IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Melvin H. ROSEN and Ethel Blaine MILLET, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 01C 6864**
	)	**Hon. Blanche M. Manning**
JAPAN, a sovereign state,	)	
Defendant.	)	

REPLY TO MOTION TO DISMISS

I. VENUE IS PROPER IN THIS DISTRICT

Defendant's argument that venue is improper in the Northern District of Illinois is based solely upon its unique interpretation of the venue statute, 28 USC § 1391(f), as mandatory rather than permissive. That statute, quoted by defendant in Motion of Japan to Dismiss Amended Complaint, at 3 [hereinafter "Mot. Dis."], provides that "[a] civil action against a foreign state . . . may be brought . . ."

Defendant asks that this Court read the word "may" as equivalent to "must," so that the present case, as well as most cases that have previously been brought or will in the future be brought against foreign governments, must be filed exclusively in the District Court for the District of Columbia. However, defendant cites no case or other authority that so interprets § 1391(f). Indeed, defendant's uniquely restrictive interpretation implies that a great many federal district courts that so far have heard cases against foreign governments were all mistaken in interpreting § 1391(f) to allow those

cases to proceed. Defendant itself has relied on eleven of these FSIA cases that have originated in federal district courts: in New York (four cases),[1] Chicago (three cases),[2] Miami,[3] Anniston, Alabama,[4] Los Angeles,[5] and San Francisco.[6] In fact, defendant cites these eleven cases more than 25 times in its Motion. Other cases against foreign states have likewise been heard and decided on their merits outside of the District of Columbia.[7] Congress has had over 25 years to correct this permissive reading of § 1391(f); the fact that it has taken no action corresponds with the uniform, exceptionless judicial interpretation of the statute as permissive rather than mandatory.

To be sure, this Court could transfer the case to another venue in the interests of convenience and justice. Last fall in an FSIA case brought in the Northern District of Illinois, Judge Gettleman transferred venue to the plaintiff's home state, but only after holding that venue was proper in the Northern District and that there was subject-matter jurisdiction under the FSIA. Chukwu v. Air France, 218 F.Supp.2d 979 (N.D.IL. 2002). Judge Gettleman listed as factors involved in evaluating the convenience and fairness of a transfer (citing Georgouses v. NaTec Resources, Inc., 963 F.Supp. 728, 730 (N.D.IL. 1997)):

> 1) plaintiff's initial choice of forum; 2) the situs of material events; 3) ease of access to sources of proof; 4) the availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of the witnesses; and 5) the convenience to the parties, specifically their respective residences and their ability to bear the expense of litigation in a particular forum.

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[1] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989); Garb v. Republic of Poland, 207 F. Supp. 2d 16 (E.D.N.Y. 2002); Smith v. Socialist People's Libyan Arab Jamahiriva, 101 F.3d 239 (2d Cir. 1996); Verlinden v. Central Bank of Nigeria, 461 U.S. 480 (1983);

[2] Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985); Sampson v. Federal Republic of Germany, 975 F.Supp. 1108 (N.D. Ill. 1997), aff'd, 250 F.3d 1145 (7th Cir. 2001); Wolf v. Federal Republic of Germany, 95 F.2d 536 (7th Cir. 1996).

[3] Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

[4] Jackson v. People's Republic of China, 596 F.Supp. 386 (N.D. Ala. 1984) (Clemon, J.), aff'd, 794 F.2d 1490 (11th Cir. 1986).

[5] McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983).

[6] Berkovitz v. Islamic Republic of Iran, 35 F.2d 329 (9th Cir. 1984).

[7] *See, e.g.*, Zappia Middle East Construction Co. v. The Emirate of Abu Dhabi, 215 F3d 247 (2d Cir. 2000); Phaneuf v. Republic of Indonesia, 106 F3d 302 (9th Cir. 1997); Weltover, Inc. v. Republic of Argentina, 941 F2d 145 (2d Cir. 1991); Olsen v. Republic of Mexico, 729 F2d 641 (9th Cir. 1984); Altmann v. Republic of Austria, __ F.3d __, 2002 WL 31770999 (9th Cir. Dec. 12, 2002); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 600 (WD-MI 1985).

218 F. Supp. at 989. Each of these factors applied to the present case favors retention in the Northern District of Illinois as opposed to transference to the District of Columbia. As far as the defendant's convenience is concerned, it maintains in Chicago a Consulate General (serving four states), the Japan American Society, the Japan External Trade Organization, and does its main American commodities trading on the Chicago Mercantile Exchange. Even more importantly, defendant has acted in its official capacity three times in Chicago in this very case: the Japanese Consulate General in Chicago has sent three packages with enclosed letters to plaintiffs' attorneys containing summonses and briefs in English and Japanese that had been rejected over the course of sixteen months for trivial reasons by the Japanese Foreign Ministry in Tokyo. *See* Ex. 1 (letters from Japanese Consulate General in Chicago). For the more than 437,025 plaintiffs in the present case who live throughout the United States, the expense of travel to the court—whether as witnesses or observers—is a critical factor. The geographical center of the continental United States is in Kansas, the population center is in Missouri, and the hub travel center is Chicago. Many of the plaintiffs who are still alive are living below the federal poverty level. They would find it prohibitively expensive, those residing in the western states, to travel to and stay over in Washington D.C.

II. JAPAN IS NOT ENTITLED TO SOVEREIGN IMMUNITY

Since this is a case brought by American citizens in an American court against a foreign country alleging injuries and deaths caused by that country's criminal violations of international law, an excellent starting point for analysis is the Restatement of Foreign Relations Law, which provides:

> § 906. A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense: ...
>
> (c) in a court or other tribunal of the injured person's state of nationality, or of a third state, pursuant to the law of such state, subject to limitation under international law.

2 Restatement of the Law Third: The Foreign Relations Law of the United States § 906, at 392. In the present case, "pursuant to the law of such state" obviously refers to the United States. The law of the United States governing claims against foreign states is

contained in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA"). The Supreme Court held that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state . . ." Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983).

Under the FSIA, there are two paths, and arguably a third, open to the plaintiffs in the present case in asserting jurisdiction over Japan: (A) the existing-treaties path (§ 1604), (B) the tort-exception path (§ 1605(a)(5), and (C) the estoppel path.

A. The Existing-Treaties Path. Prominent among the considerations of the drafters of the FSIA was to avoid any inadvertent change or modification in existing treaties which, under the Constitution, are the "supreme Law of the Land." Constitution, Art. VI. Any change or modification might lead to international disputes with other countries that are parties to those treaties. Hence, preceding the new text of the FSIA, Congress inserted a savings clause. This clause, 28 U.S.C. § 1604, provides:

> § 1604. Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Our amended complaint cites no fewer than seven treaties,[8] all signed and ratified by both the United States and Japan, that in the aggregate define all the compensable torts we charge the defendant with committing during the Second World War. Amended Complaint ¶ 24. Perhaps the most important of these treaties for present purposes is the Convention With Respect to the Laws and Customs of War on Land (Hague IV), TS 539, 1 Bevans 631 (1970) ["Hague IV"].[9] The substantive provisions of Hague IV are contained in the Regulations specified in its Annex. Among the acts of war specifically prohibited are the following:

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[8] The seven treaties are: Convention for the Pacific Settlement of International Disputes (Hague I), TS 392, 1 Bevans 230 (1907); Convention Relative to the Opening of Hostilities (Hague III), TS 538, 1 Bevans 619 (1907); Convention With Respect to the Laws and Customs of War on Land (Hague IV), TS 539, 1 Bevans 631 (1907); Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), TS 540, 1 Bevans 654 (1907); Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI), TS 539 (1907); General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), TS 796, 2 Bevans 732, 94 LNTS 57 (1928); Convention Between the United States of America and other Powers Relating to Prisoners of War, 118 LNTS 343 (1929).

[9] Defendant throughout its Motion to Dismiss mis-cites this treaty as "Hague II."

> **Prisoners of War** (Articles 4 – 20): Prisoners may be made to work, but not on tasks related to the operations of war; tasks shall not be excessive; they must be given board, lodging, and clothing on the same footing as the troops of the Government who captured them.
>
> **The Sick and Wounded** (Article 21).[10] Wounded or sick soldiers must be taken care of. Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their country.
>
> **Hostilities** (Articles 22 - 28). It is forbidden to kill or wound an enemy who has surrendered, to make improper use of a flag of truce, to pillage, to destroy religious property or monuments, or to bombard towns, villages, dwellings or buldings which are undefended.

During the course of World War II, the defendant deliberately, flagrantly and repeatedly violated every one of the above-mentioned prohibitions as well as many other provisions contained both in Hague IV and in the six other treaties cited above in footnote 8. These are not mere allegations on our part; they were the specific findings of the International Military Tribunal for the Far East, as reported in the twenty volumes of Tokyo War Crimes Trial: The Complete Proceedings of the International Military Tribunal for the Far East (1981 ed.) In the leading war-crimes case following World War II, the United States Supreme Court held *inter alia* with respect to Hague IV as follows:

> Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's [General Yamashita's] command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments. It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306-7.

In re Yamashita, 327 U.S. 1, 14 (1946).

[10] This article incorporates the provisions of the Convention for the Amelioration of the Condition of the Wounded Armies in the Field (Geneva Convention of 1864), TS 377, 22 Stat. 940.

Although Hague IV and the six other treaties we rely upon, *see* Amended Complaint, ¶¶ 24, 43, have been supplemented by numerous other treaties since World War II, they are all in force today and have been incorporated substantively into the statutes of the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the new International Criminal Court. In addition the seven treaties we have listed have been cited numerous times in criminal as well as civil cases in the United States and in countries all over the world. Yet the provisions of every one of those treaties and their numerous successors would be reduced to meaninglessness if a violating nation could plead sovereign immunity as a defense. Treaties relating to war necessarily presuppose the liability, both during the war and afterwards, of the states that are the contracting parties. This liability attaches, of course, only to the specific obligations enumerated in the treaties. In addition, when states are belligerants in a war—especially a total war like World War II—the notion of retaining a shield of sovereign immunity for the other side in a party's judicial tribunals is absurd. (To be sure, during the course of a war, one is not apt to find either belligerent <u>suing</u> the other. But there is nothing wrong with the idea conceptually.) When the United States and Japan signed and ratified the above-referenced seven treaties, they waived as a matter of law their sovereign immunity with respect to the acts specifically prohibited by the treaties. To read these treaties as providing or preserving the sovereign immunities of the parties, as the defendant wishes this court to do in the present case, contradicts the language and purpose of all seven of those treaties, and undercuts their standing as the supreme law of the land. If there were any conceivable doubt on this matter of the relinquishment of sovereign immunity, it is laid to rest by Article 3 of Hague IV which explicitly provides:

> Article 3. A belligerent party which violates the provisions of the said Regulations [contained in the Annex to Hague IV] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Defendant concedes that Article 3 supports plaintiffs' contention that Hague IV is an exception to the sovereign immunity of Japan. *See* Mot. Dis. 11. Defendant has no choice; the careful wording of Hague IV speaks for itself.[11]

Yet defendant argues that the Supreme Court's decision in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), "squarely foreclose[s]" our reliance on Hague IV and the six other cited treaties. Mot. Dis. 11. However, none of the seven treaties relied upon by plaintiffs in the present case were cited or mentioned in Amerada Hess. Moreover, the three specific treaties that were cited in Amerada Hess (relating to the high seas, to maritime neutrality, and to friendship, commerce, and navigation) were unrelated to the question of state responsibility for belligerent activity in wartime.[12] Thus those three treaties, unlike the seven treaties we rely upon in the present case, did not presuppose a waiver of sovereign immunity. The decision in Amerada Hess is simply not in point.[13]

In sum, this first path to finding jurisdiction over the defendant—based on treaties in existence at the time of the enactment of the FSIA as provided in 28 U.S.C. § 1604—is complete, exhaustive, and self-contained. The Court could end its jurisdictional inquiry here on this first path, even without considering the substantive provisions of sections 1605-1607 of the FSIA. However, there are other paths that also lead to subject-matter jurisdiction over Japan.

B. The Tort-Exception Path.

As a general rule of construction, it is important to bear in mind that the FSIA does not create a presumption in favor of sovereign immunity. Rather, as the increasing number of cases on the FSIA have uniformly held, the exceptions to sovereign immunity contained in sections 1605-07 stand on the same legal footing as the remaining instances of sovereign immunity. It is like observing that although the earth's surface is covered by land and water, there is no "presumption" in favor of either one. Indeed, Congress has

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[11] Notably, Article 3 of Hague IV is formulated in terms of civil liability for wartime transgressions. Its use as a basis for criminal liability in war-crimes trials originated in the Yamashita case and in the later Nuremberg cases. See the quotation from Yamashita, *supra*, p. 5.

[12] It should be noted that there is no requirement under 28 U.S.C. § 1604 that jurisdictional waivers in existing treaties be either explicit or implicit; the phrase "waived its immunity either explicitly or by implication" only appears in the next section of the FSIA, § 1605 (a)(1).

[13] Although there was a war in Amerada Hess, it was between Argentina and Great Britain, and did not involve the United States.

explicitly provided for equality of treatment in the first sentence of its "declaration of purpose" of the FSIA, 28 U.S.C. § 1602:

> The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.

An important exception to foreign immunity in the FSIA, as pleaded in Amended Complaint ¶ 26, is § 1605(a)(5), which provides that there shall be no immunity in any case

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . . [with an exception for "discretionary function" and seven enumerated torts]

Of course, most of the injuries to the plaintiffs occurred outside the territory of the United States.[14] However, the Ninth Circuit Court of Appeals in a leading case decided in 1984 held that:

> The FSIA requires us to protect the rights of plaintiffs while respecting the sovereignty of foreign states. Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5).

Olsen v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984). The phrase from Olsen of "at least one entire tort" was cited by the present Court in its Memorandum and Order of April 23, 2002, at 6. The Olsen case and the "at least one entire tort" language were again cited in the Amended Complaint, ¶ 26(C). Yet despite the prominence and importance of the Olsen holding, defendant ignores it completely. Surely the defendant cannot plausibly claim to have overlooked the Olsen case while inundating these proceedings with citations to no fewer than 82 cases, *see* Mot. Dis. iii-vii (Table of Authorities).

The torts that occurred in the territory of the United States and taken as true by the defendant for the purposes of its Motion to Dismiss, include:

> On February 23, 1942, shortly after 7 p.m., a Japanese submarine fired 13 shells at the Bankline Refinery at Goleta in Southern California. One oil

[14] *See*, however, the additional allegations, uncontested by the defendant, contained in Amended Complaint, ¶ 26 (A) and ¶ 26 (B).

> well was damaged. On June 21, 1942, Japanese Submarine I-25 shelled the harbor defenses of the Columbia River in Washington State. The next day, June 22, 1942, a Japanese submarine shelled a military depot at Fort Stevens, Oregon—the first attack by a foreign power on a continental U.S. military installation since the War of 1812. On September 9, 1942, a Japanese warplane, launched from Submarine I-25, bombed Mt. Emily, Oregon, igniting a forest fire. Incendiary bombs were also dropped near Brookings, Oregon. On September 29, 1942, a Japanese plane again bombed Mt. Emily. Then Submarine I-25 sank two American tankers off the Oregon coast.

Amended Complaint, ¶ 26(C). In addition, during the writing of this brief, one of the plaintiffs brought to our attention a little-known fact about Japanese attacks on American soil in 1944 during the later stages of the war.[15]

> During the Second World War the Japanese conceived the idea of fashioning incendiary bombs and attaching these to balloons which were released with easterly wintertime jet stream winds above 30,000 feet to float 5,000 miles across the north Pacific. The idea was to have these devices explode over the forested regions of the Pacific Northwest and initiate large forest fires that would hopefully divert U.S. manpower from warfighting in the Pacific theater to combating fires at home.
>
> The balloons were crafted from mulberry paper, glued together with potato flour and filled with expansive hydrogen. They were 33 feet in diameter and could lift approximately 1,000 pounds, but the deadly portion of their cargo was a 33-lb anti-personnel fragmentation bomb, attached to a 64–feet long fuse that was intended to burn for 82 minutes before detonating. The Japanese programmed the balloons to release hydrogen if they ascended to over 38,000 feet and to drop pairs of sand filled ballast bags if the balloon dropped below 30,000 feet, using an onboard altimeter. Three-dozen sand-filled ballast bags were hung from a 4-spoke aluminum wheel that was suspended beneath the balloon, along with the bomb. Each ballast bag weighed between 3 and 7 pounds. The bags were programmed to be released in pairs on opposing sides of the wheel so the balloon would not be tipped to one side or another, releasing any of the precious hydrogen. In this way the balloons would rise in the daylight heat each day of the crossing and fall each evening, till their ballast bags were depleted, at which time the balloon and its deadly contents would descend upon whatever lay beneath it.
>
> The first balloons were launched on November 3, 1944 and began landing in the United States on November 5th (off San Pedro, California) and by the following day (November 6th) were landing as far away as Thermopolis, Wyoming. 285 confirmed landings/sightings were made over a wide area, stretching from the Aleutian Islands, Canada and across the width and breadth of the continental United States: as far south as Nogales, Arizona (on the Mexican border) and easterly, to Farmington, Michigan (10 miles from Detroit). Most of the ballast bags were released in the trip across the north Pacific, but a

[15] This fact in the normal course of events would have been brought out at trial, at the end of which a new Amended Complaint would have been filed with this Court. However, because of the fact that we have been made aware of this new fact in advance of trial, it is part of our professional responsibility to bring it to the attention of the Court.

> few balloons crashed without exploding and some of the ballast bags were recovered. All of the bags contained the same type of dark colored sand.
>
> The U.S. government muzzled the media about making any mention of the balloons in fear that whoever was producing them might be encouraged to send more. On March 5, 1945 a minister's wife and five Sunday School students on a fishing trip were killed by one of the grounded balloons near Bly, Oregon while attempting to pull it through the forest, back to their camp. These were the only casualties of the balloon bombs during the war and the victim's relatives were provided with a special death benefit after the war ended (in March 1946)....
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> Although only 285 of the 9,000 bomb-laden balloons the Japanese launched were documented to have reach North America, experts believe that probably close to 1,000 made it across the Pacific.

J. David Rogers, "How geologists unraveled the mystery of Japanese vengeance bombs in World War 2,"

http://web.umr.edu/~rogersda/forensic_geology/Japanese%20engeance%20bombs%20of%20World%20War%202.doc (Ex. 2).

According to a report issued by the United States Air Force Museum:

> One of the best kept secrets of the war involved the Japanese balloon bomb offensive.... Some 9,000 balloons made of paper or rubberized silk and carrying anti-personnel and incendiary bombs were launched from Japan during a five-month period, to be carried by high altitude winds more than 6,000 miles eastward across the Pacific to North America. Perhaps a thousand of these reached this continent, but there were only about 285 reported incidents. Most were reported in the northwest U.S., but some balloons traveled as far east as Michigan.

"Japanese Balloon Bombs," http://www.wpafb.af.mil/museum/history/wwii/jbb.htm (Ex. 3).

Inasmuch as defendant has ignored the Olsen case in its entirety and thus has made no argument concerning the "entire tort" holding, it becomes our task to play devil's advocate. We submit that defendant could argue that the "entire torts" enumerated by the plaintiffs are such a tiny fraction of the overwhelming number and magnitude of the torts committed in the Pacific Theatre in World War II as to amount to jurisdictional insignificance. The present case cannot be dragged into an American court on the basis of those very few and limited Japanese torts committed on the American mainland. As the old proverb goes, one swallow does not make a summer.

If the foregoing is a fair characterization of the argument defendant might make, we respond as follows. When Japan without a declaration of war attacked Pearl Harbor on December 7, 1941, its goal was to defeat the United States by extending its attack to the American continent. It wanted and intended to take the war to American soil. It failed for the most part to do this, but not from want of effort. It failed because of the

effort, courage, sacrifice, and determination of the plaintiffs in the present case. They were successful in safeguarding American territory from the defendant's ravages. Thus the number of times the defendant actually hit the continental United States, recounted above, were numerically few only because of the efforts of the plaintiffs and not because of restraint on the part of the defendant. The fact that there were some World War II torts committed on American soil coupled with defendant's desire to commit all their torts on American soil is more than sufficient to bring the case within the meaning, purpose, and language of § 1605(a)(5) of the FSIA.

Nor are the torts committed on American soil somehow separable from the torts that caused injuries and deaths to the plaintiffs in the present case. They are all part and parcel of a war conducted by Japan in violation of the seven treaties above referred to—a war found in its entirety to have been an illegal act of aggression by the International Military Tribunal for the Far East. Japan initiated a war against American as a whole, bombing Pearl Harbor.[16] Any American person, property, or vessel was a target for the armed forces of Japan. The (thankfully) few Japanese submarines that attacked the American west coast were not engaged in a frolic of their own. The 9,000 incendiary balloons launched in 1944-45 from Japan, 835 of which made it across the Pacific Ocean, were not a showy feature of a private Japanese New Year's celebration. World War II itself was not a collection of millions of discrete wars, each beginning with a single military act and ending in a single injury, death, or destruction. The present case is not about a million torts separated from each other solely for the forensic reason of enabling the defendant to evade its responsibility for monetary damages. There was just one total War that in the years 1941-1945 reached all seven continents—so far the only total war in the history of the world.

[16] Defendant erroneously tries to separate the Pearl Harbor bombing from the rest of the war: "while the complaint does state that Japan's 'war of aggression' against the U.S. was begun by the Pearl Harbor bombing in December 1941, Rosen's claims do not rest on this act." Motion to Dismiss, at 15. To be sure, Col. Melvin H. Rosen's own claims do not rest on the Pearl Harbor tragedy, but he is only one of the more than 437,025 plaintiffs in the present class action. All American soldiers, sailors, nurses and other Army medical and engineering personnel killed (a total of 2,335 persons) or injured (total of 1,143) in the Pearl Harbor attack are included among the plaintiffs and plaintiffs' representatives in the present case. We filed at the outset of this litigation all motions and necessary supporting documents for a federal class action. In addition, the class-action allegations are an integral part of our Amended Complaint, which the defendant must for the present take as true. It is simply the defendant's time-wasting motion to dismiss that has temporarily put the matter of class-action certification on hold.

Defendant emphasizes that § 1605(a)(5) does not apply to

> (A) any claim based on the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

Defendant then devotes three pages to the argument that the plaintiffs' injuries and deaths were the legally excusable result of an exercise of discretion on the part of the Empire of Japan. But people who commit war crimes are not merely exercising a discretionary function; witness the current trials of Milosevic and Pinochet, both former heads of state. The numerous criminal trials conducted by the International Military Tribunal for the Far East convicted many Japanese political leaders of the international crime of initiating and waging an unlawful war, and furthermore convicted many Japanese military leaders of conducting the war in violation of the Hague and Geneva conventions. Not one of these defendants successfully argued to the Tribunal that they were exercising a discretionary function and thus should not be held accountable for their crimes.

Perhaps in awareness of the implausibility of its argument that committing war crimes is a discretionary function, defendant resorts to charging us with something we did not say. Defendant writes: "That plaintiffs allege that the former Japanese military abused its power does not change this result." Mot. Dis. 21. But we did not allege an abuse of power. Perhaps defendant means "abuse of discretion," invoking the last few words of paragraph (A) of the statute above quoted. But we did not allege an abuse of discretion either. Nor would we have alleged such a thing. It makes no more sense to call the commission of a serious crime an "abuse of discretion" than it would to call it an "exercise of discretion." Defendant is attributing nonsensical phrases to us and misleading this Court in the process.

To support its characterization of war crimes as an abuse of discretion, defendant misleads this Court further in the use it makes of Saudi Arabia v. Nelson, 507 U.S. 349 (1993). Scott Nelson, an American citizen working as an engineer in Saudi Arabia, complained that he was tortured by the Saudi police.[17] The alleged tort took place entirely in Saudi Arabia; no part of it occurred in the United States. Thus the "tort

[17] The Supreme Court expressed skepticism at this allegation, pointing out that when officials from the United States Embassy visited Nelson twice during his detention after the alleged torture, they concluded that his allegations of Saudi mistreatment were "not credible." 507 U.S. at 353.

exception" to the FSIA was not available to Nelson, in contrast to the plaintiffs in the present case where the Japanese war of aggression spilled over into United States territory. The only available connection to United States territory in the Nelson case for the purpose of jurisdiction over a foreign state was the commercial activity exception of § 1605(a)(2). But despite the fact that there were commercial aspects to Nelson's situation, the Supreme Court held that the particular act he complained of was not a commercial act; rather, it was a public or sovereign act committed by the Saudi police.

The Nelson case involved the construction of a different section of the FSIA than is involved in the present case. Moreover, the section of the FSIA invoked in Nelson says absolutely nothing about "discretion" or "discretionary function" or "abuse of discretion." Nor does the Nelson case say anything about international law or treaty law, whereas the present case is based entirely upon defendant's violation of international law and treaty law. Finally, Nelson does not involve the sustained projection of authority outside the territory of Saudi Arabia by its armed forces; rather, it involves only a single, wholly internal alleged police act in Riyadh, Saudi Arabia.

Defendant not only cites the Nelson case; it bases its primary reliance on that case. How can it do so in light of the distinctions just listed? Defendant's technique is worth quoting:

> [T]he acts alleged in the amended complaint "boil[] down" to an abuse of military power, Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993), and "a foreign state's exercise of [such] power . . . has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." Id. (emphasis added).

Mot. Dis. 7. The quoted term "boil[] down" is wrenched out of its context in the Nelson case so that it serves to link two concepts, namely, acts alleged in our complaint, and abuse of military power. But neither of these two concepts appear in the Nelson case. What the Supreme Court said in Nelson is as follows:

> [T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of power of its police by the Saudi Government.

507 U.S. at 361. Defendant's mis-uses of citation are bad enough, but what happens in the rest of the quotation is an outright misrepresentation. Defendant interpolates the

bracketed term "[such]" in its long quotation from Nelson so as to make it appear that the Supreme Court was referring to an abuse of military power. Yet as can be seen from the actual words of the Supreme Court quoted directly above, the Court was talking about police power and not about military power. Defendant is thus claiming in a brief filed with this Court that, on a critical issue, the Supreme Court said something which it did not say. This comes after the previously-mentioned attribution to us of an allegation we did not allege.

And defendant resorts to these tactics for the purpose of jamming the entirety of World War II into the "discretionary function" wording of § 1605(a)(5). There was an expression that became very popular in the United States during World War II as a standard response to anyone making a preposterous and unbelievable assertion. The response was "Tell it to the Marines!" One is tempted to say, in response to defendant's claim that the widespread and systematic atrocities Japan committed during four years of what was referred to at the time as "Hell in the Pacific" was merely an exercise of a discretionary function, "Tell it to the Marines!"

C. Estoppel. We are not aware of any case that has applied the doctrine of estoppel to the FSIA. Nevertheless, we advance the argument here as clearly constituting a third path to subject-matter jurisdiction over Japan. Estoppel is a common-law doctrine that can prevent or bar someone from asserting either statutory or common-law defenses. In the present case, we contend that a secret exchange of letters of interpretation between the Prime Minister of Japan and the Minister of Foreign Affairs of The Netherlands, in conjunction with the signing of the San Francisco Peace Treaty in 1951, combined with the Treaty itself, estop Japan to claim the defense of sovereign immunity against the plaintiffs in the present case.[18] Although we cite that exchange of letters as the

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[18] Estoppel is doctrinally close to waiver, and has many of the same consequences. The reason our argument is couched in terms of estoppel rather than waiver is that in 1951, when Japanese representatives of the people of Japan signed the San Francisco Peace Treaty, they had no sovereign rights to waive. They were not representing a "state" under international law, rather they were symbolic representatives of an occupied country that was totally under American sovereignty and governance. Japan had surrendered unconditionally to the Allies in 1945, and between 1945 and 1951 were governed by General Douglas MacArthur. Thus it would be incorrect to say that Japan in 1951 "waived" its "sovereign immunity" in the negotiations leading up the San Francisco Peace Treaty, for it had no "sovereignty" at all prior to the conclusion of the Treaty. It was the Peace Treaty itself, signed by the Allied Powers including the United States, that conferred sovereignty upon Japan in September, 1951.

centerpiece of our interpretation of the San Francisco Peace Treaty in our Amended Complaint at ¶ 36(A), defendant once again deals with an unwelcome contention by not mentioning it. *See* Mot. Dis. 21-29. The full story, which is in the public record and which we intend to introduce into evidence at trial, is reported in The New York Times:

> The 1951 treaty, largely through the efforts of America's principal negotiator, John Foster Dulles, sought to eliminate any possibility of war reparations. . . . Only days before the treaty was to be signed, the Dutch government threatened to walk out of the convention because it feared that the treaty "expropriated the private claims of its individuals" to pursue war-related compensation . . . . European opinion mattered to Dulles, who feared that a Dutch exodus might lead the United Kingdom, Australia and New Zealand to drop out as well. On the day before and the morning of the signing ceremony, Dulles orchestrated a confidential exchange of letters between the minister of foreign affairs of the Netherlands, Dirk Stikker, and Prime Minister Shigeru Yoshida of Japan. Yoshida pledged that "the Government of Japan does not consider that the Government of the Netherlands by signing the Treaty has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the Treaty comes into force these claims would be non-existent."
>
> Article 26 of the treaty states that "should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided to the present Treaty, those same advantages shall be extended to the parties to the present Treaty." This is why the letters had to be confidential; they preserved the rights of some Allied private citizens, in this case Dutch citizens, to pursue reparations.

Steven C. Clemons, "Recovering Japan's Wartime Past–and Ours," New York Times, Sept. 24, 2001 (Ex. 4). The Stikker-Yoshida correspondence, *reproduced in* Ex. 5, by its terms negates any intent in Article 14(b) to ratify by treaty "the expropriation by each Allied Government of the private claims of its nationals." Obviously the official understanding of Japan of the Treaty it was just about to sign cannot single out one signatory for privileged interpretation. Rather, the interpretation must apply, as the Stikker-Yoshida correspondence says, to each Allied Government.

Subsequently to the coming into effect of the Peace Treaty, a number of governments obtained financial compensation for their nationals from Japan. One of these was The Netherlands which, as we alleged in our Amended Complaint, obtained from Japan in 1956 a settlement of ten million dollars. On ten other occasions subsequent to 1951, Japan entered into separate settlements with other countries, including payment of 250 million dollars to Burma in 1954, of 25 million dollars to the Philippines in 1955, of 2,426,693 Swiss francs to Sweden in 1955, of 223 million dollars to Indonesia in 1958, and of 39 million dollars to Vietnam. In contrast to these successful

efforts by other countries to obtain compensation for the injuries, suffering, and death of their nationals, the United States has turned a cold shoulder to its servicemen and servicewomen. Because their own country will not help them, the plaintiffs are bringing the present action directly against Japan for the compensation that has been owed to them for too long.

Even apart from the Stikker-Yoshida interpretation of the Peace Treaty, it is clear that the United States could not have given away the plaintiffs' claims against Japan for the simple reason that the United States did not own those claims. The plaintiffs' claims against Japan were and are their own claims. John M. Rogers, Lewis Professor of Law at the University of Kentucky College of Law and currently President Bush's nominee to the Sixth Circuit Court of Appeals, analogizes Article 14(b) of the Treaty to the public-private distinction in criminal-tort cases. John M. Rogers, Opinion, http://www.house.gov/judiciary/rogers092502.htm, (Ex. 6). The victim of a negligent driver has a private cause of action in tort against the driver, while the public prosecutor may bring a criminal charge against the driver. The victim can no more "waive" the prosecutor's right to bring the criminal action than the prosecutor can "waive" the victim's right to bring the tort action. In the San Francisco Peace Treaty, the United States waived its own public claims against Japan in exchange for a valuable cession by Japan to the United States of the Kurile Islands as well as a number of other claim renunciations by Japan enumerated in Article 5 of the Treaty. (Def. Ex. 2) But the United States in Article 14(b) of the Treaty could not "waive" the private claims of its nationals in the sense of giving them away.[19] The waiver language in Article 14(b) was only a waiver of the United States' right to espouse those claims on behalf of its nationals. As Professor Rogers concludes, "I have reached an opinion that Article 14(b) does not preclude actions brought by United States nationals in United States courts under domestic (i.e., Japanese or United States) law."[20] Id.

[19] Japan, as we have seen, recognized in the Stikker-Yoshida correspondence the fact that the private claims remained intact after the Treaty was executed.

[20] The U.S. domestic law in the present case is found in the seven treaties previously cited plus international law as part of federal common law. The latter concept is carefully explicated in an ironically titled article by Harold Hongju Koh, "Is International Law Really State Law? 111 Harv. L. Rev. 1824 (1998).

III. NO OTHER REASONS JUSTIFY DISMISSING THIS CASE

Defendant has made several other arguments in its Motion to Dismiss, none of requires or justifies extended discussion.

A. Retroactivity. Defendant claims that the rule of sovereign immunity that was in effect in 1941-1945—the time of the events in the present case—should be applied instead of the FSIA, and that earlier rule mandated absolute immunity for Japan. Mot. Dis. 5-10.[21] If defendant's position were correct, it would only affect **II.B.** of our argument above. The arguments in parts **A** and **C** of section **II** would remain the same. It is important especially to note, as argued in part **A**, that plaintiffs' claims for damages in tort are based on seven treaties entered into by Japan prior to 1941 and specifically violated by Japan in 1941 through 1945..

A persuasive argument has been made by Judge Ginsburg that the FSIA must be given retroactive effect. Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C.Cir. 1994). At the time of enactment of the FSIA in 1976, Congress deleted from 28 U.S.C. § 1332 the provision for diversity jurisdiction over suits brought by United States citizens against foreign governments on the stated ground that diversity jurisdiction had become superfluous in light of the comprehensive treatment of jurisdiction in the FSIA. Judge Ginsburg adds:

> Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA but based upon pre-FSIA facts, the implication is strong that all questions of federal sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA.

[21] Defendant's statement of the history of sovereign immunity is totally incorrect. United States law did not render foreign states absolutely immune from liability in United States courts. Courts deferred to the State Department's wishes concerning immunity, which nearly always resulted in granting sovereign immunity to friendly governments. But if the foreign government were unfriendly to the United States—or at war with the United States—the State Department would not have asked for immunity. It cannot be assumed that during a total war against Japan and Germany that the State Department would have recommended immunity for those governments had they been sued in an American court. As the Supreme Court summed up in the definitive Verlinden case, 461 U.S. at 486, "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. . . . Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns" (emphasis supplied).

26 F.3d at 1170.[22] A later court held that

> In light of the conclusions drawn by the Court of Appeals in Princz and a plain reading of the statutory language and legislative history of the FSIA, this court is satisfied that Congress intended the FSIA to be applied retroactively.

Crist v. Republic of Turkey, 995 F. Supp. 5, 9 (D.D.C. 1998).

If one's substantive vested rights would be adversely affected by making a statute retroactive, then the retroactivity would be contrary to the settled jurisprudence of American law. *See* Kaiser Aluminum and Chemical Corp. v. Bonjorno, 494 U.S. 827, 842-44 (1990) (Scalia, J. concurring). However, when the retroactivity only adversely affects one's immunity from being sued, a different analysis is needed. For example, if Japanese officials in 1941 literally thought they could get away with murder because they were shielded by sovereign immunity, then retroactively removing that immunity does not take away any of their vested rights because they had no right to commit murder in the first place. Similarly, the Japanese military in World War II had no reasonable expectation of immunity for committing the war crimes enumerated in treaties binding upon Japan. Moreover, they had no reliance interest that courts in other countries would shield them from financial responsibility for the injuries resulting from their crimes under some sort of immunity doctrine. A statute affecting jurisdiction like the FSIA "usually takes away no substantive right but simply changes the tribunal that is to hear the case." Princz, 26 F.3d at 1170.

Assuming, however, that this Court finds that the FSIA should not be given retroactive effect in the present case, the question would then become whether Japan enjoyed sovereign immunity during the war years 1941-1945. To be sure, there was no lawsuit filed in an American court against Japan during those years, presumably because it would have been a waste of time and energy. But there was nevertheless a great deal of judicial activity involving Japan. Under the Trading With the Enemy Act, 50 U.S.C. § 1, and the First War Powers Act of 1941, 50 U.S.C. App. 616, all checking accounts, bank deposits, bank balances, letters of credit, securities, papers, real property, personal property, or vessels, belonging to the government of Japan or to the Emperor of Japan

[22] Defendant argues that there is no proof of clear Congressional intent to make the FSIA retroactive. Mot. Dis. 8. But Judge Ginsburg's reasoning demonstrates that Congress could not rationally have intended for the FSIA to be prospective only.

were made subject to seizure and confiscation by the Alien Property Custodian of the United States. The Custodian was not worried about lawyers for Japan showing up and claiming that it was official government property protected by sovereign immunity. Quite to the contrary, it was the Custodian's job to prove that the property belonged to Japan so that it could be lawfully seized. Under their supervisory powers, American courts had the final word on whether a seized property belonged to Japan or to a Japanese national—not so as to protect the property with a mantle of sovereign immunity, but rather to achieve the exact opposite—to confiscate the property in an ex parte proceeding.

During the war years, Japan had no legal rights whatever in the United States. It would be a legal fiction to claim, as defendant does, that Japan nevertheless enjoyed sovereign immunity. But even if it enjoyed a scintilla of sovereign immunity in American courts in respect of inconsequential matters,[23] that immunity did not and could not have extended to shielding Japan from accountability for the consequences of its war crimes.[24]

B. Political Question. Defendant's efforts to bury this case under a smog of high diplomatic policy are unavailing. There is no lack of judicially discoverable and manageable standards; all the issues of Japanese violations of its treaties have already been meticulously adjudicated by the International Military Tribunal for the Far East. The question of each individual plaintiff's damages in the present litigation can be handled administratively the same way it is handled in other class action cases. Any amounts already paid to any of the plaintiffs under the War Claims Act of 1948 will of course be deducted at their present dollar value from monetary damages awarded the plaintiffs in this action. The defendant quotes the "potentiality of embarrassment" from a 1962 case (Baker v. Carr, 369 U.S. 186, 217) in apparent ignorance of Justice Scalia's

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[23] *See* note 21, *supra*.

[24] It is the war-crimes charges that decisively distinguish the present case from the few cases the defendant cites regarding war-time sovereign immunity. In Hwang v. Japan, 172 F.Supp.2d 52 (D.D.C. 2001), damages were sought for the rapes committed by Japanese troops against Korean "comfort women." Regrettably, rape and sexual slavery were not war crimes during World War II, a glaring omission that has recently been corrected in international criminal law. In Djordjevich v. Bundesminister Der Finanzen, 827 F.Supp. 814 (1993), the plaintiff's uncle transferred some gold coins to a German Commandant in Yugoslavia in 1941. There was no indication whether the gold coins were borrowed, exchanged, or expropriated. No semblance of a war crime is involved in this case.

later burial of that idea when he discussed the act of state doctrine in terms equally applicable to the political question doctrine and the sovereign immunity doctrine:

> It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine . . . . The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments . . . .

W.D. Kirkpatrick v. Environmental Tectonics, 493 U.S. 400, 409 (1990) (Scalia, J.)

C. Sympathy for Japan. Defendant suggests that it would be too politically "sensitive" (Mot. Dis. 30) and "delicate" (Mot. Dis. 32) to hit Japan with a trillion dollar judgment in this Court. Defendant states that such a judgment would "undermine" the foreign policy of the United States. (Mot. Dis. 32) Indeed, a judgment against Japan in this litigation could have "serious implications for the peace and stability in the Asian-Pacific region." Mot. Dis. 34. Defendant argues that United States policy in 1951 was to rebuild Japan's economy and make it viable, and therefore the plaintiffs' private claims had to be sacrificed. But defendant makes no mention of the fact that Japanese troops during World War II would routinely descend upon village after village in China, Formosa, Burma, and the Philippines, snatch babies from the arms of their mothers, and force the women to watch while they flung the babies high in the air and caught them on the ends of their bayonets. After which they proceeded to gang-rape the mothers.[25] The plaintiffs in the present case risked their lives to prevent the Japanese armed forces from landing in the United States and doing the same thing here. For their trouble, defendant thinks it perfectly reasonable that their private claims for redress against Japan should have been taken away from them in San Francisco in 1951. The lucky recipient of the plaintiffs' valuable claims was the enemy they had defeated in the war—Japan..

Although we do not re-allege damages of one trillion dollars in our amended complaint—upon reconsideration we feel it would be better to leave the damages question up to the court—the defendant nevertheless seems quite obsessed with that figure. We originally calculated it on the assumption that the plaintiffs are each entitled

[25] *See, e.g.,* Iris Chang, The Rape of Nanking (1998); John W. Dower, War Without Mercy (1986).

to damages comparable, in today's dollars, to the rule of damage-measurement applied to the victims of the 9/11 disaster.[26] Be that as it may, the figure of one trillion dollars represents less than one per cent of Japan's net worth.

If the United States had espoused its nationals' claims in 1951, the then value of those claims, based on a discount rate of 6%, would have been 44 billion dollars. But although one trillion dollars today amounts to less than one per cent of Japan's net worth, the equivalent amount in 1951's dollars, namely 44 billion dollars, could have dealt a critical blow to Japan's war-damaged economy. It is no wonder, then, that John Foster Dulles decided to make a present to Japan of 44 billion dollars worth of claims. (However, as we have seen above, it was all mirrors, smoke and subterfuge; in fact, Mr. Dulles could not give away anything he did not have. The plaintiffs still own their private claims.)

Defendant should be grateful to the plaintiffs that they waited so many years to pursue their claims. Japan's economy has gone from bust to boom in the meantime. Claims that in 1951 dollars would have crippled their economy back then will now hardly make a dent in their net worth. Prompt payment by Japan of whatever damages a court awards would go a long way to ameliorating the hard feelings left over at the end of World War II. If prompt payment is coupled with a genuine expression of apology for its atrocities, warm relations between the citizens of the two nations could again be fostered to the mutual advantage of the trade, peace, stability, and foreign policy of both the United States and Japan. After all these years, if Japan owns up to its wartime history and makes restitution to the American people in an amount less than one per cent of its net worth, this lawsuit could turn out to be the best thing that ever happened to Japan.

D. Statute of Limitations. Although defendant would like a statute of limitations to exist so that the plaintiffs' claims would be time-barred, it cannot produce one by wishful thinking. Its search for such a statute has been fruitless; it simply has been unable to find or cite any statute of limitations in international law applicable to this case. The reason is simple: there are no statutes of any kind in international law. International law is made up of treaties and the customary practices of states. A treaty

[26] We think, however, that if this were a jury case—it cannot be because the defendant is a foreign country—the aggregate damages awarded would far exceed one trillion dollars.

may specify its own limitations period, but the presumption in the absence of such a provision is that the treaty lasts until it is abandoned, retired, or denounced by its parties.

The most important substantive treaty in the present case—Hague IV—is still very much alive and is cited, in these days of war-crimes prosecutions, more often than ever before. If there were to be applied to Hague IV an "analogous" statute of limitations of one of the states party to the treaty, which state should be chosen? If the forum state is chosen, as the defendant suggests, it would lead to the absurd result that a national of state A could sue state B in A's court but a national of state B could not sue state A in B's court for a similar tort that occurred at the same time. The reason is that state A might have a long statute of limitations, thus allowing its national to sue state B in the courts of state A. But state B, the forum state for its own nationals, might have a short statute of limitations, thus precluding suit for a similar tort committed at the same time. The most important rule of treaty interpretation in international law, going back thousands of years, is that a treaty does not apply to its parties differentially. Thus the use of the forum state for an "analagous" statute of limitations is a self-contradictory proposition..

For roughly similar reasons, it would be impossible to pick one state or several states, after a treaty has gone into effect, and announce that the statutes of limitations of the chosen states shall "count" for all the states that are party to the treaty. Consider, for example, the more than 45 original signatories to Hague IV. Should the "analogous" statute of limitations be found in the statutes of Austria, Bohemia, Ecuador, Greece, Japan, Persia, Siam, or the Ottomans? What happens if some of those states, such as Persia and the Ottomans, no longer exist? Should the modern states that have been carved out of those original states—including Iran, Iraq, Kuwait, and Turkey—be substituted for them? Wouldn't that give four states an extra weighting in the choice of the statute of limitations when there were only two states to begin with? And what can be considered an "analogous" statute in any of the states? Most states do not have domestic law that parallels the prohibitions in Hague IV. To take just one example, there is no domestic law in any of the signatories to that treaty that is analogous to the prohibition on bombing undefended towns or villages. Not only is the entire enterprise of looking for analogous statutes absurd under international law, but there is not even an international rule of law permitting the importation of domestic limitations periods in

international litigation. There simply are no statutes of limitations under international law, no rules for adopting "analogous" statutes, and no rules for plucking statutes of limitation from individual countries and elevating them to the international level.

In any event, the San Francisco Treaty of Peace upon which the defendant relies so heavily contains an explicit provision that postpones Japans liability without specifying any limitations date. Article 14(a) states explicitly:

> It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

It is clear that this provision qualifies and modifies Article 14(b) which contains the waiver clause. It is clear that the signatories to the Treaty looked forward to a time when the resources of Japan would be sufficient to pay all or most of the reparations that were now being postponed.[27] The phrase "the resources of Japan are not presently sufficient" captures this intent as well as any language possibly can. Yet one would never know any of this from reading defendant's Motion to Dismiss. Resorting once again to truncated quotations that distort the plain meaning of the texts being quoted, defendant says:

> This lawsuit—which seeks $1,000,000,000,000 in reparations, see Original Complaint ¶ 52—is quite obviously contrary to that fundamental foreign policy. As stated in the Treaty itself, Japan would not be able to "maintain a viable economy" if it were required to "make complete reparation" for "the damage and suffering caused by it during the war." Art. 14(a).

Comparing this selective version of Article 14(a) with the original version quoted above it, one notes that the "presently sufficient" language has evaporated. Once again, it is clear that defendant's brief is riddled at its most important moments with distortions and, in some cases, outright inventions, of the texts it purports to be quoting.

[27] See also Amended Complaint ¶ 25(a), showing that the critical Article 26 of the Peace Treaty also looks forward to revising in an upward direction Japan's reparations on the basis of a most-favored-nations clause.

CONCLUSION

Japan has asserted no national interest, no national public policy, and no international support for its claim that it is entitled to a free pass for the injuries, sufferings, and deaths resulting from its criminal conduct in initiating and executing a war against civilization. Especially now that Japan has become the second richest nation in the world, it cannot be allowed to continue to evade its financial responsibility for the foreseeable results of its aggression. There is a legitimate means of recourse for American victims through the American judicial system. Defendant's Motion to Dismiss must be denied.

Respectfully submitted,

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