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Waivers of Individual Claims via Treaty: Chinese Slave Laborers, Japanese Jurisprudence, and the Solution of the European Court of Human Rights

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WAIVERS OF INDIVIDUAL CLAIMS VIA TREATY: CHINESE SLAVE LABORERS, JAPANESE JURISPRUDENCE, AND THE SOLUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION

With controversial and limited exceptions, international law provides sovereign governments with the ability to waive the claims of their citizens that arise out of war or international conflict.[1] Nations often dispense with individual claims for war reparations or compensation by means of peace treaties with other nations, which establish the presumption of settling all outstanding issues relating to a war.[2] The reasons for this are logical and imposing: governments require the flexibility to establish peace and rebuild societies following eras of warfare and turmoil, and the relinquishment of all war claims is often essential to the attainment of such goals.[3] If war-torn and dismantled postwar

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1. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 468 (D. N.J. 1999) ("It is well-established that countries can waive the war-related claims of their citizens."); ARNOLD DUNCAN MCNAIR, LEGAL EFFECTS OF WAR 391 (3d ed. 1948) ("[I]t appears that international law treats a state as being invested for international purposes with complete power to affect by treaty the private rights of its nationals, whether by disposing of their property, surrendering their claims, changing their nationality, or otherwise.").

2. *Id*. *See also* Ware v. Hylton, 3 U.S. 199, 230 (1796) ("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.").

3. *See* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) ("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. 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.'"). *See also* Andrea Gattini, *To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages*, 1 J. INT'L. CRIM. JUST. 348, 365 (2003) ("[T]aking into account the main objective of [peace treaties] which is to re-establish a state of peace and, if possible, friendly relations between states in the interest of their communities, it seems inconceivable that any individual could disturb or even disrupt the whole process of peacemaking for pecuniary satisfaction of a purported right, whose foundation in interna-

nations expend their limited resources and are substantially occupied with defending themselves from numerous lawsuits, it would be very difficult for such nations to ever reestablish social, economic, and political security, much less attain a state wherein they could flourish.[4] However, with the increasing emphasis on human rights in international law,[5] scholars and jurists are beginning to rethink the premise behind allowing governments to waive these individual claims, and serious concerns have been expressed as to the premise's legality and fairness, especially in cases of grave human rights violations or breaches of *jus cogens* norms.[6] In balancing the legitimate concerns of governments in waiving claims against an individual's right to bring suit for harms suffered, the question remains as to whether a sovereign nation's ability to waive such claims may be infringed, particularly when the underlying harm to a plaintiff is an egregious breach of a *jus cogens* norm.[7]

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tional law is still dubious."); Dinusha Panditaratne, *Rights-Based Approaches to Examining Waiver Clauses in Peace Treaties: Lessons from the Japanese Forced Labor Litigation in Californian Courts*, 28 B.C. INT'L & COMP. L. REV. 299, 327 (2005) ("[T]here may be instances where a waiver of human rights claims may be indispensable in bringing about the conclusion of a war or other international crisis. In these circumstances, a government may need to agree to a waiver clause, even though the resulting impunity will undoubtedly be painful to bear for those persons who have suffered at the hands of that state and its nationals . . . .").

4. *See supra* note 3 and accompanying text.

5. Regarding the rise of human rights in international law, Lord Millett explains:

> The fundamental human rights of individuals, deriving from the inherent dignity of the human person, ha[ve] become a commonplace of international law. Article 55 of the Charter of the United Nations [i]s taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms. The trend [i]s clear. War crimes ha[ve] been replaced by crimes against humanity. The way in which a state treat[s] its own citizens within its own borders ha[s] become a matter of legitimate concern to the international community.

Regina v. Bow St. Metro. Stipendiary Mag., Ex Parte Pinochet Ugarte, 1 A.C. 147, 275 (1999).

6. *See* Gattini, *supra* note 3, at 349 ("[I]t is necessary to somehow restrict [a government's ability to waive its citizens' claims], in particular through the qualification that the state's renunciation is invalid, should it be made with regard to injury caused by a grave violation of peremptory norms."). *See also* Panditaratne, *supra* note 3, at 327 ("[J]udges should articulate the varied policy considerations at stake and, in particular, remain mindful of upholding their responsibility to protect individual human rights to the extent possible. Judges should protect rights in a manner reconcilable with the text of the waiver clause, while adopting an approach consistent with judicial precedent.").

7. *See* Michael Winn, Note, *Peace Treaty Claim Waivers: The Case of Prince Hans-Adam II of Liechtenstein and the "Scene at a Roman Well,"* 38 GEO. WASH. INT'L L. REV.

In 2001, the European Court of Human Rights ("ECHR") struggled with the issue of whether to invalidate a peace treaty claim waiver in the case *Prince Hans-Adam II of Liechtenstein v. Germany* ("*Liechtenstein*"), in which the plaintiff, a monarch of Liechtenstein, attempted to reclaim property confiscated by the Czech Republic (part of the former Czechoslovakia) in the period following World War II ("WWII").[8] The ECHR echoed several previous local German courts' decisions that barred the prince's claim based on a 1952 treaty between three of the Allied Powers and Germany[9] in which Germany relinquished all claims relating to property or assets appropriated by other nations following the war.[10] In determining whether the 1952 agreement had legitimately waived the plaintiff's claims, the ECHR utilized a test, which provides that any limitation on a plaintiff's claim—in this case, the treaty waiver—must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right [to bring the claim] is impaired."[11] Furthermore, the test requires that the limitation a government imposes on a plaintiff's claim must "pursue a legitimate aim and . . . [have] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[12] Thus, restated simply, the ECHR's "legitimate aim" test consists of the following three elements, which, if not met by the waiving nation, require a court to deem its treaty waiver invalid: (1) the waiver must seek a legitimate aim; (2) the waiver must be reasonably proportional to that legitimate aim; and (3) the "very essence" of the claim must not be impaired by the waiver.[13]

On the other side of the world, this issue is deeply felt, as many WWII-era Chinese slave labor victims have been bringing claims in Japanese

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807, 826 (2006) ("Legal scholars contest the legal limits of a state's right to waive claims on the basis of treaty.").

8. Prince Hans-Adam II of Liech. v. F.R.G., App. No. 42527/98, 2001-VIII Eur. Ct. H.R. 1, 3 (2001).

9. Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 332 U.N.T.S. 219 [hereinafter Convention on the Settlement].

10. *Liech*., 2001-VIII Eur. Ct. H.R. 1, at 19–20. For a critique and discussion of the ECHR's decision in *Liechtenstein*, see Winn, *supra* note 7.

11. *Liech*., 2001-VIII Eur. Ct. H.R. 1, at 23.

12. *Id.*

13. *See id.* Andrea Gattini restates the elements of the ECHR's "legitimate aim" test as follows: "[R]estrictions on access to justice are [lawful], where (a) they pursue a legitimate aim; (b) they are proportionate to the aim pursued; and (c) they do not restrict the right to the point of extinguishing it." Andrea Gattini, *A Trojan Horse for Sudeten Claims? On Some Implications of the* Prince of Liechtenstein v. Germany, 13 EUR. J. INT'L L. 513, 530 (2002).

courts against the Japanese government and certain Japanese corporations since the 1990s, all in the face of a waiver of claims by the Chinese government.[14] Defendants in these slave labor[15] lawsuits have often succeeded in having the plaintiffs' claims dismissed based on the Chinese government's renunciation of war reparations[16] expressed in a 1972 Joint Communiqué [17] and ratified in the 1978 Treaty of Peace and Friendship between Japan and the People's Republic of China.[18] Courts have frequently determined that, despite the treaty waiver's ambiguity with regard to individual claims, it nevertheless precludes them.[19] For more than a decade, the Supreme Court of Japan failed to comment on the issue of

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14. For a detailed discussion and history of the Chinese slave labor lawsuits in Japan, see Timothy Webster, Note, *Sisyphus in a Coal Mine: Responses to Slave Labor in Japan and the United States*, 91 CORNELL L. REV. 733 (2006). Some Chinese slave laborers, as well as American POWs and primarily Korean sex slaves of the Japanese military (so-called "jūgun-ianfu" or "military comfort women"), have also sought recourse in U.S. courts. *See id*. at 755–58. For an in-depth discussion of WWII slave labor lawsuits in U.S. courts, see John Haberstroh, Note, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 ASIAN L.J. 253 (2003).

15. Like Timothy Webster, *see supra* note 14, this Note chooses to use the terminology "slave labor" as opposed to the euphemistic phrase "forced labor" ("kyōsei rōdō") often utilized by Japanese courts when describing the activity suffered by the Chinese plaintiffs during WWII. *See, e.g.*, Chinese Victims of Forced Labor v. Mitsui Mining, 1809 HANREI JIHŌ 111 (Fukuoka Dist. Ct., Apr. 26, 2002). The opening caption to the case reads: "[t]his case admits claims based in tort for damages by Chinese individuals forcibly taken to Japan during the Pacific War [WWII] and made to perform *forced labor* in coal mines (and other venues) against the coal mining firms [under which they worked during the war]." *Id.* at 111 (emphasis added) (author's translation).

16. *See* Shin Hae Bong, *The Right of War Crime Victim to Compensation Before National Court: Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law*, 3 J. INT'L CRIM. JUST. 187, 190 (2005) ("In many cases, the government of Japan has successfully invoked [China's waiver of war reparations] to insist that the matter of war reparations had already been resolved between [China and Japan] and that inter-governmental agreements preclude individuals' claims for compensation.").

17. Joint Communiqué of the Government of Japan and the Government of the People's Republic of China (1972), *available at* http://www.mofa.go.jp/region/asia-paci/china/joint72.html (last visited Oct. 31, 2008) [hereinafter Joint Communiqué].

18. Treaty of Peace and Friendship between Japan and the People's Republic of China (1978), *available at* http://www.cn.emb-japan.go.jp/bilateral_e/bunken_1978joyaku_e.htm (last visited Oct. 31, 2008) [hereinafter Treaty of Peace and Friendship].

19. *See* William Gao, Note, *Overdue Redress: Surveying and Explaining the Shifting Japanese Jurisprudence on Victims' Compensation Claims*, 45 COLUM. J. TRANSNAT'L L. 529, 536 (2007) ("Japanese courts most commonly dismiss [war] compensation suits based on bilateral agreements between Japan and the plaintiff's nation of origin. The rationale is that such bilateral agreements effectively resolve questions of compensation between the two nations and preclude individual claims.").

war reparations for victims of Japanese slave labor and the treaty waiver of 1972.[20] However, in the landmark decision of *Lü Zhigang v. Nishimatsu Construction* ("*Nishimatsu*") in April 2007, the Court dismissed the claims of Chinese slave laborers, reversing the decision of the Hiroshima High Court in the plaintiffs' favor, and concluding that Chinese WWII victims are estopped from bringing claims owing to the waiver, despite its ambiguity.[21]

Following this Introduction, Part I of this Note reviews the traditional interpretation of treaty waivers in international law and an important potential exception to the rule that continues to gain influence as international law develops and human rights become a more paramount concern. Part II discusses the *Liechtenstein* case and the ECHR's legitimate aim test. Part III provides background on the Japanese slave labor situation and reviews several key Japanese decisions that have interpreted the Chinese treaty waiver, culminating with an assessment of the *Nishimatsu* Japanese Supreme Court case. Part IV uses the Japanese slave labor situation as a test case for the ECHR's legitimate aim analysis, concluding that the test tends to favor the Chinese plaintiffs and allows them to override their government's treaty waiver. In conclusion, this Note argues that when a treaty waiver is ambiguous and its scope undefined,[22] the legitimate aim test can serve as a viable method for courts to balance the

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20. William Gao notes that currently there are increasing limitations on appellate review within the Japanese legal system, which make it ever more difficult for lower court decisions to obtain supreme court review. *Id.* at 545–46.

21. Lü Zhigang v. Nishimatsu Constr., 1969 HANREI JIHŌ 31 (Sup. Ct., Apr. 27, 2007), *available at* http://www.courts.go.jp/hanrei/pdf/20070427134258.pdf.

22. *Cf.* Gattini, *supra* note 3, at 366 ("[I]t is usual for states to be extremely careful to specify the exact purport of their will, i.e. whether they intend to dispose only of their claims; of all possible claims of their citizens under domestic law; to bar access to domestic courts without disposing of the substantive right; or to waive only the exercise of diplomatic protection. The admissibility of civil actions before a domestic court must then be judged in light of the specific compact."). As Gattini suggests, clarity is essential in the adjudication of claims relating to treaty waivers, and governments are indeed cognizant of the fact, using highly specific language to express their will. Since governments require predictable rules to follow when establishing peace, this Note limits the application of the legitimate aim test only to situations where the treaty waiver is ambiguous. Thus, if the threshold question of ambiguity in a waiver provision is not met, this Note would argue that, for efficiency reasons, the test should not be applied at all. This requirement of provision clarity encourages governments to be explicitly clear as to what exactly is being waived, and allows them a framework for drafting these waivers with the confidence that the floodgates of litigation involving individual claims will not be unleashed following a war.

traditional governmental ability to waive claims against an individual's right to bring claims.[23]

I. TREATY WAIVERS IN INTERNATIONAL LAW

A. General Principles of Treaty Interpretation

The 1969 Vienna Convention on the Law of Treaties ("Vienna Convention") is generally acknowledged as the "codification of the customary international law governing treaties" and serves as binding international law even for nations that are nonsignatories.[24] It provides that treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . in their context and in the light of [their] object and purpose."[25] The U.S. Supreme Court reiterated this principle by affirming that, when interpreting the terms of a treaty, "clear import . . . controls" unless applying the plain meaning of the language would be incongruous with the "intent or expectations" of the parties.[26] It follows that generally, like all contracts, unless the context and intent of the parties clearly dictate otherwise, the "ordinary meaning" and "clear import" of treaty provisions are to be strictly observed.[27] In instances where a plain reading of the language fails to yield conclusive answers, deference should be given to the interpretations of the sovereign governments that are parties to the treaty,[28] especially when both parties agree to the same interpretation.[29]

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23. The question of whether victims of war crimes have the initial right to bring claims under international law, either under a treaty provision such as Article 3 of the Hague Convention, or under customary international law, is outside of the scope of this Note. The issues entertained herein assume that the plaintiffs discussed already have such a right; the essential question is whether a treaty waiver barring such a right may be overcome.

24. MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 5 (2005).

25. Vienna Convention on the Law of Treaties art. 31(1), May 23 1969, 1155 U.N.T.S 331 [hereinafter Vienna Convention].

26. Sumitomo Shoji v. Avagliano, 457 U.S. 176, 180 (1982).

27. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 457 (D.N.J. 1999) (citing numerous sources).

28. *Sumitomo*, 457 U.S. at 184–85.

29. *Id*. at 185. Interestingly, in order to determine parties' intent, the United States has shown more of an inclination than other countries to look outside of the plain language of treaty provisions and interpret them within the larger context of their drafting. *See* BYERS, *supra* note 24, at 46. In fact, the U.S. delegation to the Vienna Convention urged the other countries at the convention to codify this method of interpretation, but the overwhelming majority of the participants rejected it, and instead, agreed upon the "ordi-

B. Claim Waivers via Treaty

Under traditional principles of international law, sovereign nations have the power to relinquish the claims of their citizens through effecting peace treaties.[30] The policy justifications for this are obvious: governments require the ability to efficiently orchestrate and reestablish beneficial economic and collegial relationships with other nations through mutual negotiation and compromise, particularly following an era of warfare, in order to establish overall peace, cooperation, and international concord.[31] Accordingly, the goals of a sovereign nation are often furthered by relinquishing certain rights, including the individual rights of its citizens, in exchange for benefits that help establish the welfare of its people and security in the international community.[32] A prime example of the traditional international rule is expressed in *Ware v. Hylton*, the first U.S. Supreme Court case pertaining to the issue.[33] In *Ware*, which involved a British subject's claims against an American citizen for damages that arose out of the War of Independence, Justice Chase held: "All . . . 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*."[34] *Ware* therefore illustrates that, traditionally, international law considers individual claims resulting from war-time activity to be automatically dissolved by a government's signing of a peace treaty, there ultimately being no need for a sovereign nation to waive such claims expressly.[35]

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nary meaning" interpretation, which was ultimately adopted by the Vienna Convention. *Id.*; Vienna Convention, *supra* note 25, art. 31(1).

30. *See supra* notes 1–2 and accompanying text.

31. *See supra* note 3 and accompanying text.

32. *See* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) (discussing the benefits for governments in waiving the individual claims of their citizens as a means of resolving postwar discord between nations).

33. Ware v. Hylton, 3 U.S. 199 (1796).

34. *Id*. at 230 (emphasis added).

35. Andrea Gattini argues that the primary concern of courts when dealing with claims waived through international settlement is that they are perceived as inherently nonjusticiable, even if the judges deciding the cases do not expressly enunciate this view. She states, "Even if the [nonjusticiability] argument is not always clearly articulated, domestic courts are aware that the complex issues of post war settlements exceed the scope of their jurisdiction and should therefore be left to governments, which are in a better position to reach overall satisfactory and internationally binding settlements." Gattini, *supra* note 3, at 384.

Undoubtedly, international law has developed since *Ware*,[36] but its essential principle—that through enacting treaties, governments have control over the war-related claims of their citizens—is still the prevailing view.[37] In fact, *Ware* was recently cited in *Hwang Geum Joo v. Japan*, a 2006 decision of the Court of Appeals for the District of Columbia involving claims against Japan by WWII-era "military comfort women" from various East Asian countries (including China).[38] In *Hwang*, the court explained: "[c]ontrary to [the *Ware* rule], the ["military comfort women"] insist the treaties between Japan and [their nations] preserved the claims of individuals by failing to mention them."[39] The D.C. Circuit was unsympathetic to their argument, however, refusing to interpret the respective treaty provisions, and dismissing their claims as involving nonjusticiable political questions.[40]

In contrast with the traditional rule allowing governments complete jurisdiction over their citizens' claims, a noted scholar of international law has remarked: "[t]he right of states to dispose of claims is increasingly being challenged."[41] This results in part from an increasing worldwide

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36. *See* Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, 20 BERK. J. INT'L L. 296, 297 (2002) (arguing that "the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace," has undergone "revolutionary" changes in recent years).

37. *See, e.g.*, Burger-Fischer v. Degussa, 65 F. Supp. 2d 248, 273–74 (D.N.J. 1999). *Burger-Fischer* uses *Ware* as the basis for part of its decision to dismiss the treaty-waived claims of Nazi slave labor victims and holds that, "under international law[,] claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen." *Id.* at 273. Therefore, under *Burger-Fischer*, a nation's power over its citizens' war compensation claims is taken a step further, from control to ownership, i.e., "belong[ing] exclusively to the state." *Id.*

38. Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2006).

39. *Id.* at 51.

40. *Id.* at 51–53.

41. Gattini, *supra* note 3, at 350. *See also* Dolzer, *supra* note 36, at 297. Dolzer discusses a progressive trend away from the traditional rule and toward an emphasis on the individual's right to adjudicate claims:

> A decade ago, it would have been generally understood that only the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace, was consistent with international law as reflected in practice and doctrine. However, the 1990s have witnessed a remarkable, and in some respects revolutionary, attempt to restructure the classical approach to peacemaking and the resolution of matters relating to the international consequences of war. In what may be described as an attempt to replace the traditional exclusive government-to-government process of negotiating a comprehensive peace treaty, efforts were undertaken to adjudicate claims by individuals before regular courts of law.

sensitivity regarding human rights issues, as codified in international agreements,[42] and the perception that individuals possess complete ownership of their own right to bring compensation claims for wrongs they have suffered.[43] Although there is little evidence to indicate that courts are following this ideological shift, and no clear indication of the restrictions, if any, imposed upon a government's ability to waive individual claims via treaty,[44] one compelling theory of limitation on the traditional rule is the *jus cogens* exception.[45]

C. The Jus Cogens *Exception*

Perhaps the most persuasive potential limitation on governmental waivers of claims is the proposition that individual claims for breaches of *jus cogens* norms cannot be waived.[46] *Jus cogens* norms, also commonly referred to as "peremptory norms," are a body of the most supreme human rights protections considered common to and binding upon all na-

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Id.

42. *See* Regina v. Bow St. Metro. Stipendiary Mag., Ex Parte Pinochet Ugarte, 1 A.C. 147, 275 (1999).

43. Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & POL'Y 77, 86 (2001) ("[C]laims based on violations of law are a form of property that cannot be cavalierly waived by a nation . . . .").

44. Winn, *supra* note 7, at 826, 829.

45. *See id*. at 829. Winn mentions an "alternative forum principle" as another possible limitation on a government's ability to waive claims:

> [An] alternative forum principle . . . requires a state to offer an alternative forum such as a special tribunal [in exchange for waiving claims]. . . . An alternative forum serves a middle ground. . . . While the individual retains at least some right to bring a claim, the waiving state serves its interests in judicial efficiency and minimization of potentially aggravating claims by raising the burden of proof or by offering less stringent procedural protections to the claimant.

Id. at 827–28. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the U.S. Supreme Court seemed to apply a version of this principle when it held that the executive branch of the U.S. government had legally waived the claims of its citizens taken hostage in Iran by creating a separate arbitration "claims tribunal" where the aggrieved could bring their claims. *Id*. at 686–87 ("Our conclusion [that the president legitimately waived the plaintiffs' claims against Iran] is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief."). However, Winn contends that this rule is probably limited to claims of foreign individuals waived by executive order, and that war compensation claims waived by treaty are not within its scope. *See* Winn, *supra* note 7, at 828.

46. *See* Van Dyke, *supra* note 43, at 86 ("Treaties and amnesty agreements purporting to waive claims [for violations of basic norms of human decency] or exonerate human rights abusers . . . have no . . . validity . . . .").

tions.[47] Generally accepted *jus cogens* norms include prohibitions against military aggression, genocide, racial discrimination, torture, and slavery.[48] Even before the nomenclature came into popular usage, the concept underlying *jus cogens* norms carried weight among judges, who began to characterize certain rights as "fundamental," "inherent," or "inalienable."[49] The Vienna Convention codifies the concept and defines a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[50] The Vienna Convention further states that any treaty conflicting with a *jus cogens* norm is per se invalid.[51] Therefore, though creatures of customary international law, *jus cogens* norms are such significant human rights safeguards that they override any conflicting treaty provision, even trumping the "clear import" interpretation rule of treaties.[52] As an example, two bordering nations cannot contract through treaty to jointly massacre an unwelcome ethnic minority population common to both nations; the *jus cogens* norm against genocide would render their treaty null and void under international law.[53]

Despite the significance and weight of *jus cogens* norms in international law, it remains unclear whether claim waivers for their violation can or should be invalidated.[54] Notwithstanding this lack of clarity, there is considerable support for the proposition that courts should not allow governments to waive *jus cogens* claims, the most influential of which is the

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47. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 488–90 (Oxford 1966) (6th ed. 2003).

48. *See id*. at 488–89; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, cmt. n (1987) ("Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section [including clause (b), 'slavery or slave trade,'] are, and an international agreement that violates them is void."); International Law Commission, Articles on Responsibility of States for International Wrongful Acts (2001), art. 40, cmts. 4–5, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter Articles on Responsibility of States]. Among a number of generally accepted peremptory norms, the Commission lists prohibitions against "slavery and the slave trade, genocide, and racial discrimination and apartheid." *Id*. art. 40, cmt. 4.

49. *See* BROWNLIE, *supra* note 47, at 488.

50. Vienna Convention, *supra* note 25, art. 53.

51. *Id.* ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

52. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 457 (D.N.J. 1999) (discussing the "clear import" interpretation rule of treaties).

53. *See* BROWNLIE, *supra* note 47, at 489.

54. *See* Winn, *supra* note 7, at 829.

work of the International Law Commission ("ILC").[55] In 2001, in its efforts to restate the international law regarding wrongful acts committed by sovereign nations, the ILC adopted the Articles on Responsibility of States for International Wrongful Acts ("Articles on Responsibility of States").[56] Article 40 of this work deals with state liability for breaches of *jus cogens* norms.[57] Article 41 provides that "[n]o state shall recognize as lawful a situation created by a serious breach within Article 40, nor render aid or assistance in maintaining that situation."[58] The ILC's commentary to Article 41 illuminates the Article's intent by interpreting it to mean that not only are breaches of *jus cogens* norms unlawful, but even a State's ratification, whether explicit or implicit, of a previous breach is unacceptable, as it offends international principles and sentiments.[59] Comment 9 to Article 41 specifies that an injured state cannot sanction harm sustained from another nation's breach of a *jus cogens* norm, "since the breach by definition concerns the international community as a whole [and] *waiver or recognition induced from the injured State* by the responsible State *cannot preclude the international community interest in ensuring a just and appropriate settlement*."[60] Therefore, according to the ILC's rationale, claims for grave violations of human rights cannot be waived, as each and every violation is an international concern, not only a matter among several states, and the conscience of the international community would only be offended by neglecting to remedy, or at least entertain the claim for, such a breach.

Certain courts and judges have echoed the ILC's sentiments in limiting a nation's ability to escape accountability for breaches of *jus cogens* norms. For example, in *Regina v. Bow Street Metropolitan*, a case of the British House of Lords dealing with torture claims against a former Cuban head of state, the court rejected the defendant's argument that he was exempt from liability under the doctrine of sovereign immunity.[61] Lord

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55. In order to actualize Article 13 of the U.N. Charter, which delegates to the General Assembly the obligation to "initiate studies and make recommendations" toward international cooperation and international law's development and codification, U.N. Charter art. 13, para. 1, the General Assembly established the International Law Commission in 1947 for the "promotion of the progressive development of international law and its codification." G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947).

56. Articles on Responsibility of States, *supra* note 48.

57. *Id*. art. 40.

58. *Id*. art. 41.

59. *Id*. art. 41, cmts. 1–14.

60. *Id*. art. 41, cmt. 9 (emphasis added).

61. Regina v. Bow St. Metro. Stipendiary Mag., Ex Parte Pinochet Ugarte, 1 A.C. 147 (1999). Under the traditional doctrine of sovereign immunity, a nation (or one of its official representatives) acting within its "sovereign character" will not be made subject

Phillips stated: as "torture is prohibited by international law and . . . the prohibition against torture has the character of *jus cogens*[,] . . . it is . . . accepted that *officially sanctioned torture* is forbidden by international law."[62]

In *Al-Adsani v. United Kingdom*,[63] although the ECHR refused to deny Kuwait's sovereign immunity defense against a torture claim, eight of the seventeen judges dissented, arguing that as a rule of *jus cogens*, and therefore "hierarchically higher than any other rule of international law," a torture claim overrides a government's ability to disregard it and to escape liability by invoking the sovereign immunity defense.[64] Although these European cases deal primarily with the sovereign immunity defense, not treaty waivers, they are emblematic of the trend in international law reflected in the substance of the ILC's Articles on Responsibility of States. They echo the ILC's premise that governments should not be allowed to disregard or ratify claims for breaches of *jus cogens* norms.[65] Judging from this trend, a persuasive argument can be made that governments must not be permitted to waive the claims of their citizens when such claims are for breaches of *jus cogens* norms, as international law regards them as supreme—almost sacred—rules with powerful overriding capabilities.[66]

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to the jurisdiction of a foreign court without such nation's consent. *See* Schooner Exchange v. McFaddon & Others, 11 U.S. 116, 123–25 (1812). However, this doctrine has largely given way in modern times to a more limiting theory of sovereign immunity, where a nation will be unable to invoke the defense for acts arising out of its capacity as a commercial player. E.H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 3d 322 § 2 (1969) ("Growing concern for individual rights and public morality, coupled with the increasing entry of governments into what had previously been regarded as private pursuits, has led a substantial number of nations to abandon the absolute theory of sovereign immunity in favor of a restrictive theory, under which a foreign sovereign is not granted immunity from suit where the action arises out of its commercial activities, as distinguished from acts done in its sovereign capacity.").

62. *Regina*, 1 A.C. at 290 (emphasis added).

63. Al-Adsani v. U.K., App. No. 35763/97, 2001-XI Eur. Ct. H.R. 79 (2001).

64. *Id*. at 111–12 (Rozakis, J., Caflisch, J., Wildhaber, J., Costa, J., Cabral Barreto, J., & Vadic, J. dissenting).

65. *See* Articles on Responsibility of States, *supra* note 47, art. 41, cmt. 9.

66. Andrea Gattini argues that, even if international law does not yet recognize claims for violations of *jus cogens* norms that have been waived by a claimant's nation, the acknowledgment of such claims could ensure legitimate international settlements:

> [G]overnments . . . are in a [good] position to reach overall satisfactory and internationally binding settlements. It does not, however, follow that states are free to waive any claim and to reach any settlement: they may not reciprocally condone violations of those rules of humanitarian law which belong to *jus co-*

II. THE ECHR'S "LEGITIMATE AIM" TEST: *PRINCE HANS-ADAM II OF LIECHTENSTEIN V. GERMANY*

A. Background of the Prince's Claims and Chapter 6 of the Convention on the Settlement of Matters Arising Out of the War and the Occupation

Prince Hans-Adam II's claims arose out of events immediately following WWII.[67] His father, a monarch of the German-speaking state of Liechtenstein, which was a neutral power during the war, owned a castle in the territory of present-day Czech Republic, in which were kept family treasures dating back to at least the eighteenth century, including a cherished family painting, *Szene an einem römischen Kalkofen* ("the *Szene*").[68] In 1945, the Czechoslovak government issued "the Beneš Decrees," one of which, "Decree no. 12," allowed for the "confiscation and accelerated allocation" of certain German-owned property remaining within the Czechoslovak territory in order to fulfill war reparations for the harms caused by Germany during the war.[69] Thereafter, the Czechoslovak government confiscated the prince's family castle, along with its accompanying personal property, including the *Szene*.[70] In 1951, the prince's father, in an attempt to reclaim his property, brought suit in the Bratislava Administrative Court, which dismissed his petition, interpreting the monarch as a German national within the meaning of the Beneš Decrees, and therefore subject to the confiscation measures therein.[71]

In 1952, France, Germany, the United Kingdom, and the United States signed the Convention on the Settlement of Matters Arising Out of the War and the Occupation ("Settlement Convention").[72] Chapter 6 of the Settlement Convention states that Germany shall "in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property . . . seized . . . by the Three Powers with other Allied countries, neutral countries or former allies of Germany."[73] Chapter 6 thus waives claims regarding German

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gens. In such situations, individuals' claims, although dubiously founded in international law, could have the beneficial effect of spurring states to reach settlements consistent with international law.

Gattini, *supra* note 3, at 348.

67. Prince Hans-Adam II of Liech. v. F.R.G., App. No. 42527/98, 2001-VIII Eur. Ct. H.R. 1, 9–10 (2001).

68. *Id*. at 9.

69. *Id*.

70. *Id*.

71. *Id*. at 9, 28–29.

72. Convention on the Settlement, *supra* note 9.

73. *Id*. ch. 6, art. 3(1).

property seized outside of its borders in the aftermath of WWII. Furthermore, Chapter 6 affirms that "*[n]o claim or action shall be admissible* against [. . .] international organizations, foreign governments or persons . . . " and is therefore unambiguous and express, clearly denoting that all German claims with regard to confiscated external property, including individual claims, are to be relinquished.[74]

In 1991, the prince discovered that the City of Brno, Czech Republic, loaned the *Szene* to the Cologne municipality, and he obtained an interim injunction from the Cologne Regional Court ordering the *Szene* to be delivered to a temporary bailiff.[75] From 1992 to 1998, the prince fiercely litigated through the German courts in an attempt to reclaim his father's painting.[76] However, the German courts consistently found that Chapter 6 of the Settlement Convention waived his claims, agreeing with the 1951 Bratislava Administrative Court decision that interpreted the monarchs as German nationals.[77]

B. The ECHR Appeal and the "Legitimate Aim" Test

In 1998, the prince filed an appeal with the European Court of Human Rights, claiming, *inter alia*, that by dismissing his claims on the basis of Chapter 6, the German courts had unfairly restricted his right of access to the courts and thereby violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").[78] The ECHR found that under its body of case law, the right of access to the court expressed in Article 6 of the European Convention may be subject to limitations.[79] Placing the burden of proof on the waiving nation, the court proposed that in order to validate a limitation on an individual's right of access to the courts, three elements need to be proved: (1) the limitation needs to pursue a legitimate aim; (2) such legitimate aim and the means employed to secure it must bear a "reasonable relationship of proportionality" to each other; and (3) the limitation must not completely obliterate or impede the "very essence" of the individual's right of access to the court.[80] Therefore, in order to determine

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74. *Id*. ch. 6, art. 3(3) (emphasis added).

75. *Liech*., 2001-VIII Eur. Ct. H.R. 1, at 10.

76. *Id*. at 10–15.

77. *Id*.

78. *Id*. at 21. Article 6 of the Convention reads in pertinent part: "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing . . . ." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

79. *Liech*., 2001-VIII Eur. Ct. H.R. 1, at 23.

80. *Id*.

whether the claim waiver expressed in Chapter 6 of the Settlement Convention validly waived the prince's claims, the ECHR applied this "legitimate aim" test.[81]

With regard to the first prong, the ECHR determined that Germany had a legitimate aim in waiving claims for postwar property confiscation via Chapter 6 of the Settlement Convention.[82] It found that the Allied Powers' victory and occupation of Germany immediately following the war stripped the defeated power of its sovereignty and consigned it "under the supreme authority of the [Allied Powers]."[83] Indeed, the Allied Powers retained the ability to exercise broad rights over Germany and maintained military forces therein.[84] Considering this backdrop, Germany at the time of the Settlement Convention could hardly afford to negotiate with the Allies on equal terms and at arm's length; instead, it was in a highly compromised position, forced to barter for the return of its very sovereignty over its internal and external affairs.[85] Under these circumstances, Germany's waiver of individual property claims expressed in Chapter 6 was proper in light of the legitimate aim to re-secure its national sovereignty.[86]

The ECHR also found the second prong, the proportionality requirement, fulfilled as to the legitimate aim of recovering state sovereignty.[87] In weighing the interests of the prince in bringing his claim against the legitimate aim of the government in achieving sovereignty and unity, the court "attache[d] particular significance to the nature of the applicant's property claims in respect of the painting . . . ."[88] It held that an interest in litigating such claims "was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany."[89] In consequence, the means of terminating property claims using the Chapter 6 waiver was found proportionate to Germany's legitimate aim of attaining sovereignty.[90]

As to the third prong of the legitimate aim test, whether the limitation frustrates the "very essence" of the individual's claim, the ECHR determined that the waiver did not impair the essence of the prince's right to

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81. *Id*. at 25–31.
82. *Id*. at 27.
83. *Id*. at 25–26.
84. *Id*.
85. *Id*. at 26–27.
86. *Id*. at 27.
87. *Id*. at 29.
88. *Id*. at 28.
89. *Id*. at 29.
90. *Id*.

bring his claim.[91] Although the court did not provide a clear analysis of this prong,[92] the basis of its determination can be inferred from its suggestion that there was a more proper forum for the prince's claim—to wit, the Czech or Slovak Republics—and that his father had already brought his claim in Czechoslovakia in 1951.[93] The ECHR appeared to suggest that if there were another forum that the claimant has (or had) access to, the "very essence" of his or her right would not be frustrated.[94] Accordingly, since the prince's father had already brought the claim before the Bratislava Administrative Court, the ECHR determined that the "very essence" of his right had not been impaired by the waiver.[95] As a result of the court's findings, the waiver of Chapter 6 was upheld as valid over the prince's claim.[96]

Although it is questionable whether the ECHR's legitimate aim test was correctly or fairly applied in the *Liechtenstein* case,[97] it could still serve as an effective method for balancing the interests of individuals in bringing their war-related claims against the governmental interest in securing policy goals by waiving such claims through peace treaties.

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91. *Id*.

92. "[The ECHR] reached the conclusion that the ['very essence'] condition was satisfied, by rather clumsily drawing on the existence of the other two conditions." Gattini, *supra* note 13, at 533.

93. *Liech*., 2001-VIII Eur. Ct. H.R. 1, at 28–29 ("[T]he exclusion of German jurisdiction did not affect the great majority of such cases where property had remained within the territory of the expropriating State. The genuine forum for the settlement disputes in respect of these expropriation measures was, in the past, the courts of the former Czechoslovakia and, subsequently, the courts of the Czech or Slovak Republics. Indeed, in 1951 the applicant's father had availed himself of the opportunity of challenging the expropriation in question before the Bratislava Administrative Court.").

94. *Id*.

95. *Id*.

96. *Id*.

97. *See* Winn, *supra* note 7, at 816–17. Winn criticizes the ECHR's decision and writes that "[the prince's] situation is Kafkaesque: he is a citizen of a neutral country who, after being deemed German by a court in Bratislava, has been unable to compel the return of a painting confiscated as part of a World War II reparation scheme between Germany and Czechoslovakia." *Id*. at 816. Winn continues to describe "three violations of rights guaranteed to the prince under international law" that the ECHR failed to remedy, namely, "(1) confiscation of the prince's property by a foreign state without compensation; (2) determination of the prince's citizenship by a foreign state; and (3) imposition on the prince of a treaty not signed by Liechtenstein." *Id*. at 816–17.

III. CHINESE WWII SLAVE LABOR LITIGATION IN JAPAN AND CHINA'S WAIVER OF CLAIMS IN ARTICLE 5 OF THE JOINT COMMUNIQUÉ

A. Origins of Slave Labor Litigation in Japan

In order to relieve internal labor shortages during the course of WWII, from 1942 to 1945 the Japanese government orchestrated the abduction and transportation to Japan of approximately 37,500 Chinese slave laborers.[98] After arrival in Japan, the laborers were subjected to extreme hardship, including illness, severe working conditions, malnutrition, and violence.[99] Owing to the harshness of their treatment, about 17.5% of the slave laborers brought to Japan died during the course of the ordeal.[100] After Japan's defeat and the conclusion of the war, it signed a formal peace treaty with most of the Allied Powers in 1951 in San Francisco ("San Francisco Treaty").[101] Although Article 14 of the San Francisco Treaty expressly waives all present and future war compensation claims of the Allied Powers and their nationals,[102] China (along with several other nations previously in conflict with Japan) was not a party to the treaty.[103] Recognizing that the San Francisco Treaty was incomplete without the inclusion of all relevant parties, it authorized Japan to enact bilateral peace treaties with nonparticipating nations.[104] In 1972, Japan endeavored to complete one of these bilateral peace treaties by signing a Joint Communiqué with the People's Republic of China.[105] Article 5 of

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98. Lü Zhigang v. Nishimatsu Constr., 1969 HANREI JIHŌ 31, 32 (Sup. Ct., Apr. 27, 2007). The number of Korean slave laborers transported to Japan during the same period is estimated at approximately 290,000. *Id*.

99. *Id*. at 32–33.

100. *Id*. at 33.

101. Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 46 [hereinafter San Francisco Treaty].

102. *Id*. ch. V, art. 14(b) ("[T]he 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.").

103. *Nishimatsu*, 1969 HANREI JIHŌ at 33.

104. San Francisco Treaty, *supra* note 101, art. 26.

105. Joint Communiqué, *supra* note 17. Actually, Japan had previously signed a peace treaty with the Republic of China in 1952 in Taipei ("Taipei Treaty"). Treaty of Peace between the Republic of China and Japan (1952), *available at* http://www.taiwandocuments.org/taipei01.htm (last visited Oct. 31, 2008) [hereinafter Taipei Treaty]. The government of the Republic of China, based in Taiwan at the time, was the competing government vying for power against the communist People's Republic of China, but became virtually powerless after the communist government secured dominance; hence, the Taipei Treaty, from a practical point of view, became completely irrelevant with regard to Chinese/Japanese postwar relations. *See Nishimatsu*, 1969 HANREI JIHŌ at 33–34.

the Joint Communiqué reads: "[t]he Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan."[106] There is no further explanation or definition of the term "war reparations" found in the Joint Communiqué, however, leaving the reader unsure as to whether the waiver is meant to include individual compensation claims by victims of war, or simply refers only to governmental claims.[107] A formal peace treaty between the two nations was eventually signed in 1978, in which the terms of the Communiqué were ratified.[108]

B. The Japanese Judiciary's Treatment of Article 5 of the Joint Communiqué

In 1986, the People's Republic of China established a law that made it permissible for Chinese nationals to travel outside of their nation's borders, enabling Chinese WWII victims to bring their claims in Japanese courts.[109] Consequently, following the example of earlier Korean slave labor litigation, a group of Chinese slave labor plaintiffs brought their first suit in Tokyo District Court in 1995 against the copper mining firm under which they were forced to work during the war.[110] In holding that the plaintiffs' claims were barred under the Civil Code's statute of limitations for tort claims,[111] the Tokyo District Court avoided addressing the merits of their claims.[112] This case initiated a trend among Japanese judges handling Chinese slave labor cases—that of dismissing war compensation claims by utilizing a handful of defenses before getting to a discussion of their merits.[113]

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106. Joint Communiqué, *supra* note 17, art. 5.

107. *Id.*

108. Treaty of Peace and Friendship, *supra* note 18 ("Confirming that . . . the Joint Communiqué constitutes the basis of the relations of peace and friendship between the two countries . . . the principles enunciated in the Joint Communiqué should be strictly observed . . . .").

109. *Nishimatsu*, 1969 HANREI JIHŌ at 34.

110. Geng Zhun v. Kajima, 988 HANREI TAIMUZU 250 (Tokyo D. Ct., Dec. 12, 1997).

111. MINPŌ, art. 724 ("The right to demand compensation for damages which has arisen from an unlawful act shall lapse by prescription if not exercised within three years from the time when the injured party or his/her legal representative became aware of such damage and of the identity of the person who caused it, the same shall apply if twenty years have elapsed from the time when the unlawful act was committed.").

112. *Kajima,* 988 HANREI TAIMUZU at 254.

113. *See* Webster, *supra* note 14, at 753–54. Webster states that statutes of limitations and government immunity are the two most widely used defenses applied by Japanese courts in the slave labor context. He proceeds to describe these defenses as technical and

Initially favoring Article 5 of the Joint Communiqué as an effective legal defense, Japanese courts were largely successful in disposing of Chinese claims by concluding that, *ipso facto*, any Chinese citizen's individual claim arising out of WWII had been settled by agreement of both governments and was thus barred.[114] Despite this trend, as the below cases demonstrate, several district court judges gradually began to refuse to follow their colleagues' formalist interpretation of Article 5 by scrutinizing the ambiguous language in a larger context of international policy and fairness.

In 2002, analyzing the scope of Article 5's waiver of claims, the Fukuoka District Court in *Chinese Victims of Forced Labor v. Mitsui Mining* assigned particular significance to a 1995 statement by the Chinese foreign minister in which he expressly denied that the People's Republic of China had any intention of including individual claims when it negotiated Article 5's waiver, declaring instead that it was meant to be limited to the government's war reparation claims.[115] The Fukuoka court determined that this affirmation clarified the ambiguity in China's waiver and allowed the Chinese plaintiffs in this case to bring their claims on the merits.[116]

In *Chinese Victims of Sexual Violence v. Japan*, a case involving WWII Chinese "military comfort women," the Tokyo District Court examined the ambiguity of the phrase "war reparations" in Article 5 of the Joint Communiqué.[117] It distinguished "war reparations" from the phrase "compensation for injury," the former being inherently a state issue and the latter being payment for a claim that only an individual can bring.[118] Based on this distinction, the Tokyo District Court held that the clear import of the provision illustrates that the waiver in Article 5 applies only to the Chinese government's "war reparations," not to individual compensation claims.[119]

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as having "talismanic properties," which allow judges to arbitrarily decide cases on the "whims of spells." *Id.* at 754. Another typical technical defense successful in Japanese courts when war reparation claims are brought under international law rather than Japanese civil law includes barring claims owing to the lack of an underlying treaty provision that would explicitly allow such claims. *See* Hae Bong, *supra* note 16, at 189–90.

114. *See* Gao, *supra* note 19, at 536; Hae Bong, *supra* note 16, at 189–90.

115. *See* Chinese Victims of Forced Labor v. Mitsui Mining, 1809 HANREI JIHŌ 111, 121 (Fukuoka Dist. Ct., Apr. 26, 2002).

116. *Id*.

117. Chinese Victims of Sexual Violence v. Japan, 1127 HANREI TAIMUZU 281, 295 (Tokyo Dist. Ct., Apr. 24, 2003).

118. *Id*.

119. *Id*. ("The Joint Communiqué should be interpreted within the basic framework of international law. Claims against our country as the assailing nation during the Second

In *Zhang Wenbin v. Rinko Co.*, arguably the greatest victory for slave laborer plaintiffs,[120] the Niigata District Court also interpreted China's waiver in Article 5 to refer only to governmental claims.[121] The court emphasized that the language of the provision explicitly states that the government of the People's Republic of China renounces all war reparations, but makes no mention that private, individual claims are to be relinquished.[122] In reaching this conclusion (like the Fukuoka District Court in *Mitsui Mining*), the court in *Rinko* gave deference to official representations by Chinese public officials—particularly the 1995 statement of the Chinese foreign minister—in adhering to the interpretation of Article 5 as meaning only a renunciation of governmental claims.[123]

In July 2004, the Hiroshima High Court in *Lü Zhigang v. Nishimatsu Construction* refused to construe Article 5 as barring the claims of Chinese slave labor victims forced to work in coal mines during the war, and reversed a district court decision[124] in favor of the defendant companies.[125] For similar reasons as the above-cited district court cases, it held that the claims China waived in Article 5 definitively stopped at government-specific war reparations, and that since individual claims were not at all mentioned, they should not be barred.[126]

World War by the People's Republic of China . . . for compensation, so-called 'war reparations,' are all that is waived; claims against our nation by individual Chinese victims for compensation, so-called 'compensation for injury,' are nowhere relinquished.") (author's translation).

120. This case is considered particularly significant for Chinese slave labor plaintiffs because it marks the first time a Japanese court recognized liability on the part of the Japanese government—in addition to a defendant corporation—for harms suffered by the slave laborers. *See* Hae Bong, *supra* note 16, at 196.

121. Zhang Wenbin v. Rinko Co., 50 SHŌMU GEPPŌ 3444, 3603 (Niigata Dist. Ct., Mar. 26, 2004).

122. *Id*. at 3606–08.

123. *Id.* The court in *Rinko* also found influential an official statement by the Chinese government expressed on the website of the Japanese Embassy to China, which articulated that, during the Joint Communiqué's negotiation process, the People's Republic of China, acting in response to Japan's expression of great responsibility and deep remorse for the harm it had caused to the Chinese people during the war, agreed to relinquish all claims for war reparations. *Id*. at 3607. Notwithstanding this fact, the statement purported that the government of China urges Japan to take proper measures and respond with seriousness to protect the interests of individual Chinese WWII victims (such as victims of chemical weapons, slave laborers, and "military comfort women"). *Id*. at 3607–08. The court was moved by this statement and concluded that, based on the premise that it relinquished all its war reparation claims, the government of China expects that Japan take responsibility to resolve outstanding issues in regard to individual claims. *Id*. at 3608.

124. 1110 HANREI TAIMUZU 253 (Hiroshima Dist. Ct., July 9, 2002).

125. 1865 HANREI JIHŌ 62 (Hiroshima High Ct., July 9, 2004).

126. *Id*. at 89–91.

C. The Japanese Supreme Court's Review of Lü Zhigang v. Nishimatsu

In April 2007, the Supreme Court of Japan accepted the *Nishimatsu* case for review and, for the first time in the course of slave labor litigation in Japan, endeavored to determine the scope of Article 5's waiver.[127] The court admitted that the waiver was ambiguous and its scope undefined.[128] Then it unanimously held that Article 5 should be interpreted as barring all Chinese citizens' individual claims arising out of WWII, based primarily on two reasons: (1) the historical evidence shows that the Joint Communiqué was the product of negotiation and compromise between Japan and China, which were conditioned upon China accepting a conclusion to the war and the resolution of all outstanding issues in exchange for good consideration; and (2) the Joint Communiqué must be interpreted within the framework of the San Francisco Treaty, which had as its main goal the attainment of peace by means of settling all claims—including individual ones—and resolving outstanding issues.[129]

With regard to the first reason for finding that Article 5 waived individual claims, the supreme court looked at the historical background and negotiations behind the signing of the Joint Communiqué and found that China and Japan had demanded the acceptance of certain basic principles as preconditions to signing.[130] The court stated that the Chinese government had three basic requirements: (1) that Japan recognize the communist government of the People's Republic of China as the sole, legitimate, and lawful representative of China; (2) that Japan recognize Taiwan as the territory solely of the People's Republic of China; and (3) that the Taipei Treaty between Japan and the Republic of China[131] be deemed illegal and without effect.[132] In contrast, Japan expected the People's Republic of China to accept similar terms to those reflected in the Taipei Treaty and officially acknowledge the conclusion of WWII and the complete termination of all war reparation claims and other outstanding is-

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127. Lü Zhigang v. Nishimatsu Constr., 1969 HANREI JIHŌ 31 (Sup. Ct., Apr. 27, 2007).

128. *Id*. at 36 ("[I]t is unclear by just looking at [Article 5] whether its substance waives claims in addition to war reparations, and if it does, whether the waiver is meant to include individual claims by Chinese citizens.") (author's translation).

129. *Id*. at 36–37.

130. *Id*.

131. Taipei Treaty, *supra* note 105. The obvious reason the People's Republic of China was so interested in invalidating the Taipei Treaty was because it was signed by its competing, noncommunist, Chinese government, the Republic of China, which it, of course, did not recognize.

132. *Nishimatsu*, 1969 HANREI JIHŌ at 36.

sues.[133] The court illustrated that, from these different viewpoints, through much effort and negotiation, both countries acceded to each other's demands and came to mutual understanding and agreement, the terms of which were memorialized in the Joint Communiqué (albeit imperfectly since it failed to clearly enunciate a waiver of individual claims).[134] From this historical context of negotiation and mutual effort toward postwar stabilization, the court concluded that both nations intended the Joint Communiqué to be a peace treaty of great significance with the force to bring the war, all outstanding issues, and all related claims—including all individual claims—to a definitive end.[135]

In addition, the Court determined that, as a component of the series of events that comprise WWII's epilogue, the Joint Communiqué should be understood and interpreted only within the framework of the San Francisco Treaty, the primary peace treaty governing postwar matters between Japan and its enemies, and should not deviate from its substance or purport.[136] The court reasoned that the parties to the San Francisco Treaty, understanding that individual claims would obstruct their critical goal of establishing a conclusion to the war and overarching peace, wisely crafted the treaty to cause all parties to specifically waive all claims.[137] Because the claims waiver of Article 5 of the Joint Communiqué should be interpreted only within this framework, the court concluded, it should be construed to include individual claims, as does the San Francisco Treaty.[138] Therefore, the Chinese plaintiffs were found to have no right to

133. *Id*. In contrast with the ambiguity in Article 5 of the Joint Communiqué, Article 11 of the Taipei Treaty incorporates the San Francisco Treaty, which explicitly waives individual claims; by extension, the Taipei Treaty also waives all individual claims. Taipei Treaty, *supra* note 105, art. 11 ("[A]ny problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty."). The court in *Nishimatsu* argued that Japan relied on the terms in the Taipei Treaty during the negotiation process that preceded the signing of the Joint Communiqué, despite the fact that the People's Republic of China was not a party to the Taipei Treaty. 1969 HANREI JIHŌ at 36. It looked at the subjective intent of the Japanese government during the negotiation process and found that, "with regard to the conclusion of war [between Japan and China] and the termination of all war reparation and other claims, the Japanese government could only but rely on the premise that all these matters had already been resolved in the [Taipei Treaty] in a formal manner." *Id*. (author's translation).

134. *Id*. at 36–37.

135. *Id*.

136. *Id*. at 37.

137. *Id*. at 34–35.

138. *Id*. at 37.

bring suit; their claims were deemed to be waived, as understood within the overarching framework of WWII's conclusion.[139]

The effect of *Nishimatsu* is that it conclusively legitimizes Article 5's waiver within the Japanese courts and clarifies its ambiguity by determining that it extends to both government war reparation and individual claims.[140] Since Japan is a civil law country without a firm doctrine of *stare decisis*, the structure of the court system is such that the Supreme Court's decisions are technically not binding on inferior courts.[141] However, the decisions are nonetheless tremendously influential and followed almost without exception.[142] *Nishimatsu* leaves a strong precedent for lower courts to follow, and it is highly unlikely that it would ever be contradicted by a lower court.[143] It would appear that hereafter, Chinese WWII-era victims have very little chance of having their claims heard in Japan.

IV. THE LEGITIMATE AIM TEST APPLIED TO WWII CHINESE SLAVE LABOR LITIGATION IN JAPAN

This Note proposes that, because of the ambiguity in Article 5 of the Joint Communiqué,[144] the ECHR's "legitimate aim" test is appropriate to

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139. *Id*.

140. *See id*.

141. CHARLES F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 444 (2004) ("A decision of the [Japanese] Supreme Court, like all other judgments, binds only the parties to the action in front of the court. The civil law does not recognize *starie* [sic] *decisis* and hence the court's reasoning is, in theory, not controlling on the lower courts in future cases.").

142. *Id*. Goodman explains that Japan's Civil Code strongly encourages uniformity within Japanese case law, which "in essence direct[s] the [lower courts] to follow the Supreme Court's precedent—as if it were *starie* [sic] *decisis*." *Id*.

143. Indeed, since the Supreme Court's decision in *Nishimatsu*, as recent decisions affirm, the lower courts have clearly followed its reasoning. *See, e.g*., Associated Press, *Japanese Court Rejects WWII Forced Labor Lawsuit*, INT'L HERALD TRIB.: ASIA-PAC., Sept. 19, 2007, http://www.iht.com/articles/ap/2007/09/19/asia/AS-GEN-Japan-Forced-Labor.php (reporting that the Toyama District Court dismissed claims of Korean slave labor plaintiffs on the basis that "war-related claims had already been settled under post-war peace and compensation treaties"); Leslie Schulman, *Japan High Court Dismisses Chinese WWII Slave Labor Suit*, JURIST, June 28, 2007, http://jurist.law.pitt.edu/paperchase/2007/06/japan-high-court-dismisses-chinese-wwii.php; Theage.com.au, *Chinese WWII Slaves Miss out on Compo*, Aug. 30, 2007, http://www.theage.com.au/news/World/Chinese-WWII-slaves-miss-out-on-compo/2007/08/30/1188067198546.html (noting that the Maebashi District Court, in dismissing the claims of Chinese slave labor plaintiffs, "appeared to take its cue from [*Nishimatsu*, which] ruled [that] individual Chinese citizens lost their right to seek redress from Japan following [the Joint Communiqué]").

144. Since the Japanese Supreme Court in *Nishimatsu* found that Article 5's waiver was ambiguous, see *Nishimatsu*, 1969 HANREI JIHŌ at 36, even while holding that the

apply to the slave labor situation in Japan to determine whether the Chinese government legitimately waived the claims of its citizens, and therefore, whether the conclusion of the Japanese Supreme Court—that Article 5 applies to all Chinese claims—should be overturned. In applying the ECHR's test, a court would have to determine whether the Chinese government: (1) had a legitimate aim in waiving the claims of individual victims of war; (2) this waiver of claims was a proportional means to that legitimate aim; and (3) the "very essence" of the Chinese litigants' right to bring their claims was not impaired by the waiver.[145] It becomes clear, when applying the legitimate aim test, that a court would likely determine that the ambiguous waiver does not legitimately annul the claims of the Chinese individual plaintiffs and would allow their claims to proceed on the merits.

A. The Legitimate Aim Element

A court would likely find that the People's Republic of China had a legitimate aim in waiving its citizens' war-related claims through Article 5 of the Joint Communiqué. In determining that Germany had a legitimate aim in waiving postwar property claims, the ECHR focused on the fact that Germany was in a highly compromised position, with the pressing need to regain its sovereignty following the war.[146] In contrast, when the People's Republic of China signed the Joint Communiqué, bloodshed and warfare had ended two decades earlier, and the communist government was securely established, albeit not unanimously recognized by all other world powers.[147] Based on the historical facts enumerated by the Japanese Supreme Court, China's primary purpose for entering into the Joint Communiqué was to obtain Japan's legal recognition of its newly established communist government and its complete ownership of the territory of Taiwan.[148] In addition, China had the overarching goal of reestablishing friendly relations and economic intercourse with Japan.[149] These are certainly weighty policy considerations, but clearly the temporal and situational circumstances of China were not nearly as grave as

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waiver applies to individual claims, this Note concludes that Article 5's waiver is ambiguous for purposes of satisfying the ambiguity threshold before applying the legitimate aim test. For the reasoning this Note adopts in requiring an ambiguity threshold as a prerequisite to the legitimate aim test, see *supra* note 22.

145. *See* Prince Hans-Adam II of Liech. v. F.R.G., App. No. 42527/98, 2001-VIII Eur. Ct. H.R. 1, 23 (2001).

146. *See id*. at 25–27.

147. *See Nishimatsu*, 1969 HANREI JIHŌ at 34.

148. *See id*. at 36.

149. *See generally* Joint Communiqué, *supra* note 17.

they had been for Germany at the time it waived its citizens' claims, and therefore the purpose in waiving was not as significant.

Though it may be useful for challengers of the waiver to distinguish the goals of the waiving nations by degree of urgency, ultimately, it would probably do little to persuade a court that the People's Republic of China did not have a legitimate aim under these facts. Certainly, Germany's situation was extreme, and obviously, it had a legitimate purpose because it had no choice but to waive the claims of its citizens at the time.[150] However, that does not mean a less extreme situation, like China's at the time of the Joint Communiqué, would not also be legitimate, as long as it was not frivolous or unwarranted. Therefore, since the People's Republic of China did have significant policy justifications for Article 5's waiver, though by degree not as compelling as Germany's, a court would likely find that China had a legitimate aim.

B. The Proportionality Element

A court would probably find that the individual claim waiver of Article 5 did not bear a "reasonable relationship of proportionality"[151] to China's legitimate goal of attaining legal recognition from and establishing a collegial relationship with Japan. The court in *Liechtenstein* considered Prince Hans-Adam II's property claim insufficient to "outweigh the vital public interest in regaining sovereignty and unifying Germany."[152] It then concluded that Germany's action of waiving such property claims was reasonably proportionate to its legitimate aim of reestablishing itself.[153] In contrast with property appropriation, however, there appears to be general consensus that the prohibition against slave labor is an accepted *jus cogens* norm.[154] It is clear that *jus cogens* norms have increasingly powerful influence in international law, and waivers of *jus cogens* breaches should be taken particularly seriously.[155] Furthermore, Germany's situation at the time it waived its citizen's property claims was much more critical than China's at the time it signed the Joint Communiqué.[156] Under these circumstances, the balance between a waiver of *jus cogens* slavery claims against China's primary aim of legal recognition appears much less proportional, especially when compared with the balance that was drawn between Germany's grave circumstances and its waiver of

150. *See Liech*., 2001-VIII Eur. Ct. H.R. 1, at 26–27.
151. *See id*. at 23 (discussing the proportionality element).
152. *Id*. at 29.
153. *Id*.
154. *See supra* note 48 and accompanying text.
155. *See* Articles on Responsibility of States, *supra* note 48, art. 41, cmts. 1–14.
156. *See* discussion *supra* Part IV(a).

relatively impotent property claims in the *Liechtenstein* case.[157] Accordingly, the scales tip in favor of the Chinese litigants owing to the gravity of their *jus cogens* claims, creating a stark imbalance. Therefore, after finding that *jus cogens* claims had been waived for relatively insubstantial reasons, a court would likely find that Article 5 was not proportional to China's legitimate aim.

C. The "Very Essence" Element

A court would probably find that the "very essence" of the right of Chinese slave labor victims to have their claims heard is impeded by Article 5's waiver. The court in *Liechtenstein* was impressed by the fact that there was another, more appropriate, forum for the plaintiff's claims in Czechoslovakia and thereby determined that the very essence of his right had not been impeded by his nation's waiver.[158] Thus, the court illustrated that the very essence of a claimant's right to bring a claim is not impeded by a treaty waiver when there exists another forum in which to bring his or her claims.[159] In the case of the Chinese slave labor victims, it would be difficult to imagine a more appropriate forum than Japan. As in Czechoslovakia, all possible defendants reside in the country (in this case, Japan), and it is the locus where the protested activity took place. Indeed, there does not appear to be any other tenable forum for the Chinese plaintiffs.[160] Thus, the litigants would be left without anywhere to bring their claims and be likely to convince a court that the very essence of their right is impaired by Article 5's waiver.

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157. Andrea Gattini remarks on this, suggesting that Prince Hans-Adam II's claim might have succeeded if the underlying harm he suffered was a *jus cogens* violation, not just a mere appropriation of property:

> [U]nder what conditions could or should a state disregard an obligation it undertook not to allow claims or actions relating to property seized under certain circumstances elsewhere? The answer is, when the seizure was a breach of a peremptory norm of international law. It is difficult to characterize the Benes Decrees in that way . . . .

Gattini, *supra* note 13, at 544.

158. *See Liech.*, 2001-VIII Eur. Ct. H.R. 1, at 28–29.

159. *See id*.

160. In fact, several Chinese and other WWII victims have filed actions against the Japanese government and certain Japanese corporations in the United States, but they have been unsuccessful, as American courts have largely refused to entertain their claims. *See generally* Haberstroh, *supra* note 14 (providing a discussion of WWII slave labor lawsuits in U.S. courts and an accounting of the plaintiffs' failures therein). Even if American courts decided to entertain such cases, it would be a much more incongruous and inappropriate forum than the Japanese courts.

Therefore, the Chinese government's waiver in Article 5 would likely fail the ECHR's legitimate aim test in *Liechtenstein* and be declared invalid.

CONCLUSION

When applied to slave labor litigation in Japan, the legitimate aim test would likely weigh in favor of the Chinese slave labor plaintiffs, causing the claim waiver in Article 5 of the Joint Communiqué to be invalidated as to individual claims and overturning the Japanese Supreme Court's decision in *Nishimatsu*. In waiving the WWII Chinese victims' individual claims through Article 5, though a court would be likely to find that the People's Republic of China had a legitimate aim, it would also be likely to find that the waiver, in its termination of *jus cogens* claims, was not proportionate to that legitimate aim, and that the waiver frustrated the "very essence" of the Chinese victims' claims because there does not exist any viable alternative forum in which to bring them.

By using the slave labor litigation scenario as a test case, it becomes apparent that the ECHR's legitimate aim analysis offers a viable method for balancing the powers and interests of governments with the rights of individual victims of war. Since nations require functional and foreseeable rules in order to establish peace following warfare,[161] the legitimate aim test should not apply unless the threshold question of ambiguity in a waiver provision has been answered; that is, for purposes of efficiency and public policy, if a treaty waiver is clear and unambiguous in relinquishing all individual claims, the question should end there, and the waiver should be upheld without any further analysis.[162] However, when faced with an ambiguous treaty waiver, like Article 5 of the Joint Communiqué, the legitimate aim test provides the means to effectively weigh the traditional governmental power to waive all war-related claims through peace treaties against international law's increasing concern for human rights and the individual's right to judicial recourse for harms suffered.

From a human rights perspective, the ECHR's test has great value. It places an emphasis on the "very essence" of the individual's right to have his or her claim heard by requiring an alternative forum. In addition, it mandates that the government have sound policy reasons for

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161. *See supra* note 3 and accompanying text.

162. Since it is common for nations to be very specific in waiving claims postwar, see Gattini, *supra* note 3, at 366, it seems evident that governments would typically be able to avoid the legitimate aim test altogether by relying on the clarity of their well-tailored treaty language to dispel any claim of ambiguity.

waiving such claims,[163] and thereby ensures that it does not dispense with them for frivolous or self-serving purposes. Finally, the legitimate aim test contains the proportionality requirement, which can serve as a valuable method for balancing the interests at stake and determining overall fairness. Perhaps most importantly, the proportionality requirement, in weighing the interests, allows a court to underscore the increasing international significance of *jus cogens* norms, and to acutely assess instances where they are violated.

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163. In most cases, it appears that governments would not have a difficult time coming up with a "legitimate aim." Indeed, securing peace following warfare would almost always automatically seem to qualify as a legitimate aim. Therefore, the tension in future cases potentially applying the legitimate aim test would most likely be found in the "proportionality" prong. In this sense, it might be interesting to draw an analogy to U.S. constitutional law and the equal protection clause in regard to gender discrimination, where finding an "important governmental interest" for a gender classification is just the doorway to the more difficult question of whether the classification is "substantially related" to the achievement of governmental aims—in other words, whether the means of gender classification is "substantially related" (compare with "proportional") to the "important governmental interest" (compare with "legitimate aim") sought to be achieved. *Cf.* Craig v. Boren, 429 U.S. 190 (1976).

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