

Another Blow to the Sovereign Shield: South Korean Court Rejects Japan's Sovereign Immunity Defense in "Comfort Women" Case

Introduction

On November 23, 2023, the High Court in Seoul, South Korea, held Japan liable for damages to a group of plaintiffs who had been forcibly used as "comfort women" in the late 1930s and early 1940s. In doing so, the court rejected Japan's claim of state or sovereign immunity, holding that a state cannot have immunity for illegal acts committed against nationals of the forum state within the forum state's territory, outside of an armed conflict. This decision is significant for at least two reasons: first, because it risks undermining the recent *détente* in Korea-Japan relations; and second, because it represents the latest data point in the continuing evolution of the doctrine of sovereign immunity in public international law.

This *Insight* explains the High Court's recent decision and its implications within the larger legal and political contexts, particularly what challenges it may pose to Korea-Japan relations.

Background

Between 1932 and 1945, the Japanese government operated a system of brothels, wherein women were forced to provide sexual services to Imperial Army troops. The women, known as "comfort women," were mostly from Korea, which was a Japanese protectorate at the time. Many were abducted and sent against their will to "comfort stations" in Japan and Japanese-occupied areas, while others were lured by false

promises of employment. Estimates of the number of women involved vary but typically range up to 200,000.¹

For over 30 years, groups of these women and their family members have sued the Japanese government in a range of courts—Japanese, American, and South Korean—alleging that they were subjected to kidnapping, forced labor, rape, and other violations of international law.² The Japanese Government has generally taken the position that the 1965 bilateral agreement between it and South Korea, which normalized relations between the two countries, as well as a more recent 2015 agreement between them that sought to “finally and irreversibly” resolve the issue, extinguished all claims concerning the use of comfort women. It has also argued that Japan was immune from the jurisdiction of other countries’ courts because of sovereign immunity.³

None of these lawsuits were successful until January 2021, when a panel of judges at the Seoul District Court rejected Japan’s claim of immunity. According to reports of the decision, the court held that Japan’s actions constituted “a crime against humanity that was systematically, deliberately and extensively committed by Japan in breach of international norms,” and that “state immunity cannot be applied as [the challenged acts were] committed against our citizens on the Korean peninsula that was illegally occupied by Japan.”⁴ However, in April 2021, the court rejected the plaintiffs’ application to begin executing their judgment against Japanese assets, explaining that doing so “could result in a violation of international law, including Article 27 of the Vienna Convention on the Law of Treaties.”⁵

Just a few days later, another panel of judges at the same court dismissed on sovereign immunity grounds a separate suit that had been filed against Japan in 2016 by 95-year-old Lee Yong-soo, a surviving “comfort woman,” and the family members of 15 other survivors, with each plaintiff seeking 200 million won (approximately \$155,000) in damages.⁶ In this case, the Seoul Central District Court explained that “[i]f the court accepts an exception in state immunity, a diplomatic clash is inevitable in the process of the ruling and enforcing it . . . Resolution of the comfort women issue should be made through diplomatic discussions.”⁷ It is this second April 2021 decision that the Seoul High Court reversed in November.

Seoul High Court Decision

On appeal, the Seoul High Court concluded that customary international law—which governed the situation since Korea does not have a statute on the scope of state

immunity—does not recognize state immunity for tortious acts committed within the territory of a forum state against its nationals, and thus Korean courts had jurisdiction to try the plaintiffs’ case against Japan.⁸ To reach this conclusion, the court considered how the law of sovereign immunity has changed over time from an absolute to a limited form of immunity that permits findings of liability in certain circumstances. The court noted that the United Nations Convention on State Immunities, the European Convention on State Immunities, as well as evidence of state practice—including the laws of the United States, United Kingdom, Canada, Australia, Singapore, Japan, and Argentina, and court decisions from the United Kingdom, Italy, Greece, Brazil and Ukraine—all provide that a state is not immune from liability for certain illegal acts. These practices, together with the current direction of change in customary international law, led the court to conclude that, “at least in the case of tortious acts committed against nationals of a jurisdiction within the territory of the jurisdiction, [customary international law] does not recognize state immunity.”⁹

The court also reasoned that the International Court of Justice’s (ICJ) 2012 ruling in the Jurisdictional Immunities of the State Case (*Germany v. Italy*; Greece intervening),¹⁰ which recognized state immunity for illegal acts occurring within the territory of the forum state during the conduct of an armed conflict, was distinguishable on two grounds. First, the Court explained, the ICJ’s ruling did not apply because in this case Japan’s actions did not occur “during an armed conflict.” Rather, Japan’s war was in China and southeast Asia, not on the Korean Peninsula from where the comfort women victims were taken and, at least in part, abused. Second, the Court noted that the ICJ’s ruling was “confined to acts committed on the territory of the forum State by the armed forces of a foreign State . . . in the course of conducting an armed conflict.”¹¹ Construing the ICJ’s ruling narrowly, which the court felt was appropriate given the direction of international law’s change, the Court concluded that the offenses against the comfort women were not committed “in the course of an armed conflict.” Therefore, the Court concluded, Japan could not assert sovereign immunity with respect to its operation of the comfort women system.¹²

The Court went on to establish the nature of the plaintiffs’ claims, which included being kidnapped, deceived, and repeatedly forced into unwanted sexual acts by dozens of Japanese soldiers. It explained that Japan’s behavior violated not only its obligations under various international conventions, including the Convention (IV) respecting the Laws and Customs of War on Land, the Convention against Trafficking in Persons, the 1926 Convention on Slavery, and the 1930 Convention Concerning Forced or Compulsory Labour, but also Article 226 of its own penal code that was in effect at the time. Finally, it held that Japan’s actions constituted a tort under Korea’s Civil Code, and

that it is reasonable to assume that each victim's damages exceed the requested 200 million won.¹³

The Seoul High Court's decision became final two weeks after it was issued as a result of Japan's failure to file an appeal. According to South Korean media, Japan's choice to not appeal "was a continuation of its campaign to dismiss and minimize such rulings."¹⁴

Implications

The Seoul High Court's decision is significant for at least two reasons. The first is its conclusion that customary international law does not provide immunity to states for claims that arise from illegal behavior against nationals of the forum state that occurred within the forum state, outside of armed conflict. The law of sovereign immunity is "an established principle of customary international law whereby a state or its instrumentality is, as a general rule, immune from the jurisdiction of the courts of another state."¹⁵ The law has changed over time in response to changing global circumstances, evolving from an absolute form to the dominant "restrictive" theory today.¹⁶

When the ICJ addressed the question of whether customary international law provides immunity to states for claims that arise from illegal behavior against nationals of the forum state that occurred within the forum state, *during* armed conflict, it noted that the "judgments of national courts faced with the question [of] whether a foreign state is immune" is "of particular significance" in determining whether the requisite state practice to establish a custom exists.¹⁷ The Seoul High Court's decision is the latest opinion from such a court. It follows decisions from the Italian Constitutional Court,¹⁸ the Brazilian Supreme Court,¹⁹ and the Ukrainian Supreme Court,²⁰ each of which refused to find that a sovereign defendant was immune from jurisdiction. If courts continue to deny the application of sovereign immunity, then it may show that this once-absolute rule has continued to retreat in favor of enabling injured plaintiffs to seek justice for their injuries. Such a move would be a significant change from a law that once held *rex non potest peccare*, the king can do no wrong.

Second, on a geopolitical level, the decision risks upsetting the recent warming in the relations between Japan and Korea. There remains significant animosity amongst the Korean population towards Japan as a result of Japanese soldiers' behavior before and during World War II; relations between the two countries became especially strained in the late 2010s and early 2020s.²¹ From Japan's perspective, in addition to being immune from the jurisdiction of Korean courts, it considers all claims relating to its war-time

behavior to have been settled by the 1965 treaty between the two countries. Thus, each time a Korean court rules that Japan is liable, as the South Korean Supreme Court recently did again in reaffirming earlier damages awards against Japanese companies for forced labor claims,²² the Japanese government files a formal diplomatic protest.²³

Given these disparate positions, the recent warming in relations between both countries arose only after Soon Suk Yeol, South Korea's president, proposed the establishment of a voluntary private fund as an alternative way to satisfy an earlier 2018 South Korean Supreme Court decision that had ordered Japanese companies to compensate Korean victims of Japanese forced labor practices. This alternative did not require Japan or Japanese companies to pay the damages themselves, effectively enabling Japan to escape liability while also providing compensation to injured Korean victims and their families.²⁴

In a region of challenges, Japan and Korea have many shared interests that will be easier to attain if they work together, rather than against each other. Both countries are interested in maintaining a free and open Indo-Pacific region, and, by working together, can better address shared security concerns. The two countries are also critical partners for the United States in the region and on the global stage. From a military perspective, both countries are host to American forces and could play important roles should a "hot conflict" erupt in Asia or the Pacific. Whether Japan and Korea permit these court orders to derail diplomatic efforts to bring the countries closer together remains to be seen, but they certainly will not make things easier.

Conclusion

When the modern international legal system was born, its purpose was to protect states from each other. Today, that system is just as much about protecting individuals. With this movement, what once was a nearly impermeable shield of immunity has been slowly chipped away. The Seoul High Court's opinion is the latest blow to the shield and yet another data point supporting the development of a new doctrine in customary international law that holds not only that a king can do wrong, but that he can be held liable for doing so.

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- ¹ See, e.g., *Comfort women*, Encyclopedia Britannica, <https://www.britannica.com/topic/comfort-women>; G. Hicks, COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR (1994); Alexis Dudden, A Guide to Understanding the History of the 'Comfort Women' Issue, United States Institute of Peace (Sept. 16, 2022), <https://www.usip.org/publications/2022/09/guide-understanding-history-comfort-women-issue>.
- ² *Lawsuits brought against Japan by former Korean "Comfort Women,"* CENTER FOR KOREAN LEGAL STUDIES, COLUMBIA LAW SCHOOL, <https://kls.law.columbia.edu/content/lawsuits-brought-against-japan-former-korean-comfort-women>.
- ³ Foreign Minister Toshimitsu Motegi, Statement Regarding the Confirmation of the Judgment of the Seoul Central District Court of the Republic of Korea in the Lawsuit Filed by Former Comfort Women and Others (Jan. 23, 2021), https://www.mofa.go.jp/press/danwa/press6e_000269.html; Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint Press Occasion (Dec. 28, 2015), https://www.mofa.go.jp/a_o/na/kr/page4e_000364.html.
- ⁴ Ananaya Agrawal, *South Korea court orders Japan to compensate sex abuse victims from wartime brothels*, JURIST.ORG (Jan. 9, 2021), <https://www.jurist.org/news/2021/01/south-korea-court-orders-japan-to-compensate-sex-abuse-victims-from-wartime-brothels/>.
- ⁵ Yonhap, *Court says Japan can't be forced to pay former sex slaves' legal fees*, THE KOREA HERALD (Apr. 21, 2021), <https://www.koreaherald.com/view.php?ud=20210421000802>.
- ⁶ Hyonhee Shin, *South Korea orders Japan to compensate 'comfort women', reverses earlier ruling*, REUTERS (Nov. 23, 2023), <https://www.reuters.com/world/asia-pacific/south-korea-court-orders-japan-compensate-comfort-women-reverses-earlier-ruling-2023-11-23/>.
- ⁷ Kim Jaewon, *Former Korean 'comfort women' lose lawsuit against Japan*, NIKKEIASIA (Apr. 21, 2021), <https://asia.nikkei.com/Politics/International-relations/Former-Korean-comfort-women-lose-lawsuit-against-Japan>.
- ⁸ Seoul Godeungbeobwon [Seoul High Ct.], Nov. 23, 2023, 2021N2017165 (S. Kor.). The analysis in this *Insight* is based on a machine translation of the Korean opinion.
- ⁹ *Id.*
- ¹⁰ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, <https://icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>.
- ¹¹ *Id.* ¶ 65.
- ¹² Press Release, Seoul High Court, Case claiming compensation for illegal acts against Japan in relation to comfort women (Nov. 24, 2023), <https://slgodung.scourt.go.kr/common/util/commonBank.jsp?functionCode=2970>.
- ¹³ *Id.*
- ¹⁴ *Seoul says Japan inaction means 'comfort women' court ruling upheld*, REUTERS (Dec. 9, 2023), <https://www.reuters.com/world/asia-pacific/seoul-says-japan-inaction-means-comfort-women-court-ruling-upheld-2023-12-09/>; *No appeal by Japan after 'comfort women' ruling: South Korea*, THE JAPAN TIMES (Dec. 9, 2023), <https://www.japantimes.co.jp/news/2023/12/09/japan/crime-legal/no-appeal-comfort-women-ruling/>.
- ¹⁵ Boleslaw A. Boczek, INTERNATIONAL LAW: A DICTIONARY 125 (2005).
- ¹⁶ H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 220 (1951); Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209, 215 (2015).
- ¹⁷ Jurisdictional Immunities of the State, *supra* n. 10, at ¶ 55.

¹⁸ Marco Longobardo, *The Italian Constitutional Court's Ruling against State Immunity When International Crimes Occur: Thoughts on Decision No. 238 of 2014*, 16 MELB. J. INT'L L. 255 (2015).

¹⁹ Lucas Carlos Lima & Aziz Tuffi Saliba, *The Immunity Saga Reaches Latin America: The Changri-La Case*, EJIL: TALK! (Dec. 2, 2021).

²⁰ Ielyzaveta Badanova, *Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine*, EJIL: TALK! (Sept. 8, 2022).

²¹ James Kaizuka, *Japan-South Korea Cooperation: Strength in Unity, Danger in Division*, THE DIPLOMAT (Dec. 23, 2023), <https://thediplomat.com/2023/12/japan-south-korea-cooperation-strength-in-unity-danger-in-division/>.

²² *South Korea top court upholds wartime labor rulings against Japan firms*, NIKKEI ASIA (Dec. 28, 2023), <https://asia.nikkei.com/Spotlight/Japan-South-Korea-rift/South-Korea-top-court-upholds-wartime-labor-rulings-against-Japan-firms>.

²³ *Id.*; Statement by Foreign Minister Motegi, *supra* n. 3.

²⁴ Motoko Rich & Choe Sang-Hun, *Japan and South Korea Make Nice, but Can It Last?*, THE NEW YORK TIMES (Mar. 17, 2023), <https://www.nytimes.com/2023/03/17/world/asia/japn-south-korea-relations.html>.