Volume 22 | Issue 1 | Number 1 | Article ID 5818 | Jan 11, 2024

Korea's Court Denies Japan's State Immunity Again

Kim Chang-Rok

Abstract: *On November 23, 2023, the Seoul High Court issued a ruling excluding Japan's state immunity and fully accepting the claims of Japanese military 'comfort women' victims, following the one made by the Seoul Central District Court to the same effect on January 8, 2021. The rulings of the Korean courts are groundbreaking, contributing to the establishment of customary international law by clearly declaring that state immunity does not apply when a sovereign act of the state constitutes a serious violation of human rights, and furthermore, when it constitutes a tort. The Korean courts' rulings in turn reflect the international community's legal judgment regarding Japanese military 'comfort women' over the past 30 years. The Japanese government did not respond to the lawsuits at all and condemned the rulings as violating international law, claiming state immunity. However, the Japanese government's condemnation is just a self-contradiction, as it enacted an act embodying the customary international law that foreign countries are not exempt from jurisdiction over court proceedings in case of torts.*

Keywords: *state immunity, sovereign immunity, Japanese military 'comfort women', Japanese military sexual slavery, Seoul High Court's ruling*

This article was adapted by the author from an article he posted in Korean on the People's Solidarity for Participatory Democracy in Korea website, on December 26, 2023 (https://www.peoplepower21.org/judiciary/1954555?cat=12&paged=0).

On November 23, 2023, the 33rd Civil Affairs Division of the Seoul High Court (Judges Koo Hoe-geun, Hwang Seong-mi, and Heo Ik-soo) issued a ruling excluding Japan's state immunity and fully accepting the claims of Japanese military 'comfort women' victims.[1] This is the second ruling following the one made by the 34th Civil Affairs Division of the Seoul Central District Court (Judges Kim Jeong-gon, Kim Gyeong-seon, and Jeon Gyeong-se) to the same effect on January 8, 2021.[2]

In the previous case, a mediation application was filed in August 2013 by 12 Korean victims of the Japanese military 'comfort women' system to demand compensation of 100 million won per person from the Japanese government. The mediation was not held because the Japanese government refused. It was thus referred to the Seoul Central District Court on January 28, 2016. The ruling in favor of the plaintiffs was finalized at 00:00 on January 23, 2021, as Japan did not appeal.

The more recent appeals court ruling is in response to a second lawsuit filed on December

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press

28, 2016 by 11 Korean victims of the Japanese military 'comfort women' system and the bereaved families of five deceased victims, demanding compensation of 200 million won per person from the Japanese government. This ruling was also finalized at 00:00 on December 9, 2023, as Japan did not appeal.

The issues addressed in these lawsuits were diverse, but the core issue was whether the Korean court has jurisdiction over a lawsuit in which the Japanese government is the defendant, that is, whether Japan's 'state immunity' would be recognized by Korea's judiciary in 'comfort women' lawsuits.

Rule of State Immunity

'State immunity' or 'sovereign immunity' is a rule in international law that states that a sovereign state does not submit to the jurisdiction of other states. It is a rule derived from the principle that all sovereign states are equal.

In the 19th century, when state immunity first appeared, it started out as an absolute immunity doctrine that applied to all acts of the state, but in the 20th century, it transformed into a limited immunity doctrine that recognizes exceptions, in cases where the actions are considered private actions and not sovereign acts of the state. In the 21st century, there has been a shift toward recognizing exceptions particularly in cases of serious human rights violations or torts.

A recent case that the international community has paid particular attention to regarding state immunity is the International Court of Justice (ICJ) ruling on February 3, 2012.[3] The German government filed a suit with the ICJ, claiming that it was a violation of state immunity that the Italian Supreme Court ruled in favor of the plaintiffs in damages suits filed against Germany by victims of forced mobilization in Italy, including Ferrini v. Federal Republic of Germany.[4] Even if the ICJ accepted Germany's argument and declared Italy's defeat, it left room for changes in the future. It stated in its ruling:

> The Court concludes that, under customary international law *as it presently stands*, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.[5]

The ICJ's ruling was met with two contradictory actions by Italy's legislative and judiciary. On the one hand, the Italian National Assembly accepted the ICJ ruling above and enacted Law No. 5/2013 that mandates the application of state immunity to judges. On the other hand, however, Italy's Constitutional Court later ruled in 2014 that the law was unconstitutional because it violated the individuals' fundamental right to judicial protection.[6] The opening, created by the ICJ, was thus filled with a confusion on the status of state immunity.

The two rulings of the Korean courts are nothing but a response to the whirlwind of contention or change in the international community surrounding state immunity.

Significance of the Korean Courts' Rulings

The Korean courts made their rulings on the premises that 'international customary law on state immunity is not permanent or fixed' and that 'international customary law must be understood dynamically, taking into account the direction and flow of change.' On the basis of these premises, they declared that regarding the damage suffered by Japanese military

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press

'comfort women' victims, the government of Japan could not be given state immunity.

Despite their shared premises and verdicts, the two courts offered different reasons. In 2021, the Seoul Central District Court reasoned that state immunity must be waived "if the defendant state destroyed the universal values of the international community and inflicted extreme damage on the victims with anti-human rights acts." Two years later the Seoul High Court took one step further:

> it is a valid international customary law at present that in the case of a tort committed against a national of the State of the forum within the territory of the State of the forum, state immunity is not recognized without asking whether the act is evaluated as a sovereign act.

The Seoul Central District Court ruling can be seen as one that reflects the trend of the international community moving from a state-centered worldview to a human rights-centered worldview, actively participating in the evolution of state immunity to include exceptions on behalf of human rights. This Seoul High Court ruling, going one step further, developed a trailblazing reasoning that state immunity must change in the direction of excluding it from all torts of the state.

The two Korean rulings were bridged by Brazil's judiciary. On August 23, 2021, when the Brazilian Federal Supreme Court ruled in a case for damages filed against Germany by the families of victims of a fishing boat that sank after being attacked by a German submarine within Brazilian territorial waters during the Second World War, it decided that state immunity should be limited in cases of violations of *jus cogens* norms (or torts that violate human rights within the territory of the State of the forum).[7] In the ruling, it presented the 2021 Seoul Central District Court ruling as one of the precedents supporting its decision. The ruling of the Brazilian Federal Supreme Court was in turn brought up by the Seoul High Court as one of the supports for its 2023 ruling. The transnational chain of changes sends a clear message to the international community about the direction of international law's evolution.

The Korean courts' rulings also reflect the international community's legal judgment regarding Japanese military 'comfort women.' Since the issue of Japanese military 'comfort women' was first raised by Korean women's groups in the late 1980s—and since Kim Hak-soon came forward on August 14, 1991, revealing the facts of the damage and appealing for relief—victims and citizens around the world have demanded recognition of the crime, apology, compensation, truth-finding, history education, commemoration, and punishment of those responsible. In addition, through reports from numerous international organizations such as the UN Human Rights Subcommittee, the ruling of 'The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery' in 2000, and resolutions of national and local councils of numerous countries, including House Resolution 121 of the U.S. House of Representatives, violations of international law and Japan's legal responsibility have been confirmed repeatedly. When the Korean courts ruled in favor of the demands of victims and citizens, therefore, they were following the legal common sense of the international community that accepted them.

The Japanese Government's Self-Contradiction

Just as in the first lawsuit, the Japanese government did not respond to the second lawsuit at all, claiming state immunity. Not only

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press

did it not appear in court, it even refused to receive the notice of the complaint. This attitude was in contrast to the German government's appearance in the Italian court to argue for state immunity in the above-mentioned case.

The Japanese government issued, just as it did in the first lawsuit, a 'Statement by Foreign Minister' on the same day that the Seoul High Court ruling was pronounced, asserting that the ruling violated the "principle of State immunity under international law," and was "clearly contrary to" the 1965 'Korea-Japan Claims Agreement' and the 2015 press conference announcement by the Ministers of Foreign Affairs of Korea and Japan regarding the Japanese military 'comfort women' (the so-called '2015 agreement').[8] It also asserted that the ruling was "extremely regrettable and absolutely unacceptable," adding "Japan once again strongly urges the Republic of Korea to immediately take appropriate measures to remedy the status of its breaches of international law on its own responsibility as a country."

First, since it was only in 1992 that the Japanese government first acknowledged the existence of the Japanese military 'comfort women,' it is logically inconsistent to say that the issue had been resolved in 1965, almost thirty years earlier, by the 'Korea-Japan Claims Agreement.' Second, since the Korean Constitutional Court ruled on December 27, 2019 that the '2015 Agreement' was merely a political agreement that "has no legal effect or binding force," the agreement cannot be used to challenge the rulings of the Korean courts regarding Japan's *legal* responsibility.[9]

The Japanese government's claim that these rulings are a violation of international law, furthermore, is also in contradiction with its own 'Act on Japan's Civil Jurisdiction Over Foreign Countries, etc.' (Act No. 24 of 2009), adopted in 2009.

This act is an almost exact copy of the contents of the 'United Nations Convention on the Judicial Immunity of States and Their Property,'[10] which, according to the Japanese Ministry of Foreign Affairs, Japan ratified in 2009 "to take the initiative" in "promoting the establishment of international rules."[11] The preamble to the above 'UN Convention' states that the convention was concluded "taking into account developments in State practice with regard to the jurisdictional immunities of States and their property." In other words, it declares that the UN Convention contains practices that have become customary international law. Having adopted a law that follows the UN Convention, Japan accepts customary international law on state immunity as domestic law.

Article 10 of the above Japanese act accordingly states, "in the case of death or injury to the person, or damage to or loss of tangible property caused by an act which is alleged to be attributable to foreign countries, etc., the foreign countries, etc. are not exempt from jurisdiction over court proceedings which relates to pecuniary compensation for damage or loss arising therefrom, if the act occurred in whole or in part in the territory of Japan and if the author of the act was present in Japan at the time of the act." Applying this provision to the cases in the Korean courts leads logically to the conclusion that state immunity is excluded for Japan's tort of coercing Japanese military 'comfort women'. In other words, the Korean rulings are in accordance with and conform to customary international law embodied in Japanese law.

The totality of its actions—its refusal to receive the notice of the complaint, appear in court to present its position, and comply with the ruling—would thus amount to the denigration, or even denial, of the judicial sovereignty of the Republic of Korea.

Since the Japanese government completely

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press

denies the Korean court' rulings, it will accordingly not pay damages. If so, the Japanese military 'comfort women' victims who won the case have no choice but to carry out forcible execution. This recourse is allowed by the above Japanese act whose Article 18 stipulates:

> foreign countries, etc. are not exempt from jurisdiction over civil execution procedures for property specifically in use or intended for use for purposes other than government non-commercial purposes, and owned by them.[12]

If forcible execution is carried out, however, the Japanese government is likely to criticize it once again as a violation of international law, only adding another self-contradiction.

The Korean Rulings as a New Starting Point

Although customary international law has already established that state immunity does not apply to non-sovereign acts (private acts) of a state, customary international law regarding the application of state immunity to sovereign acts is still being formed.

The rulings of the Korean courts are groundbreaking, contributing to the establishment of customary international law by clearly declaring that state immunity does not apply when a sovereign act of the state constitutes a serious violation of human rights, and furthermore, when it constitutes a tort. The 2021 Seoul Central District Court ruling is already attracting the attention of lawyers and legal scholars around the world, and the 2023 Seoul High Court ruling will no doubt do the same.

This groundbreaking achievement was possible thanks to the earnest appeals of victims who have been crying out for justice for over 30 years. This was possible thanks to the hard work of citizens around the world who sympathized with their appeal. Even though the courts in Japan and the United States rejected their request, the courts in South Korea finally responded positively.

History is not simple. Its flow is unpredictable and unstoppable. Over the past 30 years, there have been numerous twists and turns where despair and hope intersected over the Japanese military 'comfort women' issue. We have gone through the turbulent history step by step and reached where we are now. We must take another step forward by using the historic rulings of the Korean courts as yet another stepping stone toward defending and expanding human rights.

Acknowledgements: *In translating this article into English, I received special guidance from Professor Suh Jae-Jung of International Christian University. I would like to take this opportunity to express my deepest gratitude.*

The home page thumbnail image for this article was taken by Alkan de Beaumont Chaglar.

Kim Chang-Rok is a Professor at Kyungpook National University Law School, the Republic of Korea. He has taken a historical approach to the legal aspects of Korea-Japan relations and has published papers in this regard.

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press

Notes

[1] Republic of Korea, Seoul High Court, Case No. 2016가합505092, 23 November 2023. Korean version is available online at C:/Users/user/Dropbox/PC%20(2)/Downloads/곽예남외15vs일본군_판결21나2017165익명.pdf; Japanese version is available online at http://justice.skr.jp/koreajudgements/53-2.pdf. All internet sites cited in this article are based on search results as of December 22, 2023.
[2] Republic of Korea, Seoul Central District Court, Case No. 2021나2017165, 8 January 2021. Korean version is available online at http://womenandwar.net/kr/wp-content/uploads/2021/01/판결문-일본군위안부피해자vs일본국_2016가합505092.pdf; Japanese version is available online at http://justice.skr.jp/koreajudgements/30-1.pdf; English version is available online at https://womenandwar.net/kr/wp-content/uploads/2021/07/ENG-2016_Ga_Hap_505092_30Jun2021.pdf.
[3] ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 3 February 2012, available online at https://www.icj-cij.org/sites/default/files/case-related/143/143-20120203-JUD-01-00-EN.pdf.
[4] Italy, Court of Cassation, Ferrini v. Federal Republic of Germany, decision No. 5044/4, 11 March 2004, available online at https://documents.law.yale.edu/sites/default/files/ferrini_v._germany_-_italy_-_2004.pdf.
[5] *Ibid*., para. 91. Emphasis added by the author.
[6] Italy, Constitutional Court, Judgment No. 238, 22 October 2014, available online at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf.
[7] Brazil, Federal Supreme Court (Supremo Tribunal Federal), Recurso Extraordinario com Agravo 954.858 Rio de Janeiro, 23 August 2021, available online at http://portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf.
[8] Japan, Ministry of Foreign Affairs, “Regarding the Judgment of the Seoul High Court of the Republic of Korea in the Lawsuit Filed by Former Comfort Women and Others (Statement by Foreign Minister KAMIKAWA Yoko),” 23 November 2023, available online at https://www.mofa.go.jp/press/release/press1e_000489.html.
[9] Republic of Korea, Constitutional Court, Case No. 2016헌마253, 27 December 2019, available online at https://isearch.ccourt.go.kr/search.do#view.do?link=46771_010300.
[10] United Nations, “United Nations Convention on Jurisdictional Immunities of States and Their Property”, adopted on 2 December 2004, available online at https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf.
[11] 日本国外務省, 「国及びその財産の裁判権からの免除に関する国際連合条約について」, March 2021, available online at https://www.mofa.go.jp/mofaj/gaiko/treaty/shomei_23_gai.html.
[12] According to Japanese lawyers and legal scholars, properties owned by foreign countries etc. in the State of the forum, for which state immunity over forcible execution is excluded by this provision, include real estate for lease to the general public, deposit claims related deposit accounts opened for fund management for commercial purposes, idle land, and merchant ships docked at ports in the State of the forum. See 西脇英司・米山朋宏, 「国等に対する我が国の民事裁判権に関する法律（対外国民事裁判権法）の概要」, 「NBL」 908, 2009, p.47 ; 村上正子, 「外国等に対する我が国の民事裁判権に関する法律（対外国民事裁判権法）」, 『ジュ

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press

リスト 1385, 2009, p.75.

https://doi.org/10.1017/S1557466024028894 Published online by Cambridge University Press