CASE ARGUED DECEMBER 10, 2002

No. 01-7169

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HWANG GEUM JOO, et al.,
Appellants,

v.

JAPAN,
Appellee.

_____

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

SUPPLEMENTAL BRIEF ON REMAND FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

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This litigation was brought by Philippine, Korean, and Chinese "comfort women," who were forcibly abducted and subjected to rape and torture by the Japanese military during World War II. The United States does not in any way condone that abhorrent conduct, and has condemned it in the strongest possible terms. The United States has participated in this litigation as amicus curiae, however, to express our nation's foreign policy with respect to wartime claims against Japan.

The case returns to this Court following the Supreme Court's grant of certiorari, vacatur, and remand for further consideration in light of Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004). In Altmann, the Supreme Court held that the

Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. (FSIA), applies to all claims against foreign sovereigns brought after the statute's enactment. The Court did not decide whether the claims before it came within an FSIA exception to immunity; nor did it consider the propriety of exercising jurisdiction where the political branches have made a foreign policy determination that U.S. courts should not entertain certain claims. Here, the district court properly found that this nation's foreign policy interests preclude the exercise of jurisdiction and that, in any event, the plaintiffs' claims are barred by the FSIA's general rule of foreign sovereign immunity. Those conclusions remain sound under Altmann.

A. Introduction

As we described at length in our initial amicus brief to this Court, the Executive, with the advice and consent of the Senate, has made a foreign policy determination that all World War II-related claims against Japan should be resolved exclusively through intergovernmental agreements. That determination is reflected in the 1951 Treaty of Peace among the United States, 47 other Allied Powers, and Japan. The Treaty expressly waived all wartime claims by party countries and their nationals against Japan and Japanese nationals. See 1951 Treaty, Article 14(b), at J.A. 202. At the insistence of the United States, the Treaty also provided that the wartime claims of non-

party countries (including China and Korea) and their nationals were to be resolved through intergovernmental negotiations. The claims could not be expressly waived, because a treaty is binding only on nations that are parties to it.[1] Nonetheless, the Treaty provided that China and Korea would receive from Japan the same compensation that the Allied Powers had received, and required Japan to try to reach agreements to resolve the wartime claims of those countries and their nationals. Japan subsequently entered into agreements with Taiwan and the Republic of Korea.

In the district court, the United States submitted a statement of interest expressing the view that exercise of jurisdiction over plaintiffs' claims would be fundamentally at odds with the determination that wartime claims against Japan should be resolved exclusively through diplomacy. The United States also maintained that the court did not have jurisdiction. The district court held that plaintiffs' claims did not fall within any relevant FSIA exception and that, in the alternative, the court could not exercise jurisdiction consistent with the actions of the political branches and the political question doctrine. 172 F. Supp.2d 52 (D.D.C. 2001).

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[1] There was no consensus among the Allies as to whether the People's Republic of China or the Republic of China (Taiwan) represented China; furthermore, Korea had fought as part of the Japanese empire and thus could not properly become a party to the Treaty.

This Court affirmed on the ground that the FSIA did not provide jurisdiction, reasoning that the commercial activity exception did not apply to pre-1952 conduct and that Japan's alleged violation of jus cogens norms did not impliedly waive immunity. 332 F.3d 679, 681-687 (D.C. Cir. 2003). The Court declined to consider whether plaintiffs' claims would be justiciable, although it recognized that "the Treaty 'embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements[,]' * * * without involving the courts of the United States * * *." Id. at 682, 684-685. The Supreme Court subsequently granted certiorari, vacated, and remanded for consideration in light of Altmann. 124 S. Ct. 2835 (2004).

B. *Altmann* Does Not Bar A Court From Giving Effect To The Political Branches' Foreign Policy Determination That Wartime Claims Against Japan Should Not Be Litigated In U.S. Courts.

1. The foreign policy determination of the political branches that wartime claims against Japan should be resolved exclusively through government-to-government negotiations may properly be given full effect in accord with the Supreme Court's decision in Altmann and subsequent cases.[2] Although Altmann held

[2] Plaintiffs erroneously assert that this Court must consider whether the FSIA confers jurisdiction over their claims before considering the propriety of exercising jurisdiction. (continued...)

that the FSIA's rules on foreign sovereign immunity apply in all cases brought after the statute's enactment, it did not hold that available legal doctrines could not preclude judicial consideration of a suit. Furthermore, it distinguished the case before it from one where the Executive expresses a view "on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct." Id. at 2255. The Court contrasted the Executive's views on a statutory construction question like retroactive application of the FSIA, which, while "of considerable interest to the Court, * * * merit no special deference," with the filing of a statement of interest as to the foreign affairs ramifications of exercising jurisdiction in an individual case, which "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." Id. at 2255 (noting "President's vast share of responsibility for the conduct of our foreign relations").

Justice Breyer elaborated on the relevance of the political branches' view of foreign policy in his concurring opinion in

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[2](...continued)
Justiciability is a threshold question, see, e.g., Franklin v. Massachusetts, 505 U.S. 788, 801 n.2 (1992); INS v. Chadha, 462 U.S. 919, 941-943 (1983); Stanton v. Stanton, 421 U.S. 7, 11 (1975), which may be decided at the outset. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 100 n.3 (1998) (court may decide to abstain before deciding whether jurisdiction would otherwise exist); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-585 (1999).

Altmann, emphasizing that the United States' statement of interest could "refer, not only to sovereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies, or the nonjusticiable nature * * * of the matters at issue." Id. at 2262 (citations omitted). Notably, Justice Breyer cited this very case as one in which the United States counseled dismissal on justiciability grounds, noting that the district court had found that the claims "raise[d] political questions that were settled by international agreements." Ibid.

In Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), the Supreme Court considered the significance of the government's foreign policy interests for the exercise of jurisdiction under the Alien Tort Statute, emphasizing limitations -- including "case-specific deference to the political branches" -- that could prevent private lawsuits from impinging on those interests. Id. at 2766. As the Court stressed, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view" as to the potential harm caused by litigation of particular claims in U.S. courts. Ibid.

2.a. More than 50 years ago, the Executive, with the advice and consent of the Senate, made a foreign policy determination that all wartime claims against Japan should be resolved exclusively by diplomacy. In waiving the claims of the nationals

of Allied Powers and "express[ing] a clear policy of resolving the claims of other nationals through government-to-government negotiation," the 1951 Treaty reflects the common understanding that Japan "would not be sued in the courts of the United States for actions it took during the prosecution of World War II." 332 F.3d at 685, 681. The ratified treaty is, as one court recently noted, "the ultimate formal expression of the federal executive and legislative branches in matters of foreign policy." Taiheiyo Cement Corp. v. Superior Court, 12 Cal. Rptr. 3d 32, 41 (Cal. Ct. App. 2004), petition for cert. filed, 73 USLW 3248 (Oct. 11, 2004).

The United States' foreign policy is reflected in Article 14 of the Treaty, which expressly waives the claims of party countries and their nationals for claims "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." J.A. 202. The policy is also reflected in other provisions of the Treaty, including articles requiring Japan to renounce all interests in China and authorizing China to seize Japanese assets in its territory, see Art. 21, 10, 14(a)2, at J.A. 206, 196, 201; articles requiring Japan to recognize Korea's independence and to renounce all claims to Korea and, as construed by the United States, authorizing the seizure by Korean authorities of all Japanese assets in Korea, see Art. 21, 2, 4, 9, 12, at J.A. 206, 194-195, 199-200; and articles requiring

Japan to enter into bilateral agreements with Chinese and Korean representatives resolving wartime claims on terms similar to those accepted by party nations, see Art. 26, 4(a), at J.A. 208, 195.

As the Executive explained in the Statement of Interest filed in district court, the Treaty's comprehensive framework for resolving wartime claims against Japan has been the foundation for subsequent relations among the United States, Japan, and other countries, and deviation from that framework "would have serious repercussions." Statement at 1. "To question the policy decisions behind [the 1951 Treaty or bilateral agreements between Japan and China, Taiwan, or Korea] could disrupt relations with" those countries, and "could affect United States treaty relations globally by calling into question the finality of U.S. commitments." Statement at 4, 35. Litigation of plaintiffs' claims could also "have serious implications for stability in the region." Statement, at 35. Permitting litigation to go forward against Japan based on its wartime treatment of the nationals of North Korea, for example, could pose a significant risk of seriously disrupting international relations in East Asia at a time when such relations are already extremely sensitive. It remains the policy of the United States that the war-related claims of North Korea and its nationals against Japan and Japanese nationals should be resolved through government-to-

government negotiation and not through litigation in the courts of the United States. The availability of a U.S. forum to litigate wartime claims could reasonably be expected to impair discussions between Japan and North Korea regarding the normalization of relations, talks that have grown to encompass North Korea's nuclear weapons program.

Plaintiffs' invitation for the judiciary to second-guess the foreign policy of the United States, established by the Executive at the conclusion of World War II with the advice and consent of the Senate, and carried forward to this day in a treaty that remains in effect, cannot properly be accepted. Where a political determination has been made by the political branches on an issue plainly within their province, the courts should not second-guess that determination or impair the fulfillment of that policy. See Baker v. Carr, 369 U.S. 186, 211-213, 217 (1962).

b. As the Ninth Circuit recently held, the 1951 Treaty and the foreign policy of the United States that it reflects bar a U.S. court from entertaining claims brought by U.S. prisoners of war and other victims challenging wartime atrocities. Deutsch v. Turner Corp., 324 F.3d 692, 711-716 (9th Cir.), cert. denied, 540 U.S. 820 (2003). The Deutsch court explained that the Executive exercised "exclusive power" to resolve the war with Japan by entering into the 1951 Treaty, which did not provide for a private right of action against Japan or its nationals or

authorize States to create such a right. 324 F.3d at 712, 714. The court held that this resolution barred the claims of both U.S. nationals and also nationals of non-parties China and Korea, reasoning that "[w]hen the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States." Id. at 714 n.14; see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 420-427 (2003) (President's executive agreement with Germany, reflecting agreement of Germany and German companies to establish a fund to pay Holocaust-era claims, embodied foreign policy to encourage "volunt[ary] settlement funds in preference to litigation or coercive sanctions," and preempted state law imposing coercive sanctions and creating new cause of action for Holocaust survivors); Taiheiyo Cement, 12 Cal. Rptr. 3d at 35, 44 (state-law claims brought by Korean national against Japanese company based on forced slave labor during World War II were in conflict with foreign policy expressed in 1951 Treaty, and thus invalid); Mitsubishi Materials Corp. v. Superior Court, 6 Cal. Rptr. 3d 159, 175 (Cal. Ct. App. 2003) (wartime claims brought by U.S. prisoners of war against Japanese companies were in conflict with policy expressed in 1951 Treaty and thus invalid).

Plaintiffs argue that these cases are irrelevant because they involve preemption of inconsistent state law, "a federalism doctrine inapplicable to this case." Pl. Suppl. Br. 14; but see

In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig., ___ F. Supp.2d ___, 2004 WL 2311298 (S.D.N.Y. Oct. 14, 2004) (dismissing customary international law claims). What those cases establish, however, is that a court must give effect to the political branches' determination that all wartime claims against Japan should be resolved exclusively through diplomacy -- a policy that has been adhered to since enactment of the Treaty, that has never been contradicted by the political branches in a statute or otherwise, and that continues to be foreign policy of the United States. In such circumstances, a court's interpretation and application of federal law to override this policy would be no less improper than its interpretation and application of state law to achieve that effect.[3]

In this respect, Plaintiffs' argument that the Treaty does not explicitly divest the district court of jurisdiction fails to address the broader question before the Court: whether a foreign policy determination that wartime claims against Japan should not be entertained in U.S. courts renders such claims nonjusticiable.

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[3] Plaintiffs also cannot defeat the policy of the United States as set forth in the 1951 Treaty by relying on international law for an alleged cause of action. It is well-established that a court may look to international law for a rule of decision only "where there is no treaty, and no controlling executive or legislative act or judicial decision." The Paquete Habana, 175 U.S. 677, 700 (1900). Here, there is a treaty, and its contemplation that claims will be resolved exclusively through intergovernmental negotiations precludes an international law cause of action.

Although the Treaty does not -- and, indeed, could not by its terms -- expressly extinguish claims brought by Korean and Chinese nationals, it nonetheless manifests the determination that such claims should not be heard.[4] Both Altmann and Sosa envision that such a determination may preclude the exercise of jurisdiction in an individual case under various legal doctrines. Faced with similar circumstances, courts have consistently held that dismissal is appropriate on political question, international comity, or other doctrinal grounds.

Thus, for example, the Eleventh Circuit recently invoked Altmann to affirm the dismissal of claims filed by a victim of the Nazi regime against two German banks that had allegedly stolen her family's property through the Nazi program of "Aryanization." Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004). The United States had filed a statement of interest explaining that it would be in our foreign policy interests for "the exclusive forum and remedy" for Nazi-era claims against German companies to be a fund that was to be established by the German government and German companies. See

[4] The position of the United States is not that the interpretation of a treaty is inherently non-justiciable, but that the 1951 Treaty reflects the United States' foreign policy not to entertain wartime claims against Japan even if they were not extinguished by the Treaty itself. It is irrelevant whether the Treaty is self-executing, since a foreign policy need not be contained in a self-executing treaty in order to be binding on a U.S. court. See, e.g., Garamendi, 539 U.S. at 420-427 (interpreting executive agreement to bar conflicting state laws).

id. at 1234. The court held that this statement of interest was "entitled to deference" under Altmann, and dismissed the claims on international comity grounds. Id. at 1237-1240; cf. In re Nazi Era Cases Against German Defendants Litig., 334 F. Supp.2d 690, 692-696 (D.N.J. 2004) (holding that claims by a Holocaust survivor against a German corporation were nonjusticiable under the political question doctrine); Ye v. Zemin, 383 F.3d 620, 623 n.6, 626-627, 629 (7th Cir. 2004) (deferring to "official position of the Executive Branch" that head of state should be immune from suit, and that permitting service of process "would have a deleterious effect on the conduct of foreign affairs"). Here, too, the foreign policy determination regarding resolution of wartime claims against Japan, and the damage that would result from adjudicating claims in disregard of that policy, bar a U.S. court from entertaining plaintiffs' claims.[5]

[5] Indeed, nearly forty years ago, this Court dismissed a class action brought by victims of the Holocaust -- despite the absence of a clearly articulated foreign policy such as that presented here -- as being outside "the established scope of judicial authority." Kelberine v. Societe Internationale, Etc., 363 F.2d 989, 995 (D.C. Cir. 1965). As the Court held, "[t]he time is too long," "[t]he identity of the alleged tort feasors is too indefinite," and "[t]he procedure sought -- adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power -- is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed." Ibid.

C. Plaintiffs' Claims Do Not Fit Within The FSIA's Exceptions To Foreign Sovereign Immunity.

Even if the 1951 Treaty did not preclude the district court's exercise of jurisdiction over plaintiffs' claims, their claims still would be subject to dismissal because they do not fall within the FSIA exceptions to the general rule of foreign sovereign immunity. Plaintiffs appear to concede that the waiver exception does not apply to their claims. See U.S. Am. Br. 20-21. Nor, contrary to plaintiffs' arguments, do the claims fall under the commercial activity exception, 28 U.S.C. § 1605(a)(2).

The gravamen of plaintiffs' complaint is that the Japanese military forcibly enslaved foreign women and subjected them to mass rape and torture. That conduct is not "commercial activity" within the meaning of the FSIA -- i.e., "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). It is immaterial whether trafficking in women is a worldwide problem today that generates revenue for criminal enterprises. As this Court has recognized, the purpose of the FSIA was to prevent foreign sovereigns from claiming immunity for "typical commercial activities, not to reach out to cover all sorts of alleged nefarious acts * * *." Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 168 (D.C. Cir. 1994) (kidnapping of hostage, even if for ransom, not "commercial activity" under FSIA); see also, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 361-362 (1993) (wrongful arrest, imprisonment, and

torture of employee not "commercial activity" under FSIA). To accept plaintiffs' argument that conduct is commercial so long as it is carried out by a criminal enterprise would mean that virtually any type of wrongdoing "could be thought commercial including isolated acts of assassination, extortion, blackmail, and kidnapping." Cicippio, 30 F.3d at 168. "That can hardly be what Congress meant by commercial activity * * *." Ibid.[6]

Plaintiffs cite Globe Nuclear Services, Ltd. v. AO Techsnabexport, 376 F.3d 282 (4th Cir. 2004), in support of their assertion that Japan's conduct was "commercial activity." That case, however, emphasizes that the relevant question is whether a lawsuit is "based" on commercial activity -- i.e., that commercial activity is one of the "elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." Id. at 286 (quoting Nelson, 507 U.S. at 357). The plaintiffs' claims have nothing to do with commercial activity, and the fact that Japanese soldiers might have paid a fee to the "comfort stations" has no bearing on Japan's asserted liability for war crimes, crimes against humanity, violations of

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[6] Plaintiffs rely on Commerce Clause cases as proof that sexual slavery and trafficking are "commercial" in nature (see Pl. Suppl. Br. 5-7), but those decisions are based on Congress' power to regulate the "channels" or "instrumentalities" of interstate commerce, not the commercial character of the conduct at issue. See, e.g., Cleveland v. United States, 329 U.S. 14, 19 (1946) (upholding conviction for interstate transportation of polygamous wives); see also L. Tribe, 1 American Constitutional Law 827-828 & n.10 (3d ed. 2000).

international law, intentional torts, the crime of rape, or sexual slavery.

Plaintiffs also suggest that Japan's conduct falls within the commercial activity exception because it was in connection with a commercial activity. However, they fail to identify any commercial activity that the conduct was in connection with, and have previously conceded that "the activity that is the basis of the suit and the activity that provides the basis for jurisdiction are one and the same," Motion at 5 n.1 -- i.e., the forcible abduction, rape, and torture that the district court has correctly found not to be commercial in nature. In any event, this Court has already held that forcible harm is not "in connection with" commercial activity within the meaning of the FSIA merely because it involves the payment of money. See Cicippio, 30 F.3d at 168. Accordingly, the district court lacked jurisdiction over plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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NOVEMBER 2004

CERTIFICATE OF COMPLIANCE

Counsel for amicus curiae the United States of America hereby certifies that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and District of Columbia Circuit Rule 32(a). The brief was prepared in Courier New font and the computer word count is 3666.

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