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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HE NAM YOU and KYUNG SOON KIM, for
themselves and on behalf of all others similarly
situated,

Plaintiffs,

No. C 15-03257 WHA

v.

JAPAN; HIROHITO; AKIHITO; NOBUSKE KISHI;
SHINZO ABE; NYK LINE (NORTH AMERICA);
NIPPON YUSEN KABUSHIKI KAISHA; NISSAN
MOTOR CO., LTD.; NISSAN NORTH AMERICA,
INC.; TOYOTA MOTOR CORPORATION; TOYOTA
MOTOR SALES, U.S.A., INC.; HITACHI, LTD.;
HITACHI AMERICA, LTD.; NIPPON STEEL &
SUMITOMO METAL U.S.A., INC.; NIPPON STEEL
& SUMITOMO METAL CORPORATION;
MITSUBISHI CORPORATION (AMERICA);
MITSUBISHI GROUP; MITSUI & CO. (U.S.A.),
INC.; MITSUI & CO. LTD.; OKAMOTO
INDUSTRIES, INC.; SANKEI SHIMBUN, CO., LTD.;
and DOES 1-1000, inclusive,

Defendants.

**ORDER GRANTING
DEFENDANT MITSUI
& CO. (U.S.A.),
INC.'S MOTION
TO DISMISS**

INTRODUCTION

In this putative class action for personal injury and crimes against humanity during the Second World War, one of twenty defendants moves to dismiss all claims against it. For the reasons stated below, defendant's motion is **GRANTED**.

STATEMENT

Plaintiffs He Nam You and Kyung Soon Kim are residents and citizens of the Republic of Korea. Plaintiffs allege that they were abducted by the Japanese government during the

1 Second World War, forced into servitude, and exploited as sex slaves for the benefit of Japanese
2 soldiers at “comfort stations” in Japan.

3 Plaintiffs bring claims against five overlapping categories of defendants, which they refer
4 to as “wartime defendants,” “corporation defendants,” “headquarter defendants,” “subsidiary
5 defendants,” and “individual defendants.” Defendant Mitsui & Co. (U.S.A.), Inc., is identified
6 as a member of the wartime, corporation, and subsidiary categories. Mitsui & Co. (U.S.A.) is a
7 subsidiary of defendant Mitsui & Co., Ltd., which is based in Japan. The parent company has
8 not yet been served.

9 Plaintiffs allege that “MITSUI” (without specifying which Mitsui entity), realized “huge
10 profits” from the manufacture and sale of trains and vessels to the Japanese government for use
11 by the military during the Second World War for various purposes, including the transportation
12 of plaintiffs to comfort stations where they were forced into servitude and sexually abused (Amd.
13 Compl. ¶ 47). Plaintiffs also allege that defendants Shinzo Abe (the Prime Minister of Japan)
14 and Sankei Shimbun, Co., Ltd. (a Japanese newspaper) recently engaged in a campaign to spread
15 assertions that the comfort women used by the Japanese military served as “voluntary
16 prostitutes” (Amd. Compl. ¶ 177).

17 Plaintiffs assert the following claims against Mitsui & Co. (U.S.A.): (1) crimes against
18 humanity in violation of the Alien Torts Statute, (2) cruel, inhuman, or degrading treatment
19 in violation of the Alien Torts Statute, (3) conspiracy to commit crimes against humanity in
20 violation of the Alien Torts Statute, (4) aiding and abetting torture, in violation of the Torture
21 Victim Protection Act of 1991, (5) intentional infliction of emotional distress, (6) battery, and
22 (7) violation of the Racketeer Influenced and Corrupt Organizations Act. Mitsui & Co. (U.S.A.)
23 moves to dismiss all claims against it.¹ This order follows full briefing and oral argument.

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27 ¹ Six other defendants (five corporations based in the United States and the Japanese newspaper,
28 Sankei Shimbun) have been served. Sankei Shimbun’s motion to dismiss is scheduled for a hearing on
November 19. Plaintiffs and the remaining five manufacturers have stipulated that any responses to the
complaint will not be due until several weeks after this motion is resolved.

1 ANALYSIS

2 Mitsui & Co. (U.S.A.) argues that plaintiffs’ amended complaint suffers from numerous
3 fatal deficiencies. Specifically, it contends that the allegations that give rise to plaintiffs’ claims
4 against Mitsui & Co. (U.S.A.) all occurred overseas more than seventy years ago and that
5 plaintiffs’ claims are subject to a waiver in the 1965 Treaty between Japan and the Republic of
6 Korea. The gravity of the injuries that plaintiffs allegedly suffered cannot rescue their claims,
7 inasmuch as they present a non-justiciable question and are barred by the relevant statutes of
8 limitations. Before discussing those issues, this order addresses Mitsui & Co. (U.S.A.)’s
9 argument regarding the extraterritorial reach of the bases for plaintiffs’ claims.

10 1. EXTRATERRITORIAL APPLICATION.

11 Each allegation that gives rise to plaintiffs’ claims against Mitsui & Co. (U.S.A.)
12 occurred overseas. “When a statute gives no clear indication of an extraterritorial application,
13 it has none.” *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). Plaintiffs’ RICO
14 claims and their state law claims do not include any indication of extraterritorial application.
15 *See United States v. Chao Fan Xu*, 706 F.3d 965, 974–75 (9th Cir. 2013) (“RICO does not apply
16 extraterritorially.”); *Diamond Multimedia System v. Superior Court*, 19 Cal. 4th 1036, 1059 n.20
17 (1999) (presumption against extraterritorial reach of state law claims, absent clear indication
18 otherwise).

19 Although the Torture Victim Prevention Act does explicitly apply to some extraterritorial
20 conduct, plaintiffs’ claim against Mitsui & Co. (U.S.A.) on that basis must fail because only a
21 natural person can be liable under that act. *Mohamad v. Palestinian Authority*, 566 U.S. ____,
22 132 S. Ct. 1702, 1708 (2012).

23 Plaintiffs also assert three claims under the Alien Torts Statute, which is a jurisdictional
24 statute that “allows federal courts to recognize certain causes of action based on sufficiently
25 definite norms of international law.” *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ____,
26 133 S. Ct. 1659, 1664 (2013). The Supreme Court has held that the Alien Torts Statute cannot
27 reach foreign conduct except where plaintiffs’ “claims touch and concern the territory of the
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1 United States . . . with sufficient force to displace the presumption against extraterritorial
2 application.” *Id.* at 1669.

3 During the Second World War, Japan attacked the territories of the United States at Pearl
4 Harbor, Guam, Wake Island, and Philippines. The alleged atrocities that give rise to plaintiffs’
5 claims were part and parcel of the Japanese war effort. This order finds that nexus between
6 plaintiffs’ claims and the territory of the United States is sufficient to satisfy the requirements
7 of *Kiobel* on a Rule 12(b)(6) motion.

8 Nevertheless, plaintiffs’ claims must be dismissed because they present a non-justiciable
9 question, and they are time-barred, as now discussed.

10 **2. NON-JUSTICIABLE POLITICAL QUESTION.**

11 Defendants argue that plaintiffs’ claims present a non-justiciable political question and
12 therefore must be dismissed. A case presents a non-justiciable political question if it “revolve[s]
13 around policy choices and value determinations constitutionally committed for resolution to the
14 halls of Congress or the confines of the Executive Branch.” *Japan Whaling Association v.*
15 *American Cetacean Society*, 478 U.S. 221, 230 (1986).

16 In 1951, Japan entered into a treaty of peace with the Allied Powers. 3 U.S.T. 3169,
17 TIAS No. 2490 (1951). Article 14 of the 1951 Treaty required Japan to pay certain reparations
18 to the Allied Powers “for the damage and suffering caused by it during the war.” Additionally,
19 the 1951 Treaty included a waiver of all “claims of the Allied Powers and their nationals arising
20 out of any actions taken by Japan and its nationals in the course of the prosecution of the war.”

21 Article 26 of the 1951 Treaty obligated Japan to enter into “bilateral” treaties with non-Allied
22 states “on the same or substantially the same terms as are provided for in the present treaty.”

23 In 1965, Japan entered into a treaty with the Republic of Korea. Section 1 of Article II of the
24 1965 Treaty “settled completely and finally” all claims between the parties and their nationals,
25 including those addressed in the 1951 Treaty. 583 U.N.T.S. 258, 260 (1965).

26 In *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), citizens of Korea, among others, brought
27 claims against Japan based on allegations that they were kept as comfort women for Japanese
28 soldiers during the Second World War, similar to our plaintiffs. The D.C. Circuit dismissed the

1 case as it presented a non-justiciable political question. There, the plaintiffs argued that the 1951
2 Treaty with Japan only waived claims by *Americans* against Japan and its nationals, not claims
3 by citizens of other non-party nations. They also argued that the Republic of Korea believed its
4 citizens' claims against Japan and its nationals survived the 1965 Treaty.

5 The United States submitted a statement of interest in *Joo*, noting that "it manifestly
6 was not the intent of the President and Congress to preclude Americans from bringing their
7 war-related claims against Japan . . . while allowing federal or state courts to serve as a venue for
8 the litigation of similar claims by non-U.S. nationals." *Id.* at 50 (citing Statement of Interest of
9 the United States at 28). Additionally, the decision in *Joo* noted that Article 26 of the Treaty
10 made it "pellucidly clear" that the United States intended the claims of citizens of other nations
11 to be resolved in bilateral treaties, not by domestic courts.

12 Courts have the authority to construe treaties. *Japan Whaling*, 478 U.S. at 230.
13 Moreover, the mere fact that a case presents an issue of foreign relations does not render it
14 non-justiciable. *Baker v. Carr*, 369 U.S. 185, 210 (1962). Nevertheless, in light of the statement
15 of interest submitted by the United States, the court in *Joo* held as follows:

16 [A]djudication by a domestic court not only "would undo" a
17 settled foreign policy of state-to-state negotiation with Japan,
18 but also could disrupt Japan's "delicate" relations with China and
Korea, thereby creating "serious implications for stability in the
region."

19 *Id.* at 52 (quoting Statement of Interest at 34–35). Ultimately, because the plaintiffs' claims
20 would have required the *Joo* court to resolve competing interpretations of a treaty between Korea
21 and Japan, the case was dismissed as a non-justiciable political question.

22 Although Mitsui & Co. (U.S.A.) is an American entity, plaintiffs' claims are based on the
23 theory that it is an alter ego of its parent company, Mitsui & Co. Ltd., a Japanese corporation.
24 Even if plaintiffs could establish that Mitsui & Co. (U.S.A.) can be liable for the torts of its
25 parent, that begs the question whether those claims (against the parent) were extinguished by
26 the 1965 Treaty between Japan and Korea. That was exactly the question resolved in *Joo*.

27 Plaintiffs do not meaningfully rebut this argument in their response. They do not address
28 *Joo* in their brief at all, although Mitsui & Co. (U.S.A.) devoted three pages to it in its opening

1 brief. Instead, plaintiffs contend that human rights violations do not always present political
2 questions. Plaintiffs do not address the specific political concerns here.

3 Although *Joo* is not binding in our circuit, it is the only appellate authority on point,
4 and this order adopts its thorough reasoning, which was informed by the position of the
5 United States. Accordingly, plaintiffs’ claims against Mitsui & Co. (U.S.A.) must be dismissed,
6 inasmuch as they present a non-justiciable political question. Nevertheless, an additional
7 infirmity in plaintiffs’ complaint is worth addressing.

8 **3. PLAINTIFFS’ CLAIMS ARE TIME-BARRED.**

9 In the 1965 Treaty, Japan agreed to pay reparations to the Republic of Korea in the form
10 of \$300 million in grants of supplies and services to the Republic of Korea and various loans
11 totaling \$500 million. In 1993, Japan’s then-Chief Cabinet Secretary Yohei Kono issued a
12 formal apology for the role of the Japanese government in the coercive recruitment of comfort
13 women. In 1995, the Japanese government established the Asian Women’s Fund, which issued
14 formal written apologies and paid reparations to comfort women. Next month, the heads of both
15 Japan and Korea are scheduled to meet at a summit, where it is expected they will discuss further
16 efforts to address the atrocities committed against comfort women.

17 Each allegation that gives rise to plaintiffs’ claims against Mitsui & Co. (U.S.A.),
18 including those against the unspecified Mitsui entity and those against the groups of defendants
19 that include Mitsui & Co. (U.S.A.), occurred more than seventy years ago. The longest
20 limitations period on any of plaintiffs’ claims is ten years, under the Alien Torts Statute.
21 *See Deutsch v. Turner Corp.*, 324 F.3d 692, 716–17 (9th Cir. 2003). Plaintiffs contend that
22 RICO has no limitations period. The statute itself does not provide a time bar, but the
23 Supreme Court explicitly held that the limitations period in civil RICO cases is four years.
24 *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). Plaintiffs argue
25 that equitable estoppel and equitable tolling allow them to circumvent any time bar on their
26 claims against Mitsui & Co. (U.S.A.). That argument is unavailing.

27 “Equitable estoppel, also termed fraudulent concealment, halts the statute of limitations
28 when there is ‘active conduct by a defendant, above and beyond the wrongdoing upon which

1 the plaintiff's claim is filed to prevent the plaintiff from suing in time.' The plaintiff must
2 demonstrate that he relied on the defendant's misconduct in failing to file in a timely
3 manner" *Guerrero v. Gates*, 442 F.3d 697, 706–07 (9th Cir. 2003). Plaintiffs' only
4 allegation relating to fraudulent concealment is that "Defendants including Defendant JAPAN
5 have purposefully and intentionally concealed or manipulated the evidence showing direct
6 control and involvement of the Japanese Government" (Amd. Compl. ¶ 89). That conclusory
7 allegation is not entitled to a presumption of truth on a motion to dismiss and therefore cannot
8 establish fraudulent concealment. Moreover, the Japanese government's admission of its role in
9 the recruitment of comfort women occurred in 1993, still more than a decade beyond the
10 limitations period for any of plaintiffs' claims against Mitsui & Co. (U.S.A.) (Amd. Compl.
11 ¶ 213)

12 Plaintiffs also allege they are entitled to equitable tolling. "Equitable tolling applies
13 when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the
14 defendant, or when extraordinary circumstances beyond the plaintiff's control made it
15 impossible to file a claim on time." *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999), *as*
16 *amended* (Mar. 22, 1999). Plaintiffs contend in their brief on this motion (but not in their
17 complaint) that "Defendant Mitsui has never admitted any wrongdoing against Plaintiffs.
18 Moreover, Defendant Mitsui consistently refused to provide any evidence under its control to
19 Plaintiffs" (Pl.'s Opp. at 15–16). They have not alleged any basis from which to infer that the
20 denial of liability and the failure to produce evidence prior to discovery was wrongful, much less
21 that it prevented plaintiffs from timely asserting their claims.

22 At oral argument, plaintiffs cited *Holocaust Victims of Bank Theft v. Magyar Nemzeti*
23 *Bank*, 807 F. Supp. 2d 689, 696 (N.D. Ill. 2011) (Judge Samuel Der-Yeghiayan), *vacated*
24 *on other grounds*, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), for the
25 proposition that the atrocities of the Second World War constituted extraordinary circumstances
26 sufficient to warrant the application of equitable tolling. In *Holocaust Victims*, a group of
27 Hungarian Jews and their next of kin brought claims against financial institutions based on the
28 expropriation of assets from victims of the Holocaust. That decision held that the plaintiffs

1 raised a dispute of fact regarding equitable tolling without discussing the details of that dispute.
2 Plaintiffs’ briefs on that motion relied heavily on *Bodner v. Banque Paribas*,
3 114 F. Supp. 2d 117 (E.D.N.Y. 2000), which is more instructive, although it ultimately does not
4 apply here.

5 In *Bodner*, the descendants of a group of Jewish customers of French financial
6 institutions asserted claims based on the expropriation of funds during Nazi occupation of
7 France. The defendants moved to dismiss, invoking the applicable statutes of limitations.
8 The plaintiffs responded that the defendants had engaged in a policy of “systematic and
9 historical denial and misrepresentation concerning the custody of the looted assets” and that it
10 was “impossible for [the plaintiffs] to learn which of the banks was in the possession of their
11 assets, absent cooperation from the defendants.” *Id.* at 135. *Bodner* held that equitable tolling
12 applied due to “deceitful practices by the defendants which have kept them from knowing or
13 proving the extent of these claims.” *Id.* at 136.

14 By contrast, our plaintiffs’ allegations (that Mitsui & Co. (U.S.A.) never admitted
15 liability and that the Japanese government did not admit its role in recruiting comfort women
16 until 1993) cannot support equitable tolling. Unlike the plaintiffs in *Bodner*, who could not
17 identify the proper defendants because the defendants had concealed information about the
18 location of allegedly-expropriated funds, nothing has prevented our plaintiffs from knowing or
19 proving the extent of their injuries within the limitations period.

20 Plaintiffs note that they have alleged claims against Prime Minister Abe and the
21 newspaper, Sankei Shimbun, which involve ongoing conduct, namely, defamatory statements
22 about the history of comfort women. But plaintiffs do not allege that Mitsui & Co. (U.S.A.), or
23 any Mitsui entity, contributed to those injuries. Plaintiffs’ defamation claims have no bearing on
24 the limitations period for their claims against Mitsui & Co. (U.S.A.).

25 Even if plaintiffs could amend their complaint to allege facts somehow explaining their
26 delay in asserting claims against Mitsui & Co. (U.S.A.) within the limitations period, plaintiffs
27 must also amend their claims to avoid the non-justiciable political question discussed above.
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CONCLUSION

For the reasons stated above, plaintiffs' claims against Mitsui & Co. (U.S.A.) are hereby **DISMISSED**. Plaintiffs may seek leave to amend their complaint and shall have **TWENTY-ONE CALENDAR DAYS** from the date of this order to file a motion, noticed on the normal 35-day calendar, for leave to amend the complaint. If no motion is received by this deadline, all claims against Mitsui & Co. (U.S.A.) will be dismissed. Counsel for plaintiffs should plead their best case for all arguments raised in Mitsui & Co. (U.S.A.)'s motion to dismiss, not just those addressed in this order.

IT IS SO ORDERED.

Dated: November 3, 2015.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE