

JUSTICE HELD HOSTAGE: U.S. DISREGARD FOR INTERNATIONAL LAW IN THE WORLD WAR II INTERNMENT OF JAPANESE PERUVIANS—A CASE STUDY

NATSU TAYLOR SAITO*

INTRODUCTION: *MOCHIZUKI v. UNITED STATES*

The federal government will pay \$5,000 settlements and issue an apology to Japanese who were taken from their homes in Latin America and held in U.S. internment camps during World War II, a Justice Department official said Thursday.

More than 2,200 Latin Americans, most of them of Japanese ancestry and a majority from Peru, forcibly were brought to the United States during the war.

After Pearl Harbor was bombed, the U.S. government, hoping to use Japanese Latin Americans as exchange prisoners for U.S. POWs, collaborated with the Peruvian government and other Central and South American countries to round them up and ship them to the United States . . . During the war, an estimated 550 Latin American Japanese were sent to Japan in exchange for U.S. POWs. When the war was over, 900 more were deported to Japan, even though they didn't want to go.

Neither the administration of President Franklin D. Roosevelt nor later administrations gave an official explanation for the removals and internments.

The suit, filed in a Los Angeles federal court in 1996, sought equal treatment with Japanese American internees. The 1988

* ©1998 by Natsu Taylor Saito, Associate Professor, Georgia State University College of Law. B.A. 1977, Swarthmore College; M.Ed. 1982, Georgia State University; J.D. 1987, Yale Law School. I am grateful to the Civil Liberties Public Education Fund and to the Georgia State University College of Law for support of this research, to Sumi Cho for organizing the Original Legal Scholarship Collaborative, and to Keith Aoki, Gil Gott, Dean Hashimoto, Chris Iijima, Mari Matsuda and Eric Yamamoto for providing a context for this work. I am also grateful for the cooperation of Grace Shimizu and Julie Small of the Japanese Peruvian Oral History Project and Robin Toma, plaintiffs' attorney in *Mochizuki v. United States*; to Karen Parker and Ralph Steinhardt for their insight into the applicable international law and to Cooper Knowles for exceptional research assistance. Special thanks to Kelly Jordan, whose interest, analysis and editing both sustained me and shaped the ideas presented here.

federal reparations law covered only Japanese who were either U.S. citizens or legal U.S. residents at the time of their detention.

—*San Francisco Examiner*, June 12, 1998¹

With a weakly worded statement of regret² and some redistribution of funds already allocated to interned Japanese Americans,³ these egregious violations of human rights and international law committed by the United States during World War II may pass into history without redress of the injuries, recognition of the costs or acknowledgment of the illegality of kidnapping civilians from a nonbelligerent third country and holding them as hostages for exchange. The settlement⁴ in *Mochizuki v. United States*,⁵ a class action brought on behalf of interned

¹ \$5,000, *Apology to WWII Captives Ethnic Japanese from Latin America Were Locked Up in U.S. Camps*, S.F. EXAMINER, June 12, 1998, at A5.

² Clinton's brief letter of apology acknowledges U.S. authorities "unjustly interned, evacuated, relocated or otherwise deprived you of liberty." The letter states:

We recognize the wrongs of the past and offer our profound regrets to those who endured such grave injustice. We understand that our nation's actions were rooted in racial prejudice and wartime hysteria, and we must learn from the past and dedicate ourselves . . . to renewing and strengthening equality, justice and freedom.

Jean-Loup Sense, *US Settles with Wartime LatAm Ethnic Japanese Deported to US Camps*, AGENCE FR.-PRESSE, June 13, 1998, available in 1998 WL 2301858.

³ I use the term "Japanese American" to refer to all persons of Japanese descent who had made their homes in the United States. This includes the Issei (first generation immigrants) who were still Japanese citizens as well as the Nisei (second generation) who were U.S. citizens by birth in the United States. Although the Issei were for the most part permanent residents who had every intention of living here the rest of their lives and raising their children as Americans, they were prevented from becoming naturalized citizens by the racial restrictions dating back to the Naturalization Act of 1790, 1 Stat. 103 (limiting naturalized citizenship to "free white persons"). The racial restrictions were not removed until 1952 by the Immigration and Nationality Act, chapter 477, 66 Stat. 163 (1952). See generally IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

⁴ The case was transferred from the Central District of California to the Federal Claims Court in Washington, D.C. The government and the plaintiffs have entered into a Settlement Agreement, which was approved on January 25, 1999. See Settlement Agreement, *Mochizuki v. United States*, No. 97-924C, 1999 WL 72777 (Fed. Cl. Jan. 25, 1999); *Notice of Proposed Settlement in Class Action Lawsuit Involving Latin American Japanese* <<http://www.usoj.gov/crt/ora/news.html>> (visited Mar. 8, 1999); see also K. Connie Kang, *The Battle Rages on Rights: Activist Worked Hard to Get Reparations for Japanese Latin American Internees, But Now Faults Notification Effort and Government's Different Treatment of U.S. Residents*, L.A. TIMES, Aug. 9, 1998, at B2; Dara Akiko Tom, *Deadline for WWII Redress Money*, AP, Aug. 10, 1998, available in 1998 WL 6706271 (noting plaintiff Art Shibayama's intent to "reject the payment out of principle"); Dara Akiko Tom, *WWII Internees React to Settlement*, AP, June 13, 1998, available in 1998 WL 6680095; Editorial, *A Mass Kidnapping*, WASH. POST, June 16, 1998, at A20.

Now that the Settlement Agreement has been approved, some of the plaintiffs have opted out and brought separate lawsuits. See Paul Harrington, *Japanese Latin Americans Seek Redress for Internment in U.S.*, WALL ST. J., Sept. 22, 1998, at B9; *Peruvian of Japanese Origin Demands Compensation from US*, AGENCE FR.-PRESSE, Mar. 3, 1999, available in 1999 WL 2556271.

⁵ No. 97-924C, 41 Fed. Cl. 54 (1998).

Japanese Latin Americans,⁶ is most notable for what it does not offer. The plaintiffs lost homes and possessions; some were forced to clear jungle in the Canal Zone; and men, women and children were transported under armed guard to prison camps in the Texas desert where they were incarcerated indefinitely without charge or hearing. Families were torn apart and scattered across the globe.⁷ Held as hostages, some Japanese Latin Americans were exchanged for U.S. citizens, and others were imprisoned past the end of the war, when the U.S. Immigration and Naturalization Service ("INS") declared them to be "illegal aliens" and deported them, against their will, to Japan.⁸ There has been no calculation of what would constitute actual redress for the damages incurred.

Whether the settlement provides even symbolic redress is questionable. The \$20,000 offered to each Japanese American⁹ internee under the Civil Liberties Act of 1988 ("CLA")¹⁰ does not compensate for the property lost, rights denied or injuries suffered as a result of the internment.¹¹ The payment, instead, symbolizes this country's recognition of the injustices inflicted upon Japanese Americans during World War II. The CLA restricts compensation to those who were U.S. citizens or permanent residents at the time of the internment, thus excluding interned Japanese Latin Americans. The *Mochizuki* settlement neither expands the terms of the CLA to incorporate the Japa-

⁶ I use the term "Japanese Latin Americans" to refer to all persons of Japanese ancestry who are or were living in Mexico or Central or South America. Like the Japanese Americans, many of the first generation were still Japanese citizens, but a considerable number had become naturalized citizens, and a significant number were citizens of their Latin American country by birth.

⁷ See generally JOHN EMMERSON, *THE JAPANESE THREAD: A LIFE IN THE U.S. FOREIGN SERVICE* 125-49 (1978); C. HARVEY GARDINER, *PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN JAPANESE AND THE UNITED STATES* (1981); HIGASHIDE SEIICHI, *ADIOS TO TEARS: MEMOIRS OF A JAPANESE PERUVIAN INTERNEE IN U.S. CONCENTRATION CAMPS* (1994); Ken Mochizuki, *Crystal City: Forgotten World War II Camp*, NORTHWEST NIKKEI, Apr. 29, 1997, at 1, available in 1997 WL 11711778; Corey Takahashi, *The Other Japanese American Internment*, ASIAN MAG.: INSIDE ASIAN AM., Sept. 30, 1997, at 40, available in 1997 WL 11551858; Julie Tamaki, *An Enduring Indignity: Japanese Latin Americans Interned During War Still Seek Redress*, L.A. TIMES, Feb. 24, 1997, at B1.

⁸ See *infra* notes 130-41 and accompanying text.

⁹ Japanese American, see *supra* note 3, not to be confused with Japanese Latin American, see *supra* note 6.

¹⁰ Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989 (1988)).

¹¹ This can be contrasted, for example, with indemnification from the Federal Republic of Germany to Nazi victims which, according to Weglyn, included calculations for loss of life, damage to health, incarceration in concentration camps and ghettos, damage to property, damage to profession, repatriation and interruption of education. See MICHÉ WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS* 276-77 (1996). There has been no calculation of what would constitute actual redress for the damages incurred.

nese Latin Americans,¹² nor provides for compensation comparable to that received by Japanese Americans. Instead, under the settlement, payments of \$5000 will be made from monies remaining *after* all of the claims of Japanese Americans have been paid. Thus, even this reduced amount is not guaranteed to every internee.¹³ Under such terms, it is hard to say whether the settlement constitutes acknowledgment and apology or symbolizes disrespect for the harm suffered by the Japanese Latin American claimants.

Most importantly, the settlement does not acknowledge that the United States violated any domestic or international law by interning Japanese Latin Americans.¹⁴ While the precedent set by *Korematsu v. United States*¹⁵ has never been overturned,¹⁶ it is widely accepted that the incarceration of Japanese Americans from the West Coast violated the constitutional rights of U.S. citizens and permanent residents. The terms of the *Mochizuki* settlement imply that the harm inflicted on Japanese Latin Americans, because they were nonresident aliens, was less significant than that inflicted upon Japanese Americans. Unacknowledged are the gross violations of international law committed in their kidnapping and deportation, imprisonment without hearing or

¹²The plaintiffs have asserted that this should be done by declaring them "permanent residents under color of law." Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 9-12, *Mochizuki v. United States*, 41 Fed. Cl. 54 (1998) (No. 97-924C) (on file with author); see also *infra* notes 245-49 and accompanying text.

¹³The Campaign for Justice, which has organized the redress campaign for Japanese Latin Americans, estimates that there may be as many as 1800 claimants but funding available for far fewer. President Clinton has stated that "[i]f the fund proves insufficient, I will work with the Congress to enact legislation appropriating the necessary resources to ensure that all eligible claimants can obtain the compensation provided by this settlement," but this is not part of the settlement itself. See Jerry Seper, *Government to Settle with Interned Japanese*, WASH. TIMES, June 13, 1998, at A3. An editorial in the *Sacramento Bee* referred to the settlement as "bargain basement redress." Editorial, *Bargain Basement Redress; Cheers & Jeers*, SACRAMENTO BEE, June 22, 1998, at B4.

¹⁴According to the Settlement Agreement, the United States maintains that the claimants are not eligible for redress under the CLA and their Fifth Amendment equal protection claims are unfounded. The parties agree that the Settlement Agreement "shall not operate as an admission on the part of any party for any purpose" and that nothing introduced in connection with the Agreement shall be construed as "evidence of liability or as an admission or concession." Settlement Agreement, ¶ 21, *Mochizuki v. United States*, No. 97-924C, 1999 WL 72777 (Fed. Cl. Jan. 25, 1999). Further, acceptance of payment under the Agreement is agreed to be "in full satisfaction of any and all claims against the United States relating to the internment of the class member." *Id.* ¶ 23.

¹⁵*Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁶Fred Korematsu's conviction was vacated by the United States District Court for the Northern District of California, but this did not overturn the Supreme Court precedent. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); see also *infra* note 227 and accompanying text.

charge, use as hostages for exchange and subsequent forced "repatriation."¹⁷ If the *Mochizuki* settlement is the only U.S. acknowledgment of these actions, its central message may be that the U.S. government can disregard international law and violate human rights with impunity.

This Article examines the abduction and incarceration of the Japanese Peruvians by the U.S. government from the perspective of international law—the provisions of international law that were violated during the war, and those that apply to the government's continuing refusal to compensate the victims. This case illustrates the importance of insisting that our government's foreign policy and wartime conduct comply with international law and the costs of failing to incorporate international law into U.S. litigation strategies and legal structures. The story of the U.S. collaboration with the Peruvian government to kidnap and hold hostage their citizens and residents of Japanese descent comprises Part I. This story is presented in some detail, and relies heavily on contemporaneous accounts from within the State Department, because it is important to understand how international law is, in fact, implemented—or ignored—in specific situations. Part II reviews the provisions of international law violated by these actions and concludes that they were, indeed, war crimes. Part III considers the redress currently available in U.S. courts for these violations of human rights. Given that neither Congress nor the Supreme Court has declared the Japanese American internment illegal or unconstitutional, the Japanese Latin Americans have few legal remedies available to them unless international law is applied. This is why the government could insist on such a meager settlement in the *Mochizuki* case. Part IV reviews the limited options available for bringing these international law claims in domestic and/or international tribunals. Part V considers the harm done by allowing the U.S. government to ignore international law in this situation, and suggests ways to better incorporate international law into our legal system and governmental institutions. The final part concludes that the internment of the Japanese Latin Americans and the inadequacies of the settlement in *Mochizuki* illustrate the importance of insisting that our government and our courts comply with international law.

¹⁷ "Repatriation" is not a particularly appropriate term here, as some of the people sent to Japan were not Japanese citizens and others had left long ago with no intent of returning. In either case most did not want to go to Japan. See *infra* notes 142–45 and accompanying text.

I. CIVILIANS HELD HOSTAGE: 1941-47

I cannot begin . . . even to call the role of our maimed, mutilated, and missing civil liberties, but the United States, more than two years after the war, is holding in internment some 293 naturalized Peruvians of Japanese descent, who were taken by force by our State and Justice Departments from their homes in Peru.

—Secretary of the Interior Harold Ickes, December 1947¹⁸

A. *The Japanese in Peru*

Shortly after the restoration of the Meiji emperor in 1868, Japan began a rapid industrialization.¹⁹ One result was that the population “doubled to 60 million within a little over a half century . . . and rural Japan, already saturated with people . . . , became a seemingly inexhaustible reservoir for cheap urban labor.”²⁰ With farms too small to divide among children, there was considerable pressure on second and third sons to migrate to the cities or overseas.²¹ This, combined with “unsettling economic prospects in the wake of the Sino-Japanese War [and] the desire of certain shipping companies and emigration agents to make a profit,”²² resulted in significant Japanese emigration to the Americas.

In 1899 the *Sakura Maru* brought the first 790 Japanese immigrants to Peru, landing in the port of Callao, just outside Lima.²³ Peru welcomed Japanese labor, especially to its expanding cotton and sugar plantations.²⁴ Rural contract laborers eventually leased land for them-

¹⁸ WEGLYN, *supra* note 11, at 65 (quoting *Town Meeting of the Air* (broadcast, Dec. 2, 1947)). Many of these Japanese Peruvians were naturalized or native-born Peruvian citizens, but of course, many were also Japanese citizens. Harold Ickes was the father of Raymond Ickes, who had been sent to Lima by the Justice Department to participate in the creation of U.S. lists of proposed Japanese Peruvian internees, and he was also the only senior official in the Roosevelt administration to speak out against the post-war deportation of Japanese Latin Americans.

¹⁹ See generally JOHN WHITNEY HALL, JAPAN: FROM PREHISTORY TO MODERN TIMES 243-93 (1982); JON HALLIDAY, A POLITICAL HISTORY OF JAPANESE CAPITALISM 18-19 (1975); EDWIN O. REISCHAUER, JAPAN: THE STORY OF A NATION 113-78 (1970).

²⁰ REISCHAUER, *supra* note 19, at 153.

²¹ According to Reischauer, “[s]ince there was little unused land . . . and the average size of a farm . . . was only 2½ acres, the increased rural population had to drain off to the cities, but the new industries could not grow fast enough to absorb it all.” *Id.*

²² GARDINER, *supra* note 7, at 3.

²³ See *id.* According to Emerson, they were “all destined for the coastal sugar plantations.” EMERSON, *supra* note 7, at 130.

²⁴ By 1923, when labor contracts were abolished, emigration companies had brought 17,764 Japanese workers to Peru and in the following years Japanese workers continued to migrate independently. See GARDINER, *supra* note 7, at 4.

selves or moved to the cities, where they became household servants, accumulated some capital and eventually opened barber shops, grocery stores, restaurants and other commercial ventures. According to Harvey Gardiner, by 1938, "organizations of merchants, café owners, barbers, bazaar owners, charcoal dealers, chauffeurs, importers, jewelers, hotel owners, restaura[n]teurs, peddlers, bakery owners, and building contractors . . . boasted 967 members."²⁵

The success of the Japanese immigrants generated resentment that, intensified by the depression of the 1930s, led to an "official government program to 'Peruvianize' economic activity aimed principally at eliminating Japanese interests and enterprises."²⁶ This was followed by the denunciation of Peru's treaty of friendship, commerce and navigation with Japan; the establishment of quotas requiring that eighty percent of any work force be native Peruvian; the suspension of naturalizations and the annulment of late birth registrations of Japanese Peruvians.²⁷ Fueled by these trends, in May 1940 about 600 Japanese homes and businesses in Lima and Callao were attacked and looted.²⁸ Despite such tensions most Japanese Peruvians were, by this time, deeply rooted in Peru, and the 1940 census reported 17,598 Japanese immigrants and 8790 Peruvians citizens of Japanese descent,²⁹ at least forty percent of whom were women and children.³⁰

B. Abduction and Deportation

A Conference of Foreign Ministers of the American Republics convened in Rio de Janeiro in January 1942. At the urging of the United States, its Final Act included detailed recommendations concerning subversive activities and the "control of dangerous aliens."³¹

²⁵ *Id.* at 6. John Emmerson, Second Secretary of the U.S. Embassy in Lima, reported that by the early 1940s Japanese entrepreneurs controlled large percentages of the barber shops, bakeries, poultry farms, machine shops and glass dealers. They made most of the buses in Lima; were "prominent" in the manufacture of rubber products, hosiery and hats; were known as the best plumbers, carpenters and florists; and produced 12.5% of Peru's cotton. See EMMERSON, *supra* note 7, at 133.

²⁶ GARDINER, *supra* note 7, at 8.

²⁷ See *id.*

²⁸ See EMMERSON, *supra* note 7, at 134; see also GARDINER, *supra* note 7, at 9.

²⁹ See EMMERSON, *supra* note 7, at 131. There had been, however, a net decrease in the Japanese Peruvian population through the 1930s. See *id.* at 130.

³⁰ According to Gardiner, women and children composed 40% of the Japanese community. See GARDINER, *supra* note 7, at 10. Emmerson states that "more than half of the Japanese population was female." EMMERSON, *supra* note 7, at 136.

³¹ GARDINER, *supra* note 7, at 16-17 (citing *The War: Third Meeting of Ministers of Foreign Affairs of the American Republics*, DEP'T ST. BULL., 1942, at 128-30).

The Conference established an Emergency Committee for Political Defense to "coordinate hemispheric security."³² One of the Committee's resolutions, entitled *Detention and Expulsion of Dangerous Axis Nationals*, advocated the "[i]nternment of dangerous Axis agents and nationals for the duration of the emergency."³³ While supporting repatriation of such persons, it advocated internment and suggested a program of local detention within each republic, supplemented by expulsion to other American republics for the duration of the war.³⁴ The United States agreed to pay for transportation and detention and promised to include nationals of the participating countries in any exchanges made with Axis governments.³⁵ Over a dozen Latin American countries sent internees to the United States and three countries set up their own detention programs.³⁶

Meanwhile, the U.S. State Department had been pressuring the American republics to send "potentially dangerous" persons, especially Japanese, to the United States. An October 1941 memorandum from the U.S. Ambassador to Panama to the Secretary of State described Panama's willingness to cooperate with the following plan:

Immediately following action by the United States to intern Japanese in the United States, Panama would arrest Japanese on Panamanian territory and intern them on Taboga Island All expenses and costs of internment and guarding to be paid by the United States. The United States Government would agree to hold Panama harmless against any claims which might arise as a result of internment.³⁷

Similar proposals were enthusiastically received by the Peruvian government which was, by then, eager to deport its residents and even citizens of Japanese ancestry. On December 8, 1941 Peru froze all

³² *Id.* at 17. Between April 1942 and July 1943 this Committee submitted 21 programs of action to the governments of the Western Hemisphere. *See id.*

³³ *Id.* at 18.

³⁴ *See id.* (citing the Emergency Committee's *Annual Report* (July 1943) and the Emergency Committee's *Second Annual Report* (1944)); *see also* WEGLYN, *supra* note 11, at 59.

³⁵ *See* WEGLYN, *supra* note 11, at 59. The shipping was handled by the Special War Problems Division of the State Department, using U.S. Army transports.

³⁶ *See id.*

³⁷ *Id.* at 58 (quoting Letter from Edwin Wilson, to Sumner Welles (Oct. 20, 1941) (Dept. of State File 740.00115 Pacific War/11/3, RG 59, National Archives ("NA")) (on file with author)). As early as December 8, 1941, U.S. representatives in Costa Rica wired the State Department that "[o]rders for internment of all Japanese in Costa Rica have been issued." *Id.* at 58 (quoting Telegram #375 from Lane, to State Department (Dec. 8, 1941) (DS File 740.00115 Pacific War/9, RG 59, NA) (on file with author)).

Japanese funds³⁸ and on December 9 the United States added Japanese to its *Proclaimed List of Certain Blocked Nationals*,³⁹ an economic blacklist which soon included 566 Japanese Peruvian businesses.⁴⁰ The Peruvian government severed diplomatic relations with Japan in January 1942,⁴¹ but did not declare war until 1945 when Allied victory was imminent.⁴² John Emmerson was assigned to the U.S. Embassy in Lima from April 1942 until July 1943, where, as the Embassy's only Japanese speaker, he studied the Japanese community and oversaw the detention and transport of Japanese Peruvians to the United States.⁴³ He summarized the situation:

To the Peruvians, the war was a faraway fire. Not directly involved, although pro-Allies in sentiment, they set about to enjoy the advantages, and these included war on the Axis economic stake. The measures taken against Axis nationals . . . were welcomed for their destruction of unwanted competition

Pressured by American authorities, the Peruvians zealously imposed controls on the movements and activities of Germans and Japanese All Japanese schools, organizations, and newspapers were closed, and Japanese were frequently arrested for illegal assembly . . . [and] were prohibited from traveling⁴⁴

In early 1942, the United States proposed repatriating all Axis government *officials* from the Latin American republics through the United States, ignoring Peru's request to take in addition "Axis non-official women and children and men not of military age or known to have engaged in subversive activities."⁴⁵ When the Japanese government insisted that ten Japanese trading company representatives be

³⁸ See EMMERSON, *supra* note 7, at 138.

³⁹ See GARDINER, *supra* note 7, at 14–15.

⁴⁰ See EMMERSON, *supra* note 7, at 138.

⁴¹ See *id.* at 126.

⁴² See GARDINER, *supra* note 7, at 109.

⁴³ See EMMERSON, *supra* note 7, at 139.

⁴⁴ *Id.* at 137–38 (emphasis added). These and other measures are outlined in Emmerson's Memorandum on the Control of Japanese in Peru. See Enclosure no. 1 to Dispatch no. 7288 from Henry R. Norweb, U.S. Ambassador to Peru, to Sumner Welles, U.S. Secretary of State (Mar. 24, 1942) (740.00115 Pacific War/1706, RG 59, NA) (on file with author) [hereinafter Memorandum from Henry R. Norweb, Mar. 24, 1942].

⁴⁵ GARDINER, *supra* note 7, at 19 (quoting Memorandum from Henry R. Norweb, Mar. 24, 1942, *supra* note 44, on which Assistant Secretary of State Breckinridge Long penciled "ignore this . . . in replying").

repatriated as well, Peru began a list of nonofficial Axis nationals it wished to expel, a list that quickly grew to several hundred.⁴⁶

Aware of Peruvian President Prado's desire to expel all the Japanese from Peru, the United States, in March 1942, agreed to take some "nonofficial Axis nationals."⁴⁷ In July of 1942, Ambassador Norweb wrote, "[i]n any arrangement that might be made for internment of Japanese in the States, Peru would like to be sure that these Japanese would not be returned to Peru later on. The President's goal apparently is the substantial elimination of the Japanese colony in Peru."⁴⁸ The State Department was willing to help: "The suggestion that Japanese be removed from strategic areas should be followed The suggestion that Japanese be expelled whether they are naturalized Peruvians or not might be met by a denaturalization law."⁴⁹

The first ship of civilian deportees left Callao in April 1942, carrying Germans, Japanese and Italians. Most of the Japanese had "volunteered" by notifying the Spanish embassy in Lima that they were willing to repatriate to Japan.⁵⁰ Even so, the process was a haphazard one. Peruvian authorities gave the U.S. embassy a "final and definitive" list, yet thirty-two men failed to appear and twelve who were not listed showed up.⁵¹ Almost none of these men had been blacklisted or identified as "dangerous." According to one commentator,

⁴⁶ *Id.* at 19.

⁴⁷ *Id.* at 23 (quoting Memorandum from Henry R. Norweb, Mar. 24, 1942, *supra* note 44).

⁴⁸ WEGLYN, *supra* note 11, at 60 (quoting Letter from Henry R. Norweb, U.S. Ambassador to Peru, to Sumner Welles, U.S. Secretary of State (July 20, 1942) (DS File 740.00115 Pacific War/1002 2/6, RG 59, NA) (on file with author)).

⁴⁹ *Id.* at 61 (quoting Memorandum from Philip W. Bonsal, to Selden Chapin (Sept. 26, 1942) (SD File 740.00115 Pacific War/1002 5/6, RG 59, NA) (on file with author)).

A December 1942 Intelligence Report from the Naval Attaché in Lima reflects this disregard for the law: "One of the most encouraging phases of this limited exodus of undesirable Axis nationals is that no attention was paid to the fact that one of the Germans was a naturalized Peruvian and two were married to Peruvian women." DEPT. OF THE NAVY, *Intelligence Report*, Dec. 20, 1942 (on file with author).

Denaturalization and even the stripping of citizenship of U.S.-born Americans was considered as well. In a memorandum to Secretary of State Cordell Hull dated December 17, 1943, Assistant Secretary Breckinridge Long stated, "the Attorney General is reported to have said recently to one of the [Senate] Committees that he had a formula under one of our statutes by which a native-born Japanese or one naturalized could be divested of his American citizenship—thus making him eligible for deportation." WEGLYN, *supra* note 11, at 190.

⁵⁰ GARDINER, *supra* note 7, at 25; *see also* EMMERSON, *supra* note 7, at 139. The Spanish embassy was used because Spain represented Japanese interests in Peru. It seems inappropriate to term this "voluntary" in light of the unremitting increase in governmental repression of the Japanese in Peru. It also should be noted that these men were volunteering for immediate repatriation, not indefinite incarceration in prison camps in the Texas desert. It is similarly inappropriate to term "voluntary" the departure of women and children who left to join husbands and fathers who had been abducted.

⁵¹ GARDINER, *supra* note 7, at 27.

In addition to the sloppy, incomplete lists, spur-of-the-moment additions and subtractions, quixotic and erratic inspections, and the lack of coordination between the Peruvian and American authorities, this first deportation operation exhibited no recognizable criteria for deportation. Almost all the men lacked social, economic, and community significance.⁵²

U.S. embassy official Emmerson states that "[o]n subsequent sailings, no volunteers were accepted. The object of the program was to expel those enemy aliens whose continued presence in the country presented a danger to the hemisphere's security."⁵³ While that may have been the objective, that was not the criterion used. Emmerson admits:

In selecting the deportees, since no proof of guilt existed, it seemed logical to mark for detention those individuals who by their influence or position in the community, their known or suspected connections in Japan, or by their manifest loyalty to Japan could be considered *potential* subversives. . . . Since no one in the Peruvian government or in the embassy, except myself, spoke or read Japanese, [researching the activities of the Japanese Peruvians] fell largely to me.⁵⁴

Emmerson, just transferred to Peru, thus became the only representative of the U.S. government with any specific information about the Japanese Peruvians who were to be interned. Struggling to read letters brought to him by the Peruvian police, he "failed to find a single missive which divulged bomb plots, secret trysts, contemplated assassinations, codes, or even plans to signal a Japanese ship from a lonely beach. Nothing emerged to confirm the rumors constantly whispered to our legal, army, and naval attaches by their conscientious paid informants."⁵⁵ Traveling throughout the country and gathering information about the various Japanese communities likewise revealed "nothing reliable or convincing about subversion."⁵⁶ It is hard to escape Harvey Gardiner's conclusion: "The Americans, ignoring both law and legal formality, simply wanted to weaken the Japanese community by seizing and expelling its leaders."⁵⁷

⁵² *Id.* at 28.

⁵³ EMMERSON, *supra* note 7, at 139.

⁵⁴ *Id.*

⁵⁵ *Id.* at 140.

⁵⁶ *Id.* at 143.

⁵⁷ GARDINER, *supra* note 7, at 41.

The lack of evidence regarding subversive activity did not slow down the expulsion and internment of Japanese Peruvians. The State Department knew that those on U.S. lists had not been identified as dangerous and that most of the Japanese arrested by Peruvian authorities had no connection to either the war effort or the lists prepared by the United States. As Emerson notes:

Lacking incriminating evidence, we established the criteria of leadership and influence in the community to determine those Japanese to be expelled. We prepared lists, which we presented to the Peruvian authorities. These authorities, committed at least personally if not officially, to the expulsion of *all* Japanese, treated our proposed lists rather lightly. As the second and third ships departed, it became clear that the passengers who actually embarked were not the ones so carefully identified by us.⁵⁸

The Peruvian police arrested Japanese men without warning, often in pre-dawn raids on their homes. In many cases the men were given no time to gather personal items or notify their families. They were generally held in local jails, then turned over to U.S. authorities. No charges were filed; no hearings held. To avoid arrest, some men went into hiding; others found that well-placed bribes could buy them time.⁵⁹ Most of the men were Japanese nationals, but citizenship made little, if any, difference. Naturalized and native-born Peruvian citizens of Japanese descent were arrested and deported as well. Many who were Japanese citizens had lived in Peru for decades, some for over forty years,⁶⁰ and a number had wives and children who were Peruvian citizens. For “humanitarian reasons” and, one might note, to maximize the number of internees, U.S. officials included wives and children as “voluntary deportees.”⁶¹ For many women, joining their husbands in the United States was preferable to trying to raise children alone in a hostile environment, with the wage earners gone, businesses closed and assets frozen. Even in this sense, some departures could not be termed voluntary. A “strictly confidential” memorandum from the First Secretary of the Embassy in Lima to the Secretary of State notes that Chieko Nishino was deported upon the order of the Peruvian Minister of Government despite her insistence that she did not wish to join her estranged husband (indeed, despite her threats to commit suicide

⁵⁸ EMERSON, *supra* note 7, at 143.

⁵⁹ See *id.* at 143–44; GARDINER, *supra* note 7, at 65–67; WEGLYN, *supra* note 11, at 61.

⁶⁰ See GARDINER, *supra* note 7, at 43.

⁶¹ *Id.*

should she be deported) because the embassy feared that refusal to take her "might jeopardize future deportations of Axis nationals."⁶²

In February 1943 168 Japanese and 5 Germans were driven 600 miles north in army trucks without provisions for food to the port of Talara.⁶³ From Talara the men were sent to the Panama Canal Zone, where they lived under armed guard for several weeks, forced to clear jungle and construct living quarters.⁶⁴ They were then put on a U.S. army transport, where they were again required to work without pay.⁶⁵ When the ship docked at San Pedro, California, INS officials asked each man if he had a passport. None did, as all passports—Japanese and Peruvian—had been taken by U.S. authorities as soon as the ship left Peruvian waters.⁶⁶ Ironically, the Japanese Peruvians who had just been abducted at the behest of the State Department were informed by INS officials that their entry into the United States was "illegal."⁶⁷ This Kafkaesque sleight of hand foreshadowed the problems that Japanese Latin American internees would face both at the end of the war and when applying for reparations under the Civil Liberties Act of 1988.

Meanwhile, Peruvian President Prado sought U.S. help in permanently removing all Peruvians of Japanese descent.⁶⁸ Countering legal

⁶² Letter from George H. Butler, First Secretary of Embassy, to the Secretary of State (July 10, 1943) (DS File 740.00115 Pacific War/1729, RG 59) (on file with author). U.S. officials forced Mrs. Nishino onto an army transport and sent her to a prison camp in the United States while, at the same time, sending a memorandum to the Spanish Embassy, which represented Japanese interests, "disclaim[ing] all responsibility for any untoward incident which may occur during Mrs. Nishino's stay in the United States . . . or during the voyage." Memorandum from Henry R. Norweb, U.S. Ambassador to Peru, to Pablo de Churruca y Dotes, Spanish Ambassador to Peru (July 17, 1943) (DS File 740.00115, Pacific War/1729, RG 59) (on file with author).

⁶³ See GARDINER, *supra* note 7, at 67–69.

⁶⁴ Before they got there, however, this group spent over three months clearing jungle in Panama:

[A]s the rains beat down, the men were forced to work without remuneration. Denied communication with their families, unaccustomed to the hard labor, resenting the unsavory food and their inadequate shelter under intolerable weather conditions, the men understandably put forth no special effort. In return guards occasionally kicked, beat, or nicked with their bayonets some passive worker.

Id. at 76.

Gardiner reports that a thirty-one year-old merchant became so distraught that one day he began running for freedom, barefoot and in his pajamas. Miraculously he survived after guards in the towers felled him with their machine guns. *See id.* at 77.

⁶⁵ *See id.* at 69. Gardiner reports that one man was incarcerated for insubordination when he refused to work and that all of the men were forced to sign papers stating that they had been well treated on board. *See id.*

⁶⁶ *See id.* at 69–70. They did not have visas either, as U.S. consular officials had been instructed not to issue any. *See id.* at 29.

⁶⁷ *See* GARDINER, *supra* note 7, at 70.

⁶⁸ According to Gardiner, "[h]e and Pedro Beltran [later Peruvian ambassador to the United

concerns about shipping the Japanese Peruvians from a nonbelligerent state to a belligerent one, Prado argued that such action was permissible for purposes of repatriation.⁶⁹ This, of course, would only have been true for those Japanese citizens who requested repatriation.⁷⁰ U.S. Ambassador Norweb initially recommended that only "dangerous" Japanese leaders be expelled, but he wanted to maintain good relations with the Peruvian government and eventually advocated the removal of all Japanese Peruvians to the United States, regardless of their citizenship. "While approving Norweb's . . . proposals, the [State] department did view the deportation of Nisei [second generation] and naturalized Japanese as a knotty problem and suggested that the latter be 'denaturalized.'"⁷¹

In August 1942 Secretary of State Hull proposed to President Roosevelt that the State Department "[c]ontinue our efforts to remove *all the Japanese* from these American Republic countries for internment in the United States [and] continue our efforts to remove from South and Central America *all the dangerous Germans and Italians* still there"⁷² In other words, the State Department intended to individually screen Germans and Italians to see if they were dangerous, while simply kidnapping the Japanese wholesale. This created tension between the Departments of State and Justice, as the Justice Department knew that the only plausible justification for deporting and interning Japanese Peruvians was their identification as enemy aliens who posed a significant danger to hemispheric security. In June 1942 Attorney General Francis Biddle took the position that:

[i]f [the Latin American internees] are not to be repatriated . . . , the Department of State should arrange for them to be returned to Central or South America or the same procedure should be adopted with respect to them as now applies to other Axis aliens apprehended in this country on Presidential warrants, and [] each case should be decided on its merits to determine, after proper hearing, whether the individual alien should be released, paroled, or interned for the duration.⁷³

States] agreed that the removal of 30,000 Japanese they claimed were in the country would be the most welcome aid Washington could render Peru." *Id.* at 53.

⁶⁹ *See id.* at 53.

⁷⁰ *See infra* notes 73–75 and accompanying text.

⁷¹ GARDINER, *supra* note 7, at 55.

⁷² WEGLYN, *supra* note 11, at 63 (quoting letter from Cordell Hull, U.S. Secretary of State, to Franklin D. Roosevelt, U.S. President (Aug. 27, 1942) (OF 20, FDR Library) (on file with author) (emphasis added)).

⁷³ GARDINER, *supra* note 7, at 56 (quoting Memorandum from Francis Biddle, U.S. Attorney

The State Department favored repatriation or deportation to Japan,⁷⁴ but the Attorney General hesitated, noting that "[a]ny involuntary repatriation appears to raise serious questions of law as well as of policy."⁷⁵

By January 1943 the Justice Department could no longer ignore the fact that the United States was interning people who neither posed a security threat nor, as Peruvian citizens, were even enemy aliens. Although not insisting on individual hearings before alien enemy review boards, Biddle declared that "[s]ome of the cases seem to be mistakes,"⁷⁶ and sent Raymond Ickes of the Justice Department's Alien Enemy Control Unit to Lima to review the information available on each detainee to determine if he was actually or potentially "dangerous." Ickes's review slowed the process, but failed to ensure that only "dangerous enemy aliens" were deported.⁷⁷ He, too, discovered that there was no evidence that anyone was, in fact, "dangerous." Thus, "[i]n an effort to establish parameters warranting internment, Ickes accepted the following: service as an officer of a Japanese society, residence in Callao and other (unidentified) strategic areas, attendance at Japanese meetings . . . , visits at embassies and legations of other enemy countries."⁷⁸ The "screening" done by Emmerson for the State Department and Ickes for the Justice Department had little effect. Of the 119 men interned by the U.S. government in February 1943, only 15 had been on the U.S. list.⁷⁹ The rest were selected independently, and apparently quite randomly, by Peruvian authorities.

General, to Cordell Hull, Secretary of State (June 25, 1942) (DS File 740.00115 EW1939/3610, RG59 NA) (on file with author)).

⁷⁴ Apparently the State Department took this position because it was aware that the laws of most of the Latin American republics would not allow them to detain Axis nationals for the duration of the war. See *id.* at 57.

⁷⁵ *Id.* (quoting Department of State Memorandum (Nov. 6, 1942) (DS File 311.9415/251) and Memorandum from Francis Biddle, U.S. Attorney General, to Secretary of State (Nov. 9, 1942) (DS File 740.00115 PW/1126, GR59, NA) (on file with author)).

⁷⁶ WEGLYN, *supra* note 11, at 63 (quoting Letter from Francis Biddle, U.S. Attorney General, to the Secretary of State (Jan. 11, 1943) (DS 740.00115 Pacific War/1276, RG59, NA) (on file with author)).

⁷⁷ People like Arturo Shinei Yakabi were still among those taken on the next ship. Yakabi, twenty-one years old, had been born in Peru. As the oldest child of poor farmworkers, he had been sent at age 15 to work in a bakery in Callao. In February 1943 he was awakened in his room behind the bakery, seized by the Peruvian police and held in a Lima jail for three weeks. Apparently his employer had avoided deportation by paying a bribe and offering Yakabi as a substitute. Yakabi's mother visited repeatedly and the police told the family that if they had money something could be "worked out." They did not have any, so at 3:00 a.m. on February 24, carrying all he owned in a flour sack, Yakabi was put on a truck and loaded onto the *Frederick C. Johnson*. He joined 119 other Japanese Peruvians headed to concentration camps in Missouri, Montana and later, the Texas desert. See GARDINER, *supra* note 7, at 72, 77-78.

⁷⁸ *Id.* at 73.

⁷⁹ In addition to those men who were deemed "dangerous," the United States wanted the

The last ship transporting Japanese Peruvians landed in New Orleans on October 21, 1944. By that time well over 2000 people⁸⁰ had been taken from their homes and their homelands and interned in U.S. prison camps—many of them snatched from their beds or arrested without warning at work or in meetings; others “volunteering” to be repatriated to Japan because conditions had become so harsh in Peru; some “volunteering” in order to reunite their families.

C. Internment in the United States

The Japanese Latin American internees were held by the INS, under Justice Department jurisdiction, rather than by the War Relocation Authority (“WRA”) that had been established to oversee the incarceration of Japanese Americans.⁸¹ The first INS internment center—concentration camp, to be more accurate⁸²—was in an abandoned federal Civilian Conservation Corps camp in the southern Texas town of Kenedy.⁸³ There was no doubt that this was a prison camp—the administrators were instructed to comply with the Geneva Convention of 1929, which specifies minimum requirements for the treatment of prisoners of war.⁸⁴ A censor division scrutinized all mail and a surveillance department trained civilian guards to work with INS agents.⁸⁵ There were two daily line-ups and up to four checks each night. The entire camp was surrounded by a barbed-wire fence which, if touched, activated an electric alarm.⁸⁶ Some Japanese Latin American men were sent to an abandoned army post at Fort Missoula, Montana, where “hundreds of Italian seamen, a few Germans, and an unknown number of Japanese Americans” were already being held.⁸⁷ From these camps,

families of the men who had already been interned, as the men were more likely to agree to be repatriated to Japan if their families were with them. *See id.* at 73.

⁸⁰ Weglyn says of the Japanese Latin Americans in Justice Department custody: “A total of 1,094 of them, officially designated as ‘voluntary detainees,’ answered the State Department’s ‘invitation’ to place themselves in war-duration voluntary incarceration with the 1,024 men who had been seized and spirited to the mainland by the U.S. military.” WEGLYN, *supra* note 11, at 62; *see also* EMMERSON, *supra* note 7, at 139; GARDINER, *supra* note 7, at 95.

⁸¹ GARDINER, *supra* note 7, at 22.

⁸² That these, and the WRA camps, were in fact, concentration camps, has been acknowledged by many who were responsible for them. President Roosevelt said in 1944, that “it is felt by a great many lawyers that under the Constitution [the Nisei] can’t be kept locked up in concentration camps.” WEGLYN, *supra* note 11, at 217. Upon his retirement as Associate Justice of the Supreme Court, Tom Clark said, “[w]e picked [the Japanese Americans] up and put them in concentration camps. That’s the truth of the matter.” *Id.* at 114.

⁸³ *See* GARDINER, *supra* note 7, at 29–30.

⁸⁴ *See id.* at 30.

⁸⁵ *See id.*

⁸⁶ *See id.* at 32–33.

⁸⁷ *Id.* at 83.

some "volunteers" went to Kooskia, Idaho to work on road projects while those men who remained at Kenedy were transferred to a barbed wire stockade, formerly a prison, in Santa Fe, New Mexico.⁸⁸

As more internees, particularly women and children, were brought in, the INS created two additional camps in Texas. One was at Seagoville, a former federal women's prison, where internees were initially housed with prison inmates under the immediate supervision of a Bureau of Prisons warden.⁸⁹ The Seagoville prison was soon filled, and the INS expanded a migrant labor facility in Crystal City, Texas to become the third prison camp.⁹⁰ Some Japanese Latin Americans were also held by the military at Camp Livingston, Louisiana and Fort Sill, Oklahoma.⁹¹

Living conditions in these camps were abhorrent. In July 1943 Albert Clattenberg of the State Department, after visiting the camps at Kenedy, Crystal City and Seagoville, noted that the physical facilities, except the permanent buildings at Seagoville, were significantly worse than those at a U.S. prisoner of war camp he had visited in Europe:

The climate of Texas . . . cannot be considered mild in summer and the shadeless detention areas in which there are primarily temporary structures do not measure up against the Texas heat in the same way that the permanent structures in the detention camps in Europe, even with the scarcity of fuel, measure up against the European winter.⁹²

Clattenberg worried that the poor conditions in the camps endangered the well-being of Americans that were being held by Axis governments and warned that "our Americans in Europe stand in momentary danger of ruthless retaliation."⁹³

In addition to the physical difficulties discussed above, the Japanese Peruvians were subject to social, economic, cultural and psychological hardships as well. Families were literally scattered around the world, and those who managed to reunite in camp faced years in cramped quarters with little privacy. Property, personal belongings and

⁸⁸ See GARDINER, *supra* note 7, at 97-98.

⁸⁹ See *id.* at 37-38.

⁹⁰ See *id.* at 36, 75, 98-103.

⁹¹ See *id.* at 49.

⁹² Albert E. Clattenberg, Brief Review of Impressions Obtained at Immigration Detention Stations at Kennedy, Crystal City and Seagoville, Texas (July 9, 1943) (on file with author).

⁹³ *Id.* He blamed the conditions on the "apparent failure of the appropriate agencies of this Government to accord the Immigration Service the priority ratings necessary for provision of material articles requisite for the construction and operation of a camp according to a standard affording security against reprisals for our Americans detained abroad." *Id.*

cash were lost. Parents worried about their children being accepted in Japan and tried to retain some semblance of Japanese culture and language in their lives, while the children who had grown up speaking Spanish were now constantly exposed to English. Children born in the camps added to already confused questions of identity. "The Hikoza Izumi family," Gardiner states, "represented graphically the kinds of tangled citizenship to which internment was contributing. Hikoza held Japanese citizenship, his wife Masako was a Peruvian Nisei, one child was Peruvian-born, and now their second child was American."⁹⁴

D. *Hostages for Exchange*

Why did the United States go to so much trouble and expense to detain, transport and incarcerate nearly 2000 Japanese Peruvians who were known to be of no danger to hemispheric security?

U.S. officials may have thought that catering to anti-Japanese sentiment was an easy way to obtain Peru's cooperation in the war effort. Although the U.S. government placed a military force near the northern oilfields of Talara, signed a lend-lease agreement promising Peru approximately \$29 million of arms and munitions and negotiated for Peruvian rubber, cinchona bark and other perceived strategic materials,⁹⁵ such factors do not adequately explain the U.S. motivation in this massive effort to intern civilians. The U.S. authorities wanted to have Japanese Latin American civilians in their possession and control not because these civilians posed any threat but because the United States wanted hostages to barter for American citizens held in Japanese-occupied territories.

The idea of taking hostages was not a new one. As early as 1936, George S. Patton, then Chief of Military Intelligence in Hawaii, drafted a plan "[t]o arrest and intern certain persons of the Orange race [i.e., Japanese] who [were] considered most inimical to American interests, or those whom, due to their position and influence in the Orange community, it [was] desirable to retain as hostages."⁹⁶ In August 1941, months before the U.S. Navy was attacked at Pearl Harbor, Congressman John Dingell of Michigan wrote President Roosevelt:

I want to suggest . . . that we remind Nippon that unless assurances are received that Japan will facilitate and permit the voluntary departure of [a group of one hundred Ameri-

⁹⁴ GARDINER, *supra* note 7, at 110.

⁹⁵ See *id.* at 20-21.

⁹⁶ WEGLYN, *supra* note 11, at 182.

can citizens] within forty-eight hours, the Government of the United States will cause the forceful detention or imprisonment in a concentration camp of ten thousand alien Japanese in Hawaii; the ratio of Japanese hostages held by America being one hundred for every American detained by the Mikado's Government.

It would be well to further remind Japan that there are perhaps one hundred fifty thousand additional alien Japanese in the United States who will be held in a reprisal reserve⁹⁷

In January 1942 Major Karl Bendetson, architect of the Japanese American internment, said that "the 'hostage idea' has not been sufficiently explored The question should be . . . whether the individual has any close relatives in the armed forces . . . in [a] hostile [nation]."⁹⁸ Weglyn says

[i]f a reprisal reserve urgency had indeed precipitated the sudden decision for internment, the emphasis, as the tide of the war reversed itself, switched to the buildup of a "barter reserve": one sizable enough to allow for the earliest possible repatriation of American detainees, even at the price of a disproportionate number of Japanese nationals in exchange.⁹⁹

All of this could have been avoided had the United States accepted a Japanese proposal in the early days of the war to exchange nonofficials "without limit as to their number and without question of their usefulness for the prosecution of the war."¹⁰⁰ Instead, the United States pursued a policy of creating reserves of hostages for exchange. As a result, according to Gardiner,

by mid-1942 the United States, aware of the entrapment of additional thousands of Americans by Japanese military successes, could only hope to regain those nonofficial Americans by giving up an equal number of nonofficial Japanese. Battlefield casualties did not then constitute the sole body count.

⁹⁷ *Id.* at 55 (quoting Letter from John Dingell, U.S. Congressman from Michigan, to Franklin D. Roosevelt (Aug. 18, 1941) (on file with author)). As Weglyn points out, according to the 1940 census, there were approximately 127,000 Japanese Americans in the continental United States, less than 50,000 of whom were aliens. *See id.* at 285 n.1.

⁹⁸ *Id.* at 182.

⁹⁹ *Id.* at 56.

¹⁰⁰ GARDINER, *supra* note 7, at 47 (citations omitted).

Very carefully one counted and matched the number of persons promised in any exchange with the enemy.¹⁰¹

Two such exchanges of civilians took place.¹⁰² In an *Outline of Negotiations for Exchange of American Civilians in Japanese Hands*, Clattenberg states that from December 7, 1941 to April 15, 1942 the United States "assembled from various points on this continent Japanese nationals who were to be repatriated" and from April 15 to July 25, 1942 "carried on the activities necessary to accumulate a ship-load of Japanese nationals from this hemisphere."¹⁰³ In June 1942 the *Gripsholm* left New York carrying 1065 Japanese nationals, including 35 Japanese Peruvians.¹⁰⁴ The second exchange was delayed until September 1943 by communication problems, the difficulties of working through both Spanish and Swiss intermediaries, discrepancies between the individuals requested by the Japanese government and those produced by the United States and the refusal of many Japanese Latin Americans to repatriate. This time the *Gripsholm* carried 1340 Japanese, of whom 484 were from Peru.¹⁰⁵

The United States was anxious to arrange a third exchange of 1500 prisoners, but the Japanese government's interest seems to have waned as it learned of the U.S. treatment of both Japanese Americans and Latin Americans. In October 1942 the Spanish embassy transmitted a protest from the Japanese government denouncing the "inhuman treatment given the Japanese in Panama."¹⁰⁶ A Memorandum of May 29, 1944 protested the transfer of both Bolivian and Peruvian Japanese:

¹⁰¹ *Id.* at 50.

¹⁰² Within days of the U.S. declaration of war, the Japanese had accepted a U.S. proposal for an exchange of diplomatic personnel at the east African port of Lourenco Marques (now Maputo). A memorandum of June 15, 1942 outlines the agreement. See State Department Memorandum, Summary of American-Japanese Exchange Agreement (June 15, 1942) (on file with author); see also GARDINER, *supra* note 7, at 46-47.

¹⁰³ Albert E. Clattenberg, *Outline of Negotiations for Exchange of American Civilians in Japanese Hands* (Oct. 12, 1943) (on file with author).

¹⁰⁴ GARDINER, *supra* note 7, at 48. Approximately 400 additional Japanese from the east coast of South America were picked up in Rio de Janeiro. See *id.*

¹⁰⁵ Gardiner concludes:

When the United States put the women and children from Costa Rica and Panama, the men from Peru, and the occasional family from any of those countries aboard the *Gripsholm*, those Latin American Japanese, not one of whom had been charged, tried, or convicted of espionage, sabotage, or subversive activity, were pawns in a human traffic Washington hoped to continue.

Id. at 50.

¹⁰⁶ Memorandum from the Spanish Embassy, to the U.S. Department of State, (Oct. 1, 1942), reprinted in WEGLYN, *supra* note 11, at 183-84 app. 7A. According to the Spanish Embassy:

The fact of the American Government having whimsically transferred the custody of Japanese residents of a third country, namely Bolivia, to the United States, is as unjust a measure as the one taken by the American Government with the Japanese residents of Peru, a measure that the Japanese Government is still at a loss to understand.¹⁰⁷

In addition to protesting the abduction of Japanese from Central and South America, the Japanese government paid close attention to the U.S. treatment of Japanese Americans. In late 1942 Dillon Myer, National Director of the War Relocation Authority, notified the directors of the ten U.S. "relocation centers" that the Spanish Consul, on behalf of the Japanese government, was conducting inspection tours of all civilian detention camps. He warned: "Please bear in mind that the Japanese Government has recently evidenced a substantial amount of interest in the West Coast evacuation through diplomatic channels and has lodged some rather vigorous protests concerning various phases of the treatment of Japanese generally in the United States."¹⁰⁸

In December 1942 dissent and turmoil at the camp holding Japanese Americans in Manzanar, California culminated in troops throwing tear gas grenades and firing into a crowd, killing two internees and injuring dozens.¹⁰⁹ The WRA reported, "The incident, which might well have been represented to Japanese governmental authorities as an

The Japanese diplomats and residents of Panama who recently arrived in Japan, denounce the inhuman treatment given the Japanese in Panama.

They advise that on December 7th, all Japanese residents in Panama were arrested without allowing them to take anything more with them than what they had on, and were held up to 24 hours in the jail of Panama and by the Police of Colon without any food or water.

On the 8th, they were turned over to the American Authorities and for one week were put in very unsanitary concentration camps, forced to work and given extreme punishment.

Immediately after their arrest, the homes and residences of these detainees were looted.

Upon being transferred, the American Authorities of the Canal Zone, confiscated all the money that they had . . .

Among the Japanese detainees, there was one named Alejandro who fell ill, and neither the American or Panamanian Authorities gave him medical attention until the 2nd of May, when he was placed in a hospital and where he died the same day.

Id.

¹⁰⁷ Memorandum from the Spanish Embassy, to the U.S. Department of State (May 29, 1944), reprinted in WEGLYN, *supra* note 11, at 185.

¹⁰⁸ WEGLYN, *supra* note 11, at 120 (quoting Memorandum from Myer to All Project Directors (Dec. 9, 1942) (on file with author)).

¹⁰⁹ See *id.* at 121-25.

attempt at mass murder, could easily have touched off a wave of unrestrained brutality at prisoner of war camps and detention stations throughout the Far East."¹¹⁰ There was no immediate response, but "[a]fter the docking of the first detainee exchange ship, the Japanese Government sharply protested 'these outrages on the part of the United States Authorities' in which 'unarmed civilian internees who offered no resistance were mercilessly killed and wounded.'"¹¹¹

Shortly after the second *Gripsholm* exchange, the U.S. government sent all the Japanese Americans deemed "disloyal" to the Tule Lake camp. There, 18,000 Japanese Americans were crowded into a camp complete with barbed wire, tanks patrolling its perimeter and a full battalion of guard troops.¹¹² Outrage over their treatment escalated into a demonstration of over 5000 men, women and children when WRA Director Myer visited in November 1943. Three days later, the Army invaded and martial law was declared within the camp, triggering new rounds of arrests, protests and hunger strikes.¹¹³ The Japanese government protested and Secretary of State Hull immediately warned Secretary of War Stimson of the "vital nature of this problem arising from the desire of this government to keep open negotiations with the Japanese Government, looking toward future exchange operations through which Americans in Japanese hands may be repatriated"¹¹⁴ Nonetheless, the U.S. government persisted in its hard line response. Weglyn concludes:

The Tule Lake "riot" had exploded into headlines at the very moment when the lives and safety of over 6,000 American detainees in Japanese prison camps hung precariously in the balance as they awaited exchange ships. In two years of war, fewer than 3,000 persons had been exchanged

With the follow-up report from the Spanish Embassy concerning the stockade, the 200 men being held therein, and the extraordinary Army seizure of a camp full of civilian detainees, Tokyo called an abrupt halt to prisoner-exchange negotiations. The cutoff proved permanent.¹¹⁵

¹¹⁰ *Id.* at 125 (quoting WAR RELOCATION AUTHORITY, WRA: A STORY OF HUMAN CONSERVATION 50 (1946)).

¹¹¹ *Id.* (quoting Memorandum from Spanish Embassy to State Department (Mar. 13, 1944) (on file with author)).

¹¹² *See id.* at 156-57.

¹¹³ *See* WEGLYN, *supra* note 11, at 160-66.

¹¹⁴ *Id.* at 171 (quoting Secretary of State Hull, to Secretary of War Stimson (Jan. 11, 1944) (WRA File 36.239, RG 210, NA) (on file with author)).

¹¹⁵ *Id.* at 173.

Thus, it seems that the U.S. kidnapping of civilians from third-party countries and the mistreatment in the camps of both Latin American and U.S. citizens or residents of Japanese descent made the Japanese government unwilling to participate in further exchanges. Although ships continued to bring deportees from Peru through the middle of 1944, only about 500 Japanese Peruvians, in total, were exchanged for Japanese-held American citizens. As of July 1945, over 1300 Japanese Latin Americans, mostly Peruvians, remained interned in the United States, along with 815 Germans and 53 Italians who had been brought to the United States from Latin America.¹¹⁶

E. Forced Deportations

The internment of Japanese Latin Americans, much like the internment of Japanese Americans, has been portrayed as an aberration based on wartime hysteria, confusion or haste.¹¹⁷ The implication is that the actions taken, while regrettable, were justifiable because they occurred under extraordinary circumstances. It is, however, precisely during times of war or other perceived crisis—times that our civil liberties are most easily lost—that we must most diligently guard our rights and insist on lawful conduct by the government.¹¹⁸ That these violations of human rights were not just a product of wartime hysteria, but were deeply rooted in our political and legal structures is illustrated by the treatment of the Japanese Latin Americans after the war ended.

In December 1945 Jonathan Bingham, Chief of the State Department's Alien Enemy Control Section, stated, "[t]here was never any clear understanding as to the eventual disposition of the aliens after the war, primarily because at the time they were deported from Peru no one was thinking about the postwar period."¹¹⁹ A full year before Japan's surrender, realizing that further civilian exchanges were unlikely, the State Department anticipated "difficulties in disposing of the

¹¹⁶ Even though they—unlike the Japanese—had been determined to be "dangerous," over half the Italians and almost a third of the Germans were "interned at large," having been released in a parole-type status after an investigation of their cases. All of the Japanese were kept in camps. See Memorandum on the Removal of Enemy Aliens Brought Here from the Other Americas, from J.E. Doyle, to the Acting Secretary of State (Sept. 24, 1945) (on file with author).

¹¹⁷ See Sense, *supra* note 2 (quoting apology of President Clinton); see also WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 205–06, 211 (1998) (noting that judicial review is ill-suited to determine "military necessity" and that on the West Coast there was real fear of attack by Japanese forces).

¹¹⁸ See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

¹¹⁹ GARDINER, *supra* note 7, at 129 (quoting Memorandum of Jonathan Bingham, Chief of the State Department's Alien Enemy Control Section (Dec. 13, 1945), published in 9 FRUS 298 (1945)).

enemy nationals brought here from the other American republics for internment."¹²⁰ The repatriation of those who wanted to return to Germany or Japan was not an issue, but the internees who wanted to return to Latin America or remain in the United States posed a problem for the government.

U.S. officials faced a dilemma. On the one hand, they wanted the other American republics to agree to "the return of all internees to the enemy state of which they were nationals,"¹²¹ in part because the State Department had a grand vision of banishing all "subversive" elements from the hemisphere, and perhaps also because the "more complete the harassment and removal of late enemy nationals and their operations, the more complete the economic void to be filled by Americans, their products and capital."¹²² On the other hand, the Justice Department was clear that U.S. law and policy prohibited forced repatriations.

At a meeting held on August 31, 1944, State Department officials recognized that "some individuals sent here for internment were undoubtedly relatively harmless and probably were selected for expulsion through error."¹²³ Thus, they agreed to divide the internees into three classifications: (A) dangerous, (B) probably dangerous and (C) probably harmless. Persons in categories B and C might be allowed to return to the Latin American countries from which they came, but "[a]ll persons in category A would be sent to their homeland and efforts would be made . . . to prevent them from returning to the Western Hemisphere."¹²⁴ The new classification system afforded no relief to Japanese Latin Americans because it was further agreed that "category [A] would include *all Japanese* received from the other American republics" whether considered dangerous or not.¹²⁵

In March 1945 the Inter-American Conference on Problems of War and Peace at Mexico City passed Resolution VII of its Final Act, recommending that all American republics adopt measures to prevent any person whose deportation was deemed necessary for reasons of security from further residing in the Western Hemisphere.¹²⁶ The United

¹²⁰ Memorandum of Meeting, Post-War Disposition of Interned Alien Enemies Received from the Other American Republics 1 (Aug. 31, 1944) (on file with author) [hereinafter Memorandum of Meeting].

¹²¹ See *id.* at 2.

¹²² GARDINER, *supra* note 7, at 114-15.

¹²³ Memorandum of Meeting, *supra* note 120, at 2.

¹²⁴ See *id.* at 4.

¹²⁵ See *id.* (emphasis added). By January 31, 1946, of the 513 Japanese from Latin America still in U.S. custody, 495 were from Peru. See GARDINER, *supra* note 7, at 134, tbl. 9.

¹²⁶ See Proclamation No. 2662, reprinted in 50 U.S.C., Supp. IV, app. note prec. § 1 (1945) and in 59 Stat. 880 (1945).

States invoked Resolution VII to pressure Latin American governments into repatriating all interned Axis nationals. Nonetheless, Peru insisted that the U.S. return certain German internees to Peru, regardless of their security classification, and refused to take back *any* of the Japanese, *even those who were Peruvian citizens*. After initial resistance, U.S. authorities agreed that Peru would have the final word on German deportations, despite the fact that this "would result in the return to Peru of some of the worst offenders" ¹²⁷ Regarding the Japanese, Gardiner explains,

Peru, regretting that it had not rid itself of all its Japanese, insistently refused to readmit most of those who had been shipped to the United States. Secure in the knowledge that the interned Peruvian Japanese had constituted no security risk to either country at any time, the United States had hoped that Peru would relent and readmit the several hundred who desired to return there. ¹²⁸

Ultimately, Peru agreed only to the return of those who were born in Peru (the Nisei), naturalized citizens and those who were married to Peruvians. ¹²⁹

U.S. authorities insisted that all remaining Japanese Peruvians would be deported to Japan, even though it was unclear that the government had the power to send them involuntarily. The Alien Enemy Act of 1798 ¹³⁰ provided that in the event of war all enemy aliens over fourteen years of age within the United States could be "apprehended, restrained, secured, and removed" according to presidential proclamation. The government had relied on this authority in holding Japanese Latin Americans, although its application to those brought here by the government is questionable.

On July 14, 1945 President Truman issued a proclamation authorizing the Attorney General to order the removal of alien enemies interned within the United States who were deemed "dangerous to the public peace and safety of the United States because they have adhered to . . . enemy governments or to the principles of government thereof

¹²⁷ See Memorandum, Disposition of German Internees from Peru, from Joseph Flack, to Mr. Dreier (Nov. 7, 1945) (on file with author) (with attachments giving the history of the disagreement).

¹²⁸ GARDINER, *supra* note 7, at 152.

¹²⁹ *Id.* at 153.

¹³⁰ Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (50 U.S.C. § 21 et seq. (1998)); see also J. Gregory Sidak, *War, Liberty and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1416-20 (1992) (discussing the use of the Alien Enemy Act during World War II).

...¹³¹ Because the Justice Department interpreted this to extend only to the removal of aliens who were U.S. residents, the State Department requested and obtained the Presidential Proclamation of September 8, 1945, which specifically authorized the Secretary of State to remove to destinations outside the Western Hemisphere:

All alien enemies now within the continental limits of the United States (1) who were sent here from other American republics for restraint and repatriation pursuant to international commitments of the United States Government and for the security of the United States and its associated powers and (2) who are within the territory of the United States without admission under the immigration laws . . . if their continued residence in the Western Hemisphere is deemed by the Secretary of State prejudicial to the future security or welfare of the Americas as prescribed in Resolution VII of the Inter-American Conference on Problems of War and Peace . . .¹³²

Implementing this proclamation created problems, as noted by J.E. Doyle in a State Department memorandum of September 29, 1945. First, he said, the powers granted under the Alien Enemy Act were so sweeping that the Supreme Court might suspend its application upon the unconditional surrender of the enemy.¹³³ In other words, because Japan had surrendered, the war was over and such measures were no longer needed. Second, some of the internees were not "alien enemies," but were Peruvian citizens or U.S. citizens by virtue of their birth in the camps. Third, the continued residence of Japanese Peruvians in the Western Hemisphere could hardly be considered a threat to the security or welfare of the Americas.¹³⁴ Doyle concluded:

[I]t remains far too clear that the initial apprehension of these persons, their removal to the United States, and their internment here has been accomplished in disregard of the very fundamentals of just and orderly procedure. From first to last . . . these aliens have been denied a clear statement of

¹³¹ Proclamation No. 2662, *reprinted in* 50 U.S.C., Supp. IV, app. note prec. § 1 *and in* 59 Stat. 880; *see also* Memorandum from J.E. Doyle, Summary Statement on Removal of Enemy Aliens Brought Here from the Other Americas, to Acting Secretary (Sept. 29, 1945) 2-3, (711.62115 AR/9-2945, NA) (on file with author) [hereinafter J.E. Doyle, Summary Statement].

¹³² Proclamation No. 2662, *reprinted in* 50 U.S.C., Supp. IV, app. note prec. § 1 *and in* 59 Stat. 880.

¹³³ *See* J.E. Doyle, Summary Statement, *supra* note 131, at 3.

¹³⁴ *See* GARDINER, *supra* note 7, at 132.

the charges against them or an opportunity to deny or to disprove the charges

It is now suggested that . . . all but about 50 will be deported to Germany, Italy or Japan. It is not too much to say that this crowning disregard of basic notions of fairness and decency would earn for this program an equal place with the Mitchell Palmer raids and the anti-alien crusade that followed the first World War.¹³⁵

Nonetheless, the deportations proceeded. Between November 1945 and February 1946, the United States sent between 1400 and 1700 Japanese Peruvians to a war-devastated, U.S.-occupied Japan.¹³⁶ Many of the deportees had no ties to Japan, some had never even been there and a number of the men had wives and children still living in Peru.¹³⁷ Deemed "voluntary" by the State Department, many internees only acquiesced when Peru prohibited their return and the U.S. government insisted that they would not be allowed to stay in the country.¹³⁸ In March 1946 Acting Secretary of State Dean Acheson informed Attorney General Tom Clark, formerly the Coordinator of Alien Enemy Control and later a Supreme Court Justice:

[i]n no case is there clear evidence that the individual's continued residence in this hemisphere would be prejudicial to the security and welfare of the Americas. I am therefore requesting you to inform [the approximately 425 remaining Japanese Peruvians] that they are no longer subject to restraint as dangerous alien enemies.¹³⁹

¹³⁵ J.E. Doyle, Summary Statement, *supra* note 131, at 5-6.

¹³⁶ WEGLYN, *supra* note 11, at 64 & n.28 (stating that during this period 1700 Japanese Peruvians (700 men and their dependents) were sent to Japan, but noting that the State Department reports 1440 people "voluntarily returned to Japan").

¹³⁷ *Id.* at 64.

¹³⁸ In *Ex parte Kenzo Arakawa*, a habeas corpus proceeding challenging the government's right to hold the plaintiff in custody at Seabrook Farms and to deport him to Japan, the district court held that the plaintiff was lawfully detained pursuant to the Alien Enemy Act and that the government could deport him to Japan without his consent despite the fact that the Axis nations had unconditionally surrendered and the President had proclaimed that hostilities had ceased. 79 F. Supp. 468, 470-71 (E.D. Pa. 1947). *But see* *United States ex rel. Paetau v. Watkins*, 164 F.2d 457 (2d Cir. 1947) (holding that an alien brought to the United States against his will for internment as an alien enemy could not be deported as an "immigrant" until he had been given the opportunity to depart voluntarily); *United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650 (2d Cir. 1947) (holding that a German brought to the United States from Costa Rica and interned pursuant to the Alien Enemy Act could be ordered removed from the country, but could not be held in custody unless it was shown that he "refused or neglected" to depart voluntarily).

¹³⁹ GARDINER, *supra* note 7, at 136.

Acheson added, "[Y]ou will presumably wish to take steps looking toward their departure from the United States within a reasonable time."¹⁴⁰ In other words, rather than deport them as "enemy aliens," the State Department turned responsibility for the expulsions over to the Justice Department who, through the INS, would deport the Japanese Peruvians as "illegal aliens."¹⁴¹

In the spring of 1946, the 365 Japanese Peruvians still fighting deportation came to the attention of Wayne Collins, a remarkable attorney who represented Fred Korematsu in his challenge to the Japanese American internment as well as hundreds of Japanese Americans in deportation proceedings where the government claimed they had "renounced" their U.S. citizenship.¹⁴² Collins, with the support of the ACLU of Northern California, filed two test cases challenging the Japanese Peruvian deportations, thereby delaying the process. He also arranged for about 200 Japanese Peruvians to be "paroled" (i.e., released from detention) for the purpose of working at Seabrook Farms, a frozen food processing plant in New Jersey which had been using civilian internee as well as German prisoner of war labor.¹⁴³

The plight of the Japanese Peruvians dragged on; their lives put on hold while Wayne Collins furiously pursued legal, political and diplomatic solutions. In the spring of 1949, seven years after the first Japanese Peruvians were seized, the State Department finally decided that "the obvious solution [was] to regularize their status in the United States as permanent immigrants legally admitted."¹⁴⁴ Over the next few years, individual families managed to have their orders of deportation suspended, a process that required petitioning the Board of Immigration Appeals and getting a resolution passed by Congress. In 1954 the

¹⁴⁰ *Id.* at 136 & n.7.

¹⁴¹ Thus, the arrest warrant of Iwamori Sakasegawa stated that he was to be deported because he did not have a valid visa, did not have an unexpired passport and was ineligible for citizenship at the time he entered the United States. *See id.* at 144-45.

At this time, the restrictions of the Naturalization Act of 1790 which originally limited citizenship to "free white persons" had been modified to allow the naturalization of persons of African descent and persons from certain Asian countries, but the racial restriction still applied to those of Japanese descent. *See* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 271-72 (1997) [hereinafter *Alien and Non-Alien Alike*]. *See generally* HANEY LOPEZ, *supra* note 3; Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33 (1995).

¹⁴² *See generally* JOHN CRISTGAU, "ENEMIES": WORLD WAR II ALIEN INTERNMENT (1985); PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983).

¹⁴³ *See* CRISTGAU, *supra* note 142, at 177-78; GARDINER, *supra* note 7, at 141-51; WEGLYN, *supra* note 11, at 64-65.

¹⁴⁴ GARDINER, *supra* note 7, at 168 (citing Memorandum of B.C. Davis, to State Department (Apr. 15, 1949), (FW 711.94115 AR/4-1349, RG 59, NA) (on file with author)).

Refugee Relief Act of 1953 was amended to provide that "[a]ny alien who establishes that prior to July 1, 1953, he . . . was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status."¹⁴⁵ Thus, some of the interned Japanese Latin Americans were able to remain in the United States after years of uncertainty, during which time they had effectively been rendered stateless.

II. VIOLATIONS OF INTERNATIONAL LAW

The forcible detention of Japanese from Peru, arising out of a wartime collaboration among the governments of Peru, the United States, and the American republics, was clearly a violation of human rights and was not justified by any plausible threat to the security of the Western Hemisphere.

—John Emmerson, *Second Secretary of the U.S. Embassy in Lima, Peru, 1942–43*¹⁴⁶

The U.S. kidnapping, deportation, internment, holding hostage and forced repatriation of Japanese Peruvians constituted a series of war crimes.¹⁴⁷ These crimes did not result from the actions of a few individuals, but from a callous and widespread disregard for the rights of the people involved and the applicable international law. Those responsible for making and carrying out U.S. policy willingly violated the law for perceived strategic and/or political advantage. Much of what we now call *human rights law*, particularly that which protects individuals against the actions of their own governments, emerged out of World War II,¹⁴⁸ but during the war there was already in place a large body of well-established international *humanitarian law* that covered the treatment of civilians during war.¹⁴⁹ To establish the principles of international law that were in effect at the time of the Japanese Peru-

¹⁴⁵ *Id.* at 171.

¹⁴⁶ EMMERSON, *supra* note 7, at 149.

¹⁴⁷ See generally Manjusha P. Kulkarni, Note, *Application of the Civil Liberties Act to Japanese Peruvians: Seeking Redress for Deportation and Internment Conducted by the United States Government During World War II*, 5 B.U. PUB. INT. L.J. 309 (1996); Kam Nakano, Japanese Latin Americans, The Forgotten Victims of World War 2: A Litigation Strategy Based on International Law (1997) (unpublished) (manuscript on file with author).

¹⁴⁸ See, e.g., Louis Henkin, *The Internationalization of Human Rights*, quoted in LOUIS HENKIN, ET AL., INTERNATIONAL LAW CASES AND MATERIALS 596, 597 (3d ed. 1993) ("Real, full-blown internationalization of human rights came in the wake of Hitler and World War II.").

¹⁴⁹ See generally Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171 (1997) (describing the evolution of international humanitarian law); Karen Parker & Jennifer F.

vian internment, we look to both conventions and customary international law.¹⁵⁰ By World War II, there was generally recognized international law applicable to many areas implicated by the U.S. internment of Japanese Latin Americans: mutual self-defense treaties and the extent of permissible involvement of nonbelligerents in hostilities; the treatment of "enemy aliens" and prisoners of war; the treatment of civilians in occupied territories and in nonbelligerent countries; the transfer and deportation of civilian populations; the granting, withholding and revoking of citizenship; governmental responsibility for citizens, including a prohibition on rendering people stateless; and forced repatriation.¹⁵¹ This Section examines the specific provisions of international law that were violated by the U.S. government's actions and its ongoing refusal to compensate the victims.

A. *Kidnapping and Deportation*

The United States violated well-established principles of international law by collaborating with the Peruvian government—and other Latin American governments—to kidnap and deport civilian noncombatants from a nonbelligerent to a belligerent country on the basis of their racial or ethnic identification, without charge, hearing or determination that they posed a serious threat to U.S., Peruvian or "hemispheric" security. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 states:

Chew, *Compensation for Japan's World War II War Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 511–21 (1994) (describing customary and conventional law applying to Japan's use of "comfort women" during World War II).

¹⁵⁰ The Statute of International Court of Justice, established in June 1945, states in Article 38 that in making decisions "in accordance with international law," the ICJ shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations; [and]
- (d) [as a subsidiary and non-binding means of determination,] judicial decisions and the teachings of the most highly qualified publicists of the various nations.

Statute of the ICJ, Art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

In May 1945, in drafting the Executive Agreement Relating to the Prosecution of European Axis War Criminals, the Allied Powers agreed that "International law' shall be taken to include treaties between nations and the principles of the law of nations as they result from the usages established among civilized peoples from laws of humanity, and the dictates of the public conscience." Executive Agreement Relating to the Prosecution of European Axis War Criminals (drafts 3 & 4), ¶ 12 in *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD* 206 (Bradley F. Smith ed., 1982).

¹⁵¹ See generally Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469 (1993).

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive."¹⁵² Article 146 provides that the parties will "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches . . . defined in the following Article."¹⁵³ That Article defines grave breaches to include "unlawful deportation or transfer or unlawful confinement of a protected person"¹⁵⁴ While the drafting of this treaty was not completed until a few years after World War II, "[t]hese articles of the Geneva Convention of 1949 merely codify the prohibition of deportations of civilians from occupied territories which in fact already existed in the laws and customs of war."¹⁵⁵ A proposal to prohibit deportations had been included in the Tokyo Draft of Geneva IV adopted at the International Red Cross Conference of 1934,¹⁵⁶ and some of this customary law had been codified in the 1907 Hague Regulations.¹⁵⁷ According to the Commentary to the 1949 Geneva Convention, the 1907 Hague Regulations probably did not explicitly prohibit deportations "because the

¹⁵² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3576, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention], reprinted in DOCUMENTS ON THE LAWS OF WAR, 271, 288 (Adam Roberts & Richard Guelff eds., 1982) [hereinafter DOCUMENTS]. The United States signed the treaty in 1949 and ratified it in 1955. While Article 49 deals specifically with the treatment of civilians in territory which has been occupied, one could not expect there to be less protection of civilians in territory which has not been directly occupied, but has a government which collaborates with a belligerent state to the extent of deporting its civilians into the custody of that belligerent state. See *id.* See generally *Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949*, 14 VA. J. INT'L L. 123 (1973).

¹⁵³ Geneva Convention, art. 146, *supra* note 152, reprinted in DOCUMENTS, *supra* note 152, at 323.

¹⁵⁴ *Id.* Article 4 defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. 4, DOCUMENTS, *supra* note 152, at 273.

¹⁵⁵ Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 210 (1975); see also Theodore Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987) (discussing the significance of considering the Geneva Conventions as embodying customary international law).

¹⁵⁶ See DOCUMENTS, *supra* note 152, at 271 (quoting the Prefatory Note to the 1949 Geneva Convention).

¹⁵⁷ See Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, reprinted in DOCUMENTS, *supra* note 152, at 43; Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 10, 1907 [hereinafter The Hague Convention], reprinted in DOCUMENTS, *supra* note 152, at 61.

practice of deporting persons was regarded . . . as having fallen into abeyance."¹⁵⁸

In 1863, well before the Hague Conventions, the United States had condemned the deportation of civilians in Lieber's Code, "the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies."¹⁵⁹ Also known as U.S. Army General Order 100, the Code stated, "[p]rivate citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford"¹⁶⁰

Deportations had also been condemned by international judicial practice. In 1924, in *Moriaux v. Germany*, the Belgo-German Mixed Arbitral Tribunal considered the legality of the deportation of Belgian civilians to Germany during World War I and concluded that deportations were a "most flagrant and atrocious breach of international law."¹⁶¹ In the *Chevreau* case, discussed below in the context of internment,¹⁶² the arbitrator took into consideration the claimant's deportation from Persia to Mesopotamia, India and Egypt in awarding him damages against the British government.¹⁶³

Throughout the Second World War, the Allies made it clear that they considered the mass expulsion of civilians to be criminal.¹⁶⁴ The war crimes for which German and Japanese defendants were convicted by the Nuremberg and Tokyo Tribunals included the deportation of

¹⁵⁸ Henckaerts, *supra* note 151, at 480 (quoting COMMENTARY TO THE IVTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 4-5, 279 (Jean Pictet ed., 1958)); see also Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 411-24 (1952) (describing the provisions relating to civilians). De Zayas states, "Analogously, it would have seemed unnecessary to the delegates convened at The Hague in 1907 to draft special articles to prohibit cannibalism or human sacrifices." De Zayas, *supra* note 155, at 211.

¹⁵⁹ RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 1 (1983); see also Henckaerts, *supra* note 151, at 483.

¹⁶⁰ HARTIGAN, *supra* note 159, at 45, 49; see also Henckaerts, *supra* note 151, at 483.

¹⁶¹ *Moriaux v. Germany*, 4 M.A.T. 674, 679 (1924), quoted in 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 228-29 (1968).

¹⁶² See France *ex rel* Madame Julien Chevreau, M.S. Dep't of State (file no. 500, AIA/1197) (on file with author); see also *infra* note 174 and accompanying text.

¹⁶³ See SCHWARZENBERGER, *supra* note 161, at 229 (citations omitted).

¹⁶⁴ De Zayas, *supra* note 155, at 213-14, (citing the Inter-Allied Meeting in St. James' Palace in London (Sept. 24, 1941) which endorsed the *Principles of the Atlantic Charter*; the *Allied Declaration on German War Crimes* (adopted Jan. 13, 1942); a *Decree on the Punishment of German War Crimes Committed in Poland*, adopted by the Polish Exile Cabinet (Oct. 17, 1942); and declarations at the Moscow Conference (Oct. 19-30, 1943)).

civilians.¹⁶⁵ Schwarzenberger states, "In the Charter of Nuremberg Tribunal, deportation of civilians from occupied territories to slave labour or for any other purpose is enumerated, under the heading of war crimes in the strict sense, that is, breaches of the laws or customs of war, and that of crimes against humanity."¹⁶⁶

The Nuremberg and Tokyo Tribunals focused especially on the use of deported civilians as slave labor.¹⁶⁷ "Forced labour in tropical heat without protection from the sun, complete lack of housing and medical supplies and insistence on work directly related to military operations were some of the features of forced labour castigated in the *Tokyo Judgment* (1948)."¹⁶⁸ This description fits quite closely the actions of the United States in forcing the two shiploads of Japanese Latin Americans to clear jungles and build barracks in the Canal Zone without remuneration.¹⁶⁹

If the Germans and Japanese were responsible for knowing that the deportation of civilians was a war crime, surely the United States, which prosecuted them for these acts, was similarly charged with the

¹⁶⁵ Article 6 of the Charter of London, which established the basis for the International Military Tribunal at Nuremberg, gave the Tribunal jurisdiction over three categories of crimes: (1) crimes against peace; (2) war crimes, "namely, violations of the laws or customs of war . . . [which] shall include, but not be limited to . . . ill-treatment or deportation to slave labor or for any other purpose of civilian population . . ."; and (3) crimes against humanity, which included "deportation, and other inhumane acts committed against any civilian population . . .; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Agreement and Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279 (1945), *reprinted in* THE AMERICAN ROAD TO NUREMBERG, *supra* note 150, at 212, 215. *See generally* William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 541-49 (1997) (discussing, in the context of the International Criminal Tribunal for the former Yugoslavia, how the concepts of military objective and proportionality limit what can be done to civilians under the laws and customs of war).

¹⁶⁶ *See* SCHWARZENBERGER, *supra* note 161, at 23. He continues:

In the Charter of the Tokyo Tribunal, the subject is specifically mentioned only under the latter heading . . . [T]here is, however, no doubt about it that breaches of the law of belligerent occupation constitute breaches of the laws and customs of war, and therefore, amount to war crimes in the technical sense. Thus, under both Charters, deportation is a war crime in the technical sense and a crime against humanity.

Id.

¹⁶⁷ *See id.* at 225-26, 230-32. Compulsory labor was also forbidden by Article 52 of the Hague Regulations of 1899 and 1907. *See id.* at 224-25.

¹⁶⁸ *See id.* at 225-26.

¹⁶⁹ *See supra* note 64 and accompanying text. Article 2 of the International Labour Organization Convention, No. 29, Concerning Forced or Compulsory Labour defines forced labor as "all work or service which is exacted from any person under the menace of a penalty and for which the person has not offered himself voluntarily." June 28, 1930, 39 U.N.T.S. 55, 58; *see also* Parker & Chew, *supra* note 149, at 524.

knowledge that taking civilians from their homes in a nonbelligerent third country to concentration camps in a belligerent country, and forcibly deporting them to the occupied territory of another belligerent country after the war, likewise violated the same well-established principles of international law.¹⁷⁰

B. *Indefinite Internment of Civilians*

The Hague Peace Conferences of 1899 and 1907 considered the internment of civilians by belligerents and decided that an express prohibition was not required as the practice fell below the minimum standard of civilization.¹⁷¹

In 1930 the Greco-German Mixed Arbitral Tribunal held in *Nacio v. Germany* that a neutral national unjustifiably detained by an occupying power is entitled to compensation.¹⁷² The same Tribunal held in *Palios v. Germany* that

any arrest or internment of a neutral national, not followed by criminal proceedings and condemnation, was contrary to international law. As neutral nationals are not entitled to any privileged treatment, in comparison with the rest of the population of the occupied country, this finding applies also to the population at large of the occupied territory.¹⁷³

¹⁷⁰ Henckaerts summarizes the state of the law regarding deportations at the time of the Japanese Peruvian internment:

When all the pieces of this international humanitarian law puzzle are put together, the picture becomes apparent. Deportations were prohibited under the Hague Regulations as falling below the standards of civilization. As such they have become part of customary international law merely clarified in Geneva IV. Being part of customary international law and prohibited by the Hague Regulations, the Charter of the International Military Tribunal did not run counter to the adage *nullem crimen, nulla poena sine lege* when it classified deportations as an international crime.

Henckaerts, *supra* note 151, at 484.

Deportation of civilians is, of course, still recognized as a war crime. At the urging of the United States, the U.N. Security Council adopted Resolution 674 of October 29, 1990, applying Geneva IV to Iraq and condemning the Iraqi government for deporting Kuwaitis. U.N. SCOR, Res. 674 (1990).

¹⁷¹ Schwarzenberger notes that, ironically, the Japanese delegate to the 1907 conference proposed declaring such internment illegal, but the Belgian delegate rejected it as redundant because it was generally accepted that belligerents could only intern prisoners of war. See SCHWARZENBERGER, *supra* note 161, at 227 n.45.

¹⁷² See *id.* at 221.

¹⁷³ See *id.*

In the *Chevreau* case the Sole Arbitrator, considering the legality of Chevreau's arrest and prolonged detention in a camp for Turkish prisoners of war, articulated three rules:

(1) The arbitrary arrest, detention or deportation of a foreign national may give rise to an international claim. If, however, the measures are taken in good faith and upon reasonable suspicion, in particular in a zone of military operations, they do not involve any international liability.

(2) In the case of an arrest, suspicions have to be verified by a serious inquiry, offering the legal safeguards customary among civilized nations. Moreover, the arrested person must be given an opportunity to defend himself If there is no inquiry, this is unduly delayed or the detention unnecessarily prolonged, an international claim is justified.

(3) A detainee is to be treated in a manner befitting his station, and according to the standards habitually practiced by civilized nations.¹⁷⁴

According to Schwarzenberger, it was "the German and Japanese practices . . . of wholesale internment of civilians in concentration camps, irrespective of security requirements in individual cases or for entirely different purposes"¹⁷⁵ that led to the much more precise codification of minimum standards concerning internment found in the 1949 Geneva Convention.¹⁷⁶ Article 42 of the Convention states that the "internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary,"¹⁷⁷ and Article 43 provides that any person so interned "shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board . . . [which, if the internment is maintained] shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision" ¹⁷⁸

U.S. legal scholars and courts also recognize that arbitrary or prolonged detention is a violation of international law. According to the notes to Section 702 of the Restatement of the Foreign Relations

¹⁷⁴ *Id.* at 222.

¹⁷⁵ *Id.* at 223.

¹⁷⁶ See Geneva Convention, *supra* note 152, arts. 41-43, 68, 78, 79-135, *reprinted in* DOCUMENTS, *supra* note 152, at 286-87, 294, 298-319.

¹⁷⁷ *Id.* art. 41, *reprinted in* DOCUMENTS, *supra* note 152, at 286.

¹⁷⁸ *Id.* art. 43, *reprinted in* DOCUMENTS, *supra* note 152, at 286-87.

Law of the United States, "[a]rbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments It is included also in United States legislation and national policy statements citing violations of fundamental human rights" ¹⁷⁹ The United States District Court for the District of Kansas said in *Rodriguez-Fernandez v. Wilkinson*:

Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law. ¹⁸⁰

The Alien Enemies Act authorized the presidential proclamations allowing the Attorney General to subject enemy aliens to "summary apprehension" during World War II. ¹⁸¹ This Act did not necessarily violate international law for it is recognized that enemy aliens in the territory of a belligerent can be detained, at least for as long as is necessary to determine if they pose a danger to the security of the country. ¹⁸² The Act and the related presidential proclamations, however, cannot justify the *indefinite* detention of civilians who were brought into the territory against their will, were given no hearings and were known to pose no danger to U.S. or hemispheric security. ¹⁸³

C. *The Holding of Hostages*

A hostage is "a person detained for reasons unconnected with his own acts or omissions." ¹⁸⁴ As early as 1863, Lieber's Code stated that

¹⁷⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, n.6 (1987).

¹⁸⁰ 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

¹⁸¹ Proclamation No. 2525, 6 Fed. Reg. 6321 (1941); Proclamation No. 2526, 6 Fed. Reg. 6323 (1941); Proclamation No. 2527, 6 Fed. Reg. 6324 (1941); *reprinted in* 36 AM. J. INT'L L. 236-243 (1942); *see* Sidak, *supra* note 130, at 1405-24 (summarizing the Alien Enemy Act and its application).

¹⁸² *See supra* notes 131-35 and accompanying text.

¹⁸³ During World War II, Attorney General Biddle stated that although the Act did not entitle enemy aliens to hearings, he believed "each enemy alien who had been taken into custody should have an opportunity for a hearing on the question whether he should be interned" and more than 100 hearing boards were set up for this purpose. *See* Sidak, *supra* note 130, at 1416 (quoting 1942 ATT'Y GEN. ANN. REP. 9) (hearings not granted to the interned Japanese Latin Americans); *see also* Michael Brandon, Note, *Legal Control Over Resident Enemy Aliens in Time of War in the United States and in the United Kingdom*, 44 AM. J. INT'L L. 382 (1950).

¹⁸⁴ SCHWARZENBERGER, *supra* note 161, at 240-41. He bases this on the Nuremberg Tribunal's reference to both prophylactic hostages and reprisal prisoners as hostages, noting that they

"[h]ostages are rare in the present age."¹⁸⁵ Although hostages are not specifically referred to in the Hague Regulations of 1899 and 1907,¹⁸⁶ Article 50, by prohibiting the infliction of penalty upon the population of occupied territories for acts for which they cannot be held responsible, effectively bans the taking of hostages.¹⁸⁷ The prosecution of the Nuremberg Tribunals, led by U.S. Supreme Court Justice Jackson, argued that "irrespective of the illegality of the shooting of hostages, under Article 50 of the Hague Regulations, the taking of hostages was illegal."¹⁸⁸

The 1934 Tokyo Draft of the International Red Cross Convention on the Protection of Civilian Alien Enemies forbade reprisals against civilians and the taking of hostages.¹⁸⁹ The Nuremberg Tribunal referred on several occasions to the taking and killing of hostages, condemning, for example, under the heading of *Murder and Ill-Treatment of Civilian Population*, the German practice of "keeping hostages to prevent and to punish any form of civil disorder."¹⁹⁰

Article 3 of the 1949 Geneva Convention says that in the case of armed conflict within the territory of a Party, the taking of hostages is prohibited at any time and in any place with respect to persons taking no active part in the hostilities.¹⁹¹ With respect to persons in occupied territories, Article 34 of the 1949 Geneva Convention simply states, "[t]he taking of hostages is prohibited."¹⁹² While the Geneva Convention had not been drafted at the time the United States was holding Japanese Latin Americans as hostages for exchange, it illustrates what was commonly accepted in international law at the time. Under this law, the Japanese Peruvians were hostages, held not because of any acts or omissions of their own, but because the U.S. government thought

"have in common that they are arrested on grounds not involving any personal responsibility of their own." *Id.* This definition clearly fits the interned Japanese Latin Americans.

¹⁸⁵ HARTIGAN, *supra* note 159, at 56.

¹⁸⁶ Apparently this was because of the bitterness still existing among some parties regarding the taking of hostages in the Franco-German War of 1870-71. See SCHWARZENBERGER, *supra* note 161, at 234.

¹⁸⁷ See *id.* at 237-39.

¹⁸⁸ *Id.* at 240 (citing IMT Proceedings (English ed.), Pt. 5, at 124 (1946)).

¹⁸⁹ See Robert R. Wilson, *Treatment of Civilian Alien Enemies*, 137 AM. J. INT'L L. 30, 34-35 (1943).

¹⁹⁰ SCHWARZENBERGER, *supra* note 161, at 239-40. Although the Charter of the Tribunal listed the killing of hostages as an example of war crimes, the Tribunal did not rule specifically on the taking of hostages.

¹⁹¹ See Geneva Convention, *supra* note 152, art. 3(1)(b), reprinted in DOCUMENTS, *supra* note 152, at 273. Article 3 of the 1949 Geneva Convention states that in the case of armed conflict within the territory of a party, the taking of hostages is prohibited at any time and in any place with respect to persons taking no active part in the hostilities. See *id.*

¹⁹² See *id.* art. 34, reprinted in DOCUMENTS, *supra* note 152, at 284.

it could use them, either as "bait" for an exchange or as a "reprisal reserve" to gain better treatment for U.S. citizens held by the Japanese government.

D. *Refusal to Compensate*

"The right to redress an international wrong is recognized by scholars as a fundamental principle of customary law. Recognition of this right clearly pre-dates World War II, and it has been incorporated into both treaties and international legal opinions."¹⁹³ In 1928, the Permanent Court of International Justice stated in the *Chorzow Factory* case that "reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would . . . have existed if the act had not been committed."¹⁹⁴ According to the settled practice of arbitration tribunals, a belligerent country is not responsible for accidental injury to a neutral national or damage to neutral property in a theater of war. If, however, the action taken by the belligerent state is contrary to the laws of war, the belligerent country is liable under international law for paying compensation.¹⁹⁵ The Hague Convention of 1907 defines "neutrals" as nationals of a state not taking part in war.¹⁹⁶ Accordingly, all of the Japanese Peruvians holding Peruvian citizenship were neutral nationals. Those holding Japanese citizenship, however, should have been entitled to the same general protections because "[t]he basic rule is that, compared with other inhabitants of occupied territories, neutral nationals resident there are not entitled to any privileged treatment."¹⁹⁷ If those holding Peruvian citizenship are entitled to compensation, the others should be as well.

In *Nacio v. Germany*, the Greco-German Mixed Arbitral Tribunal considered the case of a Greek national who was arrested and held by

¹⁹³ See Parker & Chew, *supra* note 149, at 524; see also Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 REC. DES COURS 285-87 (1978), reprinted in HENKIN ET AL., *supra* note 148, at 583 ("A State discharges the responsibility incumbent upon it for breach of an international obligation by making reparation for the injury caused."). This principle was also recognized by the district court in *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

The explanation that the violations of international law described above were a product of "wartime hysteria" is belied not only by the treatment of Japanese Peruvians immediately after the war, but also by the U.S. government's consistent refusal to compensate the victims in the intervening 50 years.

¹⁹⁴ *Chorzow Factory (Indemnity)*, 1928 P.C.I.J. (ser. A) No. 17, at 47; see Parker & Chew, *supra* note 149, at 524, n.159.

¹⁹⁵ See SCHWARZENBERGER, *supra* note 161, at 583.

¹⁹⁶ Hague Convention, *supra* note 157, art. 16, reprinted in DOCUMENTS, *supra* note 152.

¹⁹⁷ SCHWARZENBERGER, *supra* note 161, at 584.

German occupation forces in Rumania. Suspected of concealing weapons, he was released after eight days. The Tribunal held that the occupation authorities could arrest persons in the territory, including neutral nationals, suspected of acts which constituted a security threat. It added, however, that "if, in fact, the detention was unjustified, a detainee was entitled to compensation for any actual damage suffered, and that the non-payment of such compensation constituted an illegal act under Section 4 of the Annex to Articles 297 and 298 of the Peace Treaty of Versailles of 1919."¹⁹⁸ In *Palios v. Germany*, the same Tribunal considered a claim by a Greek restaurant owner who was detained for three months in Bucharest. It held that any arrest and detention of a neutral national, if not followed by a judgment involving conviction or the payment of compensation, constitutes an "act contrary to international law."¹⁹⁹

Applying these principles, the U.S. failure to compensate the Japanese Latin American victims of these war crimes is itself a violation of international law. That these crimes were committed over fifty years ago does not reduce the government's responsibility. Although the United States is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which entered into force in 1970, the Convention reflects customary international law on this principle. The Convention notes, for example, that none of the declarations, instruments or conventions that relate to the prosecution of war crimes and crimes against humanity, as defined by the London Charter, have provided for a period of limitation.²⁰⁰ Furthermore, because it has an ongoing responsibility to compensate the victims, the United States is engaging in an ongoing violation by failing to do so and in that respect, even if a statute of limitations did apply, it would not have begun to toll.

The United States' ongoing refusal to adequately compensate the Japanese Latin Americans also raises questions of racial and national origin discrimination. U.S. officials were clearly cognizant of the racism behind the Peruvian government's efforts to rid the country of its Japanese population. They supported this attitude and collaborated with the Peruvian authorities in this matter, taking only those German and Italian Peruvians who were individually deemed to be dangerous,

¹⁹⁸ *Id.* at 221, 584.

¹⁹⁹ *Id.*

²⁰⁰ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

while kidnapping and deporting Japanese Peruvians solely on the basis of their Japanese ancestry.²⁰¹

At the time of the internment, there were no international agreements prohibiting racial discrimination. Due in large measure to the horrors of World War II, however, such prohibitions have become well-established in international law. The Universal Declaration of Human Rights, adopted in 1948, states: "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁰² This is also the language prohibiting discrimination in Article 2 of both the International Covenant on Civil and Political Rights,²⁰³ to which the United States is a party, and the International Covenant on Economic, Social and Cultural Rights, which the United States has signed but not ratified.²⁰⁴ The International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" to mean:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁰⁵

The American Convention on Human Rights obligates the parties

²⁰¹ See *supra* note 72 and accompanying text.

²⁰² *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 2 (1948).

²⁰³ *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. II, ¶ 1, 999 U.N.T.S. at 171 (entered into force Mar. 23, 1976, ratified by the United States on June 8, 1992).

²⁰⁴ *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976), art. 2(2). This Covenant has been signed but not ratified by the United States. According to Article 18 of the Vienna Convention on Treaties, U.N. Doc. A/CONF 39/27, May 23, 1969, entered into force Jan. 17, 1980, a party that has signed but not ratified a treaty, unless it has made its intention clear not to become a party to the treaty, may not act in a manner which defeats the object or purpose of the treaty. The Vienna Convention has not been ratified by the United States, but it is widely recognized that the rule stated in Article 18 "is one of the customary international law," and thus binds the United States. BURNS H. WESTON, RICHARD A. FALK & HILARY CHARLESWORTH, *INTERNATIONAL LAW AND WORLD ORDER* 90 (3d ed. 1997) (quoting J.G. STARKE, *STARKE'S INTERNATIONAL LAW* 404-18 (11th ed. 1994)).

²⁰⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 600 U.N.T.S. 195 (entered into force Jan. 4, 1969), G.A. Res. 2106, U.N. GAOR, 20th Sess., annex 2, art. 1, ¶ 1.

to undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.²⁰⁶

These standards are now almost universally acknowledged. The racial discrimination manifest in the wholesale internment of Japanese Americans and Japanese Latin Americans should encourage the United States to comply with its international obligation to compensate the Japanese Latin American internees for the losses inflicted upon them.²⁰⁷

III. EXAMINING CURRENT DOMESTIC REMEDIES

A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need.

—Justice Jackson, dissenting in *Korematsu v. United States*,
December 1944²⁰⁸

A basic principle of our legal system is that there should be a remedy for every wrong. As the U.S. Supreme Court said in *Marbury v. Madison*, “the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford

²⁰⁶The American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978). The United States has not signed this Convention. By virtue of its membership in the Organization of American States, however, it is bound by the American Declaration on the Rights and Duties of Man.

²⁰⁷Referring to the Japanese American internment, Justice Murphy said in his dissent in *Korematsu v. United States*, “[n]o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.” 323 U.S. 214, 241 (1944) (Murphy, J., dissenting).

²⁰⁸*Id.* at 246 (Jackson, J., dissenting).

that protection.”²⁰⁹ This Section looks at the remedies available to the Japanese Peruvians under U.S. law and concludes that they are inadequate—perhaps nonexistent—because of the failure of U.S. courts to enforce international law.

The Japanese Latin Americans interned by the United States were innocent victims of U.S. policy gone astray. John Emerson, who coordinated the removals for the U.S. embassy in Lima, says:

As I look back on the Peruvian experience I am not proud to have been part of the Japanese operation. One steeled oneself against the heartbreak being inflicted on hundreds of innocent Japanese It is hard to justify our pulling them from their homes of years and herding them, whether born in Japan or in Peru, onto ships bound for a strange land, where they would live in concentration camps under conditions which at best were difficult²¹⁰

The United States has never explained these actions, although the President’s letter to the internees states that they were treated “unjustly” by government actions “rooted in racial prejudice and wartime hysteria.”²¹¹ The claim of hysteria is itself dubious since, even at the time of their abduction, Justice and State Department officials recognized that these individuals were not dangerous to U.S. or hemispheric security.²¹²

Japanese Latin American internees were subjected to conditions similar to those inflicted upon the Japanese American internees and, in addition, suffered the trauma of being uprooted from their countries and effectively rendered stateless. Why, then, would the U.S. government offer them only a fraction of the compensation given Japanese Americans? The answer lies in (1) the precedent established

²⁰⁹ *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Citing Blackstone, the Court continues, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.” *Id.* (citations omitted).

²¹⁰ EMMERSON, *supra* note 7, at 148.

²¹¹ See *supra* note 2 and accompanying text.

²¹² The excuse of “wartime hysteria” only illustrates why it is precisely during times of war or other national crisis that our civil liberties must be most vigilantly protected. Nonetheless, the history of Asian Americans illustrates that the internment of Japanese Americans during World War II was not an aberration attributable to wartime, but the logical extension of a long history of legalized racism. See Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *ASIAN LJ.* 71, 77–89 (1997). Further, even if one were to accept “wartime hysteria” as part of the motivation for the internment of Japanese Americans, it is difficult to conceive of any way in which the Japanese Latin Americans who were abducted from their countries and brought to the United States could have been seen as any kind of threat to the United States (at least until they were brought here!).

by the Supreme Court in the Japanese American internment cases, (2) the narrowly tailored terms of the law providing redress to Japanese Americans and (3) the U.S. legal system's disregard for international law.

A. *The Internment of Japanese Americans and the Supreme Court*

In the spring of 1942, all Japanese Americans living on the West Coast of the United States were rounded up and taken to concentration camps in desolate parts of the country. Nearly 120,000 people were imprisoned for several years without charge, hearing or conviction—two-thirds of them American citizens by birth; more than half either over fifty or under fifteen years of age.²¹³ Despite the fact that nearly one-third of Hawaii's population was Japanese American and Hawaii was under martial law, no mass incarcerations materialized there. Instead, individual hearings resulted in about 2000 of the 160,000 Japanese Hawaiians being sent to mainland internment camps.²¹⁴ On the mainland, some German and Italian aliens—not U.S. citizens—were subjected to restrictions, but only those deemed dangerous after individual hearings were interned.²¹⁵

The legal basis for the Japanese American internment was Executive Order No. 9066 ("EO 9066"), issued by President Roosevelt on February 19, 1942. EO 9066 authorized the Secretary of War, and commanders he designated, to prescribe "military areas" from which they could exclude "any or all persons."²¹⁶ It made no explicit reference to Japanese Americans. In order to enforce military exclusion orders against civilians, the War Department quickly persuaded Congress to

²¹³ See generally COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982); IRONS, *supra* note 142; JAPANESE AMERICANS: FROM RELOCATION TO REDRESS (Roger Daniels et al., eds., 1991); WEGLYN, *supra* note 11; Rostow, *supra* note 118; Eric K. Yamamoto, *Friend, Foe, or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223 (1992); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

²¹⁴ Rostow, *supra* note 118, at 494.

²¹⁵ Yale Law School Professor Eugene Rostow saw clearly in 1945 that

[t]he dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice. The program of excluding all persons of Japanese ancestry from the coastal area was conceived and put through by the organized minority whose business it has been for forty-five years to increase and exploit racial tensions of the West Coast.

Id. at 496; see also *id.* at 492-93. See generally CRISTGAU, *supra* note 142 (detailing the stories of individual German and Japanese internees).

²¹⁶ Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), *reprinted in* 18 U.S.C. § 97a (Supp. 1943), and in 56 Stat. 173 (1942); see also IRONS, *supra* note 142, at 61-63.

enact Public Law 503, which made it a misdemeanor to “enter, remain in, leave, or commit any act in any military area . . . contrary to the restrictions applicable to such area”²¹⁷ Three days after Roosevelt signed this into law, Lt. Gen. DeWitt issued curfew orders directed to all alien enemies and all U.S. citizens of Japanese descent on the West Coast. DeWitt also issued the first of 108 exclusion orders which forced “all persons of Japanese ancestry, both alien and non-alien” to evacuate their homes on a few days notice and report to “assembly centers” with only such personal belongings as they could carry.²¹⁸

As Nanette Dembitz pointed out in 1945, the internment of Japanese Americans was “the first instance in which the applicability of a deprivation or restraint imposed by the Federal Government [upon a citizen] depended solely upon the citizen’s race or ancestry.”²¹⁹ Four U.S. citizens—Min Yasui, Gordon Hirabayashi, Fred Korematsu and Mitsuye Endo—brought legal challenges to the internment.

The first case the Supreme Court ruled on was *Hirabayashi v. United States*.²²⁰ When the United States entered World War II, Gordon Hirabayashi was a senior at the University of Washington, a YMCA officer, a Quaker and a pacifist. Instead of obeying the evacuation order, in May 1942 he turned himself in to the FBI and was convicted of failing to report for evacuation and violating curfew.²²¹ The Supreme Court addressed only the curfew, not the evacuation, unanimously holding that it was a reasonable exercise of Congress’s and the Executive’s power to wage war, and that its imposition against only those

²¹⁷ Exec. Order No. 9066, 7 Fed. Reg. at 1407, *reprinted in* 18 U.S.C. § 97a, *and in* 56 Stat. 173; *see also* IRONS, *supra* note 142, at 66–68; Rostow, *supra* note 118, at 498. Ohio Republican Senator Robert Taft raised the only objection to the bill, saying “I think this is probably the ‘sloppiest’ criminal law I have ever read or seen anywhere.” IRONS, *supra* note 142, at 68.

²¹⁸ *See* IRONS, *supra* note 142, at 68–70. Public Proclamations No. 1, 7 Fed. Reg. 2320 (1942), No. 2, 7 Fed. Reg. 2405 (1942), No. 3, 7 Fed. Reg. 2543 (1942) and other proclamations restricted travel, residence and activities of enemy aliens and Japanese American citizens. Civilian Exclusion Order No. 1, March 24, 1942, 7 Fed. Reg. 2581 (1942) was the first evacuation order. *See* Rostow, *supra* note 118, at 498 n.30. Executive Order No. 9102 established the War Relocation Authority to oversee the internment program. *See* Exec. Order No. 9102, 7 Fed. Reg. 2165 (1942); *see also* IRONS, *supra* note 142, at 69–70.

²¹⁹ Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 176 (1945). Slavery was, of course, imposed on African Americans by virtue of their race and protected by the Constitution and federal law. *See* U.S. CONST. art. I, § 2, art. II, § 9, art. IV, § 2; Paul Finkelman, *A Covenant with Death: Slavery and the Constitution*, AM. VISIONS, May–June 1968, at 21. However, as the Supreme Court made painfully clear in *Dred Scott v. Sanford*, 60 U.S. 393, 454 (1857), African Americans were not citizens under the law until the Fourteenth Amendment was enacted. *See* U.S. CONST. amend. XIV.

²²⁰ 320 U.S. 81 (1943).

²²¹ *See id.*

persons of Japanese ancestry did not violate the Fifth Amendment's guarantee of due process.²²² Similarly, the Court sustained the curfew and avoided ruling on the internment in *Yasui v. United States*.²²³

Korematsu and *Endo* were not decided until December 1944, after President Roosevelt had been successfully re-elected. Fred Korematsu was a shipyard welder, born and raised in Oakland, turned down when he volunteered for the Navy and fired when his union expelled all persons of Japanese ancestry. He refused to report for evacuation and was arrested by the local police. The Supreme Court upheld his conviction for violating the evacuation order by a vote of six to three, but avoided addressing the detention. The Court addressed the charge of racial discrimination with the following mind-boggling logic:

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty To cast this case into outlines of racial prejudice . . . merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire²²⁴

According to Yale Law School Professor Eugene Rostow, one of the earliest critics of these decisions, Justice Black's majority found that "the exclusion orders merely applie[d] the two findings [of *Hirabayashi*]"—that the Japanese are a dangerous lot, and that there was no time to screen them individually There [was] no attempt

²²² *Id.* Regarding the unanimity of the opinion, Irons reports that Justice Murphy's concurrence was originally written as a dissent, but Justice Frankfurter convinced him that any dissent was "playing into the hands of the enemy." JUSTICE DELAYED 49 (Peter Irons, ed.) (1989) [hereinafter JUSTICE DELAYED].

²²³ 320 U.S. 115 (1943). A graduate of the University of Oregon Law School and an Army Reserve officer, Min Yasui immediately reported for military service when war broke out, but was rejected because of his Japanese ancestry. In March 1942 he became the first to test the military orders by turning himself in to the Portland police. See IRONS, *supra* note 142, at 81–86. The district court held that the orders were unconstitutional as applied to American citizens, but that Yasui had renounced his American citizenship by working for the Japanese consulate. The Supreme Court reversed on both issues. It sustained the curfew conviction by referring to *Hirabayashi* and held that there was no evidence that Yasui had renounced his citizenship. See *Yasui*, 320 U.S. at 117.

²²⁴ *Korematsu*, 323 U.S. at 223. *Ex parte Endo* was a habeas corpus proceeding brought after Mitsuye Endo had been determined to be "loyal" by the War Relocation Authority, but was still being held pending arrangements to place her in an area of the country where her presence would not cause "disorder." See 323 U.S. 283 (1944). The Court held her continued detention invalid "although temporary detention for the purpose of investigating loyalty was assumed to be

in the *Korematsu* case to show a reasonable connection between the factual situation and the program adopted to deal with it.”²²⁵

Rostow concluded, “[T]he Court, after timid and evasive delays, has now upheld the main features of the program. That step converts a piece of war-time folly into political doctrine, and a permanent part of the law.”²²⁶ Forty years later, Min Yasui, Gordon Hirabayashi and Fred Korematsu petitioned for writs of *coram nobis*, asking that their convictions be overturned on the basis of newly discovered evidence—evidence that government officials had deliberately altered, destroyed and suppressed evidence concerning the loyalty of Japanese Americans; specifically, knowledge that the allegations of disloyalty and espionage in General DeWitt’s Final Report were false. Min Yasui died while the appeals were pending, but Korematsu’s and Hirabayashi’s convictions were vacated.²²⁷ Unfortunately, however, this does not overturn the precedent of the Supreme Court’s 1943 and 1944 decisions.

B. *Redress for Japanese Americans: The Civil Liberties Act of 1988*

Japanese Americans’ first step toward redress was the Evacuation Claims Act passed in July 1948.²²⁸ In Michi Weglyn’s words, “though eminently successful in reaping media praise . . . the post-war restitution program turned out to be uncharitable in the extreme.”²²⁹ Only “tangible” losses that could be proven were compensated, i.e., damage to real or personal property. No interest was paid and claims litigation stretched out over seventeen years.²³⁰ In 1951 Congress authorized

valid as an incident to the program of ‘orderly’ evacuation approved in the *Korematsu* case.” Rostow, *supra* note 118, at 512.

²²⁵ Rostow, *supra* note 118, at 508–09.

²²⁶ *Id.* at 491. He cut through to the heart of the matter:

The Japanese exclusion program thus rests on five propositions of the utmost potential menace: (1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States; (2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights.

Id. at 532.

²²⁷ See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); IRONS, *supra* note 142, at 125, 128–30.

²²⁸ See WEGLYN, *supra* note 11, at 274.

²²⁹ *Id.*

²³⁰ See *id.* According to Edison Uno, “[t]here was a total disregard of prevailing market value

"compromise" settlements of \$2500 per family to speed up the process, and "at a time when families were reeling from destitution, going without medical attention, and the Issei [first generation] fast dying off," most chose to settle, regardless of the amount of their original claim.²³¹ Of the \$400 million in material loss estimated by the Federal Reserve Bank of San Francisco, less than ten cents on the 1942 dollar was paid under the Claims Act.²³²

By the 1970s a movement for redress had begun to take root in the Japanese American community, and in 1980 activist groups formed the National Coalition for Redress/Reparation which organized support for redress through letter-writing campaigns and public education events. At the urging of Senator Daniel Inouye, Congress established the Commission on Wartime Relocation and Internment of Civilians. After hearings across the nation, the Commission issued its report, *Personal Justice Denied*, acknowledging the "grave injustices" suffered by the interned Japanese Americans.²³³ In August 1988 Congress enacted the Civil Liberties Act, which provided \$20,000 for each surviving internee, an apology signed by President Reagan and a public education fund.²³⁴ The CLA, while providing symbolic redress, did not acknowledge that the Japanese American internment was either illegal or unconstitutional.²³⁵

With the Supreme Court decisions upholding internment and the courts' rejection of claims for reparations, Japanese Americans obtained redress through political action. The Japanese Latin Americans,

or the irreplaceable nature of items lost Petitioners were totally at [the government arbiters'] mercy since the Justice Department attitude was 'take it or leave it.'" *Id.* at 275.

²³¹ *Id.* at 275.

²³² *Id.* at 276.

²³³ In March 1983, after the Commission's preliminary report had been released and the *coram nobis* petitions had been filed, William Hohri and the National Council for Japanese American Redress filed a class action redress suit on behalf of all surviving Japanese American internees. The injuries for which they requested \$24 million included "summary removal from their homes, imprisonment in racially segregated prison camps, and mass deprivations of their constitutional rights." JUSTICE DELAYED, *supra* note 222, at 27, 46. The case was eventually dismissed. See *Hohri v. United States*, 482 U.S. 64 (1987).

²³⁴ The work of the Original Legal Scholarship Collaborative, of which this Article is a part, was supported by this fund, the Civil Liberties Public Education Fund.

It should be noted that the CLA did not provide payments for Hawaiian residents who were forcibly excluded from their homes, Nisei soldiers who were not allowed to visit their families in the camps or, of course the Japanese Latin Americans. See WEGLYN, *supra* note 11, at 282. In *Ishida v. United States*, 59 F.3d 1224 (Fed. Cir. 1995) and *Consolo v. United States*, 65 F.3d 186 (Fed. Cir. 1995), the United States Court of Appeals for the Federal Circuit made children of "voluntary evacuees," those who had moved inland before the forced internment, eligible.

²³⁵ Although it stated that one of its purposes was to "discourage the occurrence of similar injustices and violations of civil liberties in the future," it did little to ensure that. Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988).

however, being few in number and scattered across the globe, had little political clout. Seiichi Higashide, a Japanese Latin American internee, testified before the congressional Commission on Wartime Relocation and Internment of Civilians and encouraged other Japanese Latin American internees to testify.²³⁶ Although the Japanese Latin American internment was reported in Appendix D of the Commission's report,²³⁷ redress under the Civil Liberties Act was nonetheless limited to internees of Japanese descent who were citizens or permanent residents at the time of the internment.²³⁸ This set the stage for the *Mochizuki* litigation.

C. *Mochizuki v. United States: The Limits of Domestic Options*

It seems that the U.S. government would be estopped from denying Japanese Latin American internees constructive resident status for purposes of the Civil Liberties Act.²³⁹ The Office of Redress Administration, however, declared most of the Japanese Latin Americans who applied under the CLA ineligible because they were not legal residents at the time of the internment.²⁴⁰ In 1996, five of these rejected applicants brought the *Mochizuki* case as a class action requesting that all interned Japanese Latin Americans be covered by the Act.²⁴¹ This eminently reasonable and minimal demand proved difficult to enforce under domestic law.

As discussed above, the precedents established by *Hirabayashi*, *Yasui* and *Korematsu* still stand, and there have been no federal cases holding such detention illegal.²⁴² At the time the CLA was passed, one

²³⁶ Press Release of Japanese Peruvian Oral History Project, June 1, 1998; *see also* Higashide, *supra* note 7.

²³⁷ COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 213, App. D.

²³⁸ 50 U.S.C. § 1989(b-7)(2)(A) defines an "eligible individual" as one who was "a United States citizen or a permanent resident alien" during the period of internment.

²³⁹ *See* Kulkarni, *supra* note 147, at 335-37.

²⁴⁰ *See* Redress Provisions for Person of Japanese Ancestry, 28 C.F.R. § 74, 54 Fed. Reg. 34157, 34160 (1989) ("persons of Japanese ancestry who were sent to the United States from other American countries for restraint and repatriation pursuant to international commitments of the United States Government for the security of the United States and its associated powers . . . were determined by the Department of Justice to be illegal aliens"). Some internees who remained in the United States were able to obtain retroactive permanent resident status and they were deemed eligible for redress. *See id.*

²⁴¹ *Mochizuki v. United States*, No. 96-5986 (C.D. Cal. Aug. 27, 1996).

²⁴² In fact, in *Jean v. Nelson*, 727 F.2d 937, 974-75 (1984), a case challenging the detention of Haitian asylum seekers, the Eleventh Circuit interpreted *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) to mean that "even an indefinitely incarcerated alien 'could not challenge his continued detention without a hearing.'" *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1984).

redress case, *Hohri v. United States*, was pending.²⁴³ While Congress may have been influenced by the possibility of a judgment requiring billions of dollars in reparations, no law required Congress to enact the CLA or to include the Japanese Latin Americans in its terms.²⁴⁴ Thus, the *Mochizuki* plaintiffs were limited to two rather narrow arguments for relief under the CLA: first, that they should be deemed constructive residents because they were forcibly brought here by the U.S. government; and second, that providing reparations to Japanese Americans but not Japanese Latin Americans violates the guarantee of equal protection under the Fifth Amendment.²⁴⁵

The constructive resident argument is a strong one from the perspective of morality and equity. Allowing the same government which forcibly removed and imprisoned these people to avoid responsibility on the ground that they were here "illegally" is grotesquely absurd.²⁴⁶ There is precedent for deeming people "permanent residents under color of law" ("PRUCOL") even when they do not have resident status under the Immigration and Nationality Act.²⁴⁷ Given

²⁴³ See *supra* note 233 and accompanying text.

²⁴⁴ That the reparations paid to Japanese Americans were not required by law, but provided at Congress's discretion is illustrated by the Ninth Circuit's holding in *Cato v. United States*, a case seeking more than \$100 million in reparations for African Americans for damages that resulted from slavery and subsequent racial discrimination. The Ninth Circuit emphasized that the reparations paid Japanese Americans did not provide any precedent for the African American plaintiffs because "[t]hose reparations were not awarded as damages in court but rather were enacted into law in the Civil Liberties Act of 1988 The legislature, rather than the judiciary, is the appropriate forum for this relief." 70 F.3d 1103, 1110-11 (9th Cir. 1995).

²⁴⁵ See Kulkarni, *supra* note 147, at 327-38.

²⁴⁶ This is a classic "Catch-22." Support for the position that aliens forcibly brought to the United States against their will should not be deemed to be here "illegally" under the immigration laws is found in a series of postwar cases that, while acknowledging the right of the government to remove the aliens, found they had not "entered" as illegal immigrants because they had not "departed" from a foreign port as required by the Immigration and Nationality Act in its definition of "immigrant." In *Bradley v. Watkins*, the court stated, "[t]he immigration acts, we submit, deal with aliens who are voluntarily seeking to enter the United States." 163 F.2d 328, 330 (2d Cir. 1947); see also *United States ex rel Pateau v. Watkins*, 164 F.2d 457 (2d Cir. 1947) (alien seized and brought to the United States for internment as an enemy alien cannot be deported as an "immigrant" until he has been afforded an opportunity to depart voluntarily). Nonetheless, these cases also do not impose any requirement that the aliens be deemed to have "immigrant" status.

²⁴⁷ This status has been extended to refugees, asylees, conditional entrants, aliens paroled into the United States, aliens granted suspension of deportation, Cuban and Haitian entrants and applicants for registry to allow them to qualify for federal benefits. See Sharon Carton, *The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits*, 14 NOVA L. REV. 1033, 1051 (1990).

In *Holley v. Lavine*, the Second Circuit required New York state to provide aid to a woman who, though not a permanent resident, was living permanently in the United States with the knowledge and permission of the INS. 553 F.2d 845, 851 (2d Cir. 1977); see also *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985). But see *Esperanza v. Valdez*, 612 F. Supp. 241, 244-45 (D. Col. 1985) (requiring specific grant of status).

that the government was not only aware that the Japanese Latin Americans were in the country, but had forced them to come, it would seem that they should be granted a similar status.²⁴⁸ As the United States Court of Appeals for the Second Circuit said in *United States v. Toscanino*, courts should “be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct.”²⁴⁹ There is no precedent, however, *requiring* the government to treat the Japanese Latin Americans as residents; that remains at the government’s discretion.

The Fifth Amendment equal protection argument is even harder to make. Ironically, the standard for governmentally-imposed race-based classifications was first articulated in *Korematsu*, where the Supreme Court held that such classifications must be subjected to “the most rigid scrutiny.”²⁵⁰ There, of course, the Court decided that the internment of all persons of Japanese descent was *not* race-based.²⁵¹ In the *Mochizuki* case, the Japanese Latin Americans cannot say that a *racial* distinction is being made between them and the Japanese Americans who are receiving reparations; they must argue that the distinction constitutes *national origin* discrimination.²⁵² This is difficult for several reasons. Most obviously, both groups are of Japanese national origin—the very reason they were interned.²⁵³ Likewise, challenging the Act as unlawful discrimination based on citizenship is futile because internees covered by the CLA include both U.S. and Japanese citizens, and those

²⁴⁸ The possibility of extending PRUCOL status to the Japanese Peruvians is discussed by Kulkarni, *supra* note 147, at 332–35.

²⁴⁹ *United States v. Toscanino*, 500 F.2d 267, 275 (1974) (refusing to exercise federal criminal jurisdiction over an Italian defendant who had been kidnapped in Uruguay, tortured in Brazil, drugged and brought to the United States for trial) (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

²⁵⁰ *Korematsu*, 323 U.S. at 216.

²⁵¹ *Id.* at 223; *see also supra* note 224 and accompanying text. As Bannai and Minami point out, the Supreme Court denied the connection between race and exclusion, and then justified exclusion on the basis of a race-based affinity Japanese Americans were presumed to have. *See* Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations*, in *ASIAN AMERICANS AND THE SUPREME COURT* 755, 774 (Hyung-Chan Kim ed., 1992).

²⁵² *See* Saito, *Alien and Non-Alien Alike*, *supra* note 141, at 326–30 (discussing the shortcomings of national origin discrimination law as a remedy for discrimination against those perceived as “foreign”).

²⁵³ In *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1991), a German American internee brought a class action alleging that the Civil Liberties Act’s restriction of redress to persons of Japanese and Aleutian ancestry was national origin discrimination in violation of the Fifth Amendment. The court held that he had standing to bring suit, but found that, even if subjected to strict scrutiny, the statute was constitutional because Congress had “concluded that Japanese Americans were detained en masse because of racial prejudice and demagoguery, while German Americans were detained in small numbers, and only after individual hearings about their loyalty.” 959 F.2d at 314.

denied coverage include citizens of Japan, the United States, Peru and other Latin American countries.

The Civil Liberties Act distinguishes between those who, at the time of internment, had been granted permanent resident status by the government, and those who, despite being in INS custody, did not have resident status. This distinction, while unjust, is probably lawful. Ever since the Supreme Court upheld the Chinese Exclusion Act of 1882²⁵⁴ in *Chae Chan Ping v. United States*,²⁵⁵ the courts have ruled consistently that the government has plenary power over immigration, i.e., the right to exclude almost any individual or group from the country.²⁵⁶ With respect to restrictions on the entrance of non-citizens into the country and the subsequent determination of when they are "legally present," the courts have almost completely abdicated judicial review of legislation or administrative action.²⁵⁷

Congress provided compensation to Japanese Americans as a matter of discretion. Accordingly, there need only be a rational basis for the distinctions made in the legislation. In addition, considerable precedent authorizes distinguishing between people on the basis of citizenship or immigration status when the benefit at issue constitutes a privilege as opposed to a right.²⁵⁸ As a result, it is extremely difficult to make a compelling legal argument that the failure to include Japanese Latin Americans under the Civil Liberties Act constitutes national origin discrimination in violation of the Fifth Amendment's guarantee of due process.²⁵⁹ Domestic law, as currently enforced, thus provides no effective avenues for redress.

²⁵⁴ Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (banning all further Chinese immigration to the United States).

²⁵⁵ 130 U.S. 581 (1889).

²⁵⁶ See Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

This plenary power was used to justify holding Ignatz Mezei indefinitely on Ellis Island when he, as a returning permanent resident, was excluded as a security risk. See *Shaughnessy v. Mezei*, 345 U.S. 206, 215 (1953) (continued detention did not violate any statutory or constitutional right). This power, said to be inherent in sovereignty, was also the basis on which the courts allowed for the indefinite offshore detention of Haitians and Cubans trying to gain political asylum in the United States. See *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984) (upholding detention of Cubans; "[l]ike the court in *Jean*, we find [*Mezei*] to be controlling"); *Jean v. Nelson*, 727 F.2d at 969 (upholding the detention of Haitian asylum seekers).

²⁵⁷ See generally Legomsky, *supra* note 256; Motomura, *supra* note 256.

²⁵⁸ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 80 (1967) ("The fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens."). Such distinctions are also found in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2260 (codified as amended in 8 U.S.C. § 1612 (1998)).

²⁵⁹ For a discussion of the difficulties of applying theories of national origin discrimination

IV. ENFORCEMENT OF INTERNATIONAL CLAIMS

International law has emerged from the agreements and practices of nation states, and claims under international law can be heard in the domestic courts of these states, or by transnational tribunals. This Section considers the options, and attendant difficulties, of pursuing international claims in U.S. courts as well as in regional and global institutions.

A. *International Claims in U.S. Courts*

Generally, international courts or commissions require claimants to exhaust domestic remedies.²⁶⁰ This requires bringing the claim in the appropriate court of the nation with jurisdiction over the violation, and pursuing it until (a) there is a final judgment and all appeals have been exhausted, or (b) it is apparent that further pursuit of the claim is futile.²⁶¹ Therefore, claims against the U.S. government should first be litigated in U.S. federal courts.

Article VI of the Constitution provides that the Constitution, the laws made pursuant to it and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."²⁶² As early as 1804, the Supreme Court held that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."²⁶³ In 1900, the Supreme Court stated in *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose,

to claims related to perceived "foreignness," see Saito, *Alien and Non-Alien Alike*, *supra* note 141, at 326–30.

²⁶⁰ The American Convention on Human Rights, Article 46(1)(a) states that a requirement of admission of a petition or communication is that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." The American Convention on Human Rights, *supra* note 206; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55 and Protocol No. 8, E.T.S. 118 ("The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law . . .").

²⁶¹ See FRANK C. NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 48 (1990).

²⁶² U.S. CONST., art. VI, cl. 2.

²⁶³ *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)).

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.²⁶⁴

The Restatement (Third) of the Foreign Relations Law of the United States says that "[i]nternational law is law like other law, promoting order, guiding, restraining, regulating behavior It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts."²⁶⁵

Nonetheless, our legal system allows international law to be superseded by domestic law.²⁶⁶ Some nations consider domestic law and international law to be part of a unified system which acknowledges international law as the highest law of the land. In such jurisdictions, if domestic laws or judicial decision run counter to international law, they will be "trumped" by the latter. Article 25 of the Constitution of the Federal Republic of Germany, for example, states that "[t]he general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."²⁶⁷

In contrast, the U.S. judicial system regards domestic law and international law as independent. The courts attempt to enforce both, where possible, and seek to interpret domestic law in a manner compatible with international law. Where an irreconcilable conflict exists, and Congress has evinced an intent to supersede international law, the courts have adopted a "last in time" rule, enforcing later-enacted do-

²⁶⁴ 175 U.S. at 700 (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215). *But see* *Stanford v. Kentucky*, 492 U.S. 361 (1989) (rejecting international norms and upholding the constitutionality of capital punishment for juveniles).

²⁶⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 179, Introduction; *see also* *Filaritiga v. Peña-Irala*, 630 F.2d 871, 876 (1980) ("Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations.").

²⁶⁶ *See* ANTHONY D'AMATO, INTERNATIONAL LAW COURSEBOOK 261-64 (1994) (discussing theories of "monism" and "dualism" in the application of international law in U.S. courts).

²⁶⁷ *Id.* at 263.

mestic legislation even if it violates international law.²⁶⁸ Unilateral abrogation of international agreements or customary international law is not, of course, recognized as legitimate under international law. The result is that our domestic rule allows the government to consciously violate international law without necessarily violating domestic law.

In *Garcia-Mir v. Meese*, the United States Court of Appeals for the Eleventh Circuit held that detained Cuban refugees from the Mariel boatlift who had not been "admitted" under immigration law but specially "paroled" into the country, did not have a right to parole revocation hearings.²⁶⁹ The court stated, "The public law of nations was long ago incorporated into the common law of the United States. To the extent possible, courts must construe American law so as to avoid violating principles of public international law."²⁷⁰ Acknowledging that the United States' indefinite detention of aliens in this case was a violation of international law, the court nonetheless allowed it to continue.

If international law is to have any meaning, there must be places where claims under such law will be adjudicated. As recognized in *The Paquete Habana*, international law is supposed to be enforced by domestic courts. U.S. courts comprise one of the most efficient and effective systems in the world. In addition, it is generally necessary to raise international law claims in U.S. courts because domestic remedies must be exhausted before going to an international forum. Federal courts, however, are often reluctant to enforce international law claims and sometimes threaten lawyers with sanctions for frivolous litigation, making litigators hesitant to raise such claims.²⁷¹

²⁶⁸ This means that if a domestic law is enacted which conflicts with pre-existing international law—a treaty the United States has ratified, perhaps—the courts presume that Congress intended that result, and will uphold the domestic law as long as it is within the limits of the Constitution. As the district court explained in *United States v. Palestine Liberation Organization*:

Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence Wherever possible, both are to be given effect Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.

695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (holding that the United Nations Headquarters Agreement was not superseded by the Anti-Terrorism Act).

²⁶⁹ 788 F.2d 1446, 1453 (11th Cir. 1986). The court noted, however, that "public international law is controlling only 'where there is no treaty and no controlling executive or legislative act or judicial decision.'" *Id.* (quoting *The Paquete Habana*, 175 U.S. at 700).

²⁷⁰ *Id.* (citing RESTATEMENT OF FOREIGN RELATIONS LAW OF UNITED STATES, *supra* note 179, § 131 cmt. d, draft no. 6 (1985)).

²⁷¹ Attorney sanctions under Federal Rule of Civil Procedure 11 were imposed on plaintiffs' counsel for raising allegedly frivolous claims in *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989),

A significant step toward the recognition of customary and conventional international law can be seen in cases recently litigated under the 1789 Alien Tort Claims Act,²⁷² which confers federal jurisdiction over civil actions by aliens for torts committed "in violation of the law of nations."²⁷³ In *Filartiga v. Peña-Irala*,²⁷⁴ the United States Court of Appeals for the Second Circuit recognized customary international law as part of federal common law and reviewed a broad range of international law sources in determining that torture by governmental officials is now prohibited by the law of nations.²⁷⁵ Since then, a number of human rights violations have been successfully prosecuted under the Alien Tort Claims Act.²⁷⁶ U.S. courts are criticized, however, for enforcing these international standards against other governments, but not against the United States. According to Mark Gibney,

[In] suits by foreign plaintiffs against foreign state actors [] U.S. domestic courts have provided a vital forum for individuals seeking some measure of justice against those responsible for committing heinous crimes. Yet these same courts have

a suit brought by and on behalf of wounded and deceased victims of the 1986 U.S. bombing of residential areas on Benghazi and Tripoli, Libya. See Anthony D'Amato, *The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya*, 84 AM. J. INT'L L. 705, 706 (1990) ("The imposition of sanctions casts a serious chilling effect upon all attorneys who engage in international human rights litigation."). Sanctions were also sought by the government in *Haitian Centers Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992), a case challenging the policy of detaining Haitian refugees and refusing to allow them access to legal council even after they had been found to have a credible fear of persecution. See Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483, 485 (1993) ("[T]he government . . . demanded that we post a \$10,000,000 bond . . . Rule 11 sanctions run against both the clients and the lawyers personally, which gave us considerable concern."); see also *Rule 11 Report: Bush Administration Accused of Seeking Sanctions for Political Purposes*, 6 INSIDE LITIG. 15 (1992).

²⁷² 28 U.S.C. § 1350 (1994).

²⁷³ *Id.*

²⁷⁴ 630 F.2d 876 (2d Cir. 1980).

²⁷⁵ See *id.*; see also Jeffrey Blum & Ralph Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53 (1981).

²⁷⁶ The Alien Tort Claims Act has been used in a number of cases. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (claims against Ethiopian police official for cruel, inhuman and degrading treatment); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (suit against self-proclaimed president of Bosnian-Serb entity for murder, rape and other war crimes); *Estate of Ferdinand Marcos Human Rights Litigation v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (suit against former head of Filipino police and military for kidnapping, torture and death); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (suit against Guatemalan general for torture and murder); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (suit against former head of Haitian military); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), modified 694 F. Supp. 707 (N.D. Cal. 1988) (claims against former Argentine general for torture, murder and prolonged arbitrary detention).

given a much different reception to foreign plaintiffs who allege that the U.S. government itself is responsible for the commission of human rights abuses. In one suit after another, foreigners who have been harmed by the pursuit of U.S. foreign policy have had their claims dismissed by a panoply of revolving defenses.²⁷⁷

As a result, it is still an uphill battle to introduce international law into domestic litigation.²⁷⁸ Paul Hoffman refers to the judicial skepticism encountered when trying to introduce customary international law as the "blank stare phenomenon," calling it the "threshold problem" of using international law in domestic litigation. As Naomi Roht-Arriaza states:

Although the application of international human rights law in U.S. courts remains far from commonplace, the exclusion of individual rights . . . is definitively a relic of the past. . . . The challenge now is to educate both domestic advocates and judges as to the usefulness and applicability of [international law] so that judges routinely consider international law-based arguments with the same ease they consider constitutional or statutory ones.²⁷⁹

²⁷⁷ Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261 (1996-97) (citing *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989)) (suit for damages from U.S. and British bombing of Libyan cities); *McFarland v. Cheney*, 1991 WL 43262 (D.D.C. 1991), *aff'd* 971 F.2d 766 (D.C. Cir. 1992) (suit on behalf of civilians injured, killed or suffering property damage as a result of the U.S. invasion of Panama); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (seeking damages for the downing of a commercial Iranian airliner by U.S. missiles, killing all passengers and crew); *Sanchez-Espinoza v. Reagan*, 586 F. Supp. 596 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985) (suing the United States for its support of terrorist activities by the Contras in Nicaragua).

²⁷⁸ Paul L. Hoffman, *The "Blank Stare Phenomenon": Proving Customary International Law in U.S. Courts*, 25 GA. J. INT'L & COMP. L. 181, 182 (1995-96). On the difficulties in and importance of introducing international human rights law into domestic litigation, see generally Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Henry J. Richardson III, *Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993); Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE J. DEV. & HUM. RTS. 4 (1998) [hereinafter *Crossing the Border*].

²⁷⁹ Naomi Roht-Arriaza, *International Human Rights Law in United States Courts: Professor Riesenfeld's Contributions*, 20 HASTINGS INT'L & COMP. L. REV. 601 (1997); see also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990) (emphasizing the need to incorporate international human rights norms into domestic law).

B. Through Regional and Global Organizations—O.A.S. and U.N.

Persons who have suffered violations of international law and who have exhausted available domestic remedies can bring their claims to regional or global organizations. The Japanese Latin Americans' claims would be most appropriately brought to the Organization of American States' ("OAS") Inter-American Commission on Human Rights or to the United Nations' Commission on Human Rights.

As a member of the OAS, the United States is bound by the OAS Charter.²⁸⁰ The same 1948 diplomatic conference that adopted the Charter also proclaimed the American Declaration of the Rights and Duties of Man, which catalogues civil, political, economic, social and cultural rights and duties.²⁸¹ Although the Declaration was a non-binding resolution,²⁸² it has come to be regarded as the authoritative interpretation of the "fundamental rights" referred to in the Charter.²⁸³ The OAS's Inter-American Commission on Human Rights performs country studies and on-site investigations, and receives and acts on individual petitions and inter-state communications. There is an American Convention on Human Rights and an Inter-American Court which hears cases brought under the Convention,²⁸⁴ but the United States has not ratified the Convention.²⁸⁵ Nonetheless, as an OAS member, the United States is bound by the Declaration, and the Inter-American Commission has jurisdiction to hear claims based on the Declaration.²⁸⁶

²⁸⁰ Organization of American States Charter, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361; amended effective 1970, 21 U.S.T. 607, T.I.A.S. No. 6847.

²⁸¹ *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965). Among other relevant provisions, Article I provides that "[e]very human being has the right to life, liberty and the security of his person;" Article V says that "[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life;" Article VIII says that "[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will;" and Article XXV provides that "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law." *Id.*

²⁸² See Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 829 (1975).

²⁸³ See THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS*, 180 (2d ed. 1995).

²⁸⁴ American Convention on Human Rights, *supra* note 206. The Inter-American Court of Human Rights is established by Chapter VII of the Convention. See *id.*

²⁸⁵ BUERGENTHAL, *supra* note 283, at 194-95.

²⁸⁶ See Richard J. Wilson, *Researching the Jurisprudence of the Inter-American Commission on Human Rights: A Litigator's Perspective*, 10 AM. U. J. INT'L L. & POL'Y 1 (1994); see also Kam Nakano, *supra* note 147, at 20-25 (arguing that U.S. refusal to hear the claims of Japanese Latin Americans is an ongoing violation of the American Declaration of Rights and Duties of Man).

Because the United States' internment of Japanese Peruvians predated the OAS Charter its actions cannot be said to have violated the Charter or the Declaration. The U.S. government's ongoing refusal to compensate the victims, however, may well violate the Declaration.²⁸⁷ Thus, when domestic remedies for these claims have been exhausted, the Japanese Latin American internment cases could be brought before the Inter-American Commission with a request that the Commission find the United States responsible for full redress.

Options also exist within the United Nations structure. As a U.N. member, the United States is a party to the Statute of the International Court of Justice ("ICJ").²⁸⁸ The ICJ hears cases arising under international law, but only has contentious jurisdiction over states which have accepted that jurisdiction.²⁸⁹ Dissatisfied with the ICJ's handling of a case brought by Nicaragua against the United States for mining its territorial waters, attacking ports and other facilities and financing and training the "Contra" forces to overthrow the Nicaraguan government, the United States withdrew its consent to compulsory ICJ jurisdiction in 1986.²⁹⁰ To the extent that it is a party to treaties that so provide, the

The Commission has heard claims brought by individuals against the United States. In 1998 it ruled that the United States had violated William Andrews' rights under the Declaration to life, to equality before the law without regard to race, to an impartial hearing and to be free from cruel, infamous or unusual punishment. See Organization of American States, Inter-American Commission on Human Rights, Report No. 57/96, Case 11.139, United States, OEA/ser/L/V./II.98, doc. 7.rev. (Feb. 19, 1998) (on file with author). Andrews had been executed by the state of Utah despite significant evidence of racism in the proceedings, including an incident in which a juror handed the bailiff at trial a napkin on which "hang the niggers" was written. *Id.* at 39-40; see *Andrews v. Shulsen*, 485 U.S. 919, 920 (1988) (Marshall, J. dissenting from denial of certiorari); Capital Punishment on the 25th Anniversary of *Furman v. Georgia*, A Report by the Southern Center for Human Rights 5 (1997) (reproducing the note). While such judgments are difficult to enforce against the United States, they have significant impact on how other nations perceive the United States and bring some pressure on the United States to comply with international law.

²⁸⁷ The U.S.'s actions in interning the Japanese Latin Americans would now be prohibited by Articles I (life, liberty and security), II (equality before the law without distinction as to race), V (protection of the law against abusive attacks upon his private and family life), VI (protection of the family), VIII (right to fix residence within the territory of the state of which he is a national, to move freely within the territory, and *not* to leave it except by his own will), IX (inviolability of his home), XIV (right to remuneration for work), XVII (basic civil rights), XVIII (courts to protect from acts of authority that violate fundamental constitutional rights), XIX (right to nationality), XXIII (right to own private property), XXV (no deprivation of liberty except through pre-existing legal procedures), and XXVI (right to an impartial and public hearing).

²⁸⁸ Statute of the International Court of Justice, *supra* note 150. All members of the United Nations are parties to the Statute by virtue of Article 93 of the U.N. Charter.

²⁸⁹ See *id.* art. 34(1).

²⁹⁰ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26); THOMAS BUERGENTHAL & HAROLD G. MAIER, *PUBLIC INTERNATIONAL LAW* 81 (2d ed. 1990); *United States: Department of*

U.S. is still subject to ICJ jurisdiction.²⁹¹ Nonetheless, the United States continues to disregard unfavorable rulings. For example, in April 1998, ignoring a stay of execution requested by the ICJ, the United States allowed the execution of Angel Breard, a Paraguayan national who had been convicted of murder without having access to Paraguayan consular officials—a violation of the Vienna Convention on Consular Relations.²⁹²

Because no treaties confer jurisdiction in the Japanese Peruvian case and the ICJ can only hear cases brought by states parties, the ICJ is not an option for the Japanese Latin Americans.²⁹³ Such situations, however, can be brought to the world's attention by presenting them to the United Nation's Commission on Human Rights²⁹⁴ and its Sub-Commission on Prevention of Discrimination and Protection of Minorities.²⁹⁵ In March 1998, Karen Parker of International Educational Development submitted a report concerning the Japanese Latin American internment to the 54th session of the Commission on Human Rights. It said, in part:

At the time this program was in operation, international humanitarian law clearly forbade war-time abduction, incarceration, and deportation of civilians from friendly countries. Exchange of civilians from a friendly country to an enemy third party was viewed as especially serious and in this case, met the criteria of hostage-taking. International law also forbade slavery and forced labour (the conditions of the Latin Americans held in the Panama camps clearly met the then-existing prohibitions against slavery and forced labour)

State Letter and Statement concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 INT'L LEG. MAT. 1742 (1985).

²⁹¹ See Statute of International Court of Justice, *supra* note 150, art. 36(1).

²⁹² See Philippe Sands, *Perspective on International Law: An Execution Heard Round the World*, L.A. TIMES, Apr. 16, 1998, at B9; Editorial, *Execution in Virginia Killing Should Have Been Stayed*, SYRACUSE HERALD AMERICAN, Apr. 19, 1998, at D2.

²⁹³ Statute of International Court of Justice, *supra* note 150, art. 34(1).

²⁹⁴ This body was created by the United Nations' Economic and Social Council in compliance with the UN Charter, Article 68. See generally Philip Alston, *The Commission on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 126 (Philip Alston, ed., 1992).

²⁹⁵ The Commission and Sub-Commission have created working groups and have appointed special rapporteurs to investigate allegations of systematic human rights violations and special procedures for hearing complaints regarding "gross violations" of human rights. ECOSOC Res. 728F (XXVIII), U.N. ESCOR, 28th Sess., Supp. No. 1, at 19, U.N. Doc. E/3290 (1959) (allowing Commission to compile communications about human rights violations); ECOSOC Res. 1235 (XLII), U.N. ESCOR, 42nd Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967) (allowing examination of allegations of gross violations of human rights); and ECOSOC Res. 1503 (XLVIII), U.N. ESCOR, Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970) (allowing the appointment of

whether in peacetime or in war. The Charter of the International Military Tribunal (Nuremberg charter), the Charter of the Military Tribunal for the Far East (Tokyo charter) and the earlier Control Council Law 10 set out these acts as war crimes and crimes against humanity at the time of World War II.²⁹⁶

While the Commission lacks enforcement powers, it can bring considerable pressure to bear on states and can aid in raising public awareness of violations of international law. Whether it will be successful in this case remains to be seen.

To summarize, avenues are available for pursuing international claims such as those of the interned Japanese Peruvians, but each is accompanied by significant problems. Generally speaking, the U.S. judicial system is relatively effective and well-organized, but it is reluctant to enforce international law.²⁹⁷ International courts and commissions, specifically created to hear international claims, are difficult to access, slow to respond and lack enforcement power. Although such international bodies can be invaluable in bringing international attention to violations of law, domestic courts remain the best hope for effective remedies.²⁹⁸

V. TOWARD COMPLIANCE WITH INTERNATIONAL LAW

Even as one reflects on certain events of the 1940s and 1950s and concludes that they were unnecessary militarily, inept politically, and inhumane socially, it is no consolation that they are part of the dead past in which the Alien Act of 1798, President Roosevelt's Executive Order 9066, General DeWitt's orders on our West Coast, and Ambassador Norweb's program in Peru fostered gross abuse of elementary human rights. The uncertain future that precipitates other tense and fear-laden moments may unfortunately find American law, an American president, the American military, and American diplomats equally able and willing to violate the human rights of innocent men, women and children.

—Harvey Gardiner, *Pawns in a Triangle of Hate*²⁹⁹

working groups to study situations). The use of these procedures in connection with the case of Korean women subjected to sexual slavery by the Japanese during World War II is described in Parker & Chew, *supra* note 149.

²⁹⁶ Submission of International Educational Development, Mar. 1998 (on file with author).

²⁹⁷ See Strossen, *supra* note 279.

²⁹⁸ See Jordan Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L. SCH. J. HUM. RTS. 547 (1995) (describing the need for national courts to enforce international norms).

²⁹⁹ GARDINER, *supra* note 7, at 176. This is the conclusion reached by Gardiner, the only historian to thoroughly document the Japanese Peruvian internment.

While the Japanese Latin American internment may not involve large numbers of people, it is a case of significant import. A well-defined episode with relatively undisputed facts, it provides a clear example of how international law is incorporated into—or ignored by—our legal and governmental structures. It shows how considerations of human rights and international law can be lost in the foreign policy decisions of U.S. authorities and how the legal system fails to rectify such actions. It also illustrates the harm that can be done when international law is not taken seriously—harm to innocent individuals, to the national interest of the United States and to the rule of law globally. This Section considers the costs of ignoring international law in the Japanese Peruvian case, and makes two recommendations for addressing these problems: first, that remedies for such violations be made available by enforcing international law in domestic courts; and second, that the branches of government responsible for foreign policy make structural changes to institutionalize awareness of, and ensure compliance with, international law and human rights norms.

A. *Repercussions of Ignoring International Law*

The Japanese Peruvian internment resulted not so much from the malevolent designs of particular individuals, but from a convergence of perceived interests on the part of the Peruvian and U.S. governments. Within the executive branch of the U.S. government there were varying perceptions, motivations and expectations that this particular program would further U.S. interests.³⁰⁰ U.S. authorities in the Departments of War, State and Justice were interested in promoting “hemispheric security” and in accommodating Peruvian anti-Japanese hostility in order to obtain the cooperation of the Peruvian government. The primary motivation for interning the Japanese Latin Americans, however, was to accumulate hostages to exchange for Americans held in Japanese-occupied territories.

The U.S. holding of hostages turned out to be not only unnecessary, but counterproductive in a number of ways. First, the U.S. reportedly rejected a proposal from the Japanese government to exchange all civilians without regard to numbers, and began negotiating one-for-one exchanges that stalled when the Japanese government insisted on the repatriation of designated individuals. Not only did the U.S. and Peruvian lists of proposed deportees not agree, but often neither list included the individuals requested by the Japanese government.³⁰¹ The

³⁰⁰ See *supra* notes 95–99 and accompanying text.

³⁰¹ See *supra* notes 76–79 and accompanying text.

program of forced deportation and incarceration thus not only failed to release American internees but may, in fact, have helped bring the larger exchange program to a halt. As noted above, the Japanese government withdrew from the negotiations for a third exchange after lodging protests about the kidnapping of Japanese Latin Americans and the treatment of Japanese Americans, particularly those interned at Tule Lake.³⁰² While the reasons for the Japanese withdrawal are not clearly documented, it is reasonable to infer that the Japanese government would resist participating in exchanges which gave the United States further incentive to kidnap Japanese nationals from third countries. Thus, it appears that by engaging in these blatant violations of international law, the United States subverted the very ends it hoped to achieve.

Second, the holding of Japanese Latin American and Japanese American hostages in internment camps did not protect Americans held by the Japanese military. There are various references to a "reprisal reserve" designed to ensure humane treatment of American internees,³⁰³ but in fact the poor physical conditions of the U.S. camps made State Department officials fear reprisals against the Americans held overseas.³⁰⁴

Third, if increased hemispheric security was an expected benefit of the internment program that, too, failed to materialize. As John Emmerson's memoirs³⁰⁵ and the files combed by Harvey Gardiner³⁰⁶ so clearly illustrate, embassy officials found no evidence of sabotage or subversive activity by the Japanese in Peru. Until Raymond Ickes was sent to Lima to participate in the selection process, those chosen by U.S. authorities were not even identified as "dangerous."³⁰⁷ After Ickes insisted on this criterion, there was still no evidence of subversive activity by any Japanese Peruvians, so men were labeled "dangerous" simply by virtue of having been community leaders.³⁰⁸ Moreover, even after screening procedures were implemented, only a small fraction of those actually deported were on the U.S. lists. U.S. officials were under no illusion, even as the process was taking place, that the deportations did anything to promote hemispheric security.

³⁰² See *supra* notes 112–16 and accompanying text.

³⁰³ See *supra* notes 97–99 and accompanying text.

³⁰⁴ See *supra* notes 92–93, 106–11 and accompanying text.

³⁰⁵ See generally EMMERSON, *supra* note 7.

³⁰⁶ See generally GARDINER, *supra* note 7.

³⁰⁷ See *supra* notes 52–58 and accompanying text.

³⁰⁸ See *supra* notes 76–78 and accompanying text.

There is thus no evidence that any of the anticipated benefits were achieved by the actions of the U.S. government. There were, however, numerous costs. Most obvious, of course, are the losses suffered by the Japanese Peruvians and other interned Japanese Latin Americans. As described in Section II, they lost homes, businesses, property and generations of personal belongings and connections. Most could not return to their homes in Peru and had to construct new lives in a war-devastated Japan where they had few ties and were often regarded as outsiders.³⁰⁹ Those who were able to remain in the United States lived for years in uncertainty and fear.³¹⁰

Significant costs were also incurred by the United States government. Some of these were fiscal. The United States assumed the entire cost of transporting over 2,000 people from Latin America, and then guarding, feeding, and housing them for years. Transport ships, military personnel and other precious resources were devoted to this entirely unproductive end.³¹¹ The contemporaneous costs to the United States were not, however, limited to material costs. The international credibility of the country was harmed when, for example, the U.S. actions with respect to Japanese Americans were raised as a defense by German and Japanese being prosecuted at the Nuremberg and Tokyo tribunals.³¹²

The United States has accrued ongoing costs as well. By refusing to compensate the victims,³¹³ the government has incurred the liability under international law to do so. The settlement in the *Mochizuki* case only requires the government to pay five million dollars or less in redress.³¹⁴ The plaintiffs sought compensation equivalent to that afforded interned Japanese Americans under the terms of the Civil Liberties Act, which would cost approximately twenty-four million dollars. In addition, the government owes the internees compensation for the property they lost, for the lives disrupted, for the illnesses and deaths attributable to the internment.³¹⁵ It owes them this plus fifty years worth of interest. Taking only inflation into account, the \$5000

³⁰⁹ See generally WEGLYN, *supra* note 11.

³¹⁰ See generally GARDINER, *supra* note 7; HIGASHIDE, *supra* note 7.

³¹¹ See *supra* note 35 and accompanying text.

³¹² See *supra* notes 164-70 and accompanying text.

³¹³ See *supra* notes 193-99 and accompanying text.

³¹⁴ The Japanese Peruvian Oral History Project estimates that there may be 1200 JLA internees still living, but the current proposed settlement would only pay them \$5000 apiece until the already-allocated funds under the CLA run out. While this amount is not certain, it will definitely be inadequate. Therefore, I have projected that 1000 internees might receive redress under the settlement.

³¹⁵ One internee, Henry Shima, has filed suit for \$10 million in personal damages. See

now being offered each internee is the equivalent of about \$550 in 1945. At an interest rate of 6%, it represents about \$242 in 1945.³¹⁶ While one cannot begin to calculate the actual damages incurred by the Japanese Latin Americans, it is clear that the amount required to fully compensate them under international law is enormous.

The possibility of having to compensate the victims is probably the least significant of the ongoing costs incurred by the United States in this case. The plight of the Japanese Latin Americans has slowly been coming to the attention of the American public and the international community. Testimony about the Japanese Peruvian internment was presented to the Commission on Wartime Relocation and Internment of Civilians and resulted in acknowledgment of the program in the Commission's final report.³¹⁷ Testimony about the war crimes committed by the United States, and the need for redress, has been presented to the United Nations' Commission on Human Rights.³¹⁸ International attention has been paid to the *Mochizuki* case and will be paid to the cases which are being filed by plaintiffs who opted out of the settlement.³¹⁹ In short, the matter is now before the court of international opinion.

Compensation for the victims of World War II war crimes became a topic of widespread interest in 1998. In August Swiss banks and Holocaust victims agreed to a \$1.25 billion settlement of a suit filed in U.S. district court charging the Swiss banks with laundering gold looted by the Nazis³²⁰ and, under threat of suit, Volkswagen agreed in July to compensate those who had been forced to perform slave labor in its

Japanese Latin American Files Lawsuit for Full Redress, JAPAN POL'Y & POL., Aug. 31, 1998, available in 1998 WL 8032249.

³¹⁶ This is the approximate interest rate of 10-year treasury bills for the period of 1945 to 1998. At 6% interest, \$242 in 1945 would be \$5,008 in 1998. AAA corporate bonds, all maturities, averaged 6.7% interest between 1945 and 1996. At this rate, \$172 in 1945 would yield \$5,001 in 1998. Using the very conservative measure of 3-month treasury bills, the average interest since 1945 is 4.8%, at which rate \$437 in 1945 would yield \$5,003 today. These figures are from the Economic Report of the President (1997), Council of Economic Advisors, Table D-71, *Bond Yields and Interest Rates, 1929-1996* at 382 available at <<http://www.gpo.ucop.edu/catalog/-erp97.html>> (visited Mar. 26, 1999). I am grateful to Peter Philips, Professor of Economics, University of Utah, for obtaining this information and making these calculations.

³¹⁷ See COMMISSION ON WARTIME RELOCATION, *supra* note 213, App. D (testimony of Seiichi Higashide); see also JUSTICE DELAYED, *supra* note 222, at 8.

³¹⁸ See *supra* note 296 and accompanying text.

³¹⁹ See *supra* notes 7, 13 and accompanying text.

³²⁰ See Michael Hirsch, *After 50 Years, A Deal Swiss Banks Agree to Make Payments to Holocaust Victims*, NEWSWEEK, Aug. 24, 1998, at 41; *Switzerland Hopes Holocaust Settlement Clears Air*, DALLAS MORNING NEWS, Aug. 14, 1998, at 11A. The Swiss banks are criticized for following an "ethic of the least effort" and neglecting to distinguish looted gold from other gold. *Victim Gold*, STAR-TRIBUNE (Minneapolis-St. Paul), May 26, 1998, at 03A.

factories during World War II.³²¹ Based on a 200-page report issued by a U.S. commission headed by Under Secretary of State Stuart Eizenstat, an eighteen billion dollar lawsuit has been filed against two German banks.³²² In April a Japanese court ordered the Japanese government to pay reparations to three Korean women who had been used as sex slaves, and a group representing "comfort women" got a bill introduced in the U.S. Congress calling for an apology and reparations from Japan.³²³ This issue has also been presented to the United Nations Commission on Human Rights³²⁴ and some propose that the newly formed International Criminal Court should deal with the question of compensation for the "comfort women."³²⁵

The U.S. government has been a major player in recent reparations movements, particularly those concerning compensation for gold and artwork taken by the Nazis.³²⁶ The United States' position, however, appears hypocritical in the face of its refusal to compensate for the Japanese Latin American internment.³²⁷ It diminishes U.S. credibility and devalues international law in ways we may not fully recognize for

³²¹ See Paul Geitner, *VW Decision May Affect German Firms*, AP, July 8, 1998, available in 1998 WL 6692725; Michael Pinto-Duschinsky, *50 Years On, the Wages of Slave Labour*, TIMES (London), Aug. 10, 1998, at 18.

In addition, a lawsuit filed in March accuses a German subsidiary of the Ford Motor Company with knowingly profiting from forced labor during World War II, and the United States is spearheading a drive to identify and ensure compensation for billions of dollars worth of art stolen by the Nazis. See Blaine Harden, *Suit Alleges Ford Unit Used Forced Labor In WWII*, WASH. POST, Mar. 5, 1998, at A04; Barry Schweid, *39 Nations Seek Art Looted by Nazis*, AP, July 1, 1998, available in 1998 WL 6689782.

³²² See Alex Brummer, *Nazi Victims Sue Banks \$18bn Claim in New York Courts*, THE GUARDIAN (London), June 4, 1998, at O25.

³²³ See *Japan Ordered to Compensate 3 Sex Slaves Law*, L.A. TIMES, Apr. 28, 1998, at A8, available in 1998 WL 2422368; *Asian Comfort Women Seek US Support for Reparations Demands*, AGENCE FR.-PRESSE, June 4, 1998, available in 1998 WL 2295714; see also Estella Duran, *In US, Korean Woman Details Rapes by Japanese in World War II*, B. GLOBE, June 5, 1998, at A19; Yuri Kageyama, *Japan Must Pay Ex-WWII Sex Slaves*, AP, Apr. 17, 1998, available in 1998 WL 6656713. Japan has also come under pressure to provide compensation for its slaughter of civilians in Nanking during World War II. See IRIS CHANG, *RAPE OF NANKING* (1998).

³²⁴ See UN: *Commission on Human Rights Hears Statements on Role of National Human Rights Institutions*, M2 PRESSWIRE, Apr. 9, 1998, available in 1998 WL 11306214.

³²⁵ Farhan Haq, *Rights: International Justice Needed for 'Comfort Women'*, INTER PRESS SERVICE, Mar. 25, 1998, available in 1998 WL 5986352.

³²⁶ According to Stuart Eizenstat, "[t]his can be a healing process, which can strengthen each of our countries and bring this century to a close on a high note of justice." Schweid, *supra* note 321.

³²⁷ As an editorial in the St. Petersburg Times said about the Japanese Latin American internment, "[t]his outrageous episode weakens our moral authority to wag an accusatory finger at Switzerland for not accounting for Nazi gold, or at Japan for its failure to compensate the South Korean 'comfort women' it conscripted into sexual slavery." Editorial, ST. PETERSBURG TIMES, June 23, 1998, at 10A.

years to come. The effectiveness of international law rests on the recognition it receives from the governments of the world. When a nation as powerful as the United States refuses to abide by its norms, the stage is set for other governments and non-governmental groups—including the “terrorist” organizations frequently denounced by the United States—to ignore international law when it suits them.³²⁸

Ironically, one of the stated purposes of the Civil Liberties Act is to “make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.”³²⁹ The terms of the *Mochizuki* settlement, however, suggest that the mistreatment of these plaintiffs was less significant than that of U.S. citizens and residents. Viewed only in quantitative terms, this could be dismissed as a small incident in recent history. But it is difficult to see how the U.S. government’s resolution of the problem could be perceived by anyone, inside or outside of the United States, as reflecting anything but disdain for international law and human rights. As such, it sends a stark message, one that directly contradicts the purpose of the Civil Liberties Act and undermines the credibility of the United States in protesting violations of international law and human rights by other nations.

B. *Proposals for Restructuring*

We are beginning to recognize that the internment of Japanese Americans was not an aberration or a product of wartime hysteria, but quite consistent with the historical treatment of Asian Americans and other racial minorities under the law.³³⁰ Similarly, we need to consider that the internment of Japanese Latin Americans was not an aberra-

³²⁸ Harold Koh states: “A state’s violation of international law creates inevitable frictions and contradictions that hinder its ongoing participation within the transnational legal process. When the United States denies the jurisdiction of the International Court of Justice in a suit in which it is a defendant, that decision impairs its ability to invoke the court’s jurisdiction as a plaintiff.” Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203–04 (1996); see also Harold Hongju Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (describing the process of interaction, interpretation, and internalization of international norms into domestic legal systems).

³²⁹ 50 U.S.C. § 1989 (1988).

³³⁰ This history goes from the 1790 Naturalization Act which limited naturalized citizenship to “free white persons” to the 1882 Chinese Exclusion Act to the Alien Land Laws of the 1920s. See HANEY LOPEZ, *supra* note 3, 37–109 (1996) (describing the history of racial restrictions in naturalization law); Saito, *Alien and Non-Alien Alike*, *supra* note 141, at 291–95 (reviewing legal restrictions on Asian Americans). See generally Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, in this issue, at 37. For an analysis of the interrelationship of racial restrictions and wartime security concerns, see Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, in this issue, at 179.

tion, a mistake made in the turmoil of war, but instead quite consistent with the United States' treatment of minorities in the United States as well as our neighbors in Latin America. In 1823, in what came to be known as the Monroe Doctrine, the United States announced its intentions to be the primary power in the western hemisphere.³³¹ Woodrow Wilson's Secretary of State said bluntly, "[i]n its advocacy of the Monroe Doctrine, the United States considers its own interests. The integrity of the other American nations is an incident, not an end."³³²

United States has exhibited its disregard for Latin American nations' sovereignty on numerous occasions. Having failed in its attempts to buy Cuba in 1854,³³³ the United States essentially took control of it in 1898, forcing the Cubans to incorporate an amendment into their Constitution which gave the United States military bases in Cuba and an unrestricted right to intervene in Cuban affairs.³³⁴ The United States annexed Puerto Rico in 1898,³³⁵ seized the Panama Canal in 1903,³³⁶ and occupied Haiti and the Dominican Republic in 1915.³³⁷ It subsequently installed governments, often run by dictators like Machado in Cuba and Trujillo in the Dominican Republic, to do the United States' bidding.³³⁸ More recent violations of international law in Latin America include U.S. support of a 1954 military coup in Guatemala;³³⁹ the CIA-backed overthrow of Salvador Allende in Chile in 1973;³⁴⁰ and the mining of the waters and support of the Contras in Nicaragua.³⁴¹

³³¹ERIC WILLIAMS, FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN, 1492-1969, at 411 (1984). This was characterized in 1895 as a violation of international law by the British Foreign Secretary: "[N]o statesman, however eminent, and no nation, however powerful, are competent to insert into the code of international law a novel principle which was never recognized [sic] before, and which has not since been accepted by the Government of any other country." *Id.* at 416-17 (quoting a statement of Lord Salisbury, to U.S. Secretary of State Olney in 1895).

³³² See generally Saito, *Alien and Non-Alien Alike*, *supra* note 141, at 268-315.

³³³ See WILLIAMS, *supra* note 331, at 413-14.

³³⁴ See *id.* at 420-21.

³³⁵ See *id.* at 420.

³³⁶ Eric Williams, former Prime Minister of Trinidad and Tobago, characterized the U.S. attitude in the seizure of the Panama Canal: "As stated frankly by [President Theodore] Roosevelt himself in 1908 with reference to Venezuela, America had to 'show these Dagoes that they will have to behave decently.' So Roosevelt just 'took' the Panama Canal while Congress and the South Americans debated the issue." *Id.* at 422; see also Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, Nov. 18, 1903, U.S.-Pan., 33 Stat. 2234, T.S. No. 431.

³³⁷ See WILLIAMS, *supra* note 331, at 424-25.

³³⁸ As President Franklin Roosevelt said of Trujillo, "He may be an S.O.B., but he is our S.O.B." *Id.* at 465.

³³⁹ See NOAM CHOMSKY, YEAR 501: THE CONQUEST CONTINUES 172-74 (1993).

³⁴⁰ See *id.* at 189-90.

³⁴¹ See *supra* note 290 and accompanying text.

In December 1989 approximately 24,000 U.S. troops invaded Panama, inflicting significant civilian casualties and destroying entire neighborhoods.³⁴² This disregard for international law has, in turn, created tension with other nations.³⁴³

International law has been violated in these cases both in times of war and in times of peace. This means we must be cautious about accepting justifications based on "military necessity" and "national security." As Eugene Rostow notes, "[i]t is essential to every democratic value in society that official action taken in the name of the war power be held to standards of responsibility."³⁴⁴ Especially in times of war, we need to protect our civil liberties as well as human rights under international law. As Nanette Dembitz said about the *Korematsu* and *Endo* cases, "periods of war and peace are not disconnected eras; the peacetime social scene emerges from the war-time, and that which might emerge as a result of . . . such unrestrained military force is a subject for apprehension."³⁴⁵ As we move into an era of military actions marked

³⁴²General Manuel Noriega, head of the Panamanian state and reportedly on the CIA payroll, was arrested by U.S. forces, brought to the United States and put on trial for criminal conspiracy to violate U.S. law. See *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988); see also Mark Andrew Sherman, *An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega*, 20 U. MIAMI INTER-AM. L. REV. 393, 395 (1989) ("Noriega represents the ultimate intersection of United States domestic law and foreign policy, and its precedential value should not be understated."); John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991) (noting ambiguity in the justification for the invasion of Panama and arguing that the U.S. should have complied fully with the humanitarian law applicable to armed conflict); see also Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 312-13 (1991) ("With regret, I conclude that the invasion of Panama by the United States was a clear violation of international law as embodied in the principal norm of the U.N. Charter on which the world, under the leadership of the United States, built the new international order after World War II. The United States did not even have a color of justification for this invasion."). For a justification of the invasion, see Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

³⁴³Koh, *Transnational Legal Process*, *supra* note 328, at 195-96. Koh states:

[T]he Supreme Court held that a Mexican accused's forced abduction by U.S. agents . . . did not divest U.S. courts of criminal jurisdiction to try that defendant. Alvarez-Machain sparked intense media criticism and protests from political leaders in Mexico, Canada, Europe, and the Caribbean The Permanent Council of the Organization of American States requested a legal opinion regarding the international legality of the Supreme Court's decision from the Inter-American Juridical Committee, which concluded that "the decision is contrary to the rules of international law."

Id.

³⁴⁴Rostow, *supra* note 118, at 515.

³⁴⁵Dembitz, *supra* note 219, at 238.

by undeclared wars,³⁴⁶ and of declarations of open-ended "wars" on targets such as drugs, crime or terrorism, we must not lose sight of these principles.³⁴⁷

Accordingly, if the United States is to wage such "wars," we must insist that it comply with both domestic and international law.³⁴⁸ Should the U.S. violate international law, we must take victims' claims seriously, and provide them with a forum for redress. If we fail to do so, we will be undermining the rule of law throughout the world.³⁴⁹

As a powerful industrialized nation heavily vested in global markets, the United States strongly desires other nations to comply with international law. Government officials have consistently made this point with respect to Iraq's invasion of Kuwait, its biological and chemical weapons, and its treatment of the Kurds;³⁵⁰ China's use of prison labor and treatment of political dissent;³⁵¹ Pakistan's use of child la-

³⁴⁶ The military conflict in the Gulf War or the recent bombings of Afghanistan and Sudan provide examples. See James Risen & David Johnston, *Experts Find No Arms Chemicals at Bombed Sudan Plant*, N.Y. TIMES, Feb. 9, 1999, at A12.

³⁴⁷ See generally Mark Andrew Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Columbia*, 15 NOVA L. REV. 661 (1991); Peter S. McCarthy, Comment, *United States v. Verdugo-Urquidez: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade*, 27 NEW ENG. L. REV. 1067 (1993).

³⁴⁸ Regarding the importance of international human rights law to protecting the rights of minorities within the United States, see generally Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URBAN L.J. 1075 (1996) (discussing the human rights law applicable to alienage discrimination in the United States); Natsu Taylor Saito, *Crossing the Border*, *supra* note 278 (discussing the impact of U.S. human rights violations overseas on racial and ethnic minorities in the United States).

³⁴⁹ See generally Thomas David Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77, 82 (1993) (characterizing the U.S. policy toward Haitian refugees as evidence of a "malleable doctrine of universal human rights, subject to the political whims and expediency of the political party in power . . ."); Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias are Also on the Rise*, 83-NOV. A.B.A. J. 48 (1997) (discussing the increase in discrimination against Arab Americans resulting from publicity about "terrorism").

³⁵⁰ See Scott L. Silliman, Foreword, *Contemporary Issues in Controlling Weapons of Mass Destruction*, 8 DUKE J. COMP. & INT'L L. 1 (noting the international community's frustration at Iraq's unwillingness to allow weapons inspections); Proceedings of the American Society of International Law, Special Capitol Hill Session; *The Gulf War: Collective Security, War Powers and Laws of War*, Remarks of Jordan Paust, 85 AM. SOC'Y INT'L L. PROC. 1, 13-16 (1991) (criticizing Iraq's invasion of Kuwait as violating the prohibitions against deportation of civilians in the Geneva Convention of 1949); see also Gavin A. Symes, Note, *Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq*, 19 MICH. J. INT'L L. 581 (1998) (discussing possible violations of international law in the U.S. intervention to protect the Kurds in Iraq).

³⁵¹ See U.S. DEPARTMENT OF STATE, *China Country Report on Human Rights Practices for 1997*, released by the Bureau of Democracy, Human Rights, and Labor (Jan. 30, 1998); AMNESTY INTERNATIONAL, *China: Detention and Harassment of Dissidents and Others Between January and June 1998*, AI Index: ASA 17/16/98.

bor;³⁵² Taiwan's and China's respect for intellectual property rights³⁵³ and the safety of U.S. embassies and diplomatic personnel.³⁵⁴ The U.S. cannot assume to promote these interests while adhering to a policy of selective compliance with international law. To really participate in the development and promotion of the global rule of law we must take international law more seriously ourselves.³⁵⁵ This requires scrupulous compliance in large and small matters alike as those governmental policies that allow for minor violations will invite major ones. Violations of international law, like landmines, may appear small and deeply buried, yet it is difficult to know when they will explode and how much damage they will do.³⁵⁶ This problem must be tackled in at least two ways: first, by creating viable remedies within our domestic courts for violations of international law, and second, by insisting that the branches of the government charged with making and implementing U.S. foreign policy—Congress and the Executive—take international law seriously and create institutional mechanisms to that end.

According to Anthony D'Amato, "any international lawyer will estimate that over 99% of the cases that turn on rules of international law are filed in domestic courts."³⁵⁷ As the recent move to organize an International Criminal Court demonstrates,³⁵⁸ transnational courts are

³⁵² See generally Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Stephen F. Diamond & Lance A. Campa, eds., 1998)); Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663 (1997); Timothy P. McElduff, Jr. & Jon Veiga, *The Child Labor Deterrence Act of 1995: A Choice Between Hegemony and Hypocrisy*, 11 ST. JOHN'S J. LEGAL COMMENT 581 (1996) (describing U.S. efforts to combat child labor practices of other countries); Donica Croot, *Taking Aim at Soccer Balls Made in Pakistan*, L.A. TIMES, June 30, 1996, at D1; Mark Schapiro & Trudie Stegler, *Children of a Lesser God: Child Labor in Pakistan*, HARPER'S BAZAAR, Apr. 1996, at 204.

³⁵³ See Rosalind M. Parker, *Protecting American Television Programming in Russia, China, Taiwan, and Japan*, 17 HASTINGS COMM. & ENT. L.J. 445, 454-64 (1995) (describing copyright protection in China and Taiwan).

³⁵⁴ See, e.g., *The Diplomatic and Consular Staff Case (U.S. v. Iran)*, 1980 I.C.J. 3 (1980) (holding that the Iranian government violated international law by allowing the takeover of the U.S. embassy and holding the U.S. diplomatic staff hostage).

³⁵⁵ See, e.g., Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189 (1994) [hereinafter *Democracy and Human Rights*] (evaluating the Clinton Administration's human rights record); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) (using the Haitian refugee cases to illustrate problems with U.S. implementation of human rights policies).

³⁵⁶ See, e.g., Seymour M. Hersh, *My Lai and Its Omens*, N.Y. TIMES, Mar. 16, 1998, at A27 (discussing, 30 years after the fact, how the U.S. military's failure to train its personnel in international law contributed to widespread massacres in Vietnam).

³⁵⁷ ANTHONY D'AMATO, *supra* note 266, at 261.

³⁵⁸ See generally Christopher Keith Hall, *The Sixth Session of the UN Preparatory Committee on*

developing. This is a lengthy process, however, and justice will not be served by waiting for them to become effective. Furthermore, the hesitations that many in the United States have about submitting to the jurisdiction of international tribunals could be avoided if U.S. courts would enforce international law, for those tribunals always require domestic remedies to be exhausted first. By taking international law seriously, federal courts could begin to provide effective remedies for violations of international law. This would serve as a deterrent for future violations of international law and would greatly increase the credibility of the United States in the international legal community.³⁵⁹

Providing remedies after the fact, however, is not enough. Having litigated many human rights cases, Paul Hoffman laments, "I have learned [that] customary law . . . really does not restrain executive action."³⁶⁰ Improving compliance prospectively is greatly preferable to meting out punishment retroactively. There are many ways in which this could be done. Despite having been an active participant in their drafting, the United States has not ratified many human rights treaties.³⁶¹ Ratification of the major international treaties currently accepted by most other nations would be a meaningful step.³⁶² Payment of the over one billion dollars owed to the United Nations would also

the Establishment of an International Criminal Court, 92 AM. J. INT'L L. 548 (1998); Thomas Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462 (1998).

³⁵⁹ See generally Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 65 (1995) ("The provincialism of U.S. courts does harm, sometimes serious harm, to litigants, to the courts themselves, to the United States, to international law, and to the rule of law."); Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995) (discussing new possibilities and ongoing difficulties of raising human rights claims in U.S. courts).

³⁶⁰ Hoffman, *supra* note 278, at 184.

³⁶¹ These include the *International Covenant on Economic, Social and Cultural Rights*, *supra* note 204, at 49; the American Convention on Human Rights, *supra* note 206; the *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46; the *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989). The United States has neither signed nor ratified the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150; the *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966); the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty, G.A. Res. 44/128, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989); the Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519, Dec. 9, 1985; or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 27 U.S.T. 3301; see also Louis Henkin, *U.S. Ratification of the Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

³⁶² See generally Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458 (1998) (noting the "alarming exacerbation" of the "tendency of the United States not to give its treaty obligations the weight they deserve[]").

signal an increased respect for international institutions.³⁶³ The United States could begin to comply with the judgments of international bodies such as the International Court of Justice and the Inter-American Commission on Human Rights. Congress could enact legislation that provides real compensation for Japanese Latin Americans and other victims of human rights abuses. Collectively, these acts would convey the message that the United States is taking international law seriously.

In and of themselves, these measures will not be enough to ensure that U.S. authorities actually comply with international law. That will require structural changes, including extensive education about evolving aspects of international law and the assignment of specific responsibility for compliance within the Departments of Defense, State and Justice. Internal systems need to be created which will identify international law issues when they arise, initiating a process that includes investigation of the relevant law, an assessment of the effects of compliance or noncompliance, and conscious decisionmaking based on that information.³⁶⁴ At this point, there may not be a consensus on the extent to which the United States should participate in a world order defined by international agreements rather than the exertion of national power. Nonetheless, the presumption should be that the United States intends to comply with international law. To the extent that it does not do so, consensus surely exists that the United States government should not violate international law, either by accident or deliberately, without careful consideration of the costs involved, including the harm done to individuals and other countries, the immediate self-interest of the United States and damage to the United States' reputation and to the development of international law.

CONCLUSION

*Our position in the post-war world is so vital to the future that
our smallest actions have far-reaching effects We cannot*

³⁶³ See Emilio J. Cardenas, *Financing the United Nations' Activities: A Matter of Commitment*, 1995 U. ILL. L. REV. 147, 151-52; John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 878-80 (1997); *The United States as Deadbeat: Debt to U.N. Should Be Paid In Full; The Nation's Honor is at Stake*, L.A. TIMES, June 17, 1997, at B6.

³⁶⁴ Harold Koh's evaluation of the Clinton Administration's human rights record provides a good model for this process by reviewing (1) the Administration's rhetoric; (2) appointments made to key policy-making positions; (3) interventions to prevent ongoing human rights abuses; (4) accountability in seeking remedies for past abuses; and (5) preventive measures taken, "for example, adopting international standards and treaties, promoting institutional change, and

escape the fact that our civil rights record has been an issue in world politics. The world's press and radio are full of it Those with competing philosophies . . . have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people. This may seem ludicrous to Americans, but it is sufficiently important to worry our friends. The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record.

—Report of Pres. Truman's Committee on Civil Rights, 1948³⁶⁵

This Article has used the Japanese Peruvian internment as a case study of the consideration given to international law in the making of U.S. foreign policy, and the costs and consequences of ignoring, or refusing to enforce, international law. The harm caused to the thousands of interned Japanese Latin Americans, their families and their communities was the result of the United States' willingness to disregard well-established international law prohibiting the kidnapping and forced deportation of civilians, the holding of hostages, their indefinite internment without charge or hearing and their forced repatriation and/or deportation at the end of the war. The internment of Japanese Latin Americans was allowed to happen, over some objections from the Justice Department, but with very little resistance from U.S. authorities, unreported to the general public, and without triggering any subsequent intra-governmental review revealing the flawed nature of the program as a whole. This illustrates how important it is to create an oversight system designed to assure congruence between American foreign policy and international law.

Had the executive branch, through the President and the Cabinet officials, made international law a priority and then communicated this policy to each department and the agencies thereunder; had Congress enacted legislation to enforce international law; or had federal courts, particularly the Supreme Court, incorporated international law into their decisions, this situation could have been avoided altogether. What President Truman's Committee on Civil Rights said just after World War II is still true. We cannot afford to let incidents such as the Japanese Latin American internment go unremedied, for they commu-

taking measures of deterrence." Harold Hongju Koh, *Democracy and Human Rights*, *supra* note 355, at 192-93.

³⁶⁵ HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 1492-PRESENT, at 440 (1995) (quoting Report of Committee on Civil Rights).

nicate a disdain for international law that will have far-reaching effects on the protection of human rights and the furtherance of a world order that complies with international law.