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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

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*[1]

> But among those in the political establishment who have followed the sparse Japanese media coverage of the suits, there is growing anxiety and barely concealed resentment. Some see greedy U.S. lawyers plotting to mug "deep-pocket" Japanese companies, which are vulnerable because they do business in the United States, over a reparations issue that Japan believed was settled by the 1951 San Francisco Peace Treaty . . . . "This is really a form of extortion," said a source close to the Japanese government . . . . Managers and employees of the blue-chip corporations being sued who were born in the postwar period . . . may well view the lawsuits as a business opportunity for U.S. litigators and defense attorneys.[2]

I. INTRODUCTION

During times of global upheaval, the preservation of the international legal schematic proves essential. Indeed, the events surrounding the September 11th tragedy demand such preservation. As affiliates of the United Nations scamper to adopt and alter applicable resolutions on terrorism, nationals of individual states ponder their own internal strategies in an effort to cope with sadness, rage and a peculiar sense of helplessness. Once the emotional cloud dissipates, however, families of victims and domestic organizations will no doubt begin to inquire about their rights to recovery and degrees of compensation for their respective losses.[3] A right to private redress in American tribunals as a

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

2. Sonni Efron, *Pursuit of WWII Redress Hits Japanese Boardrooms; Courts: As Lawsuits Begin to Mount, Anxiety and Resentment Grow in Tokyo Over Alleged Victims' "Extortion"*, L.A. TIMES, Jan. 10, 2000, at A1.

3. On November 5, 2001, the Justice Department disclosed its efforts to create a fund for victims of the September 11th tragedy. Soon after the disaster, Congress passed legislation in an effort to pool funds to cover the lost earnings of victims and to compensate both them and their families for subsequent pain and suffering. For purposes of creating a rational system for distribution of the funds, the Justice Department has suggested that all prospective beneficiaries who apply to the fund receive compensation within 120 days of application. By seeking aid from the survivor's fund, "applicants [would] forfeit the right to sue the airlines, insurance companies,

response to international atrocities has long been a question for the United States legal system. While victim's of international aggression at times receive justice, others are asked to "take one for the team" and turn the other cheek in favor of international harmony. With its resurgence in 1999,[4] this topic has been rigorously debated in both federal and state venues.

Decided on September 21, 2000, the *World War II Case* represented the efforts of a class of aggrieved veterans who sought redress in a California state court for the inhumane acts imposed upon them subsequent to their capture by Japanese forces in 1941.[5] The original representative in the class action suit, James King, set forth a detailed account of his capture and injuries while working in a Japanese steel mill.[6] Despite their efforts, King and his associates were denied access to compensation in a federal tribunal because of the binding terms of the 1951 Treaty of Peace, established between President Truman and the remains of the Japanese Empire.[7] As a matter of basic treaty law, where the terms of a treaty are unambiguous, the court must rule in accordance with the plain language of the treaty.[8] Conversely, in ambiguous treaty scenarios, courts possess the option to consult the history and purpose of negotiation to supplement its plain meaning analysis.[9] Rooted in a laundry list of similar holdings handed down from U.S. domestic tribunals, this theory of judicial deference afforded in treaty scenarios is, indeed, nothing new.[10]

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the Port Authority of New York and New Jersey, and others for potentially greater damages." *See* Carrie Johnson, *Justice Dept. to Open Victim's Fund Debate*, WASH. POST, Nov. 5, 2001, at A10, *available at* http://www.washingtonpost.com/wp-dyn/articles/A39471-2001Nov4.html (last visited Mar. 18, 2002). Such a showing of Congressional intent for an individual to trade his or her right to sue for nominal damages is significant. This strategy of claim preclusion has become quite popular with both the Legislative and Executive Branches when met with litigation scenarios that could damage national progression and morale. *Id*.

4. In 1999, numerous claimants from the World War II era began seeking redress in domestic tribunals for alleged human rights atrocities committed by Germany and her allies. *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 250 (D.N.J. 1999); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 431-32 (D.N.J. 1999).

5. *World War II Case*, 114 F. Supp. 2d at 942.

6. *Id*. ("When captured, King was 20 years old, 5 feet 11 inches tall and weighed 167 pounds. At the conclusion of the war, he weighed 98 pounds.").

7. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law State Responsibility for Injury to Aliens: Diplomatic Protections and International Claims*, 95 AM. J. INT'L L. 139, 140 (2001).

8. Kolovrat v. Oregon, 366 U.S. 187, 194-95 (1961) (citing Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933)) (noting that the principles of international law recognize no right to extradition apart from a treaty).

9. *See World War II Case*, 114 F. Supp. 2d at 945-46 (stating that "[t]o the extent that [treaty language] raises any uncertainty, however, the court 'may look beyond the written words to the history of the treaty'"); *see also* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989).

10. *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921), and *Charlton v. Kelly*, 229 U.S. 447, 468 (1913), represent judicial landmarks in the area of treaty deference.

Because numerous legal scholars have addressed the relationship between foreign relations and domestic law in great detail,[11] this Note will expose nothing new with reference to that topic. The novelty of this Note lies rather in the policy argument presented.

This Note mainly will examine the international policy stemming from judicial decisions that consider treaties as paramount to domestic law. Often, citizens of sovereign nations view international legal scenarios through domestic lenses only. In short, international citizens frequently desire a resolution to international disputes in a fashion that will reap a sizable benefit to them, despite its possible adverse effects on the global system. Decisions such as the *World War II Case* properly aim to think "outside the domestic box" and lend support to the intentions of a few insightful politicians who wish to view the United States as a member of a greater "international team." As skepticism mounts in response to the alleged ineffectiveness of international law, the *World War II Case* offers a breath of fresh air. Simply, this case proves that the international system actually works.

To that end, this Note is divided into five remaining parts. Part II explores the subtle nuances of the *World War II Case* itself, while Part III assesses its historical legal roots from both home and abroad.[12] Excerpts from applicable foreign rulings reside in this portion of the Note to illustrate similarities in judicial rationale used by courts when resolving wartime claims, regardless of their geographic placement.

Part IV offers a legal analysis of treaties, such as the 1951 Treaty of Peace, their relationship to conflicting domestic and international laws, and a legal exercise that outlines possible arguments of plaintiffs under customary international human rights law. Initially, Part IV focuses on the *World War II Case* court's basic analysis of the 1951 Treaty of Peace through accepted notions of treaty interpretation. In addition to explicitly barring a remedy to plaintiffs, the treaty takes precedence over the conflicting California state law as a matter of domestic constitutional law.[13] Following an analysis of the *World War II Case* court's basic legal rationale, this Note will explore other

11. *See* K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277, 328 (2001); *Developments in the Law—Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030-31 (2001).

12. While not concerned with treaties per se, the rationale behind both the South African and Chilean decisions, discussed in Part III.B, share stark similarities to those made within the confines of the American judiciary. Significant monetary compensation for human rights offenses was seen as secondary to the desire to live in financial and social international harmony. *See* Azanian Peoples Org. v. The President of the Rep. of South Africa, 1996 (4) SALR 637 (CC), *available at* http://www.legalinfo.co.za/data/CL/1796.html (last visited Mar. 18, 2002); Chanfeau Orayce v. Chile, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997), *available at* http://www1.umn.edu/humanrts/cases/1997/chile25-98html (last visited Mar. 18, 2002).

13. RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW § 111(1) (1987).

possible arguments that could have been more fruitful for plaintiffs in the disputed matter.[14] Specifically, plaintiffs could have argued that the treaty itself was invalid because it conflicted with a norm of customary international law.[15] While such an argument is sound in theory, both international and domestic weaknesses persist.

In Part V of the Note, a strict policy analysis provides support to the position that, if private claims are allowed in spite of treaty provisions which forbid even their existence, the effect on the international legal schematic will prove crippling. As a policy issue, treaties may not be ignored for reasons of convenience or national interest. When prominent nation states, such as the United States, unilaterally revoke the effectiveness of certain treaties, a harmful message of "non-compliance upon convenience" is conveyed to the international legal community. Considering the less than stellar reputation of the United States in its treatment of and adherence to international agreements, the time has come for the United States to make a statement in support of honoring its duty to comply with agreements that seek to solidify its bond with the global community.

II. BEGINNING AN ANALYTICAL FRAMEWORK FOR *IN RE WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION*

The claim involved in the *World War II Case* was originally brought by James King, a veteran of the Second World War, on behalf of a host of other veterans,[16] before a California state court under the California Code of Civil Procedure § 354.6.[17] The California code provision was relatively untested until the present action was brought. Specifically, it permitted an action by a prisoner of war of the Nazi regime, its allies or sympathizers, "to recover compensation for labor performed as a Second World War slave labor victim, . . . from any entity or successor in interest thereof, for whom that labor was performed."[18] The named defendants quickly motioned for and succeeded in removal to a federal tribunal.[19] Such a move was proper because the

14. *See* discussion *infra* Part IV.A.

15. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 198 (1996).

16. In addition to Count I, which was brought specifically under the California Code of Civil Procedure, Count II sought to recover on an unjust enrichment claim in which the plaintiff sought disgorgement and restitution of economic benefits derived from his labor. In Count III, the plaintiff sought damages for the torts of battery, intentional infliction of emotional distress, and unlawful imprisonment. Finally, Count IV sought damages from defendant's failure to reveal its prior exploitation of prisoner labor to present day customers in California and elsewhere under a theory of unfair business practices. *See World War II Case*, 114 F. Supp. 2d 939, 944 (N.D. Cal. 2000).

17. *Id.*

18. *See* CAL. CIV. PROC. CODE § 354.6(b) (West 1999).

19. *World War II Case*, 114 F. Supp. 2d at 942.

plaintiffs' claims necessarily required determinations that directly and significantly affected United States foreign relations, making this issue a federal question.[20] Upon removal, the United States District Court for the Northern District of California was left to resolve: (1) whether the suit should be remanded to state court; and (2) whether the defendant's motion to dismiss was properly based on the principle of treaty preclusion.[21] Because the court disposed of the venue controversy with relative ease under 28 U.S.C. § 1441(a), it serves no purpose to elaborate on that topic. The focus of this Note's analysis will instead concentrate on both the treaty-based preclusion argument and the ensuing policy created from the aftermath of the decision.

A. The Court Honors the Agreement

To provide an initial frame of reference, the exact language of Article 14 of the 1951 Treaty of Peace is provided to illustrate the unambiguous nature of its terminology. The Treaty of Peace provided in part:

> (1) a grant of authority of Allied Powers to seize Japanese property within their jurisdiction at the time of the treaty's effective date; (2) an obligation of Japan to assist in the rebuilding of territory occupied by Japanese forces during the war and (3) *waiver of all "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*."[22]

Echoing the principles of its judicial predecessors in *Sullivan* and *Kolovrat*,[23] the *World War II Case* court upheld the principle that where the verbiage of a treaty is quite unambiguous, the court's analysis will end there and the plain meaning of the instrument will prevail.[24] In the *World War II Case*, the court insisted that the waiver language present in the above treaty provision was

20. *See* 28 U.S.C. § 1441(a) (1994) (providing that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant"); *see also* Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 163 (1997) (asserting the "proprietary of removal thus depends on whether the case originally could have been filed in federal court"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (explaining that the Court was "constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law"). *Compare* CAL. CIV. PROC. CODE § 354.6(b) (West 1999), *with* Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, art. 14(a), 3 U.S.T. 1935, *available at* http://www.vcn.bc.ca/alpha/sfpt/SanFranciscoPeaceTreaty1951.htm (last visited June 16, 2002) (providing for the waiver of all "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").

21. *World War II Case*, 114 F. Supp. 2d at 942.

22. *Id.* at 945 (quoting Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, art. 14(a)(b), 3 U.S.T. 1935) (emphasis added).

23. *See infra* text accompanying notes 44-50.

24. *World War II Case*, 114 F. Supp. 2d at 945.

quite unambiguous.[25] Thus, their analysis of the agreement, as a matter of domestic treaty interpretation, ended there. To avoid the preclusive effect of the treaty, the plaintiffs sought to distinguish their claim from those falling under the agreement. If successful, the plaintiffs could have asserted that their claims under state law did not conflict with the provisions of the treaty and, thus, escaped preemption under the Supremacy Clause.[26] They suggested that the authors of the treaty had no intention of waiving the claims of prisoners of war because the treaty failed to *expressly* include such claims in the waiver itself.[27] The court was quick to strike such a narrow assertion however, because it felt, in accordance with the strict language of Article 19(b), the Treaty of Peace envisaged the waiver of "all claims" regarding Japanese wartime atrocities.[28] The court held that the waiver was broad enough to encompass the present litigation; there was no need to insert an amendment for clarification.[29]

B. An Eye on Policy

Bearing a stark resemblance to the rationale set forth in a matter concerning South Africa,[30] the *World War II Case* court stressed policy as an over-riding reason for keeping the terms and enforcement provisions of the treaty in tact. Beyond the actual text of the document, the court, citing numerous politicians, indicated that the underlying purpose of the waiver was to achieve a sense of finality.[31] As stated by the chief negotiator of the 1951 Treaty of Peace, John Foster Dulles, "leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace."[32] Further rationale behind the comments of Dulles can best be demonstrated by his role in other post-war negotiations.

25. *Id.* at 946 (adding that "[n]evertheless, the court has conducted its own review of the historical materials, and concludes that they reinforce the conclusion").

26. U.S. CONST. art. VI (stating that "[t]his Constitution and the Laws of the United States which shall be made in [p]ursuance thereof, and all [t]reaties made, or which shall be made, under the [a]uthority of the United States, shall be the supreme [l]aw of the land, and the [j]udges in every [s]tate shall be bound thereby").

27. *World War II Case*, 114 F. Supp. 2d at 945.

28. *Id*. (articulating that "Article 19(b) states that the Japanese waiver included 'any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers'").

29. *Id*.

30. *See* discussion *infra* Part III.B.1.

31. *World War II Case*, 114 F. Supp. 2d at 946.

32. *Id*. Dulles went on to say that demanding reparations of Japan directly following the war would have hindered their economy to the point of financial impracticability. Since that time, however, Japan has emerged as one of the world's most efficient and prominent economic powerhouses. The plaintiffs in the present action cited this change as reason for payment. *Id.* at 947.

As the *World War II Case* court hinted in its decision, the negotiating parties of the 1951 Treaty of Peace, specifically Dulles, had the future upswing of Communism in mind when agreeing to the treaty's provisions.[33] Recalling his involvement in the Paris Peace Conference at the close of World War I in 1919, Dulles remembered his unsuccessful efforts in convincing his fellow countrymen that burdening the Germans with hefty reparations would send their economy into a downward spiral.[34] Arguably, such an economic depression gave rise to Nazi sentiments, seeking to revive the German State under a common socialist philosophy. In turn, Dulles vowed not to let history repeat itself upon the close of World War II.[35] Imposing heavy reparations upon Japan, in his opinion, would make them susceptible to the emerging Communist movement in Asia. A waiver of future private claims against both Japan and its corporations would provide it with the economic stability to combat a Communist ideology brewing in neighboring China. The court in the dispute at issue agreed with the sentiments of Dulles and sought to uphold the treaty provisions based upon the preservation of established foreign policy. Judge Vaughn Walker suggested, as follows:

> [B]ecause of the success of the [1951 Treaty of Peace] and of Japan in becoming a strong ally and partner of the United States, the waiver of individual rights to pursue private parties in Japan was justified. This has been the argument in the dozens of suits brought in Japan and a smaller number of cases in American courts. And the argument has so far prevailed. . . . Japan's reparation deals with some countries might present the opportunity for the signatory nations of 1951 to bring their own claims, as provided for in Article 26 of the treaty. However, "the question of enforcing Article 26" . . . is "for the United States, not the plaintiffs, to decide."[36]

Similar sentiments were conveyed by the U.S. Department of State Legal Advisor, Ronald J. Bettauer, when the *World War II Case* was pending in California. In his expert opinion, Bettauer stated that "[t]he overarching intent of those who negotiated, signed, and ultimately ratified this [t]reaty was to bring about a complete, global settlement of all war-related claims, in order to provide both compensation to the victims of the war and to rebuild Japan's

33. *Id.* at 946.

34. Steven C. Clemons, *Recovering Japan's Wartime Past—and Ours*, N.Y. TIMES, Sept. 4, 2001, at A23.

35. *See id.*

36. *Id.* Judge Walker suggested that Japan entered into specific agreements with other signatories of the 1951 Treaty, namely the Netherlands, in an effort to overcome the waiver to private reparations. Walker suggested further that such an agreement, which permits certain nations to sue privately despite the waiver provision, lies within the discretion of the federal government of the nation in question. He further commented that citizens of the United States should honor the informed decision of their elected politicians in an effort to preserve international business relations. *Id.*

economy and convert Japan into a strong U.S. ally."[37] Furthermore, he noted that the United States government instituted additional compensatory schemes, assuring that the victims of the war atrocities were made whole.[38] In short, the court shared the view of its counterparts in the State Department that "the immeasurable bounty of life for [the victims] and their posterity in a free society and in a more peaceful world service[d] the debt" owed to them.[39] Unbeknownst to the court at the time of the *World War II Case*, such a policy of "progress over vengeance" would be re-affirmed a year later by a federal court in New Jersey.[40]

III. HISTORICAL DEVELOPMENT OF TREATY DEFERENCE

When dissecting a court decision that has a similar rationale to prior cases, it is essential to expose particular principles echoed by each court. Such continued rationale is found in the line of cases prior to the *World War II Case*. The first principle involved is the premise that when nations establish a treaty, or a treaty-like mechanism, both the purpose and policy assigned to it by the negotiating parties, namely the executive branches of each nation state, will be controlling.[41] In the context of individual war reparations, "[t]he war-related claims of individual citizens can be asserted only by their government,"[42] promoting a unified national voice. The second common principle expands upon the first. When nations agree to alternative venues and methods for monetary redress, they do so under the assumption that availing oneself of the traditional legal process will pose recovery obstacles for victims.[43]

37. Murphy, *supra* note 7, at 140 (citing *Former U.S. World War II POW's: A Struggle For Justice: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 14, 14-15 (2000)).

38. *Id.* ("The scheme of the [t]reaty was that each state party would compensate its own nationals for their injuries, either out of confiscated Japanese public and private assets, or otherwise . . . . The U.S. Congress amended the War Claims Act of 1948 to create new war claims programs that would award American war victims. . . .").

39. *World War II Case*, 114 F. Supp. 2d 939, 949 (N.D. Cal. 2000).

40. *In re* Nazi Era Cases Against German Defs. Litigation, 129 F. Supp. 2d 370, 372 (D.N.J. 2001) [hereinafter *Nazi Era Cases*].

41. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

42. Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 274 (D.N.J. 1999) (suggesting that such "war related claims, [even] those not explicitly addressed [in the treaty itself], are extinguished by [any resulting] peace settlement").

43. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 489 (D.N.J. 1999) ("[T]he span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tortfeasors is too indefinite. The procedure sought . . . is too complicated, too costly. . . .").

A. Decisions From Home—The United States' Approach

1. Yielding to Plain Treaty Language and Interpretation of the Executive

Evinced by its legal tradition, the United States courts adhere to a plain meaning rule. Cases in the past have illustrated the foundations of treaty interpretation. As stated by Justice Day in *Sullivan v. Kidd*, a case which involved property rights of foreign nationals, "treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the *purposes of the high contracting parties*."[44] The actual wording of the treaty in question is essential because it is assumed that the drafters of the agreement desired to leave each participating nation on equal footing.[45] As in *Sullivan*, the Supreme Court was asked in *Kolovrat v. Oregon* to resolve another internationally tempered property dispute.[46] However, *Kolovrat* was distinguishable from *Sullivan* because it sought to go beyond the plain meaning of the instrument. Enforcing a 1948 Treaty, *Kolovrat* deferred authority to interpretations of the Executive Branch, desiring to "bring about . . . stability and uniformity in the difficult field of world monetary controls and exchange."[47] Justice Black's majority opinion expressed his skepticism regarding whether such interpretations could ever be effectively realized considering the limited language of the agreement. However, despite his argument that the agreement may fall short of its goal, Justice Black recognized that the Executive Branch of the United States had spoken, and that the "power to make policy with regard to such matters is a national one from the compulsion of both necessity and our Constitution."[48]

44. Sullivan v. Kidd, 254 U.S. 433, 439 (1921) (emphasis added). Here, *Sullivan* was met with a property rights issue and interpreted the effect of a beneficiary's foreign nationality on his rights to inherit land in the United States. The court held that notice of such transfer of possession was required of both foreign and U.S nationals, preserving reciprocity and equality. *Id*. at 442-43.

45. *Id.* at 439. "[T]he general purpose and object of such conventions [are] to secure equality in exchange of privileges and reciprocity in rights granted and secured." *Id.* at 440.

46. *See* Kolovrat v. Oregon, 366 U.S. 187 (1961). *Compare* OR. REV. STAT. § 111.070 (1961), *with* Treaty of Commerce Between the United States of America and Serbia, 1881, U.S.-Serb., arts. 1-3, 22 Stat. 963, 964 (illustrating that while the Oregon Statute sought to limit the property rights of foreign nationals with respect to domestic U.S. plots, the treaty afforded Yugoslavians and Serbian nationals "the liberty to acquire and dispose of such property").

47. *Kolovrat*, 366 U.S. at 198. The Court reiterated that "if these rights of acquiring, possessing or disposing . . . were not afforded . . . the Treaty's effectiveness in achieving its express purpose of 'facilitating . . . commercial relations' would obviously be severely limited." *Id.* at 194. As taken from Supreme Court case law, domestic principles of treaty interpretation insist that the judiciary adhere to particular interpretations of the Executive. Such a notion creates a separation of powers issue. *Id*.

48. *Id*. at 198.

Thus, the courts in both *Sullivan* and *Kolovrat* displayed their lack of competence to enact policy contrary to clearly articulated treaty provisions or varying Executive interpretations. Such recognition is rooted in the principles of exclusive commitment as defined in Article II of the United States Constitution.[49] Hence, the interpretation of the Executive Branch should prevail.[50]

2. Alternative Venues and Methods of Monetary Redress

Because the *World War II Case* began in protest to a grant of reparations to Japanese prison camp survivors, a discussion of such reparations as alternative forms of compensation is important. In recent years, domestic courts have been urged to treat an individual and his claim against a foreign nation as the same entity. Simply, one's claim "is only a right of his government against that of the [alleged defendant]."[51] This principle was applied in *Dames & Moore v. Regan*,[52] where, as a result of its withholding hostages in 1979, Iran lost its access to certain national assets. Subsequently, the United States Government traded away American citizens' ability to collect debts against Iranian corporations in American courts.[53] In spite of such a limitation on the venue in which redress could be obtained, aggrieved parties sought enforcement of liens and attachments against Iran within a designated Iran-United States Claims Tribunal.[54] Apart from the fact that the Claims Tribunal removed a number of jurisdictional and procedural obstacles to recovery, providing such a forum meant "that the claimants [would receive] something in return for the suspension of their claims, namely, access to an international tribunal."[55] Arguably, recovery rates were not affected by such a designation.

49. U.S. CONST. art. II, §2 (stating that "[the President] shall have power, by and with the [a]dvice and [c]onsent of the Senate, to make [t]reaties"); *see* discussion *infra* Part III (providing a more in-depth discussion of how the separation of powers allows for the President to make treaties in a rather unchecked manner).

50. It should be noted here that while an Executive interpretation was not needed in the *World War II Case* because of the clear language of the applicable treaty provisions, the court did go a step beyond the minimum protocol and did include a reference to the interpretation of the Executive. *World War II Case*, 114 F. Supp. 2d 939, 948 (N.D. Cal. 2000).

51. Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 274 (D.N.J. 1999) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 902 (1987)).

52. Dames & Moore v. Regan, 453 U.S. 654 (1981).

53. *Id*. at 656 (permitting "the President to maintain foreign assets at his disposal for use in negotiating the resolution of a declared national emergency [with] the frozen assets serv[ing] as 'bargaining chips' to be used . . . when dealing with a hostile country").

54. *Id.* at 687. Congress implicitly approved the practice of claims settlement by executive agreement through their enactment of The International Claims Settlement Act of 1949. The Act itself gave rise to the International Claims Commission, giving it "jurisdiction to make final and binding decisions with respect to claims by United States nationals." *Id.* at 657.

55. *Id*. at 687.

Almost a decade after *Dames & Moore*, the U. S. District Court for New Jersey was faced with similar problems in a case seeking compensation for forced labor in German factories during World War II.[56] Because over thirty years passed between the alleged malfeasance and the legal proceeding, it was extremely difficult for a plaintiff to call witnesses to testify based upon their flawed memory of the alleged events.[57] Any recovery was contingent upon the establishment of an alternative tribunal where such victims of slave labor could seek monetary redress.[58] This forum was not available until the creation of The Foundation "Remembrance, Responsibility and the Future" (the "Foundation") in July of 2000.[59]

The Foundation was formed by agreement between President Bill Clinton and German Chancellor Gerhard Schroeder in December of 1999.[60] Subject to the provisions of the agreement, each aggrieved party was to seek redress from the Foundation exclusively in exchange for their *verbal* assurance that no private cause of action would surface in a United States court.[61] President Clinton agreed to this alternative method of recovery because of the relatively "advanced age of victims" and his desire to show results as soon as possible through a mechanism of expedited payment.[62] To date, almost $100 billion has been paid out as reparations to Nazi Era victims. Including moneys contributed primarily by the German private sector, the Foundation expects to

56. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 431 (D.N.J. 1999). Resembling the factual basis for the plaintiffs' claim in the *World War II Case*, Plaintiff Iwanowa claimed that Ford Motor Company "coerced her, and thousands of other persons, to perform forced labor under inhuman conditions." *Id.* Specifically, she sought "compensation for the reasonable value of her services." *Id*. at 432.

57. *Id*. at 489.

58. *See Nazi Era Cases*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001). Historically, the Paris, Transition, and London Debt Agreements made between Germany and the Allied Powers remained silent on issues of private reparation claims. On September 12, 1990, the 2+4 Treaty reunited Germany and returned to it the ability to handle both foreign and domestic affairs. *Id.* at 377.

59. *Id*. at 379.

60. *Id.* The initiative to create such a quasi-claims settlement tribunal was fostered as early as 1998 by both the German Chancellor and various German corporations. Such an initiative culminated in the Chancellor's meeting with President Clinton a year later. *Id.*

61. *Id*. at 379. *Compare* Foundation "Remembrance, Responsibility and the Future," Dec. 1999, U.S.-F.R.G., *with* Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, art. 14(a), 3 U.S.T. 3169 (illustrating that both agreements provided for nominal monetary recovery to victims in exchange for claim preclusion in United States courts).

62. *Nazi Era Cases*, 129 F. Supp. 2d at 380 ("The position of the United States government recommending dismissal is motivated by the twin concerns of justice and urgency: matters of Holocaust-Era restitution are best resolved through dialogue, negotiation, and cooperation as opposed to prolonged and uncertain litigation . . . [providing] some measure of justice and compensation to aged victims in their lifetimes.").

pay an additional $4.3 billion.[63] In short, the Foundation, a treaty-like mechanism, supported the overall premise that international agreements were worthwhile and effective alternatives to private causes of action. The "effectiveness" of the alternative can be gauged in terms of both economic benefits and increased convenience.

As evinced in the *Nazi Era Cases*, often the plaintiffs who are part of reparations claims are parties to a class action lawsuit. When parties avail themselves of a class action lawsuit, they will most likely receive, if the suit is successful, an amount comparable to an amount that the Foundation posits to provide. Because damage awards in civil trials are distributed between attorneys and fellow plaintiffs, one may be better off simply collecting from the alternative tribunal or recovery instrument. Thus, in terms of economics, the alternative tribunal may be a more attractive alternative.[64]

In terms of convenience, a possible litigant should view the alternative tribunal as superior. When politicians form alternative recovery instruments, such an instrument is the product of their work for the sole benefit of aggrieved parties. In a sense, the aggrieved parties are spoon-fed an opportunity to recover for the atrocities committed against them. Organizational efforts are minimized so that aggrieved parties are required only to submit their names into a pool of applicants to be considered for relief.

B. Decisions From Abroad—Actions Taken by South Africa and Chile

While rights to private actions were bargained away by American politicians throughout the twentieth century via treaty provisions, nations located in distant hemispheres of the globe implemented similar non-suit provisions against their own citizens. While not dealing with wars waged against foreign nation states, both the South African and Chilean governments established claim preclusion agreements regarding intrastate wars prompted by rogue government organizations. When viewed in connection with the *World War II Case*, the purpose and implementation of these foreign acts are similar to the American decision. While the use of non-suit provisions cannot become international customary law,[65] it is worth noting the pattern of usage of this

63. *Id.* at 381.

64. *Id*.

65. Generally, treaties may be accepted as customary international law. As noted by the ICJ in the *North Sea Continental Cases*, it is possible for the specific terms of treaties to generate customary international law subsequent to their adoption. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES & MATERIALS 101 (3d ed. 2000). However, creation of international law does not come easy. Specifically, to invoke a treaty as custom, one must show the following: (1) constant and uniform application of the principle, (2) the practice of states must evidence the presence of such a custom as if they were adhering to a legal obligation, not merely following habit, and (3) the states who sign the treaty must have an interest in its content. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 38-41 (Feb. 20).

technique in national governments throughout the world. Simply, if various governments spanning across the globe believe that such provisions have merit, perhaps they really are viable options to private redress.

1. South Africa Seeks Forgiveness Over Vengeance

While the World War II veterans contested established reparation systems during the 1990's in American courtrooms, the Constitutional Court of South Africa engaged in a similar issue with its citizens to resolve Apartheid grievances.[66] The leading decision, *Azanian Peoples Organization v. The President of the Republic of South Africa*, responded to the formation of and remedies prescribed by the Commission on Truth and Reconciliation (the "TRC").[67] As expected, citizens exposed to the aftermath of South African oppression were dissatisfied with Nelson Mandela's proposed truth-finding tribunal.[68]

a. The Commission

Once the remains of Apartheid dissolved in 1994, Nelson Mandela assumed the position of President of South Africa and played an integral part in the formation of its Parliament.[69] In 1995, the South African Parliament enacted the Truth and Reconciliation Act, which gave rise to the TRC.[70] The TRC had two primary roles, which included both "a truth finding function with the power to confer amnesty on an individual basis" and a general objective to "promote national unity and reconciliation in a spirit of understanding."[71] The nature of the TRC was very similar to that of other truth commissions established previously in Uganda, Bolivia, Argentina, Zimbabwe and Chile to resolve their own histories of political and social unrest.[72] However, the TRC differed in one fundamental way. While its reformatory predecessors established confidential commissions of truth, South African leaders were quite insistent in their demand that all oppressors from the Apartheid-era come personally before the tribunal to confess their sins to the public.[73] The purpose

66. *See* Azanian Peoples Org. v. President of the Rep. of S. Afr., 1996 (4) SALR 637, 638 (CC), *available at* http://www.legalinfo.co.za/data/CL/1796.html (last visited Mar. 18, 2002).

67. LOUIS HENKIN ET AL., HUMAN RIGHTS 633 (1999).

68. *Azanian Peoples Org*., 1996 (4) SALR at 637.

69. Robert I. Rotberg, *Truth Commissions and the Provisions of Truth, Justice, and Reconciliation, in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 5 (Robert I. Rotberg & Dennis Thompson eds., 2000).

70. *Id.*

71. *Azanian Peoples Org*., 1996 (4) SALR at 641.

72. *See* Rotberg, *supra* note 69, at 5.

73. *Id.* (explaining that while other nations "dared not hear testimony in public for fear that it might be too inflammatory or arouse retaliation from the ousted military officers . . . the South African commission not only insisted on public as well as private testimony . . . but it also went a step further and permitted press and television reports").

behind such a practice was clear to both the international community and citizens of the modified South African state. By providing citizens with an intimate view of their oppressors on trial, the TRC provided each victim with a sense of closure and inner redress.[74] Arguably, such a feeling would be worth more than the receipt of monetary recovery. Thus, it could be said that "[t]he South African version of a commission empowered a popular understanding incrementally, rather than comprehensively by polished summary."[75]

Despite being embraced by numerous South African nationals, many citizens were not supportive of the TRC purpose. Specifically, the applicants in *Azanian Peoples Organization* contested the amnesty provision found in the newly ratified South African Constitution, and sought prosecution of Apartheid-era criminals.[76]

b. Preserving the TRC Purpose

Proponents of the TRC challenged the amnesty provision by asserting a constitutional argument, claiming that the newly formed South African government lacked authority to deprive victims of their day in court.[77] Furthermore, proponents asserted that the TRC was not, by definition, a court of law and thus lacked the authority to settle such "justiciable disputes."[78] In response, "[t]he Court found that the epilogue of the Constitution not only authorize[d] Parliament to enact a law providing for amnesty in certain circumstances, but oblige[d] it to do so."[79] In addition to such a retort, the court based much of its decision on public policy.[80]

The South African Constitutional Court considered the grave difficulty that would plague the success of victims' private claims, including missing relatives, the inability to link the perpetrators to certain offenses and the lengthy time span between the offenses and court dates. It argued that a greater injustice would ensue by allowing victims to pursue claims.[81]

74. *Id*. at 6 (proclaiming that not only is "[t]here is a strong sense that a society can move forward only after it comes to terms with its collective angst, . . . [but t]here is an assumption that a society emerging from an intrastate cataclysm of violence will remain stable, and prosper, only if the facts of the past are made plain").

75. *Id.*

76. *Azanian Peoples Org*., 1996 (4) SALR at 645.

77. *Id*. (arguing that the applicants have a "clear right to insist that such wrongdoers should properly be prosecuted and punished . . . [and] should be ordered by the ordinary courts of the land to pay adequate civil compensation").

78. *Id*.

79. HENKIN ET AL., *supra* note 67, at 636; *see also* Promotion of National Unity and Reconciliation Act, July 26, 1995, S. Afr., Act 95-34, § 20(7), *available at* http://www.fas.org/irp/world/rsa/act95_034.htm (last visited Mar. 18, 2002).

80. *Azanian Peoples Org*., 1996 (4) SALR at 654-60.

81. *Id*. at 648 ("The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without

Allowing claimants to proceed with a private cause of action under an assumption that oppressors would be brought to justice purported to do more harm than good.[82] While the court did not validate a "blanket immunity" to future oppressors, it did seek to legitimize the present amnesty provision due to the social climate present in South Africa.[83] Indeed, "[d]ecisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity."[84]

2. Chilean Efforts to Forget Past Thwarted By Inter-American Commission

During the late twentieth century, Chilean nationals were also tormented and tortured by their own government.[85] Under the regime of General Pinochet, many citizens lived in a state of terror, awaiting a day when they would have an opportunity to bring their oppressors to justice. Pinochet reigned for seventeen years. A democratic government was then instated and a movement began toward a resolution for the atrocities committed.[86] Specifically, as in South Africa, a truth commission was established to sort through the turmoil imposed upon Chilean citizens.[87] Again, an amnesty decree was the subject of much debate.[88]

Upon being asked to forgive and forget, victims resorted to a tribunal outside of their own judiciary. They sought adjudication from the Inter-American Commission on Human Rights in an effort to preserve their right to prosecution.[89] Although *Azanian Peoples Organization* furthered similar arguments, the treatment of the Chilean matter yielded quite a different result. While the Commission acknowledged the need for pertinent information regarding the whereabouts and condition of missing family members, it made a

the evidence to sustain the prosecution successfully, . . . [which] perpetuate[s] their legitimate sense of resentment and grief . . . .").

82. *See id.*

83. *Id.*

84. *Id.* at 649. The Court stated: "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimi[z]ation." *Id.* at 639.

85. Chanfeau Orayce v. Chile, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/Ser.L/V/II.95, doc. 7 rev. (1997), *available at* http://www1.umn.edu/humanrts/cases/1997/chile25-28.html (last visited Mar. 5, 2002).

86. *Id.* at 1.

87. *Id.* at 13.

88. *Id.*

89. *Id.* at 1. "Their claims concern the fact that there has been neither trial nor identification of those responsible nor punishments meted out against the perpetrators of these acts. . . ." *Id.* at 15.

further demand of the Chilean government.[90] Unlike the South African decision, the Commission declared that Chile should "investigate the violations committed within its jurisdiction, identify those responsible, and impose the pertinent sanctions upon them."[91] The Commission explained that since Chile was a party of the American Convention on Human Rights, it possessed a "true 'obligation to do something' in order to effectively guarantee such rights."[92] A call for affirmative action replaced the sentiment for silent forgiveness.

The Chilean decision did illustrate that barring one's access to a remedy was not always a valid state practice. It did, however, serve the purpose of showing another emerging practice of states. States desired to limit remedies to its citizens, as opposed to barring them altogether.[93] As articulated below, some states have successfully limited individual access to a remedy, skirting an international customary right that arguably affords a remedy in all cases involving an injury.[94]

IV. LEGAL ANALYSIS: RECTIFYING THE *WORLD WAR II CASE* DECISIONS IN TERMS OF INTERNATIONAL AND DOMESTIC LAW

The judge in the *World War II Case* was quick to dismiss the suit because, as a matter of treaty interpretation, the treaty, via its plain language, barred any claim by the plaintiffs.[95] Per the analysis of Judge Walker, Article 14(a) of the 1951 Treaty of Peace plainly stated that the agreement allowed for a "waiver of all '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.'"[96] The present claim of the plaintiffs fell squarely within the treaty language, "all . . . other claims of the Allied Powers and their nationals."[97] Even though the plaintiffs attempted to rely on a novel California state law to skirt the treaty waiver of private claims, their efforts were doomed from the

90. *Chanfeau Orayce*, Inter-Am. C.H.R. 512 at 23 ("[T]he State is obliged to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.").

91. *Id.*

92. *Id*.

93. *See* discussion *infra* Part IV.A.1.

94. *See* discussion *infra* Part IV.A. *But see* PAUST, *supra* note 15, at 184 (suggesting that a right to sue for human rights violations may embody a natural right).

95. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325(1) (1987) (stating that "[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose").

96. *World War II Case*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000) (citation omitted).

97. *Id.*

start because of a foundational constitutional principle.[98] Namely, the treaty, possessing the status of federal law and thus representing the "law of the land," took precedence over any state law.[99] Therefore, the presence of the conflicting California state law did not effect the meaning and force of the treaty.[100]

Although the legal issues facing the *World War II Case* court were rather elementary in nature, comparatively complex arguments were ignored, but remained at the disposal of the plaintiffs. These arguments were inherently rooted in theories of customary international law. Specifically, one could argue that the treaty was invalid because it conflicted with a norm of customary international law.

A. Possible Argument—1951 Treaty Had No Effect Because it Conflicted with International Customary Law

As a preliminary issue, international custom represents an established rule of international law evinced through uniform and continuous state practice.[101] Unlike a treaty, custom need not be expressly or formally agreed upon for it to have force upon all states.[102] Simply, these customs or "norms" are the ground rules for international activity.[103] Applicable to the *World War II Case*, the plaintiffs may have argued that due to the harsh treatment and involuntary servitude that resulted from their forced labor during World War II, a human rights violation occurred.[104] Pursuant to recognized norms of international law, victims of human rights violations are entitled to a remedy.[105] Thus, plaintiffs could have asserted that because the treaty instructed domestic courts to bar such victims from any remedy, the treaty was in conflict with customary international law and was, thus, invalid.[106] However, in saying that the 1951 Treaty of Peace conflicted with international customary law, one should first illustrate that a right to a remedy is truly a customary norm.

98. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111(1) (1987) (stating that "[i]nternational law and international agreements of the United States are law of the United States and [are] supreme over the law of the several States").

99. *See* U.S. CONST. art. VI.

100. *Id.*

101. The Paquete Habana, 175 U.S. 677, 710-12 (1900).

102. *Id*.

103. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-5 (4th ed. 1990)

104. *See* American Convention on Human Rights, Nov. 22, 1969, art. 7, *available at* http://www.cidh.org/Basicos/basic3.htm (last visited July 16, 2002) (stating that "[e]very person has the right to personal liberty and security" and that "[n]o one shall be deprived of his physical liberty"); *see also* Velasquez Rodriguez Case, *reprinted in* Inter-Am. C.H.R., INTER-AM. Y.B. ON HUMAN RIGHTS 1988, at 978 (1991) [hereinafter *Velasquez Rodriguez Case*].

105. PAUST, *supra* note 15, at 212.

106. *Id*. at 184.

In *Marbury v. Madison*,[107] the United States Supreme Court first assented to the norm that all parties who suffer an injury are entitled to a remedy.[108] In that opinion, Chief Justice Marshall stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . [and] where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."[109] Noting the competence of courts to hear a specific class of cases, Chief Justice Marshall recognized in *Fletcher v. Peck*[110] that judicial tribunals "[were] established . . . to decide on human rights."[111] Almost two centuries later, this principle of a customary right to a remedy was reaffirmed in *Filartiga v. Pena-Irala*,[112] which stated that "[t]he . . . international law of human rights . . . endows individuals with the right to invoke international [customary] law, in a competent forum and under appropriate circumstances."[113] Furthermore, one could assert that such a norm was codified in both The Universal Declaration of Human Rights and The American Convention on Human Rights.[114] Article 8 of the Declaration states that "[e]veryone has the right to an effective remedy by a competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law."[115] Noting both the Declaration and the Convention proves important to illustrate how the right to a remedy has been widely accepted by states and tribunals in the international community as a customary norm.[116]

107. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

108. PAUST, *supra* note 15, at 198.

109. *Id*. (quoting *Marbury*, 5 U.S. at 163).

110. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

111. PAUST, *supra* note 15, at 199 (quoting *Fletcher*, 10 U.S. at 133).

112. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

113. *See* PAUST, *supra* note 15, at 200 (quoting the brief of the United States Executive Branch in *Filartiga*, 630 F.2d 876). Professor Paust opined: "Although international law rarely prescribes appropriate penalties or civil remedies, successful claimants should be able to obtain actual or compensatory damages, court costs, and possibly attorney fees and travel expenses." *Id*. at 212.

114. *Id*. at 198; *see also Velasquez Rodriguez Case*, *supra* note 104, at 994.

115. PAUST, *supra* note 15, at 198.

116. In July of 1988, the Inter-American Court of Human Rights specifically applied the principles of the American Convention on Human Rights in the *Velasquez Rodriguez Case*. *Velasquez Rodriguez Case*, *supra* note 104, at 994. In the *Velasquez Rodriguez Case*, during the period from 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras. Often the victims were kidnapped by force during daylight hours while meandering in public places. It was public knowledge in Honduras that the kidnappings were carried out by military personnel, the police or others acting under military order. *Id*. at 924-30. Relying on numerous provisions of the American Convention on Human Rights, the Inter-American Court declared that Honduras should take its own initiative to hunt down and punish those responsible for the kidnappings. *Id*. at 1010.

Applying the aforementioned analysis to the *World War II Case*, the plaintiffs could have argued with impunity that the 1951 Treaty of Peace conflicted directly with principles of customary international law. Recalling the words of the treaty itself, Article 14(a) specifically and plainly waived any claim that an aggrieved veteran may have had as a result of injuries suffered during World War II. Practically, this waiver barred plaintiffs' remedy in this context. The treaty conflicted with an established norm of customary international law, namely a right to a remedy for human rights offenses, and should have been argued to be invalid. However, such a hypothetical argument of treaty invalidation is not without its weaknesses.

1. Critique of Plaintiffs' Possible Argument: The International Legal Component

As outlined above, there exists a possibility that the plaintiffs could have argued the 1951 Treaty of Peace to be invalid because it conflicted with international customary law.[117] In theory, the conflict could arise because the treaty barred aggrieved parties from any remedy for a human rights violation, a right debatably rooted in customary international law.[118] However, upon closer analysis, one could assert that a true conflict does not exist between the treaty and customary international law. Even assuming a conflict exists between the treaty and the customary norm, it is not entirely clear that the customary norm would trump the treaty as a matter of international law.[119] Such arguments take shape when viewing the treaty in question as limiting a remedy as opposed to being a complete bar to justice.

Contained in their response to the filing of the *World War II Case*, Congress stated that each injured veteran received approximately $20,000 in damages for their involuntary labor during the war.[120] The mere presence of the monetary damage award represents access to a quasi-remedy. Thus, plaintiffs were not totally barred from any remedy at all, and, in a sense, their customary right was not offended.[121] However, the reparation did limit the type of remedy the plaintiffs could have received in a jury trial.[122] The difference between a full remedy and a limited remedy is subtle indeed. The effect of the limited remedy exemplifies the alleged conflict between the treaty

117. *See* discussion *supra* Part III.A.

118. *See* PAUST, *supra* note 15, at 198.

119. *See* 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 86-87 (Elihu Lauterpacht ed., 1970).

120. *See infra* note 200 and accompanying text.

121. *Contra* PAUST, *supra* note 15, at 198.

122. *See infra* note 200 and accompanying text.

and customary international law.[123] Two examples support the validity of limiting the remedies of aggrieved parties.

The first example, from a suit similar to the *World War II Case*, arose out of atrocities committed by the Nazi Party during World War II.[124] Akin to the limitation of remedies outlined in the Japanese suit, individuals enslaved by the Nazi Party in the 1940's were as well limited in their recovery to reparations only.[125] To date, such victims have received equal amounts from a pooling of over $ 4.3 billion, yet have never survived the scrutiny of the U.S. judicial system.[126] While their pockets are not empty, victims complained that their true recovery potential had yet to be realized.[127] Supported by the argument of the present subsection of this Note, the limitation on recovery would not have entirely destroyed the victims right to a remedy.[128] Thus, international customary norms remained intact.[129]

A second example of a state limiting the recovery of its citizens occurred in the aforementioned South African decision.[130] The South African government did grant the victims a quasi-remedy by making public apologies and admissions, even though they were denied access to monetary redress for the atrocities endured.[131] While such a remedy may be inequitable when viewed in light of the injuries suffered, a remedy was offered. Thus, the right of an individual to seek a remedy under customary international law was again likely preserved.[132]

Even assuming a conflict existed between international customary law, which arguably grants an automatic right to a remedy for human rights violations, and the 1951 Treaty of Peace, which wholly denies such a remedy, it remains unclear whether the norm would trump the treaty as a matter of international law. Legal scholars differ in their interpretation of the issue. Particular materials, however, can be turned to for guidance. The legal document that resolves the dispute is Article 38 of the Statute for the International Court of Justice.

Expressed in the Statute for the International Court of Justice ("ICJ"), "[t]he Court, whose function it is to decide in accordance with international

123. *See generally* PAUST, *supra* note 15, at 198-210. Paust never implied that a limitation to a remedy would directly violate international custom. *Id.*

124. *Nazi Era Cases*, 129 F. Supp. 2d 370, 380 (D.N.J. 2001).

125. *Id.*

126. *Id.* at 381.

127. *Id.* at 378.

128. *See supra* notes 102-116 and accompanying text .

129. *See supra* notes 102-116 and accompanying text.

130. *See* discussion *supra* Part III.B.1.

131. *See* Azanian Peoples Org. v. President of the Rep. of S. Afr., 1996 (4) SALR 637, 638 (CC), *available at* http://www.legalinfo.co.za/data/CL/1796.html (last visited Mar. 18, 2002).

132. *See supra* notes 102-116 and accompanying text.

law such disputes as are submitted to it, shall apply . . . *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states."[133] While the statute itself was enacted to assist the ICJ in interpreting which legal principles apply in cases before it, the provisions could theoretically aid other tribunals (for instance, as persuasive authority in United States federal and state courts) when ruling on issues of international law. As Professor Schachter explained, the prevailing sentiment amongst contemporary legal scholars has been a demand for increased "positive science of law."[134] Simply, scholars desire a mechanism that makes international law "realistic and definite,"[135] making legal application more objective. Arguably, Article 38 represents the demystifying mechanism that could aid a variety of international tribunals in the realm of international legal interpretation. Thus, because "international conventions" or treaties are cited first in Article 38, could one reasonably infer that such agreements are controlling over international custom? Scholars differ slightly in their opinions.

In terms of articulating a hierarchical strata, Hans Kelsen believed that the highest rung was occupied by international customary law, rather than treaties.[136] Kelsen argued that treaties were created in the spirit of applicable general principles contained within customary law.[137] In other words, treaty law possesses the character of international law.[138] Similarly, Sir Gerald M. Fitzmaurice insisted that "treaties are no more a source of law than an ordinary private law contract," binding no other parties than those participating in the agreement itself.[139] However, two scholars in particular thought otherwise.

Professor Henkin disagreed in part and believed the "maxim, *lex specialis derogat generali*, the specific prevails over the general, was an accepted guide; it may give priority *either* to treaty or custom."[140] When assigning authority, one should first analyze the intent of the contracting nations as either replacing

133. HENKIN ET AL., *supra* note 65, at 51 (emphasis added).

134. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 35-36 (1991) (stating that the "doctrine which became dominant in the nineteenth century and continues to prevail today lays down veritable conditions for ascertaining and validating legal prescriptions"), *reprinted in* HENKIN ET AL., *supra* note 65, at 52.

135. *Id*.

136. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 108 (Clarendon Press ed., 1992).

137. *Id*.

138. *Id*.

139. SIR GERALD M. FITZMAURICE, SOME PROBLEMS REGARDING THE FORMAL SOURCES OF INTERNATIONAL LAW 153, 157-58 (Von Asbeck et al. eds., 1958), *reprinted in* HENKIN ET AL., *supra* note 65, at 95.

140. *Id*. (second emphasis added) (noting that while "it may be 'natural' to apply a treaty . . . [it] should not be taken to mean that a treaty provision necessarily prevails over a customary rule").

a treaty with customary rule or vice versa. If such intent is ambiguous from the wording of the agreement, "treaty and custom have equal weight."[141] Richard Baxter, in supporting Henkin, suggested that "[a]s one looks . . . into the future, it should be quite clear that treaty law will increasingly gain paramountcy over customary international law [because t]he treaty-making process is a rational and orderly one, . . . [serving to strengthen custom] and simplify its application."[142] This view complements Schachter's view that international scholars and practitioners yearn for a more scientific or objective application of the law.[143] As observed since the end of World War II, treaties should ideally be regarded as dynamic creatures that evolve and erode over time, bowing to the ever-changing tides in the international legal community.[144]

Based upon the surrounding circumstances of the 1951 Treaty of Peace, it would be prudent to assume that the *World War II Case* court would have agreed with the assertions of both Lauterpacht and Baxter. As noted, the court in the *World War II Case* was searching for a way to support the plain meaning of the 1951 agreement. Supported by Lauterpaucht's theories, where a specific intent or language can be discovered, such an intent or language will be controlling, even in light of international customary law.[145] Indeed, the intent of the drafters in the 1951 Treaty was to trade litigants' rights to sue for a more peaceful and progressive relationship with Japan. Thus, the intent was identified and was properly viewed as controlling.

As well, the *World War II Case* comported with the theories of Richard Baxter.[146] Baxter saw the treaty-making process as a rational and orderly one. The provisions contained within the four corners of the agreement should be afforded great weight and should be paramount to all other legal precedent.[147] Just as Article 38 of the ICJ demanded that treaties be treated as the highest authority, so did the court in the *World War II Case*. The non-suit treaty provision, while in violation of state law, trumped the state law provision, not only for Constitutional reasons, but also because Article 38 demanded that treaties be controlling against domestic laws of states. Thus, one could say that

141. HENKIN ET AL., *supra* note 65, at 95 (explaining that "[i]t is presumed that a treaty is not terminated or altered by subsequent custom in the absence of evidence that the parties had that intention").

142. RICHARD BAXTER, TREATIES AND CUSTOM 101 (1970), *reprinted in* HENKIN ET AL., *supra* note 65, at 97.

143. HENKIN ET AL., *supra* note 65, at 52.

144. *Id.* at 95 ("International agreements . . . have proliferated since the end of World War II. More than 30,000 treaties have been registered with the United Nations since 1945."). Virtually every aspect of social life affecting transnational relations and intercourse is dealt with through treaties.

145. LAUTERPAUCHT, *supra* note 119, at 87.

146. HENKIN ET AL., *supra* note 65, at 97.

147. *Id.*

use of international law allowed the court to reach the same conclusion it reached by using domestic law. However, even after offering the aforementioned analysis, it remains unclear if a true answer exists. Illustrating the second weakness in plaintiffs' possible argument, it remains unclear whether customary norms supercede international agreements as a matter of domestic law.

2. Critique of Plaintiffs' Possible Argument: The Domestic Legal Component

Similar to the lack of clarity evident in deciding whether customary norms trump treaties as a matter of international law, rectifying the relationship between the two legal principles on a domestic plane comes with no greater ease. The confusion as to which rule should control is particularly evident in the language of the Restatement (Third) of Foreign Relations Law.[148] Specifically, Comment d to Section 115 of the Restatement suggests the novelty of the inquiry in the U.S. domestic judicial system.[149] It 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."[150] Thus, after reading the Restatement, one is left with little guidance.

In an effort to truly resolve the relationship between customary norms and international agreements on a domestic level, one must turn to the words of legal scholar, Louis Henkin. According to Henkin, customary international law is "made" by federal courts as though it were federal law and is binding on the several states.[151] Explaining his theory by way of necessity, Henkin feared the result that would ensue if all fifty states were left to their own interpretations of customary international law.[152] For purposes of creating a

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987).

149. *Id.* at cmt. d.

150. *Id.*

151. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 238 (2d ed. 1996).

152. *Id.* As stated by Henkin:

> [B]ut if for the states customary international law had only the status of their common law, it was presumably subject to modification or repeal by the state legislature. If so, too, state courts could decide for themselves what international law requires, and issues of customary international law, unlike questions arising under treaties, would not raise federal questions and could not be appealed to the Supreme Court for final adjudication. Fifty states could have fifty different views on some issue of international law and the federal courts might still have another view. Indeed, not only would the states be free to disregard the views of the federal courts, but in cases where a federal court is required to apply the law of the state in which it sits, the court would have to apply the state's view on disputed questions of international law . . . .

Id.

uniform interpretation of international law in general, federal court decisions based upon prevailing customs were viewed to create federal common law.[153] Thus, Henkin presumed that international customary law should be labeled federal common law.[154]

Accepting international customary law as the domestic equivalent of federal common law, one must further venture to find the domestic equivalent of international agreements. As stated by Henkin, "[i]n the case of treaties, the Supreme Court has read the Constitution as giving treaties and acts of Congress equal authority as law."[155] Therefore, the equality of treaties and statutes in United States domestic law appears to be a firm rule.[156] From this point, a logical leap is merited. While Henkin was very careful not to suppose that the Framers of the Constitution intended a higher constitutional status for treaties than for customary law,[157] one could conclude this hierarchy to be true by pitting federal common law (customary law) against a federal statute (treaties).[158] In terms of general constitutional jurisprudence, statutory law will always trump common law in times of conflict.[159] Applying this notion to the treaty and custom debate, a similar result should occur. This notion alone would defeat a plaintiff's argument that suggests, on a domestic level, that a treaty should be invalid because it conflicts with international customary law. However, even if such a logical leap is found to be premature by a court, it is unlikely that such a tribunal would venture to rule in the alternative—that custom trumps a treaty. As articulated by Henkin, jurists yearn for guidance in assembling a domestic hierarchy for international legal structures.[160] Until then, confusion will reign supreme.

In sum, to have succeeded in the aforementioned arguments, plaintiffs in the *World War II Case* would have had to prove the following: (1) that a true conflict existed between customary norms and the 1951 Treaty; (2) that the norm trumped the treaty as a matter of international law; and (3) that the norm trumped the treaty as a matter of domestic law. Because of the relative

153. *Id.*

154. *Id.*

155. *Id.* at 241.

156. HENKIN, *supra* note 151, at 211.

157. *Id*. at 237.

158. PATRICK DEVLIN, THE JUDGE 177 (1979) ("Historically, it is made quite differently from the Continental code. The code precedes judgments; the common law follows them. The code articulates in chapters, sections and paragraphs the rules in accordance with which judgments are given."). From these words, one could infer that because the common law "follows" the statutes, common law comes into being from a higher source of law which dictates and controls it. Arguably, courts create and alter common law in the spirit of the foundational principles found in statutes. *Id.*

159. *Id*.

160. HENKIN, *supra* note 151, at 246.

uncertainty exhibited by the above-mentioned courts with reference to each of the issues, it is likely that the plaintiffs would fall short of their goal.

V. POLICY ANALYSIS

The previous section of this Note stated that the *World War II Case* was correct in its legal conclusion to uphold the 1951 Treaty non-suit provisions based upon both international and United States domestic law. Once the legal analysis is disposed of, it is worthwhile to inquire whether the decision furthered any policies crucial to the maintenance of U.S. foreign relations. As suggested in the Introduction, the decision in the *World War II Case* provided that sovereign nations should act in a manner that is not selfish and should take into account the effect of domestic decisions on the entire international community. Specifically, such a method of action was termed, "looking outside the box."[161] If the 1951 Treaty non-suit provision was voided by judicial interpretation, a catastrophic message would have been sent to the global community. Indeed, international legal skeptics would have had the fuel necessary to prove that, once again, an international superpower acted in a manner that grossly ignored international law by disregarding treaty provisions that are deemed inconvenient to a national interest. Rather, the decision of the *World War II Case* court shouted to the world that international law, in the form of treaties, is binding and should be taken seriously. As a result, the United States indirectly supported international legal legitimacy and urged other nations to do the same. In this final section of the Note, an outline will be offered to show the positive policy effects furthered by the decision in the case at bar.

A. 1951 Treaty of Peace Abrogated by a Later United States Statute: A Wise Policy Decision?

When the United States Congress determines that a particular treaty has been outdated or fails to give effect properly to the ideals it sought to uphold, it may, under a general consensus, pass a statute that conflicts with the treaty provisions itself.[162] Arguably, the parties to *World War II Case* suit could pressure the federal legislature in the future to pass such a statute for purposes

161. *See* discussion *supra* Part I.

162. *See* Whitney v. Robertson, 124 U.S. 190, 193-94 (1888). In *Whitney*, the plaintiff sued to recover amounts paid under protest to the Collector of Customs at New York in satisfaction of duties assessed upon plaintiff's shipments of sugar from the Dominican Republic. Plaintiff alleged that sugar from the Hawaiian Islands was admitted free of duty into the United States, and claimed that a clause of a treaty between the United States and the Dominican Republic guaranteed that no higher duty would be assessed upon goods imported into the United States from the Dominican Republic than was assessed upon goods imported from any other foreign country. An act of Congress was passed that was found to have superceded the treaty between the United States and the Dominican Republic because it occurred later in time. *Id*. at 190-92.

of receiving justice. In the framework of a civil action, a court could view the statute and the conflicting treaty provision together and decide if, in fact, the two cannot co-exist.[163] Specifically, when the two relate to the same subject, courts will always endeavor to construe them so as to give effect to them both, if that can be done without violating the language of either.[164] However, if the court rules that the two cannot possibly live in harmony with one another, the document adopted later in time will control the other.[165]

Thus, because the *World War II Case* involves a treaty waiver of United States citizens' right to sue, it is possible that if convinced, Congress could enact a code that would conflict with the 1951 Treaty of Peace, granting veterans a right to sue.[166] As a policy issue though, it is unlikely that the federal government would use its power to controvert the language of the treaty. As stated by Dulles and scores of politicians involved in the ratification of the 1951 Treaty of Peace, it proves worthwhile for the provisions of the treaty to be upheld because the nation has an interest of moving on from its wartime conflicts with the East.[167] The hardships endured by veterans were not questioned. The government as a whole, however, decided to take action in concert with the single voice of the nation.[168] That single voice of the Executive demanded that the nation move on as opposed to dwelling on past atrocities.[169] Thus, on a policy level, it seems highly unlikely that a future statute would be enacted for purposes of abrogating the 1951 Treaty of Peace. Such action would support the argument of international legal skeptics as outlined in the next section of the Note. Specifically, skeptics argue that international law has little effect and is easily discarded by international superpowers.[170]

163. *Id.* at 194.

164. *Id.*

165. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(a)(b) (1999).

> An act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled. That a rule of international law or a provision of an international agreement is superceded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation . . . .

Id.

166. *Id.*

167. *World War II Case*, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000).

168. *Id.* at 948.

169. *Id.*

170. *See* discussion *infra* Part V.B.

B. Proving International Legal Skeptics Wrong: Optimist Views Should be Supported in Furtherance of Public Policy

"Skeptical" legal philosophers have long felt that both international law and the principles it seeks to uphold prove rather ineffective because, at face value, the international legal system lacks traditional enforcement tools.[171] Conversely, the *World War II Case* illustrated the effectiveness of an international instrument, namely, treaties. There, treaty signatories adhered to the verbiage of the instrument and enforced its provisions without any pressure from other members of the international community. However, when so frequently nations disregard treaties or general custom, as established by international practice, onlookers are quick to conclude that the system itself is flawed and that individual nation states are free to act as they choose.[172] International legal skeptics fail to recognize that the absence of a legislative body is not at all fatal to the legitimacy of the international schematic.[173]

Treaties represent such a non-legislative legal entity, which have proven rather effective on a consistent basis.[174] Yet, contemporary scholars who subscribe to the skeptic's school of thought have recently questioned even the effectiveness of treaties and other enforcement mechanisms in the realm of international human rights.[175] Specifically, where treaties seek to deny human rights victims of their day in court, academics have claimed that such restrictive bi-lateral agreements do more harm than good.[176] If able to jump through the varying procedural hoops at the domestic court level, some scholars argue that human rights victims should be afforded a right to name their oppressors in the framework of a domestic civil action.[177] Otherwise, they argue, the interests of the negotiating parties, namely, those politicians with party agendas, will prevail in spite of the private interests of citizens.[178]

171. Richard A. Falk, *The Adequacy of Contemporary Theories of International Law: Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249 (1964) ("The status of controverted behavior as legal or illegal is quite problematical . . . because no central institutions exist to make judgments that will be treated as authoritative by states.").

172. *Id*. (explaining that when such violations of international law are committed by a leading world super-power, it seems easy for them to disregard the offense and escape sanctions).

173. LOUIS HENKIN, HOW NATIONS BEHAVE 26 (2d ed. 1979).

174. *See* HENKIN ET AL., *supra* note 65, at 95; *see also supra* note 144 and accompanying text. By definition, treaties are formed by the executive as opposed to the legislative bodies of governments. *Id.*

175. *See Developments in the Law—Corporate Liability for Violations of International Human Rights Law*, *supra* note 11, at 2026.

176. Boyd, *supra* note 11, at 283-84.

177. *Id*. at 322 (stating that "the 'single voice' perception can be misleading . . . [and] would commit the identification of customary human rights norms to the political branches and would ignore the clearly established role of courts in clarifying murky areas of law").

178. *Id.* (arguing that "the notion of fundamental human rights embodies an understanding that individual interests prevail over state prerogatives").

However, if such individual interests prevailed, much harm would come upon the international system.

Viewing the international legal structure in a completely different light, legal "optimists" posit that the struggle for legitimacy in international law is a false inquiry. On a metaphysical level, man is bound by international law simply because he desires order in his existence.[179] Similarly, states are bound by the rules of the international realm because they themselves are founded on the binding nature of law, creating a stable and relatively predictable society.[180] Furthering the theories of the optimist faction of international legal scholars, Professor Akehurst qualified the often-challenged philosophy of his colleagues with a paradox. Relying on a premise touted by the skeptic regime, Akehurst admitted that often powerful nation states take advantage of their international stature and support laws that inherently further their own interests.[181] While such a system may be anti-democratic, "it is unlikely that [such states] will create laws that . . . they will be tempted to break."[182] Thus, such laws will be followed not because of the presence of an international police system, but because nations choose to do so voluntarily.[183] In a sense, the end justifies the means.

Following the aforementioned analysis, one could say that the *World War II Case* furthered the cause of international legal optimists—simply, that international law has "teeth" and should be followed in furtherance of its existence and effectiveness.[184] Countering the view of skeptics, the court furthered a notion that, in practice, nations actually feel obligated to adhere to international law; no choice is available.[185] Furthermore, to preserve the effectiveness of treaty law, an established form of international law, nations must adhere to its provisions.[186] By deciding in favor of the non-suit provision in the 1951 Treaty, the *World War II Case* fueled the fire of the optimist faction. Essentially speaking for the United States as a whole, the court affirmed the principle that states are bound by the rules of the international realm because they themselves are founded on the binding nature of law, creating a stable and relatively predictable society.[187] Without honoring such international legal provisions, the United States would be snubbing the reason for its own existence since arguably, nations receive their legitimacy from the

179. J. L. BRIERLY, THE LAW OF NATIONS 56 (6th ed. 1963).

180. *Id*.

181. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 8 (6th ed. 1987).

182. *Id*.

183. *Id*.

184. Falk, *supra* note 171, at 249.

185. BRIERLY, *supra* note 179, at 56.

186. *Id*.

187. *Id*.

mere presence of international law. Members of states pay homage to the international legal system by honoring the laws it imposes upon them.[188] Therefore, in honoring the 1951 Treaty in its entirety, the *World War II Case* court furthered the policy of the necessity to follow stated international principles.[189]

C. In re World War II Case Upholds Similar Policies Stressed in South Africa

At the close of World War II, while negotiating the particulars of the 1951 Treaty of Peace, John Foster Dulles stated, "Leaving open the possibility of future [war reparation] claims would be an unacceptable impediment to a lasting peace [between the United States and Japan]."[190] Almost fifty years later, in a land left scarred by decades of Apartheid oppression, Justice Mahomed of the Constitutional Court for South Africa uttered, "those who negotiated the Constitution [of South Africa] made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization."[191] While thousands of miles and decades of time separated the two aforementioned declarants, it is possible that their argument for policy was the same.

In an effort to rebuild both the government and hearts of its citizens, the newly instated South African government declared in the 1990's that it would allow those who committed atrocities against its citizens during Apartheid to confess their deeds before the public in exchange for their amnesty and exemption from private causes of action.[192] As expected, numerous members of the public demanded justice and found no comfort in allowing their oppressors to be set free.[193] The foresight of various South African leaders, namely Nelson Mandela, allowed the shattered nation to again rebuild and become an international economic contender.[194] A non-suit provision in the South African Constitution theoretically violated a citizen's right to confront his oppressor. Government officials, however, urged angered individuals to look forward for the betterment of the nation as a whole.[195] Indeed, South Africa was not claiming that citizens should forget the recent past. Rather, it desired to heal the inner wounds of the soul by recognizing that the future of the nation was bright, transforming grief and anger into a mature

188. HENKIN, *supra* note 173, at 25.

189. *Id*. at 26.

190. *World War II Case*, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000).

191. *See* Azanian Peoples Org. v. President of the Rep. of S. Afr., 1996 (4) SALR 637, 648 (CC), *available at* http://www.legalinfo.co.za/data/CL/1796.html (last visited Mar. 18, 2002).

192. *Id*. at 640.

193. *Id*. at 644.

194. *Id.* at 648.

195. *Id*.

understanding that progressed national reconstruction.[196] Without some sacrifice of personal claims, the future of the nation would have been halted due to scores of lengthy litigation.[197]

Similarly, the words of Dulles came at a time of national healing during the post-World War II Era. For the American nation to rebuild and allow its one-time enemies to gain strength for purposes of one day becoming economic allies, personal interests of aggrieved citizens needed to be seen as secondary to national interests.[198] Like their African counterpart, the United States desired to further a philosophy of understanding over vengeance to meet the future without hatred.[199] The *World War II Case* decision affirmed the notion that American veterans should, like oppressed South African citizens, turn the other cheek in an effort to progress the stability of international relations. In short, the greater good should prevail.

D. The Cost to International Legitimacy Far Outweighs the Benefit of Suit

Before speculating about the amounts recoverable under a victim's private cause of action, it is necessary to view what they have received under the provisions of The 1951 Treaty of Peace. Contained within the Statement of Interest of the United States of America, the governmental response to the *World War II Case*, the following figures prove most thought provoking:

> Consistent with its congressional mandate, the War Claims Commission paid claimants who were prisoners of war in the hands of the Japanese a specific amount for each day of captivity of the war. Specifically, prisoners of war were paid $1 per day for each day the government by which they were held violated its obligation to furnish them the quantity of food for which they were entitled as prisoners under the Geneva Convention related to prisoners of war. Individuals were also paid $1.50 per day for each day they were used as forced labor or otherwise mistreated in violation of the Geneva Convention. A person who was captured at Bataan and remained a prisoner of war for the duration of the war would have been compensated approximately $3,103.50. Adjusted for inflation using the published Consumer Price Indexes for June 1951 (25.9%) and June 2000 (172.3%), the present day value of that amount is approximately $20,646.[200]

Arguably, the award described above is nominal considering the emotional and physical turmoil experienced by the individual plaintiffs. Yet, when court costs, attorney's fees, and emotional hardship incurred by the mere filing of the

196. *Azanian Peoples Org.*, 1996 (4) SALR at 648.

197. *Id.*

198. *World War II Case*, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000).

199. *Id.*

200. Statement of Interest of the United States of America, *In re* World War II Case Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (filed Aug. 9, 2000), *quoted in* Murphy, supra note 7, at 142 n. 11.

action, are figured into the damage equation, the gain appears significant. Furthermore, as described in *Burger-Fischer*, *Iwanowa*, *Azanian Peoples Organization* and *In re Nazi Era*, the mere fact that the transgressions occurred so long ago works against a party asserting a private claim.[201] Another principle absent in any of the previously cited case law is the theory that damage awards theoretically shrink in class action suits. As the award is spread around, the shares distributed decrease in value. When coupled with the numerous procedural and jurisdictional hurdles involved in such a case, the nominal reparation amount seems fair on its face.

Keeping in mind the possible gain to reap from a suit of this nature, one must seriously consider the subsequent harm on international relations. Even though Japan has more than recovered economically since the conclusion of the Second World War, a further financial demand will no doubt frustrate the trust established between the United States and its East Asian counterpart.[202] War is a time when the ugliest faces of humankind reveal themselves. To reopen old wounds would compromise the sense of closure already achieved by so many war veterans who would just as soon move on. Analogous in part to the desire of the South African government to seek a more peaceful and productive future, the United States utilized the 1951 Treaty as its own truth commission, yearning for understanding and reparation as opposed to vengeance and retaliation.[203] The policy of forward thinking no doubt prevailed, supporting the maintenance of pre-existing international relationships.

E. Japan Smells a Rat: That Rat is an Attorney

In response to the suits filed against various Japanese corporations in 1999, certain Japanese politicians raised suspicions as to the reasoning for the timing of the suits. The *World War II Case* was filed in Los Angeles on December 7, 1999, at exactly 10:55 a.m., the precise moment in Los Angeles of the 1941 Pearl Harbor attack.[204] Undoubtedly, when such news reached the East, certain members of the Japanese population were enraged over the public statement being made by American citizens. That was the intent of Edward D. Fagan, attorney for the plaintiffs in the *World War II Case*.[205]

Arguably, Japanese politicians were drawing conclusions that should have alarmed American citizens. The suit was originally filed by lawyers who had

201. *See Burger-Fischer*, 65 F. Supp. 2d at 285; *Iwanowa*, 67 F. Supp. 2d at 450; *Azanian Peoples Org*., 1996 (4) SALR at 648; *Nazi Era Cases*, 129 F. Supp. 2d 370 (D.N.J. 2001).

202. *World War II Case*, 114 F. Supp. 2d at 947.

203. *Azanian Peoples Org*., 1996 (4) SALR at 661.

204. Teresa Watanabe, *California and the West: Japanese Firms Sued Over WWII*, L.A. TIMES, Dec. 8, 1999, at A3.

205. *Id.*

just come off a victory lap from their recent triumph in Europe with regard to Holocaust-Era claims against German corporations.[206] A one billion dollar damage settlement was recovered for the various Holocaust survivors who had made the lucky list under the class action suit.[207] While not directly stated, it could be inferred, as the Japanese did, that the *World War II Case* was the result of a money hungry attorney who wanted to utilize arguments from the European suit to recover substantial funds from the Japanese.[208] It was easy money. The observation follows with the assumption that perhaps the attorneys in question did not have justice in mind, but rather their children's college funds. In the following passage, attorney Edward Fagan illustrated his rationale behind the filing of the suit:

> A goal of the suits is to bring so much public pressure on the Japanese that they will opt for a political settlement similar to the one being brokered among European firms, the U.S. and the German government . . . targeting Japanese banks would open the issue to scrutiny from such regulators as state controllers, banking committee members, and other entities susceptible to public pressure . . .[209]

When one views this statement of lawyer strategy together with the intent of the members of the class action suit in the *World War II Case*, it is apparent that the two conflict. Throughout the suit, many plaintiffs went on record as saying that they desired to have their day in court for purposes of revealing the details of wartime offenses committed against American soldiers in the Pacific.[210] While damages were important to them, their primary concern was to educate the public.[211] Thus, the settlement strategy of the lead attorney arguably controverted the needs and wants of his clients. Indeed, something was awry.[212]

The Japanese responded to these observations by exclaiming that these claims were a "form of extortion" and that if the United States desired to do so, the gloves essentially would come off.[213] In an effort to combat the claims and show that America was not without guilt in the Second World War, Japanese officials voiced a desire to surface the questionable usage of atomic warfare in

206. *Id*.

207. *Id*.

208. *Id*.

209. Watanabe, *supra* note 204, at A3.

210. Bob Pool, *A Culver City Couple Were Among the American Civilians Held Prisoner in Barbaric Conditions in the Philippines During World War II Case: Now They Tell Japan It's Time to Pay Up*, L.A. TIMES, May 14, 2000, at B1.

211. *Id*.

212. *Id*.

213. Efron, *supra* note 2, at A1.

both Hiroshima and Nagasaki.[214] Arguably, tensions would have soared had the *World War II Case* gone before a jury.

Dulles feared that allowing such suits to prevail would hinder progressive international relations with Japan.[215] These quotes made by Japanese officials demonstrate that the fears of Dulles came close to being true. For purposes of supporting the aforementioned policy arguments throughout this section of the piece, it seemed crucial that Justice Walker thwart the efforts of attorneys like Edward Fagan in an effort to preserve pre-existing international relationships and global stability. Otherwise, the efforts and intentions of treaty negotiators like John Foster Dulles would be undermined.

VI. CONCLUSION

As a result of the prior analysis one can begin to view the tantamount importance of preserving international rules of law. Derogating from such established rules of law would prove catastrophic in that each nation would be free to act on its will alone. While the *World War II Case* represented a re-affirmation of established treaty law, the subject matter of its decision is contested even today. Recently, Anthony D'Amato, a professor of law at Northwestern University, filed an action in federal court on behalf of more than 400,000 American citizens who were killed or injured during World War II. They seek over one trillion dollars in reparations. It is likely that they will meet the same preclusion and jurisdictional obstacles described in this Note. It is almost certain that they will fail. Otherwise, a windfall of suits will plague the judicial system for years to come. Indeed, to protect the purpose and policy prudently set forth in post-war treaties, veterans must now, more than ever, "take one for the team."

NICHOLAS P. VAN DEVEN*

214. *Id*. at A2.

215. *World War II Case*, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000).

* J.D. Candidate, Saint Louis University School of Law. I would like to thank my family namely, Mom, Dad, Katie, Kelly, Grandpa and Grandma. In particular, I owe Professor David Sloss much gratitude for his continued support and challenging insights.