TRIALS & ERRORS: THE RIGHTS OF THE KOREAN COMFORT WOMEN AND THE WRONGFUL DISMISSAL OF THE *JOO* CASE BY THE DISTRICT OF COLUMBIA FEDERAL COURTS

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I. INTRODUCTION

This article will examine the legal and political plight of the Korean Comfort Women under the scope of both U.S. and international law. Focusing in particular on the *Joo* case brought in the U.S. by former comfort women, this article will scrutinize the various legal and political considerations, as well as the faulty legal analysis used by the District of Columbia Federal District Court and Court of Appeals to deny both jurisdiction and justice to these women. With nobody to hear the silent accounts of their ordeal at first, the comfort women need now, more than ever, a forum to bring their claims against the Japanese government. This article will demonstrate that the forum should be the U.S. federal courts because the District of Columbia Federal District and Court of Appeals erred in dismissing the case for lack of jurisdiction and standing.

The urgency of the situation is of utmost importance, especially in light of the fact that many of the few surviving comfort women will soon reach the end of their days. Their claims against Japan, which include many allegations of violations of international law such as war crimes and crimes against humanity, rest on the testimonies of the victims, many of whom are Korean. Of the approximately 200,000 women trafficked and forced into prostitution by the Japanese Imperial Army between 1931 and 1945, eighty percent were Korean.[1] All the women have yet to receive any compensation, let alone a formal apology and full acceptance of culpability by the Japanese government.[2] As the suit was initially dismissed, the legal contentions did not reach the merits of the case. The case became rejuvenated

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[†] The arguments and opinions submitted by L. David Nefouse in this article do not reflect those of the Honorable Thomas B. Russell. Mr. Nefouse wrote his article containing these views prior to beginning his clerkship with Judge Russell.

[1] Sue R. Lee, Comment, *Comforting the Comfort Women: Who Can Make Japan Pay?*, 24 U. PA. J. INT'L ECON. L. 509, 512 (2003).

[2] *Id.*

in the summer of 2004 when the Supreme Court decided that the jurisdiction of U.S. courts can reach into the past to settle claims that arose during World War II.[3] However, on June 28, 2005, the D.C. Circuit Court of Appeals used similar faulty and biased reasoning to once again dismiss the case, and the Supreme Court recently denied certiorari on February 21, 2006.[4]

An analysis of the jurisdictional issues will show that the comfort women have standing and have brought a successful case under both U.S. and international law. Although a favorable holding granting a civil remedy to the victims in a U.S. federal court will not completely rectify the past, it will serve as the first formal condemnation against the Japanese in a state-recognized court of law. The importance of such a legal finding in favor of the comfort women would not only compensate these victims for the harms suffered, but it would also set a precedent in international law by announcing to the world that the perpetrators of systematic rape and sexual trafficking will not go unpunished. Further, a decision from the U.S. would represent an opportunity to partially right the past wrong of inaction, as the U.S. did not seek justice for the Korean comfort women as it did for the Holocaust survivors and others in Europe at the end of the war. As for the Japanese government, who denied responsibility and continue to ignore the claims of the comfort women, it would force the country to have to deal with the first state legal decision denouncing their war crimes and crimes against humanity. Such a legal decision would stand together with the countries—South Korea, North Korea, China, Philippines, Indonesia, Singapore and Burma—which citizens suffered at the hands of the Japanese Imperial Army from 1931-1945, and which have already called for Japan to recompense the comfort women and to fully admit to its actions with a formal apology.[5] At that point, the decision would be left to Japan as to whether it wishes to guard its pride and continue to defy a U.S. court order, as well as the request of the comfort women and the Korean government, or whether to work with Korea and its people toward not only an economic, but also a political and social reconciliation.

II. DISTRICT OF COLUMBIA FEDERAL DISTRICT COURT DECISION

On October 4, 2001, the District Court of the District of Columbia granted the Japanese government's motion to dismiss the *Joo* case. Ultimately, the court held that Japan never explicitly waived immunity under the Foreign Sovereign Immunities Act (FSIA); that the allegations of violating "jus cogens" norms did not constitute an implied waiver; that the actions organized by the Japanese military did not fall under the commercial activity waiver; and that the claims are

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[3] *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004).

[4] Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, 74 U.S.L.W. 3463, 2006 WL 387133 (Mem) (U.S. Feb. 21, 2006) (No. 05-543).

[5] Christine Wawrynek, *World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes*, 19 N.Y.L. SCH. J. HUM. RTS. 913 (2003).

nonjusticiable political questions.[6] Tracing the steps and addressing the legal fallacies of the lower court decision will demonstrate that the comfort women do have standing and proper jurisdiction before the U.S. federal court. Therefore, the court should have addressed the merits of the case.

The court accepted the factual allegations of the comfort women as true because Japan only challenged the claim on legal, and not factual, grounds.[7] However, the court incorrectly gave credit to Japan when it noted that "several [Japanese] officials have expressed their apologies for Japan's involvement."[8] In 2000, during the proceedings of the Tokyo Tribunal, a non-state-recognized tribunal established by international organizations to prosecute the Japanese for their war crimes, the Tribunal determined that the "apology" expressed by the Japanese officials, as used in context, "denotes a sense of apology slightly more weighty than 'an excuse me' offered when one bumps shoulders with someone on the subway."[9] Though not relevant to the merits, this error set the tone throughout the remainder of the memorandum opinion because it provided an example of the little time and effort the court gave in the consideration of the legality of the claims. In this particular instance, the misinterpreted "apology" shed a more favorable light on the Japanese, which had been adamant about not admitting any form of responsibility for nearly fifty years, when in actuality, all that their officials expressed to the South Korean government was a mere "excuse me."

A. Implied Waiver of Sovereign Immunity

The court began its legal analysis by noting that under the FSIA, Japan presumably remained immune from suit because of its status as a foreign state.[10] However, the FSIA provided exceptions in which immunity would be waived under specific circumstances, and in *Joo*, the comfort women offered two of those exceptions in the complaint.[11] The first of these exceptions argued by the comfort women, under Title 28 of the United States Code § 1605(a)(1), was that a foreign state would not have immunity from the jurisdiction of U.S. courts when the state "has waived its immunity either explicitly or by implication."[12] The comfort women cited as support the Potsdam Declaration of July 26, 1945, which proclaimed that "stern justice shall be meted out to all war criminals," and *In re Yamashita*, in which the Supreme Court held that "Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty

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[6] Joo v. Japan, 172 F. Supp. 2d 52, 60-67.

[7] *Id.* at 56.

[8] *Id.*

[9] Transcript of Oral Judgment at ¶ 26, Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, The Hague, The Netherlands, Dec. 4, 2001, *available at* http://www.ytech.nl/iccwomen/wigjdraft1/Archives/oldWCGJ/tokyo/summary.htm (last visited Mar. 1, 2006) [hereinafter Tokyo Tribunal].

[10] *Joo*, 172 F. Supp. 2d at 56.

[11] *Id.* at 57. The third exception did not apply because it was not submitted with the brief.

[12] *Id.* at 58. Foreign Sovereign Immunities Act, § 28 USC 1605(a)(1) (2006).

of violations of the law of war."[13] The court labeled this section of its analysis as "Explicit Waiver under the Potsdam Declaration," indicating that it gave no credence to an argument of waiver by implication.[14] Ultimately, the court ruled that the Potsdam Declaration, even considering *Yamashita*, does not explicitly waive immunity.[15]

However, in the 2002 District of Columbia Circuit Court of Appeals case of *World Wide Materials, Ltd. v. Republic of Kazakhstan* noted that courts "have found implied waiver where the state has agreed to arbitrate *or to adopt a particular choice of law*, under circumstances not present in this case."[16] In the instant matter, the court did not attempt to analyze whether the language of the Potsdam Declaration, which the Japanese government agreed to upon the conclusion of World War II, qualified as a waiver by implication.[17] The section of the Potsdam Declaration in question states, "We do not intend the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals."[18] The comfort women may not have raised the argument; however, the court did not address whether, by agreeing to the Potsdam Declaration, the Japanese in effect agreed to adopt a particular choice of law, which in this case is both U.S. and international law.

Furthermore, the precedent set by the Supreme Court in *Yamashita* held that not only did Japan agree to stand trial for war crimes because of its acceptance of the Potsdam Declaration, but also consented to the U.S. courts as the proper jurisdiction to try such war crimes.[19] In *Yamashita*, General Yamashita challenged the jurisdictional basis of a U.S. military tribunal.[20] The Court held that "the conduct of the trial by the military commission has been authorized by... international law and usage, and by the terms of the surrender of the Japanese government."[21]

By agreeing to the Potsdam Declaration and the principle of the U.S. pursuit of "stern justice" in seeking out all war criminals, Japan adopted the established U.S. law at that time, the source of which is based on the U.S. Constitution and laws as interpreted by the Supreme Court, including international laws and international norms.[22] As esteemed former Chief Justice John Marshall once

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[13] *Id.* at 59; Potsdam Declaration, § 10, July 26, 1945, *available at* http://www.isop.ucla.edu/eas/documents/potsdam.htm (last visited Mar. 4, 2006); *In re* Yamashita, 327 U.S. 1, 13 (1946).

[14] *Joo*, 172 F. Supp. 2d at 59.

[15] *Id.*

[16] World Wide Materials, Ltd. v. Republic of Kazakhstan, 296 F.3d. 1154, 1161 (D.C. Cir. 2002) (emphasis added).

[17] *Joo*, 172 F. Supp. 2d at 59.

[18] *Id.* (citing Potsdam Declaration, *supra* note 13).

[19] *Yamashita*, 327 U.S. 1, 13-14 (1946).

[20] *Id.* at 13.

[21] *Id.*

[22] U.S. CONST. art. III, § 2, cl. 1; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 453 (1964) (citing The Nereide, 13 U.S. 388, 423 (1815)).

espoused, "the court is bound by the law of nations which is a part of the law of the land."[23] Therefore, international laws are U.S. laws for the purposes of the Potsdam Declaration. Consequently, when Japan acquiesced to the terms of the Potsdam Declaration, it simultaneously adopted both U.S. and international laws because Japan should have known that U.S. courts recognized international law as law of the land since such principle had been precedent for 130 years by the conclusion of the war.

Regardless of whether the Japanese government consented to adopt U.S. *domestic* laws to seek stern justice, all international laws in place at that time were U.S. laws. Such international laws served as the legal standard to try all the war criminals as well as the crimes committed by nations.[24] Further, the Supreme Court ruled that Japan was within the reach of the jurisdiction of U.S. courts when it held in *Yamashita* that a Japanese military general can stand trial not just in an international tribunal, but specifically, in a U.S. Military Court.[25] Therefore, by adopting both U.S. and international law, Japan waived its sovereign immunity by implication under the FSIA, and the suit by the comfort women should have gone forward under the FSIA.

B. Commercial Activity Exception

The comfort women also asserted that the case falls under the commercial activity exception under §1605(a)(2) of the FSIA.[26] Here, the court closely examined whether the activity in question—the forced systematic rape and sexual trafficking of the comfort women in Japanese-run brothels—constituted a commercial activity under the scope of the FSIA.[27] The court relied upon the Supreme Court opinion in *Republic of Argentina v. Weltover, Inc.* to define the type of conduct that amounts to commercial activity, noting that

> when a foreign government acts, not as a regulator of the market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA . . . the issue is whether the particular actions that the foreign state performs . . . are the type of actions by which a private party engages in "trade and traffic or commerce."[28]

Additionally, the court compared the *Joo* case to a prior Supreme Court case, *Saudi Arabia v. Nelson*, to demonstrate how the activities conducted by the Japanese did not constitute commercial activity under the FSIA.[29] In *Nelson*, when the plaintiff discovered safety defects in a Saudi government hospital where he had

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[23] *The Nereide*, 13 U.S. at 423.

[24] *See* The Avalon Project at Yale Law School: The Nuremberg War Crimes Trials, http://www.yale.edu/lawweb/avalon/imt/imt.htm (last visited Mar. 1. 2006).

[25] *Yamashita*, 327 U.S. at 4.

[26] *Joo*, 172 F. Supp. 2d at 61.

[27] *Id.*

[28] *Id.* at 61-62 (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992)).

[29] *Id.* at 62 (citing Saudi Arabia v. Nelson, 507 U.S. 349 (1993)).

worked, he was arrested by the Saudi government, and allegedly tortured and interrogated in a Saudi prison.[30] The Supreme Court held that the alleged mistreatment came at the hands of the Saudi police, not in connection with the hospital, and that the nature of the arrest itself did not qualify as a commercial activity under the FSIA because the Court does not consider motives behind the conduct.[31]

The court in *Joo* applied the reasoning of *Nelson* to justify the exclusion of the Japanese government conduct from the FSIA commercial activity exception. The court argued that similar to *Nelson*, the "organized" act of kidnapping women from their homes did not amount to a commercial activity, even if the purpose behind the kidnapping was to have the women engage in a commercial activity such as prostitution.[32] The court further determined that although the highly-planned and developed conduct of the Japanese military was "barbaric," and rose to the level of a war crime or crime against humanity, it was not "commercial in nature."[33] The court also held that because the activity required government resources, it would not qualify as commercial in the marketplace since "private players" do not "typically" use government capital.[34]

However, the court omitted one very important analytical step at this stage of the opinion—distinguishing *Nelson* from *Joo*. Before addressing the futile attempt by the court to compare *Nelson* and *Joo*, the fact pattern offered by the court requires a second look. The court offered that:

> The "comfort stations" were for use by the Japanese military, and were regulated by the Japanese Army. Soldiers were charged a fee for access. The price charged depended on the woman's nationality, and at least a portion of the revenue went to the military. A soldier's length of stay and time of visit were determined based upon his rank. *The "comfort women" were treated as mere military supplies, and were even catalogued on supply lists under the heading of "ammunition."*[35]

These facts suggest that the *nature* of the activity described would qualify as commercial in *nature* because of the economic principles of supply and demand, the contractual principles employed by the Japanese, and the fact that the comfort women served under the category of military supplies. If, for example, another product would be substituted in for the word "comfort women" in the facts provided, the nature of activities would indeed appear to be commercial because a private party engages in such typical actions in the course of conducting commerce.

It may be argued that a private player would not engage in such a forced and systematic organization to enslave women into brothels. Yet, such behavior still

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30 *Id.* (citing *Nelson*, 507 U.S. at 353).

31 *Joo*, 172 F. Supp. 2d at 61.

32 *Id.* at 63.

33 *Id.*

34 *Id.*

35 *Id.* at 55 (emphasis added).

occurs today all over the world, from Southeast Asia to South America, and even in the United States.[36] Further, in *Weltover*, the Supreme Court did not distinguish between governments that act like private players who use government resources, and governments that act like private players and do not use government resources.[37] Logically, when a government acts as a private player in the market, it will inevitably use both its resources and outside resources. In *Joo*, the Japanese government used outside resources—the comfort women—as their market supply, and used their capital—the military—to round-up and procure the supply of comfort women to satisfy the demand of the soldiers near the frontlines. These actions demonstrate that the Japanese government engaged in "trade and traffic," regardless of the motive, because sexual favors from women were traded for cash from the soldiers.

The actions of the Saudi government in *Nelson* differed from that of the Japanese in *Joo* as to the extent of the occurrences of the crimes and commercial activities. In *Nelson*, the alleged commercial activities took place at the hospital, while the crimes took place at a Saudi prison. In *Joo*, the initial forced abductions took place at the homes of the women, and the abuse, forced prostitutions, and rapes took place at the comfort stations. While the kidnappings from the homes of the comfort women may not constitute commercial activity, the crimes committed against them at the comfort station, where the commercial activities also occurred, distinguishes *Joo* from *Nelson* because both the crimes and the commercial activities in *Joo* occurred at the same location, i.e., the comfort stations.

Further, the court in *Joo* states that even though the actions amounted to crimes against humanity and war crimes, they were not commercial in nature; however, this begs the question as to why the Japanese charged the soldiers for the women and had a set pricing plan?[38] Since the Japanese undeniably controlled the women, imprisoned them, and according to the court, possessed all of these "government resources" at their will, why then did they charge the soldiers for the services? Why not simply allow the soldiers to use the comfort women for free? Although the motive behind the activity may not be considered under the FSIA, the court can and should have viewed the actions themselves as evidence that the Japanese government did engage in commercial activity, or at minimum, that it appeared that way to outside observers. This argument is consistent with a contention initially proffered by the Japanese themselves, who at first tried to deny any culpability for the crimes by shifting the blame to private parties that organized brothels not affiliated with the government.[39]

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[36] *See Children in Crisis: Sexual Exploitation of Children*, World Vision, http://www.worldvision.org/worldvision/wvususfo.nsf/stable/globalissues_childprotection_sexexploit (last visited Mar. 1, 2006).

[37] *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992).

[38] *Joo*, 172 F. Supp. 2d at 63.

[39] Lee, *supra* note 1, at 520.

The fundamental flaw of the court in its analysis of the commercial exception to the FSIA comes from the fact that it did not consider both sides of the argument, but instead misapplied previous precedent to fit the conclusion it desired. Sue R. Lee argues that the court succumbed to the pressure of the Bush Administration to dismiss the case, noting that the court's opinion even used similar arguments and language as the Statement of Interest submitted by the Bush-appointed U.S. State Department.[40] Regardless, the court did not attempt to distinguish *Nelson* from *Joo*. By using *Nelson* in its rationale to reject finding a commercial exception under the FSIA, the court attempted to fit a square puzzle-piece into a circular space because the facts as to the disputed activities differed greatly in the two cases. Additionally, the court disregarded the Supreme Court's definition of "commercial" from *Weltover*, and added to the meaning a new standard requiring governments to use their own resources.[41] Therefore, the crimes of the Japanese government should have met the requirements of the commercial activity exception of the FSIA, and Japan should not have received sovereign immunity.

C. Political Question Doctrine

The court noted that even if Japan did not receive sovereign immunity under the FSIA, the case should be dismissed because the matter is a nonjusticiable political question.[42] Specifically, the court stated that since this matter dealt with a foreign government, it should be left to a coordinate political branch because the judiciary lacks the expertise and necessary resources to deal with this particular matter, and that it would require the court to make a non-judicial policy decision beyond the scope of its constitutionally permitted judicial powers.[43]

As support for this position, the court cited *Kelberine v. Societe Internationale*, which according to the court, two U.S. citizens brought suit seeking damages from the assets of companies that had participated in the "Nazi conspiracy" during World War II.[44] The court analogized that *Kelberine*, like *Joo*, offered reasoning to dismiss the case under the political question doctrine because the matter did not arise under the Constitution or the laws of the U.S., the matter did not take place within the territorial jurisdiction of the U.S. judicial authorities, and the time span between the damage and the claims sought remain too vague to identify exactly who should be culpable for committing the crime.[45] As further support to dismiss *Joo* as a nonjusticiable political question, the court cited the 1951 Treaty of Peace with Japan, which resolved all "claims of the Allied Powers

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[40] *Id.* at 539.

[41] *Joo*, 172 F. Supp. 2d at 61-62.

[42] *Id.* at 64.

[43] *Id.* at 66 (citing Goldwater v. Carter, 444 U.S. 996, 998 (1979); Baker v. Carr, 369 U.S. 186, 217 (1962)).

[44] *Id.* (citing Kelberine v. Societe Internationale, 363 F.2d 989 (D.C.Cir.1966)).

[45] *Id.*

and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war."[46]

The court fails to mention, however, that the plaintiffs in *Kelberine* did not seek damages directly from the corporation involved in the case, but instead sought to enjoin the United States Attorney General and the Secretary of the Treasury from paying the funds to the Swiss corporation in question.[47] Unlike Kelberine, Joo did not seek to enjoin, or in any way overrule the current decision of a U.S. political figure; rather, Joo sought damages directly from an entity that does not have any connection with the decisions of any member or official of the U.S. executive or legislative branches. The U.S. had no involvement whatsoever as far as dealing with the disputed crimes and the comfort women, and this distinguishes *Joo* from *Kelberine* because awarding damages to the comfort women would in no way override or contradict any past or current political decision or matter since neither the executive nor the legislative branches have done anything to address the matter.

In further contrast to *Kelberine*, where the alleged crimes occurred in Nazi-occupied Europe, the crimes in *Joo* did in fact take place on U.S. soil because the Japanese allegedly set up comfort stations in Guam and the Philippines, both U.S. territories at the time of the Second World War.[48] Moreover, the comfort women assert that after hostilities ceased at the end of the war, the U.S. took control of Japan's colonial possessions, including Korea, and therefore, the U.S. had a duty to address the concerns of the comfort women, and not to take advantage of the situation at the comfort stations, as the U.S. servicemen did.[49] These two facts provides U.S. courts territorial jurisdiction over the crimes committed by the Japanese because under article I, section 8, clause 17 and article IV, section 3, clause 2 of the U.S. Constitution, the U.S. has a obligation to protect the territories it possesses, including the use of its courts.[50]

In particular, Article I, Section 8, Clause 17 states that:

> Congress shall have power to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.[51]

Corresponding with this clause, which addresses Congressional power to deal with U.S. territories, article IV, section 3, clause 2 states that "[t]he Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[52] Together, these two

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[46] *Id.* at 67 (citing Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169).

[47] Kelberine, 363 F.2d at 991-92.

[48] *Id.* at 991.

[49] *Joo*, 172 F. Supp. 2d at 67.

[50] U.S. CONST., art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2.

[51] U.S. CONST., art. I, § 8, cl. 17.

[52] U.S. CONST., art. IV, § 3, cl. 2.

constitutional clauses provide *Joo* with the territorial jurisdiction, absent in *Kelberine*, to address the claims of the comfort women in U.S. courts; the clauses obligate the U.S. to manage its territories, and the U.S has the territorial jurisdiction to do so.

Kelberine also held that because of the vagueness of the claims, the court could not ascertain the identity of the tortfeasors due to the length of time and cost required to gather such information.[53] In *Joo*, however, not only does the court know the identity of the main perpetrator of the crimes—Japan—but the court also has the names of individuals, as identified by both the comfort women themselves and by former Japanese soldiers.[54] Further, the court can refer to the information assembled in the Tokyo Tribunal for purposes of determining the exact identity of those who committed the crimes, thus saving cost and time, and enhancing clarity, even given the length of time between the occurrence of the atrocities and the present case.[55]

Additionally, the court suggested that since close to seventy years have passed since the Japanese operated the comfort stations, and because the defendant is a state and not a corporation, the "rationale" used to dismiss *Kelberine* as a nonjusticiable political question becomes even stronger in *Joo*. Yet, in *Republic of Austria v. Altmann* in 2004, the Supreme Court not only addressed a matter that occurred nearly seventy years ago, and where one of the parties was a country, but also decided the case in favor of the person, and not the state.[56] Furthermore, *Altmann* distinguishes *Kelberine* from *Joo*, and further demonstrates that *Joo*, a very similar case to *Altmann*, should meet the jurisdictional requirements of the political question doctrine. Both cases involve plaintiffs who have suffered harms at the hands of domineering and totalitarian regimes during World War II, and both plaintiffs seek justice and compensation for the crimes committed against them after the countries responsible for the harms took no action to remedy the situation.

The court in *Joo* argued that regardless of *Altmann*, the 1951 Treaty of Peace settled all claims the U.S. and its allies held against Japan for crimes arising out of World War II.[57] The court referred to the specific language of the treaty, which purportedly proclaimed the resolution of all "claims of the Allied Powers and their *nationals* arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war."[58] The court correctly noted that because the Philippines and Guam were both U.S. territories, those residents therefore qualified as U.S. nationals under the treaty,[59] and they may be prohibited from participating in a suit in the U.S. court. Yet the Korean citizens were not U.S. nationals at that

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53 *Kelberine*, 363 F.2d at 995.

54 Tokyo Tribunal, *supra* note 9.

55 *Id.*

56 Republic of Austria v. Altmann, 541 U.S. 677 (2004).

57 *Joo*, 172 F.Supp.2d at 66-67.

58 *Id.* at 67 (citing Treaty of Peace with Japan, *supra* note 46) (emphasis added).

59 *Id.*

time; they did not fall under the purview of the treaty provision, and they did not sign the treaty. Therefore, the treaty did not resolve the claims of the Korean comfort women against Japan.[60]

However, the court committed the most egregious contradiction when it hypocritically noted that "Korea... negotiated separate agreements addressing war claims.... Although as plaintiffs argue the claims of the 'comfort women' might not have been specifically mentioned in these treaties, the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan."[61] The duplicity of a court, which had previously expressed a lack of expertise to deal with its own domestic policies, becomes quite evident at this point. Earlier in its decision when the court considered whether to address matters of U.S. foreign policy, it stated that "prudential concerns together with *the court's lack of judicial expertise* strongly militate in favor of dismissal"[62] Now, however, the court professed through implication an ability to interpret peace treaties between Japan and Korea. Despite its recognition that the treaties did not mention the comfort women, the court presumed that the treaties resolved all claims, including those of the comfort women, without offering any factual evidence to support the assessment.[63] Even if the court was referring to the 1965 treaty between Korea and Japan, absent any English translation of the treaty, the court conveniently assumed expertise in Korean-Japanese foreign policy, yet refrained from addressing matters of foreign policy within its own jurisdiction. Nonetheless, the court failed to cite specific passages indicating the intent of the 1965 treaty that prevent Korean nationals from bringing suit against Japan in U.S. courts for crimes committed against the comfort women.[64]

The pretense of the court appears to confirm Lee's suggestion that the courts exhibited unwarranted bias against the comfort women, presumably influenced by the political pressure from the Bush Administration to maintain normal diplomatic relations between the U.S. and Japan.[65] Furthermore, in light of the Supreme Court decision in *Altmann*, the D.C. federal courts have jurisdictional precedent that they must follow regarding the political question doctrine. The court's arguments in *Joo* act inconsistently with *Altmann*. As Justice Stevens noted in *Altmann*:

> Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the "decisions of the political branches... on whether to take jurisdiction." In this *sui generis* context, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision *inapplicable*

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60 *Id.*

61 *Id.*

62 *Joo*, 172 F.Supp.2d at 66 (emphasis added).

63 *Id.* at 67.

64 *Id.*

65 Lee, *supra* note 1, at 539.

merely because it postdates the conduct in question.[66]

Therefore, the case should not have been dismissed as nonjusticiable under the political question doctrine because the court could have and should have addressed these matters under the provisions of the FSIA.

D. Retroactive Application of the FSIA

Before *Altmann*, courts have held that the FSIA could not be retroactively applied to cases before 1952 when the U.S. State Department may use discretion to grant immunity to foreign states that brought actions against the U.S. in U.S. courts.[67] However, in 2004, *Altmann* changed the way in which the FSIA applied to all cases. In an opinion by Justice Stevens, the Court articulated that the FSIA "clearly applies to conduct, like petitioners' alleged wrongdoing, that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity."[68] Further, Justice Stevens held that

> the principle purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on immunity from suit in the United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* "protection from the inconvenience of suit as a gesture of comity."[69]

In *Altmann*, the Supreme Court noted that the holding was to be narrowly applied. However, on June 14, 2004, the Supreme Court vacated the *Joo* decision handed down by the District of Columbia Federal District Court and the D.C. Court of Appeals in light of consideration of *Altmann*.[70]

In comparing *Altmann* to *Joo*, in which the District Court initially determined that it did not have to decide on the issue of retroactivity because the court dismissed the case as nonjusticiable, the FSIA should apply retroactively to the atrocities committed by the Japanese against the comfort women from 1937-1945. Such a holding would not substantially alter the rights, obligations, or liability of the Japanese government because a retroactive application simply sets a forum where the suit against Japan should be brought.[71] Furthermore, the retroactive application of the FSIA to *Joo* would not remove any laws that were already in place at the time the Japanese committed the atrocities against the comfort women. Nor would it create new laws that do not already exist today; the trafficking of women for the purposes of sexual slavery and the systematic rape of women was

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[66] *Altmann*, 541 U.S. at 696 (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1962)) (emphasis added).

[67] *Joo*, 172 F. Supp 2d at 57; *see also Altmann*, 541 U.S. at 685-90.

[68] *Altmann*, 541 U.S. at 700.

[69] *Id.* at 696 (quoting Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)).

[70] *Id.* at 700; Joo v. Japan, 542 U.S. 901 (2004).

[71] Petition for a Writ of Certiorari at 10, Joo v. Japan, 542 U.S. 901 (2004) (No. 05-543), 2005 WL 2844948 [hereinafter Petition for a Writ of Certiorari].

illegal back then, as it is today under the 1910 International Convention for the Suppression of the White Slave Traffic, the 1926 Slavery Convention, the 1930 ILO Convention on Forced Labor; and the current United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, which was passed in 2001.[72]

Moreover, Japan cannot successfully argue that it had an expectation during the war that it would receive sovereign immunity for the period of 1937-1945 because, as Justice Stevens stated in *Altmann*, the FSIA does not allow countries to shape their behavior around a guarantee that they will likely receive immunity in the U.S. courts.[73] Such a policy would encourage illegal and egregious conduct on the part of states and their instrumentalities, and as Justice Stevens noted, would go against the purpose of the FSIA.[74] Therefore, the FSIA should apply retroactively to *Joo*. The substantive rights and causes of action against Japan would not change as a result of the application of FSIA since laws prohibiting sexual slavery and sexual trafficking existed during World War II, and these laws still exist today.

III. DISTRICT OF COLUMBIA COURT OF APPEALS DECISION

In the summer of 2003, the D.C. Court of Appeals heard the appeal of the comfort women after its dismissal by the D.C. District Court.[75] The Court of Appeals addressed issues similar to those of the lower court, and offered more legal and political reasons as to why it agreed with the ultimate decision of the District Court—that the US courts should not hear the case.[76] Although the Court of Appeals decided *Joo* before the Supreme Court's ruling in *Altmann*, the decision continued to expose the strong political prejudices against the comfort women because like the holding from the District Court, it disregarded any counterarguments to those proposed by Japan and the U.S. State Department. Furthermore, it misapplied laws and the facts in reaching its outcome.

A. Retroactive Application of the Commercial Activity Exception to the FSIA

The court adopted a two-step method in determining whether the commercial activity exception to the FSIA applies retroactively to the crimes of the Japanese.[77] The first question asked whether the commercial activity exception has a retroactive application, and the second question examined whether there was Congressional intent to legislate retroactively.

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72 *See id.* at 11.

73 *Altmann*, 541 U.S. at 696.

74 *Id.*

75 Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003).

76 *Id.*

77 *Id.* at 682.

1. Does the Commercial Activity Exception Have a Retroactive Effect?

In considering whether the commercial activity exception has a retroactive effect, the court held that such an application would "impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns."[78] The court further determined that Japan had an expectation in the 1930s and 1940s that its commercial activities would not fall under the jurisdiction of U.S. courts, and therefore such a decision would have an unjust retroactive effect on Japan because Japan did not consent to such jurisdiction.[79]

Recognizing that the U.S. Ninth Circuit Court of Appeals had at the time decided *Altmann* in favor of applying FSIA retroactively, the D.C. Court of Appeals attempted to distinguish the Ninth Circuit decision from *Joo*.[80] The court contrasted the cases by referring to the 1951 Treaty of Peace with Japan, and by advocating the arguments of the Bush State Department and the Japanese government to resolve future claims arising from World War II through government-to-government agreements between the U.S. and Japan.[81] The court noted that the 1951 Treaty stated that "[Japan] would resolve the war related claims of other United Nations member states and their nationals 'on the same or substantially the same terms,' that is, through intergovernmental agreements."[82] For example, the court observed that China and Korea both signed peace agreements with Japan in 1952, and 1965, respectively.[83] The court further stated that as a matter of foreign policy, it should not allow a claim by non-nationals to go forward because unlike *Altmann*, where the U.S. had no similar treaty with Germany and Austria, Japan had an expectation that its commercial actions would not be a subject of dispute in U.S. courts.[84] Lastly, the court distinguished *Altmann* by citing a 1949 letter, written by Bernard Bernstein of the Truman White House, which implicitly revoked the foreign sovereign immunity of Germany and Austria by addressing the specific claims brought forth in *Altmann*, but the court noted that no such letter exists in regards to the claims of the comfort women.[85]

As previously discussed, applying the FSIA retroactively does not create any additional legal obligations or take away any rights afforded to Japan because the international law against the trafficking of women for the purposes of sexual slavery and systematic rape existed both then and now.[86] The court attempted to justify this argument based upon its interpretation that there was no "expectation" in the 1930s and 1940s that Japan would have to appear before a U.S. court to

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[78] *Id.* at 683.

[79] *Id.* at 683-84.

[80] *Joo*, 332 F.3d at 684.

[81] *Id.* at 684-85.

[82] *Id.* at 685 (citing Treaty of Peace with Japan, *supra* note 46, at art. 26).

[83] *Id.* at 685

[84] *Id.*

[85] *Joo*, 332 F.3d 685..

[86] *See supra* Part II.D.

account for its commercial activities.[87] However, the court failed to mention that not only did these commercial activities take place on U.S. soil, but also that the U.S. and Japan had fought a major world war beginning on December 7, 1941, when the Japanese attacked the U.S. territory of Pearl Harbor, Hawaii. Congress has the sole authority to regulate commerce on U.S. territory. Therefore, Japan should have *clearly* expected that if the U.S. won the war, their wartime commercial activities, including the operation of the comfort stations on U.S. soil, would become the subject of review by U.S. authorities through a military or federal court since Japan effectively attempted to take the place of U.S. Congress in regulating the commerce of a U.S. territory.[88]

Additionally, the logic employed by the court to defend Japan's expectation can also apply to Nazi Germany as well. It remains highly doubtful, however, that the Allies would have accepted a similar excuse from Germany at the time of the Nuremberg Trials; that is, Germany should not stand trial for the crimes they committed because Germany could not have expected its commercial activities—of transporting Jews to concentration and death camps, and forcing them to work in factories—to fall under the jurisdiction of the Nuremberg Tribunals. The opinion of Justice Stevens in *Altmann* is also consistent with this counterargument to the decision of the Court of Appeals. As previously cited, Justice Stevens clearly stated that the FSIA should not adopt or promote a policy that would go against the purpose of the FSIA by allowing foreign states to conduct their illegal activities under the premise that they will not fall under the jurisdiction of U.S. courts.[89]

In regards to distinguishing *Altmann* from *Joo* based upon the 1951 Treaty of Peace with Japan, the court's reasoning contained fallacies as well as misconceptions. First, the Treaty of Peace between U.S. and Japan was not unique in the sense claimed by the court because the U.S. did in fact have similar peace treaties with Germany that dealt with matters of reparations due to Nazi crimes.[90] Japan and the U.S. State Department later conceded that the court had erred in making such a claim.[91]

Furthermore, the court discussed specific articles of the 1951 "San Francisco Treaty," or the Peace Treaty with Japan, noting that when combined, Articles 14 and 26 not only prohibited suits by Allied nationals, but also nationals from Korea

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87 *Joo*, 332 F.3d at 684.

88 *See supra* Part II.D.

89 *See supra* text accompanying note 70.

90 Petition for a Writ of Certiorari, *supra* note 71, at 7.

91 *Id.* at 7; *see Joo*, 332 F.3d at 685 (stating that "[b]ecause there was no similar treaty with Germany or Austria, and therefore no similar settled expectation, the opinion in *Altmann* is not relevant to the present case"). *See also* Reply Brief in Support of Petition for a Writ of Certiorari at 1-3 & n.2, Joo v. Japan, 542 U.S. 901 (2004) (No. 03-741), 2004 WL 68813: "First as respondent concedes, the United States entered into a series of post-World War II treaties with Germany and Austria that, like the Treaty with Japan, provided for reparation claims of signatory nations to be resolved through government-to-government negotiations," and "[b]oth parties agree that the [D.C. Circuit's] conjecture that 'there was no similar treaty with Germany or Austria,' was mistaken." *Id.*

because Japan could not have expected such a suit in the U.S. courts in light of the terms of those articles.[92] However, the actual language of Article 26 states:

> Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of 1 January 1942, *and* which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23 [Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America] . . . a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty.[93]

Though the court would argue that such language precluded Korean nationals from bringing suit against Japan for war reparations because Korea eventually signed the U.N. Declaration, the conditions for a nation to meet this court-imposed expectation rule included being a signatory of the U.N. Declaration *and* being at war with Japan. Since 1910, Korea had been a Japanese-occupied territory, and thus, was never at war with Japan as required by the language of Article 26 of the treaty.[94] Therefore, even if the Allies had waived the claims of their nationals in order to resolve war claims via government-to-government negotiations, the court mistakenly interpreted the treaty to include Korean nationals. Even if the court extended their self-created expectation rule, which was subsequently trumped by *Altmann*, the rule did not include Korean nationals as defined under Articles 14 and 26 of the Peace Treaty with Japan.

In its attempt to distinguish *Altmann*, the court expressly stated that "as a matter of foreign policy it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-nationals to proceed against Japan in its courts."[95] Although U.S. courts may address matters of foreign policy, courts have always erred on the side of caution when making such determinations because of the possibility that it will offend or interfere with the rights and obligations of the executive and legislative branches.[96] The hypocrisy of the court became apparent here because on the one hand, the court argued that it may not make decisions such as that of denying Japan sovereign immunity as it would go against the foreign policy set out by the Tate letter and the FSIA,[97] but on the other hand, the court made a blatant foreign policy

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[92] *Joo*, 332 F.3d at 685; Treaty of Peace with Japan, *supra* note 46, at art. 14 & 26.

[93] Treaty of Peace with Japan, *supra* note 46, at art. 23 & 26 (emphasis added).

[94] COLUMBIA UNIVERSITY, EAST ASIAN CURRICULUM PROJECT, IMPERIALISM, WAR AND REVOLUTION IN EAST ASIA: 1900-1945; KOREA AS A COLONY OF JAPAN, *available at* http://afe.easia.columbia.edu/webcourse/key_points/kp_11.htm (last visited Mar. 6, 2006). *See also Japanese Surrender Documents of World War II*, University of Oklahoma Law Center, http://www.law.ou.edu/hist/japsurr.html (last visited Mar. 1, 2006).

[95] *Joo*, 332 F.3d 679 at 685.

[96] *Joo*, 172 F. Supp. 2d at 65 (citing *Baker*, 369 U.S. at 211; Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[97] *See infra* text accompanying notes 106-07.

decision when it determined that non-nationals should not have jurisdiction in U.S. courts under the congressionally-passed statutes of the Alien Tort Claims Act and the Foreign Sovereign Immunities Act.[98] Insofar as members of the court may personally dislike the idea that persecuted non-U.S. citizens have a right to bring a claim in U.S. courts against a foreign state under established U.S. laws, it cannot overstep its bounds by overturning congressional acts simply because the court finds it odd; strange or not, it is the law of the land.[99]

Lastly, the court attempted to distinguish *Altmann* from *Joo* by paying credence to a letter written by Bernard Bernstein of the U.S. State Department in 1949, which addressed restitution claims against the Nazis.[100] The court asserted that "we are not aware of[] any similar statement of policy regarding the alleged acts of Japan in this case" and that the lack thereof, in and of itself, distinguished *Altmann* from *Joo*.[101] However, the comfort women, in their petition for certiorari, noted that the U.S. issued statements to Japan similar to the Bernstein Letter, which in fact appeared in the Bernstein Letter cited by the court.[102] Specifically, the petition listed two State Department Bulletins addressed to Japan that dealt with the comfort women matter, including a January 16, 1943 Bulletin that stated "[n]o other civilized society sells its young girls to panderers with such openness . . . Japanese soldiers have made 'Japanese' a synonym for murder, torture, and rape."[103]

Therefore, the court once again did not sufficiently research the matter and mistakenly made a claim based upon a lack of information regarding foreign policy. The court refused to get involved with foreign policy when it supported the comfort women, but the court was eager to apply foreign policy when it worked against the comfort women. The effort by the court to distinguish *Altmann* from *Joo* failed because the justification for its reasoning is clearly flawed. The many instances of inaccurate findings and misinformed claims demonstrated the court's inability to address matters of foreign policy in regards to this issue. For the reasons mentioned above, and especially because *Altmann* is precedent that overrides the holdings of the D.C. Court of Appeals in *Joo*, the commercial activity exception should apply retroactively to the *Joo* case.

2. Did Congress Clearly Intend to Legislate Retroactively?

The second step in this analysis by the court considers if Congress clearly intended to legislate retroactively when it passed the FSIA in 1976.[104] The Court

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[98] *Joo*, 332 F.3d at 683; Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1) & (a)(2) (2006).

[99] *See* U.S. CONST., art. I, § 8, cl. 3 & 17; art. III, § 1 & § 2, cl. 1.

[100] *Joo*, 332 F.3d at 685.

[101] *Id.*

[102] Petition for a Writ of Certiorari, *supra* note 71, at 6-7.

[103] *Joo*, 332 F.3d at 685 (citing 8 DEP'T ST. BULL. 49-55, Jan. 16, 1943).

[104] *Id.*

of Appeals asserted that Congress intended retroactive application of the FSIA only for the period from after May 1952 and before 1976 when the Truman Administration released the Tate Letter.[105] The court reasoned that the FSIA should not apply before May 1952 because the U.S. State Department did not officially change its policy regarding foreign sovereign immunity until that point, and therefore, foreign states could not have expected the denial of state immunity before that time.[106]

In *Altmann*, Justice Stevens specifically addressed congressional intent with regard to whether the FSIA applies retroactively. Justice Stevens held that "we find clear evidence that Congress intended the Act to apply to preenactment conduct," indicating that Congress intended to legislate retroactively regarding the application of FSIA to address conduct pre-1952.[107] Justice Stevens explained that the preamble of FSIA and the general structure of FSIA both indicate Congress's intent for the act to include all conduct prior to 1952 and 1976 because the overall purpose of creating such legislation in the first place would be limited if Congress put such restraints on the extent to which the act can apply to past actions.[108] Additionally, Justice Stevens asserted that the term "henceforth" in the preamble meant that the FSIA applied to suits brought from the time of the passage in 1976, but to set 1952 as the cut-off date for the exceptions to apply made no sense because had Congress wanted to set that date, it would have explicitly done so, and Congress did not provide a specific cut-off date in FSIA.[109] Justice Stevens also stated that it would be judicially inconsistent to hold that a specific exception did not apply retroactively.[110]

In applying Stevens's holding in *Altmann* to *Joo*, the decision of the Court of Appeals conflicted with the reasoning of the Supreme Court because not only did *Altmann* hold that Congress intended for the FSIA to apply to events prior to 1952, but also that Congress *did* intend for the FSIA exceptions to apply retroactively to events before its enactment. Although the Supreme Court did not address the Tate Letter in *Altmann*, the fact that the Court granted certiorari, vacated the judgment, and remanded *Joo* to the D.C. Court of Appeals for reconsideration in light of *Altmann* suggested that the reasoning used by the Court of Appeals in assessing congressional intent was problematic.[111] Furthermore, due to lack of congressional intent and judicial inconsistency, the court may not follow *Altmann* and declare that the commercial activity exception alone does not apply retroactively. Therefore, Congress clearly intended for the FSIA to apply retroactively to events prior to 1952.

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[105] *Id.* at 686.
[106] *Id.*
[107] *Altmann*, 541 U.S. at 697.
[108] *Id.* at 700.
[109] *Id.* at 698.
[110] *Id.* at 699.
[111] *Joo*, 542 U.S. 901.

IV. CONCLUSION

The motivation to write on this subject comes from the fact that through war we see the best and worst of mankind, yet not all of the stories about the perpetrators, victims, and heroes become exposed to the public eye, or in this case, resolved. The chronicle of the Korean comfort women has yet to gain as much attention and consideration as the atrocious events that took place in Europe, but that does not mean one series of horribles outweighs the other. If anything, the Holocaust, with all of the touching tales and legal events that have come from that period, has been a blessing in disguise for those who have suffered at the hands of malicious men. From the Nuremburg Trials to the *Altmann* decision, the role of the judiciary in seeking and delivering justice to those responsible for such horrific actions demonstrates that regardless of when the crimes committed against Holocaust survivors took place, the law in addressing these sins does not bow to the expiration of time or politics. However, for the Korean comfort women, their day in court has yet to transpire because the powers-that-be did not deal with the matter then, and these same powers refuse to deal with the plight of these women even now.

From both a fundamental fairness perspective, and a general human rights notion that no crimes against humanity and war crimes should go unpunished, or at least receive a formal investigation, the continuous denial of this issue from the courts of the U.N. and the U.S. following the end of World War II until today shows that politics may often lead to contradictions in actions. On remand, the D.C. Circuit Court of Appeals affirmed the dismissal of the case, holding that it did not need to resolve the question of subject-matter jurisdiction because the suit presented a nonjusticiable political question.[112] Despite the decision of the D.C. Court of Appeals and the subsequent denial of certiorari by the Supreme Court,[113] the importance of scrutinizing the reasoning and the legal applications of the lower court decisions remains crucial because of the influence of political pressure to dismiss the case, regardless of its facts and the law. Challenging, correcting, and countering the legal analyses of the lower courts reveals that the comfort women in fact have standing to bring the case before the U.S. federal court, and that the U.S. federal court has jurisdiction to hear the case under the FSIA and Alien Tort Claims Act.

A state court decision holding Japan culpable for damages may not be complete vindication for the comfort women; it would nonetheless be symbolic because it lets Japan know that although no recognized international court has yet to condemn its crimes, it does not mean that its actions have gone unnoticed or unaccounted for by society, and least of all, by the comfort women. Japan may never accept responsibility or apologize for its crimes, but that does not mean

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[112] *Joo*, 413 F.3d 45.

[113] *Joo*, 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, 74 U.S.L.W. 3463, 2006 WL 387133 (Mem) (U.S. Feb. 21, 2006) (No. 05-543).

nothing can rectify the situation. However, reaching the point where a tribunal would decide on the merits of the case continues to be the toughest battle, and the outcome hinges on whether the political powers and pressure to dismiss the case outweigh the law and judicial independence that supposedly protects the rights of all who have permission to come before a United States federal court.