Opinion on Comfort Women Litigation and State Immunity before Korean Courts

I Introduction

1. That sexual slavery practiced by Japanese Military during WWII has constituted grave violation of human rights of victims of that practice (also known as 'comfort women') for which Japan as a State is responsible under international law. This has been confirmed, among others, by UN human rights organs. However, legal proceedings against the Japanese State initiated by victims in Japanese courts have been largely unsuccessful; therefore, the victims had no opportunity other than recourse to courts in Korea and it is here that they have encountered the State immunity argument as an obstacle. One such case has been the April 2021 decision by 15th Civil Chamber of the Seoul Central District Court (2016Gahap580239), which is now under appeal.

2. Arguments based on State immunity interact with those premised on other sources and rules of international law. According to the Korean Constitution (Article 6(1)), "treaties concluded and promulgated under the Constitution and generally accepted international laws have the same effect as domestic laws". Thus, the Constitution invites courts to look into the content of treaties that are relevant to the situation of comfort women, to interpret them in line with Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

3. Likewise if, as the District Court has stated, "the constitutional right to request a trial presupposes the inherent constraint of state immunity according to generally accepted international law", then it has to be ascertained what the scope of State immunity is, whether it applies to the present case and claims, and how it relates to other rules of international law. It has to be borne in mind that the Constitution is an instrument of national law and hence it does not create any particular form of State immunity from which foreign States benefit before Korean courts. It merely provides that Korean courts ought to apply State immunity if, in the shape and to the extent such immunity is recognised under international law.

II. State immunity and sources of international law

4. The relevance of customary international law argument acquires here an increased importance because no treaty on State immunity applies to Japan-Korea relations. 1972 European Convention on State Immunity (ECSI) is not applicable and 2004 UN Convention on Jurisdictional Immunity (UNCSI) is not in force at all.

5. The District Court has stated that "state immunity has been acknowledged as a binding customary international law. The District Court then goes on to suggest that "In order for such state practice to be 'general practice', the practice must be constant and uniform, and 'uniform' means that the practice must be uniform amongst many states instead of within just one state." [1] This means that, in order for Korea to be obliged under international law towards Japan to respect Japanese immunity before Korean courts, there has to be a customary rule of international law applicable to Korea-Japan relations with the effect of creating both an obligation of Korea to grant immunity to Japan and

[1] Id., Section III.1.B.(2)

Japan's corresponding right to demand the same immunity from Korea – no more and no less.

6. The District Court further suggests that "Once a general practice formed by individual state practice acquires opinio juris and becomes customary international law, even states that do not agree with such practice are bound by the established customary international law."[2] However, under international law there is no question for a State to be bound by a rule to which it does not agree. The District Court seems to be putting the cart before the horse. In reality, a practice is deemed to be general practice only when no significant number of States have said or done anything against it; and such general practice leads to the emergence of customary law rules, those rules will bind only States who have not opposed it. In principle, even if there is a general State practice on a particular subject-matter' some States could still be outside the scope of the customary rule that such practice creates if those States disagree with that rule clearly and consistently (so-called persistent objection rule). There is, quite simply, no question of binding a State against it will, or of the majority of States binding the minority. The only exception from this pattern is formed by *jus cogens* rules, but State immunity rules have never been envisaged to be *jus cogens* rules.

7. The key question therefore is: does international law really contain a general rule of customary law that would oblige Korea to forbid Korean courts to adjudicate in cases to which the Japanese State is a party? Whoever asserts that a rule of international law of a particular content exists, has also to provide the evidence to prove that proposition. The burden of proof lies on those who say that a general rule of State immunity exists and requires from Korea not to let this case go forward. Therefore, in this case this burden of proof has to be discharged by the defendant.

8. With regard to the claims that State immunity is part of customary law, the doctrinal opinion is divided. Some authors consider that there is an established and generally consistent State practice supporting the existence of customary law on State immunity.[3] Others refer to the lack of uniformity of practice as a factor which may compromise the existence of a general rule on State immunity.[4] It is also suggested that

> "it is now almost impossible to speak of 'customary international law' of foreign State immunity given the divergences in State practice. Immunity has, in fact, become little more than a sub-branch of each State's domestic law. In particular, there is disagreement among States subscribing to the restrictive theory as to the circumstances in which immunity should be excluded."[5]

It seems that this approach correctly points to the surrounding legal context and draws adequate conclusions from it. In cases where international or national courts assert or

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[2] *Id*., Section III.1.B.(4); the District Court says later on in the Judgment that "That a foreign state in question does not agree to such customary international law does not mean that the forum state is no longer bound by customary international law".

[3] RY Jennings & Y Watts (ed.), *Oppenheim's International Law* (1992), 342-343. However, they admit that national decisions allegedly forming that practice vary in points of detail and even in substance, id. 342.

[4] DP O'Connell, *International Law* (1970), 846. Lack of uniformity and consistency of practice is also emphasized in Higgins, *Problems and Process* (1994), 81. See also H Lauterpacht (ed.), *Oppenheim's International Law*, volume 1, (1955), 274, expressing doubts on whether the question may be regarded as affirmatively regulated by international law and whether a State would incur international responsibility for its courts' assumption of jurisdiction. For a similar position, see Sir Arthur Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, *RdC* 247, 1994, 36, 53

[5] R Garnett, Should the Sovereign Immunity be Abolished? 20 *Australian YBIL* (1999), 175

confirm that State immunity is regulated by customary international law, they do that in a rather perfunctory manner, the way that sounds as a bare assertion and is supported by no evidence. This is illustrated by the following cases:

- The European Court of Human Rights in *Al-Adsani v UK* undertook no discussion of this issue and in just one sentence provided a mere assertion, with absolutely no discussion, let alone evidence, that UK's grant of immunity to Kuwait was required by "generally recognized rules of public international law on State immunity."[6] The Court did so without illustrating the ways in which those rules acquired their "generally recognized" character or addressing any evidence to support this thesis. Similarly, the International Court of Justice in *Germany v Italy* made no examination of State practice and instead inferred the existence of a general rule of State immunity from Italy's concession to that effect.[7] Italy has self-harmingly conceded this issue and this was one of the reasons why it has lost the case.

- A number of national courts deny that State immunity is part of customary international law. The US Supreme Court has held in *Altmann v Austria* that State immunity is a matter of comity, not customary law.[8] In *Noriega*, as well as in *Lafontant v Aristide*, US courts have clearly emphasized that 'the grant of immunity is a privilege which the United States may withhold from any claimant'.[9] Therefore, American courts do not accept that the United States is obliged under customary international law to grant immunity to foreign States or their officials, and will only grant immunities in cases where the domestic legislation (1976 Foreign Sovereign Immunities Act) requires for that to be done. By contrast, Korea does not have State immunity legislation constraining Korean courts the way that the American legislation constrains American courts.

- UK House of Lords has denied in the *Congreso* case that customary international law requires State immunity to be upheld. The House acknowledged that several States had adopted State immunity legislation which was an element of State practice. Yet the House concluded that "if one State chooses to lay down by [legislative] enactment certain limits, that is by itself no evidence that those limits are generally accepted by States. And particularly enacted limits may be (or presumed to be) not inconsistent with general international law – the latter being in a state of uncertainty – without affording evidence what that law is."[10] Similarly, Lord Denning concluded in *Trendtex* that "the nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever."[11] The Supreme Court of Ireland also denied in *McElhinney* that State immunity is part of customary international law.[12]

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[6] *Al-Adsani v UK*, para. 56
[7] *Jurisdictional Immunities* (Germany v Italy), *ICJ Reports* 2012, 122
[8] United States, Supreme Court, *Austria and Austrian Gallery v. Altmann*, 7 June 2004, 541 US 677 (2004)
[9] District Court for the Eastern District of New York, *Lafontant v. Aristide*, 27 January 1994, 844 F.Supp. 128 (E.D.N.Y. 1994), 103 ILR 581. See also United States, District Court for the Southern District of Florida, *United States v. Noriega*, 8 December 1992, 808 F.Supp 791 (S.D. Fla. 1992), 99 ILR 143, 162– 3, to the effect that the USA does not consider itself bound under international law to accord immunity to foreign States and their agents
[10] *I Congreso* (HL), I *AC* 1983, 260–261 (*per* Lord Wilberforce)
[11] Court of Appeal, Civil Division, *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 *QB* 529 at 552–553 (per Lord Denning MR)
[12] *McElhinney*, Irish Supreme Court, Decision of 15 December 1995, 104 ILR 691, at 701

- The customary international law rule on State immunity is not unambiguously established even with regard to sovereign acts proper. To illustrate, expropriation would be a clear sovereign act under the restrictive doctrine; yet 1976 US State Immunity Act clearly allows for expropriation claims against foreign States to proceed. As the very recent case in the UK has also suggested, 1978 UK State Immunity allows proceedings involving territorial torts to proceed before English courts, even if they would otherwise qualify as sovereign acts.[13] The conclusion could be either that British and American statutes violate international law, or that there is no general rule of international law requiring from British Parliament or US Congress to have legislated otherwise. I consider that the latter thesis is correct.

- At the other end of the spectrum of State practice, China still adheres to absolute immunity.

  Therefore, it is not clear at all how could the ready-made rule of customary law of general international law exist, when there is so much disagreement between States about the content of that putative rule. A more plausible conclusion is, instead, that that after the absolute understanding of immunity has been replaced by the restrictive immunity, international law has "not prescribed an alternative rule."[14]

9. Consequently, the conclusion should be that Korea is not required by any rule of international law to grant immunity to Japan in this case. Nor is there any evidence that Korea has provided any unilateral statement or promise to any other State that Korea is under international law bound to accord immunity to Japan before Korean courts (again, unlike the Italian concession in *Germany v Italy*). The conclusion that follows is that Korea does not owe to Japan any international legal obligation to prevent the adjudication of comfort women's claims before Korean courts.

III. The debate on general State immunity rule and exceptions from it

10. There is a trend, in academic writings as well as legal practice, to speak of a general rule which requires to grant immunity to foreign States before domestic courts, and of existing or desired exceptions from that general rule which remove, or would remove, State immunity with regard to specific types or categories of cases (e.g. commercial matters, employment matters, international crimes, or human rights matters). According to this logic, an argument is often heard that, in order for a claim against a foreign State relating to human rights or war crimes to succeed before domestic courts, one has to identify the existence of a specific exception that removes a particular category of cases from the scope of the generally applicable rule of State immunity.

11. In line with the above pre-conception, the District Court adopts as one of its chief premises that "a new exception to state immunity must be backed up by state practice such as individual state legislation or court decisions so as to be 'general practice', and it must also be acknowledged that there is 'opinio juris'."[15]

[13] *Al-Masarir v Saudi Arabia*, [2022] EWHC 2199 (QB), Judgment of 19 August 2022
[14] Karagiannakis, State Immunity and Fundamental Human Rights, 11 Leiden Journal of International Law, 1998, 13
[15] District Court Decision, Section III.1.B; the District Court goes on to say that "creating a new exception that is not recognized in existing customary international law should be approached with caution"

12. With the above assertion the District Court, in a way similar to the International Court of Justice in 2012 (in the case of *Germany v Italy*), has arrived at a rather bizarre conclusion that, while the exception from the general rule of State immunity needs to be proved with detailed and convincing evidence, the existence of that general rule of State immunity is simply assumed and no evidence needs to be studied or evaluated to see whether such general rule indeed exists and binds States such as Korea. Such an attitude puts claimants in a very disadvantaged position, requiring them to show that an exception from a non-existing general rule exists. No one could discharge the burden of proving that an exception from the rule exists when that rule itself cannot be proved to exist. (As we saw above, all national and international courts which have upheld State immunity for war crimes or human rights violations have avoided the issue of whether the general rule of State immunity indeed exists and have refused to go through the relevant evidence.)

13. International law does not require proving the existence of any exception from a general rule of State immunity (instead, as we shall see below, the most widely accepted international test requires the assessment of each and every State conduct in terms of whether it constitutes an exercise of State sovereignty and public authority; and not whether it falls within the remit of some exception from a general immunity rule). The rule-exception test is a creation entirely of national statutes on immunity that operate in States that form a small minority in the international community of States (mostly common law States such as UK, USA, Australia or Canada) and it cannot therefore represent any generally accepted State practice. This test has been further adopted in international conventions which are either undersubscribed (ECSI 1972 which has only 8 States-parties) or are not in force at all (2004 UN Convention on Jurisdictional Immunity). Korea neither has a State immunity legislation, nor is it a party to any of relevant treaties. Hence, there is nothing in general international law that requires assessing comfort women's claims in terms of whether any special exception exempts them from a more general State immunity rule within whose remit those claims would otherwise fall.

IV. Sovereign (*jure imperii*) and non-sovereign (*jure gestionis*) conduct of States

14. The District Court has stated that "The conventional restrictive theory of state immunity qualifies as a "generally accepted international law" stipulated in Article 6 Paragraph 1 of the Constitution." It is a commonplace that the old absolute immunity doctrine (expressed through the Latin maxim *par in parem non habet imperium*, meaning that an equal has no authority over an equal) no longer forms part of international law. Nevertheless, the District Court saw one of the rationales of State immunity in the premise that "each state is independently sovereign and every state's sovereignty is equal, so one nation may not exercise jurisdiction over another nation which has an equal sovereignty."[16] However, and unless the Korean Judiciary is keen to adhere to the antiquated and now abandoned doctrine of absolute immunity of States, it has to be accepted – without any argument – that any feasible doctrine of State immunity under international law would envisage a fair number of cases in which, contrary to the District Court's above assertion, a State is indeed entitled to exercise jurisdiction over another

[16] District Court Decision, Section III.1.A

State.[17] Equality of forum and foreign States is, quite simply, neither here nor there when State immunity issues are addressed. This outcome follows from what is commonly known as a restrictive doctrine of State immunity.

15. The key test for dealing with this matter is one that focuses on whether Japan's conduct with regard to comfort women was based on its exercise of Japan's sovereign authority, in other words whether in doing to comfort women what it did Japan acted in the exercise of its governmental and sovereign authority, i.e. did what only a State can do by using sovereign authority which it had as a State and which private persons do not have.

16. The restrictive doctrine of immunity requires that the defendant State and its officials demonstrate that their conduct was performed in the exercise of their governmental authority. The conduct impleaded in national proceedings has to be inherently an act of State authority, i.e. one which only a State could carry out and for carrying out which a State authority is used – authority which is always possessed by State organs and never possessed by any private individual or entity. This applies both to civil and criminal cases, because an act cannot be a sovereign act in one type of legal proceedings and private act in another type of legal proceedings. In addition, the scope of State immunity is the same whether the defendant in the relevant litigation is a State or its official, because individual State officials would (or would not) enjoy immunity only for the acts for which the entire State would (or would not) itself have immunity. If immunity is available to a State, it is available to its officials as well; if not, then not.

17. However, most importantly, the restrictive doctrine refers not simply to the fact of State involvement in the relevant internationally wrongful act, but to a State's use of sovereign authority uniquely available to it as a State. To illustrate this problem, in *Jones v Saudi Arabia*, the UK House of Lords relied on Articles 4 and 7 of 2001 ILC Articles on State responsibility, to hold that acts of torture for which Saudi Arabia and its officials were impleaded before UK courts were acts attributable to Saudi Arabia and generating its international legal responsibility.[18] Identifying the fact of Saudi Arabia's mere involvement in torture, the House of Lords did not undertake a further step that was required to be taken – namely whether on the top of having been involved in torture as a matter of fact, Saudi Arabia and its officials acted in their sovereign capacity and in the exercise of their sovereign authority. If we focus on mere involvement of a State, then the conclusion would be that anything that the State does, for instance withholding payments of salary or money owned by contract, failing to comply with an arbitral award, unlawful termination of employment, or anything else that any private person could do, amounts to activities to which State immunity extends. The restrictive doctrine would thus collapse and degenerate into the older, and now abandoned absolute immunity doctrine which used to require in the past that as soon a State involvement with the relevant facts and dealings could be shown, the State would enjoy immunity. The restrictive doctrine does not work like that; it is not co-extensive with the law of State responsibility; there are many areas in which a State could be responsible for an act yet

[17] The District Court has indeed contradicted its above statement relating to State equality by the following more specific statement: "The judiciary of the Republic of Korea, ever since it recognized absolute state immunity in the Supreme Court's 1975. 5. 23. 74Ma281 Decision, and changed its position to deny state immunity for non-sovereign acts with the 1998. 12. 17. 97Da39216, has denied state immunity for private acts by foreign states, while recognizing state immunity for foreign sovereign acts, even if such acts were carried out within the territory of the Republic of Korea."

[18] *Jones v Saudi Arabia*, 2006 UKHL 26, paras 12-13 (*per* Lord Bingham)

not enjoy immunity with regard to the same act, and this is the core premise of the restrictive immunity doctrine. In other words, a court has to ask two questions: (1) was the State involved in the relevant conduct? (2) did the State use its public authority when they acted? Is the conduct in question closely associated with a State's public authority which the State has and private entities do not have, i.e. one that could be carried out only by State authorities and officials, and not by private individuals and entities? The House of Lords asked only the first question, but not the second question; they established that Saudi State and officials were involved in torture; they did not establish that only State and its officials could commit torture, i.e. that it takes being a State or its officials to torture someone.

18. The distinction between sovereign (*jure imperii*) and private activities does not turn on the purpose for which the State is acting. For instance, the fact that Japan recruited comfort women for war needs of the Japanese army does not make that more sovereign than purchasing army boots for the Japanese army or stationery for any government department would be. The distinction between the two types of acts turns, instead, on their nature and association with sovereign authority of a State. Examples could be the following:

    - Enactment of legislation;
    - Regulation of national currency or of the use of foreign currency in the relevant State;
    - Handling documents required for police investigation;
    - Regulation of trade in particular goods or services;
    - Issuing a court decision, or arrest warrant, or summoning a witness to court proceedings;
    - Expropriation of property.[19]

    The above list is incomplete and further examples could be found. But what unites all the above *jure imperii* acts is that they can only be performed by a State. By contrast, recruitment and mistreatment of comfort women does not take being a State. It is only a matter of power and resources and could be performed by anyone who possesses that power and resource, for instance gangs, rebels or corporations.

19. Judicial endorsement of the restrictive doctrine took place in the *Empire of Iran* case by the German Constitutional Court, suggesting that the distinction between sovereign and non-sovereign acts does not depend "on whether the State has acted commercially. Commercial activities of States are not different in their nature from other non-sovereign State activities." What mattered was the nature of the transaction rather than its underlying motive and policy, whether the State acted in the exercise of its sovereign authority or in a private capacity the way that any private person could act.[20] Earlier, the Austrian Supreme Court had said in *Holubek* that immunity should not attach to acts performed by State organs if these are acts of private law "as can also be performed by private persons".[21]

[19] See also above para. 8 on expropriation and customary law.
[20] *Empire of Iran, Bundesverfassungsgericht*, 30 April 1963, 45 ILR 57 at 80.
[21] *Holubek v US*, Austrian Supreme Court, (1961) 40 ILR 73

20. This approach was later on more comprehensively adopted by the House of Lords in the cases of *Trendtex*[22] and *Congreso*. The House of Lords held in the latter case that the conduct of a State is not a sovereign act and attracts no immunity if it is an act which could be performed by any private actor, even if the situation related to a highly contingent political context.[23] A similar approach was voiced by the US judiciary. In the *Victory Transport* case, the Court of Appeals for the Second Circuit clearly observed that "Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases ... fall[ing] within one of the categories of strictly political or public acts."[24] Political or similar context in which an act is perpetrated does not determine the nature of the act itself. It is also difficult to see how Japanese treatment of comfort women involved "strictly political or public acts." There is nothing in rape and sexual offences that could make the unique either to State authority or policy; they may be perpetrated to pursue political goals, but that is true for all *jure gestionis* acts – whether a breach of contract, withholding salary to an employee, unlawful termination of employment or any other private activity. Again, what matters for the restrictive doctrine is the nature of the actual conduct or act of a State, not the context in or purposes for which it is perpetrated.[25]

21. The further application of the restrictive doctrine by English courts, such as in cases of *Lampen-Wolfe* and *Littrell*,[26] was concerned with the activities of foreign armed forces, have followed the *Congreso* approach, and focused on the nature of the relevant act in the underlying context, rather than it having been simply and merely authored by armed forces, in determining whether immunity should be accorded. The *Congreso* approach was also carefully followed in *Kuwait Air Co* where the governmental authority test was applied to the sequence of acts that were undertaken by public bodies of the foreign State.[27]

22. The above approach is also extensively used when courts address the issues of human rights and war crimes. The US Court of Appeals in *Marcos* refused to accord immunity in relation to acts of torture, killings and disappearance performed by, under direction or in connivance of, a head of State, and implicating systematic use of State machinery, because no public official, even the head of State, can claim these as his functions. These acts constituted violations of international law and were "as adjudicable and redressable as would be a dictator's act of rape."[28] The same approach was upheld by the UK House of Lords in *Pinochet*. In his leading speech, Lord Browne-Wilkinson has emphasised that torture cannot be part of official functions of a head of State or any other State official, because otherwise no torture could be prosecuted outside the country in which it has been committed and hence the system of universal jurisdiction over torture would

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[22] *Trendtex Trading v. Bank of Nigeria*, [1977] 1 *QB*, 529 at 552-553
[23] *I Congreso del Partido* (HL), [1983] I *AC*, 268
[24] *Victory Transport Inc. v Comisaria General*, 336 F.2d 354 (1964), para 10
[25] In *Congreso*, Lord Wilberforce did use words "whole context", but this was merely a tool to determine whether an act is a sovereign act or private act, *Congreso*, 267 (first full paragraph). At page 268 His Lordship has explained that, "Everything done by the Republic of Cuba in relation to Playa Larga could have been done, and, so far as evidence goes, was done, as owners of the ship: it had not exercised, and had no need to exercise, sovereign powers. It acted, as any owner of the ship would act, through Mambisa, the managing operators". Hence, a play of words would not assist in altering the applicable test.
[26] *Holland v Lampen-Wolfe*, [2000] 3 *All ER*, 845-846; *Littrell v USA*, [1995] 1 *WLR* 182
[27] *Kuwait Air Co*., Court of Appeal, [1995] *WLR* 1147, 1162-1163 (*per* Lord Goff)
[28] United States, Court of Appeals (9th Cir), *Hilao v. Estate of Marcos*, Docket No. 95-15779, 17 December 1996, 103 F.3d 767 (9th Cir. 1996), 104 ILR 122, 122–5.

collapse.[29] The Amsterdam Court of Appeal also held in *Bouterse* that 'the commission of very serious offences as are concerned here – cannot be considered to be one of the official duties of a head of state'.[30] The US Court of Appeals for the Fourth Circuit likewise confirmed in *Samantar* that 'because this case involves acts that violated *jus cogens norms*, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, we conclude that Samantar is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law.'[31] An earlier American decision on *Siderman de Blake* has also confirmed that "International law does not recognize an act that violates jus cogens as a sovereign act."[32] Also relying on *jus cogens*, Lord Phillips in *Pinochet* has concluded that "If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign."[33] By and large, thus, various jurisdictions have been uniform in applying that pattern of the restrictive doctrine. Its basic essence is that an act that anyone can perform is not one that is unique to State authority (*jure imperii*).

23. The Joint Separate Opinion of Judges Higgins, Koojmans and Burgenthal in the *Arrest Warrant* case before the ICJ concluded that 'serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform. This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public state acts.'[34] In all these cases it is not the context, motive or use of State capacity or resources, but the nature of the underlying act or conduct that is crucial for its qualification.[35]

V. ICJ's decision on *Jurisdictional Immunities* (2012)

24. The *Jurisdictional Immunities* case has dealt with two issues relevant to the present litigation in Korea: the armed conflict situations and *jus cogens*.

Armed conflict situations

25. The District Court has suggested that "when an armed conflict occurs, "wartime international law" applies instead of peacetime international law, so the issue of damage compensation should also be governed by wartime international law including personal

[29] United Kingdom, House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)*, Case No. 17, 24 March 1999, [1999] UKHL 17, [2000] 1 *AC* 147 at 205 (*per* Lord Browne-Wilkinson).
[30] The Netherlands, Court of Appeal (Amsterdam), *Re: Bouterse (Desire)*, Case No. R 97/163/12 Sv - R 97/176/12 Sv, 20 November 2000, (2001) 32 NYIL 276, para 4.2.
[31] United States, Court of Appeals (4th Cir) *Yousuf and others v. Samantar*, Case No. 11-1479, 2 November 2012, 699 F3d 763 (4th Cir 2012), 23.
[32] *Siderman de Blake v Argentina*, Court of Appeals, Ninth Circuit, 965 F.2d 699 (1992), 22 May 1992 (the case was determined by the text of FSIA but, as clarified above, Korea does not have State immunity legislation, unlike the US)
[33] [2000] 1 *AC* 147 at 290 (*per* Lord Phillips)
[34] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep 63, para. 85.
[35] See also practice of British (*Prince Nasser*), Belgian and Dutch courts to the same effect, as discussed in: C. Escobar Hernández, 'Fourth report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur', UN Doc. A/CN.4/686, 29 May 2015, paras. 56-8.

damages caused in the course of an armed conflict."[36] With regard to armed conflict situations, the District Court says that "We view this case in light of the ICJ majority opinion regarding illegal acts in the territory of the forum state during armed conflict." But what evidence did the International Court of Justice use when deciding that Germany was immune for its armed forces' activities? If we read the reasoning from paragraph 67 onwards of the ICJ Judgment, it turns out that the ICJ used Article 31 of 1972 European Convention on State Immunity which has only 8 States-parties and hence falls short of exposing any general picture of international law on this subject; and which has as its party Germany but not Italy and hence could not be validly used to determine what immunities Italy owes to Germany. Then, the ICJ resolved this matter on the basis of very limited State practice, consisting of decisions of courts in seven States, a rather very small minority in the international community of States, which is plainly insufficient to sustain the existence of a general rule of customary international law on this subject-matter. In addition, there is a cardinal difference between the putative rule on armed forces' activities and the restrictive doctrine of immunities: the former focus on the authorship of an act, while the latter focus on the precise nature of an act. The ICJ has focused on the authorship of the conduct of Germany, not on its precise nature. Some English decisions, which the ICJ has cited namely *Littrell* (referenced above), were about activities of management of armed forces and military bases, involved (both as claimants and defendants) only employees of armed forces, and also required to determine not just whether an act has been done by armed forces, but also, and in addition, whether the act in question is a sovereign act. At any rate, however, judicial practice on armed forces activities specifically is too small to provide any material basis for deducing the existence of any rule of international law on this discrete subject-matter.

Peremptory Norms of General International Law (Jus Cogens)

26. There has been an argument that *jus cogens* rules have no bearing on State immunity. For instance, the International Court of Justice in *Germany v Italy* has denied that immunity should be refused to a foreign State when the grant of immunity violates peremptory norms of general international law. Substantive peremptory norms relating to State conduct do not, according to the Court, conflict with State immunity which is merely of procedural character, dealing with adjudicating that State conduct before national courts; even though, the same Court has used in the same case the same immunity rules as substantive rules providing for the cause of action to Germany against Italy, so that the ICJ could hold that Italy violated those rules in relation to Germany. When it came to overriding effect of *jus cogens*, however, the same rules experienced an awkward metamorphosis and became, on some unexplained basis, procedural rules. This is a serious defect in the Court's reasoning.

27. As we saw above, national courts, notably courts in UK and USA, have held that when State conduct violates *jus cogens* rules, such State conduct does not qualify as sovereign or official act of a State and hence it attracts no State immunity. Such observations witness the added value that *jus cogens* can have in shaping the scope of the restrictive doctrine of State immunity.[37] Such added value furthermore parallels the most principal effect of *jus cogens* rules, namely their non-derogability. Article 53 of the 1969 Vienna Convention on the Law of treaties defines a peremptory norm (a norm of *jus cogens*) as

[36] District Court Decision, District Court Decision, Section III. 2. B.(2)
[37] See above, para. 21

a norm from which no derogation is permitted. The key question about the relationship between *jus cogens* and State immunity is whether the grant of the latter leads to the derogation from the former.

28. For the reasons given above, a court should not enquire whether there is exception from the general rule of immunity applicable to *jus cogens* violations specifically. Instead, the valid test is to query whether the grant of immunity by Korea to Japan derogates from *jus cogens* rules that protect the position of comfort women (their right to be free from torture and cruel treatment, and right to bodily integrity). The ICJ has also claimed that the grant of immunity to a State violating *jus cogens* does not involve derogation from *jus cogens*. In *Jones v Saudi Arabia* decided by the House of Lords in the UK, Lord Hoffmann was emphatic that "the United Kingdom, in according state immunity to the [Saudi Arabian] Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture." That statement rang hollow, as the House of Lords' attitude involved a prospective approval of the correctness and validity of the legal position that victims of torture in Saudi Arabia should get no remedy in the UK. It was not simply about one single act of torture committed in the past, but about the ongoing legal formulation of bilateral relations between the UK and Saudi Arabia: no victim of torture in Saudi Arabia would get access to and remedies from UK courts, and hence the prohibition of torture would no longer be a legal rule applicable to relations between these two States. In other words, even if the peremptory prohibition of torture arguably remains generally binding on the UK and Saudi Arabia as well as all other States, the same prohibition is denied legal effect in bilateral UK–Saudi relations. In other words, the peremptory prohibition of torture has been derogated from through the two States' mutual understanding expressed by the Saudi claim of immunity and the UK's approval of that claim, in relation to both past and prospective cases. Hence, Saudi Arabia can go on and torture any British or third country citizen and safely expect that no legal consequences will arise, and that the peremptory prohibition of torture will remain inoperative in bilateral relations between Saudi Arabia and the UK.

29. According to the District Court, the ICJ decision on *Germany v Italy* is "a recent judgment that sufficiently reflects the customary international law on state immunity including legislation and judgments of individual states." [38] This is clearly an overstatement, because the findings reached in the *Jurisdictional Immunities* have been repeatedly disapproved in practice:

- The Italian Constitutional Court decided in 2014 that Italy was not bound to adhere to the ICJ's ruling. The Swiss Federal Tribunal held that *jus cogens* has primacy over State immunity.[39] The US Court of Appeals for the Fourth Circuit likewise confirmed in *Samantar* that "Because this case involves acts that violated *jus cogens* norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, we conclude that Samantar is not entitled to conduct based official immunity under the common law, which in this area incorporates international law."[40] Most recently, the Supreme Court of Brazil also disregarded the ICJ ruling. These findings are similar to the conclusion made by the Seoul District Court in January 2021.

[38] District Court Decision, Section III. 2. B.(1)
[39] *Nezzar*, Judgment of 25 July 2012 (case no BB.2011.140), paras 5.3.5 and 5.4.3
[40] *Bashe Abdi Yousuf v Mohamed Ali Samantar*, No. 11-1479, 2 November 2012, at 23

- Similarly, the UN International Law Commission has refused to uphold the ICJ's finding that State immunity is based on a procedural rule which is not in a normative conflict with peremptory norms. The Special Rapporteur Dire Tladi has suggested in his Fifth Report that "if the Commission remained silent on the matter, its silence would be interpreted as evidence that there were no exceptions to immunity ratione materiae for *jus cogens* crimes. For that reason, a "without prejudice" clause might be the most appropriate solution." (A/CN.4/SR.3425, page 16). Only a small minority of the Commission's 34 members upheld the ICJ's findings (a minority including Commission members Murphy, Nolte, Wood and Zagaynov). Consequently, the Commission has adopted the Conclusion 22, which suggests that "The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law." The Commentary (paragraph 4) to Conclusion 22 explains that specific peremptory norms such as prohibition of torture and war crimes could require the removal of State immunity in litigation before foreign courts. Therefore, the ILC has clearly refused to side with the ICJ and endorse its ill-advised distinction between substantive rules and procedural rules. In the Sixth Committee of the UN, only two States – UK and Japan – spoke expressly in defence of the ICJ's decision in *Jurisdictional Immunities*, which shows that the ICJ's approach has no backing in the international community.

The overall value of the Jurisdictional Immunities *decision*

30. The ICJ decision on *Jurisdictional Immunities* has also disapproved the US legislation allowing US courts to proceed in cases where foreign States are impleaded before American courts with regard to claims of their involvement in terrorist activities. Nevertheless, the United States and Canada have repeatedly legislated over recent years in a way that is incompatible with the putative legal position stated in *Jurisdictional Immunities*.[41] Overall, a decade has passed since the adoption of the ICJ's decision in 2012, and the overall picture is that this decision has not commanded even a share of general authority which some conservatively minded international lawyers expected it would command. In any case, ICJ decisions (even when they are correct) are binding only on States parties to the litigation in question (in this case Germany and Italy); these decisions are not invocable against or create obligations for non-parties such as Korea (Article 59 ICJ Statute). Consequently, the ICJ's judgment of 2012 does not represent the applicable international law and has no backing of the international community. The District Court has erred when it followed the ICJ's Judgment and endorsed its findings.

VI. State immunity and individual right to access to justice

31. Access of individuals to justice is guaranteed under various international instruments, and most pertinently by Article 14 of 1966 International Covenant on Civil and Political Rights, to which Japan and Korea are parties. The Human Rights Committee which is responsible for the interpretation and application of the Covenant has attached a high importance to this right even as is not expressly mentioned in Article 14.

32. In *Bahamonde v Equatorial Guinea*, the Committee has stated that "the notion of equality before the courts and tribunals encompasses the very access to the courts and that

[41] See the amendments to the Canadian State Immunity Act (R.S.C. 1985, c. S-18), 13 March 2012; on several rounds of US amendments see Bettauer, (2009) 13 *ASIL Insight*; Daugirdas & Mortenson, 111 *AJIL* (2017), 155.

a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1."[42] The same approach was reiterated in other cases such as *Currie v Jamaica* which was concerned with the inability of a person to afford litigation costs, and the Committee has confirmed the relevance of the access to justice regardless.[43]

33. In *Mahuika v New Zealand*, the State-party claimed that "Article 14 does not provide a general right of access to courts in the absence of rights and jurisdiction recognised by law. Rather Article 14 sets out procedural standards which must be upheld to ensure the proper administration of justice."[44] The Committee has responded that "article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1)."[45]

34. The following conclusions obtain from the above: both Japan and Korea are obligated to accept that comfort women are entitled to litigate their cases before Korean courts; Article 14 ICCPR is a treaty provision that would prevail over customary rules of State immunity (if they existed, though in fact they do not exist); and ICCPR post-dates bilateral treaties between Japan and Korea (below) and would hence cancel any waiver that could be inferred from those treaties (which waiver, as explained below, is not inferable from those treaties anyway). A later rule prevails over an earlier rule (*lex posterior derogat legi priori*). This is also one of the reasons (among ones outlined below) that should any Korean waiver with regard to the comfort women situation be identified, it has to be seen as a waiver of State rights only, and has to do nothing with waiving individual rights of the victims.

VII. Comfort women litigation and the issue of treaty waiver

35. After WWII, agreements were concluded to deal with Japan's responsibility for its wartime conduct. Korea was not a party to 1951 San Francisco Treaty. Article II(1) 1965 Japan-Korea Claims Agreement has provided that "The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally."

36. The scope of this waiver should be clarified by reference to the following considerations:

- In the first place, it is a commonplace under international law that a waiver of a claim of one State against another State cannot be presumed or inferred from surrounding context of circumstances; instead, for a waiver to exist it must be firmly supported by text and words of an instrument or statement which is being alluded to as an evidence of waiver. A State has waived a claim only if the word and texts of its statement leaves no doubt about it. As the NAFTA Tribunal emphasised in *Waste Management* regarding the issue of waiver under NAFTA Article 1121, "any waiver must be clear, explicit and

[42] *Bahamonde v Equatorial Guinea*, Communication No. 468/1991, 10 November 1993, para. 9.4
[43] *Currie v Jamaica*, Communication No. 377/1989, 31 March 1994
[44] *Mahuika v New Zealand*, Communication No. 547/1993, 27 October 2000, para 7.7
[45] *Id*., para. 9.11

categorical, it being improper to deduce same from expressions the meaning of which is at all dubious."[46] In *Barcelona Traction*, the International Court refused to hold that the discontinuance by a State of a case before the Court implies the waiver of claims involved in that case.[47]

- Secondly, a State can only waive its own rights, i.e. rights that belong to it as a State. The rights of individual comfort women to compensation from Japanese Government are those victims' individual rights which may, situationally, be upheld by Korean Government as a State of nationality of the victims and in its dealings with Japanese Government as the State which has committed the internationally wrongful acts in question. In doing so, the Korean State is not asserting its own rights but is, instead, using its own diplomatic capacity to protect the rights of victims as their individual rights. Consequently, even if the text of the relevant agreement were to point to the Korean Government's waiver, such waiver could encompass only those rights which belong to Korean Government as a State, including Korean State's own claims against Japan, and Korean Government's capacity to raise this matter in its dealings with Japanese Government, but not the victims' individual rights to reparation.

37. In 2018, the Supreme Court of Korea held that 1965 Treaty could not waive forced labourers' claims against Japan, because these rights were individual rights that could not be waived without their consent.[48]

38. The following issues arise specifically with regard to the comfort women situation.

- In the first place, at the time of conclusion of 1965 Agreement the comfort women's issues were not publicly known because the victims had not spoken out yet in public, and the Agreement could have referred only to claims that were outstanding at that moment. The use of words "settled completely and finally" in Article II(1) of 1965 Agreement certifies that only claims known at that time could have been settled. The reference in Article II(1) to claims under Article 14(a) of 1951 Peace Treaty further corroborates this conclusion. It is noteworthy that 1965 Agreement only refers to Article 14(a) of 1951 Agreement, not to its Article 14(b), which is about "any actions taken by Japan and its nationals in the course of the prosecution of the war". Hence, it has to be concluded that it was simply not the intention of the parties to 1965 Treaty to waive all those claims that the Allied Powers had waived through 1951 Treaty. Treatment of comfort women would clearly have been an action "taken by Japan and its nationals in the course of the prosecution of the war", yet Article II(1) 1965 Treaty makes no reference to such action.

- Secondly, if parties had viewed 1965 Agreement to have waived or terminated comfort women's claims, why did they take trouble to deal with this issue again through 2015 Agreement? The Japanese Government maintains that 1965 Agreement settled this issue. However, why did it then engage in negotiation and conclusion of 2015 Agreement?

[46] *Waste Management* (Award of 2 June 2000), para. 18
[47] *Barcelona Traction* (Belgium v Spain), Preliminary Objections, Judgment of 24 July 1964, *ICJ Reports* 1964, 6 at 17-23
[48] 2013Da61381 4(B)(2)

39. Agreement between Japan and Korea of 28 December 2015 on comfort women is the only agreement reached between them specifically on the matter of comfort women. This Opinion does not deal with the issues arising under Korean constitutional law as to legality and constitutionality, under Korean law, of Korean Government's abandonment of comfort women's claims against Japan by acceding to the Agreement of 28 December 2015. I only focus on international law criteria as to whether the content of that Agreement leads to the Korean Government's abandonment of comfort women's claims. In that respect, two issues are of crucial importance.

40. 2015 Agreement's section 1(2) provides that "it has been decided that the Government of the ROK establish a foundation for the purpose of providing support for the former comfort women, that its funds be contributed by the Government of Japan as a one-time contribution through its budget, and that projects for recovering the honor and dignity and healing the psychological wounds of all former comfort women be carried out under the cooperation between the Government of Japan and the Government of the ROK." Section 2(1) provides that "The Government of the ROK values the GOJ's announcement and efforts made by the Government of Japan in the lead-up to the issuance of the announcement and confirms, together with the GOJ, that the issue is resolved finally and irreversibly with this announcement, on the premise that the Government of Japan will steadily implement the measures specified in 1(2) above."

41. The above issue of "final resolution" can relate, at most, to the Korean Government's capacity to continue raising these issues with the Japanese Government by way of diplomatic protection, on a State-to-State plane. This "final resolution" is about the overall settlement with regard to issues or matters that could be outstanding between one State and another State, not about litigation of specific and particular cases initiated by individual victims against Japan. It is one thing what happens in relations between Japan and Korea as two States; it is quite another thing what happens in relations between Japan and individual claimants before national courts. Under international law, Korea's Government has no authority to bargain away the rights of individuals of the type involved in this case, and there is no evidence that Korea's Government has purported to do any of that. The text of the 2015 Agreement does not say anything about litigation initiated by private persons. Therefore, Constitutional Court 2019. 12. 27. 2016Hunma253 Decision, suggesting that "it is difficult to say that the 2015. 12. 28 Korea-Japan Agreement affects the legal status of comfort women victims"[49] is correct and fully in accordance with international law applicable to this matter. Against this background, the District Court is rather ambivalent and confusing in asserting, in one go, that the 2015 Agreement is not a legal but a political agreement (whatever that means), and yet it is still in force as between Korea and Japan and "has not lost its effect". In reality, 2015 Agreement has no legal impact on the comfort women claims.

Conclusions

42. Given the examination of the argument and evidence above, the following conclusions are required to be made:

[49] The District Court says later on in its decision that "It cannot be said that the agreement has had any substantive legal effect on the existence and scope of the victims' claims of damages against the defendant."

- Korea is not obliged by international law to grant immunity to Japan before Korean courts with regard to comfort women cases. Neither conventional nor customary international law imposes any such obligation on Korea.
- The debate as to whether there is a specific exception from a general rule of State immunity to remove Japan's immunity with regard to comfort women claims is irrelevant, because that general immunity rule does not exist in international law in the first place.
- Japan's recruitment of comfort women during WWII were not acts *jure imperii*. It does not take being a State or using sovereign authority to recruit or use people for sexual enslavement. Japan did not use any sovereign authority in doing so. Japan merely did what any person or entity with requisite physical power and appropriate resources could do.
- The ICJ's decision on *Jurisdictional Immunities* is defective in its reasoning, does not invoke sufficient evidence to support the outcome it endorses, is disapproved in a later State practice, and is anyway irrelevant insofar as bilateral relations between Japan and Korea are concerned.
- Even if, for the sake of an argument, there was a customary international law rule on State immunity, Article 14 ICCPR and the rules of *jus cogens* would cancel its effect with regard to comfort women litigation.
- No treaty between Korea and Japan has resulted in Korea's waiver of individual rights or claims of comfort women to litigate reparation cases against Japan in Korean courts.

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Birmingham, 14 October 2022

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