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# The so-called 2015 Agreement between Japan and South Korea and the Korean Comfort Women Issue

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*In his Liberation Day speech, President Yoon Suk-yeol of South Korea pointed out that he would like to improve Korea-Japan relations towards a common future. However, a thorn in the relation between Japan and South Korea has been the unresolved issue of the so-called comfort women who had been forced to serve as sex slaves for the Japanese army between 1932 to 1945. The case of the comfort women raises many legal questions. On December 28, 2015, the Japanese and Korean government reached an agreement that aims to resolve the decades-old problem. The so-called 2015 Agreement gave new impetus to the debate over the legal responsibility of the Japanese government under international law. The most relevant issues and subsequent legal developments will be discussed in the following article.*

## Keywords

Comfort Women, Japan, South Korea, The so-called 2015 Agreement, Compensation

*For us (comfort women' survivors), liberation has yet to come ...*

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All the websites cited in this article were last visited on October 20, 2022.

<sup>1</sup> Lee Woo-yun, *Former Comfort Woman Decries of Historical Issues in Yoon's Liberation Day Speech*, HANKYOREH DAILY (Aug. 16, 2022), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/1054950.html](https://english.hani.co.kr/arti/english_edition/e_national/1054950.html).

*Today I have constant pain all over my body and frequent dizziness, but I cannot even afford over-the-counter drugs. ... I have no possessions, relatives, or offspring. I am alone.*

Jin Kyung-paeng<sup>2</sup>

## I. Introduction

Every Wednesday a group of Korean old women protests in front of the Japanese Embassy in Seoul to ask for an official apology and compensation from the Japanese government.<sup>3</sup> These women were systemically confined in Japanese military brothels between 1932 and 1945. They are euphemistically called “forced comfort women” or *wianbu* [위안부] in Korean. The term, comfort women is not without controversy. Some victims and survivors reject the term because it seems to imply that they voluntarily provided sex to Japanese soldiers.

Comfort women came from across Asia including China, Korea, the Philippines and Dutch women in Indonesia. It is estimated that between 100,000 to 200,000 women were victims of forced prostitution. The majority of the comfort women came from Korea, but only 11 of the Korean victims of sexual slavery are still alive.<sup>4</sup> In the words of the 2,000 Women’s International War Crimes Tribunal, “[o]nce enslaved, the girls and women were subjected to continuous and sometimes gang rape and other forms of sexual violence and torture. They lived in miserable conditions, with poor food, no privacy, and lack of hygiene.”<sup>5</sup>

The unresolved issue of the comfort women has led to diplomatic frictions between Seoul and Tokyo. The situation worsened when Japanese politicians including former Prime Minister Shinzo Abe raised doubts about the evidence that the comfort women were forcibly recruited and the Japanese military had any role in the establishment of the comfort women system.<sup>6</sup> In November 2015, Japan asked the South Korean

<sup>2</sup> Carlin Meyer, *Crimes against-Humanity-Women: The Uncomfortable Stories of ‘Comfort Women*, 17 N. Y. L. SCH. J. HUM. RTS. 1020 (2001).

<sup>3</sup> Bo-eun Kim, *Only 50 ‘Comfort Women’ Remain*, KOREA TIMES (June 18, 2015), [https://www.koreatimes.co.kr/www/nation/2022/10/113\\_181124.html](https://www.koreatimes.co.kr/www/nation/2022/10/113_181124.html). On October 6, 2022, the 1,564th demonstration took place. See Ji-young Park, “‘Comfort Women’ Advocates Condemn Plan to Shutter Gender Equality Ministry”, HANKYOREH DAILY (Oct. 6, 2022), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/1061678.html](https://english.hani.co.kr/arti/english_edition/e_national/1061678.html).

<sup>4</sup> Hye-mi Seo, *Kim Yang-ju, Survivor of Japanese Military’s ‘Comfort Women’ System, Dies at 98*, HANKYOREH DAILY (May 3, 2022), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/1041443.html](https://english.hani.co.kr/arti/english_edition/e_national/1041443.html).

<sup>5</sup> Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, Transcript of Oral Judgment, ¶ 64.

<sup>6</sup> See, e.g., Sarah Kim, *How Japan Tried to Bury Sex Slave Issue*, JOONGANG DAILY (Apr. 26, 2014), <http://>

government to remove a statue standing in front of the Japanese Embassy in Seoul which is symbolizing the Korean comfort women.<sup>7</sup> The Japanese government has also protested against the installations of comfort women statues in places like Berlin, Busan and Philadelphia.<sup>8</sup> Since 1991, comfort women have unsuccessfully filed lawsuits against the Japanese government in Japanese courts<sup>9</sup> and abroad.<sup>10</sup> In 2011, the Constitutional Court of South Korea held in a landmark decision that the South Korean Ministry of Foreign Affairs and Trade had failed to resolve the dispute between Japan and Korea in regard to the interpretation of Article 3 of the 1965 Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter 1965 Claims Agreement),<sup>11</sup> thereby violating the constitution according to the Preamble, Articles 2(2) and 10.<sup>12</sup>

The primary purpose of this research is to discuss the legal responsibility of Japan for its colonial rule in Korea with special references to the compensation for Korean comfort women. This paper is composed of the following parts: (1) overview of the Korean comfort women issue; (2) evaluation of the main arguments of the Japanese and Korean government; (3) examination of legal aspects of the agreement between the ministers of the foreign affairs of the two countries reached on December 28, 2015 as well as legal developments after the so-called 2015 Agreement and approaches by

koreajoongangdaily.joins.com/news/article/Article.aspx?aid=2988446.

- <sup>7</sup> Whan-woo Yi, *Japan Steps up Demands for Removal of 'Girl Statue'*, KOREA TIMES (Nov. 12, 2015), [http://www.koreatimes.co.kr/www/news/nation/2015/11/120\\_190857.html](http://www.koreatimes.co.kr/www/news/nation/2015/11/120_190857.html).
- <sup>8</sup> Sang-Hun Choe, *Comfort Woman Statue Reinstated Near Japan Consulate in South Korea*, N. Y. TIMES (Dec. 30, 2016), <https://www.nytimes.com/2016/12/30/world/asia/south-korea-comfort-women-wwii-japan.html>. See also *Japan Calls for Removal of 'Comfort Woman' Statue in Berlin*, JOONGANG DAILY (Oct. 8, 2020), <https://koreajoongangdaily.joins.com/2020/10/08/national/diplomacy/comfort-women-statue-war-time-sexual-slavery-Berlin/20201008184400535.html>; Craig McCoy, *Advocates and Opponents Clash in Hearing over Korean 'Comfort Women' Statue Proposed for Queen Village*, PHILA. INQUIRER (Sept. 22, 2022), <https://www.inquirer.com/arts/korea-comfort-women-japan-philadelphia-statue-memorial-war-crime-arts-commission-20220919.html>.
- <sup>9</sup> See, e.g., Masahiro Igarashi, *Post-War Compensation Cases: Japanese Courts and International Law*, 43 JAPAN ANN. INT'L L. 45-82 (2000). See also H. Kasutani, *Japan*, 2 Y.B. INT'L HUMANITARIAN L. 389-90 (1999). In only one case, the comfort women were successful, but the ruling was later reversed by the Supreme Court. See "Comfort Women" Case, Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan, *reprinted in* 8 PAC. RIM L. & POL'Y J. 63-100 (1999).
- <sup>10</sup> Comfort women unsuccessfully claimed compensation from Japanese government before US courts based on the Alien Torts Claims Acts, see Hwang Geum Joo and others v Japan. For a short summary and legal documents related to the case, see The Center for Justice & Accountability, Hwang Geum Joo v Japan, <http://www.cja.org/article.php?id=328>.
- <sup>11</sup> Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-Operation (with Protocols, Exchanges of Notes and Agreed Minutes), S. Korea-Japan (June 22, 1965), 583 U.N.T.S. 173.
- <sup>12</sup> Constitutional Court of Korea, Challenge against the Act of Omission Involving Article 3 of 'Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan,' 23-2(A) KCCR 366, 2006 Hun-Ma788, Aug. 30, 2011, 134.

the Moon Jae-in and Yoon Suk-yeol administrations towards this agreement.

## II. The Japanese Government's Position on Comfort Women Issue

### A. Overview

The Japanese government initially denied any involvement in sexual slavery during WWII. However, the government's position changed after Professor Yoshiaki Yoshimi discovered archive material.<sup>13</sup> In 1993, then Japanese Chief Cabinet Secretary, Yohei Kono offered an official apology to the former sex slaves:

The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. ... 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. ... Undeniably, this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.<sup>14</sup>

Two years after the Kono statement, Prime Minister Murayama expressed his apology:

During a certain period in the not too distant past, Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations.<sup>15</sup>

In 1994, the Japanese government established the Asian Women's Fund (AWF) which

<sup>13</sup> See, e.g., Statement by the Chief Cabinet Secretary, U.N. Doc. E/CN.4/1996/137, annex 1, <http://www.awf.or.jp/pdf/h0002.pdf>.

<sup>14</sup> Statement by the Chief Cabinet Secretary Yohei Kono, On the Result of the Study on the Issue of "Comfort Women," ICC LEGAL TOOL DATABASE (Aug. 4, 1993), <https://www.legal-tools.org/doc/cb4732/pdf>.

<sup>15</sup> Ministry of Foreign Affairs of Japan, Statement by Prime Minister Tomiichi Murayama, "On the Occasion of the 50th Anniversary of the War's End" (Aug. 15, 1995), <http://www.mofa.go.jp/announce/press/pm/murayama/9508.html>.

provided compensation to victims from across Asia.<sup>16</sup> However, the AWF had been privately funded but not by the government. Until today, Japan has rejected any individual claims for compensation, maintaining the position that all legal issues concerning the annexation of Korea had been regulated by the 1965 Treaty on Basic Relations between the Republic of Korea and Japan (hereinafter 1965 Treaty on Basic Relations).<sup>17</sup>

## B. The Legal Position of the Japanese Government

The Japanese government has only accepted a moral responsibility and denied any legal liability for a number of reasons.<sup>18</sup> First, Japan takes, *inter alia*, the view that it did not violate the Geneva Conventions of 1949 or other instruments of international law because they did not exist during the period when the comfort women system was in place. Even though Japan ratified the International Convention for the Suppression of the Traffic in Women and Children of 1921, it exercised its prerogative according to Article 14 of the 1921 Convention to declare that Korea was not included in the scope of the Convention.<sup>19</sup>

In respect of its obligations under the 1930 Forced Labor Convention, second, Japan argues that Article 2 provided for compulsory military service and military labor in the event of war. From the perspective of the Japanese government,<sup>20</sup> it also rejects the application of the 1926 Slavery Convention because the comfort women system should not be considered as slavery and Japan was not a party to the 1926 Slavery Convention at that time, either.<sup>21</sup>

<sup>16</sup> For details on the Asian Women's Fund, see Koji Teraya, *A Consideration of the so-called Comfort Women Problem in Japan-Korea Relations: Embracing the Difficulties in the International Legal and Policy Debate*, 6 J. EAST ASIA & INT'L L. 206-19 (2013).

<sup>17</sup> Treaty on Basic Relations between the Republic of Korea and Japan, <https://treaties.un.org/doc/Publication/UNTS/Volume%20583/volume-583-I-8471-English.pdf>. For details, see Pac-keun Park, *The 1965 "Korea-Japan Claims Settlement Agreement" and Individuals' Claims Rights*, 68 J. L. & POL. (Kyushu U.) 196-222 (2001), [https://catalog.lib.kyushu-u.ac.jp/opac\\_download\\_md/2261/KJ00000724351-00001.pdf](https://catalog.lib.kyushu-u.ac.jp/opac_download_md/2261/KJ00000724351-00001.pdf).

<sup>18</sup> Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996); Commission on Human Rights, Note Verbale from the permanent Mission of Japan, U.N. E/CN.4/1996/137 (Mar. 27, 1996), <http://www.awf.or.jp/pdf/h0002.pdf>.

<sup>19</sup> Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/1995, Economic and Social Council, E/CN.4/1996/53/Add.1, ¶96.

<sup>20</sup> *Id.* ¶101.

<sup>21</sup> See e.g. Summary of Remarks by Mr. Shinsuke Sugiyama, Deputy Minister for Foreign Affairs (Q&A session), Convention on the Elimination of All Forms of Discrimination against Women Consideration of the seventh and eighth periodic reports, [https://www.mofa.go.jp/a\\_o/tp/page24e\\_000163.html](https://www.mofa.go.jp/a_o/tp/page24e_000163.html).

Third, the Japanese government has consistently argued that all issues concerning reparation and claims had already been settled by the San Francisco Peace Treaty and other bilateral agreements. In regard to South Korea, Japan refers specifically to Article II (1) of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea (1965) which stipulates that “the problem concerning property, rights and interests of the two Contracting Parties and their nationals ... is settled *completely and finally*.”<sup>22</sup>

Last, Japan points out that individuals have no right to claim compensation if this is not expressly provided in an international agreement. Japan’s position has not changed over time by arguing that the comfort women had not been “forcefully taken away” and the term “sex slaves” contradicts the facts. Furthermore, Japan strongly doubts the figure “200,000 persons” for the total number of comfort women.<sup>23</sup>

### III. The so-called 2015 Agreement between Foreign Ministers of Japan and South Korea

#### A. Legally Binding?

On December 28, 2015, foreign ministers of Japan and South Korea reached an accord, the so-called 2015 Agreement.<sup>24</sup> It needs to be pointed out that the nature of the agreement is rather unique. Japan and South Korea simply announced it at a press conference. There was no joint statement or any accompanying text.<sup>25</sup> The Agreement consists of the following elements: Tokyo promised to pay around one billion yen (around USD 8.5 million) in taxpayer money to a foundation administered by the South Korean government. The foundation aims to provide assistance to the remaining forty-six victims and the verbal agreement was intended to resolve the

<sup>22</sup> Agreement on the Settlement of Problems, *supra* note 11. [Emphasis added]

<sup>23</sup> Ministry of Foreign Affairs of Japan, Japan’s Efforts on Comfort Women, [https://www.mofa.go.jp/policy/postwar/page22e\\_000883.html](https://www.mofa.go.jp/policy/postwar/page22e_000883.html).

<sup>24</sup> Simon Tisdall, *Korean Comfort Women Agreement Is a Triumph for Japan and the US*, *GUARDIAN* (Dec. 28, 2015), <http://www.theguardian.com/world/2015/dec/28/korean-comfort-women-agreement-triumph-japan-united-states-second-world-war>.

<sup>25</sup> For details, see Hyun-soo Lim, *Not “Final and Irreversible”: Explaining South Korea’s January 2018 Reversal on the “Comfort Women” Agreement*, *YALE J. INT’L L.* (Feb. 1, 2018), <https://www.yjil.yale.edu/not-final-and-irreversible-explaining-south-koreas-january-2018-reversal-on-the-comfort-women-agreement>; Seung Ju Bang, *Constitutionality of the Agreement between the Foreign Affairs Ministers of the Republic of Korea and Japan on the Issue of ‘Comfort Women’ on 28 December 2015*, *ICL J.* 400-24 (2017), <https://www.degruyter.com/document/doi/10.1515/icl-2016-0404/html>.

long-held dispute “finally and irreversibly.” The Japanese government acknowledged in this accord:

The issue of comfort women, with an involvement of the Japanese military authorities at that time, was a grave affront to the honor and dignity of large numbers of women, and the Government of Japan is painfully aware of responsibilities from this perspective. As Prime Minister of Japan, Prime Minister Abe expresses anew his most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women.<sup>26</sup>

In return, Foreign Minister of South Korea, Yun, Byung-se promised:

the Government of the ROK, together with the Government of Japan, will refrain from accusing or criticizing each other regarding this issue in the international community, including at the United Nations, on the premise that the Government of Japan will steadily implement the measures it announced.<sup>27</sup>

The then South Korean President Park Geun-hye wanted Tokyo to acknowledge the role of the Japanese military in mobilizing the comfort women in Korea and pay monetary compensation to the women alive until then.<sup>28</sup> South Korean Foreign Minister Yun Byung-se viewed the accord as a step forward from Japan’s previous actions because Japan acknowledged responsibility without adding any qualifiers and apologies were provided in a public and official manner.<sup>29</sup>

Unfortunately, the so-called 2015 Agreement did not bring an end to the historic dispute.<sup>30</sup> Shortly after then, Japanese Prime Minister Shinzo Abe claimed that there was no evidence that the Korean comfort women had been coerced into sexual slavery.<sup>31</sup> Also, Japan denied the forced nature of the comfort stations in its statement

<sup>26</sup> ROK Ministry of Foreign Affairs, Remarks at the Joint Press Availability [unofficial translation], [https://www.mofa.go.jp/a\\_o/na/kr/page4e\\_000364.html](https://www.mofa.go.jp/a_o/na/kr/page4e_000364.html).

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

<sup>28</sup> Sarah Kim, *President Justifies Reasons for Seoul-Tokyo Deal*, JOONGANG DAILY (Jan. 14, 2016), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3013897>.

<sup>29</sup> Staff writer, *Apologies and Remorse Should Be Translated into Action*, KOREA TIMES (Jan. 3, 2016), [https://www.koreatimes.co.kr/www/nation/2020/04/113\\_194539.html](https://www.koreatimes.co.kr/www/nation/2020/04/113_194539.html).

<sup>30</sup> For details on the so-called 2015 Agreement with a focus on how far the victims needs and rights had been addressed by Japan and South Korea. See Klea Ramaj, *The 2015 South Korean-Japanese Agreement on ‘Comfort Women’: A Critical Analysis*, 22 INT’L CRIM. L. R. 475-509 (2022).

<sup>31</sup> Whan-woo Yi, *Abe’s Distortion over Comfort Women Recurs*, KOREA TIMES (Jan. 19, 2016), [http://www.koreatimes.co.kr/www/news/nation/2016/01/120\\_195814.html](http://www.koreatimes.co.kr/www/news/nation/2016/01/120_195814.html).

submitted to the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW): The Japanese government maintained: “‘Forceful taking away’ of comfort women by the military and government authorities could not be confirmed in any of the documents that the [government of Japan] was able to identify.”<sup>32</sup> It further commented that the term “sex slaves” was a contradiction of the facts.<sup>33</sup>

In response, the South Korean foreign ministry harshly criticized the denial of historical facts and called upon Japan to “refrain from words and actions that could damage the purpose and spirit of the December 28 settlement and to show through its actions that it intends to restore the reputation and dignity of the former comfort women and to heal their wounds.”<sup>34</sup>

Both governments faced a barrage of criticism after the deal. The majority of the former comfort women in South Korea rejected the deal which had been concluded without their involvement.<sup>35</sup> In February 2016, only sixteen of the surviving victims showed their willingness to accept money from the Japanese government.<sup>36</sup> Ten former comfort women submitted a petition to the UN requesting to determine whether this compromise had been reached in conformity with international human rights standards.<sup>37</sup>

The weekly demonstrations for the Korean comfort women have continued on Wednesdays in front of the Japanese Embassy in Seoul. Responding to the Agreement, civic groups in thirteen cities of South Korea and in forty-five cities in twelve other countries protested against it.<sup>38</sup> A group of 400 South Korean and foreign scholars criticized the deal as a diplomatic mistake.<sup>39</sup> A civic group called civil society not only

<sup>32</sup> Jin-Kyu Kang, *Japan Denies Forced Nature of Sex Slaves in Statement*, JOONGANG DAILY (Jan. 31, 2016), <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3014619>.

<sup>33</sup> Press Release, Committee on the Elimination of Discrimination against Women Examines Reports of Japan (Japan Reviewed) (Feb. 16, 2016), <https://www.ohchr.org/en/press-releases/2016/02/committee-elimination-discrimination-against-women-examines-reports-japan>.

<sup>34</sup> Yun-hyung Gil, *In Message to UN, Japan Again Denies Official Responsibility for Comfort Women*, HANKYOREH DAILY (Feb. 1, 2016), [http://english.hani.co.kr/arti/english\\_edition/e\\_international/728785.html](http://english.hani.co.kr/arti/english_edition/e_international/728785.html).

<sup>35</sup> Justin McCurry, *Former Sex Slaves Reject Japan and South Korea's 'Comfort Women' Accord*, GUARDIAN (Jan. 26, 2015), <http://www.theguardian.com/world/2016/jan/26/former-sex-slaves-reject-japan-south-koreas-comfort-women-accord>.

<sup>36</sup> Ji-hye Jun, *Japanese Fund to Be Paid to Victims*, KOREA TIMES (Feb. 5, 2016), [http://www.koreatimes.co.kr/www/news/nation/2016/02/116\\_197458.html](http://www.koreatimes.co.kr/www/news/nation/2016/02/116_197458.html).

<sup>37</sup> Mi-hyang Kim, *Ten Former Comfort Women Petition UN over Dec. 28 South Korea-Japan Settlement*, HANKYOREH DAILY (Jan. 29, 2016), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/728501.html](http://english.hani.co.kr/arti/english_edition/e_national/728501.html).

<sup>38</sup> Se-jeong Kim, *Rally for Ex-Sex Slaves Marks 24th Anniversary*, KOREA TIMES (Jan. 6, 2016), [http://www.koreatimes.co.kr/www/news/nation/2016/01/116\\_194822.html](http://www.koreatimes.co.kr/www/news/nation/2016/01/116_194822.html).

<sup>39</sup> Sarah Kim, *Group Decries 'Comfort Women' Deal*, JOONGANG DAILY (Jan. 5, 2016), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3013525&clac=rss%7Cnews%7Cjoongangdaily>.



criticized the agreement for not acknowledging the colonial rule as a systematic crime, but also questioned the sincerity of the apology because it was not directly announced by the Japanese prime minister but through the foreign minister.<sup>40</sup> The Agreement also met with suspicion and criticism from China and the Philippines where lawyers are demanding compensation for the victims of the Japanese military brothel system from their countries.<sup>41</sup>

The so-called 2015 Agreement poses a number of questions under international law and even South Korean constitutional law. In 2011, the Constitutional Court of Korea requested the Korean government to take appropriate action in resolving the issue of the comfort women. However, by reaching an ambiguous accord without any consultation from the former comfort women and civic society, one may wonder whether the Korean government fulfilled its obligation to resolve the comfort women issue.

A major contentious issue concerns the legal responsibility of Japan. The Japanese foreign minister made it clear that the envisaged payment should not be regarded as a form of compensation, because Japan's legal responsibility had been finally addressed by the 1965 Treaty on Basic Relations.<sup>42</sup> This simply affirms the legal opinion of previous Japanese governments. If Japan had accepted legal responsibility, this could have led to a flood of claims from comfort women from other countries and forced laborers, as pointed out by an unnamed Japanese government official.<sup>43</sup> Doubts have been raised whether the December 2015 settlement is legally binding at all. A group called Lawyers for a Democratic Society argued that the Agreement is not legally binding because it was not put in writing. Furthermore, the group pointed out "[w]hat was agreed to on December 28 carries no legal weight in light of international law," and "...it has failed to reflect any of the victims' interests, a point

<sup>40</sup> The Official Statement from the Korean Civil Society regarding the Agreement on the Military Sexual Slavery (Comfort Women) Issue during the Korea-Japan Ministerial Meeting (Dec. 28, 2015), <https://www.peoplepower21.org/peace/1384579>.

<sup>41</sup> Staff writer, *Filipino Wartime Rape Victims Push for Compensation from Japan*, GUARDIAN (Jan. 6, 2016), <http://www.theguardian.com/world/2016/jan/06/filipino-wartime-rape-victims-japan-compensation-korean-comfort-women>. See also Neil Connor, *Japan Second World War 'Comfort Women' Apology Criticized in China*, TELEGRAPH (Dec. 30, 2015), <http://www.telegraph.co.uk/news/worldnews/asia/china/12073861/Japan-World-War-Two-comfort-women-apology-criticised-in-China.html>.

<sup>42</sup> *Japan-South Korea Accord on 'Comfort Women' Leaves Ambiguities*, MAINICHI DAILY (Dec. 30, 2015), <http://mainichi.jp/english/articles/20151230/p2a/00m/0na/009000c>. For details, see Treaty on Basic Relations between the Republic of Korea and Japan, *supra* note 17.

<sup>43</sup> Jonathan Soble & Sang-Hun Choe, *South Korean and Japanese Leaders Feel Backlash from 'Comfort Women' Deal*, N.Y. TIMES (Dec. 29, 2015), [http://www.nytimes.com/2015/12/30/world/asia/south-korea-japan-comfort-women.html?\\_r=0](http://www.nytimes.com/2015/12/30/world/asia/south-korea-japan-comfort-women.html?_r=0).

hard to accept even if it is a valid agreement.”<sup>44</sup> According to Professor Lee Yun-je, the so-called 2015 Agreement is in violation of international criminal law and the South Korean constitution because a state cannot abandon the privilege for prosecuting international crimes.<sup>45</sup> Pursuant to Article 60(1) of the South Korean Constitution, the National Assembly has the right to consent to the conclusion and ratification of treaties pertaining to any restriction in sovereignty.<sup>46</sup>

It is also unclear whether Tokyo can demand the removal of the comfort woman statue standing in front of the Japanese Embassy in Seoul or any other places. The South Korean Foreign Ministry has rejected any obligation under the so-called 2015 Agreement.<sup>47</sup> Japan insists it would not provide any money to the foundation unless the comfort women statue is removed.<sup>48</sup> According to the then Seoul Mayor, Park Won-soon, “[i]t is extremely difficult for us to forcibly remove the statue, which has been erected through fund-raising by civilians and citizens.”<sup>49</sup>

The answer to these issues depends on whether or not the parties to the Agreement-South Korea and Japan-wanted to create legal obligations. Even though the December settlement is not a written agreement, valid legal obligations may also be constituted on an oral basis.<sup>50</sup> As correctly observed by a South Korean government official in the present context: “There are a number of ways other than a treaty for two or more nations to reach an agreement over certain issues and implement it.”<sup>51</sup> There is actually no explicit evidence in the oral statements that both states did not have the intention to enter into a legally binding agreement. However, a legally binding agreement would be contrary to the position of previous Japanese governments that all legal issues concerning the comfort women issue had been resolved by the 1965 Claims Agreement. In regard to the removal of the comfort women statue, the

<sup>44</sup> Se-jeong Kim, *Lawyers Say Korea-Japan Deal on Sex Slavery Invalid*, KOREA TIMES (Jan. 20, 2016), [http://www.koreatimes.co.kr/www/news/nation/2016/01/116\\_195938.html](http://www.koreatimes.co.kr/www/news/nation/2016/01/116_195938.html). Cf. Vienna Convention on the Law of Treaties 1969, arts. 1 & 53, 1155 U.N.T.S. 331.

<sup>45</sup> Y.-J. Lee, *The Comfort Women Settlement Deviates from International Law*, HANKYOREH DAILY (Jan. 12, 2016), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/725831.html](http://english.hani.co.kr/arti/english_edition/e_national/725831.html).

<sup>46</sup> See The Constitution of the Republic of Korea, [http://korea.assembly.go.kr/res/low\\_01\\_read.jsp?boardid=1000000035](http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035).

<sup>47</sup> Ju-min Park, *‘Comfort Women’ Bronze May Test Resolve*, REUTERS (Dec. 28, 2015), <https://www.reuters.com/article/us-japan-southkorea-comfortwomen-statue-idUKKBN0UB0SH20151228>.

<sup>48</sup> Yun-hyung Gil, *Abe Hints at No Settlement Payment unless Comfort Women Statue Is Removed*, HANKYOREH DAILY (Jan. 19, 2016), [http://english.hani.co.kr/arti/english\\_edition/e\\_international/726878.html](http://english.hani.co.kr/arti/english_edition/e_international/726878.html).

<sup>49</sup> *Seoul Mayor Reaffirms Opposition to Removing Statue Symbolizing ‘Comfort Women’*, YONHAP NEWS (Feb. 2, 2016), <https://en.yna.co.kr/view/AEN20160202008500315>.

<sup>50</sup> On non-treaty and non-binding agreements, see H. Hillenbrand, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499-515 (1999); and F. Münch, *Non-binding Agreements*, 29 ZÄORV 1-11 (1969).

<sup>51</sup> Whan-woo Yi, *Abe’s Distortion over Comfort Women Recurs*, KOREA TIMES (Jan. 19, 2016), [http://www.koreatimes.co.kr/www/news/nation/2016/01/120\\_195814.html](http://www.koreatimes.co.kr/www/news/nation/2016/01/120_195814.html).

South Korean government only promised that it would “strive to solve this issue in an appropriate manner through taking measures such as consulting with related organizations about possible ways of addressing this issue.”<sup>52</sup> It is therefore difficult to conclude that the so-called 2015 Agreement was presumed as having legal force.

One option which has been considered by Japanese government officials<sup>53</sup> and suggested by former comfort women<sup>54</sup> would be to bring the comfort women case before the International Court of Justice (ICJ). In this case, however, Japan and South Korea have to provide their consent before the ICJ could resolve the issue of compensation for the comfort women.<sup>55</sup>

## B. The Interpretation of the so-called 2015 Agreement under the Moon Jae-in Administration

President Moon Jae-in of South Korea considered that the so-called 2015 Agreement could not be implemented because it [is] “seriously flawed” without taking into account the opinions of the victims.<sup>56</sup> A South Korean taskforce arrived at the same conclusion and criticized the agreement: “It is hard to resolve such a historical problem as the comfort women issue through short-term diplomatic negotiations or political compromise. There should be longer-term efforts for the spread of values, awareness and education for future generations.”<sup>57</sup>

The Japanese government responded to these developments by issuing a warning

... if the Government of the ROK attempts based on this report to change an agreement which has already been implemented, the Japan-ROK relationship will become unmanageable; therefore, such an attempt cannot be acceptable whatsoever. The Government of Japan will strongly urge the ROK to ensure that the Government of the ROK continues to steadily implement the agreement as a

<sup>52</sup> Shannon Tiezzi, *South Korea's 'Comfort Women' Reject Deal with Japan*, DIPLOMAT (Dec. 30, 2015), <https://thediplomat.com/2015/12/south-koreas-comfort-women-reject-deal-with-japan/>.

<sup>53</sup> Yun-hyung Gil, *Japan Considers Bringing Comfort Women Case before International Court of Justice*, HANKYOREH DAILY (Jan. 11, 2021), [https://english.hani.co.kr/arti/english\\_edition/e\\_international/978301.html](https://english.hani.co.kr/arti/english_edition/e_international/978301.html).

<sup>54</sup> *Victim Urges Seoul to Bring Wartime Sex Slavery Issue to ICJ*, YONHAP NEWS (Apr. 14, 2021), <https://en.yna.co.kr/view/AEN20210414007300315>.

<sup>55</sup> I.C.J. Statute, art. 36.

<sup>56</sup> J. Lee, Joyce & H. Shin, *South Korea Says 'Comfort Women' Deal Flawed, but Japan Warns against Change*, REUTERS (Dec. 18, 2022), <https://www.reuters.com/article/us-southkorea-japan-comfortwomen-idUSKBN1EM056>.

<sup>57</sup> Report on the Review of the Korea Japan Agreement of December 28, 2015 on the Issue of Comfort Women Victims [unofficial translation], [https://www.mofa.go.kr/www/brd/m\\_4076/down.do?brd\\_id=9795&seq=367886&data\\_tp=A&file\\_seq=3](https://www.mofa.go.kr/www/brd/m_4076/down.do?brd_id=9795&seq=367886&data_tp=A&file_seq=3); See also *Task Force Says Comfort Women Deal Lacked Victims' Views, Confirms Existence of Secret Agreements*, KORES HERALD (Dec. 17, 2017), <http://www.koreaherald.com/view.php?ud=20171227000723>.

“final and irreversible” agreement.<sup>58</sup>

On January 8, 2018, then Foreign Minister of South Korea Kang Kyung-wha made it clear that the South Korean government would not demand renegotiation.<sup>59</sup> In the same year, the Moon Jae-in administration shut down the fund established under the so-called 2015 Agreement. During the Moon’s presidency, the survivor of the comfort women system asked the government to refer the comfort women issue to the United Nations Committee Against Torture, but their claims were not accepted by the government.<sup>60</sup>

Meanwhile, the South Korean Supreme Court ruled in late 2018 that Japanese companies should have a legal obligation to pay compensation to victims of forced labor from Korea.<sup>61</sup> In response to the ruling, Japan imposed exports controls on semiconductor parts. On January 8, 2021, the Seoul Central District Court ruled that Japan should pay KRW 100 million (around USD 80,000) as compensation to twelve former comfort women.<sup>62</sup> Japan rejected to follow the ruling and formally protested to the South Korean government. According to Katsunobu Kato, chief cabinet secretary to Prime Minister Yoshida Suga, the decision was “extremely regrettable and absolutely unacceptable.”<sup>63</sup> In this case, the court argued that Japan could not rely on the principle of state immunity because it had committed crimes against humanity.<sup>64</sup> On April 21, 2021, in another decision by the Seoul Central District Court, however,

<sup>58</sup> Press Release, The Announcement of the Results of the Assessment by the Taskforce to Review the Agreement on Comfort Women Issue reached between the Governments of Japan and the ROK (Statement by Foreign Minister Taro Kono) (Dec. 27, 2017), [https://www.mofa.go.jp/press/release/press4e\\_001857.html](https://www.mofa.go.jp/press/release/press4e_001857.html).

<sup>59</sup> ‘Comfort Women’ Deal to Stand?, DEUTSCHE WELLE (Jan. 9, 2018), <https://www.dw.com/en/south-korean-minister-says-seoul-not-seeking-renegotiation-of-comfort-women-deal-with-japan/a-42075602#:~:text=South%20Korean%20minister,were%20operated%20commercially>.

<sup>60</sup> Hye-mi Seo, *Survivor of “Comfort Women” System Urges Moon to Refer Issue to UN Anti-torture Body*, HANKYOREH DAILY (Jan. 26, 2022), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/1028921.html](https://english.hani.co.kr/arti/english_edition/e_national/1028921.html).

<sup>61</sup> *Korean Force Labourers v. Nippon Steel & Sumitomo Metal Corporation*, Supreme Court, Supreme Court en banc Judgment 2013Da61381, rendered 30 October 2018 [English version], <https://www.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=1306&pageIndex=1&mode=6&searchWord=>; Ock Hyun-ju, *Court Orders Japan Firm to Compensate Wartime Forced Laborers*, KOREA HERALD (Oct. 30, 2018), <https://www.koreaherald.com/view.php?ud=20181030000606>. For a legal analysis, see Seokwoo Lee & Seryon Lee, *Yeo Woon Taek v. New Nippon Steel Corporation*, 113 AM. J. INT’L L. 592-99 (2019).

<sup>62</sup> *Korean Comfort Women v. Japan*, Seoul Central District Court, 8 January 2021, 2016 Ga Hab 505092 [in Korean]; S.H. Choe, *South Korean Court Orders Japan to Pay Compensation for Wartime Sexual Slavery*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/world/asia/south-korea-comfort-women-japan.html>.

<sup>63</sup> *Japan Calls S. Korea Comfort Women Ruling Unacceptable*, Nippon.Com (Jan. 8, 2022), <https://www.nippon.com/en/news/yjj2021010800603/>.

<sup>64</sup> Seoul Central District Court (Jan. 8, 2021), Judgment 2016 GaHap 505092, <https://casenote.kr/%EC%84%9C%EC%9A%B8%EC%A4%91%EC%95%99%EC%A7%80%EB%B0%A9%EB%B2%95%EC%9B%90/2016%EA%B0%80%ED%95%A9505092>.

the judges found a different conclusion and rejected another damage suit by referring to the principle of state immunity which protects a state from the jurisdiction of the courts of another state.<sup>65</sup> The district court mentioned in particular the *Jurisdictional Immunities* case brought before the ICJ which found that there is no conflict between the norms of *jus cogens* and the rules of state immunity.<sup>66</sup> The ICJ adjudicated:

The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.<sup>67</sup>

Therefore, norms of *jus cogens* do not trump the customary rules of state immunity.

In December 2021, the comfort women issue became a major news topic again when Harvard Professor Ramseyer published a report questioning the credibility of the testimonies of the former sex slaves and characterizing them as voluntary prostitutes.<sup>68</sup>

Meanwhile, up until November 2022, President Yoon Suk-yeol has not explained his political position how to address critical issues with Japan and the unresolved problem of the comfort women. Critics fear that he could even accept that the comfort women system was not an example of sexual slavery.<sup>69</sup> In his National Liberation Day speech of August 15, 2022, President Yoon only stressed that he would like to improve ties with Japan, but did not reflect how his administration could solve these issues.<sup>70</sup> In this course, however, the Minister of Foreign Affairs, Park Jin recognized

<sup>65</sup> Korean Comfort Women v. Japan, Seoul Central District Court, 21 April 2016 GaHab 580239 [available only in Korean]. See also *S. Korea Court Dismisses 'Comfort Women' Lawsuit, Contradicts Earlier Ruling*, REUTERS (Apr. 21, 2021), <https://www.reuters.com/world/china/skorea-court-dismisses-comfort-women-lawsuit-contradicts-earlier-ruling-2021-04-21>. For details on both cases, see Seung hyun Nam, *Sovereign Immunities in the Comfort Women Case and Its Policy Implications for the Republic of Korea*, IFANS PERSPECTIVES (Feb. 25, 2022), <https://www.ifans.go.kr/knda/ifans/kor/act/ActivityView.do?csrfPreventionSalt=null&sn=13951&boardSe=pbl&koreanEngSe=KOR&ctgrySe=02&menuCl=&searchCondition=searchAll&searchKeyword=&pageIndex=1>.

<sup>66</sup> See *Jurisdictional Immunities* case (Ger. v. It.; Greece intervening), Judgment, 2012 ICGJ 434, ¶ 93 (Feb. 3).

<sup>67</sup> *Id.*

<sup>68</sup> Sung-mi Ahn, *Controversial Harvard Professor Claims No Contemporary Evidence on Comfort Women*, KOREA HERALD (Jan. 6, 2022), <https://www.koreaherald.com/view.php?ud=20220106000855>. On the criticism to Ramseyer's argument, see Yuji Hosaka, *Contracting for Sex? "True Story" of the so-called "Comfort Women" during World War II*, 14 J. EAST ASIA & INT'L L. 161-77 (2021), [http://journal.yiil.org/home/archives\\_v14n1\\_09](http://journal.yiil.org/home/archives_v14n1_09).

<sup>69</sup> Pyong-gap Min, *The "Comfort Women" Issue Is an Issue of Human Rights of Victimized Asian Women*, HANKYOREH DAILY (May 3 2022), [https://english.hani.co.kr/arti/english\\_edition/english\\_editorials/1041442.html](https://english.hani.co.kr/arti/english_edition/english_editorials/1041442.html).

<sup>70</sup> *Address by President Yoon Suk-yeol on Korea's 77th Liberation Day*, KOREA TIMES (May 3, 2022), [https://www.koreatimes.co.kr/www/nation/2022/08/356\\_334423.html](https://www.koreatimes.co.kr/www/nation/2022/08/356_334423.html).

the so-called 2015 Agreement as ‘official.’<sup>71</sup>

## IV. Evaluation of the Japanese Comfort Women System under International Law

When the Japanese military operated the so-called comfort stations, Japan was not only bound by international treaty law, but also obliged to comply with customary international law. Slavery was already prohibited as a norm of customary international law when Japan forced more than 200,000 women into sexual slavery between 1932 and the end of World War II.<sup>72</sup> Article 1 of the 1926 Slavery Convention defines ‘slavery’ as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>73</sup> According to Geoffrey Robertson,

the precise point at which slavery became prohibited by international law is impossible to fix: there was no defining moment like the Nuremberg Judgment, but rather an accumulation of treaties throughout the nineteenth century and a gradual abandonment by the Great Powers of their toleration of the practice ... The point came somewhere between 1885 (the Treaty of Berlin forbidding slave-trading) and 1926, when the Slavery Convention confirmed that states had jurisdiction to punish slave traders ...<sup>74</sup>

Japan also violated the prohibition of rape which has also been viewed as a norm under customary international law for a long time.<sup>75</sup> Examples of early codifications include the Treaty of Amity and Commerce between the United States and Prussia of 1785,<sup>76</sup>

<sup>71</sup> *South Korea's next Top Diplomat Says 2015 'Comfort Women' Pact with Japan is Official*, JAPAN TIMES (Apr. 20, 2022), <https://www.japantimes.co.jp/news/2022/04/20/national/comfort-women-agreement/>.

<sup>72</sup> For details on the status of slavery, see Carmen M. Argibay, *Sexual Slavery and the Comfort Women of World War II*, 21 BERKELEY J. INT'L L. 375-89 (2003).

<sup>73</sup> The 1926 Slavery Convention, OHCHR, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>. However, it should be noted that Japan did not ratify the Convention.

<sup>74</sup> GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 303 (2012).

<sup>75</sup> On rape and other forms of sexual violence, see generally ALEXANDRA ADAMS, DER TATBESTAND DER VERGEWALTIGUNG IM VÖLKERSTRAFRECHT (2013); Kelly Askins, *Treatment of Sexual Violence in Armed Conflicts: a Historical Perspective and the Way Forward*, in SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 19-55 (Anne-Marie de Brouwer et al. eds., 2013).

<sup>76</sup> Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, art. 23.

the Lieber Code,<sup>77</sup> and the Declaration of Brussels in 1874.<sup>78</sup> Although The 1907 Hague Convention did not mention rape or sexual assault as a war crime, it called upon states that “[f]amily honour and rights, the lives of persons ... must be respected.”<sup>79</sup>

Many experts on the comfort women issue including the *UN Special Rapporteurs* Gay McDougall and Coomaraswamy view the enslavement, and widespread and systematic acts of rape committed against the comfort women as a crime against humanity. This type of mass crime was for the first time defined in Article 6c of the Nuremberg Charter and in an almost identical way in Article 5c of the Tokyo Charter. According to the Nuremberg Charter, “crimes against humanity” may be defined as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>80</sup>

While today it is widely accepted that crimes against humanity are firmly established in customary international law<sup>81</sup> and even rise to the level of *jus cogens*,<sup>82</sup> scholars are divided on the question of whether crimes against humanity already existed under international law or whether the drafters of the Nuremberg Charter adopted new law. While there is evidence that the term crimes against humanity had been in use before 1945, there was no formal codification of crimes against humanity.<sup>83</sup> The Charter of the International Military Tribunal for the Trial of the Major War Criminals was the first instance of positive international criminal law. As explained by Cryer, *et al.*, “many argued that the principle of non-retroactivity had to give way to the overriding need for accountability for large-scale murder and atrocities recognized as

<sup>77</sup> Project of an International Declaration concerning the Laws and Customs of War. Brussels, art. 38.

<sup>78</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code), art. 44.

<sup>79</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 46.

<sup>80</sup> Charter of the International Military Tribunal; Charter of the International Military Tribunal for the Far East.

<sup>81</sup> There is no specialized international convention but crimes against humanity have been included in Article 7 of the International Criminal Court statute; Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); and Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR).

<sup>82</sup> *Jus cogens* (compelling law) may be defined as “a norm accepted and recognized by the international community as a norm from which no derogation is permitted.” See Article 53 of the Vienna Convention on the Law of Treaties 1969. For details, see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 210-7 (1999). See also S. Kadelbach, *Staatenverantwortlichkeit für Angriffskriege und Verbrechen gegen die Menschlichkeit*, in *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, ENTSCHÄDIGUNG NACH BEWAFFNETEN KONFLIKTEN, DIE KONSTITUTIONALISIERUNG DER WELTHANDELSORDNUNG* 104 (2003).

<sup>83</sup> *E.g.*, the European powers labelled the atrocities committed against the Armenians as crimes against humanity.



criminal by all nations.”<sup>84</sup>

In addition, Japan violated international treaty law. Japan was a party to the following conventions: International Agreement for the Suppression of White Slave Traffic of 1904; International Agreement for the Suppression of White Slave Traffic of 1910; International Convention for the Suppression of White Slave Traffic; International Convention for the Suppression of Trafficking in Women and Children of 1921; and the 1930 International Labour Organization Convention Concerning Forced Labor (ILO Convention No. 29). Many of the comfort women were minors and Japan had an obligation according to Articles 2 and 3 of the International Convention for the Suppression of Traffic in Women and Children of 1921 to punish those engaged in trafficking of women and children. Japan further violated the 1930 International Labour Organisation Convention concerning Forced Labour (ILO Convention No. 29) ratified in 1932.

The Japanese government has consistently argued that it addressed and settled all issues relating to WW II through the San Francisco Peace Treaty, bilateral peace treaties and other relevant international agreements. Even earlier, by signing the San Francisco Peace Treaty of 1951,<sup>85</sup> Tokyo had recognized South Korea as a sovereign state. In support of the argument that the comfort women’s right to compensation was extinguished, Japan could refer to Article 2(1) of the Claims Agreement that all issues in regard to property and claims between Japan and South Korea had been settled “completely and finally.”

However, the correct interpretation appears to be that of the 1965 Claims Agreement had the purpose of settling the financial and civil creditor-debtor relationship between Japan and Korea.<sup>86</sup> In the 2012 unprecedented decision on the compensation for forced labor, the Supreme Court of South Korea held:

It is difficult to conclude that the right to compensation for crimes against humanity where state power was directly involved in, or crimes directly connected to colonization, was included in the scope of application of the Claims Agreement.<sup>87</sup>

<sup>84</sup> ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 188-9 (2007). For details on the principle of *nullum crimen sine lege* and the incorporation of crime against humanity in the Nuremberg Charter, see WILLIAM SCHABAS, *UNIMAGINABLE ATROCITIES* 47-72 (2012).

<sup>85</sup> San Francisco Peace Treaty, art. 2(a).

<sup>86</sup> For a different view, see Teraya, *supra* note 16, at 204. Professor Teraya also argues that the Korean government should bear the responsibility for compensating the victims because it abrogated the right of its own citizens by concluding the Claims Agreement. See *id.* 205-6.

<sup>87</sup> 2000 Da 68620 Verdict, issued May 24, 2012 (Supreme Ct.) at 16.



There appears to be no public record that Seoul and Tokyo discussed the comfort women issue during the negotiation process.<sup>88</sup> In the words of the Constitutional Court of South Korea, “[t]he comfort issue was discussed neither at the Korea–Japan normalization talks aimed at signing the Agreement nor included in the eight provisions. It was not even specified in the list of beneficiaries of compensation through legislative measures after signing the agreement.”<sup>89</sup> In addition, one may also point out that not all issues had been settled in 1965 since Japan did not acknowledge the existence of the comfort station until the mid of the 1990s.

Another major issue is whether the comfort women or only their states may claim compensation for violations of international law committed during the existence of the comfort women system from 1932 to 1945. The legal basis for individual claims could be Article 3 of The 1907 Hague Convention IV, which states: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” As to the author’s best knowledge, only the Greek first instance court in the *Distomo* decision<sup>90</sup> followed such an interpretation of Article 3. However, all courts concerned with claims from former comfort women rejected an interpretation that Article 3 of The 1907 Hague Convention IV or customary international law as it stood during the comfort women system granted a right to compensation of victims of international humanitarian law. Legal scholars have not agreed whether individuals have a right to compensation.<sup>91</sup> Contrary to state practice and jurisprudence, Frits Kalshoven claims that “it appears entirely justified to regard enemy and neutral civilians as the sole intended beneficiaries of Article 3.”<sup>92</sup> Irrespectively whether individuals have a right to remedy under Article 3 of The 1907 Hague Convention, one way to resolve the comfort women issue in general would be for the National Diet of Japan to enact a law providing compensation to the former

<sup>88</sup> GEORGE HICKS, *THE COMFORT WOMEN 188-90* (1997).

<sup>89</sup> Constitutional Court of Korea, Challenge against the Act of Omission Involving Article 3 of “Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan,” 23-2(A) KCCR 366, 2006 Hun-Ma788, Aug. 30, 2011, 134.

<sup>90</sup> Court of First Instance of Leivadia (Polymeles Protodikeio Leivadias), *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997, Judgment of 30 October 1997, 92 AM. J. INT’L L. 765 (1997).

<sup>91</sup> See e.g., Andrea Gattini, *Compensation to Victims*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 276-77 (Antonio Cassese ed., 2009); R. Wolfrum & D. Fleck, *Enforcement of International Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 708 (Dieter Fleck ed., 2008). For details, see International Law Association’s Committee for Compensation for Victims of War, *Compensation for Victims of War, Background Report Prepared by Rainer Hofmann and Frank Riemann* (Mar. 17, 2004); Rainer Hofmann, *Compensation for Personal Damages Suffered during World War II*, 2 MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW 508-19 (2012).

<sup>92</sup> F. Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces. From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond*, 40 INT’L & COMP. L.Q. 832-4 (1991).

comfort women from all countries in Asia.

## V. Position of the International Community on the Comfort Women Issue

In the past, numerous UN bodies including the Committee against Torture (CAT), the Human Rights Committee, the Universal Periodic Review of the Human Rights Council (UPR) and the ILO have adopted recommendations on how to address the issue of comfort women. They have urged Tokyo to pursue a comprehensive, impartial and lasting solution for the comfort women issue. They called upon the Japanese government *inter alia*, to express a sincere apology; to provide adequate reparation; to bring justice to those responsible for human rights violations; and to educate students and the general public about the issue, including references in textbooks.<sup>93</sup> Various congresses including the European Parliament<sup>94</sup> around the world have also adopted resolutions and recommendations on how to address the comfort women issue.<sup>95</sup> In addition to many scholars,<sup>96</sup> in 1996, the UN Special Rapporteur on Violence against Women Radhika Coomaraswamy and the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices in 1998, Gay McDougall,<sup>97</sup> the International

<sup>93</sup> See e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Report*, U.N. Doc. CERD/C/JPN/CO/7-9 (Sept. 26, 2014); Human Rights Committee, International Covenant on Civil and Political Rights, *Concluding Observations on the Sixth Periodic Report of Japan*, Civil and Political Rights, U.N. Doc. CCPR/C/JPN/CO/6 (Aug. 20, 2014); Committee against Torture, *Concluding Observations on the Second Periodic Report of Japan*, adopted by the Committee at its Fiftieth Session (May 6-31, 2013), UN Doc. CAT/C/JPN/CO/2 (June 28, 2013); Committee on the Elimination of All Forms of Discrimination against Women, *Concluding Observations of All Forms of Discrimination against Women*, UN doc. CEDAW/C/JPN/CO/6 (Aug. 7, 2009); Committee against Torture, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 2007); and the Committee of Experts of the International Labour Organization on the Applications of Conventions and Recommendations, CEAR (2003). See also *Japan's Stance on 'Comfort Women' Issue Violates Victims' Rights*, UN NEWS (Aug. 6, 2014), <https://news.un.org/en/story/2014/08/474572>.

<sup>94</sup> European Parliament, *Resolution on Comfort Women*, B6-0542/2007 (June 2011).

<sup>95</sup> A summary of resolutions by foreign assemblies from Australia, Canada, South Korea, Taiwan, The Netherlands and the United States can be found at in the appendix no.1 of the NGO Shadow Report to CEDAW Japan, 44th 2009, [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ComfortWomen\\_Japan\\_cedaw44.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ComfortWomen_Japan_cedaw44.pdf).

<sup>96</sup> See e.g., Sue R. Lee, *Comforting the Comfort Women: Who Can Make Japan Pay*, 24 U. PA. J. INT'L L. 509-47 (2003); G.J. McDougall, *Addressing State Responsibility for the Crime of Military Sexual Slavery during the Second World War: Further Attempts for Justice for the "Comfort Women"*, 1 KOREAN J. INT'L & COMP. L. 137-65 (2013).

<sup>97</sup> Appendix: An Analysis of the Legal Liability of the Government of Japan for "Comfort Women Stations" Established during the Second World War to the Report of the Special Rapporteur on Systematic Rape, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict: Final Report submitted by Ms Gay J. McDougall, U.N. Doc. E/CN.4/Sub. 2/1998/13 (June 22, 1998), <http://www.refworld.org/docid/3b00f44114.html>.

Commission of Jurists<sup>98</sup> and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery<sup>99</sup> arrived at the conclusion that the victims of the Japanese military brothel system have the right to claim compensation.

## VI. Conclusion

From the perspective of an international lawyer, true reconciliation arguably starts with a legal process addressing past human rights violations. For the comfort women inside and outside of Korea, this process has been deeply unsatisfactory. Very few perpetrators of sexual abuse have ever been held criminally responsible. Only eleven Japanese officers and comfort station operators had been convicted at the 1948 Batavia Military Trials. Only two cases brought before the International Military Tribunal for the Far East dealt in general with mass rape and sexual violence.<sup>100</sup> The act of enslavement was included as a crime against humanity in the Charter of the Tokyo Tribunal, but none of the defendants were prosecuted for crimes related to the comfort stations.<sup>101</sup> The emphasis of the Tokyo Tribunal was clearly on the prosecution of the crime against peace and war crimes. The lack of prosecution also raises the question of whether Japan had and still has a duty under international law to punish those who committed crimes against humanity.<sup>102</sup>

There are no easy answers resolving the comfort women issue. Remaining passive and not taking active steps will lead to the impression that the Japanese and the South Korean government are hoping that the problem will fade away after the death of all remaining comfort women. One critical issue is whether Japan should accept legal responsibility for the crimes committed in their so-called comfort stations during World War II. However, this is unlikely to happen as explained above. A compromise

<sup>98</sup> International Commission of Jurists, *Comfort Women: An Unfinished Ordeal* (1994), <https://www.icj.org/comfort-women-an-unfinished-ordeal-report-of-a-mission/>.

<sup>99</sup> The Prosecutors & the Peoples of the Asia-Pacific Region v Hirohito Emperor Showa and others, *The Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery*, Case No. PT-2000-1-T (Jan. 31, 2002), [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Japan/Comfort\\_Women\\_Judgement\\_04-12-2001\\_part\\_1.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Japan/Comfort_Women_Judgement_04-12-2001_part_1.pdf).

<sup>100</sup> For details on the Yamashita and Kuroda cases, *see* the judgments, <https://www.legal-tools.org/doc/c574e3/pdf>; <https://www.legal-tools.org/doc/c574e3/pdf>.

<sup>101</sup> Nicola Henry, *Silence as Collective Memory: Sexual Violence and the Tokyo Trial*, in *BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED* 263-82 (Yuki Tanaka et al. eds., 2011).

<sup>102</sup> Such a duty to prosecute may be derived from the *jus cogens* status of crimes against humanity. *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 L. & CONTEMP. PROBS. 63-74 (1996).

solution could follow the example of the German force labor compensation program. The Bundestag (German Federal parliament) established the Foundation for “Remembrance, Responsibility and Future” in 2000, which provided compensation to victims of forced labor during the Nazi occupation. More than Euro 4.4 billion were paid to 1.7 million people.<sup>103</sup> In this case, Germany only acknowledged a moral although not a legal obligation to pay compensation.<sup>104</sup>

Any settlement between Japan and South Korea should be based on a dialogue with the victims of sexual slavery. The traumatic experience of sexual slavery and being raped left many physical and emotional scars behind. Many of the comfort women never got married or could not have children. Some of them did not return to their families because they felt deeply humiliated. Very few of them are still alive. Providing them with a sincere and meaningful apology and adequate compensation would allow them to die in peace.

Received: August 1, 2022

Modified: September 30, 2022

Accepted: November 1, 2022

<sup>103</sup> Marcel Fürstenau, *Forced Labor*, DEUTSCHE WELLE (July 17, 2010), <https://www.dw.com/en/foundation-gives-voice-to-nazi-era-forced-laborers/a-5807459>.

<sup>104</sup> R. Bank & F. Foltz, *German Forced Labour Compensation Programme*, 4 MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW 426-35 (2012).