

# Just Reparations for Korean “Comfort Women”: A Transitional Justice and International Law Perspective

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## Abstract

On December 28 2015, South Korean and Japanese foreign ministers abruptly reached an agreement (hereinafter “the 2015 Agreement”) to settle the Korean “comfort women” issue. This agreement evoked strong opposition among the victims and civic groups due to the lack of participation by the victims in reaching it; consequently the agreement appeared to result in unjust reparations for these victims. In addition, two conflicting judgments were reached in the South Korean court in relation to compensating Korean “comfort women” in 2021; namely, (i) the judgment on January 8 2021 and (ii) the judgment on April 21 2021. In terms of the former, the Seoul Central District Court ruled on January 8 2021, that the victims’ right to claim reparations for damages against the Japanese government was not included within the scope of application of the 2015 Agreement. On the contrary, in its April 21 2021 ruling, the Seoul Central District Court dismissed the lawsuit on the ground of state immunity filed by other victims of Japanese military sexual slavery against the Japanese government. Besides, the court ruled that an “alternative remedy” was provided by the 2015 Agreement. This raises the question of if the 2015 Agreement provided adequate just reparations to be considered an “alternative remedy” for the victims. This article argues that the reparations the Japanese government provided to Korean “comfort women” cannot be regarded as just since it does not meet the international standards of just reparations, especially from the perspective of transitional justice and international law. For this purpose, Section 2 discusses the background of the so-called “comfort women” and confirms the legal responsibility of the Japanese government. Section 3 explores the international standards on providing a remedy and reparations for victims of violations of international human rights law and international humanitarian law. Then, it outlines what just reparation should be from the perspective of transitional justice. Section 4 examines whether the reparations the Japanese government offered these women, including those set out in the 2015 Agreement, constitute just reparations for the victims. Section 5 discusses the relationship between justice and politics in reparations for these victims and finds that justice in reparations for these women was determined by political considerations between the two countries. The implementation of the 2015 Agreement shows

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*how difficult it is to achieve reconciliation between these two countries without just reparations.*

KEYWORDS: Reparations, Comfort Women, Sex Slave, Victim, Just Reparation, Compensation, Transitional Justice

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## I. Introduction

At the end of 2015, a statue of a teenage girl in Seoul attracted widespread public attention. The bronze cast of a barefoot teenage girl, sitting on a chair with her fists clenched on her lap, stares at the Japanese embassy in Seoul. The statue was installed on Dec 11 2011 by the civic group that has supported Korean “comfort women” on the anniversary of the 1000<sup>th</sup> Wednesday Demonstration to redress the problems faced by these so-called “comfort women”.<sup>1)</sup> The statue symbolizes Korean women who were forced to serve as sex slaves for the Imperial Japanese army during World War II. The “comfort women” issue has long formed one of the main reasons for the strained ties between South Korea and Japan; the issue worsened following a 2011 ruling by the Constitutional Court of South Korea that the Korean government had violated the fundamental rights of these women by not taking appropriate actions to protect their rights and settle their damage claims.<sup>2)</sup> The Korean government made efforts to settle the issue according to the ruling, including establishing the Special Task Force on the Korea-Japan Claims Settlement Agreement of 1965,<sup>3)</sup> and through diplomatic channels, urged the Japanese government to

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1) Carol Giacomo, *Statue Honoring ‘Comfort Women’ Faces Uncertain Fate*, N. Y. TIMES (Jan. 7, 2016, 09:24 AM), [http://takingnote.blogs.nytimes.com/2016/01/07/statue-honoring-comfort-women-faces-uncertain-fate/?\\_r=0](http://takingnote.blogs.nytimes.com/2016/01/07/statue-honoring-comfort-women-faces-uncertain-fate/?_r=0).

2) Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011 (KCCR 23-2 366) (S. Kor).

3) Tai-young Cho, Spokesperson’s Press Briefing, Ministry of Foreign Affairs of the Republic of Korea (Aug. 13, 2013), [https://www.mofa.go.kr/eng/brd/m\\_5679/view.do?seq](https://www.mofa.go.kr/eng/brd/m_5679/view.do?seq)

offer reparations to these women.<sup>4)</sup> However, while the Japanese government has argued that reparations for these women have been provided by the Korea-Japan Claims Settlement Agreement of 1965 [“the 1965 Agreement”],<sup>5)</sup> the Korean government has contended that such reparations are not complete because the issue was not included within the scope of the 1965 Agreement. Nevertheless, on Dec 28 2015, the South Korean and Japanese foreign ministers abruptly reached an agreement to settle the issue [“the 2015 Agreement”]; this evoked strong opposition, especially in South Korea. This raises the question of why should this agreement arouse such anger in the victims and many other Koreans. Is this simply a matter of securing reparation for the victims? In contrast, this deal was mostly welcomed in other countries—especially in Japan and the United States—because the restoration of the relationship between South Korea and Japan was to their mutual benefit in terms of safeguarding the security of the region.

In addition, there have been two conflicting judgments in 2021 concerning the compensation to the Korean “comfort women” victims in the South Korean court. On January 8 2021, the Seoul Central District Court (Civil Chamber 34, presiding judge Kim Jeong-Gon) recognized the Japanese government’s responsibilities to make reparations to the victims.<sup>6)</sup> The court ruled that the victims’ right to claim compensation against the Japanese government was not included within the scope of the 2015 Agreement; thus, the victims’ right to claim compensation was neither expired nor finally and irreversibly resolved. The court further ruled that a state could not dispose of individuals’ rights without a separate mandate or provision of laws and regulations; no such mandate or provision existed in the 2015 Agreement. In contrast, in its April 21 2021 ruling, the Seoul

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4) *Id.*

5) Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation (with Protocols, exchanges of notes and agreed minutes), Japan-S. Kor., June 22, 1965, 583 U.N.T.S. 173.

6) Seoul Central District Court [Seoul Central Dist. Ct.], 2016Ga-Hap505092, Jan. 8, 2021 (S. Kor.).

Central District Court (Civil Chamber 15, presiding judge Min Seong-Cheol) dismissed a lawsuit filed by other Korean “comfort women” victims against the Japanese government on the ground of state immunity.<sup>7)</sup> It ruled that although it is difficult for the victims to obtain a legal remedy in the Korean court, due to state immunity, an “alternative (political) remedy” is provided by the 2015 Agreement—despite its substantial and procedural flaws.

In light of the above, can the 2015 Agreement be considered as providing adequate just reparations to represent an “alternative remedy” for the victims? This paper argues that, to date, the reparations provided by the Japanese government to the Korean “comfort women” cannot be considered just reparations as the reparations have not meet the international standards of just reparations, especially from the perspective of transitional justice and international law. Next, to address how specific regional political factors have affected the deal, Section 2 examines the background of the so-called “comfort women” issue and confirms the legal responsibility of the Japanese government. Section 3 explores the international standards regarding reparations to victims for violations of international human rights law and international humanitarian law before discussing what constitutes just reparations from the perspective of transitional justice. Section 4 examines whether the reparations the Japanese government has provided to these women, including those in the 2015 Agreement, meet the standards of just reparations. Section 5 discusses the relationships between justice and politics in reparations for these victims and finds that justice in reparations for the victims was affected by political considerations between Korea and Japan. Lastly, Section 6 concludes that the 2015 Agreement was not just reparations; rather, it was a product of diplomatic considerations influenced by regional geopolitics.

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7) Seoul Central District Court [Seoul Central Dist. Ct.], 2016Ga-Hap580239, Apr. 21, 2021 (S. Kor.).

## II. A Background on the Korean “Comfort Women” Issue and the Legal Responsibility of Japan

In 1905, the Korean Empire concluded the Japan-Korea Protectorate Treaty with the Japanese Empire by coercion; this deprived Korea of its diplomatic sovereignty and made Korea a protectorate of Japan.<sup>8)</sup> At that time, the Japanese military encircled the Korean Palace and forced the Korean emperor to sign the treaty.<sup>9)</sup> Subsequently, Japan annexed Korea under the Japan-Korea Annexation Treaty of 1910.<sup>10)</sup> During the Japanese occupation of Korea, more than 200,000 young Korean girls were forced to serve as “comfort women” for the Japanese Imperial Army.<sup>11)</sup> They were recruited against their will, mainly through coaxing, coercion, and abduction, etc., with the involvement of the Japanese military, especially from 1930-1945 and during the latter part of WWII.<sup>12)</sup> These girls were transported mainly by the Japanese military, as seen in a statement by the Chief Cabinet Secretary Yohei Kono [“the Kono Statement”] in 1993.<sup>13)</sup> They were systematically detained, raped, and forced to serve as prostitutes at “comfort stations”: rape centers established and managed by the Japanese military.<sup>14)</sup> This illegal recruitment, transportation, and forced prostitution constitute sexual slavery.<sup>15)</sup> Those who survived the war had to live mostly

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8) U.S. S. Doc. No. 109, 67th Cong., 2d Sess. *Korea’s Appeal to the Conference on the Limitation of Armament*, at 35 (1922).

9) FREDERICK ARTHUR MCKENZIE, *THE TRAGEDY OF KOREA* 134 (1908).

10) FREDERICK ARTHUR MCKENZIE, *KOREA’S FIGHT FOR FREEDOM* 179-180 (1920).

11) Gay J. McDougall (Special Rapporteur on Contemporary Forms of Slavery), *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13, at 38 (June 22, 1998).

12) *Id.* at 41. As partial recognition, Ministry of Foreign Affairs of Japan, *Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of “Comfort Women”*, ASIAN WOMEN’S FUND (Aug. 4, 1993), <https://www.awf.or.jp/e6/statement-02.html>. The Kono Statement was available at: <http://www.mofa.go.jp/policy/women/fund/state9308.html> (accessed: July 31, 2019), but it was deleted as of July 10, 2021.

13) *Id.*

14) McDougall, *supra* note 11, at 3.

15) Susan H. Shin, *Justice Delayed: Accountability in the “Comfort Women” Case*, in *ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* 425 (JANE E. STROMSETH ed., 2003); Radhika Coomaraswamy (Special Rapporteur on violence against women, its

in silence due to the overwhelming social stigma attached to their plight: concealing the fact that they were once sex slaves for the Japanese Imperial Army. Many of them never married or had children because of their incurable physical and psychological wounds and suffered poor economic conditions. The “comfort women” issue only began to attract public attention in 1991, almost 50 years after the war ended, with the first testimony of a former “comfort woman”, Hak-Soon Kim, in a press interview.<sup>16)</sup> Before that, both the Korean and Japanese governments had been reluctant to acknowledge their existence publicly. However, starting with Kim’s testimony, numerous testimonies from around the world followed, and “comfort women” and their reparation became a controversial debate in international human rights fora in the 1990s. While a total of 240 women have registered as victims in South Korea, only 14 are still alive.<sup>17)</sup> Since the surviving former “comfort women” are all mostly over 90 years old, it is assumed that the number of survivors will decrease rapidly over the next few years; this case will likely become a “waiting game” where, in a few years, none will be left to seek justice.<sup>18)</sup> In this case, this issue will remain unresolved forever if it is not settled as soon as possible as most of these women do not have children or families to succeed them after death. Therefore, the settlement of this issue is a matter of extreme urgency.

Japan had a duty to protect people under its control during the occupation of Korea; instead, it seriously infringed the freedom and rights of the former “comfort women”. It violated the customary international law prohibiting slavery, torture, and other cruel, inhuman or degrading treatment or punishment, and rape and forced prostitution during

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causes and consequences), *Report on the Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, Comm’n on Human Rights, E/CN.4/1996/53/Add.1 (Jan. 4, 1996); See also McDougall, *supra* note 11, at paras. 46-47, Appendix, at paras. 4, 7-16, 27.

16) The Korean Council for Justice and Remembrance for the issue of Military Sexual Slavery by Japan, *What is Japanese Military Sexual Slave System?*, <https://womenandwar.net/kr/what-is-japanese-military-sexual-slavery-system/> (accessed: June 10, 2021).

17) Chaeyeon Yoo, *A Victim of Japanese Wartime Sexual Slavery Dies at Age 92*, THE DONG-A ILBO (May 4, 2021, 07:23 AM), <https://www.donga.com/en/List/article/all/20210504/2620405/1/A-victim-of-japanese-wartime-sexual-slavery-dies-at-age-92>.

18) *Id.*

wartime.<sup>19)</sup> Specifically, women and children should have been even more strongly protected during the occupation of Korea. The systematic, widespread characteristics of these crimes also constitute crimes against humanity, the prohibition of which has been accepted as one of *jus cogens* after WWII.<sup>20)</sup> Besides, crimes against humanity fall under the jurisdiction of the Charter of the International Military Tribunal for the Far East,<sup>21)</sup> as well as the Charter of the International Military Tribunal at Nuremberg.<sup>22)</sup> Therefore, those responsible for the commission of such crimes should have faced justice.<sup>23)</sup> However, no investigation or prosecution has ever been brought against the Japanese government perpetrators under the

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19) See McDougall, *supra* note 11, at paras. 11-17.

20) *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al, and the Government of Japan*, PT-2000-1-T, Judgment, pp. 116-159 (The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery ["The Women's Tribunal"] Dec. 4, 2001). The Tribunal held that "the Japanese military and civilian authorities committed rape and sexual slavery as crimes against humanity against tens of thousands of women and girls forced into sexual servitude to the Japanese military as part of the "comfort system" during WWII," in the same judgment. at para. 666.

21) Charter of the International Military Tribunal for the Far East, art. 5 (c), Jan. 19, 1946, amended Apr. 26, 1946, Vol. 4, T.I.A.S., No. 1589, at 20, available at <https://www.loc.gov/help/us-treaties/bevans/m-ust000004-0020.pdf> (accessed: June 10, 2021). However, no persons were convicted of this crime at the Tokyo Tribunal.

22) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, art. 6 (c), London, 1945, U.N.T.S., Vol. 82, No. 251, at 280, available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf) (accessed: June 10, 2021).

23) McDougall, *supra* note 11, at paras. 36, 37.

"36. The widespread and systematic involvement of the Japanese military in the establishment and operation of the "comfort stations" ensures that senior officers of the Japanese military must have had actual or constructive knowledge of the existence of the "comfort stations". It is also important to note that mid-level Japanese military officials who were involved in or responsible for the "comfort stations" may not escape criminal liability by asserting a "superior orders" defense, as such a claim may only be considered in mitigation of any punishment that is actually imposed."

"37. The various international crimes that correspond to violations of these *jus cogens* norms include slavery, crimes against humanity, genocide, certain war crimes and torture. These crimes are subject under customary international law to universal jurisdiction and they are exempt in most cases from the effect of any statute of limitations to prosecutions. States, including successor Governments, have an obligation to ensure that those who violate such norms do not do so with impunity and are brought to justice, either by prosecution within the State or extradition for prosecution in another State."

International Military Tribunal for the Far East Charter. Instead, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery ["the Women's Tribunal"], a non-binding mock tribunal organized by Violence Against Women in War-Network Japan ["VAWW-NET Japan"]<sup>24)</sup> on December 4 2001 in The Hague, found Hirohito Emperor Showa—and other individuals responsible for the crimes—guilty in the final judgment.<sup>25)</sup> Further, Japan has state responsibility for these illegal acts under international law,<sup>26)</sup> so it has a duty to make effective remedy and

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24) The purpose of this tribunal was to gather testimony from victims for documentation and to raise awareness about the issue. The tribunal consisted of four renowned professional lawyers, Judge Gabrielle Kirk McDonald (Presiding), Judge Carmen Argibay, Judge Christine Chinkin, and Judge Willy Mutunga.

25) *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al, and the Government of Japan*, Judgment, the Women's Tribunal, *supra* note 20, at paras. 874-876.

26) McDougall, *supra* note 11, at paras. 41-42, 44.

"41. Prior to the Second World War, it was clear that a Government and its officials could be held liable for violations of international law under a theory of "original liability" for acts performed by a Government and "actions of the lower agents or private individuals as are performed at the Government's command or with its authorization" The responsible State is then liable "to pay compensation for injurious acts of its officials which, although unauthorized, fall within the normal scope of their duties". Therefore, a State was considered liable for commission of an injury to an individual alien within its territory if an agent of the State caused wrongful injury to that individual. Thus, Japan is liable for the actions of its military and any of its agents, including the private individuals who ran and profited from "comfort stations" at the request of the Japanese military."

"42. The Japanese Government is also liable for its failure to prevent the harm that was inflicted on the "comfort women". Under customary international law, States are liable for failing to act to prevent harm to aliens. Article 3 of the Hague Convention No. IV of 1907, which reflected customary international law by the Second World War, provided that a party to the 1907 Convention that violated the Convention's provisions was liable to pay compensation for the violation and "shall be responsible for all acts committed by persons forming part of its armed forces". This principle of responsibility and compensation has been described as an extension of the principle of respondeat superior to the law of nations, making States liable for the acts of their military forces. Pursuant to article 3 of the Hague Convention, each State has a duty to prevent, investigate, and punish gross human rights violations and violations of fundamental freedoms. The Japanese Government, therefore, is independently liable for failing to prevent harm to the "comfort women" and to punish the offenders."

"44. The Japanese Government has also argued that because conventional international law is deemed to regulate relationships between States, rather than relationships between individuals and States, no claim may be made against Japan by individual 'comfort women'. This argument, however, is clearly without merit since by the late 1920s international law



reparation to the victims.<sup>27)</sup> According to the judgment of the Permanent Court of International Justice in the Chorzow Factory case, "It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form."<sup>28)</sup> In addition, *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ["the Basic Principles and Guidelines"] state that the victims of gross human rights violations have a right to "adequate, effective and prompt reparation for harm suffered."<sup>29)</sup> Thus, it would be proper to say that these former Korean "comfort women" have a right to receive "adequate, effective and prompt" remedy and reparation for the harm they suffered at the hands of Japan in this period.

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recognized that when a State injured the nationals of another State, it inflicted injury upon that foreign State and was therefore liable for damages to make whole the injured individuals. Moreover, international law recognizes that individuals are also 'subjects of rights conferred and duties imposed by international law.'"; *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al, and the Government of Japan*, Judgment, the Women's Tribunal, *supra* note 20, at paras. 205-253.

27) See Theo van Boven, *Victims' Rights to a Remedy and Reparation*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 26-27 (CARLA FERSTMAN ET AL. eds., 2009) (1st ed.); McDougall, *supra* note 11, at para. 3; *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al, and the Government of Japan*, Judgment, the Women's Tribunal, *supra* note 20, at paras. 254-263.

28) *Factory at Chorzow (Germ. v. Pol.)*, 1927 P.C.I.J. (Ser. A) No. 9, at 21 (July 26).

29) UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147, at para. 11 (Mar. 21, 2006). In its preamble, the *Basic Principles and Guidelines* emphasizes that they "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law." Since the *Basic Principles* were adopted by the Resolution of the UN General Assembly in December 2005, they do not legally enforceable such as treaties or customary international law. However, they could have a normative value as "soft laws" and to the degree that they demonstrate states' *opinio iuris* as an element of customary international law. Also, all UN member states should respect and comply with the UN General Assembly's Resolutions.

### III. Just Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

What do “just reparations” mean? As the term “just” can be used very widely and in various contexts, this paper will use the term “just reparations” in the context of transitional justice, as elaborated in Section III. A. 1. However, even if the term “just reparations” is used in the context of transitional justice, it remains difficult to determine its exact meaning. In addition, while *The Basic Principles and Guidelines* state that “adequate, effective and prompt reparation” must be provided, the question of what this constitutes in real terms remains vague and ambiguous. What should constitute “just and adequate, effective and prompt reparation” for the Korean former “comfort women” victims of such gross violations of international human rights and international humanitarian law?

#### 1. *Reparations as a Tool for Transitional Justice*

Before discussing what constitutes just reparation, it is necessary to consider the relevant definition of reparation, determine the context in which such reparation should be understood, and why it is relevant to dealing with this issue. Transitional justice provides the most suitable basis for such a discussion. In addition, Section A investigates the different types of reparations available and the relationships between them.

##### 1) *The concept of transitional justice and reparations*

Transitional justice means “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation.”<sup>30)</sup> Transitional justice is “not a special form of justice, but justice adapted to societies transforming themselves after a period of

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30) U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Rep. of the Secretary-General, UN Doc. S/2004/616 (Aug. 23, 2004), at para. 8. available at <http://www.ipu.org/splz-e/unga07/law.pdf>.

pervasive human rights abuse.”<sup>31)</sup> It contains a set of judicial and non-judicial measures including criminal prosecutions, truth commissions, reparations, and guarantees of non-recurrence that are closely related to one another in practice.<sup>32)</sup> Although the concept of transitional justice was developed in the 1980s and 1990s (mainly with respect to the political transitions that took place in Latin America and Eastern Europe), it has expanded to deal with a legacy of massive of systematic human rights violations.<sup>33)</sup> The Korean former “comfort women” issue concerns efforts to ensure accountability, serve justice, and achieve reconciliation between the two countries after the widespread and systematic human rights violations during WWII. Thus, the framework of transitional justice can also be applied to this issue.

Generally, in public international law, reparation means “recompense given to one who has suffered legal injury at the hands of another; to make amends, provide restitution, or give satisfaction or compensation for a wrong inflicted; it also refers to the thing done or given to the injured party.”<sup>34)</sup> The critical point is that because victims have a right to reparations, as stated in *The Basic Principles and Guidelines* above (Section II), this upholds the status of victims as the bearers of rights: namely, “reparations [should be] understood as a right of victims, not only as an inter-state prerogative of an act of compassion or charity.”<sup>35)</sup> Thus, states

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31) International Center for Transitional Justice, *What is Transitional Justice*, available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (accessed: June 10, 2021).

32) This paper focuses on reparations for the Korean “comfort women,” but to achieve transitional justice effectively and as a whole, several transitional justice measures should be chosen together to complement one another. Thus, other transitional justice measures, such as criminal justice, truth-seeking, and guarantee of non-recurrence, should be accompanied to settle the comfort women issue. See, U.N. Secretary-General, GUIDANCE NOTE OF THE SECRETARY-GENERAL: UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE 3 (2010); *Id.*

33) Ruti G. Teitel explains that there are three phases in the transitional justice genealogy: The first phase is the post-World War II model of transitional justice. The second phase is the post-cold war model of transitional justice. Lastly, the third phase is steady-state transitional justice. See RUTI G. TEITEL, *GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS* 51-52 (2014).

34) Dinah Shelton, *Reparations*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’ L L. (2009), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e392?rkey=uBIS3p&result=41&prd=OPIL>.

35) Carla Ferstman et al., *Introduction*, in CARLA FERSTMAN ET AL. eds., *supra* note 27, at 8-9.

responsible for gross violations of international human rights and international humanitarian law have a duty to “ensure that their domestic law is consistent with their international legal obligation.”<sup>36)</sup> These obligations include “making available adequate, effective, prompt and appropriate remedies, including reparation.”<sup>37)</sup> In this vein, reparations for the Korean former “comfort women” must be based on the rights of the victims; reparations must not be understood as a form of humanitarian assistance or charity. Also, these reparations must conform with international legal standards and obligations.<sup>38)</sup>

Reparation is a crucial element of a transitional justice initiative because “out of all the dimensions of transitional justice, reparations focus most directly and explicitly on the victims’ situation, as it seeks to provide some repair for rights that have been trampled, for harms suffered, and for indignities endured.”<sup>39)</sup> Namely, reparations provide justice directly to victims, to alleviate their suffering to some extent.<sup>40)</sup> Reparations also help to build trust and restore dignity through public acknowledgement of what the victims have suffered.<sup>41)</sup> “The acknowledgment is important, precisely because it constitutes a form of recognizing the significance and value of persons..., as individuals, as citizens, and as victims.”<sup>42)</sup> All of these functions of reparations should be considered in designing reparations for these former “comfort women” to properly serve as a tool for transitional justice.

This paper uses the term “just reparations” in the context of transitional

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36) *Supra* note 29, at 2.

37) Besides, they include: “(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system; (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice; (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below; (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.” *Id.* at 2.

38) See U.N. Secretary-General, *supra* note 32, at 3.

39) LISA MAGARRELL, REPARATIONS IN THEORY AND PRACTICE 2 (2006).

40) Int’l Ctr. for Transitional Justice, *supra* note 31.

41) LISA MAGARRELL, *supra* note 39, at 2.

42) PABLO DE GREIFF, *Justice and Reparations*, in THE HANDBOOK ON REPARATIONS 461 (2006).

justice because reparations for the victims is related to the restoration of justice after the significant human rights abuses they suffered at the hands of the Japanese during WWII, and the politically influenced reconciliation between South Korea and Japan. Also, instead of merely discussing ideal compensation in proportion to harm in individual judicial cases, it will seek to establish a standard of justice for a massive reparations program for these women.<sup>43)</sup>

## 2) *Types of reparations*

Reparation does not only constitute offering monetary compensation; it also includes restitution and rehabilitation in body, mind, and status.<sup>44)</sup> While satisfaction and guarantees of non-repetition also cover a broad category of reparations measures,<sup>45)</sup> they can overlap with other transitional measures. Since no single form of reparation is likely to be satisfactory to all victims, appropriate combinations of these measures are usually required as a complement to the proceedings of criminal tribunals and truth commissions.<sup>46)</sup> In the case of the former “comfort women”, restitution is impossible; therefore, other measures, such as monetary compensation, rehabilitation, satisfaction, and guarantees of non-repetition measures could be employed. Indeed, the latter measures should be performed given that no investigation or prosecution of the perpetrators has been forthcoming.

Further, reparations constitute material components (such as cash payments or health services) and symbolic components (such as public apologies or establishment of memorials). “By definition, all reparations have an important symbolic role in the process of building public trust and integrating victims into society.”<sup>47)</sup> The importance of public aspects of symbolic reparation is outlined as follows:

The public dimension in symbolic reparation, such as public

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43) *Id.* at 451.

44) Teo van Boven, *supra* note 27.

45) See *The Basic Principles and Guidelines*, *supra* note 29.

46) Report of the Secretary-General, *supra* note 30, at 19.

47) LISA MAGARRELL, *supra* note 39, at 4.

apologies from state authorities, public rites and ceremonies, and the establishment of memorials, is crucial in facilitating recognition by broader society of what happened and who was victimized. Public acknowledgment, both by the state authorities and—crucially—by the rest of society, can play an important role in overcoming the exclusion victims have suffered.<sup>48)</sup>

However, material reparations cannot be underestimated because the victims usually wish to be provided with a concrete solution: for example, compensation for the harm suffered.<sup>49)</sup> Besides, material reparations can be regarded as proof of apology.<sup>50)</sup> Therefore, it is necessary to combine both material *and* symbolic components rather than relying only on a single measure.<sup>51)</sup> This should also be emphasized in the case of the Korean former “comfort women” because ideally they would like to seek public acknowledgment, as well as monetary compensation. Lee Yong-Soo, one of the victims, said, “We are not craving for money,” and “What we demand is that Japan makes official reparations for the crime it had committed.”<sup>52)</sup> In this vein, the Japanese government must acknowledge that it committed serious crimes against these women, and sincerely apologize to the women for their suffering to restore their dignity and status. Offering compensation can constitute just reparation as long as it contributes to restoring the victims’ dignity, status, and rights. If not, such financial reparation can be regarded as “blood money.”

## 2. Characteristics of Just Reparations: What Should Just Reparations Be?

How can reparations be evaluated as “just”? What standards or guidelines exist to decide this issue? It is difficult to find specific standards

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48) *Id.* at 5.

49) *Id.* at 4.

50) CHRISTOPHER DAASE ET AL., *APOLOGY AND RECONCILIATION IN INTERNATIONAL RELATIONS: THE IMPORTANCE OF BEING SORRY* 13 (1st ed., 2015).

51) LISA MAGARRELL, *supra* note 39, at 4.

52) Sang-Hun Choe, *Japan and South Korea Settle Dispute Over Wartime ‘Comfort women’*, N. Y. TIMES (Dec. 28, 2015), [http://www.nytimes.com/2015/12/29/world/asia/comfort-women-south-korea-japan.html?\\_r=0](http://www.nytimes.com/2015/12/29/world/asia/comfort-women-south-korea-japan.html?_r=0).

for just reparation because the circumstances differ from case to case: they depend on the unique political and social circumstances of each country and the nature and severity of the atrocities.<sup>53)</sup> However, based on existing studies, some desirable and general characteristics of just reparation can be drawn, as outlined below.

Pablo de Greiff, a special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the United Nations Human Rights Council, highlights that the goals of reparations are providing recognition to victims of the fact that they have been harmed, to foster trust, contribute to reconciliation, and strengthen the rule of law.<sup>54)</sup> He also argues that “in favor of thinking about justice in the context of massive cases in terms of the achievement of three goals, namely, recognition, civic trust and social solidarity ... are intimately related to justice.”<sup>55)</sup> Even though he stated these goals in connection with reparations in relation to a transition to democracy, his argument shed light on how justice—and the different measures applied to achieve it—should be understood. This is also important in the Korean former “comfort women’s” case; thus, for them, reparations should contribute to achieving these goals. However, as discussed in detail in Section IV, to date, the Korean and Japanese government have categorically failed to meet these goals.

Pablo de Greiff also suggests “integrity or coherence” as crucial characteristics of reparation programs, which are divided into two different dimensions, internal and external, as follows:

External coherence expresses the requirement that the reparations program be designed in such a way as to bear a close relationship with the other transitional mechanisms, that is, with criminal justice, truth-telling, and institutional reform. This requirement is both pragmatic and conceptual. The relationship increases the likelihood that each of these mechanisms be perceived

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53) See Jane E. Stromseth, *Peacebuilding and Transitional Justice*, in *MANAGING CONFLICT IN A WORLD ADRIFT* 579 (PAMELA AALL, CHESTER A. CROCKER & FEN OSLER HAMPSON eds., 2015) (1st ed.).

54) Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, U.N. Doc. A/HRC/21/46, at 28-46 (2012).

55) PABLO DE GREIFF, *supra* note 42, at 451.

as successful ..., and, more importantly, that the transitional efforts, on the whole, satisfy the expectations of citizens. But beyond this pragmatic advantage, it may be argued that the requirement flows from the relations of complementarity between the different transitional justice procedures that I sketched before.

Reparations programs ought to display integrity or coherence in another dimension: a program of reparations, if it is to attain its proper goals, must always be a complex program that distributes different benefits, and the different components of the plan ought to be mutually coherent. That is, the program ought to be internally coherent. Most reparations programs distribute more than one kind of benefit. These may include symbolic as well as material reparations, and each of these categories may include different measures and be distributed individually or collectively. Obviously, in order to reach the desired aims, it is important that benefits be part of a plan whose elements internally support one another.<sup>56)</sup>

To be “just” in the case of the Korean former “comfort women” issue, reparation should incorporate both external and internal integrity, according to de Greiff. That means reparations for these women should be in harmony with other transitional tools, such as criminal justice and truth-finding. Besides, a reparation measure ought to be mutually coherent with other reparation frameworks. Thus, mere monetary compensation without sincere apology and public acknowledgement cannot be regarded as just reparations. In addition, just reparations should contribute to the guarantee of non-recurrence of the past atrocities – through proper historical and human rights education and the establishment of memorials and museums. The past should be remembered, not erased – primarily because not only is it impossible to erase that past, it is also deeply unforgivable to try to forget such atrocities.

Furthermore, a victim-centered approach should be adopted in just reparations. “The most general aim of a program of reparations is to do

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56) *Id.* at 467.



justice to victims<sup>57)</sup>; this cannot be achieved without the meaningful participation of the victims in this process. “Reparations will only be successful if victims and civil society at large have been involved in the design of the schemes, so the measures are commensurate to the harm inflicted and contribute to the recognition of the victim as rights holders.”<sup>58)</sup> Thus, the positive right to reparation entails both the procedural right of access to the remedy as well as the substantive form of relief.<sup>59)</sup> Therefore, it is necessary for the Korean former “comfort women” to participate in this negotiation process by expressing their opinions and recollections of the atrocities. However, to date, the Korean government has failed to offer any public procedure to the victims; it has only resorted to contacting civic groups nominally, which is why the victims are protesting against both the Korean and Japanese governments. As a result, this lack of action by the Korean government has severely damaged civic trust and solidarity in South Korea and has led to further deteriorations in reconciliation between the two countries.

In light of the above, this paper now outlines some desirable characteristics or general standards for just reparations that should be considered in the case of the Korean former “comfort women”:

- 1) Just reparation should be a tool for achieving transitional justice and strengthening the rule of law and meeting international legal standards.
- 2) Just reparation should be understood as a right of victims, not as an inter-state prerogative or an act of compassion or charity. States should uphold the victim’s status as the bearer of rights and seek to restore their dignity.
- 3) Just reparation should take a victim-centered approach to tailor reparation programs, so they appropriately reflect the needs of the victims in complex transitional situations. In particular, it is crucial to empower victims and enable them to participate in the design, implementation, and evaluation of reparations programs.

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57) Pablo de Greiff, *supra* note 54, at 54.

58) *Id.*

59) CARLA FERSTMAN ET AL., *supra* note 35, at 8-9.

- 4) Just reparation should be based on a public acknowledgement of past crimes and hold the perpetrators to account. This will help to recognize the victims as constituents of society and promote their integration into it.
- 5) The role of reparation as a symbolic act should not be disregarded in just reparation. It is necessary to combine both the material *and* symbolic components rather than relying on a single measure alone.
- 6) Just reparation should be characterized by both external and internal integrity. This means that a reparation program should work in harmony with other relevant transitional mechanisms, and the different components of the reparation program ought to be mutually coherent.
- 7) Just reparation should aim to strengthen civic trust and social solidarity. This helps to rehabilitate social order and promote reconciliation between the conflict parties.

#### **IV. Are Japanese Reparations Offered to the Korean Former “Comfort Women” Just?**

To date, can the reparations the Japanese government has offered to the Korean former “comfort women” be considered “just”? In addressing this question, two important agreements have been ratified between South Korea and Japan regarding reparations for Korean former “comfort women”, albeit 50 years apart: (i) the 1965 Agreement, and (ii) the 2015 Agreement. The following examination of the reparations offered under both these agreements demonstrates that neither of the two reparations offered are just.

##### *1. Past Reparations Offered by the Japanese Government Prior to the 2015 Agreement*

The debate over whether the Japanese government has already implemented its duty to compensate the Korean former “comfort women” has been plagued by a long and complicated controversy due to the interpretation of the 1965 Agreement.<sup>60</sup> In 1965, Korea and Japan signed the

Korea-Japan Claim Settlement Agreement for economic cooperation and settlement of problems in regard to property and claims.<sup>61)</sup> The Korean government has argued that the Japanese government should offer compensation to former “comfort women” because this issue was not included in the scope of this agreement<sup>62)</sup>; in contrast, the Japanese government has contended that this issue did, in fact, fall within the scope of the 1965 agreement, and has thus been settled ultimately and finally.<sup>63)</sup> However, the 1965 Agreement *should* be interpreted as not providing compensation for the Korean former “comfort women”, as outlined below.<sup>64)</sup>

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60) *Supra* note 5. The controversy in interpretation is mainly about Article 2 of the 1965 Agreement.

61) *Id.*

62) Foreign Minister’s Spokesperson, *Ministry of Foreign Affairs Spokesperson’s Statement on the Outcome of Japan’s Review of the Details Leading to the Drafting of the Kono Statement*, Ministry of Foreign Affairs of the Republic of Korea (June 20, 2014, 18:00 PM), [https://www.mofa.go.kr/eng/brd/m\\_5676/view.do?seq=313899&srchFr=&srchTo=&srchWord=kono&srchTp=0&multi\\_itm\\_seq=0&itm\\_seq\\_1=0&itm\\_seq\\_2=0&company\\_cd=&company\\_nm=&page=1&titleNm=](https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=313899&srchFr=&srchTo=&srchWord=kono&srchTp=0&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm=&page=1&titleNm=)

63) Fumio Kishida, *Details of Exchanges Between Japan and the Republic of Korea (ROK) Regarding the Comfort Women Issue*, Ministry of Foreign Affairs of Japan (June 24, 2014, 09:48 AM), [http://www.mofa.go.jp/press/kaiken/kaiken4e\\_000084.html](http://www.mofa.go.jp/press/kaiken/kaiken4e_000084.html). However, judging from the 2015 Agreement, it seems that the Japanese government ‘actually’ admitted that the issue of Korean “Comfort women” was not included in the 1965 Agreement. This means that the issue was not settled by the 1965 agreement and the Japanese government still has the responsibility to offer reparations to those women, unlike the past argument of the Japanese government. However, Japanese Prime Minister Abe said in the parliament of Japan on 18 Jan 2016 that there is no change in position that claim settlement issues between South Korea and Japan already completed and settled by the 1965 treaty. Junhyeong Jo, *Abe “Wianbu Gangjeyeonhaeng Jeunggeoeopda” Ipjang Bulbyeon(Jonghap) [Abe “There is No Evidence of Forcing Comfort Women to Police” Position Unchanged (Comprehensive)]* Yonhap News Agency (Jan. 18, 2016, 16:58 AM), <http://www.yonhapnews.co.kr/bulletin/2016/01/18/0200000000AKR20160118056051073.HTML> (In Korean).

64) The Civil Society-Government Joint Committee in 2005, which was set up by the Korean government, announced that the “comfort women” issue had not been covered by the 1965 Agreement. *See also*, McDougall, *supra* note 11, para. 55. “The Government of Japan’s attempt to escape liability through the operation of these treaties fails on two counts: (a) Japan’s direct involvement in the establishment of the rape camps was concealed when the treaties were written, a crucial fact that must now prohibit on equity grounds any attempt by Japan to rely on these treaties to avoid liability; and (b) the plain language of the treaties indicate that they were not intended to foreclose claims for compensation by individuals for harms committed by the Japanese military in violation of human rights or humanitarian

Furthermore, many Japanese have expressed “apology fatigue” because they believe they have already offered several apologies to the Koreans affected.<sup>65</sup> Indeed, although the Japanese government has made several apologies, most have been mere political rhetoric, faint apologies, or partial apologies.<sup>66</sup> Even in the Kono statement and the Murayama statement, the Japanese government did not admit to the illegality of the annexation of Korea and its legal responsibility for the crimes it committed during the occupation of the Korean peninsula.<sup>67</sup> Crucially, Japan has denied the forced recruitment of Korean “comfort women,” even though the Kono Statement partially acknowledges this:

As a result of the study which indicates that ... The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments.<sup>68</sup>

This denial on the part of the Japanese government has encouraged many Koreans to distrust the sincerity of Japan’s apologies. Most Koreans still opine that the Japanese apologies are insufficient to heal their past wounds. For this reason, many former “comfort women” have refused compensation from the Asian Women’s Fund (AWF)<sup>69</sup> (founded in 1994 by Japanese civil society fora—not by the Japanese government). The AWF’s

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law.”; Pyoungkeun Kang, 1965Nyeon Hanil Hyeobjeongui ‘Cheonggugwon’ui Beomwie Gwanhan Yeongu [A Study on the Scope of the ‘Claims’ Used in the 1965 Agreement between Korea and Japan], 60 KOREAN J. INT’ L L. 11-31 (2015) (In Korean).

65) Ja-Hyun Chun, *Beyond “Dissatisfaction” and “Apology Fatigue”: Four Types of Japanese Official Apology*, 30 Pac. Focus 250, 251 (2015).

66) *Id.* at 260-265.

67) The Kono Statement, *supra* note 12; Prime Minister Tomiichi Murayama, *On the Occasion of the 50th Anniversary of the War’s End*, Ministry of Foreign Affairs of Japan, <https://www.mofa.go.jp/announce/press/pm/murayama/9508.html> (last visited Aug. 10, 2021).

68) The Kono Statement, *supra* note 12.

69) Only sixty South Korean women had received financial aid from the AWF, and many others refused to accept it. Choe, *supra* note 52.

goal was to acknowledge "moral" responsibility for these former "comfort women" and offer reparations in the context of humanitarian assistance alone.<sup>70)</sup> In addition, the former Prime Minister of Japan, Abe Shinzo, once announced he would reconsider the apologies issued by past cabinets.<sup>71)</sup> However, he finally decided to take the same stance as that of past cabinets after facing criticism.<sup>72)</sup> He also declined to offer a straightforward apology in his own words and suggested that Japan had apologized enough on the eve of the 70th anniversary of Japan's surrender, August 15 1945.<sup>73)</sup> However, if he really wanted to "not let our children, grandchildren, and even future generations to come, who have nothing to do with the war, be predestined to apologize," as he said,<sup>74)</sup> he should have acknowledged honestly the atrocities committed by Japan in this period and offer a sincere apology to the victims. If Japan does not face the past honestly and resolve its historical conflicts now, the future generations of Japan will be obliged to do so on behalf of this generation.

The Japanese government also appears to wish to erase their past actions in terms of their treatment of the Korean "comfort women" as it has attempted to delete any descriptions of them (as well as other past crimes) in its history textbooks. The Japanese Foreign Minister also requested that the US high school textbook publisher McGraw-Hill revise its description of Korean "comfort women": the publisher rejected the request, saying that its account is supported by historical fact.<sup>75)</sup> However, former Prime Minister

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70) In this vein, the Japanese government merely subsidized some of the fund's expense. For details, see Digital Museum: The Comfort Women Issue and the Asian Women's Fund, *Establishment of the AWF Fund, and the Basic Nature of its Project*, <http://www.awf.or.jp/e2/foundation.html> (last visited June 10, 2021).

71) Justin McCurry, *Japan will not Revise Apologies for Past Military Conduct in Asia*, *Officials Say*, THE GUARDIAN (May 8, 2013, 13:06 PM), <http://www.theguardian.com/world/2013/may/08/japan-apologies-military-conduct-asia>.

72) *Id.*

73) Eleanor Warnock, *Japan's Abe Stops Short of Direct Apology Over World War II*, WALL ST. J. (Aug. 15, 2015, 2:41 AM), <http://www.wsj.com/articles/japans-abe-expresses-condolences-on-war-anniversary-1439545449>.

74) *Id.*

75) Alexander Martin, *U.S. Publisher Rebuffs Japan on 'Comfort Women' Revision*, WALL ST. J. (Jan. 15, 2015, 5:44 AM), <http://www.wsj.com/articles/u-s-publisher-rejects-japan-over-textbook-on-comfort-women-1421299438>.

Abe singled out the publisher and criticized this description when he addressed the US Congress in 2015, the year of the 70<sup>th</sup> anniversary of the end of WWII.<sup>76)</sup> In addition, several Japanese history textbook publishers have decided to exclude a drawing of one of these women being taken away, adding that “no proof of forced abduction has been found” after Abe criticized the textbooks.<sup>77)</sup> Former Prime Minister Abe continued to insist that “no proof of forced abduction has been found” despite the numerous victim testimonies,<sup>78)</sup> which shows that many of them were forcibly taken, even after the 2015 Agreement.

To sum up, the extent of the reparations offered by the Japanese government under the 1965 Agreement can be summarized as denying their legal responsibilities and the fact that Korean women were recruited by force as “comfort women” with the involvement of the Japanese military, repeating its inconsistent actions with vague apologies, and attempting to erase documented history. On these grounds, the actions of the Japanese government cannot be considered to be just reparations.

## 2. *The Failure of the 2015 Agreement*

While the evaluation of the 2015 Agreement is controversial, this section outlines how the reparations under the 2015 Agreement falls short of the

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76) Martin Fackler, *U.S. Textbook Skews History, Prime Minister of Japan Says*, N. Y. TIMES (Jan. 29, 2015), [http://www.nytimes.com/2015/01/30/world/asia/japans-premier-disputes-us-textbooks-portrayal-of-comfort-women.html?\\_r=0](http://www.nytimes.com/2015/01/30/world/asia/japans-premier-disputes-us-textbooks-portrayal-of-comfort-women.html?_r=0).

77) Yuka Hayashi, *Japan's Textbook Changes Get Failing Grade from Neighbors*, WALL ST. J. (Apr. 7, 2015, 7:36 AM), <http://www.wsj.com/articles/japanese-middle-school-textbook-changes-raise-irk-china-south-korea-1428402976>.

78) See the victims' testimonies. The Korean Council for Justice and Remembrance for the issue of Military Sexual Slavery by Japan, <https://womenandwar.net/kr/testimonies/> (last visited June 10, 2021); Ji-HYEON YOON, CAN YOU HEAR US? THE UNTOLD NARRATIVES OF COMFORT WOMEN – A COLLECTION OF ORAL NARRATIONS OF JAPANESE MILITARY COMFORT WOMEN (2014); Radhika Coomaraswamy (Special Rapporteur on violence against women, its causes and consequences), *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, E/CN.4/1996/53/Add.1 (Jan. 4, 1996), <https://www1.umn.edu/humanrts/commission/country52/53-add1.htm> (last visited June 10, 2021); *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa et al, and the Government of Japan*, Judgment, The Women's Tribunal [W.I.W.C.T.], *supra* note 21, paras. 269-288.

international standard of just reparations.

1) *The character and content of the 2015 Agreement*

The Foreign Ministers of South Korea and Japan made a joint announcement at a press conference that the Japanese government felt strongly responsible for the issue of the former Korean "comfort women" as a matter of deeply wounding the honor and dignity of these women.<sup>79)</sup> The Japanese government also apologized to the women and promised to provide \$8.3 million to a foundation that the South Korean government would establish to offer medical, nursing, and other services to the women.<sup>80)</sup> In exchange, the Korean government offered to consider the issue resolved "finally and irreversibly".<sup>81)</sup> In addition, the Korean government would make proper efforts to resolve the matter of relocating the statue of the girl that activists had erected outside the Japanese embassy in Seoul via consultation with the relevant organization.<sup>82)</sup> Surprisingly, rather than an official document between the two states, the 2015 Agreement comprised a joint announcement made at a press conference. As such, it was not considered to be a treaty as defined in Article 2 of the Vienna Convention on the Law of Treaties of 1969 [hereinafter "the 1969 Vienna Convention"].<sup>83)</sup> Although this does not necessarily mean that the 2015 Agreement has no legal force, according to Article 3 of the 1969 Vienna

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79) Shin-mo Yu et al., *South Korea-Japan Reach "Final Agreement" after 24 Years: Japan Apologizes for Military's Involvement in Comfort Women Issue, But Free from Liab*, THE KYOUNGHYANG SHINMUN (Dec. 29, 2015, 17:36 PM), [http://english.khan.co.kr/khan\\_art\\_view.html?code=710100&artid=201512291736337&medid=enkh](http://english.khan.co.kr/khan_art_view.html?code=710100&artid=201512291736337&medid=enkh).; Holly Yan et al., *South Korea, Japan Reach Agreement on 'Comfort Women'*, CNN (Dec. 29, 2015, 8:52 AM), <http://www.cnn.com/2015/12/28/asia/south-korea-japan-comfort-women/>.

80) Choe, *supra* note 52.

81) *Id.*

82) *Id.*

83) Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

"Article 2 [Use of terms]

1. For the purposes of the present Convention:

(a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;"

Convention,<sup>84)</sup> it is likely that both the governments did not intend to give legal force to the 2015 Agreement.<sup>85)</sup> The Korean government stated that the 2015 Agreement was not, in fact, a treaty but a political agreement with a legal effect; to date, the Japanese government has not denied this.<sup>86)</sup>

## 2) Benefits of the 2015 Agreement

The 2015 Agreement provides several benefits for the Korean victims. First, it appears to indicate that the Japanese government has ‘actually’ admitted that the comfort women issue was not included in the 1965 Agreement<sup>87)</sup>; therefore, the issue had not, in fact, been settled by the 1965 Agreement. Besides, Japan’s conservative Abe regime had already made an apology to these women and mentioned “responsibility”. Before the agreement, the Japanese government had only ever mentioned “moral responsibility”; this time, it removed the term “moral” even though this does not imply that the Japanese government acknowledged its legal responsibility. The Japanese government also promised to provide \$8.3

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84) *Id.* art. 3.

“Article 3 [International agreements not within the scope of the present convention]

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) The legal force of such agreements;”

85) Pae Keun Park, *2015nyeon Hanil Wianbu Habuiui Gukjebeobjeok Jiwi – Joyaginga Bijoyaghabuiinga? [Status of the 2015 Comfort Women Agreement under International Law: Is It a Treaty or a Non-treaty Agreement?]*, 59(2) PUSAN L. R. 257, 269-274 (2018) (In Korean).

86) Foreign Minister’s Spokesperson, *Ministry of Foreign Affairs Spokesperson’s Statement on the Outcome of Japan’s Review of the Details Leading to the Drafting of the Kono Statement*, Ministry of Foreign Affairs Republic of Korea (June 20, 2014, 18:00 PM), Foreign Minister’s Spokesperson, *Spokeperson’s Press Briefing (January 26, 2016)*, Ministry of Foreign Affairs Republic of Korea (Jan. 26, 2016, 00:00 AM), [https://www.mofa.go.kr/eng/brd/m\\_5679/view.do?seq=316132&srchFr=&srchTo=&srchWord=&srchTp=&multi\\_itm\\_seq=0&itm\\_seq\\_1=0&itm\\_seq\\_2=0&company\\_cd=&company\\_nm=&page=47&titleNm=](https://www.mofa.go.kr/eng/brd/m_5679/view.do?seq=316132&srchFr=&srchTo=&srchWord=&srchTp=&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm=&page=47&titleNm=); see also Task Force on the Review of the Korea-Japan Agreement on the Issue of “Comfort Women” Victims, *Report on the Review of the Korea-Japan Agreement of December 28, 2015 on the Issue of “Comfort Women” Victims*, 20 (Dec. 27, 2017), [http://www.mofa.go.kr/eng/brd/m\\_5674/view.do?seq=319637&srchFr=&srchTo=&srchWord=victim&srchTp=0&multi\\_itm\\_seq=0&itm\\_seq\\_1=0&itm\\_seq\\_2=0&company\\_cd=&company\\_nm=&page=1&titleNm=](http://www.mofa.go.kr/eng/brd/m_5674/view.do?seq=319637&srchFr=&srchTo=&srchWord=victim&srchTp=0&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm=&page=1&titleNm=).

87) See *supra* note 63.



million to a foundation for the victims; this time, the money would come from the Japanese government itself—not Japanese civil society as in the case of the AWF. This would mean that the money was offered in the context of the Japanese government’s responsibility. All of this would be an advancement compared to reparations offered before the 2015 Agreement. Thus, a consenting party to the 2015 Agreement declared it more advanced than the Kono statement.<sup>88)</sup>

According to the 2015 Agreement, the Reconciliation and Healing Foundation (established by the Korean government in July 2016) was set up to distribute the Japanese government’s payment to the victims. Of the 47 victims who were still alive when the deal was reached, a total of 34 received payouts from the foundation while the family members and relatives of 58 victims of the 199 who had already passed away received their share, as of July 5, 2019.<sup>89)</sup> Thus, more than 70 percent of the surviving victims have received financial reparations from the Japanese government.

### 3) Drawbacks of the 2015 Agreement

Despite the above-mentioned merits of the 2015 Agreement, it appears to constitute several significant drawbacks for the Korean victims. First, many Koreans are suspicious of the sincerity of the apology contained within the 2015 Agreement; immediately after the agreement had been announced, Prime Minister Abe stated that there would be no more apologies from Japan in the future.<sup>90)</sup> While the victims wanted a sincere apology, Abe’s attitude following the announcement made it difficult for the Korean victims to accept that his apology was meant sincerely.<sup>91)</sup> Furthermore, although the Japanese government used the phrase “feel responsibilities” in the joint statement, there was no acceptance of its legal

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88) For example, a Japanese feminist Ueno Chizuko supports the 2015 Agreement. See Soyeon Kim, *Hanilui Yugsa Gieog Chai, Simini Dari Nwaya* [Citizens Should Mediate the Historical Memory Differences between Japan and Korea], HANKYOREH (Aug. 13, 2021, 5:00 AM), <https://www.hani.co.kr/arti/international/japan/1007555.html> (In Korean).

89) *Japan-funded “Comfort Women” Foundation in South Korea Formally Closed*, KYODO NEWS (July 5, 2019, 14:38 PM), <https://english.kyodonews.net/news/2019/07/372abc34d2fe-japan-funded-comfort-women-foundation-in-s-korea-formally-closed.html>.

90) Yu et al., *supra* note 79.

91) Yan et al., *supra* note 79.

responsibility.<sup>92)</sup> Instead, Japan's Foreign Minister stated that the financial package did not constitute legal reparation<sup>93)</sup>; this implies that the financial settlement was only intended as a form of humanitarian assistance with moral responsibility. However, if this is what the victims wanted, they would have accepted the money already offered by the AWF a decade before. In fact, the victims wanted the Japanese government to publicly acknowledge its past wrongs, legal responsibility, and reparations based on their rights – not in the form of a humanitarian-based offering.

In addition, the part of the 2015 Agreement in which the Japanese government recognizes the involvement of its military in the “comfort women” issue is very vague.<sup>94)</sup> This is in stark contrast to the notion that “the most effective apologies are unequivocal; they are not diluted by qualifying language designed to limit their scope or redirect blame.”<sup>95)</sup> Even though the Japanese government expressed “remorse” to the women for their “immeasurable and painful experiences”, “Expressions of regret ... are most frequently statements of sadness and disappointment that fall short of apologizing, whereas unequivocal apologies contain a more explicit if not unconditional acknowledgment of responsibility.”<sup>96)</sup> The Japanese government should make it clear who they intend as the subject of their responsibilities and what role the Japanese military played in this. The 2015 Agreement lacks any acknowledgment of the fact that the Japanese government and its military had violated international law.<sup>97)</sup> Furthermore, the victims stated, “the government had not just been simply involved but actively initiated the activities which were criminal and illegal.”<sup>98)</sup> However, Abe continued to refer to his original statement that “no proof of forced

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92) Some press reported that Abe “acknowledged” a responsibility, but the term he used is “통감(痛感, Tonggam)” in Korean and “痛感(Tsukan)” in Japanese, which means “strongly or keenly feel” in English.

93) Sang-Hun Choe, *supra* note 52.

94) Shin-mo Yu et al, *supra* note 79.

95) Ruben Carranza et al., *More Than Words: Apologies as a Form of Reparation* 12 (Dec, 2015) available at <https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf>.

96) *Id.*

97) The Korean Council for the Women Drafted for Military Sexual Slavery, recite from Holly Yan et al., *supra* note 79.

98) *Id.*

abduction has been found" in Japan's parliamentary records directly after the 2015 Agreement was announced.<sup>99)</sup> Japan's Foreign Minister Fumio Kishida also said in parliament that this agreement was not an acknowledgement of war crimes<sup>100)</sup> and the women should not be called "sex slaves" because the term "doesn't match the fact."<sup>101)</sup> Given all of these exclusions and backtracking, who among the victims could accept this apology as real and sincere? Monetary reparation alone is not sufficient; it must be combined with symbolic reparation. As the reparations and apologies under the 2015 Agreement lack sincerity and meaningful acknowledgement of Japan's past atrocities and legal responsibilities, they cannot be considered just reparations.

Second, the Japanese government wanted to settle this issue "finally and irreversibly" to avoid continuing international criticism after the 2015 Agreement. In real terms, this means that the Korean government can never complain about the issue again at a later point. In fact, almost all forms of damages in respect of tort compensation, no matter how formal or informal, have this type of "final" character because "compensation functions as corrective justice and the injured party is expected to be satisfied by the deal."<sup>102)</sup> However, as Noah Feldman accurately pointed out, "crimes against humanity aren't the same as car accidents."<sup>103)</sup> "Promising a form of silence about such crimes in exchange for an apology and compensation seems inadequate to the scope and meaning of the wrongdoing."<sup>104)</sup> Crimes against humanity, the prohibition of which are recognized as *jus cogens* in international law, must be publicly denounced

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99) (Lead) *Former Korean 'Comfort Women' Criticize Korea-Japan Deal, Demand Abe's Apology*, YONHAP NEWS AGENCY (Jan. 26, 2016, 20:27), <https://en.yna.co.kr/view/AEN20160126009751315http://english.yonhapnews.co.kr/news/2016/01/26/0200000000AEN20160126009751315.html>.

100) *Japan Lambasted by Former "Comfort Women," Official Apology Demanded from Abe*, XINHUA NEWS (Jan. 26, 2016, 17:36), available at [http://www.china.org.cn/world/Off\\_the\\_Wire/2016-01/26/content\\_37668077.htm](http://www.china.org.cn/world/Off_the_Wire/2016-01/26/content_37668077.htm).

101) *Id.*

102) Noah Feldman, *Apology Isn't Justice for Korea's Comfort Women*, BLOOMBERG VIEW (Dec. 29, 2015, 07:30 AM), <http://www.bloombergview.com/articles/2015-12-28/how-korea-s-deal-with-japan-fails-comfort-women->.

103) *Id.*

104) *Id.*

repeatedly and be remembered to prevent such atrocities from happening again. In addition, victims are entitled to reparation without promising to maintain their silence. It seems very unfair and “feels wrong if they can only get it [reparation] because their government has agreed to drop their case and, and to a degree, is encouraging them to drop their efforts to shame the perpetrators.”<sup>105)</sup> This approach attempts to “buy” the victims’ silence by exchanging their rights to compensation for finality.<sup>106)</sup> The Los Angeles Times succinctly depicted this aspect in a cartoon entitled “Sorry and shut up,” in which a piece of big black tape covers the mouth of the girl statute outside the Korean embassy while beside the chair where she sits is a pile of money.<sup>107)</sup> Also, “apologies should not end truth seeking effort nor stifle truth telling by victims. Instead, an apology should encourage a collective reckoning by society of conflict-related crimes or human rights violations carried out in the name of the state. An apology should open up space for accountability rather than close it.”<sup>108)</sup>

Nevertheless, the Korean government promised to consider the issue resolved “finally and irreversibly” in an apparent hurry, without properly consulting the victims or resorting to public procedure during the negotiation of the 2015 Agreement. This sparked outrage among the victims, who filed a petition to nullify the 2015 Agreement with the Constitutional Court of South Korea, arguing that “the Korean government neglected its constitutional duty by making it hard for the victims of wartime sexual slavery to demand compensation from Japan through the Seoul-Tokyo accord.”<sup>109)</sup> Ten of the women submitted a petition to the

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105) *Id.*

106) *Id.*

107) Bert Ring, *News-Press Cartoon: Sorry and Shut up*, L. A. TIMES (Jan. 2, 2016), <http://www.latimes.com/socal/glendale-news-press/opinion/tn-gnp-news-press-cartoon-sorry-and-shut-up-20160102-photo.html>.

108) David Tolbert, *Japan’s Apology to South Korea Shows What Public Apologies Should (Not) Do*, THE HUFFINGTON POST (Jan. 29, 2016, 10:59 AM), [http://www.huffingtonpost.com/david-tolbert/japans-apology-to-south-k\\_b\\_9111566.html](http://www.huffingtonpost.com/david-tolbert/japans-apology-to-south-k_b_9111566.html).

109) Da-hee Kim, *‘Comfort Women’ File Petition to Nullify Korea-Japan Accord*, THE KOREA TIMES (Mar. 28, 2016, 02:49 PM), [http://www.koreatimes.co.kr/www/news/nation/2016/05/116\\_201288.html](http://www.koreatimes.co.kr/www/news/nation/2016/05/116_201288.html). However, the Constitutional Court dismissed their petition because the 2015 Agreement does not have a legally binding effect. Constitutional Court [Const. Ct.], 2016Hun-Ma 253, Dec. 27, 2019 (S. Kor.).

United Nations to ask whether the 2015 Agreement meets international human rights standards.<sup>110)</sup> Also, some Koreans began gathering \$8.3 million voluntarily instead of receiving what amounts to "blood money" from Japan.<sup>111)</sup>

Not surprisingly, immediately after the 2015 Agreement, the Japanese government addressed this issue, stating, "recent public statements that there was no evidence that proved forcible removal of 'comfort women'" by the UN Committee on the Elimination of All Forms of Discrimination Against Women ["CEDAW"], with the 2015 Agreement that each party will regard the comfort women issue is "resolved finally and irreversibly."<sup>112)</sup> Further, the Japanese government also argued:

The GOJ has conducted a full-scale fact-finding study on the comfort women issue since the early 1990s.... The fact-finding study included ... hearings of relevant individuals including former military parties and managers of comfort stations and analysis of testimonies collected by the Korean Council. "Forceful taking away" of comfort women by the military and government authorities could not be confirmed in any of the documents that the GOJ was able to identify in the above-mentioned study.<sup>113)</sup>

However, the above is highly questionable: the victims have firmly maintained (for over 25 years) that many of them were forcefully abducted.<sup>114)</sup> In addition, this report is inconsistent with the announcement

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110) Mi-hyang Kim, *Ten Former Comfort Women Petition UN over Dec. 28 South Korea-Japan Settlement*, HANKYOREH (Jan. 29, 2016, 05:42 PM), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/728501.html](http://english.hani.co.kr/arti/english_edition/e_national/728501.html).

111) Mi-hyang Kim, *Unhappiness with SK-Japan Comfort Women Settlement Sparks Private Donations*, HANKYOREH (Jan. 20, 2016, 04:55 PM), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/727055.html](http://english.hani.co.kr/arti/english_edition/e_national/727055.html).

112) UN Committee on the Elimination of Discrimination against Women, *List of Issues in Relation to the Seventh and Eighth Periodic Reports of Japan, Addendum: Replies of Japan to the List of Issues*, para. 50, CEDAW/C/JPN/Q/7-8/Add.1 (Jan. 29, 2016), available at [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/JPN/CEDAW\\_C\\_JPN\\_Q\\_7-8\\_Add-1\\_22898\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/JPN/CEDAW_C_JPN_Q_7-8_Add-1_22898_E.pdf).

113) *Id.* Para. 51.

114) *See, supra* note 78.

of the fact-finding study conducted by the Japanese government<sup>115)</sup> and the subsequent Kono statement on August 4 1993.<sup>116)</sup> In response to the Japanese government's reply, CEDAW made a recommendation to Japan in its concluding observations as below:

The Committee further regrets that: (a) ... the announcement of the bilateral agreement with the Republic of Korea, which asserts that the "comfort women" issue "is resolved finally and irreversibly" did not fully adopt a victim-centered approach; ... The Committee... urges the State party to: (a) Ensure that its leaders and public officials desist from making disparaging statements regarding responsibility, which have the effect of retraumatizing victims; ... (c) Ensure that in the implementation of the bilateral agreement announced jointly with the Republic of Korea in December 2015, the State party takes due account of the views of the victims/survivors and ensure their rights to truth, justice, and reparations<sup>117)</sup>

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115) Cabinet Councilors' Office on External Affairs of Japan, *On the Issue of "Comfort women,"* (Aug. 4, 1993), <http://www.mofa.go.jp/policy/postwar/issue9308.html>.

116) Tessa Morris-Suzuki, *The Ever-Shifting Sands of Japanese Apologies*, EAST ASIA FORUM (Feb. 22, 2016), <http://www.eastasiaforum.org/2016/02/22/the-ever-shifting-sands-of-japanese-apologies>.

117) UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Seventh and Eighth Periodic Reports of Japan*, CEDAW/C/JPN/Q/7-8 (Mar. 7, 2016). The full remarks regarding "Comfort women" in the Concluding observations is as below:

"Comfort Women"

28. The Committee recalls its previous concluding observations (CEDAW/C/JPN/CO/6, paras. 37 and 38) and also refers to numerous recommendations on the unresolved issue of "comfort women" made by other United Nations human rights mechanisms such as the Committee on the Elimination of Racial Discrimination (CERD/C/JPN/CO/7-9), the Human Rights Committee (CCPR/C/JPN/CO/6), the Committee Against Torture (CAT/C/JPN/CO/2), the Committee on Economic, Social and Cultural Rights (E/C.12/JPN/CO/3), several United Nations Special Procedures mandate holders of the Human Rights Council and the Universal Periodic Review (A/HRC/22/14/Add.1, para.147145 et seq.). While noting the efforts by the State party to attempt to resolve the issue of "comfort women", most recently through the bilateral agreement between the State party and the Republic of Korea announced on 28 December 2015, the Committee regrets the State party has not implemented the aforementioned recommendations and its position that the issue of "comfort women" does not fall within the mandate of the Committee, as the alleged violations occurred prior to the entry into force of the Convention for the State party in 1985. The Committee further regrets

In short, the Japanese government must stop exploiting the 2015 Agreement to deny, distort and cover up the truth.

Third, there is no mention of guarantees of non-recurrence or truth-seeking; instead, the Japanese government requested the removal of the statue of the girl that has served as a memorial for the victims. A 2016 survey indicated that more than two-thirds of Koreans objected to the statue's removal.<sup>118)</sup> As the statue was erected by a civic group to serve as a memorial for these women, it may be removed voluntarily by the group and the victims, but not by the 2015 Agreement itself.<sup>119)</sup> At least the Korean government should have asked for Japan's cooperation in establishing a memorial or museum on behalf of these women; rather, the Koreans

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that: (a) Recently, there has been an increase in the number of statements from public officials and leaders regarding the State party[Japan]'s responsibility for violations committed against "comfort women"; and that the announcement of the bilateral agreement with the Republic of Korea, which asserts that the "comfort women" issue "is resolved finally and irreversibly" did not fully adopt a victim-centered approach; (b) Some "comfort women" have died without obtaining an official unequivocal recognition of responsibility by the State party for the serious human rights violations that they suffered; (c) The State party has not addressed its obligations under international human rights law towards "comfort women" victims in other concerned countries; and (d) The State party deleted references to the issue of "comfort women" in textbooks."

"29. The Committee reiterates its previous recommendations (CEDAW/C/JPN/CO/6, paras. 37 and 38) and observes that the issue of "comfort women" gives rise to serious violations that have a continuing effect on the rights of victims/survivors of those violations that were perpetrated by the State party's military during the Second World War given the continued lack of effective remedies for these victims. The Committee, therefore, considers that it is not precluded *ratione temporis* from addressing such violations, and urges the State party to: (a) Ensure that its leaders and public officials desist from making disparaging statements regarding responsibility, which have the effect of retraumatizing victims; (b) Recognize the right of victims to a remedy, and accordingly provide full and effective redress and reparation, including compensation, satisfaction, official apologies and rehabilitative services; (c) Ensure that in the implementation of the bilateral agreement announced jointly with the Republic of Korea in December 2015, the State party takes due account of the views of the victims/survivors and ensure their rights to truth, justice, and reparations; (d) Adequately integrate the issue of "comfort women" in textbooks and ensure that historical facts are objectively presented to students and the public at large; and (e) Provide information in its next periodic report on the extent of consultations and other measures taken to ensure the rights of victims/survivors to truth, justice and reparations."

118) Alastair Gale, *Japan-South Korea 'Comfort Women' Deal Faces Backlash in Seoul*, WALL ST. J. (Jan. 3, 2016, 12:29 AM), <http://www.wsj.com/articles/comfort-women-deal-faces-backlash-in-seoul-1451557585>.

119) David Tolbert, *supra* note 108.

promised to make a proper effort to remove the statute via consultation with the relevant organizations. However, history, and in particular, such atrocities as crimes against humanity, should be remembered wholly and correctly rather than being erased. If the Japanese government truly wishes to resolve the “comfort women” issue “finally and irreversibly”, it should remember what the Kono Statement said: “we shall face squarely the historical facts as described above instead of evading them, and take them to heart as lessons of history. We hereby reiterate our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history.”<sup>120)</sup>

CEDAW also recommended that the Japanese government adequately integrate the issue of “comfort women” into school textbooks and ensure that the historical facts are objectively presented to students and the public at large.<sup>121)</sup> Also, in 2016 in Tokyo, David Kaye, Special Rapporteur for the United Nations Human Rights Council, expressed serious concerns about the Japanese government’s influence on history textbooks, saying, “government interference with how textbooks treat the reality of the crimes committed during the Second World War undermines the public’s right to know and its ability to grapple with and understand its past.”<sup>122)</sup> Furthermore, the Japanese government should publicly disclose its internal documents relating to these “comfort women”, which they once studied internally within the government, to reveal the truth. Much of the evidence indicating the existence of the “comfort women” is assumed to have disappeared or been destroyed with the end of WWII, so it is critical to disclose these documents to the public to ensure the transparency of the Japanese government’s 1993 fact-finding study and promote further studies on the issue of these “comfort women” who are seeking the truth about their ill-treatment.

In the same regard, the Korean government should have requested that

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120) *Id.*

121) Concluding observations on the combined seventh and eighth periodic reports of Japan, *supra* note 117.

122) Yun-hyung Gil, *UN Rapporteur Speaks out Against Comfort Women Descriptions in Japanese Textbooks*, HANKYOREH (Apr. 21, 2016, 16:22 PM), [https://m.hani.co.kr/arti/english\\_edition/e\\_international/740714.html#cb](https://m.hani.co.kr/arti/english_edition/e_international/740714.html#cb).



a correct description of these "comfort women" be featured in Japanese history textbooks; it failed to incorporate this matter into the agreement, even though the victims have requested this over 1400 times across 28 years via the Wednesday Demonstrations, which have been held in front of the Japanese embassy in Seoul every Wednesday.<sup>123)</sup> At a bare minimum, the Korean government should have asked for greater cooperation between the two states to investigate the truth of this issue more precisely, to halt any remaining doubts and contentions. However, since the Korean government stated that it would regard the matter resolved "finally and irreversibly" and refrain from international criticism in future, never mentioning cooperation for a guarantee of non-recurrence or truth-seeking, it appears difficult for the victims to block the Japanese movement to "revise" this dark section of its history. Furthermore, Japan has never attempted to investigate the criminals responsible for the abduction of the "comfort women" nor prosecute them; it does not appear that Japan will do so in the near future. Therefore, at the least, Japan should "show its sincerity by erecting its own monuments to those wronged, by refuting the deniers, and by repeating George Santayana's famous line: "Those who cannot learn from the past are condemned to repeat it."<sup>124)</sup>

In this context, the 2015 Agreement is not in harmony with other transitional justice tools such as truth-seeking and criminal justice; thus, it lacks external coherence. The compensation featured in the 2015 Agreement also lacks internal coherence with the other reparation measures, such as memorials and a guarantee of non-recurrence. Therefore, the reparations under the 2015 Agreement are not just. Zeid Ra'ad Al Hussein, the former United Nations High Commissioner for Human Rights, also cast doubts on the justification of the 2015 Agreement and urged both governments to reach out to the victims.<sup>125)</sup>

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123) The Korean Council for Justice and Remembrance for the Issue of Military Sexual Slavery by Japan, <http://www.womenandwar.net/> (last visited June 10, 2021).

124) Rekha Basu, *Japan's Apologies on 'Comfort Women' Not Enough*, THE SEATTLE TIMES (Jan. 22, 2016, 03:46 PM), <http://www.seattletimes.com/opinion/japans-apologies-on-comfort-women-not-enough/>.

125) Zeid Ra'ad Al Hussein (U.N. High Commissioner for Human Rights), *Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, to the Human Rights Council's 31st Session*, United Nations Human Rights Council (Mar. 10, 2016), <https://ohchr.org/>.

## V. Conceding Justice for Politics

The international reaction to the 2015 Agreement varies; mostly, it was welcomed, especially by the United States, Japan, EU,<sup>126)</sup> and UN,<sup>127)</sup> immediately after its announcement. In the US, Obama congratulated Japan and South Korea for “having the courage and vision to forge a lasting settlement to this difficult issue.”<sup>128)</sup> In Japan, at least, it appeared that positive reactions to the agreement outnumbered negative ones.<sup>129)</sup> However, these positive reactions among international actors were primarily due to their respective geopolitical interests: the restoration of the Japan-South Korea tie was strategically essential to the United States. A closer alliance between the two countries was seen as helping to confront China’s growing military and economic influence in the region and keep North Korea’s attempt to build nuclear weapons in check.<sup>130)</sup> Thus, the Obama administration played a vital role over the last two years before the 2015 Agreement to foster an environment that allowed the two countries to settle the issue.<sup>131)</sup> Besides, Abe was also driven to improve Japan’s national

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org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17200&LangID=E.

The original statement is as below:

“Its[the 2015 Agreement] terms have been questioned by various UN human rights mechanisms, and most importantly by the survivors themselves. It is fundamentally important that the relevant authorities reach out to these courageous and dignified women; ultimately only they can judge whether they have received genuine redress.”

126) EEAS Press Team, *Statement by the Spokesperson on the Agreement between Japan and the Republic of Korea Regarding the Treatment of “Comfort Women” During WWII*, EUROPEAN UNION EXTERNAL ACTION SERVICE (Dec. 29, 2015, 01:41 AM), [https://eeas.europa.eu/headquarters/headquarters-homepage/2848/statement-spokesperson-agreement-between-japan-and-republic-korea-regarding-treatment-comfort\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/2848/statement-spokesperson-agreement-between-japan-and-republic-korea-regarding-treatment-comfort_en).

127) *UN Chief Welcomes Agreement between Japan and Republic of Korea on ‘Comfort Women’*, UN NEWS (Dec. 28, 2015), <https://news.un.org/en/story/2015/12/519052-un-chief-welcomes-agreement-between-japan-and-republic-korea-comfort-women>.

128) Juliet Ellperin, *Agreement on ‘Comfort Women’ Offers Strategic Benefit to U.S. in Asia-Pacific*, WASH. POST (Jan. 9, 2016), [https://www.washingtonpost.com/politics/agreement-on-comfort-women-offers-ancillary-benefit-to-us-in-asia-pacific/2016/01/09/41a03d84-b54c-11e5-a842-0feb51d1d124\\_story.html](https://www.washingtonpost.com/politics/agreement-on-comfort-women-offers-ancillary-benefit-to-us-in-asia-pacific/2016/01/09/41a03d84-b54c-11e5-a842-0feb51d1d124_story.html).

129) *Id.*

130) *Id.*

131) *Id.*

security against China's military expansion; the strong nationalist paid a high political price, even though it was relatively small compared to that paid by Korea. The deal "was motivated less, if at all, by a desire to render justice to comfort women but by a need to ease tensions between Japan and South Korea."<sup>132</sup> In this way, *The Guardian* reported the deal as "a triumph for Japan and the US."<sup>133</sup> Yet, the victims and the Korean Council denounced the deal as "a humiliating diplomacy for South Korea to give a bushel only to get a peck."<sup>134</sup> They also stated, "The agreement is nothing but a diplomatic collusion that thoroughly betrayed the wishes of comfort women and the South Korean people."<sup>135</sup>

However, justice should not be a bargaining chip to achieve diplomatic or geopolitical ends. If we consider that at the close of WWII, an A level Japanese war criminal was released from jail due to US policy blocking the influence of the Soviet Union during the Cold War era.<sup>136</sup> After being released from jail, this individual became the Prime Minister of Japan and liberated war criminals, honoring them as patriots.<sup>137</sup> His grandson also became a solid nationalist and regularly visited the controversial Yasukuni shrine, which honors Japan's war dead, including convicted war criminals. The grandson denied that the "comfort women" were brought by force to serve as sex slaves. The grandson tried to revise Japan's history and the Pacific Constitution: the grandson is no other than Shinzo Abe, the former Prime Minister of Japan.

The butterfly effect alludes to the notion that "small causes can have large effects"; it has now become a metaphor used both in science and more

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132) Tolbert, *supra* note 108.

133) Simon Tisdall, *Korean Comfort Women Agreement is a Triumph for Japan and the US*, *THE GUARDIAN* (Dec. 28, 2015), <https://www.theguardian.com/world/2015/dec/28/korean-comfort-women-agreement-triumph-japan-united-states-second-world-war>.

134) Choe, *supra* note 52.

135) *Id.*

136) Michael Schaller, *America's Favorite War Criminal: Kishi Nobusuke and the Transformation of U.S.-Japan Relations*, JAPAN POLICY RESEARCH INSTITUTE, <http://www.jpri.org/publications/workingpapers/wp11.html>.

137) Hyun-Ki Kim, *Far from Yasukuni, Cemetery Honors Criminals*, *KOREA JOONGANG DAILY* (Aug. 15, 2013), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2976138>.

generally.<sup>138)</sup> Relatedly, while sacrificing justice for political expediency may appear to be a relatively inconsequential act at first glance, its influence could be hugely significant later. Putting injustices right, as well as being very costly, is like having a wrongly-fastened first button: If you wish to correct the wrongly-aligned buttons, you need to unfasten all of them from the beginning. However, undertaking such a comprehensive process is time-consuming, bothersome, and sometimes is impossible to fix in the real-world conflict situations. For this reason, justice should not be surrendered for mere political expediency in post-conflict society.

Not surprisingly, the implementation of the 2015 Agreement highlights exactly this aspect: “Reparation without steps to ascertain the truth about past violations... may be perceived as an effort to buy victims’ silence—and thus may not only offend victims but also allow denial to flourish.”<sup>139)</sup> In South Korea, a 2016 survey indicated that over 50% of those surveyed objected to the 2015 Agreement;<sup>140)</sup> many of them, including the victims, demonstrated against the 2015 Agreement alongside the memorial statute of the girl.<sup>141)</sup> The Reconciliation and Healing Foundation has faced a lot of opposition since its launch in 2016; it managed to overcome these operational difficulties, especially after the regime change in South Korea in May 2017. The new president, Moon Jae-in, was the leader of the main opposition Minjoo Party, which had supported the nullification of the 2015 Agreement.<sup>142)</sup> Shortly after his inauguration, the Ministry of Foreign Affairs of Korea established the Task Force on the Review of the Korea-Japan Agreement on the issue of “Comfort Women” Victims [“the Task Force”] to review and assess the process and substance of the 2015

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138) Catherine Rouvas-Nicolis & Gregorie Nicolis, *Butterfly Effect*, SCHOLARPEDIA (May 4, 2009, 15:31 PM), [http://www.scholarpedia.org/article/Butterfly\\_effect](http://www.scholarpedia.org/article/Butterfly_effect).

139) MAGARRELL, *supra* note 39, at 2.

140) Gale, *supra* note 118.

141) Jun-ho Bang, *Students Guarding Comfort Women Statue Endure a Cold Watch*, HANKYOREH (Jan. 16, 2016, 19:54 PM), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/726493.html](http://english.hani.co.kr/arti/english_edition/e_national/726493.html).

142) Celeste Arrington, *Can Japan and Korea ‘Resolve’ the Question of Japan’s Korean Sex Slaves during WWII?*, WASH. POST (Jan. 13, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/13/can-japan-and-korea-resolve-the-question-of-japans-korean-sex-slaves-during-wwii/>.

Agreement. In December 2017, the Task Force concluded that "the victim-centered approach that has become an internationally accepted norm for war time women's human rights was not sufficiently incorporated in the course of the "comfort women" consultation process, and the [2015] Agreement was reached through give-and-take negotiations as if it were a common diplomatic issue."<sup>143</sup> After the Task Force's report, the foundation virtually came to a standstill; almost all of its board members resigned in protest against the non-disclosed elements of the 2015 Agreement.<sup>144</sup> Thus, the Moon Jae-in administration finally decided to dissolve the foundation and the process of dissolution was completed in June 2019.<sup>145</sup> The Japanese

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143) The Task Force reached four conclusions in its report, and the first part is as follows:

"... the victim-centered approach that has become an internationally accepted norm for war time women's human rights was not sufficiently incorporated in the course of the "comfort women" consultation process, and the Agreement was reached through give-and-take negotiations as if it were a common diplomatic issue. The Korean government took up the consultations, noting that the issue should be resolved while as many victims were still alive as possible. Nevertheless, the Agreement was concluded reflecting mainly the government's position and without sufficiently listening to, and incorporating, the victims' opinions. As long as a resolution is not accepted by the victims as was the case with the Agreement, the comfort women issue will continue to be raised as an unresolved issue even if the two governments declare that it is "finally and irreversibly resolved." It is difficult to resolve historical matters such as the comfort women issue in a short period through diplomatic negotiations or political compromises. There should at the same time be an expansion of values and perceptions, as well as history education for future generations from a long-term perspective." *Report of the Task Force, supra* note 86, at 24.

144) Hyunmin Michael Kang, *South Korea Decides to Dismantle 'Comfort Women' Reconciliation and Healing Foundation*, THE DIPLOMAT (Nov. 27, 2018), <https://thediplomat.com/2018/11/south-korea-decides-to-dismantle-comfort-women-reconciliation-and-healing-foundation/>; *Report of the Task Force, supra* note 86, at 18-20.

The report exposed that there were hidden elements in the 2015 Agreement. The non-disclosed part "did not promise that the Korean government would relocate the statue of a girl, intervene to prevent setting up memorials in other countries, or refrain from using the term "sex slavery", but they left room for the Japanese side to intervene in those issues." However, these hidden remarks are even more against the above criteria for just reparations in Section III. 2. In particular, since "unofficial" remarks intended to avoid oppositions of victims and civic groups, they naturally lack the victims' participation. Besides, memorials are an important part of reparations, but these elements try to minimize remembrance of the victims and to blur the heart of the matter of "sex slaves," so they do not match to other reparations and transitional justice measures. The official part of the 2015 Agreement is already unjust, and these hidden elements make it even more unjust.

145) *South Korea Formally Closes Japan-Funded 'Comfort Women' Foundation*, JAPAN TIMES (July 5, 2019), <https://www.japantimes.co.jp/news/2019/07/05/national/politics->

government strongly opposed these measures because the foundation constituted a key part of the 2015 Agreement; however, President Moon explained to Japan that this did not mean that an annulment or a renegotiation of the 2015 Agreement was to be forthcoming.<sup>146)</sup> However, with the Korean Court's ruling that upheld the right to compensation of the victims of Japan's wartime forced labor in June 2019, the dissolution of the foundation sparked a flurry of Japanese export restrictions on materials essential to South Korea's computer memory and semiconductor industry in July 2019.<sup>147)</sup> Also, the Japanese government excluded South Korea from its list of trusted trade partners.<sup>148)</sup> In response, the Korean government tried to bring this case to the WTO.<sup>149)</sup> In January 2021, immediately after the ruling of the Seoul Central District Court on January 8, 2021, which ordered the Japanese Government to pay damages to 12 former "comfort women," President Moon said, "The South Korean government recognizes it as an official agreement between the two countries."

Considering that the two countries are close economic and security partners (as well as in many other areas), the strained diplomatic relations between the two countries appears likely to harm both countries and adversely affect their respective futures.<sup>150)</sup> While President Moon sought to redress the injustices of the previous administration, in practice, achieving this goal looks very difficult and extremely costly. Besides, the reconciliation of the two countries now seems further off than before. The

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diplomacy/south-korea-formally-closes-japan-funded-comfort-women-foundation/#.XUvhzhKg2w.

146) *Id.*

147) Tom Miles, *Japan and South Korea Clash at WTO over Trade Row*, REUTERS (July 24, 2019, 08:35 PM), <https://www.reuters.com/article/us-southkorea-japan-laborers-wto/japan-and-south-korea-clash-at-wto-over-trade-row-idUSKCN1UJ1EM>.

148) Joohee Cho, *Japan Removes South Korea from Trade 'Whitelist'*, ABC NEWS (Aug. 2, 2019, 08:41 PM), <https://abcnews.go.com/International/japan-removes-south-korea-trade-whitelist/story?id=64728582>.

149) Miles, *supra* note 147.

150) Joohee Cho, *South Korea and Japan Trade Dispute Could Lead to 'Dire Consequences,' Official Warns*, ABC NEWS (July 18, 2019, 02:04 AM), <https://abcnews.go.com/International/south-korea-japan-trade-dispute-lead-dire-consequences/story?id=64389089>; Lindsay Maizland, *The Japan-South Korea Trade Dispute: What to Know*, COUNCIL ON FOREIGN RELATIONS (Aug. 5, 2019, 04:10 PM), <https://www.cfr.org/in-brief/japan-south-korea-trade-dispute-what-know>.

Korean government should have not been in such a hurry to reach accord with Japan on the "comfort women" issue in the 2015 Agreement, even though this goal was urgent due to the advanced age of the survivors. Although reconciliation is crucial, yet it should not be forced. The 2015 Agreement will long be remembered as another bad precedent: conceding justice for political interests.

## VI. Conclusion

In conclusion, there is strong evidence that Japan has failed to offer just reparations for the Korean former "comfort women." The reparations made by the Japanese government under the 1965 Agreement denied its legal responsibility and the forcibility of the recruitment of those women... Besides, this is compounded by the Japanese government's repeated inconsistent action, vague apologies, and attempts to erase and rewrite history. Therefore, the 2015 Agreement cannot be considered just reparations and an "alternative remedy" for the victims. Also, the reparations under the 2015 Agreement fall far below the international standards for just reparations. Japan's apology was insincere and conditional; there was no unequivocal acknowledgement of their past atrocities and legal responsibilities. Even worse, the Japanese government continues to exploit the 2015 Agreement to deny the truth while the victims are forced into silence by the attached unjust conditions. The above demonstrates that the 2015 Agreement comprehensively failed to uphold the victims' status as the bearers of rights. The 2015 Agreement also lacks both the external and internal coherence necessary for just reparation; therefore, it would be difficult to achieve transitional justice in its entirety under the 2015 Agreement system. Most importantly, the victims were excluded from the negotiation process. The 2015 Agreement deepened the victims' suffering, and damaged civic trust and social solidarity. To sum up, the reparations promised by the 2015 Agreement do not fit the criteria for just reparations. In reality, the agreement constitutes nothing more than conceding justice for political gain. Although the Korean government appealed for cooperation in implementing the 2015 Agreement, it was difficult to progress this without the victims' support. The situation is more

complex now after the dissolution of the Reconciliation and Healing Foundation. President Moon attempted to undo President Park's 2015 Agreement, which sparked a fierce trade war between the two countries. Reconciliation between South Korea and Japan cannot be forced by either of the two governments or external pressure. The Korean "comfort women" case illustrates how difficult achieving reconciliation can be if there is no justice.