Republic of the Philippines

Supreme Court

Manila

EN BANC

ISABELITA C. VINUYA, VICTORIA C. DELA PEÑA, HERMINIHILDA MANIMBO, LEONOR H. SUMAWANG, CANDELARIA L. SOLIMAN, MARIA L. QUILANTANG, MARIA L. MAGISA, NATALIA M. ALONZO, LOURDES M. NAVARO, FRANCISCA M. ATENCIO, ERLINDA MANALASTAS, TARCILA M. SAMPANG, ESTER M. PALACIO, MAXIMA R. DELA CRUZ, BELEN A. SAGUM, FELICIDAD TURLA, FLORENCIA M. DELA PEÑA, EUGENIA M. LALU, JULIANA G. MAGAT, CECILIA SANGUYO, ANA ALONZO, RUFINA P. MALLARI, ROSARIO M. ALARCON, RUFINA C. GULAPA, ZOILA B. MANALUS, CORAZON C. CALMA, MARTA A. GULAPA, TEODORA M. HERNANDEZ, FERMIN B. DELA PEÑA, MARIA DELA PAZ B. CULALA, ESPERANZA MANAPOL, JUANITA M. BRIONES, VERGINIA M. GUEVARRA, MAXIMA ANGULO, EMILIA SANGIL, TEOFILA R. PUNZALAN, JANUARIA G. GARCIA, PERLA B. BALINGIT, BELEN A. CULALA, PILAR Q. GALANG, ROSARIO C. BUCO, GAUDENCIA C.	**G.R. No. 162230** Present: PUNO, *C. J.*, CARPIO, CORONA, CARPIO MORALES, VELASCO, JR., NACHURA, LEONARDO-DE CASTRO, BRION, PERALTA, BERSAMIN, DEL CASTILLO, ABAD, VILLARAMA, JR., PEREZ, and MENDOZA, *JJ.*

DELA PEÑA, RUFINA Q. CATACUTAN, FRANCIA A. BUCO, PASTORA C. GUEVARRA, VICTORIA M. DELA CRUZ, PETRONILA O. DELA CRUZ, ZENAIDA P. DELA CRUZ, CORAZON M. SUBA, EMERINCIANA A. VINUYA, LYDIA A. SANCHEZ, ROSALINA M. BUCO, PATRICIA A. BERNARDO, LUCILA H. PAYAWAL, MAGDALENA LIWAG, ESTER C. BALINGIT, JOVITA A. DAVID, EMILIA C. MANGILIT, VERGINIA M. BANGIT, GUILLERMA S. BALINGIT, TERECITA PANGILINAN, MAMERTA C. PUNO, CRISENCIANA C. GULAPA, SEFERINA S. TURLA, MAXIMA B. TURLA, LEONICIA G. GUEVARRA, ROSALINA M. CULALA, CATALINA Y. MANIO, MAMERTA T. SAGUM, CARIDAD L. TURLA, et al. In their capacity and as members of the "Malaya Lolas Organization",
Petitioners,

Promulgated:
April 28, 2010

- versus -

THE HONORABLE EXECUTIVE SECRETARY ALBERTO G. ROMULO, THE HONORABLE SECRETARY OF FOREIGN AFFAIRS DELIA DOMINGO-ALBERT, THE HONORABLE SECRETARY OF JUSTICE MERCEDITAS N. GUTIERREZ, and THE HONORABLE SOLICITOR GENERAL ALFREDO L. BENIPAYO,
Respondents.

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D E C I S I O N

DEL CASTILLO, *J.:*

> The Treaty of Peace with Japan, insofar as it barred future claims such as those asserted by plaintiffs in these actions, exchanged full compensation of plaintiffs for a future peace. History has vindicated the wisdom of that bargain. And while full compensation for plaintiffs' hardships, in the purely economic sense, has been denied these former prisoners and countless other survivors of the war, the immeasurable bounty of life for themselves and their posterity in a free society and in a more peaceful world services the debt.1[1]

There is a broad range of vitally important areas that must be regularly decided by the Executive Department without either challenge or interference by the Judiciary. One such area involves the delicate arena of foreign relations. It would be strange indeed if the courts and the executive spoke with different voices in the realm of foreign policy. Precisely because of the nature of the questions presented, and the lapse of more than 60 years since the conduct complained of, we make no attempt to lay down general guidelines covering other situations not involved here, and confine the opinion only to the very questions necessary to reach a decision on this matter.

Factual Antecedents

1[1] *In Re World War II Era Japanese Forced Labor Litigation,* 114 F. Supp. 2d 939 (N.D. Cal. 2000).

This is an original Petition for *Certiorari* under Rule 65 of the Rules of Court with an application for the issuance of a writ of preliminary mandatory injunction against the Office of the Executive Secretary, the Secretary of the Department of Foreign Affairs (DFA), the Secretary of the Department of Justice (DOJ), and the Office of the Solicitor General (OSG).

Petitioners are all members of the MALAYA LOLAS, a non-stock, non-profit organization registered with the Securities and Exchange Commission, established for the purpose of providing aid to the victims of rape by Japanese military forces in the Philippines during the Second World War.

Petitioners narrate that during the Second World War, the Japanese army attacked villages and systematically raped the women as part of the destruction of the village. Their communities were bombed, houses were looted and burned, and civilians were publicly tortured, mutilated, and slaughtered. Japanese soldiers forcibly seized the women and held them in houses or cells, where they were repeatedly raped, beaten, and abused by Japanese soldiers. As a result of the actions of their Japanese tormentors, the petitioners have spent their lives in misery, having endured physical injuries, pain and disability, and mental and emotional suffering.2[2]

Petitioners claim that since 1998, they have approached the Executive Department through the DOJ, DFA, and OSG, requesting assistance in filing a claim against the

2[2] U.N. Doc. E/CN.4/1996/53/Add.1 (January 4, 1996), Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45.

Japanese officials and military officers who ordered the establishment of the "comfort women" stations in the Philippines. However, officials of the Executive Department declined to assist the petitioners, and took the position that the individual claims of the comfort women for compensation had already been fully satisfied by Japan's compliance with the Peace Treaty between the Philippines and Japan.

Issues

Hence, this petition where petitioners pray for this court to (a) declare that respondents committed grave abuse of discretion amounting to lack or excess of discretion in refusing to espouse their claims for the crimes against humanity and war crimes committed against them; and (b) compel the respondents to espouse their claims for official apology and other forms of reparations against Japan before the International Court of Justice (ICJ) and other international tribunals.

Petitioners' arguments

Petitioners argue that the general waiver of claims made by the Philippine government in the Treaty of Peace with Japan is void. They claim that the comfort women system established by Japan, and the brutal rape and enslavement of petitioners constituted a crime against humanity,3[3] sexual slavery,4[4] and torture.5[5] They allege

3[3] Treaty and customary law both provide that when rape is committed as part of a widespread or systematic attack directed at any civilian population, regardless of its international or internal character, then it

that the prohibition against these international crimes is *jus cogens* norms from which no derogation is possible; as such, in waiving the claims of Filipina comfort women and failing to espouse their complaints against Japan, the Philippine government is in breach of its legal obligation not to afford impunity for crimes against humanity. Finally, petitioners assert that the Philippine government's acceptance of the "apologies" made by Japan as well as funds from the Asian Women's Fund (AWF) were contrary to international law.

Respondents' Arguments

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constitutes one of the gravest crimes against humanity. This principle is codified under Article 6(c) of the 1945 Nuremberg Charter as well as Article 5(c) of the Tokyo Charter, which enumerated "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war" as crimes against humanity, and extended in scope to include imprisonment, torture and rape by Control Council Law No. 10.

4[4] Article 1 of the Slavery Convention provides:

For the purpose of the present Convention, the following definitions are agreed upon:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 L.N.T.S. 253, *entered into force* March 9, 1927.

5[5] Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (Convention Against Torture, Article 1.1)

Respondents maintain that all claims of the Philippines and its nationals relative to the war were dealt with in the San Francisco Peace Treaty of 1951 and the bilateral Reparations Agreement of 1956.6[6]

Article 14 of the Treaty of Peace7[7] provides:

> Article 14. Claims and Property
>
> a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the present time meet its other obligations.
>
> b) Except as otherwise provided in the present Treaty, the Allied Powers 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, and claims of the Allied Powers for direct military costs of occupation.

6[6] Signed at San Francisco, September 8, 1951; Initial entry into force: April 28, 1952. The treaty was signed by Argentina, Australia, Belgium, Bolivia, Brazil, Cambodia, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Indonesia, Iran, Iraq, Japan, Laos, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, The Philippines, Poland, Saudi Arabia, the Soviet Union, Sri Lanka, South Africa,Syria, Turkey, the United Kingdom, the United States, Uruguay, Venezuela, Vietnam. The signatories for the Republic of the Philippines were Carlos P. Romulo, J.M. Elizalde, Vicente Francisco, Diosdado Macapagal, Emiliano Tirona, and V.G. Sinco.

7[7] Signed in San Francisco, September 8, 1951, ratified by the Philippine Senate on July 16, 1956. Signed by the Philippine President on July 18, 1956. Entered into force on July 23, 1956.

In addition, respondents argue that the apologies made by Japan8[8] have been satisfactory, and that Japan had addressed the individual claims of the women through the atonement money paid by the Asian Women's Fund.

Historical Background

The comfort women system was the tragic legacy of the Rape of Nanking. In December 1937, Japanese military forces captured the city of Nanking in China and began a "barbaric campaign of terror" known as the Rape of Nanking, which included the rapes and murders of an estimated 20,000 to 80,000 Chinese women, including young girls, pregnant mothers, and elderly women.9[9]

8[8] On September 21, 1992, the Japanese Embassy formally confirmed to the Philippine government the involvement of the Japanese Imperial Army in the establishment of comfort women stations.

In May 1993, Japan approved textbooks featuring an account of how comfort women were forced to work as prostitutes for the Japanese Imperial Army.

On August 4, 1993, Japanese Prime Minister Miyazawa, before resigning, formally apologized to women all over the world who were forced to serve as comfort women:

> The Japanese government regrets and sincerely apologizes for the unbearable pain that these women regardless of their nationalities, suffered while being forced to work as so-called comfort women.
>
> The Japanese government expresses its heartfelt sentiments of reflection and apology to all the women for their many sufferings and the injuries to mind and body that cannot be healed.

The Philippine government, under the administration of then President Fidel V. Ramos, accepted the formal apology given the Japanese Government. Though the formal apology came late, it is a most welcome gesture from the government of Japan, which has been very supportive of our economic development.

9[9] Richard J. Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT'L & COMP. L. 59, 64 (2003).

In reaction to international outcry over the incident, the Japanese government sought ways to end international condemnation10[10] by establishing the "comfort women" system. Under this system, the military could simultaneously appease soldiers' sexual appetites and contain soldiers' activities within a regulated environment.11[11] Comfort stations would also prevent the spread of venereal disease among soldiers and discourage soldiers from raping inhabitants of occupied territories.12[12]

Daily life as a comfort woman was "unmitigated misery."13[13] The military forced victims into barracks-style stations divided into tiny cubicles where they were forced to live, sleep, and have sex with as many 30 soldiers per day.14[14] The 30 minutes allotted for sexual relations with each soldier were 30-minute increments of unimaginable horror for the women.15[15] Disease was rampant.16[16] Military doctors regularly examined the women, but these checks were carried out to prevent the spread of

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10[10] *See* Argibay, Ad Litem Judge, International Criminal Tribunal for the Former Yugoslavia, Speech at the *Stefan A. Riesenfeld Symposium: Sexual Slavery and the "Comfort Women" of World War II*, in 21 BERKELEY J. INT'L L. 375, 376 (2003).

11[11] Id.

12[12] Nearey, *Seeking Reparations in the New Milleunium: Will Japan Compensate the "Comfort Women" of World War II?*, 15 TEMP. INT'L & COMP. L.J. 121, 134 (2001).

13[13] USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN: AN UNFINISHED ORDEAL 15 (1994).

14[14] Id. at 48.

15[15] *See* Johnson, Comment, *Justice for "Comfort Women": Will the Alien Tort Claims Act Bring Them the Remedies They Seek?*, 20 PENN ST. INT'L L. REV. 253, 260 (2001).

16[16] *Id.* at 261. Soldiers disregarded rules mandating the use of condoms, and thus many women became pregnant or infected with sexually transmitted diseases.

venereal diseases; little notice was taken of the frequent cigarette burns, bruises, bayonet stabs and even broken bones inflicted on the women by soldiers.

Fewer than 30% of the women survived the war.17[17] Their agony continued in having to suffer with the residual physical, psychological, and emotional scars from their former lives. Some returned home and were ostracized by their families. Some committed suicide. Others, out of shame, never returned home.18[18]

Efforts to Secure Reparation

The most prominent attempts to compel the Japanese government to accept legal responsibility and pay compensatory damages for the comfort women system were through a series of lawsuits, discussion at the United Nations (UN), resolutions by various nations, and the Women's International Criminal Tribunal. The Japanese government, in turn, responded through a series of public apologies and the creation of the AWF.19[19]

Lawsuits

17[17] Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?* 3 OCCASIONAL PAPERS/REPRINT SERIES CONTEMPORARY ASIAN STUDIES 8 (1995).

18[18] Id.

19[19] YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION 435-38 (2001).

In December 1991, Kim Hak-Sun and two other survivors filed the first lawsuit in Japan by former comfort women against the Japanese government. The Tokyo District Court however dismissed their case.20[20] Other suits followed,21[21] but the Japanese government has, thus far, successfully caused the dismissal of every case.22[22]

Undoubtedly frustrated by the failure of litigation before Japanese courts, victims of the comfort women system brought their claims before the United States (US). On September 18, 2000, 15 comfort women filed a class action lawsuit in the US District Court for the District of Columbia23[23] "seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II," in violation

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20[20] Meade, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in* Hwang v. Japan, 35 VAND. J. TRANSNAT'L L. 211, 233 (2002).

21[21] Numerous lawsuits immediately followed, including lawsuits filed by the Korean Council for Women Drafted for Sexual Slavery, and a suit by a Dutch former comfort woman; Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 44 (2000).

22[22] The lower court ruling in *Ha v. Japan* has been the lone courtroom victory for comfort women. On December 25, 1992, ten Korean women filed the lawsuit with the Yamaguchi Prefectural Court, seeking an official apology and compensation from the Japanese government. The plaintiffs claimed that Japan had a moral duty to atone for its wartime crimes and a legal obligation to compensate them under international and domestic laws. More than five years later, on April 27, 1998, the court found the Japanese government guilty of negligence and ordered it to pay ¥300,000, or $2,270, to each of the three plaintiffs. However, the court denied plaintiffs' demands that the government issue an official apology. Both parties appealed, but Japan's High Court later overturned the ruling. *See* Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum,* 3 ASIAN-PAC. L. & POL'Y J. 40 (2002); Kim & Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA PAC. BASIN L.J. 263 (1998). Park, *Comfort Women During WW II: Are U.S. Courts a Final Resort for Justice?*, 17 AM. U. INT'L L. REV. 403, 408 (2002).

23[23] *Hwang Geum Joo v. Japan* ("Hwang I"), 172 F. Supp. 2d 52 (D.D.C. 2001), affirmed, 332 F.3d 679 (D.C. Cir. 2003), vacated, 542 U.S. 901 (2004), remanded to 413 F.3d 45 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1418 (2006).

of "both positive and customary international law." The case was filed pursuant to the Alien Tort Claims Act ("ATCA"),24[24] which allowed the plaintiffs to sue the Japanese government in a US federal district court.25[25] On October 4, 2001, the district court dismissed the lawsuit due to lack of jurisdiction over Japan, stating that "[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen x x x discussions nearly half a century later x x x [E]ven if Japan did not enjoy sovereign immunity, plaintiffs' claims are non-justiciable and must be dismissed."

The District of Columbia Court of Appeals affirmed the lower court's dismissal of the case.26[26] On appeal, the US Supreme Court granted the women's petition for writ of certiorari, vacated the judgment of the District of Columbia Court of Appeals, and remanded the case.27[27] On remand, the Court of Appeals affirmed its prior decision, noting that "much as we may feel for the plight of the appellants, the courts of the US simply are not authorized to hear their case."28[28] The women again brought their case

24[24] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). The ATCA gives US federal district courts original jurisdiction to adjudicate civil cases and award tort damages for violations of the law of nations or United States treaties. *See* Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women*, 14 TEX. J. WOMEN & L. 121, 141-42 (2004).

25[25] Under the ATCA, when a "cause of action is brought against a sovereign nation, the only basis for obtaining personal jurisdiction over the defendant is through an exception to the Foreign Sovereign Immunities Act (FSIA)." *See* Jeffords, *Will Japan Face Its Past? The Struggle for Justice for Former Comfort Women,* 2 REGENT J. INT'L L. 145, 158 (2003/2004). The FSIA (28 U.S.C. § 1604 (1994 & Supp. 1999).) grants foreign states immunity from being sued in US district courts unless the state waives its immunity or the claims fall within certain enumerated exceptions. The Japanese government successfully argued that it is entitled to sovereign immunity under the FSIA. The government additionally argued that post-war treaties had resolved the issue of reparations, which were non-justiciable political questions.

26[26] See *Hwang Geum Joo v. Japan* ("Hwang II"), 332 F.3d 679, 680-81 (D.C. Cir. 2003), vacated, 542 U.S. 901 (2004), remanded to 413 F.3d 45 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1418 (2006).

27[27] See *Hwang Geum Joo v. Japan* ("Hwang III"), 542 U.S. 901 (2004) (memorandum), remanded to 413 F.3d 45 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1418 (2006).

28[28] Id.

to the US Supreme Court which denied their petition for writ of certiorari on February 21, 2006.

Efforts at the United Nations

In 1992, the Korean Council for the Women Drafted for Military Sexual Slavery by Japan (KCWS), submitted a petition to the UN Human Rights Commission (UNHRC), asking for assistance in investigating crimes committed by Japan against Korean women and seeking reparations for former comfort women.29[29] The UNHRC placed the issue on its agenda and appointed Radhika Coomaraswamy as the issue's special investigator. In 1996, Coomaraswamy issued a Report reaffirming Japan's responsibility in forcing Korean women to act as sex slaves for the imperial army, and made the following ***recommendations***:

> A. At the national level
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> 137. The Government of Japan should:
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> (a) Acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the Second World War was a violation of its obligations under international law and accept legal responsibility for that violation;
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> (b) Pay compensation to individual victims of Japanese military sexual slavery according to principles outlined by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. A special administrative tribunal for

29[29] SOH, THE COMFORT WOMEN PROJECT, SAN FRANCISCO STATE UNIVERSITY (1997-2001), http://online.sfsu.edu/~soh/comfortwomen.html, at 1234-35.

this purpose should be set up with a limited time-frame since many of the victims are of a very advanced age;

(c) Make a full disclosure of documents and materials in its possession with regard to comfort stations and other related activities of the Japanese Imperial Army during the Second World War;

(d) Make a public apology in writing to individual women who have come forward and can be substantiated as women victims of Japanese military sexual slavery;

(e) Raise awareness of these issues by amending educational curricula to reflect historical realities;

(f) Identify and punish, as far as possible, perpetrators involved in the recruitment and institutionalization of comfort stations during the Second World War.

Gay J. McDougal, the Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, also presented a report to the Sub-Committee on June 22, 1998 entitled *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict.* The report included an appendix *entitled An Analysis of the Legal Liability of the Government of Japan for 'Comfort Women Stations' established during the Second World War*,30[30] which contained the following findings:

68. The present report concludes that the Japanese Government remains liable for grave violations of human rights and humanitarian law, violations that amount in their totality to crimes against humanity. The Japanese Government's arguments to the contrary, including arguments that seek to attack the underlying humanitarian law

30[30] *An Analysis Of The Legal Liability Of The Government Of Japan For "Comfort Women Stations" Established During The Second World War* (Appendix); REPORT ON CONTEMPORARY FORMS OF SLAVERY: SYSTEMATIC RAPE, SEXUAL SLAVERY AND SLAVERY-LIKE PRACTICES DURING ARMED CONFLICT, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights (Fiftieth Session) E/CN.4/Sub.2/1998/13 (June 22, 1998).

prohibition of enslavement and rape, remain as unpersuasive today as they were when they were first raised before the Nuremberg war crimes tribunal more than 50 years ago. In addition, the Japanese Government's argument that Japan has already settled all claims from the Second World War through peace treaties and reparations agreements following the war remains equally unpersuasive. This is due, in large part, to the failure until very recently of the Japanese Government to admit the extent of the Japanese military's direct involvement in the establishment and maintenance of these rape centres. The Japanese Government's silence on this point during the period in which peace and reparations agreements between Japan and other Asian Governments were being negotiated following the end of the war must, as a matter of law and justice, preclude Japan from relying today on these peace treaties to extinguish liability in these cases.

69. The failure to settle these claims more than half a century after the cessation of hostilities is a testament to the degree to which the lives of women continue to be undervalued. Sadly, this failure to address crimes of a sexual nature committed on a massive scale during the Second World War has added to the level of impunity with which similar crimes are committed today. The Government of Japan has taken some steps to apologize and atone for the rape and enslavement of over 200,000 women and girls who were brutalized in "comfort stations" during the Second World War. However, anything less than full and unqualified acceptance by the Government of Japan of legal liability and the consequences that flow from such liability is wholly inadequate. It must now fall to the Government of Japan to take the necessary final steps to provide adequate redress.

The UN, since then, has not taken any official action directing Japan to provide the reparations sought.

Women's International War Crimes

Tribunal

The Women's International War Crimes Tribunal (WIWCT) was a "people's tribunal" established by a number of Asian women and human rights organizations, supported by an international coalition of non-governmental organizations.31[31] First proposed in 1998, the WIWCT convened in Tokyo in 2000 in order to "adjudicate Japan's military sexual violence, in particular the enslavement of comfort women, to bring those responsible for it to justice, and to end the ongoing cycle of impunity for wartime sexual violence against women."

After examining the evidence for more than a year, the "tribunal" issued its verdict on December 4, 2001, finding the former Emperor Hirohito and the State of Japan guilty of crimes against humanity for the rape and sexual slavery of women.32[32] It bears stressing, however, that although the tribunal included prosecutors, witnesses, and judges, its judgment was not legally binding since the tribunal itself was organized by private citizens.

Action by Individual Governments

On January 31, 2007, US Representative Michael Honda of California, along with six co-sponsor representatives, introduced House Resolution 121 which called for

31[31] Chinkin, *Women's International Tribunal on Japanese Sexual Slavery*, 95 AM. J. INT'L. L. 335 (2001).

32[32] A large amount of evidence was presented to the tribunal for examination. Sixty-four former comfort women from Korea and other surrounding territories in the Asia-Pacific region testified before the court. Testimony was also presented by historical scholars, international law scholars, and two former Japanese soldiers. Additional evidence was submitted by the prosecution teams of ten different countries, including: North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands. Id. at 336.

Japanese action in light of the ongoing struggle for closure by former comfort women. The Resolution was formally passed on July 30, 2007,33[33] and made four distinct demands:

> [I]t is the sense of the House of Representatives that the Government of Japan (1) should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner for its Imperial Armed Forces' coercion of young women into sexual slavery, known to the world as "comfort women", during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II; (2) would help to resolve recurring questions about the sincerity and status of prior statements if the Prime Minister of Japan were to make such an apology as a public statement in his official capacity; (3) should clearly and publicly refute any claims that the sexual enslavement and trafficking of the "comfort women" for the Japanese Imperial Army never occurred; and (4) should educate current and future generations about this horrible crime while following the recommendations of the international community with respect to the "comfort women."34[34]

In December 2007, the European Parliament, the governing body of the European Union, drafted a resolution similar to House Resolution 121.35[35] Entitled, "*Justice for Comfort Women*," the resolution demanded: (1) a formal acknowledgment of responsibility by the Japanese government; (2) a removal of the legal obstacles preventing compensation; and (3) unabridged education of the past. The resolution also stressed the urgency with which Japan should act on these issues, stating: "the right of individuals to claim reparations against the government should be expressly recognized in national law,

33[33] Press Release, *Congressman Mike Honda, Rep. Honda Calls on Japan to Apologize for World War II Exploitation of "Comfort Women"* (January 31, 2007).

34[34] H.R. Res. 121, 110th Cong. (2007) (enacted).

35[35] European Parliament, Human rights: Chad, Women's Rights in Saudi Arabia, Japan's Wartime Sex Slaves, Dec. 17, 2007, http:// www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20071210BRI14639&secondRef=ITEM-008-EN.

and cases for reparations for the survivors of sexual slavery, as a crime under international law, should be prioritized, taking into account the age of the survivors."

The Canadian and Dutch parliaments have each followed suit in drafting resolutions against Japan. Canada's resolution demands the Japanese government to issue a formal apology, to admit that its Imperial Military coerced or forced hundreds of thousands of women into sexual slavery, and to restore references in Japanese textbooks to its war crimes.36[36] The Dutch parliament's resolution calls for the Japanese government to uphold the 1993 declaration of remorse made by Chief Cabinet Secretary Yohei Kono.

The Foreign Affairs Committee of the United Kingdom's Parliament also produced a report in November, 2008 entitled, "*Global Security: Japan and Korea*" which concluded that Japan should acknowledge the pain caused by the issue of comfort women in order to ensure cooperation between Japan and Korea.

Statements of Remorse made by representatives of the Japanese government

36[36] The Comfort Women--A History of Trauma,

http:// taiwan.yam.org.tw/womenweb/conf_women/index_e.html.

Various officials of the Government of Japan have issued the following public statements concerning the comfort system:

a) Statement by the Chief Cabinet Secretary Yohei Kono in 1993:

The Government of Japan has been conducting a study on the issue of wartime "comfort women" since December 1991. I wish to announce the findings as a result of that study.

As a result of the study which indicates that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women. Comfort stations were operated in response to the request of the military authorities of the day. The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere.

As to the origin of those comfort women who were transferred to the war areas, excluding those from Japan, those from the Korean Peninsula accounted for a large part. The Korean Peninsula was under Japanese rule in those days, and their recruitment, transfer, control, etc., were conducted generally against their will, through coaxing, coercion, etc.

Undeniably, this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.

It is incumbent upon us, the Government of Japan, to continue to consider seriously, while listening to the views of learned circles, how best we can express this sentiment.

We shall face squarely the historical facts as described above instead of evading them, and take them to heart as lessons of history. We hereby reiterated our firm

determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history.

As actions have been brought to court in Japan and interests have been shown in this issue outside Japan, the Government of Japan shall continue to pay full attention to this matter, including private researched related thereto.

b) Prime Minister Tomiichi Murayama's Statement in 1994

On the issue of wartime "comfort women", which seriously stained the honor and dignity of many women, I would like to take this opportunity once again to express my profound and sincere remorse and apologies"

c) Letters from the Prime Minister of Japan to Individual Comfort Women

The issue of comfort women, with the involvement of the Japanese military authorities at that time, was a grave affront to the honor and dignity of a large number of women.

As Prime Minister of Japan, I thus extend anew my most sincere apologies and remorse to all the women who endured immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women.

I believe that our country, painfully aware of its moral responsibilities, with feelings of apology and remorse, should face up squarely to its past history and accurately convey it to future generations.

d) The Diet (Japanese Parliament) passed resolutions in 1995 and 2005

Solemnly reflecting upon the many instances of colonial rule and acts of aggression that occurred in modern world history, and recognizing that Japan carried out such acts in the past and inflicted suffering on the people of other countries, especially in Asia, the Members of this House hereby express deep remorse. (Resolution of the House of Representatives adopted on June 9, 1995)

e) Various Public Statements by Japanese Prime Minister Shinzo Abe

I have talked about this matter in the Diet sessions last year, and recently as well, and to the press. I have been consistent. I will stand by the Kono Statement. This is our consistent position. Further, we have been apologizing sincerely to those who suffered immeasurable pain and incurable psychological wounds as comfort women. Former Prime Ministers, including Prime Ministers Koizumi and Hashimoto, have issued letters to the comfort women. I would like to be clear that I carry the same feeling. This has not changed even slightly. (Excerpt from Remarks by Prime Minister Abe at an Interview by NHK, March 11, 2007).

I am apologizing here and now. I am apologizing as the Prime Minister and it is as stated in the statement by the Chief Cabinet Secretary Kono. (Excerpt from Remarks by Prime Minister Abe at the Budget Committee, the House of Councilors, the Diet of Japan, March 26, 2007).

I am deeply sympathetic to the former comfort women who suffered hardships, and I have expressed my apologies for the extremely agonizing circumstances into which they were placed. (Excerpt from Telephone Conference by Prime Minister Abe to President George W. Bush, April 3, 2007).

I have to express sympathy from the bottom of my heart to those people who were taken as wartime comfort women. As a human being, I would like to express my sympathies, and also as prime minister of Japan I need to apologize to them. My administration has been saying all along that we continue to stand by the Kono Statement. We feel responsible for having forced these women to go through that hardship and pain as comfort women under the circumstances at the time. (Excerpt from an interview article "A Conversation with Shinzo Abe" by the Washington Post, April 22, 2007).

x x x both personally and as Prime Minister of Japan, my heart goes out in sympathy to all those who suffered extreme hardships as comfort women; and I expressed my apologies for the fact that they were forced to endure such extreme and harsh conditions. Human rights are violated in many parts of the world during the 20th Century;

> therefore we must work to make the 21st Century a wonderful century in which no human rights are violated. And the Government of Japan and I wish to make significant contributions to that end. (Excerpt from Prime Minister Abe's remarks at the Joint Press Availability after the summit meeting at Camp David between Prime Minister Abe and President Bush, April 27, 2007).

The Asian Women's Fund

Established by the Japanese government in 1995, the AWF represented the government's concrete attempt to address its moral responsibility by offering monetary compensation to victims of the comfort women system.37[37] The purpose of the AWF was to show atonement of the Japanese people through expressions of apology and remorse to the former wartime comfort women, to restore their honor, and to demonstrate Japan's strong respect for women.38[38]

The AWF announced three programs for former comfort women who applied for assistance: (1) an atonement fund paying ¥2 million (approximately $20,000) to each woman; (2) medical and welfare support programs, paying ¥2.5-3 million ($25,000-$30,000) for each woman; and (3) a letter of apology from the Japanese Prime Minister to each woman. Funding for the program came from the Japanese government and private donations from the Japanese people. As of March 2006, the AWF provided ¥700 million

37[37] YAMAMOTO ET AL., supra note 19 at 437. The government appointed Bunbei Hara, former Speaker of the Upper House of the Diet, as the first President of the Asian Women's Fund (1995-1999). Former Prime Minister Tomiichi Murayama succeeded Hara as the second president of the program (1999-present). See Jeffords, *supra* note 25 at 158.

38[38] The Asian Women's Fund, http://www.awf.or.jp/english/project_ atonement.html, at 55.

(approximately $7 million) for these programs in South Korea, Taiwan, and the Philippines; ¥380 million (approximately $3.8 million) in Indonesia; and ¥242 million (approximately $2.4 million) in the Netherlands.

On January 15, 1997, the AWF and the Philippine government signed a Memorandum of Understanding for medical and welfare support programs for former comfort women. Over the next five years, these were implemented by the Department of Social Welfare and Development.

Our Ruling

Stripped down to its essentials, the issue in this case is whether the Executive Department committed grave abuse of discretion in not espousing petitioners' claims for official apology and other forms of reparations against Japan.

The petition lacks merit.

From a Domestic Law Perspective, the Executive Department has the exclusive prerogative to determine whether to espouse petitioners' claims against Japan.

*Baker v. Carr*39[39] remains the starting point for analysis under the political question doctrine. There the US Supreme Court explained that:

> x x x Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on question.

In *Tañada v. Cuenco,*40[40] we held that political questions refer "to those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government. It is concerned with issues dependent upon the wisdom, not legality of a particular measure."

Certain types of cases often have been found to present political questions.41[41] One such category involves questions of foreign relations. It is well-established that "[t]he conduct of the foreign relations of our government is committed by the Constitution

39[39] 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

40[40] 103 Phil 1051, 1068 (1957).

41[41] *See Baker v. Carr*, 369 U.S. at 211-222.

to the executive and legislative--'the political'--departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."42[42] The US Supreme Court has further cautioned that decisions relating to foreign policy

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.43[43]

To be sure, not all cases implicating foreign relations present political questions, and courts certainly possess the authority to construe or invalidate treaties and executive agreements.44[44] However, the question whether the Philippine government should espouse claims of its nationals against a foreign government is a foreign relations matter, the authority for which is demonstrably committed by our Constitution not to the courts but to the political branches. In this case, the Executive Department has already decided that it is to the best interest of the country to waive all claims of its nationals for reparations against Japan in the Treaty of Peace of 1951. The wisdom of such decision is not for the courts to question. Neither could petitioners herein assail the said determination by the Executive Department *via* the instant petition for *certiorari*.

42[42] *Oetjen v. Central Leather Co*., 246 U.S. 297, 302 (1918).

43[43] *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp*., 333 U.S. 103, 111 (1948).

44[44] CONSTITUTION, Art. VIII, Sec. 5(2)(a).

In the seminal case of *US v. Curtiss-Wright Export Corp*.,45[45] the US Supreme Court held that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign relations."

> It is quite apparent that if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible where domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. x x x

This ruling has been incorporated in our jurisprudence through *Bayan v. Executive Secretary*46[46] and *Pimentel v. Executive Secretary;*47[47] its overreaching principle was, perhaps, best articulated in (now Chief) Justice Puno's dissent in *Secretary of Justice v. Lantion:*48[48]

45[45] 299 US 304, 57 S. Ct. 216, 81 L. Ed, 255 (1936).

46[46] 396 Phil 623, 663 (2000). We held:

> By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded." Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is "executive altogether".

47[47] 501 Phil. 304, 313 (2005). We stated:

> In our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations. As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, the President is vested with the authority to deal with foreign states

> x x x The conduct of foreign relations is full of complexities and consequences, sometimes with life and death significance to the nation especially in times of war. It can only be entrusted to that department of government which can act on the basis of the best available information and can decide with decisiveness. x x x It is also the President who possesses the most comprehensive and the most confidential information about foreign countries for our diplomatic and consular officials regularly brief him on meaningful events all over the world. He has also unlimited access to ultra-sensitive military intelligence data. In fine, the presidential role in foreign affairs is dominant and the President is traditionally accorded a wider degree of discretion in the conduct of foreign affairs. The regularity, nay, validity of his actions are adjudged under less stringent standards, lest their judicial repudiation lead to breach of an international obligation, rupture of state relations, forfeiture of confidence, national embarrassment and a plethora of other problems with equally undesirable consequences.

The Executive Department has determined that taking up petitioners' cause would be inimical to our country's foreign policy interests, and could disrupt our relations with Japan, thereby creating serious implications for stability in this region. For us to overturn the Executive Department's determination would mean an assessment of the foreign policy judgments by a coordinate political branch to which authority to make that judgment has been constitutionally committed.

In any event, it cannot reasonably be maintained that the Philippine government was without authority to negotiate the Treaty of Peace with Japan. And it is equally true that, since time immemorial, when negotiating peace accords and settling international claims:

> and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty-making, the President has the sole authority to negotiate with other states.

48[48] 379 Phil. 165, 233-234 (2004).

> x x x [g]overnments have dealt with x x x private claims as their own, treating them as national assets, and as counters, `chips', in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one category of claims might be set off against concessions in the other, or against larger political considerations unrelated to debts.49[49]

Indeed, except as an agreement might otherwise provide, international settlements generally wipe out the underlying private claims, thereby terminating any recourse under domestic law. In *Ware v. Hylton*,50[50] a case brought by a British subject to recover a debt confiscated by the Commonwealth of Virginia during the war, Justice Chase wrote:

> I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violences, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States,

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49[49] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 300 (2d 1996); *see Dames and Moore v. Regan,* 453 U.S. 654, 688, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (upholding the President's authority to settle claims of citizens as "a necessary incident to the resolution of a major foreign policy dispute between our country and another [at least] where ... Congress acquiesced in the President's action"); *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 424, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (acknowledging "President's authority to provide for settling claims in winding up international hostilities"). See also *Akbayan Citizens Action Party ("AKBAYAN") v. Aquino*, G.R. No. 170516, July 16, 2008, 558 SCRA 468, 517 where we held that:

> x x x While, on first impression, it appears wise to deter Philippine representatives from entering into compromises, it bears noting that treaty negotiations, or any negotiation for that matter, normally involve a process of *quid pro quo*, and oftentimes negotiators have to be willing to grant concessions in an area of lesser importance in order to obtain more favorable terms in an area of greater national interest.

50[50] 3 U.S. (3 Dall.) 199, 230, 1 L.Ed. 568 (1796).

> could only be provided for by the treaty of peace; and *if there had been no provision, respecting these subjects, in the treaty,* they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. (Emphasis supplied).

This practice of settling claims by means of a peace treaty is certainly nothing new. For instance, in *Dames & Moore v. Regan*,51[51] the US Supreme Court held:

> Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink*, 315 U.S. 203, 225, 62 S.Ct. 552, 563, 86 L.Ed. 796 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. x x x Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf. But it is also undisputed that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, *supra*, at 262-263. Accord, Restatement (Second) of Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against a foreign state x x x [even] without the consent of the [injured] national"). It is clear that the practice of settling claims continues today.

51[51] 453 U.S. 654, 101 S.Ct. 2972 (1981) (re the establishment of the Iran-United States Claims Tribunal following the seizure of American personnel as hostages at the American Embassy in Tehran).

Respondents explain that the Allied Powers concluded the Peace Treaty with Japan not necessarily for the complete atonement of the suffering caused by Japanese aggression during the war, not for the payment of adequate reparations, but for security purposes. The treaty sought to prevent the spread of communism in Japan, which occupied a strategic position in the Far East. Thus, the Peace Treaty compromised individual claims in the collective interest of the free world.

This was also the finding in a similar case involving American victims of Japanese slave labor during the war.52[52] In a consolidated case in the Northern District of California,53[53] the court dismissed the lawsuits filed, relying on the 1951 peace treaty with Japan,54[54] because of the following policy considerations:

> The official record of treaty negotiations establishes that a fundamental goal of the agreement was to settle the reparations issue once and for all. As the statement of the chief United States negotiator, John Foster Dulles, makes clear, it was well understood that **leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace**:
>
> > Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception.
> >
> > On the one hand, there are claims both vast and just. Japan's

52[52] Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L. L. 11, 25-32 (2002).

53[53] *In Re World War II Era Japanese Forced Labor Litigation*, supra note 1.

54[54] Treaty of Peace with Japan 1951, 136 UNTS 45.

aggression caused tremendous cost, losses and suffering.

> On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work. x x x

The policy of the United States that Japanese liability for reparations should be sharply limited was informed by the experience of six years of United States-led occupation of Japan. During the occupation the Supreme Commander of the Allied Powers (SCAP) for the region, General Douglas MacArthur, confiscated Japanese assets in conjunction with the task of managing the economic affairs of the vanquished nation and with a view to reparations payments. **It soon became clear that Japan's financial condition would render any aggressive reparations plan an exercise in futility. Meanwhile, the importance of a stable, democratic Japan as a bulwark to communism in the region increased.** At the end of 1948, MacArthur expressed the view that "[t]he use of reparations as a weapon to retard the reconstruction of a viable economy in Japan should be combated with all possible means" and "recommended that the reparations issue be settled finally and without delay."

That this policy was embodied in the treaty is clear not only from the negotiations history but also from the Senate Foreign Relations Committee report recommending approval of the treaty by the Senate. The committee noted, for example:

> Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish. In short, [it] would be contrary to the basic purposes and policy of x x x the United States x x x.

We thus hold that, from a municipal law perspective, that certiorari will not lie. As a general principle – and particularly here, where such an extraordinary length of time has lapsed between the treaty's conclusion and our consideration – the Executive must be given ample discretion to assess the foreign policy considerations of espousing a claim against Japan, from the standpoint of both the interests of the petitioners and those of the

Republic, and decide on that basis if apologies are sufficient, and whether further steps are appropriate or necessary.

The Philippines is not under any international obligation to espouse petitioners' claims.

In the international sphere, traditionally, the only means available for individuals to bring a claim within the international legal system has been when the individual is able to persuade a government to bring a claim on the individual's behalf.55[55] Even then, it is not the individual's rights that are being asserted, but rather, the state's own rights. Nowhere is this position more clearly reflected than in the dictum of the Permanent Court of International Justice (PCIJ) in the 1924 *Mavrommatis Palestine Concessions Case*:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its *own right* to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.56[56]

55[55] The conceptual understanding that individuals have rights and responsibilities in the international arena does not automatically mean that they have the ability to bring international claims to assert their rights. Thus, the Permanent Court of International Justice declared that "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself." Appeal from a Judgment of the Hungaro/Czeochoslovak Mixed Arbitral Tribunal, Judgment, 1933, PCIJ, Ser. A/B No. 61, p. 208 at 231.

56[56] PCIJ, Ser. A, No. 2, p. 11, at 16. This traditional view was repeated by the PCIJ in the *Panevezys-Saldutiskis Railway Case*, the Case Concerning the Payment of Various Serbian Loans issued in France, Judgment of July 12, 1929, PCIJ Reports, Series A No. 20; and in the *Case Concerning the Factory at Chorzow*, Judgment of September 13, 1928, Merits, PCIJ Reports, Series A No. 17. The ICJ has adopted it in the

Since the exercise of diplomatic protection is the right of the State, reliance on the right is within the absolute discretion of states, and the decision whether to exercise the discretion may invariably be influenced by political considerations other than the legal merits of the particular claim.57[57] As clearly stated by the ICJ in *Barcelona Traction*:

> The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection **by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.** All they can do is resort to national law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.58[58] (Emphasis supplied)

The State, therefore, is the sole judge to decide whether its protection will be granted, to what extent it is granted, and when will it cease. It retains, in this respect, a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.

Reparation for injuries suffered in the service of the United Nations Advisory Opinion: ICJ Reports 1949, p. 174; the *Nottebohm Case (second phase)* Judgment of April 6, 1955: ICJ Reports 1955, p. 4 at p. 24; the *Interhandel Case* (Judgment of March 21st, 1959: ICJ Reports 1959, p. 6 at p. 27) and the *Barcelona Traction, Light and Power Company, Limited* case, (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

57[57] *See* BORCHARD, E., DIPLOMATIC PROTECTION OF CITIZENS ABROAD AT VI (1915). Under this view, the considerations underlying the decision to exercise or not diplomatic protection may vary depending on each case and may rely entirely on policy considerations regardless of the interests of the directly-injured individual, and the State is not required to provide justification for its decision.

58[58] *Barcelona Traction, Light and Power Company*, Limited, case, *supra* note 56, at p. 44 par. 78.

The International Law Commission's (ILC's) Draft Articles on Diplomatic Protection fully support this traditional view. They (i) state that "the right of diplomatic protection belongs to or vests in the State,"59[59] (ii) affirm its discretionary nature by clarifying that diplomatic protection is a "sovereign prerogative" of the State;60[60] and (iii) stress that the state "has the right to exercise diplomatic protection

on behalf of a national. It is under no duty or obligation to do so."61[61]

It has been argued, as petitioners argue now, that the State has a *duty* to protect its nationals and act on his/her behalf when rights are injured.62[62] However, at present,

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59[59] *ILC First Reading Draft Articles on Diplomatic Protection*, U.N. Doc. A/CN.4/484, ILC Report, A/53/10 (F), par. 60, Commentary to Draft Article 2, par. (1); see also, Commentary to Draft Article 1, par. (3), and text of Draft Article 2.

60[60] Report of the International Law Commission on the work of its 50th session, supra note 60, par. 77.

61[61] *ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 60, commentary to Draft Article 2, par. (2).

62[62] For instance, Special Rapporteur Dugard proposed that the ILC adopt in its Draft Articles a provision under which States would be *internationally obliged* to exercise diplomatic protection in favor of their nationals injured abroad by grave breaches to *jus cogens* norms, if the national so requested and if he/she was not afforded direct access to an international tribunal. The proposed article reads as follows:

> Article [4]1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State. 2. The state of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority". Special Rapporteur John Dugard, appointed in 1999, First Report on Diplomatic Protection, par. 74 (UN Doc. A/CN.4/506 (March 7, 2000) and Corr. 1 (June 7, 2000) and Add. 1 (April 20, 2000).

However, the proposal was not accepted by the ILC, as "the question was still not ripe for treatment" because "the State practice and their *opinio juris* still had not evolved in such direction". *Official Records of the General Assembly: 55th session, Supplement No. 10, Doc.* A/55/10 (2000), Report of the ILC on the work of its 52nd session, p. 131. Instead, Draft Article 19, entitled 'Recommended Practice', suggests that states should be encouraged to exercise diplomatic protection 'especially when significant injury occurred' to the national. Drafted in soft language, the Article does not purport to create any binding obligations on the state.

In addition, some States have incorporated in their *municipal* law a duty to exercise diplomatic protection in favor of their nationals. (Dugard identifies this "obligation" to exist in the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy,

there is no sufficient evidence to establish a general international obligation for States to exercise diplomatic protection of their own nationals abroad.63[63] Though, perhaps

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Kazakhstan, Lao People´s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia, albeit with different reaches. J. Dugard, First Report on diplomatic protection, *supra* note 13, par. 80), but their enforceability is also, to say the least, questionable (in many cases there are not even courts competent to review the decision). Moreover, their existence in no way implies that international law imposes such an obligation, simply suggesting "that certain States consider diplomatic protection for their nationals abroad to be desirable" (*ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 60, Commentary to Draft Article 2, par (2)).

63[63] Even decisions of national courts support the thesis that general international law as it stands does not mandate an enforceable legal duty of diplomatic protection.

The traditional view has been challenged in the UK in a case arising from the unlawful detention by the US of prisoners in Guantanamo Bay. In *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* ([2002] EWCA Civ 1316, 19 September 2002), the applicant (a British national) sought judicial review of the adequacy of the diplomatic actions of the British government with the US government. The UK Court of Appeals came to the conclusion that diplomatic protection did not as such give rise to an enforceable duty under English Law. It found that "on no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy."

Courts in the UK have also repeatedly held that the decisions taken by the executive in its dealings with foreign states regarding the protection of British nationals abroad are non-justiciable.

(1) *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai* (107 ILR 462 (1985):
"x x x in the context of a situation with serious implications for the conduct of international relations, the courts should act with a high degree of circumspection in the interests of all concerned. It can rarely, if ever, be for judges to intervene where diplomats fear to tread." (p.479, per Sir John Donaldson MR)
(2) *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Ferhut Butt* (116 ILR 607 (1999):
"The general rule is well established that the courts should not interfere in the conduct of foreign relations by the Executive, most particularly where such interference is likely to have foreign policy repercussions (see *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Everett* [1989] 1 QB 811 at 820). This extends to decisions whether or not to seek to persuade a foreign government of any international obligation (e.g. to respect human rights) which it has assumed. What if any approach should be made to the Yemeni authorities in regard to the conduct of the trial of these terrorist charges must be a matter for delicate diplomacy and the considered and informed judgment of the FCO. In such matters the courts have no supervisory role." (p. 615, per Lightman J).
"Whether and when to seek to interfere or to put pressure on in relation to the legal process, if ever it is a sensible and a right thing to do, must be a matter for the Executive and no one else, with their access to information and to local knowledge. It is clearly not a matter for the courts. It is clearly a high policy decision of a government in relation to its foreign relations and is not justiciable by way of judicial review." (p.622, per Henry LJ).
(3) *R. (Suresh and Manickavasagam) v. Secretary of State for the Home Department* [2001] EWHC Admin 1028 (unreported, 16 November 2001):

desirable, neither state practice nor *opinio juris* has evolved in such a direction. If it is a duty internationally, it is only a moral and not a legal duty, and there is no means of enforcing its fulfillment.64[64]

We fully agree that rape, sexual slavery, torture, and sexual violence are morally reprehensible as well as legally prohibited under contemporary international law.65[65]

> "... there is, in my judgment, no duty upon the Secretary of State to ensure that other nations comply with their human rights obligations. There may be cases where the United Kingdom Government has, for example by diplomatic means, chosen to seek to persuade another State to take a certain course in its treatment of British nationals; but there is no *duty* to do so." (paragraph 19, per Sir Richard Tucker).

The South African Constitutional Court in *Kaunda and others v. President of the Republic of South Africa and others* (Case CCCT23/04) recognized the constitutional basis of the right of diplomatic protection as enshrined in the South African Constitution, but went on to hold that the nature and extent of this obligation was an aspect of foreign policy within the discretion of the executive.

64[64] BORCHARD, E., DIPLOMATIC PROTECTION OF CITIZENS ABROAD, 29 (1915).

65[65] The concept of rape as an international crime is relatively new. This is not to say that rape has never been historically prohibited, particularly in war. But modern-day sensitivity to the crime of rape did not emerge until after World War II. In the Nuremberg Charter, the word rape was not mentioned. The article on crimes against humanity explicitly set forth prohibited acts, but rape was not mentioned by name. (For example, the Treaty of Amity and Commerce between Prussia and the United States provides that in time of war all women and children "shall not be molested in their persons." The Treaty of Amity and Commerce, Between his Majesty the King of Prussia and the United States of America, art. 23, Sept. 10, 1785, U.S.-Pruss., 8 TREATIES & OTHER INT'L AGREEMENTS OF THE U.S. 78, 85. The 1863 Lieber Instructions classified rape as a crime of "troop discipline." (Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. INT'L. L. 219, 224). It specified rape as a capital crime punishable by the death penalty (*Id.* at 236). The 1907 Hague Convention protected women by requiring the protection of their "honour." ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." Convention (IV) Respecting the Laws & Customs of War on Land, art. 46, Oct. 18, 1907. General Assembly resolution 95 (I) of December 11, 1946 entitled, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal"; General Assembly document A/64/Add.1 of 1946; *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Article 6(c) of the Charter established crimes against humanity as the following:

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or

persecutions on political, racial or religious grounds in execution of or in connection with any crime within the Jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Nuremberg Judgment did not make any reference to rape and rape was not prosecuted. (Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals Crime and Punishment in the International Arena,*7 ILSA J. INT'L. COMP. L. 667, 676.) However, International Military Tribunal for the Far East prosecuted rape crimes, even though its Statute did not explicitly criminalize rape. The Far East Tribunal held General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota criminally responsible for a series of crimes, including rape, committed by persons under their authority. (THE TOKYO JUDGMENT: JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 445-54 (1977).

The first mention of rape as a specific crime came in December 1945 when Control Council Law No. 10 included the term rape in the definition of crimes against humanity. Law No. 10, adopted by the four occupying powers in Germany, was devised to establish a uniform basis for prosecuting war criminals in German courts. (Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946))

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War was the first modern-day international instrument to establish protections against rape for women. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) [hereinafter Fourth Geneva Convention].Furthermore, the ICC, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR) have significantly advanced the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity.

Rape is clearly emerging as a core crime within humanitarian law. (APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 299 (1954); MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 47 (1989). A major step in this legal development came in 1949, when rape and sexual assault were included in the Geneva Conventions. Rape is included in the following acts committed against persons protected by the 1949 Geneva Conventions: "willful killing, torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health." Rape as a violation of the laws or customs of war generally consists of violations of Article 3 of the 1949 Geneva Conventions, which, in part, prohibits "violence to life and person, in particular mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment." (*See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(1)(c), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3(1)(c), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1)(c), 75 U.N.T.S. 973; Fourth Geneva Convention, supra note 23, art. 3(1)(c).

Article 27 of the Fourth Geneva Convention, directed at protecting civilians during time of war, states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

Protocol I of the Geneva Conventions continues to expand the protected rights by providing that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault." (Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 76(1), 1125 U.N.T.S.

However, petitioners take quite a theoretical leap in claiming that these proscriptions automatically imply that that the Philippines is under a non-derogable obligation to prosecute international crimes, particularly since petitioners do not demand the imputation of individual criminal liability, but seek to recover monetary reparations from the state of Japan. Absent the consent of states, an applicable treaty regime, or a directive by the Security Council, there is no non-derogable duty to institute proceedings against Japan. Indeed, precisely because of states' reluctance to directly prosecute claims against another state, recent developments support the modern trend to empower individuals to directly participate in suits against perpetrators of international crimes.66[66] Nonetheless, notwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy arguments warranting such a rule, the practice of states does not yet support the present existence of an obligation to prosecute international crimes.67[67] Of course a customary duty of prosecution is ideal, but we cannot find enough evidence to reasonably assert its existence. To the extent that any state practice in this area is widespread, it is in the practice of granting amnesties, immunity, selective prosecution, or *de facto* impunity to

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66[66] For instance, the International Criminal Court was established to deal with the "most serious crimes of concern to the international community," with jurisdiction over genocide, crimes against humanity, and war crimes, as defined in the Rome Statute. The ICC Prosecutor can investigate allegations of crimes not only upon referral from the Security Council and state parties, but also on information from victims, non-governmental organizations or any other reliable source (Article 15). See also the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

67[67] Scharf, *The Letter of the Law: The Scope of the International Legal Obligation To Prosecute Human Rights Crimes*, 59(4) LAW & CONTEMP. PROBS. 41, 59 (1996). Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1003 (1999). Gavron, *Amnesties in Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L.Q. 91, 106 (2002).

those who commit crimes against humanity."68[68]

Even the invocation of *jus cogens* norms and *erga omnes* obligations will not alter this analysis. Even if we sidestep the question of whether *jus cogens* norms existed in 1951, petitioners have not deigned to show that the crimes committed by the Japanese army violated *jus cogens* prohibitions at the time the Treaty of Peace was signed, or that the duty to prosecute perpetrators of international crimes is an *erga omnes* obligation or has attained the status of *jus cogens*.

The term *erga omnes* (Latin: *in relation to everyone*) in international law has been used as a legal term describing obligations owed by States towards the community of states as a whole. The concept was recognized by the ICJ in *Barcelona Traction:*

> x x x an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character.

68[68] O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 35 (2002).

The Latin phrase, '*erga omnes*,' has since become one of the rallying cries of those sharing a belief in the emergence of a value-based international public order. However, as is so often the case, the reality is neither so clear nor so bright. Whatever the relevance of obligations *erga omnes* as a legal concept, its full potential remains to be realized in practice.69[69]

The term is closely connected with the international law concept of *jus cogens*. In international law, the term "*jus cogens*" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. *Jus cogens* norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.70[70]

Early strains of the *jus cogens* doctrine have existed since the 1700s,71[71] but

69[69] Bruno Simma's much-quoted observation encapsulates this feeling of disappointment:'Viewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"'THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 125 (Simma, ed. 1995). *See* Tams, Enforcing Obligations *Erga omnes* in International Law (2005). In all cases where this principle has been cited, even the ICJ has found a way to avoid giving force to the claims based on the *erga omnes* character of the obligation, despite having recognized them in principle. In the *South West Africa Case*, the ICJ declared that an action *popularis* was incompatible with existing international law. In the Nicaragua case, it evaded the consequences of a violation of *erga omnes* obligations by treating human rights conventions as self-contained regimes. Nicaragua v. US, Merits, ICJ Reports 1986, 14 et seq. (134, par. 267): "However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves." In the *East Timor Case*, it denied jurisdiction on the ground that Indonesia was an "indispensable third party" to the proceedings which had not accepted jurisdiction. (Portugal v. Australia, ICJ Reports 1995, 90 (102, par 29) "Portugal's assertion that the right of peoples to self-determination… has an *erga omnes* character, is irreproachable."

70[70] See Vienna Convention on the Law of Treaties art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

71[71] Classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff drew upon the Roman law distinction between *jus dispositivum* (voluntary law) and *jus scriptum* (obligatory law) to differentiate consensual agreements between states from the "necessary" principles of international law that bind all states as a point of conscience regardless of consent. (See Hugonis Grotii, De Jure Belli et Pacis [On the Law of War and Peace] (William Whewell ed. & trans., John W. Parker, London 2009) (1625); Emer de Vattel, Le Droit des

peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross's influential 1937 article, Forbidden Treaties in International Law.72[72] The recognition of *jus cogens* gained even more force in the 1950s and 1960s with the ILC's preparation of the Vienna Convention on the Law of Treaties (VCLT).73[73] Though there was a consensus that certain international norms had attained the status of *jus cogens*,74[74] the ILC was unable to reach a consensus on the

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Gens ou Principes de la Loi Naturelle [The Law of Nations or Principles of Natural Law] §§ 9, 27 (1758) (distinguishing "le Droit des Gens Naturel, ou Nécessaire" from "le Droit Volontaire"); Christian Wolff, Jus Gentium Methodo Scientifica Pertractorum [A Scientific Method for Understanding the Law of Nations] ¶ 5 (James Brown Scott ed., Joseph H. Drake trans., Clarendon Press 1934) (1764)). Early twentieth-century publicists such as Lassa Oppenheim and William Hall asserted that states could not abrogate certain "universally recognized principles" by mutual agreement. (William Hall, A Treatise on International Law 382-83 (8th ed. 1924) (asserting that "fundamental principles of international law" may "invalidate [], or at least render voidable," conflicting international agreements); 1 Lassa Oppenheim, International Law 528 (1905).) Judges on the Permanent Court of International Justice affirmed the existence of peremptory norms in international law by referencing treaties *contra bonos mores* (contrary to public policy) in a series of individual concurring and dissenting opinions. (For example, in the 1934 Oscar Chinn Case, Judge Schücking's influential dissent stated that neither an international court nor an arbitral tribunal should apply a treaty provision in contradiction to bonos mores. Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (Schücking, J., dissenting).

72[72] Verdross argued that certain discrete rules of international custom had come to be recognized as having a compulsory character notwithstanding contrary state agreements. At first, Verdross's vision of international *jus cogens* encountered skepticism within the legal academy. These voices of resistance soon found themselves in the minority, however, as the *jus cogens* concept gained enhanced recognition and credibility following the Second World War. (See Lauri Hannikainen, Peremptory Norms (*Jus cogens*) in International Law: Historical Development, Criteria, Present Status 150 (1988) (surveying legal scholarship during the period 1945-69 and reporting that "about eighty per cent [of scholars] held the opinion that there are peremptory norms existing in international law").

73[73] In March 1953, the ILC's Special Rapporteur, Sir Hersch Lauterpacht, submitted for the ILC's consideration a partial draft convention on treaties which stated that "[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice." Hersch Lauterpacht, Law of Treaties: Report by Special Rapporteur, [1953] 2 Y.B. Int'l L. Comm'n 90, 93, U.N. Doc. A/CN.4/63.

74[74] See Summary Records of the 877th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 227, 230-231, U.N. Doc. A/CN.4/188 (noting that the "emergence of a rule of *jus cogens* banning aggressive war as an international crime" was evidence that international law contains "minimum requirement[s] for safeguarding the existence of the international community").

proper criteria for identifying peremptory norms.

After an extended debate over these and other theories of *jus cogens*, the ILC concluded ruefully in 1963 that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*."75[75] In a commentary accompanying the draft convention, the ILC indicated that "the prudent course seems to be to x x x leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals."76[76] Thus, while the existence of *jus cogens* in international law is undisputed, no consensus exists on its substance,77[77] beyond a tiny core of principles and rules.78[78]

75[75] Second Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 1, 52, U.N. Doc. A/CN.4/156.

76[76] Id. at 53.

77[77] While the ICJ recently endorsed the *jus cogens* concept for the first time in its 2006 Judgment on *Preliminary Objections in Armed Activities on the Territory of the Congo* (Congo v. Rwanda), it declined to clarify *jus cogens*'s legal status or to specify any criteria for identifying peremptory norms. (Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda) (Judgment of February 3, 2006), at 31-32, available at http://www.icj-cij.org/docket/files/126/10435.pdf.

In some municipal cases, courts have declined to recognize international norms as peremptory while expressing doubt about the proper criteria for identifying *jus cogens*. (See, e.g., Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149 (7th Cir. 2001) (expressing concern that *jus cogens* should be invoked "[o]nly as a last resort")).

In other cases, national courts have accepted international norms as peremptory, but have hesitated to enforce these norms for fear that they might thereby compromise state sovereignty. (See, e.g., Bouzari v. Iran, [2004] 71 O.R.3d 675 (Can.) (holding that the prohibition against torture does not entail a right to a civil remedy enforceable in a foreign court)).

In *Congo v. Rwanda*, for example, Judge ad hoc John Dugard observed that the ICJ had refrained from invoking the *jus cogens* concept in several previous cases where peremptory norms manifestly clashed with other principles of general international law. (See Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Rwanda*) (Judgment of February 3, 2006), at 2 (Dissenting Opinion of Judge Dugard))

Similarly, the European Court of Human Rights has addressed *jus cogens* only once, in *Al-Adsani v. United Kingdom*, when it famously rejected the argument that *jus cogens* violations would deprive a state of sovereign immunity. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 61).

Of course, we greatly sympathize with the cause of petitioners, and we cannot begin to comprehend the unimaginable horror they underwent at the hands of the Japanese soldiers. We are also deeply concerned that, in apparent contravention of fundamental principles of law, the petitioners appear to be without a remedy to challenge those that have offended them before appropriate fora. Needless to say, our government should take the lead in protecting its citizens against violation of their fundamental human rights. Regrettably, it is not within our power to ***order*** the Executive Department to take up the petitioners' cause. Ours is only the power to ***urge*** and ***exhort*** the Executive Department to take up petitioners' cause.

WHEREFORE, the Petition is hereby **DISMISSED.**

SO ORDERED.

MARIANO C. DEL CASTILLO

Associate Justice

WE CONCUR:

78[78] SZTUCKI, *JUS COGENS* AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 119-123 (1974).

REYNATO S. PUNO

Chief Justice

ANTONIO T. CARPIO

Associate Justice

RENATO C. CORONA

Associate Justice

CONCHITA CARPIO MORALES

Associate Justice

PRESBITERO J. VELASCO, JR.

Associate Justice

ANTONIO EDUARDO B. NACHURA

Associate Justice

TERESITA J. LEONARDO-DE CASTRO

Associate Justice

ARTURO D. BRION

Associate Justice

DIOSDADO M. PERALTA

Associate Justice

LUCAS P. BERSAMIN

Associate Justice

ROBERTO A. ABAD

Associate Justice

MARTIN S. VILLARAMA, JR.

Associate Justice

JOSE PORTUGAL PEREZ

Associate Justice

JOSE CATRAL MENDOZA

Associate Justice

C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

REYNATO S. PUNO

Chief Justice