Discursive Justice

Discursive Justice: Interpreting World War II Litigation in Japan
Timothy Webster†

Abstract: Over the past few decades, human rights litigation has spread around the world as a social practice. I posit a theory of discursive justice to interpret the multiple motivations, and results of, human rights litigation. Examining civil lawsuits against the Japanese state and corporate sector for World War II, this Article shows the limits and contributions such litigation can make. Even when plaintiffs lose, as they often do, the lawsuit itself helps establish facts, combat denialism, allocate liability, develop legal doctrines, and, in rare instances, push judges’ emotional limits. This model has implications for human rights litigation in other parts of the world, even as it reflects the unique historical and political context of contemporary East Asia.

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, however, the war remains a site of vigorous contestation across politics, law, culture, and society. In August 2015, Japanese Prime Minster Abe Shinzo delivered remarks on the seventieth anniversary of the war’s end. He was both apologetic and aversive, mixing expressions of regret for the past with a repeated call to move towards a new future.² A few weeks later, President Xi Jinping celebrated China’s victory over Japan with an unprecedented military parade.³ Most Western leaders declined Xi’s invitation to attend.⁴ But Russian President Vladimir Putin, United Nations Secretary-General Ban Ki-moon, and South Korean President Park Geun-hye accompanied Xi on the rostrum. In this retelling of the war, China, Russia, Korea and the U.N. unite in victory, while Japan stands by itself.⁵ This is one of many revisions of the war in the contemporary context.

Controversies over World War II run deep. Even now, the basic facts of the war are contested. The Japanese government, for instance, currently maintains there is “no documentary evidence” to show the comfort women were forced into sexual slavery by

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¹ Assistant Professor of Law, Director of Asian Legal Studies, Case Western Reserve University.
² See Japanese PM Shinzo Abe stops short of new apology in war anniversary speech, GUARDIAN, Aug. 14, 2015. Abe expressed “deepest remorse” and “sincere condolences” to victims of World War II. Yet media in China accused Abe of “linguistic tricks” and rhetorical twists,” while those in South Korea claimed his comments “fell short of Korea’s expectations.” Id. Moreover, Abe did not acknowledge the Japanese military’s coercion of the comfort women. Instead, he said, “We must not forget that there were women behind the battlefields whose honour and dignity were severely injured.” Id.
³ See Tom Phillips, China military parade shows might as Xi Jinping pledges 300,000 cut in army, GUARDIAN, Sept. 3, 2015.
⁴ During the war, Korea was a Japanese colony, and approximately 110,000 Koreans were conscripted in the Japanese Army. Brandon Palmer, Imperial Japan’s Preparations to Conscription Koreans as Soldiers, 1942-1945, 31 KOREAN STUDIES 63 (2007). Moreover, the Russian government was unwilling to work with China on several initiatives, including the Dumbarton Oaks conference. See Timothy Webster, Paper Compliance: How China Implements WTO Decisions, 35 MICH. J. INT’L L. 525, 537-538 (2014).
the Japanese Army. Other issues—legal liability, adequacy of reparations, the constitutional renunciation of war—still generate controversy, uncertainty and reflection in the present moment.

These debates are not new. Seventy years ago, the Tokyo Tribunal (1946-1948) asked some of the same questions. There, the focus was on prosecuting those most responsible for the war, including the twenty-five Japanese officials found guilty of aggression, conspiracy, failure to prevent war crimes, and so on. In addition, many countries, China and Russia among them, conducted domestic military tribunals to try suspected Japanese war criminals. But like many post-conflict judicial mechanisms, these tribunals presided over a select group of perpetrators. Many crimes, including the institutionalized military rape of the comfort women system, and the medical experimentation of Unit 731, were either overlooked or minimized. In addition, some of the actual harm from World War II—radiation sickness from the United States’ bombing of Hiroshima and Nagasaki, unexploded ordnance left by the Japanese Army in Manchuria—emerged only years or decades after the war.

For much of the postwar period, civil litigation has also probed Japan’s legal, moral and historical responsibility for the war. In 1962, survivors of the atomic bombing of Nagasaki sued the Japanese government for waiving their rights to seek compensation from the U.S. government pursuant to the San Francisco Peace Treaty. In Shimoda, the Tokyo District Court determined America’s bombing of Nagasaki violated international law. The court also held that plaintiffs had no legal right to recover from the Japanese government because only states, not individuals, have standing under international law. Plaintiffs did not appeal, according to Richard Falk, because

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7 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). See also Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, Transcript of Oral Judgment, para. 6 (Dec. 4, 2001), available at www.iccwomen.org/wigdraft1/Archives/oldWCGJ/tokyo/summary.html. The 2000 Women’s Tribunal gathered scholars, activists, lawyers and judges for a mock trial of the Japanese military’s sexual violence during the war. Judges included Professor Christine Chinkin (LSE), Judge Gabrielle Kirk McDonald (former President of the International Criminal Tribunal for the former Yugoslavia, and United States District Court judge), and Willy Mutunga (who later became Chief Justice of Kenya).
9 See RUTI G. TEITEL, TRANSITIONAL JUSTICE 40 (2008) (“[S]ome selectivity is inevitable given the large numbers generally implicated in modern state prosecution, scarcity of judicial resources in transitional societies and the high political and other costs of successor trials. Given these constraints, selective or exemplary trials, it would seem, can advance a sense of justice.”)
11 The plaintiffs posited that, by waiving their rights to seek reparations from the United States in the San Francisco Peace Treaty, Japan became liable for their medical treatment.
12 Shimoda v. Japan, translated in 8 JAPAN ANN. INT’L L 212, 252 (1964). (“The dropping of the atomic bombs is a violation of international law, which can be interpreted as a tort under domestic law.”).
13 Id at 249.
the court held that the bombing was illegal. That was enough justice for them. Shimoda has important implications for later lawsuits, not the least of which is the firm barrier between individuals and states in international law. In the 1970s and 1980s, plaintiffs from the former colonies of Korea and Taiwan demanded the Japanese government extend social welfare benefits, such as military pensions and medical treatments, to them, as it did for citizens of Japan.

In 1991, a new phase of World War II trials began. In December, 1991, Kim Hak-sun, a former comfort woman, filed a lawsuit as the named plaintiff against the Japanese government. Together with thirty-five other Korean citizens, Kim demanded an apology and compensation from Japan for various aspects of that country’s prosecution of World War II. Since Kim’s lawsuit, hundreds of victims have stepped forward to seek compensation for the war, filing over one hundred lawsuits in Japan, China, Korea and the United States. This Article focuses on cases brought against the Japanese government, and Japanese corporations, in Japan, where approximately 80 cases have generated well over one hundred decisions at trial, appellate and supreme court

15 Japan took control of Taiwan after defeating China in the 1895 Sino-Japanese War. Japan annexed Korea in 1910.
17 Other plaintiffs included former soldiers, comfort women, military personnel, and heirs thereof.
18 These include approximately 81 lawsuits in Japan. See Tanaka Hiroshi, Nakayama Takeshi & 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, Nakayama Takeshi & Arimitsu Ken et al. eds. 2012). The appendix lists ninety postwar compensation lawsuits, eighty-one filed since 1990. Id. at 208-213. 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, 2006 Hun-Ma 788, Aug. 30, 2011. 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, 2009 Da 22549, May 24, 2012. See also Ethan Shin, The “Comfort Women” Reparation Movement, 28 FLA. J. INT’L L. 87 (2016). 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.
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levels. Following Japanese convention, I refer to these cases collectively as “postwar compensation litigation” or “PCL.” How have they fared?

The verdicts generally do not favor plaintiffs, at least in Japan. Japanese judges by and large dismiss plaintiffs’ claims as either time-barred, or precluded by sovereign immunity. In a small handful of decisions, courts have found for the plaintiffs, only to be overturned on appeal. Except for a handful of lawsuits that led to settlement, the redress movement would seem to have failed: it has neither extracted reparations from Japan, nor produced a permanent resolution of the war compensation issue.

But before consigning these efforts to failure, we need also ask at what the lawsuits have accomplished. More pointedly, must we judge a verdict by whether plaintiff won or lost? What else is at stake in human rights litigation? Did the lawsuits advance other elements of the war reparations, even if they did not achieve the immediate goal of securing compensation or apology? Discursive justice provides a framework to answer these questions. The basic idea is that the fact-finding, liability-allocating, and legality-judging functions of litigation complement the traditional goal of “victory.” Particularly in human rights litigation, we must widen the lens in two ways. First, we must look at the multiplicity of players in litigation. As plaintiffs pursue different aims than either their lawyers, or the civil society groups supporting them, we must first determine the various motives at stake. Next, we must probe the contents of the judicial opinions in finer detail. How did the judge depict the facts or historical events? What violations of the law, if any, did the judge find? Which law? Finally, what kinds of liability did the judge attach? And what was the reasoning for doing so? These questions illumine the other aspects of human rights litigation, and these lawsuits in particular.

This Article proceeds in six parts. In the first, we examine the precedents and practices of human rights litigation. In the second, the key players in the PCL movement, and their motivations are explored. The third part postulates a theory of discursive justice to understand the results of these lawsuits. This includes the traditional binary of whether plaintiff won or lost the suit. But it extends beyond this inquiry to ask whether other players achieved their goals. Even if plaintiff lost the case, did she (or the cause) gain something through the process? Did the court apply a particular legal theory proposed by the lawyers? Did it endorse a version of history supported by civil society? Did it acknowledge the suffering plaintiffs endured?

In parts four through seven, I apply discursive justice to the PCL movement. Part four examines the issue of factual recognition. Given the broader political environment in Japan, even recognizing the basic facts of the war has become hotly contested. How has jurisprudence both sprung from, and contributed to, these debates? Part five examines decisions where courts found defendant violated domestic and international law. This has broader implications for the issue of accountability and culpability. Part six investigates doctrinal developments: sovereign immunity, statute of limitations and

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21 Korean courts have found both the Japanese government and Japanese corporations liable in two recent decisions. See supra, note 19.
the right to individual standing at international law. Part seven analyzes a unique phenomenon in these lawsuits, whereby judges attach epilogues (fugen) to express their feelings about the case. A conclusion distills lessons from the PCL movement for other jurisdictions.

I. HUMAN RIGHTS LITIGATION

A. Civil Litigation as Human Rights Litigation

Four decades ago, Professor Abraham Chayes sketched out the main features of the traditional civil lawsuit. Public law litigation, by contrast, aimed to enforce constitutional or statutory rights that the coordinate branches of government had failed to vindicate. Litigation would redeem those who had fallen through the cracks of public institutions: schools, prisons, mental health facilities, housing, and so on. The logic was simple, though hardly infallible: the political branches had failed a discrete group of people. The judiciary would make them whole again.

At the same time, public law litigation was tied to a broader cause. Chayes cited the Supreme Court’s decisions on racial discrimination cases as proof that the judiciary may not fulfill the aspirations of activists and lawyers. He further noted the Court’s “lack of sympathy with . . . the idea of the district courts as a vehicle of social and economic reform.” In other words, the courtroom, like the ballot-box, could be a site of political contention. But it would lack the finality and clarity of an election.

Over time, the idea of “public” grew to include issues dear both to the left (civil rights, antidiscrimination) and the right (lowering taxes, protecting small business, and encouraging enterprise). But whatever the political orientation of the litigants, the suit itself promoted a larger reform. The imperatives underlying the lawsuit—effectuating social change, remediating harm (past and ongoing), highlighting the political branches’ failures—remained vital to the institution of public interest litigation.

Drawing on public law precedents, human rights litigation emerged in the United States in the 1980s. The alien tort statute, resurrected after two centuries, enabled U.S. courts to hear cases involving human rights abuses from around the world. The underlying events could take place in Burma or Beijing, the Philippines or Serbia, Zimbabwe or Paraguay. But the case would be litigated in Honolulu or New York, Los

23 Chayes’ canonical piece on public law litigation enumerates 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).
25 Id. at 1304. The cases are (1) Warth v. Seldin 422 U.S. 490, 502 (1975) (upholding zoning ordinance that excluded persons “of low or moderate income and, coincidentally . . . a member of a minority racial or ethnic group”); and (2) Rizzo v. Goode, 423 U.S. 362, 364 (1975) (overturning trial court decision to require Philadelphia’s police department draw up a plan to handle civil complaints more effectively).
26 Chayes, supra note __, at 1305.
27 Southworth, 1249.
29 The alien tort statute has targeted many former and current world leaders, including Chinese Premier Li Peng, Zimbabwean President Robert Mugabe, Philippines President Ferdinand Marcos, and Republika
Angeles or San Francisco. State officials, and later corporations, faced protracted legal battles, potentially large damage awards, and the attendant publicity of a federal lawsuit.31

Some have celebrated the rise of human rights litigation, while others sound a more circumspect note.32 Scholars detect tension between “elite” and “grassroots” lawyering.33 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.”34 At the grassroots level, lawyers address the immediate problem or violation endured by the plaintiff. In many cases, grassroots and elite concerns overlap. But they can also diverge, splitting the lawyer between the particularities of his client’s case, and the broader cause or principle he seeks to establish by means of litigation.35

More concretely, human rights litigation frequently does not provide appropriate remedies, or any remedies at all.36 Many human rights plaintiffs “lose,” due to technical, legal or evidentiary problems.37 And even when plaintiffs win, they may be unable to collect on the verdict ordered by the court.38 A related issue is defining an appropriate remedy, a problem that baffles judges and lawyers alike. The traditional remedy in civil cases, monetary damages, is often not enough to make victims whole again. But the law

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32 For example, Bradley suggests alien tort litigation may impose costs on U.S. foreign policy.
33 Thomas M. Hilbink, You Know the Type . . .: Categories of Cause Lawyering, 29 L. & SOC. INQ. 657 (2004).
34 Id. at 683.
35 Id.
36 Sabel & Simon, supra note __, at 1054.
37 By technical, I mean doctrines like statutes of limitations or sovereign immunity. These may exculpate defendants, even if the evidence shows they committed the underlying acts. By legal, I mean the law may not proscribe the type of conduct about which plaintiff complains. Various types of discrimination were not illegal under federal law until the 1960s (housing discrimination, employment discrimination). Even now, federal law does not proscribe discrimination on the basis of sexual identity, though many state and local bodies do. By evidentiary, I mean the problem of recovering proof from activities long since past.
38 This has been particularly acute in the alien tort context. Plaintiffs may win the case, but fail to collect the damages, because the defendant is unable to pay. See Rosemary Nagy, Post-Apartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?, 40 L. & SOC’Y REV. 623, 628 (2006) (“The moral and political symbolism of the litigation is just as significant as the unsettled question of legal culpability. Even successful alien tort claims rarely collect damages; they are usually filed with goals of affording victims a measure of recognition and respect, of publicly shaming those responsible for human rights violations and of perhaps instigating change outside the courtroom.”).
can often do little more.\textsuperscript{39} When we consider the resource intensity, slowness and uncertainty of litigation, court-determined solutions are generally incomplete even in the best of outcomes. Litigation’s place in attaining social justice is hardly assured. Indeed, Orly Lobel opines that law “brings more harm than good to social movements that rely on legal strategies to advance their goals.”\textsuperscript{40}

Perhaps because of these drawbacks, some scholars detect a movement away from litigation, or at least using litigation as the predominant strategic tool to promote a cause.\textsuperscript{41} Instead, more collaborative and interdisciplinary activities—policy proposals, lobbying, education, community organization—occupy much of the human rights lawyer’s time. If that is so, why sue at all? What contribution does litigation make to the larger cause? To answer this question, we must first look to the actors in litigation.

B. Criminal Trials

Criminal prosecutions have also directed attention to human rights violations. Domestic trials in Greece, Portugal and Argentina helped introduce accountability mechanisms after the fall of dictatorships in those countries in the 1970s and 1980s.\textsuperscript{42} The 1990s resurrection of international criminal law took concrete form in the establishment of international tribunals for the former Yugoslavia (1993) and Rwanda (1994), and by adopting the Rome Statute (1998). The arrest and extradition of Chilean dictator Augusto Pinochet, as well as various unsuccessful attempts to try him in his native Chile, also suggested the possibility of holding individual leaders accountable for grave human rights abuses.\textsuperscript{43}

Of course, many governments hesitate to hold their own, or other countries’, officials to account through criminal trials. Given this reluctance, civil litigation can make an important contribution. In the United States, the alien tort statute is probably the most notable channel of civil litigation for human rights abuses. But lawsuits have also been used in other countries to hold states and corporations liable for human rights.

C. Human Rights Litigation in Japan

Japan’s experience with public interest and human rights litigation parallels that of the United States in certain ways. To be sure, the Japanese litigate less frequently than Americans do.\textsuperscript{44} And the use of litigation for social change is probably also rarer in

\textsuperscript{39} Tanaka Hiroshi et al., \textit{supra} note __, at 15. I discuss the seven cases that have settled in a companion article. \textit{See} Timothy Webster, \textit{Why Settle? The Promise and Peril of Ending World War II} (on file with author).

\textsuperscript{40} Orly Lobel, \textit{The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics}, 120 \textit{Harv. L. Rev.} 936 (2007).


\textsuperscript{43} \textit{Id.} at 121-123.

\textsuperscript{44} A large body of literature explains Japan’s “reluctance” to litigate. \textit{See} Takeyoshi Kawashima, \textit{Dispute Resolution in Contemporary Japan}, in \textit{Law in Japan: The Legal Order in a Changing Society} 41 (Arthur von Mehren ed. 1963) (explaining Japanese reluctance to litigate as a function of cultural preferences for informal dispute resolution); John O. Haley, \textit{The Myth of the Reluctant Litigant}, 4 J. \textit{Japanese Studies} 359 (1978) (ascribing Japan’s lower usage of litigation to institutional factors, such as fewer judges and lawyers); J. Mark Ramseyer, \textit{Reluctant Litigation Revisited: Rationality and Disputes in Japan}, 12 J. \textit{Japanese Studies} 111 (1988) (attributing Japan’s low litigation rate to the modest and
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Yet, as Frank Upham demonstrated, civil litigation has addressed Japanese social ills for at least for half a century. In the 1960s, the so-called “Big Four” environmental lawsuits led to successive victories against corporations that polluted Japan’s air and water. At about the same time, women also began to challenge discrimination in wage, retirement and termination policies. They would later sue for discrimination in promotion, unequal compensation and unequal retirement practices. In the 1980s, ethnic minorities, including Resident Koreans, began to file suits against the Japanese government to address various types of human rights infringements. More recently, foreigners of various ethnic backgrounds have sued private companies for various acts of racial discrimination.

II. PLAYERS IN LITIGATION

Winning in the traditional sense, per Chayes, may not be the primary motive of the plaintiffs, lawyers, or civil society groups that support them. A more nuanced understanding of litigation grapples with the participants’ multiple motivations. They have related, yet distinct, aims in pursuing litigation.

Victims want many things. Some seek an apology. After a serious injury, a sincere apology can help restore the relationship between victim and perpetrator.

predictable size of damage awards, at least as compared to the United States). It is important to remember, as Haley notes, that citizens of many countries use litigation more sparingly than Americans. Haley at 361.

45 Robert L. Kidder & Setsuo Miyazawa, Long-Term Strategies in Japanese Environmental Litigation, 18 LAW & SOC. INQUIRY 605 (1993). The authors describe the United States as a “jungle” for social movement litigation, and Japan a “desert.” Id. at 608. They analyze an “oasis,” or case study, involving environmental litigation in the 1980s and 1990s. Id. at 609.


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 131-138.

50 Numbering approximately 600,000, resident Koreans are the descendants of people brought to Japan during the colonial period (1910-1945), often forcibly. Though born and raised in Japan, they continue to face difficulty in acquiring Japanese nationality, finding employment in Japan, marrying Japanese people and others.


54 Max Borstad, Learning from Japan: The Case for Increased Use of Apology in Mediation, 48 CLEV. ST. L. REV. 545, 546-47 (2000).
Indeed, this remedy is available in many Asian jurisdictions.\(^{55}\) The precise contours of the apology vary with the circumstances, but typically includes at least acknowledging both injury and fault (liability), and compensating the injured party.\(^{56}\)

Some desire monetary compensation.\(^{57}\) This would cover damages for the many forms of emotional and physical suffering that many victims underwent. For others, namely forced laborers and comfort women, a damages award would disgorge unpaid wages from the state or corporate actor that benefited from the victims’ service.\(^{58}\) During World War II, Japanese policymakers went so far as to determine the rates Chinese forced laborers would earn.\(^{59}\) Yet many never received a single yen for their labor.

Other victims demand a more secure position within public memory. For many decades, no one talked about the serious human rights violations that took place during World War II. Moreover, the Japanese government has knowingly and actively concealed information about the human rights violations with which it was involved.\(^{60}\) The resultant social amnesia silences victims, who cannot freely speak of their experiences (even if they wanted to).\(^{61}\) As memories fade, people die, and life moves on, this aversion hardens into oblivion. Plaintiffs have used litigation to bring these events back into public discourse. Likewise, they have requested the government build memorials, and include their stories within history textbooks.\(^{62}\) In the handful of lawsuits that have settled, many plaintiffs have pressed defendant corporations to establish historical monuments, steles and museums to commemorate these painful events.\(^{63}\) In so doing, they seek to avoid what Elie Wiesel has characterized as dying a second death.\(^{64}\)

Victims also want official acknowledgment. Given the state’s role in the abuses, its attempts to suppress history, and Japanese politicians’ repeated denials about the war, judicial opinions reinsert victims back into the past from which they have been excised. The comfort women, to take but the most prominent example, were deprived of their identity, and “called by a number, an assigned name, or by nothing at all.”\(^{65}\) As official

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\(^{56}\) Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC’Y REV. 461 (1986). The authors also suggest future-oriented aspects of apology: the injury will not take place again, and the parties will work towards better relations in the future. *Id.* at 470.

\(^{57}\) Virtually all plaintiffs in the postwar compensation litigation movement have sought monetary compensation in the form of a damages award (*songai baishô*).

\(^{58}\) Qiu, *supra* note 54, at 62 (noting that comfort women received either nothing or very little by way of payment); Yamaguchi, 83 (noting “plaintiffs did not receive any payment”).

\(^{59}\) 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.” *Id.* at sec 2.10, *quoted in* Webster, 91 CORNELL L. REV. at 737.

\(^{60}\) *See infra*, notes __.

\(^{61}\) Many former comfort women, for instance, have never spoken of their experience as comfort women.

\(^{62}\) 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*.

\(^{63}\) Webster, *Why Settle?*

\(^{64}\) Wiesel observed that “The executioner always kills twice, the second time with silence.” *See* Mounir Bouchenkai, *Breaking the Silence: Sites of Memory*, WORLD HERIT. NEWSLETTER, 23 (Sept. 1999)

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records carrying state imprimatur, judicial opinions reconstruct official history. In so doing, they may contradict other official narratives: Diet debates, Diet testimony, government archives, and school textbooks. Unlike these other official narratives, the lawsuit offers the victim a chance to express views in a publicly sanctioned venue; many such victims have testified in open court. While the fact section is written by a judge, and the victim’s testimony itself likely guided by a lawyer, the inclusion of victims' narratives in a court’s fact section creates “an official record of the human rights abuses inflicted on them.” 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.

For some victims, confronting one’s tormentor brings its own consolation. Civil litigation permits victims “to exact justice from their perpetrators.” It is not quite retribution, in the sense that victims do not demand an eye for an eye. But many lawyers and scholars report that victims “take tremendous personal satisfaction from filing a lawsuit,” and “forcing the defendant to answer in court.” Some plaintiffs take satisfaction from a judgment “announcing a that the defendant had transgressed universally recognized norms of international law.” defendants violated international law, even if full compensation As Malcolm Feeley wrote about the criminal justice system in the United States, “the process is the punishment.” Given the slow gears of justice in Japanese civil litigation, where a single trial can take upwards of ten years, 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 lawsuit.

Lawyers, too, serve various purposes. They represent their clients, and seek to vindicate their legal interests. Lawyers expect, at some level, that litigation will plot a pathway to a remedy. But lawyers also hold ideological, political and ethical commitments. Commonly shared among cause lawyers is the idea that society perpetuates inequality against marginalized groups. These lawyers believe that the law, properly applied (or revised), can protect vulnerable people, and remediate rights violations. Lawyers use lawsuits to rectify failed or unjust policies, highlight omissions, and redirect public attention and resources towards victims and other socially precarious people.

66 The Tokyo Women’s Tribunal (2000) allowed many former comfort women to speak in their own voice before a panel of mock judges.
68 Stephens, supra note __, at 154.
70 Stephens, supra note __, at 154.
73 The first trial in the postwar compensation litigation movement, Kim Hak-Sun v. Japan, took over nine years to complete was filed in December, 1991, and decided in March, 2001.
74 Anna-Maria Marshall, Social Movement Strategies and the Participatory Potential of Litigation, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 164 (Sarat & Scheingold eds. 2005),
76 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).
Lawyers are also legal professionals. Some scholars suggest professionalism may hinder the promotion of the cause, diverting lawyers away from the cause and toward the mechanical aspects of the profession. But lawyers seek to develop the law so that it embeds and reflects their ideals. They go to great lengths to recover the factual record, cite precedent, draw legal inferences, and interpret statutory and international treaty law. These professional skills—imagination, investigation, application, interpretation—are not impediments, any more than paint is an obstacle to the artist, or words to the poet. In the PCL movement, lawyers show how Japanese government and corporate actors violated legal rights of Chinese, Korean, and many others. Calling this a “tort” may somewhat lighten the severity of the conduct (versus, say, human rights violation). But that term does not prevent the lawyer or victim from providing other theories of liability.

Civil society groups have actively supported issues of wartime responsibility for the entire postwar period. They support lawsuits for many reasons, including the propagation of their core message: the principles, commitments and values to which the group is dedicated. Litigation offers one channel through which groups express their cause. The lawsuit has the added benefit of concretizing the cause, of requesting the judiciary to instantiate a particular norm. Like human rights lawyers, these groups also use litigation to raise public awareness of the issue. The courthouse, like the street protest, sit-in, or picket line, is a forum for norm contestation.

By supporting lawsuits, civil society groups may obtain a ruling sympathetic to or reflective of their cause. Activists hold the verdict out as “proof,” of judicial endorsement of their cause. And when plaintiffs lose, as normally happens, the lawsuit becomes another public event. When the verdict is announced, victims, lawyers, and activists gather outside the courthouse to protest the result: making speeches, unfurling “unjust verdict” banners, talking to reporters, and vowing to appeal and continue the fight. They blog about it afterwards, hyperlinking articles from Japan’s major news outlets to their own websites.

Given the multiple constituencies, even on one side of the lawsuit, winning takes on multiple meanings. Victory for which party? On whose facts? To what end? Parties win and lose many times over the span of a single lawsuit. This redirects the inquiry from “Did plaintiff win or lose?” to a host of other inquiries: “On which claims did plaintiff win or lose?,” “Why did plaintiff lose on this claim?,” and “What can be realigned for the appeal or subsequent lawsuits?”

To some, I propose a taxonomy of loss, an ill-fated attempt to recuperate a failed social movement. But as argued, 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. It does, of course, put plaintiffs through the slow, technical, uncertain

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79 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], available at www.suopei.jp. This site, run by a civil society organization, aggregates information about the war compensation movement and litigation in particular.
80 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 provides a cause of action to people who would otherwise be left with no alternatives. Moreover, because an individual can
and ornate mechanism of civil litigation. But it can also help to right a wrong—often, many wrongs. Victims understand know that no damages award will fully compensate them for their suffering. Instead, litigation offers the possibility of redressing some aspect of that harm. Meanwhile, litigation also offers lawyers the opportunity to promote a more rights protecting legal system. Civil society groups, meanwhile, draw attention to their cause, instigate broader discussions in society, and perhaps change minds about recent and not-so-recent events.

III. DISCURSIVE JUSTICE: A FRAMEWORK

Drawing attention to the multiple features of lawsuits generally and judicial opinions in particular challenges litigation’s traditional emphasis on winning. Indeed, legal scholars increasingly focus on such “second-order” phenomena. To take an example from the United States, one can both acknowledge the Supreme Court’s particular construction of a case, and see how it may disadvantage parties to the suit. Legal scholarship, then, can step in to recover the “multiple meaning that are submerged below the surface.” As James Boyd White, for example, deflects seeks to move scholarly attention away from the “outcome” of the opinion, and towards its fidelity to facts and to law; openness to the contraries in the case, and hence to what can fairly be said against one’s own result; the processes of reasoning by which the past is interpreted and brought to bear on the present; the degree to which the court recognizes the legitimacy and humanity of the litigant (especially the losing litigant), and fairly judges the legitimacy of his or her point of view; the way the court defines the legislature, the lower court, the jury, and the lawyer, and the sort of relations it establishes among them. White offers not so much a research agenda, as a series of scholarly trajectories that emanate from judicial opinions. He fragments the essentially binary view of litigation, into a broader prism that reflects the multiple currents underlying the lawsuit.

The broad view is particularly apt in public interest or human rights litigation, where winning stricto sensu may well be an ancillary consideration. Professor Jules bring a lawsuit, she need not mobilize the international community, or national government, to seek redress. Id. at 144.

81 Lutz & Sikkink
82 Many survivors made a similar point during the Holocaust Litigation. See Elizabeth J. Cabraser, Human Rights Violations as as Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System, 57 VAND. L. REV. 2211, 2229 (2004). Cabraser cites several plaintiffs’ dissatisfaction with the idea of settlement, for “no 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.” Id. at 2228. However, plaintiffs ultimately agreed to the settlement for several reasons, including placing the Holocaust “on the map against all the denials.” Id. at n. 81.
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Lobel describes how many lawyers—himself included—understand they are undertaking 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.” For Lobel, lawsuits embody, inspire, and reflect political action. They educate the broader public about controversial sociopolitical issues. Citing the American Transcendentalists, Lobel even suggests that litigation is a form of inner expression. Emerson and Thoreau freely admitted their failures, but justified their efforts by the self-expression inherent in their writings and political actions.

How can we apply the above insights to the postwar compensation lawsuits? I posit three 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, often to a greater extent than substantive laws or legal theories do. Moreover, as elaborated more fully below, factual recognition of WWII is a fraught issue. Japanese judges have not made factual findings in several PCL cases, namely those involving comfort women (itself a form of a denial). More often, judges make elaborate factual findings. Judicial depictions of the war frequently contradict other “official” versions. The judge’s contrasting viewpoint is not, of course, based on his original historiographical research. That is the lawyer’s job, in conjunction with experts.

In representing events, policies, and personal experiences from WWII, judges make judgments. They not only find historical facts, but string them together with normative facts: the social judgment used to what defendant should have done in a given context. These normative facts help courts establish reasonability, determine what conduct was proper in a given context, demarcate the effect of a policy on a particular person, and so on. Indeed, some judgments explicitly provide a normative stance—a moral compass, even—in narrating the events of the war. In so doing, these opinions bring moral and legal judgment to bear upon conduct that has escaped judicial scrutiny.

Second, did the defendant break the law? Again, this question needs to be broken down into its constituent parts. Which defendant was found liable? If state and corporation acted jointly, which party bears liability for what acts? When the state is liable, that may signal to the Diet that it needs to do something, like create a better remediation scheme. When the corporation is liable, the court will order it to compensate plaintiffs, and provide other forms of relief. Next, what laws were violated? The framing of the violation has important implications not only for the development of international law disciplines, but also for Japan’s own adoption of international norms. When Japanese judges find violations, they couch it in provision of the Japanese Civil Code. That is expected, and not unlike the United States’ own experience with Alien Tort Law. However, a handful of Japanese judges have also evaluated Japan’s conduct under the frameworks of international law. This has led to the unusual, but significant, result that Japan violated international law. In turn, the decisions assist the development of

87 Lobel, supra note __, at 1333.
89 Id. at 4.
90 Id.
91 DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 4 (1984) (“[M]ost cases principally involve contests over historical events, not over substantive rules”).
92 Id. at 8.
international human rights and international humanitarian law, and permit glimpses into Japan’s acceptance of international legal standards.

Third, did the court exculpate defendant? If so, why? This question comes nearest to traditional models of “winning” the lawsuit. Because it happens so rarely in the PCL movement, we identify the unusual cases where defendant was held liable. This short list of lawsuits is important in engaging broader debates about sovereign immunity, corporate legal liability, sexual violence, forced labor and others.

IV. FACTUAL RECOGNITION

To understand the importance of establishing facts in the PCL movement, we must first grapple with the status of World War II in contemporary East Asia. This may seem a quaint exercise. How could the events of a bygone war still matter in today’s fast-paced, high-tech, and amnesiac culture? Yet they do. Asian political elites, activists, and victims vigorously dispute the facts, meanings and responsibilities of WWII. To some extent, as the next section shows, the very contestation of World War II’s underlying factual basis has impelled the postwar compensation 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 aspects: the comfort women system, forced labor, Rape of Nanking (Nanjing), and so on. Politicians associated with Japan’s conservative Liberal Democratic Party, as well as affiliated civil society organizations and academics, 93 downplay the damage, underestimate the number of victims, and attenuate the role of the Japanese government. On the other hand, progressives—including human rights lawyers, civil society groups, activists and some academics—investigate Japan’s wartime acts, extend apologies, and devise ways to offer compensation.94 They have apologized for the war, attempted to make amends through legislation,95 and enlisted their aggrieved neighbors (China and Korea) to reconcile past differences.96

A. Contemporary Japanese Views of WWII

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93 The most famous of these groups is probably the Japanese Society for History Textbook Reform (Atarashii Rekishi Kyōkasho wo Tsukuru Kai). It was founded in 1996 to produce nationalistic textbooks. Previously, it was led by Prime Minister Abe Shinzo.

94 Diet members Motooka Shōji (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, Attempts at legislation in the Japanese Diet, available at http://www.awf.or.jp/e4/legislation.htm.

95 Diet members Motooka Shōji (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, Attempts at legislation in the Japanese Diet, available at http://www.awf.or.jp/e4/legislation.htm.

96 For example, Prime Minister Murayama was a Socialist (shamintō), and the first non-LDP prime minister since the 1950s. Kōno Yōhei was a member of the Liberal Democratic Party (jiyūtō). Kato statement. In 2013, former Prime Minister Hatoyama Yukio, of the Democratic Party (minshutō), told students at the City University of Hong Kong, “As a Japanese citizen, I feel that it’s my duty to apologize for even just one Chinese civilian killed brutally by Japanese soldiers and that such action cannot be excused by saying that it occurred during war.” Hatoyama apologizes for atrocities in China, S. CHINA MORN. POST, Nov. 13, 2013, available at http://www.scmp.com/news/china/article/1355427/former-japanese-pm-yukio-hatoyama-apologises-atrocities-china.
World War II never fully subsided in East Asia. But it has taken on added urgency since 1990, when comfort woman Kim Hak-sun came forward for the first time to acknowledge that she had been a comfort woman. Statements by high-level Japanese officials such as Katô Kôichi (1992),97 Kôno Yôhei (1993),98 and Murayama Tomiichi (1995),99 are widely regarded as sincere expressions of contrition.100 The Kôno Statement admits the direct and indirect involvement of the Japanese military in abducting, transporting, imprisoning and regulating the hygiene of the comfort women.

During this crescendo of apology, the Japanese government also established the Asian Women’s Fund. The Fund provided assistance to comfort women upon request. But because the Fund channeled money raised primarily from private donations, and not government coffers, many comfort women refused to accept its disbursements. They believe the Japanese government has still not expressed sincere atonement, or legal responsibility, for orchestrating the comfort women system.101

Since that time, Japanese politicians have taken a harsher tone on the war, perhaps even gaining the upper hand. As David Pilling puts it “conservative 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...”102 In the following section, we explore statements Japanese politicians have made about three sets of PCL litigants: comfort women, forced laborers and victims of the Nanjing Massacre.

1. Comfort Women

When the comfort women issue surfaced in 1990, the Japanese government denied any involvement. The contents of these denials shifted over time, as activists and

97 See Statement by Chief Cabinet Secretary Koichi Kato on the Issue of the so-called “Comfort Women” from the Korea Peninsula, July 6, 1992 (admitting government 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), available at www.mofa.go.jp/policy/postwar/state9207.html.
98 See Statement by the Chief Cabinet Secretary Yohei Kono on the result of the study on the issue of “comfort women,” Aug. 4, 1993, available at www.mofa.go.jp/policy/women/fund/state9308.html. Kôno announced the results of a nineteen-month government investigation of the comfort women system. His statement acknowledges the Japanese military’s involvement in establishing and managing the comfort stations, as well as transferring the comfort women thereto. Id. He notes that many women were recruited against their will by “private recruiters who acted in response to the request of the military.” Id. The statement concludes with a nod to the lawsuits: “As actions have been brought to court in Japan, and interests have been shown in this issue outside Japan, the Government of Japan shall continue to pay full attention to this matter, including private research related thereto.” Id.
100 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”).
101 The Fund has attracted criticism from both progressive and conservative circles. See Qiu Peipei et al., Chinese Comfort Women: Testimonies from Imperial Japan’s Sex Slaves 171 (2013); Yoshimi Yoshiaki, Comfort Women: Sexual Slavery in the Japanese Military During World War II 24 (Suzanne O’Brien trans. 2000).
academics unearthed evidence of state involvement in abducting, transporting, and regulating the women. During Diet hearings in June 1990, testimony from a labor official summarizes the government position:

"[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."\(^{103}\)

By calling them prostitutes, and attributing responsibility to their “owners,” the official distances the state from the comfort women system, shifting blame from the government 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.”\(^{104}\) The notion that the comfort women engaged in consensual sexual relations, outside the coercive apparatus of the state, figures prominently in denial narratives. The suggestion, also present here, is that the comfort women were consenting prostitutes, not rape victims.

The denials did not make the issue go away. In December 1990, South Korean women’s groups sent Japanese Prime Minister Kaifu Toshiki an open letter making six demands: (1) recognition of the forced nature of the comfort women system, (2) a public apology, (3) full disclosure, (4) a memorial, (5) compensation, and (6) inclusion of comfort women in historical education.\(^{105}\) For several months, the Japanese government remained silent, itself a type of denial.\(^{106}\) The groups sent another letter on March 26, 1991. A month later, the Japanese Embassy replied since “there was no evidence that the Japanese military forcibly recruited” the women, there was “no need for compensation.”\(^{107}\) The Japanese government again sought to portray the women as willing participants. The absence of evidence theme recurs throughout official denials.\(^{108}\)

Japan’s denial was not well received. On August 14, 1991, Kim Hak-sun publicly acknowledged, for the first time in history, that she had been a comfort woman. Kim’s admission yielded a new form of evidence of the comfort women system. Testamentary

\(^{103}\) TAKU TAMAKI, DECONSTRUCTING JAPAN’S IMAGE OF SOUTH KOREA: IDENTITY IN FOREIGN POLICY 122, 128 (2010).

\(^{104}\) STANLEY COHEN, STATE OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 6, 9-10 (2001).


\(^{106}\) For the idea that silence itself constitutes denial, see EVIATAR ZERUBAVEL, THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL 6 (2006).


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evidence challenged the official absence of evidence line. On December 7, 1991, forty-six years after the attacks on Pearl Harbor, Kim sued the Japanese government.109 She was the named plaintiff in a 35-person lawsuit alongside other Korean victims of the war.110 For the purposes of this Article, Kim’s lawsuit is important because it is one of the first transnational postwar compensation lawsuits, and certainly the first to capture significant media attention.111 Hundreds of other victims subsequently followed Kim’s lead, setting off a veritable socio-legal movement. The lawsuit (and its progeny) brought the comfort women issue to a global audience, capturing headlines, raising public awareness, and forcing reconsideration of the events of WWII.112 A handful of U.S. outlets also reported on Kim, noting the attention her lawsuit had generated.113

The lawsuit forced a reexamination of a critical part of modern Japanese history.114 The government had to confront its role in orchestrating the comfort women system: abducting the women, trafficking them to distant parts of the Japanese empire, and subjecting them to repeated rape. The trial forced Japan, like any common defendant, to respond to these allegations—now closely watched by the rest of the world.

A month after the lawsuit was filed, the Asahi Shimbun published definitive proof of the Japanese military’s direct involvement in the comfort women system.115 This fractured, but did not fully shatter, the official line. Shortly afterward, Chief Cabinet Secretary Katô Kôichi issued an apology, expressed remorse, and acknowledged the military’s role.116 As he put it, “We cannot deny that the military was involved, although at this point we are still not certain to what extent.”117

Following this report, the government reframed its explanation of the comfort women system, admitting military involvement for the first time. But that did not end the discussion. Politicians continued to challenge the facticity of the comfort women system,118 calling them “prostitutes.”119 They disputed the women’s motives (calling them money-seeking), challenged the facts of their abduction, and minimized the number of men they served. Japan would henceforth admit military “involvement,” but aimed to

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109 The choice to file the lawsuit on the fiftieth anniversary of Japan’s attacks on Pearl Harbor likely helped draw worldwide attention to the suit.
110 As noted, plaintiffs had filed war-related civil compensation lawsuits since the 1960s. 1991 was a turning point, with plaintiffs filing lawsuits for damage caused by the war (as opposed to access to entitlements like pensions and atomic bomb treatments.  See, e.g., Kim Kyeeong-seok vs. Japan & NKK, 1614 HANREI JIHÔ 41 (Tokyo D. Ct., May 26, 1997) (filed Sept. 30, 1991); Korean BC War Criminals suit, 1600 HANREI JIHÔ 3 (Tokyo D. Ct., Sept. 9, 1996) (filed Nov. 12, 1991).
111 See, e.g., Government Mulling ‘Comfort Women’ Issue 1 Year After Lawsuit, KYODO NEWS, Dec. 7, 1992 (noting the comfort women issue got worldwide attention after the suit was filed).
112 Chieko Kuriki, Cruel ‘Comfort:’ Koreans Sue for Damage for Wartime Disgrace, CHICAGO TRIB., Mar. 29, 1992 (noting the “case has received extensive coverage in the news media in Japan, Korea and the U.S.”).
113 Kato notes that the government had been reviewing facts since December 1991, when Kim filed her lawsuit.
114 On January 11, 1992, Asahi reported that historian Yoshimi Yoshiaki discovered documents showing the army established and operated “comfort stations” (ianjo).
117 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).
118 Nagano Shigeto used the term kôshô (公娼), literally “public prostitutes,” to describe the women. The phrase implies licensed, voluntary prostitution, such as the system that existed in prewar Japan. Id.
muffle the impact by claiming “no documents exist to prove the women had been forcibly recruited.”

The Japanese government continues to mince words about comfort women. In 2007, during his first term as prime minister, Abe Shinzo used legalistic language to refute the coerciveness of the comfort women system. He told reporters, “There is no evidence to prove coercion, as initially suggested.” In 2015, during Abe’s second stint, Japan and South Korea reached a historic accord to resolve the comfort women issue. Two weeks later, Abe repeated the claim that there was no evidence of forcible recruitment, and that his views had not changed on the matter since 2007. In 2016, Japan told the U.N. Women’s Committee that no documents confirm the military forcibly recruited the comfort women, and disputed that the number was as high as 200,000.

2. Forced Labor

Japan’s widespread use of forced labor has received less media attention in the West. But within East Asia, forced labor has been the single largest source of lawsuits in the PCL movement, numbering twenty-five at the time of this writing. This reflects the vast scale of forced labor. At least 700,000 Koreans were forcibly mobilized, brought to Japan, and forced to work under dire conditions. In addition, roughly 40,000 men and boys were abducted from China and pressed into service in Japan. A small subset of

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121 Colin Joyce, Japanese PM denies wartime comfort women were forced, TELEGRAPH, Mar. 3, 2007, http://www.telegraph.co.uk/news/worldnews/1544471/Japanese-PM-denies-wartime-comfort-women-were-forced.html.
122 The accord has been coolly received on the Korean side.

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forced laborers from both Korea and China still live; they have sued both the Japanese government, and twenty Japanese corporations, for compensation and apologies.128

An important issue in the forced labor litigation concerns a report that the Japanese government commissioned right after the war. In 1946, the Ministry of Foreign Affairs (“MOFA”) sent researchers to investigate working conditions of the one hundred thirty-five sites that used Chinese labor.129 The idea was to compile information in order to portray the state, and corporate sector, in the best possible light before the Allies could conduct their own investigation.130

The Japanese government did not, however, share the report. Instead, it spent the next half-century denying its existence.131 In 1960, a MOFA 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.”132 In 1990, another MOFA official testified to before 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.”133 A week after MOFA stated the documents were destroyed, NHK (Japan’s public broadcasting agency) aired The Discovery of the Phantom Foreign Ministry Report: A Comprehensive Investigation of Chinese Forced Labor.134 The program revealed the contents of the report, as well as the government’s attempts to conceal it.135 MOFA took an additional year to confirm the authenticity of the report,136 and finally to admit using forced labor.137 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.”138

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128 Guan Jianqiang 233.
131 Courts have chastised the government for purporting to have burned the books and otherwise concealed them. Niigata.
132 Id.
133 Id.
135 Id.
136 Underwood, supra note __.
137 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.
138 Underwood.
As with the comfort women, certain Japanese government officials have sought to refute the *forcible* nature of the program. They claimed that the workers “came pursuant to contracts,” as if the laborers volunteered their services.\(^\text{139}\) Other officials stated that forced laborers “worked abroad in response to recruitment activities.”\(^\text{140}\) Plaintiff testimony reveals a whole host of tactics used by the Japanese army to ensnare Chinese laborers.\(^\text{141}\) It is unlikely any of them knew the actual conditions of forced labor they would endure before they disembarked for Japan.

3. Rape of Nanking

The Rape of Nanking is now well known in the annals of history. In December 1937, the Japanese army invaded the then-capital of China, now known as Nanjing. Japan wanted to send a strong message to China. In the space of six weeks, the Japanese killed between 200,000 and 300,000 Chinese civilians, and raped as many as 20,000 women. This is exceptional even by the grim statistics of World War II.

Given the enormity of this campaign, Japanese officials make efforts to diminish its importance. In May 1994, Minister of Justice Nagano Shigetô called the Nanjing Massacre a “fabrication.”\(^\text{142}\) His comment cost him his ministerial position, showing that it clashed with prevailing political opinion.\(^\text{143}\) But the assertion reflects lingering suspicions about a critical moment of the war. One might question the number of casualties, but no one seriously doubts that Nanjing was the epicenter of one of the twentieth century’s gravest atrocities.\(^\text{144}\)

The above recitations in no way capture the full panoply of statements Japanese officials have made about World War II. Instead, they portray a set of comments and understandings that interacted with the PCL Movement in key ways.

B. Courts as Fact-finders

The relationship between courts and facts is complicated. At its most basic level, litigation rests upon facts. The judicial process requires fact-finders to sort through


\(^{140}\) *Id.* at 93.

\(^{141}\) *Id.* at 88 (describing the conditions under which various plaintiffs were brought to Japan: several were forced by Japanese soldiers, at gunpoint, to board a truck to a Chinese port; one was told by his Japanese boss, after the factory shut down, that additional work was available in Japan;

\(^{142}\) Daniel E. Sanger, *New Tokyo Minister Calls ‘Rape of Nanking’ a Fabrication*, NY TIMES, May 4, 1994. The minister also denied the war was an act of aggression, and that Japan was seeking to “liberate” its Asian neighbors. *Id.* Nagano was not the first to question the veracity of Nanjing. In 1990, Ishihara Shintarô 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.” IRIS CHANG, *THE RAPE OF NANKING* 201 (1995). Ishihara would later serve as Governor (mayor) of Tokyo from 1999 to 2012.

\(^{143}\) 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.

\(^{144}\) 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.
plaintiffs’ and defendants’ submissions to arrive at a set of substantiated facts. Media coverage can resurrect episodes, crimes and other dark moments otherwise forgotten.\footnote{Forced laborer’s son asks Japan to respect redress ruling, KYODO NEWS, July 13, 2001 (describing how the son of a forced laborer “said at a news conference that he is glad to know many people learned about his father’s fate through the trial”).}

On the one hand, scholars express skepticism about the fact-finding capacity of trials, particularly regarding war crimes. Writing about Israel’s prosecution of Adolf Eichmann, Hannah Arendt sought to shear the trial of any historical, didactic, or political significance:\footnote{Arendt may have been writing in response to views such as those held by Robert Jackson, the chief prosecutor at Nuremberg. As Jackson wrote to President Truman, The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world . . . . Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.” \textit{See} Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945, \textit{reprinted in} 39 AM. J. INT’L L. 178, 184 (Supp. 1945), \textit{available at} https://www.roberthjackson.org/wp-content/uploads/2015/01/Report_to_the_President_on_the_Prosecution_of_Axis_War_Criminals.pdf. \textit{See also} Michael P. Scharf, \textit{The Case for a Permanent International Truth Commission}, 9 DUKE J. COMP. INT’L L. 375 (1997) (describing two primary methods for establishing the record of grave human rights abuses: international tribunals and inquiry commissions).}

The purpose of a trial is to render justice and nothing else; even the noblest ulterior purposes—“the making of a record of the Hitler regime which would withstand the test of history” . . . —can only detract from the law’s main business: to weigh the charges against the accused, to render judgment and to mete out due punishment.\footnote{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.” \textit{Id.} at 19.}

For Arendt, trials matter only insofar as they dispense abstract justice. This is not necessarily wrong; trials must meet this basic obligation. But such a view overlooks the human aspect of the trial, particularly when gross inhumanity is at stake. The families of Eichmann’s victims, survivors of the Holocaust, and those concerned about the incalculable loss of life Eichmann orchestrated doubtless found his trial important.

Arendt is not the only public intellectual suspicious of the extralegal purposes of court proceedings. Ian Buruma, who has written insightfully about Japan for several decades, critiqued the Nuremberg and Tokyo trials in the following ways:

Just as a belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics—though I have my doubts about this too.\footnote{Ian Buruma, \textit{The Wages of Guilt: Memories of War in Germany and Japan} 142 (1995)}

For Buruma, the fear is that propaganda will trump process. Courts will blindly ascribe blame to a few, carefully chosen scapegoats, providing an opportunity for the rest of the world to watch, and breathe a cathartic sigh of relief when the bad apples are expunged and punished.

Legal scholars too express reservations about the historiographical functions of courts. Richard Wilson explains that international institutions—judicial and otherwise—
write better history than domestic ones do.\textsuperscript{149} Wilson posits that domestic judges—both members and products of the political elite—might feel pressure from coordinate branches that fund, supervise, appoint, and promote them.\textsuperscript{150} This pressure prevents judges from providing historically accurate, but politically undesirable, accounts. Courts are not scriveners of truth, but “collaborators in the state’s portrayal of reality.”\textsuperscript{151}

On the other hand, scholars such as Lawrence Douglas praise the ways that World War II trials, from Nuremberg to John Demjanjuk, function beyond mere adjudication. These “dramas of didactic legality . . . 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.”\textsuperscript{152} Trials, in short, recuperate or redeem past injustices. Martha Minow 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.”\textsuperscript{153} Likewise, Ruti Teitel explains that trials “enable vivid representations of collective history through the recreation and dramatization of the criminal past.”\textsuperscript{154} Psychologists have also found official acknowledgment of truth, such as that delivered by a court (or truth commissions, international tribunals, etc.) can help end political violence visited upon the victims.\textsuperscript{155}

This has particular salience in Japan, where political pressures on the judiciary can be heavy. As Mark Ramseyer and Eric Rasmussen have shown over a series of publications,\textsuperscript{156} the ruling (conservative) Liberal Democratic Party (“LDP”) exerts influence over judges through various mechanisms: assigning less attractive jobs to those affiliated with leftwing organizations, giving less attractive duties to judges who decide against the government, and placing such judges in branch offices with fewer administrative responsibilities.\textsuperscript{157} While lower court judges occasionally buck the

\textsuperscript{149} By international institutions, Wilson refers to institutions administered by the United Nations, such as the International Criminal Tribunals for the former Yugoslavia, and Truth and Reconciliation Commission in Guatemala. By domestic institutions, Wilson refers to South Africa’s Truth and Reconciliation Commission and municipal courts more generally. See Richard Ashby Wilson, \textit{Humanity’s Histories: Evaluating the Historical Accounts of International Tribunals & Truth Commissions}, 80 \textit{POLITIX} 31, 45 (2007) (“national institutions produce the most inadequate documents on the past”).

\textsuperscript{150} \textit{Id.} at 46.

\textsuperscript{151} Sharon Weil, 17.


\textsuperscript{153} Martha Minow, \textit{Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence} 26 (1996).


\textsuperscript{156} In addition to articles cited below, these works would include J. Mark Ramseyer & Eric B. Rasmussen, \textit{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. Rasmussen, \textit{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).

political orthodoxy, most judges “tend to parrot the moderately conservative positions of the longtime incumbent [LDP].”

In the context of postwar compensation lawsuits, scholars question the role of judges as historians. Kawashima Shin doubts the judge’s ability to marshal “historical facts.” Given recent critiques of objectivity in the humanities and social sciences, it may no longer make sense to say a judicial opinion merely presents historical “facts.” As Kawashima puts it, “the ‘facts’ and ‘truths’ must, on one level, be a type of fiction.” Instead, the opinion reflects the judge’s own ideology and historical views, which emerge from time to time in the text of the opinion.

C. Fact-finding in Litigation

The above recitations reflect the contentious political environment surrounding the events of World War II in Japan. It is no surprise that lawyers, victims and activists in the PCL movement go to great lengths to lay a factual foundation for the underlying events in the lawsuits. They have combed historical archives, university libraries, and government agencies gathering documentary evidence. They have submitted numerous historical volumes about the war, including the Nanjing Massacre, comfort women system, and the medical experimentation of Unit 731. They have flown in experts from Japan and around the world to testify. Lawyers used videos and

159 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. 200).
160 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.” It may be true, but it certainly renders a normative judgment of the war.
162 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, 118 (1999), available at http://www.waseda.jp/folaw/icl/assets/uploads/2014/05/A02859211-00-000190110.pdf. This was reportedly the first time a foreign expert gave live testimony in Japan. Id. International law scholar Kotera Akira, of University of Tokyo, also testified in this decision. Id. See also Koshô Tadashi, ‘Shinshi’ ni wa Uketomerumo, Jijitsu Kaimei ni Seii Nashi: Nihon Kôkan Soshô Wakai o Kangaeru [Accepting the Truth, But Insincere in Clarifying the Facts: Thinking about the Settlement of the Nippon Steel Lawsuit] 73, 78, in NIHON KIGYÔ NO SENSÔ SEKININ [WAR RESPONSIBILITY OF JAPANESE COMPANIES] 73, 78, in NIHON KIGYÔ NO SENSÔ SEKININ [WAR RESPONSIBILITY OF JAPANESE COMPANIES] (Koshô Tadashi et al. eds. 2000).
photographs to help judges envision the predicate acts. They adduced materials from Russian domestic tribunals that tried Japanese soldiers right after the war. They have scoured rural China to find victims of Japanese war crimes, interviewed them about their wartime experiences, helped them file lawsuits in Japan, and even arranged for some of them to fly to Japan in order to testify. Lawyers have also adduced testimony from perpetrators; Miyake Yutaka, a guard at the Unit 731 medical experimentation facility, testified about the forms of torture he inflicted upon Chinese citizens.

Defendants, including the Japanese government, do not contest the facts, as they might under the rules of Japanese civil litigation. Instead, they claim that they “do not know.” This is not the same as admitting the facts; it shows a kind of passive resistance to the truth by state and corporate actors. Yet in practice, a “party who does not completely deny facts alleged by the opposing party may be deemed to have admitted them.”

Under Japanese civil procedure, judges enjoy wide latitude in finding facts. In the context of PCL, judges use this discretion to compose elaborate fact sections, acknowledging Japan’s commission of grave human rights abuses. Given the frequently lengthy descriptions of the facts of the war, this section focuses on a handful of representative opinions.

In the Yamaguchi District Court decision, the first lawsuit to order Japan to compensate victims of World War II, Judge Konoshita Hideaki made several important findings of fact. Most saliently, the court linked the military to the comfort women:

The recruitment of comfort women took place largely through private agents, as 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.

**COMPANIES** (Koshô Tadashi et al. eds. 2000) (citing impact of written testimony from Rikkyo University Professor Yamada Shôji)

164 In both Russia and China, for instance, local courts heard cases involving low-level offenders in the Japanese army. In the eastern city of Khabarovsk, the Soviet Union tried twelve Japanese soldiers for war crimes in association with Japanese bacterial warfare and medical experimentation in 1949. See SHELDON H. HARRIS, FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE, 1932-1945, AND THE AMERICAN COVER-UP 317 (2002). Prosecutors at the trial put together an 18-volume historical record, some of which is available in other languages. Id. at 320. See also Yamada, supra note __, at 242 (indicating the use of materials from the Khabarovsk trials).

165 Gao Xiongfei testified about losing an arm during a Japanese air raid at the age of four. He described the pain and humiliation he suffered 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], available at http://www.suopei.jp/saiban_trend/731_nankin/post_347.html.


168 TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.05(2)(b) (2d ed. 2000).


171 MINSOSHÔ, 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.”). This is known as the principle of free determination.
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 Imperial Government issued identification cards for the comfort women . . . . Even when private agents ran the comfort station, the Imperial Army authorized its foundation, 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.172

The italicized words help weave the Japanese army and government back into the warp of history, describing the many ways in which the Japanese government and military ran the stations. It acknowledges the private sector’s possible role, but clearly places the responsibility on Japanese state actors.

Judge Konoshita also presented many normative facts, statements that reflect prevailing social mores. These provide the normative glue linking historical facts to Japanese and international standards of the time. For instance, he cited the rules posted on comfort stations, as well as their fees: 1 yen for a Chinese, 1.5 yen for a Korean, 2 yen for a Japanese.173 The court interpreted the rules in the following way:

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.174

This opinion acknowledges the discursive environment of recent Japan debates about the war. The euphemism “prostitution” is rejected in favor of the more charged “sex slave.”175 More surprising still is the ascription of racism, a finding by no means necessary to the holding, but a serious indictment of the system. Finally, Judge Kinoshita noted that the comfort women “is not a past issue, but rather an ongoing human rights


173 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.” Id. at 59.

174 Id. at 60.

issue that should be resolved now.” \(^{176}\) The contemporaneity of the issue helped him find a present violation of law.

This kind of critique figures prominently in other cases, too. In the Nanjing Massacre decision, Judge Itô Tsuyoshi waded into the historical debates in several passages, repeating the word “invade” (shinryaku) or “invasion” (shinryaku kōi) eight times. \(^{177}\) In his opinion,

> [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. \(^{178}\)

To say this part of the opinion This portrays Japan’s prosecution of the war in a particular manner. It is not strictly a factual or legal matter, but one that understands the full weight of the lawsuit: the human rights violations, the imperialist intent, the ongoing historical debates, the implications for international relations, the need for apology, and so on. Other opinions have faulted the government for denying key documents were within its custody, and falsely claiming to the Japanese Diet that a fire destroyed the documents. \(^{179}\)

On the other hand, not all judges are sympathetic. In the Filipina comfort women case, Judge Ichikawa Yoriaki included a very brief (approximately one page) fact section. This section noted that the Philippines had been, at different points in its history, a “colony” (shokuminchi) of both Spain and the United States. \(^{180}\) But on “October 14, 1943, with Japanese approval, the Philippine Republic was launched with Jose Laurel as President.” \(^{181}\) By focusing on high politics, and the establishment of the short-lived Second Philippine Republic under Japanese tutelage, \(^{182}\) the opinion overlooks the comfort women system in the Philippines, and the peculiar harm these eighteen plaintiffs suffered. It refers to plaintiffs as “women of Philippine nationality who lived in the Philippines during the three years of Japanese military occupation.” \(^{183}\) It does not refer to them as “comfort women,” as all other opinions do. It only uses the term once, in “explaining crimes against humanity.” The court does not mention Henson’s role in a

\(^{176}\) Yamaguchi, supra note __, at 69.

\(^{177}\) TDC September 22, 1999, 1028 HANREI TIMES 92. The high court opinion is available here: [http://www.ne.jp/asahi/suopei/net/3_saiban/1_731/saiban_731_kosai_hanketu.htm](http://www.ne.jp/asahi/suopei/net/3_saiban/1_731/saiban_731_kosai_hanketu.htm)

\(^{178}\) Li Xiuying et al. v. Japan (Tokyo D. Ct., Sept. 22, 1999) (emphasis added). Even the word “invade” is controversial. Revisionist scholars and politicians prefer instead the term “advance” to describe Japanese aggression in mainland China.


\(^{181}\) Id.


\(^{183}\) Hansen, supra note 103, at 4.
resistance group, nor her induction into the comfort women system at a military checkpoint.\footnote{Maria Rosa Henson, Comfort Woman: A Filipina’s Story of Prostitution and Slavery under the Japanese Military 32 (1999).}

Judicial opinions tell us much about the current debate over World War II in Japan. Most judges seem sympathetic to the victims in the fact sections. Some explicitly condemn Japan’s wartime conduct, while others apologize to the people of China. A handful of decisions do not recognize the facts of the war at all, symbolically denying both the victims’ suffering and the state’s atrocities.\footnote{Trial courts did not find facts in cases involving both comfort women and forced labor. See Japan Military Comfort Women Issue Movement Network, \textit{Did you Know? Contents of the Verdicts in the Comfort Women Trials}, available at space.geocities.jp/ml1alt2/data/data5/ianhusaibanpanhu1.pdf. See Liu Mianhua v. Japan (Tokyo D. Ct., May 30, 2001) (court did not recognize facts of three Chinese comfort women), \textit{aff’d} (Tokyo H. Ct., 2003); Rosa Henson et al. v. Japan (Tokyo D. Ct., Oct. 9, 1998) (court did not recognize facts of forty-six Filipina comfort women), \textit{aff’d}; Taiwan comfort women (Nagoya D. Ct., Oct. 15, 2002) (court did not recognize facts of nine Taiwanese comfort women). \textit{See also} Li Wanzhong v. Japan & Mitsui (Tokyo D. Ct., Mar. 11, 2001) (court did not recognize forced labor of eleven former forced laborers).} This fact section forms a kind of literary tribute, and a central plank of discursive justice. Judicial recognition of facts also helps the victims, who feel Japanese institutions have consistently denied involvement. In the words of one plaintiff, “It’s a terrible decision. But the court recognized the fact of the harm. It expressed hope that the Japanese government will apologize. As long as I’m alive, I’ll continue the fight.”\footnote{Liu also expressed some satisfaction that the Supreme Court had previously recognized the facts in the earlier decisions.}

\section*{V. Violations of Law}

The postwar compensation lawsuits raise many questions about the legality of Japan’s conduct of World War II. In making out their cases, Japanese human rights lawyers draw on domestic Japanese law, Chinese law, international treaty law, and customary international law. Violations of domestic law sound in basic tort and dereliction of duty. It requires no particularly vivid imagination to see how defendants’ conduct constituted a tort.\footnote{Japan’s Civil Code has provision} The dereliction of duty, on the other hand, requires some fictionalization. In a handful of cases, Japanese courts have attached a duty to care to defendant corporations and defendant state. In failing to care for their charges (the plaintiffs), the corporation or state violated this duty.

In presenting their arguments, lawyers relied on contemporaneous domestic and international law. They hoped to avoid the charge, heard from Nuremberg and Tokyo to Arusha and the Hague, that judges were applying \textit{ex post facto} law. The lawsuits can also help gauge the development of international law, as well as Japan’s internalization of international human rights and humanitarian law norms. But first, we attend to the domestic legal implications of the lawsuits.

\subsection*{A. Violations of Domestic Law}
To the extent that plaintiffs win the lawsuit in the traditional sense, courts find violations of domestic law, as opposed to international law. Of course, all successful civil litigation requires a finding that defendant breached a duty owed to plaintiff. The question is how courts characterize that violation. In these cases, the judges exercise some caution, perhaps because they are evaluating the acts of other government actors. Suffice it to say, in the context of Japan (and probably other jurisdictions as well), judges plot circuitous routes to liability. Given the enormity of the conduct here, it may seem unnecessary to split judicial hairs. But the Japanese judiciary has exhibited some creativity in depicting how defendants violated the law.

1. Comfort Women

The first PCL decision to find Japan liable—the 1997 Yamaguchi District Court comfort women case—did so obliquely. As noted, the decision mentioned the brutal treatment of the comfort women. It further noted Japan’s inhumane conduct would be illegal under the present (1946) Constitution. But the court would not apply postwar constitutional principles retroactively. The court found that the prewar (Meiji) constitution did not require compensation, absent a special written measure or law.

Instead, the court found the current Diet had acted illegally. By virtue of the Kono Statement, Japan took on an obligation to apologize to the comfort women. This may well be a misreading of the Kono Statement, which both “extended its sincere apologies and remorse to all . . . comfort women,” and called upon Japan “to consider seriously, while listening to the voice of learned circles, how best we can express this sentiment.” From this hortatory language, the judge implied two possible obligations: to compensate the comfort women, and to apologize to them. This is a fairly expansive interpretation of vague language about “expressing a sentiment.” By failing to pass a law, the court held the Diet engaged in legislative omission (rippō fusakui). This omission obligated the Diet to pay each plaintiff 300,000 yen (about $2,300) as compensation. In this way, PCL plaintiffs achieved a rare damages award.

But the court did not order an apology. The court encouraged the Diet to think about whether to issue an official apology. But, citing concerns about separation of powers, the court determined itself unable to order the Diet to apologize. This victory is thus more equivocal than the word “victory” implies. The absence of apology denies the comfort women one main goal of the PCL movement: acknowledgment and apology for the underlying crimes. Second, the failure to attach liability for the underlying acts of abduction, transportation and forced rape exculpates Japan for the war. By finding a contemporary violation, the court highlights the urgency and contemporaneity of the wartime problem—it continues to violate present human rights. But it also fails to

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188 See infra, notes 180-188, and accompanying text.
189 See supra, notes 96-98, and accompanying text.
190 See Ha, supra note 93, at 95.
191 Id. at 101-2.
192 Kono Statement, supra note __.
193 Id.
194 Ha at 102.
195 Id. at 103
196 Id.
197 Id.
address the wartime injury. This is the only comfort women case to find against the Japanese government. While important for that reason, it was nevertheless overturned on appeal. 198

2. Liu Lianren

The first decision to find for a forced laborer, and against Japan, was handed down in 2001. 199 In September, 1944, Liu Lianren was abducted from his home in China, and transported to work at a mine in Hokkaido. He escaped in April 1945, and lived as a fugitive in Japan’s mountain wilderness for over twelve years. When discovered in 1958, he was deported “for overstaying his visa.” 200 He returned to Japan in 1996 to sue the Japanese government for abducting, transporting, and subjecting him to forced labor, and failing to repatriate him after the war. 201 The company that used his labor had subsequently dissolved, and so could not be named as a defendant.

In 2001, the Tokyo District Court found Japan had acted illegally. As with the comfort women decision above, however, the illegal conduct was not the abduction, transportation or forced labor; Japan once again escaped liability for its wartime conduct. Instead, the court attached liability to the postwar government’s omission: the Japanese government’s failure to find and repatriate Liu.

In articulating a theory of liability, the district court likened Liu to a Japanese civil servant. Among the obligations the Japanese government owed to civil servants was a duty to rescue (kyûgo gimu). In allowing Liu to remain in Japan for twelve years wandering around northern Japan, the state breached this duty. Accordingly, the court held that the postwar Japanese government failed to rescue Liu, and ordered the government to pay him 20 million yen ($20,000) in compensation. 202

As indirect as the route to liability may have been, civil society proclaimed the decision as “epochal.” 203 According to one group, “It has been a difficult struggle to pursue state liability. This decision represents a breakthrough, a way to overcome that difficulty.” 204 One can imagine the brief flush of pride that these groups felt, before the government appealed the decision. 205 In this way, excitement over Liu’s victory must be tempered in the same way as the comfort women decision. The victory was fleeting, and attached to conduct peripheral to the grievous injuries plaintiff actually suffered.

200 I have previously discussed this decision in some detail. See Timothy Webster, Note: Sisyphus in a Coalmine: Forced Labor in Japan and the United States, 91 CORNELL L. REV. 733, 734, 750-752 (2006).
201 Id. at 750.
202 Id.
204 Id.
B. Violations of International Law

From the beginning of the PCL movement, lawyers have accused defendants of violating international treaty law and customary international law. In 1991, Kim Kyeong-seok alleged that Japan Steel (NKK) violated *inter alia* the ILO Convention on Forced Labor. After the verdict, Kim’s legal team expressed “regret” that the court found the corporation did not violate the forced labor convention.

Violating international law matters in various ways. First, violators of international law incur reputational harm. Andrew Guzman articulates four factors to evaluate the reputational harm of an international law violation. 1) A state that commits a severe violation—one causing “substantial and widespread harm”—risks concomitantly serious damage to its reputation. Here, there can be no doubt that Japan’s violations caused widespread harm. 2) A state that violates international law during a national crisis—such as wartime—produces less reputational harm than one committed during a period of normalcy. This factor somewhat mitigates the reputational damage, as Japan committed these acts during the barbarism of World War II. 3) The number of states that know of the violation also matters. For present purposes, many governments do not simply know about these violations, they have publicly denounced them. The United States, South Korea, the European Parliament, and Canada have issued resolutions urging Japan to address the comfort women issue. Moreover, international bodies, such as the International Labour Organization and United Nations, have issued reports cataloging Japan’s international law violations, and encouraging Japan to provide compensation. 4) The clarity of the obligation matters. When both the obligation, and the consequences of violating that obligation, are clearly

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207 Koshô, *supra* note 163, at 80.
209 Id. at 1862.
210 Id.
211 Id.
spelled out, the state suffers a correspondingly large reputational sanction.\textsuperscript{214} This final factor is somewhat mitigated here. Certain war crimes, including rape, were not clearly articulated in international treaties. For example, the 1907 Hague Convention did not proscribe rape, per se, but instead required respect for “[f]amily honour and rights, the lives of persons, and private property.”\textsuperscript{215} It is possible to interpret this as a prohibition of rape, but one must make several inferences to arrive at such a conclusion.\textsuperscript{216} Based on these factors, Japan has suffered significant, though not irredeemable, reputational harm.

Second, judicial decisions activate international law, giving form and teeth to the norms of international law.\textsuperscript{217} In light of realism’s longstanding critique of international law—that the lack of enforcement mechanisms renders international law illusory—judicial decisions in many ways realize international law. Domestic courts, as many scholars have shown, enforce international legal norms.\textsuperscript{218} More specifically, domestic application of international law increases the transparency and clarity of the rules.\textsuperscript{219} Litigation also permits outsiders—civil society groups, lawyers, academics—to challenge the government’s interpretations of international legal obligations.\textsuperscript{220} Since the government is defendant in many of these lawsuits, it must reflect on its legal positions and compensation efforts, under the watchful, but not too probing, eye of the judiciary.

Third, it is still rare for a court to find its own government violated international law. In the United States, only a few decisions have found the federal government violated international law.\textsuperscript{221} This is not because the U.S. government has not violated international law. Rather, U.S. courts deploy avoidance doctrines, political question and sovereign immunity, to bypass the issue altogether.\textsuperscript{222} On the other hand, U.S. courts

\begin{footnotesize}
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\item \textsuperscript{214} Guzman, supra note 208, at 1863.
\item \textsuperscript{215} Hague, Art. 46.
\item \textsuperscript{216} Rape did not enter treaty lexicon until 1949. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Art. 27.
\item \textsuperscript{217} ANDRÈ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 10 (2011).
\item \textsuperscript{218} Id. at 9 (2011)(“national courts can decide international claims”); Oona Hathaway, Why Do Countries Commit to Human Rights Treaties, 51 J. CONFLICT RES. 588, 593 (2007)(arguing that domestic legal enforcement, particularly by actors outside government, is as important as
\item \textsuperscript{219} 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).
\item \textsuperscript{220} Id. at 157.
\end{itemize}
\end{footnotesize}
have found foreign governments and government officials violated international law in many instances.\textsuperscript{223}

It is far from inevitable, then, that Japanese judges would find violations of international law. Many courts sidestepped the issue. Some adopted the Shimoda line: states are not liable to individual victims for violations of international treaties.\textsuperscript{224} Others cited the corollary “San Francisco framework:” that all claims from individuals have been settled by the bilateral peace treaties of state governments. In a few cases, however, judges broke rank, and found violations of both international treaty law and customary international law.\textsuperscript{225}

The Yamaguchi decision first suggested Japan violated international law.\textsuperscript{226} Judge Konoshita noted “the comfort women phenomenon could have violated the Prostitution Convention\textsuperscript{227} and Forced Labour Convention.”\textsuperscript{228} But it was not until another comfort woman case, involving a single plaintiff named Song Shindo, that a court found Japan violated international law:

In light of the facts acknowledged above, the appellant’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 did not realize these measures, it would not violate international law. Thus, the appellant’s claims cannot be accepted.\textsuperscript{229}

This sends a mixed message. On the one hand, the court unambiguously found Japan violated the Forced Labor Convention and the Prostitution Convention, the first time a court had done so. It thus takes up the gauntlet thrown down in the Yamaguchi decision. On the other hand, by finding Japan’s failure to remediate an international law violation is not itself illegal, the court weakens the normative force of international law. In terms of supporting international law, the court both giveth and taketh away. This bifurcated approach found support among many courts.

In the Kim Hak-sun lawsuit, for instance, the Tokyo High Court adopted a similar logic. The court surveyed a broad range of international law, including customary and

\textsuperscript{223} Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995) (discussing possibility of Geneva Convention violations).

\textsuperscript{224} 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, 1683 HANREI JIHÔ 46 (Tokyo D. Ct., Oct. 9, 1998). Other courts have repeatedly refused to find violations of international law on this ground.

\textsuperscript{225} Koh (1997), Sadat (2010).

\textsuperscript{226} Yamaguchi, supra note __, at 100.


\textsuperscript{228} Convention Concerning Forced or Compulsory Labour, ILO Convention 29, June 28, 1930, 39 U.N.T.S. 55.

\textsuperscript{229} Song Shindo v. Japan, 1741 HANREI JIHÔ 40 (Tokyo H. Ct., Nov. 30, 2000).
conventional (treaty) law.\textsuperscript{230} The court found violations of the customary international law of slavery,\textsuperscript{231} the Prostitution Convention,\textsuperscript{232} and the Forced Labour Convention.\textsuperscript{233} It also cited two U.N. reports: one by Radhika Coomaraswamy,\textsuperscript{234} and one by Gay McDougall.\textsuperscript{235} The reports explained how the comfort women system violated international law, and called on Japan to remediate the comfort women.\textsuperscript{236} But the reports did not persuade the appellate court, for they did not cite case where an individual had a direct cause of action against the perpetratiing state.\textsuperscript{237} Even as courts acknowledged violations of international law, they held these violations were in essence irremediable. The \textit{Shimoda} decision continued to haunt other victims of World War II.

It was not just the prostitution and slavery conventions that were interpreted in this way. The Tokyo High Court, in a case involving Chinese comfort women, likewise found Japan violated international humanitarian law:

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,\textsuperscript{238} Hague Regulations,\textsuperscript{239} and others. Since they were

\begin{itemize}
  \item Kim Hak-sun v. Japan, 1704 HANREI JIHÔ 54 (Tokyo H. Ct., Jul 22, 2003). The court analyzed slavery, prostitution and forced labor as matters of both treaty law, and customary international law. Id. at 81-88.
  \item 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, \textit{jus cogens} norm of customary international law by the mid-20th century.” Id. at 84
  \item 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, \textit{Comfort women: an unfinished ordeal}, Dec. 1, 1994, 157-58 available at http://icj2.wpengine.com/wp-content/uploads/1994/01/Japan-comfort-women-fact-finding-report-1994-eng.pdf.
  \item 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. Kim, \textit{supra} note __, at 86.
  \item Coomaraswamy Report; McDougall Report.
  \item Kim, \textit{supra} note __, 1704 HANREI JIHÔ at 85.
  \item Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (“Hague Convention”). Article 3 provides “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.”
  \item Hague Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907 (“Hague Regulations”). Article 46 provides “Family honor and rights, the lives of persons, and private property as well as religious convictions and practice, must be respected.”
\end{itemize}
neither acts of war, nor acts in preparation of war, they cannot amount to proper exercises of public power. The 1907 Hague treaties did not explicitly forbid rape or sexual abuse. Instead, the court made the reasonable inference that protecting “family honour and rights” amounted to a prohibition on rape. Given this interpretation, it was a small step to hold that the comfort women system violated the Hague Convention. This judicial articulation of a transnational norms should Still, despite the strong tone of the opinion, the court clung to the traditional separation between the individual and the state, namely that individuals lack standing to bring claims against the offending state.

When courts find that defendants violate the law, it sends a signal to plaintiffs, defendants and society as a whole. The precise meaning of that signal depends upon the violation and the court’s articulation of it. The PCL cases found violations of both domestic and international law, each with a different set of consequences. In the rare case where judges ordered damages, they did so based on postwar violations of domestic Japanese law: the failure to repatriate, failure to discharge a duty of care, and so on. Providing a remedy for serious human rights abuses is, generally speaking, a positive sign. Yet, this exercise in interpretive gymnastics may have served to inoculate the violation itself. Japanese courts could have issued stronger messages about how state-sponsored rape and forced labor deserve compensation. When judges found violations of international law, they did not take the additional step of ordering compensation. These judgments might have brought about some degree of reputational harm, the fact that violations of international law went uncompensated—in a sense, unpunished—casts some doubt on the efficacy of using international law in domestic courts.

VI. DOCTRINE

Human rights lawyers face a number of common defenses, no matter where they file suit. These include sovereign immunity, statutes of limitations, and the individual standing in international law. Finding ways to surmount these barriers challenges lawyers around the world. In this section, we see how Japanese lawyers addressed these common barriers, and how they surmounted some of them.

A. Sovereign Immunity

One major barrier to human rights litigation is sovereign immunity. Some jurisdictions will hear cases against the government, as long as it is a foreign government, or representative thereof. Recent examples of this include Ferrini, Distomo (Prefecture of

240 Despite the strong language, the court did not find Japan liable in this case. Instead, 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. Huang Youlong v. Japan, slip opin. 32-33 (Tokyo H. Ct., Mar. 26, 2009) (dismissed on other grounds), available at http://www.suopei.jp/saiban_trend/ianfu/post_313.html; http://www.ne.jp/asahi/suopei/net/3_sai banquet/4_ianhu/hainan/090326_kosai_hanketu.pdf.

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

242 Huang, supra note __, at slip op. 33.
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Voitio), Princz, and many cases brought under the alien tort statute. These cases involve state immunity claims: where plaintiff sues the government of country B in the courts of state A. On the other hand, courts hesitate to hear lawsuits against their own government—the issue of sovereign immunity. This doctrine has felled many human rights cases for the simple reason that many courts view the state as above, perhaps outside of, the law.

In Japan, sovereign immunity has deep roots. The Meiji Constitution did not specifically enshrine sovereign immunity. However, the framers of Japan’s Civil Code, including juriste Gustave Boissonade, drafted a provision to hold the state liable for tortious conduct by its officers. But this provision was later deleted. Academic theories held that the state, when exercising its proper authority, would not be liable in tort. When the state exceeded its proper authority, special measures (laws, regulations) were required. As the eminent prewar scholar Minobe Tatsukichi described it, there was no right to seek compensation from the state, even if “a policeman illegally exceeded his authority, used violence against a person, and ended up injuring him,” or if “a tax collector, in searching someone’s house, damaged his belongings.” The “plenary theory” of sovereign immunity held sway during the Meiji era, though other scholars did at least the possibility of sovereign liability for tortious acts.

In the immediate aftermath of World War II, Japan partially eradicated the prewar concept of sovereign immunity. The 1946 Constitution permitted people to sue for redress when they “suffered damage through the illegal act of any public official.” The 1947 State Liability Law animated this provision by requiring the government to compensate “illegally inflicted losses, whether intentionally or negligently, upon another person.” While the constitutional and statutory provisions opened the postwar Japanese government up to tort liability, a 1950 Supreme Court decision foreclosed the possibility of holding the prewar government liable. This decision has exerted a strong

243 See Ferrini v. Federal Republic of Germany, Cass., sez. un., 11 mar. 2004, n.5044) (holding the German arm’s 1944 capture, deportation and enslavement of Italian citizen violated jus cogens norms, and thus Germany waived its immunity); Prefecture of Voitio v. Federal Republic of Germany, Areios Pagos (Supreme Court) 11/2000 (concluding that Germany’s 1944 massacre of 300 Greek civilians violated jus cogens norms and thus Germany waived immunity); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) (). See also Mathias Reimann, A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany, 16 MICH. J. INT’L L. 403 (1995) (arguing “[i]t is time to deny immunity to foreign sovereigns for torture, genocide or enslavement, at least when they are sued by Americans in American courts”).


245 Id. at 319.

246 Id.


248 Id. at 108.

249 MIYABE TATSUKICHI, SUMMARY OF ADMINISTRATIVE LAW 231 (1933), quoted in Nishino, 120.

250 Id. at 121-122 (describing the theories of prewar scholars Watanabe Shôtarô, Issei Masao, and Tanaka Nirô).

251 KENPÔ, Art. 17.


influence over the PCL cases. Indeed, judges have applied sovereign immunity to exculpate the prewar Japanese government from civil liability in most cases. 254

Despite a relatively uniform canon of interpretation, Japanese courts have refused to apply sovereignty immunity in a couple of PCL decisions. In 2004, the Niigata District Court refused to apply sovereign immunity, and ordered the Japanese government to compensate eleven Chinese plaintiffs. 255 In rendering the first decision against the prewar state for forced labor, 256 Judge Katano Noriyoshi provided the following context:

When the state, in exercising public power, ignores humanity (for example, enslavement) and causes damage . . . it would be extremely unfair and unjust to allow the state to avoid civil liability. Here, Defendant state, as a matter of policy, engaged in malicious conduct, implementing a program of forced transportation and forced labor that is unforgivable, as either a legal or humanitarian matter. Moreover, as described above in the factual recognition [section of the opinion], Defendant state engaged in extremely malicious conduct: concealing the facts of forced transportation and forced labor and forced, burning the Foreign Ministry Report. 257

After one of the most withering criticisms in the PCL jurisprudence, the court found it “extremely inappropriate” to apply sovereign immunity to forced labor. 258 Specifically, to exonerate the Japanese government would “violate the principles of fairness and justice.” 259 At base, the idea is that legal interpretation must hew closely to equitable principles. When the law fails to arrive at a just result, the judge has discretion to “do justice,” even if that means deviation from settled law. Resolving a dispute ex aequo et bono, in “justness and fairness,” is of course possible under international law, but generally frowned upon. 260 Here, the judge might have decided that, despite abundant case law to the contrary, he could not continue to shield the Japanese government from liability.

The idea of “fairness and justice” as a bar to sovereign immunity, at least in the Japanese context, was first suggested by Professor Nishino Akira of Hōsei University. 261 In 1998, he proposed a limited exception to the exercise of sovereign immunity when the

254 See, e.g., Ha Sun-nya v. Japan, supra note __ (applying sovereign immunity to deny liability for prewar Japanese government); Kim Hak-sun v. Japan, supra note __ (same).
255 This decision ordered both defendants – the Government of Japan and the Rinko Corporation – to pay each plaintiff (ten laborers, and the heir of one other laborer) 80 million yen (about $75,000). The court did not apportion the damages award between the two defendants. Instead, the court found defendants jointly and severally liable, ordered one amount they should jointly pay.
256 The Liu Lianren decision also held the state liable, but for failing to care for Liu after the war, not for abduction and forced labor during the war.
258 Id. at 3579.
259 Id.
260 Leon Trakman, Ex Aequo et Bono: Demystifying an Ancient Concept, 8 CHI. J. INT’L L. 621, 622 (2008) (describing ex aequo et bono as “negatively stereotyped, misunderstood or both”)
261 Nishino Akira, Kyôsei Renko, Kyôsei Rôdô Soshô to Kokka Mutôseki no Gensoku, 77 HÔRITSU RONSÔ 125 (2004).
underlying “conduct is cruel and inhumane.”

According to Nishino, whether the standards came from the Postwar Constitution (1946) or the Meiji Constitution (1889), it is clear that forced labor would violate basic ideas about fairness and justice. The judgment does not treat forced labor as a jus cogens violation, even though there is both scholarly support and (increasingly) judicial practice for treating forced labor as a jus cogens violation.

As with all plaintiff victories in the PCL movement, this decision was overturned on appeal. A handful of other court decisions have since refused to apply sovereign immunity, but exculpated states on other grounds.

[Doctrinal discussions of statute of limitations and individual standing are omitted from this draft]

VII. EPILOGUES

Normally, courts exude little sympathy. The men in black robes (and in Japan most judges are men) ground their judgment in legal codes, not moral or affective ones. Nonetheless, one usual feature of the postwar compensation lawsuits is the number of epilogues (fugen) that judges have attached to their opinions. In these short, non-binding statements, Japanese judges express their emotional reactions to these lawsuits. It is not surprising that judges would react to war crimes, systemic rape, and other serious abuses of human rights. The odd thing is that so many judges took the effort to express these feelings, either verbally at the end of the trial, or in writing as part of the opinion. Three sentiments in particular stand out from these judicial supplements.

First is the stated desire to help the victims. As one trial court judge noted at the conclusion of the trial:

As a judge, after reading the complaint, you immediately want to offer a remedy. That’s the kind of case it is. As a human being, you think to yourself, I must remedy this case. Emotionally I want them to win. Be that as it may, I cannot have them win. There are personal conflicts here,

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262 Id. at 141. Nishino recognizes that such standards would change over time.
263 Id. at 133.
265 See Ferrini, *supra* note __, Voiotia, *supra* note __.
269 American judges have expressed similar sentiments when writing about German slave labor. See Burger-Fischer v. Degussa, 65 F. Supp. 2d 248 (D.N.J. 1999). Before dismissing the lawsuit, Judge Dickinson Debevoise wrote, “Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated.” Id. at 285.
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and lots of instability. But when the Supreme Court has made a ruling, the precedent must be followed. We can construe no theory to overturn the decision. To elaborate a special theory for this case would undermine legal stability.270

This sense of inevitability, that the judge had no choice but to apply the law in a foreordained fashion, also recurs. Several judgments, written in the wake of the 2007 Supreme Court decision, adopt this line. As one judge put it, he “had no alternative but to hold the defendant’s legal responsibility extinguished” because the Supreme Court had ruled on the matter.271 While Supreme Court decisions are technically not binding in Japan,272 it is almost certain that a contrary decision would both reach the Supreme Court, and be overturned there.

Second, several judges suggested that defendants—the state and corporations—continue to bear moral responsibility to compensate their victims.273 As one judge put it “even if legal responsibility has been extinguished, there is no reason why the moral responsibility has also been extinguished. From the moral perspective, the compensation fund for forced laborers established by the Federation of German Industry, and the settlement of the Hanaoka Incident, are meaningful in a case like this.274

Third, as argued above, the factual recognition sections constitute purposive endeavors for the judge. One judge described the importance of the facts as follows, “This decision could have been written without factual recognition. Yet, not to recognize the facts would have been insupportable. So we provided factual recognition. Damages from war, we believe, should be resolved without the use of courts.”275

These brief exercises in catharsis may suggest the gap between law and humanity. Many judges would probably agree that these plaintiffs have endured horrible treatment, but many would also agree that the legal system can only provide limited redress for this suffering.

CONCLUSION

The postwar compensation litigation movement aims to do many things. Winning undoubtedly features among these aims, but it is not the only focus. Instead, these lawsuits demand nothing less than a moral, legal and political recalculation of Japan’s role in World War II. The litigation has yielded unassailable evidence that Japan participated in serious human rights violations during World War II, which is contentious in many sectors of contemporary Japanese society. They provide a judicial record, for

270 Zhang Shuhai v. Japan, Kajima Construction et al. (Nagano D. Ct., March 10, 2006)(Tsuji Jirô, J.), quoted in MATSUOKA, supra note __, at 188.
271 Matsuoka 186
272 There is some dispute about whether Supreme Court decisions are binding. The better view appears to be that, while not legally binding, Supreme Court precedents “have a de facto binding power.” See Shigenori Matsui, Constitutional Precedents in Japan: A Comment on the Role of Precedent, 88 WASH. U. L. REV. 1669, 1669 (2011). The Supreme Court itself can use different reporters to publish its decisions, and by this selection process influence “the precedential value of its own judicial decisions.” Hiroshi Itoh, The Role of Precedent at Japan’s Supreme Court, 88 WASH. U. L. REV. 1631, 1637 (2011).
274 Id.
275 Zhang Shuhai v. Japan, Kajima Construction et al. (Nagano D. Ct., March 10, 2006)(Tsuji Jirô, J.)
the first time, that Japan’s prosecution of World War II violated both international law and Japan’s own domestic law. The judgments often arrive at these conclusions in fairly circuitous manner. But they contribute nonetheless to the development of international human rights law and international humanitarian law, as well as to the judicial proscription of massive human rights violations. Finally, the lawsuits have allowed judges both to evaluate the rather grim circumstances of the war, and to urge the political branches to address the underlying injustices. To be sure, this is not the tidy resolution most victims, human rights lawyers and activists groups desire. But litigation at least offers the possibility—the forum—to challenge conduct largely immune to legal, historical or moral judgment.