

SOUTH KOREA SHATTERS THE PARADIGM:  
CORPORATE LIABILITY, HISTORICAL  
ACCOUNTABILITY, AND THE SECOND WORLD WAR

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ABSTRACT

South Korea is currently revising its interpretation of Japanese colonialism, and the fallout from World War II more generally. In 2018, the Supreme Court of South Korea issued two opinions that staked new ground in this process of legal revision. First, by holding Japanese multinational enterprises legally liable for events that took place in the early 20th century, the verdicts fissure a wall of corporate impunity that courts in Japan, the United States and many Western jurisdictions have erected over the past three decades. Second, by situating the decisions within Korea's own colonial past, the judgments advance a post-colonial jurisprudence that many scholars have long discussed, but few judgments have actually explored. In particular, the narrative of colonial *illegality*—accepted by some scholars, but relatively few judges—may finally make inroads into the jurisprudence of economically developed countries. Third, just as repairing colonialism has come to the fore in contemporary debates of law, politics and society, issues of World War II liability—legal, financial, historical, and otherwise—will likely face revisions in the years to come.

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INTRODUCTION

Repairing the past is a theme for our time. As the United States reviews linkages between contemporary forms of racial injustice and the institution of slavery,<sup>1</sup> France is sending back dozens of artifacts seized from former African colonies.<sup>2</sup> Even England, the largest imperial power, apologized and compensated thousands of Kenyans brutalized during its suppression of the Mau Mau Rebellion.<sup>3</sup> By linking current inequality to historical suppression, victims make a case for compensation in the present moment. The sins of the past do not disappear. Instead, they compound interest, sometimes for decades, before the principal becomes due.

Few phenomena wreak more destruction than war. One way to conceive of the vast devastation occasioned by World War II is to reflect on the breadth and depth of contemporary reparations movements. Victims of war crimes and crimes against humanity, ably assisted by civil society organizations, lawyers, and historians, have

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1. Katanga Johnson, *U.S. Public More Aware of Racial Inequality But Still Rejects Reparations: Reuters/Ipsos Polling*, REUTERS (June 25, 2020, 4:03 AM), <https://www.reuters.com/article/us-usa-economy-reparations-poll/u-s-public-more-aware-of-racial-inequality-but-still-rejects-reparations-reuters-ipsos-polling-idUSKBN23W1NG> [<https://perma.cc/233F-EUQA>].

2. Anna Sansom, *France’s National Assembly Votes to Return Colonial-era Artefacts to Benin and Senegal*, ART NEWSPAPER (Oct. 7, 2020), <https://www.theartnewspaper.com/news/france-s-national-assembly-votes-to-return-colonial-era-artefacts-to-benin-and-senegal> [<https://perma.cc/827W-34MU>] (describing several individual laws that France has passed to repatriate art, weapons, and human remains to former colonies).

3. Caroline Elkins, *Britain Has Said Sorry to the Mau Mau. The Rest of the Empire Is Still Waiting*, GUARDIAN (June 7, 2013), <https://www.theguardian.com/commentisfree/2013/jun/06/britain-maumuau-empire-waiting> [<https://perma.cc/9KTZ-69MH>] (describing Britain’s apology, acknowledgment of the use of torture, and compensatory payments of £2,600 to ethnic Kikuyus).

demanded redress in Europe, Asia, and the United States. They have queried lawmakers, beseeched executive officials, and filed hundreds of lawsuits.<sup>4</sup> In some instances—notably in the West—these efforts have yielded national laws, compensatory mechanisms, charitable foundations, and claims tribunals to restitute stolen property.<sup>5</sup> But in other cases—notably in East Asia—there is little to show for reparative efforts.

Yet, South Korean courts are writing a new chapter in the reparative saga. In January 2021, a trial court in Seoul ordered the Japanese government to pay 100 million won (roughly \$90,000) to each of a dozen Korean women forced into sexual slavery during the War.<sup>6</sup> In April 2021, a different trial court arrived at the opposite conclusion, inoculating the Japanese government under the theory of state immunity.<sup>7</sup> And in June 2021, another Korean court dismissed a case brought against sixteen Japanese corporations that used forced labor during the war.<sup>8</sup> These lawsuits, as well as their contradictory outcomes, suggest that a comprehensive resolution of the war reparations issue remains a distant improbability.

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4. Most of the English-language material on World War II reparations focuses on developments in the West. See, e.g., LEORA BILSKY, *THE HOLOCAUST, CORPORATIONS, AND THE LAW: UNFINISHED BUSINESS* (2017) (arguing that the transnational Holocaust litigation movement yielded compensation, but failed to provide normative clarification for corporate liability); *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* (Michael J. Bazylar & Roger P. Alford eds., 2005) (discussing lawsuits in the United States and the various international agreements the lawsuits yielded); MICHAEL J. BAZYLAR, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (2003). Professor Bazylar calls the “American justice system” the “real hero” of the story because, *inter alia*, foreign citizens can file suit in the United States for human rights abuses that occurred abroad, U.S. courts exert jurisdiction over foreign companies that do business in the United States (even if the conduct took place elsewhere), American legal culture allows attorneys to take high-risk cases on a contingency see basis, filing casts are relatively low, and judges act independently of government pressure. *Id.* at xi-xiii.

5. MICHAEL BAZYLAR, *HOLOCAUST, GENOCIDE & THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD* 161–68 (2017) (describing the results of the transatlantic Holocaust restitution movement)

6. Choe Sang-Hun, *South Korean Court Orders Japan to Pay Compensation for Wartime Sexual Slavery*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2021/01/07/world/asia/south-korea-comfort-women-japan.html> [<https://perma.cc/Y5K3-D59D>].

7. Hyonhee Shin, *S. Korea Court Dismisses ‘Comfort Women’ Lawsuit, Contradicts Earlier Ruling*, REUTERS (APR. 20, 2021, 10:04 PM), <https://www.reuters.com/world/china/skorea-court-dismisses-comfort-women-lawsuit-contradicts-earlier-ruling-2021-04-21/> [<https://perma.cc/WR3R-GHUC>].

8. Hyonhee Shin, *South Korea Court Dismisses Forced Labour Case Against Japanese Firms*, REUTERS (JUNE 7, 2021, 2:35 AM), <https://www.reuters.com/world/asia-pacific/south-korea-court-dismisses-forced-labour-case-against-japanese-firms-2021-06-07/> [<https://perma.cc/7VAP-52G2>].

These lower court decisions follow a pair of verdicts rendered by the Supreme Court of South Korea (SCSK) to compensate victims of other wartime human rights abuses. On October 30, 2018, the SCSK ordered Nippon Steel-Sumitomo to pay 100 million Korean won (roughly \$90,000) each to four former forced laborers, including 98-year-old Yi Chun-shik, the sole surviving plaintiff.<sup>9</sup> On November 29, 2018, the SCSK likewise ordered Mitsubishi Heavy Industries (MHI) to pay 400 million won (roughly \$365,500) to ten plaintiffs in a consolidated lawsuit.<sup>10</sup> Both SCSK verdicts stem from a pair of 2012 decisions wherein the Court held that these Japanese companies committed “torts against humanity” against Korean citizens.<sup>11</sup> At the time of this writing, at least a dozen other civil cases, with hundreds of plaintiffs, are wending their way through trial and appellate courts in Busan, Gwangju, Seoul, and Taegu. If past is precedent, these plaintiffs may well prevail, though whether any Korean victim will live long enough to see the *enforcement* of these judgments is another matter entirely. The Japanese corporate defendants, like the Japanese government in the 2021 “comfort women” decision, have indicated that they have no intention of paying the damages award.<sup>12</sup>

9. Hyonhee Shin, *Friction Likely as Korean Court Orders Nippon Steel to Compensate WWII Workers*, REUTERS (Oct. 29, 2018, 4:12 PM), <https://www.reuters.com/article/us-southkorea-japan-laborers-idUSKCN1N32TS> [<https://perma.cc/3HVH-WHLJ>]; Shin Cheon-su v. Nippon Steel-Sumitomo Metal Corp., Daebeobwon [S. Ct.], Oct. 30, 2018, 2013Da61381 [hereinafter SCSK Opinion]. The decision has been translated into English. See Seokwoo Lee & Seryon Lee, *Decision of the Korean Court on Japanese Forced Labor re New Nippon Steel Corporation (Supreme Court, Case 2013 Da 61381, Final Judgment)*, 7 KOREAN J. INT'L & COMPAR. L. 88 (2019) [hereinafter SCSK Translation].

10. Simon Denyer, *New South Korea Court Ruling Angers Japan, Deepening Crisis Between America's Closest Pacific Allies*, WASHINGTON POST (Nov. 29, 2018), [https://www.washingtonpost.com/world/s-korea-court-orders-japans-mitsubishi-to-pay-compensation-for-wartime-forced-labor/2018/11/28/4f0a6616-f37e-11e8-9240-e8028a62c722\\_story.html](https://www.washingtonpost.com/world/s-korea-court-orders-japans-mitsubishi-to-pay-compensation-for-wartime-forced-labor/2018/11/28/4f0a6616-f37e-11e8-9240-e8028a62c722_story.html) [<https://perma.cc/6C89-GLSC>]. Pak Chang-hwan v. Mitsubishi Heavy Indus., [S. Ct.], Nov. 29, 2018, 2013Da67587.

11. See Pak Chang-hwan v. Mitsubishi Heavy Indus., Daebeobwon [S. Ct.], May 24, 2012, 2009Da22549, *rev'g* Busan Godeungbeobwon [Busan High Ct.], Feb. 3, 2009, 2007Na4288, *aff'g* Busan Jibangbeobwon [Busan Dist. Ct.], Feb. 2, 2007, 2000Gajap7960; Shin Cheon-su v. Nippon Steel-Sumitomo Metal Corp., Daebeobwon [S. Ct.] May 24, 2012, 2009Da68620 (S. Kor.).

12. See *Regarding the Confirmation of the Judgment of the Seoul Central District Court of the Republic of Korean in the Lawsuit Filed by Former Comfort Women and Others (Statement by Foreign Minister MOTEGI Toshimitsu, MINISTRY OF FOREIGN AFFS. OF JAPAN (Jan. 23, 2021)*, [https://www.mofa.go.jp/press/danwa/press6e\\_000269.html](https://www.mofa.go.jp/press/danwa/press6e_000269.html) [<https://perma.cc/7QVP-VFAC>] (indicating the Japanese government “has repeatedly expressed its position that this lawsuit therefore must be dismissed”). Because the Japanese companies have refused to pay the damages awards, the South Korean judiciary has begun the process of seizing assets that the companies own in South Korea. See *Nippon Steel Appeals South Korean Court-Ordered Asset Seizure*, NIKKEI ASIA (Aug. 7, 2020), <https://asia.nikkei.com/>

The verdicts have been widely credited with bringing bilateral relations between South Korea and Japan to their lowest point in fifty years.<sup>13</sup> Given the enmity that frequently surfaces between Korea and Japan, that is quite a feat.

It is too early to tell whether the verdicts will lead to another bilateral agreement, similar to the 2015 comfort women agreement infelicitously hammered out by the Japanese and Korean governments.<sup>14</sup> Nevertheless, the importance of these judgments cannot be underestimated. Civil reparations lawsuits have previously been filed in Germany,<sup>15</sup> France,<sup>16</sup> Austria,<sup>17</sup>

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Spotlight/Japan-South-Korea-rift/Nippon-Steel-appeals-South-Korean-court-ordered-asset-seizure [https://perma.cc/L7YZ-SEM5].

13. Choe Sang-Hun, *Ex-Chief Justice of South Korea Is Arrested on Case-Rigging Charges*, N.Y. TIMES (Jan. 23, 2019), <https://www.nytimes.com/2019/01/23/world/asia/south-korea-chief-justice-japan.html> [https://perma.cc/9NU9-6N4D] (“Relations between Seoul and Tokyo have plummeted to their worst point in years after the South Korean Supreme Court ruled last fall that Korean victims of forced labor . . . had the right to seek damages from wartime employers, including Japanese industrial giants.”).

14. See *Full Text of Announcement on ‘Comfort Women’ Issue by Japanese, South Korean Foreign Ministers*, JAPAN TIMES (Dec. 28, 2015), <https://www.japantimes.co.jp/news/2015/12/28/national/politics-diplomacy/full-text-announcement-comfort-women-issue-japanese-south-korean-foreign-ministers/> [https://perma.cc/K7C6-WTHK]. “Comfort women” refers to women and girls that the Japanese army forced into sexual slavery during WWII. The 2015 agreement included an apology from the Japanese foreign minister to the South Korean comfort women, payment from Japan of roughly \$8 million to create a fund for the surviving women, a pledge from South Korea to address the comfort “girl” statue placed in front of the Japanese embassy in Seoul, and a mutual agreement to refrain from criticizing the other party’s handling of the issue in the international community.

15. *Krakauer v. Germany*, Landgericht [LG] [Regional Court] Nov. 5, 1997, 1\*134/92 (finding in favor of forced laborers against German government), *rev’d* Oberlandesgericht [OLG] [Higher Regional Court] Dec. 3, 1998 (dismissing claims as time-barred). The German cases are discussed at length in *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

16. See, e.g., *Georges Lipietz v. Prefect of Haute-Garonne and Société Nationale des Chemins de fer Français*, Tribunal administratif [TA] [administrative tribunal] Toulouse, June 6, 2006, No. 0104248. While the trial court ordered damages against the French government and national railway system, the decisions was overturned on appeal, and ultimately dismissed by the French Supreme Court. See generally Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMPAR. L. 363 (2008) (describing the historical background to the *Lipietz* case).

17. Maria Altmann first filed her claim, to restitute a Gustav Klimt painting that once belonged to her aunt, in Austria. After realizing that it would cost hundreds of thousands of dollars merely to file the case in Austria, she decided instead to file in the United States. See *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001). The U.S. Supreme Court ultimately ruled in Altmann’s favor in the 2004 decision, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (holding that the Foreign Sovereign Immunities Act applied retroactively, including to Austria’s postwar practice of “forcing Jews to donate . . . valuable artworks to [Austria’s national gallery] in exchange for export permits for other works” (citations omitted)). Her case would ultimately reach a broader audience through the film *WOMAN IN GOLD* (BBC Films & Origin Pictures 2015).

China,<sup>18</sup> Japan,<sup>19</sup> the Philippines,<sup>20</sup> and the United States.<sup>21</sup> By and large, judges have dismissed war reparations lawsuits as time-barred, treaty-waived, or non-justiciable political questions. No judge—before the SCSK decisions—had issued a final and binding judgment ordering a corporation to pay damages for World War II-era conduct.<sup>22</sup> The SCSK decisions thus mark uncharted territory. Their historical and political implications aside, they lend support for an emergent norm of corporate civil liability for grave human rights abuses. When corporations commit, aid, or abet serious human rights abuses, they generally evade legal liability. The ongoing call for corporate legal liability has attracted scholarly attention, initiatives from international organizations, and plenty of litigants. Few judgments, however, actually find corporations legally liable for human rights violations, although recent European decisions have cracked the wall of corporate impunity.<sup>23</sup> The South Korean decisions need to be under-

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18. Chinese plaintiffs have filed lawsuits in Chinese courts, but no court would accept a case until 2014. That case, against Mitsubishi Heavy Industries, settled in 2016. For details on the Mitsubishi settlement, see Timothy Webster, *The Price of Settlement: World War II Reparations in China, Japan, and Korea*, 51 N.Y.U. J. INT'L L. & POL'Y 301, 365–72 (2019) [hereinafter Webster, *The Price of Settlement*].

19. Roughly one hundred lawsuits have been filed in Japan. See generally Timothy Webster, *Japan's Transnational War Reparations Litigation: An Empirical Analysis*, 63 HARV. INT'L L.J. (forthcoming, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3823767](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3823767) [<https://perma.cc/AJ23-D52F>] [hereinafter Webster, *Japan's Transnational War Reparations Litigation*].

20. *Vinuya v. Romulo*, G.R. No. 162230, 633 Phil. Rep. 538 (Apr. 28, 2010) (dismissing claims brought by Filipina comfort women as political questions).

21. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing wartime forced labor claims against Ford's German subsidiary as time-barred and waived by applicable treaty); *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing wartime forced labor claims as a nonjusticiable political question); *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) (dismissing claims against the Japanese government on sovereign immunity grounds); *Princz v. Fed. Rep. Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (exculpating Germany for use of slave labor at Nazi concentration camp under state immunity).

22. The few Japanese verdicts that ordered Japanese corporations to pay damage awards were overturned on appeal. See Timothy Webster, *Discursive Justice: Interpreting World War II Litigation in Japan*, 58 VA. J. INT'L L. 161, 210 (2018) [hereinafter Webster, *Discursive Justice*]. Prior to the 2012 SCSK decisions, Korean lower courts—citing Japanese precedents—also dismissed cases brought by Korean plaintiffs. See Steven S. Nam, *From Individual to Collective Restitution: Recasting Corporate Accountability for Korean Forced Labor in the Second World War*, 22 U.C. DAVIS J. INT'L L. & POL'Y 1, 10 (2015).

23. See, e.g., Ulrike Verboom & Eleonora Di Pangrazio, *Dutch Court Rules on Parent Companies' Responsibility for Overseas Subsidiaries*, FRESHFIELDS BRUCKHAUS DERINGER (Feb. 22, 2021), <https://riskandcompliance.freshfields.com/post/102gr55/dutch-court-rules-on-parent-companies-responsibility-for-overseas-subsidiaries> [<https://perma.cc/9NRQ-26AD>] (discussing Dutch appellate court's January 2021 decision to hold liable Shell's Nigerian subsidiary for causing oil spills in the Niger Delta); Dalia Palombo, *Parent Company Liability for Human Rights Abuses in the UK? We Need Clarity*, OXFORD

stood at the intersection of trends towards corporate legal liability, as well as Korea's own unique interpretation of its colonial and wartime past.

Part I of this article provides the recent political and jurisprudential context for the SCSK decisions of 2018 against Nippon Steel-Sumitomo and MHI.<sup>24</sup> Part II encapsulates the major findings of the decisions, locating them within both international standards and Korean law, as well as summarizing the majority, dissenting, and concurring opinions. Part III discusses the significance of these cases in the broader context of war reparations, international relations, and corporate legal liability.

## I. CONTEXT

The South Korean judgments against Nippon Steel-Sumitomo and MHI form part of a global trend to judicialize World War II reparations claims. In the United States, federal and state courts have presided over many such claims, from forced labor and sexual enslavement, to the restitution of stolen art and looted bank accounts.<sup>25</sup> In Europe, Greek and Italian courts found the German government civilly liable for wartime massacres, deportations, and forced labor.<sup>26</sup> But the International Court of Justice ultimately immunized Germany from civil liability, even as it noted Germany had committed *jus cogens* violations.<sup>27</sup> Ger-

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HUM. RTS. HUB (July 24, 2018) <http://ohrh.law.ox.ac.uk/parent-company-liability-for-human-rights-abuses-in-the-uk-we-need-clarity> [<https://perma.cc/YS4X-P7D8>] (discussing English appellate court decisions holding parent company liable for human rights violations committed by its overseas subsidiary).

24. The discussion focuses mainly on the Nippon Steel case, the first of the two decisions, where the SCSK fully explained its rationales. The later Mitsubishi case largely adopts the reasoning laid out in the Nippon Steel case.

25. For a brief overview of the Holocaust Restitution movement in the United States, see BAZYLER, *supra* note 5, at 161–68 (2017) (describing lawsuits filed in the United States that led to compensation mechanisms). The sexual violence case, brought by a transnational consortium of “comfort women,” was dismissed in 2005. See Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003) (dismissing case brought by fifteen comfort women of various nationalities on the grounds of sovereign immunity). Of course, the United States has also contributed to the war reparations discussion, such as when Congress passed the Civil Liberties Act of 1988. That law provided compensation and an apology to Japanese-Americans interned by the United States government during World War II. See generally Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998).

26. See *Ferrini v. Fed. Republic of Ger.*, Cass., sez. un., 11 marzo 2004, n. 5044, Giur. it. 2004, II (It.) (holding the German army's 1944 capture, deportation and enslavement of Italian citizens violated *jus cogens* norms, and thus Germany waived its immunity); *Prefecture of Voiotia v. Fed. Republic of Ger.*, Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece) (concluding that Germany's 1944 massacre of 300 Greek civilians violated *jus cogens* norms and thus Germany waived immunity).

27. *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99 (Feb. 3).

man, Austrian, and French courts presided over cases involving forced labor, looted art, and looted properties, respectively, yet none of these cases were successful. The cases did, however, pressure the political branches to arrange more lasting solutions, such as claims tribunals and foundations that provided lump-sum payments to victims.<sup>28</sup> Germany, for its part, devised one of the largest mass compensation schemes in human history, disbursing \$5.2 billion to over one million Europeans who performed forced and slave labor during the war.<sup>29</sup> In the latest initiative, the French government paid \$60 million to survivors transported to concentration camps on France's National Railway.<sup>30</sup> The particular blend of diplomacy, coercion, and cooperation that produced these various European initiatives seems largely absent in East Asia,<sup>31</sup> one of the least politically integrated areas in the world.<sup>32</sup>

Instead of bilateral agreements, litigation remains the primary method for addressing Japan's war crimes, though activists have pressed claims in a range of venues, from people's tribunals<sup>33</sup> to weekly sit-ins in front of the Japanese embassy.<sup>34</sup> On December 7, 1991, for-

28. The Swiss and French governments, under U.S. pressure, set up claims tribunals in Zurich and Paris, respectively. *See generally* HOLOCAUST VICTIMS ASSETS LITIG. (SWISS BANKS), [https://www.crt-ii.org/index\\_en.php.html](https://www.crt-ii.org/index_en.php.html) [<https://perma.cc/V98N-GUW2>] (website with information, including awards, about the Swiss claims); COMM'N FOR THE COMP. OF VICTIMS OF SPOILATION, [civs.gouv.fr/home/](https://civs.gouv.fr/home/) [<https://perma.cc/YPY4-BPRH>] (website with information about French program to restore stolen real and physical property to French Jews and their heirs).

29. Germany established the Foundation Remembrance, Responsibility and Future in 2000. That initiative continues to operate to this day. *See generally* STIFTUNG ERINNERUNG, VERANTWORTUNG, ZUKUNFT [FOUNDATION REMEMBRANCE, RESPONSIBILITY AND FUTURE], [stiftung-evz.de/eng/the-foundation.html](https://stiftung-evz.de/eng/the-foundation.html) [<https://perma.cc/8NZA-MSPV>].

30. *See* BAZYLER, *supra* note 5, at 167. In 2014, France and the United States agreed to the compensation scheme, which dispensed some \$60 million to survivors deported to death camps on France's national rail system. *See* Ron Kampeas, *US Distributes Further \$30m to Survivors of France Holocaust Train Deportations*, *TIMES OF ISR.* (Feb. 8, 2019), <https://www.timesofisrael.com/us-distributes-further-30m-to-survivors-of-france-holocaust-train-deportations/> [<https://perma.cc/8LKR-XLZD>].

31. In sum, a combination of strong pressure from the United States and varying degrees of willingness to face up to the past in different European states laid the groundwork for the various mechanisms established in France, Germany, Switzerland, and Austria.

32. *See* Timothy Webster, *Bilateral Regionalism: Paradoxes of East Asian Integration*, 25 *BERKELEY J. INT'L L.* 435, 435 (2007) (describing East Asia as one of the least internally integrated regions in the world, in comparison with Europe, Africa and the Americas).

33. In 2000, women's rights groups convened the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery. The tribunal was not a legal tribunal in the strict sense, though judges presided over the cases, comfort women provided live testimony, and the tribunal issued factual findings and legal conclusions about Japan's violations of international law. *See Tokyo Tribunal 2000 & Public Hearing on Crimes Against Women*, WOMEN'S CAUCUS FOR GENDER JUST., <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/index.html> [<https://perma.cc/CH5T-28CM>].

34. Since 1992, activists have gathered on Wednesdays outside the Japanese embassy

mer comfort woman Kim Hak-Sun filed a lawsuit against the Japanese government in Tokyo. Together with 35 other Korean compatriots who suffered a variety of wartimes injuries, Kim<sup>35</sup> demanded an apology and monetary compensation.<sup>36</sup> While ultimately unsuccessful, her case has been credited with launching East Asia's war reparations movement.<sup>37</sup>

In her wake, hundreds of Asian victims—mostly Chinese and South Korean—have sued Japan and Japanese corporations for war crimes such as forced labor, military sexual slavery, medical experimentation, chemical weapons use, and civilian massacres, such as the Rape of Nanjing.<sup>38</sup> For the past three decades, Japanese lawyers have reenacted the war in scores of trial courts up and down the Japanese archipelago.<sup>39</sup> Taiwanese, Chinese, Korean, and Filipina witnesses testified, through interpreters, to Japanese judges about their experiences. Their lawyers brought Japanese judges to mines and factories where victims performed wartime forced labor,<sup>40</sup> and assembled historians, international lawyers, scholars, and other experts to inform the judiciary of Japan's wartime history.

In the end, Japanese courts dismissed all of the cases,<sup>41</sup> citing prescription (statute of limitations), waiver by international treaty, sovereign immunity (in cases against Japan), and alter ego theories (that the corporate defendant is legally distinct from the wartime entity).<sup>42</sup> Nonetheless, Japanese courts elaborated on theories of legal

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in Seoul to demand Japan apologize and compensate Korean comfort women. See Sarah Kim, 'Comfort Women' Group Loses Its Wednesday Rally Spot, KOR. JOONGANG DAILY (June 24, 2020), <https://koreajoongangdaily.joins.com/2020/06/24/national/socialAffairs/comfort-women-issue-Peace-Monument-Korean-Council/20200624190800337.html> [<https://perma.cc/L8TN-R3QU>].

35. See, e.g., Celeste L. Arrington, *The Mechanisms Behind Litigation's "Radiating Effects": Historical Grievances Against Japan*, 53 LAW & SOC'Y REV. 6, 10 (2019) (noting that "the present wave of [reparations] lawsuits began in 1991").

36. Kim Hak-sun v. Japan [Tokyo Dist. Ct.] Mar. 26, 2001.

37. See Webster, *Discursive Justice*, *supra* note 22, at 176.

38. See generally *id.*

39. A comprehensive survey of the litigation can be found in Webster, *Japan's Transnational War Reparations Litigation*, *supra* note 19 (categorizing and analyzing the roughly ninety reparations lawsuits filed by foreign plaintiffs in Japan).

40. See Kaneko Osamu, *Chūgokujin kyōsei renkō, kyōsei rōdō Niigata soshō: Kōwan niyaku sagyō ni jūji sa se rareta chūgokujin* [Chinese Forcible Abduction and Forced Labor, Niigata Trial: Chinese People Engaged in Stevedoring Services], in HŌTEI DE SABAKARERU NIHON NO SENSŌ SEKININ [COURT ADJUDICATION OF JAPAN'S WAR RESPONSIBILITY] 211, 217 (Zukeyama Shigeru ed., 2014) (describing an on-site visit by Japanese judges to Niigata port where hundreds of Chinese men performed forced labor during the war).

41. However, a significant number of cases did settle. See generally Webster, *The Price of Settlement*, *supra* note 18 (analyzing the results of six settlement agreements between Asian forced laborers and Japanese corporations).

42. *Id.* at 306, 336–37, 340.

liability for multinational enterprises in many opinions.<sup>43</sup> Even as they ultimately accepted the corporation's affirmative defense, Japanese judges reviewed the corporation's conduct and found it *illegal* under various legal theories: direct liability, joint liability (corporation and state conspired to violate plaintiffs' rights), and indirect liability.<sup>44</sup> Over the course of dozens of lawsuits, plaintiffs' lawyers tested different legal theories, some of which gained broad acceptance by Japanese courts.<sup>45</sup> In other words, courts accepted that Japanese corporations acted brutally and illegally, but ruled against plaintiffs due to the defenses listed above.

When plaintiffs refiled their cases in South Korea, Korean judges did not view their claims any more favorably. Indeed, Korean judges also dismissed cases against Japanese corporations, largely adopting the reasoning articulated by Japanese courts. They also presided over fewer cases than their Japanese counterparts and did not engage in the same iterative process of norm elaboration. Even when Korean courts determined that a Japanese company's conduct was illegal, they did not specify which provisions of the Korean Civil Code were actually violated. Nor did they determine that the conduct violated international law. Findings of illegality, whether under domestic law or international law, contribute to the broader project of norm elaboration for corporate civil liability.

Take the *Nippon Steel* case, where two plaintiffs who had adjudicated their dispute in Japan joined three plaintiffs who filed for the first time in Korea.<sup>46</sup> The Seoul Central District Court dismissed the case on the grounds of *res judicata* for the two repeat plaintiffs.<sup>47</sup> For the three

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43. See Timothy Webster, *Disaggregating Corporate Liability: Japanese Multinationals and World War II*, 56 STAN. J. INT'L L. 175 (2020) (discussing modes of liability that Japanese courts have used against corporate defendants) [hereinafter Webster, *Disaggregating Corporate Liability*].

44. *Id.* at 195–209.

45. *Id.* at 212–13 (describing judgments where courts found the corporation's conduct illegal under (a) standard tort theory, (b) joint liability between corporation and state, (c) indirect theory, that is, corporation violated its duty to provide a safe workplace environment, or (d) combinations of these three theories).

46. See Shin Cheon-su v. Nippon Steel-Sumitomo, Seoul Jungangbeobwon [Seoul Dist. Ct.], Apr. 3, 2008, 2005Gahap16473, *aff'd* Seoul Godeungbeobwon [Seoul High Ct.], July 16, 2009, 2008Na49129 [hereinafter Trial Court Slip Opinion]. Plaintiffs Yeo Un-taek and Shin Cheon-su had already sued, and lost, in Japan. They were joined by Yi Chunshik, Kim Kwi-su, and another plaintiff surnamed Yi (Lee). The trial court opinion is available online at <https://casenote.kr/서울중앙지방법원/2005가합16473>. The opinion has been translated into English. See Seokwoo Lee, *Seoul Central District Court 10th Civil Division Decision*, 2 KOREAN J. INT'L & COMPAR. L. 68 (2014) [hereinafter Trial Court Translation].

47. Trial Court Slip Opinion, *supra* note 46, at 18; Trial Court Translation, *supra* note 46, at 83–84.

other plaintiffs, the trial court accepted the Japanese trial court's finding that defendant Nippon Steel was legally distinct from the wartime entity that enslaved the plaintiffs.<sup>48</sup> The trial court acknowledged:

Nippon Steel separated the three plaintiffs at a young age from their families, forced them to perform grueling work in extremely bad conditions, forcibly placed their wages in savings account without plaintiffs' knowledge, prevented them from leaving the premises through constant surveillance, and provided them with insufficient food. In so doing, Nippon Steel made the three plaintiffs perform forced labor, which amounts to a tort.<sup>49</sup>

The court went on to note that the plaintiffs suffered mental anguish from having to perform forced labor.<sup>50</sup> However, since the defendant was a different legal entity from the one operating during the war, the trial court dismissed the case against Nippon Steel.<sup>51</sup> This is one of several findings the Supreme Court reversed when it held Nippon Steel liable in 2012,<sup>52</sup> and they finally awarded damages in 2018.<sup>53</sup>

The reversals by the SCSK did not emerge *ex nihilo*. Instead, they responded to a host of domestic developments within South Korea, calling on the country to “clear up” or “overcome the past,” a wide-ranging political project to reexamine Korea's modern history, reapportion legal liability, and reallocate resources towards victims of historical wrongs.<sup>54</sup> Specific laws have addressed the Korean War (1950–53), Gwangju Massacre (1980), and the Donghak Uprising (1894).<sup>55</sup> The National

48. See Shin Cheon-su v. Nippon Steel & Japan, Ōsaka Chihō Saibansho [Osaka Dist. Ct.] March 27, 2001, Hei 9 (wa) no. 13134 (dismissing claims against the Japanese corporation on the theory that Nippon Steel was legally distinct from the wartime entity that enslaved plaintiffs).

49. Trial Court Slip Opinion, *supra* note 46, at 20; Trial Court Translation, *supra* note 46, at 85.

50. Trial Court Slip Opinion, *supra* note 46, at 20; Trial Court Translation, *supra* note 46, at 85.

51. During the American occupation of Japan (1946–1952), US authorities ordered the dissolution of large corporate conglomerates, such as Mitsubishi and Mitsui, which were considered complicit in Japanese aggression. See generally Howard B. Schonberger, *Zaibatsu Dissolution and the American Restoration of Japan*, 5 BULL. CONCERNED ASIAN SCHOLARS 16, 17–18 (1973).

52. Shin Cheon-su v. Nippon Steel-Sumitomo Metal Corp., Daebeobwon [S. Ct.], May 24, 2012, 2009Da68620 (S. Kor.).

53. SCSK Opinion, *supra* note 9.

54. In Korean, the term is “clearing up past history” *gwageosa jeong-ni* (과거사 정리, 過去史整理).

55. See generally Andrew Wolman, *Looking Back While Moving Forward: The Evolution of Truth Commissions in Korea*, 14 ASIAN-PAC. L. & POL'Y J. 27, 35–38 (2013); Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs after Democratization*, 16 PAC. RIM L. & POL'Y J. 579, 580 (2007) (listing recent developments in the “cleansing campaign” undertaken by the Korean government).

Assembly has also established truth and reconciliation commissions to examine the colonial period (1910–1945), the Pacific War (1937–1945), and the issue of Korean forced labor in particular.<sup>56</sup> Pursuant to a 2006 law, South Korea seized property held by “collaborators” with the colonial Japanese government, and disbursed it to those who fought against Japanese colonial rule.<sup>57</sup> A 2007 law provided compensation to wartime forced laborers.<sup>58</sup> Within South Korean politics, then, history is not an ossified set of causal linkages, but an actively contested and frequently reconstructed exercise of political calculation.

In January 2005, under the left-wing presidency of Roh Mu-hyun, South Korea released the *travaux préparatoires* of the 1965 Claims Agreement and other treaties that restored diplomatic relations between Japan and Korea after twenty years of mutual nonrecognition.<sup>59</sup> In August 2005, a committee of government officials and scholars issued their findings about the documents, two of which pertain to the present discussion.<sup>60</sup> Firstly, the “Claims Agreement was fundamentally not seeking compensation for Japan’s colonial rule. Instead, based on Article 4 of the San Francisco Peace Treaty, the Agreement was intended to

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56. Wolman, *supra* note 55, at 39–40. See also Ilje kangjeom-ha gangjedong-won-pihae jinsang-kyumyeong deung-e kwanhan teukbyeolbeop [Special Act to Investigate the Truth of Damage Caused by Forced Mobilization Under Japanese Imperialism], amended by Act No. 10646, May 19, 2011; Ilje kangjeom-ha panminjok-haengwi jinsang-kyumyeong-e kwanhan teukbyeolbeop [Special Act to Investigate the Truth of Anti-National Acts Under Japanese Imperialism].

57. Chinil-panminjok-haengwi-ja jaesan-ui gulgagwisog-e gwanhan teukbyeolbeop [Special Act to Redeem the Property of Pro-Japanese Collaborators], amended by Act No. 10646, May 19, 2011; see *Committee OKs Seizure of Collaborators’ Property*, CHOSUN ILBO (Dec. 7, 2005), [http://english.chosun.com/site/data/html\\_dir/2005/12/07/2005120761026.html](http://english.chosun.com/site/data/html_dir/2005/12/07/2005120761026.html) [<https://perma.cc/5E2V-ER5M>]. The law was challenged in Korea’s Constitutional Court but was found to be constitutional. Chinil-panminjok-haengwi-ja jaesan-ui gulgagwisog-e gwanhan teukbyeolbeop je-2-jo deung wiheonsowon deung [Unconstitutional Wish of Article 2, etc. of the Special Act on the State Attribution of Pro-Ethnic Actors’ Property].

58. Taepyeong-yang-jeonjaeng jeon-hu gugoe gangjedongwon-huisaengja deung jiwon-e gwanhan beopryul [Law to Assist Victims of Forced Overseas Mobilization during the Pacific War].

59. Treaty on Basic Relations, Japan-Republic of Korea, June 22, 1965, 583 U.N.T.S. 33.

60. See *Seoul Deems Tokyo Still Liable for Colonial Crimes*, CHOSUN ILBO (Aug. 26, 2005), [http://english.chosun.com/site/data/html\\_dir/2005/08/26/2005082661010.html?related\\_all](http://english.chosun.com/site/data/html_dir/2005/08/26/2005082661010.html?related_all) [<https://perma.cc/P929-LHQH>]. The committee consisted of nine government officials drawn from various ministries and ten civilians drawn from the academy, civil society and the media. See generally *Hanil-hoedam munseo-gonggae husokdaechaek gwanryeon mingwangongdongwiwonhoe-gaechoe [Joint Committee on Follow-up Measures to the Document Disclosure of the Korea-Japan Negotiations Meets]*, GUGMU-JOJEONGSIL [OFF. FOR GOV’T POL’Y COORDINATION] (Aug. 26, 2005) (hereinafter “Joint Document”), <https://www.opm.go.kr/flexer/view.do?ftype=hwp&attachNo=73036> [<https://perma.cc/U2TW-2ZNN>].

resolve financial and civil debts between the two countries.”<sup>61</sup> Secondly, the “Claims Agreement does not resolve *torts against humanity* in which state authorities—including the Japanese government and military—participated, such as the military comfort women issue. Instead, the Japanese government remains legally liable.”<sup>62</sup> This report provided the legal basis for theories of liability adopted by the SCSK.<sup>63</sup>

Over the past two decades, South Korea has revised its understanding of history, reallocated legal liability, and redistributed wealth. The Korean Left has sought, not without reason, to pin some of the early twentieth century’s worst human rights abuses on Japanese colonialism. Right-wing Koreans, as manifested rather clumsily in ex-President Pak Geun-hye’s judicial interference, play down the predations of colonialism in favor of a more “productive” relationship with Japan.<sup>64</sup> In other words, the SCSK was hardly advancing idiosyncratic views of Korea’s legal past when it held Japanese corporations liable for wartime atrocities. Instead, its stance gels with various political initiatives from the Korean Left.<sup>65</sup> With these broad contours in mind, we now turn to the decisions by the SCSK, specifically the Nippon Steel judgment.<sup>66</sup>

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61. Joint Document, *supra* note 60, at 1.

62. *Id.* (emphasis added). The Korean judiciary took up the phrase “torts against humanity” (*banindo-jeok bulbeop haengwi*, 반인도적 불법행위, 反人道的不法行為) to describe various programs of Japanese colonialism.

63. See *infra* Part II.D.

64. After the SCSK rendered its 2012 decisions, then-President Park Geun-hye ordered Supreme Court Chief Justice Yang Sung-tae to delay final judgment. President Park is currently spending 25 years in prison on corruption charges, while Justice Yang is being criminally tried *inter alia* for sitting on the case. See Sang-Hun, *supra* note 13; Choi Woo-ri & Kim Yang-jin, *Prosecutors Request Arrest Warrants for Former Supreme Court Justices*, HANKYOREH (Dec. 4, 2018), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/873016.html](http://english.hani.co.kr/arti/english_edition/e_national/873016.html) [<https://perma.cc/CK6Y-QQ2J>] (describing criminal investigation of Justice Yang’s “ordering second-in-command Im [Jong-heon] to interfere in trials, monitor judges, and implement disadvantageous personnel decisions”). The justice has denied all allegations of criminal conduct. See *Ex-Top Justice Claims Innocence in Trial Over Alleged Judiciary Power Abuse*, KOREA HERALD (Apr. 7, 2016), <http://www.koreaherald.com/view.php?ud=20210407000823> [<https://perma.cc/CK6Y-QQ2J>].

65. Ethan Shin describes a similarly deferential dynamic in Supreme Court decisions about “past affairs” lawsuits of a strictly domestic nature. See Ethan Hee-Seok Shin, *The “Comfort Women” Reparation Movement: Between Universal Women’s Human Right and Particular Anti-Colonial Nationalism*, 28 FLA. J. INT’L L. 87, 136 (2016) (describing how popular pressure, and lower precedent, presaged the Court’s “bold” results in other lawsuits to clear up the past).

66. The Nippon Steel and MHI adopt similar reasoning. Since the *Nippon Steel* judgment explains the reasoning in far greater (49 pages in length vs 5 pages for MHI), we refer exclusively to it in this section.

## II. MAJOR ISSUES IN THE DECISION

The majority opinion of the Nippon Steel judgment hinges on resolving three legal questions: the recognition of prior Japanese judgments, the proper interpretation of the 1965 Claims Agreement, and the statute of limitations. The Court devoted most of its opinion to the second issue of interpreting the Claims Agreement.

### A. Recognition of Foreign Judgments

As noted above, East Asian jurisdictions have presided over World War II lawsuits for decades. Japanese courts, with a handful of exceptions, have exculpated corporate and state defendants for one of three reasons: (1) a treaty waived the plaintiff's individual right to claim; (2) the claim was extinguished by prescription (statute of limitations); or in cases against the Japanese government, (3) sovereign immunity barred the claims.

Faced with unfavorable verdicts in Japan, many Korean plaintiffs returned to South Korea.<sup>67</sup> In *Nippon Steel*, two of the four male plaintiffs had already exhausted the Japanese judiciary before refile in Seoul.<sup>68</sup> In *Mitsubishi*, five of the female plaintiffs sued unsuccessfully in Nagoya

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67. Shin Cheon-ju (申千洙) and Roh Un-taek (呂運澤) first sued Nippon Steel and Japan in Osaka. See *Shin Cheon-su v. Nippon Steel & Japan*, Ōsaka Chihō Saibansho [Osaka Dist. Ct.] March 27, 2001, Hei 9 (wa) no. 13134, *aff'd* Ōsaka Kōtō Saibansho [Osaka High Ct.] Nov. 19, 2002, *aff'd* Saikō Saibansho [Sup. Ct.] Oct. 9, 2003 (Japan) (dismissing claims as extinguished by the 1965 Claims Agreement). Later joined by Yi Chun-shik (李春植) and Kim Kwi-su (金圭洙), they sued in Seoul Central District Court. See Trial Court Slip Opinion, *supra* note 46 (finding the claims resolved by the Japanese judgments). In 2012, however, the SCSK overturned these lower-court rulings. See *Shin Cheon-su v. Nippon Steel-Sumitomo Metal Corp.*, Daebeobwon [S. Ct.], May 24, 2012, 2009Da68620 (S. Kor.). The SCSK remanded the case to the Seoul High Court to determine damages, which ordered the Japanese company to pay 400 million won. The SCSK affirmed this judgment on Oct. 30, 2018.

68. Nippon Steel was sued by four plaintiffs: Shin Ch'eon-ju, Roh Un-t'aek, Yi Chun-shik and Kim Kwi-su. Plaintiffs Shin and Roh had unsuccessfully sued Nippon Steel and the Japanese government in Osaka. See *Shin Cheon-su v. Nippon Steel & Japan*, Ōsaka Chihō Saibansho [Osaka Dist. Ct.] March 27, 2001, Hei 9 (wa) no. 13134, *aff'd* Ōsaka Kōtō Saibansho [Osaka High Ct.] Nov. 19, 2002, *aff'd* Saikō Saibansho [Sup. Ct.] Oct. 9, 2003 (Japan) (dismissing claims as extinguished by the 1965 Claims Agreement).

before refiling in Kwangju.<sup>69</sup> And the six remaining male plaintiffs in *Mitsubishi* lost at all three levels in Japan before refiling in Busan.<sup>70</sup>

The wartime narrative created by the current Korean government lays the blame for colonialism squarely on Japan. Korean complicity in Japanese war crimes—in particular, the role that Koreans played in recruiting Korean forced laborers and Korean comfort women<sup>71</sup>—tends to disappear in contemporary Korean reconstructions of the war.<sup>72</sup> Indeed, the 2018 SCSK decisions proceed from the premise that Japan’s colonization of Korea was itself illegal.<sup>73</sup> Hence, any statute or regulation that Japan issued during the colonial period, including those responsible for bringing Korean laborers to Japan, is *ipso facto* illegal.<sup>74</sup>

No one doubts that Korean courts enjoy the sovereign authority to reinterpret the past, and reconfigure issues of legality, liability, and accountability. But whether Japanese corporations or the Japanese government will abide by the results of the decision remains unclear at this point. In the 2012 *Nippon Steel* verdict, the SCSK legally

69. See *Yang Keum-deok v. Mitsubishi Heavy Indus. & Japan, Nagoya Chihō Saibansho* [Nagoya Dist. Ct.] Feb. 24, 2005, 1210 HANREI TAIMUZU 186 (dismissing claims as extinguished by the 1965 Claims Agreement); *aff’d* Nagoya Kōtō Saibansho [Nagoya H. Ct.] May 31, 2007, 1894 HANREI JIHŌ 44; *aff’d* Saikō Saibansho [Sup. Ct.] Nov. 11, 2008 (Japan). Eight plaintiffs filed suit in Japan: Kim Bok-eui (金福禮), Kim Hae-ok (金惠玉), Kim Jung-gon (金中坤), Kim Seong-ju (金性珠), Jin Jin-jeong (陳辰貞), Pak Hae-ok (朴海玉), Yi Tong-nyon (李東連), and Yang Keum-deok (梁錦德). Kim Hae-ok and Jin Jin-jeong did not join the lawsuit in Korea.

70. See *Pak v. Mitsubishi Heavy Industries & Japan, Hiroshima Chihō Saibansho* [Hiroshima D. Ct.] Mar. 25, 1999 (denying claim against Mitsubishi as time-barred and claim against Japan for reasons of sovereign immunity); *aff’d* Hiroshima Kōtō Saibansho [Hiroshima H. Ct.] Jan. 19, 2005, 1217 HANREI TAIMUZU 157; *aff’d* Saikō Saibansho [Sup. Ct.] Nov. 1, 2007 (Japan).

71. Many Japanese verdicts highlight the role that Korean teachers played in encouraging their students to go to Japan to “make money” or gain valuable employment experience. Of course, once the teenaged students ended up in Japan, they were pressed into grueling work. See Webster, *Discursive Justice*, *supra* note 22, at 215–16; Webster, *Disaggregating Corporate Liability*, *supra* note 43, at 208.

72. See, e.g., C. SARAH SOH, *THE COMFORT WOMEN: SEXUAL VIOLENCE AND POSTCOLONIAL MEMORY IN KOREA AND JAPAN* (2008). Soh’s powerful work has explored the role of Korea’s “masculinist sexual culture” in recruiting women for the comfort women system. Some comfort women were sold by their indigent parents to human traffickers. Others were recruited by “compatriot entrepreneurs” who worked on behalf of the Japanese Army. See *id.* at 3–4.

73. SCSK Opinion, *supra* note 9, at 11; SCSK Translation, *supra* note 9, at 102.

74. In 1938, Japan passed the National Mobilization Act. See *Kokka sōdōinhō* [National Mobilization Law], Law No. 55 of 1938. In 1939, the Japanese Cabinet passed the Citizen Conscription Order, which provided the specific mechanism to recruit Korean workers for Japanese companies. 国民徴用令 *Kokumin chōyōrei* [Citizen Conscription Order], Regulation No. 451 of 1939. The conscription order took effect in Japan in 1939, but in Korea in 1942. These two enactments provided the legal basis for sending Koreans to perform forced labor in Japan.

“nationalized” the dispute, replacing colonial Japanese law with post-war Korean law. As the Court wrote in 2012:

Japan’s control over the Korean Peninsula during the imperial period amounts to nothing more than illegal occupation. Given that Japan’s rule was illegal, any legal relations that cannot be reconciled with the constitutional spirit of the Republic of Korea, and the effects of such relations, must be rejected. The reasoning of the Japanese judgments conflicts directly with core values of the Korean Constitution, which deemed illegal the forced mobilization campaign under Japanese imperialism. Recognizing the Japanese judgments, based on this reasoning, would clearly violate the sound morals or other social order of the Republic of Korea. Thus, we can neither recognize nor enforce the Japanese judgments in this country.<sup>75</sup>

The SCSK contravenes the longstanding principle of intertemporal law: judges apply the law in effect at the time of the act, not a subsequent codification. By substituting Korea’s postcolonial constitution for colonial Japanese tort law, the court re-inscribed Korean history with a Korean legal lens. This renationalization process staked out a distinctly Korean interpretation of colonial history. By voiding Japanese law, and applying Korea’s “democratic” Constitution of 1948 backwards, the Court posited an “original” Korean bedrock divorced from Japan. The court’s dynamic approach to international law may be justifiable, but its flexible use of intertemporal law awaits further justification.

The phrase “sound morals or other social order” provides the standard for the public policy exception in enforcing foreign judgments.<sup>76</sup> According to the Korean Civil Enforcement Act, a “judgment of execution shall be made without making any examination as to whether the judgment is right or wrong.”<sup>77</sup> In practice, Korean courts enjoy wide latitude to determine whether to recognize and enforce foreign judgments.<sup>78</sup> Suk Kwang Hyun describes substantive and procedural

75. Shin Cheon-su v. Nippon Steel, Daebeobwon [S. Ct.], May 24, 2012, 2009Da68620 (S. Kor.). The opinion is available in Korean at [https://glaw.scourt.go.kr/wsjo/panre/sjo100.do?contId=1971792&q=\\*&nq=&w=panre&section=panre\\_tot&subw=&subsection=&subId=1&csq=%7bpanre\\_bub\\_idx:%26%2345824%3B%26%2348277%3B%26%2350896%3B%7d&groups=6,7,5,9&category=&outmax=1&msort=s:6:0,d:1:1,p:2:0&onlycount=&sp=&d1=20120524~20120524&d2=&d3=&d4=&](https://glaw.scourt.go.kr/wsjo/panre/sjo100.do?contId=1971792&q=*&nq=&w=panre&section=panre_tot&subw=&subsection=&subId=1&csq=%7bpanre_bub_idx:%26%2345824%3B%26%2348277%3B%26%2350896%3B%7d&groups=6,7,5,9&category=&outmax=1&msort=s:6:0,d:1:1,p:2:0&onlycount=&sp=&d1=20120524~20120524&d2=&d3=&d4=&). Unfortunately, the online opinion is not paginated, making pinpoint citation difficult.

76. Minsa sosong-beop [Civil Procedure Act] art. 217(3).

77. Minsajibhaengbeob [Civil Execution Act], art. 27(1).

78. See Hongsik Chung, *Private International Law*, in INTRODUCTION TO KOREAN LAW 271 (Korean L. & Rsch. Inst. ed., 2013). “What constitutes the violation of good morals and other social orderliness is left at [*sic*] the discretion of the competent court.” *Id.* at 281.

elements to the determination.<sup>79</sup> Substantively, a court may examine the reasoning of the foreign judgment, as long as it does not determine whether the reasoning is right or wrong.<sup>80</sup> Procedurally, the courts ask if the party received due process of law: an opportunity to defend herself, representation by competent counsel, notice of the hearing, and so on.<sup>81</sup>

Korean courts have refused to enforce foreign judgments when they (1) violate Korean legal principles, (2) run counter to basic values of the Korean legal system, or (3) far exceed prevailing social norms.<sup>82</sup> In light of Korean state attitudes towards Japanese colonialism, expressed through contemporary legislation and commission reports, one might expect Korean courts to reject Japanese judgments out of hand. Yet for over a decade, as the political branches reviewed, revised, and reconceived the past, Korean judges dismissed war reparations lawsuits just as their Japanese counterparts had.<sup>83</sup>

## B. Effects of the 1965 Claims Agreement

The nub of the *Nippon Steel* and *Mitsubishi* decisions lies with the SCSK's reinterpretation of the 1965 Claims Agreement.<sup>84</sup> Specifically, did the Claims Agreement dispose of all compensation claims that individual Korean forced laborers might raise against *private* actors? The SCSK answered in the negative: individual plaintiffs could still file compensation claims against Japanese entities.

In arriving at this conclusion, the SCSK relied on the metanarrative of *colonial illegality*: since Japanese colonialism was itself illegal, any law, regulation, or administrative action taken by the Japanese colonial government was illegal. "Illegal Japan," as Alexis Dudden writes, represents the dominant discourse through which South Korea has come to view Japanese colonialism.<sup>85</sup> This view is hardly unique to East Asia.

79. Kwang Hyun Suk, *Recognition and Enforcement of Judgments Between China, Japan and South Korea in the New Era: South Korean Law Perspective*, 13 FRONTIERS L. CHINA 171 (2018).

80. *Id.* at 186–87.

81. *Id.* at 188–89.

82. NAM HYO-SUN ET AL., ILJEGANGJEOMGI GANGJEJINGYONG-SAGEON PANGYEORUI JONGHAPJEOK YEONGU [COMPREHENSIVE STUDY OF THE FORCED MOBILIZATION DECISIONS UNDER JAPANESE OCCUPATION] 54–55 (2014).

83. As is typical of these cases, the Korean trial court and appellate court both enforced Yeo and Shin's Japanese judgments against them. A translation is available in Seok-woo Lee, *Seoul High Court: 21st Civil Division*, 2 KOREAN J. INT'L & COMPAR. L. 89 (2014).

84. Treaty on Basic Relations, Japan-Republic of Korea, 583 U.N.T.S. 33, June 22, 1965. The Basic Treaty reestablished diplomatic relations between Seoul and Tokyo for the first time in two years. The two countries also signed instruments on fisheries, cultural assets, legal status of Korean residents in Japan, and claims and property.

85. See generally ALEXIS DUDDEN, *TROUBLED APOLOGIES AMONG JAPAN, KOREA, AND*

Many postcolonial states characterize colonial subjugation as illegal, illegitimate, or even criminal.<sup>86</sup> The illegality discourse gained prominence in South Korea in the early 1990s, as the “comfort women” issue emerged. The term “Illegal Japan” initially referred to state action, but the term is broad enough to encapsulate non-state conduct, especially given the close wartime connections between major Japanese conglomerates (*zaibatsu*) and the Japanese state.<sup>87</sup>

The SCSK specifically cited the 2005 Report issued by the Joint Commission,<sup>88</sup> and then adopted the Report’s reinterpretation of the Claims Agreement:

The Claims Agreement was negotiated not to demand Japanese compensation for colonial rule. Instead, pursuant to Article 4 of the San Francisco Peace Treaty,<sup>89</sup> the Claims Agreement only resolves financial and civil debts between the two countries. But it does not resolve the torts against humanity in which the Japanese government participated, such as the military comfort women issue. The Japanese government remains legally liable for such claims. Nor does the Claims Agreement resolve related issues, such as Sakhalin compatriots, or victims of atomic bombs.<sup>90</sup>

Of course, the assertion that the Japanese government remains legally liable is hardly commensurate with the idea that a Japanese corporation must incur legal liability. However, the idea that the Claims Agreement left unresolved a number of compensation issues, including

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THE UNITED STATES 63–96 (2008).

86. *Id.* at 64–65.

87. The ties between Japanese corporations that used forced labor and Japanese state actors have been extensively analyzed in the edited volume, *NIHON KIGYŌ NO SENSŌ HANZAI : KYŌSEI RENKŌ NO KIGYŌ SEKININ 3 [WAR CRIMES OF JAPANESE COMPANIES: CORPORATE RESPONSIBILITY OF TAKING A STRONG SYSTEM 3]* (Koshō Tadashi, & Tanaka Hiroshi Satō Keshō eds., 2000). For a summary in English of how state and non-state actors brought about Japan’s wartime forced labor program, see *Disaggregating Corporate Liability*, *supra* note 43, at 202–04. It is important to link wartime politicians and their scions, many of whom hold, or have recently held, important posts in Japan. Recent prime ministers—including Abe Shinzo (2012–2020, 2006–2007), Taro Aso (2008–2009), and Koizumi Junichiro (2001–2005)—are the sons and grandsons of prominent wartime politicians and entrepreneurs. Abe’s grandfather, Kishi Nobusuke, ordered the conscription of Chinese and Korean forced labor in his post as Minister of Commerce and Vice Minister of Munitions. Koizumi’s grandfather was the Minister of Communications. Taro Aso, the current Deputy Prime Minister, is the son of the chairman of Aso Cement Company, which used both Allied POW and Korean slave labor during the war.

88. SCSK Opinion, *supra* note 9, at 9; SCSK Translation, *supra* note 9, at 98.

89. Article 4(a) provides that claims, including debts, of the nationals of Japan’s former colonies shall be “the subject of special arrangements between Japan and such authorities.” Treaty of Peace with Japan, art. 4(a), Sept. 8, 1951, 136 U.N.T.S. 45 [hereinafter San Francisco Peace Treaty]. Important to this discussion, North Korea, South Korea and China did not attend the treaty negotiations and did not sign the Treaty.

90. SCSK Opinion, *supra* note 9, at 9; SCSK Translation, *supra* note 9, at 102.

grave human rights abuses, blunts its potential impact on claims against private actors.

The SCSK examined the treaty negotiations between Japan and South Korea. Recalling the colonial metanarrative of illegality, the Court held the Claims Agreement's failure to acknowledge the illegality of Japanese colonialism meant it could not compensate for Japan's illegal occupation of thirty-five years. Instead, the court found the document merely a "political agreement" (*jeongchi-jeok hap-ui*) to settle economic and civil debts between Japan and South Korea, as urged by the San Francisco Peace Treaty and the United States.<sup>91</sup> At the start of the negotiations, South Korea submitted a list of eight types of compensation it sought from Japan.<sup>92</sup> The so-called "eight items" listed cultural treasures, debts owed by the Japanese colonial government, properties owned by Japan, and other forms of property.<sup>93</sup> Of particular relevance is item five, which includes "unpaid wages, compensation, and other reimbursements for conscripted Koreans."<sup>94</sup> During the treaty negotiations, Japan opposed the idea of individual compensation for forced laborers.<sup>95</sup> Ultimately, the two sides agreed that Japan would pay a lump sum to Korea, but "without labeling the respective amounts for each category of the claims payment."<sup>96</sup> In other words, South Korea and Japan opted for strategic ambiguity, rather than spelling out exactly what was compensation, economic development, reparations, and so on.

To minimize the likelihood that the Claims Agreement actually addressed plaintiffs' claims, the SCSK also subjected the "eight items" to the colonial metanarrative: "Nowhere do the eight items, including item five, mention the illegality of Japan's colonial rule. It is therefore difficult to conclude that the agreement covers unpaid wages, compensation, and other reimbursements for conscripted Koreans."<sup>97</sup> To make

91. SCSK Opinion, *supra* note 9, at 13; SCSK Translation, *supra* note 9, at 102

92. Victor D. Cha, *Bridging the Gap: The Strategic Context of the 1965 Korea – Japan Normalization Treaty*, 20 KOREAN STUD. 123 (1996). Cha describes the negotiations as "protracted and acerbic," and says they were "suspended on numerous occasions and for periods in excess of two years." *Id.* at 124. Fourteen years later, when the treaty was signed, "mass protests raged in both countries." *Id.*

93. The General Outline of Claims against Japan, produced in 1951, consisted of property that Korea sought from Japan. Item 5 listed various types of financial claims, such as securities, banknotes, and unpaid wages of conscripted Koreans. The Constitutional Court of Korea had ample opportunity to review the eight items in its "comfort women" decision of 2011. See Hunbeobjaepanso [Const. Ct.], Aug. 30, 2011, 2006Hunma788 [hereinafter KCC, Comfort Women Decision].

94. SCSK Opinion, *supra* note 9, at 13–14; SCSK Translation, *supra* note 9, at 102

95. KCC, Comfort Women Decision.

96. *Id.*

97. SCSK Opinion, *supra* note 9, at 14; SCSK Translation, *supra* note 9, at 102.

sure, the SCSK characterized the claims as *solatium* (*wijaryo*),<sup>98</sup> that is, payments to cover plaintiffs' mental and emotional suffering. In the Court's own words, it awarded solatia against Nippon Steel as a "Japanese corporation that engaged in torts against humanity, with direct links to the prosecution of an aggressive war, and the illegal colonial occupation of the Korean peninsula, by the Japanese government."<sup>99</sup>

Finally, the SCSK examined the structure of the Claims Agreement itself. In Article I, Japan pledged \$300 million of "products" and "services," and \$200 million in "low-interest loans," to South Korea.<sup>100</sup> In Article II, Japan and South Korea:

confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951 is *settled completely and finally*.<sup>101</sup>

A plain reading of this provision—the last phrase in particular—seems to foreclose claims from private individuals. The phrasing arguably covers Korean forced laborers' claims against Nippon Steel, which are between Korean natural persons and Japanese legal persons. Yet the SCSK held otherwise, finding that the financial products and services in the first article do not bear any relation to the waiver of private property rights in the second article. At the very least, those funds cannot be understood as compensation for the "property, rights and interests" mentioned in Article II. The Court noted that Article I says nothing about the purpose of the money, aside from being "conducive to the economic development of the Republic of Korea."<sup>102</sup> The Court clarified, "Even at the time, Japan's position was that the funds in Article I were basically for economic assistance. The SCSK position was that there was no legal relationship between Article I and Article II."<sup>103</sup> The Court repeated its earlier findings that the Japanese government did not recognize the illegal nature of its colonial rule and fundamentally denied legal compensation to those forcibly mobilized. Thus, according to the Court, the Claims Agreement—even with its language of

98. Solatium repair the emotional and mental anguish of injury, as opposed to the physical damage or financial harm.

99. SCSK Opinion, *supra* note 9, at 12; SCSK Translation, *supra* note 9, at 102.

100. Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation, Japan-Republic of Korea, , art. I(1)(a)–(b) June 22, 1965, 583 U.N.T.S. 173 [hereinafter Claims Agreement].

101. Claims Agreement, art. II(1) (emphasis added).

102. Claims Agreement, art. I(1)(b).

103. SCSK Opinion, *supra* note 9, at 15; SCSK Translation, *supra* note 9, at 104.

“property, rights and interests”—did not extend as far as *solatia* for the forcibly mobilized.

### C. Statute of Limitations

The final issue involved the statute of limitations. While the passage of half a century would seem to exceed the three-year prescription period of Korean tort law, the SCSK found a workaround. The Court acknowledged that new documents illuminating the meaning of the Claims Agreement surfaced in 2005. Until 2005, it was reasonable for Korean forced laborers to believe that the Claims Agreement extinguished their individual claims to seek compensation against Japan or Japanese citizens. But with a new understanding, gleaned from the recently released documents, it would be “extremely unfair to reject the claims of plaintiff through prescription, as defendant claims. Since prescription must be applied in good faith, we cannot allow an abuse of this right.”<sup>104</sup> This is similar to the equitable tolling used in common law jurisdictions. Moreover, some Japanese courts have also applied Japan’s good faith principle to waive prescriptive defenses in war reparations lawsuits.<sup>105</sup>

### D. Other Opinions

Eleven of the thirteen justices signed the majority opinion. In addition, the justices issued two separate opinions, one dissent, and one concurrence.<sup>106</sup> Justice Yi Ki-taik issued the first separate opinion. He disagreed with the majority’s interpretation of the Claims Agreement, opining that the Agreement incorporated, and thus extinguished, plaintiffs’ claims.<sup>107</sup> Nonetheless, he believed the Court was bound by its own precedent, the 2012 decisions against Nippon Steel and Mitsubishi.<sup>108</sup> Without new evidence or legal theories, he posited, there was no

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104. SCSK Opinion, *supra* note 9, at 17; SCSK Translation, *supra* note 9, at 106.

105. To be clear, most Japanese decisions dismissed war reparations lawsuits as time-barred. But some courts refused to exculpate corporate defendants on timeliness grounds. *See, e.g., Zhang Baoheng v. Mitsui Mining Co., Fukuoka Chihō Saibansho* [Fukuoka Dist. Ct.] Apr. 26, 2002, 1098 HANREI TAIMUZU 267.

106. In South Korea, a separate opinion arrives at the same result, but for a different reason. A concurrence agrees with the result, with an additional reason.

107. SCSK Opinion, *supra* note 9, at 18 (Yi Ki-taek, J.); SCSK Translation, *supra* note 9, at 108.

108. SCSK Opinion, *supra* note 9, at 19; SCSK Translation, *supra* note 9, at 107. Justice Yi cited Article 8 of the Court Organization Act, and Article 436 of the Civil Procedure Code for the premise that courts are bound by precedent. Technically, the Court is not bound by its own precedent. But there is a high bar—“manifest legal error”—to undo the effect of a prior Supreme Court decision.

reason to reverse.<sup>109</sup> In other words, Justice Lee felt his hands were tied by the law, if not the logic, of the 2012 decisions.

The second separate opinion was coauthored by Justices Kim So-young, Lee Dong-won, and No Jung-hee.<sup>110</sup> It too advanced an alternate interpretation of the Claims Agreement: it waived the right of the South Korean government to seek compensation from Japan (i.e., right of diplomatic protection), but not the individual's right to seek compensation.<sup>111</sup> The trio wrote:

International law generally accepts the modern principle of separate legal subjectivity between the individual and the state. If we acknowledge the abandonment of the right, we must also observe the general principle that the intent of the right-holder must be strictly interpreted. When the state steps in to abandon an individual's right, we must look even more strictly.<sup>112</sup>

With stricter scrutiny in mind, the justices compared terms from the San Francisco Peace Treaty (“waive”) and the Claims Agreement (“settle”).<sup>113</sup> The implication is that “waive” would extinguish all claims, while “settle” may permit them to linger. Finally, the trio discussed a Japanese domestic law passed shortly after the Claims Agreement.<sup>114</sup> That law extinguished all property rights and claims that South Korea or its citizens may have against Japan or Japanese citizens.<sup>115</sup> Accordingly, if the Claims Agreement extinguished the individual claims, Japan would have no need to pass a domestic law extinguishing them. Since Korea did not pass similar legislation, plaintiffs could bring their legal claims in Korea.

109. SCSK Opinion, *supra* note 9, at 21; SCSK Translation, *supra* note 9, at 109.

110. SCSK Opinion, *supra* note 9, at 21; SCSK Translation, *supra* note 9, at 109. Both Justices Lee and No joined the Supreme Court in August, 2018, two months before the verdicts came down.

111. SCSK Opinion, *supra* note 9, at 22; SCSK Translation, *supra* note 9, at 109–110.

112. SCSK Opinion, *supra* note 9, at 29; SCSK Translation, *supra* note 9, at 116.

113. SCSK Opinion, *supra* note 9, at 30; SCSK Translation, *supra* note 9, at 117.

114. SCSK Opinion, *supra* note 9, at 30; SCSK Translation, *supra* note 9, at 117.

115. *See* Zaisan oyobi seikyūken nikansuru mondai no kaiketsu narabini keizai kyōryoku nikansuru nipponkoku to daikanminkoku to no ma no kyōtei dai 2 jō no jisshi ni tomonau daikanminkoku no zaisanken nitaisuru sochi nikansuru hōritsu [Law Concerning Measures for Property Rights of the Republic of Korea and Others Incidental to the Implementation of Article 2 of the Agreement Between Japan and the Republic of Korea Regarding the Settlement of Issues Related to Property, Claims, and Economic Cooperation], Law No. 144 of 1965.

The dissent responded to both the majority and separate opinions.<sup>116</sup> According to Justice Kwon Soon-il and Justice Cho Jae-youn, even if the Claims Agreement did not waive the individual right to claim compensation, it narrowly restricted the exercise of that right.<sup>117</sup> After Japan and South Korea signed the Agreement, South Korea implemented measures in the 1960s and 1970s to compensate forced laborers, using money Japan provided in the Claims Agreement.<sup>118</sup> South Korea passed additional compensatory measures in 2007 and 2010.<sup>119</sup> By September 2016, some 550 billion Korean won (\$474 million) had been disbursed to families of dead and missing forced laborers, and injured forced laborers, as well as modest amounts of medical assistance.<sup>120</sup> The Claims Agreement therefore constituted both direct payment to individual victims, through the reparative legislation, and indirect payment, by revitalization of Korea's postwar economy. Then-President Pak Chung-hee invested Japan's economic assistance into various infrastructure projects, including the creation of Posco (Pohang Iron and Steel Company), the country's largest steel manufacturer.<sup>121</sup> In other

116. SCSK Opinion, *supra* note 9, at 32 (Kwon Soon-il, J. & Cho Jae-youn, J., dissenting); SCSK Translation, *supra* note 9, at 118.

117. SCSK Opinion, *supra* note 9, at 37; SCSK Translation, *supra* note 9, at 123.

118. SCSK Opinion, *supra* note 9, at 37; ; SCSK Translation, *supra* note 9, at 122-23. (listing laws that Korea passed to disburse money given by Japan)

119. *Id.* The first law is the 2007 Taepyeongyang jeonjang jeonhu kukwe kangje dongweon hisaengja-deung jiweon-e kwanhan beomnyul [Act to Assist Victims of Forced Overseas Mobilization during the Pacific War Law]. The law provided approximately "\$20,000 to families of military and civilian conscripts who died or went missing outside of Korea; conscripts who returned to Korea with disabling injuries; and families of conscripts who returned to Korea with injuries and died later." See William Underwood, *New Era for Japan-Korea History Issues: Forced Labor Redress Efforts Begin to Bear Fruit*, ASIA-PAC. J. (Mar. 3, 2008), <https://apjjf.org/-William-Underwood/2689/article.html> [<https://perma.cc/U244-SBPK>]. The second law was the 2010 Tae'il hangjaenggi kangje dongweon pihejosa mit kukwe kangje dongweon hisaengja-deung jiweon-e kwanhan teukbyeolbeop [Special Act to Verify and Support Victims of Forced Overseas Mobilization Under Japanese Colonialism]; see also Lee Yoon-jae v. Korea, Hunbeobjaepanso [Const. Ct.], Dec. 23, 2015, 2009Heonba317 (finding the 2010 law constitutional, even if the amount of compensation it provided to plaintiff's father did not match the value of unpaid wages he should have received during his stint as a forced laborer in Japan). See also Sayuri Umeda, *South Korea: Constitutional Court Decides Long-Running Case on Compensation for Forced Labor During Colonial Rule*, LIBR. OF CONG. (Jan. 6, 2016), <https://www.loc.gov/item/global-legal-monitor/2016-01-06/south-korea-constitutional-court-decides-long-running-case-on-compensation-for-forced-labor-during-colonial-rule/> [<https://perma.cc/4G6L-7EBN>].

120. SCSK Opinion, *supra* note 9, at 41 (Kim Jae-hyung, J. & Kim Seon-su, J., supplemental opinion).

121. YAMAMOTO SEITA et al., CHŌYŌKŌ SAIBAN TO NIKKAN SEIKYŪKEN KYŌTEI : KANKOKU DAIHŌIN HANKETSU O YOMITOKU [Recruitment Trial and Japan-Korean Claims Agreement: Reading the Supreme Court of Korea Judgment] 63 (2019) (noting that Japanese economic assistance was used to build a highway between Seoul and Busan, to create Posco, and to erect a dam on the Soyang River).

words, Korea's own legislation, paid in part by Japan, extinguished plaintiffs' claims. Finally, the dissent cited the text of the Claims Agreement, particularly the language that all claims were "settled completely and finally," which foreclosed plaintiffs' claims.<sup>122</sup>

Two justices issued a concurrence agreeing with the majority, but for additional reasons.<sup>123</sup> Justices Kim Jae-hyung and Kim Seon-su supported the individual right to compensation in three ways. First, if the treaty unilaterally waived the individual's claim to compensation and not just the state's right to seek compensation on the individual's behalf (diplomatic protection), the treaty must do so unambiguously.<sup>124</sup> To waive individual rights, the treaty must use clear language to inform individuals of the extinguishment.<sup>125</sup> The treaty's failure to specify left open the possibility of an individual right.

Second, the Justices Kim noted the ambiguity of the term "claim."<sup>126</sup> Since "claim" is polysemous, the justices asked if the Agreement extinguished plaintiffs' right to seek compensation for the suffering endured at the hands of a "Japanese company that engaged in torts against humanity."<sup>127</sup> They determined that the San Francisco Peace Treaty only disposed of property claims and debts, not claims for mental suffering.<sup>128</sup> Since the "eight items" did not address the solatium claims, and since the male plaintiffs continue to suffer from their experiences as forced labor, prior negotiations could not have addressed this ongoing harm.

Third, since the "eight items" did not mention the illegality of Japan's colonial occupation, the Claims Agreement did not resolve the solatium claims.<sup>129</sup> In the end, the two justices found that plaintiffs continued to experience mental suffering from their experiences as forced laborers, and that prior negotiations did not address this.<sup>130</sup>

### III. SIGNIFICANCE

The SCSK's judgments broke new legal ground, both regionally and globally. As the first *final and binding* civil judgments to order compensation for World War II-era war crimes, they were almost

122. SCSK Opinion, *supra* note 9, at 32 (Kwon Soon-il, J. & Cho Jae-yeon, J., dissenting)

123. SCSK Opinion, *supra* note 9, at 41 (Kim Jae-hyung, J. & Kim Seon-su, J., supplemental opinion).

124. *Id.*

125. *Id.*

126. *Id.* at 42.

127. *Id.*

128. *Id.* at 43.

129. *Id.* at 44.

130. *Id.* at 47.

guaranteed to generate controversy. The reaction from Japanese corporations and the Japanese government has been severe. The corporations have refused to pay the damages award while the Japanese government threatened to take South Korea to the International Court of Justice.<sup>131</sup> Whether the judgments will be enforced, and at what diplomatic cost, remain unknown at the time of this writing.

Nevertheless, the decisions penetrate a cloak of legal impunity that has enshrouded multinational enterprises for many years. In the West, World War II litigation has not yielded a single judgment against defendant-corporations.<sup>132</sup> However, it has placed pressure on German corporations, as well as Swiss and French financial institutions, to review their roles in perpetrating serious war crimes.<sup>133</sup> Ultimately, European governments—under pressure from the United States—set up compensation funds in Germany and claims tribunals in both France and Switzerland to provide compensation to those who performed slave labor, or whose property had been looted. Yet, corporations publicly characterized their donations to these schemes as “humanitarian,” expressly *avoiding* an admission of legal liability.<sup>134</sup> We can debate the extent to which a pair of judgments might realize the concept of corporate legal liability. But the scarcity of such judgments, as Rudolf Dolzer observed, means “the recent series of national proceedings has failed to overcome the relevant jurisprudential obstacles.”<sup>135</sup>

Thus, the SCSK took the road not traveled.<sup>136</sup> In awarding comparatively large damages awards to war-era forced laborers and their heirs, the

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131. Choe Sang-Gun & Motoko Rich, *The \$89,000 Verdict Tearing Japan Apart*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/world/asia/south-korea-slave-forced-labor-japan-world-war-two.html> [<https://perma.cc/89CZ-J8XA>] (reporting Japanese prime minister’s remark that the Korean judgments were “impossible”); *Japan May Take South Korea Wartime Labor Dispute to International Court of Justice: NHK*, REUTERS (July 17, 2019, 6:07 PM), <https://www.reuters.com/article/us-southkorea-japan-laborers/japan-may-take-south-korea-wartime-labor-dispute-to-international-court-of-justice-nhk-idUSKCN1UD02Z> [<https://perma.cc/2VLY-4P5G>].

132. BAZYLER, *supra* note 5, at 163 (indicating that “none of these [Holocaust restitution] lawsuits went to trial. All ended with settlements . . .”).

133. BILSKY, *supra* note 4, at 12–13.

134. *Id.* at 119.

135. Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim’s Private Right of Action – Lessons After 1945*, 20 BERKELEY J. INT’L L. 296, 299 (2002).

136. Prior judicial rulings have ordered governments, but not private corporations, to grant reparations to individuals. For example, in the United States, the *Altmann v. Austria* decision found that Austria had to return a painting seized by the Nazis, and later placed in Austria’s national museum, to Maria Altmann. In Italy, the Supreme Court found that the German government owed individual reparations to an Italian forced laborer. *Ferrini v. Fed. Republic of Ger.*, Cass., sez. un., 11 marzo 2004, n. 5044/04; see generally Pasquale De

SCSK repaired harm dating back three-quarters of a century. The focus on a handful of forced laborers reveals both the strengths and weaknesses of the individualist paradigm adopted in these cases. On the one hand, the individualist paradigm challenges several elements of the postwar status quo. First, it questions the exclusively *statist* nature of war reparations. The individuation of reparations claims pokes another hole in the increasingly porous border between the state and the individual in international law.<sup>137</sup> The fact that an area of law was once the exclusive preserve of states does not, on its own, justify a perpetual prohibition on individual claims. Individuals and corporations sue states regularly in international investment arbitration, human rights courts, and other institutions. The Nuremberg and Tokyo Tribunals attached individual criminal responsibility to heads of state for war crimes and crimes against humanity. But they left corporations largely untouched. The extension of an individual right to seek civil compensation for wartime atrocities challenges legal conventions with unpredictable results. Yet, if the ultimate result yields a new measure of accountability—requiring those who committed wrongful acts to repair them—this realignment may be a welcome development.

Second, the individualist paradigm also empowers courts at the expense of the political branches. The postwar treaties were negotiated by members of the executive branch, whose priorities did not necessarily align with the interests of their compatriots; diplomats might have wanted closure, while their compatriots would have demanded compensation for the human rights abuses they endured at the hands of Japanese entities. The postwar treaties were then ratified by the legislature. Of course, national legislatures can also pass reparative legislation, providing support to veterans, comfort women, forced laborers, and other victims.<sup>138</sup> The reallocation of authority among the three branches, by inserting the judiciary into a space normally occupied by the political branches, may seem ill advised.

Yet, the political branches are hardly perfect. The elites running the country might have been unaware, or simply uninterested, in the suffering of the common man or woman. This concern is heightened when the governments are undemocratic, unrepresentative, or unresponsive to marginalized people. Many have criticized China, for example,

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Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT'L L. 89 (2005).

137. Individuals enjoy certain rights and capacities directly from international law, but only with the consent of states and international organizations that control access to the international legal system. See generally KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 359–60 (2011).

138. See *supra* notes 56–58.

for waiving reparations on behalf of its citizens against Japan when the two nations signed the Joint Communiqué in 1972.<sup>139</sup> In Korea, the administration of Park Chung-hee—the autocratic South Korean president during the negotiations of the Basic Treaty—did not seem excessively concerned with ensuring that Japan compensate individual Koreans who performed forced labor in Japan.<sup>140</sup>

As in many postcolonial states, Korea's elite retained close ties to the former colonial power. As we have seen, Korea's recent wartime jurisprudence emphasized the illegality of Japanese colonialism as a key factor in awarding damages.<sup>141</sup> This helps reframe South Korean calls for reparations as more than individual claims for compensation. Rather, victims demand reparation of extraordinary historical harms rooted in an illegal occupation, widespread atrocities, and the absence of recompense to victims. The gravity of these harms was such that their effects linger, even after seventy-five years. Long-lasting impacts of systemic injustice show up in other reparations claims as well. For example, contemporary advocates of slavery reparations in the United States likewise focus on the extreme brutalization of human beings, the intergenerational harm done to slaves and their descendants, and the destruction of entire families as factors weighing in favor of financial and other remedies to African Americans, one hundred and fifty years after the abolition of slavery.<sup>142</sup> The fact that atrocities' effects often go unaddressed for generations suggests that leaving reparations up to the political branches may mean victims and their descendants will never be made whole.

Third, the individualist paradigm directs attention towards compensating the victim. The postwar tribunals in Nuremberg and Tokyo

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139. See, e.g., CAROLINE ROSE, *SINO-JAPANESE RELATIONS: FACING THE PAST, LOOKING TO THE FUTURE?* 45–47 (2005) (describing China's waiver of reparations from Japan as a "potentially useful bargaining chip to get the Japanese side to compromise on other aspects of the negotiations (for example, Taiwan)").

140. Park himself served in the Imperial Japanese Army during the war and swore a blood oath to the Japanese military during his service. See *Evidence of Park Chung-hee's Military Allegiance to Japan Surfaces*, HANKYOREH (Nov. 6, 2009, 12:23 PM), [https://www.hani.co.kr/arti/english\\_edition/e\\_national/386277.html](https://www.hani.co.kr/arti/english_edition/e_national/386277.html) [<https://perma.cc/ZSG3-DPYL>].

141. Here we merely reference the growing body of legal scholarship on postcolonial studies, itself worthy of a much more sustained and nuanced treatment than can be assembled here. See generally Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT'L L.J. 459 (2005) (noting that international law has always been in the service of empire); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 15 (2007) (arguing that international law was in effect created by the encounter between European colonizers and the indigenous people they conquered around the world).

142. ALFRED L. BROPHY, *REPARATIONS: PRO AND CON* 57–58 (2006) (detailing historical arguments for providing reparations to contemporary African Americans for the inequities of slavery).

took aim at the political and military leadership responsible for prosecuting the war, but largely ignored civilian casualties. Half a century later, in both Europe and Asia, belated attention to reparations illuminated the victims of World War II, in many instances for the first time. More acutely, it called attention to the ongoing harms—post-traumatic stress disorder, social disadvantage from being dispossessed of wealth during the war, ostracism, stigmatization—that many victims still suffer.

On the other hand, the individualist paradigm, by definition, only addresses one small part of the greater damage. A lawsuit only binds the plaintiffs and defendants who participate in the litigation. The fact that hundreds of thousands of Koreans performed forced labor in Japan during World War II means that the overwhelming majority of victims (or their heirs) will never receive compensation. The question then becomes, is it better to treat all victims equally and provide no compensation, or to treat them unequally by compensating a lucky handful of victims? Ideally, the SCSK decisions would serve as a springboard toward a broader reparative scheme, such as the one that the German state and private sector collaboratively produced in 2000. But with Japanese state and corporate figures perennially opposed to reparations, such a private-public partnership seems unlikely. The only path toward compensation, in this author's opinion, would involve significant intervention by the U.S. government. In the late 1990s and early 2000s, the United States went to extraordinary lengths to secure reparation for Jewish victims of World War II from European states.<sup>143</sup> A similar amount of diplomatic capital would be necessary to arrange an Asian settlement, but the prospects for such a proposal are dim.

#### IV. CONCLUSION

The SCSK decisions against Mitsubishi and Nippon-Steel chart new territory in various fields of endeavor: war reparations, corporate legal liability, and post-colonial compensation. While controversial and thus far unenforced, the Korean decisions diverge from Western and Japanese precedents that limited corporate liability for wartime wrongs. To be sure, the precision and persuasiveness of the legal reasoning are hardly infallible. Yet, by attaching liability to powerful corporations that have thus far avoided scrutiny, liability, or accountability, the decisions break new ground in ongoing discussions of corporate civil liability for grave human rights abuses.

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143. The architect of these Euro-American schemata was Stuart Eizenstat, who played an active role in negotiating various initiatives with European governments under the Clinton Administration. See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 339–43 (2009).