The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery

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Comment

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Mary De Ming Fan

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I. INTRODUCTION

Tomasa Salinog remembers her rape at thirteen and her initiation into Imperial Japan’s system of “comfort stations.”¹ Japanese soldiers burst into

¹ The author dedicates this Comment to her grandmothers Li Ru Jen and Tsaur Ruey Lin, who taught her wisdom, strength and justice.

her home in the middle of the night, soon after the Japanese invasion of the Philippines in 1942. They decapitated her father and removed her to a garrison where two soldiers raped her and then beat her unconscious. After this initiation, she served as a "comfort woman" in the garrison, used by Japanese soldiers from the afternoon until late into the night, her body priced in blocks of time allocated to each soldier. Hwang Geum Joo, who grew up in Japanese-occupied Korea, remembers her "recruitment" differently. When she was nineteen, Emperor Hirohito purported to order all unmarried girls to work in Japanese military factories. She reported to the train station where she was packed into a Japanese military train carrying about fifty girls per car, and taken to a troop station. There she was repeatedly raped for two weeks. Then she was installed in a commodified rape center, euphemistically misnomered a "comfort station," where she served thirty to forty soldiers on the average day. She was also beaten daily. Like more than 200,000 other human commodities in Imperial Japan's system of pay-to-rape centers, both girls were priced according to perceived racial inferiority. As a Korean, Hwang Geum Joo fetched a higher price than Filipina Tomasa Salinog. The payments that the soldiers made rarely went to the women, but were retained to pay for the purported costs of cosmetics, housing, or "national security." Decades later, these women have yet to receive an admission or finding of legal responsibility from the Japanese government, much less reparations. In 2001, the women and other survivors brought suit in U.S. District Court

2. See YOSHIAKI YOSHIKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 60-61 (Suzanne O'Brien trans., 2000) (reporting interview with a Japanese Army accounting officer who described learning at the army's accounting school how to set prices and periods of use for each woman at the comfort stations based on a combination of her strength and the purchasing officer's rank). This training of Army officers to run "comfort stations" is discussed in greater detail in text accompanying infra note 37.

3. Pl.'s Mot. for Declaratory J., supra note 1, at 12 (citing PI.'s Compl. ¶ 7).


One of the most egregious documented cases of sexual slavery was the system of rape camps associated with the Japanese Imperial Army during the Second World War. A significant impetus for the creation of the mandate of the Special Rapporteur was the increasing international recognition of the true scope and character of the harms perpetrated against the more than 200,000 women and girls enslaved in so-called "comfort stations" throughout Asia... which in its totality constitutes crimes against humanity.

Id.

5. CENTER FOR RESEARCH AND DOCUMENTATION OF JAPAN'S WAR RESPONSIBILITY, FIRST REPORT ON THE ISSUE OF JAPAN'S MILITARY "COMFORT WOMEN"—HISTORICAL AND LEGAL STUDY ON THE ISSUE OF "MILITARY COMFORT WOMEN" 51 (1994) [hereinafter JAPAN'S WAR RESPONSIBILITY].

6. Japanese comfort women fetched the highest price, but Korean comfort women commanded the second highest price, followed by Chinese comfort women. Those of other nationalities were considered racially inferior and priced accordingly. Id. at 51, 54, 56.

7. See YOSHIKI, supra note 2, at 142 (describing regulations governing how much of the fees comfort women could retain, and noting that many women were unable to retain any sum because of purported fees or required contributions).

8. See infra Section II.B for a discussion of both the stymied drive for reparations and justice and a privately funded effort at compensation in response to an invitation by the Japanese government.
against Japan under, *inter alia*, the commercial activity waiver to modify foreign sovereign immunity in 28 U.S.C. § 1605(a)(2). The decision in *Hwang Geum Joo v. Japan*\(^9\) derailed their effort, holding, *inter alia*, that state-sponsored commodified rape and sexual slavery failed to qualify for the commercial activity waiver of foreign sovereign immunity.\(^{10}\) This ruling is an anomaly in light of the tests prescribed for commercial activity cases.\(^{11}\) This Comment argues that the opinion’s reasoning that forced prostitution is an exercise of sovereign power rather than a brutal commodification of women’s bodies legitimizes an historical inequity in the proscription of slavery in international law that U.S. courts today should not recognize.

Although multiple treaties prohibited slavery by the early twentieth century,\(^{12}\) separate conventions treated forced prostitution as distinct from “slavery”\(^{13}\) and considered it a “domestic” issue on which each sovereign state could legislate individually.\(^{14}\) Forced prostitution was defined in the 1910 International Convention for the Suppression of the White Slave Traffic as “[t]he case of the retention, against her will, of a woman or girl in a house of prostitution.”\(^{15}\) This is essentially the commodification of repeated rape and sexual slavery. The resemblance of the condition to slavery is emphasized by the term “White Slave” in the title of the Convention.\(^{16}\) This Comment therefore uses the terms “forced prostitution,” “commodified sexual slavery,” and “commodified rape” interchangeably, though preferring as more accurate the latter two terms over the former when not discussing treaties employing the former term. This Comment explains that the relegation of commodified sexual slavery to the “domestic” sphere created a liability rule exception to the property rule governing human bodies that disproportionately affected women

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11. Other cases hold that sovereign immunity is waived when the activity is one that can be carried out by private entities in a commercial context. Given the existence of widespread and profitable commercial prostitution rings, both historically and today, Japan’s commodified prostitution centers, even if they were illegal, meet the test for commercial waiver of sovereign immunity. See discussion *infra* Part II.C.
12. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 340h, at 590-91 (1928) (citing treaties prohibiting slavery).
13. A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 Va. J. Int’l L. 303, 329 (1999) ("Since the early 1900s, sex trafficking and forced prostitution have been treated by the international community as distinct from other forms of slavery and slave-like practices, even though they give rise to similar effects (e.g., loss of human dignity).”).
14. International Convention for the Suppression of the White Slave Traffic at Final Protocol, United Nations Sales No. 1950.IV.2 (1910) [hereinafter 1910 Convention] ("The case of the retention, against her will, of a woman or girl in a house of prostitution could not, in spite of its gravity, be included in the present Convention, because it is exclusively a question of internal legislation."). This sentiment was not abrogated by treaty until the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature Mar. 21, 1950, 96 U.N.T.S. 272, 282 (entered into force July 25, 1951). See discussion *infra* Parts IV-V.
16. The use of a human being’s body against his or her will is a fundamental aspect of both slavery and involuntary servitude. Compare Part IV, describing cases holding that forced prostitution constitutes peonage and involuntary servitude. Moreover, sexual use of a human being against his or her will constitutes the crime of rape.
and girls. Couched in terms of Calabresi and Melamed's seminal formulation of the property/liability rule framework, a liability rule provides that bodies may be taken by force with compensation set ex post by the state. In contrast, a property rule bars taking without ex ante bargaining. This Comment also uses the term "de minimis liability rule" to signify the situation wherein no bargaining leading to agreement occurs before a forcible taking of an initial entitlement, and the compensation—if any—is set at a value so low in comparison to the value of the resource as to effectively value the initial entitlement at zero.

This Comment argues that the commercial activity reasoning in *Hwang Geum Joo v. Japan* recharacterizes Japan's act of commodified mass rape as an act that usurps the power of conquered states to set liability rules for sexually enslaved bodies in their territory. Essentially, the idea of commodified sexual slavery as an activity akin to commercial activities in which private parties often engage vanished from the court's analysis. This also explains the anomalous contrast between the *Hwang Geum Joo* court's commercial activity ruling, and the D.C. Circuit's decision in *Princz v. Federal Republic of Germany* declining to rule that the leasing of Holocaust-era Jewish slaves to industrial concerns by Germany was not a commercial activity. Part II describes the events leading up to *Hwang Geum Joo*, and the strong case for holding that commodified sexual slavery and rape constitute a "commercial activity" within the meaning of 28 U.S.C. §§ 1605(a)(2) and 1603(d). This Part also argues that the district court's ruling raises the question of whether U.S. courts may recognize, from the *Hwang Geum Joo* court's extreme statist perspective, a purported sovereign prerogative to sanction or induce forced prostitution. Part III describes the embodiment of the notion of the sovereign prerogative to set liability and property rules for victims of forced prostitution in pre-World War II-era treaties. Part IV describes two prominent treaties in the post-World War II era that eliminate the sovereign prerogative to set property and liability rules for women's bodies, bringing about a convergence in an international property rule for all human bodies. This Part argues that three sources of law render erroneous the *Hwang Geum Joo* court's implicit recognition of the sovereign prerogative to set liability rules for women and girls forced into prostitution: Japan's ratification of treaties eliminating the sovereign prerogative to set property

17. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); see also Jules Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1336 (1986) ("Under a liability rule, individuals who value entitlements more than those on whom the rights are initially conferred can secure the entitlements without ex ante negotiations: they can compel transfers to themselves and pay damages.").

18. *Id.* at 1092.

19. 26 F.3d 1166 (D.C. Cir. 1994).

20. *Id.* at 1172 (noting that "the question is ... a close one, viz whether to pierce the sovereign veil, lest the purpose of the statute be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party"). The *Princz* court based its dismissal on grounds the *Hwang Geum Joo* court never reached, the failure to show the requirement of "direct effect in the United States" in the third clause of 28 U.S.C. § 1605(a)(2)’s waiver of sovereign immunity. *Id.* at 1172-73.
and liability rules for women’s bodies; the United States’ signing of the Convention to Eliminate All Forms of Discrimination Against Women; and the Thirteenth Amendment to the U.S. Constitution.

Methodologically, this Comment aims to deliver an objective analysis, aided by some terms associated with economic analysis. While this goal diverges from the feminist belief in “permanent partiality,” this paper does embrace the melding of techniques and readiness to recognize gendered inequalities in purportedly neutral bodies of law that distinguish feminist analyses. Though acknowledging that economic analysis is vulnerable to many of the critiques employed by feminist authors towards international law’s institutions and elites, this Comment finds a male-shaped lense useful to explain male-shaped international law and analysis. While law is not neutral, objective or rational, the description and understanding of its impact may be based on rational, objective inquiries and modes of analysis.

II. STATE-SPONSORED COMMODIFIED SEXUAL SLAVERY AND ITS AFTERMATH: DOCTRINAL REVERSION

A. Commodified Sexual Slavery at the Point of a Sword

_Hwang Geum Joo v. Japan_23 has its origins in Imperial Japan’s perpetuation of a system of commodified rape centers to service its soldiers in the World War II era. This system of forced prostitution was “unparalleled in history” in terms of sheer systematic planning, conscription, and brutal administration by a state, though “chilling parallels” exist to the rape centers where thousands of Bosnian women suffered in the 1990s.25 More than 200,000 women were forced into commodified sexual slavery, including those trafficked from their nations to other occupied territories.27 The first “comfort house,” a misleading euphemism for a brutal pay-to-rape center, was established in 1932.28 After the infamous “Rape of Nanjing” in 1937, where

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22. Economic analysis is one of the archetypical disciplines adopting scientific rationality towards the law, making it vulnerable to feminist critiques that it reproduces a masculine type of reasoning. See id. at 615 (citing study by Carol Gilligan of male and female ways of thinking that characterized the male mode of thinking “in abstract terms of right and wrong, fairness, logic, rationality, winners and losers, ignoring context and relationships” and arguing that “[i]f legal reasoning simply reproduces a masculine type of reasoning, its objectivity and authority are reduced”). Moreover, the perpetuation of economic analysis and its continued practice was and is dominated by men. Cf. id. at 621-22 (critiquing international law’s decision-makers and institutions as dominated by men).


24. DAVID BOLING, MASS RAPE, ENFORCED PROSTITUTION, AND THE JAPANESE IMPERIAL ARMY: JAPAN ESCHews LEGAL RESPONSIBILITY? 6 (3 Occasional Papers/Reprints Series in Contemporary Asian Studies 1995). See also Update to the Final Report on Slavery, supra note 4, at 17 (terming Imperial Japan’s comfort women system “[o]ne of the most egregious documented cases of sexual slavery . . . which in its totality constitutes crimes against humanity”).

25. YOSHIK, supra note 2, at 19.


27. See, e.g., JAPAN’S WAR RESPONSIBILITY, supra note 5, at 10 (describing orders for trafficking of women and girls out of their home country to military zones).

28. Id. at 2.
Japanese soldiers mass raped, tortured and killed thousands of Chinese women and men, the establishment of commodified rape facilities in Japan’s military theater accelerated.29

Japan gave several reasons for its use of the women: to prevent espionage and the leak of military secrets feared to ensue from use of uncontrolled private brothels; to provide “comfort” to Japanese soldiers given virtually no leave; to prevent Japanese soldiers from raping women in occupied territories; and to control outbreaks of venereal disease.30 The commander of the Japanese Eleventh Army reported “almost all units are accompanied by comfort women corps.”31 To aid in its invasion of China, which ultimately weakened the Nationalist government and helped boost Communists into power, Imperial Japan by 1939 was importing as many as one woman for every hundred soldiers into occupied areas.32 The races and nationalities of the women ranged from Caucasian to East and South Asian, including Korean, Taiwanese, Japanese, Chinese, Filipina, Indonesian, Vietnamese, Indonesian, Dutch, Malaysian, Thai, Burmese, Indian, Eurasian, and Australian.33

The women were referred to as “public toilets” and listed on military supply lists as ammunition.34 Soldiers paid for each woman in a price scaled according to purported ethnic inferiority,35 and waited their turn in line.36 The army’s accounting school taught how to allocate use of women in “comfort stations” in a manner akin to planning efficient use of exhaustible resources. In a 1930 interview, Shikanai Nobutaka, an army accounting officer described his studies:

[W]e estimated the endurance of the women rounded up in local areas and the rates at which they would wear out. We analyzed which women were strong or weak in those areas, and then had to go so far as to determine “how long they would be in use” from the time soldiers entered the rooms until they left—how many minutes for commissioned officers, how many minutes for noncommissioned officers, how many minutes for soldiers . . . . We set different prices for different ranks and prices for overstaying.37

The Japanese army issued regulations concerning the percentage of fees that the women could retain.38 The amount women actually kept often was close to zero because of purported cash advances for the costs of clothing, cosmetics, medical treatment for illness or pregnancy, and pretextual forced savings or contributions to “national defense.”39

29. YOSHIMI, supra note 2, at 49-51.
30. Id. at 60, 72; JAPAN’S WAR RESPONSIBILITY, supra note 5, at 4-5.
31. YOSHIMI, supra note 2, at 66 (quoting Okamura Yasuji, commander of the 11th Army in 1938).
32. Id. at 56 (quoting Matsumura Takeshi, chief of the Medical Section in the 21st Army).
33. JAPAN’S WAR RESPONSIBILITY, supra note 5, at 3.
34. BOLING, supra note 24, at 9.
35. JAPAN’S WAR RESPONSIBILITY, supra note 5, at 36.
36. See YOSHIMI, supra note 2, at 130 for a photograph.
37. Id. at 61-6 (describing interview with Nobutaka).
38. Id. at 142.
As demand grew with the number of Japanese soldiers involved in expanding invasions, “comfort women” were “recruited” through fraud, debt bondage and brutal kidnappings often accompanied by murder, torture and rape. Many girls were under the age of eighteen, as underage girls were preferred because, among other things, they were unlikely to carry disease. In occupied villages, local leaders were forced to round up women and girls and turn them over to the occupying Japanese. Some recruiters lured women and girls with promises of jobs in war industries. Some of the recruitment practices paralleled debt bondage. Women were told that their transportation to the brothel and medical treatment were debts incurred, and that they could not leave until all their debts were repaid through prostitution.

The events related by the plaintiffs in the Hwang Geum Joo complaint illustrate the cruelties of the “recruitment” process. For example, plaintiff Maxima Regala de la Cruz was abducted from her town in the Philippines along with her mother, transported to a Japanese garrison, raped at saber point by a Japanese soldier, and thereafter forced into commodified sexual slavery along with her mother. A Japanese military officer abducted plaintiff Kim Boon-Sun from her village in South Korea when she was fifteen years old, and transported her on a ship with other young girls to Taiwan and later the Philippines, where she was forced to provide sexual service to fifteen to twenty soldiers a day, and sometimes more on weekends. Plaintiff Zhu Qiaomei was among seven women in her village who were forced to become comfort women when her village fell to the Japanese. The women were forced to report to work at a nearby comfort station or were raped in their homes by Japanese soldiers. Plaintiff Zhu was raped throughout a pregnancy and after giving birth. Ten-year old Narcisa Claveria was abducted by Japanese soldiers to serve as a “comfort woman” after soldiers tortured her father to death, raped her mother, and bayonet her eight-year-old sister in front of her.

Comfort women who refused to serve soldiers often were beaten or forced to submit at the point of a sword. The number of men each woman served varied by location and time, but ranged from a few to seventy soldiers a day. Military doctors examined the women for venereal diseases every week to ten days, but took “little notice of cigarette burns, bruises, bayonet...
stabs and even broken bones" that were a consequence of the sexual servitude. Some women stricken with disease were killed. A U.N. Special Rapporteur reported that one Korean comfort women who contracted venereal disease was "sterilized" by insertion of a hot iron bar into her vagina.

As a result of the brutality, women attempted suicide and escape. Escape attempts, however, drew greater brutality, torture and murder, with other comfort women forced to witness punishments. For example, one Korean woman who asked why she and other women at her "comfort station" were forced to serve as many as forty men a day was beaten with a sword, stripped, tied, and then rolled over a board covered in nails until the nails were red with her blood and torn flesh. She was then decapitated. One of the Japanese officers told the women forced to watch that "it's easy to kill you all, easier than killing dogs," and suggested that the dead girl's flesh be boiled and the survivors forced to eat it. A new woman at the commodified rape center who resisted by biting a soldier was decapitated and hacked into pieces while other women were forced to watch.

When the Japanese surrendered in World War II, soldiers reportedly murdered many of the remaining comfort women. Less than 30 percent of the women survived the war, according to estimates by some historians. The number of survivors is currently estimated as in the hundreds, compared to the more than 200,000 estimated as forced into prostitution.

B. Struggle for Justice Against a Political Tide

The crimes against the few survivors of the brutal sexual servitude remain largely unremedied and unacknowledged. The only tribunal that punished perpetrators of sexual slavery was a Dutch Military Tribunal in Indonesia, which prosecuted Japanese soldiers for using thirty-five Dutch women as sex slaves in the former Dutch East Indies (now Indonesia). Initially, Japan denied involvement. Japanese officials did not begin acknowledging some involvement in operating "comfort stations" until 1992. In one of his last official acts, former Prime Minister Miyazawa

52. Id. at 15 (reporting testimony of survivor Hwang So Gyun).
53. Id. at 14 (reporting testimony of survivor Chong Ok Sun).
54. Id. at 10.
55. Id. at 14.
56. Id. at 15 (citing testimony of survivor Hwang So Gyun).
57. Id. at 7. For example, in one case from Micronesia, the Japanese Army killed 70 women in one night, "because they felt the women would be an encumbrance or an embarrassment were they to be captured by the advancing American troops." Id.
58. BOLING, supra note 24, at 8.
59. See supra note 26 and accompanying text.
60. Update to the Final Report on Slavery, supra note 4, at 17 ("The atrocities against the so-called "comfort women" remain largely unremedied. There has been no reparation to the victims: no official compensation, no official acknowledgment of legal liability, and no prosecutions.").
61. BOLING, supra note 24, at 13.
62. Id. at 14.
acknowledged that Imperial Japan condoned the brothels, but did not describe the act as a war crime. Japan never paid reparations to the few surviving comfort women, though in 1995 it did invite private citizens to contribute to the Asian Women’s Fund. Historian Yoshiaki Yoshimi reported that “[m]any suspect that, in order to preserve its official position and avoid being pressed by the UN Human Rights Commission, the government has come to rely on this vague means of ‘settling’ the issue.” Japan continues to deny legal responsibility, arguing that the women consented to being used and therefore have no right to reparations under international law.

Stonewalled in Japanese courts, which have echoed the Japanese government’s position that Japan bears neither legal responsibility nor moral obligation to pay reparations, the survivors’ only vindication is a panel initiated and convened by nongovernmental organizations, which delivered a powerful statement that unfortunately had no legal force. The Women’s International War Crimes Tribunal deliberated over evidence brought by prosecution teams from ten countries: North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands. Japan refused to enter an appearance. After four days of trial, the tribunal, composed of a former president of the International Criminal Tribunal for Yugoslavia from the United States, an international law scholar from the United Kingdom, an Argentine criminal law judge, and a Kenyan human rights lawyer, found Emperor Hirohito guilty on the basis of command responsibility, and Japan guilty of violating customary international law and its treaty obligations for slavery, forced labor, trafficking and rape amounting to crimes against humanity. Although this ruling has no legal force, it gives a detailed analysis of the state responsibility of the government of Japan and of the individual criminal culpability for those accused under law existing at the time the crimes were committed. The forum also allowed an airing of the

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64. BOLING, supra note 24, at 15.
67. YOSHIKI, supra note 2, at 24.
68. Chinkin, supra note 66, at 335. Yoshimi observed that while the Japanese government invited private citizens to donate to a private fund for victims of its state-sponsored prostitution, it has been careful to avoid legal culpability:

[T]he government has been able to maintain its position of not paying out even one yen in reparations. This also leaves the government free to emphasize in private that while it does have some ‘moral responsibility’ to former comfort women, the brunt of that responsibility lies with private citizens. The government’s acknowledgement of moral responsibility is merely the flip side of its insistence that it has no legal responsibility.

YOSHIKI, supra note 2, at 24.
69. See YOSHIKI, supra note 2, at 28-29 for a discussion of Japanese courts that have refused to rule that Imperial Japan bears legal responsibility for state-sponsored forced prostitution, nor a responsibility to offer reparations. One court did find legal responsibility to enact legislation to afford compensation, but the decision was overturned by the Japanese High Court, which held that Japan is not legally responsible to offer either an apology or monetary reparations. High Court Reverses Ruling Favoring Comfort Women, DAILY YOMURI, Mar. 30, 2001, at 1.
70. Chinkin, supra note 66, at 336.
71. Id. at 338 (describing interim judgment).
grave injustices experienced by the “comfort women.” The failure of the international community to secure these women a legal forum for evaluation of this testimony and delivery of a ruling binding upon the government of Japan represents a profound denial of justice continuing to the present day.

C. Turn to U.S. Court: Hwang Geum Joo and its Holding on the Commercial Activity Waiver of Foreign Sovereign Immunity

Fifteen survivors brought suit in a Washington, D.C. district court on behalf of themselves and those similarly situated against the government of Japan, only to hit another wall: dismissal of the complaint on grounds of sovereign immunity and the political question doctrine. The plaintiffs proposed three grounds for waiving sovereign immunity, and the court rejected each one. This Comment is concerned with the Hwang Geum Joo court’s holding that commodified sexual slavery does not meet the test for the commercial activity waiver to the waiver of foreign sovereign immunity in the third clause of 28 U.S.C. § 1605(a)(2).

The third clause of 28 U.S.C. § 1605(a)(2) waives foreign sovereign immunity for “an act performed outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere...[that] causes a direct effect in the United States.” The Hwang Geum Joo court denied that the allegations of commodified sexual slavery by Imperial Japan were “commercial,” the threshold requirement for the waiver. The court thus did not examine whether the facts alleged by the plaintiffs met the further requirement for satisfying the commercial activity waiver to foreign sovereign immunity of “direct effect in the United States.” This Comment confines itself to discussion of the Hwang Geum Joo court’s analysis of the threshold question, noting that the plaintiffs made a strong case that the second prong also is satisfied.

75. Hwang Geum Joo, 172 F. Supp. 2d, at 63.
76. The Foreign Sovereign Immunities Act defines “United States” as including “all territory and waters, continental or insular, subject to the jurisdiction of the United States.” 28 U.S.C. § 1603(c) (1994 & Supp. V 1999). Plaintiffs argue that the establishment of comfort houses on the island of Guam and the islands of the Philippines that became U.S. territories after the close of the Spanish-American War in 1898 constituted direct effect in the United States. Moreover, they contend that Japan’s surrender of Korea south of the 38th north latitude and adjacent islands, the Philippines and other lands where recruitment and commodified sexual slavery occurred to the United States further satisfies the “direct effect” requirement. Pl.’s Mot. for Declaratory J., supra note 1, at 34-36. Because the District Court neither addressed this question nor adduced enough facts for a circuit court to rule on the issue, this question should be remanded for consideration. See Janini v. Kuwait University, 43 F.3d 1534, 1537 (D.C. Cir. 1995) (remanding case back to district court to adduce further facts concerning whether allegations met the “direct effect” requirement after reversing lower court’s erroneous dismissal of the case on the threshold question of whether the allegations constituted commercial activity).
1. The Clear Case for a Waiver of Sovereign Immunity for Commodified Sexual Slavery

Court precedents and legislation concerning the proper inquiry for what constitutes a commercial activity strongly support an argument that commodified sexual slavery qualifies as a "commercial activity" under 28 U.S.C. § 1605(a)(2). United States Supreme Court and D.C. Circuit precedents firmly hold that the test for whether an alleged activity qualifies as a "commercial activity" depends on whether the action is of the type in which private parties engage in commerce.77 As expressly set forth in 28 U.S.C. § 1603(d), whether an activity qualifies as commercial "shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 78 Accordingly, court precedents firmly establish that the motive of the state in engaging in the alleged activity is irrelevant to the inquiry, as is the lack of profit-seeking motive or consideration for the act.79 A now classic example of how a court disregards motive in the inquiry of whether the alleged activity is one in which a private actor may engage is the Supreme Court's hypothetical of a contract to buy bullets or boots during a war. Because a private party may similarly buy goods via contracts, the activity qualifies for a waiver, despite the sovereign motivation of war-making.80 Another easy illustration of the correct inquiry is the Ninth Circuit's holding that a cultural program sponsored by Taiwan to foster closer relations with Chinese-Americans qualified for the commercial activity exception, because the nature of the activity was similar to activities by private, for-profit tour groups.81 The complete lack of either profit motive or actual profit, the fact that Taiwan actually spent its resources to fund the activity rather than turned a profit, and the sovereign motive of fostering closer ties were irrelevant.82

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77. Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992) ("[W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA."); accord Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167 (D.C. Cir. 1994) ("Putting aside for now the relationship between purpose and context, we take from Weltover the key proposition that in determining whether a given government activity is commercial under the act, we must ask whether the activity is one in which commercial actors typically engage.").
79. The Supreme Court stated in Weltover that:
[B]ecause the [Foreign Sovereign Immunities] Act provides that the commercial character of an act is to be determined by reference to its ‘nature’ rather than its ‘purpose,’ 28 U.S.C.A. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce.’
Wellover, 504 U.S. at 614 (first emphasis added). Later in the decision the Court emphasized that "[c]ommercial activity does not require the receipt of fair value, or even compliance with the common-law requirements of consideration." Id. at 616 (1992).
80. Weltover, 504 U.S. at 614-15; accord Cicippio, 30 F.3d at 166.
81. Sun v. Taiwan, 201 F.3d 1105, 1107-08 (9th Cir. 2000) (O'Scannlain).
82. Id.
According to this logic, trafficking in women for sexual purposes and commodified sexual slavery clearly qualify for the commercial activity waiver to foreign sovereign immunity, as akin to activities in which private actors engage for profit. Sex trafficking and forced prostitution were lucrative trades for private actors in the early 1900s, including for many in Japan. Japan's early private trade in commodified female flesh shows strong parallels with the comfort women system that soon followed. Karayuki-san, the Japanese term for prostitutes that worked abroad in the pre-World War II era, contained among their ranks children sold into sexual slavery by poor families. Japanese men working abroad realized they could profit by shipping Japanese women abroad to serve the colonizing Japanese elites, creating an industry of about 20,000 women registered as overseas prostitutes in 1910, according to government statistics. The system was an outgrowth of a domestic system of "officially condoned" prostitution and brothels opened by ronin, masterless or unemployed samurai, that also marketed "girls and young women sold into sexual servitude by parents desperate for cash," or tricked into forced prostitution with the promise of a nonsexual job. Concerned about prestige costs, by 1920 the Japanese government ordered the repatriation of all Japanese prostitutes. The key parallels between the private, commercial karayuki-san and the comfort women system remain, however. As one scholar noted: "Just as the karayuki-san formed the vanguard of colonial and commercial expansion, 'military comfort women' (jugun ianfu) were in the vanguard of Japanese military forces in Asia... Eighty percent of comfort women were between fourteen and eighteen years old, and the

83. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION at 4, U.N. Doc. ST/SOA/SD.8 (1959) [hereinafter STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION]. The study quoted the 1927 findings of an investigation by the League of Nations' Special Body of Experts relating to traffic in persons in twenty-six nations: [R]eliable information has been obtained from certain countries which justifies the belief that a traffic of considerable dimensions is being carried on. Many hundreds of young women and girls—some of them very young—are transported each year from one country to another for purposes of prostitution. Id.


85. See, e.g., Karen Colligan-Taylor, Translator's Preface and Acknowledgement to YAMAZAKI TOMOKO, SANDAKAN BROTHEL NO. 8: AN EPISODE IN THE HISTORY OF LOWER-CLASS JAPANESE WOMEN, at ix (Karen Colligan-Taylor, trans., 1999) (describing the chronicle of a Japanese woman born at the turn of the century and sold into prostitution in North Borneo).


87. Id. at xxii.
88. Id.
89. Id. at xvi, xxi.
majority were deceived or kidnapped in the same manner as were young Japanese women who became *karayuki-san* in earlier decades.\textsuperscript{90}

Commodified sexual slavery was also recognized as a problematic commercial activity in the United States by the early 1900s. As early as 1909, Americans expressed consternation over the practice of "white slavery." The term was used at the time to signify "the forced prostitution of white women and girls by trick, narcotics, and coercion,\textsuperscript{91} essentially commodified sexual servitude and rape by private parties.

Commodified sexual slavery today has exploded national boundaries and control, facilitated by modern means of advertising and transportation that enable the phenomenon of the sex tour package.\textsuperscript{92} Many of those forced into prostitution are children, like many of the comfort women at the time of their first rape. A 1996 Report of the United Nations Special Rapporteur on the Sale of Children and Child Pornography estimated that about one million children in Asia alone are forced into the sex industry, and that the child prostitution industry in 1995 generated about $5 billion globally.\textsuperscript{93} Contemporary methods of recruitment into forced sexual slavery echo some of those used by Japan in the past, including debt bondage, fraudulent promises of wage labor in non-sex industries, and sale of women and children.\textsuperscript{94} Brutal methods of torture, murder and rape used to retain women\textsuperscript{95} also echo the practices used by Imperial Japan not so long ago. Japanese men are among the patrons of today’s sex industry, prompting scholar Suzuki Yoko to suggest that "the modern sex industry, whether it involves the consumption of Asian women by Japanese men at home or abroad, is a contemporary version of the Japanese Imperial Army’s exploitation of Asian women as comfort women," with the only difference being that "the men now wear business suits rather than military uniforms."\textsuperscript{96}

The commodification of women in Imperial Japan’s system of forced sexual slavery is akin to the commodification performed by private profiteers. As discussed in Part II.A, supra, the clientele of the system, Japanese soldiers, paid to rape the “comfort women” held in commodified sexual slavery. Japanese military accounting offices learned how to price and set periods of use for human commodities.\textsuperscript{97} "Comfort stations" were "regarded as merely another amenity"—the convenient location of women, the rape of whom was available for purchase by soldiers in the military theater.

\textsuperscript{90} Id. at xxv.

\textsuperscript{91} FREDERICK K. GRIFFNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW 3 (1990).

\textsuperscript{92} See JEREMY SEABROOK, NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION 121-22 (2000) (explaining that Internet advertising and the increase in cheaper intercontinental air travel facilitate child sex tourism).

\textsuperscript{93} See id. at 121 (citing figures from a 1996 United Nations Commission on Human Rights report).

\textsuperscript{94} See id. at 121 (citing figures from a 1996 United Nations Commission on Human Rights report).

\textsuperscript{95} Colligan-Taylor, supra note 86, at xxvi-xxvii (paraphrasing Yoko’s reasoning).

\textsuperscript{96} Report on the Mission to the Democratic Republic of Korea, supra note 39, at 6.
The D.C. Circuit has stated in a majority opinion by Judge Silberman that the illegal character of an act is probably not a bar to sovereign immunity, despite contrary rulings from other circuits. The court gave two grounds for this assertion. First, "all causes of action can be thought, in some sense, to accuse a defendant of acting unlawfully." Second, and more importantly, the court observed that the Supreme Court, in *Saudi Arabia v. Nelson*, had eschewed the reasoning of past courts that illegal activities are not commercial *per se*, though the approach "offered the most obvious line of analysis." The issue of the legality of the allegations was not significant to the *Hwang Geum Joo* court's rejection of the commercial activity waiver of foreign sovereign immunity. Because this Comment's concern is with a historical inequity in international law reflected in the logic of the district court's commercial activity reasoning, this Comment accepts Judge Silberman's reasoning and does not argue the issue further, except to note that many of the most profitable commercial activities for private actors are illegal.

2. The *Hwang Geum Joo* Court's Converse Commercial Activity Holding

The *Hwang Geum Joo* court dismissed the suit on summary judgment, however, with only a fleeting mention of the commodification of forced rape, and no recognition of the troubling parallels between Imperial Japan's system of forced sexual slavery and the trafficking of women in the private sector. Rather, the *Hwang Geum Joo* court held that since Japan (1) used resources like transportation, construction crews and material, (2) to further a system established for the benefit of soldiers, and (3) abducted women from occupied countries, the allegations amounted to an abuse of military power or a potential "war crime" or "crime against humanity," but "not in connection with a commercial activity."

Which of the factors persuaded the court is unclear in the court's ultimately cryptic reasoning that "[a]s plaintiffs correctly recognize, this system 'required' the resources at the government's disposal. Such conduct is not typically engaged in by private players in the market." The observation that in their massive scale and impact, the activities could constitute a "war crime" or "crime against humanity" certainly is no bar to the application of the commercial activity waiver, if, pursuant to 28 U.S.C. § 1603(d), the nature of the course of conduct—commodification of

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99. Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 168 (D.C. Cir. 1994) (reasoning that the Supreme Court, in its analysis in *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993), did not hold that the illegality of wrongful imprisonment and torture prevented them from being proper subjects for the application of the commercial activity exception, but rather that the exercise of police power is a sovereign prerogative).
100. Id. at 167.
101. Id.
102. Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52, 64 (D.D.C. 2001) ("The mere fact that soldiers allegedly paid money in order to access 'comfort stations' is insufficient to justify characterizing the challenged conduct as commercial in nature.").
103. Id. at 63-64.
104. Id.
sexual slavery—is one in which private actors engage. For example, in *Princz v. Federal Republic of Germany*,105 the D.C. Circuit refrained from ruling that the leasing of Holocaust-era Jewish slaves to industrial concerns by Germany was not a commercial activity, noting that "the question is . . . a close one, viz. whether to pierce the sovereign veil, lest the purpose of the statute be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party."106

Nor is the grand scale of the activity, when fueled by the sovereign power of the state, sufficient grounds for refusing to apply the commercial activity waiver of foreign sovereign immunity. The large scale is due to the state marshaling its competitive advantages in contracting. The framers of the 1976 Foreign Sovereign Immunities Act recognized that states increasingly are entering the marketplace and competing with private market players, and codified the restrictive theory of foreign sovereign immunity, under which foreign states are not immune for suits based on their commercial or private acts.107 The 1976 Act was aimed at equalizing the market playing field in at least one regard—liability for torts. Imposing a size-of-the-enterprise inquiry also creates perverse incentives. The more egregious the state’s abuse of its competitive power, the greater the probability for commission of a tort based on expanded activities. In the case of an activity with high external costs, the greater the number of injured people, the more the state would be shielded from the reach of the law.

The remaining possible rationales for holding that commodified sexual slavery by Imperial Japan did not constitute a commercial activity are even weaker. If the court was swayed by the fact that the system of commodified sexual slavery was for the benefit of Japanese soldiers, the holding seems contrary to legislation and precedent mandating that the motive of the sovereign is irrelevant to the commercial activity inquiry. If the court was persuaded by the enumeration of inputs by Imperial Japan into the comfort women system—for example, construction crews and materials—the reasoning suggests an internally flawed inquiry into the source of Imperial Japan’s power to carry out its system of commodified sexual slavery. All acts

105. 26 F.3d 1166 (1994).

106. Id. at 1172. The Princz court based its dismissal on grounds the Hwang Geum Joo court never reached, the failure to show the requirement of “direct effect in the United States” in the third clause of 28 U.S.C. § 1605(a)(2)’s waiver of sovereign immunity. Id. at 1172-73. The Hwang Geum Joo plaintiffs made convincing arguments that the direct effect requirement was satisfied. These arguments are described in supra note 76.

107. This is clear from the legislative history:

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. . . . In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill . . . would . . . codify the so-called “restrictive” principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is ‘restricted’ to suits involving a foreign state’s public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

performed by a state, whether contracting to buy bullets, or deciding to default on payments, occur under government authority and power. Under the source of power inquiry, then, no act of state would qualify for the commercial activity waiver to foreign sovereign immunity, though the activity itself may be one a private individual may perform. The reasoning also finds no support, despite repeated references by the Hwang Geum Joo court, in the Supreme Court holding in Saudi Arabia v. Nelson108 that allegations of wrongful police detention and arrest failed to qualify as “commercial activities” because exercise of police power to detain and arrest are uniquely sovereign functions. The Nelson court adhered to the private actor test for commercial activity, reasoning “the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce.””109 No private actor engages in arrest and detention of suspected dissidents or malfeasors in prison for profit. In contrast, as discussed in Part II.C.1, supra, many private actors engage in commodified sexual slavery for profit. The proper inquiry is into the “nature of the course of conduct”110 alleged, not the source of sovereign power or motivation behind the activity.

D. Hwang Geum Joo Rephased: Reversion to the Purported Sovereign Prerogative to Set Liability Rules for Women’s Bodies

The District Court’s ruling may be predicated on reasoning that is less obvious—and less obviously contrary to precedent. The court may have performed the inquiry into the nature of the activity alleged from the perspective of the state, rather than the individuals affected, fading the commodification of sexual slavery from the primary field of vision. At the individual level, the harm was commodified sexual slavery and rape, and the benefit to Japanese soldiers was the use of women’s bodies for pay. From the perspective of states, however, the wrong may be viewed as Imperial Japan usurping the uniquely sovereign activity of setting property and liability rules for women’s bodies from the states that it conquered, a war crime now prohibited by the Geneva Convention.111 That is, the harm may be recharacterized as the usurpation of the right to determine whether the bodily integrity of women within the jurisdiction may be disrupted by commodified sexual slavery and rape without ex ante bargaining, setting a de minimis liability rule that has the effect of regularizing and facilitating an activity that brutalizes women’s bodies.

109. Id. at 360-61.
111. See YOOGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 43 (1982) (describing art. 27(2) of the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, as prohibiting rape and enforced prostitution “in all places and in all circumstances”). Under the Geneva Convention, “women[, ] whatever their nationality, race, religious beliefs, age, marital status or social condition[, ] have an absolute right to respect for their honour and their modesty; in short, for their dignity as women.” Id.
In their seminal formulation, Calabresi and Melamed described a property rule as one that forbid the taking of a resource without *ex ante* bargaining that leads to consent:

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. . . . It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.\(^{112}\)

A liability rule permits someone to:

destroy the initial entitlement if he is willing to pay an objectively determined value for it. . . . This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder’s complaint that he would have demanded more will not avail him once the objectively determined value is set.\(^{113}\)

This Comment uses the term de minimis liability rule to describe an extreme version of a liability rule, in which the state sets no *ex post* penalty for a destruction of an entitlement, effectively setting the value of the entitlement at zero.

In the context of prohibitions against the use of women’s bodies as a depersonalized commodity, a property rule would forbid forced prostitution, which fails to allow for *ex ante* bargaining, but allow consensual prostitution, assuming that despite socioeconomic coercion, such a thing is possible. A liability rule would allow forced prostitution with *ex post* compensation, as set by the state, while a de minimis liability rule would permit forced prostitution with no compensation, setting the victim’s entitlement to bodily integrity at zero.

The usurpation of the conquered state’s power over its women is a repossession of the women by the conquering state and disruption of the initial allocation of property entitlements in her bodily integrity possessed by her society, husband and family relations, as set by the defeated state. These property entitlements in the woman had the derivative effect of property protections for the woman, rendering her body inviolate without *ex ante* bargaining. Note that under the sovereign prerogative to set liability rules for women’s bodies, the conquered state was free to tolerate a liability rule for women who fell out of the regime of property entitlements in the woman’s sexuality, i.e., by seduction or rape and continued rape during forced prostitution.

Under military conquest, women in conquered states were no longer protected even by kinship or marital ties; they could be seduced, raped, or subjected to continued rape during forced prostitution. The previously existing regime of property entitlements in the woman’s sexuality could be ignored by the conquering Imperial battalions. The benefit to Japan was the conversion

\(^{112}\) Calabresi & Melamed, *supra* note 17, at 1092.

\(^{113}\) *Id.*
and exercise of this seized prerogative, without the constraints of recognizing initial allocation of property entitlements in the women and the vestigial property protections vested by the defeated states. Arguably this seizure of sovereign prerogative constitutes the kind of dealings between states that the D.C. Circuit has held is a uniquely sovereign activity protected by sovereign immunity. In light of the persistence of the sex industry discussed above, however, this statist perspective seems strained. In describing the creation of “comfort stations” as an abuse of power made possible by military conquest and might, the court essentially opted not to see the effect of the activity alleged on its human victims, and its parallels to commodified rape by private actors.

This interpretation of Hwang Geum Joo raises the complicated question of whether courts should recognize a sovereign prerogative to set property and liability rules for women’s bodies. If no such prerogative exists, no interchange of prerogatives between sovereigns occurred, and the court must view the acts alleged in Hwang Geum Joo for what they are—commodified mass rapes that qualify for the waiver of foreign sovereign immunity under 28 U.S.C. § 1605(a)(2), as discussed in Part II.C.1, supra. Arguably this determination may depend upon understanding the way that forced prostitution has been treated under international law, both today and during World War II. The sections that follow argue that, although at one time a sovereign prerogative to set liability rules for use of women’s bodies may have existed under international law, today international law, as recognized by Japan, outlaws forced prostitution.

III. The Era of the State Prerogative to Set Initial Property and Liability Rules for Victims of Commodified Sexual Slavery

Historically, treaties distinguished between sex trafficking, forced prostitution, and slavery, creating a hierarchy of protections for enslaved human beings. The definition of “slavery” that was the subject of early treaties emerged from the experience of the Atlantic slave trade, which trafficked in African human beings. While Atlantic slavery did result in many rapes and sexual abuses of women, sex trafficking and forced prostitution “[s]ince the early 1900s . . . have been treated by the international community as distinct

114. Cf. Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 168 (D.C. Cir. 1994) (“When two governments deal directly with each other as governments, even when the subject matter may relate to the commercial activities of its citizens or governmental entities, or even the commercial activity conducted by government subsidiaries, those dealings are not akin to that of participants in a marketplace.”). The Hwang Geum Joo court considered Cicippio in its commercial activity discussion, Hwang Geum Joo, 172 F. Supp. 2d at 62-63, 64, though it did not explicitly cite this passage from Cicippio.

115. See supra notes 92-96 and accompanying text.

116. See Rassam, supra note 13, at 329 (“[T]he nineteenth-century customary international law arising in specific response to the Atlantic chattel slave trade.”).

117. See, e.g., Neal Kumar Katyal, Note, Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution, 103 YALE L.J. 791, 796-803 (1993) (describing sexual abuses of antebellum slaves, and “fancy-girl markets,” where the sexuality of certain women and girl slaves was commodified to command a higher price).
from other forms of slavery and slave-like practices, even though they give rise to similar effects.”

Slavery was defined in Article 1 of the 1926 Convention to Suppress the Slave Trade and Slavery\footnote{September 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, 255 [hereinafter 1926 Slavery Convention].} as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,” a definition at once narrow, because all rights of ownership must be exercised, and open-textured, because it was unclear what “all rights” signified.\footnote{Rassam, supra note 13, at 337.} Usage in treaty law, however, clearly distinguished sex trafficking from forced prostitution by the term “white slavery,” though not all women so used were Caucasian. The term suggested a racial valuation for flesh commodities that were the object of sexual desire, reflecting social mores regarding which races were appropriate objects for sexual coupling. Sex trafficking and forced prostitution were the subjects of separate treaties\footnote{Rassam, supra note 13, at 337.} and international proscription evolved more slowly than prohibition of Atlantic slavery, a phenomenon that disproportionately impacted women and girls.

Yet forced prostitution shares the most fundamental characteristic of slavery—use of a human’s body against his or her will, with the additional indignity of the commodification of this use—as implicitly acknowledged even in differential treaties by the term “white slavery.” Forced prostitution, as sexual use of a human against his or her will, also constitutes rape, leading this Comment to use the term “forced prostitution” interchangeably with “commodified sexual slavery” and “commodified rape,” though preferring the latter two terms as more accurate when not discussing treaty provisions. Because of the commonality, it is no surprise that both sexual slavery and Atlantic slavery faced the same conceptual roadblocks to proscription, albeit in different eras. International law asserts a private/public distinction regarding proper objects of international legislation and control, a distinction that often has operated to exclude problems that women face at the hands of nominally private actors abetted by the neglect of state actors.\footnote{Charlesworth et al., supra note 21, at 625.} International law imposes artificial conceptual distinctions between “matters of ‘public’ concern, and matters ‘private’ to states that are considered within their domestic jurisdiction.”

Still, Atlantic slavery was considered a sufficient affront to natural law conceptions that by 1928 it was considered a violation of the “Law of Nations,” defined then as “a product of Christian civilization and represent[ing] a legal order which binds States, chiefly Christian, into a community.”\footnote{Oppeheim, supra note 12, § 292, at 523.} International scholar Bonfils argued that international law condemned slavery, reasoning that slaves became free when they set foot in a

\begin{itemize}
  \item \footnote{Rassam, supra note 13, at 337.}
  \item \footnote{September 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, 255 [hereinafter 1926 Slavery Convention].}
  \item \footnote{Rassam, supra note 13, at 337.}
  \item \footnote{Charlesworth et al., supra note 21, at 625.}
  \item \footnote{Id.}
  \item \footnote{Oppeheim, supra note 12, § 292, at 523.}
\end{itemize}
country that rejected slavery. Treatise writer Oppenheim disagreed with Bonfils, stating famously, "[I]t is difficult to say that customary International Law condemns two of the greatest curses which man has ever imposed upon his fellow-man, the institution of slavery and the traffic in slaves." He noted that multilateral and bilateral efforts at stamping out slavery were not sufficient to make the traffic in slaves a crime jure gentium, which would be repressible by any state regardless of the nationality of the offender.

Several multilateral and bilateral treaties were in place by 1926, however, that outlawed slavery. The Treaty of Paris of 1814 between Great Britain and France represented one of the earliest bilateral efforts. Among the most widely subscribed treaties was the Convention of St. Germain of September 10, 1919, which "endeavored to secure the complete suppression of slavery and of the slave trade by land and by sea." By 1926, the Convention was signed by the United States, Belgium, the British Empire, France, Italy, Japan, and Portugal, and accepted in advance by Germany, Austria, Bulgaria and Hungary in the Treaties of Peace. Most significantly, the Slavery Convention of 1926, with nineteen signatories by 1928, bound parties:

(a) To prevent and suppress the slave trade;
(b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.

In contrast to the prohibitions on slavery, forced prostitution was submerged as a private issue of domestic jurisdiction until 1949. Early conventions focused on the recruitment, or corruption of women, and ceased their reach when the women were successfully forced into prostitution, becoming besmirched beyond the reach of international law. Parties to the 1904 International Agreement for the Suppression of the White Slave Traffic agreed to set up watch at points of departure to gather data on women and girls being trafficked abroad for "immoral purposes." Parties to the 1910 International Convention for the Suppression of the White Slave

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125. Id. § 340h, at 590 n.1.
126. Id. § 340h, at 590.
127. Id. Compare the later naming of the eradication of slavery as an example of a legal obligation erga omnes, referring to legal rights that are "the concern of all states," and so important that "all states can be held to have a legal interest in their protection." Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 33 (second phase) (judgment of Feb. 5).
128. OPPENHEIM, supra note 12, § 340h, at 590.
129. Id. at 591.
130. Id. at 591 n.2.
131. 1926 Slavery Convention, supra note 119.
132. OPPENHEIM, supra note 12, § 340h n.3, at 590.
133. 1926 Slavery Convention, supra note 131, art. 2.
136. Id. art. 2.
De Minimis Liability Rules for Sexual Slavery

Traffic pledged to punish one who, "to gratify the passions of others, has by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed a woman or girl of full age for immoral purposes."\(^{137}\) Those who "hired, abducted or enticed" minors for "immoral purposes" would be punished regardless of consent.\(^{138}\) A minor was one under twenty years of age.\(^{139}\) The Final Protocol to the 1910 Convention expressly stated that "[t]he case of the retention, against her will, of a woman or girl in a house of prostitution could not, in spite of its gravity, be included in the present Convention, because it is exclusively a question of internal legislation."\(^{140}\) A 1921 Agreement under the auspices of the League of Nations extended the protections of the 1904 and 1910 Conventions to minors of either sex, and raised the age of protection for minors to twenty-one.\(^{141}\) The 1933 International Convention for the Suppression of the Traffic in Women of Full Age punished the "procuring, enticing or leading away, even with her consent, a woman or girl of full age, for immoral purposes to be carried out in another country."\(^{142}\)

Each of these treaties protected the initial allocation of property interests in women accorded by the sovereign state to its citizens, refraining from interference in domestic decisions concerning the allocation of liability and property rules for different classes of women. The concern animating the pre-World War II treaties was against disruption of the initial allocation of property rights in women. Norma Deitleiner has noted the implicit distinction between "women who have not yet fallen prey to 'the procuration... with a view to their debauchery in a foreign country' and therefore must be protected from being approached, and those foreign women 'who surrender themselves to prostitution' and will eventually be repatriated."\(^{143}\) The repatriation provisions of the 1904 Convention illustrate that the motivation behind this distinction is restoration of the initial state allocation of property rights in women. Article 3 of the Convention provides "[t]he Governments also undertake, within legal limits, and as far as possible, to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them."\(^{144}\) Article 4 of the Convention elaborates on the theme in Article 3 of restoring property interests in the woman to "persons exercising authority over them":

Where the woman or girl to be repatriated cannot herself repay the cost of transfer, and has neither husband, relations, nor guardian to pay for her, the cost of repatriation shall be

\(^{137}\) 1910 Convention, \textit{supra} note 14, art. 2.
\(^{138}\) \textit{Id.} art.1.
\(^{139}\) \textit{STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION,} \textit{supra} note 83, at 1.
\(^{144}\) 1904 Agreement on White Slave Traffic, \textit{supra} note 135.
borne by the country where she is in residence as far as the nearest frontier or port of embarkation in the direction of the country of origin; and by the country of origin as regards the rest.\footnote{145}

The preoccupation of these provisions is restoring initial property entitlements in the woman allocated by the sovereign state to her husband, relations or guardians—and failing that, the state, who owns her in the sense that it can set property or liability rules regarding her person.

Scholars that co-authored a report for the Center for Research and Documentation on Japan’s War Responsibility argue that Imperial Japan primarily used women taken from occupied territories in their “comfort stations” in part because the nation was a signatory of the 1910 Convention and thus legally prohibited from trafficking in Japanese women and children for the purposes of prostitution, though not against trafficking women and children in colonies.\footnote{146} In essence, Imperial Japan bound itself to recognize initial entitlements in its citizens, but was free to disrupt entitlements set by states it invaded and occupied.

The 1910 Convention expressly relegates forced prostitution—the actual act of sexual enslavement, rather than the disruption of initial, domestically determined distinctions between pure and debauched woman—to domestic law. Expressed alternatively, it is the state’s prerogative to determine whether the woman shall be protected by an inalienability rule, property rule, or liability rule. In contrast, when states forbade slavery by treaties in the early 1900s, they were binding themselves to a multilateral property norm for human bodies and their labor. Bodies could not be possessed, and labor forced without bargaining \textit{ex ante} as to a price. States acknowledged that the natural law prohibition against slavery rendered the matter a proper subject of multilateral bargaining and agreements that would accrete to become customary international law and obligations \textit{erga omnes}.\footnote{147} States were acknowledging, in the terminology prevalent in 1928, that slavery was an affront to the Law of Nations, such that the prerogative of individual states to permit it properly could be curtailed. The relegation of forced prostitution to the private sphere, as a domestic matter improper for multilateral prohibition thus created an exception to the multilateral property rule norm for human bodies that developed as a response to Atlantic slavery. This exception disproportionately affected female bodies.

Under this exception, the setting of property or liability rules for female bodies was a prerogative of the state. Forced prostitution without \textit{ex ante} compensation and consent but with state-set \textit{ex post} compensation created a liability rule for female bodies. As was often the case, forced prostitution without even \textit{ex post} compensation created de facto zero-liability rules. In effect, once besmirched, these women and girls were accorded less consideration than natural law demanded for human beings generally.

\footnote{145}{Id.}  
\footnote{146}{\textsc{Japan's War Responsibility, supra} note 5, at 5-6.}  
\footnote{147}{See supra note 127 and accompanying text.}
emphasizing that the personhood and humanity of women and girls were recognized only insofar as they fit neatly in the initial allocation of property rights in her to her family, husband, relations and state. When kidnapped, stripped and raped repeatedly in forced prostitution, the woman or girl also was stripped of her personhood and natural law rights.

IV. CONVERGENCE: THE DELETION OF THE LIABILITY RULE EXCEPTION

Two treaties in the post-World War II era disrupted the troubling historical period of disparate, gendered norms regarding sexual enslavement. Both the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the 1979 UN Convention on Elimination of All Forms of Discrimination Against Women outlaw forced prostitution. Japan ratified both treaties, and its ratification acts as estoppel against asserting or benefiting from a purported sovereign prerogative to set liability rules for women’s bodies. Moreover, the signing by the United States of the 1979 Convention to Eliminate Discrimination Against Women, even without ratification, should guide U.S. courts towards interpretations of law that avoid direct conflict with the Convention’s obligations if clear and compelling alternatives are available. Finally, the Thirteenth Amendment sets property protection for all human bodies, thus barring U.S. courts from recognizing any purported sovereign prerogative to set liability rules for a particular set of bodies, though this constitutional question need not be reached because the prior arguments are dispositive.

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others pierced the domestic domain rule that submerged the problem of forced prostitution below the reach of multilateral agreement. The Preamble of the Convention speaks in natural law terms of the “dignity and worth of the human person,” signaling a shift in the approach of conventions on sexual servitude. Article 1 of the Convention binds parties to

\[\text{punish any person who to gratify the passions of another: 1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;}\]
\[\text{2. Exploits the prostitution of another person, even with the consent of that person.}\]
The Convention thus covers the subject of forced prostitution both prior to being debauched, and after debauchment, removing the distinction between the pure woman and girl worthy of protection and the fallen female of past Conventions. The 1949 Convention is solicitous of aiding those engaged in prostitution, removing domestic laws or regulations that subject prostitutes to special registration requirements,\(^{153}\) and providing for the undertaking or encouragement of "public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention."\(^{154}\) The Convention thus recognizes the dignity of the individual forced into prostitution, and does not discard her once debauched, but envisions "rehabilitation." Thus, under the Convention, the intrinsic worth of the female person does not depend on her sexual state.

The piercing of the domestic-issue veil accomplished by the 1949 Convention lead many states to resist ratification and accession. As a result, in 1999, the Convention was ratified by only 66 of the 160 United Nations member states.\(^{155}\) States that refused to sign the Convention cited constitutional incompatibility and disagreement with the basic assumptions of the text.\(^{156}\) Many states refused to accede because prostitution within their borders was highly regulated.\(^{157}\)

The Convention also drew criticism for ambiguity as to whether it intends to abolish only forced prostitution or all forms of prostitution.\(^{158}\) On its face, the Preamble to the Convention declares "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person." Unclear in this definition is whether the prohibition against "exploitation of prostitution" in Article 1 includes more than forced prostitution on its terms. The term "exploitation of prostitution" is not defined. A later U.N. report, however, asserts that "[l]egal provisions proscribing prostitution should not therefore be considered as prerequisite measures to be taken in conjunction with the abolition of the regulation of prostitution," since prohibition of prostitution may drive prostitution underground, and be enforced selectively against prostitutes.\(^{159}\)

Japan signed, ratified and acceded to the 1949 Convention, accepting the Convention's elimination of forced prostitution, a category of "exploitation of prostitution," as a subject of domestic legislation improper for multilateral agreements. Japan also assumed treaty obligations that bound states to accord

153. Id. art. 6.
154. Id. art. 16.
155. MARJAN WIJERS & LIN LAP-CHEW, TRAFFICKING IN WOMEN, FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOUR AND PROSTITUTION 26 (1999).
156. Id.
157. Id.
159. STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, supra note 83, at 11.
women property protections against forced prostitution, calling for “punishment” of those who transgress these property protections. A de minimis liability rule for female bodies is clearly forbidden by the 1949 Convention—a state is obliged to levy a sanction. Importantly, the form of sanction states are obliged to levy is more than a mere state-set indemnity, or, in the words of Calabresi and Melamed, the setting of “a value determined by some organ of the state rather than by the parties themselves.”160 The state’s obligation to punish signifies criminal prosecution by the state, the punishment accorded to transgressors of property norms. “Punishment” is accorded to those who upset an initial allocation of entitlements. Japan’s accession to the 1949 Convention estops it from asserting a sovereign prerogative to set liability rules for the bodies of those forced into prostitution.

The widely ratified 1979 U.N. Convention on Elimination of All Forms of Discrimination Against Women161 reiterates the contemporary international property rule applying to the bodies of those forced into prostitution. To further the broad nondiscrimination objective of the Convention, Article 6 requires all States to “take all appropriate measures . . . to suppress all forms of traffic in women and exploitation of prostitution of women.”162 While “exploitation of prostitution” is undefined in the 1979 Convention, similar to the 1949 Convention, the state commitment to “suppress” exploitation of prostitution eliminates the right of signatories to tolerate or establish liability rules for the bodies of those forced into prostitution. Japan is a signatory of the Convention, and thus is doubly estopped from asserting any sovereign prerogative to set liability rules for women’s bodies.

The United States also is a signatory of the Convention, though the Senate has failed to ratify the treaty due to concerns over potential assumption of certain obligations, for example those related to women in the military.163 As a signatory, and the only Western democracy that has failed to ratify the Convention, it has been said that the United States will “undoubtedly” ratify the Convention.164 According to Malvina Halberstam, “[t]he question is when and with what limitations.”165 Thus, as a prudential matter, U.S. courts should avoid interpretations that may be contrary to the Convention and not the subject of proposed U.S. reservations to the Convention if another course of reasoning is possible. None of the proposed reservations considered thus far by the United States would claim a sovereign right to tolerate forced prostitution, nor could the United States assert such a right within the constraints of the Thirteenth Amendment to the U.S. Constitution.166

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160. Calabresi & Melamed, supra note 17, at 1092.
162. Id.
164. Id. at 162.
165. Id.
166. See id. at 145-52 (discussing proposed reservations to the Convention that do not include any right of the United States to tolerate forced prostitution).
The abolition of slavery and involuntary servitude in the Thirteenth Amendment to the U.S. Constitution forbids U.S. courts from recognizing a claim of a sovereign prerogative to allow forced prostitution. Courts have ruled that forced prostitution violates the Thirteenth Amendment’s prohibition against involuntary servitude. A strong argument may be made that forced prostitution falls under the purview of the Thirteenth Amendment’s proscription of slavery, whether performed by public or private actors, because the “customary ravishment and prostitution of colored women” was considered one of the ills of slavery at the time of the Thirteenth Amendment’s enactment; sexual slavery constituted a ubiquitous component of the slave trade; forced prostitution today parallels antebellum slavery; and forced prostitution fits tests courts today use when applying the Thirteenth Amendment’s proscription against slavery in non-antebellum contexts.

The Thirteenth Amendment thus constitutes separate and independent grounds for rejecting the Hwang Geum Joo district court’s strained mischaracterization of the act of state-sponsored forced prostitution as an abusive interchange of power between states. This constitutional question need not be reached in the circumstances of Hwang Geum Joo, however, because Japan’s signing of treaties that establish property rules for women’s bodies acts as estoppel to any claim to a purported sovereign right to set liability rules for women’s bodies.

V. CONCLUSION

The difficulties with the D.C. District Court’s ruling in Hwang Geum Joo are clear whether the rationale is the orthodox commercial activity inquiry consistent with legislative intent and court precedents detailed in Part III.C; treaty obligations; or the Thirteenth Amendment. States should not be able to cloak practices of commodified sexual slavery akin to that for which private actors are often castigated behind a claim of sovereign prerogative, effectively asserting a de minimis liability rule for the bodily integrity of those harmed by their vast destructive power. De minimis liability rules impose high costs to both international and domestic rules of law. First, de minimis liability rules impose no deterrent to future similar conduct. For example, the rape centers during the Bosnian conflict exhibit troubling parallels to the “comfort stations” of Imperial Japan. Second, de minimis liability rules signal powerfully that the violated entitlement is of no value, legitimizing gross violations of human rights. A decision that applies the mandates of law impartially, rather than straining to avoid applying the law for political

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167. E.g., Pierce v. United States, 146 F.2d 84, 86 (5th Cir. 1944) (upholding conviction of defendant who forced women with beatings or threat of beatings into prostitution at roadhouses for peonage based on involuntary servitude); Bernal v. United States, 241 F. 339, 341-42 (5th Cir. 1917) (upholding conviction for peonage against a defendant who lured a woman on the promise of domestic employment, to his brothel, where he forced her to work).

168. Katyal, supra note 117, at 791, 796-813 (quoting an 1883 writing by abolitionist, the Reverend Charles Olcott).

169. YOSHIMI, supra note 2, at 19.
reasons would create a more coherent and principled jurisprudence, and lend needed legal support to the vital work of staunching future tragedies.