor and end-customer, albeit in full knowledge of the elements of deceit in the recruitment process and the involuntary nature of women’s labor, counts as a “commercial activity.”

### C. Commercial activity exception

The “commercial activity” exception has long been accepted as a stable part of state practice and *opinion juris*.<sup>47</sup> The initial question is whether the nexus to “armed forces/armed conflicts” is an appropriate sword that can be applied to the Gordian knot of state immunity doctrine. The ICJ in *Ferrini* discussed the involvement of armed forces in relation to the “territorial tort” exception, which Italy raised, but did not discuss that in relation to the “commercial activity” exception, which Italy did not raise. Of course, Italy could not have raised the “commercial activity” for the obvious reason that the Italian internees were captured directly by the German military, transported to Germany by the German military, and were put into forced labor at war factories supervised by the German military.

One feature of *Ferrini* is the ICJ’s demonstrated strong commitment to the distinction between *actus jure imperii* and *actus jure gestionis*, and it is this rather fundamentalist distinction that drove the ICJ to a rather quick decision that involvement of “armed forces/armed conflicts” obviates any further analysis into applicability of the “tort” exception. However, the “commercial activity” exception takes the challenge head on as it is clearly *actus jure gestionis* under the ICJ’s distinction. It is profitable to discuss the U.S. state practice in this case because the United States

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47. Council of Europe, Committee of Legal Advisors on Public International Law (CAHDI), *Proceedings of the Seminar on State Immunity Under International Law and Current Challenges* (2017).

has a municipal law fashioned after the UN Convention, an attempt to codify into concrete categories the jurisprudence of *actus jure gestionis*.

The FSIA provides for jurisdiction over a foreign state in any case based upon or in connection with<sup>3</sup> a commercial activity of the foreign state.<sup>48</sup> The statute defines commercial activity as determined by its nature, rather than its purpose.<sup>49</sup> In relation to that definition, the Supreme Court held in *Weltover* that “when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the Foreign Sovereign Immunities Act.”<sup>50</sup> In that case, the Argentinian government’s unilateral refinancing of bonds, though done for the sovereign purpose of currency stabilization, was considered commercial and therefore could not be shielded from a suit in the United States. In a wrongful termination case, *Janini v. Kuwait Univ.*,<sup>51</sup> Kuwait University was held not entitled to sovereign immunity for terminating employment contracts due to the Persian Gulf War, where the court opined “there is nothing “peculiarly sovereign” about unilaterally terminating an employment contract.” Also, in *Rush-Presbyterian-St Luke’s Med. Ctr. v. Hellenic Republic*,<sup>52</sup> a federal appellate court held that the Greek government’s contract to provide kidney transplants in the United States as part of its national health plan was a commercial activity, reasoning that the fact that government resources were “required” was irrelevant.”

It is not just contractual claims that are freed from state immunity. In *Sun v. Taiwan*,<sup>53</sup> a federal appellate court also held that “[p]romoting and operating a cultural tour is an activity that could be and regularly is conducted by private players in the market,” and the fact that a tour is run without charge for the national purpose of promoting cultural ties with overseas Taiwanese was deemed “irrelevant” to the admissibility of wrongful death action on behalf of a tourist who drowned during that tour. Also, in *Zveiter v. Brazilian Natl Superintendency of Merck Marine*,<sup>54</sup> a Brazilian government agency was not immune from sexual harassment suit for “[t]he employment of a secretary is hardly within the unique sphere of sovereign authority.”

The U.S. courts seem to have drawn a stable demarcation limiting the scope of “commercial activity.” In *Nelson v. Saudi Arabia*, the Court, while broadly holding that “as long as the action with which the suit is concerned could be undertaken by a private entity, then the action is commercial for the purposes of the FSIA,” and rejected the claims as immune because the real claims against the state owned

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48. 28 U.S.C. § 1605(a)(2).

49. 28 U.S.C. § 1603(d).

50. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

51. *Janini v. Kuwait Univ.*, 43 F.3d 1534, 1537 (D.C. Cir. 1995).

52. *Rush-Presbyterian-St Luke’s Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir. 1989).

53. *Sun v. Taiwan*, 201 F.3d 1105, 1107 (9th Cir. 2000).

54. *Zveiter v. Brazilian Nat’l Superintendency of Merch. Marine*, 833 F. Supp. 1089, 1093 (S.D.N.Y. 1993).

hospital employing the plaintiff were for the plaintiff being arrested, imprisoned, and tortured by Saudi Police.<sup>55</sup> Similarly in *Cicippio v. Islamic Republic of Iran*,<sup>56</sup> a federal appellate court, in facing an argument that hostage-taking by a terrorist group backed by Iranian government was a commercial activity, rejected that argument despite its economic motive of the Iranian government. In other words, the purpose of the activity is irrelevant.

This line-drawing can be applied to the activities taken *even for military purposes*. The Supreme Court also held that “a contract to buy army boots or even bullets is a ‘commercial’ activity.”<sup>57</sup> This concept is rooted in the FSIA’s legislative history. The section by section analysis submitted with the legislation in the House of Representatives states<sup>58</sup>:

It is the commercial nature of an activity or transaction that is critical. Thus a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes commercial activity . . . such contracts should be considered commercial contracts even if their ultimate object is to further a public function.

In *Hwang Geum Joo*, the plaintiffs also made that argument, but it was based on characterization of the Japanese military’s activity as a supplier, the sex trafficker. The district court there quickly ruled that there is no market in which Japanese military participated as a competing supplier. This made sense precedentially. In *Princz*,<sup>59</sup> a federal appellate court had already held that the Nazis’ leasing of Princz’s labor for profit to private companies did not constitute a commercial activity, stating that “private parties do not take or hold prisoners.” The “comfort women” were not taken prisoners but were recruited albeit by deceit by private contractors and were forced into slavery labor benefitting the Japanese military as the customer.

Indeed, what the courts so far have not discussed is the role of the Japanese military as the *customer*. The Supreme Court in *Weltover* stated that the military’s purchase of boots and bullets is a commercial activity. “Comfort women” were considered military supplies and it was the auspices of the field canteen regulations that their services (albeit forced) were made available to the soldiers.<sup>60</sup>

In 1937, when the Japanese military decided to provide “comfort services” as part of their field canteen supplies and build “comfort stations” for that purpose, they requested the colonial administrations in Korea and Taiwan and also Japan’s own Ministry of Interior to recruit and send “comfort women.” The Japanese military provided funds to these agencies to defray the cost of recruitment, which included a solace money given to the parents parting with their daughters. Most of them were recruited from Korea by private contractors who used deceit and force

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55. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Virtual Def. & Dev. Int’l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 4 (D.D.C. 1999).

56. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167 (D.C. Cir. 1994).

57. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

58. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

59. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994).

60. Han, *supra* note 44, at 2.

under the protection of the local police. Once private contractors brought them to “comfort stations” which were part of field canteens, their daily activities were controlled mostly by private contractors, who provided “comfort services” of the women to the Japanese military as the customer for fees. “Comfort women” themselves were given “tickets” by the customer-soldiers for each instance of slavery labor, which were to be converted into payment by the private contractors.<sup>61</sup>

In this narrative, the Japanese military’s actions can be categorized as the act of a primary contractor and end-consumer. On the job, they were tortured, beaten, and sometimes killed as part of job discipline and physical confinement by private contractors with the help of the Japanese military, who maintained the physical facilities and boundaries of “comfort stations” to receive the “comfort services.” This does not detract from the essentially commercial act of ordering and consuming sex through slave labor and often rapes. Sexual violence does not change the essence of the Japanese military role as the consumer. On-the-job sexual harassment was held to be an immunity-lifting commercial activity in *Zweiter* for the same reason that *Weltover* purchases of boots and bullets were commercial. Even on the purpose analysis, it should be remembered that the Japanese military instituted “comfort stations” to “reduce the cost of war,”<sup>62</sup> i.e., replace home-coming rotations with comfort services for morale-boosting purposes.

#### D. Colonial racism and the “comfort women” system

Colonial racism underlay this extremely exploitative commercial and tortious activity of the Japanese military as a joint tortfeasor engaged in fraudulent recruitment and purchase of sex slaves. Racism is different from international conflicts in that the former forms the economic base while the latter is the superstructure arising from geo-politics. Racism is a self-perpetuating structure that oppresses a certain race within a society into both a cheap labor force and an obedient consumer market. International hostilities and their culminations, armed conflicts, are the states of affair between two societies defined by difference in race, religion, geography, and most importantly sovereignty. Racism is an intra-sovereignty state of affairs that is often sustained by law, which keeps the dominant group and the subservient group in their respective places, ultimately for an economic reason.

The comfort women system owes its origin to the licensed prostitution system uniquely run by Japan.<sup>63</sup> There is a close connection between the two<sup>64</sup> through *karayuki*, the Japanese prostitutes who made livings providing sexual and entertainment services to soldiers near military services. As the war intensified in 1930s, the demand for military sexual comfort increased and could not be met by Japanese women. Fortunately for the colonial administration, as part of the colonial policy, Japan had introduced the state-controlled prostitution system into Taiwan

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61. *See id.*

62. *Id.*

63. YOSHIOKA, *supra* note 3, at 27.

64. *Id.*

and Korea, recruiting local women.<sup>65</sup> Thereby, the foundation of the comfort women system had gradually formed<sup>66</sup>: Japan could use Japanese women for homemaking and child-rearing while using non-Japanese women in the colonies and occupied territories for sexual comfort of Japanese soldiers.<sup>67</sup>

However, other than originating from the need previously met by the licensed prostitution system, the comfort women system was radically different in terms of their recruitment, treatment, and autonomy granted to them. The economic circumstances of the colonies had produced an ample supply of young women who could be easily coaxed away from home with false promises of jobs. Immediately after the Annexation, the poverty rate had increased as the colonial administration had instituted the Land Reform from 1911-1918 and the Rice Propagation Plan in the 1920s, which deprived the peasants both the land and its crops. According to the usual pattern of development policies, the rice price was artificially maintained at low level. The high rent was exacted from the now increased number of tenant farmers.<sup>68</sup> Impoverished by 1930s, many peasant men and women went to cities in China and Japan to only form the low wage working class or live in the slums and some chose prostitution as jobs.<sup>69</sup> Also, women of occupied territories were more vulnerable to promises of good jobs because their factory jobs were subject to racial and sexual discrimination and earned only half the salary of Japanese women workers.<sup>70</sup> “Some former Korean comfort women actually recall that they were lured with ‘three bowls of white rice everyday’ by recruiters—at the time a very appealing bait that was hard to decline.”<sup>71</sup>

Many Korean women were sent to cities or remote destinations through the Korean job mediators who could now making livings without much training or investment, mediating the urban exodus of the impoverished peasant men and women, the latter usually into restaurants, bars and brothels by false job offers, human trafficking, and outright abduction.<sup>72</sup> As the need for military sexual comfort increased in China in the eyes of the military administrators, the destinations in job mediation extended to Japan and China.<sup>73</sup> On top of that, throughout the colonial era, an estimated total of 7.5 million Koreans were mobilized (both men and women) as forced laborers, war industry workers, or (for males only) soldiers and sent to foreign countries. Among these, one million are estimated to have died while in forced service. This includes those who were forcibly removed from Korea (1930) and sent to coal mines in Japan, Sakhalin, or Southeast Asia.<sup>74</sup> By then, the

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65. *Id.* at 28.

66. *Id.* at 31.

67. *Id.* at 28.

68. *Id.* at 33.

69. *Id.*

70. *Id.* at 32.

71. Yoon, *supra* note 45, at 470.

72. YOSHIOKA, *supra* note 3, at 32.

73. *Id.*

74. Yoon, *supra* note 45, at 466–67.

job mediators in Korea built up a human trafficking network transnationally, which mobilized large numbers of Korean women as “comfort women.”<sup>75</sup>

The human trafficking machinery operated likewise for military “comfort stations.”<sup>76</sup> Brothel owners in Korea and managers of Japanese military comfort houses in China had common strong incentives.<sup>77</sup> “When recruiters sold women, it was more profitable to sell women to China. Women cost about 200 yen in Korea, but at least 400 yen in China. Thus, for recruiters, China had better marketability.”<sup>78</sup> Also, some Korean brothel owners themselves moved to China in response to the military’s call for war mobilization and many of them were incorporated into military comfort houses. For Korean mediators and traders, the business of “comfort house” operation and recruitment of “comfort women” was profitable, and the Japanese military could save the labor needed to manage and staff comfort houses by using Korean traders and women.<sup>79</sup> While most of the Japanese “comfort women” were adult prostitutes, other Asian “comfort women” from the colonies and occupied territories were minors or non-prostitutes.<sup>80</sup> Indeed, Korea the colony became a supply base of men and women for Japan’s war efforts where Korean women were forced into the most inhumane role, sexual slavery, so that Japanese women could be saved from the ordeal. Also, unlike the few Japanese “comfort women,” as a final touch on the discriminatory system, Korean women were not allowed to return because they were not given passports.<sup>81</sup> These discriminatory rules frustrated Korean women’s attempts to escape out of the “comfort stations.”

In sum, it was not militaristic operation, at least not the kind in *Ferrini* or state practice cases constituting its base, when the Japanese military requested the colonial administration to recruit women for “comfort stations.” Most of women were recruited by force or deceit of private contractors who were paid by the colonial administration. The Japanese military, as the end customer, did maintain the physical facilities, namely, “comfort stations,” but the operation inside the facilities was done by private contractors. The Japanese military was the end-consumer of the slave labor provided. It was this commercial activity that the Japanese government should be held liable for despite state immunity. Also, the Japanese military can be held liable for the actions of private contractors who recruited women from Korea by force or deceit as they were aware of the elements of force and deceit, paid for those actions, and benefitted from the consequences of their actions. These “territorial torts” are not subject to state immunity.

Colonial racism often involves slavery, and at times sexual slavery. The existing legal system based on racial discrimination produces impoverished people who are vulnerable to false promises of jobs and opportunities. They are brought into

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75. YOSHIOKA, *supra* note 3, at 32.

76. *Id.* at 34.

77. *Id.*

78. *Id.*

79. *Id.* at 35.

80. *Id.* at 21.

81. Han, *supra* note 44, at 7.

slavery, which is not administered by the state, but is usually exercised by private parties. Now, these private parties can be held liable in the forum state without being interfered with by state immunity. The question is whether the government can be held liable for outsourcing and consuming the procurement of the labor produced through sexual slavery. At this point, the government operates as a consumer and its action commercial act. This venue is important because the victims of slavery are decolonized and now belong to a new country, often that country's court is the only viable alternative means to redress and reparation. The fact that the colonizer's country, Japan, was at war with third countries should not be a reason barring state responsibility when it purchased sexual services and failed to compensate properly for the labor and hardship that the "comfort women" suffered.

#### CONCLUSION

The reason for making exceptions to state immunity is that state actions are sometimes not exercises of sovereignty but private commercial acts such as e.g., hiring, contracting, or property owning, or private civil acts such as negligently causing damages inside the forum state. Japan's mobilization and maintenance of "comfort women" and "comfort stations" does not constitute "armed conflict," the quintessential exercise of sovereignty. It was the result of colonial racism whereby men and women of occupied territories within the empire were forced into most subservient and inhumane roles in the intra-empire economy, supplying its imperial war efforts. For the victims of colonial racism, often their home country is the only viable forum for their civil claims against the former empire, especially while their male-dominated government slights gender issues in reparation negotiation with their former occupier. I am not making an already-rejected legal argument that lack of alternative forum constitutes an exception to state immunity but simply making a political argument on the importance of such remedy. An anticipated rebuttal that state-sponsored racism may be an exercise of sovereignty and, therefore, in principle, subject to state immunity, just as crimes against humanity and *jus cogens* violations, will require another article. What is important, the evolution of jurisprudence on exceptions to state immunity should not be shut down easily with respect to "comfort women" issues on the ground of a nexus to "armed forces" and "armed conflicts," given the possibilities that we have explored above. Such shutdown is especially worrying because it is during "armed conflicts" that the worst tragedies, especially against women, take place and they happen at the hands of "armed forces."

Of course, reparation claims for racism can be always brought in international courts,<sup>82</sup> the empire's courts, or maybe even in criminal courts<sup>83</sup> of the former

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82. Joseph P. Nearey, *Seeking Reparations in the New Millennium: Will Japan Compensate the "Comfort Women" of World War II?*, 15 TEMP. INT'L & COMPAR. L.J. 121, 121-45 (2001).

83. JOANNE FOAKES, CHATAM HOUSE, IMMUNITY FOR INTERNATIONAL CRIMES?: DEVELOPMENTS IN THE LAW ON PROSECUTING HEADS OF STATE IN FOREIGN COURTS (2011), [https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111\\_foakes.pdf](https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf).

colonial subjects' home state. However, as perpetrators die off, opportunities for criminal trials evaporate. Post-colonial state-to-state negotiations often hamper remedies in international courts as the 1965 Korea-Japan Claims Agreement and successive Korea-Japan diplomatic solutions did. In Korea, the South Korean government distributing the 1965 Claims fund did not even include "former comfort women" in the beneficiaries' lists.<sup>84</sup> The courts of the former empire, formerly the home country for the colonial subjects, are no longer home and are often hostile to the claims of the citizens of the now foreign country: all claims brought in Japanese courts were dismissed on the grounds of the 1965 Claims Agreement. As the post-colonial territories are often drawn by ethnic lines, the unraveling of an empire often puts the colonial subjects back in their pre-colonial independent state and presents them as foreigners to the courts of the former empire. Therefore, often the former colonial subjects' home state's civil court is the only forum that will take seriously legal claims of the victims of colonial racism. This is the reason why we should continue the inquiry beyond a finding of "armed forces/armed conflicts" such that state immunity doctrine applies and thus brushing off all war efforts as quintessential acts of sovereignty subject to immunity.

The Japanese military, as the end-customer of "comfort services," solicited/procured and paid for "comfort services" to reduce the cost of the war. These private legal acts incentivized the private contractors into recruiting Korean women already impoverished under colonial racism by deceit and into treating the Korean women thus recruited harshly and inhumanely during the "comfort services." Throughout the relevant periods, the Japanese military did not engage in any militaristic action that can be categorized as the act of "armed forces during an armed conflict" or any other sovereign act or governing act with respect to "comfort women," but merely set the specifications of the services to be delivered, exercising its prerogative as the end-customer and primary contractor. It is for this role as a joint tortfeasor in the "territorial tort" of fraudulent human trafficking and as a purchaser in the "commercial activity" of purchasing "comfort services" that the modern Japanese government should be held accountable in a Korean court of law despite state immunity.

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84. The Act on the Declaration of Civilians' Claims Against Japan was enacted on January 19, 1971.