

Seoul High Court
The 33rd Civil Chamber
Judgment

Case No.: 2021 Na 2017165 Compensation for Damage (Others)

Plaintiff & Appellant: 1.

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Attorneys of the Plaintiffs

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Kwon Tae-yoon, Sun Soo-ji

Defendant & Appellee: State of Japan

Legal representative: Ryuji Koizumi, Minister of Justice

Judgment of Previous Court : Seoul Central District Court Decision No.
2016*Gahap*580239, April 21, 2021

End of Pleadings: September 21, 2023

Verdict Issued : November 23, 2023

Orders

1. The judgment of the first instance is revoked.
2. The Defendant should recompense each amount of money stated in “Claimed Amount (Appeal Amount)” in the attached list to each Plaintiff who are stated as ‘Plaintiffs’ in the attached list together with interest calculated at a rate of 5% per annum from September 21, 2023 to November 23, 2023, and 12% per annum from the next day until the date of full payment.
3. The Plaintiffs’ other claims are dismissed.

¹ Unlike other attorneys, Law Firm APRO is not an attorney for (), one of the Plaintiffs, as it has not been delegated by The Korean Council for the Women Drafted for Military Sexual Slavery by Japan to handle the lawsuit.

4. Total litigation costs incurred are borne by the Defendant.
5. Section 2 of these Orders can be provisionally executed.

Purports of the Claim and the Appeal

The judgment of the first trial should be revoked. The Defendant should recompense each amount of money stated in “Claim Amount (Appeal Amount)” in the attached list to each ‘Plaintiff’ who are stated as ‘Plaintiffs’ in the attached list together with interest calculated at a rate of 12% per annum from May 10, 2019 until the date of full payment.

Reasoning

1. Basic Facts

A. Status of Plaintiffs

- 1) The people listed in the ‘Comfort Women Victims’ section in the below table are those who are registered as Comfort Women Victims in accordance with the [Act on Protection, Support, and Commemorative Projects for Sexual Slavery Victims for the Japanese Imperial Army] as it is acknowledged that they were mobilized by the Japanese Empire, the predecessor of the Defendant (hereinafter, collectively, “Defendant”) from around 1932 to around 1945 and were forced to engage in sexual acts for the sake of the Defendant’s soldiers at ‘Japanese Military Comfort Stations’ (hereinafter only as ‘Comfort Stations’) established in China, Southeast Asia, etc. (hereinafter, when referring to Defendant’s military Comfort Women Victims in general, they are referred to as ‘Comfort Women’ or ‘Comfort Women Victims’, and when referring to the Plaintiffs in this case or ‘Comfort Women Victims’ who are the inheritees, referred to as ‘Victims of this Case’).

No.	Comfort Women Victims		Whether the Plaintiff is alive or not	Plaintiff	Relationship
	Name	Date of birth			
1					The principal
2					Legatee

3				The principal
4				Child (adopted)
5				Child (adopted)
6				The principal
7				The principal
8				Child
9				Child
10				Child
11				Child
12				Child

2) Among the Victims of this Case, Plaintiffs No. 3, 6, and 7() are currently alive, and among the remaining victims, Plaintiffs No. 8 to 12 () died before this case was filed. Accordingly, the Plaintiffs listed in the Plaintiff section in the above table have inherited the rights and obligations of the above victims, and Plaintiffs No. 1, 2, 4, and 5 () died while the first instance trial was pending after the filing of the lawsuit in this case, so the people listed in the relevant Plaintiff section inherited the rights and obligations of the above victims by inheritance or general legacy² (legacy by universal title), and took over the proceedings in this case.

B. Establishment of Comfort Stations and Mobilization of Comfort Women, etc. by Defendant

- 1) After the Korea-Japan Annexation Treaty dated August 22, 1910, the Defendant ruled the Korean Peninsula through the Government-General of Korea. The Defendant assumed a war footing in the East Asia region by initiating the Manchurian Incident in 1931, the Sino-Japanese War in 1937, and the Pacific War in 1941, and the battlefronts extended beyond East Asia to the Pacific Islands and the South Pacific Ocean area.
- 2) Comfort Stations, where Comfort Women were forced to sexual slavery for soldiers, were first established by the Japanese Navy as a preventive measure against the frequent rapes committed by Japanese soldiers during the Shanghai Incident in 1932 that resulted in other problems, such as local

² A person who has received a legacy by universal title from the deceased can apply to take over the lawsuit (refer to Supreme Court Decision No. 93Da31993, November 4, 1994, etc.)

resistance and sexually transmitted diseases. As the Sino-Japanese War began in full force, the Defendant judged to expand the installation of Comfort Stations” to manage soldiers given the expansion of the battlefronts. It was the intention of the Defendant to offer soldiers mental comfort thus boosting their morale, alleviating discontent of soldiers prone to deserting a war that never seemed to end and preventing loss of combat power due to sexually transmitted diseases and, in particular, to reduce the possibility of the leakage of military secrets by placing women from colonies who cannot speak Japanese as ‘Comfort Women’. From around 1937, Comfort Stations began to be installed in full scale in war zones such as China, which was occupied by the Defendant’s military. As the area occupied by the Defendant’s military expanded after 1941, the Comfort Stations were further installed in Southeast Asia and the South Pacific area.

- 3) The Defendant’s army amended the 「Battlefield Canteen Regulations」, which is the Army Ministry of Japan Document Vol. 48 regulating shops, on September 29, 1937, to allow the installation of Comfort Stations in military canteens (a shop established in military camps during wartime that sells goods to soldiers and civilians attached to the military). On July 18, 1943, the Defendant’s army stipulated in the 「Regulations for Facilities Outside Military Camps」 that special Comfort Stations exclusively for soldiers and civilians attached to the military could be established outside military camps, but in the form of entrusted businesses if the camp hosts a company or larger unit. These regulations provided the basis for installing Comfort Stations within and outside military camps. The 「Wartime Military Service Guide」 published by the Defendant’s military in May 1938 stated to “seek active preventive measures against sexually transmitted diseases, implement sanitary facilities for Comfort Women, and prohibit contact with prostitutes and local civilians other than those designated by the military.”
- 4) As the number of Comfort Stations increased, the Defendant’s military directly mobilized Comfort Women in China, Southeast Asia, and the occupied territories of the Pacific region, but in Japan and its colonies such as Joseon (Korea) and Taiwan, the Government General, at the request of the military, allocated the number of Comfort Women to be mobilized in each province, and the police selected recruiters to mobilize the Comfort Women. As such, the mobilization was conducted mainly through administrative or regional organizations. Specifically, the mobilization of Comfort Women

were conducted by ways of ① forced mobilization through physical attack, threats, and abduction of women, ② mobilization through local community leaders, government officials, and schools, ③ mobilization through false promises of “employment and big money,” ④ commission to private recruiters, and ⑤ mobilization through labor corps and conscription, etc.

- 5) The Defendant’s military headquarters facilitated the private operators with the convenience for the smooth transportation of mobilized Comfort Women to places outside the Korean peninsula by issuing free passports and identification cards required for overseas travel, or the Defendant’s soldiers or police directly carried out the tasks of transporting Comfort Women to the battlefronts. Comfort Stations were directly managed by the Defendant’s military or consigned to private operators by the Defendant Government. In cases where private operators were consigned an operation, the Defendant’s military took part in the establishment and management of Comfort Stations by determining the private operator’s operations of business, acquisition of equipment and facilities, opening hours, fees, obligation of the users to use contraceptive measures, etc. The healthcare of Comfort Women, which was limited to the prevention, diagnosis, and treatment of sexual disease, was mainly managed by the Defendant’s military doctors. When Comfort Women escaped, the Defendant’s military itself tracked them down and dragged them back to the Comfort Station or killed them on the spot.
- 6) According to official documents, Comfort Stations were installed across places such as Joseon (Korea), China, Hong Kong, Macau, and the Philippines. The number of Comfort Women is estimated to be around 80,000 to 100,000 or 200,000, of which 80% were Joseon (Korean) women, and the other Comfort Women Victims were from the Philippines, China, Taiwan, the Netherlands and more.

C. Individual Mobilization Process of the victims of this Case and their Experiences at Comfort Stations

- 1) (), deceased
(), deceased, was born in Damyang, South Jeolla Province in 1925. In around 1940, while gathering wild vegetables in the mountains behind the neighborhood, she and other women were forcibly taken by the Japanese military and taken to Comfort Stations near Heilongjiang Province, China. (), deceased, was kept in a small room with only a partition erected between

the rooms, not being able to go out freely, and forced by the Defendant's soldiers to conduct sexual acts against her will.

- 2) (), deceased
(), deceased, was born in Yangsan, North Gyeongsang Province in 1926. In 1941, the village chief came to the house with a Japanese men and told her mother that (), deceased should be sent to 'Teishintai' (working at a factory that makes military uniforms), threatening, "Since you don't have a son, you have to send your daughter for the sake of the country", "If you don't do that, then you will become a traitor." (), deceased, was dragged out and taken by boat from Busan to China via Taiwan. (), deceased, was forced to engage in sexual acts against her will by the Defendant's soldiers while living at Comfort Stations in Guangdong Province, China. Sexual assaults were accompanied by extreme physical torture, and she regularly received injections to treat sexually transmitted diseases, which had serious side effects regardless of whether or not the disease occurred, and she was also assaulted by the Defendant's soldiers. After living at Comfort Stations in Guangdong Province, China, deceased () lived as a Comfort Woman in Hong Kong, Singapore, Indonesia, and Malaysia etc., and in the process, she attempted suicide several times before she came back to Singapore where she witnessed the independence of her country.
- 3) (), deceased
(), deceased was born in Boeun, North Chungcheong Province in 1928 and lived with her parents and grandparents. In around 1941, she and her aunt were forcibly taken away by the Defendant's police, and afterwards, she lived as a Comfort Woman, being raped by the Defendant's soldiers at Comfort Stations near Hiroshima. She was imprisoned in a basement by the Defendant's soldiers and was beaten with a whip, etc.. In particular, while resisting the Defendant's soldiers who attempted to rape her, she was injured and was no longer unable to use her left arm for the rest of her life.
- 4) (), deceased
(), deceased was born in 1919 and lived in Gimcheon, North Gyeongsang Province. In around 1935, when she was home alone, the local mayor and police officer told her to follow them without any explanation and she was forcibly mobilized as a Comfort Woman. (), deceased, moved to Shimonoseki, Japan, Thailand, Singapore, Myanmar, etc., and lived as a Comfort Woman. (), deceased, spent most of her life as a Comfort Woman in Myanmar, where she lived with a group of 20 to 30 Korean women who

were forced to be sexually assaulted by the Defendant's military officers on weekdays and soldiers on Saturdays and Sundays.

5) (), deceased

(), deceased was born in around 1926 and lived with her family in Yeongil, North Gyeongsang Province. In around 1944, she was deceived by the wrongful promise that she would get a paid job at a textile factory and taken to Comfort Stations in Mokdan River, North Manchuria. At the Comfort Stations, one woman was sent into each room to conduct sexual acts against her will by the orders of the Defendant's soldiers. About three months after being taken to the Comfort Stations, (), deceased, became pregnant and had an abortion at the hospital, and the doctor removed () deceased's uterus at his own discretion without consulting her. (), deceased, was forced by the manager to wear an abdominal bandage and conduct sexual orders of the Defendant's soldiers just about a week after being discharged from the hospital. Afterwards, (), deceased, was caught while running away and suffered injuries from such as being seared with a heated iron in the chest by the Defendant's soldier

6) Plaintiff ()

Plaintiff () was born in 1928, and in around 1944, she was deceived by a Japanese who told that she could be given good clothes and could make money. She followed the Japanese who lured her by showing leather shoes and a dress, and she was sent to Daegu, Gyeongju, and Anju, Pyeongan Province. Afterwards, she took boat at Dalian, China towards Comfort Stations located in Hsinchu, Taiwan. Plaintiff () was raped by the Defendant's soldier on a ship, was imprisoned at Comfort Stations and suffered sexual exploitation while conducting sexual acts forced by several Defendant's soldiers every day, and was even subjected to electric torture using a telephone cord.

7) Plaintiff ()

Plaintiff () was born in 1932 and lived with her father in Yongin, Gyeonggi Province. In around 1944, she was deceived by Japanese homeroom teacher who told her that she could make money at a Japanese factory, so she went to Toyama Prefecture, by train and ship, via Shimonoseki, Japan, and she arrived to the Comfort Stations. Plaintiff () was raped by the Defendant's soldier before she started menstruation, and she was called 'Esakawa' at Comfort Stations, being forced to live as a Comfort Woman.

8) (), deceased

(), deceased, was born in Pyongyang in 1926 and worked at a cigarette factory. When she was 17 years old, a Japanese police officer and a Korean police officer came to her and threatened saying ‘We must send you to a textile factory in Japan,’ and ‘if you run away in a few days, we will shoot all your family to death.’ For fear of the threats, she followed them to Pyongyang Station and took a boat to Comfort Stations in Nanjing, China. (), deceased, was first raped every day for about 15 days by Defendant’s high-ranking soldier, and was later forced to conduct sexual acts for about 10 or more soldiers a day on a Tatami (a Japanese mat). In the meantime, she suffered physical and mental pain, including being assaulted and infected with sexually transmitted diseases. Some of the Comfort Women Victims committed suicide at Comfort Stations, and some of the Comfort Women died from opium or from bombings. (), deceased, also intended to commit suicide, but gave up after seeing other fellow Comfort Women Victims who had attempted suicide but failed get shot to death by the Defendant’s soldier.

9) (), deceased

(), deceased, was born in Wonsan and was the second grade student at the Second Common School. In around the winter of 1941, she was taken by two unfamiliar men who said, ‘Come here,’ and was confined in a Japanese-populated area for a few days before she took a train to China. She was taken to Comfort Stations in Misan County, Dongan Province, China. There were about 20 Korean Comfort Women at the Comfort Stations, and they were exposed to daily violence. (), deceased, was caught by the manager while trying to escape the Comfort Stations and was hit severely on the head with wooden shoes, resulting in an indelible scar.

10) (), deceased

(), deceased, was born in Joongwon, North Choongcheong Province, and she got married in the spring of 1942 and lived with her husband in Onyang, South Chungcheong Province until her husband was forced into conscription. At night in around July 1942, when she was 18 years old, police officers and soldiers broke into her house and forcibly dragged her and put her on a train to Comfort Stations in Jilin Province, China. The place where (), deceased, was taken was the Comfort Stations, which were built with boards located next to the military base, and each room had a number. Comfort Women were assigned individual numbers. From the first day, the Defendant’s soldiers entered the room and raped (), decease. When (

), deceased, resisted, the soldier cut the left and right sides of her neck and beat her, and she became a total mess with wounds all over her body.

11) (), deceased

(), deceased, was born in Pyongyang, and at the age of 17, she was deceived by one Korean and several Japanese men who said 'Let's go to China, then you could get a good job' and 'You can come back if you don't like it.' She was sent to Comfort Stations in Harbin, China. (), deceased, was called 'Kakioka Mineko' at the Comfort Stations, and was forced to engage in sexual acts up to 30 to 40 soldiers a day, and was frequently assaulted by soldiers and managers.

12) (), deceased

(), deceased, was born in Gochang, North Jeolla Province in 1927. She was forcibly taken by a Japanese police officer on her way to buy medicine for her father, and taken to Japan by boat. The place where (), deceased, arrived was the Comfort Stations, where only Korean Comfort Women were sent. There, she got a venereal disease and was forced to engage in sexual acts against her will. She was brutally assaulted by the Defendant's soldiers, treated as a mental patient, and became addicted to opium

13) The Lives of the Victims of this case After the End of the War

A) When the war ended, the Defendant's military abandoned the Comfort Women at Comfort Stations and retreated. Most of the Victims of this Case were lost and wandered around the Comfort Stations without knowing that the war was over and were forced to go through combat situations in full, or had to do all kinds of work to make their own living. Most of the Victims of this Case were not able to return home immediately and had to wander around in China and Japan, etc..

B) The Victims of this Case either could not get married, or those who did were not able to maintain a stable marriage. Even when they managed to return home, their parents or family members regarded them with shame, leaving them unable to engage in normal social life. They also struggled with speaking out about their devastating past and many hid their Comfort Women experience from their husbands and children.

C) The Victims of this Case suffered physical damages from injuries, illnesses, and aftereffects of sexually transmitted diseases at the Comfort Stations. In addition to physical damages, they suffered from severe psychological damages and could not adapt to normal lives in society, which left them unable to have stable jobs and to live in poverty.

D. International Conventions, etc that the Defendant had signed by the End of the War

1) The Convention with Respect to the Laws and Customs of War on Lands

The Convention with Respect to the Laws and Customs of War on Lands (hereinafter “Hague Convention on War on Lands”) was signed at the Hague Peace Conference in 1907. The Convention was ratified by the Defendant on December 13, 1911. Article 3 of the Convention stipulates that “A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces,” and Article 46 of its Annex of Regulations states “Family honor and rights, the lives of persons, and private property, as well as religious convictions and practices, must be respected.”

2) International Convention for the Suppression of the White Slave Traffic

The International Convention for the Suppression of the White Slave Traffic (hereinafter “Convention on the Prohibition of Trafficking in Persons with Minors”) ratified by the Defendant in 1925, states that “Any person who, to gratify the passions of others, has hired, abducted or enticed, even with her consent, a woman or a girl who is a minor, for immoral purposes, even when the various acts which together constitute the offence were committed in different countries, shall be punished.”

3) International Convention for the Suppression of the Traffic in Women and Children

The League of Nations adopted the International Convention for the Suppression of the Traffic in Women and Children on September 30, 1921, and Defendant ratified this Convention in 1925 (*provided, however*, that application to its colonies such as the Korean peninsula and Taiwan, and leased territory of Kwantung was reserved). According to this Convention, any act of persuading, enticing, or kidnapping minor woman(women younger than 21 years old) for purposes of the sex industry that gratify the passions of others, is a crime even with her consent.

The League of Nations also adopted the Slavery Convention (hereinafter “Slavery Convention”) on September 25, 1926, and announced it on March 9, 1927. This Convention defined ‘slavery’ as ‘the status or condition of a

person over whom any or all of the powers attaching to the right of ownership are exercised.’ It stipulated emancipation of slaves, prohibition of slave trade and forced labor.

4) Forced Labour Convention

The International Labour Organization adopted the Forced Labour Convention (Forced Labour Convention, 1930(“ILO Convention No. 29”), hereinafter “Forced Labour Convention”) in 1930, and the Defendant ratified the Convention on November 21, 1932. According to this Convention, the signatories should abolish forced or compulsory labor within the shortest possible period and, even during the transitional period, should exclude women completely from such labor, limit the period and time of such labor, provide reasonable wages and industrial compensation, and provide labor conditions that safeguard the health of the workers.

5) Former Criminal Act of Defendant

The Defendant’s Former Criminal Act (Defendant Act no. 45, enacted in 1907, hereinafter the “Defendant’s former Criminal Act”), which was applied to the Korean peninsula at the time under the Korea-Japan Annexation Treaty, included Article 226, a criminal punishment provision for “kidnapping, enticement, or trafficking of other persons for the purpose of transporting them overseas.”

[Relevant Evidence] Each content of Exhibit 1 through 21, 34 through 53, and 62 through 66 (Exhibit with branch number shall be included, the same as follows), and whole purport of pleadings

2. Assessment on Jurisdiction in relation to the Applicability of State Immunity

A. The Premise of Judgment

Taking the evidence cited above and each content or video Exhibit 54 to 61, 75 to 78, and 81, and the whole purpose of the pleading into consideration, each of the following facts can be acknowledged.

1) Traditional legal doctrine on State Immunity and general International Customary Law

- A) State Immunity or sovereign immunity (hereinafter, collectively, “State Immunity”) is an international customary law in which domestic national courts do not have jurisdiction over lawsuits against foreign countries and the state is not compelled to foreign jurisdiction over its actions and property. State Immunity is based on the basic principle of the state that all countries with sovereignty 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)’.
- B) The legal principle of State Immunity is historically evolved from the absolute immunity that does not allow any national courts to exercise jurisdiction over foreign countries regardless of whether the act is related to sovereign, authoritative, public law -related- (*acta jure imperii*) or to non-sovereign, non-authoritative, private laws –related- (*acta jure gestionis*), to the restrictive immunity which limits State Immunity with respect to non-sovereign acts among the acts committed in foreign countries. In 1812, the U.S. Supreme Court adopted the doctrine of absolute immunity by declaring that State Immunity could be applied in accordance with generally accepted International Customary Law³. From the mid-19th century, courts in Belgium, Italy, Greece, etc. began to judge based on the doctrine of restrictive immunity, but even until World War II, courts in England, Poland, etc. continued to judge based on the doctrine of absolute immunity. It is widely acknowledged that after World War II, as courts in other countries such as the UK and the United States adopted the ‘doctrine of restrictive immunity,’ the restrictive immunity doctrine has become a common practice in the international community.⁴

2) Applicable International Convention

A) UN State Immunity Convention

- (1) The UN International Law Commission (hereinafter “ILC”) began drafting the above Convention in around 1978 and continued the

³ The Schooner Exchange v. McFaddon, 11 U.S. 116, 137 (1812)

⁴ In a case (Supreme Court en banc Decision No. 97Da39216, December 17, 1998, Korean Supreme Court) where a plaintiff who was dismissed while working at an agency affiliated with the U.S. Department of Defense sought confirmation of invalidity of dismissal against the United States and payment of wages until reinstatement, the Korean Supreme Court changed the existing precedents and adopted the legal principle of limited immunity, stating that “According to International Customary Law, an sovereign act of a state has state immunity from the jurisdiction of other states, in principle. However, it cannot be said that judicial act of a state can be immune from jurisdiction of other state under the current international law or international custom. Unless there are circumstances such as that the judicial act of a foreign country carried out within the territory of our country falls under the sovereign activities or is closely related to it, so that the exercise of jurisdiction over it may cause an unfair interference with the sovereign activity of a foreign country, courts of our country can exercise jurisdiction with that country as the defendant, for the judicial acts of a foreign country.”

discussion on it for a long time until the UN General Assembly adopted the [United Nations Convention on Jurisdictional Immunities of States and Their Property] (hereinafter “UN State Immunity Convention”). The main contents of the Convention are as follows⁵.

Article 5 A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6 A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

Article 12 (Personal injuries and damage to property) Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible 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.

- (2) In the meantime, Article 30 (1) 1 of the above Convention stipulates that ‘the present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, and as of March 24, 2021, the Convention was signed by 28 countries and ratified by 22 countries⁶. Even as of the end of pleading of this case, the above Convention has not yet met the requirements needed

⁵ Article 12 personal injuries and damages to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible 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.

⁶ The 22 countries that have ratified the above Convention are Austria, Czech Republic, Equatorial Guinea, Finland, France, Iran, Iraq, Italy, Japan, Kazakhstan, Latvia, Lebanon, Liechtenstein, Mexico, Norway, Portugal, Romania, Saudi Arabia, and Slovakia. , Spain, Sweden, and Switzerland.

for entry into force.

B) European Convention on State Immunity

- (1) European Convention on State Immunity was enacted on May 16, 1972 and entered into force on June 11, 1976, and its main contents are as follows⁷.

Article 11 A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 31 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.

- (2) The European Convention on State Immunity was first ratified by Austria on October 7, 1974, and lastly by Germany on May 15, 1990. And as of March 24, 2021, the Convention has been ratified by 8 countries⁸.

3) Legislative Practices of Individual Countries

- A) U.S. Foreign Sovereign Immunity Act (28 U.S.C. 1605, hereinafter ‘U.S. FSIA’)

The contents of U.S. FSIA 1605(a)(5) are as follows⁹.

⁷ Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 31

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

⁸ The ratifying countries include Austria, Belgium, Cyprus, Germany, Luxemburg, Netherlands, Switzerland, and the United Kingdom, and Portugal signed on October 5, 1979, but has not ratified it yet.

⁹ (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(5) not otherwise encompassed in paragraph (2) above, 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

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
(5) not otherwise encompassed in paragraph (2) above, 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; except this paragraph shall not apply to—
(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

Contents of U.S. FSIA 1605A (a)(1) are as follows¹⁰.

(a) In General,
(1) No Immunity.
A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or

any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

¹⁰ (a) In General,

(1) No immunity,

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employees, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employees, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

B) [Act on the Civil Jurisdiction of Japan with respect to Foreign State] of Japan (外国等に対する我が国の民事裁判権に関する法律, hereinafter ‘Japan’s Law’)¹¹

Article 3 The provisions of this Act do not affect the privileges or immunities enjoyed by foreign states based on treaties or established international laws.

Article 10 If the death of or injury to a person or the loss of or damage to a tangible object resulted from an act for which it is claimed that a foreign state should take responsibility, when all or part of the act took place in Japan and the person who performed the act was in Japan at the time it was performed, the foreign state will not have immunity from jurisdiction with respect to the judicial proceedings in which monetary compensation for the damage or loss resulting from the act is being sought.

C) State Immunity Act 1978 of U.K. (hereinafter ‘British SIA’)¹²

¹¹ 第三条 この法律の規定は、条約又は確立された国際法規に基づき外国等が享有する特権又は免除に影響を及ぼすものではない。

第十条 外国等は、人の死亡若しくは傷害又は有体物の滅失若しくは毀損が、当該外国等が責任を負うべきものと主張される行為によって生じた場合において、当該行為の全部又は一部が日本国内で行われ、かつ、当該行為をした者が当該行為の時に日本国内に所在していたときは、これによって生じた損害又は損失の金銭によるてん補に関する裁判手続について、裁判権から免除されない。

¹² 1. General immunity from jurisdiction.

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

5. Personal injuries and damage to property.

A State is not immune as respects proceedings in respect of—

(a) death or personal injury; or

(b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

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16. Excluded matters

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the [1952 c.67] Visiting Forces Act 1952.

- D) In addition to the countries mentioned above, countries that have laws that do not recognize State Immunity with respect to tort of foreign states against persons or property damages committed within their territory include South Africa, Canada, Australia, Singapore, Argentina, Israel, Pakistan, and Malawi, and the laws of these countries provide similar provisions to Article 5 of the British SIA regarding torts committed within the territory of the forum state.
- E) Among them, Canada enacted the ‘Justice for Victims of Terrorism Act’ in around March 2012 and revised the State Immunity Act and the Criminal Act accordingly. The main content of the Act is that any person who has been harmed by an act punishable as terrorism under the Criminal Act of

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Canada, whether inside or outside Canada, after January 1, 1985, can file a lawsuit for damages against a country, corporation, or organization excluded from State Immunity under the International Immunity Act.

4) Relevant Judgments of Foreign Courts, Etc.

A) Judgments of Italian and Greek courts and Judgments of the International Court of Justice regarding Damages incurred during World War II

(1) Judgment of Italian Court in Ferrini Case

Luigi Ferrini of Italian nationality was arrested by German soldiers on August 4, 1944, and was subject to forced labor at a German munitions factory until April 20, 1945, but was not recognized as a prisoner of war. In 1998, he filed a lawsuit for indemnification for damages in Arezzo District Court of Italy. The court of first instance rejected the suit in recognition of Germany's claims of State Immunity, and the Court of Appeals also rejected Plaintiff Ferrini's appeal. However, the Supreme Court of Italy reversed the judgment of the original court on March 11, 2004, noting that State Immunity cannot be applied to the acts of a state which constitute international crimes in violation of *jus cogens*. The lower court then ruled in favor of the Plaintiff (hereinafter "Ferrini Ruling").

(2) Judgment of Greek Court in Distomo Case

On June 10, 1944, in retaliation for the death of 18 German soldiers in an attack by Greek resistance fighters near the village of Distomo in southern Greece, the German occupational forces surrounded Distomo and went around raping, burning, and looting the houses of the village and brutally murdered 218 residents, including infants. On November 27, 1995, 257 people, including the bereaved of the victims, filed a lawsuit for indemnification for damages in a Greek court against Germany for the illegal acts. The Greek court ruled that illegal acts in violation of *jus cogens* cannot be recognized as sovereign act under international law and that Germany had implicitly abandoned State Immunity by violating *jus cogens*. The Greek court did not acknowledge Germany's State Immunity and announced the judgment

ordering Germany to pay approximately 30 million dollar in damages (hereinafter ‘Distomo Ruling’).

(3) Decision to approve compulsory execution based on the Italian court’s Distomo Ruling

The plaintiffs in Distomo Ruling applied to the Italian court for approval of compulsory execution based on the Greek court’s decision, and the Firenze Court of Appeal approved execution of the Judgment on May 2, 2005, and the Italian Supreme Court dismissed Germany’s appeal on May 6, 2008. The plaintiffs in Distomo Ruling took measures under the execution acts against ‘Villa Vigoni’ (a center for cultural exchange between the two countries), a building owned by the German federal government in Italy, based on the Judgment of the Firenze Court of Appeal on June 7, 2007.

(4) ICJ Ruling - German v. Italy¹³ (hereinafter ‘ICJ Ruling in this Case’)

The German government filed a case against Italy before the International Court of Justice (hereinafter “ICJ”) on December 23, 2008, claiming that the Italian court violated the international law on State Immunity enjoyed by Germany by issuing Ferrini Ruling and approving compulsory execution based on the Greek court’s Distomo Ruling. In response, Italy asserted that even if the actions of the German military constituted sovereign acts of the state, (1) State Immunity cannot enjoy state immunity for torts such as murder, injury, or property damage occurred within the territory of forum state (hereinafter “Torts occurred in the Territory of Forum State”), and (2) State Immunity should be denied for acts that seriously violate *jus cogens*, such as international treaties on human rights (hereinafter ‘Acts violating *jus cogens*’)¹⁴.

On February 3, 2012, the ICJ, with a vote of 12 to 3¹⁵ out of 15 judges, ruled that the Italian court denied the State Immunity that

¹³ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Rep. 2012.99

¹⁴ In addition, it was argued that State Immunity of Germany should not be recognized because the plaintiffs had no other means of redress and their last resort was to file a lawsuit against Germany for damages in an Italian court. Since it has no direct implication on the issues of this case, it is not included in the main text (the above argument was rejected on the grounds that whether a lawsuit against a foreign country is a last resort cannot be considered a factor that determines whether State Immunity is recognized).

¹⁵ Majority opinion (12): Hisashi Owada, Peter Tomka, Abdul G. Koroma, Bruno Simma, Ronny Abraham, Kenneth Keith, Berenado Sepulveda-Amor, Mohamed Bennouna, Leonid Skotnikov, Sir Christopher Greenwood, Xue Hanqin, Joan E.

Germany could have enjoyed under the Customary International Law and that the Italian court had violated the obligation to respect German's State Immunity privilege by ruling on civil lawsuit which was filed on the ground of German Empire's violation of international laws from 1943 to 1945. And the ICJ, by a vote of 14 to 1¹⁶, judged that Italy had violated its obligation to respect Germany's State Immunity privilege by declaring that Greek court's judgment could be compulsorily executed within Italy on the ground of Germany's violation of international laws in Greece and taking enforcement action against German-owned property. The majority opinion on Italy's claim regarding State Immunity can be summarized as follows.

- (a) With respect to assertion on exception of Torts occurred in the Territory of Forum State, the majority opinion considered the issue in the above case is whether State Immunity should be applied in respect to the 'acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in cooperation with those armed forces, in the course of conducting an armed conflict' (hereinafter "Torts occurred in the Territory of Forum State in the course of conducting an armed conflict"), and they rejected Italy's assertion, judging that Italy's claim is not supported by the legislation or rulings of individual countries to the extent of general practice, and rather, courts in many countries recognize State Immunity with respect to Torts occurred in the Territory of Forum State in the course of conducting an armed conflict, and thus, State Immunity of Germany should still be recognized.
- (b) With respect to claims of exceptions to Acts violating *jus cogens*, the majority of the judges rejected the Italy's claim, judging on grounds that whether or not there is a significant infringement resulting from a violation of *jus cogens* can inevitably be determined only after the completion of hearing on the merits, that

Donoghue.

Dissenting opinion (3): Antonio Augusto Cancado Trindade, Abdulgawi Ahmed Yusuf, Giorgio Gaja

¹⁶ Majority opinion (14): Hisashi Owada, Peter Tomka, Abdul G. Koroma, Bruno Simma, Ronny Abraham, Kenneth Keith, Berenado Sepulveda-Amor, Mohamed Bennouna, Leonid Skotnikov, Sir Christopher Greenwood, Xue Hanqin, Joan E. Donoghue, Abdulgawi Ahmed Yusuf, Giorgio Gaja

Dissenting opinion (1): Antonio Augusto Cancado Trindade

it is difficult to recognize State Immunity on this basis as State Immunity is a pre-requisite for litigation prior to hearing on the merits, that the Italian court ruling is almost the only ruling in individual countries denying State Immunity depending on the content and degree of the violation¹⁷, and the courts in most other countries did not deny State Immunity on the grounds that the act violates *jus cogens*, and that the exception to State Immunity due to violation of *jus cogens* claimed by Italy cannot be considered to have been justified to the extent that it can be accepted as general practice.

- (5) Progress after the ICJ Ruling in this case - Implementation Act of the Italian Parliament and Decision by the Italian Constitutional Court thereto
 - (a) After the above ICJ Ruling, many lower courts in Italy rejected the suit on the grounds that the Italian courts had no jurisdiction in the same case under the principle of State Immunity. And on January 29, 2013, the Italian Parliament enacted ‘Law No. 5 of 2013’, which requires Italian courts to abolish its jurisdiction over cases within the scope of the ICJ Ruling in this case and to rehear and reconsider the rulings that acknowledged jurisdiction in such cases.
 - (b) However, some lower courts applied to the Italian Constitutional Court for review of unconstitutionality of the above-mentioned ‘Law No. 5 of 2013’, enacted by the Italian Parliament, for the reasons that the ICJ Ruling in this case and the above-mentioned violate fundamental human rights, and victims’ fundamental right to property and access to courts guaranteed under the Italian Constitution.
 - (c) On October 22, 2014, on the premise that International Customary Law on State Immunity has gradually evolved to limit the scope of State Immunity to sovereign acts in order to prevent unjust infringement on individual rights, and Articles 2 and 24 of the

¹⁷ The Greek court initially denied State Immunity of Germany in the Distomo Ruling, but later reversed its position, as a Special Supreme Court ruled that state immunity of Germany should be recognized.

Italian Constitution guarantee human dignity, and this Constitutional right shall be placed at the top of Italian legal order and that the right to access to court is one of the main legal principles recognized in modern democratic society, the Italian Constitutional Court ruled that the above ‘Law No. 5 of 2013’ is unconstitutional in denying jurisdiction over acts committed by foreign countries that constitute war crimes and crimes against humanity that violate basic human rights, since kidnapping and forced labor by the German military constitute a serious war crime that violates *jus cogens* under international law and cannot be considered as a typical, substantive or functional exercise of sovereignty by a foreign state, and the interpretation of the law on State Immunity in the ICJ Ruling in this case completely nullifies the victims’ right to trial for crimes against humanity and violations of basic human rights, and as a result, it results in the denial of judicial relief for crimes against humanity, so State Immunity cannot be justified.

B) Judgments issued after the ICJ Ruling in this case related to State Immunity

(1) The so-called Changri-la Ruling by the Brazilian Supreme Court¹⁸

On August 23, 2021, in a lawsuit filed for indemnification for damages against Germany by the families of victims of a fishing boat that sank after being attacked by a German submarine in Brazilian territorial waters in around 1943 during World War II, the Supreme Court of Brazil ruled that the above act violated the general principles of International Humanitarian Law, and that torts committed by a foreign state in violation of human rights within the territory of a state cannot enjoy State Immunity for reasons that even if it is a sovereign act, State Immunity must give way to the supremacy of human rights stipulated by the Brazilian Constitution.

¹⁸ Brazilian Federal Supreme Court (Extraordinary Appeal with Interlocutory Appeal 954.858 RIO) (Appellate Unit Special Appeals 954.858 Rio de Janeiro)

In the above Ruling, judges cited *Letelier v. Republic of Chile* case, evaluating that even if it is a sovereign act, State Immunity should be limited for torts committed in the forum state by persons in the forum state.

(2) Ukrainian Supreme Court Ruling decided on April 14, 2022¹⁹

On around April 14, 2022, in a lawsuit filed for indemnification for damages to Ukrainian Court by the family of a victim who died during a battle with Russian troops who invaded Ukraine in 2014, the Supreme Court of Ukraine revoked the original ruling that has judged that the court has no jurisdiction under State Immunity law, and acknowledged Russia's liability for damages.

In the above ruling, the Supreme Court of Ukraine premised that “Although the European Court of Human Rights recognized international customs in relation to State Immunity, it emphasized that there should be restrictions pursuing a legitimate purpose and it should be proportional to that purpose,” and stated that “In cases where damage to human life or health is caused, if all or part of the damage occurred within the forum state and the perpetrator was in the forum state, it can be concluded that the state concerned does not have immunity from liability for damages, “State Immunity is a characteristic showing a legal status of a state as a subject of international relations, and it is based on the general principle of international law which stipulates that ‘equal subjects do not have reciprocal authority or jurisdiction.’ However, mutual recognition of the sovereignty of states is a necessary condition for complying with this principle. Accordingly, if the Russian Federation denied Ukraine's sovereignty and waged a war of aggression against Ukraine, Ukraine has no obligation to respect and observe the sovereignty of other state.”

(3) High Court of Wales, England, Ruling on *Al Masarir v. Kingdom of Saudi Arabia*²⁰

¹⁹ 308/9708/19:Civil Case(from 01. 01. 2019)

²⁰ *Al-Massari v. Kingdom of Saudi Arabia* (2022) EWHC 2199 (QB) (19 August 2022)

On August 19, 2022, in a case where spyware was installed on two iPhones without permission by Saudi Arabia in the UK, Al Masarir, a human rights activist who was injured by Saudi Arabian agents in Knightsbridge, London, filed a lawsuit for indemnification for damages against Saudi Arabia, High Court of U.K acknowledged Saudi Arabia's liability for torts judging that Article 5 (s5) of the British SIA and Article 11 of the European Convention on State Immunity do not distinguish sovereign acts from private acts (non-sovereign acts). Furthermore, the above Court explained that Article 5 of the British SIA does not require that all torts should occur in the U.K, and ruled that if the cause of the personal injury occurred in the United Kingdom, that alone could be the reason to limit the State Immunity of the foreign state.

B. Issues and Objects of Judgment

- 1) This is a case in which the Plaintiffs, who are citizens of the Republic of Korea, file a lawsuit for indemnification for damages in a Korean court against a foreign state who is the Defendant in this case due to torts. The Republic of Korea has not enacted a law which stipulates the scope of State Immunity in applying civil jurisdiction by courts against foreign states, and no treaty has been concluded between the Republic of Korea and the Defendant regarding the recognition of mutual civil jurisdiction. Therefore, in this case, whether to recognize State Immunity of the Defendant should be determined in accordance with 'Customary International Law'²¹ that performs the function of a court.
- 2) It is generally understood that an International Customary Law is established when the general practice of states and *opinio juris* is found. The existence of a 'general practice of a state' may be identified through legislation, rulings or administrative measures of individual countries, the contents of resolutions of international organizations, etc. '*Opinio juris*' refers to the individual country's perception to be legally bound by the established practices as seen above.

²¹ Article 38 (1) b of the Statute of the International Court of Justice (hereinafter 'ICJ Regulation') designates 'international custom, as evidence of a general practice accepted as law' as one of the courts of international law.

- 3) First, in order to determine the existence or identify the contents of International Customary Law related to State Immunity to be applied to this case, it is necessary to clarify core elements related to the legal principle of State Immunity from this case and confirm its contents.

Taking the basic facts above, the Plaintiffs' claims, the evidence presented above and the purpose of the entire pleading into consideration, Defendant's acts in this case started within the territory of the Korean Peninsula, that is, the Republic of Korea, which was illegally occupied by Defendant, and were carried out throughout several foreign states. Therefore, it can be understood that this is a tort committed against the Comfort Women Victims, citizens of the Republic of Korea, and that the Plaintiffs are seeking compensation for the damages suffered by the Victims due to the above-mentioned acts of the Defendant in this case. Based on these grounds, the court shall determine whether International Customary Law related to State Immunity exists and what are the details of the Law, to the extent that it is required for this case.

C. Specific Judgment

Judging from the following circumstances, which are comprehensively acknowledged in addition to the premise for the above judgment, the preceding evidence, and the purpose of the pleading as a whole, and in light of the required elements for establishing International Customary Law, it is reasonable to determine that there exists an International Customary Law that does not acknowledge the State Immunity for torts committed against a national of a forum state within the territory of the forum state, regardless of whether an act is a sovereign act or not. Furthermore, judging this case under the above-mentioned International Customary Law, the State Immunity shall not be applicable to the Defendant in this case, and thus, the Defendant shall not be exempted from the jurisdiction of the courts of the Republic of Korea.

- 1) Identification of the currently valid International Customary Law applicable to this case
 - A) International Customary Law on State Immunity is not permanent nor absolute. As discussed earlier, the immunity under the Law has already changed from absolute immunity to restrictive immunity. Furthermore, in order to confirm the existence of International Customary Law on State

Immunity, the dynamic nature of International Customary Law must be taken into consideration when looking into general practice of states and *opinion juris* on it. Looking at the process of evolving into the restrictive immunity doctrine, which is now accepted under the existing International Customary Law with no contradictory opinion, during a certain period, 'state practice' of the rulings of individual country based on the principles of absolute immunity and restrictive immunity will inevitably coexist. However, even in such coexisting period, the rulings that adopted the principle of restrictive immunity based on a specific point in time cannot be dismissed as rulings that violated International Customary Law. Considering this evolving nature of International Customary Law, the trend and tendency of developments in relevant International Customary Law should also be considered in considering the state practice and *opinion juris*.

B) However, apart from reasons such as 'commercial transactions', it is highly noteworthy that accumulated state practices that acknowledges an exception to the State Immunity of the offending country are found in relation to 'torts such as causing personal death or injury within the territory of the forum state'.

(1) Although it did not acquire a legal effect, there are international conventions such as the UN Convention on State Immunity that was signed by 28 countries and ratified by 22 countries, and the European Convention on State Immunity as seen from above. As seen earlier, the U.S FSIA, national law of the Defendant, the British SIA as well as many other countries, including South Africa, Canada, Australia, Singapore, Argentina, Israel, Pakistan, and Malawi, have laws stipulating the same contents. Furthermore, these regulations do not distinguish 'sovereign acts' from 'non-sovereign acts' in defining the requirements for torts committed in territories where State Immunity is not recognized. Among the rulings applied by the above individual laws, it is more difficult to find a ruling that explicitly states that the immunity can not be applied because the tort is a sovereign act. Rather, it is found that in *Al Masarir v. Kingdom of Saudi Arabia* case etc., that the Court ruled that Article 5 of the British SIA does not distinguish sovereign acts from private acts (non-sovereign acts) in determining the state immunity. The commentary of the UN's

International Law Commission (ILC) on Article 12 of the UN State Immunity Convention also states that the scope of Article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination²².

- (2) The Italian court's ruling on Ferrini case, the recently announced Brazilian Supreme Court's ruling on so-called Changri-la case, and the Ukrainian Supreme Court ruling announced on the April 14, 2022 basically denied the application of State Immunity to the perpetrator state even though there has been an aspect where the state acts may be evaluated as sovereign acts in lawsuits for indemnification for damages filed on the grounds of torts committed by foreign troops, etc., within the forum country. These can be understood as a series of state practices that are in line with the State Immunity Convention or the legislations of individual countries as seen above.
- C) Furthermore, the above mentioned state practices are found in a number of countries. Fact that many countries have remained silent and has not made any statement regarding State Immunity, does not necessarily give grounds to judge the existence of the state practice by simply calculating the number of countries that have implemented state practice with the 193 UN member countries as the denominator. In addition, it is not difficult to acknowledge that such state practice is carried with *opinio juris* through the legislation of individual countries or the rulings of the highest courts.
- D) Besides, given the facts that the State Immunity doctrine has evolved initially from the absolute immunity doctrine to the restrictive immunity doctrine, and that since then, many countries have continued to acknowledge exception of the State Immunity with respect to torts committed within their own territory, it is reasonable to recognize that the international legal system related to State Immunity is being shifted in the direction of protecting the individual's right to seek trial in the above mentioned areas.

²² ILC, "Draft articles on Jurisdictional Immunities of States and their Property, with commentaries 1991", Yearbook of the International Law Commission, 1991, vol. II Part Two, 13

- E) Taking the above circumstances, including the identifiable state practices and *opinio juris* thereto, the dynamic nature of International Customary Law and the current shifting direction into consideration, even when determining the International Customary Law to this case in the most conservative aspect, it is reasonable to concede that under the currently valid International Customary Law, State Immunity may be excluded for torts committed against nationals of the forum state within the territory of the forum state regardless of whether the act is evaluated as a sovereign act or not²³.
- F) Meanwhile, as seen earlier, in the ICJ Ruling in 2012, Italy argued that ‘State Immunity of Germany should be denied because Germany’s actions constituted a Tort occurred in the Territory of Forum State’, but to be rejected. However, the ICJ ruled the State Immunity should be recognized for ‘Tort occurred in the Territory of Forum State in the course of conducting an armed conflict’ only after limiting the issue of the case to whether or not the court shall recognize State Immunity regarding ‘acts committed on the territory of the forum state in the course of conducting an armed conflict’. Thus, the ICJ Ruling cannot be seen as contradicting the previous judgment. In other words, ‘armed conflict’ typically refers to a state in which armed intervention occurs by multiple armed forces of countries, as such in a war. In this case, the Defendant formed battle fronts in China, Southeast Asia, and the South Sea Islands, etc. at that time, and yet the Korean Peninsula was no longer a place where ‘armed conflicts’ such as war took place. Moreover, considering the shifting trend of the International Customary Law related to State Immunity as seen above, there is no justifiable reason for interpreting ‘armed conflict’ intentionally more broadly than the literal meaning seen above. Therefore, the Defendant’s actions in question in this case, that is, the acts of deceiving, kidnapping, and abducting Comfort Women Victims in order to mobilize ‘Comfort Women’ do not belong to the acts occurred ‘in the course of

²³ However, with regard to acts of armed forces, the contents of the UN Convention on State Immunities and individual legislation of the United States and Japan are different from those of the European Convention on State Immunity and the British SIA. In other words, while there are no such provisions in the UN Convention on State Immunities and the individual legislation of the United States and Japan, Article 31 of the European Convention on State Immunity stipulates that “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.” The British SIA states “16. Excluded matters (leaving out the text in between) (2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the [1952 c. 67.] Visiting Forces Act 1952.

conducting an armed conflict’, which is the premise for the discussion in the ICJ Ruling.

2) Application of identified Customary International Law to this case

As seen above, the Defendant’s act in this case is a tort committed within the territory of the forum state against Victims of this Case, citizens of the forum state, and therefore, pursuant to the currently valid International Customary Law discussed above, State Immunity of Defendant is denied²⁴.

Meanwhile, there may be a question over whether State Immunity can be excluded even when only a ‘part’ of the tort was committed within the forum state, which is questioned in the course of applying the above International Customary Law. This is an issue relevant to the state practice recognized by conventions or legislations of individual countries, that is, it relates to interpretation of ‘torts committed within the territory of the forum state’. Article 12 of the UN Convention on State Immunity and Article 10 of Japan’s law stipulate that State Immunity is denied even if only ‘part’ of the act in question takes place in the territory of the forum state. Considering the purpose of acknowledging the exception of the State Immunity with respect to torts committed within the territory of the forum state, there is no rational to require that ‘all’ of the acts in question shall be committed within the territory of the forum state to be exempt from State Immunity. In *Al Masarir v. Kingdom of Saudi Arabia* case, decided by High Court of Wales, England on August 19, 2022, the Court stated that Article 5 of the British SIA does not require that the whole of torts should occur in the UK.

3. Assessment on International Jurisdiction

A. Relevant Legal Principles

Determination of international jurisdiction should follow the basic objective of ensuring to achieve impartiality between the parties, and appropriateness,

²⁴ Therefore, on the premise that the currently valid Customary International Law recognizes state immunity in cases such as this, there is no possibility that normative control under our Constitution, which requires discussion may cause any issue.

promptness, and economy of adjudication, and should, more specifically, take into account not only private interest such as impartiality between the parties, convenience, and predictability, but also interests of the judiciary of the state as well such as appropriateness, promptness, and efficiency of adjudication, and effectiveness of judgment, etc.. The issue of determining which among such diverse interests deserves protection should be determined in accordance with the principle of reasonableness, applying, in each individual case, the objective criteria of substantial relevance between the forum and the parties, and substantial relevance between the forum and the case in dispute (refer to Supreme Court Decision 2010Da18355, July 15, 2010, and Supreme Court Decision 2009Da22459, May 24, 2012, etc.). Determination of predictability ought to be made on the basis of whether the Defendant could have reasonably predicted the filing of a suit at a court in the relevant jurisdiction because of “substantive relevance” between the Defendant and the jurisdiction (refer to Supreme Court Decision 2016Da33752, June 13, 2019). Furthermore, given that treaties or generally accepted principles of international law on international jurisdiction are yet to be established, no statutes regarding this matter is established in the Republic of Korea, and the provisions on the land jurisdiction of the Korean Civil Procedure Act were established in accordance with the above basic principles, it is reasonable to determine that the Republic of Korea has jurisdiction over litigation related to extraterritorial cases when the venue is in Korea according to the above provisions (refer to Supreme Court Decision 91Da41897, July 28, 1992).

B. Assessment

In light of the above legal principles to be applied to the following circumstances which can be identified based on the above basic findings, or can be acknowledged based on the evidence cited above and by the whole purpose of the entire pleading, the Republic of Korea has a substantial relevance with the parties to this case and the matter subject to dispute in this case. Accordingly, the court of Republic of Korea has jurisdiction over this case.

- 1) Article 18 (1) of the Civil Procedure Act stipulates that ‘A lawsuit concerning a tort may be brought to the court in the place of an act’. As Plaintiffs filed lawsuit for indemnification for damage considering the Defendant’s act of kidnapping, deceiving, or luring the citizens of the Korean Peninsula, which was then illegally occupied by the Defendant, and forcing them to live as

Comfort Women as a tort. Therefore, the Republic of Korea is the place where the above-mentioned series of illegal acts took place.

- 2) Most of the Plaintiffs are Korean citizens and currently reside in Korea, and they are bringing the Defendant to account for the tort based on the Civil Act of the Republic of Korea.
- 3) Since Plaintiffs and other Comfort Women Victims have continuously filed claims for damages similar to this case in the Defendant's courts, U.S. courts, etc., it is difficult to say that the Defendant could not have reasonably foreseen that Plaintiffs would file a lawsuit in the court of the Republic of Korea.
- 4) Since most of the physical evidence supporting the claims of Plaintiffs in this case has been destroyed, and the testimony of witnesses cannot be expected, this is not a case where additional investigation of evidence in other places, such as the Defendant's country is inevitably necessary.

4. Assessment on the Merits²⁵

A. Determination of Applicable Laws

The applicable law, which is the criterion for determining whether the right to claim damages due to torts of this case is established, shall be decided by the norm of the applicable law to legal relation having foreign elements in the Republic of Korea which is the venue in this case (hereinafter "Conflict of Law Norm"). According to the facts recognized above, the legal relations regarding the torts of the Defendant and the damages incurred had occurred before January 15, 1962, the date of the enactment of the former Private International Law (enacted by Act No. 996 of January 15, 1962).

²⁵ Article 418 of the Civil Procedure Act stipulates that "Where a judgment of the first instance, which has rejected a lawsuit on account of its illegality, is revoked, the court of appeals shall remand the case to the court of first instance: Provided, That where the first instance has examined the case to the extent of being able to render a judgment on the merits of the case, or where the parties have consented thereto, the court of appeals may render a judgment on the merits directly."

In light of the claims made by the plaintiffs in the first trial and the evidence submitted, it seems that the hearing on this case has been completed to the extent that a judgment on the merits can be made in the first trialinstance judgment (in this trialjudgment, the plaintiffs tried to emphasize that the claim has met the requirements of the lawsuit in this case). Therefore, pursuant to the proviso to Article 418 of the Civil Procedure Act, this court will not remand the case to the court of first instance and makes a judgment on the merits.

The Republic of Korea's Conflict of Law Norm applied to the legal relation occurred before the enactment of the former Private International Law, was the Japanese "Rules concerning the application of law" (Law No. 10 of June 21, 1898) which was incorporated as current law under the military government law No. 21 and by Article 100 of the Republic of Korea's Original Constitution Addendum into the Republic of Korea's law order after it had been applied to Korea by the Emperor of Japan's Edict No. 21 from March 28, 1912. Under the Japanese Rules concerning the application of law which was the Republic of Korea's Conflict of Law Norm applicable at the time when the Plaintiffs' rights to claim were established, establishment and validity of the right to claim reparations for damages follow the law of where a tort occurred (Article 11). The places in which torts in this case occurred are located in the Republic of Korea, China, the Defendant, and South Pacific Islands, and as such, the applicable laws to determine the right to claim reparations for damages due to torts include laws of the Republic of Korea, China, Japan, etc. The Plaintiffs in this case are clearly asking the Defendant's responsibilities for illegal activities with the Republic of Korea's law as the applicable law. Accordingly, it is held that the law of the Republic of Korea is applied in determining whether the Plaintiffs' right to claim reparations for damages due to illegal activities is established (refer to Supreme Court Decision 2009Da22549, May 24, 2012).

Furthermore, the Act of the Republic of Korea applicable to the determination of torts in cases before Jan. 1 of 1960, when the enacted Civil Act was enforced, is the "current Civil Act," not the "previous Civil Act (Japanese Civil Act)" (refer to Article 2 of its Addendum).

B. Occurrence of Liability for Indemnification of Damages

1) Considering the basic findings and the purpose of the entire pleading, the following facts are all recognized by this court. In other words, the Defendant established and operated Comfort Stations during the Sino-Japanese War and the Pacific War for the purpose of boosting the morale of soldiers and reducing civil complaints. The Defendant, through administrative organizations, deceived, lured, or forcibly kidnapped young Victims of this Case, in their early to mid-teens to their twenties at that time, to mobilize them as Comfort Women. Victims of this Case were separated from their families against their will, deprived of even the minimum level of freedom for a considerable period of time, and forced to sexual slavery by dozens of Defendant's soldiers every day. In the process, not only did they suffer

injuries from countless assaults, but they were also constantly exposed to the risks of sexually transmitted diseases and unwanted pregnancies, and ultimately suffered from the fear of death. Victims of this Case as Comfort Women suffered from physical and mental pain and could not adapt to a normal social life even after the end of the war.

- 2) According to Article 98 (2) of the Defendant's current Constitution (promulgated on November 3, 1946), "the treaties concluded by Japan and established laws of nations shall be faithfully abided." Even before the enactment of the current Constitution, the above provision was declaring the common obligation of the state rather than introducing a new statutory obligation to the state. Therefore, the Japanese Empire even before the establishment of the current Constitution is also obligated to faithfully comply with the treaties and international laws. And the acts of this case violate the following conventions that the Defendant had ratified at the time as follows: ① "The belligerent party's duty to respect family honour and rights" as stipulated in the Article 3 of the Hague Convention and Article 46 of the Annex of Regulations had not been abided. The serious infringement of the rights to sexual self-determination of women, who are members of the family, was a breach of the state duty to respect their honor and rights; ② The provision of the 'International Convention for the Suppression of the White Slave Traffic' that prohibited prostitution, as well as abduction and human trafficking for the purpose of prostitution,²⁶ had been breached; ③ The acts constituted deceit and abduction of under-age women as prescribed in the 'International Convention for the Suppression of the Traffic in Women and Children'; ④ The provision on the abolition of slavery under the League of Nations' 'Slavery Convention'²⁷ had been breached; ⑤ The article that mandated the immediate abolishment of forced labor of women in ILO 'Convention No. 29' had been breached, and ⑥ then government officials of Defendant breached the Article 226 of the Defendant's former Criminal Act,

²⁶ The original text is as follows: "Article 1 The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person."

²⁷ Although the Interim Committee on Slavery under the League of Nations considers slavery as 'a status or condition of a person whose exercise of some or all of the rights accompanying ownership is restricted', the MacDougall Report of the UN Subcommittee on Human Rights defines 'Comfort Women' as 'sex slaves'. And since the exercise of some or all of the rights of 'Comfort Women' at the time was restricted by the Japanese military, 'Comfort Women' are considered as 'sex slaves' by many people.

and the Government of former Imperial Japan actively encouraged and assisted such acts.

- 3) Considering the facts acknowledged above as well as international treaties at the time of the acts of this case committed, the International Customary Law, domestic laws of former Japanese Empire, the charter of the International Criminal Court regarding war crimes, and the whole purport of pleadings, the previously acknowledged acts of the Defendant constitute torts under the Civil Act of the Republic of Korea, which is the applicable law of this case.

C. Scope of Responsibility for Indemnification of Damage

1) Amount of Compensation

Considering details of the Defendant's violence and the severity of the breach of such crimes, the age of Victims of this Case at the time, the length of the period in which they had to suffer as Comfort Women, the degree of physical and mental damages inflicted upon Victims of this Case including the environment at the time and the degree of suppression of freedom, the social and economic difficulties that Victims of this Case experienced after the end of war, the fact that any meaningful recovery has not been made for a long time after the torts, and other circumstances made in the arguments of this case, it is reasonable to assume that the amount of compensation for each Victim of this Case exceeds at least KRW 200,000,000, which is what the Plaintiffs are partially claiming in this case²⁸.

2) Inheritance

As seen earlier, as some of the Victims of this Case have been deceased, their designated heirs inherited the deceased, and the Korean Council for the Women Drafted for Military Sexual Slavery by Japan, the successor of (), deceased, in the lawsuit, bequeathed the property of (), deceased by universal title. As such, the share ratio and amount of solatium inherited or bequeathed by universal title to Plaintiffs, heirs of the deceased or those comprehensively bequeathed by the above comprehensive bequest are the

²⁸ The amount sought by the plaintiffs, who are the heirs, or those who succeeded the lawsuit as the victims of this case, is the same as the amount stated in the respective columns of the 'Inherited Share' and the 'Claimed Amount (Appeal Amount)' in the attached list of the KRW 200,000,000 above.

same as those stated in the respective columns of the 'Inherited Share' and the 'Claimed Amount (Appeal Amount)' in the attached list.

3) Initial Date in Reckoning Damages for Delay

In calculating the amount of compensation, not only all circumstances that have occurred up to the time of closing the pleading in the trial court, but also the national income level and value of currency, which are the standards for calculating compensation at the time of closing the pleading should also be considered. If the amount of compensation is determined based on the value of the currency close to the time when the tort was committed, and there is no particular change in the value of currency, then it can be assumed that damages for delay are incurred from the time that the tort was committed, when the liability for damages was established. However, if a long period of time has elapsed between the time of the tort and the close of pleading, and there has been a significant change in the value of currency at the time of the closing the pleading, which must be taken into consideration when determining the amount of compensation, compared to the time of the tort, if damages for delay are also deemed to arise from the time of a tort, the question of substantially excessive compensation can be raised. Therefore, if a long period of time has elapsed between the time of the tort and the close of the pleading, and there has been a significant change in the value of currency at the time of the close of the pleading, which must be taken into consideration when calculating the amount of compensation, compared to the time of the tort, even if there is an exception. In such case, damages for delay in paying the compensation resulting from the torts should be considered as occurring from the date of the closing of the pleading, which is the record date for calculating the amount of compensation (refer to Supreme Court Decision No. 2009Da103950, January 13, 2011).

In this case, a long period of time has elapsed from the date of completion of the tort to the date of closing the pleading, and there has been a significant change in the value of the currency, the amount of compensation has been considered as of the closing of the pleading in this case, taking into account of such changed circumstances. Therefore, it is reasonable to assume that damages for delay occur only for the period after the closing of the pleading. Accordingly, the Plaintiffs' claim for payment of damages for delay calculated until the day before the closing of the pleadings is not accepted.

D. Sub-conclusion

Therefore, the Defendant is obliged to pay the Plaintiffs the amount of money stated in ‘Claimed Amount (Appeal Amount)’ in the attached list, together with the damages for delay calculated at the rate of 5% per annum as stipulated by the Civil Act from September 21, 2023, the closing date of the pleading to November 23, 2023, the date of this judgment, and 12% per annum as stipulated in the Act on Special Cases Concerning Expedition of Legal Proceedings from the next day until the date of full repayment.

5. Conclusion

Therefore, the judgment of the court of first instance that dismissed the suit in this case to the contrary shall be revoked. To the extent that a judgment on the merits made in the first instant judgment may be derived, this court decided to make judgment on the merits pursuant to proviso to Article 418 of the Civil Procedure Act, and it is decided as orders.

Presiding Judge Ku Hui-geun_____ (sealed)

Judge Hwang Sung-mi____ (sealed)

Judge Heo Ik-soo _____ (sealed)

Annex

List

No.	Plaintiff	Relationship	Shares inherited	Claimed amount (Appeal Amount)
1			1	200,000,000
2			1	200,000,000
3				200,000,000
4			1	200,000,000
5			1/2	100,000,000
6			1/2	100,000,000
7				200,000,000
8				200,000,000
9			1	200,000,000
10			1/4	50,000,000
11			1/3	66,666,667
12			1	200,000,000
13			1/4	50,000,000
14			1/4	50,000,000
15			1/4	50,000,000
16			1/4	50,000,000
			Total sum	2,116,666,667

