

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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HWANG GEUM JOO, et al., )  
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 Plaintiffs, )  
 v. ) Civil Action No. 00-CV-  
2288 ) Judge Henry H. Kennedy,  
 Jr. )  
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 JAPAN, )  
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 )  
 Defendant. )  
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STATEMENT OF INTEREST  
OF THE UNITED STATES OF AMERICA

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## PRELIMINARY STATEMENT

The named plaintiffs in this case are South Korean, Chinese, and Filipino women, as well as residents of Taiwan, who were held as "Comfort Women" during World War II by Japanese military forces. The horror of plaintiffs' ordeal can scarcely be overstated. There is no dispute about the moral force animating their quest to redress the wrongs done to them. At the conclusion of the Second World War, the United States condemned, in the strongest possible terms, the Japanese Government's conduct before and during the War. The United States and its allies conducted War Crimes Trials, which resulted in the execution or other punishment of hundreds of Japanese perpetrators of atrocities. Despite our deep sympathy for the plaintiffs, the United States is nonetheless compelled to file this Statement of Interest in order to explain that this Court has no jurisdiction over plaintiffs' claims due to Japan's sovereign immunity and by virtue of international obligations entered into by the United States and other nations with Japan at the close of World War II, which render plaintiffs' claims nonjusticiable. As a matter of law, Japan is not amenable to suit on plaintiffs' claims in the courts of the United States. The United States appears in this action, pursuant to 28 U.S.C. § 517, because of its interests in the proper application of the law relating to the immunity of foreign nations in U.S. courts, and because the relief sought would have serious repercussions for our foreign policy toward Japan and other nations.<sup>1</sup>

The actions that are the subject of plaintiffs' complaint occurred during the period when sovereigns enjoyed absolute immunity in the United States. The law in effect at the time the events occurred is the law that applies here. Under that law, Japan is immune from suit.

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<sup>1</sup> "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

Even under current law, the result would be no different. In 1952, the United States adopted a restrictive policy of immunity, which was later codified in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602, et seq. The FSIA is the exclusive means by which a federal court may exercise jurisdiction over a foreign sovereign. No exceptions under the FSIA permit the exercise of jurisdiction by the Court over Japan in this case. The FSIA's waiver exception must be narrowly construed. There is no support for the argument that Japan waived its immunity from suit, either explicitly or implicitly. Nor is there any support for the proposition that alleged jus cogens violations create an exception to the FSIA. Further, under the FSIA, Japan's conduct does not constitute a "commercial activity" with a sufficient nexus to the United States to justify the exercise of federal jurisdiction under that FSIA exception. None of the conduct complained of, however abhorrent, constitutes "either a regular course of commercial conduct or a particular commercial transaction or act."

Plaintiffs' lawsuit is also subject to dismissal because it presents a nonjusticiable political question. The claims of the Allied powers and their nationals against Japan and its nationals arising out of their conduct during the war are governed exclusively by the Treaty of Peace with Japan of September 8, 1951 ("Peace Treaty" or "Treaty"), 3 U.S.T. 3169. In that Treaty, the Japanese Government recognized its obligation to pay reparations for the damage and suffering caused by it during the war and did so by providing reparations to an extent never before seen in modern times. Under the 1951 Treaty, Japan gave the United States and its Allies the right to seize and dispose of public and private Japanese assets located within their territories. In return, in Article 14 of the Treaty, the Allied nations expressly waived "on behalf of themselves and their nationals" claims arising out of actions taken by Japan and its nationals during the war.

The Philippines was a party to the Treaty. The Philippines and its nationals are therefore bound by the claims waiver provisions of Article 14. For reasons having to do with post-war division and conflicts, neither China nor the two Koreas were parties to the Treaty. Nevertheless, several provisions in the Treaty protected the rights of those countries and placed an obligation on Japan to resolve claims issues with those nations through future bilateral agreements, which Japan later did. United States policy, then and now, was that those war claims controversies be dealt with through diplomacy.

The decision of the United States to join the 1951 Peace Treaty with Japan – together with 45 other nations – reflected a broad, bipartisan consensus within the Executive and Legislative Branches. The national decision to sign and ratify the Peace Treaty was based on a strong desire to ensure that Japan would develop into a democratic, economically viable ally that would not fall under Communist sway, as well as the hope of avoiding the disastrous consequences of the punitive reparations provisions of the Versailles Treaty that ended World War I.

In order to decide the claims here, the Court would have to question the policy judgment and wisdom of the President, Congress and our Allies in entering the 1951 Treaty with Japan. The Court also would have to interpret and evaluate the bilateral agreements entered into between Japan and Taiwan, Japan and the People's Republic of China, and Japan and Korea. This would require the Court to move beyond areas of judicial expertise into the realm of foreign relations. The need for our nation to speak with one voice in the area of foreign affairs counsels strongly against such judicial involvement in this matter, which is committed by the Constitution exclusively to the Executive and Legislative Branches. To question the policy decisions behind any of those treaties now could disrupt relations with Japan, Korea and China. Indeed, it could implicate U.S. international treaty relations globally. For these reasons, plaintiffs' claims also raise nonjusticiable political questions.

## **DISCUSSION**

### **I. THE GOVERNMENT OF JAPAN IS IMMUNE FROM THE JURISDICTION OF THE UNITED STATES COURTS IN THIS CASE.**

#### **A. Background Of U.S. Sovereign Immunity Practice.**

The United States has maintained, and two courts of appeals have held, that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602, et seq., does not apply retroactively to conduct that took place during the period when the United States afforded absolute sovereign immunity to foreign nations. However, whether Japan's assertion of immunity is assessed under the FSIA or the law existing at the time of the conduct complained of, Japan's assertion of immunity must be upheld. The United States has approached the question of foreign sovereign immunity in three distinct periods, in each period relying upon then-prevailing principles of customary international law.

In the first period (from about 1812 to 1952), the United States accorded foreign sovereigns "absolute" immunity from suit in United States courts. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). In The Schooner Exchange v. M'Faddon, 11 U.S. 116, 136-37 (1812), the Supreme Court first recognized this principle of absolute immunity, based upon the "perfect equality and absolute independence of sovereigns." Although Schooner Exchange concerned seizure of a military vessel, the immunity principle applied in that case later was extended by the Court to all acts of a foreign state, including ordinary commercial transactions. See Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562, 576 (1926). During this initial phase, the federal courts deferred to the views of the Executive Branch as to whether to recognize sovereign immunity in a particular case. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 33-36 (1945); Ex parte Republic of Peru, 318 U.S. 578, 588 (1943). The State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." Verlinden B.V., 461 U.S. at 486.

In 1952, the United States' practice concerning foreign sovereign immunity entered a second

phase when the Executive Branch formally adopted the "restrictive" theory of immunity in the "Tate letter." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976) (copy of the "Tate letter"). In that letter of its Acting Legal Adviser, the State Department announced that henceforth it would recommend to United States' courts that foreign states be granted immunity only for their sovereign or public acts (jure imperii), and not for their private acts (jure gestionis). See Verlinden B.V., 461 U.S. at 486-87. As explained in the Tate letter, the adoption of the restrictive theory reflected the increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill of London, 425 U.S. at 714.

Foreign sovereign immunity practice entered its third (and current) phase when the United States enacted the FSIA, which became effective in January 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1602, et seq. "For the most part, the Act [FSIA] codifies, as a matter of federal law, the restrictive theory of foreign sovereign immunity." Verlinden B.V., 461 U.S. at 488; Saudi Arabia v. Nelson, 507 U.S. 349, 359 (1993). It contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Verlinden B.V., 461 U.S. at 488. The FSIA sets forth the general rule of foreign state immunity, 28 U.S.C. § 1604, and provides for specific exceptions to that immunity rule, id. §§ 1605-07. The Supreme Court has made clear that the FSIA "'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'" Nelson, 507 U.S. at

355 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989)).<sup>2</sup>

**B. Under The Law Applicable At The Time Of The Challenged Conduct, Japan Is Entitled To Immunity From Suit.**

The conduct at issue in this case occurred between 1932 and 1945. Under the principles of sovereign immunity then in force, Japan is entitled to immunity from suit. Although plaintiffs' arguments address the provisions of the FSIA, the FSIA was not enacted until 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976).

The United States has argued, and several courts have held, that the FSIA does not apply to conduct preceding the adoption of the restrictive theory of immunity. See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988), cert. denied, 487 U.S. 1219 (1988); Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987); Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1115 (N.D. Ill. 1997); Lin v. Government of Japan, No. 92-2574, 1994 WL 193948, at \*2 (D.D.C. May 6, 1994); Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany, 827 F. Supp. 814,

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<sup>2</sup> The plaintiffs have brought claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Compl. ¶ 79. The ATS does not trump the FSIA. The Supreme Court held in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 437 (1989), that Congress intended the FSIA to be the exclusive basis for jurisdiction over foreign sovereigns and, thus, the ATS could not be invoked as an independent basis for jurisdiction. Therefore, if none of the enumerated exceptions to the FSIA apply, a suit cannot proceed. Id. at 443.

817 (D.D.C. 1993), aff'd, 124 F.3d 1309 (D.C. Cir. 1997); Slade v. United States of Mexico, 617 F. Supp. 351, 356-57 (D.D.C. 1985), aff'd, 790 F.2d 163 (1987). But cf. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1170-71 (D.C. Cir. 1994), cert. denied, 513 U.S. 1121 (1995) (questioning, without deciding, whether or not application of FSIA to pre-1952 conduct would be impermissibly retroactive). Both the Second and Eleventh Circuits concluded that the FSIA affects the "substantive rights and liabilities" of foreign states by authorizing suits against foreign states that could not have been brought earlier. See Jackson, 794 F.2d at 1497-98 ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns"); Carl Marks, 841 F.2d at 27 (same). See also H.R. Rep. No. 94-1487, 94th Cong. 2d Sess, at 33, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6632 (noting that ninety-day delay in the FSIA's effective date was "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states").

Under principles of sovereign immunity that prevailed during the 1940s, Japan is immune from suit. As explained above, prior to 1952, the Executive Branch and the federal judiciary took the position that "foreign sovereigns and their public property are . . . not . . . amenable to suit in our courts without their consent." Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 134 (1938). See also Alfred Dunhill of London, 425 U.S. at 712 (Tate Letter, noting that the United States previously had followed the "classical or virtually absolute theory of sovereign immunity").

Moreover, the Executive Branch does not support the exercise of jurisdiction over plaintiffs' claims against Japan. The Court is not, in this case, left to its own devices to surmise the views of the Executive. Cf. Verlinden B.V., 461 U.S. at 487-88 (noting that, prior to the FSIA, courts were required to discern the likely policy of the Executive Branch in cases in which the State Department

made no filing). The United States hereby affirmatively states that, because Japan is entitled to sovereign immunity, the United States opposes the assertion of jurisdiction by United States courts over claims against the Government of Japan concerning the consequences of its actions during World War II.

**C. Under The Applicable Provisions Of The FSIA, The Japanese Government Is Immune From Suit On Plaintiffs' Claims In United States Courts.**

Alternately, even looking to the FSIA as the basis for assessing the Court's jurisdiction, Japan is also immune from this suit. As explained above, the general rule of the FSIA is that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604. The FSIA also provides various exceptions to that rule, 28 U.S.C. § 1605-07, but, absent an applicable exception, U.S. courts lack jurisdiction over the suit. Nelson, 507 U.S. at 355; Amerada Hess, 488 U.S. at 443.

The FSIA provides that:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. The exceptions in sections 1605 through 1607 focus on waiver, commercial activities, U.S. property rights, torts occurring in the United States (subject to exceptions), arbitration, a limited class of acts of international terrorism and certain maritime claims. Plaintiffs appear to assume the FSIA is applicable and rely on the "waiver" exception, 28 U.S.C. § 1605(a)(1), arguing that Japan's violations of jus cogens constituted a waiver by implication of Japan's sovereign immunity. Pltfs' Mem. at 38. That argument has been rejected by the District of Columbia Circuit as well as the other courts of appeals that have considered it and should be rejected here as well. Plaintiffs also

attempt to rely on the commercial activity exception, but that exception is equally inapplicable here.<sup>3</sup>

Pltfs' Mem. at 30.

**1. Neither The Language Nor The Legislative History Of The FSIA Supports An Expansive Construction Of The Implied Waiver Exception To The Statute.**

There is no general exception to sovereign immunity for violations of international law. The exceptions to sovereign immunity in the FSIA are clear and specific, suggesting that a theory of constructive waiver based on violation of international law would be inconsistent with the intent of the

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<sup>3</sup> Plaintiffs further argue that Japan explicitly waived sovereign immunity. In support of this position, plaintiffs allege that Japan's consent to the terms of the Potsdam Declaration was an acceptance that it would be held responsible for its actions and therefore a knowing and intentional waiver of its sovereign immunity. Pltfs' Mem. at 25. However, the Potsdam Declaration does not expressly state that Japan intended to waive its sovereign immunity for suit in the United States, so there is no explicit waiver. Amerada Hess, 488 U.S. at 442-43; Princz, 26 F.3d at 1175; Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 720 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); Sampson, 975 F. Supp. at 1119. Moreover, the Postdam Declaration does not create a private right of action. See Amerada Hess, 488 U.S. at 442; Princz, 26 F.3d at 1175; Siderman, 965 F.2d at 719-20. Plaintiffs also point to five international treaties existing at the time that prohibited sexual slavery and the trafficking in women and children, although plaintiffs do not argue that Japan waived its sovereign immunity in any of those treaties, was a party to the those treaties, or even violated them. Pltfs' Mem. at 26-27.

statute to recognize sovereign immunity except in certain limited and identifiable situations.

The Supreme Court in Amerada Hess adopted this narrow construction of the exceptions to sovereign immunity. The Court observed that "Congress had violations of international law by foreign states in mind when it enacted the FSIA," 488 U.S. at 435 (citing in particular section 1605(a)(3)'s denial of immunity when property rights are taken in violation of international law). The Court concluded that, "[f]rom Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." Id. at 436.<sup>4</sup> See also Nelson, 507 U.S. at 355.

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<sup>4</sup> The Supreme Court also observed that, in passing the FSIA, Congress had invoked its power to punish "Offenses against the Law of Nations," Amerada Hess, 488 U.S. at 436 (citing U.S. Const. Art. I, § 8, cl. 10). The Court took this as further indication that the omission of a general exception for violations of international law was intentional. See ibid.

The Supreme Court's narrow interpretation is further supported by a subsequent amendment to the FSIA in which Congress abrogated foreign states' immunity for specific acts of international terrorism. In 1996, the FSIA was amended to create an exception to sovereign immunity for torture, extrajudicial killing, aircraft sabotage and hostage taking, but limited the exception to suits brought by U.S. citizens against foreign governments identified by the Executive Branch as state sponsors of terrorism. Pub. L. No. 104-132, Title II, Subtitle B, § 221(a)(1), 110 Stat. 1214, 1241-42 (1996), adding 28 U.S.C. § 1605(a)(7).<sup>5</sup> Like section 1605(a)(3)'s limited removal of immunity for violations of international law respecting property rights, section 1605(a)(7)'s limited exception for certain acts of international terrorism by designated states counsels strongly against a broad interpretation of section 1605(a)(1) under which all violations of international law, including those that some consider to be violations of jus cogens are construed, ipso facto, as implied waivers of immunity. See Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir.), cert. denied, 520 U.S. 1204 (1997) (noting that section 1605(a)(7) is "a carefully crafted provision that abolishes the defense [of sovereign immunity] only in precisely defined circumstances" and that this is "evidence that Congress is not necessarily averse to permitting some violations of jus cogens to be redressed through channels other than suits against foreign states in United States courts").

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<sup>5</sup> In amending the FSIA to permit suit for certain enumerated torts abroad by designated state sponsors of terrorism, Congress expressly declined to adopt a broader approach, originally passed by the House. See 142 Cong. Rec. 4570, 4586, 4591-93 (March 13, 1996) (§ 803 of H.R. 2703, as amended); 142 Cong. Rec. 4814-15, 4836, 4846 (March 14, 1996).

Courts frequently have observed that the implied waiver provision of section 1605(a)(1) in particular must be construed narrowly. See Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari, 12 F.3d 317, 325 (2d Cir. 1993), cert. denied, 511 U.S. 1069 (1994) (quoting Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991)) ("Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly"); see also Smith, 101 F.3d at 243; Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985). In support of this conclusion, the courts have cited the limited list of examples given by Congress in the legislative history of the implied waiver provision. Congress specifically referred to three circumstances that would constitute implied waivers – "where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," and "where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6617. Although these examples are not exclusive, "courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." Frolova, 761 F.2d at 377; Princz, 26 F.3d at 1174 (quoting same); Drexel Burnham Lambert, 12 F.3d at 325, and Shapiro, 930 F.2d at 1017 (both accepting the notion that "courts have been reluctant to find an implied waiver where the circumstances" of the waiver were ambiguous); see also Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 577 (2d Cir. 1993) (a more expansive interpretation

of the implied waiver exception would "vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations"); Cargill Intern. S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1017 (2d Cir. 1993); Foremost- McKesson, 905 F.2d at 442-44; Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 727 F.2d 274, 276 (2d Cir. 1984).

More particularly, as the Seventh Circuit noted in Frolova, the examples listed by Congress reflect that an implied waiver should not be found "without strong evidence that this is what the foreign state intended." 761 F.2d at 377. See also id. at 378 ("waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so" (emphasis added)); Princz, 26 F.3d at 1174 ("jus cogens theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)"); Drexel Burnham Lambert, 12 F.3d at 326 (waiver must be "unmistakable" and "unambiguous"). Plaintiffs' arguments in this case are inconsistent with the intentionality requirement of the implied waiver provision. Whereas Congress has declared that a foreign state designated as a state sponsor of terrorism may forfeit its sovereign immunity when it engages in certain classes of conduct, Congress has not adopted a broad forfeiture of immunity for all alleged violations of jus cogens. It is not the role of the courts to do so, and no higher court has ever done so.

In light of the above, it is not surprising that each of the three courts of appeals that has addressed the relationship of jus cogens to sovereign immunity has rejected the idea that conduct by a sovereign nation in violation of jus cogens norms constitutes an implied waiver of immunity. See Princz, 26 F.3d at 1173-74; Smith, 101 F.3d at 242-45; Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718-19 (9th Cir. 1992).

**2. The D.C. Circuit's Decision In Princz Is Dispositive In Determining That Japan's Alleged Violation Of Jus Cogens Norms Does Not Constitute An Implied Waiver Of Sovereign Immunity.**

Princz v. Federal Republic of Germany, 26 F.3d 1166, 1170-71 (D.C. Cir. 1994), is dispositive on the issue of Japan's implied waiver of sovereign immunity due to alleged violations of jus cogens principles. In nearly identical circumstances, the D.C. Circuit determined that under the FSIA there was no such implied waiver; that such a waiver would be inconsistent with the requirements of the FSIA; and that there were strong policy considerations against finding such a waiver. Analyzing plaintiffs' contentions under the FSIA (rather than under the doctrine of absolute immunity, which we believe applies here), the Princz decision is controlling.

In Princz, the D.C. Circuit held that torture and enslavement by the Third Reich did not constitute an implied waiver, even though the court acknowledged that "it is doubtful that any state has ever violated jus cogens norms on a scale rivaling that of the Third Reich." 26 F.3d at 1174. The court relied on the Ninth Circuit's statement in Siderman that "[t]he fact that there has been a violation of jus cogens does not confer jurisdiction under the FSIA." Id. (quoting Siderman, 965 F.2d at 719). The D.C. Circuit also held that the jus cogens implied waiver theory is inconsistent "with the intentionality requirement implicit in § 1605(a)(1)." Id. The court concluded that "an implied waiver depends upon the foreign government's having at some point indicated an amenability to suit." Id.

Significantly, in addition to the statutory construction reasons for concluding that jus cogens violations do not constitute an implied waiver of immunity, the D.C. Circuit in Princz observed that there are strong policy considerations for not expanding jurisdiction of the American courts over foreign governments:

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day – unless disrupted by our courts, that is.

Id. at 1174-75 n.1.

The policy concerns reflected in Princz are particularly acute because of the unsettled character of jus cogens (discussed infra), and because of the procedural posture in which a claim of implied waiver likely would be presented. As is the case here, plaintiffs of foreign nationality, having no contacts with the United States, might be alleging an implied waiver of sovereign immunity on the basis of purported jus cogens violations overseas. The foreign state – perhaps currently a close ally of the United States – potentially could face a default unless it appeared to litigate two very difficult and potentially sensitive issues: (1) whether a particular principle has achieved the status of jus cogens under international law, and (2) whether the foreign state has, in fact, violated jus cogens (which may require a searching inquiry into the motivation of particular officials). This litigation would take place in a context, unlike other exceptions to sovereign immunity under the FSIA, where no contacts with the United States would be required and where no international precedents would support U.S. assertion of jurisdiction. In such circumstances, it would be especially difficult for the Executive Branch to persuade the foreign state to appear to litigate, contrary to the intent of the FSIA.

Because the D.C. Circuit explicitly held in Princz that a foreign sovereign does not waive its immunity by violating jus cogens norms, plaintiffs' claim that Japan waived its sovereign immunity must

fail here.

**3. The Jus Cogens Doctrine Does Not Address, And Would Be A Highly Uncertain Guide To, Resolving Sovereign Immunity Issues.**

A further problem in plaintiffs' argument is that jus cogens would provide a highly uncertain guide to implementing the FSIA's implied waiver exception. As stated in one of the leading treatises on international law, jus cogens "is a comparatively recent development and there is no general agreement as to which rules have this character." See Oppenheim's International Law, ed. by R. Jennings and A. Watts, 9th ed. (1992), p. 7. Further, there is no support in state practice for the proposition that the international consensus required to generate a principle of jus cogens necessarily implies a similar consensus that municipal remedies for their violation are either appropriate or mandatory. Indeed, given that no state heretofore has recognized such an exception to sovereign immunity, plaintiffs' theory requires the untenable premise that there can be an international law principle that no state supports.

Accordingly, plaintiffs' argument that a court may decide that a foreign sovereign has violated jus cogens and therefore waived sovereign immunity is based on a conceptual confusion concerning substantive and procedural principles of international law, as well as domestic law. Even if jus cogens principles are described as non-derogable, that description does not resolve what such principles are or how violations are to be remedied. And, even assuming that all states are bound to respect jus cogens principles, they are not required to open their domestic courts to private litigation to resolve alleged jus cogens violations of other states. See Reimann, A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz, 16 Mich. J. Int'l L. 403, 421 (1995).

Case law in the United States discussing jus cogens is sparse and inconsistent, and

commentators frequently note that the content of jus cogens is not agreed. See Restatement, § 102, Reporters Note 6.<sup>6</sup> In most cases, the political branches, which speak for governments in foreign

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<sup>6</sup> Because of its lack of definition, the concept of jus cogens lends itself to extravagant claims such as a right not to be "locally deported" (removed from the city limits). See Klock v. Cain, 813 F. Supp. 1430 (C.D. Cal. 1993). See also Xuncax v. Gramajo, 886 F. Supp. 162, 189 (D. Mass. 1995) (court was reluctant to stretch asserted jus cogens norm against cruel and inhuman or degrading treatment to encompass constructive expulsion); Sablan v. Superior Court of Commonwealth of Northern Mariana Islands, No. 91-002, 1991 WL 258344, 2 N.M.I. 165 (N. Mariana Islands 1991) (dissenting opinion) (right of self-government is so fundamental that it constitutes a peremptory norm); see also Sablan v. Iginoef, No. 88-366, 1990 WL 291893, 1 N.M.I. 146 (N. Mariana Islands 1990) (concurring opinion) (same); Borja v. Goodman, No. 88-394, 1990 WL 291854, 1 N.M.I. 63 (N. Mariana Islands 1990) (same); Gisbert v. U.S. Attorney General, 988 F.2d 1437 (5th Cir. 1993) (jus cogens does not prohibit the United States from continuing to detain Cubans who arrived with the Mariel "boat lift" in 1980); Committee Of U.S. Citizens Living In Nicaragua v. Reagan, 859 F.2d 929, 939-942 (D.C. Cir. 1998) (stating in dicta that "genocide, slavery, murder, torture [and] prolonged arbitrary detention" "arguably . . . meet the stringent criteria for jus cogens" (emphasis added)); United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995), cert. denied, 519 U.S. 1118 (1997) (defendant abducted by government agents from Honduras and brought to U.S. for criminal prosecution; court held that kidnapping was not among jus cogens norms). These cases illustrate the

relations, would not have pronounced on the issue whether a certain principle has attained ius cogens status. And, since other countries have not adopted a ius cogens exception to sovereign immunity, there would be little if any international practice on which to rely. In these circumstances, there is no basis to contend that Congress silently intended the FSIA's implied waiver exception to incorporate violations of ius cogens. The determination of what violations of international law will subject a foreign state to the domestic courts of the United States is a foreign policy question that must be reserved for the political branches of government, the Congress and the Executive. See Princz, 26 F.3d at 1174-75 n.1.

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difficulty that would face the courts in interpreting the FSIA implied waiver exception on the basis of ius cogens principles.

Appellate decisions other than Princz that have addressed the relationship of jus cogens to sovereign immunity also have rejected the idea that conduct by a sovereign nation, even though it may violate jus cogens norms, constitutes an implied waiver of immunity.<sup>7</sup> In these cases, the courts concluded that it is up to the political branches, and not the judicial branch, to determine whether jus cogens violations should give rise to exceptions to foreign sovereign immunity. See Smith, 101 F.3d at 245; Siderman, 965 F.2d at 719. Smith involved Libya's participation in the bombing of Pan Am Flight 103. The court stated that the issue "is not whether an implied waiver derived from a nation's existence is a good idea, but whether an implied waiver of that sort is what Congress contemplated . . . in section 1605(a)(1)." 101 F.3d at 242. The court ultimately rejected the claim that a jus cogens violation constitutes an implied waiver under the FSIA, because Congress did not intend that the implied waiver exceptions extend to such circumstances. Id. at 245.<sup>8</sup> In Siderman, one of the plaintiffs had been

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<sup>7</sup> This case poses the question whether courts are competent to create new exceptions to sovereign immunity, as distinguished from Kadic v. Karadicz, 70 F.3d 232 (2d Cir. 1996), and Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), where the court explored the issue of what conduct constitutes a violation of "the law of nations." In the Alien Tort Statute, 28 U.S.C. § 1350, Congress provided for suits by individual aliens against defendants, other than foreign states. See Amerada Hess, 488 U.S. at 436. As construed by the Court, that statute calls upon the courts to determine what types of conduct violate international law and are actionable in U.S. courts. By contrast, the FSIA does not provide for courts to determine whether international law provides new exceptions to sovereign immunity. Indeed, U.S. courts have not, on their own, created exceptions to sovereign immunity.

<sup>8</sup> In Denegri v. Republic of Chile, No. 86-3085, 1992 WL 91914, at \*3 (D.D.C. April 6, 1992), the court declined to imply a waiver of foreign sovereign immunity for a violation of peremptory norms. The court assumed that the alleged torture of human rights activists violated a peremptory norm; but it concluded, based on Amerada Hess, that Congress did not intend jus cogens violations to constitute an implied waiver of immunity under FSIA; see also Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1123 (N.D. Ill. 1997) (Germany's behavior violated a jus cogens norm; but such violation not sufficient to abrogate sovereign immunity under FSIA); Hirsh v. State of Israel, 962 F. Supp. 377, (S.D.N.Y.), aff'd, 133 F.3d 907 (1997).

kidnapped and tortured by officials of Argentina's government. The court determined that it must construe the FSIA through the prism established by the Supreme Court in Amerada Hess, 488 U.S. at 436. 965 F.2d at 719. Accordingly, the court concluded that "if violations of ius cogens committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of ius cogens does not confer jurisdiction under the FSIA." Id.

Further, were U.S. courts to establish a new, broad implied waiver doctrine based on an alleged violation of international law, the United States could in turn find itself subject to reciprocal denial of sovereign immunity in foreign courts for acts like the U.S.S. Vincennes incident (downing by a United States warship of an Iranian airbus), see Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989), or the detention of the Cuban Mariels, see Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986).

In such circumstances, it cannot be assumed that foreign judicial systems would operate independently of their political branches as our system does. Thus, if other states were to expand jurisdiction over sovereign nations for alleged ius cogens violations, judgments against the United States or other foreign governments might be rendered solely on the basis of prevailing political circumstances rather than on a universal concept of peremptory norms.

**D. The Actions Complained Of Do Not Come Within The "Commercial Activities" Exception Of The FSIA.**

Plaintiffs also contend that Japan's conduct constitutes a "commercial activity" falling within that exception under the FSIA. Pltfs' Mem. at 30. That exception is not applicable to these circumstances. The FSIA provides an exception from immunity:

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and states that "[t]he commercial character of an activity 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." 28 U.S.C. § 1603(d).

The conduct of Japan complained of here does not constitute "commercial activity." Japan's acts were those of a sovereign and not those of a private player within a market. A government which uses its police power to effect "[w]idespread abduction by force or coercion of thousand of women into sexual slavery" resulting in the establishment of "comfort houses" to serve its military during war, Pltfs' Mem. at 30, is not engaging in the type of activity generally performed by individual commercial entities. While the suffering experienced by plaintiffs was horrific, the actions of the Japanese military, although abhorrent, were not commercial and were not actions that could be undertaken by private parties.

In Nelson, the Supreme Court, applying the distinction between a state's public acts (jure imperii) and its private or commercial acts (jure gestionis), held that a foreign state engages in "commercial activity" where "it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" 507 U.S. at 360 (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992)); Princz, 26 F.3d at 1172. Thus, a foreign government engages in "commercial activity" when it "acts, not as regulator of a market, but in the manner of a private player within it" Weltover, 504 U.S. at 614. The Court also clarified the statutory

directive that courts examine the "nature" of the transaction rather than its "purpose," stating that "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.'" Nelson, 507 U.S. at 360-61 (quoting Weltover, 504 U.S. at 614 (emphasis in original)); Princz, 26 F.3d at 1172; see also H.R. Rep. No. 94-1487, supra, at 16, reprinted in 1976 U.S.C.C.A.N. at 6615.

According to plaintiffs' complaint, the "comfort women" stations were operated by the Japanese Government for the benefit of Japanese soldiers serving in occupied territories. Compl. ¶¶ 28, 43. The "comfort women" were kidnapped, tricked or coerced into service by the Japanese military. Id. ¶¶ 25, 45, 46. The women were held against their will by the Japanese military and forced to perform sexual acts. Id. ¶¶ 44, 48. These actions do not represent "a regular course of commercial conduct." 28 U.S.C. § 1603(d). These activities were sovereign in nature. See Nelson, 507 U.S. at 363 (the "powers allegedly abused were those of police and penal officers," not the sort of activity exercised by private parties); Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167-68 (D.C. Cir. 1994), cert. denied, 513 U.S. 1078 (1995); De Letelier v. Republic of Chile, 748 F. 2d 790, 797 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980); Doe v. Unocal Corp., 963 F. Supp. 880, 888 (C.D. Cal. 1997); see also Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 885 (D.C. Cir. 1988) ("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on sovereign activity"). Japan's treatment of plaintiffs was an abuse of its military power, but "[h]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of that power has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." Nelson, 507

U.S. at 361.

## **II. PLAINTIFFS' COMPLAINT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.**

Plaintiffs' complaint also must be dismissed because it presents a nonjusticiable political question. Courts may not adjudicate cases whose resolution would entail the determination of a political question. See, e.g., Baker v. Carr, 369 U.S. 186, 210 (1962); Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948); Coleman v. Miller, 307 U.S. 433, 454-55 (1939); Marbury v. Madison, 5 U.S. 137, 165-66 (1803). Under the political question doctrine, courts dismiss as nonjusticiable cases which would require the judiciary to involve itself in policy choices in areas that have been constitutionally committed to the political branches. In Baker v. Carr, the Supreme Court identified six hallmarks of a nonjusticiable case. 369 U.S. at 217 (outlining the criteria for what constitutes a non-justiciable political question); see also Nixon v. United States, 506 U.S. 224, 228 (1993); United States v. Rostenkowski, 59 F.3d 1291, 1304 (D.C. Cir. 1995). Any one of these characteristics may be sufficient to preclude judicial review. Baker, 369 U.S. at 217; Aktepe v. United States, 105 F.3d 1400, 1402-03 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998).

In his concurrence in Goldwater v. Carter, 444 U.S. 996, 998 (1979), Justice Powell summed up the Baker criteria into three inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" The answers to each of those questions demonstrate that plaintiffs here have presented a nonjusticiable political question. See also Antolok v.

United States, 873 F.2d 369, 381 (D.C. Cir. 1989).

The instant lawsuit presents stark separation of powers difficulties. Determining whether, and how, to assert the claims of their citizens against foreign states is properly the role of the government – in this case the governments of China, the Philippines, and North and South Korea. Consideration of plaintiffs' claims would require U.S. courts to pass on the sufficiency of these countries' agreements with Japan and their reasons for entering those agreements. Japan has entered into, or is in the process of negotiating, war-claims settlement and/or peace agreements with China and the two Koreas that emerged after WWII. The United States supported those agreements and negotiations. United States courts are not the appropriate forums to judge the policy considerations underlying the drafting, negotiation and ratification of the 1951 Treaty of Peace with Japan and the successive war claims agreements consummated between Japan and third countries pursuant to that Treaty.

**A. The Treaty Of Peace With Japan And Related Treaties Establish A Framework For The Resolution Of War Claims Against Japan.**

This lawsuit cannot be addressed in a vacuum, distinct from the complex historical matrix from which it arises. The plaintiffs in this case are of at least three different nationalities, Filipino, Chinese, and Korean. The history of Japan's war claims settlements with the United States and its allies, including the Philippines, and various Chinese and Korean political entities is complex, and some context is appropriate. The framework established by those treaties was intended to resolve completely claims against Japan arising out of World War II.

The 1951 Treaty of Peace with Japan, 3 U.S.T. 3169, provided, among other things, for the

end of the U.S. Occupation, a return of Japan to the family of nations, and payment by Japan (through the asset-seizure mechanism) for damages caused by wartime aggression. Although unequivocally requiring Japan to compensate Allied nations for war losses, the Peace Treaty recognized that full payment for all damages was impossible if a "viable economy" were to be created in Japan. See Peace Treaty, Art. 14(a) (Exhibit 1); S. Exec. Rep. No. 82-2, at 12 (1952) (Exhibit 2).

Under the Treaty, the Government of Japan gave up the use of property and other assets held by Japanese nationals outside of Japan to satisfy war claims. The seizure and eventual liquidation of Japanese assets was legitimized in Article 14(a)(2) of the Peace Treaty. Pursuant to that Article and Article 16 of the Treaty, assets located in Allied territory valued at approximately \$4 billion were confiscated by Allied governments, and their proceeds distributed to Allied nationals in accordance with domestic legislation. See Comments on British Draft, Memorandum by the Officer in Charge of Economic Affairs in the Office of Northeast Asian Affairs (Hemmendinger) to the Deputy to the Consultant (Allison), April 24, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1016 (1977) (Exhibit 3). In return, under Article 14(b) of the 1951 Peace Treaty, the United States and the Allies agreed to "waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its

nationals in the course of the prosecution of the war."<sup>9</sup>

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<sup>9</sup> Several lawsuits were filed in California courts by plaintiffs seeking to recover from defendant Japanese companies damages for back wages and injuries allegedly suffered as prisoners of war during WW II under Cal. Code of Civ. Pro. 354.6. The court granted defendants' motion to dismiss the claims of the Allied prisoners of War under the Treaty of Peace with Japan because "[o]n its face, the treaty waives 'all' reparations and 'other claims' of the 'nationals' of Allied powers 'arising out of any actions taken by Japan and its nationals during the course of the prosecution of the war.'" In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000).

In a unanimously favorable report on the Treaty, the Senate Committee on Foreign Relations expressly recorded its decision that "the reparations provisions of the Treaty are eminently fair," and that it "is the duty and responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable, such compensation to be paid out of reparations that may be received from Japan or from other sources." S. Exec. Rep. No. 82-2, at 12-13 (Ex. 2). Consistent with the United States' "duty and responsibility" to provide such "compensation for persons under its protection as it deems fair and equitable," *id.*, Congress amended the War Claims Act of 1948, 50 U.S.C. App. §§ 2001-2017 (1994), to afford compensation to victims of Japan during WWII. 50 U.S.C. App. § 2005(d) (1994).<sup>10</sup>

The Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10. 98 Cong. Rec. 2594 (1952). The Treaty was considered as part of a package with three additional security treaties relating to the Pacific region, reflecting the United States' view of the Treaty as an integral part of its political and foreign relations goals in that region. *See, e.g.*, 98 Cong. Rec.

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<sup>10</sup> A proposal that would have allowed federal courts to adjudicate war compensation claims was rejected because of the complexity of the issues and the need to have the claims "classified by experts who are qualified so to do" in order to "get some rationality out of this situation [and] to determine the categories of claims that should be allowed." 94 Cong. Rec. 564 (1948). There can be no doubt that Congress did not want claims within the Commission's jurisdiction to be adjudicated by the courts, because it barred even judicial review of the Commission's decisions "by mandamus or otherwise." 50 U.S.C. App. § 2010 (1994).

2327, 2361, 2450, 2462 (1952).

The participation of other nations in the Treaty, and in particular the resolution of claims arising from Japan's actions during the World War II, was strongly influenced by the geopolitical situation in East Asia. The Philippines was a party to the Treaty. Because the Philippines signed and ratified the Peace Treaty, any wartime claims of Philippine nationals against Japan have been expressly waived by Article 14(b) of the Treaty, including those claims at issue here. As a result of political complications, China and Korea did not become party to the 1951 Treaty.<sup>11</sup> Consequently, Article 14(b) of the Treaty, providing for waiver of all Allied claims against Japan and its nationals, does not cover the PRC, Taiwan, or North or South Korea. However, the Allies inserted several provisions into the Treaty that provided for some form of compensation to these countries. Other articles of the Treaty obligated Japan to enter into bilateral agreements with China and Korea on terms similar to those provided in the Treaty. In this manner, the Allies established comprehensive framework for the disposition of war

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<sup>11</sup> China presented the biggest obstacle to a comprehensive settlement, since by 1949 there was strong international disagreement over which political entity legally represented China: the People's Republic of China ("PRC") in Beijing or Chiang Kai-Shek's Nationalist forces on Taiwan ("the Republic of China"). See Memorandum of Conversation, by the Deputy Director of the British Commonwealth and Northern European Affairs (Satterthwaite), Washington, March 30, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 953-54 (1977) (Exhibit 4). The U.S. Government continued strongly to support the Chinese Nationalists. Great Britain, by contrast, favored recognition of the People's Republic of China.

Korea presented a different but equally complicated set of problems. As Korea had been under the colonial occupation of Japan since 1910, "the view of the United States and Japanese governments was that . . . Korea had fought against the Allies during the Pacific War and therefore was not eligible for reparations." See U.S. Dep't of State Publications, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan, 84 (1951) (Exhibit 5). Korea nevertheless was recognized as having "a special claim on Allied consideration." Id.

claims.

Article 26 of the Treaty, for example, obligated Japan to enter into a war-claims settlement with a Chinese political entity (without specifying which Chinese entity) within three years. Article 21 of the Treaty stated that China would be entitled to the benefits of Articles 10 and 14(a). In Article 10, Japan renounced all rights and interests in China, and Article 14(a) provided for the seizure and liquidation of assets located in Chinese territory. This was extremely significant because almost half of all Japanese-owned assets abroad were located in China.

Within three years, Japan concluded a bilateral treaty of peace with the "Republic of China" (Taiwan), on substantially the same terms as are provided for in the 1951 Treaty. See Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858 U.N.T.S. 38 (Exhibit 6). The situation with regard to the People's Republic of China is more complicated. In the wake of President Nixon's "opening" to the People's Republic of China, Japan sought to normalize relations. Japan and the PRC, while not signing a formal peace treaty, agreed to a "Joint Communiqué" which terminated the "abnormal state of affairs that ha[d] hitherto existed between Japan and the People's Republic of China." Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Art. 1 (Exhibit 7). In the Joint Communiqué, the PRC renounced its demand for war reparations from Japan. Id., Art. 5. The Treaty of Peace and Friendship between China and Japan incorporated and formalized the terms of the Joint Communiqué. August 12, 1978, 19784 U.N.T.S. 269 (Exhibit 8).

Korea also received benefits under Article 21 of the Treaty, and its independence was recognized under Article 2. Article 4(a) obligated Japan to resolve all claims between Korea and Japan through "special arrangements between the two governments," and Article 4(b) provided for the Korean

Government's seizure of all Japanese-owned assets in Korea. This was a significant step towards the resolution of Korean claims as these assets were, by all accounts, substantial. By the end of World War II, Japan and its nationals had acquired 5 billion dollars' worth of assets in Korea, almost 85 percent of all property in Korea. See Sung-Hwa Cheong, *The Politics of Anti-Japanese Sentiment in Korea: Japanese-South Korean Relations under American Occupation, 1945-1952*, 48 (1991).

Japan and the Republic of Korea (South Korea) entered into an agreement as contemplated in Article 4(a) of the Treaty in 1965 following years of protracted negotiations in which the United States was heavily involved. See Agreement on the Settlement of Problems Concerning Property and Claims and On Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, 8473 U.N.T.S. 258 (Exhibit 9); see also generally Cheong, *supra*, at 99-118 (discussing U.S. role in the negotiations). The terms of this agreement were greatly influenced by the fact that Korea already had received substantial compensation under Article 4(b) of the 1951 Treaty, as discussed above. Cheong, *supra*, at 117. The Japan-ROK agreement is part and parcel of the framework created by the United States and its allies in 1951. A similar agreement between Japan and North Korea is currently under negotiation, in furtherance of Japan's obligations under Article 4(a) of the 1951 Treaty.

Thus, although Article 14(b) of the Treaty did not extinguish claims of nationals of countries not party to the Treaty, the text and negotiating history of the Treaty demonstrates that it was intended to completely resolve war claims against Japan and its nationals. See *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000); *Tenney v. Mitsui & Co., Ltd.*, Case No. CV-99-11545, slip op. at 4-5 (C.D. Cal. Feb. 24, 2000) (J. Marshall) (Exhibit 10).

## **B. The Court Must Defer To The Judgment Of The Executive And Legislative**

**Branches In The Resolution Of War-Related Claims Against Japan, As Reflected In The 1951 Peace Treaty.**

The United States Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10. In entering into the Treaty, it manifestly was not the intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan and Japanese nationals in U.S. courts, while allowing federal or state courts to serve as a venue for the litigation of similar claims by non-U.S. nationals. Regardless of what arrangements Korea and China have with Japan, it would be inconsistent with the framework and intent of the 1951 Treaty for their claims to be litigated in U.S. courts.

The 1951 Treaty created the international framework for bringing closure to World War II claims against Japan and its nationals. In drafting the Treaty, the Allies took pains not only to address settlement of their own war-related claims with Japan, but those of non-party nations as well. As discussed above, the Allies inserted several provisions into the Treaty that provided for some form of compensation to those countries. See Treaty, Arts. 2, 4, 10, 14 and 21 (Ex. 1). In addition, the Treaty obligated Japan to enter into bilateral agreements with those entities on terms similar to those provided in the Treaty. Id., Arts. 4 and 26. The Allies' intent was to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting the resolution of those claims through political means. This policy decision was made in order to allow Japan as a nation to rebuild its economy and become a stable force and strong ally in Asia. See In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d at 946-47; S. Exec. Rep. No. 82-2, at 2-3 (Ex. 2); Aldrich v. Mitsui & Co. (USA), Case No. 87-912-Civ-J-12, slip op. at 3 (M.D.

Fla. Jan. 20, 1988) (Exhibit 11). To that end, the United States actively facilitated and encouraged Japan's efforts to enter into peace treaties and/or claims settlement agreements with non-signatory nations such as China, Korea, Burma and Indonesia.

An assertion of jurisdiction by this Court would fail to give appropriate deference to the policy established by the Executive and Congress and would be at odds with established precedents. Foreign relations in general – and matters of war and peace in particular – frequently present political questions. U.S. v. Belmont, 301 U.S. 342, 328 (1937). Under the Constitution, the conduct of American diplomatic and foreign affairs is entrusted to the political branches of the federal government. See, e.g., Haig v. Agee, 453 U.S. 280, 292 (1981); Chicago & Southern Air Lines, 333 U.S. at 111; United States v. Pink, 315 U.S. 203, 222-23 (1942); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). As articulated by the Court in Baker v. Carr, 369 U.S. at 217, there is a "textually demonstrable constitutional commitment" of U.S. diplomacy and foreign policy to the political branches of the government.<sup>12</sup> Indeed, as the Supreme Court has observed, matters

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<sup>12</sup> The President and Congress both have constitutional authority with respect to the Nation's foreign affairs. The President is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." Ludecke v. Watkins, 335 U.S. 160, 173 (1948). The President's power flows from his positions as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and Commander in Chief, id. art. II, § 2, cl. 1. See Chicago & Southern Air Lines, 333 U.S. at 109. In particular, the Constitution grants the President the specific power to "make Treaties" with the advice and consent of two-thirds of the Senators present, U.S. Const. art. II, § 2, cl. 2. Congress has the power to declare war, U.S. Const. art. I, § 8, cl. 11; and broad power to regulate commerce with foreign nations, id. art. I, § 8, cl. 3. And, as noted above, the Senate provides its advice and consent with regard to treaties. Id. art. II, § 2, cl. 2. It is clear from the text of the Constitution that the power over foreign affairs and foreign commerce lies exclusively with the Executive and Legislative Branches.

vitaly and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); see also Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967); Z & F Assets Realization Corp. v. Hull, 114 F.2d 464, (D.C. Cir. 1940), aff'd, 311 U.S. 470 (1941). Thus, the Judiciary's refusal to review foreign policy decisions – in this case the policy reflected in the 1951 Treaty – properly shows deference to the responsibilities committed to the political branches under the Constitution, as well as the practical limitations on the role of the Judiciary. Chicago & Southern Air Lines, 333 U.S. at 111; see also Antolok, 873 F.2d at 381 ("nowhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary, in any fashion in the making of international agreements"); Ange v. Bush, 752 F. Supp. 509, 512 (D.D.C. 1990) ("the Constitution grants operational powers only to the two political branches . . . where decisions are made based on political and policy considerations. The far-reaching ramifications of those decisions should fall upon the shoulders of those elected by the people to make those decisions").

The Court should not second guess the difficult and sensitive foreign policy judgments made by the United States and the other Allied governments in the wake of World War II. See Chicago & Southern Air Lines, 333 U.S. at 111; Aktepe, 105 F.3d at 1403-04; Ange, 752 F. Supp. at 515.

**C. Resolution of Plaintiffs' Claims Would Require The Court To Move Beyond Areas Of Judicial Expertise.**

Resolution of the plaintiffs' claims also would demand that a court move beyond areas of judicial expertise. Plaintiffs' claims involve issues for which there are no judicially manageable standards.

Consideration of plaintiffs' allegations necessarily would put the Court in the position of judging the reasonableness of agreements entered into between other foreign governments, such as Japan and China or Korea, and the effects of those agreements on the rights of their citizens with respect to events occurring outside the United States. Belmont, 301 U.S. at 328. Under international law, governments decide how to address the claims of their own nationals – whether to put them forward and whether and how to settle them. See L. Henkin, Foreign Affairs and the Constitution 299-300 (1972). The plaintiffs' governments, China, Korea and the Philippines, as well as the authorities on Taiwan, chose to resolve those claims through international agreements with Japan. The decisions of those governments as reflected in those agreements are not susceptible of analysis by U.S. courts.

While both political branches maintain certain authority in foreign relations and in war-making, "the judicial branch, on the other hand, is neither equipped nor empowered to intrude" into this realm. Ange, 752 F. Supp. at 512. The judgments required in foreign affairs "are delicate, complex, and involve large amounts of prophecy," and therefore should "be undertaken only by those directly responsible to the people whose welfare they advance or imperil." Id. (citing Chicago & Southern Air Lines, 333 U.S. at 111); see also More v. Intelcom Support Services, Inc., 960 F.2d 466, 472 (5th Cir. 1992) (while "courts are well equipped to resolve questions of domestic law," they "venture into unfamiliar territory when interpreting . . . treaties negotiated with foreign governments"); Riegle v. Federal Open Market Committee, 656 F.2d 873, 881 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981) (Meddling with the decision making of the political branches "extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power" (citations omitted)).

The Supreme Court has recognized not only "the limits of [its] own capacity to 'determine

precisely when foreign nations will be offended by particular acts' . . . but consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of [the] Court.'" Crosby v. National Foreign Trade Council, 530 U.S. 363, 386 (2000) (internal citations omitted); see also Harisiades, 342 U.S. at 588-89; Regan v. Wald, 468 U.S. 222, 242 (1984).

United States courts should not be placed in the position of judging the wisdom behind agreements entered into between two foreign governments, such as Japan and China or Korea, on the rights of their citizens with respect to events occurring outside the United States, or attempting to analyze those agreements. Courts as a general matter do not consider themselves competent to resolve such matters. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-25 (1964); Kelberine v. Societe Internationale, Etc., 363 F.2d 989, 995 (D.C. Cir. 1965), cert. denied, 385 U.S. 1044 (1967); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196, 1204-05 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979). These are matters to be decided through negotiation among the governments involved, not in a United States' courtroom.

**D. Prudential Considerations Counsel Against Judicial Intervention.**

Prudential considerations also counsel against review of plaintiffs' claims. First, on matters of international relations, the United States needs to speak with one voice. See Antolok, 873 F.2d 384. Second, this case presents "an unusual need for unquestioning adherence to a political decision already made." Baker, 369 U.S. at 217. Finally, the respect due the political branches, in addition to all the other factors discussed above, weighs in favor of finding this case nonjusticiable.

Judicial review of plaintiffs' claims against Japan would frustrate the policy established by the 1951 Peace Treaty of fostering resolution of all war claims against Japan by state-to-state negotiations, a policy that has been in effect for over half a century. The United States was the driving force behind the decision to waive all Allied claims against Japan in the 1951 Treaty. It did so to fulfill fundamental U.S. foreign policy and national security goals. The Peace Treaty, along with a bilateral security agreement the United States entered into with Japan on the same day the Peace Treaty was signed, forms the basis of U.S.-Japan relations, and has been the very cornerstone of our country's foreign policy and regional security in East Asia and the Pacific. A decision to allow these claims to proceed in the face of the Peace Treaty and other governments' agreements with Japan effectively would undo that foreign policy, which has benefitted the entire country for the last 50 years, by reopening claims that have long since been resolved.

In Article 14 of the 1951 Treaty, the United States expressly waived – on behalf of themselves and its nationals – claims arising out of actions taken by Japan and its nationals during the war, thereby closing the doors of U.S. courts to such claims. This decision by the federal government is entitled to substantial deference because, "when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice." See United States v. Li, 206 F.3d 56, 67 (1st Cir.) (Selya, J., concurring), cert. denied, 121 S. Ct. 379 (2000); Curtiss-Wright Export Corp., 299 U.S. at 320; accord Department of Navy v. Egan, 484 U.S. 518, 529 (1988); Agee, 453 U.S. at 293-94; Alfred Dunhill of London, Inc., 425 U.S. at 705-06 n.18. The necessity that the United States speak with one strong voice is especially critical in complex and delicate circumstances such as one involving an international peace treaty. See DKT Memorial Fund LTD v. Agency for International Development,

887 F.2d 275, 291 (D.C. Cir. 1989) (area of "foreign affairs" is where "the Executive receives its greatest deference, and in which we must recognize the necessity for the nation to speak with a single voice").

The 1951 Treaty of Peace with Japan created a basic framework for the non-judicial resolution of war claims that, for nearly half a century, has been adhered to by all states with war-related claims against Japan. The unambiguous purpose of this process was "to settle the reparations issue once and for all" because "it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace." In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d at 946 (emphasis added). The litigation of these claims in U.S. court would be inconsistent with the United States' objective of achieving finality on the issue of war-related claims.<sup>13</sup> It also could have serious implications for stability in the region. The Japanese Government has stated that its relationships with China and Korea are very delicate and that such lawsuits could disrupt relations and ongoing negotiations with those countries. See Memorandum in Support of Motion of Government of Japan to Dismiss Complaint at pp. 1, 27.

Finally, a Court decision to allow these claims to proceed would create the very "multifarious pronouncements" about America's actions overseas that Baker v. Carr commands the Court to avoid. 369 U.S. at 217. Rather than bringing closure on war claims against Japan and its nationals – the

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<sup>13</sup> As the U.S. Supreme Court has instructed, the United States' interpretation of the Peace Treaty is entitled to "great weight." See Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight"); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (same).

purpose of the 1951 Treaty – litigation of these claims would throw open a case-by-case adjudication of war-related claims. If individual plaintiffs were allowed to impose their interpretation of the Treaty on a piece-meal basis through litigation, this would have a potentially serious negative impact on U.S.-Japan relations. It also could affect United States treaty relations globally by calling into question the finality of U.S. commitments.

### CONCLUSION

The United States respectfully submits that the claims raised by the plaintiffs should be dismissed.

Respectfully submitted,

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