

*South Korea Shatters the Paradigm: Corporate Liability, Historical Accountability, and the Second World War*  
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## Introduction

Repairing the past is a theme for our time. As the United States reviews linkages between racial injustice and slavery, France questions whether to return museum artifacts seized from its former colonies in Africa, Asia, and Polynesia. Even the English, the greatest imperial power, recently apologized and compensated hundreds of Kenyans brutalized during the suppression of the Mau Mau Rebellion. By linking contemporary inequality to historical suppression, victims make a case for compensation in the present moment. The sins of the past do not disappear; they actually compound interest, marginalizing many for decades after the war.

Few phenomena wring more destruction than war. One way to imagine the devastation wrought by World War II is to reflect on how far contemporary reparations movements reach. Victims of war crimes and crimes against humanity, ably assisted by civil society organizations, lawyers, and historians, have sought redress in Europe, Asia, and the United States. They have queried lawmakers, beseeched executive officials, and filed hundreds of lawsuits.<sup>1</sup> In many instances in the West, these efforts yielded national laws, compensation mechanisms, charitable foundations, and even claims tribunals. East Asia, despite what you've heard, prefers litigation.

The Supreme Court of South Korea (SCSK) wrote the latest chapter in this global saga by ordering two Japanese multinationals to compensate Koreans who performed forced labor during the war. On October 30, 2018, the SCSK ordered Nippon Steel-Sumitomo to pay 100 million Korean won (\$87,700) to each of four former forced laborers, including 98-year-old Yi Chunshik, the sole surviving plaintiff.<sup>2</sup> On November 29, 2018, Mitsubishi Heavy Industries (MHI) was ordered to pay 400 million won (\$365,500) to ten plaintiffs in a consolidated lawsuit.<sup>3</sup> At the time of this writing, at least a dozen other civil cases, with hundreds of plaintiffs, wend through trial and appellate courts in Busan, Gwangju, Seoul, and Taegu. If past is precedent, these plaintiffs may well prevail. Though whether any Korean plaintiff will live to see the enforcement of these judgments remains to be seen.

The judgments have badly frayed diplomatic ties between South Korea and Japan.<sup>4</sup> But they were not unexpected. In 2012, the SCSK found Nippon Steel and MHI committed "torts

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<sup>1</sup> Most of the English-language material on World War II reparations has focused on developments in the United States and Europe. See, e.g., LEORA BILSKY, *TRANSNATIONAL HOLOCAUST LITIGATION: UNFINISHED BUSINESS* (2017); (arguing that ); Michael Bazylar & Roger Alford, eds., *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* (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) (arguing that the intervention of United States courts was crucial to settlement agreements between the United States and various European states).

<sup>2</sup> Hyonhee Shin, *Friction likely as Korean court orders Nippon Steel to compensate WWII Workers*, Reuters, Oct. 29, 2018. Shin Cheon-su et al. v. Nippon-Steel-Sumitomo Metal Corp., 2013 Da 61381, (Sup. Ct. S. Kor., Oct. 30, 2018) available at [http://www.scourt.go.kr/sjjudge/1540892085928\\_183445.pdf](http://www.scourt.go.kr/sjjudge/1540892085928_183445.pdf)

<sup>3</sup> Simon Denyer, *New South Korea court rulings angers Japan, deepening crisis between America's closest Pacific allies*, WASHINGTON POST, Nov. 29, 2018. Pak Chang-hwan v. Mitsubishi Heavy Industries, 2013 Da 67587 (Sup. Ct. S. Kor., Nov. 29, 2018), available at [http://www.scourt.go.kr/sjjudge/1544582697067\\_114457.pdf](http://www.scourt.go.kr/sjjudge/1544582697067_114457.pdf).

<sup>4</sup> Choe Sang-Hun, *Ex-Chief Justice of South Korea Is Arrested on Case-Rigging Charge*, Jan. 23, 2019, NEW YORK TIMES. "Relations between Seoul and Tokyo have plummeted to their worst point in years after the South Korean

against humanity” against Korean forced laborers, and remanded the decisions to appellate courts.<sup>5</sup> Both Seoul and Busan High Court timely assessed damages, but the South Korean Supreme Court then sat on the cases for many years, under pressure from then-President Park Geun-hye.<sup>6</sup> The Chief Justice of the Supreme Court at the time, Yang Sung-tae, is currently on trial for abuse of office; one of the forty-seven charges against him stems from his failure to issue the verdicts, at President Pak’s request.<sup>7</sup> Ex-President Pak is serving a 25-year term for corruption. These factors diminish the credibility of the opinions.

It is too early to tell whether the verdicts will produce another bilateral agreement, along the lines of the 2015 “comfort women” agreement between Japan and South Korea.<sup>8</sup> Nevertheless, the importance of these judgments cannot be underestimated. Globally, judges have played a modest to nugatory role in deciding war reparations cases in Germany,<sup>9</sup> France,<sup>10</sup> Austria,<sup>11</sup> China,<sup>12</sup> Japan,<sup>13</sup> the Philippines,<sup>14</sup> and the United States.<sup>15</sup> In none of these cases, however, did judges issue a final and binding judgment ordering a defendant to pay compensation.

The SCSK decisions, final and binding, mark uncharted territory. Their historical and political implications aside, they lend support for an emergent norm of corporate civil liability

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Supreme Court ruled that Korean victims of forced labor . . . had the right to seek damages from wartime employers, including Japanese industrial giants.” *Id.*

<sup>5</sup> See Pak Chang-hwan v. Mitsubishi Heavy Industries, 2009 Da 22549 (Sup. Ct. S. Kor., May 24, 2012); Shin Cheon-su et al. v. Nippon Steel-Sumitomo Metal Corp., 2009 Da 68620 (Sup. Ct. S. Kor., May 24, 2012).

<sup>6</sup> Choi Woo-ri & Kim Yang-jin, *Prosecutors Request Arrest Warrants for Former Supreme Court Justices*, HANGYOREH, Dec. 4, 2018 (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”).

<sup>7</sup> Bae Joo-yon, *Ex-Supreme Court Chief Justice Indicted on 47 Charges*, KBS WORLD, Feb. 11, 2019.

<sup>8</sup> See Full Text of Announcement on ‘Comfort Women’ Issue by Japanese, South Korean Foreign Ministers, JAPAN TIMES (Dec. 28, 2015).

<sup>9</sup> Krakauer v. Germany, Bonn Regional Court, Nov. 5, 1997, (finding in favor of forced laborers against German government), *rev’d* Cologne 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).

<sup>10</sup> See, e.g., Georges Lipietz v. Prefect of Haute-Garonne and Société nationale des chemins de fer français, No. 0104248, Administrative Tribunal for Toulouse, June 6, 2006. While the trial court ordered damages against the French government and national railway system, the decision 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. COMP. L. 363 (2008) (describing the historical background to the Lipietz case).

<sup>11</sup> Maria Altmann first filed her claim, to restitute a Gustav Klimt painting that once belonged to her aunt, in Austria. Upon 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. Rep. Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001). Her case would ultimately reach the U.S. Supreme Court, and reach a broader audience through the 2015 film, *Woman in Gold*.

<sup>12</sup> Chinese plaintiffs have filed lawsuit in Chinese courts, but no court would accept a case until 2014. That case, against Mitsubishi heavy Industries, settled in 2016.

<sup>13</sup> Scores of lawsuits have been filed in Japan. See generally Timothy Webster, *Discursive Justice*, 58 VA. J. INT’L L. 266 (2018).

<sup>14</sup> *Vinuya v. Romulo*, G.R. No. 162230, Apr. 28, 2010 (dismissing claims brought by Filipina comfort women as political questions).

<sup>15</sup> 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 Japanese government on sovereign immunity grounds).

for grave human rights abuses. When corporations commit, aid, or abet serious human rights abuses, they often evade legally liability. The ongoing call for corporate legal liability has attracted much attention, but few judgments, in the West. Perhaps it is time to look at the rest of the world for instances of corporate civil liability, even if the events took place during World War II.<sup>16</sup>

This article proceeds in three parts. Part I provides the recent political and jurisprudential context for the SCSK decision. Part II encapsulates the major findings of the decision, locating them within both international standards and Korean law; it also summarizes 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. A brief conclusion follows.

## I. Context

The South Korean judgments 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>17</sup> In Europe, Greek and Italian courts found the German government civilly liable for wartime massacres, deportations, and forced labor.<sup>18</sup> But the International Court of Justice ultimately immunized Germany from civil liability, even as it noted the *jus cogens* violation.<sup>19</sup> German, Austrian, and French courts heard cases on forced labor, looted art, and looted properties, respectively. None of those cases succeeded in the end. But they pressured the political branches to arrange a more lasting solution, including claims tribunals, foundations, and individual payments. Claims tribunals represent the most resource-intensive of the mechanisms.<sup>20</sup> Germany, for its part, devised one of the largest mass compensation schemes in human history, disbursing \$5.2 billion to over one million forced and slave laborers during the war.<sup>21</sup> In the latest initiative, the French government paid \$65 million to survivors transported to

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<sup>16</sup> *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).

<sup>17</sup> For a brief overview of the Holocaust Restitution movement in the United States, see MICHAEL BAZYLER, *HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD* 161-168 (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).

<sup>18</sup> See *Ferrini v. Federal Republic of Germany*, Corte Suprema di Cassazione [Ital. Sup. Ct.], Mar. 11, 2004, 5044 (holding the German army’s 1944 capture, deportation and enslavement of Italian citizen violated *jus cogens* norms, and thus Germany waived its immunity); *Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos [Greek Sup. Ct.], Nov. 11, 2000 (concluding that Germany’s 1944 massacre of 300 Greek civilians violated *jus cogens* norms and thus Germany waived immunity).

<sup>19</sup> *Jurisdictional Immunities of the State* (Ger. v. Italy), 2012 I.C.J. 2 (Feb. 12).

<sup>20</sup> The Swiss and French governments, under U.S. pressure, set up claims tribunals in Zurich and Paris, respectively. See generally *Holocaust Victims Assets Litigation* (Swiss Banks), Claims Resolution Tribunal, *available at* [crt-ii.org/index.php.html](http://crt-ii.org/index.php.html) (website with information, including awards, about the Swiss); Commission for the Compensation of Victims of Spoliation, *available at* [civs.gouv.fr/home/](http://civs.gouv.fr/home/) (website with information about French program to restore stolen real and physical property to French Jews and their heirs).

<sup>21</sup> 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], *available at* [stiftung-evz.de/eng/the-foundation.html](http://stiftung-evz.de/eng/the-foundation.html).

concentration camps on France's National Railway.<sup>22</sup> That particular blend of diplomatic cooperation, which requires both a hegemon and a willingness to reflect publicly on the past, coercion, and cohesion are largely absent in East Asia.<sup>23</sup>

Instead of bilateral agreements, litigation remains the primary method to address war reparation in East Asia. On December 7, 1991, former 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 demanded an apology and monetary compensation.<sup>24</sup> While ultimately unsuccessful, her case “launched a thousand plaintiffs,” setting in motion a process that hums unpredictably to this day. In her wake, hundreds of Asian victims—mostly Chinese and South Korean—sued Japan and Japanese corporations for war crimes such as forced labor, military sexual slavery (e.g. the “comfort women” system), medical experimentation, chemical weapons use, and civilian massacres, like the Rape of Nanjing.<sup>25</sup> For the past three decades, Japanese lawyers have reenacted the war in scores of trial courts up and down the archipelago. Taiwanese, Chinese, Korean, and Filipina witnesses have testified, through interpreters, to Japanese judges about their experiences, brought judges to Japanese mines and factories where plaintiffs performed forced laborers during the war, 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 the cases,<sup>26</sup> citing prescription (statute of limitations), waiver by international treaty, sovereign immunity (in cases against Japan), and alter ego theories (i.e., corporate defendant is legally distinct from the wartime entity).<sup>27</sup> The Japanese cases nonetheless elaborated theories of legal liability for multinational enterprises.<sup>28</sup> That topic has generated significant scholarly attention in recent decades. But the case law is surprisingly sparse. Realizing that Japanese courts would not provide the satisfaction they sought, plaintiffs weighed the option of suing Japanese multinational enterprises with offices in Korea or China.

When Korean plaintiffs refiled their cases at home, Korean judges did not necessarily view their claims any more favorably. The *Nippon Steel* case, for instance, brought together two plaintiffs who had adjudicated their dispute in Japan, and three plaintiff who filed for the first time in Korea.<sup>29</sup> The Seoul Central District Court dismissed the case on the grounds of *res*

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<sup>22</sup> See BAZYLER, *supra* note 17, at 167.

<sup>23</sup> See Timothy Webster, 25 BERKELEY J. INT'L L. 435, 436 (2007) (describing East Asia as one of the least integrated regions in the world).

<sup>24</sup> Kim Hak-sun et al. v. Japan, *unpublished opinion* (Tokyo D. Ct., Mar. 26, 2001).

<sup>25</sup> See generally Timothy Webster, *Discursive Justice: World War II Litigation in Japan*, 58 VA. J. INT'L L. 161 (2018).

<sup>26</sup> A significant number of cases did, however, settle. See generally Timothy Webster, *The Price of Settlement: World War II Reparations in China, Japan and Korea*, 51 N.Y.U. J. INT'L L. & POL. 301 (2019) (analyzing the results of six settlement agreements between Asian forced laborers and Japanese corporations).

<sup>27</sup> *Id.* at 165.

<sup>28</sup> 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).

<sup>29</sup> See Yeo Un-taek et al. v. Nippon Steel, 2005 Gahap 16473 (Seoul Cent. Dist. Ct., April 3, 2008), *aff'd* Yeo v. Nippon Steel, 2008 Na 49129 (Seoul H. Ct., July 16, 2009). Plaintiffs Yeo Un-taek and Shin Cheon-su had already sued, and lost, in Japan. They were joined by Yi Chun-shik, Kim Kwi-su, and another plaintiff surnamed Yi (Lee). The opinion is available in Korean, Japanese, and English. For the Korean, see [justice.skr.jp/koreaajudgments/K12-1.pdf](http://justice.skr.jp/koreaajudgments/K12-1.pdf). For the Japanese, see [justice.skr.jp/koreaajudgments/12-1.pdf](http://justice.skr.jp/koreaajudgments/12-1.pdf). For the English, see Seokwoo Lee (trans.), Seoul Central District Court 10th Division, 2 KOREAN J. INT'L & COMP. L. 68 (2014).

*judicata* for the two plaintiffs.<sup>30</sup> For the three other plaintiffs, the Seoul court accepted the Japanese trial court's finding that Nippon Steel was legally distinct from the wartime entity that enslaved them.<sup>31</sup> Initially, then, Korean courts followed the lead of domestic courts elsewhere, including in the former colonial power, by dismissing these cases.<sup>32</sup>

That deferential posture shifted abruptly in 2012, when the Supreme Court of South Korea overturned two appellate court decisions: one against Nippon Steel, and the other against Mitsubishi Heavy Industries.<sup>33</sup> Those decisions held the Japanese corporations legally liable for their wartime conduct, before sending them back to their respective appellate courts to calculate damages. The 2018 decisions are, in effect, damages awards from decisions that had already determined legal liability.

The Supreme Court cases did not emerge *ex nihilo*, but instead respond to a host of domestic developments within South Korea. Specifically, they form part of a Korean government initiative to “clear up 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>34</sup> Specific laws have addressed the Korean War (1950-53), Gwangju Massacre (1980), and the Donghak Uprising (1894).<sup>35</sup> The National 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>36</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>37</sup> A 2007 law provided compensation to wartime forced laborers.<sup>38</sup> Within South Korea, then, history is not a ossified set of causal linkages conclusions, but an actively reconstructed exercise in redistribution.

In January 2005, under the liberal presidency of Roh Mu-hyun, South Korea released the *travaux préparatoires* of the 1965 Basic Agreement, and other treaties that restored diplomatic

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<sup>30</sup> *Id.* at 83-84.

<sup>31</sup> See Shin Cheon-su et al. v. Nippon Steel and Japan, *unpublished opinion*, (Osaka Dist. Ct., Mar. 27, 2001) (dismissing claims against Japanese corporation on the theory that Nippon Steel was legally distinct from the wartime entity that enslaved plaintiffs).

<sup>32</sup> See also Pak Chang-hwan et al. v. Mitsubishi Heavy Industry, 2000 Gajap 7960 (Busan Dist. Ct., Feb. 2, 2007) (dismissing case on prescriptive grounds), *aff'd* 2007 Na 4288 (Busan H. Ct., Feb. 3, 2009).

<sup>33</sup> Pak v. Mitsubishi, Yeo v. Nippon Steel, *supra* note 2&3.

<sup>34</sup> In Korean, the term is “clearing up past history” *gwageosa jeong-ni* (과거정리, 과거정리).

<sup>35</sup> 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).

<sup>36</sup> Wolman, 39-40. See also Ilje Kangjeom-ha Kangje Tongweon Pihae Jinsang Kyumyeon-deung-e kwanhan Teukbyeolbeop [Special Act to Investigate the Truth of Damage Caused by Forced Mobilization under Japanese Imperialism], Law No. 7174 of 2004. See also Ilje Kangjeom-ha Panminjok Jinsang Kyumyeong-e kwanhan Teukbyeolbeop [Special Act to Investigate the Truth of Anti-National Acts under Japanese Imperialism], Law No. 11494 of 2004.

<sup>37</sup> Chinil Panminjok Haengwi Haengwija Jaesan-ui Gukga Gwisok-e kwanhan Teukbyeol-beop [Special Act to Redeem the Property of Japanese Collaborators], Law No. 7975 of 2005. See Chosun Ilbo, *Committee OKs Seizure of Collaborators' Property*, Dec. 7, 2005. The law was challenged in Korea's Constitutional Court, but found to be constitutional. 2008 Hun-Ba 141 (Mar. 31, 2011).

<sup>38</sup> Taepyeongyang Jeonjaeng Jeonhu Gukwe Kangje Tongweon Hisaengja-teung Jiweon-e kwanhan Beop-nyul [Law to Assist Victims of Forced Overseas Mobilization during the Pacific War], Law No. 8669 of 2007.

relations between Japan and Korea after twenty years of mutual nonrecognition.<sup>39</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>40</sup> First, 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 resolve financial and civil debts between the two countries.”<sup>41</sup> Second, 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>42</sup> This report would provide many of the legal theories adopted by Supreme Court in its decisions.

Over the past decades, South Korea has revised its history, reallocated legal liability, and redistributed wealth. The Korean Left has sought, not without reason, to pin early twentieth century worst human rights abuses on Japanese colonialism. While we might applaud Korea’s efforts to come to grips with colonial-era atrocities, we cannot lose sight of the fact that in many instances, Korean actors participated in the process. The Korean Right, as manifest rather clumsily in Pak Geun-hye’s judicial interference, plays down the predations of colonialism, in favor of a more “productive” relationship with Japan. In other words, the Supreme Court was hardly advancing *sui generis* or idiosyncratic views of Korea’s legal past. Instead, its stance gels quite well with various political initiatives from the Korean Left.<sup>43</sup> While one should not strain the parallels, a similar split divides the Japanese Left (which favors war reparations efforts for Koreans and Chinese) from the Japanese Right (including the powerful liberal Democratic Party, which advocates for the position that Japan has already compensated its war victims).

## II. Major Issues in the Decision

The majority opinion hinges on resolving three legal questions: the recognition of Japanese judgments, the proper interpretation of the 1965 Claims Agreement, and the statute of limitations. The Court spent the longest time on the second of the Claims Agreement.

### A. Recognition of Foreign Judgments

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<sup>39</sup> Treaty on Basic Relations between Japan and the Republic of Korea, June 22, 1965, U.N.T.S. 8471.

<sup>40</sup> See Seoul Deems Tokyo Still Liable for Colonial Crimes, CHOSUN ILBO, Aug. 26, 2005, [http://english.chosun.com/site/data/html\\_dir/2005/08/26/2005082661013.html?related\\_all](http://english.chosun.com/site/data/html_dir/2005/08/26/2005082661013.html?related_all). 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 Gung-mu Jojeong-shil [Office for Government Policy Coordination], Bodo Jaryo [Press Release], Han-Il Hoedam Munseo Gonggae Husok Daechaek Kwalleon Min’gwan Kongdong Wiweonhoe Gaechoe [Joint Committee on Follow-up Measures to the Document Disclosure of the Korea-Japan Negotiations Meets], Aug. 26, 2005. The press release is available at [opm.go.kr/flexer/view.do?ftype=hwp&attachNo=73036](http://opm.go.kr/flexer/view.do?ftype=hwp&attachNo=73036).

<sup>41</sup> *Id.* at 1.

<sup>42</sup> *Id.* (emphasis added). The Korean judiciary took up the phrase “torts against humanity” (*banindo-jeok bulbeop haengwi*, □ □ □ □ □ □ □ □, □ □ □ □ □ □ □ □) to describe various programs of Japanese colonialism.

<sup>43</sup> 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).

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

Faced with unfavorable verdicts in Japan, many Korean plaintiffs returned to South Korea.<sup>44</sup> In *Nippon Steel*, two of the four male plaintiffs had already exhausted the Japanese judiciary, before refile in Seoul.<sup>45</sup> In *Mitsubishi*, five of the female plaintiffs sued unsuccessfully in Nagoya, before refile in Kwangju.<sup>46</sup> And the six remaining male plaintiffs in *Mitsubishi* lost at all three levels in Japan, before refile in Busan.<sup>47</sup>

The wartime past confected by the current Korean government lays the blame for colonialism squarely on Japan. Korean complicity in Japanese war crimes, from the conscription of forced laborers to the abduction of comfort women, tends to disappear in Korea's contemporary reconstructions of the war.<sup>48</sup> Indeed, the 2018 SCSK decisions proceed from the premise that Japan's colonization of Korea was itself illegal.<sup>49</sup> Hence, any colonial-era statute, including the two that brought Koreans to Japan,<sup>50</sup> are *ipso facto* illegal.<sup>51</sup>

No one doubts that Korean courts enjoy the sovereign authority to remake the past, and reconfigure issues of legality, liability, and accountability. But whether Japanese corporations,

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<sup>44</sup> Shin Cheon-ju (申千洙) and Roh Un-taek(呂運澤) first sued Nippon Steel and Japan in Osaka. See Shin Ch'eon-ju v. Nippon Steel & Japan, *unpublished opinion* (Osaka D. Ct., Mar. 27, 2001) (dismissing claims as extinguished by the 1965 Claims Agreement), *aff'd* (Osaka H. Ct., Nov. 19, 2002), *aff'd* (Sup. Ct. Japan, Oct. 9, 2003). Later joined by Yi Chun-shik (李春植) and Kim Kwi-su (金圭洙), they sued in Seoul Central District Court. See Shin v. Nippon Steel, 2005 Ga-hap 16473 (Seoul Central D. Ct., Apr. 3, 2008) (finding the claims resolved by the Japanese judgments), *aff'd* Seoul H. Ct. (July 16, 2009). In 2012, however, the Supreme Court of South Korea overturned these lower-court rulings. See Shin v. Nippon Steel, (Sup. Ct. S. Korea, May 24, 2012). 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.

<sup>45</sup> Nippon Steel was sued by four plaintiffs: Shin Ch'eon-ju (申千洙), Roh Un-t'aek (呂運澤), Yi Chun-shik and Kim Kwi-su. Plaintiffs Shin and Roh had unsuccessfully sued Nippon Steel and the Japanese government in Osaka. See Shin Ch'eon-ju v. Nippon Steel & Japan, *unpublished opinion* (Osaka D. Ct., Mar. 27, 2001) (dismissing claims as extinguished by the 1965 Claims Agreement), *aff'd* (Osaka H. Ct., Nov. 19, 2002), *aff'd* (Sup. Ct. Japan, Oct. 9, 2003). Shin and Roh then filed suit at Seoul Central District Court in 2005. Shin v. Nippon Steel, 2005 Ga-hap 16473 (Seoul Central D. Ct., Apr. 3, 2008).

<sup>46</sup> See Yang Keum-deok v. Mitsubishi Heavy Industries & Japan, 1210 HANREI TAIMUZU 186 (Nagoya D. Ct., Feb. 24, 2005) (dismissing claims as extinguished by the 1965 Claims Agreement), *aff'd* 1894 HANREI JIHŌ 44 (Nagoya H. Ct., May 31, 2007), *aff'd* (Sup. Ct. Japan, Nov. 11, 2008). 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.

<sup>47</sup> See Pak v. Mitsubishi Heavy Industries & Japan, *unpublished opinion* (Hiroshima D. Ct., Mar. 25, 1999) (denying claim against Mitsubishi as time-barred, and against Japan for reasons of sovereign immunity), *aff'd* 1217 HANREI TAIMUZU 157 (Hiroshima H. Ct., Jan. 19, 2005), *aff'd* (Sup. Ct. Japan, Nov. 1, 2007).

<sup>48</sup> See, e.g., Pak Hae-ok v. Mitsubishi Heavy Ind. & Japan, 1894 HANREI TAIMUZU 44 (Nagoya H. Ct., May 31, 2007), *slip opinion available at* justice.skr.jp/judgements/59-2.pdf. I cite to the slip opinion, p. 19.

<sup>49</sup> Slip opinion, 11.

<sup>50</sup> In 1938, Japan passed the National Mobilization Act. See Kokka Sôdôin Hô [National Mobilization law], Law No. 55 of 1938. In 1939, the Japanese Cabinet passed the Citizen Conscription Order, which provided the specific mechanisms for recruiting workers for Japanese companies. Kokumin Chôyôrei [Citizen Conscription Order], Regulation No. 451 of 1939. The conscription order took effect in Japan in 1939, but in Korea in 1942.

<sup>51</sup> These two enactments provided the legal basis for mobilizing Koreans to work in Japan.

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 “nationalized” the dispute, replacing colonial Japanese law with postwar Korean law instead. As the Court wrote,

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 as this reasoning, would clearly violate the *sound morals or other social order* of the Republic of Korea.<sup>52</sup>

The phrase “sound morals or other social order” provides the standard for the “public policy” exception in enforcing foreign judgments.<sup>53</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>54</sup> In practice, Korean courts enjoy wide latitude to determine whether to recognize and enforce foreign judgments.<sup>55</sup> Professor Suk Kwang Hyun of Korea University sees substantive and procedural elements to this determination.<sup>56</sup> Substantively, a court may examine the reasoning of the foreign judgment, as long as it does not determine whether it is right or wrong.<sup>57</sup> Procedurally, the courts ask if the party received due process of law – did he have an opportunity to defend himself, was he represented by counsel, and so on?<sup>58</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>59</sup> In light of Korean state attitudes towards Japan colonialism, expressed in contemporary legislation and commission reports, one might have expected Korean courts would refuse to enforce Japanese judgments. Yet for over a decade, as the political branches reviewed, revised and reconceived the past, Korean judges dismissed cases for the same reasons that their Japanese confrères had.<sup>60</sup>

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<sup>52</sup> Kim v. Nippon Steel, 2009 Da 68620, May 24, 2012 (Sup. Ct. Korea).

<sup>53</sup> See Minsa sosong-beop [Civil Procedure Act], Art. 217(3), Law No. 6626 of 2002.

<sup>54</sup> Korean Civil Execution Act, Act no. 73 (2005), art. 27(1).

<sup>55</sup> See KOREAN LAW AND RESEARCH INSTITUTE, INTRODUCTION TO KOREAN LAW 281 (2012). According to one ABA report, the “meaning of good morals and social order is so abstract that whether a judgment of a foreign country violated [them] is unknown until it becomes final at the Supreme Court.” *Recognition and Enforcement of Foreign Judgments in Korea*, June 2014, available at [www.americanbar.org/content/dam/aba/events/international\\_law/2014/06/international-families/Recognition1.pdf](http://www.americanbar.org/content/dam/aba/events/international_law/2014/06/international-families/Recognition1.pdf)

<sup>56</sup> Suk Kwang Hyun, *Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era: South Korean Perspectives*, 13 FRONTIERS OF LAW IN CHINA 171 (2018), available at <http://www.law.ruc.edu.cn/upic/20180802/20180802144419925.pdf>.

<sup>57</sup> *Id.* at 186-87.

<sup>58</sup> *Id.* at 188-89.

<sup>59</sup> Nam Hyo-Sun et al., *Ilje Kangjeomgi Kangje Jiongyong Sageon Pankyeoul-ui Jonghapjeok Yeongu* [Comprehensive Study of the Forced Mobilization Decisions under Japanese Occupation] 54-55.

<sup>60</sup> 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 Seokwoo Lee (trans.), *Seoul High Court: 21st Civil Division, Verdict of July 16, 2009*, 2 KOREAN J. INT’L & COMP. L. 89 (2014).



## B. Effects of 1965 Claims Agreement

The nub of the decision lies with the Supreme Court's reinterpretation of the 1965 Claims Agreement.<sup>61</sup> Specifically, did the Claims Agreement dispose of all compensation claims that individual Korean forced laborers might raise against Japanese corporations? The SCSK answered no: plaintiffs could still file compensation claims.

In arriving at this conclusion, the SCSK relied on a metanarrative of *colonial illegality*: since Japanese colonialism was itself illegal, any Japanese law, regulation, or administrative action taken by the Japanese colonial government was *ipso facto* illegal. "Illegal Japan," as Professor Alexis Dudden writes, represents the dominant discourse through which many South Koreans view Japanese colonialism.<sup>62</sup> This is hardly unique to East Asia. Many postcolonial states characterize their colonial subjugation as illegal, illegitimate, or even criminal.<sup>63</sup> "Illegal Japan" gained prominence in South Korea in the early 1990s, as the "comfort women" issue emerged, and spread globally through activism, litigation, and reports by international organizations like the UN and ILO. The term generally refers to state action; but it takes no great leap of imagination to view conduct by corporations, in close coordination with the Japanese government, in a similar vein.<sup>64</sup>

The SCSK specifically recalled the 2005 Report issued by the Joint Commission.<sup>65</sup> The Court 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>66</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 resolved related issues, such as Sakhalin compatriots, or victims of atomic bombs.<sup>67</sup>*

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<sup>61</sup> Treaty on Basic Relations between Japan and the Republic of Korea. 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 Korea residents in Japan, and claims and property.

<sup>62</sup> See generally ALEXIS DUDDEN, TROUBLED APOLOGIES AMONG JAPAN, KOREA, AND THE UNITED STATES 63-96 (2008).

<sup>63</sup> *Id.* at 64-65.

<sup>64</sup> 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 [WAR CRIMES OF JAPANESE COMPANIES] (Koshō Tadashi ed. 2000). For a summary in English of how state and non-state actors brought about Japan's wartime forced labor program, see Timothy Webster, *Disaggregating Corporate Liability: Japanese Multinationals and World War II*, 56 STAN. J. INT'L L. 175, 202-04 (2020).

<sup>65</sup> Slip Opinion, 9.

<sup>66</sup> 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, 3 U.S.T. 3169 (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.

<sup>67</sup> Slip opinion, 9.

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 certain grave human rights abuses, certainly blunts its potential impact on claims against a private actor.

The SCSK examined the treaty negotiations. Recalling the colonial metanarrative of illegality, the Court held the Claims Agreement’s failure to acknowledge the illegality of Japanese colonialism meant it did not compensate for Japan’s illegal occupation. It was 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>68</sup> At the start of the protracted negotiations, the South Koreans submitted eight types of compensation they sought from Japan.<sup>69</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>70</sup> Of particular relevance is item five, which includes “unpaid wages, compensation, and other reimbursements for conscripted Koreans.”<sup>71</sup> During the treaty negotiations, Japan opposed the idea of individual compensation for forced laborers.<sup>72</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>73</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>74</sup> To make sure, the SCSK characterized the claims as *solatium* (*wijaryo*)<sup>75</sup>, that is, payments to cover plaintiffs’ mental and emotional suffering. In the Court’s own words, it awarded solatia against a “Japanese corporation that engaged in torts

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<sup>68</sup> Slip opinion, 13.

<sup>69</sup> Victor D. Cha, *Bridging the Gap: The Strategic Context of the 1965 Korea – Japan Normalization Treaty*, 20 KOREAN STUDIES 123 (1996). Professor Cha describes the negotiations as both “protracted and acerbic,” and “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.*

<sup>70</sup> The General Outline of Claims against Japan, produced in 1951, consisted of property that Korea sought from Japan. Item 5 listed 6 types of claims: Japanese securities, Japanese currency, unpaid wages of conscripted Koreans (被徴用韓国人の未収金), compensation for injuries sustained by conscriptees during the war (戦争による被徴用者の被害に対する補償), and claims by Koreans against Japanese state, citizens or natural persons (韓国人の我が国の国民または法人に対する請求). 1210 Hanrei Times 186, 217. The Constitutional Court of Korea had ample opportunity to review the eight items in its “comfort women” decision of 2011. See *Kim v. Ministry of Foreign Affairs of the Republic of Korea*, 2006 Heon-ma 788 (Const. Ct. South Korea, Aug. 30, 2011) (hereinafter “KCC, Comfort Women Decision”).

<sup>71</sup> Slip opinion, 13-14.

<sup>72</sup> KCC, Comfort Women Decision.

<sup>73</sup> KCC, Comfort Women Decision.

<sup>74</sup> Slip Opinion, 14 (translation by author).

<sup>75</sup> Solatium seeks to repair “pain and suffering,” the emotional and mental anguish of injury, as opposed to the physical damage or financial harm.

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>76</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>77</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>78</sup>

A plain reading of this provision—the last phrase in particular—would seem to foreclose claims from private individuals. The phrasing would seem to cover the claims at bar: between Korean natural persons (plaintiffs) and Japanese legal persons (defendants). The SCSK held otherwise.

The SCSK viewed Article I and Article II *disjunctively*.<sup>79</sup> That is, the money and the property claims have nothing to do with each other. At the very least, the money should not be understood as compensation for the property interests. The Court noted that Article I mentions says nothing about the specific purpose of the money, aside from being “conducive to the economic development of the Republic of Korea.”<sup>80</sup> The Court clarified “Even at the time, Japan’s position was that the funds in Article I were basically for economic assistance. The position was that there was no legal relationship between Article I and Article II.”<sup>81</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 the forcibly mobilized. Thus, according to the Court, the claims agreement did not include *solatium* for forced mobilization.<sup>82</sup>

### C. Statute of Limitations

The final issue involved the statute of limitations. While the passage of half a century would certainly seem to exceed the prescription period of Korean tort law, the Supreme Court found a way out. The Court acknowledged that a new interpretation of the Claims Agreement surfaced 2005. Until 2005, it was reasonable for Korean forced laborers to believe the Claims Agreement extinguished their individual claims against Japan or Japanese citizens. Accordingly, plaintiffs could not exercise their rights to seek compensation in South Korea. But with this new understanding, 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>83</sup> This is similar to the equitable tolling used in common law

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<sup>76</sup> Slip opinion, 12.

<sup>77</sup> Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, June 22, 1965, U.N.T.S. 8473, Art. I(1)(a), I(1)(b) (hereafter “Claims Agreement”).

<sup>78</sup> Claims Agreement, Art. II(1) (*italics added*).

<sup>79</sup> Slip Opinion, 15.

<sup>80</sup> Claims Agreement, Art. I(1)(b).

<sup>81</sup> Slip Opinion, 15 (translation by author).

<sup>82</sup> Slip Opinion, 15-16.

<sup>83</sup> Slip Opinion, 16.

jurisdictions. Moreover, Japanese courts have also applied Japan's good faith principle to waive prescriptive defenses in war reparations lawsuits.<sup>84</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>85</sup> We briefly summarize each. Justice Lee 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>86</sup> Nonetheless, he believed the Court was bound by its own precedent, the 2012 decisions against Nippon Steel and Mitsubishi.<sup>87</sup> Without new evidence or legal theories, Lee posited, there was no reason to reverse the prior judgments.<sup>88</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>89</sup> It too advanced an alternate interpretation of the Claims Agreement, namely, that it waived the right of the South Korean government to seek compensation from Japan, the so-called right of diplomatic protection, but not the individual's right to seek compensation.<sup>90</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>91</sup>

With stricter scrutiny in mind, the justices compared term from the San Francisco Peace Treaty ("waive") and the Claims Agreement ("settle").<sup>92</sup> The implication is that "waive" would extinguish all claims, but somehow "settle" may permit them to linger. Finally, the trio discussed a Japanese domestic law passed shortly after the Claims Agreement.<sup>93</sup> That law extinguished all property rights and claims that South Korea or its citizens may have against Japan or Japanese citizens.<sup>94</sup> According to the three justices, this law extinguished individual

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<sup>84</sup> To be clear, most Japanese decisions dismissed war reparations lawsuits as time-barred. But some courts refused to exculpate corporate defendants on timeliness grounds, such as *Zhang v. Mitsui Mining*.

<sup>85</sup> In South Korea, a separate opinion arrives at the same result, but for a different reason. A concurrence, like in the United States, agrees with the result, with an additional reason.

<sup>86</sup> Slip Opinion, 18 (Yi Ki-taek, J.) ("Lee Separate Opinion").

<sup>87</sup> *Id.* 19. Justice Lee 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. *Id.* at 20-21.

<sup>88</sup> *Id.* at 21.

<sup>89</sup> Slip Opinion, 21 ("KLM Separate Opinion"). Both Lee and No joined the Supreme Court in August, 2018, two months before the verdicts came down.

<sup>90</sup> *Id.*, 22.

<sup>91</sup> *Id.*, 29.

<sup>92</sup> *Id.*, 30.

<sup>93</sup> *Id.*

<sup>94</sup> See *Zaisan oyobi seikyûken ni kansuru mondai no kanketsu narabini keizai kyôryoku ni kan suru nihonkoku to daikanminkoku tonô aida no kyôtei dainijô no jisshi ni tomonau daikanminkoku tô nozaisanken ni taisuru hôritsu*

Koreans' rights to seek compensation in Japan. If the Claims Agreement extinguished the individual claims, the trio postulated, Japan would have no need to pass a domestic law extinguishing the claims. Since Korea did not pass similar legislation, plaintiffs could bring their legal claims in Korea.<sup>95</sup>

The dissent responded to the majority and separate opinions.<sup>96</sup> According to Justice Kwon Soon-il, a relatively liberal appointment from the Pak administration, and Justice Cho Jae-young, a Moon Jae-in appointee, even if the Claims Agreement did not waive the individual right to claim compensation, it narrowly restricted the exercise of that right.<sup>97</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>98</sup> South Korea passed additional compensatory measures in 2007 and 2010.<sup>99</sup> By September, 2016, some 550 billion Korean won (US\$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>100</sup> The Claims Agreement therefore constituted both direct payment to individual victims through the reparative legislation, and indirect payment by revitalizing Korea's postwar economy. Then-President Pak Chung-hee invested Japanese economic assistance into Posco (Pohang Iron and Steel Company), the country's largest steel manufacturer. In other words, Korea's own legislation, paid in part by Japan, extinguished plaintiffs' claims. Finally, the dissent cited the text of the Agreement, all claims were "settled completely and finally," forecloses plaintiffs' claims.

Two justices issued concurrences (*pocheung uigyeon*), agreeing with the majority, but for separate reasons.<sup>101</sup> Justices Kim Jae-hyung and Kim Seon-su supported the individual right to

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[Law concerning measures for property rights of the Republic of Korea and others following the implementation of article 2 of the agreement on economic cooperation and settlement of issues regarding property and claims between Japan and the Republic of Korea], Law no. 144 of 1965.

<sup>95</sup> *Id.*

<sup>96</sup> Slip Opinion, 32 (Kwon Soon-il, J. and Cho Jae-young, J. in dissent).

<sup>97</sup> Slip Opinion, 37.

<sup>98</sup> Slip Opinion, 37. These laws included the (1) Act on Operating and Managing the Claims Fund, Law no. 1741, Feb. 19, 1966 (repealed by Law no. 3613 of Dec. 31, 1982); (2) Act on Applying for Civil Claims against Japan, Law No. 2685, Jan. 19, 1971 (3) Act on Settling Civil Claims against Japan, Law no. XX, Dec. 21, 1974 (repealed by Law no. 3614 of Dec. 31, 1982).

<sup>99</sup> *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], No. 8669 of 2007. 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-Pacific Journal | Japan Focus, Mar. 3, 2008, available at <https://apjif.org/-William-Underwood/2689/article.html>. The second law was the 2010 Tae'il Hangjaengi 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], Law No. 10143 of 2010. See also Lee Yoon-jae v. Korea, 2009 Heon ba 317 (Const. Ct. South Korea, Dec. 23, 2015) (finding 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*, Jan. 6, 2016, Library of Congress Global Legal Monitor, available at <https://www.loc.gov/law/foreign-news/article/south-korea-constitutional-court-decides-long-running-case-on-compensation-for-forced-labor-during-colonial-rule/>

<sup>100</sup> *Id.*

<sup>101</sup> Slip Opinion, 41 (Supplemental Opinion of Justices Kim Jae-hyung and Kim Seon-su).

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>102</sup> To waive individual rights, the treaty had to do so must use clear language to inform individuals of the extinguishment.<sup>103</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>104</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>105</sup> They determined that the San Francisco Peace Treaty only disposed of property claims and debts, and not claims for mental suffering.<sup>106</sup> Since the eight items did not address the solatium (mental suffering) claims, and since the men 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>107</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>108</sup>

### III. Significance

The Supreme Court of South Korea issued a pair of judgments that, comparatively speaking, break new ground. As the first *final and binding* judgments to order compensation for World War II-era war crimes, they almost guaranteed to generate controversy. The reaction from Japanese corporations, and the Japanese government, has been harsh. The former refuse to pay the judgments, while the latter threatened to take South Korea to the International Court of Justice. Whether the judgments will be enforced, and at what diplomatic cost, remain among many questions outstanding.

The decisions penetrate a cloak of legal immunity that has enshrouded multinational enterprises for many years. In the West, World War II litigation yielded no meaningful judgments against defendant-corporations. Once the cases had been dismissed, corporations contributed money to state-sponsored compensation funds in Germany, and to the Zurich Claims Tribunal. Yet corporations publicly characterized their donations as "humanitarian," and expressly avoided admitting legal liability. We can debate the extent to which *one* single judgment, or even a pair, might realize the concept of corporate legal liability. But the scarcity of such judgments, as Professor Dolzer observed, means "the recent series of national

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<sup>102</sup> Slip Opinion, 42.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 42.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 43.

<sup>107</sup> *Id.* at 44.

<sup>108</sup> *Id.* at 47.

proceedings has failed to overcome the relevant jurisprudential obstacles.”<sup>109</sup> The Supreme Court of South Korea has thus taken the road not traveled.<sup>110</sup>

The individual 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. The fact that an area of law was once the exclusive preserve of states does not, by itself, justify a perpetual prohibition on individual claims. Individuals (natural persons) and corporations (legal persons) sue states all the time in international investment arbitration. Courts in Europe, Africa and the Americas empower individuals to bring cases against states that violated their human rights. The Nuremberg and Tokyo Tribunals attached individual responsibility to heads of state for war crimes and crimes against humanity. But they left the corporations untouched. The extension of a right to seek compensation challenges legal conventions with unpredictable results. 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 empowers courts at the expense of the other branches. The postwar treaties were negotiated by the executive branch, who had to negotiate with a country that was priorities did not necessarily align with compensation. The legislature can also pass reparative legislation, providing support to veterans, compensation women, forced laborers, and other victims. The reallocation of authority among the three branches may seem ill advised, inserting the judiciary into a space normally occupied by the political branches. Yet the political branches are hardly perfect. The elites running the country may be unaware, or simply uninterested, in the common man or woman. This concern is heightened when the governments are undemocratic, unrepresentative, or unresponsive to marginalized people. Park Chunghee, the autocratic South Korean president during the negotiations, served the Japanese Imperial Army in colonial Manchuria during the war. He reportedly swore a blood oath to Japan.<sup>111</sup> As in many postcolonial states, Korea’s postwar elite retained close ties to the former colonial power.

Third, the individualist paradigm directs attention towards compensating the victim. The postwar tribunals in Nuremberg and Tokyo took aim at the political and military leadership responsible for prosecuting the war, but left aside civilian casualties. Half a century later, in both Europe and Asia, belated attention to reparations illuminated the victims of World War II.

## Conclusion

The South Korean Supreme Court 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 so far unenforced, the Korean decisions plot a new course from Western and Japanese precedents. And while the precision of the legal reasoning may not be the legal reasoning infallible. Yet, by attaching liability to powerful

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<sup>109</sup> 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, 300 (2002).

<sup>110</sup> 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. Federal Republic of Germany*. See generally Pasquale De 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).

<sup>111</sup> *Evidence of Park Chung-hee’s military allegiance to Japan surfaces*, HANGYOREH, Nov. 6, 2009.

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.