

# COMPENSATING WAR VICTIMS IN IRAQ AND AFGHANISTAN

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## I. INTRODUCTION

The stories of World War II era American prisoners of war ("POWs"), victims of the South Korean No Gun Ri massacre, members of the Organization of Ukrainian Antifascist Resistance Fighters, and the Ukrainian Union of Nazi Victims and Prisoners are united by one common thread. In each instance, victims suffered grave wartime breaches of their human rights, and few, if any, of their injuries were ultimately compensated.

This article reviews legal and political obstacles to efforts to redress wartime victims of human rights violations. It then advocates certain preventative measures to increase access to a civil system of tort compensation to future victims. Part II examines instances of deserving victims who were frustrated in their search for justice and pinpoints where the compensatory system failed them. Part III discusses the proposition that current strife in Afghanistan and Iraq will produce a stream of new victims of human rights violations. Part IV concludes by suggesting the international community can learn from its mistakes by avoiding those same pitfalls as they resolve the claims made by the plaintiffs who will emerge from the wars in Iraq and Afghanistan.

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## II. IMPEDIMENTS TO JUSTICE: THE USUAL SUSPECTS

### The Political Question Doctrine

Filing a motion to dismiss under the political question doctrine is a favored shield in the extensive armory of human rights defendants.<sup>1</sup> The political question doctrine is a more potent tactic than the statute of limitation issue which often accompanies it because (1) the political question doctrine can be argued at any point in time, and (2) the result appears more equitable to the now twice victimized plaintiff.<sup>2</sup> Whereas a suit that is time barred is often the end of the line for the sympathetic victim, when a judge grants a motion to dismiss on political question doctrine grounds, she can assuage her conscience through her hope that higher branches of government will ultimately resolve the plaintiff's claim.

In determining whether a political question is nonjusticiable, federal courts look to the following elements:

(1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>3</sup>

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<sup>1</sup> "The defendants in the modern period of Nazi-era litigation have relied on a uniform battery of defenses in seeking to have the cases dismissed." Russel Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Law Statute of Limitations and its Place in the Increasingly Futile Effort to Obtain Compensation from American Courts*, 23 WHITTIER L. REV. 121 (2001) (citing Michael Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 33 (2000) (discussing various Holocaust litigation defenses by Swiss Banks including motions to dismiss for political question and statute of limitation issues).

<sup>2</sup> Miller, *supra* at 126 (asserting that "the compelling emotional and historical significance of [human rights litigation] demands a more 'substantive' response from the courts than merely a dismissal on technical grounds.").

<sup>3</sup> *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 689 (N.D. Cal. 2003) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Should the court find "any one of these factors 'inextricable from the case,' the court should dismiss the case as nonjusticiable" under the political question doctrine."<sup>4</sup>

The political question doctrine strategy operates as follows. Defendants ask the courts to pass the buck to politicians because the claim is not of the kind typically predisposed to a judicial solution.<sup>5</sup> Upon exile from the judicial arena, the plaintiffs' quest is doomed unless they or their cause have enough resources or popularity to win politicians to their cause. The more horrific and grand in scale the atrocity committed, the more likely a judge will take sanctuary in the doctrine. The scheme finds support among members of the judiciary hesitant to try large scale human rights violations within their jurisdiction for fear of "wasting U.S. taxpayers' money" in the form of judicial resources on litigation between predominantly foreign parties over human rights abuses that occurred in another country.<sup>6</sup> In *Kelberine v. Societe Internationale*,<sup>7</sup> the court justified its ruling, in part, by holding the plaintiff's claim against a German corporation which profitably conspired with the Nazis, "[was] too complicated, too costly, to justify undertaking by a court."<sup>8</sup>

In practice, avoidance of judicial responsibility in trying grave breaches of human rights through the political question doctrine works so well that significant amounts of caselaw have accumulated, paving the way for yet more judicial abdications, as seen below in *Alperin v. Vatican Bank*.<sup>9</sup>

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<sup>4</sup> *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

<sup>5</sup> "The political question doctrine holds that a federal court having jurisdiction over a dispute should decline to adjudicate it on the ground that the case raises questions which should be addressed by the political branches of government." *Id.*

<sup>6</sup> Interview with Robert A. Swift, lead counsel, *In re Ferdinand E. Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); 103 F.3d 767 (9th Cir. 1996), Shareholder, Kohn, Swift & Graf, P.C., (Jan. 30, 2004).

<sup>7</sup> *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966).

<sup>8</sup> *Id.* at 995.

<sup>9</sup> 242 F. Supp. 2d 686 (N.D. Cal. 2003).

### ***Alperin v. Vatican Bank***

In *Alperin v. Vatican Bank*, the plaintiffs, a class of individual victims, their heirs, and four organizations<sup>10</sup> filed suit in the U.S. District Court of Northern California against defendant Order of Friars Minor ("OFM") and defendant Istituto per le Opere di Religione ("IOR"). The plaintiffs claimed that OFM and IOR cooperated with the Ustasha Regime, a "Nazi puppet government that controlled the Independent State of Croatia from 1941 through 1945 and occupied portions of the former Soviet Union along with German military forces" and were the recipients of the plaintiffs' looted assets.<sup>11</sup> The plaintiffs alleged that the defendants profited from the Ustasha Regime's genocidal acts through the conversion and transfer of over 200 million Swiss francs to the IOR. The plaintiffs also alleged that the IOR and OFM profited by smuggling Ustasha war criminals and their various assets to safety in South America after the war ended.<sup>12</sup> The defendants responded to the complaints by moving to dismiss under a variety of legal theories including that the court was not empowered to resolve political issues and on statute of limitations grounds.<sup>13</sup>

In applying the political question doctrine, the court relied on (1) the holdings of a series of cases ruling that Holocaust litigation is nonjusticiable,<sup>14</sup> and (2) various United States treaties

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<sup>10</sup> The organizations were "(1) the Ukraine Organization of Ukrainian Antifascist Resistance Fighters, representing '8,500 former partisans and resisters of the Nazi occupation of Ukraine and concentration camp victims,' (2) the Ukrainian Union of Nazi Victims and Prisoners, representing 'over 300,000 former slave and forced laborers, prisoners, concentration camp, and ghetto survivors,' (3) the Jasenovac Research Institute, a non-profit human rights organization and research institute 'committed to establishing the truth about the Holocaust in Yugoslavia,' and (4) the International Union of Former Juvenile Prisoners of Fascism, representing 'Nazi victims in the former Soviet Union including Ukraine, Russia and Belarus.'" *Id.* at 687.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 689 (citations omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *See Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing as nonjusticiable political question, Nazi concentration camp victims' claim seeking compensation for defendant companies' use of slave labor, production of Zyklon B, the gas used to kill prisoners in death camps, and refining gold and precious metals taken from prisoners, with knowledge of the source of labor and gold and use of the gas); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing plaintiff's claims that defendants were unjustly enriched by her forced

and agreements from the 1945 Potsdam Conference onwards that addressed the issue of reparations.<sup>15</sup> The district court stated that the "history of the management by the political branches of claims arising out of World War II and the Holocaust reveals a long-standing foreign policy commitment to resolving such claims at the governmental level."<sup>16</sup>

The problem with applying the political question doctrine in *Alperin* is that the court's theoretical preference for resolving Holocaust claims at the governmental level doesn't reflect reality. In practice, the relevant governmental entities will never force the Vatican Bank to turn over funds it received from the Ustasha regime or to disgorge profits it made smuggling Nazis. In the human rights case context, courts should only invoke the political question doctrine where they sincerely believe a governmental resolution is imminent. For example, if the *Alperin* court believed an inter-governmental resolution was in the works, it could have stayed the proceedings to give the executive branch an opportunity to act, either positively or negatively. The court could then wait, certainly for at least a year or more, depending on the circumstances, and see whether the political question became resolved successfully. If so, then the court could safely put the case to rest. If not, it would at least have the option of resuming the proceedings. In this model, inaction by the executive branch would not necessarily be viewed as a resolution against the plaintiffs, but rather as a signal that the matter was of such little international political significance that the courts could safely decide the case without impinging upon a sensitive political issue.

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labor during World War II, because international war reparations treaties precluded plaintiff's private cause of action).

<sup>15</sup> "Treaties and agreements between the United States and former Axis powers immediately following the end of World War II include the Potsdam Agreement (1945), Paris Agreement (1946), Treaty of Peace with Italy (1947), Transition Agreement (1952-54), London Debt Agreement (1955)." *Alperin*, 242 F. Supp. 2d at 691 n.6.

<sup>16</sup> *Id.* at 690 (citing *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 382 (D.N.J. 2001)).

## Waiver of the Right to Sue in Treaties

Throughout military history, the transfer of wealth from vanquished to conqueror has been a consequence of war. In the modern era, the United States turned the concept of warfare as a wealth transfer vehicle on its head. American victories fueled post-war booms in Germany, Japan, and South Korea through liberal grants, loans, subsidies, and investments aimed at rebuilding the institutions vital to modern industrial societies. The European Marshall plan alone cost American taxpayers over \$11.8 billion in grants and \$1.5 billion in loans<sup>17</sup> (for an inflation adjusted total of \$103 billion).<sup>18</sup>

The United States assumes the financial responsibility for rehabilitating its former foes and therefore has a vested interest in extinguishing claims for reparations made against the defeated nation. In coming to terms regarding claims for reparations against Japan, the official U.S. policy "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."<sup>19</sup> In accordance with this stance, the United States signed away its nationals' rights to sue in Article 14(b) of the Treaty of Peace with Japan, reproduced as follows:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.<sup>20</sup>

Money is fungible. If Japan and its companies had paid reparations to those it injured, then the United States would have been forced to expend that much more resources in

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<sup>17</sup> See *Marshall Plan Expenditures Chart*, at <http://www.marshallfoundation.org> (last visited Mar. 10, 2004).

<sup>18</sup> What cost \$13,325,800,000 in 1948 would cost \$103,278,696,190.54 in 2002. See *The Inflation Calculator*, at <http://www.westegg.com/inflation> (last visited Mar. 10, 2004).

<sup>19</sup> Treaty of Peace With Japan, Sept. 8, 1951, U.S.-Japan, 3 U.S.T. 3169.

resurrecting the Japanese economy. By entering into postwar treaties foreclosing the rights of private individuals to sue for human rights violations, the United States extracted savings from the suffering of war victims. It is doubtful that those savings were worth sacrificing our moral notions of justice.

### **In re World War II Era Japanese Forced Labor Litigation**

Mirroring the Nazi reliance on slave laborers, the cogs in the Japanese war machine were greased by prisoners' sweat and blood.<sup>21</sup> American POWs numbered in the ranks of laborers forced to toil for the Japanese military and private industries. The aftermath of World War II found the Japanese economy in shambles. However, the Japanese companies that benefited from forced labor grew to become wealthy global businesses.<sup>22</sup>

The World War II Era case arose after California enacted Code of Civil Procedure § 354.6 in an attempt to open new avenues of action to "individuals forced to labor without compensation by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regimes, through an extension of the applicable statute of limitations; as applied to foreign corporations."<sup>23</sup> The district court in the World War II Era case dismissed a class of plaintiffs' consolidated claims, including American

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<sup>20</sup> *Id.*

<sup>21</sup> "Japan's use of foreign slave labor during World War II appears to have equaled or exceeded that of Nazi Germany, which brutally exploited at least ten million slave laborers." John Haberstroh, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 *ASIAN L.J.* 253 (2003) (citing Donald Macintyre, *WWII: Imperial Japan on Trial*, *ASIAWEEK*, Nov. 15, 1996, at 36).

<sup>22</sup> "[American veterans] taken to Japan and Manchuria were forced to serve as slave laborers for private Japanese companies... who have [now] become some of the world's top corporations." *Justice for United States Prisoners of War Act of 2001: Hearing on H.R. 1198 Before the Subcomm. on Immigration, Border Sec., and Claims of the Comm. on the Judiciary House of Representatives*, 107th Cong. 4 (2002) (Statement of Dana Rohrabacher, Representative in Congress From the State of California).

<sup>23</sup> Cal. Code Civ. Proc. § 354.6.

veterans' action to compel Japanese companies to disgorge unpaid wages, holding that the Treaty of Peace waived the veterans' claims.<sup>24</sup>

Congressman Dana Rohrabacher reported to the House Committee on the Judiciary that "citizens of eleven countries, including China, Holland, the Philippines, Vietnam, the former Soviet Union and Korea have all received reparations or payments from Japan or Japanese companies in compensation for their slave labor."<sup>25</sup> For example, in recent years, the Fujikoshi, Kajima and Mitsubishi Corporations settled claims with slave laborers in China and other Asian countries.<sup>26</sup>

The fact that forced laborers from non-Allied nations ultimately received reparations from Japanese companies indicates that the resources for compensation did exist. Those resources should have been equally applied towards redressing American veterans' claims. The plight of the American POWs is instructive. When policy makers cut corners in nation rebuilding at the expense of justice, every party loses. Here, the American veterans' injuries went uncompensated, Japanese companies became embroiled in expensive litigation and had their reputations dragged through the mud long after the time when reconciliation would have been useful, and the members of the U.S. judiciary and Congress expended time and taxpayers' money addressing the unsatisfactorily resolved issue a half-century later.

### **Cover-ups: The Massacre at No Gun Ri**

Even more troubling than cases in which victims are thwarted by the political question doctrine or statute of limitations, or their rights to sue are waived by treaties, are human rights

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<sup>24</sup> See *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 944 (N.D. Cal. 2000).

<sup>25</sup> *Justice for United States Prisoners of War Act*, *supra* note 22, at 6.

violations concealed for so many years that by the time the atrocity is ferreted out, there is insufficient evidence for the plaintiffs to prevail.

In July, 1950, American soldiers fired on South Korean refugees underneath the bridge at No Gun Ri, killing or injuring 248 civilians.<sup>27</sup> For years, "survivors and relatives of the victims . . . petitioned the government in Seoul for compensation, but they were routinely rejected for lack of proof."<sup>28</sup> The United States successfully denied and covered up the No Gun Ri incident for five decades. Martha Mendoza described the use of journalistic censorship in the U.S. military's cover-up: "Reports critical of command decisions or the conduct of soldiers on the battlefield [were not tolerated]. A guide to war correspondents [instructed], 'friendly losses should never be divulged' without permission from headquarters."<sup>29</sup>

Finally, in 2001, in a series of Pulitzer Prize winning articles, journalists wrangled a report out of the U.S. Defense Department in which "the U.S. Army Inspector General, affirmed that the U.S. military had killed and wounded an 'unknown number' of South Korean refugees at No Gun Ri with small-arms, artillery and mortar fire, as well as aerial strafing."<sup>30</sup>

The quest for compensation for survivors and relatives of the victims, an official apology, and the United States' admission of guilt that the negligent soldiers were in fact following orders to fire on South Korean civilians, was unsuccessful due to the extent of the cover-up, the distance in time from the event, and the fact that many veterans refused to testify about the incidents unless granted immunity from prosecution. President Clinton seemingly wrote the end of the No Gun Ri chapter by issuing a statement of regret and trivially promising to erect a monument

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<sup>26</sup> See, e.g., Jennifer Joseph, *POWs Left in the Cold: Compensation Eludes American WWII Slave Laborers for Private Japanese Companies*, 29 PEPP. L. REV. 209, 241 (2001) (cautioning that justice will not be served unless the Japanese companies themselves, and not the United States Government, compensate American slave laborers).

<sup>27</sup> See Elizabeth Becker, *Army Confirms G.I.'s in Korea Killed Civilians*, N.Y. TIMES, Jan. 12, 2001, at A1 (describing Army confirmation of No Gun Ri incident).

<sup>28</sup> *Id.*

<sup>29</sup> Martha Mendoza, *No Gun Ri: A Cover-Up Exposed: A Commentary*, 38 STAN. J INT'L L. 153, 154 (2002).

commemorating South Koreans slain during the Korea War and establish a scholarship fund for Korean students.<sup>31</sup> The scholarship fund was a kind gesture and a partial step in the direction of compensating the victims. However, providing scholarships for Korean students was disconnected from the primary purposes of tort compensation. The award was not specifically directed towards the actual victims and therefore did nothing to satisfy their needs for redress. The Bush administration distanced itself from the entire affair; additional pleas for valuable compensation and a sincere apology garnered the response that the Clinton administration effectively dealt with the issue.<sup>32</sup>

The primary obstacle to justice was the initial U.S. and Republic of Korea cover-up and chilled media coverage concerning friendly fire incidents, compounded by the related failure to collect evidence of orders to commit the massacre which would be necessary to impute the individual soldiers' actions to the United States. American persistence in denying responsibility even after the No Gun Ri massacre came to light further minimized any possibility of a non-symbolic recovery.

### **III. IRAQ AND AFGHANISTAN AS SOURCES OF FUTURE LITIGATION**

Saddam Hussein and the Taliban regime violated human rights on a vast scale. The U.S. Department of State has declared that, "Saddam Hussein and his closest aides have committed a long list of criminal violations of international humanitarian law and the laws and customs of

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<sup>30</sup> *Id.* at 155.

<sup>31</sup> "To emphasize American sympathy, Mr. Clinton telephoned President Kim Dae Jung this evening to discuss the report and his statement of regret. He also announced that the United States would erect a monument in South Korea to honor the more than one million Korean civilians who died in the war, and establish a scholarship fund for Koreans studying in their homeland or the United States." Becker, *supra* note 27.

<sup>32</sup> Swift, *supra* note 6.

war."<sup>33</sup> The U.S. led invasions of Iraq and Afghanistan and subsequent democratic nation-building in those countries aim to create political systems in which societal accountability to victims will gain a high priority and a system of tort compensation will be created. As the international community works to rebuild Iraq and Afghanistan, they will address claims for restitution made by victims of human rights violations committed over decades of misrule. One of the first steps in identifying those claims is the investigation and indictment of Saddam Hussein and other high ranking members of his former regime. The prosecution of Saddam and his cronies will shed light on a host of human rights violations that until now have only been hinted at: mass graves are being tallied, secret dungeons and torture chambers cast open to the world, and cruel devices catalogued.<sup>34</sup>

Even as international tribunals and the newly formed coalition governments of Iraq and Afghanistan prosecute the most grievous human rights violations, parallel private suits could be brought on behalf of victims or their surviving family members. The trend towards private enforcement of human rights violations began long before the events of September 11, 2001. However, governmental foot-dragging in going after sources of terrorism and compensating terror victims has spurred private class action lawsuits against nations and institutions sponsoring terrorism. Trial lawyer Ronald Motley is redefining law and diplomacy by filing private class action suits to combat terrorism on a global scale:

[Motley] filed a civil lawsuit in federal court in Washington charging that a wide variety of parties from the [Saudi] kingdom sponsored the [9/11] attacks, either directly or indirectly, by making donations to institutions that they knew fostered terrorism.. Among the case's 205 defendants are seven Saudi charities, including the largest in the Muslim world; three Saudi financial institutions, including one

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<sup>33</sup> U.S. DEPARTMENT OF STATE'S OFFICE OF INTERNATIONAL INFORMATION PROGRAMS, *War Crimes*, at <http://usinfo.state.gov/regional/nea/iraq/iraq99h.htm> (last visited April 5, 2004).

<sup>34</sup> See Jack Kelley, *Iraqis pour out tales of Saddam's torture chambers*, USA TODAY, Apr. 14, 2003, at A1.

that is now state-run; dozens of prominent Saudi individuals; and perhaps most audaciously, several members of the royal family.<sup>35</sup>

Even if Motley's litigation fails to return significant amounts of compensation to the Sept. 11 victim or their families, his litigation has already been useful in airing out the true story of the Saudi financial backers of terrorism. And Motley is not the only trial lawyer pursuing global justice through private class action litigation.<sup>36</sup> Similar private legal actions have the backing of senior members of the GOP such as Senators Arlen Specter and Charles Grassley.<sup>37</sup>

Even prior to the events of Sept. 11, private class action human rights suits have been brought in domestic courts, and scored huge victories.<sup>38</sup> Those successes, combined with the publicity and political support shown for Motley's case will spur similar litigation in the future. One possible target should include American companies, or foreign companies under the jurisdiction of domestic U.S. courts, which participated in funneling cash bribes to the former Iraqi regime in transactions authorized under the United Nations Oil for Food Program. The Oil for Food Program scandal has been described as follows:

The intent of the program was to sell Iraqi oil to pay for food and medicine for the Iraqi people, who were suffering due to sanctions. Instead, vouchers were doled out as gifts or as payment for goods imported into the country in violation of U.N. sanctions. The recipient would then turn the voucher over to one of a number of firms...in exchange for commissions ranging anywhere from 5 cents to 30 cents per barrel, depending on market conditions. (This translates into a profit of \$50,000 on the low end and \$300,000 on the high end for every 1 million barrels worth of oil vouchers).<sup>39</sup>

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<sup>35</sup> Jennifer Senior, *A Nation Unto Himself: Intruders in the House of Saud Part II*, N.Y. TIMES, Mar. 14, 2004, (magazine) at 36.

<sup>36</sup> *See id.* at 36-38 (noting while other U.S. tort lawyers "filed international lawsuits connected with Sept. 11, his case is by the far the most lavishly financed.").

<sup>37</sup> *See id.* at 39 (describing substantial support for Motley's case among "prominent Congressional Republicans.").

<sup>38</sup> *See In re Ferdinand E. Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); 103 F.3d 767 (9th Cir. 1996) (finding liability against late president of Philippines for torture, summary execution and disappearance of 10,000 Filipinos in first class action human rights case ever filed).

<sup>39</sup> *The U.N. Oil For Food Scandal*, WASH. TIMES, Mar. 22, 2004, available at <http://washingtontimes.com/op-ed/20040321-101405-2593r.htm> (last visited April 4, 2004).

For example, if a European oil company, with offices in the United States, financially propped up the Iraqi regime by illegally buying oil that funded Iraqi torture rather than purchases of food and medicine, that company could face civil liability in American courts for sponsoring Iraqi torture. Other possibilities for suits against the former Iraqi regime include bringing actions in other countries, as well as suing through the judicial system that the coalition government will create in the new Iraq.

In addition to the thousands of Iraqi and Afghan civilians who were kidnapped, imprisoned, tortured, and executed by their regimes, potential claimants might include Iranian victims of poison gas during the 1980-88 Iran-Iraq War,<sup>40</sup> victims of Iraqi-financed Palestinian terrorist operations in Israel, Kurdish victims of Iraqi chemical weapons in the 1980's Anfal Campaign,<sup>41</sup> victims of "crimes against humanity and war crimes arising out of Iraq's 1990-91 invasion and occupation of Kuwait,"<sup>42</sup> and kidnapped and murdered reporters.

### **Post-September 11th Incidents**

Kurdish claims of genocide and Kuwaiti complaints of Iraqi looting may recall Holocaust litigation. By the same token, the United States continues to be party to its own set of post-invasion incidents that echo No Gun Ri.

According to the nonprofit group, Civic, and the Cambridge arms control think tank, The Project on Defense Alternatives, the U.S. military killed between 3,200 and 5,000 innocent Iraqi civilians in heavy combat.<sup>43</sup> The casualty figures are similar in Afghanistan, and the count for both countries continues to rise. Most of these casualties are accidental deaths that do not violate

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<sup>40</sup> See *War Crimes*, *supra* note 33.

<sup>41</sup> See *id.* (describing mass killing of Kurds where "Iraq dropped chemical weapons on Halabja in 1988, in which as many as 5,000 people — mostly civilians — were killed.").

<sup>42</sup> *Id.*

military rules of engagement, however, the possibility remains that some of the death tolls may be attributable to improper military action.<sup>44</sup>

Instances of friendly fire during the course of U.S. military strikes in Afghanistan have occurred, and resulted in attempts to deny responsibility.<sup>45</sup> Similar scandals have included a friendly fire incident in which the U.S. Air Force accidentally bombed an Afghan wedding celebration.<sup>46</sup> While The Federal Tort Claims Act immunizes the United States from suits except for a very narrow range of claims,<sup>47</sup> if the right pieces should fall into place, it is essential that potential plaintiffs gather records while memories and evidence are fresh. It is therefore imperative, that the United States military be deterred from covering up those incidents. Thus far, around the clock war-coverage by modern-era news networks have accomplished this result.

#### IV. CONCLUSION

Plaintiffs will emerge from the current wars in Iraq and Afghanistan, or from the events preceding the wars, and step forward in search of recognition, apologies, and compensation for injuries. Part II, *supra*, examined human rights claims dating from World War II and the Korean War which were filed as many as fifty years after the conclusion of those wars. Those cases are

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<sup>43</sup> See Jeffrey Gettleman, *For Iraqis in Harm's Way, \$5,000 and 'I'm Sorry'*, N.Y. TIMES, Mar. 17, 2004, at A1 (describing efforts to accurately record death tolls among Iraqi civilians).

<sup>44</sup> "[I]n Afghanistan...hundreds of civilians were killed after faulty intelligence steered bombs into the wrong villages." *Id.*

<sup>45</sup> See, e.g., *What's News: World Wide*, WALL ST. J., Mar. 11, 2004, at A1 (reporting "the military concluded an inquiry into an airstrike that killed nine Afghan children, saying 'appropriate' rules of engagement were followed.").

<sup>46</sup> "The Afghan Government says 48 civilians - mostly women and children - were killed and 117 injured by the US AC-130 aircraft during the incident, which severely strained relations between Washington and Kabul." *U.S. Justifies Afghan Wedding Bombing*, BBC NEWS, Sep. 7, 2002, available at [http://news.bbc.co.uk/2/hi/south\\_asia/2242428.stm](http://news.bbc.co.uk/2/hi/south_asia/2242428.stm) (last visited April 5, 2004).

<sup>47</sup> "[T]he district courts...shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.S. § 1346.

instructive of the worst case scenario: instead of prompt reconciliation, the United States, Iraq, and Afghanistan could be facing Gulf War II human rights claims in the year 2050.

The United States and the new Iraqi and Afghan coalition governments have the power to settle human rights and war claimant's injuries in a just and expeditious manner. Claims should be settled as early as possible because 1) the purpose of compensation is defeated if it is not timely; 2) the transaction costs entailed in delaying and drawing out litigation for fifty years could quite possibly be more expensive than settlement itself; 3) delaying the timely resolution of reparations to human rights and war victims interferes with reconciliation;<sup>48</sup> and 4) as we learned from Motley's 9/11 lawsuit, private litigation in response to foot dragging at the inter-governmental level will "transform the American legal system into a blunt instrument of foreign policy."<sup>49</sup>

The relevant parties must make concerted efforts not to chill media coverage of human rights violations in an effort to conceal their existence, dismiss human rights cases from their court systems through the heavy-handed use of the political question doctrine, or void national debts to war victims due to inability to pay. The growing role of the media as a watchdog somewhat alleviates concerns that the United States will brazenly cover-up war crimes. However, the potential for a rash of expensive lawsuits may tempt the relevant parties to consider a legislative solution similar to the Treaty of Japan's Article 14 to purge the new coalition government's debts.

Unfortunately, the international community's receptiveness towards forgiving a nation's debts wholesale is on the rise. Imagine the World War II Era case in bankruptcy terms. Japan

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<sup>48</sup> See Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 BERKELEY J. INT'L L. 296, 340 (2002) (discussing the adverse impact of delaying payment of compensation to human rights victims on reconciliation).

<sup>49</sup> See Senior, *supra* note 35.

injured and unjustly profited from its forced laborers. Japan was therefore indebted to compensate the victims for their injuries and unpaid wages. After the war, the forced laborers became creditors of Japan. However, the Allied Powers recognized in Article 14 that Japan could not afford to repay the debt and also rebuild its economy at the same time, so it facilitated Japan's bankruptcy of its debts to human rights creditors in the form of the Article 14 waiver.

There has been much debate in the international community over whether to permit deadbeat nations to declare bankruptcy. In December, 2001, the Economist reported that the International Monetary Fund was moving towards permitting sovereign bankruptcy to cure loan defaults on a national scale.<sup>50</sup> The trend continues to gather steam two years later as the IMF signaled to the world's "deadbeat nations" that it will encourage a system of sovereign bankruptcy when it agreed to subsidize Argentina's \$82 billion government bond default with continued loan repayments.<sup>51</sup>

This movement is not limited to the capital markets, nor is the renunciation of national debts to war victims a relic of World War II. For example, in 1999, an amnesty was offered to the "perpetrators of human rights atrocities in Sierra Leone."<sup>52</sup> The factions that committed grave breaches of human rights were not only indemnified from having to compensate their victims, they were granted amnesty from criminal prosecutions and retained their political power.<sup>53</sup> Van Dyke writes:

Although it is sometimes tempting to enact a general amnesty in order to heal a nation's wounds, promote harmony, and "let bygones be bygones," such efforts rarely achieve their goals because the wounds fester and the victims need a just resolution to their suffering. The only way to bring true healing to a divided

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<sup>50</sup> *When Countries Go Bust*, ECONOMIST, Dec. 8th, 2001, at 88.

<sup>51</sup> *The IMF Blinks*, WALL ST. J., Mar. 11, 2004, at A16.

<sup>52</sup> Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & Pol'y 77, 86 (2001).

<sup>53</sup> *See id.* at 80 ("The founder of the rebel movement, Foday Sankoh, instead of being prosecuted for unspeakable atrocities, was put in charge of a commission to oversee the country's rich mineral resources, and his commanders occupied four top cabinet positions.").

society is to face up to the wrongs that were committed, to prosecute those who violated the fundamental human rights of others, and to provide compensation to the victims.<sup>54</sup>

To some extent, the United States is on the right track in working to compensate human rights and war victims, both to aid efforts at reconciliation, and to avoid costly litigation down the road.

For example, the United States has already devised and implemented a compensatory system in Iraq in which it metes out awards for injuries and wrongful deaths occurring in noncombat situations.<sup>55</sup> The U.S. military has already paid out 261 claims "under the Foreign Claims Act, which covers damages and wrongful death but only in noncombat situations."<sup>56</sup> The military pays about \$5,000 per claim, "but does not issue a formal apology or claim of responsibility."<sup>57</sup>

One of the top U.S. priorities undertaken in rebuilding Iraq is freezing Saddam Hussein's financial accounts around the world and repatriating the money to the Iraqi people through the Development Fund for Iraq.<sup>58</sup> As of March, 2004, the United States has recovered \$5.5 billion dollars worth of former Hussein funds and Iraqi assets.<sup>59</sup> The Department of the Treasury's Assistant Secretary for Public Affairs, Robert Nichols, further asserts that the United States uncovers additional accounts daily.<sup>60</sup>

A basic hurdle in settling claims by war and human rights victims is finding sources of compensation. One solution to the limited funds problem would be to set aside a portion of the Development Funds to pay off claims to future plaintiffs. In the case of human war victims

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<sup>54</sup> *Id.* at 77.

<sup>55</sup> See Gettleman, *supra* note 43 (reporting hundreds of instances in which U.S. military paid compensation to Iraqi civilians injured in noncombat situations).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See Robert Nichols, *U.S. Ferrets Out Saddam's Billions*, WALL ST. J., Mar. 9, 2004, at A17 (describing progress in hunt for "countless dollars and possessions Saddam Hussein thieved from the Iraqi people.").

<sup>59</sup> Including approximately \$4.5 billion in frozen accounts world-wide and additionally "roughly \$1 billion in cash and precious items in Iraq." *Id.*

caused by U.S. military negligence, U.S. taxpayers would obviously have to pick up the tab. Yet another possibility could be for the new Iraqi coalition government to pay a small percentage of future Iraqi oil sales into a pool from which claims made against the former Iraqi regime could be paid out. Afghanistan does not have as many obvious sources of funds as Iraq, but neither does it have as many human rights victims. Furthermore, we must remind ourselves that in 1950, no one imagined that within a handful of years, Japan and her corporations would one day be financially able to cure its claims. Likewise, we should not underestimate the future resources of Afghanistan.

With proper foresight in budgeting for expected human rights claims, the international community will no longer need to resort to waiving claims through treaties or invalidating suits in the courts under the political question doctrine. By planning ahead and preserving the funds now, we may yet avoid leaving future plaintiffs in the lurch.

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<sup>60</sup> *See id.* (heralding daily "developments and accomplishments in the fight against those who fund terror.").