THE PRICE OF SETTLEMENT: WORLD WAR II REPARATIONS IN CHINA, JAPAN AND KOREA

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World War II litigation has roiled East Asia for the past quarter century. Asian victims of Japanese military aggression—from Taiwanese comfort women to Korean forced laborers to Chinese subjects of medical experimentation—filed more than one hundred lawsuits against the government of Japan, and dozens of large Japanese corporations. The Japanese judiciary has, pursuant to various affirmative defenses, insulated both government and corporate defendants. However, in a handful of cases, Japanese corporations settled, in spite of guaranteed judicial victory. To answer the question of why corporations settled, this Article provides the first comprehensive treatment of six settlement agreements signed by Japanese corporations and forced laborers from China and South Korea. It argues that the process and terms of settlement, upon fulfilling certain criteria, make a discrete contribution to the project of war reconciliation. After providing historical context, the Article articulates a framework to evaluate the settlement agreements, based on apology, admission of liability, public memory, and monetary compensation. It then examines the extent to which each agreement attained these remedies. The case studies show the value of openness in settlement and suggest a role in private settlement for advancing social concerns.

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I. Introduction

Cameras flashed at the Simon Wiesenthal Center in Los Angeles, but this was no red-carpet affair for the expensively dressed. Instead, Kimura Hikaru—a senior executive at Mitsubishi Materials (MMC)—made a brief speech, bowed, and apologized for his company's use of forced labor during World War II.[1] He shook hands with James Murphy, an American prisoner of war (POW) who performed forced labor for Mitsubishi in 1944 and 1945.[2] Murphy accepted Kimura's apology, striking an optimistic tone: "[t]he acceptance of this sincere apology will bring some closure and relief to the age-old

1. *See* Scott Neuman, *Japan's Mitsubishi Apologizes for Using U.S. POWs as Forced Labor in WWII*, NPR (July 19, 2015, 6:10 PM), https://www.npr.org/sections/thetwo-way/2015/07/19/424408003/japans-mitsubishi-to-apologize-for-using-u-s-pows-as-laborers-in-wwii. The video is available on line. *See* CCTV Video News Agency, *Mitsubishi Apologizes to US POWs for Forced Labor During WWII*, YouTube (July 20, 2015), https://www.youtube.com/watch?v=8Ybln8QTEl4.

2. *Id.* Murphy was captured in the Philippines; he survived the Bataan Death March (April, 1942) and served in various prisoner-of-war camps until September, 1944. He was then transported to Japan, and forced to work at the Hanawa Mine, between Tokyo and Sendai. *See* Brooke County Public Library, *American Defenders of Bataan and Corregidor Museum*, Defender of the Philippines: James Murphy, Philippine-defenders.wv.us/html/murphy_james_bio.html.

problems confronting the surviving former Prisoners of War and to their family members."[3]

A year afterward, Kimura performed the ritual again in Beijing.[4] He apologized to a roomful of Chinese reporters, lawyers, officials, and three forced laborers.[5] The Chinese venue lacked the solemnity of the Wiesenthal Center. But the atmosphere was not the only difference between the transpacific events. For the Chinese, the Beijing announcement capped a twenty-year legal battle to extract an apology and compensation.[6] MMC used 3,765 Chinese men at ten mines throughout Japan.[7] Yan Yucheng (87), who worked in a coalmine near Fukuoka, Japan,[8] sounded as upbeat as James Murphy, his nonagenarian American counterpart. Yan said, "[o]ur forced labor case today has finally come to a resolution. We have won this case. This is a big victory that merits a celebration."[9]

Not everyone cheered. Chinese lawyer Kang Jian, who represented many Chinese forced laborers from World War II, impugned Mitsubishi's motives: "[t]he company did it not for reconciliation, but to try to relieve pressure on the Japanese government."[10] Kang suggested the agreement lacked "sincer-

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3. *Neuman*, *supra* note 1.

4. Austin Ramzy, *Mitsubishi Materials Apologizes to Chinese World War II Laborers*, N.Y. Times (June 1, 2016), https://www.nytimes.com/2016/06/02/world/asia/mitsubishi-china-ww2-apology.html.

5. The forced laborers included Yan Shun (96), Zhang Yide (89) and Yan Yucheng (87). *See Sanling xiang Erzhan Zhongguo Shouhai Laogong Xiezui, Chengruo zai Ri Xiujian Jinianbei* (三菱向二战中国受害劳工谢罪，承诺在日修建纪念碑) [*Mitsubishi Apologizes to World War II Forced Laborers, Promises to Build Memorial in Japan*], People's Net, June 2, 2016, bj.people.com.cn/n2/2016/0602/c233086-28440843.html.

6. *Id.*

7. William Underwood, *NHK's Finest Hour: Japan's Official Record of Chinese Forced Labor*, Asia-Pac. J. — Japan Focus, Aug. 2006, at 1, 4.

8. Luo Pan, *Sanling zhong xiang Zhongguo Laogong Xiezui, Xingcun Laoren: Women Zheng le Kouqi* (三菱终向中国劳工谢罪幸存老人：我们争了口气) [*Mitsubishi Finally Apologies to Chinese Laborers, Old Survivors: We Sighed a Breath of Relief*], Zhongguo Xinwen Wang [China News Network], June 2, 2016, www.chinanews.com/gn/2016/06-02/7891327.shtml.

9. Ramzy, *supra* note 4.

10. *Japanese Company Apologises to War Slaves*, Sky News (June 1, 2016, 7:43 AM), https://news.sky.com/story/japanese-company-apologises-to-war-slaves-10300902.

ity" and its apology rang "empty and false."[11] She advised her clients not to settle, but to continue the lawsuit.[12]

The events in Los Angeles and Beijing reveal much about contemporary geopolitics, attitudes toward World War II, victimhood, and transnational dispute resolution. For many North Americans, World War II conjures the gauziest of memories. But in East Asia, the war generates intense disagreement, distrust, and mutual recrimination. Since the end of the Cold War, Japanese government officials have downplayed, diminished, or denied established facts about World War II.[13] In response, a range of actors—from international organizations to human rights lawyers, from civil society organizations to the survivors themselves—have demanded the Japanese government and corporate sector make reparations for the war.[14] In East Asia, war reconciliation remains a work in progress—or

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11. Fu Xinxin (付鑫鑫), *Zhongguo Laogong Suopei An Lüshi Tuan Kangjian: Sanling Gongsi Suowei 'Xiezui' Quefa Chengyi* (中国劳工索赔案律师团康健：三菱公司所为'谢罪' 缺乏诚意) [*Lawyer Kang Jian of Chinese Labor Compensation Cases: Mitsubishi's So-called "Apology" Lacks Sincerity*], XINHUA (June 2, 2016), http://www.xinhuanet.com//world/2016-06/02/c_129035020.htm. Professor Guan Jianqiang, of East China University of Political Science and Law, criticized the agreement in the following way: "[e]ven if the Settlement uses the words 'apology' or 'apologize,' it only admits to moral responsibility." *Id.* For Professor Guan, among other Chinese commentators, apology requires the defendant to acknowledge legal responsibility, an admission no companies will make.

12. *Id.*

13. *See, e.g.*, GEORGE HICKS, THE COMFORT WOMEN 182–83 (1995) (recounting testimony in Japan's Diet by a government official that the comfort women system was operated by private actors, without the involvement of the military); David. E. Sanger, *New Tokyo Minister Calls 'Rape of Nanking' a Fabrication*, N.Y. TIMES (May 5, 1994), https://www.nytimes.com/1994/05/05/world/new-tokyo-minister-calls-rape-of-nanking-a-fabrication.html (noting that Japan's then-Justice Minister Shigeto Nagano, called the Rape of Nanjing a "fabrication"). In 2007, during his first stint as Prime Minister, current Prime Minster Shinzo Abe claimed there is no "documentary evidence" that the Japanese government was involved in forcibly recruiting women to become "comfort women." Peter Van Buren, *Willful Ignorance and the Legacy of the 'Comfort Women'* (慰安婦) *in Japan*, HUFFPOST (May 22, 2017, 8:51 AM), https://www.huffingtonpost.com/entry/willful-ignorance-and-the-legacy-of-the-comfort-women_us_5922de2be4b0b28a33f62deb.

14. *See* YINAN HE, THE SEARCH FOR RECONCILIATION: SINO-JAPANESE & GERMAN-POLISH RELATIONS SINCE WORLD WAR II 7–8 (2009) (describing the relative inattention to war reconciliation in the decades after World War II, and the renewed attention to this issue since 1990).

rather many works at various stages of progress and regression.[15]

The current reparations movement began in the 1980s. In 1989, Chinese forced laborer Geng Zhun sent a letter to the Kajima Construction Company, which had enslaved Geng during the Second World War. Geng and his lawyers discussed settlement terms with Kajima company for many years, but could not agree on the amount of compensation. Geng sued Kajima in Tokyo in 1995[16]—the first of hundreds of Chinese to do so. Geng, for his part, followed in the footsteps of various Koreans, including former "comfort woman" Kim Hak-sun, who filed the first transnational reparations lawsuit on December 7, 1991—Pearl Harbor Day.[17]

From 1991 to the present, Chinese, Filipina, Korean, and Taiwanese plaintiffs have filed scores of lawsuits against both the Japanese government and roughly twenty Japanese corporations.[18] Plaintiffs initially sued in Japan, where they faced a relatively unsympathetic judiciary; while the courts rendered a handful of decisions in plaintiffs' favor, they were all overturned on appeal.

In 2007, the Supreme Court of Japan finally ruled on the wartime lawsuits, obviating the possibility of a judicial remedy

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15. To cite one potent example, consider the ongoing debates about resolving the "comfort women" issue, which include a bilateral agreement between Japan and South Korea, a dozen completed compensation lawsuits in five different jurisdictions, ongoing litigation about statues commemorating the comfort women in the United States, and a host of other issues. *See* Karen Knop & Annelise Riles, *Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the "Comfort Women" Agreement*, 102 CORNELL L. REV. 853, 858–59 n.22 (2017); *see also id.* at 858 ("In a globalized world, no one settlement can possibly resolve the Comfort Women issue once and for all.").

16. Geng Zhun v. Kajima Corp., Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 10, 1997, 988 HANREI TAIMUZU 250.

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

18. *See* NIHON SENGO HOSHO SAIBAN SORAN [OVERVIEW OF JAPAN'S POSTWAR COMPENSATION TRIALS], justice.skr.jp/souran/souran-jp-web.htm (listing one hundred compensation lawsuits filed in Japan, including plaintiffs, plaintiffs' nationalities, defendants and other information) (last visited Jan. 5, 2019).

in Japan.[19] When plaintiffs sued elsewhere—the United States, China, South Korea—courts dismissed the cases as time-barred, waived by treaty, or a non-justiciable political question. For two decades, it did not matter whether one filed in Beijing or Busan, Sapporo or San Francisco, the outcome was more or less the same: plaintiffs lost.[20] That state of affairs changed with a 2012 decision by the Korean Supreme Court against Mitsubishi, the reverberations of which continue roiling the Korean judiciary and Japan-Korea relations.[21]

Within Japan, however, a small number of corporations unexpectedly settled the cases, begging the question of why the corporations would settle if they were practically guaranteed to win in court. In 1997, still relatively early in the war reparations litigation movement, a Japanese steel manufacturer settled a lawsuit it actually won in the first instance.[22] That company, Nippon Steel, paid ¥2 million—about $17,000—to the living heirs of forced laborers killed during the war, the first time a corporation settled a war reparations lawsuit.[23] The settlement agreement introduced remedies—memorial services for the dead, monuments commemorating their lives, individual payments to family members—that now form a canon of reparative techniques. This remedial reper-

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19. Song Jixiao v. Nishiamatsu Constr. Co., Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, 1969 HANREI JIHO 31, *translated in* Mark A. Levin, *Nishimatsu Construction Co. v. Song Jixiao*, 102 AM. J. INT'L L. 148, 149 (2008).

20. *See* Timothy Webster, *Discursive Justice: Interpreting World War II Litigation in Japan*, 59 VA. J. INT'L L. 161, 163-164 (2018) (describing the judicial tendency to dismiss suits due to timeliness or waiver by the appropriate treaty).

21. *See generally* Steven S. Nam, *From Individual to Collective Restitution: Recasting Corporate Accountability for Korean Forced Labor in the Second World War*, 22 U.C. DAVIS J. INT'L L. & POL'Y 1, 7–10 (2015) (describing the 2012 decision against Mitsubishi). Since 2012, forced laborers have filed over a dozen lawsuits in South Korea, with several winning at both trial and appellate levels. *See Court rules Mitsubishi must pay compensation to forced labor victims*, KOREA HERALD, Aug. 8, 2917 (noting fourteen lawsuits ongoing in Korea as of 2017).

22. *See infra* notes 97–120 and accompanying text.

23. *See Shin Nittetsu Kyosei Renko, Hatsu no Wakai, Kankokujin Izoku ni Nisenmanen* [*Nippon Steel Forced Mobilization, First Settlement, 20 Million Yen for Korean Heirs*], HOKKAIDO SHINBUN CHOKAN [HOKKAIDO NEWS MORNING EDITION], Sept. 22, 1997 ("This is the first forced labor lawsuit to settle. It is likely to have a major impact, not just on forced labor cases, but on all war reparations lawsuits.").

toire has expanded over time, reflecting a combination of what plaintiffs want, and what defendants will concede.

Settlement remains the road typically not taken by Japanese corporations. Out of approximately twenty-three lawsuits adjudicated in Japan, only eight Japanese corporations have settled.[24] Most Japanese corporations vigorously defend, and often reach the Supreme Court.[25] Moreover, the very companies that settled these lawsuits—Mitsubishi, Fujikoshi, NKK—are defending multiple lawsuits in South Korea at the time of this writing.[26] This suggests that even within the same corporation, divergent solutions emerge.

The first step in comprehending settlement agreements involves evaluating, comparing, and interpreting them. Key questions in this analysis include: what do plaintiffs want? What do they get? What do they *not* get? Such inquiries allow development of a vocabulary for understanding settlement in cross-cultural and historical contexts.

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24. The most comprehensive list of war reparations cases that this author has seen appears online. *See* NIHON SENGO HOSHO SAIBAN SORAN [[OVERVIEW OF JAPAN'S POSTWAR COMPENSATION TRIALS], *supra* note 14 (listing one hundred war-related lawsuits, twenty-three of them brought against Japanese corporations).

25. A partial list of cases includes Han Yinglin et al. v. Nishimatsu Const. et al., [Tokyo Dist. Ct.] Mar. 11, 2003 (citation of unpublished opinion, dismissed), *aff'd* [Tokyo High Ct.] Mar. 16, 2006, *aff'd* [Sup. Ct.] June 15, 2007; Luo Haishan v. Kajima Constr. Co., [Nagano Dist. Ct.] Mar. 10, 2006 (citation of unpublished opinion), *aff'd* [Tokyo High Ct.] Sept. 17, 2009, *aff'd* [Sup. Ct.] Feb. 24, 2011; Song Jixiao v. Nishimatsu Constr. Co., Hiroshima Chiho Saibansho [Hiroshima Dist. Ct.], July 9, 2002, 1110 HANREI TAIMUZU 253 (dismissed as time-barred); Hiroshima Koto Saibansho [Hiroshima High Ct.] July 10, 2002, 1865 HANREI JIHO 62 (finding Nishimatsu failed to uphold its duty of safety to employees and awarding 5 million yen to each plaintiff; Saiko Saibansho [Sup. Ct.], 1969 HANREI JIHŌ 28 (settled Oct. 27, 2009). *See infra* Part IV.B. for a discussion of this case.

26. *See, e.g.*, Park v. Mitsubishi Heavy Ind., Busan High Court [Busan High Ct.], 2012Na4497, July 20, 2013 (S. Kor.) (ordering defendant to pay 80 million KRW [approximately $71,800] to each of five Korean forced laborers); Shin Chan-soo v. Nippon Steel, Seoul High Court [Seoul High Ct.], 2012Na44947, July 10, 2013 (S. Kor.) (ordering defendant to pay 100 million KRW [approximately $89,800] to each of four Korean forced laborers). Both opinions have been translated into English. *See 2012 Na 4497, Issued July 20, 2013 (Busan High Court)*, 2 KOREAN J. INT'L & COMP. L. 221–38 (Seokwoo Lee trans., 2014); *Seoul High Court 19th Civil Division Verdict*, 2 KOREAN J. INT'L & COMP. L. 109 (Seokwoo Lee trans., 2014).

This Article makes three primary contributions to scholarly discussion of international dispute resolution. First, it provides a framework for understanding and perhaps resolving the thorny morass of war reparations cases in contemporary East Asia. To be sure, lawsuits for World War II reparations represent a tiny fraction of total Japanese civil litigation. Their relative rarity does not make them unimportant. Forced labor litigation in South Korea and ongoing discussions between the Japanese and Korean governments over these disputes highlight the importance of settlement models.[27] Key to understanding the war reparation settlement agreements is the presence of *affective remedies*: statements, expressions, and manifestations of apology and remorse beyond the pecuniary.

Second, the analysis presented here informs scholarly discussions of settlement in the United States. In the United States, private settlements, even those addressing matters of great public concern, are often tight-lipped affairs. The current discussion about non-disclosure agreements is the latest salvo in a larger debate about secrecy, truth, and the release of private information for public debate.[28]

Many U.S. settlements disclose *no* public information at all; others announce the amount that changed hands.[29] For decades, the Securities and Exchange Commission pursued a policy whereby defendants would "neither admit nor deny" civil liability, even if they were found guilty on criminal

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27. *See* Jesse Johnson, *Tokyo set 30-day deadline for Seoul over talks on forced labor rulings, South Korean media reports*, JAPAN TIMES, Jan. 14, 2019 (indicating government negotiations between South Korea and Japan after the South Korean Supreme Court delivered a pair of rulings against Japanese corporations in late 2018).

28. *See, e.g.*, Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARVARD BUS. REVIEW (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (critiquing non-disclosure agreements for demanding silence and preventing employees from "speaking up against corporate culture or saying anything that would portray the company and its executives in a negative light.").

29. For example, Bill O'Reilly settled a sexual harassment case for $32 million dollars, but the terms of that settlement are not known. *See* Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html (calling it an "extraordinarily large amount [of money] for such cases.").

charges.[30] Apologies are also atypical in America.[31] Yet when a matter of public concern—a category both difficult to define and likely to grow over time—arises, settlement may demand more. Not all settlements need such elaborate procedures. But some do. When a set of settlements yields common values, reparative techniques, or historical narratives, it is worth asking how, why, and to what end.

Third, this Article informs scholarly discussions of transborder settlement in a comparative context. Scholars often address settlement within a domestic legal system; a vast academic literature examines settlement in the United States.[32] However, negotiations grow complicated once plaintiffs cross borders. Plaintiffs and defendants must negotiate linguistic, cultural, professional, and personal barriers. This Article views settlement as a contest of wills, where both parties pay a price to achieve settlement. Any individual settlement proceeds from what the defendant will admit to, or apologize for, and what redress the plaintiff will accept.[33] For defendants, that price may run to the millions of dollars, and perhaps more.[34] For each individual plaintiff, the price hovers between $7,500

30. The SEC changed the language of the policy in 2012. *See* Public Statement, Robert Khuzami, U.S. Securities and Exchange Comission, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), https://www.sec.gov/news/public-statement/2012-spch010712rskhtm. Under the "traditional" approach, a defendant could be found guilty of criminal conduct, yet settle civil charges without admitting or denying civil liability. That approach changed in 2012, because it "seemed unnecessary for there to be a 'neither admit' provision." *Id.*

31. *See* Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 Cornell L. Rev. 1261, 1262 (2006) ("Many civil rights plaintiffs want apologies. Few ever get them.").

32. *See supra* notes 24–28 and accompanying text.

33. *See infra* Part III.B (discussing the NKK company's refusal to apologize or admit liability for permanently maiming plaintiff Kim Kyeong-seok); *infra* Part III.C (recounting how the Fujikoshi Company president refused to apologize to Korean forced laborers).

34. *See infra* Part IV.A (estimating the Kajima settlement to cost $4.6 million); *infra* Part IV.C (estimating the Mitsubishi settlement to cost as much as $56 million).

and $17,000.[35] These numbers are analogous to compensation reparations schemes in the United States and Europe.[36]

The Article proceeds in five parts. Part II briefly introduces relevant scholarship on settlement in the United States and Japan. Part III builds on this foundation and articulates a framework to understand war reparations settlements, drawing on legal scholarship, sociology, communications, and cultural studies. With this interdisciplinary lens, it establishes a four-part framework for evaluating each of the settlement agreements. Parts IV and V provide "thick description[s]" of six settlement agreements involving Japanese corporations and forced laborers.[37] Part IV examines settlement agreements with Korean forced laborers, and Part V, with Chinese forced laborers. Part VI distils lessons from the war reparations lawsuits, their successes and failures, before discerning their contribution to the broader project of reconciliation for World War II. A conclusion in Part VII teases out implications for the study of cross-cultural settlement more broadly.

II. SETTLEMENT

Settlement has generated an enormous body of scholarly reflection in the United States, and a smaller corpus of materials in Japan. The following section examines some of that literature, mindful of the fact that the focus here is on transnational litigation in East Asia.[38] A few salient elements are

35. *See infra* Table 1 (listing Korean settlements); *infra* Table 2 (listing Chinese settlements).

36. The Civil Liberties Act of 1988 paid each Japanese-American $20,000 for interment during World War II. 50 U.S.C. §§ 4211–20 (2018). The German Remembrance Fund of 2000 paid either $2,500 or $7,500 to forced laborers enslaved by the Nazi industrialists. Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Law to Create the "Remembrance, Responsibility and Future" Foundation], Aug. 2, 2000, BGBL I at 1263 (Ger.).

37. A thick description examines the "complex layers of understanding foreign law (rules, principles, institutions, doctrines, customs, etc [sic]) that structure the world of law." JAAKKO HUSA, A NEW INTRODUCTION TO COMPARATIVE LAW 206 (2015). Here, a thick description provides the necessary background to help Western readers, and U.S. readers in particular, make sense of the events, compromises, and larger political issues at stake in each of these war reparations settlements.

38. Settlement has been subjected to various interdisciplinary investigations in the past few decades. Law and economics scholars tend to favor

worth raising. First, as Professor Owen Fiss of Yale Law School famously observes, coercion and abuse often accompany settlement.[39] For Fiss, settlement is an expedient by which judges clear their dockets, and defendants their consciences; it allows the stronger, more sophisticated, and generally better resourced party to avoid liability. Accordingly, settlement does not fully reckon with the underlying harm or facts.[40] Likewise, Professor Albert Alschuler of Northwestern University believes the unpredictability of trial outcomes, coupled with the procedural complexity of civil litigation, pushes many parties to settle, often prematurely.[41] Encapsulating this skeptical view of civil settlement, Professor Roy Brooks of the University of San Diego calls settlement "less a victory than a compromise."[42]

Of course, not all share Fiss' skepticism. Professor David Luban of Georgetown argues that settlement, when its terms are presented openly, can constitute a *public good*.[43] Specifically, a properly crafted settlement can yield legal justice, an accurate account of past events, or the elaboration of public law norms, including human rights.[44] Beyond plaintiff and defendant, settlements address larger social issues and public

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settlement, as it can reduce litigation costs, and may reduce societal costs in general. *See* John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1134 (2009) (noting that, barring a few exceptions, "the vast majority of the economic literature on settlement takes a wholly positive view"). Another line of inquiry comes from behavioral law scholars, who emphasize that litigants are generally *not* efficient wealth maximizers, but instead seek psychological, moral, or other aims through litigation. *See, e.g.*, Jeffrey J. Rachlinksi, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996) (finding that plaintiffs are irrationally risk averse when faced with the prospect of the fixed gain of settlement).

39. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Fiss calls settlement "a highly problematic technique for streamlining dockets," "the civil analogue of plea bargaining," and "a capitulation to the conditions of mass society." *Id.*

40. *Id.* at 1085 ("[W]hen the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.").

41. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1821–31 (1985).

42. Roy L. Brooks, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH 3, 9 (Roy L. Brooks ed., 1999).

43. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2647 (1995).

44. *Id.* at 2620.

goals, such as healing, remembrance, or atonement.[45] Professor Carrie Menkel-Meadow of the University of California, Irvine suggests that settlements embody, generate, and amplify values such as participation, consent, empowerment, dignity, and catharsis.[46]

In other words, settlement can theoretically help restore public trust and generate goodwill among disparate people. As international and local media report on war reparation lawsuits, the settlement agreements may promote reconciliation—a task that the governments of China, Japan, and Korea have either sidestepped or handled ineffectively. It is at least *conceivable* that settlements—properly constructed and correctly stated—repair the damaged relationships between the parties. The effect these agreements have on the international relations between these countries is another matter.

In Japan, settlement has a unique significance.[47] First, it is generally considered part of Japanese legal tradition. As Judge Iwai observes, Japanese civil "courts operate in the context of a very strong, popular and traditional preference for resolution by compromise. For these and other reasons, Japanese judges intervene extensively during in-court settlement."[48] Such pres-

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45. *Id.*

46. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669–70 (1995).

47. In using the term settlement, this article follows East Asian linguistic conventions, which do not map perfectly onto English-language legal conventions. Chinese, Japanese, and Korean commentators use the word *settlements* (和解): *hejie* (Chinese), *wakai* (Japanese), *hwahae* (Korean). In each language, settlement refers to an agreement between litigants to conclude a civil lawsuit pursuant to specified conditions. That is what these are, arrangements between Japanese corporations and their former forced laborers. The verdicts largely favored Japanese corporations. Yet, even after some corporations won their lawsuits, they still wanted to settle. In the Nishimatsu case, for example, the Supreme Court of Japan delivered a final judgment, thereby ending the lawsuit. *See infra* Part IV.B. Nevertheless, Supreme Court Justice Nakagawa Ryoji encouraged the parties to continue working towards reconciliation. The parties settled the case two years later, though the precise function of the justice's exhortation is not clear. Chinese and Japanese scholars refer to this as a *settlement*, though it took place after final judgment. It might be possible to call them conciliations; but for ease of reference the present article uses the word settlements.

48. Nobuaki Iwai, *Alternative Dispute Resolution in Court: The Japanese Experience*, 6 J. DISP. RESOL. 201, 201 (1991). "[E]very Japanese judge is expected,

sure means that approximately thirty percent of Japanese civil litigation ends in settlement.[49] In the war reparations lawsuits, many judges have urged the parties to settle, including Supreme Court Justice Nakagawa Ryoji.[50] However, without a shared sense of which party is responsible for what conduct, plaintiffs and defendants are unlikely to settle.[51]

The functional achievements of each settlement must be evaluated by the way it advances the parties' particular goals and how skillfully it balances their respective interests.[52] Settlement traces a middle ground—jagged, unique, and lopsided—between what each party wants and what it is prepared to offer. In the ensuing compromise, each side obtains only a fraction of its desiderata.[53] Given the unequal bargaining power in

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indeed almost required—both by law and by the litigants—to move the lawsuit towards settlement." *Id.*

49. *See* Eric A. Feldman, *No Alternative: Resolving Disputes Japanese Style*, *in* FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION 130, 135 (Joachim Zekoll et al. eds., 2014). Professor Feldman adds that roughly a third of cases reach a final judgment, and a final third are dropped during the process of litigation. *Id.* at 135.

50. Nishimatsu Const. Co. v. Song Jixiao, Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, 61 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1188 (Japan). Justice Nakagawa noted that the individual's legal claim had been waived by the San Francisco Peace Treaty, but "expected that the parties, including Nishimatsu, to continue to work towards remedying the victims' harm." A copy of the Justice's remarks appears in MATSUOKA HAJIME, NITCHU REKISHI WAKAI E NO MICHI [THE ROAD TO RECONCILIATION IN SINO-JAPANESE HISTORY] 188 (2014). One year after the Supreme Court decision, Judge Ishi Kôji tried to settle a case against the Japanese government, Mitsui Mining, and Mitsubishi Materials at the Fukuoka High Court. In the end, the government rejected the agreement, and the corporations followed suit. *See* Inamura Haruo, *Chugokujin Kyosei Renko, Kyosei Rodo: Fukuoka Nijin Sosho* [*Chinese Abduction & Forced Labor: The Second Fukuoka Case*], *in* HOTEI DE SABAKARERU NIHON NO SENSO SEKININ [THE ADJUDICATION OF JAPAN'S WAR RESPONSIBILITY] 259, 264 (Zukeyama Shigeru ed., 2014).

51. J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 266–70 (1989) (finding that parties are most likely to settle when they can accurately predict damages awards).

52. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1388 (1994). Galanter and Cahill argue that settlement can effectuate better outcomes because it more closely attends to the facts and party preferences, and accommodates a broader range of norms, than adjudication. *Id.* at 1372–73.

53. *See* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 69 (2016) (noting that neither party may be

many settlement negotiations, as Fiss warns, the more sophisticated party—here, the defendant—will take advantage of its privileged position to influence the outcome.[54]

Settlement presents the possibility of insulating the defendant from future litigation, effectively bringing an end to decades of legal wrangling. If the settlement extinguishes individual claims and establishes a mechanism for handling future claims, the corporation may obtain "legal peace."[55] When courts approve these schemes, future plaintiffs may have to accept the redress schemes, even if they did not participate in their creation. Guarantees of this type are usually needed to secure defendant's willingness to settle in the first place. Both sides benefit from the *finality* created through such guarantees. The litigated events occurred in the 1940s but were never subsequently addressed by postwar reparative mechanisms. The chance to remediate this portion of plaintiffs' personal and cultural history holds enormous appeal.

Settlements are also mutable, providing a bespoke set of solutions, and reaching where judicial decisions may not. In Japanese tort law, the primary remedy is monetary compensation,[56] though apology is available when Plaintiff shows Defendant harmed her *reputation*.[57] Courts generally do not de-

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satisfied with the settlement. Instead, the parties believe the settlement offer is better than every other alternative).

54. *See e.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 174–75 (1987) (recounting how plaintiffs' attorneys claimed they lacked sufficient information about the medical problems of Agent Orange to evaluate the fairness of settlement).

55. For example, in the Holocaust litigation, the United States signed an Executive Agreement with Germany that committed the U.S. government to seek dismissal of any lawsuit filed in the United States against German corporations for Holocaust-related events. *See* Statement of Interest of the United States: Preliminary Statement at 1, *In re* Nazi Era Cases Against Ger. Defendants Litig., 129 F. Supp. 2d 370 (D.N.J. 2000) (No. 98-4104). An agreement between the governments of South Korea and Japan, or China and Japan, is theoretically possible, if unlikely, given the governments' relative inattention to the forced labor issue.

56. *See* MINPO [CIV. C.] art. 722, para. 1 (Japan) (allowing "compensation for damages in tort").

57. *See* MINPO [CIV. C.] art. 723 (allowing courts "to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages"). In addition, injunctive relief may be available in cases where constitutional violations have occurred. *See* HIROSHI ODA, JAPANESE LAW 197 (3d ed. 2011).

mand defendants apologize, and none of the cases discussed herein yielded court-ordered apologies. In the context of serious human rights abuses, particularly in the cases discussed here, where most plaintiffs were never paid a wage, monetary compensation is necessary but not sufficient.[58] Plaintiffs also seek to reclaim their dignity, restore their reputation, correct the historical record, and vindicate grievances they may bear. Unconstrained by the Civil Code, settling parties can include measures better suited to what they want. In so doing, settlements have produced a vocabulary of remediation that enriches today's understanding of settlement's potential fruits.

III. A Framework for War Reparations Settlements

In all likelihood, there is no universally ideal settlement scheme. Instead, each agreement must attend to the contingencies of the dispute. A settlement is shaped, *inter alia*, by parties' willingness to enter negotiations, their lawyers' negotiating skills and communicative abilities, financial resources, the gravity of underlying harm, the amount of compensation sought, pressure from the presiding judge or outside actors, and a basic willingness to compromise.

Settlement is particularly fraught in the present context, which addresses human rights abuses across international boundaries, class divisions, gender lines, and decades of history. The economics of settlement are discussed elsewhere, and many scholars agree that settlement may well be a rational and efficient response to certain types of disputes.[59] However,

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58. *See* Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples*, 25 Duke J. Comp. & Int'l L. 1 (2014) (describing reparations ordered by the Inter-American Court). Professor Antkowiak notes that "monetary reparations frequently disappoint." *Id.* at 3. Instead, other remedial forms—such as legislative reform, health care programs, cultural promotion initiatives and public apologies—may have a greater impact on the process of reparation. *Id* at 46–62.

59. The conventional wisdom is that legal disputes have a certain expected value calculated as the *probability* of a favorable judgment multiplied by the *expected* damages award. Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 Emory L.J. 619, 620 (2006). Rhee lists the relevant scholarship on the efficiency of settlement. *Id.* at 621 n.2. Note that much U.S. scholarship focuses on settlement *before* final judgment. That is generally not the case here. Most of these cases had at least a trial court decision, which the corporation generally won. One had a final judgment from the Supreme Court.

these cases are not really about money. Instead, forced laborers seek various forms of redress for the physical, psychological, dignitary, and emotional harms they suffered. Based on the plaintiffs' own complaints, demands from other victims, and relevant scholarship, this Article posits a four-part typology to evaluate these settlements: (1) apology; (2) acknowledgment of liability; (3) memorialization, either ritual or concrete; and (4) monetary compensation. This typology inverts the monetary concerns often associated with settlement in the United States.

This Article argues that satisfaction, and not monetary compensation, primarily drives these settlements. Under international law, satisfaction may refer to many types of reparations: commemoration of victims, searching and repatriating the remains of the deceased, apologies, public memorials, full disclosure of the truth, and sanctions for the culpable.[60] The thirst for satisfaction drew out many forced laborers in the first place.[61] Even before the transnational litigation movement began, Chinese forced laborer Geng Zhun sent an open letter to his wartime employer, the Kajima Construction Corporation.[62] In December of 1989, Mr. Geng, as head of a recently-formed war victims group, demanded Kajima (1) issue an apology; (2)

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60. *See* G.A. Res. 60/147, pmbl., ¶ 22 (Dec. 16, 2005) (listing various types of satisfaction available to "victims of gross violations of international human rights law and serious violations of international humanitarian law"). For instance, plaintiffs generally do *not* seek restitution—a return to the *status quo ante* before World War II. Likewise, plaintiffs have *not* requested the corporation to refrain from further injury, probably because these firms are not about to abduct or enslave laborers. However, it is conceivable that a settlement would require the corporation to respect its workers' rights and abide by international labor standards in future business dealings. *See* GUAN JIANQIANG (管健强), KUAYUE DUI RI MINJIAN SUOPEI DE FALU ZHANG' AI (跨越对日民间索赔的法律障碍) [OVERCOMING LEGAL OBSTACLES TO CIVIL COMPENSATION AGAINST JAPAN] 123 (2006).

61. *See* Elisabeth Rosenthal, *Wartime Slaves Use U.S. Law to Sue Japanese*, N.Y. TIMES (Oct. 2, 2000), https://www.nytimes.com/2000/10/02/world/wartime-slaves-use-us-law-to-sue-japanese.html (describing cases brought in state and federal courts wherein victims demanded compensation and apologies). Most Korean and Chinese plaintiffs in the Japanese lawsuits also made these two demands.

62. NOZOE KENJI, HANAOKA WO WASURERU NA: KO SHUN NO SHOGAI [DON'T FORGET HANAOKA: THE LIFE OF GENG ZHUN] 153 (Nozoe Kenji ed., 2014). During World War II, Kajima ran a copper mine in Hanaoka, Japan, which is near present-day Ôdate, Akita Prefecture.

build memorial halls "for the martyrs of Hanaoka" in both China and Japan; and (3) pay 5 million yen (about US$35,000) to each of the 986 Chinese laborers that Kajima used at the mine.[63] The memorials would allow "visitors to mourn martyrs' deaths" and "educate future generations" about the Hanaoka Incident.[64]

Other war victims have made similar reparative demands. In 1990, Korean "comfort women"[65] wrote an open letter to Japanese Prime Minister Kaifu Toshiki,[66] demanding that his country: (1) recognize the forcible nature of the comfort women system; (2) issue a public apology; (3) disclose the government's full involvement in the comfort women system; (4)

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63. Guo Xu (郭绪), *Riben Gei Zhongguo Laogong Erzhan Bei Hong Hui Luanhua Le?* (日本给中国劳工二战赔款被红会乱花了?) [*Did the Red Cross Squander Japan's Compensation for Chinese Forced Laborers from World War II?*], Fazhi Zhoumo (法治周末) [Legal Weekend] (Nov. 15, 2011), http://history.people.com.cn/BIG5/205396/16254354.html; Fukuda Akinori, *Kajima Kensetsu: Kyosei Renko no Kigyo Sekinin Mitomeru* [*Kajima Construction: Recognizing Corporate Responsibility of Forced Transportation*], *in* Nihon Kigyô no Senso Hanzai [War Crimes of Japanese Enterprises] 154, 154 (Kosho Tadashi et al. eds., 2000). Both the apology and memorial hall constitute a type of satisfaction. G.A. Res. 60/147, *supra* note 58, ¶ 22. The apology, memorial site and monetary compensation have become the three principles of compensation for Chinese victims. Historian Liu Baochen of Hebei University, whose research has played an important role in the compensation movement, told reporters that "the most important thing is to realize our three requirements: compensation, apology, monument." Qi Fei (齐飞), *Zhongguo Laogong Wunai Yu Ri Fang Hejie: Lushi Ri hou Suopei Cheng Zhang'ai* (中国劳工无奈与日方和解：律师忧日后索赔成障碍) [*Chinese Laborers Have No Choice But to Settle with Japan: Lawyers Worry about Future Obstacles to Compensation*], Xinhua (Nov. 3, 2009), news.sohu.com/20091103/n267921800.shtml.

64. Nozoe, *supra note* 62, at 153–54.

65. As far back as 1932, and throughout World War II, Japan drafted hundreds of thousands of women—mostly Korean, but also Chinese, Taiwanese, Filipina, Dutch, Indonesian and Malaysian—to provide sexual services to the Japanese military. Installed at so-called "comfort stations," often annexed to military bases, these women and girls were raped by Japanese soldiers, serving "as many as 60 to 70 men per day." Econ. & Soc. Council, *Rep. on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Iussue of Military Sexual Slavery in Wartime*, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996). To be sure, not *all* the women were coerced into this system, but a large number certainly was.

66. Bonnie B. C. Oh, *The Japanese Imperial System and the Korean "Comfort Women" of World War II*, *in* Legacies of the Comfort Women of World War II 3, 16 (Margaret Stetz & Bonnie B.C. Oh eds., 2000).

erect a memorial; (5) provide monetary compensation; and (6) include the topic of comfort women in public education.[67] All of these remedies—with the exception of monetary compensation—sound in satisfaction.

Given the importance of satisfaction, much of the following discussion centers around the forms most commonly found in the settlement agreements: (1) apology, (2) acknowledgement of legal liability, and (3) memorialization. Monetary compensation also features in the settlements and figures into this discussion, both for its economic and symbolic value. Each settlement contains at least one of the four elements, and the latter agreements contain several. Before reviewing the agreements, it is useful to explore the four categories and situate them in their socio-cultural context.

A. *Apology*

Apology may well be the primary animus of these lawsuits. As social science research shows, apology is a nuanced ritual.[68] The complexity stems from its multiple roles. An apology can, in no particular order, acknowledge the grievance, specify the violation, enforce respect for proper treatment, admit fault, express regret, show concern for the future, or assure the act will not happen again.[69] Social scientists have pruned the list down in various ways, but generally include some combination of acknowledging the offense, communicating remorse, and explaining why it happened.[70]

While the importance of apology cannot be overstated, its cultural specificity cannot be denied.[71] In the current con-

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67. *Id.*

68. A smattering of that literature is explored below. *See infra* notes 67–105 and accompanying text.

69. Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 239 (1999).

70. This is the formula proposed by the late Aaron Lazare, a leading apology theorist. AARON LAZARE, ON APOLOGY 110–13 (2005) (recounting a several examples of apologies that involved some form of acknowledgement, remorse, and explanation).

71. *See* Letitia Hickson, *The Social Contexts of Apology in Dispute Settlement: A Cross-Cultural Study*, 25 ETHNOLOGY 283, 283 (1986) ("Although . . . apology is used in many cultures, these cultures differ in the extent to which their members stress apology as a redressive technique.").

text—where Japanese corporations apologize to Korean victims, Chinese victims, and their heirs—the opportunities to offend abound; the casual apologist runs a risk that cultural differences may render his apology moot or seemingly insincere.[72] Given the plaintiffs' cultural expectations on one side and the defendants' practices on the other, even a good-faith apology may fall on deaf ears.[73]

It is perhaps no surprise that the legal systems of China, Japan, and Korea allow apology in civil defamation actions.[74] In Japan in particular, a court may order defendant to publish an apology if it would restore the plaintiffs' honor or good

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72. Xiaowen Guan et al., *Cross-cultural Differences in Apology*, 33 INT'L J. INTERCULTURAL REL. 32, 43 (2009) (noting that "foreigners can be seen as communicatively incompetent" if their apology does not subscribe to the norms of the host country).

73. I acknowledge the risk of cultural essentialism in the foregoing paragraphs. Cultures change, institutions strengthen and atrophy, and exceptions dog every rule that one can make about "China" or "the Japanese." Nonetheless, culture must inform any analysis of foreign jurisprudence, lest we unwittingly superimpose American values or expectations on systems born of different soil.

74. China has fairly strong protection of reputational rights. *See* Minfa Tongze (民法通则) [General Principles of Civil Code] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 120 (China) (listing apology as an available remedy for violations of the right to name, image, reputation and honor); Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L.J. 33, 90 (2006). Professor Liebman notes the publication of court-approved apologies is common when plaintiffs prevail in civil defamation. *Id.* at 91. This helps explain the frequency with which Chinese plaintiffs requested apologies. In Japan, the Civil Code allows courts to take "suitable measures to restore the plaintiff's honor." MINPO [CIV. C.] art. 723. Japanese courts order apologies when (a) there is defamation, (b) plaintiff requests it, and (c) it is "necessary to restore the plaintiff's honor." MARK D. WEST, SECRETS, SEX, AND SPECTACLE: THE RULES OF SCANDAL IN JAPAN AND THE UNITED STATES 80 (2006). One study showed that apology was granted in about 30% of Japanese cases where damages were awarded. *Id.* In Korea, a defamed party can request the defaming defendant apologize in print. As in Japan, the Korean Civil Code provides for "proper measures" by which to "recover the defamed reputation." Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act. No. 14965, Oct. 31, 2017, art. 764. (S. Kor.). In practice, court-ordered publication of apology is "well-established" in Korean case law. Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205, 205 (2000). This too helps explain the importance of apology to Korean plaintiffs.

name.[75] The practice of apology forms an essential part of the reparative repertoire that forced laborers seek from Japanese corporations.

Broadly speaking, China, Japan, and Korea share a degree of cultural overlap. For the past two millennia, Japan and Korea have borrowed heavily from Chinese culture, language, law, philosophy, literature, religion, and other fields.[76] To different degrees, and at various times during those two thousand years, Chinese values held sway in Korea and, to a lesser extent, Japan. At the risk of overgeneralization, one might say China, Japan, and South Korea constitute Confucian,[77] collectivist,[78] high-context[79] societies. These traits inform the practice of apology in distinct ways.

Confucianism commands a certain decorousness. Confucius himself attached great importance to ritual and assumed a

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75. MINPO, art. 723.

76. As Professor Charles Armstrong of Columbia University states, "[t]hrough much of its history Korea has been greatly influenced by Chinese civilization, borrowing the written language, arts, religions, and models of government administration from China." Charles K. Armstrong, *Central Themes for a Unit on Korea*, ASIA FOR EDUCATORS (2009), afe.easia.columbia.edu/main_pop/kpct/ct_korea.htm. Likewise, Professor Carol Gluck, also of Columbia University, notes that "Japan's cultural setting was Sinic civilization, with China as the great center of culture, from which Japan in its earliest historical times borrowed the main elements of its own civilization, from forms of government to written language to art and religion." Carol Gluck, *Central Themes for a Unit on Japan*, ASIA FOR EDUCATORS (2009), http://afe.easia.columbia.edu/main_pop/kpct/ct_japan.htm#1.

77. Confucianism would stress, among other things, family and ancestral ties, respect for elders and established hierarchies, and decorous conduct in public. *See* Tu Weiming, *Confucianism*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Confucianism.

78. Collectivism emphasizes harmonious relations with members of one's in-group, which includes family, colleagues, neighbors, and acquaintances, but devotes correspondingly little attention to outsiders like strangers, passersby, and foreigners. *See* Kendra Cherry, *Understanding Collectivist Cultures*, Verywellmind, https://www.verywellmind.com/what-are-collectivistic-cultures-2794962 (including Japan, Korea, China and Taiwan as collectivist cultures).

79. "High-context" cultures express meaning implicitly through gestures, stock phrases or other culturally significant practices, rather than explicitly through the literal meaning of the words. The listener is expected to read between the lines in order to decipher the speaker's meaning. *See* Brian Neese, *Intercultural Communication: High- and Low-Context Cultures*, SOUTHEASTERN UNIVERSITY, Aug. 17, 2016, https://online.seu.edu/high-and-low-context-cultures/.

serious air in public appearances.[80] He chose his words carefully, believing that proper terminology lay at the heart of an orderly society.[81] According to Confucian beliefs, a statement that does not apologize—i.e., employ the appropriate terminology—is no apology at all.[82] Apology can also cement Confucian values such as harmony, tolerance, and forbearance.[83]

Collectivism also informs the practice, and particularly the target, of the apology. Members of collectivist cultures direct most attention to their "in-group:" family, friends, colleagues, close neighbors and others. They devote correspondingly less attention to the "out-group:" strangers, foreigners, adherents to different religions, etc.[84] Maintaining harmony *within* the in-group is paramount in such societies, whereas apologizing to a member of the out-group may be humiliating or socially impossible.

Applied to this discussion, Japanese corporations, at least at present, would infrequently interact with the Chinese or Korean forced laborers suing them. Moreover, to the extent the corporation shares a relationship with a plaintiff, it arose through coercion and a long period of forced labor—hardly a recipe for amity. These facts increase the unlikelihood that a rich and powerful company like Mitsubishi would apologize to a working-class Chinese or Korean plaintiff.[85] In addition, the

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80. D.C. Lau, *Introduction to* CONFUCIUS, THE ANALECTS 9 (D.C. Lau transl., 1979). In Book 1, Chapter 8 of the Analects, Confucius states "A gentleman who lacks gravity does not inspire awe." *Id.* at 60. In Book 7, Chapter 38, Confucius is described as "cordial yet stern, awe-inspiring yet not fierce, respectful yet at ease." *Id.* at 90.

81. *See* Janet E. Ainsworth, *Categories & Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 21 (1996) (describing Confucianism's "long tradition of intense engagement with issues of language, including a long-standing preoccupation with the correspondence of language and reality, of the name with the named"). In Book XIII, Chapter 3 of the Analects, Confucius says, "When names are not correct . . . . the common people will not know where to put hand and foot." CONFUCIUS, *supra* note 75, at 118.

82. *Id.*

83. Ilhyung Lee, *The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 36–37 (2005).

84. Guan et al., *supra* note 72, at 33.

85. It is impossible to generalize about the hundreds of plaintiffs who have sued in the war reparations litigation movement. Yet the evidence suggests many came from working-class backgrounds. For example, when Japa-

victim may want an *individual* apology—a specific recognition of the peculiar harm he suffered. This *individuating* function of an apology may be difficult to express in collectivist cultures. The problem is particularly acute when the apologist is a corporation, but the recipient is an individual plaintiff rather than the group.

In high-context cultures, people "understand each other because they share the social context with the speaker."[86] Intentions may be conveyed indirectly, not literally through words, but by reference to broader circumstances.[87] Prescribed gestures, stock phrases, or even rituals express the apology, quite apart from the words used. A long bow expresses sincerity as effectively as reciting the phrase "I'm sorry." Better yet, the speaker combines them in a decorous ritual, as Mr. Kimura did.[88]

When persons from different cultures communicate, the likelihood of cultural miscommunication increases dramatically. If a victim expects certain terms or gestures in the apology and the non-native speaker fails to use them, the victim may reject the apology. Relatedly, the illusion of a shared culture may confound attempts to reconcile cross-cultural disputes. The Chinese, Japanese, and Korean languages share many cognate words,[89] including one for apology itself.[90] Yet

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nese human rights lawyers first sought out victims in China, they visited remote villages in Shanxi and Shandong provinces. They interviewed a group of former forced laborers in their seventies without many resources. *See* Yamada Yoshihiko, *Saiban Jitsumu kara Mita Sengo Hoshô* [*Postwar Compensation as Seen from Trials*], *in* KYÔDÔ KENKYÛ CHÛGOKU SENGO HOSHÔ: REKISHI, HÔ, SAIBAN [JOINT RESEARCH ON CHINESE POSTWAR COMPENSATION: LAW, HISTORY, TRIALS] 217, 230 (Kawashima Shin et al. eds., 2000). Consequently, many of the Japanese lawyers paid for the court costs out of their own pocket. PEIPEI QIU ET AL., CHINESE COMFORT WOMEN: TESTIMONIES FROM IMPERIAL JAPAN'S SEX SLAVES 171 (2013).

86. JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES 39 (2d ed. 2007).

87. *Id.*

88. *See* Andrew Dalton, *70 Years After WWII, Japanese Company Apologizes to US POWs*, SAN DIEGO UNION-TRIBUNE (July 20, 2015), https://www.sandiegouniontribune.com/sdut-70-years-after-wwii-japanese-company-apologizes-2015jul20-story.html (noting Mr. Kimura's bow in a private ceremony before the main event).

89. Lydia Liu shows that many of these compounds, even if constructed of "Chinese characters" may in fact have been coined by Japanese, Chinese

each culture attaches a different set of meanings to those words, suggesting they are not truly equivalent terms across the languages.[91] In addition, each language has its own rich vocabulary of words used in apologies. Whatever cultural similarities unite China, Japan and Korea, each country also has its own autonomous cultures, codes, and customs of apology.

In Korea, apology is often a critical step of the dispute settlement process.[92] Indeed, a properly-worded apology may avoid litigation in the first place.[93] Moreover, the individual act of apology may carry little weight, but "repeated apologies might be perceived as genuine expressions of regret."[94] This has implications for the present study.

Finally, as in many cultures, recipients of a Korean apology focus on the performative elements of the apology: facial expressions, eyes, tone of voice, and more.[95] Gestures amplify the significance of the message. The inclusion of commemorative rituals in Korean settlements suggests that words, important as they are, must be supplemented by actions to bring about meaningful reparation.

In China, apology focuses less on the reasons why the harm occurred and more on its consequences.[96] A Chinese recipient may wish to hear the apologist both acknowledge the harmful acts and describe how they affected him personally.[97] In addition, Chinese victims might expect an apology in situa-

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or European scholars. LYDIA H. LIU, TRANSLINGUAL PRACTICE: LITERATURE, NATIONAL CULTURE, AND TRANSLATED MODERNITY—CHINA, 1900-1937, at 259–60 (1995).

90. The two-character compound, 謝罪, can be used to translate *apology* in Chinese (*xiezui*), Japanese (*shazai*) or Korean (*sajoe*). The word was used in both the Nishimatsu and Mitsubishi settlement agreements. *See infra* Parts IV.B and IV.C.

91. For example, the Chinese word *jiuji* (救济—donation, benefits, alms, charity) and its Japanese derivative *kyûsai* (救済—remedial measure, relief for rights violation) have engendered cross-cultural confusion. *See infra* note 315 and accompanying text.

92. Choi, *supra* note 74, at 212.

93. Lee, *supra* note 83, at 36.

94. Hye Eun Lee, *The Effectiveness of Apologies and Thanks in Favor Asking Messages: A Cross-cultural Comparison Between Korea and the United States*, 43 INT'L J. INTERCULTURAL REL. 335, 347 (2014).

95. Lee, *supra* note 80, at 34, 34 n.189.

96. Peter Hays Gries & Kaiping Peng, *Culture Clash? Apologies East and West*, 11 J. CONTEMP. CHINA 173, 175–76 (2002).

97. *Id.* at 176.

tions that threaten their public self-image.[98] Chinese plaintiffs have demanded Japanese corporations apologize in Chinese and Japanese newspapers.[99] Refusal to do so may provoke resentment or lead plaintiff to reject the settlement.[100]

Observers of Japan, from the inside and the outside, have generated a rich literature on apology. On the one hand, a minority of scholars detect a preference for indirect phrases in Japanese apologies, reputedly reflecting that culture's elliptical or vague communication styles.[101] On the other hand, many scholars argue the opposite: most Japanese prefer and produce direct apologies.[102] This preference for clarity attaches both to the directness of language use, as well as the concreteness of the remedy.[103]

Regarding Japanese corporate culture, two leading scholars remark upon the frequency with which senior manage-

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98. *See, e.g.*, Hee Sun Park & Xiaowen Guan, *The Effects of National Culture and Face Concerns on Intention to Apologize: A Comparison of the USA and China*, 35 J. INTERCULTURAL COMM. RES. 183 (2006). The authors of this study point out that Americans tend to apologize more than Chinese when their actions threaten the other person's "negative face"—e.g. personal space, freedom from imposition, whereas Chinese tend to apologize more than Americans when their actions threaten the other's "positive face"—e.g. self-image, public perception. *Id.* at 199.

99. *See, e.g.*, Zhang Wenbin v. Rinko Corp., Niigata Chiho Saibansho [Niigata Dist. Ct.] Mar. 26, 2004, 50 SHOMU GEPPO 3444 (ordering the Japanese government and the Rinkô corporation to compensate and eleven former forced laborers). The slip opinion is available at justice.skr.jp/judgements/63-1.pdf. Korean plaintiffs have also sought published apologies. *See, e.g.*, Yi Jong-suk v. Fujikoshi, Toyama Chiho Saibansho [Toyama Dist. Ct.] July 24, 1996, 941 HANREI TAIMUZU 183, 183–84 (requesting a published apology in Japanese and Korean language newspapers).

100. Gries & Peng, *supra* note 97, at 177. Geng Zhun rejected the settlement agreement with Kajima in part because the company attempted to rescind its apology. *See infra* notes 275-77, and accompanying text.

101. *See e.g.*, Jeffrey Mok & Mitsuhiro Tokunaga, *A Cross Cultural Apology Episode of a Diplomatic Repair*, 8 J. LANGUAGE & POL. 72, 82 (2009) ("Japanese prefer to send implicit messages rather than showing directness in their expressions.").

102. Dean C. Barnlund & Miho Yoshioka, *Apologies: Japanese and American Styles*, 14 INT'L J. INTERCULTURAL REL. 193, 204 (1990).

103. *See e.g.*, Naomi Sugimoto, *A Japan-U.S. Comparison of Apology Styles*, 24 COMM. RES. 349 (1997). Sugimoto notes that the Japanese directly request forgiveness, whereas the Americans state a desire to be forgiven. In addition, the Japanese tend to employ *direct* offers to remediate, while Americans make conditional offers. *Id.* at 363.

ment in Japanese corporations make "abject public apology[ies]."[104] It is not uncommon to see the CEO of a major Japanese company apologize publicly, even prostrating himself before the injured party.[105]

As in Korea, a well-crafted apology may obviate formal legal sanctions altogether in Japan.[106] The candor and forthrightness of Japan's apology culture impress many American scholars, who in turn argue that defendants should adopt a similarly repentant approach.[107]

On a wider level, as Professor John Haley argues, apology can redefine social norms in Japan.[108] This is not to deny apology's restorative or reparative purpose. Rather, apology can introduce new forms of accountability and redress into Japanese society. When a Japanese corporation apologizes to a Chinese plaintiff, that act redefines the social order for both sides. It has different meanings for both the corporation and the forced labor, and of course a variety of meanings when it reaches different national and international audiences.[109]

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104. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 488 (1986). It is not uncommon for a CEO to make a public apology, complete with long and deep bow, after his—and it is almost always his—company has admitted serious wrongdoing.

105. High-profile apologies include Japan Airlines (1985), Toyota (2010), and Takata (2015). *See, e.g.*, Clyde Haberman, *The Apology in Japan: Mea Culpa Spoken Here*, N.Y. TIMES, Oct. 4, 1986, at 2; Peter Whoriskey, *Toyota Issues Public Apology, Details Plan to Fix Pedals*, WASH. POST, Feb. 2, 2010, at A13; Chris Woodyard, *No Cause, but Takata CEO Apologizes for Deadly Air Bags*, U.S.A. TODAY (June 26, 2015), https://www.usatoday.com/story/money/cars/2015/06/26/takata-ceo-air-bags-explain/29326613/.

106. Wagatsuma & Rosett, *supra* note 103, at 464.

107. *See e.g.*, Mitchell A. Stephens, *I'm Sorry: Exploring the Reasons Behind the Differing Roles of Apology in American and Japanese Civil Cases*, 14 WIDENER L. REV. 185, 203–204 (2008) (arguing for changes in federal evidence rules to reduce the punitive effect of offering apologies); Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 545–46, 578 (2000) (proposing American mediators use apologies more often). *See also* Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006) (arguing for the availability of apology as an equitable remedy in civil rights disputes).

108. John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499, 503–04 (1986).

109. For example, Mitsubishi's apology might be read with pride or relief by liberal Japanese readers, horror and anger by conservative Japanese read-

B. *Liability*

In the United States, denying liability is a standard feature of settlement.[110] Corporations rarely acknowledge responsibility, fearful of additional litigation such an admission may invite.[111] For decades, the SEC has allowed corporations and banks to settle civil investigations without admitting wrongdoing: the so-called "neither admit nor deny" policy.[112] While the practice attracts its fair share of critics,[113] defendants commonly settle without admitting liability.[114] As Professor Scott Moss writes, "the most hotly contested lawsuits typically end in a confidential settlement forbidding the parties from disclosing their allegations."[115]

Defendants maintain silence for the simple reason that admitting liability may invite additional litigation. The com-

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ers, envy and resentment by Korean readers, interest and suspicion by Chinese readers, or puzzlement by American readers.

110. *See* JOHN FELLAS, TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE § 30.81 (June 2017), Westlaw (noting a statement that defendant does not admit liability is a common feature of private settlement agreements).

111. Edward Wyatt, *Promises Made, and Remade, by Firms in S.E.C. Fraud Cases*, N.Y. TIMES (Nov. 7, 2011), https://www.nytimes.com/2011/11/08/business/in-sec-fraud-cases-banks-make-and-break-promises.html ("Nearly every settlement allows a company to 'neither admit nor deny' the accusations—even when the company admitted to the same charges in a related case . . . ."). Judge Jed Rakoff rejected a settlement between Citigroup and the S.E.C., at least in part, on the corporation's refusal to admit liability. *See* Claire A. Hill & Richard W. Painter, *Why S.E.C. Settlements Should Hold Senior Executives Liable*, N.Y. TIMES (May 29, 2012), https://dealbook.nytimes.com/2012/05/29/why-s-e-c-settlements-should-hold-senior-executives-liable/ (arguing for corporate officers to be held personally liable for damages incurred through their illegal activities).

112. Consent Decrees in Judicial or Administrative Proceedings, Exchange Act Release No. 33–5337 (Nov. 28, 1972) (codified at 17 C.F.R. § 202.5(e)).

113. *See S.E.C. v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285 (2d Cir. 2014). Judge Rakoff rejected the consent decree—a type of settlement agreement with enforcement powers—because it lacked "proven or admitted facts upon which to exercise even a modest degree of independent judgment." *Id.* at 330.

114. *See* Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL'Y REP. 49, 64 (2004) ("Indeed, the typical settlement agreement in civil litigation contains an exculpatory clause wherein the defendant expressly denies liability.").

115. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential* Settlements, 105 MICH. L. REV. 867, 867 (2007).

mon practice for civil litigation over human rights abuses, such as those brought under the Alien Tort Claims Act, appears to be settlement under confidential terms.[116] Yet these settlement usually release little information to the public, other than the amount of money.[117] This absence represents a missed opportunity to reflect on the past, remediate a wrong, recalibrate expectations for resolving conflicts.

In war reparations settlements, plaintiffs' lawyers cite the liability issue as the most contentious.[118] For the plaintiff, the experience as a forced laborer likely ranks as the harshest of his or her life. Plaintiffs would probably prefer the Japanese government *and* corporation acknowledge these events. Certainly, the current government of Japan, led by nationalist Prime Minster Abe Shinzo, is unlikely to apologize. The nearest possibility is, then, a corporation's acknowledgment of its role in the forced labor process. Such admissions are often the first step in repairing a strained relationship.[119]

In their final forms, the six settlements considered herein vary on the liability issue. Early agreements do not raise the issue of liability, at least in the text of the agreement itself.[120] Others plot circuitous narratives about historical events that end by exonerating the corporation, or at least minimizing its responsibility.[121] Over time, the parties developed a vocabulary

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116. *See* Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 128 (2013) (noting that most ATS settlements are confidential).

117. *See Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2 (Nov. 11, 2009), https://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ (listing seventeen ATS cases that led to confidential settlements).

118. See Tanigawa Toru, *'Shinshi' ni Uketomerumo, Jijitsu Kaimei ni Seii Nashi: Nihon Kokan Sosho Wakai wo Kangaeru* [*Accepting the 'Truth' Without Sincerely Clarifying the Facts: Thoughts on the Japan Steel Settlement*], *in* NIHON KIGYO NO SENSO HANZAI [WAR CRIMES OF JAPANESE ENTERPRISES] 154, 154 (Kosho Tadashi et al. eds., 2000) [hereinafter Tanigawa, *Truth*] ("The biggest controversy was legal liability.").

119. *See* AARON LAZARE, ON APOLOGY 75 (2005). Lazare believes acknowledgment to be the "most essential part of an effective apology." *Id.*at 75. Without it, the process cannot move forward. *Id.*

120. Imura Kensuke, President of Kajima, specifically denied that his corporation was liable. *See infra* note 216 and accompanying text.

121. For example, the corporate statement in the Kajima settlement that there were "many unfortunate incidents, and many died of diseases" deflects attention from the grim conditions prevailing at the mine. Kajima Construc-

for the issue of liability: *historical liability*—the *historical* fact that they used forced labor—or even *corporate liability*, as differentiated from government liability. In no settlement does a corporation admit unqualified liability.

C. *Memorialization*

A third element of the war reparations settlements involves memory, which fuses both private and public concerns. For most of the late twentieth century, few Asian scholars, victims, or advocates openly discussed the events of World War II. Shame, guilt, and a refusal to confront inhumanity perpetuated nearly half a century of silence. This was not a static silence; the Japanese government suppressed information about its many roles in the war, as well as those of Japanese corporations.[122] These efforts impeded, but did not completely *preclude*, the substantiation of many facts about the war. The war reparations movement has both contributed to and benefited from archival research by historians into Japan's wartime atrocities, not all of which have been properly documented.[123]

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tion, *Hanaoka Jian Wakai ni Kan suru Kajima Kensetsu no Komento* [*Comment by Kajima Construction on the Settlement of the Hanaoka Case*] (Nov. 29, 2000), http://www.ne.jp/asahi/hanaoka/1119/Kajima-com.html [hereinafter *Kajima Comment*]; *see infra* note 249–254 and accompanying text.

122. In 1946, just after the war, the Japanese government compiled a comprehensive report on the use of Chinese forced labor by thirty-five Japanese companies. The government then denied the existence of the report, saying it had been burned, until the 1990s. In 1990, NHK, Japan's national broadcast network, aired a program that revealed the contents of the report, and outlined the government's fraudulent attempts to conceal it. *See* Underwood, *supra* note 5, at 1–2. In 2002, a Japanese court chastised the government's fraudulent conduct in a case brought by Chinese forced laborers. *See* Zhang Baoheng v. Mitsui Mining Co., Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Apr. 26, 2002, 1098 HANREI TAIMUZU 267, 270 (Japan).

123. The most notable breakthrough linking the Japanese government to grave war crimes was historian Yoshimi Yoshiaki's 1991 discovery of a cache of documents in Japan's National Defense Archives. These documents put to rest the prevailing wisdom that the Japanese government had no involvement with the "comfort women" system. Norimitsu Onishi, *In Japan, a Historian Stands by Proof of Wartime Sex Slavery*, N.Y. TIMES (Mar. 31, 2007), https://www.nytimes.com/2007/03/31/world/asia/31yoshimi.html. In 1993, Japan's national broadcaster, NHK, aired "Phantom Foreign Ministry Report," about a recently discovered report, originally compiled in 1946, about Japan's widespread use of Chinese forced labor. *See* Underwood, *supra* note 5, at 3–4.

To ensure the preservation of these historical events and their dissemination to future generations, victims demand memorialization—both physical and metaphysical.[124] Geng Zhun, as noted above, proposed a memorial for the "martyrs of Hanaoka" in 1989.[125] Since then, various settlement agreements have provided for the construction of physical memorials—steles, cenotaphs, museums—the apparent larger aim of which is securing a place within public memory in Japan.[126]Some settlements also include commemorative rituals for the dead.[127] These rituals typically only include family members of the victims and are consequently more *private* in nature. Still, both types of memorialization aim to reconstitute the patchy historical record existing in many aspects of Japanese and East Asian society. The settlement agreements in this sense serve the public good of reminding the domestic and international communities of the human toll of the war.

At first glance, the memorialization aspect may seem at odds with prevailing discussions of settlement in the United States. However, these settlements are inextricably linked to the larger issue of war memory. Many countries erect war memorials—to specific battles, entire wars, notable battleships, fallen soldiers—and dedicate national holidays—Memorial Day, Veterans Day—to the cause of war. These settlements, though private in nature, replicate many of the same functions as national monuments and holidays: recuperating history, mourning the war dead, educating the broader public about sacrifices, and more.

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124. As noted above, Korean comfort women demanded that Japanese textbooks mention the comfort women system.

125. *See* NOZOE, *supra* note 62, at 153–54 (describing the monument that Geng Zhun requested Kajima build to commemorate the Hanaoka Incident).

126. *See, e.g.*, *infra* notes 149–152 and accompanying text (discussing the Nippon Steel settlement); *infra* notes 208–210 and accompanying text (discussing the Fujikoshi settlement).

127. *See, e.g.*, *infra* notes 149-152 and accompanying text (discussing the Nippon Steel settlement); *infra* notes 342–345 and accompanying text (detailing the Mitsubishi settlement).

D. *Monetary Payment*

Payment is the final element of these settlements.[128] Monetary compensation is routinely demanded in the lawsuits[129] and is integral to numerous general settlement schemes: from U.S. reparations to interned Japanese-Americans,[130] to the German Remembrance Fund,[131] to the many confidential agreements concluding everything from sexual harassment claims to human rights abuses under the Alien Tort Statute.[132]

In the war reparation settlements, payment comes in two forms. In the Korean settlements, which involved small numbers of plaintiffs, Japanese corporations paid a lump sum directly to each plaintiff.[133] In the Chinese settlements, where the number of claimants ran to the hundreds or even thousands, Japanese corporations set up foundations.[134] In either case, payment raises two questions: (1) how much is necessary, and (2) to what end?

First, the parties must decide how much to award. This is always a difficult question, in part because *no* amount of

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128. *See* FELLAS, *supra* note 110, § 30.81. The author describes two basic types of settlement: lump sum and sliding scale. Both involve the payment of money, but do not mention other elements such as apology, memorials, etc.

129. In Japan, where most of the lawsuits were originally filed, monetary damages are the primary form of tort remedy. *See* MINPO [CIV. C.] art. 722, para. 1 (allowing "compensation for damages in tort").

130. The Civil Liberties Act of 1988 offered $20,000 in compensation, and a formal apology, to more than 100,000 people of Japanese descent incarcerated in internment camps during World War II. *See* Bilal Qureshi, *From Wrong to Right: A U.S. Apology for Japanese Internment*, NPR (Aug. 9, 2013, 4:24 PM), https://www.npr.org/sections/codeswitch/2013/08/09/210138278/japanese-internment-redress.

131. In 2000, Germany passed a law to compensate forced laborers from World War II. In a symbolically loaded gesture, the German government and German corporate sector each contributed 5 billion deutschemarks to establish the "Foundation for Remembrance, Responsibility and the Future." See Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Law to Create the "Remembrance, Responsibility and Future" Foundation], Aug. 12, 2000, BGBL I at 1263 (Ger.). Many Asian scholars cite the German Remembrance Fund as a prototype for resolving Asia's war dilemmas. However, the Japanese government seems unlikely to pass such a law.

132. Goldhaber, *supra* note 116, at 127–36.

133. *See infra* Part IV (describing settlement agreements which paid sums directly to Korean forced laborers and their heirs).

134. *See infra* Part V (describing settlement agreements which set up foundations that paid Chinese forced laborers and their heirs).

money can make victims whole again. It is impossible to quantify abduction, forced transportation, and forced labor under abysmal conditions for a period stretching from a few months to several years. Methods of quantification vary. Some analogize to prior compensation schemes, both Japanese and foreign, with somewhat comparable factual and legal issues.[135] Alternatively, victims—depending upon their nationality and, to some extent, the peculiar harm they have suffered—receive payments ranging from the thousands to the tens of thousands of dollars.[136]

The second question concerns what settlement agreements actually call the payments. Terms such as compensation, reparation, and consolation money (*solatium*)—and their Japanese, Chinese and Korean equivalents—carry a set of associations. As described more fully below, settlement agreements use words, including anodyne terms such as *money* or *payment*, to avoid the implication that the paying corporation committed any wrongdoing. This highlights and reaffirms the importance of language and cultural resonance in the settlement process.

IV. Korean Settlements

By way of historical background, Japan mobilized millions of people from Korea during World War II. They worked as soldiers in the Japanese Imperial Army, "comfort women" or sexual slaves for Japanese soldiers, and forced laborers for Japanese companies.[137] The last of these is most salient to the pre-

135. For instance, lawyers and activists reference the Taiwan Veterans Act, a Japanese law enacted in 1987 to pay Taiwanese soldiers ¥2 million (about $20,00) for injuries sustained while serving the Japanese Imperial Army. They also cite the U.S. Civil Liberties Act of 1988, which provided $20,000 in compensation to Japanese-Americans interned during World War II. *See, e.g.*, Tanigawa Toru, *Nihon Kokan Sosho Wakai to Sono Imi Suru Mono* [*The Settlement of the Japan Steel Case and What It Means*], 25 Kikan Senso Sekinin Kenkyu [Quarterly War Responsibility Research] 50, 51 (1999) (referring to both laws). Later, the German Remembrance Fund became another touchstone for discussions about resolving Japan's forced labor issue. *See* Matsuoka, *supra* note 50, at 141–42.

136. *See infra* Parts III, IV.

137. Chung Hye-Kyung, *The Forcible Drafting of Koreans During the Final Phase of Colonial Rule and the Formation of the Korean Community in Japan*, 44 Korea J. 30, 38–47 (2004). Approximately 7.3 million Koreans were mobilized for labor purposes both within Korea, and beyond to Japan and other

sent discussion. Japan's mobilization of Korean labor took place in three increasingly coercive phases: (a) "recruitment," from July 1939 to February 1942; (b) "government involvement," from February 1942 to September 1944; and finally (c) "conscription," from September 1944 to August 1945.[138] Despite the names, scholars believe coercion was used in all three phases, albeit to varying degrees.[139]

In 1991, Korean laborers filed the first compensation lawsuit in Japan, setting off a transnational redress movement that continues to the present day.[140] Since then, South Korean victims have filed dozens of compensation lawsuits in Japan, Korea, and the United States.[141] The following section examines three lawsuits—first filed in Japanese courts by Korean plaintiffs—that produced settlements.

A. *Nippon Steel (1997)*

During World War II, some 1,700 Koreans performed forced labor for Nippon Steel Corporation[142] in Kamaishi, a

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places in the Japanese Empire, and 615,000 for military purposes. *Id.* at 45. The exact number of military sexual slaves (comfort women) is not known, but rough estimates suggest there were as many as 200,000 Korean comfort women. *See Number of Comfort Stations and Comfort Women*, ASIAN WOMEN'S FUND), www.awf.or.jp/e1/facts-07.html (last visited Jan. 6, 2018).

138. *See id.* at 37 (listing three periods). In the first "recruitment" phase (K: mojip, J: boshu), Japan's colonial apparatus in Korea delegated to individual corporations the task of recruitment. Corporations either did it themselves, or hired agents to recruit labor for them. In the second "government involvement" phase (K: kwan alseon, J: kan assen), the colonial government authorities took control of the recruitment process, using government agencies to gather and transport laborers. In the third "conscription" (K: chingyong, J: choyo), colonial authorities maintained their control over the recruitment process, but used more coercive techniques in doing so. *Id.*

139. *Id.* at 39.

140. The first postwar compensation lawsuit was brought by thirty-five Koreans who served in the Japanese army, including three comfort women, and several soldiers. Subsequent lawsuits were filed by forced laborers, including the three discussed here. Kim Hak-sun v. Japan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 26, 2001, 1597 HANREI JIHO 102 (Japan).

141. *See* Timothy Webster, *Discursive Justice: Interpreting World War II Litigation in Japan*, 58 VA. J. INT'L L. 161, 225 (2018).

142. The company is now known as Shin Nippon Seitetsu (New Japan Steel) in Japanese, but its English name remains Nippon Steel.

coastal town in northeastern Honshu.[143] On July 30, 1945, the U.S. Navy bombed the steel foundry, killing twenty-five Korean workers.[144] Fifty years later, some of their heirs sued Nippon Steel and the Japanese government,[145] seeking the repatriation of their family members' remains, their unpaid wages, apologies in Korean and Japanese newspapers, and ¥240 million in compensation.[146]

Nippon Steel raised two defenses: (a) the twenty year statute of limitations for civil claims had already elapsed, and (b) the theory of separate corporate identity—that today's Nippon Steel was not the company that enslaved the plaintiffs' dead relatives during World War II.[147] Two years later, Nippon Steel settled out of court with the Korean plaintiffs. This was the first time a Japanese corporation, indeed *any* corporation, set-

143. William Underwood, *Names, Bones and Unpaid Wages (1): Reparations for Korean Forced Labor in Japan*, 4 ASIA-PAC. J. — JAPAN FOCUS, Sept. 2006, at 1, 19.

144. *See* Nihon Seitetsu Moto Choyo Saiban Bengodan & Nihon Seitetsu Moto Choyo-ko Saiban wo Shien Suru Kai [Lawyers Group Suing Nippon Steel for Forced Labor & Support Group Suing Nippon Steel for Former Forced Labor], *Bengodan to Shien surukai no Seimei* [*Statement by Lawyers' Group and Support Group*], https://krwizard.blogspot.com/2013/11/1997-09-21.html?m=0 [hereinafter Lawyers' Statement].

145. Cho Yeong Shik v. Nippon Steel, Tokyo Chiho Saibansho [Tokyo Dist. Ct.], *settled out of court* Sept. 17, 1997. Hong's father was abducted and sent to work in Kamaishi, Japan in 1942. *See Ilje Chingyong Hangugin e Il-eok O Ch'eonman Weon Bosang* [*Koreans Forced to Work Under Japanese Colonialism Compensated 150 Million Yen*], KYEONGHYANG SHINMUN, Dec. 25, 1997. *See also Han-Il Hyeopjeong Oshipmyeon: Kangje Tongweon Taebeopweon P'angyeoul 'Shin Ilch'eol Jugeum Sageon, Ilbonseo Choejong Paeso, Hangug Taebeopweon-eseo Jinhaeng-jung* [*Fifty Years of the Korea-Japan Agreement, Supreme Court Decision on Forced Mobilization: Final Decision of 'Nippon Steel Incident' in Japan, Advancing in South Korea Supreme Court*], THE ASIAN (Jan. 6, 2016), http://kor.theasian.asia/archives/154007 (describing the 2012 Korean Supreme Court decision).

146. *Ilbon Ki-eop Chingyong Han'in Posang Hap-eui* [*Compensation Agreement Between Japanese Enterprise & Forced Laborers*], HANKYEOREH, Sept. 22, 1997 [hereinafter *Compensation Agreement Between Japanese Enterprise & Forced Laborers*].

147. Yano Hideki, *Chosenjin Kyosei Renko, Kyosei Rodo Mondai: Sono Kadai to Tenbo* [*The Problem of Korean Forced Transport and Forced Labor: Issues and Prospects*], *in* MIKAIKETSU SENGO HOSHO: TOWARERU NIHON NO KAKO TO MIRAI [UNRESOLVED WAR COMPENSATION: QUESTIONING JAPAN'S PAST AND FUTURE] 48, 54 (Tanaka Hiroshi et al. eds., 2012).

tled a case in the transnational World War II litigation movement of the 1990s.[148]

The settlement contains three provisions. First, unable to locate the remains of the plaintiffs' relatives, Nippon Steel agreed to pay ¥2 million (about $17,000) to ten of the plaintiffs.[149] Second, the company erected a shrine in its Kamaishi foundry, listing the names of all twenty-five Korean forced laborers who died in the attack.[150] Nippon Steel also performed a memorial service at the foundry and partially paid the travel expenses of Korean plaintiffs to attend.[151] Third, Nippon Steel paid 10 million Korean won (about $8,900) to partially defray the costs of holding a memorial service in Korea.[152]

The Nippon Steel settlement attracted headlines all over Japan. Media reports focused on the metaphysics: the "spirit-calming" shrine placed in the factory and the company's participation in memorial services.[153] These images depict reconciliation in a positive and spiritually significant light, a lens that likely resonated with Japanese readers. Indeed, many reports expressed the hope that this settlement would influence

148. Yamamoto Naoyoshi, *Jinken Shingai no Chingin Mibarai: Mibaraikin Henkan wo Motomete Tatakau Nittetsu Sosho* [*The Human Rights Violation of Unpaid Wages: The Nippon Steel Litigation and the Fight to Recover Unpaid Wages*], *in* NIHON KIGYO NO SENSO HANZAI [WAR CRIMES OF JAPANESE ENTERPRISES] 81, 82 (Koshô Tadashi et al. eds., 2000).

149. The terms of the settlement agreement appear in a press release issued by the civil society organization that supported the lawsuit. *See* Press Release, Nihon Seitetsu Moto Choyo Saiban Bengodan, Nihon Seitetsu Moto Choyo-ko Saiban wo Shien Suru Kai [Lawyers Group Suing Nippon Steel for Forced Labor & Support Group Suing Nippon Steel for Former Forced Labor] (Sept. 21, 1997), https://krwizard.blogspot.com/2013/11/1997-09-21.html?m=0 [hereinafter Lawyers' Statement]. The group is led by Kosho Tadashi, an economist at Komazawa University in Tokyo. Nippon Steel also paid 50,000 yen to the eleventh plaintiff, Paek Nam-yeol, whose relative's remains had already been repatriated. Yano, *supra* note 145, at 54.

150. Literally, it was a spirit-calming shrine (*chinkonsha*), a memorial to appease dead spirits.

151. Six of plaintiffs attended the ritual on September 17, 1997. Lawyers' Statement, *supra* note 145.

152. *Id.*

153. Moto Choyoko Kankokujin no Izoku ni Ireikin Watasu: Wakai Shita Shin Nihon Seitetsu [*Paying Bereavement Money to Families of Former Korean Forced Laborers: New Japan Steel Settles*], KEIZAI SHIMBUN [ECONOMIC TIMES], Sept. 24, 1997.

ongoing litigation, including the Nishimatsu case described below.[154]

The settlement made fewer waves in South Korea, where only a handful of media outlets reported on the news. Korean media described it as the first "monetary compensation" from a lawsuit involving "Korean or Chinese forced laborers."[155] They also described the memorial service and the company's financial contribution to the service. Reporters pointed out the failure to apologize, if obliquely, in several accounts.[156]

Nippon Steel's decision to settle earned praise from the plaintiffs' attorneys, which is hardly assured in these lawsuits.[157] The attorneys wrote:

> Nippon Steel, one of Japan's top companies, paid money directly to Korean war victims and cooperated in memorial services. Nippon Steel, the successor company, recognizes these expenses, from a humanitarian perspective, as postwar resolution for forced mobilization and forced labor. We think this will breathe new life into discussions about whether the Japan-Korea Agreement resolved all claims [from the war].[158]

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154. *See infra* III.B. The regional newspaper, CHUNICHI SHIMBUN, explained "This is the first settlement in all of the forced labor lawsuits. It will influence not just forced labor suits, but all kinds of postwar compensation cases." *See Kankokujin Kyosei Renko, Hajimete no Wakai Shinnittetsu ga Ireikin Nisenman, Kuni Aite no Sosho Keizoku* [*First Settlement for Korean Forced Laborers: Nippon Steel Gives ¥20 Million in Memorial Money, Case against Government Continues*], CHUNICHI SHIMBUN, Sept. 22, 1997.

155. To some extent, the citizens of Korea and China compete against each other for recognition, remorse, and reparations from Japan. *See Compensation Agreement Between Japanese Enterprise & Forced Laborers*, *supra* note 147. The Korean term for compensation money (posanggeum) shares a common etymology with compensation in both Chinese and Japanese, suggesting that Nippon Steel was making up for past wrongdoing.

156. The newspapers do this by citing plaintiffs' original legal claims: ¥240 million in compensation, and apologies printed in Japanese and Korean newspapers. *Id.*

157. For instance, Chinese attorney Kang Jian vociferously criticized the settlement terms of the Nishimatsu Settlement. *See infra* Part V.B.

158. *See* Lawyers' Statement, *supra* note 145 (original in Japanese, translation in Korea also available online). In 1934, the Japanese government merged various steelmakers into the state-operated Nippon Steel. After the war, the conglomerate was split up "under pressure from the Allied occupation authority." *See Nippon Steel Corporation*, ENCYCLOPEDIA BRITANNICA,

Several points in the statement above merit further consideration. First is the use of the neutral term "money," as opposed to a phrase that conveys legal liability or reparation.[159] This was likely a concession to Nippon Steel, which refused to apologize or admit liability. Despite the neutral phrasing of "money," Korean scholars later praised the company for paying "memorial money."[160]

Second, the statement says nothing about whether Nippon Steel broke the law or violated the plaintiffs' human rights. It stresses humanitarian aims, not reparative ones. As a spokesperson for the steel manufacturer said:

> Our company has not changed its position. We did not take over the credits and debts of [the Old] Nippon Steel, and bear no legal liability for its acts. However, since plaintiffs could not appease the spirits of their dead relatives without their bodily remains, we decided to help them.[161]

The company's assertion subscribes to the theory, put forth by several Japanese companies and endorsed by Japanese courts,[162] that the *New* Nippon Steel, the Defendant, is legally distinct from the *Old* Nippon Steel, the company that used forced labor during the war. Based on this legal distinction

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https://www.britannica.com/topic/Nippon-Steel-Corporation (last visited Jan. 6, 2019).

159. In Japanese, *kinsen* is a general term for money. By contrast, *hosho* (compensation) and *baisho* (reparations) both mean money paid to right a wrongdoing.

160. *See* KIM MINCHEOL, KUNHAMDO: KKEUNNAJI ANHEUN JEONJAENG [BATTLESHIP ISLAND: WAR WITHOUT END] 350 (2016) (reviewing Korean settlements). The term *wiryeong-keum* does not clearly indicate wrongdoing. However, the idea that one is, literally, using *money to comfort spirits*, suggests a compensatory purpose.

161. *Shinnitettsu Wakai" 'Sengo Hoshô ni Kazaana'* [*New Nippon Steel Settlement 'Breathes New Life into Postwar Compensation'*], JIJI TSUSHIN NYUSU SOHOKU [JIJI NEWS EXPRESS REPORTS], Sept. 22, 1997.

162. *See* Shin Ch'eon-su v. Nippon Steel, *unpublished opinion*, Osaka Chiho Saibansho [Osaka Dist. Ct.] Mar. 27, 2001 (dismissing claims against Nippon Steel on the grounds that it is a separate legal entity from the one that used forced labor during the war, and claims against the government on sovereign immunity grounds), *aff'd* [Osaka H. Ct.] 2002, *aff'd* [Sup. Ct.] 2003. The separate identity theory has been criticized on veil-piercing grounds. Since the *new* entity had substantially the same operating assets and personnel as the wartime entity, it is not *necessarily* the case Nippon Steel is a distinct legal entity.

from the wartime entity, Nippon Steel did not acknowledge its legal liability.

Third, the attorneys' statement identifies the Japanese government as the primary culprit in the forced labor program.[163] It ascribes a "heavy responsibility" to the Japanese government for the forced mobilization, forced labor, and unpaid wages of Koreans.[164] It also notes that the plaintiffs will continue with the lawsuit against the Japanese government, which has consistently maintained that postwar treaties disposed of all individual war reparations claims.[165]

Fourth, the statement references a 1987 law compensating Taiwanese veterans of the Japanese Imperial Army.[166] That law led to the payment of ¥2 million (about $17,000) in "condolence money" to wounded veterans or their bereaved families.[167] In the Nippon Steel settlement, plaintiffs' attorneys may have wanted to suggest that Nippon Steel would also offer "condolence money" (*chôikin*) or "consolation money" (*mimaikin*) for the harm it occasioned.[168]

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163. Lawyers' Statement, *supra* note 144. The lawsuit against the Japanese government was dismissed at all three levels. *See* Cho v. Japan, *unpublished opinion,* Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 26, 2003 (dismissed on sovereign immunity grounds), *aff'ed* Tokyo Koto Saibansho [Tokyo H. Ct] Sept. 29, 2005, *aff'ed* Saiko Saibansho [Sup. Ct. Japan] Jan. 29, 2007.

164. Lawyers' Statement, *supra* note 144.

165. The Japanese government has taken this position in each of the war reparations lawsuits. *See, e.g.*, Levin, *supra* note 15, at 152 (noting that a 2007 Supreme Court of Japan decision dismissed Chinese forced laborers' claims because of the 1972 Japan-China Joint Communique).

166. During World War II, many Taiwanese fought for Japan, which had occupied the island since 1895. However, Taiwanese soldiers had been excluded from Japanese pension and medical schemes due to exclusionary nationality laws. The 1987 law provided relief to those veterans who maintained addresses in Taiwan. *See generally* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW 179 (1998).

167. *See* Taiwan Jumin de aru Senbotsusha no Izoku nado ni tai suru Choikin nado ni Kan suru Horitsu [Law on Condolence Money for the Bereaved Families of Taiwan Residents Injured in the War], Law No. 105 of 1987 (hereinafter Taiwan Veterans Law).

168. Lawyers' Statement, *supra* note 144 (citing Taiwan Veterans Law). In Japan, one pays condolence money (*choikin*) when the person has died, and consolation money or a solatium (*mimaikin*) when the person is still alive. Neither term implies the donor is at fault. Both terms have been used in Japanese laws and regulations to cover costs from earthquakes, natural disasters and workers' compensation.

This first settlement broaches many of the important themes in this Article: properly caring for the dead, administering to the wishes of the living, compensating for harm done, and properly structuring these concerns. In devising a novel solution to the war reparations problem, the Nippon Steel settlement is noteworthy and rarely duplicated. The emphasis on commemoration likely stems from the fact that the heirs, not the victims who died in 1945, brought the suit.

Hindsight yields a somewhat different assessment. The settlement misses two key elements of the quadripartite framework devised above. First, Nippon Steel did not apologize, either in the statement or in media coverage of the settlement. In their petition, plaintiffs specifically requested the company publish apologies in the leading newspapers of Japan (e.g. ASAHI, MAINICHI, YOMIURI, and SANKEI) and South Korea (e.g. CHOSUN ILBO, JOONGANG ILBO, and HANGYOREH).[169] The company issued no apology in either country.

Second, Nippon Steel did not admit legal liability. Indeed, it specifically denied legal liability as an entity *independent* of the one extant during the war. The failures to apologize and to admit liability are not rare in the settlements, especially at this early stage. In 1997, no Japanese court had found a state or corporate actor liable in the war reparations lawsuits.[170] Moreover, while Nippon Steel settled *this particular* lawsuit, it defended other lawsuits in Japan and Korea brought by *surviving* forced laborers.[171] It may be that the company's

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169. HORITSU JIMUSHO NO SHIRYO TANA [LAW OFFICE ARCHIVE], NIHON SENGO HOSHO SAIBAN SORAN [OVERVIEW OF JAPANESE CASES OF WAR COMPENSATION] (1995), http://justice.skr.jp/petition/40.pdf. This extremely informative website, run by Fukuoka-based lawyer Yamamoto Seita, lists all of the relevant war reparations lawsuits filed in Japan. It also includes plaintiffs' demands, defendants' arguments, the resulting jurisprudence, and other relevant information.

170. As noted, no Japanese court has enforced a compensation award against a government or corporate defendant. However, several Japanese courts found for plaintiffs—including "comfort women" and forced laborers—between 1998 and 2004. *See* Webster, *supra* note 141, at 196–201 (describing results of the war reparations lawsuits).

171. *See* Shin Ch'eon-su v. Nippon Steel, *unpublished opinion*, Osaka Chiho Saibansho [Osaka Dist. Ct.] Mar. 27, 2001 (dismissing plaintiffs' claims as waived by postwar treaties), *aff'ed* Osaka Koto Saibansho [Osaka H. Ct.] Nov. 19, 2001, Saiko Saibansho [Sup. Ct.] Oct. 9, 2003. Shin also sued in Korea. *See infra*, note 368.

decision to settle was a rare response to the metaphysics of the plaintiffs' claims, and that it had more to do with repatriating remains than with reconciling with the past. Nevertheless, the agreement broke new ground, both by offering a new mode of dispute resolution—settlement—and inventing methods of memorializing the war dead.

B. *NKK (Japan Steel) (1999)*

One of the most active members in the war reparations movement was a Korean forced laborer named Kim Kyeong-seok.[172] During the war, Kim left his native Korea to work at NKK's steel manufacturing facility in Kawasaki. In 1943, he led an unsuccessful strike protesting the grim conditions of the foundry.[173] After quelling the strike, NKK employees caught him, suspended him upside-down from the ceiling, and beat him, irreparably injuring his right arm.[174]

In September 1991, a few months before former comfort woman Kim Hak-sun filed her epochal lawsuit,[175] Mr. Kim sued NKK.[176] Acting *pro se* in a foreign jurisdiction, Mr. Kim filed a hand-written complaint to the Tokyo District Court, seeking an apology and ¥10 million in compensation.[177] Upon hearing of Kim's actions, Japanese human rights lawyers and labor unions formed an NGO to support his suit.[178] In 1995,

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172. Kim would later lead the effort to obtain compensation from Fujikoshi. His name is also rendered Kim Kyung Suk in English.

173. Sonni Efron, *Japanese Steelmaker to Pay Slave Laborer*, L.A. TIMES (Apr. 7, 1999), http://articles.latimes.com/1999/apr/07/news/mn-25049.

174. *Id.*

175. The lawsuit brought by Ms. Kim (no relation to Mr. Kim) is considered a catalyst in the war reparations litigation movement. The lawsuit brought by Ms. Kim (no relation to Mr. Kim) is considered a catalyst in the war reparations litigation movement. *See* CHIZUKO UENO, NATIONALISM & GENDER 69 (2000) (describing Kim's lawsuit as the "conclusive problematizing of the military comfort women within Japan" and a key node in "the debate surrounding the post-war compensation of nationals from former colonies").

176. *See* Kim Kyeong-Seok v. Nihon Kokan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.], May 26, 1997, 1614 HANREI JIHO 41 (dismissed as time-barred). The Tokyo High Court settled the case on April 6, 1999.

177. The company goes by the name Japan Steel, or NKK (Nihon Kohan Kabushiki Kaisha [Japan Steel Stock Corporation]). To differentiate this company from Nippon Steel, I use the abbreviation NKK.

178. Tanigawa, *Truth*, *supra* note 118, at 76. Many civil society organizations have formed to support plaintiffs' lawsuits.

the trial court dismissed his case on statute of limitations of grounds—a common result in these lawsuits.[179]

The trial court made several findings of fact relevant to subsequent settlement negotiations. First, the court found that Kim had *not* been forcibly mobilized, and that he went from Korea to Japan of his own volition.[180] Second, after cross-examining Kim at trial, the court determined that NKK employees had in fact beaten and permanently injured Kim, dispelling any doubt about the cause of his injury.[181] Third, the court found Kim suffered from post-traumatic stress disorder after the war.[182]

Despite succeeding in trial court, NKK agreed to settle the case one year later in July 1998.[183] The negotiations, however, did not go smoothly. According to one of Kim's supporters, the issue of legal liability was the hardest issue to resolve during the negotiations.[184] NKK insisted the settlement agreement state unequivocally that it bore no legal liability.[185] Like Nippon Steel, NKK wanted to appear to be paying voluntarily, from a posture of morality or humanitarianism, not out of legal duty or obligation.[186]

On April 6, 1999, Tokyo High Court Judge Kitô Sueo announced the settlement agreement, which has three primary provisions.[187] Under the first provision, the parties agreed to "take *seriously* the fact that there was an unfortunate period in

179. *Id.* at 78.

180. Kim was mobilized in October 1942. His eldest brother had been called, but at his father's request, Kim Kyeong-seok took his brother's place. Confucianism values elder brothers over younger brothers. Kim's father, said to be a traditionalist, may have sought to sacrifice the younger brother to save the older one. *See* Tanigawa Toru, *supra* note 136, at 53 (describing Kim's background in Korea). *See also* Azusawa Kazuyuki, *Kankokujin, Chosenjin Kyosei Renko Nihon Kokan Sosho: Saibanjo no Wakai de Kaiketsu,* [*Korean Forced Labor, Japan Steel Litigation: Resolved through Court Settlement*], in HOTEI DE SAIBAN SABAKARERU NIHON NO SENSO SEKININ [JAPAN'S WAR RESPONSIBILITY AS ADJUDICATED IN COURTS] 280, 281 (Zukeyama Shigeru ed. 2014).

181. Kim Kyeong-Seok v. Nihon Kokan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.], May 26, 1997, 1614 HANREI JIHÔ at 43.

182. *Id.*

183. Tanigawa, *supra* note 180, at 51.

184. *Id.*

185. *Id.*

186. *Id.*

187. Tanigawa, *Truth,* supra note 118, at 73.

the past history of Korea and Japan, and agree to settle according to the following terms."[188] The second provision, quoted below, describes the factual background of the case. The third provision confirms that the parties no longer owed any obligations to the other.[189]

The second provision forms the heart of the settlement:

> In 1942, during the special circumstances of war, Appellant left his home country for Japan . . . to work in Appellee's factory in Kawasaki. Appellant claims he suffered an injury during a violent incident in the factory in April, 1943, and that the consequences were serious. On the other hand, Appellee, based on certain materials, insists there is no way to confirm Appellant's claims. It can be inferred that some kind of riot broke out at that time. Yet Appellant's relationship to that event is not clear.
>
> Since these events took place over 50 years ago, it is extremely difficult to specify the perpetrator. Thus, it is unavoidable that there should be serious legal difficulties in asking Appellee to bear responsibility for this incident. On the other hand, Appellee *deeply accepts* Appellant's claim that he sustained an injury, and struggled for a long time afterward. Appellee bears a sincere feeling towards his long struggle with his injury. To express that sentiment, it will pay 4.1 million yen.[190]

This provision demonstrates how *unsettled* settlement can actually be. It does not reconcile the parties' divergent versions of events. Instead, it simply presents two separate accounts, an interpretive agnosticism that civil liability—which normally rests upon a set of proven facts—is unable to accommodate. NKK acknowledged Kim's injury and paid him, in effect, to express sympathy for that injury. However, the settlement, per NKK's wishes, does not attach legal liability to NKK. Nor does

188. Settlement Terms of Kim Kyeong-Seok & Nihon Kokan, Apr. 16, 1999, *in* Tanigawa, *supra* note 180, at 52 [hereinafter NKK Settlement]

189. *Id.* art. 3.

190. *Id.* art. 2.

it mention the fact, proven at trial, that NKK employees caused Kim's injury in the first place.[191]

Moreover, the agreement avoids terms like apologize (*shazai*), reparation (*baishô*), or consolation money (*isharyô*). It simply refers to the payment as 4.1 million yen." Unlike the decision rendered by the Tokyo District Court, the settlement agreement apparently absolves NKK of any wrongdoing. The company emerges as a charitable bystander and not the direct cause of Kim's permanent disability.

At a press conference afterwards, Kim told reporters, "I'm pleased with today's settlement. It has been an extremely long road for me. In light of my age, we accomplished something that no prior litigation had. So I think it's good we resolved the case while I'm still alive."[192] Kim correctly acknowledged that he received something that no other litigant had: money.[193] In the broader context of war reparations litigation, ¥4.1 million (about $35,000) is a decent sum. Indeed, Kim may well have been the best compensated of any World War II victim—European or Asian—at the time.[194]

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191. Lawyer Azusawa Kazuyuki describes this factual finding as a "major factor" that the case produced a "successful settlement." Azusawa, *supra* note 180, at 286.

192. Tanigawa, Truth, *supra* note 118, at 74.

193. By 1999, only one lawsuit had found in favor of the plaintiffs. Ha Sunnyo et al. v. Japan, Yamaguchi Chiho Saibansho [Yamaguchi Dist. Ct.] Apr. 27, 1998, 1642 HANREI JIHO 24. For an English translation of the ruling, see *The "Comfort Women" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan*, 8 PAC. RIM L. & POL'Y J. 63, 68 (Taihei Okada trans., 1999). However, that decision was overturned on appeal. *See Japan Overturns Sex Slave Ruling*, BBC: ASIA-PACIFIC (Mar. 29, 2001, 11:09 AM), http://news.bbc.co.uk/2/hi/asia-pacific/1249236.stm.

194. In 1998, Korean comfort women won a small damages award ($3,000) in the Yamaguchi District Court, but this was overturned on appeal. *Id.* Chinese forced laborers had filed lawsuits by 1995, but did not "win" cases until 2001. Korean forced laborers did not win any verdicts in Japan, and did not file in South Korea until 2000. In 1999, American courts dismissed cases against multinational corporations brought by Russian, Czech, Romanian, Polish and German forced laborers. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing case against Ford subsidiary by Russian forced laborer), Burger-Fischer v. DeGussa Ag, 65 F, Supp. 2d 248 (D.N.J. 1999) (dismissing case against Siemens and DeGussa by eight plaintiffs). The German Remembrance Fund, which stemmed from these lawsuits, first disbursed payments of $7,500 and $2,500 to forced laborers in 2001.

Kim's lawyers were more circumspect. Attorney Yonekura Tsutomu told the same press conference, "NKK did not admit legal liability, or apologize."[195] He added, "[b]ut we can still call it a substantial victory. Phrases such as 'take seriously' and 'deeply accept' can be understood as apologies. Plus, the settlement was over 40% of the amount originally sought."[196] Kim himself also expressed disappointment that NKK would not publish an apology in Korean- and Japanese-language newspapers.[197] This shows both the desire for an apology and the limits on what Japanese corporations were willing to do.

The NKK settlement agreement *obscures* the issue of liability, exculpating NKK from any wrongdoing. The trial court determined that NKK employees beat and injured Kim,[198] but the settlement skates over that fact, claiming in effect that the passage of time made it too difficult to specify the perpetrator. Furthermore, as Korean media were quick to note, there was neither an apology nor a recognition of legal liability.[199] The closest NKK comes to apologizing is its expression of *sincere feelings* regarding Kim— not an apology in any sense of the word and not the kind of language that restores trust. There is also no public monument, though it is unclear whether the parties raised this issue.

C. *Fujikoshi (2000)*

Toward the end of the war, the Fujikoshi Company, a munitions supplier to the Imperial Army, relocated some 1,600 Koreans to the Japanese archipelago.[200] Among those

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195. *See Iljeonhu Paesang Sosong Sae Haebeop* [*New Settlement in Japanese Postwar Compensation Litigation*], HANKYOREH, Apr. 8, 1999.

196. Tanigawa, Truth, *supra* note 118, at 74. Korean media noted the fact that NKK did not admit legal liability, or make the apology plaintiffs sought.

197. Tanigawa, *supra* note 180, at 53.

198. Kim Kyeong-Seok v. Nihon Kokan, Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Apr. 6, 1999, 1614 HANREI JIHO 41.

199. See *Il Ki-eop, Kangje Chingyong Hangugin e Wijaryo* [*Japanese Company Compensates Korean Forced Laborer*], KYEONGHYANG SHINMUN, Apr. 7, 1999 (suggesting that the Japan settlement agreement would be "influential in Japanese war compensation lawsuits").

200. Yamada Hiroshi, *Hatan shita 'Subete Kaiketsu Zumi' Shucho: Fujikoshi Kyosei Renko Sosho no Wakai Seiritsu* [*Promoting a Bankrupt 'Complete Resolution:' Establishing a Settlement in the Fujikoshi Forced Labor Lawsuit*], *in* NIHON KIGYO NO SENSO HANZAI [WAR CRIMES OF JAPANESE ENTERPRISES] 99, 100 (Kosho Tadashi et al. eds., 2000).

relocated were two teenage girls, Yi Jong-suk, aged thirteen in 1943, and Choe Bong-nyeon, aged fourteen in 1943. During the war, a recruiter fraudulently told them that if they went to Japan they could attend school, learn to sew and type, and study flower arrangement.[201] In addition, Koh Deok-hwan, twenty-one at the time of his mobilization, received an order from the Japanese colonial authorities—the governor general—to go to Japan.[202] In total, Koh and Yi spent one year as forced laborers, while Choe spent two.[203]

In 1992, Yi, Choe, and Koh sued Fujikoshi, requesting damages, unpaid wages, and an apology.[204] The trio lost at both trial and appellate levels on statute of limitations grounds.[205] In 1999, other Korean forced laborers prepared to sue Fujikoshi in California pursuant to a state statute that extended civil causes of action until 2010 for any "Second World War Slave labor victim," or heir.[206] Before they could file suit in the United States, however, the Supreme Court of Japan brokered a settlement.[207]

The settlement terms were not publicized, but the agreement reportedly involved payment of between ¥30 and 40 million (roughly $30,000 to $40,000) for distribution among the three original plaintiffs, four additional forced laborers who worked for Fujikoshi, and the civil society organization that

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201. Part of Choe's testimony is available online. *Choe Bong-nyeon san no Chinjutsusho* [*Choe Bong-Nyeon's Testimony*], FUJISOSHO.EXBLOG.JP, http://fujisosho.exblog.jp/9032680/ (last visited Jan. 6, 2019).

202. Yi Jong-suk v. Fujikoshi, Toyama Chiho Saibansho [Toyama Dist. Ct.] July 24, 1996, 941 HANREI TAIMUZU 183.

203. *Id.* at 184.

204. *Id.*

205. 941 HANREI TAIMUZU [HANTA] 183 (dismissed on statute of limitations grounds), *aff'd* [Nagoya High Ct.] 1998, 1046 HANREI TAIMUZU 161, *settled* [Sup. Ct.] 2000. Justice Machida Akira, of the First Petty Bench, presided over the settlement.

206. CalCCP sec 354.6 (West 2000). The California statute was ultimately struck down for interfering with the federal government's exclusive power to conduct foreign relations. *See In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000), *aff'd sub nom.* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003). The pressure from this lawsuit might have exerted pressure on Fujikoshi to settle. Yamada, *supra* note 198, at 104.

207. *Fujikoshi Sosho Wakai Seiritsu 'Kingaku Ijo no Mono wo Kachitotta' Nagakatta Sengo Hosho: Toyama* [*Postwar Compensation a Long Time in Coming: 'We Won More Than Money' Fujikoshi Settles Lawsuit in Toyama*], MAINICHI SHIMBUN, July 12, 2000.

supported the lawsuit.[208] Fujikoshi called this "resolution money,"[209] (*kaiketsukin*) implying that the corporation did not harm plaintiffs, and thus did not need to "compensate" them.[210] Kim Kyeong-seok, the head of the plaintiffs' litigation team and litigant in the NKK settlement, said the payment included both unpaid wages and monetary damages.[211] As to the nature of the money, he asked rhetorically, "if Fujikoshi did nothing wrong, why did it pay?"[212]

Fujikoshi also agreed to build a memorial at its Toyama facility. During the negotiations, plaintiffs requested the company build a memorial to commemorate their wartime experiences including both Korean and Japanese languages.[213] The "labor stele for World War II," as one Japanese newspaper dubbed it, would express gratitude to the plaintiffs for their labor during the war.[214] However, it would not state the company was liable for forced transportation or forced labor.[215] Nor would the company apologize or acknowledge liability.[216] Later, the company designed the memorial on its own without the input of the Korean forced laborers.[217]

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208. The precise amount of the settlement is unclear, but is somewhere between 30 and 40 million yen for the seven plaintiffs and civil society group. Zhang Hongbo, *Nihon Senso Sekinin to Kurikaesareru: Aimai na Kaiketsu* [*Japan's War Responsibility Repeats an Ambiguous Solution*], 431 JINKEN TO KYOIKU [HUM. RTS. & EDUC.] 150, 152 (2009); *Dongjing Zhuandian: Riben di San Jian Zhanhou Buchang Susong Hejie an Dacheng* (东京专电：付钱不认罪，日本第三件战后补偿诉讼和解案达成 [*Reuters Tokyo: Payment But No Apology, Japan Reaches Third Settlement in Postwar Compensation Litigation*], PEOPLE'S DAILY (July 12, 2000), http://www.people.com.cn/BIG5/channel2/17/20000712/141361.html [hereinafter *Reuters Tokyo*] (between 30 and 40 million yen).

209. The term *resolution money* (*kaiketsukin*) implies no wrongdoing.

210. *Fujikoshi Sosho de Wakai ga Seiritsu 'Sengo Hosho' wa Hajimete Saikosai* [*Fujikoshi Settles Postwar Compensation Lawsuit for First Time at Supreme Court*], ASAHI SHIMBUN, July 11, 2000.

211. *Reuters Tokyo*, *supra* note 206.

212. *Id.*

213. Yamada, *supra* note 198, at 105.

214. *Kankokujin e no Sengo Hosho, Fujikoshi Sosho ga Wakai, Kaiketsukin Sanzenman'en: Saikosai* [*Supreme Court: War Compensation for Korean, Fujikoshi Lawsuit Settles, 30 Million Yen in Settlement Money*], YOMIURI SHIMBUN, July 12, 2000.

215. *Id.*

216. *Id.*

217. Yamada, *supra* note 198, at 105.

Fujikoshi offered money and a monument, but little remorse. During a press conference, Fujikoshi President Kensuke Imura thanked the plaintiffs for their work, but took a hard line about apology and liability. "There will be no apology. We never forced them to come to Japan," he stated.[218] When asked about the issue of corporate liability, Kensuke replied, "[i]t is wrong to apply modern sensibilities when discussing wartime events."[219] He also questioned plaintiffs' claims they had not been paid.[220]

The plaintiffs, for their part, expressed partial satisfaction.[221] Plaintiff Choe said she "was pleased with the settlement," as it helped release the anger (*han*)[222] that had accumulated over the years."[223] The corporation's failure to apologize bothered her, yet she believed this was the best she could get during her lifetime.[224] Plaintiff Yi stated that "with the settlement, the war has ended for me."[225]

The Fujikoshi settlement attracted attention beyond Japan and Korea. The PEOPLE'S DAILY, the official newspaper of the Chinese Communist Party, predicted the agreement would "directly impact" ongoing war reparations lawsuits brought by

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218. *Koreans Granted Redress for Wartime Forced Labor*, JAPAN TIMES (July 12, 2000), http://www.japantimes.co.jp/news/2000/07/12/national/koreans-granted-redress-for-wartime-forced-labor/#.V7hBuiMrJ3k.

219. *Id.*

220. *Id.*

221. At the press conference, Plaintiff Yi Jong-suk shed tears of joy, and claimed she could not put the feeling into words. *See Fujikoshi Sosho Wakai, Mizo nao Umarazu: Genkokudan 'Jisshitsu Shoso Da,' Kaisha wa Shazai Kyohi* [*Unfilled Gaps in the Settlement of the Fujikoshi Lawsuit: Plaintiffs' Group Claims "It's a Substantial Victory" But Company Refuses to Apologize*], MAINICHI SHIMBUN, July 12, 2000.

222. As Professor C. Sarah Soh writes, "In the Korean ethnopsychological imagination, *han* takes the form of a painful, invisible knot that an individual carries in her heart over a long period of time, made of a complex of undesirable emotions and sentiments such as sadness, regret, anger, remorse and resignation." C. SARAH SOH, THE COMFORT WOMEN: SEXUAL VIOLENCE AND POSTCOLONIAL MEMORY IN KOREA AND JAPAN 82 (2008). Many comfort women's stories are suffused with *han* (恨).

223. *Fujikoshi Wakai, Genkoku Igai nimo Kaiketsukin: Moto Teishintaiinra Gonin nado ni* [*Fujikoshi Settlement, Resolution Money for More than Plaintiffs: 5 Former Forced Laborers and Others*], ASAHI SHIMBUN, July 12, 2000.

224. *Id.*

225. *Moto Joshi Teishintaira ga Fujikoshi Shacho to Hatsu Mendan, Fujikoshi Sosho Saiban* [*First Meeting Between Former Volunteer Corps Women and Fujikoshi President, Fujikoshi Lawsuit*], KUMAMOTO NICHINICHI SHIMBUN, July 13, 2000.

Chinese citizens.[226] The PEOPLE'S DAILY also pointed out the company's failure to apologize and the president's lack of remorse.[227] These details suggest the importance of apology, accountability, and contrition in China.

TABLE 1. RESULTS OF THE KOREAN SETTLEMENTS

Year	Lead Plaintiff	Defendant	A	L	Amount	Public Memory
1997	Cho Yeong-shik	Nippon Steel	N	N	$17,000	Stele + Service
1999	Kim Kyeong-seok	Japan Steel	N	N	$35,000	NA
2000	Yi Jong-sul	Fujikoshi	N	N	$30,000 (*)	Stele

A: Apology
L: Liability
*: The exact amount of the payment in the Fujikoshi settlement was not made public.

V. CHINESE SETTLEMENTS

In the final years of World War II, Japan also mobilized some 40,000 Chinese men and boys to Japan.[228] In Korea, Japan relied on its decades-old administrative apparatus to conscript laborers. However, Japan lacked similar infrastructure in China and resorted to more brutal tactics. The Japanese Imperial Army encircled Chinese villages, moved towards the center, and captured anybody who fled—a practice soldiers called "rabbit-hunting" (*usagigari*).[229] Once captured, the Chinese men and boys were transported to ports in Shandong Province China and shipped to 135 worksites spread across the Japanese archipelago.[230] From 1995 to the present, Chinese

226. *Reuters Tokyo, supra* note 206.
227. *Id.*
228. In Spring, 1946, Japan's Ministry of Foreign Affairs compiled an exhaustive report on Chinese forced labor. The researchers calculated the number of 38,935 after visiting each of the 135 worksites that used forced labor. *See* William Underwood, *Chinese Forced Labor, the Japanese Government and the Prospects for Redress*, 3 ASIA-PAC. J. — JAPAN FOCUS, July 2005, at 1, 2.
229. Kojima Takao, *'Usagi kari Sakusen' wa Jitsuzai Shita: Tanabe Toshio no Hanron ni Kotaeru* [*'Rabbit-Hunting Operations' Were Real: A Refutation of Tanabe Toshio*], KIKAN-TYUKIREN (May 23, 2004), http://www.ne.jp/asahi/tyuukiren/web-site/backnumber/04/usagigari.htm.
230. *See* Underwood, *supra* note 228, at 1–2.

forced laborers have filed dozens of lawsuits against the Japanese companies that used their labor.[231] Three lawsuits that settled are examined below.

A. *Kajima Construction (2000)*

In November 2000, some five months after the Fujikoshi agreement, the first lawsuit involving Chinese forced laborers settled.[232] Thus ended Geng Zhun's decade-plus campaign for reparation.[233] By way of background, Geng was abducted from his home in Henan Province in 1944, and sent to a copper mine in Hanaoka, Japan.[234] Along with 985 other Chinese forced laborers, Geng toiled in abject conditions.[235] On June 30, 1945, six weeks before Japan's surrender, Geng led an unsuccessful insurrection at the mine.[236] He was later sentenced to death by the Akita District Court.[237] However, the war's end prevented his execution, and he returned to China in 1946.[238]

In December 1989, Geng wrote to Kajima on behalf of himself and other Chinese forced laborers as representative of the Association of Hanaoka Victims.[239] They demanded an apology, the construction of memorials in Japan, and ¥5 million (about $50,000) in compensation for each victim.[240] In 1990, after six months of negotiations, Geng, his lawyers, and a representative of the Kajima Construction Corporation issued a Joint Statement. The Joint Statement is significant in that it

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231. *See, e.g.*, Geng Zhun v. Kajima Corp., Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 10, 1997, Hei 7 (wa) no. 12631, 988 HANREI TAIMUZU 250 (dismissing case on statute of limitations grounds), *settled on appeal* [Tokyo High Ct.] 2000; Zhang Wenbin v. Rinko Corp., Niigata Chiho Saibansho [Niigata Dist. Ct.] Mar. 26, 2004, 50 SHOMU GEPPO [SHOGETSU] 3444.

232. Stephanie Strom, *Fund for Wartime Slaves Set Up in Japan*, N.Y. TIMES (Nov. 30, 2000), https://www.nytimes.com/2000/11/30/world/fund-for-wartime-slaves-set-up-in-japan.html.

233. MIKI Y. ISHIKIDA, TOWARD PEACE: WAR RESPONSIBILITY, POSTWAR COMPENSATION, AND PEACE MOVEMENTS AND EDUCATION IN JAPAN 42–43 (2005).

234. *See* NOZOE, *supra* note 62, at 124–25.

235. *Id.* at 125.

236. *Id.*

237. *Id.*

238. *Id.* at 138.

239. In translating the association's name, I have shortened it somewhat. *Huagang Shounanzhe Lianyi Choubeihui* would literally translate to Hanaoka Victims Friendship and Preparatory Association.

240. ISHIKIDA, *supra* note 233, at 43.

includes an admission and an apology, something no Japanese corporation offered in the Korean settlements. The agreement is translated *in toto*:

Chinese survivors and their bereaved families visited the Kajima Construction Company. The laborers worked in the Hanaoka Mine for the Kajima Construction Company from 1944 to 1945. After discussions, the two sides make the following statement, to reflect their agreement on certain matters:

> 1. It is a historical fact that the suffering that the Chinese endured at the Hanaoka Mine derived from a Cabinet Decision on forced transfer and forced labor. Kajima Construction Company ("Kajima") recognizes this as a fact, and admits its liability as a corporation. We express a deep apology to the Chinese survivors and the bereft families.
>
> 2. The Chinese survivors and the bereft families sent an open letter, dated December 22 [1989]. Kajima acknowledges that this issue should be resolved through negotiations by both sides.
>
> 3. The two parties, including the survivors and legal representatives of the bereft families, will continue to negotiate based on the spirit of "Preparing for the future by not forgetting the past" (Zhou Enlai). We aim to resolve the problem in a timely manner.[241]

The 1990 Joint Statement does several noteworthy things. First, it directly implicates the Japanese government in the forced labor program. In November 1942, the Japanese Cabinet passed a formal resolution to recruit Chinese laborers.[242] Citing this resolution in Article 1 places the blame squarely on the Japanese government, removing any doubt about which entity is ultimately responsible for the forced labor program.[243]

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241. GENG ZHUN ET AL., JOINT STATEMENT (July 5, 1990), http://www4.plala.or.jp/Hanaoka-jiken/shiryou.html [hereinafter KAJIMA JOINT STATEMENT].

242. *See* Kakugi Kettei [Cabinet Decision], *Kajin Romusha Naichi I'nyu ni Kansuru Ken* [*Matter Concerning Importation of Chinese Laborers to Japan*], Nov. 27, 1942. For a description of the implementation of this policy, see Timothy Webster, Note, *Sisyphus in a Coalmine: Responses to Slave Labor in Japan and the United States*, 91 CORNELL L. REV. 733, 736–37 (2006).

243. KAJIMA JOINT STATEMENT, *supra* note 241, art. 1.

Second, Kajima acknowledged its "liability as a corporation."[244] It does not define the term, but given the identification of the government's role in Article 1, corporate liability seems to imply a kind of secondary liability. This is especially significant in contrast with the Korean settlements, where *no* corporation acknowledged liability. Here, in 1989, even before the war reparations issue came to the fore, one Japanese corporation made at least a partial admission of its responsibility.

Third, Kajima expressed its "deep apology" to the survivors and their families.[245] At this early stage, before the filing of any compensation lawsuits, Kajima exhibited rare candor. Forced laborers have long sought apology and admissions of liability—legal, corporate, historical, or otherwise. As discussed above, no Japanese corporation apologized, or acknowledged liability, to Korean victims of forced labor.

If the Joint Statement abounded in affective relief, it lacked a different vital component of settlement: monetary compensation. The issue proved more elusive than either party originally imagined.[246] Negotiations continued for five years, but ground to a halt in 1995. With no payment terms apparently in the offing, Geng and ten other forced laborers sued Kajima in Tokyo District Court, becoming the first Chinese forced laborers to file suit.[247] The trial court dismissed the case in 1997 as time-barred, shielding the company from legal liability.[248]

On appeal, Judge Niimura Masato said "I see this is no ordinary case. The parties should try to settle."[249] The Tokyo High Court endorsed a final settlement agreement on November 29, 2000—a full decade after the Joint Statement. The first Chinese settlement was, to be sure, hard-wrought. On the one

244. *Id.*

245. *Id.* The importance of the three elements is underscored by their placement in Article 1 of the statement.

246. *See* K. Connie Kang, *Japanese Lawyer in L.A. as Voice of War Victims*, L.A. TIMES (May 2, 1996), http://articles.latimes.com/1996-05-02/local/me-65172_1_japanese-war-victims (noting that it both parties struggled for years to settle the suit).

247. Geng Zhun v. Kajima Corp., Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 10, 1997, 988 HANREI TAIMUZU 250.

248. *Id.* at 250.

249. *See* Nozoe Kenji, *Ronsetsu: Hanaoka Jiken no Wakai wo Megutte* [*Editorial: On the Settlement of the Hanaoka Incident*], ASOSHI'E 21 NEWSLETTER (Jan. 2001), http://www.ne.jp/asahi/hanaoka/1119/nozoe.html.

hand, the Hanaoka settlement innovated a new remedial technique: the establishment of a foundation. The parties agreed to establish a Hanaoka Peace and Friendship Fund, which compensated nearly one thousand forced laborers and their heirs.[250] Kajima put ¥500 million (about $4.6 million) into the fund for payments.[251] Victims and their families receive a payment of an undisclosed amount, disbursements for memorial services for when victims die, health care and maintenance costs for the laborers, and money for the education of their descendants.[252] In exchange, laborers and their families waive all claims against Kajima in Japan and other countries.[253] This provided the "legal peace" or "legal certainty" sought by companies around the world in World War II litigation.[254]

On the other hand, the settlement agreement revised revise the 1990 Joint Statement. According to the settlement agreement, "the parties reconfirm the Joint Statement of July 5, 1990. However, Appellee [Kajima] insists that the Joint Statement does not recognize its *legal liability*. Appellants [plaintiffs] have understood this."[255] Having won the issue of legal liability at trial, Kajima sought to undo the acknowledgment it made in 1990. Kajima later issued its own statement:

> From 1944 to 1945, pursuant to a Cabinet Directive issued by the Japanese government to import Chinese labor into Japan, many Chinese laborers worked at our company's Hanaoka Plant, in Odate, Akita Pre-

250. *Geng Zhun v. Kajima Const. Corp., Settlement Terms*, art. 4 (Nov. 29, 2000), http://www.ne.jp/asahi/hanaoka/1119/wakaisho.html [hereinafter *Kajima Settlement Terms*].

251. The agreement does not specify how much each victim is to receive. The New York Times, dividing the total amount of the fund by the 986 forced laborers, estimated each laborer could receive about $4,600. It is unclear, however, how much victim, or his family, actually received. *See* Strom, *supra* note 230.

252. *Kajima Settlement Terms*, *supra* note 250, art. 4.

253. *Id.* art. 5.

254. Following a series of high-profile lawsuits brought by Holocaust victims in the 1990s, various European governments, banks, and companies settled under the condition that the victims would not institute additional lawsuits. *See In Re* Austrian & Ger. Holocaust Litig., 250 F.3d 156, 159 (2d Cir. 2001) (defining legal peace as the "final dismissal of pending Holocaust-related litigation against German companies in United States courts."). Japanese scholars refer to this as "legal certainty" (*hoteki anteisei*). *See* MATSUOKA, *supra* note 50, at 160.

255. *Kajima Settlement Terms*, *supra* note 250, art. 1.

> fecture. Since it was wartime, the conditions were quite harsh. Our company did its utmost, in good faith, to exercise a duty of care towards our workers. However, there were many unfortunate incidents, and many died of diseases. These events are deeply painful.
>
> Some of the Chinese workers, seeking to hold our company liable, filed a lawsuit. The trial court dismissed plaintiffs' claims. The Tokyo High Court, where the case was pending, suggested settlement. Our company was willing to discuss settlement based on the assumption that we would not bear legal liability, as charged in the litigation. We discussed how to move towards a concrete solution in order to commemorate the 986 people who worked at the Hanaoka Plant. Our positions were fully understood by both judges and plaintiffs. As one condition of settlement, we agreed to establish the Hanaoka Peace Fund with the participation of the Chinese Red Cross Society. The court urged us to contribute money to the fund, which will implement concrete measures: commemorating the victims, paying maintenance and health care costs for bereaved families, providing scholarships for their children, and so on. Payments from the fund are neither compensation nor reparations.[256]

The preceding is undeniably Kajima's *interpretation* of the settlement agreement—not part of the legally approved settlement. However, it reveals much about Japanese companies' views about liability for the war.

First, like the 1990 Joint Settlement, Kajima's statement ascribes primary blame to the Japanese government for instituting the forced labor program. Second, it depicts Kajima as genuinely concerned about the health of its workers. The facts, however, tell a different story. Even by the grim standards of Japanese forced labor, the Hanaoka mine stood out for its brutality. On average, about one in six, or 17%, of Chinese forced laborers died in Japan—a powerful indictment of

256. *Kajima Comment*, *supra* note 122. I translate *hosho* as compensation and *baisho* as reparations.

the brutality of the entire forced labor program.[257] At Hanaoka, however, that number more than doubled, to 42%, 418 of 986 forced laborers died during the eighteen months in which Hanaoka used forced labor.[258] Many died in the uprising of June 30, 1945, also known as the Hanaoka Incident.[259] In the face of these records, Kajima's claim that it did its "utmost in good faith to exercise a duty of care"[260] to protect its labor force is not credible. Third, the company explicitly rejected legal liability, walking back from the "liability as a corporation"[261] language used in the 1990 Joint Statement. Fourth, Kajima also denied it was paying "compensation,"[262] which would suggest it was making up for a wrongful or illegal act.

The Kajima Settlement Agreement ignited controversy. Japanese commentators generally offered praise, while Chinese commentators responded with criticism.[263] Japanese commentators called the fund a realistic solution and possible model for ongoing lawsuits.[264] Others highlighted the participation of the Chinese Red Cross, which, they claimed, enjoyed high levels of public trust in China.[265] Judge Niimura said, "[n]ow that we are at the end of the twentieth century, resolution is truly significant."[266] Of course, some in Japan also criti-

257. Bruce Ramsey, *No Moves in Japan to Pay Asians Forced into Labor in WWII*, SEATTLE POST-INTELLIGENCER, May 24, 1999, at A2.

258. *See* NOZOE KENJI, KIGYO NO SENSO SEKININ: CHUGOKUJIN KYOSEI RENKO NO GENBA KARA [THE WAR RESPONSIBILITY OF COMPANIES: FROM THE WORKSITES OF CHINESE FORCED LABOR] 145 (2014) (noting 412 of 986 workers died at the mine).

259. *Id.*

260. *Kajima Comment,* supra note 122.

261. *Id.*

262. *Id.*

263. Zhang Hongbo, *Nitchukan no Rekishi Ninshiki ni Yokotawaru Fukai 'Mizo'* [*Deep 'Chasm' between China's and Japan's Historical Recognition*], *in* HANAOKA WO WASURERU NA: KO JUN NO SHOGAI [DON'T FORGET HANAOKA: THE LIFE OF GENG ZHUN] 240, 240 (Nozoe Kenji ed., 2014).

264. See Strom, *supra* note 232 (offering praiseworthy comments from Japanese lawyers and professors); *Hanaoka Jiken Sosho de Wakai Seiritsu* [*Settlement Established for Hanaoka Incident Lawsuit*], KYODO NEWS (Oct. 26, 2009), http://www.zephyr.dti.ne.jp/~kj8899/wakai_.html [hereinafter *Settlement Established for Hanaoka Incident*].

265. *Settlement Established for Hanaoka Incident*, *supra* note 264 (statement by Professor Tanaka Hiroshi of Ryukoku University).

266. *Id.*

cized the settlement, in particular its renunciation of legal liability.[267]

The reaction in China was more varied. Geng Zhun reportedly expressed rage upon reading the settlement agreement. According to the Chinese media, "his chest tightened in anger, he lost consciousness, fell over, and was hospitalized."[268] To Geng, the settlement amounted to losing the lawsuit. "Each provision is like a shackle on my wounded body. Even the 1990 apology had been overturned. There was no mention about building the memorial hall. The ¥500-million payout was now merely a 'donation.' This means it is not compensatory or reparative in nature."[269]

Geng later publicly condemned the settlement agreement. He refused to sign a copy, lobbied other victims to do the same, and refused money from the fund.[270] He explained the situation in the following way:

> The settlement was reached by the Japanese lawyers who represented us. They made us transfer full power of attorney to them, and sign our names. But what they told us about the agreement, and the actual Japanese text, are different. We thought the Jap-

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267. *See Settlement Established for Hanaoka Incident*, *supra* note 264. Professor Yamada Shoji of Rikkyo University criticized both Kajima's renunciation of legal liability, and its expression, "memorial for the victims," because it sounds like it is coming from a third party, not the party that committed the acts.

268. Yuan Tiecheng (袁铁成), *Hua Gang Laogong Lingxiu Shouci Jielu Riben Weituoren Chumai Yuangao Liyi* (花岗劳工领袖首次揭露日本委托人出卖原告利益) [*Hanaoka Labor Leader Reveals for the First Time that Japanese Trustees Sold Out Plaintiffs' Interests*], ZHONG QING (中国青年报) [CHINA YOUTH NEWS] (Mar. 17, 2003), http://japan.people.com.cn/2003/3/17/200331783037.htm [hereinafter *Hanaoka Labor Leader Reveals Trustees Sold Out Plaintiff's Interests*] (noting Japanese lawyers group and a few "so-called well-known overseas Chinese . . . sold out" the plaintiffs); *see 60 Years Ago Japanese Firm Made Him Suffer; Now Japanese Gov't Makes Him Angry*, XINHUA NEWS AGENCY (June 24, 2005), http://www.china.org.cn/english/fetures/WWII/133054.htm (reporting that Geng fell into a coma for three days upon hearing the result of the settlement).

269. *Hanaoka Labor Leader Reveals Trustees Sold Out Plaintiff's Interests*, *supra* note 267.

270. Ivy Lee, *Toward Reconciliation: The Nishimatsu Settlements for Chinese Forced Labor in World War II*, 8 ASIA-PAC. J. — JAPAN FOCUS, Aug. 2010, at 1, 1–2 (noting other victims also did not accept the Hanaoka Settlement). *See also* Yuan, *supra* note 267.

> anese side agreed with our demands, and accepted them.[271]

Geng's son was blunter: "I never expected we would be duped by lawyers. We simply cannot accept this result."[272]

Chinese legal scholars also denounced the agreement. Professor Guan Jianqiang of East China University of Political Science and Law interpreted the settlement agreement as a nullification of Kajima's 1990 apology in the Joint Statement.[273] According to Professor Guan, apology is predicated upon admitting one's fault; by denying legal liability, Kajima no longer admitted its wrongdoing.[274] The official Chinese media amplified Guan's analysis, reporting the settlement "not only lacked sincere repentance, but reduced the exercise to a game of words."[275]

The Hanaoka Settlement, the first between Chinese victims and a Japanese corporation, left a mixed legacy. The agreement brought about a multifaceted compensation scheme that looked backward at victims' injuries and forward toward the education of their children and grandchildren. Still, it failed in key aspects. First, despite Geng Zhun's original demand, the settlement agreement did not provide for a memorial. In time, such a museum would be built, though Kajima's role in its construction is not clear.[276] Second, the

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271. Guo Xu (郭绪), *Ri Peichang Wo Laongon 5yi Riyuan Quxiang Cheng Mi: Ceng Xintuo Hong Shizihui* (日赔偿我劳工5亿无疑日元去向成谜：曾信托红十字会) [*Whereabouts of 500 Million Yen of Japanese Compensation to Chinese Laborers Now a Mystery: Entrusted to Red Cross*], Fazhi Zuomo (法治周末) [Legal Weekend] (Oct. 19, 2011), http://news.sina.com.cn/c/sd/2011-10-19/102823327556.shtml.

272. *Id.*

273. Guan Jianqiang (管健强), *Xi 'Huangang Anjian' de Hejie Moshi yu Duiriminjian Suochang* (析'花岗案件'的和解模式与对日民间索偿) [*Analyzing the Settlement Model of the "Hanaoka Incident" and Civil Compensation against Japan*], Faxue (May 25, 2007), http://view.news.qq.com/a/20100427/000004_1.htm.

274. *Id.*

275. *'Huagang Hejie' Guozhen Tixianle Gongzheng he Zhengyi?* ('花岗和解'果真体现了公正和正义?) [*Did the "Hanaoka Settlement" Achieve Fairness and Justice in the End?*], People's Daily (Apr. 11, 2001), http://www.people.com.cn/BIG5/guandian/29/163/20010411/439484.html.

276. The Hanaoka Peace Memorial Hall opened in Odate, Japan in April 2010. The Chinese Ambassador to Japan, Cheng Yonghua, and Japan's Minister of Consumer Affairs, Fukushima Mizuho, attended the opening ceremonies. *See "Hanaoka Jiken" no Heiwa Kinenkan ga Oishi ni Kansei*, ('花岡事

2000 settlement agreement apparently withdrew the admission of liability Kajima first made in the 1990 Joint Statement. The 2000 agreement merely states that Kajima did not accept *legal liability* in the 1990 Joint Statement.[277] That is rhetorically true; Kajima admitted its *liability as a corporation*.[278] Third, the 2000 Settlement Agreement did not include an apology. It could be that Kajima believed the apology from the 1990 Joint Statement sufficed, and another apology would be redundant. The settlement agreement—the instrument by which plaintiffs waived their right to sue Kajima[279] and thus ended the litigation—included no apology. From the Chinese perspective—that of victims, lawyers, and academics—the Hanaoka settlement did not deliver the satisfaction, legally speaking, of a full settlement agreement.[280] The lack of apology, the apparent retraction of liability, and the failure to produce a memorial reveal some of the holes in this redress mechanism.

B. *Nishimatsu Construction (2009)*

During World War II, the Nishimatsu Construction Company employed hundreds of Chinese forced laborers: approximately 360 at its Yasuno power plant in Hiroshima and 183 at its Shinanogawa power plant near Niigata.[281] Many died at Nishimatsu's worksites, but most made it back to China.[282] In the 1990s, forced laborers from both worksites filed two sepa-

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件'の平和記念館が大石に完成) [*English Translation*], CHINA NET (Apr. 19, 2010), http://japanese.china.org.cn/jp/txt/2010-04/19/content_19856969.htm. Press reports did not mention the presence of Kajima officials at the opening ceremony.

277. The term *hoteki sekinin* can best be translated as *legally liable*.

278. The term *kigyo toshite sekinin* means literally *liable as a corporation*. It implies someone or something else—here the Japanese government—also bears a type of liability.

279. *Kajima Settlement Terms*, *supra* note 248, art. 5.

280. The U.N. Basic Principles do not define "satisfaction," but instead include a variety of remedies that constitute satisfaction. *See* G.A. Res. 60/147, 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005), art. 22 (listing *inter alia* verification of facts, public apology, official declaration or a judicial decision restoring victims' dignity and reputation as forms of satisfaction).

281. NOZOE, *supra* note 256, at 287–88.

282. *See Kyosei Renko Sareta Chugokujin Rodosha, Kinenhi ga Niigataken de Kenritsu* [*Forced Chinese Laborers Set up Memorial Site in Niigata Prefecture*],

rate lawsuits against Nishimatsu, here referred to by the names of their worksites, Yasuno and Shinanogawa.[283]

Both sets of plaintiffs demanded a printed apology, the construction of a memorial, and monetary compensation.[284] The Yasuno plaintiffs lost at the trial court level but prevailed on appeal. In so doing, they joined a rare group of war reparations plaintiffs to secure a damages award in Japan. Each plaintiff received an award of ¥5.5 million, about $10,000. However, the victory was ephemeral; the Supreme Court vacated the appellate court decision and dismissed the case on April 3, 2007.[285]

Supreme Court Justice Nakagawa Ryôji attached a nonbinding addendum (*fugen*), in which he encouraged the parties to continue negotiating a settlement:[286]

> On the one hand, plaintiffs in this case endured extraordinary mental and physical suffering. On the other hand, [Nishimatsu] received the corresponding benefit of Chinese forced laborers in the working conditions described above, and accepted compensation from the Japanese government. In light of these facts, it is expected that the relevant parties, includ-

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CHINANET (Nov. 18, 2016), http://japanese.china.org.cn/jp/txt/2016-11/18/content_39733847.htm (noting deaths of 12 laborers at Shinanogawa).

283. Zhang Jinwen v. Nishimatsu Const. Co., Hiroshima Chiho Saibansho [Hiroshima Dist. Ct.] July 9, 2002, 1110 HANREI TAIMUZU 253, *rev'd* [Hiroshima High Ct.] 2003, *rev'd* [Sup. Ct.] 2007. *See Nishimatsu Kensetsu wa Zenmen Wakai* [*Nishimatsu Construction in Comprehensive Settlement*], NIHON KEIZAI SHIMBUN (Apr. 27, 2010), http://www.suopei.jp/pdf/newspaper20100426.pdf.

284. Uchida Masatoshi, *Hanaoka Wakai kara Nishimatsu Wakai e: Chugokujin Kyosei Renko, Kyosei Rodo 'Junan no Ishibumii' wo 'Yuko no Ishibumi' e* [*From the Hanaoka Settlement to the Nishimatsu Settlement: Chinese Forced Transport, Forced Labor, from Victims' Stele to Friendship Stele*], 333 RITSUMEIKAN HOGAKU [RITSUMEIKAN L. REV.] 1631, 1635 (2010).

285. Song Jixiao v. Nishiamatsu Constr. Co., Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, 1969 HANREI JIHO 31, *translated in* Mark A. Levin, *Nishimatsu Construction Co. v. Song Jixiao*, 102 AM. J. INT'L L. 148, 152 (2008) (dismissing plaintiffs' claims as waived by the San Francisco Peace Treaty).

286. The addendum (*fugen*) is not legally binding. Instead, it offers a presiding judge the opportunity to reflect upon the case he has just heard. *Fugen* are fairly rare, especially in cases where plaintiff loses. *See* MATSUOKA, *supra* note 50, at 89.

> ing [Nishimatsu], will make efforts to remedy (*kyûsai*) the injuries of the victims.[287]

Justice Nakagawa's exhortation did not effectuate settlement on its own. According to plaintiffs' lawyers, Nishimatsu reacted coolly to the Justice's suggestion.[288] However, the company's stance softened two years later, when its president was indicted for violations of campaign finance law.[289] On June 26, 2009, just a few weeks before his conviction, Nishimatsu president Kunisawa Mikio stated his company would "seriously weigh" the Supreme Court's recommendation and "sincerely face the Chinese victims."[290] Noting the company "did not want to drag the past into the present," Kunisawa offered to settle.[291] The problem was that Kunisawa wanted to negotiate one settlement for both cases, while the two groups of litigants had differences of opinions, outlined below. In the end, Nishimatsu reached two separate settlement agreements—with the Yasuno plaintiffs in 2009 and the Shinanogawa plaintiffs in 2010.[292]

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287. *Id.* at 186 (quoting Justice Nakagawa's addendum in full).

288. *Id.* at 91. *See also* Uchida, *supra* note 283, at 1644 (describing the company's "stubborn attitude towards denying legal liability").

289. Former Nishimatsu president Kunisawa Mikio was convicted of violating political campaign laws and foreign exchange regulations in July 2009. *See Ozawa Aide Denies Donation Scam Role*, KYODO NEWS (Dec. 19, 2009), https://www.japantimes.co.jp/news/2009/12/19/national/ozawa-aide-denies-donation-scam-role/#.W-8w6pNKgsk. The scandal also involved high-profile political operative, Ozawa Ichiro. *See Japan's Ichiro Ozawa 'Won't Quit' Over Funding Row*, BBC (Jan. 16, 2010), http://news.bbc.co.uk/2/hi/asia-pacific/8463112.stm. As Uchida put it, "[w]ithout the illegal contribution to Ozawa Ichiro, we would not have this settlement." *See* Uchida, *supra* note 283, at 1644.

290. *Id.*

291. *Id.*

292. MATSUOKA, *supra* note 50, at 93. The Yasuno agreement was signed on October 27, 2009. The Shinanogawa agreement was signed on April 26, 2010. For background on the Shinanogawa litigation, see Han Yinglin et al. v. Nishimatsu Const. et al., [Tokyo Dist. Ct.] Mar. 11, 2003 (citation of unpublished opinion, dismissed on statute of limitations grounds), *aff'd* [Tokyo High Ct.] Mar. 16, 2006, *aff'd* [Sup. Ct.] June 15, 2007.

The two settlement agreements share some attributes.[293] Both establish a fund[294] to pay "compensation" to the victims.[295] Both extinguish the debts and claims of the parties,[296] thus providing Nishimatsu with legal certainty. They also cite Justice Nakagawa's addendum, suggesting his exhortation might have made some difference in the settlement process.[297] Both agreements also reference the Supreme Court decision, specifically its finding that the plaintiffs "lost the right to make a claim."[298] They then interpret the Supreme Court's language that it "denied that Nishimatsu was legally liable."[299] That is certainly *an* interpretation of the decision, but not the sole potential meaning.[300] The Supreme Court held the San Fran-

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293. *See Settlement Agreement Between Nishimatsu Corp. & Lü Zhigang et al.* (Oct. 23, 2009), http://www.ne.jp/asahi/hanaoka/1119/N-Yasuno-wakai.html [hereinafter *Yasuno Settlement*]. *See Settlement between Nishimatsu Corp. & Zhang Zaoling et al.* (Apr. 26, 2010), http://apjjf.org/data/AppA_NS_Agreement_26Apr2010_JP.pdf [hereinafter *Shinanogawa Settlement*]. The Yasuno Settlement, involving 360 workers, put aside 250 million yen (about $2.76 million in total, or $7,666 per person). The Shinanogawa Settlement, involving 183 workers, put aside 128 million yen (about $1.41 million in total, or $7,700 per person).

294. *See Yasuno Settlement*, *supra* note 293, art. 5 (designating the Japan Civil Liberties Union as the fund manager); *Shinanogawa Settlement*, *supra* note 294, art. 3 (designating the China Foundation for Human Rights Development as the fund manager). Established in 1947, the JCLU is an independent non-profit organization dedicated to protecting human rights. The China Foundation is a Chinese government agency established in 1994 by the State Council Information Office (SCIO). *See Nishimatsu Shinanogawa Heiwa Kikin no Kanri Hikitsugu: Chugokujin Jinken Hatten Kikinkai* [*China Foundation for Human Rights Development Takes Over Management of Nishimatsu Shinanogawa Peace Fund*], CHUGOKU TSUSHINSHA [CHINA NEWS SERVICE] (May 5, 2010), http://www.china-news.co.jp/node/47453.

295. The Yasuno Settlement uses the more legalistic term *hosho-kin*. *Yasuno Settlement*, *supra* note 293, art. 4. The Shinanogawa Settlement uses the more colloquial term *tsugunai-kin* (償い金). *Shinanogawa Settlement*, *supra* note 294, at art. 2. Both mean money (金) for compensation (償).

296. *Yasuno Settlement*, *supra* note 293, art. 8; *Shinanogawa Settlement*, *supra* note 294, art. 6.

297. *Yasuno Settlement*, *supra* note 293, art. 1; *Shinanogawa Settlement*, *supra* note 289, pmbl.

298. *Yasuno Settlement*, *supra* note 293, art. 1; *Shinanogawa Settlement*, *supra* note 294, pmbl.

299. *Yasuno Settlement*, *supra* note 293, art. 1; *Shinanogawa Settlement*, *supra* note 294, preamble.

300. Most Japanese courts have recognized the corporations' affirmative defenses: either on treaty waiver grounds, or on statute of limitations

cisco Peace Treaty *extinguished* plaintiffs' compensation claim.[301] However, it did not positively deny Nishimatsu's legal liability. Instead, it accepted Nishimatsu's affirmative defense that plaintiffs had lost their right to compensation.[302]

An interpretive appendix to the Yasuno settlement further parsed the liability issue.[303] Previously, the Hanaoka settlement showed the delicacy of word choice, and explicitly called for different interpretations of the same events.[304] Similarly, the Yasuno settlement spelled out the parties' divergent interpretations.[305] The appendix noted the "objective fact that the Supreme Court had denied Nishimatsu's legal liability"[306] and then offered two interpretations of this "objective" fact: (1) Nishimatsu agreed that it was an objective fact that the Supreme Court decision denied legal liability, while (2) plaintiffs did not accept this as an objective fact.[307]

As in the Hanaoka settlement, the language of liability was carefully crafted:

> It is a historical fact that the suffering of 360 survivors, who performed forced labor at Nishimatsu's power station in Yasuno, stemmed from the cabinet decision, "Matter of Introducing Chinese Labor to the Mainland." Nishimatsu recognizes this as a fact, and recognizes its *historical liability as a corporation.*

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grounds. However, it is important to note that a handful of Japanese lower courts, including the Tokyo High Court in the Yasuno case, found that Nishimatsu both owed a duty of care to the plaintiffs, and violated that duty for its awful treatment of them. *See* Zhang, *supra* note 260, at 62. For more on the duty of care in the context of war reparations lawsuits, see Webster, *supra* note 139, at 27.

301. *See* Levin, *supra* note 15, at 152.

302. Indeed, the appellate court found Nishimatsu violated its duty of care to Zhang and thus liable under Japan's civil code.

303. *See Yasuno Settlement*, *supra* note 293. The Shinanogawa Settlement contains no such terms. *See Shinanogawa Settlement*, *supra* note 293.

304. *See supra* note 150.

305. Kang Jian, *Rejected by All Plaintiffs: Failure of the Nishimatsu-Shinanogawa "Settlement" with Chinese Forced Laborers in Wartime Japan*, 8 ASIA-PAC. J. — JAPAN FOCUS, Aug. 2010, at 1, 4. Indeed, the language of the Nishimatsu settlements closely resembles that of the 1990 Joint Statement.

306. *Yasuno Settlement*, *supra* note 293, art. 2 ("Interpretive Appendix").

307. *Id.*

> Nishimatsu expresses a *deep apology* to the Chinese survivors and their families.[308]

As in prior settlements, the Yasuno settlement identifies the Japanese government as the prime culprit in the forced labor program. Nevertheless, Nishimatsu makes two important concessions: it recognizes the somewhat attenuated historical liability as a corporation and it apologizes. Both the admission of liability and apology were part of the 1990 Joint Settlement. As discussed above, Kajima backtracked from the liability issue in the 2000 Agreement, and did not reaffirm the apology.

In contrast, Nishimatsu admitted *qualified* liability. First, it suggested that primary liability remained with the government, while only ancillary, or *corporate*, liability lay with Nishimatsu. Second, *historical* liability implies that Nishimatsu is not presently liable to the plaintiffs. In several war reparations lawsuits, courts have attached liability based on notions of a *present* legal liability[309] Here, Nishimatsu clarifies that it does not bear a legal liability to compensate defendants, but is doing so as a humanitarian gesture. Of course, the inclusion of an apology in the text a settlement agreement is unprecedented and a major concession to plaintiffs.

The Nishimatsu agreements earned praise from Chinese and Japanese media.[310] Civil society groups noted the "progress" made in the decade between the Kajima settlement and

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308. *Yasuno Settlement*, *supra* note 293, art. 2. Similar language appears in the *Shinanogawa Settlement*, *supra* note 293, art. 2.

309. *See, e.g.*, Ha Sun-nyo v. Japan, Yamaguchi Chiho Saibansho [Yamaguchi Dist. Ct.] Apr. 27, 1998, 1642 HANREI JIHO 24 (finding current government of Japan owed duty to compensate three Korean comfort women); Kim v. Japan, Kyoto Chiho Saibansho [Kyoto D. Ct.] Aug. 7, 2001, 1772 HANREI JIHO 121 (ordering Japan to pay 45 million yen to survivors and relatives of victims of a ship that sank carrying Koreans back to the peninsula right after World War II), *overturned on appeal* Osaka Koso Saibansho [Osaka H. Ct.] May 30, 2003, 1141 HANREI TAIMUZU 84.

310. Xue Hongtao (薛洪涛), *Liangci Hejie Xieyi Zhongjie 'Xisong' Zhongguo Laogong Suopei* (两次和解协议终结'西松'中国劳工索赔案) [*Two Settlement Agreements End the "Nishimatsu" Chinese Labor Compensation Cases*], FAZHIWAN (法制网) [LEGAL DAILY NET] (May 6, 2010), http://blog.sina.com.cn/s/blog_ac09febf0102vnqg.html; Sun Ran (孙冉), *Lishi Shiwunian 'Xisong Jianshe' Suopei An de Hejie zhi Lu* (历史十五年'西松建设'索赔案的和解之路) [*15-year Road to Settling the "Nishimatsu Construction" Compensation Case*], ZHONGGUO XINWENWANG (中国新闻网) [CHINA NEWS NET] (Apr. 28, 2010), http://www.chinanews.com/hr/hr-yzhrxw/news/2010/04-28/2251229.shtml; *Nishimatsu Settles with Chinese Forced Laborers*, KYODO NEWS (Oct. 24, 2009), https:/

the Nishimatsu settlements: the inclusion of an unfettered apology, the construction of a memorial site in the case of the Yasuno settlement, and the admission of historical liability.[311] The apology in particular emerges as an important achievement—one that eluded victims in the three Korean settlements and the Kajima settlement.

However, not everyone was satisfied. Chinese lawyer Kang Jian, who represented the Shinanogawa plaintiffs, criticized several aspects of the agreement. She noted Nishimatsu's failure to accept complete liability and took issue with some of the terms of the agreement.[312] For instance, Kang critiqued the use of the non-legal term "atonement money," instead of the more legalistic "damages."[313] She also objected to the use of the term "relief," which she interpreted to mean "relief of a charitable nature," or even "aid."[314]

It is true that *compensatory payment* is more colloquial in Japanese—a native term as opposed to a Chinese compound. However, its plain meaning is "money given as monetary damages," or "damages or losses given to another party after one has harmed them either intentionally or negligently."[315] The term arguably lacks the gravitas of a Chinese derivative, just as some believe that Latinate phrases in English convey an authority that Germanic words do not.[316] The phrase *compensa-*

/www.japantimes.co.jp/news/2009/10/24/national/nishimatsu-settles-with-chinese-forced-laborers/#.XDO_pC3MzWd (outlining settlement terms).

311. See Arimitsu Ken, *Chugokujin Kyosei Renko, Nishimatsukensetsu (Hiroshima, Yasuno) Soho go no Wakai ni Tsuie* [*On Settling the Lawsuit Between Chinese Forced Laborers and Nishimatsu Construction (Hiroshima, Yasuno)*] (Oct. 23, 2009), https://apjjf.org/data/Arimitsu_JP_comments_on_Nishimatsu_Yasuno_settlement.pdf.

312. Kang Jian, *supra* note 306.

313. *Id.* at 5. While this article presumes no background in Asian languages, a brief look may be instructive. In Japanese, compensatory payment (*tsuginai-kin*) shares two of three characters as damages (*baisho-kin*) its more legalistic synonym.

314. *Id.* at 9. The term is relief (救済) (*kyusai* in Japanese; *jiùjì* in Chinese).

315. *See* Tsugunau (償う), Goo Jiten, https://dictionary.goo.ne.jp (last visited Jan. 5, 2019). Also, weblio defines *tsugunau* (the base word) as "make up for," "compensate," and even "atone" and "apologize." *Tsugunau*, Weblio https://www.weblio.jp/content/償う (last visited Jan. 7, 2019).

316. The idea is that Germanic words are earthier or closer to lived experience, whereas Latin words represent higher, more abstract or loftier matters. *See* George Orwell, *Politics and the English Language*, *in* 4 The Collected Es-

tory payment includes recognition of the harmful acts; it conveys atonement or even apology. The Yasuno settlement used a different word, "compensation," but that too was apparently objectionable to the Chinese side.[317]

Nor is Kang's concern about use of the word relief (*kyûsai*) entirely apposite. First, it was the word used by Justice Nakagawa, not a term introduced by either side. Second, the term does not *only* mean charity. Indeed, Japanese translations of international human rights treaties use the term to "relieve" or "remedy" the harm suffered from a human rights violation.[318] In Chinese, however, the two-character cognate means "give relief to" irrespective of one's culpability. One can even give relief (*jiuji*) to refugees or people affected by a natural disaster. In contrast, in Japanese the term acknowledges that one has infringed someone else's rights.

According to Chinese media, survivors accepted the Shinanogawa settlement because it included an apology.[319] As

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says, Journalism and Letters of George Orwell 127, 131 (Sonia Orwell & Ian Agnos eds., 1968) ("Bad writers, and especially scientific, political and sociological writers, are nearly always haunted by the notion that Latin or Greek words are grander than Saxon ones . . . .").

317. *Yasuno Settlement*, *supra* note 293 (using compensation [*hosh*o in Japanese, *buchang* in Chinese]). In the context of damages awards under international law, it is common to translate *hosh*o as compensation, and *baisho* as reparation. However, *hosho* is sometimes rendered as compensation or reparations, while baisho can be translated as indemnity. *See* Hirose Yoshio, *Senso Songai ni Kan suru Kojin no Baisho Seikyuken* [*The Right to Seek Individual Reparation for War Damages*], *in* Sengo Hosho to Kokusai Jindoho: Kojin no Seikyuken wo Megutte [Postwar Reparations & International Humanitarian Law: The Question of Individual Claims for Compensation] 106, 119, 158 (Shin Hae-bong et al. eds., 2005).

318. For example, the racial discrimination convention provides that "States Parties shall assure to everyone . . . effective protection and *remedies*, through the competent national tribunals and other State institutions . . . as well as the right to seek from such tribunals just and adequate *reparation* or satisfaction . . . ." International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195 (emphasis added) (entered into force for Japan on January 14, 1996). The Japanese translation uses *kyusai* for both "remedies" and "reparation." Arayuru Keitai no Jinshu Sabetsu no Teppai ni kansuru Kokusai Joyaku (Convention on the Elimination of All Forms of Racial Discrimination] art. 6, Min. For. Aff. Japan, www.mofa.go.jp/mofaj/gaiko/jinshu/conv_j.html (last visited Jan. 7, 2019).

319. See Sun Ran, *supra* note 310; Wu Xiang (吴翔), *Zhongguo Laogong Jujue Riben Xisong Gongsi 'Bang Jiashi Hejie'* (中国劳工拒绝日本西松公司'绑

one forced laborer described, "This is exactly what the Chinese are looking for."[320] Yet the feeling of contentment did not last long. Days later, heirs of forced laborers who worked in Shinanogawa denounced the settlement at a Beijing press conference.[321] They claimed that "Nishimatsu has not made a substantive apology. Moreover, this compensation smacks of 'relief,' which is an affront to us."[322] Kang Jian called the Shinanogawa settlement a second "abduction," since it purported to include all the victims, even those who refused its terms.[323]

The Nishimatsu settlements succeeded in areas where prior agreements did not. First, they produced monetary compensation of about $7,700 per person. This may be low by comparison with the Korean awards, although the cost of living in China is much lower than in South Korea—about 43%, by 2009 estimates.[324] However, it is also explicitly compensation, not charity.

Second, they produced an unambiguous apology. The language mirrors the 1990 Joint Statement devised by Kajima. The settlements do not specify the conduct for which Nishimatsu apologizes. Nevertheless, they use the appropriate term for apology (*shazai/xiezui*), thus satisfying the linguistic or cultural expectation for apologies. The inclusion of such a word made the remediation palpable to both Chinese and Japanese speakers.[325]

架式和解') [*Chinese Laborers Refuse 'Abduction-Style Settlement' from Japan's Nishimatsu Corporation*], GUOJI XIANQU DAOBAO (国际先驱导报) [INT'L HERALD LEADER] (Apr. 29, 2010), www.chinanews.com/gj/gj-zwgc/news/2010/04-29/2254096.shtml.

320. *See* Sun Ran, *supra* note 310. This particular laborer, Lu Tangsuo, did not accept funds from the Hanaoka Settlement, perhaps because it did not include an apology.

321. Kang Jian, *supra* note 305, at 4.

322. Wu Xiang, *supra* note 318.

323. *Id.*

324. *See Cost of Living Index for Country 2009*, NUMBEO, https://www.numbeo.com/cost-of-living/rankings_by_country.jsp?title=2009 (estimating that the cost of living in China is less than half the cost of living in Korea) (last visited Jan. 7, 2019).

325. *See, e.g.*, Li Gong (李攻), *Xisong Shouhai Laogong Suopei An: 17 Nian Kangzheng Hou De Hejie* (西松受害劳工索赔案：17年抗争后的和解) [*Nishimatsu Forced Labor Compensation Suit: Settlement after 17 Years of Fighting*], DIYI CAIJING RIBAO (第一财经日报) [FIRST FIN. NEWS] (Dec. 3, 2009), http://news.ifeng.com/history/special/hghpjng/zuixinbaodao/detail_2010_04/26/145

Third, the agreements call for the erection of a memorial stele in the worksite.[326] This shows the continued importance of memorializing the war and commemorating the forced labor performed by hundreds of Chinese citizens during the war.

Nishimatsu pushed back on the liability issue, bearing what some may term *qualified* liability. Nishimatsu accepted *historical* liability for the underlying harm, a term still undefined. By this, Nishimatsu acknowledged that the historical events occurred, but may deny that Nishimatsu bears legal liability for them. Indeed, by specifying a reservation in the interpretative appendix, and by identifying the Japanese government as the primary culprit in its description of the forced labor program, Nishimatsu apparently downplays its liability for the use of forced labor.

C. *Mitsubishi (2016)*

One of Japan's most prominent companies, Mitsubishi made ample use of forced labor during the war.[327] Thousands of Chinese and Korean forced laborers, as well as hundreds of American prisoners-of-war, worked for various subsidiaries of the conglomerate (*zaibatsu*).[328] Unsurprisingly, Mitsubishi has

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3280_0.shtml (calling the apology unprecedented); Song Shijing (宋石井), *Dui Ri Suopei 16 Nian Zhongguo Laogong Gannian Ta*) (对日索赔16年，中国劳工感念他) [*After Sixteen Years Seeking Compensation from Japan, Chinese Forced Laborers Thank Him*], Jiancha Ribao (检察日报) [Procuratorate Daily] (Dec. 7, 2009), http://news.sina.com.cn/o/2009-12-07/083016730124s.shtml (calling the apology unprecedented).

326. *Yasuno Settlement*, *supra* note 293, art. 4.

327. During the war, Mitsubishi was one of the big three conglomerates (*zaibatsu*), together with Mitsui and Sumitomo. Originally a shipping business, Mitsubishi diversified into coalmining, shipbuilding, marine insurance and other fields. After the war, Mitsubishi was dissolved into smaller, publicly traded companies. Mitsubishi Materials, formerly known as Mitsubishi Mining, is therefore the defendant in cases brought by forced laborers who worked in mines, while Mitsubishi Heavy Industries is the defendant in cases brought by forced laborers who worked in shipbuilding, aviation and heavy machinery. *See* Mitsubishi Heavy Industries, History: The origin of MHI can be traced all the way back to 1884, https://www.mhi.com/company/aboutmhi/outline/history.html.

328. See *Mitsubishi Materials Set to Settle 3,765 Chinese Wartime Labor Redress Claims*, Japan Times (July 24, 2015), https://www.japantimes.co.jp/news/2015/07/24/national/history/mitsubishi-materials-apologize-settle-3765-chinese-wwii-forced-labor-redress-claims/ (noting 3,765 Chinese forced la-

faced more lawsuits than any other company in the war reparations litigation movement.[329] In Japan, victims brought a total of eight lawsuits again Mitsubishi: three against Mitsubishi Heavy Industries (MHI)[330] and five against Mitsubishi Materials (MM).[331] In China, victims have filed at least four lawsuits, one of which was finally accepted in March 2014.[332] In South

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borers, and 900 American POWs, worked for Mitsubishi). Yamada Tadafumi, *Kyosei Renko, Hibaku soshite Kurushimi no Hanseiki: Mitsubishi Hiroshima Saiban de Towareru Nihon no Jindo Shugi* [*Forced Mobilization, Irradiation, then Half a Century of Suffering: Questioning Japanese Humanitarianism at Mitsubishi's Hiroshima Trial*], *in* NIHON KIGYÔ NO SENSO HANZAI [WAR CRIMES OF JAPANESE ENTERPRISES] 107, 107 (Kosho Tadashi et al. eds., 2000) (noting 2,800 Korean forced laborers worked at two worksites owned by Mitsubishi Heavy Industries: the Enami shipyard and Kannon factory).

329. Kajima Construction, Mitsui Mining, Nippon Steel, and Nishimatsu Construction have each been sued three times. Fujikoshi and Tobishima Construction have been sued twice. It is not unusual for plaintiffs to sue two or more companies in the same suit.

330. *See* Kim Sun-gil v. Mitsubishi Heavy Indus., Nagasaki Chiho Saibansho [Nagasaki Dist. Ct.] Dec. 2, 1997, 1641 HANREI JIHO 124 (filed on July 31, 1992); Pak Chang-hwan v. Mitsubishi Heavy Indus., Hiroshima Chiho Saibansho [Hiroshima Dist. Ct.] Mar. 25, 1999, 1903 HANREI JIHO 23; Seven Korean Victims v. Mitsubishi Heavy Indus., Nagoya Chiho Saibansho [Nagoya D. Ct.] Feb. 24, 2005, 1210 HANREI TAIMUZU 186.

331. *See* Forty-two Chinese Plaintiffs Laborers v. Mitsubishi Materials et al., *unpublished opinion,* Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 11, 2003; Sixty-five Chinese Plaintiffs v. Mitsubishi Materials et al., *unpublished opinion*, Sapporo Chiho Saibansho [Sapporo Dist. Ct.] Mar. 23, 2004, Forty-five Chinese Plaintiffs v. Mitsubishi Materials et al., *unpublished opinion*, Fukuoka Chiho Saibansho [Fukuoka Dist. Ct.] Mar. 29, 2006; Chinese Victims v. Mitsubishi Materials et al., *unpublished opinion*, Nagasaki Chiho Saibansho [Nagasaki Dist. Ct.] Nov. 28, 2003; Thirteen Chinese Plaintiffs v. Mitsubishi Materials, *unpublished opinion,* Miyazaki Chiho Saibansho [Miyazaki Dist. Ct.] Mar. 26, 2007.

332. There may be more than four lawsuits. Professor Koga reports three forced labor lawsuits were filed in China between 2000 and 2010, but does not specify which corporations were sued. Yukiko Koga, *Between the Law: The Unmaking of Empire and Law's Imperial Amnesia*, 41 LAW & SOC. INQUIRY 402, 410 (2016). Since then, victims have filed at least four cases filed against Mitsubishi: one in Beijing (which led to the Mitsubishi settlement), one in Tangshan, one in Qingdao, and one in Shijiazhuang. *See Jieshou Sanling Xiezui De Zhongguo Laogong Jiang Jixu Qisu Riben Zhengfu* (接受三菱谢罪的中国劳工将继续起诉日本政府) [*Chinese Laborers Who Accepted Mitsubishi's Apology Will Continue to Sue Japanese Government*], XINLANG XINWEN (新浪新闻) [SINA NEWS] (June 14, 2016), http://news.sina.com.cn/o/2016-06-14/doc-ifxszmnz7280226.shtml (mentioning suit brought by plaintiff Han Shun in Tangshan); Sui-Lee Wee & Li Hui, *Hundreds of Chinese Families Seek Wartime Compensation from Japan*, REUTERS, May 12, 2014, https://www.reu

Korea, after a landmark decision rendered by the Supreme Court in 2012,[333] forced laborers have filed lawsuits against MHI in Busan, Gwangju, and Seoul.[334] Finally, forced laborers have also sued MM in state and federal courts in the United States.[335]

Faced with this multijurisdictional mélange, Mitsubishi has settled only once Mitsubishi has discussed the possibility of settlement several times,[336] but insists that the Japanese government actively guided the forced labor program and must therefore be part of any settlement.[337] Given the Japanese government's longstanding refusal to offer compensation, Mitsubishi has defended forced labor lawsuits, in one jurisdiction or another, for a quarter-century.

The settlement discussions with the Chinese forced laborers began in January 2014.[338] In February 2014, a separate

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ters.com/article/us-china-japan-reparations-insight/hundreds-of-chinese-families-seek-wartime-compensation-from-japan-idUSBREA4B0VO20140512 (describing the lawsuit in Qingdao); *Xiang Xun: Han Zhong Erzhan Iaogong ni Iianshou Kongsu Riben Quiye* (详讯：韩中二战劳工拟联手控诉日本企业) [*Details: World War II Laborers from China and Korea Join Hands to Sue Japanese Companies*], Hulianwang Hanlianshe Nelianwang (韩联网) [Yonhap News Agency] (Apr. 2, 2014) https://cn.yna.co.kr/view/ACK20140402001300881 (mentioning the case brought by Li Yunde in Shijiazhuang).

333. Pak Chang-hwan v. Mitsubishi Heavy Indus., Supreme Court [S. Ct.] 2009Da22549, May 24, 2012. For an analysis of the decision, *see* Nam, *supra* note 17, at 2–3, 7–11.

334. *See* Kentaro Ogura, *Again, South Korea Court Orders Japanese Company to Pay*, Nikkei Asian Review (June 24, 2015), https://asia.nikkei.com/Politics/Again-South-Korean-court-orders-Japanese-company-to-pay (noting decisions by high courts in Busan, Seoul, Gwangju ordering Mitsubishi to compensate forced laborers). *See also* Jung Dae-ha, *One Elderly Women's Emotional Wounds Still Unhealed from Forced Labor*, Hankyoreh (Apr. 9, 2017), http://english.hani.co.kr/arti/english_edition/e_international/789892.html (noting three ongoing forced labor lawsuits against Mitsubishi in Gwangju).

335. *See* K. Connie Kang, *Law Allowing Suits by Forced Laborers Voided*, L.A. Times (Sept. 20, 2001), http://articles.latimes.com/2001/sep/20/local/me-47705; Sonni Efron, *Pursuit of WWII Redress Hits Japanese Boardrooms*, L.A. Times (Jan. 10, 2000), http://articles.latimes.com/2000/jan/10/news/mn-52553 (noting "at least 14 lawsuits" against various Japanese corporations, including Mitsubishi).

336. Matsuoka, *supra* note 47, at 101.

337. *Id.*

338. Matsuoka also describes the difficulty of dealing with so many Chinese groups: some that deal directly with Chinese lawyers, some that do not; some that work with Japanese lawyers, some that do not; some that work on the Mitsubishi issue exclusively, others that do not. *Id.* at 156. *See also Mitsub-*

group of forced laborers brought suit in Beijing, which the court accepted one month later—the first time a Chinese court has accepted a forced labor lawsuit.[339] It is certainly possible that the threat of Chinese litigation increased the pressure on Mitsubishi to settle. Negotiations continued into the summer of 2015, and on June 1, 2016, Mitsubishi—through Mr. Kimura—made its apology at a Beijing hotel.[340]

The settlement itself stretches to eight articles and thousands of Chinese characters—the longest and most comprehensive of the settlement agreements.[341] It also includes the most effusive, and arguably effective, apology of the various agreements. The apology encompasses the first article:

> Article 1: Apology
>
> Party B, under the following terms, *apologizes* to Party A. Party A accepts Party B's *sincere apology*.
>
> During the Second World War, pursuant to the Cabinet of the Japanese Government "Decision to Import Chinese Labor into Japan," approximately 39,000 Chinese laborers were forcibly transported to Japan. Our company's predecessor, Mitsubishi Mining Company and its contracting companies (including subsidiaries of Mitsubishi Mining Company) accepted

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ishi Materials Set to Settle, *supra* note 328 (reporting on the settlement between 3,000 Chinese citizens and Mitsubishi Materials Corp. over the company's use of forced labor during wartime).

339. Bai Tiantian, *Forced Laborers Sue Japanese Firms in Beijing*, GLOBAL TIMES (Feb. 27, 2014), http://www.globaltimes.cn/content/845033.shtml; *Beijing Court to Hear Japanese Wartime Forced Labor Suit*, JAPANTODAY (Mar. 20, 2014), https://japantoday.com/category/national/beijing-court-to-hear-japanese-wartime-forced-labor-suit. Chinese judges exercise some amount of discretion in deciding whether to accept a case. Margaret Y.K. Woo, *Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation-State*, 15 NEV. L.J. 1261, 1275 (2015). A court's decision to accept a lawsuit frequently stems from political or economic concerns, and not solely the legal merits of the dispute.

340. *See* Ramzy, *supra* note 4.

341. *See Riben Sanling Gongsi Yu Zhongguo Shouhai Laogong Hejie Xieyishu Quanwen Gongbu* (日本三菱公司与中国受害劳工'和解协议书'全文公布) [*Full Text Published of 'Settlement Agreement' by Japan's Mitsubishi Company and Chinese Forced Laborer*], SINA NEWS (June 1, 2016), http://news.sina.com.cn/sf/news/2016-08-15/doc-ifxuxnah3531790.shtml [hereinafter *Mitsubishi Agreement*], *translated in* MITSUBISHI SETTLEMENT AGREEMENT (June 1, 2016), http://www.10000cfj.org/en/wp-content/uploads/2016/09/SETTLEMENT-AGREEMENT.pdf.

> 3,765 Chinese laborers from this group, sent them to our worksites, and forced them to work under awful conditions. As many as 722 Chinese laborers died. This issue has never been resolved.
>
> *"To make a mistake, but not correct it, is indeed a mistake."*[342]
>
> Our company frankly and sincerely recognizes the *historical fact* that the *human rights* of every Chinese laborer were violated, and hereby express *deep remorse*. Every Chinese laborer suffered enormous pain and suffering, apart from their families and motherland, in a foreign and faraway country. Our company recognizes we bear *historical responsibility* as their employer at that time, and for this we *sincerely apologize* to each worker and his family. We also express our *deep condolences* to those Chinese laborers who died.
>
> *"Don't forget the past; it will guide the future."*[343]
>
> Our company recognizes the above *historical facts*, and takes *historical responsibility*. From the perspective of contributing to amicable relations between China and Japan, and for the purposes of finally and comprehensively resolving this problem, we establish a fund for the laborers and their family.
>
> In order not to repeat past mistakes, our company will establish a monument, and promise to convey these facts on to future generations.[344]

Even in this first provision of a much longer agreement, several new words stand out.

Most notably, the agreement runs the gamut of apologies: deep remorse, sincere apology, and deep condolences. This is striking in comparison to the absence of apology in the three Korean settlements and Kajima's attempt to void its apol-

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342. This comes from Book 15, Chapter 30 of the Confucian Analects. Lau translates this as "[n]ot to mend one's ways when one has erred is to err indeed." *See* CONFUCIUS, *supra* note 77, at 136.

343. This originally comes from the ZHAN'GUO CE [STRATEGIES OF THE WARRING STATES] an ancient Chinese guide to politics, diplomacy and strategy.

344. *Mitsubishi Agreement*, *supra* note 341 when describing the compensation that plaintiffs received., art. 1 (emphases added).

ogy.[345] Mitsubishi, by contrast, made amends for the "historical fact that the human rights of every Chinese laborer were violated."[346] Through this, the agreement both universalizes the Chinese subjects and acknowledges the severity of the harm.

The Mitsubishi settlement quotes from classical Chinese philosophy and history, surely a first in World War II settlement agreements.[347] The first quotation comes from the ANALECTS OF CONFUCIUS.[348] A choice selection from the ANALECTS reflects the speaker's sophistication and worldliness. As the late D.C. Lau observed, the "ability to speak through the guise of a quotation was particularly useful in diplomatic exchanges."[349] In a document that hundreds, if not thousands, of Chinese people would eventually sign,[350] the reference to Confucius evinces a rare deftness. It references Mitsubishi's own failure to apologize, an act of self-criticism potentially appealing to Chinese observers. It also alludes to the richness of Chinese culture. The Mitsubishi agreement thus reveals a cultural sensibility and sensitivity absent in prior texts.

Outside of the apology, the Mitsubishi agreement is fairly standard. Mitsubishi admitted that it bore "historical responsibility" as a corporation.[351] Like Nishimatsu, Mitsubishi did not accept full or legal responsibility. As in prior agreements, primary responsibility for the forced labor program attached to the Japanese government by virtue of the 1942 Cabinet Directive.[352]

Like both Kajima and Nishimatsu, Mitsubishi set up a multi-purpose fund. The fund pays 100,000 renminbi, or

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345. *See Kajima Comment*, *supra* note 119 and accompanying text.

346. *See Mitsubishi Agreement*, *supra* note 341.

347. The agreement cites Confucius' ANALECTS and the WARRING STATES STRATEGIES in the original Chinese language (*wenyanwen* [文言文]).

348. *See generally* Nicolas Levi, *Confucianism in South Korea and Japan: Similarities & Differences*, 26 ACTA ASIATICA VARSOVIENSIA 185 (2013) (describing the diffusion, reception and contemporary relevance of Confucian ideas in Japan and South Korea).

349. CONFUCIUS, *supra* note 77, at 42.

350. Each former forced laborer, or his heir, was to sign the settlement agreement to receive payment. *Mitsubishi Agreement*, *supra* note 341, arts. 5, 8.

351. *See id.* and accompanying text.

352. Mitsubishi merely "accepted" 3,765 Chinese forced laborers pursuant to the Cabinet Decision. *Id.* art. 1.

roughly $15,000, to any eligible forced laborer.[353] The Mitsubishi funds also assist in locating other former laborers and families of deceased laborers to determine their eligibility for payment (*zhifu*).[354] Throughout the agreement, Mitsubishi does not offer *compensation* (*peichang*, *suopei*), but instead *pays* the forced laborers and their families. This gives the agreement a transactional flavor, as opposed to one that redresses old wrongs.

Finally, the Mitsubishi agreement provides for a monument and performance of memorial services. The fund set aside ¥300 million (about $3 million) to build a monument.[355] It also provides ¥250,000 (about $2,500) to either the forced laborer himself or to a family member to conduct a memorial service in Japan.[356] This draws on the earliest settlement, Nippon Steel, which permitted Korean relatives to visit the foundry where their family members died during the war. The settlement could be worth as much as $56 million, depending on the number of laborers who can be located.[357]

The Mitsubishi settlement is the fullest of the agreements. Mitsubishi paid each forced laborer approximately $15,000, substantially more than other Chinese schemes, but somewhat less than Korean agreements.[358] It also allocated funds for both a monument and memorial services, something only seen in Korean settlements. Mitsubishi conveyed an apology that was at once culturally astute and concrete. This too was largely absent from antecedent agreements. On the other hand, Mitsubishi avoided taking *legal* liability, even as it accepted vague historical liability for its forced labor.[359] It also avoided legally

353. "To express the sincere apology in the prior article, after this settlement agreement is signed, Party A will pay Party B 100,000 renminbi." *Id.* art. 2.

354. *Id.* art. 5(1)(2).

355. *Id.* art. 5(4).

356. *Id.* art. 5(5).

357. *See Mitsubishi Materials, Chinese WWII Slave Workers Reach Deal*, CHI. TRIBUNE (June 1, 2016), https://www.chicagotribune.com/business/ct-mitsubishi-chinese-wwii-slave-workers-settlement-20160601-story.html.

358. *See Mitsubishi Agreement*, *supra* note 341, art. 2. It is difficult to compare payments across jurisdictions (Korea vs. China) and over time (1997 vs. 2016). Nevertheless, by comparison with earlier Chinese settlements, such as Nishimatsu ($7,700) and Kajima ($4,600), $15,000 is generous.

359. *See id.*

significant and morally weighty words such as *compensation* or *reparations* in describing its payments.

TABLE 2. RESULTS OF THE CHINESE SETTLEMENTS

Year	Lead Plaintiff	Defendant	A	L	Amount	Memorialization
2000	Geng Zhun	Kajima	Y*	Y	$4,600	Unaffiliated museum
2009	Zhang Jinwen	Nishimatsu	Y	Y	$7,700	Stele
2016	Yan Yucheng	Mitsubishi	Y	Y	$15,000	Stele + Service

A: Apology
L: Liability: Kajima admitted "corporate liability," while Nishimatsu and Mitsubishi admitted "historical liability."
*: Kajima apologized in the 1990 Joint Statement, not the 2000 Settlement Agreement.

VI. THE PRICE OF SETTLEMENT

World War II forced laborers began suing Japanese corporations in the 1990s. By and large, Japanese judges dismissed the lawsuits, foreclosing the possibility of a judicial remedy in that jurisdiction. Recent lawsuits in South Korea suggest a role for the judiciary in remedying human rights abuses from World War II. Regardless, that recent development does not change the basic fact that from 1991 to 2012 settlement was the sole avenue for legal redress. Though limited by a small sample size, the settlements achieved, and failed to achieve, various forms of redress. This final section evaluates the settlements both collectively and individually and accounts for both the achievements and failures of the Korean and Chinese settlement agreements.

Preliminarily, this paper notes that each settlement comprises a unique combination of monetary compensation and affective remedies including apology, admissions of liability, memorial services, and monuments. Over time, perhaps due to the involvement of lawyers in multiple disputes, a common vocabulary of remediation developed across the lawsuits.[360]

360. Many lawyers served as counsel in multiple lawsuits. For instance, attorney Niimi Takashi served as counsel in both the Kajima and Nishimatsu cases, as well as four other reparations lawsuits. Adachi Shuichi served as

Lawyers commonly rely on information gleaned from prior settlements, both to enhance bargaining power and to decide appropriate remedies.[361] The feedback effect brought about by this repetition set the terms for later settlements.[362]

The outcome of the first settlement, involving Nippon Steel, was by no means easy or expected. Until that time, no Japanese corporation had paid compensation, admitted liability, or apologized for its use of forced labor. Since then, very few corporations have followed suit.[363] Even Nippon Steel itself has not settled lawsuits filed in Japan, South Korea, and the United States.[364] Moreover, Japanese corporations eventu-

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counsel in the Nishimatsu case, and ten other lawsuits against state and corporate actors. It is more than likely, then, that lawyers tried to achieve similar outcomes across the different settlement agreements. A list of the attorneys appears on the Overview of War Reparations Cases. OVERVIEW OF JAPAN'S POSTWAR COMPENSATION TRIALS, *supra* note 14. The extent to which plaintiffs, as opposed to attorneys, drive the settlement varies with each case. *See* John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1542–43 (2008) (describing the variable relations between attorneys and clients). The final questions of when, whether, and under what terms to settle are, ideally, discussed by lawyers and their clients. However, given the language barriers between Chinese and Korean plaintiffs, and their Japanese lawyers, it is not necessarily the case that communication was easy or effective in these lawsuits.

361. Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 974 (2010).

362. *Id.* ("[P]rior settlements influence future settlements.").

363. The Japanese government has steadfastly refused to settle cases, insisting that the postwar treaties vitiated all individual claims arising out of the war. *See* Masahiro Igarashi, *Post-War Compensation Cases, Japanese Courts and International Law*, 43 JAPANESE ANN. INT'L L. 45, 47 (2000). *See also* Catherine Chung, *Japan Reiterates 1965 Deal Settled Individual Compensation to Forced Labor Victims*, KOREA HERALD (Aug. 9, 2017), http://www.koreaherald.com/view.php?ud=20170809000690 (reporting remarks made by Yoshihide Suga, Chief Cabinet Secretary of Japan, that all individual claims "are completely settled under the 1965 agreement" between Japan and South Korea).

364. *See, e.g.*, Shin Ch'eon-su v. Nippon Steel, *unpublished opinion*, Osaka Chiho Saibansho [Osaka Dist. Ct.] Mar. 27, 2001. After losing in Japan, Plaintiffs Shin and Yeo, together with two new plaintiffs, sued Nippon Steel in Seoul Central District Court (2005). That case ended in 2012, when the South Korean Supreme Court ruled in plaintiffs' favor. Shin Ch'eon-su v. Nippon Steel, Supreme Court [S. Ct.], 2009Da68620, May 24, 2012 (S. Kor.). An English translation of the decision is available at *Supreme Court of Korea 1st Division*, 2 KOREAN J. INT'L & COMP. L. 93 (Seokwoo Lee trans., 2014). Nippon Steel has also defended suits in the United States. *See, e.g.*, *In re* World War II Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000)

ally seem to win their cases, provided they appeal all the way to the Supreme Court of Japan.[365]

Several factors might have contributed to Nippon Steel's unexpected decision to settle. First, unlike in most cases, the plaintiffs were not former forced laborers, but their heirs. The corporation therefore did not have to face off against the actual persons it enslaved half a century ago. Second, the plaintiffs' primary request was *reparative*, not remunerative—repatriating remains of family members. Since Nippon Steel literally held the bodies, it was uniquely positioned to grant the plaintiffs' request. Third, the forced laborers did not die from malnutrition, disease, or violence, as did thousands of their compatriots. Instead, they were collateral damage in an attack by the U.S. Navy. Accordingly, Nippon Steel could plausibly deny *direct* liability for their deaths. The nature of plaintiffs' request, coupled with the primary assignation of liability to the United States, may have convinced Nippon Steel that *this* was a case worth settling. Whatever the precise motives, the settlement was influential both as an alternative form of dispute resolution, and as a progenitor of creative remedial techniques.

A. *Achievements*

Given the goals of the Nippon Steel lawsuit—repatriating remains and assuaging the souls of the dead—commemoration played an important role in the settlement. The agreement provided for two distinct types of memorialization: physical, in the form of a stele, and ritual, in the form of memorial services. These proved influential in later settlements involving both Korean and Chinese laborers, leading some commentators to describe the settlement as an "Asian type of dispute resolution."[366] Many cultures, including those connected to Con-

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(dismissing case brought against multiple Japanese corporations, including Nippon Steel, Mitsubishi and Mitsui).

365. *See e.g.*, Wang v. Nanao Land & Sea Transp. Co., *unpublished opinion*, Kanazawa Chiho Saibansho [Kanazawa Dist. Ct.] Oct. 31, 2008 (dismissed under treaty waiver), *aff'd* [Nagoya High Ct.] 2010, *aff'd* [Sup. Ct.] 2010; Han v. Fujikoshi, *unpublished opinion*, Toyama Chiho Saibansho [Toyama Dist. Ct.] Sept. 9, 2007 (dismissed under treaty waiver), *aff'd* [Nagoya High Ct.] 2010, *aff'd* [Sup. Ct.] 2011.

366. *See Sei'i: Moto Choyoko Hibakusha no Tatakai, Kim Sun-gil Sosho Hanketsu wo Mae ni (shita)* [*Sincerity: Battle of Former Forced Laborer and Nuclear*

fucian values, emphasize proper recognition of the dead, especially within the context of war.[367]

While the names of the war dead appear on steles, the role of the corporation is hardly chiseled in stone. In many instances, the agreements provide little information, blame other actors, or deny the corporation's involvement altogether. In this sense, private agreements can in fact complicate public understanding, by endorsing a vague recitation of historical events, or none at all. Settlement statements—the publicized portion of the agreements—may misrepresent the situation, as when Kajima claimed to have done "its utmost in good faith to exercise a duty of care towards our workers."[368]

It is no surprise, then, that the assignation of liability was so contentious. Korean settlements include no admissions of liability, while the Chinese settlements produce only qualified admissions. Acknowledging liability is an important element of reconciliation. Without it, plaintiffs may not believe the defendant has adequately reflected on its past and that the dispute is therefore incapable of true reconciliation. An unequivocal acknowledgment of liability may advance social values like transparency, democratic deliberation, and attention to historical facts.[369] Liability narratives reshape public memory, reallocating a wartime burden that fell mostly on the wartime Japanese government, but not the corporate sector.

In East Asia, it would be premature to say that two agreements, of six analyzed, establish a norm of corporate liability, although perhaps they bend in that direction. In the Korean settlements, corporations did not admit liability. Nippon Steel

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Victim: Before the Kim Sun-gil Verdict (Part II)], ASAHI SHIMBUN, Nov. 29, 1997 (describing comments of Professor Sato Kensho).

367. The United States has numerous monuments to the war dead (Civil War, World War I, World War II, Korean War, Vietnam War), and celebrates at least two national holidays in recognition of fallen soldiers: Memorial Day and Veterans Day. Memorials to the victims and the survivors of the Holocaust likewise show that respect for the dead exceeds national borders and cultural boundaries.

368. *Kajima Comment*, *supra* note 119.

369. LEORA BILSKY, THE HOLOCAUST, CORPORATIONS, AND THE LAW: UNFINISHED BUSINESS 60–63 (2017) (detecting public functions, such as norm elaboration and fact finding, in the holocaust litigation settlements of the 1990s and 2000s).

stated the company "bore no legal liability."[370] Instead, its decision to settle stemmed from solely humanitarian considerations.[371] The president of Fujikoshi likewise declaimed corporate liability for his company, calling the term ahistorical.[372] These early agreements perpetuate the notion that Japanese corporations owed no legal obligations to the forced laborers they used.

In time, however, Japanese corporations admitted liability to Chinese plaintiffs. Kajima, after winning at the trial court level, tried to limit its 1990 admission of liability.[373] In its 2000 settlement statement, Kajima explicitly denied that it was legally liable.[374] Such a revision reveals the continued tensions between corporations and forced laborers about the legality, morality, and responsibility of forced labor.

Only in the final two statements, Nishimatsu and Mitsubishi, does a corporation acknowledge *qualified* liability. Nishimatsu borrowed the "liability as a corporation" from Kajima's 1990 Joint Statement and appended "historical," ultimately admitting its "historical liability as a corporation."[375] Mitsubishi too acknowledged historical liability, but more fulsomely conceded the "awful conditions" to which it subjected the workers. It furthermore admitted the death toll of the particular worksite and recognized the "historical facts" of "human rights violations."[376]

These carefully crafted statements may seem like empty scripts in a broader morality play. However, they carry deeper significance. Consider a comparison with the West. In the late 1990s, European forced laborers sued corporations in Germany and the United States for enslaving them during World War II.[377] The ensuing Holocaust Litigation ultimately produced a number of political settlements on a grand scale—involving both the governments and private sectors of Ger-

370. *New Nippon Steel Settlement 'Breathes New Life into Postwar Compensation'*, *supra* note 159.

371. *Id.*

372. *Koreans Granted Redress for Wartime Forced Labor*, *supra* note 216.

373. *See Kajima Comment*, *supra* note 119.

374. *See id.*

375. *See Yasuno Settlement*, *supra* note 293, art. 2.

376. *See Mitsubishi Agreement*, *supra* note 341, art. 3.

377. *See* BILSKY, *supra* note 369, at 35–40 (providing background on the Holocaust litigation).

many, Austria, and Switzerland. Despite these achievements the European settlements did not articulate clear norms of corporate liability.[378] Instead, corporations paid into settlement funds, but did not admit liability or clarify their roles in the slave labor system.[379] By contrast, the Nishimatsu and Mitsubishi settlements show that corporations may, under certain circumstances, openly acknowledge their role in the war crimes such as forced labor.

The first settlements were also influential in securing payments from Japanese corporations. In the Nippon Steel settlement, the ¥2 million ($18,000) settlement figure did not approximate the economic harm incurred, nor the current value of the laborers' unpaid wages.[380] Instead, it echoed a 1987 law compensating Taiwanese veterans. This endowed the monetary award with public symbolism. Just as the Japanese government owed a duty of care to its former soldiers, irrespective of their nationality, Japanese corporations owed similar duties to their previous workers, irrespective of nationality. The sum also approximated the $20,000 given by the U.S. government to Japanese-Americans interned during World War II.[381]

The Chinese settlements typically involve smaller sums distributed by a third-party fund. One might ascribe this feature to the collectivist nature of Chinese society, although administrative convenience and governmental control may well have played a more pressing role. For the corporation, an externally operated fund eases the burden of processing, adjudicating, and paying out hundreds, perhaps thousands, of indi-

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378. *See id.* at 72–75; Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 853 (2002) (describing a series of setbacks in the Holocaust Litigation settlements, including the lack of corporate liability).

379. BILSKY, *supra* note 369, at 114-15 (noting that corporations evaded "legal responsibility" by calling payment schemes "humanitarian," and not reparative, in nature).

380. As one lawyer noted in the context of Holocaust Litigation, "[n]o amount of compensation, even damages measured in the billions, could serve as a fair, adequate or reasonable measure of justice" given the atrocities committed. Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2228 (2004). Even proponents of monetary compensation in the Holocaust Litigation acknowledged their "fundamental inadequacy." *Id.* at 2229.

381. Civil Liberties Act of 1988, 50 U.S.C. § 4215 (2018).

vidual claims. Since the Korean settlements involved far fewer plaintiffs, a one-time lump-sum payment was feasible.

It is also possible that the Chinese government sought a role in the settlement. Any foundation established in China, particularly one that disburses money to Chinese citizens, requires approval from the Ministry of Civil Affairs.[382] By organizing an entity under Chinese law, the Japanese corporation had to submit to the approval process of a Chinese government agency. This reveals the government's involvement in the private settlement process, a reality that likely gave plaintiffs additional leverage in the process.

A final point involves terminology. The settlement agreements used anodyne language such as "money" or "payment" when describing the compensation that plaintiffs received.[383] In this way, corporations succeeded in sheering any reparative overtones from the terms of settlement. Kajima explicitly denied that its disbursements constituted "compensation" or "reparation."[384] Even Mitsubishi, the most verbally contrite of the defendants examined herein, offered mere "payment" to the Chinese forced laborers, not "compensation."[385]

B. *Failures*

Despite these successes, it is also important to remark upon the failures or tensions underlying the agreements. To begin with, most cases did *not* settle. Most plaintiffs received no remedy whatsoever, and the ones that did represent the minority of war victims.

Turning to the settlements themselves, the most glaring omission from the Korean agreements is the apology. This was not from a lack of trying. Korean plaintiffs demanded apologies in their lawsuits, even drafting newspaper advertisements for the corporations to publish in Korean and Japanese media.[386] The courts uniformly dismissed these requests, usually

382. *See* KARLA W. SIMON, CIVIL SOCIETY IN CHINA: THE LEGAL FRAMEWORK FROM ANCIENT TIMES TO THE "NEW REFORM ERA" 241–42 (2013) (describing registration procedures for non-governmental organizations).

383. NKK Settlement, *supra* note 189.

384. *See Kajima Comment*, *supra* note 119.

385. *See* Mitsubishi settlement, *supra* note 341.

386. The apology drafted by Kim stated that NKK "recruited approximately 2,000 Korean youth under the guise of 'official placement.'" Kim also sought an apology (*shazai*) from the corporation for permanently maiming

as time-barred.[387] Without a court order, Japanese corporations are unlikely to apologize. Some seventy years after the predicate events, Japanese corporations struggle, or simply refuse, to accept that they planned, participated, and profited from the widely acknowledged *jus cogens* norms of forced labor.

On the other hand, Mitsubishi offered an elaborate apology to Chinese forced laborers, inviting film crews and international media to broadcast the event. This contrasts sharply with earlier settlements, which avoided apology. Based on publicly available information, it is difficult to know with certainty what accounts for the difference. There are a few possible theories.

First, stakes may be on the rise for corporations; they must now do more to satisfy plaintiffs than they once did. In an age of widespread social media use, corporations likely bend to publicity more readily than they did twenty years ago. It is no accident that Mitsubishi, a Japanese consumer company trying to woo Chinese car-buyers, proffered the most culturally astute apology. Arguably, Mitsubishi rendered an apology *qua* advertisement, not just creating a public spectacle of the ritual of apology, but also inviting global media to broadcast the images to consumers around the world.

Apology has complicated the settlement process, but at the same time, it is perhaps the most significant element for the plaintiffs. It is now common for a specially designed foundation to run the remunerative portions of a settlement. This complexity derives from two sources. One is the simple function of numbers; serving hundreds of forced laborers, as well as their families, is relatively complicated. A second source is

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him. Shin Ch'eon-su v. Nippon Steel, *unpublished opinion*, Osaka Chiho Saibansho [Osaka Dist. Ct.] Mar. 27, 2001*;* s*ee also* Yi v. Fujikoshi, Toyama Chiho Saibansho [Toyama Dist. Ct.] July 24, 1996, 941 HANREI TAIMUZU, slip op. at 111, http://justice.skr.jp/judgements/23-1.pdf.

387. Yi v. Fujikoshi, slip opinion, at 107–08. In a case involving South Korean comfort women, the Yamaguchi District Court found that there was no legal basis to order the Japanese government to apologize to the comfort women. This is, of course, different from a case seeking a corporation to apologize. But it reflects the Japanese judiciary's reluctance to order apologies in these circumstances. *See The "Comfort Women" Case*, *supra* note 191, at 92 (detailing the court's decision not to order an apology in the Yamaguchi District Court case).

the will to innovate, particularly after the establishment of a baseline of comparison.[388] When plaintiffs learn of prior settlements, they expect at least that amount, and perhaps more. Money on its own does not suffice. Instead, corporations must satisfy a growing list of remedies: to address past harms, cure present sufferings, and prepare for the future.[389]

A second potential explanation lies in the disparate natures of the Korean and Chinese conscription regimes. Koreans were conscripted under the 1938 National Mobilization Act, a statute passed by the Diet (Japan's Congress).[390] The law applied to Koreans and Japanese alike, though it was implemented in phases, first in Japan, the in Korea. As the government legalized and operationalized the forced labor regime, so the argument goes, the corporation did nothing wrong. Japanese corporations used conscripted labor, supplied by the government, just as the Japanese Army forcibly conscripted citizens (Japanese, Korean and Taiwanese) in to the army. Korean conscription was *legal* in the sense that it flowed from generally applicable law.

By contrast, the Chinese forced labor program rested on more tenuous ground, legally, politically, and morally. The legal authority to import Chinese labor derived from a 1942 Cabinet decision.[391] But the means of recruiting Chinese labor were often left to the Japanese Army, and often harsher than those used to conscript Koreans.[392] Consequently, corporations may recognize, as Mitsubishi did, that the use of forced labor constituted a human rights violation, and thus deserved an apology.

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388. Depoorter describes how prior innovative settlements serve as benchmarks for ambitious lawyers in future disputes. Depoorter, *supra* note 361, at 960.

389. The Mitsubishi settlement provides for the education of the forced laborers' children and grandchildren. As many plaintiffs come from relatively poor backgrounds, the support could conceivably help educate their descendants. *See Mitsubishi Agreement*, *supra* note 341.

390. Kokka Sodoin Ho [National Mobilization Law], Law No. 55 of 1938.

391. *See* Ju Zhifen, *Labor Conscription in North China*, *in* CHINA AT WAR: REGIONS OF CHINA, 1937–45, at 207, 216 (Stephen R. MacKinnon et al. eds., 2007).

392. The plaintiffs in these lawsuits are fairly typical. Geng Zhun, for example, was captured by Japanese forces in 1944. Kim Kyeong-Seok, on the other hand, was induced by the conscription apparatus that Japan installed in colonial Korea.

A third possibility is that the lawyers in the Chinese settlements, many of whom were Chinese, insisted on apologies more tenaciously. As an example, Chinese lawyer Kang Jian went to great lengths to ensure the settlement agreements used proper terms. While not all of her criticisms appear well-founded, at least from a linguistic perspective, the importance of appropriate terminology cannot be denied. It may well be that Chinese lawyers focused more of their attention on this particular aspect of the remedy than their Korean counterparts. At least with the first Korean settlement, the main issue was repatriating remains, and secondarily consecrating them. An apology may have appeared ancillary.

C. *Prospects for Reconciliation*

Discerning the broader social significance of the settlements is more difficult. Settlement agreements can theoretically function as a public good, moving members of a particular society towards new understandings of the past. However, the awareness of these settlements in China, Japan, and South Korea suggests a greater possible effect in certain jurisdictions than others. Korean media barely mentioned the agreements in the late 1990s.[393] It was never front-page news, but a personal interest story stuck in the middle of Korean dailies.[394] More recently, Korean outlets reported on the 2016 agreement with Mitsubishi.[395]

Japanese media, by comparison, covered the agreements extensively and, for the most part, favorably. Japanese reports

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393. *See Ilbon Kiob Chingyong Hanin Posang Habui* [*Compensation Agreement between Japanese Companies and Conscripted Koreans*], HANKYOREH, Sept. 22, 1997, at 24 (describing contents of Nippon Steel agreement); *Ilche Chingyong Hangugine Irok Ochonmanwon Posang* [*150 Million Won Compensation for Conscripted Koreans under Japanese Imperialism*], KYONGHYANG SHINMUN, Sept. 22, 1997, at 22.

394. *New Settlement in Japanese Postwar Compensation Litigation*, *supra* note 193 (describing NKK settlement with Kim Kyeong-seok); *Ilche Ttae Kunsu Gongjangso Kangje Noyok Paesang Pihaeja, Kahaeja Naeju Hyopsang* [*Compensation for Forced Laborers at Military Supply Factories Under Japanese Imperialism: Victims and Perpetrators to Reopen Negotiation*], CHOSUN ILBO, July 26, 2000, at 25 (describing the Fujikoshi settlement agreement).

395. *See* Cho Ki-weon, *Mitsubishi to establish fund to compensate Chinese victims of forced labor within the year*, HANGYOREH, Nov. 6, 2018 (reporting on the implementation of the Mitsubishi settlement in China), http://english.hani.co.kr/arti/english_edition/e_international/869081.html.

frequently expressed the hope that settlement would be "influential," prodding other Japanese corporations to attend to the war reparations problem.[396] Measure by the number of corporations that elect this particular approach, the settlements have limited influence. Nevertheless, the fact remains that *narratives* of reconciliation captured Japanese headlines.

Likewise, Chinese media followed the settlements involving Chinese forced laborers quite closely. Much Chinese reporting portrayed the settlements as incomplete, insincere, or inequitable.[397] In this way, they echo criticisms made by lawyer Kang Jian about some of her own settlements.[398]

In summary, the settlements have been (a) largely overlooked in Korea; (b) followed most closely and covered most favorably in Japan; and (c) criticized as insufficient in China. This in turn suggests that the settlements probably had very little impact in Korea, the most positive impact in Japan, and a mixture of negative and positive impact in China.

VII. Conclusion

A quarter century of war reparations litigation has resolved certain issues, but others linger. The Japanese government has largely insulated itself from any additional acts of reparation. However, litigation against corporations proceeds in South Korea, most of it favorably for Korean plaintiffs. Bilat-

396. *See Nippon Steel Forced Mobilization*, *supra* note 19 (expressing the expectation that the Nippon Steel settlement would exert influence on all war reparations lawsuits); *First Settlement for Korean Forced Laborers*, *supra* note 152 (correctly predicting that the Nippon Steel case would "have a major impact on the Hanaoka Mine [i.e. Kajima] forced labor lawsuit").

397. *See, e.g.*, Chen Tieyuan (陈太原), *Zhongguo Yuangao Gongkai Jielu Huagang "Hejie" Pianju* (中国原告公开揭露花岗揿骗局) [*Chinese Plaintiff Publicly Exposes Scam of Hanaoka "Settlement"*], People's Daily (June 28, 2001), http://www.people.com.cn/GB/shizheng/19/20010628/499301.html (recording plaintiff's disappointment that Kajima did not acknowledge its legal liability in the settlement agreement, contradicting what the parties agreed to in 1990); Embassy of China in Japan, *Riben Xisong Jianshe Gongsi yu Erzhan Bei Lu Zhongguo Laogong Dacheng Hejie* (日本西松建设公司与二战被掳中国劳工达成和解) [*Japan's Nishimatsu Construction Company Reaches Settlement with Chinese Laborers from World War II*], Xinhua (Oct. 23, 2009), https://www.fmprc.gov.cn/ce/cejp/chn/zrgx/t622489.htm (expressing the hope that the Japanese government, and other corporations, will work toward a comprehensive solution to the forced labor problem).

398. *See* Fu, *supra* note 11 (noting criticisms by Lawyer Kang Jian)

eral discussions between Korea and Japan continue, but the likelihood of a successful negotiation, while not zero, remains low.[399] Meanwhile, Asian plaintiffs and Japanese corporations offer a number of blueprints to settle the corporate liability portion of the war reparations project.

Ultimately, settlement broadens remedial choices. In many legal systems, including Japan's, tort law narrows the range of available remedies, usually to a damages award. However, money may not cure the underlying harm. Plaintiffs may wish to restore dignity, social status, or psychological wellbeing. Many desire the emotional satisfaction of a sincere, or at least well-crafted, apology. Plaintiffs may want a bespoke remedy, lying beyond the realm of legal possibility. Alternatively, plaintiff may not qualify for the remedy under prevailing legal interpretations in court.

Settlement expands the range of remedies, but it does not guarantee a particular remedy. The parties must still negotiate. Many corporations discuss, although not all reach, settlements. Even when they settle, the parties disagree about basic elements of the corporation's degree of liability for the war.

This divergence was most tangible in the Korean settlements. Korean forced laborers demanded apologies, but not one Korean plaintiff received one. In exchange for monetary compensation, memorial services, or a monument, Korean plaintiffs forwent an apology. This is a major gap in the record of Korean settlement.

Chinese forced laborers built on the advancements of their Korean counterparts. They too sought apologies, monuments, and monetary compensation. In the final agreements, companies like Mitsubishi apologized and admitted partial liability. For many Chinese plaintiffs the price of settlement was somewhat lower than for those in Korea. They obtained apologies, admissions of liability, and recitations of history that hew closer to historical events than those that appeared in the Korean settlements.

Throughout these agreements, the role of culture helps elucidate the features, failures, and fault lines of the ongoing debates about war reparations and liability. The broad brushstroke analysis of China, Japan, Korea, and their respective cul-

399. *See* Johnson, *supra* note 27 (describing ongoing bilateral discussions).

tures, set out a framework for examining the interests of these plaintiffs. The monetary awards reveal little about the processes and products of the negotiations. Other modes of redress, such as memorial services and public monuments, likely mattered more to the plaintiffs. The loss of life in the first settlement, Nippon Steel, set expectations for what settlement could achieve, and its possible forms. The ritualistic and commemorative aspects of this settlement influenced future settlements.

The broader prospects for reconciliation do not burn bright. The Japanese government has maintained its position that postwar treaties disposed of all individual claims. The governments of China and South Korea have not shown much interest or engagement in the issue of corporate legal liability for the war. These settlements chart the rare path toward transnational reconciliation among Chinese, Japanese and Korean actors.