ARTICLE

Discursive Justice: Interpreting World War II Litigation in Japan

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Since the 1980s, human rights litigation has spread around the world. I propose an analytical framework by which to interpret the multiple motivations and results of human rights litigation. By examining a recent spate of lawsuits brought by victims of World War II against Japan and Japanese corporations, this Article illuminates the contributions — and limits — of human rights litigation. Even when plaintiffs "lose," as they usually do, the judicial opinion itself often serves several non-pecuniary purposes. First, the lawsuits serve a truth function, helping to establish facts about the war that are still contested at the present moment. Second, the lawsuits hold out the possibility of advancing the rule of law. Given the serious violations of human rights that took place during the war, judicial opinions reassert the primacy of law by clearly stating why certain conduct is illegal. Third, human rights litigation can also establish violations of international law, and thus contribute to the development of international legal norms. This framework, which I call a discursive justice model, has implications for understanding human rights litigation in the United States and other parts of the world.

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I. INTRODUCTION

World War II ended in 1945.[1] Despite the occasional parade, decennial anniversary, or Hollywood film, the war has largely receded from public attention in the West. In East Asia, by contrast, the war remains a focal point of vigorous dispute across politics, law, culture, and society. In June 2017, South Korean President Moon Jae-In[2] renounced a "final and irreversible" agreement on the "comfort women" issue with Japan.[3] In June 2016, the Mitsubishi company announced a multi-million-dollar settlement with Chinese forced laborers it had used during the war. And in 2015, the seventieth anniversary of the war's conclusion, political leaders gathered in Beijing to watch a military parade, while Japanese Prime Minister Abe Shinzo delivered a carefully scrutinized apology about Japan's role in the war.[4] Beneath these incidents churn long-simmering tensions about legal liability, historical memory, remediation, and reconciliation of the war.

At the same time, hundreds of victims of the war have sought reparations through civil litigation in East Asia and the United States. Since 1990, a transnational array of World War II victims, with support from human rights lawyers and civil society groups, have sued the government of Japan and over twenty Japanese corporations. The litigants hail mainly from China and South Korea, but have also come from the Philippines, Taiwan, and Allied Powers such as Australia, the Netherlands, New Zealand, and the United States. This Article refers to these cases collectively as war reparations litigation or "WRL."

Japanese WRL decisions rarely favor plaintiffs.[5] Instead, judges generally dismiss the suits based on one of three theories: statutes of

1. The term World War II is familiar to English readers, but many lawsuits discussed herein stem from the early 1930s. In Asia, it is generally agreed that the Second World War began in 1937, with hostilities dating back as early as the 1931 Manchurian Incident. By the end of 1932, Japan had set up its first "comfort station" in Shanghai, established a biological warfare program in Manchuria, and conducted its first mass killing in China. One reason the war still casts a longer shadow in East Asia than the West is that it lasted fourteen years, compared with less than four years for the United States. *See* RANA MITTER, FORGOTTEN ALLY: CHINA'S WORLD WAR II, 1937–1945, 56–57 (2013).

2. In keeping with Chinese, Japanese, and Korean conventions, this Article places the family name first, then the given name.

3. *See* James Griffiths, *South Korea's New President Questions Japan 'Comfort Women' Deal*, CNN, June 5, 2017.

4. *See* Tom Phillips, *China Military Parade Shows Might as Xi Jinping Pledges 300,000 Cut in Army*, GUARDIAN, Sept. 3, 2015 (describing a victory parade in Beijing attended by the leaders of China, Russia, South Korea, and the United Nations); Justin McCurry, *Japanese PM Shinzo Abe Stops Short of New Apology in War Anniversary Speech*, GUARDIAN, Aug. 14, 2015.

5. Korean courts have found both the Japanese government and Japanese corporations liable in two recent decisions. In May, 2012, the South Korea Supreme Court ordered Mitsubishi Heavy Industries to pay compensatory damages and unpaid wages to Koreans who performed forced labor between 1910 and 1945. Supreme Court [S. Ct.] 2009Da22549, May 24, 2012 (S. Kor).

limitations,[6] sovereign immunity,[7] or waiver by postwar treaties.[8] In 2007, the Supreme Court of Japan issued two decisions — one involving the Government of Japan,[9] another involving a Japanese corporation[10] — that rejected plaintiffs' claims. The justices held that postwar treaties between Japan and China barred individuals from bringing claims against either the government of Japan, or Japanese corporations.[11] These interpretations, in the words of Professor Mark Levin of the University of Hawaii, foreclosed "all pending and future similar lawsuits in Japanese domestic courts."[12] The decisions have not prevented all victims from suing in Japan, but they have slowed the rate at which victims file. They have also led victims to sue in alternative fora, including their "home" jurisdictions of China and South Korea. At the time of writing (2017), courts in both China and South Korea are presiding over war-related litigation against Japanese corporations.[13]

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6. Japanese tort law provides for two statutes of limitation. Pursuant to Article 724 of the Civil Code, the right to seek compensation "shall be extinguished . . . if it is not exercised by the victim . . . within three years from the time she came to know of the damages and the identity of the perpetrator." This three-year period is known in Japanese as the period of prescription (*jikô shômetsu*). Second, the right to seek compensation may also be extinguished "when twenty years have elapsed from the time of the tortious act." This twenty-year period is known in Japanese as the statute of limitations (*joseki kikan*). *See* MINPÔ [CIVIL CODE], Art. 724. The former targets inaction by the victim, while the latter ensures legal stability. *See* Matsumoto Katsumi, *Minpô 724-jô Godan 'Joseki Kikan' Zetsu no Owari no Hajimari* [*The Beginning of the End of the Statute of Limitations Theory in the Latter Paragraph of Article 724 of the Civil Code*], 304 RITSUMEIKAN HÔGAKU 2638, 2640 (2005). Most judges dismiss claims against corporations based on the twenty-year statute of limitations. However, in at least two WRL decisions, the court held that applying the statute of limitations "would be extremely contrary to justice." *See* Zhang Baoheng v. Mitsui Mining Co., Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Apr. 26, 2002, 1098 HANREI TAIMUZU 267; Liu Lianren v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] July 12, 2001, 1067 HANREI TAIMUZU 119.

7. Sovereign immunity (in Japanese, *kokka mutôseki*) holds that the state is not obligated to pay compensation, even when the damage is caused by the state's illegal activities. Japan abandoned this principle with its postwar constitution (1946). Yet scholars generally agree that under the Meiji Constitution of 1889, sovereign immunity shielded the state from tort liability. More recent scholarship suggests that the state was immune for illegal activities *only* when exercising its proper authority. *See generally* Matsumoto Katsumi, *"Kokka Mutôseki no Hôri" to Minpôten* [*"The Principle of Sovereignty Immunity" and the Civil Code*], 292 RITSUMEIKAN HÔGAKU 317, 318 (2003); Nishino Akira, *Sensô Songai to Kokka Mutôseki no Gensoku* [*War Damage and the Principle of Sovereign Immunity*], 31 HÔSEI RIRON 107, 108 (1998).

8. Under the San Francisco Peace Treaty, along with other postwar treaties, states waived claims against Japan on behalf of their citizens. *See* Treaty of Peace with Japan, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3169. Japanese courts have found that other postwar treaties, such as that between China and Japan, affirmatively disposed of individual claims against Japan. *See* Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, P.R.C.-Japan, Sept. 29, 1972.

9. *See* Hou Qiaolian v. Japan, Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, 1969 HANREI JIHÔ 38, *available at* http://www.courts.go.jp/app/files/hanrei_jp/591/034591_hanrei.pdf.

10. *See* Song Jixiao v. Nishimatsu Construction Co., Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, 1969 HANREI JIHÔ 31.

11. *Id.*

12. Mark A. Levin, *International Decision: Nishimatsu Construction Co. v. Song Jixiao*, 102 AM. J. INT'L L. 148 (2008).

13. *See* Tabata Shunsuke, *Zhongguo Qianlaogong zai Beijing Qisu Riben Ludao Gongsi* [Chinese Former Laborer Sues Japan's Kajima Company in Beijing], RIBEN JINGJI XINWEN ZHONGWENBAN [NIKKEI

While most Japanese decisions found in favor of defendants, a handful of lower court decisions found for the plaintiffs. In this small subset of cases, Japanese judges awarded monetary compensation, as described more fully below.[14] Yet it is important to note at the outset that these decisions were all overturned on appeal. In other words, no lawsuit ended in a final and binding judgment for plaintiffs in Japan.

By one standard, then, the judicial redress movement failed. The victims received no monetary compensation for the harm they suffered.[15] No amount of interpretative wrangling can change that basic fact. Indeed, Professor Yukiko Koga of Hunter College, one of the few Anglophone scholars to examine these lawsuits, suggests such results show the "absence," "erasure," "lacuna," or even "vacuum" of law.[16] In this view, law's inability to compensate victims of grievous human rights abuses reveals a fundamental failure of law as a social institution.[17]

Before consigning these efforts to failure, however, one must measure what the lawsuits accomplished. Must a verdict be judged by whether the plaintiff won a damages award? The attachment of meaning is, ultimately, a subjective enterprise. Monetary compensation and apologies are certainly plaintiffs' primary desiderata.[18] But they are not the only ones involved in litigation. Moreover, lawsuits can also serve symbolic, ideological, social, educational, and moral aims.[19]

In light of these various persons and purposes, this Article seeks to make two primary contributions to legal scholarship. First, it provides a

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(CHINESE EDITION)], Dec. 6, 2016 (describing a lawsuit filed by 92-year-old former laborer Guo Shusheng against Kajima Corporation in Beijing Third Intermediate People's Court); *South Korea Court Orders Japanese Firm to Compensate Forced Laborers*, JAPAN TIMES, Nov. 24, 2016. Several South Korean courts have also ordered Japanese corporations to compensate Korean forced laborers.

14. *See infra Part III*. Plaintiffs also sought apologies, but courts did not order defendants to apologize. Even in the cases where plaintiffs won monetary compensation, the courts construed the defendants' torts as derelictions (failures to uphold a duty), rather than acts to defame or dishonor the plaintiffs. Consequently, courts did not order defendants to issue apologies in local newspapers.

15. In several cases, Japanese corporations settled with the plaintiffs. *See, e.g.*, Tokyo Koto Saibansho [Tokyo High Ct.] Nov. 29, 2000, Hanaoka Incident; Zhang v. Nishimatsu, Hiroshima Chiho Saibansho [Hiroshima Dist. Ct.] July 9, 2002, *rev'd* Hiroshima Koto Saibansho [Hiroshima High Ct.] July 15, 2003, *rev'd* Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, *settled* (Oct. 23, 2009).

16. Yukiko Koga, *Between the Law: The Unmaking of Empire and Law's Imperial Amnesia*, 41 L. & SOC. INQUIRY 402, 429–30 (2016).

17. *Id.* at 403.

18. Most plaintiffs included a damages award, and the publication of an apology in major newspapers, in their petitions to the court. *See, e.g.*, Zhang Baoheng v. Mitsui Mining, Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Apr. 26, 2002, 1098 HANREI TAIMUZU 267 (allowing plaintiffs' monetary compensation claim, but denying their apology claim).

19. *See* Robert N. Strassfeld, *Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, WISC. L. REV. 839, 844 (1994) (noting the use of "popularly held myths, symbols, and beliefs, as well as legal doctrines" to persuade judges).

comprehensive survey, in English,[20] of the war reparations litigation, a social movement with implications for current discussions and reconciliation efforts for World War II, international relations, and the role of civil litigation in remediating grave human rights abuses. In so doing, it describes an important, if neglected, part of contemporary human rights litigation, akin to the Alien Tort Statute litigation in the United States. It also discusses several cases, many for the first time in English, that bear on doctrinal issues common in human rights litigation, such as statutes of limitation, sovereign immunity, corporate liability, and violations of international law.

Second, this Article posits a framework to explain the multiple motivations behind these lawsuits, and to evaluate their underlying significance. Scholars rightly question what litigation offers to human rights and socio-legal movements, particularly when the underlying events took place half a century ago, and when the plaintiffs "lose."[21] *Discursive justice* begins from the proposition that words matter. Discourse refers to patterns in the way people talk, write, and think about particular phenomena.[22] These patterns in turn inform history, politics, race, society, and a wide range of other disciplines. A judicial opinion both participates in, and reproduces, official discourse; it may determine a whole range of ancillary matters before decision on the plaintiff's primary claims. These different ways of talking about historical events, the varied ways in which judges frame human rights violations, the diverse configurations of tort or contractual liability, and other elements of the judicial opinion constitute legal discourse.[23] These subsidiary meanings must also form part of the scholarly enterprise.

Human rights litigation operates on multiple levels and may mean different things to disparate actors: victims, plaintiffs, defendants, lawyers, civil society organizations, and academics. Plaintiffs seek monetary compensation, apologies, and the restoration of dignity. Defendants aim to minimize their culpability in a number of possible ways: denying the facticity of the underlying events, refuting the underlying legal theory, or diminishing the publicity generated by the lawsuit. Lawyers translate grievances into legal claims: infringements of domestic or foreign tort law, breaches of contract,

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20. The war reparations movement in Japan has attracted some scholarly attention in English, primarily by Japanese scholars. With the exception of Koga, *supra* note 16, most articles were published a decade or two ago. *See, e.g.*, Masahiro Igarashi, *Post-War Compensation Cases, Japanese Courts and International Law*, 43 JAPANESE ANN. INT'L L. 45 (2000) (offering a typology of cases brought by 2000, including forced labor, comfort women, prisoner of wars, indiscriminate bombing, and others); Tetsuo Ito, *Japan's Settlement of Post-World War II Reparations and Claims*, 37 JAPANESE ANN. INT'L L. 38 (1994) (arguing that the postwar treaties have disposed of all claims from individuals).

21. *See* Douglas NeJaime, *Winning through Losing*, 96 IOWA L. REV. 943, 947 (2011) (articulating productive ways that activists, lawyers, and others can use "litigation loss," i.e., when plaintiffs lose their lawsuits).

22. MARY BOYLE, SCHIZOPHRENIA: A SCIENTIFIC DELUSION? 207 (1998).

23. James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 520–22 (1996) (defining "legal discourse" as the facts, holding, numerous interpretations of a case, as well as the uncertainty about the ultimate meaning of a case).

and violations of international law. Civil society groups support lawsuits, seek court media attention, publicize the results, and inform the public about the reasons plaintiffs sought redress in the courts. Any attempt to understand human rights litigation must grapple with these disparate perspectives.

Discursive justice examines three sources of meaning salient to many human rights lawsuits. First, judicial opinions recognize *facts*. A court's depiction of historical events — indeed even calling them *facts* — may be particularly valuable in societies where denial of those very facts is prevalent. Judicial opinions, official records penned by neutral arbiters, lend weight to certain reconstructions of the past. Second, the court's characterization of the harm visited upon the plaintiff — the way it frames the tort or breach of contract — matters for the rule of law, the restoration of dignity, and the repair of relations between victim and perpetrator. The construction of the tort also matters to lawyers, who advance novel theories of liability in the hopes that courts will accept them. Third, discursive justice grapples with the international law implications of human rights litigation. A court's finding that defendant violated international law signals that its conduct reached a serious level of harm or egregiousness. As a matter of practice, it is still relatively uncommon for a domestic judge to find that her government violated international law. Moreover, international law helps universalize standards by which to judge human rights violations; cross-jurisdictional comparison may be helpful to the buttressing of human rights litigation in other parts of the world. Given the increasingly transnational nature of both litigation and human rights abuses, this third inquiry may help human rights litigation in other jurisdictions.

There are, of course, possible objections to this framework. First, discursive justice remains a theory. This author has not conducted interviews with lawyers, plaintiffs, or activists to see if they attach the various meanings described below. The fact that plaintiffs continue to file lawsuits, even after so many "failures," suggests, however, that other motivations, encapsulated by a theory of discursive justice, may be at stake.[24] But full confirmation of this hypothesis must await additional research.

Second, by diverting attention away from the ultimate decision, discursive justice runs the risk of diminishing the verdict's impact. Given the severity of the underlying violations, the length of time that has elapsed, and the impending mortality of many plaintiffs (some of whom have died during the course of the lawsuit), the loss is substantial and often irrevocable.

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24. In June 2015, Chinese forced laborers filed a lawsuit against Japan for its role in trafficking them to Japan, and forcing them to work in a mine. *See Kyôsei Renkô Kuni o Teiso: Chûgokujinra Jûsan Baishô Motome* [*Forced Transportation Lawsuit against the State: Thirteen Chinese Seek Reparations*], MAINICHI SHIMBUN, June 27, 2015, *available at* http://www.jca.apc.org/hanaokajiken/.

Third, some doubt that litigation is an appropriate response to wartime atrocities. Some of the benefits described below — factual recitation, restoration of dignity, reinforcement of the rule of law — are available through alternative mechanisms, such as truth and reconciliation commissions, public hearings, or remedial legislation.[25] Each of these mechanisms would, however, require a legislative response, and Japan's national legislature, or Diet, has proven unwilling to pursue these alternative measures.[26]

The argument proceeds in four Parts. Part I offers an account of discursive justice. After examining the rise of transnational human rights litigation in the United States and Japan, this Part singles out the key players, motivations, and concerns of the human rights actors. This includes the traditional binary of whether plaintiffs won the suit. But it extends beyond this inquiry by asking if other players achieved their goals. Even if plaintiff lost the case, did she gain something through the process? For instance, did the court acknowledge the fact of their suffering (rape, enslavement, abuse, etc.)? What about the civil society groups? And what about the lawyers, who filed the suits and funded them out of their own pocket? Did the court apply a novel legal theory proposed? Did it endorse a version of history supported by civil society groups?

Parts II, III, and IV apply the discursive justice paradigm to three issues raised in the postwar compensation litigation. Part II investigates the issue of factual recognition. Many lawsuits responded directly to statements made by Japanese politicians about World War II, from the "comfort women" to the Rape of Nanjing. Plaintiffs' lawyers go to extraordinary lengths to elucidate the factual background in these cases. They also closely evaluate the "factual recognition" section of each judgment to see what facts are accepted. The establishment of facts is thus a central concern to victims, lawyers, and civil society groups, independent of whether the court orders compensation.

Part III examines the small minority of plaintiffs' victories — those decisions where the court ordered compensation. One might expect that courts, in delivering a victory to plaintiffs, articulate a strong human rights message. But that is not necessarily the case. Instead, courts construe the

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25. In 2000, a group of civil society actors held a mock trial of Japan's comfort women system in Tokyo. The judges included Christine Chinkin (Professor Emerita of International Law, London School of Economics), Gabrielle McDonald (Former President of the International Criminal Tribunal for the Former Yugoslavia and U.S. District Court judge), and Willy Mutunga (who subsequently became the Chief Justice of Kenya). *See* Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, *available at* http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/.

26. Individual members of the Diet have submitted numerous bills to resolve the comfort women issue, but they have been unable to persuade a majority of their fellow members to pass a law. *See* Digital Museum: The Comfort Women Issue and the Asian Women's Fund, *Attempts at Legislation in the Japanese Diet*, www.awf.or.jp/e4/legislation.htm.

tort — the underlying illegality — in vague or indirect ways. They seem to cushion the blow of finding against the state or corporation by attaching liability to legal fictions or acts of omission. In other words, even if they provide compensation, these decisions do not necessarily advance the rule of law, accountability, and human rights values more generally, at least at a discursive level.

Part IV grapples with the international law implications of these lawsuits. Specifically, have Japanese courts found the Japanese government or Japanese corporations violated international law? Drawing on expressivist and reputational accounts of international law, this Article finds the WRL decisions play a muted role in naming and redressing violations of international law. A conclusion distills the lessons and suggests alternative lines of inquiry.

II. THE DISCURSIVE JUSTICE FRAMEWORK

The broader thesis of this Article — that litigation serves discursive, symbolic, or expressive concerns — builds on several decades of practice and scholarship. The following section examines the rise of human rights litigation in the United States and Japan, introduces the different players, and then propounds the theoretical framework of discursive justice.

A. Public Law Litigation in the United States and Japan

Four decades ago, the late Professor Abraham Chayes of Harvard Law School sketched the basic features of the traditional civil lawsuit: a private, bilateral affair seeking to remediate a past harm.[27] In contrast, he offered a theory of public law litigation, where litigants vindicate human rights that the political branches fail to protect.[28] Public law litigation redeemed those who had fallen through the cracks of public institutions and social services: schools, prisons, mental health facilities, housing, and so on.[29] The logic was simple: the political branches had failed a discrete group that the judiciary could make whole again.

A cause, or broader set of goals, normally attaches to public law litigation. Chayes cited the Supreme Court's racial discrimination

27. Chayes lists five elements of traditional civil adjudication: (1) two parties, (2) past events, (3) relationship between right and remedy, (4) lawsuit applies only to the parties ("self-contained"), and (5) party-controlled. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

28. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

29. *Id.*

jurisprudence to suggest the possibility that litigation could advance social causes.[30] Such progress, of course, was hardly assured. Chayes specifically noted the Court's "lack of sympathy with … the idea of the district courts as a vehicle of social and economic reform."[31] For Chayes, the courtroom and ballot-box were both sites of political contestation. And while lawsuits lack the finality or clarity of an election, they allow individuals to step into the arena, assert rights, contest norms and narratives, and demand official recognition. Over time, the idea of "public" law litigation expanded to reach issues important both to the left (civil rights and anti-discrimination), and to the right (lower income taxes and corporate tax breaks).[32] Whatever the political orientation, the suit itself promoted a larger reform effort. The imperatives underlying the lawsuit — effectuating social change, remediating harm, highlighting failures of the political branches — remain vital to the institution of public interest litigation.

Drawing on public law precedents, human rights litigation emerged in the United States in the 1980s.[33] The Alien Tort Claims Act, resurrected after two centuries of dormancy, enabled federal courts to preside over human rights abuses from around the world.[34] State officials and corporate defendants faced protracted legal battles, potentially large damage awards, public censure, and unsympathetic juries in the lawsuits.[35]

While some celebrate human rights litigation, others sound a more circumspect tone. [36] Scholars pinpoint a tension between "elite" and "grassroots" lawyering.[37] At the elite level, lawyers vindicate "substantive principles in the upper echelons of state structure on behalf of 'unrepresented interests,' 'the public interest,' or other similar constituencies."[38] At the grassroots level, lawyers address the immediate problem or violation endured by the plaintiff. In many cases, grassroots and

30. Chayes, *supra* note 26, at 1304.

31. *Id.* at 1305.

32. Ann Southworth, *Conservative Lawyers & The Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1249 (2009).

33. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHICAGO J. INT'L L. 457 (2002).

34. The ATCA has targeted many world leaders, including Premier Li Peng (China), President Robert Mugabe (Zimbabwe), President Ferdinand Marcos (Philippines), and President Radovan Karadzic (Serb Republic).

35. *See, e.g.*, Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown*, N.Y. TIMES, Sept. 1, 2000 (describing the filing of a lawsuit in Manhattan against Li Peng); Henry Weinstein, *U.S. Court Upholds Damages Against Marcos*, L.A. TIMES, Dec. 18, 1996 (noting the Ninth Circuit's affirmation of a Honolulu court's damages award against the estate of Ferdinand Marcos).

36. *See,* e.g., Bradley, *supra* note 32, at 459 (noting the costs that alien tort cases impose on foreign policy).

37. Thomas M. Hilbink, *You Know the Type….: Categories of Cause Lawyering*, 29 L. & SOC. INQ. 657 (2004).

38. *Id.* at 683.

elite concerns overlap. But they can also diverge, splitting the lawyer between the particularities of her client's case, and the broader cause or principle she seeks to establish through litigation.[39]

In the end, many human rights lawsuits do not provide anything close to a suitable *monetary* remedy.[40] Plaintiffs often lose on technical, legal, or evidentiary grounds. Even when they win, plaintiffs may not collect for various reasons.[41] A related question asks, what *is* an appropriate remedy? The traditional remedy in civil cases, monetary damages or injunctive relief, may not suffice to make victims whole again. But the law can often do little else. When one considers the cost of litigation, as well as its inherent uncertainty, courts may offer suboptimal results even in the best of outcomes. As Professor Orly Lobel of the University of San Diego School of Law suggests, "the law often brings more harm than good to social movements that rely on legal strategies to advance their goals."[42]

Perhaps because of these drawbacks, some scholars detect motion away from litigation, or at least using litigation as the predominant strategic tool to promote a cause.[43] Instead, more collaborative and interdisciplinary activities — policy proposals, lobbying, education, truth and reconciliation commissions, community organizations — occupy much of the human rights lawyer's time. If that is so, why sue at all? What contribution does litigation make to the cause? One way to answer that question is to examine the motivations that actors bring to the process.

i. Human Rights Litigation in Japan

Public law litigation has also developed in Japan over the last half century. The Japanese, it is frequently stated, litigate less often than Americans do,[44] so public law litigation is itself rarer.[45] Yet public law

39. *Id.*

40. Sabel & Simon, *supra* note 28, at 1054.

41. This has been particularly acute in the alien tort context. *See* Rosemary Nagy, *Post-Apartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?*, 40 L. & SOC'Y REV. 623, 628 (2006).

42. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 936 (2007).

43. Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2076 (2008).

44. A large body of literature explains reputed reluctance of the Japanese to litigate. *See* John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUDIES 359 (1978) (ascribing Japan's lower usage of litigation to institutional factors, such as fewer judges and lawyers); J. Mark Ramseyer, *Reluctant Litigation Revisited: Rationality and Disputes in Japan*, 12 J. JAPANESE STUDIES 111 (1988) (attributing Japan's low litigation rate to the modest and predictable size of damage awards, at least as compared to the United States). Of course, citizens of many countries sue less often than Americans. Haley, at 361.

45. Robert L. Kidder & Setsuo Miyazawa, *Long-Term Strategies in Japanese Environmental Litigation*, 18 L. & SOC. INQUIRY 605 (1993). The authors describe the United States as a "jungle" for social

litigation has addressed social concerns, including human rights abuses, for many decades in Japan.[46]

In the 1960s, as Professor Frank Upham of New York University School of Law documents, the "Big Four" environmental lawsuits led to successive victories against companies whose factories polluted and poisoned local residents.[47] Women, too, have challenged employment discrimination in Japanese courts.[48] In response, courts devised new legal doctrines from relatively "thin" law in employment discrimination in an effort to safeguard equality in wages, hiring, retirement, and termination.[49] The 1985 Equal Employment Opportunity Law codified some of this jurisprudence, providing an additional set of statutory protections for Japanese women.[50] Employment discrimination is still a problem in Japan, as in many places around the world. Nevertheless, Japanese courts have buttressed employment rights through a form of "stealth activism."[51]

Ethnic and racial minorities have used courts to oppose government policies and challenge administrative actions. Resident Koreans used litigation to challenge Japan's nationality requirements, procedures for registering as a resident alien, and naturalization requirements.[52] The Ainu, Japan's indigenous minority, sued the Japanese government for expropriating land sacred to them.[53] In the 1990s, foreigners of diverse ethnic backgrounds challenged racial discrimination in public accommodation. Caucasian, African-American, South Asian, Brazilian, and Chinese plaintiffs have sued bars, bathhouses, stores, and restaurants for excluding them on discriminatory grounds.[54] Japanese courts awarded compensation to plaintiffs on several occasions, suggesting a role for courts in adopting international legal norms, even in the absence of domestic law

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movement litigation, while describing Japan as a "desert." *Id.* at 608. They analyze an "oasis," or case study, involving environmental litigation in the 1980s and 1990s. *Id.* at 609.

46. FRANK K. UPHAM, LAW & SOCIAL CHANGE IN JAPAN 35 (1987).

47. Ultimately, Japan passed a compensation law to remediate victims of pollution-related health injuries. *Id.* at 58.

48. *Id.* at 129

49. *Id.* at 130. Constitutional norms of gender equality, enshrined in Article 14 of the Japanese Constitution, do not apply to private action.

50. Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. UNIV. L. REV. 1493, 1501 (2011) [hereinafter Stealth Activism].

51. *Id.* at 1501.

52. YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 150–75 (1998) (discussing lawsuits brought by resident Koreans against the Japanese government for degrading treatment, political rights, pensions, and public service employment).

53. *See* Katano v. Hokkaido Expropriation Committee, Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Mar. 27, 1997, 1598 HANREI JIHÔ 78; Mark A. Levin (trans.), *The Nibutani Dam Decision*, 38 I.L.M. 394 (1999) (recognizing the Ainu, one of Japan's indigenous populations, as a distinct ethnic group).

54. See Timothy Webster, *Reconstituting Japanese Law: International Norms and Domestic Litigation*, 30 MICH. J. INT'L L. 211, 213 (2008).

prohibiting racial discrimination.[55] The judiciary is well poised to deliver remedies in the context of small, discrete acts of harm. But judges' ability to provide remedies in larger and politically complex areas such as war reparations is more tenuous.

ii. World War II Litigation in Japan

In the West, World War II litigation is largely a phenomenon of the 1990s and early 2000s. Victims sought compensation for a variety of war crimes in American, German, Greek, and Italian courts. German forced laborers sued their government in 1993,[56] while Greek victims of a German massacre filed a tort action in 1995.[57] Later, victims sued multinational corporations that used slave labor, and banks that redistributed assets seized from the accounts of Holocaust victims, in the United States.[58] These decisions have been part of a larger global reexamination of the war and reapportioning of liability for the war.[59] Ultimately, these efforts produced multi-billion-dollar settlements, such as the German Remembrance Fund, between the victims of European war crimes on the one hand, and the governments, banks, and corporations of Switzerland, Germany and Austria on the other.[60] Such finality eludes litigants in East Asia. But that does not prevent them from trying.

The 1990s witnessed an uptick in World War II litigation in Japan as well. Before turning to those suits, however, we review a few cases from the immediate postwar period. After World War II, the Allied powers established the Tokyo Tribunal (1946-1948). The Tribunal prosecuted twenty-five of Japan's top leaders for crimes such as aggression, conspiracy,

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55. *Id.* at 235.

56. Bundesverfassungsgericht [Federal Constitutional Court] May 13, 1996 ("Krakauer I"). The court dismissed the case on procedural grounds, but found that the state, not the individual, has the right to press claims for violations of international law. *See* Burger-Fischer v. DeGussa, 65 F. Supp. 2d 248, 279–80 (D.N.J. 1999) (describing lawsuits brought in three German courts). *See generally* Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 508–09 (2002).

57. In Greece, the Distomo case centered around Germany's 1944 massacre of a Greek village. Ilias Bantekas, *Prefecture of Voiotia v. Fed. Rep. Germ.*, *Case 137/1997*, 92 AM. J. INT'L L. 765 (1998).

58. In the United States, Holocaust victims filed a class action lawsuit against three Swiss banks in October 1996. Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, The United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683, 689 (2003). The first forced labor lawsuit in the United States, against Ford Motor Company and its German subsidiary, was filed in 1998.

59. *See* ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICE 3–18 (2000).

60. *See* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003) (describing the various mechanisms worked out by the Swiss, German and Austrian governments and private sectors).

and the controversial failure to prevent war crimes.[61] But like many post-conflict judicial mechanisms, these efforts were incomplete.[62] First, they only targeted a few big fish, passing over many lesser war criminals. Second, as a military court, the Tribunal devoted little attention to issues of remediation. Instead, the focus was on punishing the most culpable. Third, many war crimes, from the "comfort women" system to the medical experimentation of Unit 731, were either overlooked[63] or suppressed.[64] Fourth, some of the damage — radiation sickness from the bombing of Hiroshima, unexploded ordnance left by Japan in China — emerged years or even decades *after* the war.

Even at its earliest stages, Japanese civil litigation probed issues of compensation, citizenship, and liability.[65] In 1955, Shimoda Ryûichi, and other survivors of the atomic bombing of Nagasaki, sued the Japanese government for waiving their rights to seek compensation from the United States.[66] Eight years later, the Tokyo District Court dismissed the case, finding that the individual does not have a right to seek compensation from the state.[67] This interpretation, in effect denying legal personality to individuals, has played a central role in Japanese decisions ever since.[68]

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61. The Tokyo Tribunal tried twenty-eight Japanese defendants, but two died and one was declared unfit for trial. RICHARD MINEAR, VICTOR'S JUSTICE 203 (1970).

62. *See* RUTI G. TEITEL, TRANSITIONAL JUSTICE 40 (2008) ("[S]ome selectivity is inevitable given the large numbers generally implicated in modern state prosecutions, scarcity of judicial resources in transitional societies, and the high political and other costs of successor trials.")

63. *See* Nicola Henry, *Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial*, 37 ASIAN STUD. REV. 362, 362 (2013) (noting "the failure of the [Tokyo] Tribunal to adequately prosecute crimes such as the vivisection of prisoners, biological warfare and the systematic sexual enslavement of the so-called 'comfort women'").

64. The United States agreed not to prosecute Japanese medical experimenters if they handed over all of the evidence derived from brutal human experimentation to Allied forces. *See generally* SHELDON H. HARRIS, FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE, 1932–1945, AND THE AMERICAN COVER-UP (2002).

65. Yasuhiro Okuda*, Government Liability for Injuries to Foreign Individuals in Japan*, 3 Y.B. PRIV. INT'L L. 115, 116 (2001).

66. Under the San Francisco Peace Treaty, the Japanese government extinguished its citizens' rights to seek compensation against the Allied Powers, including the United States. Shimoda claimed Japan's waiver imposed an obligation to pay damages upon Japan. Shimoda v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 7, 1963, 355 HANREI JIHÔ 17, 37, translated in 8 JAPANESE ANN. INT'L L 212 (1964). The original opinion is available in Japanese at http://www.geocities.jp/bluemilesjp/genbaku.html.

67. *Shimoda*, 8 JAPANESE ANN. INT'L L. 245 ("individuals are not the subject of rights in international law, unless it is concretely recognized by treaties"). This subscribes to the classical theory of international law as a set of regulations that binds states, but not individuals. This theory is increasingly untenable in the contemporary age. Yet Japanese courts in the war reparations lawsuits have adhered to this formula, believing it represents the status of international law during the time of the underlying events (the 1940s).

68. *See infra*, note 330, and accompanying text.

Shimoda is important in two other respects. First, the decision held that the bombing of Nagasaki violated international law.[69] This finding, it is said, so satisfied the plaintiffs that they did not appeal the dismissal.[70] In the terms of this Article, the decision provided adequate discursive justice — a judicial recognition of wrong — to satisfy the plaintiffs, even though no damages were awarded. Second, the court pointed out that the responsibility for determining the sufficiency of the remedy lay with the Diet (national legislature) and Cabinet (executive), not the judiciary.[71] This also resonates in the war reparations litigation movement, as courts have frequently claimed that the issue of reparations is a political matter for the other branches of government to decide.

In 1976, several Taiwanese veterans, who worked for the Japanese Imperial Army, sued Japan for medical pensions. The 1952 Relief Law provided pensions to Japanese nationals, but not to non-nationals.[72] The Taiwanese veterans argued the nationality requirement amounted to irrational discrimination and violated the Japanese constitution and applicable international human rights law.[73] While dismissed at all three instances,[74] the Tokyo High Court urged the Diet to offer compensation and to determine "the number of recipients, amount of compensation, timing, and method of payment."[75] The Diet responded within one year, passing a law to pay "condolence money" of 2 million yen ($20,000) to each Taiwanese soldier.[76] Other former colonial subjects, including Koreans, have also sued Japan to gain access to health care and related benefits.[77] Japanese courts have regularly dismissed their claims, finding that Japan's failure to provide pensions based on nationality does not violate the equal

69. *Shimoda*, *supra* note 67, at 241–42.

70. Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 761 (1965).

71. *Shimoda*, *supra* note 67, at 250.

72. Deng Sheng et al. v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Feb. 26, 1982, 463 HANREI TAIMUZU 90, *aff'd* Tokyo Koto Saibansho [Tokyo High Ct.] Aug. 26, 1985, 1065 HANREI JIHÔ 41. Most Japanese social services require Japanese nationality.

73. *Id.* at 91. According to Professor Iwasawa, Japan included the nationality requirements because the compensation question would be concluded between different countries. IWASAWA, *supra* note 52, at 177.

74. The courts determined that the issue of compensation was fulfilled by the peace treaties.

75. *Deng Sheng*, 1065 HANREI JIHÔ, at 70.

76. IWASAWA, *supra* note 52, at 179.

77. *See generally* Asada Masahiko, *Nihon ni okeru Sengo Hoshô Saiban to Kokusaihô* [*War Compensation Trials in Japan & International Law*], 1321 JURISUTO 26, 27-28 (2006). *See also* SUSAN SOUTHWARD, NAGASAKI: LIFE AFTER NUCLEAR WAR 225 (2015) (describing the efforts of Korean atomic bomb survivors to obtain medical care and compensation); Petra Schmidt, *Disabled Colonial Veterans of the Imperial Japanese Forces and the Right to Receive Social Welfare Benefits from Japan*, 21 SYDNEY L. REV. 230 (1999).

treatment principles of the constitution.[78] Judges have repeated the *Shimoda* interpretation that compensation is a political matter for the Diet.[79]

In the 1990s, a new phase of World War II litigation began in Japan. On December 7, 1991, 50 years to the day after the Pearl Harbor attacks, former comfort woman Kim Hak-sun launched a campaign of her own.[80] She was among the first foreigners to sue Japan for compensation from the war. Outraged by Japanese denials about comfort women, Kim and thirty-five compatriots sought an apology (injunctive relief) and compensation from the Japanese government.[81] Since Kim's lawsuit, hundreds of victims have stepped forward to seek compensation, filing over one hundred lawsuits in Japan, China, Korea, and the United States.[82] This Article examines one slice of that activity: cases brought against the Japanese government, and Japanese corporations, in the courts of Japan.[83]

B. Players in Postwar Compensation Litigation

Winning in the traditional sense, per Chayes, may not be the primary motivation of the plaintiffs, lawyers, or civil society groups in the war reparations movement. All of the winning decisions, rare in and of

78. *Schmidt*, *supra* note 77, at 243.

79. *Id.*

80. Kim Hak-sun v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 26, 2001, 1597 HANREI JIHÔ 102.

81. Other plaintiffs included former soldiers, comfort women, military personnel, and heirs thereof.

82. These include approximately 81 lawsuits in Japan. *See* Tanaka Hiroshi, Nakayama Taketoshi & Arimitsu Ken, *Sengo Hoshô Nokosareta Kadai* [*Remaining Challenges in Postwar Compensation*], *in* MIKAIKETSU NO SENGO HOSHÔ: TOWARERU NIHON NO KAKO TO MIRAI [UNRESOLVED WAR COMPENSATION: QUESTIONING JAPAN'S PAST & FUTURE] (Tanaka Hiroshi et al. eds., 2012). The appendix lists ninety postwar compensation lawsuits, eighty-one filed since 1990. *Id.* at 208–13. In addition, prisoners of war, comfort women and forced laborers have filed over two dozen lawsuits in the United States. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 311 (2003). Korean victims have also sued Japan and Japanese corporations in Korea. In 2011, the Constitutional Court of Korea held the Korean government's failure to resolve the comfort women issue with the Japanese government was unconstitutional. Constitutional Court [Const. Ct.], 2006 Hun-Ma 788, Aug. 30, 2011 (S. Kor.). *See also* Seokwoo Lee et al. *Historical Issues between Korea and Japan and Judicial Activism*, 35 U. HAW. L. REV. 857 (2013). In 2012, the Korean Supreme Court awarded damages to five Korean forced laborers who worked at Mitsubishi factories in Hiroshima. *See* Supreme Court [S. Ct.], 2009 Da 22549, May 24, 2012 (S. Kor.). Numerous lawsuits have followed in the wake of this decision. *See Seoul Court Orders Toyama Firm to Compensate WWII Forced Laborer*, JAPAN TIMES, Mar. 17, 2017. Finally, a Chinese court accepted that country's first World War II lawsuit, against Mitsubishi Materials and Nippon Coke and Engineering, in 2014. *See Chinese Sue Japan Firms Over Forced World War Two Labour*, BBC, Feb. 26, 2014. The case settled in 2016, with Mitsubishi issuing an apology and paying 100,000 renminbi (about $15,000) to each of the three survivors. Austin Ramzy, *Mitsubishi Materials Apologies to Chinese World War II Laborers*, N.Y. TIMES, June 1, 2016.

83. Igarashi Masahiro, *Nihon no 'Sengo Hoshô Saiban' to Kokusaihô'* [*Japan's "Postwar Compensation Lawsuits" & International Law*], 105 KOKUSAIHÔ GAIKÔ ZASSHI [JOURNAL INT'L L. & INT'L REL.] 1, 12 (2006).

themselves, were overturned on appeal. A more nuanced understanding of litigation must grapple with the possibility of numerous purposes among the litigants. To understand these multiple motives, we begin by looking at the actors themselves.

i. Victims

Victims want many things. Some seek an apology.[84] After a serious injury, a sincere apology helps restore the relationship between victim and perpetrator.[85] It can also be forward-looking: a promise never to repeat the past.[86] The availability of apology as a legal remedy in many East Asian jurisdictions suggests its importance across various cultures.[87] Particularly in Japan, "apology is an integral of every resolution of conflict."[88]

Some desire monetary compensation.[89] This would cover damages for the emotional and physical harm suffered. For others, forced laborers and comfort women, damages would also disgorge unpaid wages from the corporate actor that benefited from their labor.[90] During the war, Japanese policymakers set rates for forced laborers and comfort women.[91] Yet many were never paid.

Other victims seek a more stable position within historical memory, or greater public awareness.[92] For decades, no one talked about the serious human rights violations of World War II.[93] Moreover, the Japanese government concealed information about its wartime record of abuse and even destroyed evidence of those abuses.[94] The resultant social amnesia

84. Many plaintiffs have sought apologies from the Japanese government, and individual Japanese corporations, for the events of the war. *See, e.g.*, PEIPEI QIU, SU ZHILIANG & CHEN LIFEI, CHINESE COMFORT WOMEN: TESTIMONIES FROM IMPERIAL JAPAN'S SEX SLAVES 97 (2012).

85. Max Borstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 546–47 (2000).

86. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 470 (1986).

87. Brent T. White, *Say You're Sorry*: *Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1262 (2006) (noting that China, Japan, and Korea all provide court-ordered apologies for civil law violations).

88. Wagatsuma & Rosett, *supra* note 86, at 463.

89. Virtually all plaintiffs in the war reparations litigation movement have sought monetary compensation in the form of a damages award (*songai baishô*).

90. QIU, *supra* note 84, at 62 (noting that comfort women received either nothing or very little by way of payment).

91. For example, Issues Concerning the Importation of Chinese Laborers, the Japanese government's 1942 policy on obtaining Chinese forced labor, stated "The salary of the laborers will be commensurate with wages they would make in China." *See* Zhang v. Rinkô, 50 SHÔMU GEPPÔ at 3456.

92. *Forced Laborer's Son Asks Japan to Respect Redress Ruling*, KYODO NEWS, July 13, 2001 (describing how a forced laborer's son was "glad to know many people learned about his father's fate through the trial").

93. DAI SIL KIM-GIBSON, SILENCE BROKEN: COMFORT WOMEN 98 (1999)

94. The most infamous example would be the alleged burning of a report, compiled in 1946, that detailed the extent of Japan's use of Chinese forced labor. Government officials repeatedly stated the

made it difficult for victims to speak publicly, openly, or frankly about their experiences.[95] As memories fade, people die, and life moves on, this aversion hardens into oblivion. Plaintiffs have demanded that textbooks and educational materials include their story.[96] In the few settlements that have emerged from the WRL, plaintiffs have pressed corporate defendants to establish historical monuments, steles and museums to commemorate the past.[97]

Victims also want official acknowledgment. Given the state's role in the abuses, as well as its attempts to cover up the abuses, judicial opinions have the ability to reinsert victims back into a past from which they have been, in many ways, erased. The comfort women suffered affronts to physical, mental, and reproductive health. They were dehumanized by being "called by a number, an assigned name, or by nothing at all."[98] As official records carrying state imprimatur, judicial opinions constitute a form of official acknowledgment, a reconstruction of official history. It is not uncommon for judicial opinions to recount Japan's wartime policy, plaintiffs' suffering, and defendants' complicity, in painstaking detail.

These histories contradict official narratives espoused by certain government officials. Indeed, the lawsuit invites the victim to express her views. Scores of Chinese, Korean, Taiwanese, Philippine, and other Asian victims have testified in Japan. While the fact section of the opinion is written by a judge, and the victim's testimony guided by a lawyer,[99] the inclusion of victims' narratives creates "an official record of the human rights abuses inflicted on them."[100] The text of the opinion itself — carefully constructed, permanent, monolithic — cannot be secreted like a government report, censored like a history textbook, or consigned to obscurity in nameless archives.

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report had been burned, only to have it publicly appear in 1994. *See* William Underwood, *NHK's Finest Hour: Japan's Official Record of Chinese Forced Labor*, ASIA-PACIFIC JOURNAL|JAPAN FOCUS, Aug. 14, 2006, http://apjjf.org/-William-Underwood/2187/article.html.

95. Many former comfort women, for instance, have never spoken of their experience as comfort women.

96. Edward Neilan, *Japan Regrets Era of Forced Prostitutes*, WASH. TIMES, Jan. 14, 1992. Lawyer Takagi Kenichi, who has represented many victims, noted that the comfort women sought monetary damages, a memorial for the comfort women, and inclusion in history textbooks. *Id.*

97. Uchida Masatoshi, *Hanaoka Wakai kara Nishimatsu Wakai e* [*From the Hanaoka Settlement to the Nishimatsu Settlement*], 333 RITSUMEIKAN HÔGAKU 1631, 1632 (noting plaintiffs' request that defendants build memorial steles in two forced labor settlement arrangements).

98. QIU, *supra* note 84, at 58.

99. The Tokyo Women's Tribunal (2000) allowed many former comfort women to speak in their own voice before a panel of mock judges. *See* Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, Transcript of Oral Judgment (Dec. 4, 2001), www.iccwomen.org/ wigjdraft1/ Archives/oldWCGJ/tokyo/summary.html.

100. Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations against Women*, 5 HASTINGS WOMEN'S L.J. 143 (1994).

For other victims, confronting one's tormentor brings its own consolation.[101] Civil litigation in this way allows victims "to exact justice from their perpetrators.[102] It is not quite retribution, in the sense that victims do not demand an eye for an eye. But as scholars in restorative justice studies report, some victims "take tremendous personal satisfaction from filing a lawsuit" and "forcing the defendant to answer in court."[103] Other plaintiffs find redress in a judgment that "the defendant had transgressed universally recognized norms of international law."[104] Given the slow gears of justice in Japanese civil litigation,[105] where a trial court decision can take up to a decade,[106] the process takes a toll on defendants and plaintiffs alike. Victims may well be the *sine qua non* of human rights litigation. But others also have a stake in the outcome of the lawsuit.

ii. Lawyers

Lawyers, too, serve various purposes. They represent clients, and seek to vindicate their legal interests. Before filing a lawsuit, lawyers must expect that litigation will bring their client closer to a remedy. But lawyers also hold ideological, political and ethical commitments.[107] Commonly shared among human rights lawyers is the idea that society perpetuates inequalities against marginalized groups.[108] Human rights lawyers believe that the law, properly applied or revised, can help protect vulnerable people, and remediate rights violations.[109] They use lawsuits to rectify failed or unjust policies, highlight omissions, and redirect public attention and resources towards vulnerable people. Of particular interest to this discussion is the role Japanese attorneys played in bringing these lawsuits, often funding them out of their own pocket.[110]

Lawyers are also legal professionals. Some scholars suggest professionalism may hinder the promotion of the cause, diverting lawyers

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101. *Id.* at 154.

102. Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. CENT. L.J. 130 (2005).

103. Stephens, *supra* note 100, at 154.

104. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368 (1991); *see also* MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

105. HIROSHI ODA, JAPANESE LAW 32 (2011).

106. The first trial in the war reparations litigation movement, *Kim Hak-Sun v. Japan*, took over nine years to complete. It was filed in December, 1991, and decided in March, 2001.

107. Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 164 (Sarat & Scheingold eds. 2005).

108. Lynn Jones, *The Haves Come Out Ahead: How Cause Lawyers Frame the Legal System for Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 188 (Sarat & Scheingold eds. 2005).

109. Susan Bibler Coutin, *Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 101 (Sarat & Scheingold eds. 2005).

110 . MATSUOKA HAJIME, NITCHÛ REKISHI WAKAI E NO MICHI [THE ROAD TO RECONCILIATION IN SINO-JAPANESE HISTORY] 67 (2014).

away from the cause and toward the mechanical aspects of the profession.[111] But lawyers seek to develop the law so as to reflect their ideals and embed them into society. They go to great lengths to recover the factual record, interviewing victims and perpetrators, sifting through university and government archives, and speaking with attorneys in foreign jurisdictions.[112] They also cite precedent, draw legal inferences, interpret statutes and treaties, using skills such as imagination, investigation, application, and interpretation. In the WRL movement, lawyers must prove that the Japanese government and corporate sector committed serious human rights abuses. Lawyers must fit such conduct into the legal framework of tort law. While calling such a serious human rights violation a tort — like a car accident, or slip and fall — arguably lightens the severity of the conduct, that is the price of using the legal system in the first place.

iii. Civil Society Groups

Civil society groups have actively supported issues of wartime responsibility for the entire postwar period.[113] They have used lawsuits to propagate their core message: the principles, commitments, and values to which the group is dedicated. The lawsuit has the added benefit of concretizing the cause, of requesting the judiciary to take a stance on a proposed norm, program, right, or privilege. The courthouse, like the street protest, sit-in, or picket line, is a forum for normative contestation. Civil society groups use litigation to take the judicial temperature of a particular issue. When a sufficiently large number of judges support the claims, the issue may be ripe for a legislative solution.

By supporting lawsuits, civil society groups can also obtain verdicts sympathetic to their cause. Activists hold the verdict out as "proof," judicial endorsement of their proposition. When plaintiffs lose, as normally happens, the lawsuit becomes another public event. After an unfavorable ruling, victims, lawyers, and activists pour outside the courthouse, parade around with "unjust verdict" banners, hold press conferences, and vow to appeal. They can always blog about it afterwards, hyperlinking articles from Japan's major news outlets to their own websites.[114]

Given the multiple constituencies, even on one side of the lawsuit, winning takes on a variety of meanings. Victory for which party? On what

111. MAYER N. ZALD & JOHN D. MCCARTHY, SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 380 (1987).

112. MATSUOKA, *supra* note 110, at 68–69.

113. FRANZISKA SERAPHIM, WAR MEMORY & SOCIAL POLITICS IN JAPAN, 1945–2005 37 (2006).

114. *See, e.g.*, Web-Suopei: Chûgokujin Sensô Higaisha no Yôkyû wo Sasaeru Kai Webusaito [Web-reparations: Website of the Society to Support the Demands of Chinese War Victims], www.suopei.jp. This site, run by a civil society organization, aggregates information about the war compensation movement and litigation in particular.

facts? Of what crimes or violations? To what end? Parties may prevail, or fail, many times over the span of a single lawsuit. This redirects the inquiry from "Did plaintiff win or lose?" to "On which claims did plaintiff win or lose?," or "Why did plaintiff lose on this claim?" Lawyers sharpen their claims through this iterative process; an unsuccessful argument in one lawsuit may be the main holding of the next one.

To some, this Article may suggest a taxonomy of loss, an ill-fated attempt to recuperate a failed social movement. But the binary "win-lose" view of civil adjudication often fails to capture the full significance of a lawsuit, particular in public interest or human rights litigation.[115] It does, of course, subject plaintiffs to the slow, technical, uncertain, and ornate mechanism of civil litigation. But it can also help to right a wrong, or many wrongs. Victims well understand that a monetary award may not fully compensate them for their suffering.[116] Instead, litigation offers partial redress. But it also offers lawyers the opportunity to promote a more rights-protecting legal system. Civil society groups, additionally, draw attention to their cause, instigate broader discussions in society, and perhaps change minds about recent and historical events.

C. *Discursive Justice: A Framework*

Human rights litigation calls for a different standard of success than the traditional civil lawsuit.[117] Legal scholarship increasingly examines such "second-order" phenomena to recover the "multiple meanings that are submerged below the surface."[118] Professor James Boyd White of the University of Michigan Law School, for example, has called for scholarship to move away from the result of the opinion and towards its "fidelity to facts and law, openness to the contraries in the case, … the processes of reasoning by which the past is interpreted and brought to bear on the present [and] the degree to which the court recognizes the legitimacy and

115. *See* Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations against Women*, 5 HASTINGS WOMEN'S L.J. 143 (1994). Stephens argues that civil litigation in effect empowers individuals, who can bring a cause of action without the help of the international community, or national government. *Id.* at 144.

116. Many survivors made a similar point during the Holocaust Litigation. *See* Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2228–29 (2004) ("[N]o amount of compensation, even damages measured in the billions, could serve as a 'fair,' 'adequate' and 'reasonable' measure of justice in light of the wrongs committed.").

117. Jules Lobel, *Losers, Fools and Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1332 (1995).

118. *Id.* at 844.

humanity of the litigant."[119] In this view, judicial opinions offer a host of possible scholarly trajectories.

In human rights litigation more broadly, winning a damages award may well be ancillary. Professor Jules Lobel of the University of Pittsburgh School of Law describes how many lawyers (himself included) understand they are taking on *losing* causes. But they possess a "prophetic vision of law," one that sees "law as a process of struggle rather than a collection of substantive rules or mere norms."[120] For Lobel, lawsuits embody, inspire, and reflect political action;[121] they educate the broader public about sociopolitical issues.[122] Similarly, Professor Douglas NeJaime of Yale Law School argues that civil society organizations use loss not only to raise consciousness of social issues, but also to mobilize constituents, "inspiring outrage, strengthening resolve, and building a more fervent feeling of entitlement."[123] In this view, loss helps crystalize "the deprivation of rights and the unequal treatment that the movement is fighting."[124]

How can one apply the above insights to the war reparations lawsuits? This Article proposes three related lines of inquiry. First, did the court recognize the facts? Recognition of facts may seem a low bar in the context of civil litigation. Yet facts decide cases, sometimes more than substantive laws or theories do.[125] Moreover, as elaborated more fully below, factual recognition of World War II remains a fraught issue, seven decades after its conclusion. Japanese judges have made some startling observations in the "factual recognition" section of their opinions. One called Japan's military campaign in China "an invasion…based on indefensible imperial and colonial intent."[126] Indeed, elaborate factual findings can perform a type of restoration, an official acknowledgment of harm.[127] On the other hand, some judges are less effusive with the facts, denying them or presenting them quite parsimoniously. That has been the case with certain judgments involving the comfort women and may in fact constitute another form of

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119. James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1680 (1984).

120. Lobel, *supra* note 117, at 1333.

121. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 3 (2004).

122. *Id.* at 4.

123. Douglas NeJaime, *Winning through Losing*, 96 IOWA L. REV. 943, 969 (2011).

124. *Id.* at 987.

125. *See* DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 4 (1984).

126. Li Xiuying v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Sept. 22, 1999, 1098 HANREI TAIMUZU, *aff'd* Tokyo Chijo Saibansho [Tokyo Dist. Ct.] Apr. 19, 2005.

127. In this way, the factual recognition sections of judicial opinion resemble Truth and Reconciliation Commissions. *See* Marth Minow, *Between Vengeance and Forgivness: South Africa's Truth and Reconciliation Commission*, 14 NEGOTIATION J. 319, 321 (1998) (describing the restorative power of truth-telling as practiced by South Africa's Truth and Reconciliation Commission).

denial.[128] The judge's viewpoint is not, of course, based on independent historiographical research. Nor is there a singular "judge's" view of the underlying events. Its value, rather, derives from its status as an official document, generated by one of the three branches of government

Second, did the court find the defendant liable? Again, this question needs to be broken down into its constituent parts. Which defendant was found liable? For what acts or omissions? When the state is liable, how does the court articulate its illegal activity? When corporations are liable, how do we account for the differences in the juridical construction of the illegal act? Corrective justice scholars note that tort liability "can rectify the injustice inflicted by one person on another."[129] Tort law moreover protects "morally fundamental interests, such as one's interest in physical security."[130] Given the compensatory function of tort law, it is necessary to ask what act or acts are being compensated. As Professor Peter Gerhart of Case Western Reserve University School of Law urges, tort law's corrective impulse hinges upon accurately accounting for the circumstances of the case, as well as the values underlying the law itself (liberty, security of person, or social cooperation).[131] Only by understanding how the wrong is construed can we understand the basic wrong addressed by the lawsuit.

Third, did the defendant violate international law? Courts play a critical role in adopting international legal norms to their domestic environment.[132] In the WRL context, Japanese judges have had numerous occasions to evaluate state conduct under international law. In this way, it is similar to Alien Tort Claims litigation in the United States, where judges use international legal standards to evaluate tortious, indeed often criminal, behavior. Such analysis has important lessons. Violating international law can incur severe reputational costs, suggesting a state has violated "the holiest of the holies." In extreme cases, such violations may ostracize the state from the international community. Moreover, expressive theories suggest that judicial decisions that reference international law reinforce the rule of law by crafting historical narratives, authenticating them as true, and disseminating the results to the public.[133] When a court holds that certain conduct violates the universal norms enshrined in international law, it expresses those norms. In these lawsuits, the Japanese judiciary has — in

128. For the idea that silence itself constitutes denial, *see* EVIATAR ZERUBAVEL, THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL 6 (2006).

129. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002).

130. MARK GEISTFELD, TORT LAW: THE ESSENTIALS 76 (2011).

131. PETER GERHART, TORT LAW AND SOCIAL MORALITY xii–xiv, 120 (2010).

132. Koh, *supra* note 104, at 2347–48 (describing the role of courts in articulating international legal norms).

133. Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007)

small but significant ways — assisted the development of international human rights law and international humanitarian law.[134] Human rights lawyers may prefer more robust engagement with international treaties. But the mere fact that a Japanese judge found that its own state violated international law, from the American lawyer's perspective, is noteworthy.

III. DISCURSIVE JUSTICE: FACTS

To understand the importance of establishing facts in the WRL movement, we must first grapple with the status of World War II in contemporary East Asia. World War II generates more controversy in East Asia than it does in North America. Political elites, activists, and victims vigorously dispute the facts, meanings, and responsibilities of the war. To some extent, as the next section shows, the very contestation of the war's factual basis propelled the postwar compensation movement in the first place.

Broadly speaking, two camps have formed around the issue of Japan's wartime responsibilities. Conservatives tend to downplay the state's role in the war, especially the darker episodes, such as the comfort women system, forced labor, the Rape of Nanking (Nanjing), and the biological experimentation of Unit 731. Politicians associated with Japan's conservative Liberal Democratic Party, as well as affiliated civil society organizations and academics,[135] downplay the damage, underestimate the number of victims, and attenuate the role of the state and military.

On the other hand, progressives — including human rights lawyers, politicians associated with opposition parties, civil society groups, and academics — investigate the events of the war, overturn official narratives of silence or absence, and acknowledge Japan's brutality. They have apologized for the war and submitted bills to the Diet to establish compensation schemes.[136] Many of the lawyers representing plaintiffs in the WRL lawsuits would fall into this camp.[137] Many of them have worked with

134. *See* SHARON WEILL, THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW 157–58 (2014) (noting the positive impact that domestic judges play in interpreting international humanitarian treaties).

135. The most famous of these groups is probably the Japanese Society for History Textbook Reform (*Atarashii Rekishi Kyôkasho wo Tsukuru Kai*). In 1996, Fujioka Nobukatsu founded the society to revise educational materials, which had started to include World War II material such as the comfort women.

136. Diet members Motooka Shôji (socialist party), Yoshikawa Haruko (communist party), and Hatoyama Yukio (democratic party) have introduced bills to resolve the comfort women issue. *See* Asian Women's Fund, *supra* note 26.

137. Takagi Kenichi, Matsuoka Hajime, and Uchida Masatoshi are among the many lawyers who have worked on multiple WRL cases.

Chinese and Korean lawyers to find victims, and arranged for them to testify in Japanese courts.

A. Contemporary Japanese Views of World War II

East Asia has grappled with the historical memory and proper commemoration of World War II, since the conclusion of hostilities in 1945. The debate took on added urgency in the early 1990s, when former comfort women came forward for the first time to publicly acknowledge this dark aspect of Japan's past. For a brief period in the mid-1990s, high-level Japanese officials offered remorseful statements. Public statements by Chief Cabinet Secretary Katô Kôichi (1992),[138] Chief Cabinet Secretary Kôno Yôhei (1993),[139] and Prime Minister Murayama Tomiichi (1995)[140] are generally considered to be sincere expressions of contrition.[141] The Kôno Statement admitted the direct involvement of the Japanese military in abducting, transporting, imprisoning, and regulating the hygiene of the comfort women — the first time a Japanese official had made such an admission.[142]

During this crescendo of apology, the Japanese government also established the Asian Women's Fund.[143] The Fund had several purposes, such as the provision of "medical and welfare projects and other similar projects…to former comfort women," and expressing "the nation's feelings of sincere remorse and apology to the former comfort women."[144] "But because the Fund channeled money from private donors, and not

138. *See* Statement by Chief Cabinet Secretary Koichi Kato on the Issue of the so-called "Comfort Women" from the Korea Peninsula, July 6, 1992 [hereinafter Katô Statement]. The statement admitted the government's involvement in (1) establishing comfort women stations, (2) controlling those who recruited comfort women, (3) constructing the stations, (4) managing the stations, (5) maintaining the hygiene of the comfort women, and (6) issuing related identification and others documents.

139. *See* Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women," Aug. 4, 1993, www.mofa.jo.jp/policy/women/fund/ state9308.html [hereinafter Kôno Statement]. Kôno announced the results of a nineteen-month government investigation of the comfort women system.

140. *See* Statement by Prime Minister Tomiichi Murayama "On the occasion of the 50th anniversary of the war's end," Aug. 15, 1995.

141. *See, e.g.*, Kazuhiko Togo, *The Historical Role and Future Implications of the Murayama Statement: A View from Japan*, *in* JAPAN & RECONCILIATION IN POST-WAR ASIA: THE MURAYAMA STATEMENT AND ITS IMPLICATIONS 1, 2 (Kazuhiko Togo ed., 2013) (calling Murayama's statement "the most unambiguous expression of Japan's contrition since World War II").

142. *Id.* at 2.

143. The Fund has its own trilingual website to explain its mission. But the Fund has attracted criticism from both progressive and conservative circles. *See* QIU *supra* note 84, at 163–63, 171. The Fund also offered reparations of approximately 2 million yen to former comfort women. *See* YOSHIMI YOSHIAKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 24 (2000).

144. Digital Museum: The Comfort Women Issue and the Asian Women's Fund, *Establishment of the AW Fund, and the Basic Nature of its Projects*, awf.or.jo/e2/foundation.html.

government coffers, many comfort women refused its disbursements. Even today, many still believe the Japanese government has not taken legal responsibility, or expressed sincere atonement, for the comfort women system."[145]

Since that brief period of apology, many Japanese politicians have taken a harsher tone on the war. As journalist David Pilling puts it, "conservatives and nationalists have tended to dominate the discourse in Japan, overshadowing the statements and actions of many Japanese who have sought to look at history more squarely. As a result, the revisionist view of history is often seen by Japan's critics as the true sentiments of its people…."[146] A full recounting of the statements Japanese politicians have made is beyond the scope of this Article. Yet a few statements, noted below, set the tone, and also suggest the importance of facticity to many victims of the war.

i. Comfort Women

When the comfort women issue surfaced in 1990, the Japanese government denied involvement.[147] As one labor official testified,

> [F]rom the interviews we had with former soldiers, our conclusion thus far is that the so-called 'comfort women' were prostitutes working in brothels, whose owners took them wherever the imperial army went. To this extent, the Ministry of Labor cannot conduct any further investigation, as it falls outside our remit.[148]

By calling them prostitutes and attributing responsibility for the comfort women to the brothel "owners," the official distanced the state from the entire system and redirected blame towards the private sector. Sociologists call this *interpretive denial*, a way of saying, "Yes, there were comfort women. But no, the Japanese government was not involved."[149] The notion that the comfort women engaged in consensual sexual relations, outside the coercive apparatus of the Japanese military, has figured prominently in denialist narratives. To be sure, *some* comfort women may have started out as prostitutes. But many others were deceived; it was not uncommon to be

145. QIU, *supra* note 84, at 163 (describing efforts by Taiwanese activists to raise money and provide compensation to Taiwanese comfort women who refused to accept payments from the Fund).

146. DAVID PILLING, BENDING ADVERSITY: JAPAN AND THE ART OF SURVIVAL 222 (2015).

147. QIU, *supra* note 84, at 160.

148. TAKU TAMAKI, DECONSTRUCTING JAPAN'S IMAGE OF SOUTH KOREA: IDENTITY IN FOREIGN POLICY 122, 128 (2010).

149. STANLEY COHEN, STATE OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 6, 9–10 (2001).

promised work in a factory, school, or store and then sent to a "comfort station."[150]

Over time, the contours of Japanese government's denials changed. When South Korean comfort women demanded compensation and a public apology in 1990, the Japanese government replied "there was no *evidence* the Japanese military forcibly recruited" the women, and therefore "no need for compensation."[151] In 1991, Kim Hak-sun publicly acknowledged that she had been a comfort woman, yielding a new form of evidence: testimony. Henceforth, testamentary evidence challenged the official line that there was no evidence. Later that year, on December 7, 1991, Kim sued the Japanese government, becoming the first of thousands of victims to seek reparations in civil courts. Her lawsuit, and its progeny, brought the comfort women issue and many other World War II issues to a global audience.[152]

A month after Kim's lawsuit was filed, the left-leaning newspaper *Asahi Shimbun* published definitive proof of the Japanese military's involvement in the comfort women system.[153] Shortly thereafter, Chief Cabinet Secretary Katô Kôichi issued an apology, expressed remorse, and acknowledged the military's role.[154] As he put it, "We cannot deny that the military was involved, although at this point we are still not certain to what extent."[155] Thereafter, the government reframed its explanation of the comfort women system, admitting military involvement.[156] But that was not the final word. Japanese politicians have publicly challenged various elements of the comfort women system.[157] Many continue to refer to comfort women as

150. *See* C. SARAH SOH, THE COMFORT WOMEN: SEXUAL VIOLENCE AND POSTCOLONIAL MEMORY IN KOREA AND JAPAN (2008). Soh describes various ways in which Korean girls and women entered the comfort women system. Some left home of their own accord. *Id.* at 83. Some were sold by their families, relatives, or pimps. *See id.* at 24–25. In the Philippines, by contrast, some comfort women were abducted by Japanese soldiers, thrown into a truck, and imprisoned in a one-room shack. MARIA ROSA HENSON, COMFORT WOMAN: A FILIPINA'S STORY OF PROSTITUTION AND SLAVERY UNDER THE JAPANESE MILITARY 35–36 (1999).

151. GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 186 (1997) (emphasis added).

152. *See, e.g.*, Chieko Kuriki, *Cruel "Comfort": Koreans Sue for Damage for Wartime Disgrace*, CHICAGO TRIB., Mar. 29, 1992 (the "case has received extensive coverage in the news media in Japan, Korea and the U.S.").

153. On January 11, 1992, Asahi reported that historian Yoshimi Yoshiaki discovered documents showing the army established and operated "comfort stations" (*ianjo*).

154. *See* Katô Statement, *supra* note 138.

155. *See id.*; Edward Neilan, *Japan Regrets Era of Forced Prostitutes*, WASH. TIMES, Jan. 14, 1992.

156. *See Government Mulling 'Comfort Women' Issue 1 Year After Lawsuit*, KYODO NEWS, Dec. 7, 1992.

157. For example, Agriculture Minister Nakagawa Shôichi doubted the comfort women issue would appear as a "historical fact" in textbooks. PHILIP A. SEATON, JAPAN'S CONTESTED WAR MEMORIES 101 (2008).

"prostitutes," implying the sex was consensual and to their pecuniary advantage.[158] Others deny the coercive nature of the arrangement.[159]

The current Japanese Prime Minister, Abe Shinzo, has also weighed in on the debate. In 2007, during his first term as prime minister, Abe denied that the women had been coerced into the comfort women system. He told reporters, "There is no *evidence* to prove coercion, as initially suggested."[160] In 2015, during Abe's second term, Japan and South Korea reached a historic accord to resolve the comfort women issue.[161] Two weeks later, Abe repeated his claim that there was no evidence of forcible recruitment, and that his views had not changed on the matter since his 2007 comments.[162] In 2016, a Japanese diplomat told the UN Women's Committee that no documents confirmed the military forcibly recruited the comfort women and disputed that the number was as high as 200,000.[163] Seven decades after the war, and a quarter century after the first comfort woman publicly acknowledged her role in the system, the Japanese government is still coming to grips with the "comfort women" system.

ii. Forced Labor

Japan's widespread use of forced labor has received less media attention in the West than the comfort women issue. But within East Asia, forced labor has been the largest source of lawsuits in the WRL movement, numbering twenty-five at the time of this writing.[164] This reflects the vast

158. In May 1994, Justice Minister Nagano Shigeto used the term *kôshô* (公娼), literally "public prostitutes," to describe the women. The phrase implies licensed, *voluntary* prostitution, which was legal in early twentieth century Japan. *Id.* at 101. In 1996, former Justice Minister Okuno Seisuke stated foreign women had volunteered to have sex with Japanese soldiers as "a commercial activity." SOH, *supra* note 150, at 66. In January 1997, Chief Cabinet Secretary Kajiyama Seiroku explained that prostitution was legal in Japan at the time, and the comfort women were prostitutes who did it for the money. SEATON, *supra* note 157, at 100.

159. In July 1998, Agriculture Minister Nakagawa Shôichi said it was unclear whether Japan had used force to coerce the women into sexual slavery. *Official Retracts Sex Slave Comments*, CHICAGO TRIB., Aug. 1, 1998.

160. Colin Joyce, *Japanese PM Denies Wartime Comfort Women Were Forced*, TELEGRAPH, Mar. 3, 2007.

161. The current South Korean President, Moon Jae-In, has indicated that Korea will renounce the deal. *See* James Griffiths, *South Korea's New President Questions Japan 'Comfort Women' Deal*, CNN, June 5, 2017.

162. *See* Choi Yirak, *Abe "Wianbu kangje yeonhaeng cheung-geo eopda' ip-jang pul-pyeon"* [*Abe's "Position Unchanged: 'No Evidence Comfort Were Forcibly Mobilized'"*], YONHAP NEWS, Jan. 18, 2016.

163. Committee on the Elimination of Discrimination against Women examines reports of Japan, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17052. *See No Documents Confirm Military Coerced 'Comfort Women,' Japan Envoy Tells U.N.*, KYODO NEWS, Feb. 17, 2016.

164. Forced laborers have filed twenty-five lawsuits. Korean forced laborers have filed nine lawsuits. See Yano Hideki, *Chôsenjin Kyôsei Ryôkei, Kyôsei Rôdô Mondai — Sono Kadai to Tenbô* [*The Problem of Korean Forced Transport and Forced Labor: Issues and Prospects*], *in* MIKAIKETSU SENGO HOSHÔ: TOWARERU NIHON NO KAKO TO MIRAI [UNRESOLVED WAR COMPENSATION: QUESTIONING JAPAN'S PAST AND FUTURE] 48, 49, 208–13 (Tanaka Hiroshi et al. eds. 2012). Chinese forced laborers

scale of Japan's wartime slave labor program. Historians estimate that 1.2 million Koreans were mobilized (through force or deception), brought to Japan, and forced to work under dire conditions.[165] In addition, roughly 40,000 men and boys were abducted from China, and pressed into forced labor throughout Japan.[166] About one in six Chinese forced laborers died during their servitude, a reflection of the grinding work and awful living conditions imposed on these laborers. In the 1990s and 2000s, Korean and Chinese forced laborers sued the Japanese government for abducting them, in addition to suing dozens of Japanese corporations that used their labor during the war.

Japanese politicians have been somewhat oblique in discussing the forced labor program. In 1946, the Ministry of Foreign Affairs sent researchers to investigate working conditions of the one hundred thirty-five Japanese sites that used Chinese labor.[167] After compiling a report, however, the ministry did not hand it over to the Allied forces, as initially planned. Instead, the Japanese government spent the next half-century denying its existence. Courts have criticized the government for falsely claiming to have burned the report.[168]

In 1960, a Ministry official testified to the Diet that the ministry compiled a report in 1946, but "if the documents [in the report] were used for war crimes prosecutions, they would cause trouble to a great many people. Therefore, all of the documents were burned, and the Ministry does not now possess even a portion of the documents."[169] In May, 1990, another Ministry official repeated that denial to the Diet, "Since that report does not exist, however, we cannot say anything with certainty[…].We have answered in the Diet in the past that such documents no longer remain[…]. We are sorry to keep repeating ourselves, but I must state once more that the records are not here."[170] Less than a week after this denial, NHK (Japan's

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have filed sixteen lawsuits. See GUAN JIANQIANG, GONGPING, ZHENGYI, ZUNYAN: ZHONGGUO MINJIAN ZHANZHENG SHOUHAIZHE DUI RI SUOCHANGDE FALÜ JICHU [FAIRNESS, JUSTICE, RESPECT: THE LEGAL BASIS FOR CIVIL CLAIMS OF CHINESE WAR VICTIMS AGAINST JAPAN] 72 (2006).

165. *See* Choe Sang-hun, *Remains of Nearly 2,750 Korean Wartime Laborers Found in Japan*, N.Y. TIMES, Nov. 4, 2015.

166. *See* Timothy Webster, *Note*, *Sisyphus in a Coalmine*, 93 CORNELL L. REV. 733, 734 (2006).

167. MATSUOKA, *supra* note 110, at 44. The two reports were called (1) Investigative Report on Work Incidents of Chinese Laborers (Kajin Rômusha Shûrô Jiken Chôsa Hôkokusho) ("Foreign Ministry Report"), and (2) Report on the Work Conditions of Chinese Laborers (Kajin Rômusha Shûrô Tenmatsu Hôkokusho) ("Worksite Report"). The Ministry of Finance compiled a comprehensive report on Korean forced labor in 1947. *See* ÔKURASHÔ KANRIKYOKU [MINISTRY OF FINANCE, BUREAU OF ADMINISTRATION], NIHONJIN NO KAIGAI KATSUDÔ NI KAN SURU REKISHI CHÔSA [HISTORICAL REPORT ON THE OVERSEAS ACTIVITIES OF THE JAPANESE] (1947).

168. *See, e.g.*, Zhang Baoheng v. Mitsui Mining & Japan, Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Apr. 26, 2002, 1098 HANREI TAIMUZU 267.

169. *See* Underwood, *supra* note 94.

170. *Id.*

public broadcaster) aired a program that revealed both the contents of the 1946 report, and the government's attempts at fraudulent concealment.[171] The Ministry took an additional year to confirm the authenticity of the report[172] and finally to admit using forced labor.[173] In the end, the Ministry admitted that it "knew these reports were kept in the basement storeroom" but could not "confirm that they were the reports submitted by individual companies."[174]

As with the comfort women, some Japanese officials refute the forcible nature of the program. They claimed the workers "came pursuant to contracts," as if the laborers volunteered their services.[175] Courts have relied on the quasi-contractual nature of the relationship to craft theories of liability, as explored more fully below.[176] Others stated that forced laborers "worked abroad in response to recruitment activities."[177] Such accounts may be correct for a subset of forced laborers. But Japanese soldiers also used abduction techniques, such as "hunting rabbits," to round up the forced laborers. [178] Moreover, the laborers endured grim conditions, often supervised by armed guards. In sum, they did not work of their own volition.

iii. Rape of Nanjing

The Rape of Nanking (Nanjing) is now well known in the West, largely due to Iris Chang's 1995 book of the same name.[179] In December 1937, the Japanese army invaded China's capital and laid it to waste. In the space of six weeks, the Japanese killed between 200,000 and 300,000 Chinese civilians

171. See NHK, *Moboroshi no Gaimushô Bunsho Hakken, Chûgokujin Kyôsei Renkô no Zenbô Kyûmei* [Phantom Foreign Ministry Documents Discovered: The Complete Investigation on Chinese Forced Labor], KURÔZU APPU GENDAI [CONTEMPORARY CLOSE-UP] 21, May 17, 1993, http://www.nhk.or.jp/ gendai/articles/21/.

172. *See* Underwood, *supra* note 94.

173. Associated Press, *Japan Admits to WWII labor Abuses*, L.A. TIMES, June 23, 1994. The foreign minister told the Diet "it was regrettable that it caused pain to the Chinese people." *Id.*

174. *See* Underwood, *supra* note 94.

175. Matsuoka Hajime, *Kyôseitekina 'Rachi,Renkô' de Chûgokujin o Kyôsei Rôdô: Chûgokujin Kyôsei Renkô, Kyôsei Rôdô Jiken to wa Nani ka?* [*Forced Labor of Chinese through Forcible 'Abduction and Transportation:' What is Chinese Forced Labor and Forced Transportation?*], *in* SENGO SHICHIJÛNEN NOKOSARERU KADAI [SEVENTY YEARS AFTER THE WAR: REMAINING ISSUES] 80, 93 (Nakayama Taketoshi et al. eds. 2016).

176. *Mitsui*, 1098 HANREI TAIMUZU, at 267.

177. *See id.* at 268.

178. *See* Kojima Takao, *'Usagigari sakusen' wa Jitsuzai Shita: Tanabe Toshio no Hanron ni Okaeru* [*'Rabbit-Hunting Operations' Were Real: A Refutation of Tanabe Toshio*], 4 CHÛKIREN: SENSÔ NO SHINJITSU WO KATARITSUGU [ASSOCIATION OF RETURNED POWS: TELLING THE TRUTH OF THE WAR] 48 (1998). Japanese soldiers would encircle Chinese villages, move towards the center and capture anyone who tried to flee. *Id.* at 51.

179. IRIS CHANG, THE RAPE OF NANKING (1995).

and raped as many as 20,000 women.[180] This is exceptional even by the grim math of World War II.

Still, a handful of Japanese officials have tried to diminish the gravity or destructiveness of Nanjing, even make the atrocity disappear. In a May 1994 interview with a Japanese newspaper, Justice Minister Nagano Shigeto called the Nanjing Massacre a "fabrication."[181] His comments ultimately cost him his position at the ministry, suggesting his views did not comport with prevailing political opinion.[182] One week later, historian Tanaka Masaaki testified to the Diet that the Nanjing Massacre never took place, and that postwar educators had demonized the Japanese Empire.[183] One can question the number of casualties — and scholars actively do — but no one seriously doubts Nanjing was the epicenter of one of the war's worst campaigns.[184]

The above recitations capture some of the statements certain Japanese officials have made about World War II in the past quarter-century. Their techniques vary, but the overarching aim is to downplay the events of World War II and minimize Japan's culpability for the predicate acts. It is precisely this diminution that, in at least a handful of cases, spurred victims to file lawsuits in the first place.

B. Courts as Fact-finders

The relationship between courts and facts is complex. At its most basic level, litigation rests on facts. In cases about historical events, the judicial process demands fact-finders sift through a series of submissions from both sides to arrive at a set of substantiated facts. Many commentators suspect that courts, especially in politically sensitive cases, may not be able to

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180. Estimates vary widely by historian, nationality and time. Japanese historians put the number of casualties at 200,000, whereas Chinese historians estimate 300,000 were killed. *See id.* at 51; *Japan Complains after China Says 300,000 Died in Nanking Massacre*, KYODO NEWS, Jan. 14, 2015.

181. David E. Sanger, *New Tokyo Minister Calls 'Rape of Nanking' a Fabrication*, NY TIMES, May 4, 1994. In 1990, Ishihara Shintarô (later, the mayor of Tokyo) told *Playboy*, "People say that Japan made a holocaust, but that is not true. It is a story made up by the Chinese. It has tarnished the image of Japan, but it is a lie." CHANG, *supra* note 179, at 201.

182. This was the first time in decades that the Japanese government was not headed by the LDP, but by a splinter LDP group called the Japan Renewal Party, comprised of former LDP officials, including Nagano.

183. TAKASHI YOSHIDA, THE MAKING OF THE "RAPE OF NANKING": HISTORY AND MEMORY IN JAPAN, CHINA AND THE UNITED STATES 144 (2006). Tanaka served as secretary to General Iwane Matsui during the Massacre. General Iwane was later convicted of war crimes and executed by the Tokyo Tribunal in 1948.

184. The issue erupted again in 2014, when one of the governors of NHK, the Japanese public broadcasting company, claimed the Nanjing Massacre "never happened." Hyakuta indicated he was speaking in an individual capacity, and not as a NHK board member. Michelle Florcruz, *Japanese NHK Board Member Naoki Hyakuta Denies Nanjing Massacre Happened*, INT'L BUS. TIMES, Feb. 4, 2014.

produce objective facts. When writing about the criminal trial of Adolf Eichmann by an Israeli court, Hannah Arendt criticized the idea that the case would make "a record of the Hitler regime which would withstand the test of history."[185] For Arendt, the "purpose of a trial is to render justice and nothing else."[186] Judges may not be particularly good historiographers or skillful detectors of historical fact. But what Arendt misses is the fact that trials focus and capture public attention. Indeed, the *New Yorker* sent Arendt to Jerusalem to report on the trial, and inform the public, about Eichmann's case and, by extension, the Nazi regime.

Legal scholars and historians express reservations about judicial historiography. Professor Kawashima Shin of the University of Tokyo has questioned whether judges can in fact marshal "historical facts."[187] Given recent critiques of objectivity in the humanities and social sciences, it may no longer make sense to say a judicial opinion presents the "facts." As Kawashima puts it, "the 'facts' and 'truths' must, on one level, be a type of fiction."[188] Instead, judicial opinions reflect a judge's ideological and historical views.

Moreover, domestic judges[189] may face serious political constraints when writing about their own country's history.[190] Domestic court judges — both members and products of the political elite — feel pressure from coordinate branches that fund, supervise, appoint, and promote them.[191] This pressure may inhibit them from providing historically accurate, but politically unsalable, accounts.[192] Accordingly, judges are not scriveners of an abstract truth but "collaborators in the state's portrayal of reality."[193]

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185. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (1994). Arendt was particularly critical of Gideon Hausner, the chief prosecutor, whose opening statements melded "bad history and cheap rhetoric." *Id.* at 19.

186. *Id.* at 253.

187. Kawashima Shin, *Rekishigaku kara Mita Sengo Hoshô* [*Postwar Compensation from the Point of View of History*], *in* KYÔDÔ KENKYÛ CHÛGOKU SENGO HOSHÔ: REKISHI, HÔ, SAIBAN [JOINT RESEARCH ON CHINESE POSTWAR COMPENSATION: HISTORY, LAW, TRIALS] 13, 36 (Kawashima Shin et al. eds. 2000).

188. *Id.* at 37. Kawashima believes the judge's temperament inflects the opinion. One judge called the war "nothing but an invasion of China and the Chinese people, based on indefensible and colonialist intent." *Id.* It may be true, but it certainly renders a normative judgment of the war.

189. A separate issue involves the public reception of rulings by *international* tribunals. In Serbia, for instance, rulings issued by the International Criminal Tribunal for Yugoslavia — based in the Hague — have "failed to persuade the relevant target populations that the findings in its judgments are true." Marko Milanovic, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AM. J. INT'L L. 233, 257 (2016)

190. *See* Richard Ashby Wilson, *Humanity's Histories: Evaluating the Historical Accounts of International Tribunals & Truth Commissions,* 80 POLITIX 31, 45 (2007) ("[N]ational institutions produce the most inadequate documents on the past.").

191. *Id.* at 46.

192. *See id.*

193. *See* WEILL, *supra* note 134, at 17.

In Japan, as elsewhere, judges are political actors. As Professors Mark Ramseyer of Harvard Law School and Eric Rasmusen of Indiana University's Kelley School of Business demonstrate over a series of publications,[194] the ruling political party exercises influence over the judiciary through various mechanisms.[195] Indeed, most Japanese judges "tend to parrot the moderately conservative positions of the longtime incumbent Liberal Democratic Party."[196] But as described below, many judges have written quite detailed fact sections that run counter to the views of history espoused by many conservative politicians. In this way, judges exercise an independence from prevailing political ideologies, probably based on their exposure to the overwhelming evidence proffered by lawyers and victims.

Court decisions can also help society come to grips with war. Professor Lawrence Douglas of Amherst College explains that trials can "both show the world the facts of astonishing crimes, and demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense."[197] The structure of trials, and judicial opinions in particular, place gruesome events into chronological, legal, and moral orders. They reframe carnage, death, and degradation into a beginning, middle, and end.

Professor Martha Minow of Harvard Law School opines that trials bring closure to traumatic events by "getting out the facts through an adversarial test, applying clear norms to conduct, and reaching a judgment on facts and norms.[198]" Psychologists likewise note that official acknowledgments of truth, such as that delivered by a court (or truth commission, international tribunal, etc.) can help end political violence visited upon the victims.[199]

Courts, then, can play a role in both the presentation of facts and the dissemination of those facts to a wider audience. Judges should not be

194. In addition to articles cited below, these works would include J. Mark Ramseyer & Eric B. Rasmusen, *Political Uncertainty's Effect on Judicial Recruitment and Retention: Japan in the 1990s*, 35 J. COMP. ECON. 329 (2007) (finding that Japanese judges whose political preferences align with the LDP self-select into judicial careers, instead of the private sector); J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993*, 154 U. PA. L. REV. 1879, 1880 (2006) (noting that Chief Justices of the Japanese Supreme Court supervise courts so as to further the electoral interests of the LDP).

195. *See* J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J. L., ECON. & ORG. 259, 285–86 (1997).

196. J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 332 (2001).

197. LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIAL OF THE HOLOCAUST 3 (2001). *Accord* Michael P. Sharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. INT'L & COMP. L. 375 (1997) (reciting Justice Robert Jackson's conclusion that one of Nuremberg's most important legacies was its detailed documentation of Nazi atrocities).

198. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 26 (1996).

199. Nora Sveaass & Nils Johan Lavik, *Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation*, 69 NORD. J. INT'L L. 35, 49 (2000).

confused with historians, but their opinions inform the broader public. And as official documents, court opinions may prove particularly salient at times when history is being rewritten or revised.

C. Fact-finding in Postwar Compensation Lawsuits

The basic factual background of World War II is, to some extent, contested. Given this contentiousness, WRL lawyers go to great lengths to lay down the factual foundation of their lawsuits. They have combed historical archives, university libraries, and government agencies gathering documentary evidence.[200] They have submitted historical studies of the war, from topics as diverse as the Nanjing Massacre, comfort women system, and medical experimentation of Unit 731.[201] They have flown in experts from Japan and around the world to testify.[202] They have even produced videos to help judges envision the predicate acts.[203] They submitted materials from the Khabarovsk Military Tribunal, a Russian court that tried Japanese soldiers in the immediate aftermath of the war.[204] They have scoured rural China to find victims of Japanese war crimes, interviewed them about their wartime experiences, filed lawsuits on their behalf in Japan,

200. The best-known example is Professor Yoshimi Yoshiaki's discovery, in the library of a government agency, of documents that linked the Japanese Army with comfort stations. *See* Norimitsu Onishi, *In Japan, a Historian Stands by Proof of Wartime Sex Slavery*, N.Y. TIMES, Mar. 31, 2007. Less well known, Professor Koshô Tadashi found documents about Korean forced labor in the library of his home institution, Komazawa University. The documents included, *inter alia*, a report on Korean forced labor prepared by the general affairs division of the Nippon Steel company. *See* Yamamoto Naoyoshi, *Jinken Shingai no Chinkin Mibarai: Mibaraikin Henkan wo Motomete Tatakau Nittetsu Soshô* [*The Human Rights Violation of Unpaid Wages: The Nippon Steel Litigation and the Fight to Recover Unpaid Wages*] 81, 82, *in* NIHON KIGYÔ NO SENSÔ SEKININ [WAR RESPONSIBILITY OF JAPANESE COMPANIES] (Koshô Tadashi et al. eds. 2000).

201. Yamada Katsuhiko, *Saiban Jitsumu kara Mita Sengo Hoshô* [*Postwar Compensation from the Point of View of Trial Practice*], *in* KYÔDÔ KENKYÛ CHÛGOKU SENGO HOSHÔ: REKISHI, HÔ, SAIBAN [JOINT RESEARCH ON CHINESE POSTWAR COMPENSATION: HISTORY, LAW, TRIALS] 217, 242 (Kawashima Shin et al. eds., 2000).

202. Sir Christopher Greenwood (professor emeritus of the London School of Economics, now a judge on the International Court of Justice), Frits Kalshoven (professor emeritus at Leiden University), and Eric David (professor at Free University of Brussels) all testified in a case brought by Dutch prisoners of war. *See* Moritaka Hayashi & Hiroyuki Banzai, *Tokyo District Court, November 30, 1998: Former POWs and Civilian Internees from the Netherlands v. the Government of Japan*, 19 WASEDA BULL. COMP. L. 114 (1999).

203. *See* Kaneko Osamu, *Chûgokujin Kyôsei Renkô, Kyôsei Rôdô Niigata Soshô* [*Chinese Forced Transportation and Forced Labor, The Niigata Litigation*], *in* HOTEI DE SABAKARERU NIHON NO SENSÔ SEKININ [JAPAN'S WAR RESPONSIBILITY AS ADJUDICATED IN COURTS] 211, 217 (Zukeyama Shigeru ed. 2014).

204. In 1949, the Soviet Union tried twelve Japanese soldiers for war crimes in association with Japanese bacterial warfare and medical experimentation. *See* SHELDON H. HARRIS, FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE, 1932–1945, AND THE AMERICAN COVER-UP 317 (2002).

and arranged for them to testify in Japan.[205] Lawyers have even adduced testimony from perpetrators, as when a guard at the Unit 731 medical experimentation facility testified in 1997 about the forms of torture he inflicted upon Chinese citizens.[206]

Defendants thus face a fair amount of incriminating evidence. Under Japanese civil procedure, defendants can respond to plaintiffs' evidence in one of four ways: admit (*jihaku*), deny (*hinin*), remain silent (*chinmoku*), or lack knowledge (*fuchi*).[207] For the most past, defendants admit the facts.[208] The government claims it "does not know" about plaintiff's factual allegations.[209] This gives rise to a presumption of denial, but does not require the plaintiff to offer additional evidence, as a denial would.[210] Corporations tend to adopt the same stance — that they "do not know."

On a few occasions, however, corporations have denied the facts.[211] In one case involving Chinese forced labor, both Japanese corporate defendants denied allegations that plaintiffs were transported to Japan against their will and engaged in forced labor at their workplaces.[212] The Maebashi District Court found that the plaintiffs were brought to Japan against their will. The court further found that "defendants…not only participated in the Decision by the Cabinet [to implement forced labor], they

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205. Gao Xiongfei testified about losing an arm during a Japanese air raid at the age of four, and the humiliation of growing up with a disability in China. *See Musabetsu Bakugeki Jiken Genkoku Kô Yûhi-san no Chinjutsu kara* [*Indiscriminate Bombing Case from the Testimony of Plaintiff Gao Xiongfei*], http://www.suopei.jp/saiban_trend/731_nankin/post_347.html.

206. *Moto Genpei ga Shôgen Nankei Daisatsugai Jiken nadode: Tôkyô Chisai* [*Former Military Policeman Testifies about Nanjing Massacre etc. in Tokyo District Court*], MAINICHI SHIMBUN, Oct. 1, 1997.

207 . TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.05(2)(b) (2d ed. 2000). Functionally, the four postures can be divided into two. When a defendant admits or remains silent, he effectively accepts plaintiffs' facts, and the facts need not be proven. MINSOHÔ [Code of Civil Procedure], Law No. 109 of 1986, Art. 179 ("Facts admitted by a party in court . . . are not required to be proven."). But when he denies, or lacks knowledge, it is legally equivalent to denial, and the facts must be proven. *See* MINSOHÔ, Art. 159 (2) ("A person offering a statement indicating that she has no knowledge of a fact alleged by the other party is presumed to have denied that fact."). By comparison, Rule 8 of the Federal Rules of Civil Procedure allows defendant to admit, deny, or lack information.

208. *See* Igarashi Masahiro, *Nihon no 'Sengo Hoshô Saiban' to Kokusaihô* [*Japan's 'Postwar Compensation Trials' and International Law*], 105 KOKUSAIHÔ GAIKÔ ZASSHI [J. INT'L L. & DIPL.] 1, 13 (2006).

209. *See* Law Library of Congress, *Japan: WWII POW and Forced Labor Compensation Cases* 3 (2008) (prepared by Sayuri Umeda), *available at* http://www.loc.gov/law/help/japan-wwii-pow.pdf.

210. See Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1, 5 (2002).

211. For example, in a Chinese forced labor case, one of seven corporate defendants (Chizaki Heavy Industry) denied the facts of forced abduction and forced labor. The court recognized the facts of abduction from China, transportation to Japan, and forcible work in Hokkaido. Liu Zhizhong (刘致中) v. Japan et al., Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Mar. 23, 2004, *aff'd* Sapporo Chiho Saibansho [Sapporo Dist. Ct.] June 28, 2007.

212. Wang Junfang (王俊芳) v. Kajima Construction, Maebashi Chiho Saibansho [Maebashi Dist. Ct.] Aug. 29, 2007.

actually took part in the implementation. They sent workers to the site in China, and brought forced laborers back to Japan."[213]

Under Japanese civil procedure, judges enjoy wide latitude in finding facts.[214] This is known as the "free evaluation principle," and allows judges to consider a wide variety of information presented by the parties:

> the allegations of the parties, their attitudes, the fact that a party did not make a certain allegation or failed to tender evidence that he/she might naturally have been expected to tender, that a party later disputed a fact that he/she did not dispute before … and the timing of the submissions of allegations and evidence.[215]

In the context of WRL, judges use this discretion to compose elaborate fact sections, acknowledging the serious human rights violations that took place during the war. To some extent, the judicial construction of the fact section reflects broader political discussions in Japan: how do Japanese judges write the history of the war? What assertions do they consider sufficiently supported in the evidentiary record to deem "facts" in the factual recognition section of the opinion?[216] The choice of words ("military sex slave" over "comfort woman," for example), and the depiction of certain historical events, show Japanese judges wade into political discussions. Moreover, their presentation of history often contradicts those interpretations advanced by members of Japan's ruling party, the LDP. In a small number of decisions, of course, Japanese judges present history in terms that more precisely mirror the contours of the LDP's positions. A few examples bear out the different renditions of the war.

In the Yamaguchi District Court decision — the first lawsuit to order the Japanese government to compensate World War II victims — Judge Chikashita Hideaki made several important findings of fact. The court drew a clear link between the Japanese Army and the comfort women system:

> The recruitment of comfort women took place largely through private agents, at the *request* of *military authorities*. In many cases, the agents used deception and threats to recruit the women against their will. Furthermore, *military police* were often in charge of these activities. When an agent transported the comfort women on ships and so forth, the *Imperial Army* classified them as civilian employees working for the military, and gave them permits to travel. The

213. *Id.*

214. *See* MINSOSHÔ, *supra* note 207, at Art. 247 ("In rendering a judgment, the court shall, weighing the whole of the oral argument and results of the examination of evidence, and based on its free determination, determine whether the facts as alleged are true.").

215. TAKAAKI HATTORI ET AL., CIVIL PROCEDURE IN JAPAN 7-130 (2d. ed. 2000).

216. I appreciate the insight of my colleague Professor Peter Gerhart on this point.

> *Imperial Government* issued identification cards for the comfort women…. Even when private agents ran the comfort station, the *Imperial Army* authorized it, established rules, such as hours of operation and usage fees, and required clients to use contraception. *Military doctors* regularly checked the women for sexually transmitted diseases.[217]

The italicized words weave the Japanese Army back into the warp of history, listing the many roles the military played in perpetrating the comfort women system. Among other things, the account contradicts the narrative, discussed above, that *private* agents alone ran the comfort stations. The opinion takes cognizance of evidence, uncovered by activists in the 1990s, that the Army initiated the stations, abducted the women, and monitored their health and hygiene.

Judge Chikashita did not avoid rendering judgment on normative facts: statements or reflections of prevailing social mores.[218] For instance, the court listed the differential pricing structure used by one of Japan's comfort stations: 1 yen for a Chinese woman, 1.5 yen for a Korean woman, 2 yen for a Japanese woman.[219] The court interpreted the hierarchical payment structure as follows:

> There was no entertainment, food or drink. The facility was for sexual intercourse and nothing else. The comfort women were just necessary equipment for the facility. One cannot even call it *prostitution*. The comfort station was simply for sexual intercourse and release of lust. Given the daily life of comfort women, and the purpose of comfort stations, the women were in effect sex slaves. Moreover, the pricing system reveals blatant *racial discrimination*. It cannot be that mere scarcity, the law of supply and demand, placed such a premium on Japanese comfort women.[220]

This opinion acknowledges the broader debates about war responsibility in Japan. The word "prostitution," which some politicians have used to characterize the comfort women system, is singled out as inappropriate,

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217. Ha Sun-nyo et al. v. Japan, Yamaguchi Chiho Saibansho [Yamaguchi Dist. Ct.] Apr. 27, 1998, 1642 HANREI JIHÔ 24 (emphases added). An English translation is *available at* Taihei Okada (trans.), *The "Comfort Women" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan*, 8 PAC. RIM L. & POL'Y J. 64, 68 (1999) [hereinafter Yamaguchi]. This Article cites to this unofficial translation.

218. BINDER & BERGMAN, *supra* note 125, at 6–7.

219. The rules also banned alcohol consumption, limited users to one hour per visit, and warned them "to take precautions, as all of the women carry diseases." Yamaguchi, *supra* note 217, at 59.

220. *Id.* at 60.

replaced by the politically-charged "sex slave."[221] More surprising still is the ascription of racial discrimination, a finding by no means necessary to the holding, and a serious, if casually made, indictment of the entire system. The opinion further noted that the comfort women system "is not a past issue, but rather an ongoing human rights issue that should be resolved now."[222] This too casts the problem in a narrative and normative structure reflecting plaintiffs' preferences.

In the Nanjing Massacre decision, Judge Itô Tsuyoshi waded into the historical debates on several occasions, repeating the word "invade" (*shinryaku*) or "invasion" (*shinryaku kôi*) eight times.[223] A word choice like "invade" may seem anodyne, particularly given Japanese aggression during World War II. But the word has generated controversy ever since Japan's Education Ministry ordered publishers to substitute the word "advance" for "invade" in high school history textbooks.[224] A brief excerpt helps convey the judge's critical tone:

> [The campaign] was nothing other than an *invasion* of China and the Chinese people based on *indefensible imperial and colonial intent*…. Japan's invasion of territory and derivative inhumane acts continued over a long period of time. Because of this, many Chinese citizens suffered enormous harm. This is an *indubitable historical fact*. On this point, it is clear that Japan *should sincerely apologize* to the Chinese people. That apology will maintain peace and friendly relations between the states and their peoples, now and in the future. It will appease resentments based on citizenship and ethnicity.[225]

This portrays Japan's prosecution of the war not simply as a factual or legal matter, but as a deeply normative one. It accounts for the human rights violations and imperialism, but also wades into political debates, wrestling with the implications for international relations, public policy, and citizen

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221. This term, and its cognates (military sex slave, military sexual slavery), have gained currency among intergovernmental organizations such as the ILO and UN. *See* Int'l Labor Org., Observation (CEACR) 87th ILC Session (1999), Forced Labour Convention, 1930 (No. 29), para. 4 (using the terms "military sexual slavery"); U.N. Econ. & Soc. Council (ECOSOC), Comm. on Human Rights, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) [hereinafter McDougall Report]. The report extensively analyzes Japan's legal liability for the comfort women system. *See id.*, Appendix, paras. 1, 58.

222. Yamaguchi, *supra* note 217, at 69.

223. Li Xiuying v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Sept. 22, 1999, 1028 HANREI TIMES 92.

224. Professor Ienaga Saburo waged a decades-long legal battle against the Japanese government in over the censoring of his textbooks. At various points, the education ministry ordered Ienaga to use "advance" instead of "invade," and to delete sections on the comfort women and Unit 731. Sonni Efron, *Japan's High Court Rules against Rewriting History*, L.A. TIMES, Aug. 30, 1997.

225. *Li Xiuying*, 1028 HANREI TIMES at 94.

diplomacy. It even recommends an apology, an extraordinary and relatively rare occurrence in the WRL context. Other opinions have faulted the Japanese government for falsely claiming to the Japanese Diet that a fire destroyed the same documents.[226]

To be sure, not all judges express sympathy. In two comfort women decisions, brought by Taiwanese and Filipina plaintiffs respectively, the judges did not recognize the facts at either trial or appellate levels.[227] The judgments did not discuss the army's abduction of the women. They did not individuate the harm visited upon the plaintiffs, giving each a name, age, hometown, and identity. Nor did they include testimony from the survivors, as several other opinions.[228]

Instead, these two judgments adopt a more conservative view of history. In the Filipina comfort women case, Judge Ichikawa Yoriaki condensed the facts into a single page.[229] He noted the Philippines was a "colony" (*shokuminchi*) of Spain and the United States at different points in its history.[230] But on "October 14, 1943, with Japanese approval, the Philippine Republic was launched with Jose Laurel as President."[231] Indeed, the judge does not even refer to plaintiffs as "comfort women," as other decisions do.[232] Instead, they are "women of Philippine nationality who lived in the Philippines during the three years of Japanese military occupation."[233] The court did not take note of the fact that lead plaintiff Rosa Henson was forcibly abducted into the comfort women system at a Japanese military checkpoint in the Philippines.[234] It also overlooked her role in the resistance.[235]

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226. Liu Lianren v. Japan, Tokyo Koto Saibansho [Tokyo High Ct.] June 23, 2005, 1904 HANREI JIHO 83, 84.

227. *See* Teng Kao Pao-chu v. Japan, Tokyo Chiho Siabansho [Tokyo Dist. Ct.] Oct. 15, 2002, 1162 HANREI TAIMUZU 154, *aff'd* Tokyo Koto Siabansho [Tokyo High Ct.] Feb. 9, 2004, *aff'd* Saiko Saibansho [Sup. Ct.] Feb. 25, 2005; Rosa Henson v. Japan, Tokyo Chiho Siabansho [Tokyo Dist. Ct.] Oct. 9, 1998, 1683 HANREI JIHO 57, *aff'd* Tokyo Koto Siabansho [Tokyo High Ct.] Dec. 6, 2000, 1718 HANREI JIHO 30.

228. A copy of the facts submitted on behalf of both set of plaintiffs is available online. *See Teng Kao Pao-chu*, 1162 HANREI TAIMUZU 154, *available at* http://justice.skr.jp/fact/fact1-7.pdf (Taiwanese plaintiffs); *Rosa Henson*, 1683 HANREI JIHO 57, *available at* http://justice.skr.jp/fact/fact1-5.pdf (Filipina plaintiffs).

229. *Rosa Henson*, 1683 HANREI JIHÔ at 57.

230. *Id.*

231. *Id.* The implication is that Japan had liberated the Philippines from Western colonialism. This idea has deep roots, including in Japan's wartime conception of a "Greater East Asia Co-Prosperity Sphere." *See* Kim Keong-il, *Nationalism & Colonialism in Japan's "Greater East Asia Co-Prosperity Sphere" in World War II*, 8 REV. KOREAN STUD. 65, 72 (2015).

232. *See, e.g.*, Yamaguchi, *supra* note 217; Chen v. Japan, Tokyo Chiho Siabansho [Tokyo Dist. Ct.] Apr. 24, 2003, 1822 HANREI JIHÔ 83.

233. *Rosa Henson*, 1683 HANREI JIHÔ at 57.

234. MARIA ROSA HENSON, COMFORT WOMAN: A FILIPINA'S STORY OF PROSTITUTION AND SLAVERY UNDER THE JAPANESE MILITARY 32 (1999)

235. *Id.*

Judicial opinions thus reflect the larger debates about World War II. Most judges seem to acknowledge the events of the war in the fact sections, reinserting plaintiffs back into history. Some judges go so far as to condemn Japan's wartime conduct, while others have apologized to the people of China. This suggests an important role for judges in the larger political debates over World War II. When presented with clear, factual evidence, judges produced opinions that, in large measure, track the basic facts of the war, and thereby challenge the denials issued by certain members of ruling Liberal Democratic Party. Not all judgments do this, of course; some make few factual findings, in a sense denying the events ever took place. It would seem, however, that most judges compose elaborate factual recognition sections, and may not "parrot" the prevailing LDP ideology as closely as Ramseyer and Rasmussen predict.

Judicial recognition of facts may help victims come to grips with their own past. Many Chinese and Korean victims express concern that Japan, and Japanese officials in particularly, have denied key facts of the war. That is partially what motivated Kim Hak-sun to sue in the first place. As one disappointed former comfort woman put it, "It's a terrible decision. But the court recognized the fact of the harm, so I hoped the Japanese government would apologize. As long as I'm alive, I'll continue the fight."[236]

IV. THE JUDICIAL CONSTRUCTION OF "VICTORY": TORT LAW

The correction of the factual record is not the primary aim of lawsuits. Instead, WRL litigants typically demand compensation and an apology in their petitions.[237] In a small handful of decisions, including the four analyzed below, plaintiffs "won" their case in the sense that the court awarded monetary damages. That means, at a minimum, that plaintiff proved defendant infringed a right.[238] But what was the right? For what activity was

236. *See* Chûgokujin 'Ianfu' Saiban o Shien Suru Kai [Association to Support the Chinese 'Comfort Women' Lawsuit], *'Ikiteiru Kagiri Tatakai Tsuzukemasu' Futô Hanketsu o Ukete* [*'I'll Keep Fighting As Long As I'm Alive:' Receiving an Unjust Ruling*], Dec. 29, 2004, (recording statement by former comfort women Liu Mianhuan), *available at* http://www.suopei.jp/local/tokyo/ ianfu/post_324.html.

237. *See, e.g.*, Norimitsu Onishi, *Wartime Chinese Laborers Sue Japan*, N.Y. TIMES, Nov. 15, 2006 (quoting plaintiff and former forced laborer Tang Kunyan, "First, we want an apology, then compensation. Mitsubishi Materials has done terrible things").

238. In most of the cases, plaintiffs rely on the general tort liability provision of Japan's Civil Code: "A person who violates, intentionally or negligently, the right of another shall compensate for damages arising therefrom." MINPÔ, Art. 709. The tort test differs slightly from the duty — breach — causation — damages framework of U.S. law. In Japan, scholars break a tort action into four parts: (1) intentional or negligent action by defendant; (2) violation of plaintiff's rights; (3) causation between damages and defendant's action; and (4) damages. *See* Susumu Hirano, *Drafts of the Japanese Strict Product Liability Code*, 25 CORNELL INT'L L.J. 643, 645–46 (1992).

the defendant found liable? How courts characterize that violation is important for discursive justice.

Tort law expresses a society's ideal of justice.[239] Corrective justice scholars draw a close link between tort law and social morality. To the extent a court attaches liability, it should define that tort with specificity and clarity.[240] If tort compensation serves expressive or symbolic functions — that injuring others is wrong — then the judicial opinion should make that clear.[241]

Yet, as the below decisions show, when Japanese judges attach liability in WRL decisions, they do so in indirect fashion. They rarely attach tort liability to the underlying war crimes — rape, abduction, and forced labor. Instead, they ground the liability decision in legal fictions such as the postwar government's failure to compensate plaintiffs, or the corporation's failure to exercise care for the plaintiff. In other words, tort liability stems not from rape, enslavement, or abuse, but a failure to correct that abuse. Japanese judges, who may express their political predilections in the fact section, nonetheless maintain a deferential attitude towards the political branches, and the military, in theorizing legal liability.

From the viewpoint of discursive justice, these victories do not endorse principles such as human rights, or rule of law, as advocates may desire. The awarding of monetary damages, central in most conceptions of tort law, does not vindicate all of the wrongs that a plaintiff seeks to address through litigation. The following section examines four "victories" in the WRL movement, devoting particular attention to the court's construction of the underlying tortious activity.

A. Korean Comfort Women Decision

The first WRL decision to find the government of Japan liable — the 1997 Yamaguchi District Court comfort women case — did so obliquely. This is the only of the ten comfort women lawsuits to find Japan liable, and was overturned on appeal. Nevertheless, the decision suggests that courts can play a role in remediating human rights abuses. What is that role?

As noted above, the decision depicted the brutal treatment of the three Korean comfort women.[242] It also noted the inhumane treatment violated the present (1946) Constitution.[243] But the court refused to apply present

239. *See* Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 357 (1992).

240. Professor Peter Gerhart has explored this connection in his recent book, TORT LAW & SOCIAL MORALITY (2010).

241. Rick Swedloff & Peter Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553, 588 (2010).

242. *See supra*, notes 217, 219, and accompanying text.

243. *See* Yamaguchi, *supra* note 217, at 95.

constitutional principles retroactively, to scrutinize conduct that took place during World War II.[244] The court also discussed the Meiji Constitution, in effect at the time of the war, but held that the state was not liable for human rights violations under that constitution.[245]

Where, then, did the court locate the tort liability? Surprisingly, perhaps, it was the *current* Diet's failure to remediate the harm that the court determined to be illegal. With the 1993 Kôno Statement, Judge Chikashita surmised, Japan took on an obligation to compensate the comfort women.[246] The judgment cited the Kôno Statement at some length, including its extension of "its sincere apologies and remorse to all…comfort women,"[247] and its request upon the Japanese government "to consider seriously, while listening to the voice of learned circles, how best to express this sentiment."[248] From this hortatory language, the court inferred an obligation to pay compensation to the comfort women, or more specifically a "constitutional obligation to pass special legislation to compensate the plaintiffs for the damages they suffered."[249] When the Diet failed to pass such a law within a "reasonable period" of three years, the obligation entered into a small number of "exceptional cases" that required state compensation. Because of its legislative omission (*rippô fusakui*), the trial court ordered the Diet to pay each plaintiff 300,000 yen (about $2,300).

The brutality of the comfort women system may well have motivated the court's decision. In interpreting the duty to legislate, the court noted "a constitutional duty to legislate arises in cases that recognize both the *seriousness* of the human rights violation and the *strong necessity* for a remedy."[250] Citing Supreme Court precedent, the court held the duty to legislate was not limited to literal violations of the Constitution.[251]

Yet, from a jurisprudential point of view, the theory of legislative omission provides a weak legal basis. Japanese courts have frequently rejected lawsuits against the Diet for failing to legislate, especially in the context of World War II reparations.[252] In 1981, for example, a court held the Diet's decision to relieve wounded soldiers, but not to wounded

244. *Id.* at 99.
245. *Id. at* 95.
246. *Id.* at 101–02.
247. Kôno Statement, *supra* note 139.
248. Yamaguchi, *supra* note 217, at 97.
249. *Id.* at 102.
250. *Id.* at 100.
251. *Id.* at 103.
252. *See* Nishino Akira, *Rippô Fusakui to Kokka Sekinin* [Legislative Omissions and State Responsibility], 76 HÔRITSU JIHÔ 50, 50 (2001) (noting the "negative trends" in legislative omission precedents). Several war compensation lawsuits have charged the Diet with failing to compensate plaintiffs. With the exception of the Yamaguchi decision, courts have not found this to be an unconstitutional legislative omission.

civilians, was a proper exercise of legislative discretion.[253] In 1986, the Supreme Court of Japan narrowed the grounds for liability for legislative omissions to cases involving "exceptional cases" (*reigaiteki baai)*.[254] In 1989, the Tokyo District Court dismissed a case brought by Japanese POWs who performed forced labor in the Soviet Union after the war.[255] The court found that the Constitution does not place a duty on the state to pay compensation for war damages.[256]

Given the disfavor in which the legislative omission doctrine is held, it was not a surprise when the Hiroshima High Court reversed the Yamagushi District Court decision. It held, "[A]s a matter of constitutional interpretation, we cannot say there was a clear legislative obligation to apologize and compensate the former comfort women. We do not accept that the failure to legislate was illegal."[257] Thus fell the one and only "victory" achieved by the comfort women in Japanese courts.

The Yamaguchi comfort women decision is important both for its factual recitation and award of monetary damages. The latter is extremely rare in World War II litigation in any jurisdiction. Yet the Yamaguchi comfort women case was not a hearty endorsement of human rights.[258] It did not attach liability to the abduction, transportation, and rape of the three comfort women — or what is known in the present as "human trafficking." Each of those actions was both tortious and criminal. Failing to call the "tort a tort," as it were, does not reinstate rule of law, restore the dignity of the victims, or express the appropriate opprobrium.[259] For these reasons the opinion's contribution to discursive justice seems minimal.

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253. Saito v. Japan, Nagoya Chiho Saibansho [Nagoya Dist. Ct.] Aug. 29, 1980, 1006 HANREI JIHÔ 86, *aff'd* Nagoya Koto Saibansho [Nagoya High Ct.] July 7, 1983, 1086 HANREI JIHÔ 111. *See also* Shishido Masahisa, *Sengo Shori no Nokosareta Kadai – Nihon to Ôbei ni okeru Ippan Shimin no Sensô Higai no Hoshô* [Issues Remaining After the War – Compensation for Civilians' War Damage in Japan, Europe and the United States], 20 REFARENSU [REFERENCE] 111, 113 (2009) (noting the exclusion of wounded civilians was not unreasonable discrimination).

254. The court held the Diet would be liable only when making gross errors, as when a law literally contradicts the Constitution. Sato v. Japan, Saiko Saibansho [Sup. Ct.] Nov. 21, 1985, 39 MINSHÛ 1512.

255. *See* Kamibayashi v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Apr. 18, 1989, 1329 HANREI JIHÔ 36, *aff'd* Tokyo Koto Saibansho [Tokyo High Ct.] Mar. 5, 1994, 1466 HANREI JIHÔ 40 , *aff'd* Saiko Saibansho [Sup. Ct.] Mar. 13, 1998, 51 MINSHÛ 1233.

256. A partial translation and analysis of the district court decision are available in English. *See* Sumio Adachi, *Japan: Excerpts of the Tokyo District Court Decision in Kamibayashi et al. v. Japan (War Claims of Former Japanese Prisoners of War in the Soviet Union)* 29. I.L.M. 391 (1990). The court found, *inter alia*, the text of the Constitution did not require Japan to pass a compensation law for the POWs. *Id.* at 398.

257. Ha v. Japan, Hiroshima Koto Saibansho [Hiroshima High Ct.] Mar. 29, 2001, 1759 HANREI JIHO 42.

258. *See* Naito Mitsuhiro, *Chûgoku Zanryû Fujin Kokubai Soshô in okeru Rippô Fusakui Iken Ron* [*The State Compensation Lawsuit of Women Stranded in China and the Unconstitutionality of Legislative Omissions*], 99 SENSHÛ HÔGAKU RONSHÛ [SENSHU LAW REVIEW] 57, 78 (2007).

259. *See* Ha, Hiroshima Koto Saibansho [Hiroshima High Ct.] Mar. 29, 2001, 1642 HANREI JIHÔ at 25. The appellate court held the Diet only incurred liability when "the contents of its laws literally violate the language of the Constitution." *See also* Nakajima Shigeki, *Kenpô o Kijun toshita Zaisanken no*

B. Liu Lianren

The first decision to find in favor of a forced laborer was rendered in 2001.[260] In 1944, Liu Lianren was abducted from his home in Northeast China and forced to work in a mine in Northern Japan. He and four others escaped the mine on July 30, 1945 — just a few weeks before Japan's surrender. He spent the next twelve years as a fugitive in Japan's mountainous wilds. When discovered by hunters in 1958, Liu was promptly deported back to China "for overstaying his visa."[261]

In 1996, Liu returned to sue Japan for abducting, transporting, and subjecting him to forced labor. Since the mining company that used his labor had dissolved, the state was the sole defendant in the case. In 2001, the Tokyo District Court ordered Japan to pay 20 million yen (about $20,000) in damages.[262] Unfortunately, Liu died in 2000.[263]

In articulating a theory of liability, the district court trod lightly. Rather than attach liability to Japan's wartime actions, the court focused on its postwar omissions. Judge Nishioka Seiichirô acknowledged Japan abducted Liu as a "matter of state policy."[264] The state thereby incurred a duty to return him to his original condition (*genjô kaifuku*), that is, to ensure he returned back to China.[265] The Foreign Ministry Report, discussed above, recorded the escape of five men from the Showa Mine on July 30, 1945.[266] Charged with this knowledge, the Ministry of Health took on a "duty of rescue" (*kyûgo gimu*), to ensure his life and physical integrity.[267] The ministry should have informed local Japanese governments that a Chinese worker had fled, described his physical features, and repatriated him. The failure to

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Naiyô Keisei: Sengo Hoshô Mondai no Rippôteki Kaiketsu ni Yosete [*The Formation of Constitutional Property Rights: Legislative Solutions to the Postwar Compensation Problem*], 284 RITSUMEIKAN HÔGAKU 1, 4 (2003).

260. *Government Appeals Against Ruling on Forced Laborer from China*, KYODO NEWS, July 23, 2001.

261. Liu Lianren v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] July 12, 2001, 1067 HANREI TAIMUZU 116, 119, *rev'd* Tokyo Koto Saibansho [Tokyo High Ct.] June 23, 2005.

262. *Liu*, 1067 HANREI TAIMUZU at 119. This may not seem to be a large award by American tort standards, but it is decent by Japanese standards. Acknowledging the difficulty of translating physical and emotional harm into monetary amounts, the Yamaguchi comfort women each got about one-tenth of Liu (roughly $2,300). In U.S. Alien Tort litigation, verdicts have run to the millions of dollars, but few have actually been enforced. *See generally* Jon M. Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHILIPPINE L.J. 169, 185 (2001).

263. Under Japanese law, an appropriately designated heir may continue a deceased plaintiff's lawsuit. *See* MINJI SOSHÔ HÔ [CIVIL PROCEDURE LAW], Art. 124(1)(i) (allowing plaintiff's heir to continue the cause of action when plaintiff dies); MINPÔ [CIVIL CODE], Art. 896 (allowing an heir to succeed to "all rights and duties" once belonging to the deceased).

264. *Liu*, 1067 HANREI TAIMUZU at 120.

265. *Id.* at 121.

266. *Id.*

267. *Id.*

take appropriate measures violated Japan's State Compensation Law.[268] Under this interpretation, Japan was liable to Liu for eleven years: from the passage of 1947 law until his 1958 discovery.

While a victory in the sense of factual recognition and monetary damages, the decision did not attach liability to Japan's wartime acts. In this sense, it continued to immunize Japan for its wartime conduct. Like the Yamaguchi comfort women decision above, the compensable tort was a postwar omission (failure to find Liu and repatriate him), not a wartime violation of Liu's rights (abducting him and forcing him to work in abject conditions. As one Japanese lawyer explained, the court did not use the word "illegal" to describe Liu's abduction, confinement, or forcible transportation, even though any of these acts would be criminal.[269]

Liu Lianren is an unusual decision in that it represents a domestic court ordering its own government to pay compensation for the acts and omissions of World War II.[270] Rarer still, the plaintiff was foreign, while the defendant was the "home state" litigant.[271] In other leading cases where compensation was ordered for World War II abuses, such as *Ferrini* and *Distomo*, the plaintiff was a citizen of the "home state" (Italy and Greece, respectively), while the defendant was a foreign state (Germany, in both cases). One can understand the excitement expressed by human rights lawyers and civil society organizations, who proclaimed the decision "epochal."[272] According to one group, "it has been a difficult struggle to

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268. Kokka Baishô Hô [Law Concerning State Liability for Compensation], Law No. 125 of 1947. "When a government official . . . in the course of performing his duties, illegally inflicts loss upon another person, either intentionally or negligently, the State shall be liable to compensate such loss." *Id.* at 1(1).

269. Takahashi Tôru, *Ryû Renjin Hanketsu no Seika to Eikyô* [*The Achievements and Impact of the Liu Lianren Decision*], 362 HÔ TO MINSHU SHUGI [LAW & DEMOCRACY] 47, 49 (2001).

270. *See* Ferrini v. Federal Republic of Germany, Corte Suprema di Cassazione [Ital. Sup. Ct.] 5044, Mar. 11, 2004 (holding the German army's 1944 capture, deportation, and enslavement of Italian citizen violated *jus cogens* norms, and thus Germany waived its immunity) [hereinafter Ferrini]; 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) [hereinafter Distomo]. But as noted, those cases involve very different situations than in the Liu Lianren case. Many plaintiffs have filed compensation lawsuits in the United States. But federal courts have dismissed them. *See, e.g.*, Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001), *aff'd* 413 F.3d 45 (D.C. Cir. 2003) (dismissing case brought by former comfort women on sovereign immunity grounds); Iwanowa v. Ford Motor Werke, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing forced labor case on grounds of nonjusticiability and international comity); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing slave labor suit against Siemens and Degussa as nonjusticiable); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (dismissing slave labor case on ground of sovereign immunity).

271. In *Ferrini*, an Italian citizen sued Germany in Italy. Ferrini v. Federal Republic of Germany, Corte Suprema di Cassazione [Ital. Sup. Ct.] 5044, Mar. 11, 2004. In *Distomo*, a Greek citizen sued the German government in Greece. Prefecture of Voiotia v. Federal Republic of Germany, Areios Pagos [Greek Sup. Ct.], Nov. 11, 2000.

272. Takahashi, *supra* note 269, at 49. *See also* Kyôsei Renkô, Kigyô Sekinin Tsuikyû Saiban Zenkoku Nettowa-ku [National Network for Trials on Forced Labor and Corporate Accountability],

pursue state liability. This decision represents a breakthrough, a way to overcome that difficulty."[273]

Despite these developments, *Liu* does not affirm the rule of law or sanctity of human rights in a robust way. The court attached liability to the government's *failure* to act after 1947, as opposed to its actions from 1944 to 1945. It did not hold Japan liable for the predicate acts of enslavement, abduction, or confinement. Instead, the illegal act amounted to a 13-year failure to repatriate. Strictly speaking, then, Japan again avoided liability for its *wartime* conduct. In this way, the decision did not condemn the serious human rights violations that underlay Liu's cause of action.

C. Mitsui Mining

A third decision ordering compensation — and the first to find against a corporation — also involved forced labor.[274] In 2000, fifteen Chinese men sued Japan and the Mitsui Mining Company for forced abduction and forced labor. They worked at two of Mitsui's coal mines during the final two years of the war.[275] In 2002, Judge Kimura Motoaki rendered a split decision, holding the corporation liable but not the state. This result highlights the peculiarities of WRL decisions. For the first time, a Japanese court found a corporation liable, ordering Mitsui to pay each plaintiff 1.1 million yen (approximately $11,000).[276] Again, in the context of global World War II litigation, that makes the resultant decision relatively exceptional. But the court fell back on the standard exculpation for the state, invoking the doctrine of sovereign immunity (*kokka mutôseki*) to shield it from liability.[277]

For the purposes of discursive justice, however, the court made several important findings. First, it found both Japan and Mitsui acted as "joint tortfeasors."[278] Judge Kimura criticized the defendants in the following way:

> As the above facts show, the damages arising from defendant company's actions sought to make up for the labor shortages during the war. Together with defendant state, defendant company also

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Ryû Renjin Saiban Hanketsu ni kansuru Seimei [*Statement on the Liu Lianren Court Decision*], July 12, 2001, *available at* www.suopei.jp/local/renko-net/post_403.html.

273. *Id.*

274. Zhang Baoheng v. Mitsui Mining & Japan, Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Apr. 26, 2002, 1098 HANREI TAIMUZU 267 [hereinafter Mitsui]. The decision was reversed on appeal, and the reversal was affirmed by the Supreme Court. *See* Fukuoka Koto Saibansho [Fukuoka High Ct.] May 24, 2004, 1875 HANREI JIHÔ 62, *aff'd* Saiko Saibansho [Sup. Ct.] Apr. 27, 2007.

275. *Mitsui*, 1098 HANREI TAIMUZU at 271. *See also* KYODO NEWS SERVICE, Forced Laborers Win Suit: Mitsui Mining Ordered to Pay 165 Million Yen, JAPAN TIMES, Apr. 27, 2002.

276. *Mitsui*, 1098 HANREI TAIMUZU at 301.

277. *Id.* at 268.

278. *Id.*

> engaged in abductions through use of fraud, intimidation and violence, and imposed forced labor under terrible conditions. The conduct was extremely malicious.[279]

The language may not be especially harsh, but it closely links the government of Japan, and the Mitsui company, to a range of tortious acts. The court invoked sovereign immunity to shield the state, yet its characterization of the state as a "joint tortfeasor" nevertheless indicates the court's disapproval. To underscore this, the court explained both defendants "planned and executed the forced transportation and forced labor," further implicating the state in the illegal acts.[280]

The true import of the decision, however, lies with the court's attachment of corporate liability. Judge Kimura states that "defendant company should bear tort liability towards plaintiffs for violating Article 709 and 715 of the Civil Code."[281] Those are basic tort provisions of Japan's Civil Code and not, in and of themselves, especially damning.[282] Yet, read in conjunction with the court's statements about Mitsui's "extremely malicious" acts, the court unequivocally attaches tort liability to corporate wrongdoing. Such clarity and transparency can help reinstate the rule of law, vindicate human rights, and perhaps even restore the victims' dignity.

The decision reached another milestone in denying the statute of limitations defense. Prior WRL decisions had insulated defendants[283] from tort liability because the illegal acts took place decades prior to the filing of the lawsuit.[284] Here, Judge Kimura refused to apply the 20-year statute of limitations on what appears to be equitable grounds. To deny liability "would run strongly counter to the principles of justice and equity."[285] This equity exception may have utility in other jurisdictions where plaintiffs bring cases involving serious human rights violations from previous eras.

The *Mitsui* decision emerges as a strong endorsement of discursive justice, at least as far as the corporate defendant is concerned. The court attached liability to serious human rights abuses that took place during the

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279. *Mitsui*, 1098 HANREI TAIMUZU at 270.

280. *Id.*

281. *Id.*

282. Article 709 provides that "A person who has intentionally or negligently infringed any right or legally protected interest of another person shall be liable to compensate for any damages resulting therefrom." Article 715 assigns liability to businesses and employers.

283. Illustrative decisions would include Song Jixiao v. Nishimatsu Construction Co., Hiroshima Chiho Saibansho [Hiroshima Dist. Ct.] July 9, 2002, 1110 HANREI TAIMUZU 253 (applying Japan's 20-year statute of limitations to torts committed by Nishimatsu); Kim Kyeong-seok v. Japan Steel (NKK), Tokyo Chiho Saibansho [Tokyo Dist. Ct.] May 26, 1997, 1614 HANREI JIHÔ 41 (dismissing lawsuit on statute of limitations grounds), *aff'd* Tokyo Koto Saibansho [Tokyo High Ct.] Apr. 6, 1999.

284. The limitations periods in Japan's Civil Code is explained, *supra* note 6, and accompanying text.

285. *Mitsui*, 1098 HANREI TAIMUZU at 298.

war. It did not construct an elaborate theory of liability that attached to postwar conduct, as the Yamaguchi comfort women and *Liu Lianren* decisions had. Moreover, it attached liability to activities, as opposed to *omissions*.[286] Of course, the decision exculpated the government, and thus did not completely vindicate plaintiffs' claims.[287] The Japanese judiciary, like those in other jurisdictions, remains a political actor, and thus reluctant to censure other political actors.

D. Rinko Corporation

The apotheosis of WRL victories, and the final one in Japan, was handed down in 2004. The Niigata District Court found for eleven Chinese forced laborers.[288] Judge Katano Yoshinori again called the state and corporate actors "joint tortfeasors," as had Judge Kimura in the Mitsui decision. But Judge Katano went one step further, attaching tort liability to the state and the Rinko Corporation. This is the first and only WRL decision where a Japanese court attached liability to the government for acts that took place during the war.[289] Yet like the other decisions, this opinion was not exactly a full-throated endorsement of human rights.

On the one hand, the court explains the numerous tortious acts committed by both Japan and the Rinko Corporation. First, Judge Katano found:

> Defendant State [Japan] carried out, as a matter of policy, forced transportation and forced labor. Using Japanese soldiers, Defendant State confined the plaintiffs, detained them in the Xinhua Institute (a prisoner of war detention facility), forcibly transported them on a train, and sent then to Japan on a cargo ship…. In implementing the policy, Defendant State made the plaintiffs engage in forced labor. These were clearly illegal violations of plaintiffs' rights to physical integrity and liberty. Thus, Defendant State is liable to

286. This was the pattern for both the Yamaguchi comfort women and Liu Lianren, among others.

287. The decision also did not order Mitsui to apologize, as plaintiffs requested. *Mitsui*, 1098 HANREI TAIMUZU at 267.

288. Zhang Wenbin v. Rinko Corp. & Japan, Niigata Chiho Saibansho [Niigata Dist. Ct.] Mar. 26, 2004, 54 SHÔMU GEPPÔ 3444 [hereinafter Rinko]. Ten forced laborers, and two heirs of one additional laborer, amounted to eleven plaintiffs.

289. Nihon Kyôsantô [Communist Party of Japan], *Chûgokjin Kyôsei Renkô wa Fuhô Kôi: Hajimete Kuni no Sekinin Mitomeru* [Forcibly Abducting Chinese Laborers Is an Illegal Act: State Liability Recognized for First Time], SHIMBUN SEKKI [NEWSPAPER RED FLAG], Mar. 27, 2004, www.jcp.pr.jp/akahata/aik3/2004-03-27/01_02.html.

> plaintiffs for tort liability under Articles 709 and 715 of the Civil Code.[290]

The court does not condemn Japan in particularly harsh terms. Yet in comparison with earlier decisions, which extended liability only to postwar activity, this opinion seems to carve out a revolutionary approach. It acknowledges the state's role in abducting forced laborers, notes that it resulted from state action, and would appear to hold the state liable under common tort provisions of the civil code. The court made similar factual and tort findings about Rinko.[291] However, the court later refused to attach liability for these tort actions by applying Japan's 20-year statute of limitations.[292]

On other hand, in keeping with the indirect approach, the court found both defendants liable for failing to perform their "duty of care" (*anzen hairyo gimu*).[293] In Japanese tort law, a duty of care arises when two parties share "special social contacts," such as that between an employer and employee.[294] In this case, Japan owed plaintiffs a duty of care because it (a) established the policy of recruiting forced labor, (b) used the Japanese army and related organizations to recruit the laborers in China, (c) signed contracts with port operators that used the forced laborers, and (d) dispatched police who monitored the forced laborers while in Japan.[295] Similarly, Rinko owed a duty of care to the forced laborers, because it signed contracts with the organizations in North China that recruited the laborers, controlled the laborers while they were in Japan, and forced them to work.[296]

Yet, even under the nonperformance theory, Judge Katano still had to avoid the implications of the statute of limitations. He looked to earlier WRL decisions, including the equitable considerations raised in the *Mitsui* decision:

> The idea of denying damages claims against the state . . . is difficult to justify or rationalize. Under current law, courts have the power

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290. *Rinko*, 54 SHÔMU GEPPÔ at 3455.

291. The court noted that Rinko, with help from the police, monitored the plaintiffs; prepared almost no clothing, bedding, or heating for them, despite the extreme weather conditions; provided insufficient nutrition, showed little concern for the plaintiffs' physical integrity and hygiene; and allowed almost no breaks or holidays. These acts also violated plaintiffs' rights to physical integrity and freedom. *Rinko*, 54 SHÔMU GEPPÔ at 3455–60.

292. *Id.* at 3471 (citing the prescription clause of Art. 724(b) of the Civil Code).

293. *Id.*

294. This doctrine derives from a 1975 Supreme Court decision that required Japan to pay compensation for a Japanese soldier killed while on duty. The doctrine is often applied against employers when their employees are injured on the job. *See* Saiko Saibansho [Sup. Ct.] Feb. 25, 1975, 27 MINSHÛ 143. The opinion is *available at* http://www.courts.go.jp/app/files/hanrei_jp/111/052111_hanrei.pdf.

295. *Rinko*, 54 SHÔMU GEPPÔ at 3470.

296. *Id.* at 3465.

> to hear both public and private law cases. The State may, in exercising its authority, ignore humanity (e.g., enslavement) and cause damage. But it would *run strongly counter to the principles of justice and equity* to insulate the state from civil liability, simply because the events transpired *before* the enactment of the Constitution or State Compensation Act.[297]

Judge Katano seems motivated more by equitable than by legal principles. It is tempting to interpret the language of "ignoring humanity" as pointing to *jus cogens* norms.[298] However, the decision appears primarily concerned about the unfairness of allowing the state to avoid liability for its indefensible treatment of vulnerable persons.

In the preceding discussion, we have examined four decisions that attached tort liability. It is important to note that such decisions are quite rare among WRL decisions. Moreover, each "victory" was overturned on appeal. In the end, no plaintiff saw even one yen of compensation from any of these verdicts.

Indeed, in this handful of "successful" decisions, Japanese judges clearly struggled with how to characterize the violation. They did not attach liability to the actual human rights violations: abducting people, confining them, raping them, or otherwise. Instead, the judges referenced postwar *failures* to correct the underlying damage, or the nonperformance of putative obligations, to theorize liability. Accordingly, from the point of view of the rule of law, human rights, or corrective justice, these decisions are hardly the victories that they might seem on first blush. This is not necessarily a criticism of the lawyers and civil society groups that held up these decisions as "epochal" or "major breakthroughs." As noted, it is rare for a court to order compensation for World War II harm in the twenty-first century. Rather, it is to show that the opinions themselves do not endorse basic human rights or rule of law principles with the clarity and transparency some may wish.

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297. *Id.* at 3466.

298. Many scholars have argued in favor of a *jus cogens* exception for sovereign immunity. That is, courts cannot immunize the state when it has committed grave rights abuses, such as genocide. Merva Belsky & Naomi Roht-Arriaza, *Implied Waiver under the FSIA: A Proposed Exception to the Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365 (1989) (arguing that a state automatically waives sovereign immunity because observing peremptory norms is "a condition of statehood"). The doctrine has yet to find its way into a majority opinion in the United States, but Judge Patricia M. Wald has argued for a *jus cogens* exception in dissent. "*Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity." *Princz v. Fed. Rep. Germany*, 26 F.3d 1166, 1181 (D.C. Cir. 1994).

V. VIOLATIONS OF INTERNATIONAL LAW

The postwar compensation lawsuits also passed judgment on various matters of international treaty law and customary international law. Japanese human rights lawyers invoked a range of treaties and customs, offering many opportunities for Japanese judges to engage with international law: to review the obligations that Japan accepted in the first half of the twentieth century, to determine which customs bound Japan, to decide which norms to accept (and which to refute), and to offer remedies, as appropriate. From the beginning,[299] the lawsuits prodded Japan and Japanese corporations to internalize human rights and humanitarian law norms.[300] After one early decision, a lawyer expressed regret when the trial court did not find that the defendant's conduct violated the Forced Labor Convention (ILO 29).[301]

Violating international law matters in various ways. First, it incurs reputational harm. Dean Andrew Guzman of the University of Southern California Gould School of Law has articulated four factors to evaluate the reputational harm of an international law violation: 1) severity of violation, 2) whether it takes place in a national emergency, 3) how widespread the knowledge of the violation is, and 4) the clarity of the obligation.[302]

Taken as a whole, the WRL movement has caused Japan *moderate* reputational harm. To be sure, the underlying violations — institutionalized rape, massacre, medical experimentation on human beings, forced labor — rank as severe. Some 200,000 women are alleged to have worked at "comfort stations." And as many as 300,000 people were killed in the six-week "Rape of Nanking."[303] Japan may not have committed genocide, arguably the gravest human rights violation of all, but the brutality of its prosecution of World War II cannot be underestimated.

The second factor somewhat mitigates Japan's reputational harm. The fact that these human rights abuses took place during the bloodiest and most destructive conflict in human history suggests not just a national, but international, emergency. Indeed, the horrors of the Holocaust in Europe have tended to attract most of the West's attention. As Professor Rana

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299. Kim Kyeong-seok v. Japan Steel (NKK), Tokyo Chiho Saibansho [Tokyo Dist. Ct.] May 26, 1997, 1614 HANREI JIHÔ 41, *aff'd* Tokyo Koto Saibansho [Tokyo High Ct.] Apr. 6, 1999.

300. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). Human rights litigation offers one venue where non-state actors can vindicate international norms. An important part of this process, Koh writes, is its normativity: how "new rules of law . . . are interpreted, internalized and enforced." *Id.* at 184.

301. *See* Tanigawa Tooru, *'Shinshi' ni wa Uketomeru mo, Jijitsu Kaimei ni Seii Nashi* [*Accepting the 'Truth,' But Insincerely Clarifying Facts*], *in* NIHON KIGYÔ NO SENSÔ HANZAI [WAR CRIMES OF JAPANESE CORPORATIONS] 73, 80 (Koshô Tadashi et al. eds. 2000).

302. Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1862–63 (2002).

303. IRIS CHANG, THE RAPE OF NANKING (1997).

Mitter of Oxford University has argued, the history of Japanese aggression in Asia "disappeared down a hole created by the early Cold War."[304] This has drawn attention *away* from the devastation wrought by Japan.

The third factor also alleviates some of the potential reputational harm. Certainly in the West, Japanese aggression is probably less well known than the contemporaneous acts committed by the Nazis. The opposite may be true in East Asia, where China and South Korea have both recently made efforts to educate their citizenry, and the broader public, about the war.[305] As noted above, the WRL lawsuits themselves are drawing unprecedented attention and educating people around the world about the particularities of World War II in East Asia and elsewhere. In the past decade, the U.S. House of Representatives, European Parliament, and Canada's House of Commons (Lower House) have all passed resolutions calling on Japan to apologize to the comfort women and offer more substantial compensation.[306] In addition, international bodies such as the International Labour Organization and United Nations have issued reports cataloging Japan's international law violations and encouraged Japan to provide compensation.[307]

The final factor, clarity, depends upon the particular obligation. Certain war crimes, such as rape, were not clearly articulated in international

304. Mitter argues that the West knew about Japanese aggression as it unfolded in China, but the early Cold War's recalibration of political alliances — where the West "traded" its wartime ally, China, for its wartime enemy, Japan — has obscured the facts of the war. *See* RANA MITTER, FORGOTTEN ALLY: CHINA'S WORLD WAR II, 1937–1945 10 (2013).

305. *See* Kim Sue-young, *National Assembly Urges Japan to Apologize to Comfort Women*, KOREA TIMES, Oct. 27, 2008 (South Korea's National Assembly calls on Japan to apologize to comfort women), *available at* http://www.koreatimes.co.kr/www/news/nation/2008/11/116_33365.html.

306. *See* H. Res. 121 (July 30, 2007) (U.S. House of Representatives calls on Japan to acknowledge, apologize for, and stop denying the role of the Japanese army in the comfort women system); *House of Commons Passes Motion Recognizing 'Comfort Women,'* CBC NEWS, Nov. 29, 2007 (Canada's lower house unanimously calls on Japan to recognize and remediate comfort women); Joint Motion for a Resolution on Comfort Women, EUR. PARL. DOC. RSP 2682 (Dec. 12, 2007) (European Parliament calls on Diet to "remove existing obstacles to obtaining full reparations before Japanese courts; in particular the right of individuals to claim reparations against the government should be expressly recognized").

307. The ILO Committee of Experts called the "massive conscription of labour to work for private industry in Japan under such deplorable conditions was a violation of the [Forced Labour] Convention." Committee of Experts on the Application of Conventions and Recommendations Observation, adopted 1998, published 87th ILC session (1999). Likewise, U.N. Special Rapporteur Gay McDougall found Japan's operation of the comfort women system violated international treaty law (Hague Convention of 1907 and customary international law). *See also* McDougall Report, *supra* note 221, Appendix para. 12 (noting comfort women system violated customary international law prohibiting slavery), para. 42 (noting comfort women system violated Hague Convention No. IV).

treaties.[308] The 1907 Hague Convention,[309] for instance, does not mention rape at all. Instead, it provides that "family honour and rights, individual lives and private property, as well as religious convictions and liberty, must be respected."[310] Among academics, the prevailing interpretation is that respecting "family honour" amounts to a ban on rape.[311] But one must make several inferences to arrive at such a conclusion. Similarly, the Hague Convention prohibits poison and poisonous gas. But the precise contours of this prohibition are shaped, at least in part, by court decisions.[312] As we shall see in the following analysis, Japan has suffered moderate reputational harm from these decisions.

In additional to reputational harm, judicial decisions also activate international law, giving form and teeth to the norms encapsulated in binding treaties. [313] In light of realism's longstanding criticism of international law — that its lack of enforcement powers renders it illusory — judicial decisions can implement treaty provisions and international norms.[314] By evaluating state behavior under the prism of international treaties, domestic courts select, reinforce, or dismiss these provisions.[315] Judicial decisions help stigmatize the offender or the offense, reassert the importance of law, and propagate human values embodied in international treaties. [316] They thus express norms and ideals that the international community has formalized in treaties, but may not have occasion to enforce.[317]

Finally, the decisions increase the transparency and clarity of international rules, providing guidance to domestic political actors, and the

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308. The Fourth Geneva Convention eventually prohibited "rape enforced prostitution or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 27, 6 U.S.T. 3516.

309. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons during War on Land, Art. 1. Oct 18, 1907, 187 CTS 227, 1 Bevans 631 [hereinafter Hague Convention].

310. *Id.* at Art. 46.

311. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 348 (1999) (calling the provision a "euphemism" that nonetheless bans rape and sexual assault).

312. *See infra*, notes 325–334 and accompanying text.

313 ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 10 (2011).

314 . *See, e.g.*, Terry Nardin, *Ethical Traditions in International Affairs*, *in* TRADITIONS OF INTERNATIONAL ETHICS 1, 13 (Terry Nardin & David Mapel eds. 1992).

315. Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RES. 588, 593 (2007).

316. Marc Drumbl, 75 GEO. WASH. L. REV. at 1201 (noting the expressive value of criminal trials such as Nuremberg).

317. Diane Marie Amman, *Group Mentality, Expressivism and Genocide*, 2 INT'L CRIM. L. REV. 93, 120 (2002) (suggesting that pronouncements may help articulate a norm, but that chronic nonenforcement of that norm may strip away its moral authority).

legal community more generally.[318] Outsiders — civil society groups, lawyers, academics, victims — can challenge the government's understanding of its legal obligations and its interpretations of international law.[319] The Japanese government has defended itself in scores of lawsuits, staking out a set of legal interpretations that, at one point in the past, may have been unassailable. Now, however, the Japanese government must countenance the fact that its own judiciary has said its wartime conduct violated international human rights law and international humanitarian law.

In practice, domestic courts rarely find that state actors from their own government violated international law. In the United States, for instance, only a few decisions have found that the U.S. government violated international law.[320] This is not because the United States has not violated international law.[321] Instead, U.S. courts deploy avoidance techniques, such as the political question doctrine and sovereign immunity, to bypass the issue altogether.[322] On the other hand, federal courts have found *foreign* government officials violated international law in a variety of contexts.[323]

It is far from inevitable, then, that Japanese judges would find that the Japanese government violated international law. Judges could easily sidestep the issue by invoking *Shimoda*: states are not liable to individual victims for

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318. Ashley Deeks*, Domestic Humanitarian Law: Developing the Law of War in Domestic Courts*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL & QUASI-JUDICIAL BODIES 134 (Derek Jinks et al. eds., 2014).

319. *Id.* at 157.

320. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding Bush administration's military commissions violated the Geneva Conventions and Uniform Code of Military Justice); Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980) (holding attorney general violated customary international law by detaining Cuban immigrant indefinitely). At the same time, some decisions have found the United States did *not* violate international law. *See* U.S. v. Alvarez-Machain, 504 U.S. 655 (1992) (holding DEA's forceful abduction of Mexican citizen into the United States did not violate the two countries' extradition treaty).

321. The invasion of Iraq, and abuse of prisoners at Abu Ghraib, are two relatively recent examples where the United States violated international law. *See* Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, GUARDIAN, Sept. 15, 2004 (noting U.N. Secretary General's explicit declaration that the US-led war on Iraq was illegal); Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL INSIGHTS, May 21, 2004 (noting the treatment of detainees amounted to "clear violations of the provisions of both the Third and Fourth Geneva Conventions").

322. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (finding sovereign immunity protects U.S. officials from liability in suits alleging human rights abuses). *See also* Denise L. Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 630 (2007) (arguing for "the elimination of all sovereign immunity doctrines from the United States legal system").

323. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995) ("I have no difficulty concluding that [various acts committed by soldiers under defendant's command] constitute 'cruel, inhuman or degrading treatment' in violation of international law.").

violations of international treaties.[324] Others invoke the "San Francisco framework," that all individual claims were settled by bilateral peace treaties.[325] Nevertheless, several judges examined Japan's conduct under international law and found that its prosecution of the war violated various provisions of international treaty law, as well as customary international law.

Before examining how Japanese courts have interpreted its international obligations, some background on the domestic legal force of international law is in order. The current Constitution of Japan (1946) states that treaties and customary international law "shall be faithfully observed."[326] Most scholars interpret that to mean that international law has domestic legal force in Japan, and ranks above statutes, but below constitutional provisions.[327] But even under the Meiji Constitution (1889), which would apply to the acts at issue in the WRL lawsuits, the Government and the courts believed that treaties and custom both had the force of law in Japan's domestic legal order.[328] It is important to note, however, that this Article is primarily concerned with the expressive effects of violating international law, as opposed to the question of whether such a violation automatically incurs an obligation to provide a remedy. Needless to say, Japanese courts, even those that have found a violation of international law, have not required a remedy.

A. Comfort Women Cases

The Yamaguchi comfort women decision first broached the prospect that the comfort women system in fact violated international law.[329] Judge Chikashita merely hinted at the possibility: "the comfort women phenomenon *could* have violated the Prostitution Convention and Forced Labour Convention."[330] Only in a later suit, brought by former comfort woman Song Shindo, did a court rule *definitively* that Japan violated international law. In that decision, the Tokyo District Court introduced a

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324. In the Filipina Comfort Women decision, the Tokyo District Court found that victims of Hague Convention violations do not have the right to claim compensation directly against the state. Rosa Henson v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Oct. 9, 1998, 1683 HANREI JIHÔ 46.

325. *See supra* note 10, and accompanying text; Lapre v. Japan, Tokyo Koto Saibansho [Tokyo High Ct.] Nov. 30, 1998, 1769 HANREI JIHÔ 61 (finding claims of Dutch prisoners of war settled by the San Francisco Peace Treaty).

326. KENPÔ [CONSTITUTION], Art. 98(2).

327. Iwasawa, *supra* note 52, at 29.

328. *Id.* at 28–29. Kenneth Colegrove, *The Treaty-Making Power in Japan*, 25 AM. J. INT'L L. 270, 289 (1931) ("Although it is the practice of the government to consider a treaty as domestic law, it is deemed necessary to promulgate it as law before it becomes effective towards nationals.").

329. Yamaguchi, *supra* note 217, at 100.

330. *Id.* (referencing International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416, and Convention Concerning Forced or Compulsory Labour, ILO Convention 29, June 28, 1930, 39 U.N.T.S. 55 [hereinafter ILO 29]).

few facts about Song's life: she fled home at sixteen to avoid an arranged marriage.[331] Later, an acquaintance told her she "could make money by serving the nation and going to the frontlines" and "could live by herself without getting married."[332] Song, unaware this would mean sexual enslavement, first went to Sinuiju on the Korea-China border, then to Tianjin, China, and finally to Wuchang (now Wuhan).

The trial court cited a number of international law violations. To do so, Judge Narita Yoshitsune drew on three UN reports, authored by Theo van Boven, Radhika Coomaraswamy, and Gay McDougall, respectively.[333] This shows the Japanese judiciary's willingness both to engage the international community and to address various perspectives, even ones diametrically opposed to the state's. In any event, Judge Narita had at least two UN Special Rapporteurs to cite for his conclusion that Japan violated at least four kinds of international law: (1) customary international law prohibiting slavery, as codified in the Slavery Convention, (2) the Forced Labor Convention, (3) customary international law on crimes against humanity, and ordinary war crimes, and (4) the Prostitution Convention.[334]

Judge Narita explored the violations in some detail. For example, under the Prostitution Convention, parties agree to punish anyone who "has procured, enticed or led away, even with her consent, a woman or girl under age, for immoral purposes."[335] The court found that "plaintiff, aged 16, was tricked by the statement that she 'could make money by serving the nation and going to the frontlines.'"[336] The decision also addressed the common refrain that the comfort women system was private, finding that "defendant, whether through government officials or private contractors, engaged in conduct prohibited by the Convention."[337] The court thus concluded "defendant's conduct clearly violated Article 1 of the Prostitution Convention,"[338] and Judge Narita provides a rights-endorsing interpretation

331. Song Shindo v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Oct. 1, 1998, unpublished opinion (on file with author).

332. *Id.* at 9.

333. *Id.* at 4–5. *See Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/Sub.2/1993/8, July 2, 1993 ("Van Boven Report"); *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. Doc. E/CN.4/1996/53/Add.1, Jan. 4, 1996 ("Coomaraswamy Report"); *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13, June 22, 1998 ("McDougall Report").

334. *Song Sindo*, Chiho Saibansho at 5.

335. International Convention for the Suppression of the White Slave Traffic, Art. 1, May 4, 1910, 98 U.N.T.S. 101 [hereinafter Prostitution Convention].

336. *Song Sindo*, Chiho Saibansho at 9.

337. *Song Sindo*, Chiho Saibansho at 9–10.

338. *Id.* at 10.

of a human rights treaty concluded over a century ago that may seem old yet that remains relevant to this day.

Japan was also found to have violated the Forced Labor Convention. Article 14 ensures forced laborers have the right to remuneration "in cash at rates not less than those prevailing…in the district."[339] Article 15 guarantees workers "compensation from accidents or sickness arising out of…employment."[340] The court found Japan violated both provisions, which entitled Song to seek damages from the government.[341]

Judge Narita also addressed the customary international law on slavery. Since Japan had not ratified the Slavery Convention, the court instead looked to customary international law. Again, citing the McDougall report, Judge Narita found "slavery had reached the status of a *jus cogens* norm by the early twentieth century."[342] Consequently, Japan's enslavement of Song violated the customary prohibition on slavery.[343] The prohibition on slavery also led the court to conclude Japan committed at least one "crime against humanity" in the form of enslavement.[344]

Despite these many violations, the court did not order Japan to compensate Song. In discussing state liability, the court noted:

> State liability arises when states engage in conduct that violates international law. The state owes a responsibility to repair the damage caused by the violation. Particularly when there is a serious human rights violation, or a violation of *jus cogens* norm, the country owes a responsibility to repair the damage directly to the harmed individuals. This is an obligation to the international community as a whole, and to all people. In such a case, the victim has the right to seek an effective remedy from the domestic courts of the authorized state.[345]

However, the court rejected the idea that customary international law had also crystalized to the point that states owed a duty to compensate individuals. Citing both the lack of state practice and *opinio juris*, the court found the individual had no right to seek compensation from the state.

On appeal, the Tokyo High Court recited both the violations of international law and the legal conclusion that Japan did not, in fact, owe a duty to remediate Song:

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339. Article 14 provides that "forced or compulsory labour of all kinds shall be remunerated in cash." ILO 29. *See* Hague Convention, *supra* note 309.

340. Article 15 provides "laws or regulations relating to workmen's compensation for accidents or sickness" shall also apply to forced laborers. *Id.*

341. *Song Sindo*, Chiho Saibansho at 11.

342. *Id.* at 6.

343. *Id.*

344. *Id.* at 9.

345. *Id.* at 12.

> In light of the above facts, the state's establishment and maintenance of the military comfort women violated the *Forced Labor Convention* and *Prostitution Convention*, both of which bound Japan at the time. These treaty violations can give rise to state responsibility under international law. To discharge its responsibility for violating international law, Japan had to take corrective measures and to punish the former military officials responsible for administering the comfort stations. Japan also had an obligation to remediate the victims. But even if Japan does not realize these measures, that in itself does not violate international law. Thus, the plaintiffs' claims cannot be accepted.[346]

This interpretation accurately reflects current judicial practice;[347] states rarely provide compensation when they *themselves* have violated international treaty law. But such an interpretation undercuts the normative force of international law and overlooks international advances in remedies more generally.[348]

In the appeal of Kim Hak-sun, the first comfort woman to step forward, the Tokyo High Court adopted a similar logic. After surveying a broad range of international law,[349] the court found the Japanese government violated customary international law of slavery,[350] the Prostitution Convention,[351] and the Forced Labour Convention.[352] But as in the Song Shindo case, these

346. Song Shindo v. Japan, Tokyo Koto Saibansho [Tokyo High Ct.] Nov. 30, 2000, 1741 HANREI JIHÔ 40.

347. Tomuschat remains skeptical of a general "right to compensation" for aggrieved individuals in the human rights context. He believes such a right has formed in certain regional instruments, but not globally. *See* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 364 (2d ed. 2008). On the prospects of a right to compensation for violations of international humanitarian law, Tomuschat is similarly dim. *Id.* at 368.

348. The International Law Commission has drawn up "Draft Articles" on state responsibility, which require "[f]ull reparation" for "internationally wrongful acts." Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/55/10 (2000), Art. 34.

349. Kim Hak-sun v. Japan, Tokyo Koto Saibansho [Tokyo High Ct.] Jul 22, 2003, 1704 HANREI JIHÔ 54 [hereinafter Hak-sun]. The court analyzed slavery, prostitution, and forced labor as matters of both treaty law and customary international law. *Id.* at 81–88.

350. Since Japan did not ratify the Slavery Convention, it could not violate that treaty. However, the court specifically found that slavery had reached the status of "a binding, *jus cogens* norm of customary international law by the mid-20th century." *Id.* at 84.

351. The court adopted a position first staked out by the International Commission of Jurists. The court noted that Japan entered a reservation to withhold application of the Prostitution Convention in the colonies. *Id.* at 85. But the court also noted that the women were trafficked from Korea (the colonies) to mainland Japan, China, Burma, and the South Pacific, at which point the convention became applicable. *Id.* This line of reasoning was first articulated by the ICJ. *See* International Commission of Jurists, *Comfort women: an unfinished ordeal*, Dec. 1, 1994, 157–58.

352. The court acknowledged a violation of ILO 29, but also that such a violation did not empower individual forced laborers to bring claims directly against the state that conscripted their labor. *Hak-sun*, 1704 HANREI JIHÔ at 86.

violations did not push the court to provide monetary compensation to remedy the harm.[353]

The comfort women system violated more than just international human rights prohibitions on slavery and forced prostitution. In a third decision brought by Chinese plaintiffs, the Tokyo High Court held that the comfort women system violated international humanitarian law (the law of war):

> The damage here was caused by Japanese soldiers in occupied Hainan, a Chinese island they had invaded. To abduct and transport non-combatants, who were neither part of the war nor preparing for war, to imprison them for extended periods of time, and to violate them sexually are outrageous atrocities. These acts clearly violated international law of the time: the Hague Convention,[354] Hague Regulations,[355] and others. Since they were neither acts of war, nor acts in preparation of war, they cannot amount to proper exercises of public power.[356]

The Hague conventions do not *expressly* forbid rape or sexual abuse. Instead, the court interpreted the Hague's protections of "family honour and rights" as a prohibition of rape.[357] In light of this interpretation, it was a small step to conclude the comfort women system violated the Hague Convention. Yet, as Professor Theodor Meron of New York University School of Law notes, this is the rare instance where a court actually pronounced that rape violated the "family honor" provision of the Hague Convention.[358]

From the rule of law perspective, these decisions help articulate the surprisingly *underdeveloped* international law of sexual violence. On purely legal grounds, it is not difficult to see how the comfort women system violated international law. Yet, in arriving at this conclusion, Japanese courts drew heavily on UN reports that outlined the violations and suggested Japan offer reparations. This shows a positive role that international organizations

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353. *Id.* at 85.

354. *See* Hague Convention, *supra* note 309, at Art. 3 ("A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.").

355. *Id.* at Art. 46 ("Family honor and rights, the lives of persons, and private property as well as religious convictions and practice, must be respected.").

356. The court found "there was not enough accurate evidence" to link the conduct back to the legitimate orders, strategic activities or occupation policy of the Japanese army. It thus did not order compensation. *See* Huang Youlong v. Japan, Tokyo Koto Saibansho [Tokyo High. Ct.] Mar. 26, 2009, slip opinion 32–33 (dismissed on other grounds).

357. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 348 (1999).

358. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 (1993) ("Article 46 of the Hague Regulations can be considered to cover rape, but in practice it has seldom been so interpreted.").

play in ensuring respect for international law and the international system. On political grounds, these judgments stake out the somewhat rare position that the "home state" violated international law in several registers.

B. Individuating War Crimes: Dutch Prisoners of War

The 1998 Dutch Prisoner of War case is important for two reasons.[359] First, with testimony provided by leading international authorities — including Professor Frits Kalshoven of Leiden University and Professor Christopher Greenwood[360] of the London School of Economics — the decision remains one of the clearest expositions of international humanitarian law among WRL decisions.[361] Second, the decision clearly spelled out how Japan violated international humanitarian law. Courts do not often elaborate on how or why state actors broke international law. In this decision, however, the Tokyo District Court particularized the harm to each plaintiff.

Lead plaintiff Sjoerd Albert Lapre, a lieutenant in the Dutch Army,[362] had been beaten at several Indonesian detention centers run by the Japanese Army.[363] He was also compelled to perform forced labor.[364] On a journey from Indonesia to Singapore, Lapre found himself "surrounded by fecal matter, and choking on the stench" on a boat "filled with POWs."[365] He spent the next twenty months in Singapore's Changi Prison,[366] where he endured additional beatings, a stabbing, and chronic malnutrition.[367] The court found this mistreatment violated several provisions of the 1907 Hague Regulations and the 1929 Geneva Convention on Prisoners of War.[368]

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359. Lapre v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Nov. 30, 1998, 1685 HANREI TAIMUZU 23.

360. Sir Christopher Greenwood is now a Judge on the International Court of Justice.

361. As one of the plaintiffs' lawyers put it, "we can brag that the discussion of international humanitarian law by the expert testimony was, even by contemporary international standards, at the highest levels." *See* Aitani Kunio, *Oranda oyobi Igirisu nado Rengôkuko no Horyo Minkan Koryûsha ('Ianfu' o Fukumu) Songai Baishô Soshô* [Compensation Lawsuit by Dutch, English and Other Allied POWs and Civilian Detainees (Including the 'Comfort Women')], *in* HÔTEI DE SABAKARERU NIHON NO SENSÔ SEKININ [JAPAN'S WAR RESPONSIBILITY AS ADJUDICATED IN COURTS] 64, 70 (Zukuyama Shigeru ed. 2015).

362. *See Dutch Former POWs Lose Appeal: Court Rules Individuals Have No Right To Compensation*, JAPAN TIMES, Oct. 12, 2001.

363. *Lapre*, 1685 HANREI TAIMUZU at 23.

364. *Id.* at 25.

365. *Id.*

366. Changi was one of Japan's more notorious prisoner-of-war camps during the war. *See* Australian War Memorial, *Changi*, *available at* https://www.awm.gov.au/articles/encyclopedia/pow/changi.

367. *Lapre*, 1685 HANREI TAIMUZU at 25.

368. Convention relative to the Treatment of Prisoners of War, 118 L.N.T.S. 343, July 27, 1929 (entered into force June 19, 1931) (annexed to the Hague Regulations) [hereinafter War Treatment Convention]. The court found violations of Article 3 (respect for persons and honor), 10 (housing and

Regarding the former, the court found Lapre had not been "humanely treated" as a prisoner of war, in violation of Article 4(2).[369] In addition, his performance of forced labor violated Article 6 of the Hague Regulations, which exempts military officers from forced labor.[370] The court also found Japan denied Lapre "board, lodging and clothing" in violation of various Hague rules.[371] Similarly, the court found several violations of the Geneva Convention on Prisoners of War, pertaining to humane treatment (Art. 3), involvement of the Red Cross (Art. 10), medical attention (Art. 15), and clothing (Art. 27).[372]

Likewise, plaintiff Gerard Jungslager was imprisoned in Bandung, Indonesia, as a 15-year-old.[373] He was beaten with a whip, his hands bound behind his back for 24 hours at a time.[374] Such treatment, the court found, violated the obligation to respect "family honour and rights" in the Hague Regulations.[375] Keep in mind that this is the same language used to outlaw rape, a very different form of abuse than the form Jungslager faced. The court found Japan's treatment of other plaintiffs also violated the "family honour" provision.[376]

The lawyers hoped that, by finding violations of international law, the Japanese government would be liable for reparations under international law. To this end, Professor Frits Kalshoven and Professor Christopher Greenwood — now a Judge on the International Court of Justice — testified at trial. Both maintained the Hague Conventions conferred a right to seek reparations directly upon individuals injured during war.[377] Lawyers cited a handful of postwar mechanisms where individuals had the right to seek compensation against the state.[378] But the Tokyo District Court held fast to the familiar statist framework:

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hygiene), Article 15 (monthly medical inspections), and Article 27 (exempting military officers from forced labor). Lapre, 1685 HANREI TAIMUZU at 25. The court also found three violations of the 1907 Hague Convention: Article 4(2) (humane treatment of POWs), Article 6 (forced labor exemptions for officers), and Article 7 (board, lodging and clothing of POWs). *See supra* note 309.

369. *Lapre*, 1685 HANREI TAIMUZU at 25.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 26.

374. *Id.* at 27.

375. War Treatment Convention, *supra* note 368, at Art. 46(1).

376. *Lapre*, 1685 HANREI TAIMUZU at 28–33.

377. Frits Karlshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 INT'L & COMP. L. Q. 827, 830–31 (1991). Other scholars have challenged Karlshoven's findings. *See, e.g.*, TOMUSCHAT, *supra* note 344, at 367 ("Individuals negatively affected . . . do not have direct claims against the enemy state.").

378. Lapre, 1685 HANREI TAIMUZU at 26. These included the Administrative Court in Münster Germany, and the Treaty of Versailles.

> Under international law, a state that violates international legal obligations owes a responsibility to the injured state. Even in cases where the harm to the individual violates a state's obligations under international law, the damage is regarded as belonging to the state, not the individual. The harmed individual will only get an indirect remedy, when his home state exercises diplomatic protection on his behalf.[379]

The opinion notes that remedial provisions in human rights treaties have, on occasion, also provided an individual right:

> Originally, international law did not provide rights and duties directly to the individual. Now, in extremely exceptional cases, human rights treaties explicitly provide rights to individuals. We cannot conclude that it is *impossible* for an individual to have the right to seek compensation under civil law. However, in almost all of these exceptional treaties, a special international law procedure or system is set up to give the individual such a right.[380]

These findings help clarify the content of international humanitarian law. The important point is not that, say, beating a POW violates international law. Any reading of the applicable convention would yield a similar result. What matters is that a domestic court, sitting in judgment of its own military, had the occasion, and competence to make such a finding. To be sure, over half a century has elapsed between the underlying events and the trial that is sitting in judgment of those events. Moreover, the fact that postwar "democratic" Japan is sitting in judgment of wartime, or "militaristic," Japan may give judges additional distance from those events, and allow them to view them somewhat more dispassionately. Still, that should not distract us from the court's conclusion that its own government violated international humanitarian law. Given the various avoidance doctrines available to, and employed by, Japanese courts, that is an important finding.

C. Chemical Weapons and Customary International Law

Perhaps the furthest a court went towards recognizing state responsibility for violating international law took place in the Unit 731 litigation.[381] During World War II, the Japanese Imperial Army ran a

379. *Id.* at 34.

380. *Id.*

381. Chen Zhifa v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Aug. 27, 2002, 1028 HANREI TAIMUZU 92, *available at* http://www.courts.go.jp/app/files/hanrei_jp/795/ 005795_hanrei.pdf.

medical experimentation center in northeast China. Japanese doctors injected Chinese subjects with anthrax, cholera, dysentery, and other contagious diseases.[382] They also developed chemical weapons, and infected Chinese civilian populations in Ningbo and Changde with cholera and Bubonic plague. Hundreds of victims sued the Japanese government in 1997.

The Tokyo District Court applied various international humanitarian law proscriptions to these historical facts, beginning with the Hague Convention's ban on "poison or poisonous weapons."[383] The court conceded that "it is not immediately clear whether bacteriological weapons are included under Article 23(1) of the Hague Convention."[384] Consequently, it reviewed earlier instruments, such as the Brussels Conference of 1874, and St. Petersburg Declaration of 1868, that reflected the international community's awareness of the problems. But these instruments did not, according to the court, expressly proscribe biological weapons.[385]

The court next examined the 1925 Geneva Protocol, also known as the "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare."[386] This instrument covered gases, of course, but also "all analogous liquids, materials or devices."[387] Such capacious language would apply to the chemical weapons that Japan developed in Northeast China, and then unleashed upon Chinese civilians. Indeed, Judge Iwate found the "Japanese Army's use of biological weapons during combat in several Chinese regions violated the Geneva Protocol's prohibition on biological warfare."[388] But Japan did not ratify the Protocol until 1970.[389] The court then had to ask if customary international law prohibited chemical weapons by 1933.[390] The court reasoned that since the Protocol entered into effect in 1928, "many countries" had ratified it by 1933. From this widespread ratification, the court inferred both that states did not produce chemical weapons and that

382. DANIEL BARENBLATT, A PLAGUE UPON HUMANITY: THE HIDDEN HISTORY OF JAPAN'S BIOLOGICAL WARFARE PROGRAM, xii (2005).

383. War Treatment Convention, *supra* note 368, at Art. 23.

384. *See Chen Zhifa*, Chiho Saibansho, at 15.

385. *Id.* at 16.

386. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into force Feb. 8, 1928, for the United States, Apr. 10, 1975) [hereinafter Geneva Protocol].

387. *Id.*

388. *Id.*

389. A table of ratifications is *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=280.

390. *See Chen Zhifa*, Chiho Saibansho, at 16.

those states did so out of *opinio juris* (i.e., the belief that it was legally forbidden to do so).[391]

Both assumptions are questionable. The court noted parenthetically that one hundred and twenty-five countries have signed the Geneva Protocol.[392] But that is the number of signatories as of 2002. The customary international law inquiry should be directed towards 1933, when Japan established its first chemical weapons laboratory in China. At that time, only twenty-eight states had ratified the protocol: not a small number, but hardly proof of "general and consistent practice by states."[393] Moreover, ratification says nothing about actual state practice, much less *opinio juris*. Many states ratified the Protocol, yet produced or used chemical weapons after ratification.[394] It seems doubtful, then, that customary international law banned chemical weapons by 1933.

Nevertheless, the court in this litigation determined that customary international law banned chemical weapons. Moreover, it found "that defendant bears state responsibility for this case of bacteriological warfare according to customary international law as established in Article 3 of the Hague Convention."[395] However, the court ultimately immunized the state from compensatory liability, resorting to the conventional understanding that Japan had discharged its state responsibility by making reparations to China through the Japan-China Joint Communiqué.[396]

When courts find that defendants — especially state actors — violate international law, it sends a signal to plaintiffs, defendants and the international community as a whole. The precise meaning of that signal hinges upon the court's articulation of the violation. The WRL decisions found numerous violations of international treaty law and customary international law. If more broadly disseminated, these results would certainly illuminate Japan's wartime experiences, and the many war crimes it committed. But the decisions also express the basic values of the international community. Amplified through media reports, scholarly articles, and citations from other courts, these cases help bring international law out of the ether and into the world's daily experience.

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391. *Id.*

392. *Id.*

393. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary and International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001).

394. Signatory countries such as Egypt (1928), Iraq (1931), and Russia (1928) have all used chemical weapons.

395. *See Chen Zhifa*, Chiho Saibansho, at 14.

396. *Id.* Many scholars and government officials have disputed this interpretation of the Joint Communiqué. For instance, in 1995, Chinese Foreign Minister Qian Qishen claimed that the Joint Communiqué binds China as a state, but does not bind Chinese individuals. Thus, Chinese individuals still enjoy the right to seek compensation from Japan. *See* MATSUOKA, *supra* note 110, at 63.

VI. CONCLUSION

The postwar compensation litigation movement, at it has unfolded in Japan, has left a mixed legacy. On the important question of achieving compensation, the lawsuits simply did not deliver. Most decisions found for the defendant (state or corporate), denying redress to victims of World War II. And the few opinions that found for plaintiffs were overturned on appeal. In this regard, we can rightly question whether the opinions delivered meaningful relief plaintiffs sought.

This article has proposed a different set of parameters, however, by which to evaluate these decisions, and human rights lawsuits more generally. Discursive justice asks what kinds of factual findings, judicial interpretations, or legal violations the court determined. This broader interpretation accounts for both the various actors involved in human rights litigation (victims, lawyers, and civil society organizations) and the disparate aims they bring. It proceeds from the assumption that what judicial opinions say, quite apart from how they rule, should contribute to the final evaluation of whether the lawsuit "succeeded."

In the face of grave human rights violations, truth is often one of the first casualties. From My Lai to Srebrenica, from Armenia to Abu Ghraib, government officials often bury the truth, hoping to evade public scrutiny and historical condemnation. To be sure, the writing of the historical record will fall mainly to historians, archivists and specialists. Yet lawyers, activists, and judges can also shape the dominant historical narratives and, through media attention, help disseminate those accounts. In the case of contemporary Japan, denial of both factual elements, as well as responsibility for the war, remain strong. Yet after dozens of opinions, the basic facts of the war have been accepted by the judiciary, even as other government actors challenge those accounts. Indeed, it is possible that the consistent revision of the comfort women narrative — from "no comfort women" to "private actors controlled the system" to admission of military involvement, and finally to the current claim that no *documentary* evidence exists that the comfort women were coerced — responds to factual findings made by Japanese courts. It is hard to say that a particular historical event, or program, did not happen, when a judicial opinion has recognized it as "fact" in dozens of opinions.

Judicial opinions can also help restore the rule of law. They do this by clearly stating what kind of conduct is illegal and attaching liability thereto. From a human rights or rule of law perspective, the court would order compensation for the underlying abuses. On this matter, the postwar litigation lawsuits have not been particularly successful. Even in that tiny minority of decisions where judges ordered compensation, the opinion itself did not frontally address the issue of tort liability. Instead, tort liability

attached to a *secondary* wrong: an omission rather than a commission, the postwar failure to compensate rather than the wartime actions of abducting, enslaving, or raping. Here, Japanese courts have not done their part to bring the rule of law within the ambit of the law of war.

A final element of discursive justice incorporates expressive or reputational theories of international law. Even if a judge does not order compensation, she can bring back some aspect of the rule of law (or rule of international law) by showing how actions violated international treaties or customs. As discussed, several decisions clearly showed that Japan's treatment of both POWs and "comfort women" violated international law. This provides some consolation to victims and injects moral force into the system of international law.

Finally, it is important to note that no Japanese decision included both compensation *and* a violation of international law. In other words, there seems to be a limit to how far Japanese judges will go. Many were comfortable providing the factual basis of discursive justice. But those who found violations of international law did not also order compensation. And those who ordered compensation did not find violations of international law.

The emphasis in this Article has been on World War II litigation in Japan, but the techniques can be applied to judicial decisions rendered in many jurisdictions. Since monetary compensation, by itself, generally cannot make victims of serious human rights abuses whole again, the symbolic resonances of a lawsuit may be equally as important as whether the plaintiff won. This Article has suggested three alternative trajectories that scholars may wish to investigate in researching the results of human rights litigation. Of course, future researchers will have to examine closely the underlying nature of the disputes to determine whether these three issues are relevant.