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Rights-Based Approaches to Examining Waiver Clauses in Peace Treaties: Lessons from the Japanese Forced Labor Litigation in Californian Courts

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RIGHTS-BASED APPROACHES TO EXAMINING WAIVER CLAUSES IN PEACE TREATIES: LESSONS FROM THE JAPANESE FORCED LABOR LITIGATION IN CALIFORNIAN COURTS

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Abstract: Waiver clauses, which purport to bar claims for reparations, appear in numerous historical and contemporary peace agreements, including in the 1951 Treaty of Peace with Japan. This Article questions the validity of many such waivers under the Constitution and applicable international law. However, as demonstrated in a series of federal court decisions from 2000 to 2003 which rejected the reparations claims of former forced laborers in wartime Japan, judges are induced by political considerations to uphold the validity of waiver clauses. How can courts reconcile their duty to protect the fundamental rights of claimants with the *realpolitik* considerations at play? One answer lies in adopting established interpretive approaches to limit the scope of a waiver clause. The waiver clause in the 1951 Treaty, like many of its counterparts in other treaties, contains several ambiguities. This Article outlines three rights-based interpretive approaches and demonstrates how these could have been invoked to construe one particularly ambiguous aspect of the waiver in the 1951 Treaty, in a manner which would have reconciled competing policy imperatives.

Introduction

From 1999 through 2003, numerous former prisoners of war (POWs) and civilians who were forced laborers in wartime Japan filed suits against the corporations for whom they had worked.[1] Their

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[1] Over thirty individual and class action suits against Japanese corporations—and in certain cases, their U.S. subsidiaries and affiliates—were filed between 1999 and 2001 alone. *See* Kinue Tokudome, *POW Forced Labor Lawsuits Against Japanese Companies* (Japan Policy Research Inst. Working Paper No. 82, Nov. 2001), *at* http://www.jpri.org/publica

claims were triggered by Section 354.6 of the California Code of Civil Procedure[2] which purported to grant any World War II slave laborer or forced laborer the right to sue for compensation.[3]

In 2000 and 2001, however, federal district courts dismissed the plaintiffs' claims on the ground that they were incompatible with the 1951 Treaty of Peace with Japan[4] (1951 Treaty) and, specifically, with the waiver clause contained in Article 14(b) of that treaty, which states:

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tions/workingpapers/wp82.html; *see also* Deutsch v. Turner Corp., 324 F.3d 692, 705-06 (9th Cir. 2003) ("*Deutsch II*") (tracing the history of twenty-seven of these suits).

[2] For the legislative history of Section 354.6, see http://ssl.csg.org/dockets/22cycle/2002A/2002Abills/1722a06ca.html (last visited Apr. 26, 2005).

[3] *See* CAL. CIV. PROC. CODE § 354.6(b) (1999) (declared unconstitutional in *Deutsch II*, 324 F.3d 692 (9th Cir. 2003)). The Code provides that, regardless of any applicable statute of limitation that may otherwise bar such litigation,

> [a]ny Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

Id. Section 354.6 defines "forced labor" and "slave labor" differently. Section 354.6(a)(1) provides that:

> "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

Id. By contrast, Section 354.6(a)(2) provides that:

> "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

Id. The term "forced laborers" will be used in this Article when referring to the former forced laborers in Japan who filed claims pursuant to Section 354.6, given that the definition of a "slave labor victim" in Section 354.6(a)(1) makes reference to "concentration camps" and "ghettos," concepts which are associated with wartime Europe rather than wartime Japan. Furthermore, the definition of a "forced labor victim" in Section 354.6(a)(2) expressly refers to "civilians" and "prisoners of war," terms which describe the wartime status of plaintiffs in the cases examined in this Article. *See id.*

[4] Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter 1951 Treaty].

> 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.[5]

Additionally, the district courts held that Section 354.6 was an unconstitutional infringement by California of the foreign affairs power of the federal government. The district courts' decisions were subsequently affirmed by the United States Court of Appeals for the Ninth Circuit in the case of *Deutsch v. Turner Corp.*[6] The Ninth Circuit's decision in *Deutsch* effectively ended the hopes of victims of forced labor in wartime Japan of obtaining compensation on the basis of Section 354.6. In October 2003, the United States Supreme Court refused a petition for the writ of certiorari with respect to the Ninth Circuit's decision.[7]

This Article does not delve into the longstanding debate regarding the capacity of states to legislate on matters of foreign policy under federal constitutional law. Consequently, it does not assess the courts' refusal to grant the forced laborers' claims for compensation on the ground that Section 354.6 was unconstitutional for violating the federal foreign affairs and war powers. There are reasons to support the position of the Ninth Circuit in *Deutsch* as well as the Supreme Court's position in recent decisions[8] that the federal arm of government is supreme over states in the realm of foreign affairs, which have already been elucidated by other commentators.[9] How-

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[5] *Id.* art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

[6] *Deutsch II*, 324 F.3d 692 (9th Cir. 2003), *amending and superseding* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003) ("*Deutsch I*").

[7] *See* Saldajeno v. Ishihara Sangyo Kaisha, Ltd., 540 U.S. 821 (2003); Suk Yoon Kim v. Ishikawajima Harima Heavy Industries, 540 U.S. 820 (2003); Tenney v. Mitsui & Co., 540 U.S. 820 (2003); Zhenhuan Ma v. Kajima Corp., 540 U.S. 820 (2003). The Supreme Court's refusal to review the Ninth Circuit's decision in *Deutsch II* was unsurprising in light of its earlier decision, issued in June 2003, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), where the Court held that California's Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE §§ 13800–13807 (1999) [hereinafter HVIRA], unconstitutionally interferes with the President's conduct of foreign policy.

[8] *See, e.g., Garamendi*, 539 U.S. at 397.

[9] *See generally* Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999). The article pre-dates the Japanese forced labor litigation but cautions against upholding state and local laws that aim to promote global human rights standards by imposing "sanctions" against foreign countries with poor human rights records. For an alternate view, see generally Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282 (2002).

ever, now that states clearly have been restricted in legislating on matters affecting foreign policy, it is imperative to examine what role the courts should have in overseeing provisions in treaties and federal executive agreements.

It is an underlying tenet of this Article that in a federal democracy, both states *and* courts have a vital role to play in ensuring pluralistic government with counter-majoritarian checks.[10] And if states are to be circumscribed from playing any significant role in foreign affairs, even where their intention is only to protect individual rights, then there is an even greater need for courts to act as judicial overseers of treaties and other international agreements entered into by the federal government.[11] It is a matter for particular concern when courts retreat from examining agreements which infringe upon the rights of individuals to make claims for serious human rights violations, especially when those violations have not been committed by other nations *per se*, but by corporations or other private parties.[12] Yet such a judicial retreat was precisely what occurred when the federal district courts and the Ninth Circuit were called on to examine the validity and import of Article 14(b) of the 1951 Treaty on former forced laborers' claims for compensation.[13]

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[10] *See* Ronald Dworkin, Taking Rights Seriously 140–49 (1977) (discussing the role of the courts in protecting rights). States and courts are intrinsically more likely to protect individual rights than the federal arms of government, which have a greater tendency to be concerned with broader matters such as national security and the maintenance of trade and other relations with foreign countries. By contrast, states and local communities are responsive to a narrower field of stakeholders, and courts focus (at least in civil matters) on resolving disputes among individuals and other private parties.

[11] *See* Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States,* 20 Mich. J. Int'l L. 301, 320–21 (1999) (noting the historical foundation of the view that U.S. judges should be vigilant protectors of individual rights against government encroachment). Paust comments that "the Founders had worried about the dangers of oppression and denial of rights by a government that is a mere instrument of the majority" and that "[j]udicial power is an integral part of the constitutional design for the separation of powers." *Id.*

[12] At least one commentator has criticized the courts' deferential approach to executive agreements (i.e., agreements which are neither treaties ratified by the Senate, nor made with other congressional approval) that waive private claims against non-sovereign entities. *See* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President,* 44 Harv. Int'l L.J. 1 (2003) (arguing that a series of such agreements, which were made during the final months of the Clinton administration, conflict with the Treaty and Supremacy Clauses of the Constitution and "mark an important departure from prior practice by resolving pending U.S. litigation against private companies rather than claims against foreign sovereigns"). Even with respect to treaties and congressionally approved executive agreements, courts should adopt a rights-based examination and interpretation of such documents. *See infra* Parts II, IV.

[13] *See infra* Parts II, IV.

Section 354.6 is only one example of numerous pieces of state and local legislation which show that human rights values now have taken root in political and law-making culture.[14] If states no longer are able to act on matters which affect foreign affairs, the courts must approach the inspection and interpretation of treaties and other international agreements entered into by federal powers in a manner which supports these human rights values.[15] Indeed, this rights-based approach by courts in assessing treaty provisions is strongly supported by historical judicial precedent, as evinced in earlier Supreme Court cases, such as *Asakura v. City of Seattle.*[16] This Article suggests how such a rights-based approach could have been implemented by the courts that assessed Article 14(b) in the Japanese forced labor cases, and thereby also indicates how it could be pursued in the context of other provisions in peace treaties which adversely impact human rights. Clauses similar to Article 14(b) appear in numerous international peace agreements, including several that have been concluded in recent years.[17]

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[14] Examples of state human rights legislation include CAL. CIV. PROC. CODE § 354.6 (1999), the HVIRA, CAL. INS. CODE §§ 13800–13807 (1999), and MASS. GEN. LAWS ch. 7, §§ 22G–M (2004) (declared unconstitutional in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000)), a Massachusetts statute that prevented the Commonwealth of Massachusetts from purchasing goods or services from individuals or companies engaging in business with Myanmar (previously known as Burma) [hereinafter Massachusetts Burma Law]. For a discussion of some of these initiatives and of other state and local legislation, see Denning & McCall, *supra* note 9, Danielle Everett, Comment, *New Concern for Transnational Corporations: Potential Liability for Tortious Acts Committed by Foreign Partners,* SAN DIEGO L. REV. 1123, 1135–36 (1998), and Carol E. Head, Note, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries,* 42 B.C. L. REV. 123, 127-34 (2000).

[15] Some commentators argue that states can and should play a significant role in protecting human rights in a federal democracy. *See, e.g.*, Bradley, *supra* note 9. Others trumpet the role of courts—especially federal courts—in upholding rights. *See, e.g.*, Paust, *supra* note 11. It is not the purpose of this Article to debate whether states or courts have the greater contribution to make to protecting rights. Suffice to say that, now that states have been circumscribed in their protective role, *see supra* notes 6–8 and accompanying text, it is all the more important that courts are vigilant in upholding rights to ensure a check and balance against a majoritarian federal government.

[16] Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.").

[17] More recent peace treaties that have contained waivers or immunities for human rights violations include the 1991 Paris Peace Accords with respect to Cambodia, Final Act of the Paris Peace Conference on Cambodia, U.N. SCOR, 46th Sess., Annex, U.N. Doc. A/46/608 & s/23177 (1991), *reprinted in* 31 I.L.M. 180, 186 (1992), the 1995 Oslo Accords with respect to Israel and the Palestinian Council, Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO, *reprinted in* 36 I.L.M. 551 (1997), the Guatemalan 1996 *Ley de Reconciliación,* Law of National Reconciliation, Decree Number 145-96,

In particular, this Article demonstrates that, in rejecting the forced laborers' claims on account of Article 14(b) of the 1951 Treaty, the courts neglected to properly examine the validity and scope of Article 14(b) of the 1951 Treaty. It is argued that the courts had strong grounds to declare Article 14(b) invalid under both international law[18] and domestic constitutional law because of the severe, rights-based implications of Article 14(b). Yet it also must be acknowledged that political considerations strongly deter judicial invalidation of treaty provisions, even if those provisions condone gross violations of human rights. Accordingly, this Article suggests how courts can undertake their examination of treaty provisions in a manner that takes into account these *realpolitik* considerations while also maintaining their historical role as guardians of individual rights. Specifically, courts could, and should, adopt rights-based interpretive approaches in construing the scope of treaty provisions, which would involve identifying any ambiguities in such provisions and resolving such ambiguities in favor of those whose rights have been infringed.

Part I of this Article comprises a brief historical background to the relevant issues in the Japanese forced labor litigation and a brief

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adopted by the Congress of the Republic of Guatemala, Dec. 18, 1996, arts. 1-7, (Law of National Reconciliation), and the 1999 Sierra Leone Peace Accord, Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lome, Togo, May 18, 1999. For example, Article XX(1)(a) of the 1995 Oslo II (Interim) Accord states as follows:

> [t]he transfer of powers and responsibilities from the Israeli military government and its civil administration to the Council, as detailed in Annex III, includes all related rights, liabilities and obligations arising with regard to acts or omissions which occurred prior to such transfer. Israel will cease to bear any financial responsibility regarding such acts or omissions and the Council will bear all financial responsibility for these and for its own functioning.

Id.

Article IX(3) of the 1999 Sierra Leone Peace Accord provided that:

> [t]o consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted . . . .

Id.

[18] The grounds for Article 14(b)'s invalidity would be international law as it is applied in U.S. courts.

account of Section 354.6 and the case law that followed it. In Part II, the validity of Article 14(b) is critically assessed, from an international law perspective as well as from a domestic constitutional perspective. Part III contains an exploration of the political considerations at stake in the Japanese forced labor cases, as a means of understanding why the courts were reluctant to invalidate Article 14(b). In Part IV, the author first discusses several ambiguities in the text of Article 14(b). The author examines the utility of interpretive methods in protecting rights while still taking into account political considerations, and presents three distinct, rights-based interpretative approaches which could be adopted to resolve such ambiguities. Finally, in Part V, the application of these interpretive approaches is exemplified by demonstrating how they could have been employed to resolve one of the starker ambiguities in the meaning of Article 14(b).

I. Background

A striking aspect of the Japanese forced labor litigation is that the courts inquired primarily into the legal, rather than factual, aspects of the plaintiffs' claims.[19] At the outset of each case, the courts largely accepted the veracity of the plaintiffs' harrowing stories of forced labor at the hands of the defendants,[20] stories which mirror the numerous historical accounts of forced labor in wartime Japan.[21] Thus it was uncontested that the claims of the plaintiffs in the Section 354.6 litigation implicated grave violations of human rights.[22] In *Deutsch,* for example, Circuit Judge Reinhardt described how corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions,

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[19] *See Deutsch II*, 324 F.3d at 703 ("Plaintiffs-Appellants . . . seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor."); *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000) ("*Japanese Forced Labor Litig. I*") ("James King is one of the plaintiffs in these actions against Japanese corporations for forced labor in World War II; his experience. and the *undisputed injustice* he suffered, are representative.") (emphasis added).

[20] *See Deutsch II*, 324 F.3d at 703–06; *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 942.

[21] *See, e.g.*, James L. McClain, Japan: A Modern History 489, 497 (2002); Gary K. Reynolds, Congressional Research Serv., U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan 2, 10–12 (July 27, 2001), *available at* http://www.fas.org/man/crs/RL30606.pdf.

[22] *See Deutsch II*, 324 F.3d at 703–06; *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 942.

and denied medical care.[23] Furthermore, many were murdered, and others died as a result of the maltreatment they suffered.[24] In *Taiheiyo Cement Corp. v. Superior Court,*[25] the California Court of Appeal heard the claim of a former Korean forced laborer, and described the circumstances of the plaintiff, Jae Won Jeong, as follows: "[r]efusing to join the Japanese military, Jeong was taken to a slave labor camp in Korea operated by a Japanese cement company. Along with other Korean nationals, Jeong was subjected to physical and mental torture and forced to perform physical labor without compensation . . . ."[26]

Japan captured approximately 27,000 U.S. POWs and 140,000 Allied POWs in total.[27] Historians have estimated that by 1945, as many as 50,000 Allied POWs, 30,000 Chinese, and between 600,000 and 1 million Koreans were forced to labor for Japanese industry, frequently in the most dangerous and arduous of industries, such as coal mining, in which Japanese men and women were reluctant to work.[28] It has been estimated that 38.2% of U.S. POWs in Japan died in captivity, although it is unclear precisely how many of these deaths are attributable to forced labor.[29] By contrast, a little over 1% of U.S. POWs died while in German wartime captivity.[30]

The surrender of Japan on August 15, 1945, following the United States' use of atomic bombs on the cities of Hiroshima and Nagasaki,[31] and the subsequent occupied rule of Japan for seven years under the leadership of General MacArthur,[32] eventually led to the signing of the 1951 Treaty. The terms of the Treaty, which took effect

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[23] *Deutsch II*, 324 F.3d at 704.

[24] *Id.*

[25] Taiheiyo Cement Corp. v. Superior Court, 129 Cal. Rptr. 2d 451 (Cal. Ct. App. 2003) ("*Taiheiyo I*"). The decision preceded, and was contradicted by, the decision of the Ninth Circuit in *Deutsch II*. In *Taiheiyo I*, the court agreed that the 1951 Treaty barred the claims of plaintiffs from signatory nations, but affirmed the constitutionality of Section 354.6 with respect to plaintiffs from non-signatory nations, thereby upholding the claim of a Korean victim of forced labor made pursuant to Section 354.6. This decision was later vacated, however, in *Taiheiyo Cement Corp. v. Superior Court*, 12 Cal. Rptr. 3d 32 (Cal. Ct. App. 2004), where the court reconsidered their decision in light of the Supreme Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), and held that Section 354.6 was, after all, unconstitutional and preempted by the 1951 Treaty. *See* 12 Cal. Rptr. 3d at 42.

[26] *Taiheiyo I*, 129 Cal. Rptr. 2d at 454.

[27] Reynolds, *supra* note 21, at 2, 12.

[28] McClain, *supra* note 21, at 489.

[29] Reynolds, *supra* note 21, at 11.

[30] *Id.*

[31] The United States dropped a nuclear bomb on Hiroshima on August 6, 1945 and on Nagasaki on August 9, 1945.

[32] Colin Mason, A Short History of Asia 240 (2000).

on April 28, 1952, were not designed to punish Japan for its wartime role nor to exact heavy reparations from it, but rather to pave the way for Japan's future economic prosperity and political stability, which would ensure its status as a U.S. and Western ally.[33] It was, apparently, with this objective in mind, that the United States and other Western Allied Powers agreed to the waiver set forth in Article 14(b) of the 1951 Treaty.[34]

In enacting Section 354.6 almost half a century later, the Californian legislature was not seeking to override the terms of the 1951 Treaty, nor even to provide a means of legal redress to victims of Japanese forced labor.[35] Rather, the foremost objective of the legislators was to assist the cause of slave and forced labor victims in Germany and other European countries during World War II, whose negotiations with German companies for war reparations had come to a standstill.[36] But when a mass settlement of claims against German industry and government was achieved in December 1999, and against the Austrian industry and government in October 2000, Section 354.6 essentially became obsolete with regard to German and other Euro-

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[33] *See* McCLAIN, *supra* note 21, at 556.

[34] *See* 1951 Treaty, *supra* note 4, art. 14(a), 3 U.S.T. at 3180–90, 136 U.N.T.S. at 60–61 (recognizing explicitly "that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation"); *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 946–47. Limited compensation was granted to certain categories of war victims from Allied nations. In the United States, the War Claims Act of 1948 established the War Claims Commission (WCC), *see* REYNOLDS, *supra* note 21, at 3, which paid American POWs between $1 and $2.50 per day of imprisonment and paid limited types of civilian American internees $60 per month of detention. *Id.* at 6–7. However, substantial categories of former war victims and forced laborers were excluded from the WCC scheme. These included several thousand POWs in U.S. territories (e.g. Filipino POWs) and U.S. civilians interned in most Asian countries who had received State Department warnings to leave those countries. For further details on the WCC scheme, see *id.* at 3–9. More recently, forced laborers have pursued legal and political means to obtain additional compensation, especially after Congress approved granting $20,000 to Japanese-Americans detained in the United States during World War II. *See* Civil Liberties Act of 1998, 50 U.S.C. § 1989b-4 (2000). Thus, POWs and civilian internees filed suit in Japanese courts in 1995 for a net individual payment of $20,000, but the Japanese courts refused these claims, citing Article 14(b) of the 1951 Treaty. REYNOLDS, *supra* note 21, at Summary. Several bills have been unsuccessfully introduced in Congress to provide additional compensation to forced laborers. *Id.* at 21–23. Currently, a bill entitled the "Justice for United States Prisoners of War Act of 2003," which directs courts *not* to interpret Article 14(b) as a bar to forced laborers' claims for compensation, is being considered by Congress. *See* Justice for United States Prisoners of War Act of 2003, H.R. 1864, 108th Cong. (2003).

[35] *See* Michael J. Bayzler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 26–27 n.67 (2002).

[36] *See id.* There is a distinction between "slave labor" and "forced labor." *See supra* note 3.

pean slave and forced labor victims and, consequently, became of greatest use to victims of Japanese forced labor.[37]

Following the implementation of Section 354.6, several cases were filed by former POWs and civilian internees of various nationalities against Japanese corporations who were alleged to have engaged forced labor.[38] Most of these cases were filed in state courts, but were then removed to and consolidated in the United States District Court for the Northern District of California, where they were heard by Judge Vaughn Walker.[39] In the first of a series of decisions, Judge Walker denied the claims of the plaintiffs who were former U.S. and Allied POWs in *In re World War II Era Japanese Forced Labor Litigation*[40] (*Japanese Forced Labor Litigation* (2000)), on the basis that the claims were incompatible with the 1951 Treaty.[41] The district court looked specifically to Article 14(b) of the 1951 Treaty and held that, as the plaintiffs were former members of the U.S. and other Allied armed forces, Article 14(b) constituted a clear waiver of their claims.[42]

Judge Walker left open, however, the question of the impact of Article 14(b) on the claims of plaintiffs who were not former U.S. or Allied POWs.[43] He addressed that question a year later in the cases of *In re World War II Era Japanese Forced Labor Litigation (Filipinos)*[44] and *In re World War II Era Japanese Forced Labor Litigation*[45] (*Japanese Forced Labor Litigation* (2001)). In the former case, Judge Walker determined that, although the Filipino plaintiffs were not former U.S. or Allied

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[37] *See* Bayzler, *supra* note 35, at 22–25, 27.

[38] *See supra* note 1 and accompanying text.

[39] *See, e.g.*, *Deutsch II*, 324 F.3d at 705–06; Bayzler, *supra* note 35, at 27; Brannon P. Denning, *International Decision:* American Insurance Ass'n v. Garamendi *and* Deutsch v. Turner Corp., 97 Am. J. Int'l L. 950, 955 (2003).

[40] *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d 939 (N.D. Cal. 2000).

[41] *Id.* at 945.

[42] *Id.*

[43] *Id.* at 942. The court stated the following:

> This order does not address the pending motions to dismiss in cases brought by plaintiffs who were not members of the armed forces of the United States or its allies. Since these plaintiffs are not citizens of countries that are signatories of the 1951 treaty, their claims raise a host of issues not presented by the Allied POW cases and, therefore, require further consideration in further proceedings.

Id.

[44] *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1153 (N.D. Cal. 2001) ("*Japanese Forced Labor Litig. II*").

[45] *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001) ("*Japanese Forced Labor Litig. III*").

soldiers, their claims were nevertheless barred by Article 14(b) because the Philippines, having signed and ratified the 1951 Treaty, was an "Allied Power" pursuant to the terms of the Treaty.[46] In *Japanese Forced Labor Litigation* (2001), Judge Walker decided that, by contrast, Article 14(b) did not bar the claims of plaintiffs of Korean and Chinese descent because neither Korea nor China were signatories to the 1951 Treaty.[47] Those plaintiffs' claims, however, were denied nonetheless.[48] Judge Walker held that Section 354.6 of the California Code of Civil Procedure was an unconstitutional infringement on the exclusive foreign affairs power of the federal government of the United States,[49] and that the plaintiffs' remaining claims pursuant to the Federal Alien Tort Claims Act[50] (ATCA) were time-barred.[51]

The appeals of plaintiffs in all of the aforementioned cases were heard and dismissed in *Deutsch,* where the Ninth Circuit reiterated that Section 354.6 amounted to an "unconstitutional intrusion on the foreign affairs power of the United States,"[52] and that the forced laborers' remaining claims pursuant to the ATCA and the Torture Victims Protection Act[53] were time-barred.[54] Furthermore, the Ninth Circuit held that Article 14(b) of the 1951 Treaty barred all reparations claims in U.S. courts, even by claimants who were not nationals of parties to the 1951 Treaty.[55] However, just a week prior to the Ninth Circuit's decision in *Deutsch,* the California Court of Appeal in *Taiheiyo* had taken a mark-

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[46] *See Japanese Forced Labor Litig. II*, 164 F. Supp. 2d at 1157. The Philippines was named in Article 23 of the 1951 Treaty as a state to which the Treaty would be presented for signature and ratification. 1951 Treaty, *supra* note 4, art. 23, 3 U.S.T. at 3189, 136 U.N.T.S. at 74. Article 25 of the 1951 Treaty states that "the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty." *Id.* art. 25, 3 U.S.T. at 3190, 136 U.N.T.S. at 74.

[47] *See Japanese Forced Labor Litig. III*, 164 F. Supp. 2d at 1165–68.

[48] *Id.* at 1168 ("Simply because the claims of the Korean and Chinese plaintiffs derived from section 354.6 are not preempted by the Treaty of Peace with Japan does not mean that they can go forward, however.").

[49] *Id.* at 1168–78.

[50] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

[51] *See Japanese Forced Labor Litig. III*, 164 F. Supp. 2d at 1179–82.

[52] *Deutsch II*, 324 F.3d at 719. The Ninth Circuit held that Section 354.6 also infringed the exclusive power of the federal government in matters relating to *war.* According to the Ninth Circuit, "the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design." *Id.* at 713–14.

[53] Torture Victim Protection Act, 28 U.S.C. § 1350 (2000).

[54] *See Deutsch II*, 324 F.3d at 716–18.

[55] *See id.* at 714 n.14.

edly different approach. While the California Court of Appeal agreed that the 1951 Treaty barred the claims of plaintiffs from signatory nations, it affirmed the constitutionality of Section 354.6 with respect to plaintiffs from non-signatory nations, thus upholding the claim of a Korean victim of forced labor made pursuant to Section 354.6.[56] The Supreme Court's refusal in October 2003 to hear an appeal of the Ninth Circuit's decision in *Deutsch*, however, made clear that the decision in *Deutsch,* rather than in *Taiheiyo,* prevails.[57]

II. Validity of Article 14(b) of the 1951 Treaty of Peace with Japan

Article 14(b) of the 1951 Treaty is typical of a so-called "waiver clause" in a peace treaty, in that it purports to waive or otherwise prevent civil claims by a state and its nationals (potential plaintiffs) against another state and its nationals (potential defendants).[58] A fundamental question, however, is whether a state can waive claims of reparative justice on behalf of its nationals, including its private citizens. In other words, is Article 14(b) even a legally valid treaty provision, either under international law or domestic constitutional law? Judge Walker in *Japanese Forced Labor Litigation* (2000) determined that, under domestic law, the federal government can indeed waive the claims of its citizens against another state and that state's nationals, and thereby affirmed the legality of Article 14(b).[59] Judge Walker looked to the decision of the Supreme Court in *Dames & Moore v. Regan*[60] as clear authority for this view.[61] In that case, Justice Rehnquist stated:

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[56] *See generally Taiheiyo I,* 129 Cal. Rptr. 2d 451, 472 (upholding the claims of plaintiffs from nonsignatory nations).

[57] *See supra* note 7 and accompanying text.

[58] *See supra* note 17 for examples of other peace treaties that contain waiver clauses. A waiver clause is also sometimes referred to as an "immunity clause," although there appears to be a technical distinction between the two types of clauses. It would seem that an immunity clause purports to grant immunity from *criminal* prosecution, while a waiver clause purports to prevent *civil* claims.

[59] *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948.

[60] 453 U.S. 654 (1981).

[61] *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948. In reaching the conclusion that the federal government can waive the claims of its citizens, Judge Walker relied heavily upon the views of the U.S. government as they were reflected in statements of interest and elsewhere. *See, e.g., Japanese Forced Labor Litig. III,* 164 F. Supp. 2d at 1176; *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948.

> 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 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals.[62]

Judge Walker's conclusion, however, warrants further scrutiny. At the outset, it is instructive to consider whether a state can waive the claims of its nationals for human rights abuses under customary international law. This is not an esoteric consideration, given that there is judicial and academic authority for the view that international law, whether part of customary international law or self-executing treaties,[63] is automatically part of U.S. law.[64] There are two divergent strands of this view. The stricter form of this view is that international law is directly applicable by U.S. judges and thus a treaty or statutory provision which is invalid under later-developed customary international law would have no effect in U.S. courts.[65] In its more lenient form, the view that international law is part of U.S. law holds that legislative and executive acts should be *construed* in light of international law, and accordingly, courts should endeavor to interpret treaties in a

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[62] *Regan*, 453 U.S. at 679.

[63] *See* Amy K. Rehm, Casenote, *International Law: The Supreme Court Rules on Government Authorized Abduction*–United States v. Alvarez-Machain*, 112 S.Ct. 2188 (Interim Ed. 1992)*, 18 U. Dayton L. Rev. 889, 916 n.230 (1993) ("Customary international law is self-executing and therefore enforceable in United States courts.").

[64] The Paquete Habana, 175 U.S. 677, 700 (1900). In *The Paquete Habana*, the Supreme Court stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.*; *see* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Regarding the substance of international law to be applied by U.S. courts, the Second Circuit has opined that "it is clear that courts must interpret international law not as it was in 1789, but as has evolved and exists among the nations of the world today." Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980). Commentators who have supported the view that international law is automatically part of U.S. law include Professor Paust, who stated that "the customary law of nations is part of the law of the United States, even with respect to private duties." Paust, *supra* note 11, at 336. As a logical extension of the later-in-time rule expounded in *Reid v. Covert,* 354 U.S. 1 (1957), that in case of inconsistency between a treaty and statute, the most recent one must prevail, Professor Henkin, among others, has argued that newly developed customary international law would also prevail over earlier statutes and treaties, assuming that the United States has been party to its development and Congress has not indicated rejection of such law. Louis Henkin, *International Law as Law in the United States.* 82 Mich. L. Rev. 1555, 1563–69 (1984).

[65] For a defense of this view, see Henkin, *supra* note 64, at 1561, 1564–65.

manner which does not conflict with customary international law.[66] Yet neither Judge Walker, nor the courts in *Taiheiyo* and *Deutsch,* paused to consider the validity or meaning of Article 14(b) from the perspective of international law.[67]

A. *Validity of Waiver Clauses Under International Law*

International law consists primarily of rules contained in treaties and rules forming part of customary international law.[68] A state is bound by every treaty to which it is a party, but it is usually permitted to disavow a rule of customary international law; for example, by consistently objecting to a customary rule or by ratifying a treaty which permits or mandates divergence from the rule.[69] However, there exists a special category of customary international law known as *jus cogens* norms (for example, the norms prohibiting genocide and torture), from which no divergence is permitted.[70] *Jus cogens* norms, which are also known as "peremptory norms," are regarded as inalienable.[71] Accordingly, states always are bound by them and moreover, a treaty can-

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[66] *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (2003) (stating that it is unlikely that "international law is part of our law," but acknowledging that an "interpretive role is where customary international law may have its most significant effect in the U.S. legal system").

[67] There is no discussion in *Deutsch II* or *Taiheiyo I* as to the validity or meaning of Article 14(b) under international law. *See generally Deutsch II*, 324 F.3d 692; *Taiheiyo I*, 129 Cal. Rptr. 2d 451 (both cases lacking treatment of the subject). In *Japanese Forced Labor Litigation I*, Judge Walker notes plaintiffs' argument "that waiver of plaintiffs' claims renders the treaty unconstitutional and invalid under international law" but does not address the international law component of this argument. 114 F. Supp. 2d at 948.

[68] Customary international rules are norms that nation states both (1) actually practice, and (2) accept as legally binding. The first of these two requirements is commonly referred to as *usus* and the latter is known as *opinio juris. See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4–9 (5th ed. 1998); Wesley A. Caan, Jr., *On the Relationship Between Intellectual Property Rights and the Need of Less-Developed Countries for Access to Pharmaceuticals*, 25 U. PA. J. INT'L ECON. L. 755, 912 (2004). Pursuant to Article 38(1) of the Statute of the International Court of Justice, "the general principles of law" constitute a third source of international law, aside from treaties and custom. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, 1060, *annexed to* U.N. CHARTER.

[69] *See* BROWNLIE, *supra* note 68. at 10. 12–13.

[70] *See id.*, at 514–15; *see also* United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995). Note, however, that some commentators disagree that *jus cogens* norms constitute part of customary international law. *See, e.g.*, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 AM. J. INT'L L. 757, 783 (2001).

[71] BROWNLIE, *supra* note 68, at 514–16; V. D. DEGAN, SOURCES OF INTERNATIONAL LAW 217, 226 (1997).

not contain any provision that conflicts with such norms.[72] Article 53 of the Vienna Convention on the Law of Treaties[73] (VCLT) thus states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is 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.[74]

Article 64 of the VCLT similarly provides that a treaty is void if it conflicts with a norm which attains *jus cogens* status *after* the treaty enters into force.[75]

The least controversial peremptory norms include the law of genocide, the principle of racial non-discrimination, and the prohibition against slavery.[76] The prohibition against forced labor was, at the time the 1951 Treaty entered into force in 1952, an undisputed norm of treaty law as well as of customary international law.[77] The 1929 Convention on Prisoners of War[78] and the 1949 Third Geneva Convention[79] prohibited states from using POWs as forced laborers, and the International Labor Organization (ILO) Convention No. 29 of

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[72] *See* BROWNLIE, *supra* note 68, at 516; DEGAN, *supra* note 71, at 217, 226.

[73] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT was signed, but not ratified, by the United States. *See id.* Nevertheless, its provisions are widely accepted as part of customary law and have been cited by U.S. courts on numerous occasions. *See, e.g.*, State v. Pang, 940 P.2d 1293, 1322 n.88 (Wash. 1997) (stating that "although the United States has not ratified this treaty, it is accepted as the authoritative guide to treaty law and practice and declaratory of customary international law").

[74] VCLT, *supra* note 73, art. 53, 1155 U.N.T.S. at 344.

[75] *Id.* art. 64, 1155 U.N.T.S. at 347 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

[76] For a list of established *jus cogens* norms see BROWNLIE, *supra* note 68, at 515. For a discussion on the peremptory norm against slavery, see Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 26–27 (2001).

[77] *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 440 (D.N.J. 1999) ("The use of unpaid, forced labor during World War II violated clearly established norms of customary international law."). For an identification of treaties prohibiting forced labor at the time the 1951 Treaty entered into force, see notes 78–80 *infra* and accompanying text.

[78] Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

[79] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

1930 contained similar proscriptions on using civilian forced laborers.[80] By analogy to the prohibition against slavery, the prohibition against forced labor is now also widely accepted as a *jus cogens* norm, both in judicial and academic commentary.[81] The ILO has also recently described forced labor as a violation of a *jus cogens* norm.[82] At the least, forced labor can be regarded as violating a *jus cogens* norm when it is practiced in a manner equivalent to slavery; signified, for example, by imposing forced labor for an indefinite amount of time (thereby presuming ownership rights by the perpetrator and a loss of personhood of the victim) and in highly abusive conditions, as almost invariably occurred in wartime Japan.[83]

As Article 14(b) purportedly prevents compensation for forced labor, certain commentators have argued that Article 14(b) conflicts with a *jus cogens* norm and is therefore void.[84] However, it must be recognized that waiver clauses like Article 14(b) do not *per se* permit

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[80] Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (ratified by 164 countries, including Japan). Article 4 provides that: "The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations." *Id.* art. 4, 39 U.N.T.S. at 58–59.

[81] *See, e.g.*, Cleveland, *supra* note 76, at 27. In identifying *jus cogens* norms, Cleveland states that the "prohibition against slavery reasonably may be read to include the prohibition against forced and bonded labor." *Id.*; *see also Japanese Forced Labor Litig. III*, 164 F. Supp. 2d at 1179 ("Given the Ninth Circuit's comment . . . that slavery constitutes a violation of *jus cogens,* this court is inclined to agree . . . that forced labor violates the law of nations."). For a contrary view that appears to be in the minority, see Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is* Unocal *the Answer?*, 42 Wm. & Mary L. Rev. 619, 633–34 (2000) ("Forced labor involves involuntary and abusive conduct, however, unlike slavery, it does not involve ownership rights in other human beings. This is not to say that forced labor should be condoned under any standard, but if allowed, this definitional flexibility might lead U.S. courts to sanction deviant conduct that does not rise to the level of a *jus cogens* violation.").

[82] *See* Int'l Labour Org., *Forced Labour in Myanmar (Burma)*, para. 538 (July 2, 1998), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm (stating that the practice of forced labor violates a *jus cogens* norm).

[83] *See* Nat'l Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 353 (C.D. Cal. 1997) ("With respect to allegations of forced labor, although the parties have not yet fully briefed the issue, for purposes of the pending motion, the Court concludes that the allegations of forced labor raise *the potential* that plaintiffs could state a claim for slavery or slave trading, which appear to be *jus cogens* violations." (emphasis added)).

[84] Karolyn A. Eilers, *Article 14(b) of the 1951 Treaty of Peace with Japan: Interpretation and Effect on POWs' Claims Against Japanese Corporations,* 11 Transnat'l L. & Contemp. Probs. 469, 479 (2001); *see also* Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims,* 17 Hastings Int'l & Comp. L. Rev. 497, 538 (1994) (arguing that Article 14(b) is void if it "effectively nullifies . . . *jus cogens* rights or allows violations of *jus cogens* to go uncompensated").

or condone forced labor.[85] Rather, Article 14(b) waives the right to claim for compensation or reparations for forced labor "in the course of the prosecution of the war."[86] A pertinent question, therefore, is whether a peremptory norm encompasses the right to *compensation* for a violation of that norm. Put in the language of Article 53 of the VCLT,[87] is a government's purported waiver of individual claims for compensation for a violation of a peremptory norm in "conflict with" that peremptory norm, and therefore void? There is no authoritative case law or commentary on this issue,[88] but it has been argued that a treaty which bars compensation claims for forced labor, or any other violation of a *jus cogens* norm, is void under international law because it frustrates the very purpose and realization of that norm.[89] Indeed, this argument is particularly forceful with respect to treaty provisions that bar compensation for violations of the *jus cogens* norms prohibit-

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[85] *See* 1951 Treaty, *supra* note 4, art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

[86] *Id.*

[87] *See* VCLT, *supra* note 73, art. 53, 1155 U.N.T.S. at 344.

[88] The most relevant case law and commentary addresses whether the international norm of sovereign immunity precludes claims against a state or other sovereign entity for a violation of *jus cogens* norms. The majority of relevant U.S. and international cases have upheld sovereign immunity as a defense against such claims for *jus cogens* violations. *See, e.g.*, Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994); Controller and Auditor Gen. v. Davison [1996] 2 N.Z.L.R. 278; Al-Adsani v. United Kingdom, 2002-34 Eur. Ct. H.R. 1751 (2001). At least two factors, however, argue against using these cases as precedent for upholding the validity of a treaty provision which waives claims against a state and its nationals. Most obviously, the defense of sovereign immunity is only available to states or state-owned entities, not to private corporations or other non-state actors. *See* Rosalyn Higgins, Problems and Process: International Law and How We Use It 78–79 (1994). Secondly, the application of the defense of sovereign immunity appears to be narrowing, as courts and legislators try to balance it with human rights concerns. Thus, there is some authority for the view that sovereign immunity does not bar criminal prosecutions for *jus cogens* norms. *See* Regina v. Bow St. Metro. Stipendiary Magistrate Ex. P. Pinochet Ugarte, [2000] A.C. 147. Even in civil suits, the defense of sovereign immunity has been held inapplicable when the state entity was acting *qua* private party (i.e. *de jure gestionis,* as distinct from *jus imperii* or public law authority) when violating *jus cogens* norms. *See* Ilias Bantekas, *State Responsibility in Private Civil Action–Sovereign Immunity–Immunity for* Jus Cogens *Violations–Belligerent Occupation–Peace Treaties*, 92 Am. J. Int'l L. 765 (1998).

[89] Eilers, *supra* note 84, at 487. Note that such a finding would not necessarily render the 1951 Treaty void. According to established principles of interpretation, Article 14(b) should be interpreted to the extent possible to be compatible with international law and especially with international human rights. *See infra* Part IV. Even where it is impossible to reconcile the treaty provision with international law, the offending provision may be severable. As noted by Brownlie, pursuant to Article 44 of the VCLT, severability may be possible where a norm crystallizes to a *jus cogens* status *after* the conclusion of a treaty, as appears to be the case with the norm prohibiting forced labor with respect to the 1951 Treaty. *See* Brownlie, s*upra* note 68, at 627. But severability may not be possible in practice. *See infra* note 145.

ing forced labor or slavery. Unlike with other *jus cogens* norms, such as those prohibiting torture or genocide, the absence of due compensation is intrinsic to the violation of norms prohibiting forced labor or slavery because such absence partly evidences the lack of a consensual employment relationship.

Of course, while a waiver of legal claims for a violation of a *jus cogens* norm is likely to frustrate the purpose and realization of that norm (and therefore be void), this is not *always* the case. Some or all of the parties who agreed to the waiver may have provided alternative means of redressing those violations, for example, by establishing a substantial fund to comprehensively compensate the victims.[90] The most judicious approach for courts would be to take into account the sufficiency and comprehensiveness of such alternative means of redress to determine whether the operation of the waiver provision does in fact frustrate the *jus cogens* norm against forced labor. *If* the parties have established sufficient and comprehensive alternative measures to compensate the would-be claimants, a court could reasonably uphold the waiver provision.[91]

At a minimum, the courts in the *Japanese Forced Labor Litigation* cases, *Taiheiyo*, and *Deutsch* were remiss not to address the validity of Article 14(b) on the ground of international law as it applies in U.S. courts.[92] But had they undertaken such an inquiry, they plausibly would have found that Article 14(b) was invalid under international law for "conflicting with" a *jus cogens* norm; specifically, the norm prohibiting forced labor.[93] Although Article 14(b) does not directly permit violation of this *jus cogens* norm, it appears to frustrate the

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[90] As noted earlier, the absence of compensation is not intrinsic to the violation of *jus cogens* norms *other than* the prohibitions on slavery and forced labor. With respect to these other *jus cogens* norms, such as the prohibition on torture or genocide, sufficient alternative means of redress may include non-compensatory measures, such as the creation of a human rights or "truth and reconciliation" commission to investigate those violations, or prosecution by the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

[91] To expand on the test provided by Eilers, that a provision which defeats the *purpose* of a *jus cogens* norm is void, sufficient and comprehensive compensation would avoid frustrating the "purpose and realization" of the norm prohibiting forced labor. *See* Eilers, *supra* note 84, at 484–90.

[92] *See generally Deutsch II*, 324 F. 3d 692 (9th Cir. 2003)*; Japanese Forced Labor Litig. I*, 114 F. Supp. 2d 939 (N.D. Cal. 2000)*; Taiheiyo I*, 129 Cal. Rptr. 2d 451 (Cal. Ct. App. 2003) (all neglecting to discuss the subject).

[93] *See supra* notes 81–89 and accompanying text.

purpose and realization of the norm in the absence of sufficient and comprehensive alternative means of redress.[94]

B. *Federal, Executive Power to Waive Claims of U.S. Nationals*

Aside from the standpoint of international law, it is highly contentious whether Article 14(b) is constitutionally valid under U.S. law.[95] In this respect, Judge Walker (although not the courts in *Taiheiyo* and *Deutsch*)[96] at least addressed the issue of whether Article 14(b) overstepped the constitutional bounds of treaty-making.[97] However, as is shown in the following paragraphs, the district court relied on inapt judicial precedent in concluding that Article 14(b) was a constitutionally valid treaty provision. Judge Walker could not cite any judicial precedent to support the validity of a treaty provision which waived individual claims against a *corporation* (rather than a country), especially where those claims were based on *human rights* violations.[98]

Article II, section 2, clause 2 of the U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."[99] It is well-settled that there are constitutional limits to this treaty-making power. As the Supreme Court held over a century ago in *De Geofroy v. Riggs*: "[t]he treaty power, as expressed in the Constitution, is in terms unlimited *except* by those restraints which are found in that instrument against the action of the

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[94] The federal government did establish the WCC scheme in 1948. *See supra* note 34 and accompanying text. This would not, however, appear to qualify as a "sufficient and comprehensive" alternative means of redress. Even if compensation of between $1 and $2.50 a day paid under the WCC scheme was deemed sufficient compensation in real terms (taking into account the fiscal standards of the time), it was hardly comprehensive, given that the scheme did not provide compensation for many of the plaintiffs in the Californian forced labor litigation (for example, Filipino POWs).

[95] *See infra* notes 100–125 and accompanying text.

[96] The issue presumably was not considered in *Taiheiyo I* because the court determined that the 1951 Treaty was inapplicable to the plaintiff's claims, as he was not a national of a country which became party to the 1951 Treaty at the time it came into effect. *See Taiheiyo I,* 129 Cal. Rptr. 2d at 458–60. In *Deutsch I,* the Ninth Circuit considered the 1951 Treaty more as an exercise of the federal government's *war* powers, rather than of the treaty-making power, and the court simply appeared to assume the provisions of the 1951 Treaty were within the scope of these war powers. *See Deutsch I,* 317 F.3d at 1023–24.

[97] *See supra* notes 61–62 and accompanying text.

[98] *See Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948 (relying on *Regan,* 453 U.S. 654, which concerned commercial claims rather than human rights-based claims).

[99] U.S. CONST. art. II, § 2, cl. 2.

government or of its departments, and those arising from the nature of the government itself and of that of the States."[100]

In rejecting the plaintiffs' arguments that the United States could not constitutionally waive claims of its nationals against foreign governments and their nationals, Judge Walker in *Japanese Forced Labor Litigation* (2000) referred to the Supreme Court's statement in *Regan* that the United States has repeatedly exercised its "sovereign authority to settle the claims of its nationals against foreign *countries*."[101] However, there are key distinctions between the decision in *Regan* and the cases relating to Section 354.6, particularly concerning the type of claims which were at issue. Most obviously, the claims before Judge Walker and the courts in *Taiheiyo* and *Deutsch* were not against the country of Japan, nor any of its officials or government entities, but against private corporations incorporated or constituted in Japan.[102] Additionally, in upholding the executive's nullification of claims against Iran, the Court in *Regan* placed weight on the fact that the President had "provided an alternative forum, the [Iran-United States] Claims Tribunal, which is capable of providing meaningful relief" and would possibly "*enhance* the opportunity for claimants to recover their claims."[103] Such a meaningful alternative forum was not provided to the forced labor litigants whose claims purportedly were waived by Article 14(b).[104] Moreover, the petitioners' claims in *Regan* implicated commercial or proprietary interests, as distinct from the serious human rights considerations which were raised by the plaintiffs' claims in the Section 354.6 cases.[105] These distinctions and their intersection with one another are further considered below.

Since the Supreme Court in *Regan* only determined the validity of agreements which settled claims against other *countries,* the case

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[100] De Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (emphasis added). While there is also plenty of judicial authority in support of a wide treaty-making power, this has generally been provided in cases where the power has been weighed against states' rights. The ambit of the power has not been conclusively determined where it conflicts with fundamental human rights, especially rights that are not specifically protected in the Constitution. Thus, the Second Circuit in *United States v. Wang Kun Lue*, 134 F.3d 79, 83 (2d Cir. 1998), recognized that "[a]dmittedly, there must be certain outer limits, *as yet undefined,* beyond which the executive's treaty power is constitutionally invalid" (emphasis added).

[101] *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948 (citing *Regan,* 453 U.S. at 679–80) (emphasis added).

[102] Or corporations whose parent or subsidiary entities were incorporated in Japan.

[103] *Regan,* 453 U.S. at 686–87.

[104] *See supra* notes 34, 94.

[105] The petitioner in *Regan* was a corporation with claims arising out of contracts and business in Iran. *See* 453 U.S. at 664.

cannot be regarded as authoritative on the power of the federal government to waive the claims of U.S. citizens against the *nationals* of other countries.[106] Ironically, a statement of interest filed by the United States with the court indicated a better understanding of this distinction than was grasped by Judge Walker. In its statement of interest, the United States argued that the Court's reasoning in *Regan* strongly supports *similar* authority to settle claims of private citizens (even against *private citizens* of another nation) when there is a compelling public policy justification for doing so.[107]

An immediate question which arises from this contention is whether there was judicial authority to support the capacity of any branch of government to waive the claims of its citizens against the private citizens of another country. One relevant precedent cited by the United States in its statement of interest was the 1801 case of *United States v. Schooner Peggy*[108] and its dicta that "if the nation has given up vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a cause for proper compensation."[109] However, the claims at issue in *Schooner Peggy* were of a proprietary nature, and did not raise human rights concerns.[110] This factor substantially devalues its applicability to *Japanese Forced Labor Litigation* (2001) and other Section 354.6 cases. In fact, the statement of interest could cite no judicial precedent for validating a purported waiver of claims of U.S. citizens against foreign nationals for violations of human rights.[111] While the cases of *Regan* and *Schooner Peggy* sup-

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[106] *Cf. Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 948; *see also* Wuerth, *supra* note 12, at 5 ("[T]hose cases [that] involved claims against foreign sovereigns . . . do not provide a basis for executive authority over claims against private individuals. In *Dames & Moore v. Regan*, for example, the Supreme Court upheld an executive order nullifying claims against Iran.").

[107] *See* Sean D. Murphy, *Contemporary Practice of the United States: State Responsibility for Injury to Aliens: Diplomatic Protection and International Claims*, 95 Am. J. Int'l L. 139, 142 (2001); Statement of Interest of U.S., *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000) (No. MDL-1347) (filed Aug. 9, 2000), *available at* http://www.state.gov/documents/organization/6641.doc (last visited Apr. 13, 2005).

[108] 5 U.S. (1 Cranch) 103 (1801).

[109] *Id.* at 110.

[110] *See id.* at 103–06. Specifically, the case concerned the restoration of a trading ship captured by an U.S. ship to its owners, who were French citizens. *See id.*

[111] Aside from *Regan* and *Schooner Peggy*, four other cases were cited by the United States at note 7 of its Statement of Interest, *supra* note 107, in support of its propostition that Article 14(b) constitutes a valid waiver of claims: Belk v. United States, 858 F.2d 706 (Fed. Cir. 1988); Asociasion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1986); Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). Yet the first three of these cases concern claims against sovereign na-

port the validity of a waiver or settlement of commercial or proprietary claims by the federal government, it was disingenuous of the United States to argue, and erroneous of the district court to accept, that these cases support the validity of Article 14(b), which purports to waive claims against private citizens or corporations for grievous violations of fundamental human rights.

However, after the decisions of Judge Walker and the decisions in *Taiheiyo* and *Deutsch,* the Supreme Court in *Am. Ins. Ass'n v. Garamendi*[112] appeared to validate certain settlements of individual claims against corporations, even though the claims were not of a purely monetary or proprietary nature but implicated grave violations of human rights.[113] *Garamendi* concerned the constitutional validity of California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which required every insurance company operating in California to disclose, upon penalty of loss of its state business license, certain information about insurance policies they or their affiliates wrote in Europe between 1920 and 1945.[114] The state HVIRA legislation was enacted against the backdrop of a federal settlement of claims against insurance companies which had been negotiated by the President.[115] In determining the constitutionality of the HVIRA, the Court examined the Presidential power to make executive agreements which settle individual claims[116] and posited that such a power, which had been most clearly enunciated in *Regan* with respect to the claims of U.S. nationals against foreign governments, was also exercisable with respect to claims against corporations.[117] As the Court put it after examining *Regan* and other relevant authorities: "[t]he executive agreements at issue here do differ in one respect from those just

tions (respectively, against Iran, Mexico, and the United States), rather than against private citizens or corporations, and the fourth case concerns private debts between British and U.S. nationals around the time of the Revolutionary War, rather than violations of human rights. Although there are a number of treaty provisions like Article 14(b), their validity has not been determined in court. *See generally* Wuerth, *supra* note 12 (detailing a number of historical waiver provisions and arguing that waivers of individual claims against private entities are valid if made by treaty, although not by executive agreement).

[112] *Garamendi*, 539 U.S. at 396.

[113] *See id.* at 401–03. The facts in *Garamendi* implicated a settlement of insurance claims by Jewish survivors of World War II, whose policies had either been confiscated by Nazi Germany as part of its genocidal program or dishonored by insurance companies. *See id.*

[114] *Id.* at 408–12.

[115] *Id.* at 405–08.

[116] Executive agreements are created and implemented differently than treaties, but the issue of the validity of waivers arises regardless of whether the waivers are contained in executive agreements or treaties.

[117] *See id.* at 415–16.

mentioned insofar as they address claims . . . . against corporations, not the foreign governments. But the distinction does not matter."[118]

The *Garamendi* decision, however, should not be regarded as a *post facto* validation of the Ninth Circuit's and federal district courts' approval of Article 14(b) in the Japanese forced labor litigation cases. There are at least two critical factors which distinguish Article 14(b) from the federal settlement of claims upheld by the Court in *Garamendi*. First, and most obviously, *Garamendi* concerned a substantial settlement of claims, rather than a waiver of claims. The Supreme Court in *Garamendi* observed that the federal government negotiated a settlement agreement under which Germany agreed to establish a foundation of 10 billion deutsch marks, contributed equally by the German Government and German companies, to compensate the companies' victims during the Nazi era.[119] By contrast, Article 14(b) of the 1951 Treaty purports to constitute a complete waiver of claims by victims of wartime forced labor in Japan.[120] The Court in *Garamendi* cited its decision in *Regan*,[121] but failed to acknowledge the distinction between the relatively substantial settlement of claims at issue in *Garamendi* and the nullification of claims in *Regan*.[122] The distinction is an important one.[123] It is perhaps understandable that courts are reluctant to assess the adequacy of settlements for human rights abuses, particularly when the settlements result from arduous negotiations for the side of the victims. Nevertheless, courts must be vigilant with regard to agreements which purport to prevent any and all claims for compensation for such abuses.

The second distinguishing factor between the settlement of claims at issue in *Garamendi* and Article 14(b) is that the former *explic-*

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[118] *See Garamendi,* 539 U.S. at 415–16.

[119] *Id.* at 405.

[120] *See supra* notes 5, 105 and accompanying text.

[121] *Garamendi,* 539 U.S. at 415.

[122] The Court also failed to acknowledge another key distinction between *Regan* and *Garamendi*. In *Regan,* the claims, which were nullified by executive action, concerned commercial interests rather than violations for fundamental human rights, whereas in *Garamendi,* the federal settlement concerned insurance policies which violated the *jus cogens* principle of racial non-discrimination. That the Court did not even identify this distinction between the facts in *Garamendi* and in *Regan* is a worrying sign that superior courts are neglecting their historical and conceptual role as protectors of rights. Part IVD, *infra,* further examines the historical role of judges as guardians of rights, insofar as it arises in examining and interpreting treaty provisions.

[123] In *Mitsubishi Materials Corp. v. Superior Court,* 6 Cal. Rptr. 3d 159 (Cal. Ct. App. 2003), a California appeals court, which followed and cited the Supreme Court's decision in *Garamendi*, also failed to recognize this distinction. *See id.* at 176–77.

itly settled claims against corporations,[124] whereas Article 14(b) ambiguously waived claims against Japan and "its nationals."[125] As discussed in Parts IV and V below, it is by no means clear that the term "nationals" as used in Article 14(b) encompasses corporations.[126]

III. Policy Considerations

The discussion in Part II indicates strong bases for considering Article 14(b) invalid under international law and scant authority for upholding the constitutional validity of Article 14(b) under domestic law. The Ninth Circuit's and federal district courts' exploration of Article 14(b)'s validity therefore clearly seems wanting. It is essential, however, to consider *why* courts hearing the Japanese forced labor cases neglected to properly examine the validity of Article 14(b) and indeed, why courts are generally reluctant to explore the validity of any treaty provision even where compelling grounds exist for doing so.

It is tempting to believe that judicial reluctance to examine the validity of a treaty provision in any given case stems from a principled weighing of policy considerations which relate to that case. In the various Japanese forced labor litigation cases, for instance, one may wish to surmise, optimistically, that the courts' reluctance to properly explore the validity of Article 14(b) arose from an articulation and careful evaluation of the manifold policy considerations at stake in those cases. It could be supposed that the courts eventually decided to uphold the government's use of the claims of private citizens as "bargaining chips"[127] with Japan, favoring the goals of peaceful and prosperous re-

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[124] *See Garamendi*, 539 U.S. at 415. Note the Court's statement that the

> Government agreed that whenever a German *company* was sued on a Holocaust-era claim in an American court, the Government of the United States would submit a statement that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German *companies* arising from their involvement in the National Socialist era and World War II" and its reference to a "letter from President Clinton to Chancellor Schröder committing to a 'mechanism to provide the legal peace desired by the German government and German *companies*."

Id. (citation omitted, emphasis added).

[125] *See* 1951 Treaty, *supra* note 4, art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

[126] *See infra* notes 165–170 and accompanying text.

[127] The phrase (in its singular and plural versions) was used in both the majority and minority judgments in *Regan*. *See, e.g.*, *Regan*, 453 U.S. at 673–74; *see also id.* at 691 (Powell, J., concurring in part and dissenting in part) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The

lations with that country over the need to support the notion and practice of individual rights.[128] This account of the courts' reluctance to invalidate or even examine the legality of Article 14(b) raises concerns as to the strength of judicial commitment to upholding individual rights, but it at least supposes that judges are willing to articulate and undertake a balancing of policy considerations to some extent.

However, there is a more perturbing explanation as to why judges are so reluctant to invalidate treaty provisions and, indeed, to even examine their validity. Specifically, in cases which raise *foreign* policy issues, the federal government has come to enjoy an almost subservient judicial deference to its acts and decisions, in contrast to a greater judicial readiness to review *domestic* governmental acts and decisions.[129] Judges are so wary of overturning, or even altering or interfering with, foreign policy decisions, that they often simply refuse to adjudicate cases with foreign policy implications and resort to an array of doctrines to justify their refusal even to embark on an adjudicative process.[130] The most notable of these doctrines is the political question doctrine,[131] but judges also resort to the principle of international comity,[132] the act of state doctrine,[133] and the prin-

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extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.") If Justice Powell was concerned about the taking of property pursuant to a waiver when only commercial interests were implicated, surely courts should be even more vigilant about waivers when human rights are implicated.

[128] This occurred despite the fact that Article 14(b) purported to insulate corporate entities for egregious violations of such rights, rather than to insulate a government from commercial claims, as in *Regan*.

[129] *See* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. Colo. L. Rev. 1439, 1440 (1999) (commenting that "there is very real cause for concern in unbridled judicial deference to executive branch decision making in the foreign relations area"). *See generally* Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (1992) (discussing the broad deference that the judiciary gives to the political branches in foreign affairs).

[130] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2391 (1991); Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. Ann. Surv. Am. L. 623, 624, 634–35 (2003); Jeremy Sarkin, *Reparation for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, to Pursue African Human Rights Claims*, 32 Int'l J. Legal Info. 426, 441 n.58 (2004).

[131] *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (establishing that matters of international law can be seen as political questions).

[132] *See, e.g.*, Hilton v Guyot, 159 U.S. 113 (1895); Bi v. Union Carbide Chem. & Plastics Co., 984 F. 2d 582 (2d Cir. 1993) (both referencing the principle of comity).

[133] *See, e.g.*, Banco Nacional de Cuba v. Sabatino, 376 U.S. 398 (1964) (applying the act of state doctrine to its analysis).

ciple of ripeness.[134] Even if they do decide to adjudicate on the case and ostensibly disavow the application of the political question doctrine or comparable canons, in practice, judges habitually rule in favor of the government's position on the merits, often without even considering the consistency of that position.[135] Indeed, judges sometimes extend this extraordinary deference[136] to the executive's position without acknowledging and examining the public policy considerations which arise from it. This was evident in *Garamendi,* where the majority opinion of the Supreme Court did not mention the human rights factors at stake and simply declared that, while "a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies."[137]

It is therefore unsurprising that the U.S. government's statement of interest submitted in *Japanese Forced Labor Litigation* (2001) recognized that there needed to be "a compelling public policy justification," to validate a waiver of private claims, vet failed to identify the relevant public policy considerations at play.[138] Given the practice of judicial deference, it appears that the government simply assumed that the district court would not need to know which public policies were identified as relevant by the government[139] and furthermore, would not question its judgment that there were federal, executive policies that justified the waiver in Article 14(b).[140]

Judicial unwillingness to (1) review federal acts related to foreign policy and (2) balance competing policy considerations appears to be magnified when iudges are called upon to determine and apply international law.[141] It was therefore somewhat predictable that, although some courts in the various Japanese forced labor cases considered the validity of Article 14(b) under domestic constitutional law,

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[134] *See, e.g.*, Goldwater v. Carter 444 U.S. 996, 997–1002 (1979) (Powell, J., concurring in the judgment) (referring to ripeness).

[135] *See* Bederman, *supra* note 129, at 1464–68.

[136] *See id.* at 1465–66.

[137] *Garamendi*, 539 U.S. at 415.

[138] *See* Murphy, *supra* note 107, at 142 (citing Statement of Interest of United States of America, *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000) (No. MDL-1347) (filed Aug. 9, 2000)).

[139] *See id.*

[140] *See id.*

[141] Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases,* 80 Wash. U. L.Q. 835, 844–46 & n.64 (2002).

none of them paused to consider its validity under international law as it is applied in the United States.[142] In contrast to their forebears,[143] many judges in the United States are now reluctant to apply norms of international law, including international human rights law, aside from their applicability to limited, specified contexts such as the ATCA.[144] Thus, while judges have frequently considered *jus cogens* norms in determining the ambit of the ATCA, they clearly are uncomfortable with invoking Article 53 or Article 64 of the VCLT to invalidate or override treaties[145] for violations of customary international law, even of a *jus cogens* status.[146]

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[142] *See supra* note 67 and accompanying text.

[143] See Paust, *supra* note 11, at 306–07, for a commentary on the historical practice of applying international law, including human rights, in U.S. courts. For example, Paust refers to "the continuous use of customary international law both directly and indirectly by federal courts for more than 200 years. . . . In fact, Chief Justice Marshall recognized in 1810 that our judicial tribunals 'are established . . . to decide on human rights.'" *Id.* at 307.

[144] *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on* Lawrence v. Texas, 44 VA. J. INT'L L. 913, 914 (2004). Alford writes:

> Courts essentially remain convinced that the use of extra-constitutional material, including international human rights decisions, to give meaning to the content and scope of constitutional guarantees is illegitimate. . . . Despite precedents from international human rights tribunals asserting that the death penalty violates international human rights, and notwithstanding citations of those precedents in United States death penalty litigation (in support of the argument that the death penalty is unconstitutional), the Supreme Court has never considered such arguments germane.

Id. (footnote and internal quotations omitted); *see* Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited,* 15 EUR. J. INT'L L. 751, 757, 777–79; *cf.* Roper v. Simmons, 125 S. Ct. 1183 (2005).

[145] Recall that the VCLT provides, somewhat overzealously and impracticably, that a whole treaty is void if any one of its provisions violates a *jus cogens* norm that existed at the time the treaty was concluded, *supra* note 73, art. 53, 1155 U.N.T.S. at 344, or a *jus cogens* norm that emerged after the treaty came into force, *id.* art. 64, 1155 U.N.T.S. at 347. Assuming that the norm prohibiting forced labor evolved into a *jus cogens* norm after the 1951 Treaty came into effect, under international law, a court would be bound to take the extraordinary position that the entire 1951 Treaty is void, rather than just the offending provision (Article 14(b)). In order for Article 14(b) to be severable from the rest of the 1951 Treaty, it would have to satisfy stringent criteria pursuant to Article 44 of the VCLT, *id.* art. 44, 1155 U.N.T.S. at 343 (e.g., the offending clause must not have been an essential basis of the consent of the other party or parties to be bound by the treaty), but these would be unlikely to be satisfied. Hence, the VCLT hardly encourages due judicial consideration of treaty provisions that violate *jus cogens* norms and this may be an additional reason why judges in the Japanese forced labor litigation were reluctant to examine the validity of Article 14(b) under international law.

[146] Also, the Court in *Paquete Habana,* 175 U.S. at 700, stated that customary international law was meant to apply in the absence of a treaty or "controlling executive or legislative act or judicial decision." *But see* Henkin, *supra* note 64, at 1564 (noting that "[t]he status of customary international law and the law of the United States in relation to treaties

How then *should* a court address challenges to a waiver clause like Article 14(b)? In the interest of transparency, courts at least must be willing to recognize and articulate the competing public policy considerations at stake. On the one hand, it can be argued that (1) the terms of the 1951 Treaty, including Article 14(b), were vital in creating a lasting peace with Japan, (2) the executive branch of the federal government was best placed to frame the terms of this peace, and (3) Japan's displeasure with the Californian suits threatens the harmony of U.S.–Japanese relations, which is essential for economic and security reasons.[147] Such policy arguments buttress judicial reluctance to invalidate Article 14(b). On the other hand, the plaintiffs in the Californian suits suffered such atrocious violations of human rights[148] that to deny them redress is innately unjust and tantamount to condoning the actions of the perpetrators. Furthermore, human rights norms have undergone an exponential development and influence in the decades since World War II, to the extent that concerns about human rights have expanded beyond the confines of international organizations, nations' foreign affairs, and state departments to permeate the consciences of local polities and communities.[149]

If judges are to disallow or discourage local initiatives to protect human rights,[150] they also must not abdicate their established role as guardians of individual rights.[151] This judicial role is critical when considering the natural tendency of federal governments to be preoccupied with national trade and security issues, to the comparative neglect of the seemingly "microcosmic" concerns of individual rights. One obvious undesirable consequence of judicial obeisance to federal

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or acts of Congress has not been authoritatively determined"). It should also be noted that Article 2(3) of the International Covenant on Civil and Political Rights ("ICCPR") provides the right to an "effective remedy" for forced labor (which is prohibited in Article 8 of the ICCPR). *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 2(3), 8, 999 U.N.T.S. 171, 174, 175. The United States has declared the substantive provisions of the ICCPR to be not self-executing, but the covenant arguably has the force of customary international law. *See id.*

[147] *See Japanese Forced Labor Litig. III*, 164 F. Supp. 2d at 1173, 1175; *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 943, 947 (discussing these arguments).

[148] *See supra* notes 19–26 and accompanying text.

[149] Aside from Section 354.6, other examples of such state and local laws include the Massachusetts Burma law, Mass. Gen. Laws ch. 7, §§ 22G–M (2004), and the HVIRA, Cal. Ins. Code §§ 13800–13807 (1999).

[150] *See generally Garamendi*, 539 U.S. 396 (2003) (finding the HVIRA unconstitutional); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (finding the Massachusetts Burma Law unconstitutional, albeit on narrow grounds); *Deutsch II*, 324 F.3d 692 (9th Cir. 2003) (finding Section 354.6 unconstitutional).

[151] Paust, *supra* note 11, at 320–21.

foreign policy agreements, especially when individual rights are implicated, is the stark inequalities in the application of such rights. For example, former forced laborers who worked for European companies under Nazi rule endured similar judicial reluctance to enforce their claims for compensation, because of waiver clauses in post-war peace treaties, but now are receiving compensation as a result of intensive efforts by the federal government.[152] By contrast, former forced laborers who worked for Japanese corporations have not benefited from any such federal foreign policy efforts.[153] If judges readily assumed their role as protectors of individual rights, they could avoid, or at least lessen, such a disparity in the rights of former forced laborers caused by the inconstant and politicized inclinations of the federal government.

Regrettably, there 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, as well as being inequitable from the perspective of any person and organization seeking to uphold basic human rights in our world. Courts may be compelled on policy grounds to uphold such a waiver.[154] However, even in those cases, judges 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. An important means by which courts can balance, to some degree, the competing interests of federalized foreign relations with the need to protect basic human rights is through *interpretation,* a tool which enables judges to avoid the seemingly drastic action of invalidating a treaty or any of its provisions. The following section highlights the need to determine the scope of Article 14(b) and outlines three interpretive methods which were open to judges in the forced labor litigation cases. U.S. judges have previously used the lat-

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[152] Bayzler, *supra* note 35, at 29–31.

[153] For a commentary on the disparity between federal government efforts with respect to Europe and Japan, see *id.* at 28 n.79.

[154] Indeed, the making and maintaining of a lasting peace is generally a necessary precursor to the entrenchment of human rights and other "goods" in any community.

ter two of these methods in cases where individual rights have conflicted with federal acts in the sphere of foreign relations.[155]

IV. Interpretation as a Tool for Protecting Rights and Balancing Policy Considerations: Interpretive Approaches in International and Domestic Law

A. *Ambiguities in Article 14(b)*

Having assumed or swiftly determined that Article 14(b) is a legally valid treaty provision, the courts hearing the Japanese forced labor claims proceeded to pay perfunctory consideration to the meaning or scope of Article 14(b).[156] This was despite the claimants' arguments that there were several ambiguities in the language of Article 14(b) that precluded their claims from the scope of the waiver.[157]

For example, claimants pointed to the phrase in Article 14(b), "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 questioned whether the defendants, being corporations rather than government entities or members of the armed forces, could have acted in prosecuting the war.[158]

The claimants further argued that the aforementioned phrase in Article 14(b) of the 1951 Treaty could not have been intended to preclude claims of Allied POWs and civilian internees, given that the reciprocal waiver clause in Article 19, which barred claims of Japanese nationals against Allied Powers and their nationals, *specifically* waived the claims and debts arising in respect to "Japanese prisoners of war

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[155] *See, e.g.*, United States v. Payne, 264 U.S. 446 (1924); United States v. Rauscher, 119 U.S. 407 (1886); *see also infra*, Part IVC–D.

[156] For example, in response to the plaintiff's arguments of vagueness and ambiguity in the text of Article 14(b), Judge Walker commented that "[t]he court does not find the treaty language ambiguous, and therefore its analysis need go no further." *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 945. In *Deutsch I*, the court noted the plaintiff's arguments as to the meaning of Article 14(b). *Deutsch I*, 317 F.3d at 1025–26. But, given its finding that Section 354.6 was an unconstitutional intrusion into foreign affairs, the court did not proceed to address such arguments. *See id.* The *Mitsubishi Materials* decision constitutes a notable exception to the otherwise perfunctory analysis of the meaning of Article 14(b) by courts in the Japanese forced labor cases. *See Mitsubishi Materials*, 6 Cal. Rptr. 3d at 164 (noting the plaintiff's argument as to the meaning and scope of Article 14(b)); *see also id.* at 170–75 (addressing some of these arguments).

[157] For a summary recitation of these arguments, see *Japanese Forced Labor Litigation I,* 114 F. Supp. 2d at 948, and *Mitsubishi Materials,*6 Cal. Rptr. 3d at 164.

[158] *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948; *see Deutsch I,* 317 F.3d at 1025 n.12.

and civilian internees in the hands of the Allied Powers."[159] The claimants argued that, had the parties to the 1951 Treaty intended to preclude the claims of Allied POWs and civilian internees, Article 14(b) would have mirrored the wording of Article 19 and contained specific reference to these categories of persons.[160]

The claimants also cited the limiting nature of the introductory clause of Article 14(b): "[e]xcept as otherwise provided in the present Treaty . . . ."[161] The claimants noted that Article 26 of the 1951 Treaty provides that if Japan makes a war claims settlement with any country granting it greater advantages than those provided by the 1951 Treaty, then Japan must grant those same advantages to the parties to the 1951 Treaty.[162] They then pointed out that, since the conclusion of the 1951 Treaty, the Japanese government had entered into war claims settlement agreements with other countries (including the Netherlands, the Philippines, Vietnam, Russia, and Burma) permitting nationals of those countries to sue Japanese nationals, or to receive reparations or payments from Japan or Japanese companies in compensation for their forced labor, on terms far more favorable than U.S. veterans.[163]

Perhaps the most ambiguous aspect of Article 14(b) is the use of the phrase "Japan and its nationals," raising the specific question of whether the term "nationals" can be deemed to include the defendant

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[159] 1951 Treaty, *supra* note 4, art. 19(b), 3 U.S.T. at 3187, 136 U.N.T.S. at 70. The article provides that:

> (a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.
> (b) The *foregoing waiver includes* any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between 1 September 1939 and the coming into force of the present Treaty, as well as any *claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers,* but does not include Japanese claims specifically recognized in the laws of any Allied Power enacted since 2 September 1945.

Id. art. 19(a)–(b), 3 U.S.T. at 3187, 136 U.N.T.S. at 70 (emphasis added).

[160] *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 945.

[161] 1951 Treaty, *supra* note 4, art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

[162] *Id.* art. 26, 3 U.S.T. at 3190–91, 136 U.N.T.S. at 76 ("Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.").

[163] *See* Bayzler, *supra* note 35, at 29–30; Rosen v. People of Japan, Complaint, para. 40, *available at* http://anthonydamato.law.northwestern.edu/Adobefiles/Rosen-Japan-Complaint-filed.pdf (last visited Apr. 30, 2005).

corporations (i.e. juridicial persons) as well as individuals (i.e. natural persons), particularly given that the defendants were multinational corporations.[164] There is considerable evidence that the parties did not intend or assume the term "nationals" to encompass corporations. Specifically, the practice of other nations with respect to treaties in the immediate post-war era was to assume that the term "nationals" did *not* include corporations. If the term "nationals" was defined, this was usually done so as to limit or expand the categories of *private individuals* who should be deemed nationals for the purposes of that treaty.[165] Where the parties to a treaty that was concluded in the immediate post-war era intended that corporations be treated in the same way as private citizens, they separately referred to "nationals" and "companies" (or to "nationals" and "corporations").[166] It was only during and after the 1960s that states more frequently adopted express definitions of the term "nationals" that encompassed corporate entities, and such definitions specified the circumstances under which a corporation would be deemed a "national" under the treaty.[167] But even this change

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[164] *Mitsubishi Materials,* 6 Cal. Rptr. 3d at 164 n.3.

[165] *See* Treaty of Peace, Apr. 28, 1952, P.R.C.-Japan, 136 U.N.T.S. 45 [hereinafter China-Japan Treaty] (including corporations in the definition of "juridicial persons" but not "nationals"). Article 10 of that treaty states:

> For the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the *inhabitants and former inhabitants* of Taiwan (Formosa) and Penghu (the Pescadores) and their descendents who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).

Id. art. 10 (emphasis added).

[166] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VII(1) 4 U.S.T. 2063, 2069. Article VIII(1) refers in pertinent part to "[n]ationals *and* companies of either Party" (emphasis added), clearly indicating that corporate entities were not assumed to be "nationals." *Id.* art. VIII(1), 4 U.S.T. at 2070. Likewise, the Treaty of Commerce, Establishment and Navigation of 1959 between the United Kingdom and Iran separately defined "nationals" and "companies." *See* Brownlie, *supra* note 68, at 426–27; *see also* Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, U.S.-Italy, arts. I–III, 63 Stat. 2255, 2256–60 (referring separately to "nationals," "corporations," and "associations," although similar rights are granted under the Treaty to persons or entities falling under these three categories).

[167] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, art. 25, 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 175–76 [hereinafter ICSID Convention] (defining the term "national of another Contracting State" to mean any natural or juridical person). A corporation qualifies as a juridical person and would appear to be considered a national of the state in which it is incorporated or where its headquarters are situated. *See id.* The Treaty Establishing the European Economic Community, Mar. 25, 1957, 294 U.N.T.S. 5 [hereinafter Treaty of Rome], can be regarded as a half-way house between post-war treaties and treaties that

of practice usually has been employed with respect to tax-related and other commercially oriented treaties.[168] In the absence of an express definition of the term "nationals" to include corporations, the prevailing practices of the United States, other countries, and international organizations in drafting international documents, especially of a non-commercial nature, still appear to regard "nationals" and "corporations" as distinct categories.[169] For instance, a relatively recent United Nations Security Council resolution provided that: "Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals *and* corporations, as a result of its unlawful invasion and occupation of Kuwait . . . ."[170] The drafters of the 1951 Treaty surely must have been aware of the conventional perception that "nationals" and "companies" were distinct types of persons. If their intention was for companies or corporations to be considered "nationals," this would have warranted an express provision or clarification to that effect. In the absence of such express language, there are strong grounds to consider that Article 14(b) should not be deemed to waive claims against corporations.

Yet, with respect to all these aspects which are open to interpretation, the near consistent stance of the courts in the Japanese forced labor litigation was simply to deny ambiguities and insist that Article

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came into effect in the 1960s or later. Article 58 provides that "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States." *Id.* art. 58, 294 U.N.T.S. at 57; *see* BROWNLIE, *supra* note 68, at 427.

[168] ICSID Convention, *supra* note 167, art. 25, 17 U.S.T. at 1280, 575 U.N.T.S. at 175–76; Treaty of Rome, *supra* note 167, art. 58, 294 U.N.T.S. at 57.

[169] In fact, it remains a common practice of the United States to categorize "nationals" and "companies" separately even in *commercially*-oriented treaties. Thus, for example, the Treaty Concerning Business and Economic Relations, 1990, U.S.-Poland (Congressional Treaty Number: 101–18) contains numerous instances of the phrase "nationals *and* companies" (emphasis added), such as in Articles III, VI, and IX. The Treaty Concerning the Reciprocal Encouragement and Protection of Investments, 1986, U.S.-Egypt, (Congressional Treaty Number: 99–24) also contains several instances of the same phrase, such as in Articles II and X. The Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 1994, United States-Uzbekistan (Congressional Treaty Number: 104–25) uses the term "nationals or companies" in Article II and the term "national or company" in Article IX, again indicating that the United States continues to regard "nationals" as natural persons. Indeed, Article I of each of the three aforementioned treaties goes so far as to define "nationals" as natural persons and "companies" as legally constituted entities.

[170] S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶19, U.N. Doc. S/22454 (1991) (emphasis added).

14(b) was "clearly" broad enough to preclude the plaintiffs' claims.[171] Responding to the plaintiffs' arguments relating to the scope of Article 14(b), Judge Walker in *Japanese Forced Labor Litigation* (2000), for example, curtly stated that "[t]he court does not find the treaty language ambiguous, and therefore its analysis need go no further."[172] Judge Walker, and the other judges who heard the plaintiffs' arguments in the Japanese forced labor litigation, may have benefited from the adoption of (or at least awareness of) more systematic interpretive approaches, three of which are outlined below. These approaches are not abstract rights-based theories that are often unappealing to judges, but rather practical methods for resolving disputes in which rights are potentially contravened by a treaty provision. In applying such approaches, it still is possible that the judges nevertheless would have concluded that Article 14(b) should be interpreted to bar the plaintiffs' claims in the forced labor litigation, but at the very least, they would have done so after undertaking a procedural analysis befitting their judicial status as guardians of individual rights.

B. *Interpretation of Treaties under the VCLT*

As noted above, the VCLT, although not ratified by the United States, is accepted as declaratory of customary international law and therefore accepted as binding in U.S. law.[173] Article 31 of the VCLT sets forth the general rule of interpretation of treaties:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . There shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . [and] any relevant rules of international law applicable in the relations between the parties.[174]

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[171] *See supra* note 156 and accompanying text.

[172] *See supra* note 156 and accompanying text.

[173] *See supra* note 73 and accompanying text.

[174] VCLT, *supra* note 73, art. 31, 1155 U.N.T.S. at 340 The entire text reads as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

Article 32 of the VCLT provides that recourse may be had to supplementary means of interpretation.[175] This includes the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or alternatively, to determine the meaning when the interpretation according to Article 31 either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[176]

Application of the interpretive principles set forth in the VCLT would not appear to immediately resolve the meaning of ambiguous phrases in Article 14(b). Article 31 of the VCLT requires that both "subsequent practice" and "relevant rules of international law" be taken into account.[177] These two criteria, however, could produce contradictory results. For instance, it is the subsequent practice of the U.S. government that Article 14(b) be interpreted to bar compensation claims by former POWs and other forced laborers against Japan, and multinational corporations identified as Japanese, such as Nippon Steel Corporation, Mitsubishi International Corporation, and Mitsui & Co. Ltd.[178]

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Id.

[175] *Id.* art. 32, 1155 U.N.T.S. at 340.

[176] *Id.*, 1155 U.N.T.S. at 340. The entire article reads as follows:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

Id.

[177] *See id.* art. 31, 1155 U.N.T.S. at 340.

[178] Bayzler, *supra* note 35, at 29. The Japanese government appears to have shared the same interpretation, given that its view that allowing the Section 354.6 claims could im-

Yet relevant rules of international law argue against an interpretation that bars the forced laborers' claims in the Japanese forced labor litigation cases. For example, Article 8 of the Universal Declaration of Human Rights,[179] which is widely accepted as declaratory of customary international law,[180] provides that everyone must have "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[181] Article 4 of ILO Convention No. 29,[182] ratified by both the United States and Japan, states that each "competent authority shall not impose or permit the imposition of forced or compulsory labor for the benefit of private individuals, companies or associations."[183]

How should this apparent conflict between the "subsequent practice in the application of the treaty" and the "relevant rules of international law" be resolved? It should be recalled that a treaty provision which bars compensation for forced labor is likely to conflict with a *jus cogens* rule of international law, especially when that forced labor was carried out in a manner akin to slavery and was not sufficiently

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pede diplomatic relations with the United States. *See Japanese Forced Labor Litig. III*, 164 F. Supp. 2d at 1173, 1175.

[179] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plenary mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR]. Article 8 provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution *or* by law." *Id.* art. 8, at 73 (emphasis added).

[180] *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*. 32 Am. U. L. Rev. 1. 15–16 (1982).

[181] Nicholas P. Van Deven, *Taking One for The Team: Principle of Treaty Adherence as a Social Imperative for Preserving Globalization and International Legal Legitimacy as Upheld in In Re* World War II Era Japanese Forced Labor Litigation, 46 St. Louis U. L.J. 1091, 1108 (2002).

[182] *See* Convention Concerning Forced or Compulsory Labour, *supra* note 80, art. 4, 39 U.N.T.S. at 58–59.

[183] Similarly, application of the interpretive criteria expressed in Article 32 of the VCLT yields contradictory results. *See* VCLT, *supra* note 73, art. 32, 1155 U.N.T.S. at 340. The *travaux préparatoires* of the 1951 Treaty does not indicate whether the parties intended to bar compensation claims for forced labor by Allied POWs and civilians against Japanese corporations. The "circumstances of [the treaty's] conclusion," however, suggest that the parties did not intend to bar compensation claims by forced laborers against Japanese corporations. For example, as argued in Part IV, *infra,* in the era that the 1951 Treaty was concluded, the prevailing practice was to interpret the term "nationals" to *exclude* corporations, unless corporations or other juridical persons were specifically included within a definition of "nationals." Additional relevant "circumstances of [the treaty's] conclusion" include the fact that Article 19 of the 1951 Treaty specifically prohibited "claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers," *supra* note 4, art. 19, 3 U.S.T. at 3187, 136 U.N.T.S. at 70, whereas no such express prohibition on "claims in respect to Allied POWs and civilian internees in the hands of the Japanese" appeared anywhere in the 1951 Treaty.

and comprehensively redressed by other compensatory measures, as appears to be the case with forced labor in wartime Japan.[184] An interpretation of Article 14(b) which causes it to conflict with a *jus cogens* norm would render the 1951 Treaty or at least Article 14(b) void under international law, pursuant to the provisions of Article 53 or Article 64 of the VCLT.[185] Although Article 31 of the VCLT requires judges interpreting treaties to take into account *both* "subsequent practice" when interpreting the treaty as well as "relevant rules of international law,"[186] a logical consequence of the supreme status of *jus cogens* rules in international law is that, where an interpretation according to "subsequent practice" conflicts with an interpretation according to a relevant *jus cogens* rule of international law, the latter should be preferred.

As noted above, however, the United States has not ratified the VCLT.[187] And it has been observed that the principles of interpretation set forth in the VCLT are not identical to domestic principles of treaty interpretation developed in U.S courts.[188] There are two such domestic principles of interpretation, which judges have previously applied when interpreting treaty provisions, that are relevant to determining the meaning and scope of Article 14(b). Neither of these principles were applied by the judges in the Japanese forced labor litigation cases. The first is the principle that federal acts, including treaties, should be interpreted in a manner consistent with *customary international law* and especially, with human rights norms embedded therein.[189] The second is the principle that, irrespective of international law *per se,* courts should interpret treaties in a manner protective of *individual rights,* whether those rights derive from the Constitution, the common law, or international law.[190] The following two sections will summarize the development of these approaches in U.S. jurisprudence and demonstrate their applicability to resolving the ambiguities in the text of Article 14(b).

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[184] *See supra* note 94 and accompanying text.
[185] *See supra* notes 74–75, 89 and accompanying text.
[186] *See supra* note 174 and accompanying text.
[187] *See subra* note 73.
[188] Acrilicos v. Regan, 617 F. Supp. 1082, 1086 n.15 (Ct. Int'l Trade 1985).
[189] *See infra* Part IVB.
[190] *See infra* Part IVC.

C. *Interpretive Impact of Customary International Law in U.S. Law*

Despite the pronouncements of the U.S. Supreme Court in *The Paquete Habana* and *Charming Betsy,*[191] and of eminent commentators like Professors Paust[192] and Henkin,[193] concerning the automatic effect of international law in U.S. courts, it remains unlikely that a treaty or statute would be invalidated by a U.S. court for failure to comply with customary international law.[194] The more widely accepted impact of customary international law on U.S. domestic law is that customary international law modulates the *interpretation* of congressional and executive acts.[195] In particular, there is strong authority for the view that legislative and executive acts must be interpreted to be consistent with customary international law, especially, but not exclusively, with the human rights norms embedded therein.[196]

The genesis of this canon of interpretation is the Supreme Court's holding almost two hundred years ago in *Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[197] The canon, which subsequently was applied to the interpretation of treaties,[198] is clearly of relevance to the Japanese war reparations cases given that several terms and phrases in Article 14(b) are open to various plausible interpretations (such as whether "nationals" of Japan include corporations, especially multinational corporations (MNCs),[199] and whether the phrase "in the

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[191] *See supra* note 64 and accompanying text.

[192] *See supra* note 64 and accompanying text.

[193] *See supra* note 64 and accompanying text.

[194] *See* Van Deven, *supra* note 181, at 1113, who observes that an inquiry into whether the 1951 Treaty is invalid for conflicting with customary international law may be a "novelty" for U.S. courts (citing Restatement (Third) of Foreign Relations Law § 115 cmt. d (1987), which states that "[i]t has also not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States"); *see also* Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959) (stating that it has long been settled that "the federal courts are bound to recognize [treaties, statutes, or constitutional provisions] as superior to canons of international law," and adding that "[t]here is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law").

[195] *See* Bradley & Goldsmith, *supra* note 66, at 483.

[196] *See* Paust, *supra* note 11, at 306–07.

[197] Murray v. Schooner Charming Betsy, 6 (2 Cranch) U.S. 64, 118 (1804).

[198] *See, e.g.*, Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

[199] A multinational corporation (MNC) can be defined as a "cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a

course of the prosecution of the war" encompasses actions by private companies).[200] Given that forced labor violates a customary international norm (indeed, most often a *jus cogens* norm) and that customary international law provides that states should ensure remedies for violations of fundamental rights,[201] this historical canon of interpretation would oblige courts to interpret ambiguous language of Article 14(b) in a manner favorable to victims of forced labor seeking compensatory remedies.

The *Charming Betsy* canon was implicitly applied in *United States v. Rauscher*,[202] where the Court interpreted the Webster-Ashburton Treaty of 1842[203] in light of customary international law. After surveying various commentary on the issue of whether a person extradited for a specific offense pursuant to an extradition treaty could be tried for any other offense, the Court in *Rauscher* implied a term in the Webster-Ashburton Treaty that an extradited person could not be tried for anv offense other than the specific crime for which he was extradited.[204] The Court reiterated the general principle that treaties must be construed in light of customary international law in later decisions, such as in *Santovincenzo v. Egan,* where it stated that "[as] treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'"[205]

However, the decision in *Rauscher* was qualified by the Supreme Court's controversial decision more than a century later in *United States v. Alvarez-Machain* (*Alvarez-Machain I*), which concerned the abduction of a Mexican citizen, who was brought from Mexico to the United States and indicted on criminal charges.[206] The Court was called on by the Mexican national to imply a term in the 1978 Extradition Treaty[207] between the United States and Mexico prohibiting

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common management strategy." Raymond Vernon, *Economic Sovereignty at Bay*, 47 FOREIGN AFF. 110, 114 (1968–1969).

[200] *See Deutsch I,* 317 F.3d at 1025 n.12; *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 948; *Mitsubishi Materials*, 6 Cal. Rptr. 3d at 164.

[201] *See* UDHR, *supra* note 179, art. 8, at 73.

[202] United States v. Rauscher, 119 U.S. 407 (1886).

[203] A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; for the Final Suppression of the African Slave Trade; and for the Giving up of Criminals, Fugitive from Justice, in Certain Cases, U.S.-G.B., Aug. 9, 1842, 8 Stat. 576.

[204] *See Rauscher,* 119 U.S. at 416–17.

[205] *Santovincenzo*, 284 U.S. at 40 (citing *Riggs*, 133 U.S. at 271).

[206] United States v. Alvarez-Machain, 504 U.S. 655 (1992) ("*Alvarez-Machain I*"). The decision was heavily criticized by commentators. *See, e.g.*, Rehm, *supra* note 63.

[207] May 4, 1978, 31 U.S.T. 5059.

abductions, in light of customary international law as evidenced, for example, by the Charters of the United Nations and the Organization of American States.[208] This time, the Court refused to interpret the treaty in accordance with customary international law, stating that "only the most general of international law principles" supported an implied term prohibiting abductions.[209] The Court did not overrule *Rauscher*, but stated that in that case, the Court had implied a term which was supported by the *actual practice* of nations with regard to extradition treaties, a factor that the Court deemed absent on the facts in *Alvarez-Machain I*.[210]

Given the decision in *Alvarez-Machain I,* the Californian courts in the Japanese forced labor cases could arguably be forgiven for overlooking the interpretive impact of customary international law on treaties. There does not appear to be a specific *and observed* international custom which prohibits a government from waiving reparations claims of its nationals in peace treaties for human rights abuses suffered by such nationals.[211]

Even in the face of *Alvarez-Machain I,* there is a compelling reason why the courts in the Japanese war reparations cases should nevertheless have interpreted Article 14(b) in a manner that allowed compensation claims by forced laborers. Namely, the customary international norm implicated in the Iapanese war reparations cases is a fundamental, or *jus cogens,* norm.[212] In comparison, the norm at issue in *Alvarez-Machain I*–the prohibition against abductions–is not of a comparably high status.[213] While customary international norms are usually contingent on both state practice (specifically, widespread and consistent

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[208] *Alvarez-Machain I*, 504 U.S. at 666.

[209] *Id.* at 669.

[210] *Id.* at 667–68. Hence, in the language of Roman law, the Court in *Alvarez-Machain I* appeared to hold that only *lex lata* (the law as actually *practiced*) could be used to inform the meaning of a treaty provision, and not *lex ferenda* (the law as it *should* be). *See id.* For an analysis of (descriptive) *lex lata* and (normative) *lex ferenda,* and how these two concepts intersect in the "modern" approach to customary international law, see Roberts, *supra* note 70, at 763.

[211] There is a general, and frequently violated, customary norm that states should ensure judicial remedies for violations of fundamental rights. *See, e.g.*, UDHR, *supra* note 179, art. 8, at 73. This would appear to be an insufficiently specific norm under the specificity test set forth in *Alvarez-Machain I,* as it is not a norm relating to a specific type of treaty (e.g. extradition treaties or peace treaties). *Cf. Alvarez-Machain I*, 504 U.S. at 658 (interpreting a particular treaty).

[212] *See supra* note 81 and accompanying text.

[213] The norm prohibiting abductions is not included on lists of established *jus cogens* norms. *See, e.g.*, Brownlie, *supra* note 68, at 515 (lacking mention of prohibition of abductions in its list of established *jus cogens* norms).

state practice of the norm) and *opinio juris* (the belief of states that the practice is legally obligated), *jus cogens* norms constitute a special, "superior" category of customary international law.[214] *Jus cogens* norms depend heavily on evidence of *opinio juris* and will *not* be undermined by contrary state practice.[215] This view was recently reflected in the dicta of the Ninth Ciruit in *Alvarez-Machain v. United States et al.*[216] (*Alvarez-Machain II*), which reiterated that:

> Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm. . . . In contrast, *jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested

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[214] *See id.* (referring to *jus cogens* norms as "overriding principles" and as "rules of customary law which cannot be set aside by treaty or acquiescence").

[215] *See* Roberts, *supra* note 70, at 790; Oscar Schacter, *Entangled Treaty and Custom*, *in* International Law at a Time of Perplexity 717, 733–35 (Yoram Dinstein ed., 1989). In theory, a *jus cogens* norm can be modified by a subsequent norm of the same character. *See* VCLT, *supra* note 73, art. 53, 1155 U.N.T.S. at 344. Given the fundamental normative status of a *jus cogens* norm, however, such modification would be most unlikely to occur. *See* Degan, *supra* note 71, at 228.

[216] Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (en banc) ("*Alvarez-Machain II*"). Following *Alvarez-Machain I,* the criminal case against Alvarez-Machain was heard on remand, but, in an ironic twist, was thrown out for lack of evidence. *See* United States v. Alvarez-Machain, No. CR-87–422-(G)-ER (C.D. Cal. Dec. 14, 1992). Following this dismissal, Alvarez-Machain sued the United States for, *inter alia,* violation of the Federal Tort Claims Act (FTCA) and the ATCA. 331 F.3d at 608. After a series of decisions considered whether Alvarez-Machain could proceed with such a suit, in 2002 the Ninth Circuit granted a rehearing *en banc* and issued its decision in 2003 in *Alvarez-Machain II,* where it held (1) that transborder abduction does not violate customary international human rights law, as required to be actionable under ATCA because prohibition of such acts is not an international norm which is specific, universal, and obligatory, *id.* at 617–20, but (2) that the prohibition of arbitrary arrest and detention is such a norm which is actionable under the ATCA, and Alvarez-Machain, therefore, has a remedy for his unilateral, nonconsensual, extraterritorial arrest and detention, *id.* at 620, and (3) the limited waiver of sovereign immunity of the United States operates in this case as neither the "foreign activities" exception or the "intentional tort" exception, *id.* at 637–40. The Supreme Court very recently reversed the Ninth Circuit's holdings, determining *inter alia* that the prohibition of arbitrary arrest and detention is *not* a binding customary norm and is not actionable under the ATCA. *See* Sosa v Alvarez-Machain, 124 S. Ct. 2739 (2004). However, nothing in the Court's decision repudiated the Ninth Circuit's dicta regarding the identification of *jus cogens* norms. Indeed, a majority of the Court recognized that grave violations of fundamental human rights norms, such as torture and slavery, are actionable under the ATCA. *See id.* at 2765–66.

> choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent . . . .[217]

Alvarez-Machain I concerned a human rights norm, but not one which approached the status of *jus cogens*. By contrast, the imperative nature of a *jus cogens* norm is not affected by contrary state practice and, once established by evidence of a strong *opinio juris*, a *jus cogens* norm can continue to inform the interpretation of statutes regardless of non-compliance by nations.[218] It is submitted that these decisions nuance the principle laid down in *Alvarez-Machain I*, which established that a treaty should be interpreted in light of customary international law only when there exists a specific norm in customary international law that is supported by the actual practice of nations with respect to the same type of treaty being examined.[219] In particular, where the relevant norm is a *jus cogens* norm, the treaty should be interpreted to avoid inconsistency with that norm, even if it is *disregarded* in practice, since *jus cogens* norms are predicated on *opinio juris* rather than state practice.[220] Moreover, the specificity of the norm and the type of treaty at issue should not be matters for examination, given that *jus cogens* norms are, by definition, established norms of universal applicability.[221]

In short, a two-stage interpretive test to resolve an apparent conflict between a treaty and customary international law appears to emerge from a combined reading of the *Charming Betsy, Rauscher, Alvarez-Machain I*, and *Alvarez-Machain II* cases. Normally, a treaty need only be interpreted so as to avoid inconsistency with specific and observed rules of customary international law in relation to the type of treaty being examined.[222] However, where a *jus cogens* norm is at stake, the treaty should be interpreted so as to avoid inconsistency with such a norm regardless of whether it is supported by the actual practice of nations with respect to the same type of treaty being examined.[223]

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[217] *Alvarez Machain II*, 331 F.3d at 613 (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir.1992)).

[218] For example, the ATCA was interpreted in light of the *jus cogens* norm prohibiting torture in *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 & n.15 (2d Cir. 1980). If *jus cogens* norms affect the interpretation of statutes regardless of non-compliance by nations, then presumably such norms would comparably affect the interpretation of treaties.

[219] *See Alvarez-Machain I*, 504 U.S. at 666–68.

[220] *See supra* note 215 and accompanying text.

[221] *See supra* notes 70–74 and accompanying text.

[222] *See Alvarez-Machain I*, 504 U.S. at 657; *Rauscher*, 119 U.S. at 433.

[223] *See Alvarez-Machain II*, 331 F.3d at 609.

Applying this test to the interpretation of Article 14(b) of the 1951 Treaty in the Japanese forced labor cases, which appeared to violate the *jus cogens* norm prohibiting forced labor, the courts were bound to interpret Article 14(b) in a manner which did not preclude claims for compensation by victims of forced labor. One of the particular ways in which the courts could have so interpreted Article 14(b) is discussed in Part V below.

D. *Rights-Based Interpretation of Treaties in Judicial Precedent*

Aside from the interpretive impact of customary international law, however, there is also an established judicial custom in U.S. courts that ambiguous treaty provisions are to be construed in a manner that protects express and implied rights, whether or not the source of such rights is in international law.[224] As meticulously documented by Professor Paust, there is a long and distinguished history of case law that obligates judges to adopt a rights-based approach to interpreting treaty provisions.[225] Professor Paust has shown how this interpretive principle emerged from a series of Supreme Court decisions and continued to be applied by the Supreme Court and other courts in the twentieth century.[226] In *Hauenstein v. Lynham (1879),* for example, the Court declared that "[w]here a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred."[227] And in *United States v. Payne (1924),* the Court applied itself to "[c]onstruing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . . ."[228] Significantly, courts have not used the word "rights" in this context to denote only *constitutional* rights, such as free speech or due process. U.S. courts have applied the principle articulated in cases like

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[224] *See* Paust, *supra* note 11, at 325.

[225] *See id.* at 325 n.118.

[226] *See id.*

[227] 100 U.S. 483, 487 (1879) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"); *see also Riggs*, 133 U.S. at 271–72 (stating that "where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred").

[228] 264 U.S. 446, 448–49 (1924). Other examples in twentieth century cases include *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933), *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924), *St. Paul Insurance Co. of Illinois v. Venezuelan Int'l Airways, Inc.* 807 F.2d 1543, 1546 (11th Cir. 1987), *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.* 737 F.2d 456, 458 (5th Cir. 1984), and *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 80 (Tex. 2000) (applying *Asakura* to imply a right in the International Covenant on Civil and Political Rights to equal access to courts).

Hauenstein and *Payne* to construe treaty provisions in favor of rights as diverse as the right of an individual to trade as a pawnbroker,[229] the retention of citizenship and political rights of women who marry aliens,[230] and inheritance rights to real property.[231] Thus, both constitutional *and* non-constitutional rights must be considered in examining a contentious treaty provision. At the outset, if the provision violates an individual right entrenched in the Constitution (or indeed, any article of the Constitution), the provision will have exceeded the executive's treaty-making power and therefore be invalid.[232] However, even if the provision does not clearly violate a constitutional right and is a valid exercise of the treaty-making power, its meaning may be ambiguous. In this case, if there are competing interpretations, judges should adopt the interpretation which is more protective of a (non-constitutional) right.

Of course, when a treaty provision is open to competing interpretations, there are several aspects to be considered. These include the intentions of parties and the purpose of the treaty,[233] which may be ascertained by examining the *travaux préparatoires* of the treaty,[234] diplomatic correspondence,[235] conditions and circumstances existing at the time the treaty was entered into,[236] the practice of signatory nations since the treaty came into effect,[237] how the provision is cur-

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[229] *See Asakura*, 265 U.S. 332, 334–35 (discussing whether the business of a pawnbroker was a "trade," as such term was used in the Treaty of Commerce and Navigation Between the United States and Japan, Apr. 5, 1911, U.S.-Japan, 37 Stat. 1504).

[230] *See* Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 244–47 (1830) (determining whether the petitioner was a "subject" or "citizen" as within the meaning of the Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, 1793, U.S.-G.B., 8 Stat. 81).

[231] *See generally Riggs*, 133 U.S. 258 (1890) (analyzing whether Article 7 of the Consular Convention Between the United States of America and His Majesty, the Emperor of the French, Feb. 23, 1853, U.S.-Fr., art. 7, 10 Stat. 992, 996, gave French citizens the right to inherit land from a citizen of the United States).

[232] Arguably, a treaty provision can exceed the treaty-making power even if the Constitution has not been explicitly breached, such as where the provision waives or settles claims of a non-commercial or non-proprietary nature, especially when the claims arose from a violation of human rights. *But see generally* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (making this argument more difficult for judges to adopt).

[233] *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("[I]t is the intention of the parties . . . that must control any attempt to interpret [a] treat[y].").

[234] Block v. Compagnie Nationale Air Fr., 386 F.2d 323, 337 (5th Cir. 1967).

[235] *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 194–95 (1961).

[236] *See, e.g.*, Rocca v. Thompson, 223 U.S. 317, 331–32 (1912).

[237] *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp, 466 U.S. 243, 259–60 (1984).

rently interpreted by the executive branch,[238] and other extraneous factors. It is beyond the scope of this Article to provide detailed analyses of these factors in treaty interpretation and their interaction with one another, either under international law as set forth in the VCLT or as they have been articulated and applied by U.S. courts. Such an analysis would be a considerable undertaking, especially because courts have not been a model of clarity in enunciating a hierarchy of principles in treaty interpretation.[239] Although the Supreme Court has clearly stated that courts should look first to the language of the treaty,[240] it has not provided clear guidance on the interplay of extraneous factors which should be considered by judges when a textual analysis of a treaty provision does not yield a clear answer.[241]

Nevertheless, it is at least clear that the protection of individual rights is at least one factor which the courts should take into account when construing an ambiguous treaty provision.[242] In this respect, the Ninth Circuit's and federal district courts' assessment of Article 14(b) of the 1951 Treaty in the Japanese forced labor cases (without weight being accorded to the rights at stake) was clearly wanting. Moreover, as has been pointed out above,[243] there are strong conceptual grounds why this rights-based approach should not be neglected. A democratic political system is conceptually predicated on the role of judges as protectors of individual rights, as a counter-balance to the majoritarian priorities of the legislature and executive.[244] Furthermore, this judicial role is even more imperative in a federal system when state and local governments have actively sought to protect rights via legislation and other means, but have been discouraged or prevented from doing so by courts on the grounds of undue interference in foreign affairs.[245]

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[238] *See, e.g.*, El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999); *Factor*, 290 U.S. at 295–98.

[239] For further commentary on this problem, see, for example, Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of The Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 296–98 (2002).

[240] *See, e.g.*, United States v. Stuart, 489 U.S. 353, 372–73 (1989).

[241] *See id.* at 373 (stating that "[o]nly when a treaty provision is ambiguous have we found it appropriate to give authoritative effect to extratextual materials"). But, the Court did not provide guidance on the hierarchy or weight of these extrinsic factors in the same manner as provided in the VCLT. *Compare id. with supra* notes 174–176.

[242] Paust, *supra* note 11, at 325.

[243] *See supra* Introduction.

[244] *See supra* notes 10–11 and accompanying text.

[245] *See supra* notes 8–11 and accompanying text.

V. Applying Interpretive Rights-Based Approaches to Article 14(b) of the 1951 Treaty

To recapitulate, there are certain established rules and principles which are applicable to determining the validity and scope of a treaty provision like Article 14(b) of the 1951 Treaty. These rules and principles were largely overlooked by the courts in the Japanese forced labor cases. In determining the validity of Article 14(b), courts should have considered, firstly, whether it violates a *jus cogens* norm, either explicitly or by frustrating the purpose and realization of that norm,[246] and secondly, whether the treaty provision was constitutional.[247] Even if a court determined Article 14(b) was a valid treaty provision (either because such a determination was technically correct as a matter of law, or because a contrary determination would be unfeasible on policy grounds), the court should have then proceeded to examine its scope.[248] This stage of analysis must venture beyond merely inquiring into the subjects to whom the treaty applied and a facial interpretation of the language of the provisions, two aspects with which the judges in the Japanese forced labor cases were preoccupied.[249] Rather, the courts should have identified the terms and phrases in Article 14(b) that were ambiguous or contentious, and then armed themselves with interpretive approaches to construe those terms and phrases. The construction of ambiguous treaty provisions should not simply be a matter of individual judges deciding which interpretation appears more convincing to him or her.[250] In the first place, there is strong authority for the view that, where a *jus cogens* norm is implicated, judges should endeavor to construe the provision in a manner compatible with upholding that norm.[251] Secondly, both judicial precedent and policy considerations direct judges, in a situation where several competing interpretations present themselves, to prefer the interpretation which is most favorable to individual rights.[252]

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[246] *See supra* Part IIA.

[247] *See supra* Part IIB.

[248] *See supra* note 156 and accompanying text.

[249] *See supra* notes 46, 156 and accompanying text.

[250] As, for example, Judge Walker did in *Japanese Forced Labor Litig. I*, 114 F. Supp. 2d at 948, in discussing the ambit of the phrase "in the course of the prosecution of the war" in Article 14(b).

[251] This accords with the first and second interpretive approaches outlined *supra* Part IV.

[252] This accords with the third interpretive approach outlined *supra* Part IV.

How should the above analyses of international law, domestic constitutional law, and U.S. judicial precedent be applied in assessing the validity and scope of Article 14(b)? With respect to its validity, Article 14(b) appears to be void under international law for "conflicting with"[253] a *jus cogens* norm, given that it purports to deny compensation to nationals of Allied Powers who were forced laborers.[254] Many of the plaintiffs had not previously received any compensation at all for their labor, and others, namely former American POWs and civilian internees, had received only limited amounts under the WCC scheme (between $1 and $2.50 a day, which are trifling in comparison to the amounts received by some victims of World War II human rights abuses by European corporations).[255] There is also no precedent to support the constitutional validity of a treaty provision that purports to prevent compensation claims for human rights abuses against corporations rather than foreign governments.[256] There are therefore strong grounds for a court to invalidate Article 14(b).

In reality, however, invalidating a treaty provision would be too radical a decision for almost all judges to make. Yet the judges in the Japanese forced labor cases were bound to recognize (as most of them did)[257] the serious rights-based interests at stake.[258] The most constructive and feasible approach for judges to have adopted, which would have balanced the different policy concerns at stake, would have been to narrowly interpret the waiver in Article 14(b) in determining its scope. While it is not possible to explore in this Article how each and every ambiguity in Article 14(b) could have been resolved, the section below demonstrates how one of the most ambiguous aspects of Article 14(b) would have been construed had the courts adopted any one of these rights-based interpretive approaches identified in Part IV. Specifically, the following section discusses whether a corporation, especially an MNC,[259] can be considered a "national" of a state, and thereby be entitled to the protective effect of the waiver in Article 14(b) of the 1951 Treaty.

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[253] *See* VCLT, *supra* note 73, arts. 53, 64, 1155 U.N.T.S. at 344, 347.

[254] *See supra* Part IIA.

[255] *See supra* notes 34, 119, 152–153.

[256] *See supra* Part IIB.

[257] *See* the first two paragraphs located *supra* Part I.

[258] *See id.*

[259] For a representative definition of an MNC, *see supra* note 199.

A. *Interpreting "Nationality"*

In *Japanese Forced Labor Litigation* (2000), Judge Walker rejected the notion that the scope of Article 14(b) was unclear and instead found the language of the waiver in Article 14(b) to be "strikingly broad"[260] and "straightforward."[261] As such, the district court did not even entertain the possibility that the term "nationals" in Article 14(b) did not encompass corporations, and that, therefore, the defendant corporations did not enjoy the benefit of a waiver extended to "Japan and its nationals."[262] Yet there are sound reasons why the term "national" is ambiguous and why courts could and should have determined that Article 14(b) did not waive claims against corporations, but only against Japan and private Japanese citizens.[263] Furthermore, even if judges accepted that a waiver against "nationals" includes waivers against corporations in general, they ought to have considered the argument that the benefit of the waiver should not extend to MNCs.

As a factual matter, the 1951 Treaty did not define the term "nationals" to include corporations; indeed, the treaty did not provide a definition of the term at all.[264] Yet, as indicated in Section A of Part IV, an examination of treaty practice in the post-war era reveals that nation-states considered the term "nationals" to be *exclusive* of corporate entities.[265] If a treaty was intended to apply to both individuals and corporate entities, it would contain distinct references to "companies," as well as to "nationals."[266] Since the 1960s, commercially-oriented treaties have more frequently expressly defined the term

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[260] *Japanese Forced Labor Litig. I,* 114 F. Supp. 2d at 945.

[261] *Id.*

[262] There was no consideration of this argument in the district court's decision in *Japanese Forced Labor Litigation I,* 114 F. Supp. 2d 939 (N.D. Cal. 2000), in *Japanese Foced Labor Litig. III,* 164 F. Supp. 2d 1160 (N.D. Cal. 2001), or in the Ninth Circuit's decision in *Deutsch I,* 317 F.3d 1005 (9th Cir. 2003). In *Japanese Forced Labor Litigation I,* Judge Walker only reiterated the statement of the U.S. government that the "1951 Treaty of Peace with Japan . . . precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals—*including Japanese commercial enterprises.*" 114 F. Supp. 2d at 947(emphasis added). The argument was expressly noted in *Mitsubishi Materials,* 6 Cal. Rptr. 3d at 164, but not examined by that court.

[263] *See supra* notes 164–170 and accompanying text.

[264] *See supra* note 4.

[265] *See supra* notes 164–170 and accompanying text.

[266] *See supra* note 166 and accompanying text.

"nationals" to include corporations.[267] But in the absence of such an express inclusion, particularly with respect to non-commercial international documents, the practice of regarding the term "nationals" as exclusive of corporations continues.[268] It is therefore curious that none of the courts which heard the Japanese war reparations claims recognized or accepted the ambiguity of the scope of the term "nationals" as it is used in Article 14(b) of the 1951 Treaty.[269] It should be noted that the lack of clarity as to whether the term "nationals" in Article 14(b) encompasses corporations also stands in clear contrast to the facts of *Garamendi,* where the settlement in question was expressly aimed at shielding corporations from further claims.[270]

Given the evident ambiguity of the term, the courts hearing the Japanese war reparations cases should have investigated whether there was a prevailing international practice to define "nationals" in treaties as encompassing corporations. From an examination of treaty practice on this matter, it is certainly a plausible conclusion that the absence of any express reference to corporations in a definition of the term "nationals" in the 1951 Treaty signifies that the term was *not* intended to include corporations,[271] or, at the least, that it was an unresolved issue that the parties could not agree upon which would thus be left for courts to determine.[272] Pursuant to the first two of the three interpretive approaches outlined in Part IV, since a *jus cogens* norm is adversely affected by broadly construing the term "nationals" to encompass corporations, there is a particular reason for courts to narrowly construe the ambit of the term.[273] Similarly, pursuant to the third interpretive approach identified above, where several competing interpretations of a treaty provision present themselves, judges should follow the strong historical precedent in U.S. courts that demands that they select the interpretation which is most favorable to individ-

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[267] *See supra* note 167 and accompanying text; BROWNLIE, *supra* note 68, at 426 ("On the plane of international law and relations a great many treaty provisions define 'nationals' to include corporations . . . .").

[268] *See supra* notes 169–170 and accompanying text.

[269] *See supra* note 262.

[270] *See supra* notes 136–137 and accompanying text

[271] Note that the intention of the parties at the *time of entering into the treaty* is significant, not their later interpretations.

[272] The latter possibility is particularly conceivable, given that several other post-war settlements with Japan allowed for claims against corporations. *See supra* note 163 and accompanying text.

[273] *See supra* notes 184–186 and accompanying text; *see also supra* notes 222–223 and accompanying text.

ual rights.[274] Hence, employing any one of the three interpretive canons should have led courts to decide that corporations are not protected by the waiver language in Article 14(b) because they cannot be considered "nationals" of Japan.[275]

Even if the term "nationals" were deemed to encompass corporations, it is possible that not all *types* of corporations could be so encompassed. In particular, one could argue that MNCs, by their very nature, cannot be deemed to be "nationals" of any one state.[276] The issue is relevant because many of the respondents in the Japanese forced labor litigation were MNCs or their subsidiaries and affiliates, such as Nippon Steel Corporation, Mitsubishi International Corporation, and Mitsui & Co. Ltd.[277] The broader issue of corporate nationality has received much attention from commentators who have explored the nature and practice of MNCs, especially in light of the increasing globalization of economic actors.[278] It is certainly now plausible to assert that an MNC, even though formally incorporated in one state, cannot be deemed to be a national of that state in the sense of its rights and obligations being exclusively defined by the laws

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[274] *See supra* Part IVC.

[275] It can be argued that because the Japanese government exercised significant control (or at least influence) over the corporations in Japan during World War II, Japanese corporations were in effect acting as part of Japan's national war effort and as extensions of the Japanese government rather than as private entities. *See Deutsch II*, 324 F.3d at 712. The Ninth Circuit in *Deutsch II* appeared to agree with the position that the defendant corporations acted in the course of the "prosecution of the war," stating that such enterprises "if not themselves our wartime enemies, were operating in enemy territory and presumably—no party disputes this—with the consent and for the benefit of our wartime enemy." *Id.* An implication of this argument is that, while the term "nationals" can *generally* be viewed as exclusive of corporations, the term must *include Japanese* corporations in the context of World War II on the grounds that those corporations did not operate as private entities. However, this implication ought to be rejected. *See id.* Most nations during World War II exercised significant control over large-scale enterprises operating within their borders. Yet this did not prevent the drafters of post-war treaties from routinely regarding the term "nationals" as exclusive of corporations. *See supra* note 166 and accompanying text. Indeed, it did not prevent Japan herself from accepting that "nationals" did not include Japanese corporations in its post-war treaties, such as in the 1952 Treaty of Peace between the Republic of China and Japan. *See supra* note 165.

[276] *See* Vernon, *supra* note 199, at 114 (noting that an MNC is a "cluster of corporations of *diverse* nationality") (emphasis added).

[277] See the defendants named in the cases cited herein, including in *Japanese Forced Labor Litigation I*, *Japanese Forced Labor Litigation III*, *Taiheiyo I*, *Deutsch II*, and *Mitsubishi Materials*.

[278] *See* Saskia Sassen, Globalization and its Discontents 206–07 (1998); Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 Harv. L. Rev. 739, 740 (1970).

of that state.[279] The traditional view of a corporation as having a legal personality rooted in a particular jurisdiction has been transformed by the practice of MNCs, whose rights and obligations are defined by a confluence of different laws, including the laws of the numerous jurisdictions in which they operate, the laws and rules of international organizations, such as the OECD,[280] and to a small but increasing extent, the evolving norms of international human rights.[281]

It is thus arguable that a treaty provision that purports to waive liability for the actions of "nationals" of a state should, *if* the term "nationals" is deemed to include corporations and the treaty provision is otherwise valid, be applied with regard to *substantive,* rather than formal, nationality; and therefore should not apply to MNCs that are formally incorporated in that state, but whose operations are conducted outside of it and whose activities are subject to an intersection of various national and international laws. Such a narrower construction of the ambit of a treaty provision which purports to excuse violations of human rights norms by nationals of any given state(s) is particularly appropriate in view of the exponential development and influence of international human rights laws in the past few decades.[282] And in our increasingly globalized world, the time is ripe for adopting a progressive, substantive approach to determining the question of nationality.

In approaching waiver clauses similar to Article 14(b) in contemporary peace treaties, judges ought to adopt, or at least be mindful of, this substantive view of nationality. This would mean that, even if such a contemporary waiver clause differed from the 1951 Treaty by expressly defining "nationals" to include companies or corporations, judges could, and probably should, deem that MNCs are not protected by that waiver clause, given that MNCs operate on an international scale and are subject to a global intersection of laws, making it difficult to regard them as nationals of any one state. Yet it should be

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[279] *See* Vernon, *supra* note 199, at 114.

[280] *See* Org. for Econ. Co-Operation & Dev., The OECD Guidelines for Multinational Enterprises (2000). A booklet describing implementation of the guidelines can be found at http://www.oecd.org/pdf/M000015000/M00015419.pdf (last visited Apr. 4, 2005).

[281] *See, e.g.*, UN Global Compact, *The Ten Principles, available at* http://www.unglobal compact.org/Portal (last visited Apr. 27, 2005); *see also* Bus. & Human Rights Res. Ctr., *Business and Human Rights: Principles, at* http://www.business-humanrights.org/Categories/ Principles (last visited Apr. 27, 2005) (detailing other sets of evolving norms).

[282] *See* Higgins, *supra* note 88, at 95–110 (providing one account of the range of international human rights standards).

acknowledged that this substantive approach would likely be inappropriate to apply to the actions of corporations that took place over fifty years ago. The actions of the respondents in the Japanese forced labor litigation occurred prior to the profusion of MNCs and of international organizations impacting the activities of MNCs.[283]

In any event, however, Article 14(b) of the 1951 Treaty did not expressly define the term "nationals" to include corporations and was drafted in an era when such express definitions were rare.[284] In light of a historical examination of state practice which suggests that the term "nationals" in the 1951 Treaty was not intended to encompass *any type* of corporation, and in view of the interpretive approaches examined in Part IV of this Article which demand a narrow construction of the waiver contained in Article 14(b), Article 14(b) should be construed so as to permit claims against all corporations that employed forced labor.

Conclusion

Assuming that a court determines that a treaty provision does not bar the claims of a particular claimant seeking compensation for violations of his or her rights (for example, because the treaty provision is invalid, or because its scope does not preclude the plaintiff's claim, or because the plaintiff has never been a national of a state party to the treaty in question), the plaintiff must determine as a practical matter how to pursue his or her claim. The options include a state-law cause of action such as Section 354.6, common law and equitable causes of action such as for unjust enrichment, and the causes of action provided in federal statutes, namely the ATCA[285] and TVPA.[286] As was amply demonstrated in the Japanese forced labor litigation, it is possible that none of these causes of action will eventually succeed (for example, if the state-law cause of action is deemed unconstitutional and the remaining causes of action are time-barred).[287]

However, a plaintiff's claim pursuant to any one of these causes of action is at the outset dependent on a court's examination and con-

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[283] *See* Vagts, *supra* note 278, at 746 (observing that "[f]or present purposes one can fairly treat the [multinational enterprise] as a recent creation, certainly post-World War II and largely post-1955").

[284] *See supra* notes 165–167 and accompanying text.

[285] *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (requiring a plaintiff to be an "alien").

[286] A plaintiff can only invoke the Torture Victim Protection Act, 28 U.S.C. § 1350 (2000), if she or he has suffered "torture."

[287] *See supra* notes 49, 51–52, 54 and accompanying text.

struction of the relevant treaty provision. In the Japanese forced labor litigation, courts willingly and thoroughly explored arguments invalidating the claimants' *causes of action* (such as the federal foreign affairs power as it affected Section 354.6), yet neglected to comparably examine the validity and scope of the relevant *treaty provision*. The courts failed to consider compelling grounds in international and constitutional law for invalidating Article 14(b).[288] Admittedly, such a consideration is sometimes daunting for courts, given the judiciary's desire and need to avoid confrontation with the executive and even for more resolute judges, the fact that policy considerations may argue in favor of upholding the relevant provision. However, judges are duty-bound to at least openly acknowledge and weigh such policy considerations—including those arguing against the executive's position—and in particular, the need to safeguard rights. Where individual rights are implicated, judges may not always be able to invalidate the treaty provision in question due to policy considerations. But in the face of any ambiguity, they may yet protect such rights by adopting established interpretive approaches to more narrowly construe the scope of the treaty provision, thereby permitting the victim's claim and signaling a judicial undertaking to shield such rights from future invasion.

With this approach, negotiators and drafters of future treaties would be forewarned that, although judges are highly unlikely to declare a treaty provision invalid, courts nevertheless demand maximum candor and clarity in its text.

[288] *See supra* Part IIA–B.