

Herstory: A Case for Using Japan’s Restitution Agreement with Korea as a Model for Easing the Discomfort of Other Comfort Women

Sharon Grace Lin†

I.	Introduction.....	57
II.	History	60
III.	Diplomatic History Between Korea and Japan.....	65
IV.	Legal or Moral Remedy?	68
V.	International Impact and Response.....	71
VI.	Seeking Judicial Redress	74
VII.	Recommendations.....	79

I. Introduction

Each denial by the Japanese government regarding military brothels during World War II is another attempt to make a waning group of women in Asia completely disappear before the country will accept blame for its mistakes.¹ Wounds these women received during the war caused life-long suffering and prevented many of the women from leading normal lives and having families.² These women are *comfort women*, women who were forced into sexual slavery for and by the Japanese Imperial Army.³ Born in countries

† J.D. Candidate 2017, University of North Carolina School of Law.

¹ See Lucy Williamson, *Comfort Women: South Korea’s Survivors of Japanese Brothels*, BRIT. BROADCASTING CORP. (May 29, 2013), <http://www.bbc.com/news/magazine-22680705> [https://perma.cc/49VD-T4Z8] (“We’re all very old We’re dying each year, one by one. Historically speaking the war might have stopped, but for us it’s still going on, it never ended. We want the Japanese Emperor to come here, kneel before us and apologise [sic] sincerely. [But] I think the Japanese are just waiting for us to die.”).

² See *id.*

³ See, e.g., Pamela Constable, *70 Years Later, a Korean ‘Comfort Woman’ Demands Apology From Japan*, WASH. POST (Apr. 22, 2015), https://www.washingtonpost.com/local/70-years-later-a-korean-comfort-woman-demands-apology-from-japan/2015/04/22/d1cf8794-e7ab-11e4-9767-6276fc9b0ada_story.html [https://perma.cc/X6ZD-9C8T] (detailing Yong Soo Lee’s

across Asia, the surviving comfort women are vocal thorns in the sides of their respective governments.⁴

In World War II, an extremely powerful Japan invaded much of Asia.⁵ Japan attacked China and swiftly occupied the country and many other territories, including the Philippines and Indonesia.⁶ From these territories and Japan's two colonies, Taiwan and Korea, the Japanese Imperial Army deceived and kidnapped local women to provide sexual services for Japanese soldiers.⁷

This historical issue contributed to political tensions between Japan and Korea, the latter being the country from which the majority of comfort women were taken.⁸ In a recent agreement to settle the issue between the two nations, Japan promised ¥1 billion (approximately \$8.3 million) and formally apologized to Korean victims.⁹ The initiative significantly eased the otherwise strained relationship.¹⁰ While the United States and other nations are excited for the potential future collaboration between these neighboring

experience as a comfort woman in the post-war world).

⁴ *See id.*

⁵ Floyd Whaley, *In Philippines, World War II's Lesser-Known Sex Slaves Speak Out*, N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/30/world/asia/japan-philippines-comfort-women-emperor-kihito.html?_r=0 [https://perma.cc/XGC9-2B3L] (“The stories of women from Korea forced into sexual slavery by the Japanese military before and during World War II are notorious worldwide [T]he issue has been a festering national trauma that has long hindered relations with Japan.”).

⁶ *Fact Sheet on Japanese Military “Comfort Women,”* CENTRE FOR RESEARCH ON GLOBALIZATION (May 12, 2015), <http://www.globalresearch.ca/fact-sheet-on-japanese-military-comfort-women/5449039> [https://perma.cc/PX3D-6UAB] [hereinafter *Fact Sheet*].

⁷ *Id.*

⁸ *See Whaley, supra* note 5; Justin McCurry, *South Korea Warns Japan Over ‘Comfort Women’ Accord After Claims of No Proof*, THE GUARDIAN (Feb. 18, 2016, 5:08 EST), <https://www.theguardian.com/world/2016/feb/18/south-korea-warns-japan-comfort-women-accord-claims-of-no-proof> [https://perma.cc/678U-K8QR] (describing how most comfort women were from Korea).

⁹ *Japan and South Korea Agree WW2 ‘Comfort Women’ Deal*, BRIT. BROADCASTING CORP. (Dec. 28, 2015), <http://www.bbc.com/news/world-asia-35188135> [https://perma.cc/5TJP-27H5] [hereinafter *Deal*]. *See also* Tessa Berenson, *Watch a Korean ‘Comfort’ Woman Explode With Anger at a Foreign Minister*, TIME (Dec. 31, 2015), <http://time.com/4164990/korean-comfort-woman-video/> [https://perma.cc/RP69-B5DH].

¹⁰ *See generally Deal, supra* note 9 (providing a brief overview of the agreement and diplomatic relations).

countries,¹¹ the agreement left a bitter taste in the mouths of former comfort women,¹² both from Korea and other nations that were exposed to Japan's comfort women military policy.¹³

Seventy years have lapsed since the end of World War II, but there are still comfort women who suffer without redress, monetary or otherwise.¹⁴ Some suffer in silence, forced to live with "suppressed emotional trauma for the rest of their lives—too embarrassed to tell even their most loved ones."¹⁵ Others died in silence during the war.¹⁶ Despite cultural shame, many have recently stepped out to bring light to the tragedies they endured.¹⁷ As of 2000, "[t]he official surviving number of those who have been identified as former comfort women for each Asian country is as follows: South Korea, 168; North Korea, 260; resident Koreans in Japan, 1; the Philippines, 169; Taiwan, 45; mainland China, 11; Indonesia, about 20,000; the Netherlands, 20-30."¹⁸

All of these comfort women suffered loss of dignity and most

¹¹ Martin Fackler, *Japan to Revisit Apology to Wartime Sex Slaves*, N.Y. TIMES (Feb. 28, 2014), http://www.nytimes.com/2014/03/01/world/asia/japan-to-review-apology-made-to-wwii-comfort-women.html?_r=0 [<https://perma.cc/GW46-28LD>] (The United States has previously "been frustrated by the inability of its two Asian allies to work together to offset the growing strength of China.").

¹² *Deal*, *supra* note 9 (One comfort woman said, "[W]e've lived a life deprived of our basic rights as humans. So I can't be fully satisfied.").

¹³ Whaley, *supra* note 5 ("But the Japanese government has offered no official apology or compensation to those from the Philippines and elsewhere.").

¹⁴ Claire O'Neill, *Comfort Women: Untold Stories of Wartime Abuse*, NAT'L PUBLIC RADIO (June 4, 2011, 7:00 AM), www.npr.org/sections/pictureshow/2011/06/04/134271795/comfort-women-untold-stories-of-wartime-abuse [<https://perma.cc/MY72-GTLE>]. See also Whaley, *supra* note 5.

¹⁵ O'Neill, *supra* note 14. See also Constable, *supra* note 3.

¹⁶ Radhika Sanghani, *The Horrific Story of Korea's 'Comfort Women'-Forced to be Sex Slaves During World War Two*, TELEGRAPH (Dec. 29, 2015, 1:36 PM), <http://www.telegraph.co.uk/women/life/the-horrific-story-of-koreas-comfort-women---forced-to-be-sex-sl/> [<https://perma.cc/Y5N3-QDGU>].

¹⁷ See Constable, *supra* note 3; see also Whaley, *supra* note 5 ("The Japanese government is responsible for what happened to me," she said. "I never told anyone except my mother about what happened to me. I was too ashamed. But now I want people to know.").

¹⁸ Kyeoung Park, *Japan, U.S. and World War II: The Search for Justice: The Unspeakable Experiences of Korean Women under Japanese Rule*, 21 WHITTIER L. REV. 567, 568 (2000). A more recent estimate of surviving women in South Korea is 59. See Williamson, *supra* note 1.

still bear the scars of physical and psychological wounds.¹⁹ All of these women deserve closure and compensation. In spite of the fact that most comfort women came from Korea, Japan should make similar treaties with all the other countries it occupied. The issue of comfort women should not be viewed by the aggregate amount of harm, but rather by the individualized harm.

This note proposes that Japan should agree to mediation between itself and all the affected countries to address the issues surrounding the military brothels and forced prostitution. This mediation should invite the surviving women and end in a discussion regarding the compensation of all the comfort women and the education on the tragedy in all affected nations. Part II of this note gives a brief history of the international treaties regarding slavery and forced labor to which Japan is a signatory, military brothels, comfort women, and Japanese military involvement. Part III provides an overview of the diplomatic history between Korea and Japan over the issue of the comfort women and the current Japanese-Korean Agreement. Part IV distinguishes and emphasizes the importance of Japan taking moral responsibility and legal responsibility, while assessing the current Japanese-Korean Agreement's legal and/or moral significance. Part V examines each affected country's response to the current Japanese-Korean Agreement and forecasts the likelihood of other countries receiving a comparable agreement from Japan. Part VI follows the comfort women's attempts to find an alternate resolution by adjudicating the issue in Japan and the United States. Part VII recommends an international mediation as the starting point to formally resolve this problem through a means outside the judicial system. This section also prods Japan to give an official statement regarding the situation and to strive for reconciliation with each of the affected countries through formal apologies, monetary reparations, and plans to create educational facilities to shed light on this dark chapter of Japanese history.

II. History

During wartime today, international law specifically protects

¹⁹ See Williamson, *supra* note 1 (providing language of an official apology by the Japanese government, extending "its sincere apologies and remorse to all those who suffered immeasurable pain and incurable physical and psychological wounds as comfort women."); see also Constable, *supra* note 3.

women “against any attack on their honour [sic], in particular against rape, enforced prostitution, or any form of indecent assault,” through the Fourth Geneva Convention.²⁰ Prior to 1949 and the adoption of the Geneva Conventions, other treaties had contemplated the trafficking of women, children, and prostitution.²¹ Although not a signatory to the 1910 International Convention for the Suppression of the White Slave Traffic,²² Japan was a party of three other international agreements that clearly prohibited the establishment of comfort stations through means of kidnapping and forced labor.²³

First, Japan signed the 1922 International Convention for the Suppression of the Traffic in Women and Children, an updated and expanded version of the 1910 Convention.²⁴ Additionally,

Japan ratified the 1907 Hague Convention (the Hague Convention) on December 13, 1911 . . . , [which] prescribe[d] an international code for nations to follow during land warfare . . . , [including] broad human rights protections: “Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice.”²⁵

A violation of the Hague Convention’s regulations would result in a mandatory compensation to a nation’s victims.²⁶ In particular, a nation’s government would be responsible for any convention violations committed by its military.²⁷

Lastly, Japan committed itself to the International Labour

²⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²¹ See, e.g., International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 U.N.T.S. 415 [hereinafter *Traffic in Women*]; Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT’L L.J. 528, 531 (1995).

²² International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 30 U.N.T.S. 23.

²³ Christopher P. Meade, *From Shanghai to Globocourt: An Analysis of the “Comfort Women’s” Defeat in Hwang v. Japan*, 35 VAND. J. TRANSNAT’L L. 211, 220–25 (2002).

²⁴ *Traffic in Women*, *supra* note 21; see also Meade, *supra* note 23, at 221.

²⁵ Meade, *supra* note 23, at 222–23.

²⁶ *Id.* at 223.

²⁷ *Id.*

Organization's Convention No. 29 on Forced Labor ("ILO Convention"), which focused on the prohibition of forced labor.²⁸ The labor performed by the comfort women clearly fell within the bounds of forced labor, which was defined by the ILO Convention as "work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."²⁹ Aside from prohibition, the ILO Convention also "placed an affirmative duty on the signers to 'suppress' the use of forced labor 'in all its forms.'"³⁰

While there were orders for the Japanese Imperial Army to follow the bounds of these international treaties,³¹ the existence of comfort women, many of whom were under the age of twenty-one and were virgins, reveals the blatant misconduct by those executing the orders.³² It was during this climate of wartime disregard for human rights and dignity that an estimated "200,000 women were forced to be sex slaves for Japanese soldiers."³³ These women were euphemistically called *jugun ianfu*, the Japanese name for comfort women.³⁴

²⁸ *Id.* at 223–24.

²⁹ ILO Convention No. 29 Concerning Forced or Compulsory Labor art. 2, Jun. 28, 1930, 39 U.N.T.S. 55.

³⁰ Meade, *supra* note 23, at 223.

³¹ *Who were the Comfort Women?-Women Were Collected*, DIGITAL MUSEUM: THE COMFORT WOMEN ISSUE AND THE ASIAN WOMEN'S FUND, <http://www.awf.or.jp/e1/facts-04.html> [<https://perma.cc/3RC7-4AZM>] (last visited Sep. 19, 2016) [hereinafter Fact 1] ("The stipulation that the women must be at least 21 was made because the International Convention for the Suppression of Traffic in Women and Children, which Japan had ratified, prohibited the prostitution of minors.").

³² *See id.* ("In this case, it would appear that the rules in effect in Japan were also applied when recruiting in Taiwan, although whether they were always followed is unknown. Because in ratifying the International Convention for the Suppression of Traffic in Women and Children in 1925, the Japanese government excluded the colonies from its application."); *see also* Digital Museum: The Comfort Women Issue and the Asian Women's Fund, *Who were the Comfort Women?-Women Were Collected*, ASIAN WOMEN'S FUND, <http://www.awf.or.jp/e1/facts-05.html> [<https://perma.cc/LB7F-EAJR>] [hereinafter Fact 2] ("When recruiters commissioned by the military were assisted by the police in Korea, it is not known whether they followed the Police Bureau's rules, as set out in the above-mentioned memorandum of February 1938. It is natural to assume that, in the beginning, the women sent from Korea were already involved in prostitution, but that, over time, women from poor families mainly came to be taken.").

³³ *Deal*, *supra* note 9.

³⁴ Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3

The first comfort station, located in China, began for numerous reasons.³⁵ The military-run brothels were meant to boost morale,³⁶ prevent the Japanese army from raping civilian women in occupied areas,³⁷ stop the spread of venereal diseases among the soldiers, and thwart the potential for soldiers to expose military secrets to civilian women.³⁸ The model was fairly successful in ridding the posts of rape crimes, so comfort stations spread.³⁹ The first comfort women were Japanese, “recruited primarily from existing brothels in Japan by offering them a way to repay their debts more quickly,” but this did not solve the problem of the spread of venereal diseases.⁴⁰ Additionally, the Sino-Japanese war deepened and there was an ever-expanding need for women.⁴¹ Thus, the search spread abroad.⁴²

The recruitment of comfort women in Japan was tasked to business agents,⁴³ who were given no guidelines. The methods used “were criticized by the police in different parts of Japan, who equated the [recruiting] agents’ efforts with kidnapping unsuspecting women and said that they were tarnishing the honor of the Imperial Army.”⁴⁴ The Director of the Police Bureau of the Home Ministry then implemented constraints, limiting recruitment to women who were at least twenty-one years old and were already involved in prostitution.⁴⁵ Furthermore, these women were required to “obtain permission from their parent or guardians to go

ASIAN-PAC. L. & POL’Y J. 2, 2 (2002) [hereinafter *Broken Silence*].

³⁵ Fact 2, *supra* note 32 (“The comfort stations were first established at the request of the Japanese military authorities, as part of war efforts in China.”). See generally Fact 1, *supra* note 31 (providing information collected about comfort women).

³⁶ Mindy Kolter, *The Comfort Women and Japan’s War on Truth*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/15/opinion/comfort-women-and-japans-war-on-truth.html?_r=0 [https://perma.cc/PTR5-VNW7].

³⁷ Meade, *supra* note 23, at 219–20 (speculating that the Japanese Imperial Army was encouraged to create comfort stations partially in response to the harrowing Rape of Nanking).

³⁸ *Id.* at 220.

³⁹ Fact 1, *supra* note 31 (providing that the number of comfort stations spread).

⁴⁰ *Fact Sheet*, *supra* note 6.

⁴¹ See *id.*; see also Park, *supra* note 18, at 571.

⁴² *Fact Sheet*, *supra* note 6.

⁴³ Fact 1, *supra* note 31.

⁴⁴ *Id.*

⁴⁵ *Id.*

overseas.”⁴⁶ When reaching into the then Japanese colony of Taiwan for more comfort women, these same restrictions applied, but it is unclear whether there was strict adherence to the rules.⁴⁷ This flouting of orders is assumed to have carried into Korea.⁴⁸ Recruitment of comfort women likely started out with only women who “were already involved in prostitution, but that, over time, women from poor families mainly came to be taken.”⁴⁹ These women were either enticed with what they believed would be jobs, other factory work, or were simply kidnapped.⁵⁰ Plucked from their families at ages as young as ten years old, these girls were forced to serve the Japanese soldiers by cooking and washing for them “during the day then provid[ing] sexual services at night.”⁵¹

Having suffered physical and psychological trauma that, for most, ultimately ruined any hopes of a normal post-war life,⁵² these women need closure. For them, the war has not yet ended.⁵³ These women have expressed that closure will come by way of a sincere, unequivocal apology and acknowledgement of participation in the human rights crime from the Japanese government.⁵⁴ There have also been calls for monetary reparations “from the *government's own funds*, as a means of demonstrating that the government has accepted responsibility for these crimes.”⁵⁵ When evaluated in light of all that “was taken from them when they were trapped in the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Fact 2, *supra* note 32; *see also* Sanghani, *supra* note 13.

⁴⁹ Fact 2, *supra* note 32.

⁵⁰ *See* C. SARAH SOH, THE COMFORT WOMEN: SEXUAL VIOLENCE AND POSTCOLONIAL MEMORY IN KOREA AND JAPAN 115 (2008) (“Both *karayuki-san*[, overseas Japanese prostitutes,] and *ianfu* came mainly from impoverished families and were sold or deceptively recruited into indentured prostitution. Some were simply abducted.”); Rekha Basu, *Japan's apologies on 'comfort women' not enough*, SEATTLE TIMES (Jan. 22, 2016, 3:46 PM), <http://www.seattletimes.com/opinion/japans-apologies-on-comfort-women-not-enough/> [<https://perma.cc/J8RZ-C9J7>] (explaining women were promised factory or other work).

⁵¹ MARIA ROSA HENSON, COMFORT WOMAN: A FILIPINA'S STORY OF PROSTITUTION AND SLAVERY UNDER THE JAPANESE MILITARY xvi (1999).

⁵² *See supra* note 19 and accompanying text.

⁵³ *See supra* note 1.

⁵⁴ MARGARET D. STETZ & BONNIE B.C. OH, LEGACIES OF THE COMFORT WOMEN OF WORLD WAR II 129 (2001).

⁵⁵ *Id.*

military brothels,”⁵⁶ “the redress [these] survivors seek is so minimal . . . that in any other context it would almost seem pitiful.”⁵⁷

III. Diplomatic History Between Korea and Japan

At the end of the war, Japan largely denied government and military involvement in the establishment of the comfort stations and the recruitment of comfort women.⁵⁸ This blanket denial eventually became an argument of the semantics about the operations, with the government passing off the blame into the hands of the businessmen they hired to do the dirty work.⁵⁹ The “male-dominated and patriarchal perception of war . . . made crimes against women in wartime ‘invisible’” and likely caused the issue of comfort women to be excluded from treaty-bargaining tables at the end of the War.⁶⁰ In this atmosphere, Korea did little in response to Japan’s denial, despite being the most affected nation.⁶¹ A decade later, in the Japan-Republic of Korea Basic Treaty of 1965 (“1965 Treaty”), also known as the Japan-Korea Settlement of Claims Agreement,⁶² there was still no discussion of comfort women or reparations for them.⁶³ Furthermore, as Japan understood the Treaty, “*all* the issues related to Japan’s wartime wrongdoings were resolved with the signing of [the 1965 Treaty],” including the issue

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Reiji Yoshida, ‘*Comfort Women*’ Issue Refuses to Go Away, THE JAPAN TIMES (Oct. 27, 2014), <http://www.japantimes.co.jp/news/2014/10/27/reference/comfort-women-issue-refuses-go-away/#.VsjlThjwpaU> [<https://perma.cc/8YA4-48FY>].

⁵⁹ *See id.*

⁶⁰ MAITA GOMEZ, FROM THE DEPTHS OF SILENCE v–vi (Alex Umali ed. 2000) (“Many people, including the Japanese government, have suggested that the policy of systematic abduction was simply one of the ‘horrors of war,’ and a fate suffered by many women and children throughout human history.”). *See* Park, *supra* note 18, at 571.

⁶¹ Sue R. Lee, *Comforting the Comfort Women: Who can Make Japan Pay?*, 24 U. PA. J. INT’L ECON. L. 509, 519 (2003).

⁶² *See* Meade, *supra* note 23, at 226.

⁶³ Japan and South Korea Treaty on Basic Relations, June 22, 1965, 44 U.N.T.S. 8471; *see also* C. Sarah Soh, *Japan’s Responsibility Toward Comfort Women Survivors* (Japan Policy Research Inst., Working Paper No. 77, 2001) <http://www.jpri.org/publications/workingpapers/wp77.html> [<https://perma.cc/MH6X-3LUZ>] (“It should be noted, however, that the issue of comfort women remained a non-issue for both Japan and South Korea during the fourteen years (1952-1965) of negotiations to normalize bilateral relations.”).

with the comfort women and stations.⁶⁴

After the 1965 Treaty, however, Chief Cabinet Secretary Yohei Kono officially shifted the Japanese government's position on the comfort women with the "Kono Statement" on August 4, 1993.⁶⁵ This statement revealed Japan's military involvement, intimidating recruitment tactics, and "coercive [comfort station] atmosphere."⁶⁶ Aside from being the first official admission of Japanese military responsibility,⁶⁷ the Kono Statement was the first acknowledgement of the coercion involved in recruiting comfort women.⁶⁸ Following the Kono Statement, Japan and South Korea reached an agreement regarding the comfort women in the Japan-Republic of Korea Joint Declaration in 1998.⁶⁹ Then-President of South Korea, Kim Dae-jung, promised Japanese Prime Minister Keizo that an apology from Japan would settle the score and President Kim's "successor would not resurrect the histor[ical] issue with Japan again."⁷⁰ When President Kim's successor Roh Moo-hyung failed to keep the promise, the relationship between Japan and South Korea quickly soured.⁷¹

⁶⁴ Yuki Tatsumi, *Japan, South Korea Reach Agreement on 'Comfort Women'*, THE DIPLOMAT (Dec. 28, 2015), <http://thediplomat.com/2015/12/japan-south-korea-reach-agreement-on-comfort-women/> [<https://perma.cc/BZX6-6J2X>].

⁶⁵ See *Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women"*, MINISTRY OF FOREIGN AFF. OF JAPAN (Aug. 4, 1993), <http://www.mofa.go.jp/policy/women/fund/state9308.html> [<https://perma.cc/F2QW-BXJ9>] [hereinafter *Statement*]. A study initiated by the Japanese government preceded the Kono statement. See *id.* The study aimed to be an impartial search for truth behind the numerous narratives and theories surrounding the comfort women. STEPHANIE WOLFE, *THE POLITICS OF REPARATIONS AND APOLOGIES* 75 (ed. 2014) ("Between 1990 and 1991 Japan denied official military involvement in the comfort women system . . .").

⁶⁶ *Statement*, *supra* note 65.

⁶⁷ Kyodo, *China Awaits Abe's Stance on 70th Anniversary of WWII*, THE JAPAN TIMES (Dec. 20, 2004), <http://www.japantimes.co.jp/news/2014/12/20/national/politics-diplomacy/china-awaits-abes-stance-70th-anniversary-wwii/#.VrPbYhjwpE4> [<https://perma.cc/B9YR-28SS>].

⁶⁸ *Id.*

⁶⁹ Tatsumi, *supra* note 64. See generally, *Japan-Republic of Korea Joint Declaration: A New Japan-Republic of Korea Partnership Towards the Twenty-first Century*, MINISTRY OF FOREIGN AFF. OF JAPAN (Oct. 8, 1998), <http://www.mofa.go.jp/region/asia-paci/korea/joint9810.html> [<https://perma.cc/M4LN-ZCHX>] (providing objectives of the two countries).

⁷⁰ Tatsumi, *supra* note 64.

⁷¹ See *id.*; see also Fackler, *supra* note 11 ("South Korea's president, Park Geun-hye,

Amidst these formal communications between Japan and South Korea, the Japanese government attempted to compensate all the comfort women for the first time in 1995, when then-Prime Minister Tomiichi Murayama established the Asian Women's Fund, a non-governmental organization.⁷² The Fund provided either individual monetary compensation to the surviving comfort women or resources to create medical facilities and nursing or retirement homes for the women.⁷³ Accompanying this money was a "letter of apology signed by the prime minister [for] each victim."⁷⁴ Many South Korean and Taiwanese comfort women rejected the monetary compensation because of the money was taken from private donors and "charity funds rather than state compensation."⁷⁵ The letter from the prime minister was similarly rejected because the women saw the repentance as an apology from the prime minister in his personal capacity rather than in his official role as Prime Minister of Japan.⁷⁶ In further proof of their theory, the letter was "delivered by the Asian Women's Fund rather than by diplomats."⁷⁷ Eventually, with all requests completed, the Asian Women's Fund was dismantled in 2007.⁷⁸

has refused even to meet with Mr. Abe until Japan shows more contrition on the [comfort women] issue.").

⁷² See Kyodo, *Japan-South Korea Deal on 'Comfort Women' Draws Mixed Reaction*, THE JAPAN TIMES (Dec. 29, 2015), <http://www.japantimes.co.jp/news/2015/12/29/national/politics-diplomacy/japan-south-korea-deal-comfort-women-draws-mixed-reaction/> [https://perma.cc/4BEP-SPME] [hereinafter *Mixed Reaction*]; see also SOH, *supra* note 50.

⁷³ Chris Hogg, *Japan's divisive 'comfort women' fund*, BRIT. BROADCASTING CORP. (April 10, 2007, 1:20 PM GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/6530197.stm> [https://perma.cc/RE7Y-HRZA].

⁷⁴ *Id.*

⁷⁵ *Id.* "In the 1990s, an attempt by the Murayama government to provide compensation for comfort women through the Asia Women's Fund failed, largely because of criticism within South Korea that the Fund was not official and therefore could not be considered as 'official' reparations." Tatsumi, *supra* note 64.

⁷⁶ Hogg, *supra* note 73; see also Tatsumi, *supra* note 64 (noting "some vocal critics who dismissed the 1993 Kono Statement and the 1995 Murayama Statement as expressions of those leaders' personal feelings, and thus not official government apologies.").

⁷⁷ Hogg, *supra* note 73.

⁷⁸ Digital Museum: The Comfort Women Issue and the Asian Women's Fund, *Closing of the Asian Women's Fund*, THE ASIAN WOMEN'S FUND, <http://www.awf.or.jp/e3/dissolution.html> [https://perma.cc/4LY7-MV4X] (last visited Sep. 19, 2016); see also Hogg, *supra* note 73.

Most recently, on December 28, 2015, the Foreign Ministers of Japan and South Korea came to another compensation agreement, only for the Korean comfort women.⁷⁹ The new agreement (“2015 Agreement”) established a foundation under the South Korean government, which is funded by the Japanese national budget,⁸⁰ and provided for an apology from Japanese Prime Minister Shinzo Abe in his official capacity.⁸¹ Like the 1995 fund, however, compensation to the women is officially given through the foundation.⁸² This means the Japanese government is not directly compensating the comfort women—something that the Japanese government believes they do not need to do because of the resolution of all wartime wrongdoings in the 1965 Treaty.⁸³ The two countries agreed that this would be the final resolution on the comfort women issue between the two nations, with specific language indicating that the “issue is resolved finally and *irreversibly*.”⁸⁴

IV. Legal or Moral Remedy?

Although the agreement was meant to serve as a reconciliatory measure, the comfort women and their advocates received the agreement with mixed feelings.⁸⁵ Some were happy that the governments had finally come to a resolution and improved bilateral relations.⁸⁶ Others were outraged that history repeated itself and the women were once again excluded from the bargaining table.⁸⁷ The compensatory amount has been called “insulting” and “stingy,” and

⁷⁹ See Tatsumi, *supra* note 64.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.* (quoting the Foreign Minister).

⁸⁵ See generally *Mixed Reaction*, *supra* note 72 (providing the different points of view in response to compensation).

⁸⁶ See Toru Higashioka, *For Dwindling Number of Former ‘Comfort Women,’ Time Running Out to Resolve Issue*, THE ASAHI SHIMBUN (Feb. 29, 2016), http://ajw.asahi.com/article/asia/korean_peninsula/AJ201602290074 [<https://perma.cc/C2AP-YA2D>].

⁸⁷ Jonathan Soble & Choe Sang-Hun, *South Korean and Japanese Leaders Feel Backlash From ‘Comfort Women’ Deal*, N.Y. TIMES (Dec. 29, 2015), http://www.nytimes.com/2015/12/30/world/asia/south-korea-japan-comfort-women.html?_r=0 [<https://perma.cc/52MK-BH6A>].

the deal considered “traitorous.”⁸⁸ Most importantly, however, common sentiment among the women is that “there is no change to the position that Japan has no legal responsibility” for its horrendous actions.⁸⁹

For comfort women who bore the consequences of a regime’s inhumane decisions, winning the fight over moral responsibility is not enough.⁹⁰ They demand that Japan take legal responsibility by offering official and state-sponsored amends.⁹¹ The Japanese government has evaded, and continues to evade, the assumption of any kind of responsibility for the comfort women for as long as possible.⁹² Only in recent years has the Japanese government tried to assuage international pressure by accepting moral responsibility.⁹³

Before the 2015 Agreement, Japan maintained that it had no legal responsibility to remedy the comfort women.⁹⁴ Instead, Japan’s steps to compensate the women were motivated by a “general moral obligation.”⁹⁵ Accepting moral responsibility is easier for Japan because it merely means that the Japanese government supports the comfort women, but does not admit that the comfort stations were in violation of any law, nationally or internationally.⁹⁶ In the 2015 Agreement, Japan strategically avoided addressing whether or not the agreement was made in

⁸⁸ *Id.*

⁸⁹ *Mixed Reaction*, *supra* note 72 (quoting Eriko Ikeda, the director of the Women’s Active Museum on War and Peace).

⁹⁰ See *Japan effectively admitted legal responsibility in ‘comfort women’ deal: experts*, YONHAP NEWS AGENCY (Jan. 5, 2016, 6:23 PM), <http://english.yonhapnews.co.kr/national/2016/01/05/33/0301000000AEN20160105004151315F.html> [<https://perma.cc/ZY2A-ZDDA>] [hereinafter *Legal Responsibility*]; Meade, *supra* note 23, at 216.

⁹¹ See *Legal Responsibility*, *supra* note 90; Meade, *supra* note 23, at 216.

⁹² Meade, *supra* note 23, at 216.

⁹³ *Id.*

⁹⁴ Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT’L & COMP. L. 59, 109–10 (2003); see also Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT’L L.J. 515, 530 (1995).

⁹⁵ Galvin, *supra* note 94, at 110.

⁹⁶ See *No Final Resolution Without Legal Responsibility on Comfort Women Issue*, THE HANKYOREH (Dec. 29, 2015, 5:23 PM), http://english.hani.co.kr/arti/english_edition/e_editorial/723940.html [<https://perma.cc/4C6G-KBK6>].

response to a moral or legal responsibility.⁹⁷ If, unlike Japan's understanding of the 1965 Treaty, the treaty did not resolve the legal issue behind the comfort women problem, Japan has violated "then existing treaty law and customary international law" and should pay for its sins.⁹⁸ By trafficking women for the purpose of sexual slavery, Japan broke its promise to condemn and prevent the trafficking of women and children, which Japan made when it ratified the International Convention for the Suppression of the Traffic in Women and Children of 1921-1922.⁹⁹ Japan also broke a handful of customary laws, some of which include multilateral agreements and customary international law "protect[ing] the lives of civilians and the individual dignity of human beings."¹⁰⁰

Accepting legal responsibility for the matter would force Japan to accept that it must engage in direct, individual compensation for each comfort woman, and thus must enter into similar agreements with all of the other affected countries, representing comfort women in each nation.¹⁰¹ Admitting legal responsibility for the comfort women issue would "open[] Japan to a deluge of potential claims, including from women from other countries and from men who were rounded up to work in Japanese wartime industries such as coal mining."¹⁰² Japanese politicians assert that recognition of all victim's claims would "drain national economic resources."¹⁰³ Additionally, accepting legal blame for the incident forces Japan to fully admit that it committed human rights violations—an

⁹⁷ See Yukari Easton, *The Comfort Women Agreement: A Win for Traditional Diplomacy*, THE DIPLOMAT (Dec. 31, 2015), <http://thediplomat.com/2015/12/the-comfort-women-agreement-a-win-for-traditional-diplomacy/> [https://perma.cc/K8TB-VYZ2]; "Strategic Ambiguity" Highlights Divergence on Japan-S. Korea "Comfort Women" Deal, NEW CHINA (Dec. 30, 2015, 5:29 PM), http://news.xinhuanet.com/english/2015-12/30/c_134965300.htm [https://perma.cc/LJ6H-VS3C].

⁹⁸ Yu, *supra* note 94, at 531.

⁹⁹ See *id.* at 531 ("Article 2. The Contracting Parties agree to take all measures to discover and prosecute persons who are engaged in the traffic in children of both sexes and who commit offences within the meaning of Article I of the Convention of May 4, 1910.").

¹⁰⁰ *Id.* at 532; see *supra* Part I.

¹⁰¹ See Soble & Sang-Hun, *supra* note 87.

¹⁰² *Id.*

¹⁰³ Joseph P. Nearey, *Compensating "Comfort Women" of World War II*, RACE, RACISM, AND THE LAW, http://racism.org/index.php?option=com_content&view=article&id=1285:gender02&catid=72&Itemid=215 [https://perma.cc/WAB2-JR2H] (last visited Sep. 19, 2016).

admission that detracts from a popularly held Japanese view that it was itself a “victim of other aggressive nations” during World War II.¹⁰⁴

V. International Impact and Response

Although it seems reasonable for other countries to expect similar agreements regarding comfort women in their jurisdiction, Japan has not made any movements toward any such agreements.¹⁰⁵ Taiwan, China, Indonesia, and the Philippines have all demanded official reparations and a formal apology from Japan.¹⁰⁶ Since the agreement was made, Taiwan has been pressing Japan for an agreement.¹⁰⁷ In response, Japan maintains that it “had already apologized to and compensated Taiwanese ex-comfort women.”¹⁰⁸ Japan also believes that the Prime Minister Shinzo Abe’s apology in December 2015 served as a universal apology to all comfort women.¹⁰⁹ China has also been vocal about its opinion that Japan must right its wartime crimes when China’s last surviving comfort woman passed away in 2015.¹¹⁰ Although China no longer has its own comfort women to avenge, it maintains its position that Japan needs to issue an apology and provide compensation for all comfort women, regardless of nationality.¹¹¹ Additionally, Chinese state-run

¹⁰⁴ *Id.*

¹⁰⁵ Mina Pollmann, *Will Taiwan’s ‘Comfort Women’ Get an Apology From Japan?*, THE DIPLOMAT (Mar. 4, 2016), <http://thediplomat.com/2016/03/will-taiwans-comfort-women-get-an-apology-from-japan/> [<https://perma.cc/CRG8-HHVS>].

¹⁰⁶ See Whaley, *supra* note 5 (Philippines); Pollmann, *supra* note 105 (Taiwan); Sun Ding, *Commentary: More Sincerity, Actions Required from Tokyo to Resolve “Comfort Women” Issue*, XINHUANET NEWS: ASIA & PACIFIC EDITION (Dec. 28, 2015, 11:18 PM), http://news.xinhuanet.com/english/2015-12/28/c_134959194.htm [<https://perma.cc/2S4P-XR5Z>] (China); Basu, *supra* note 50 (interviewing an Indonesian woman).

¹⁰⁷ Pollmann, *supra* note 105; see also Mark Rivett-Carnac, *Taiwan Urges Japan to Apologize for ‘Comfort Women’ After South Korean Deal*, TIME (Dec. 30, 2015), <http://time.com/4164004/taiwan-japan-comfort-women-resolution/> [<https://perma.cc/6TZ3-9MXV>].

¹⁰⁸ Joseph Yeh, *Private Compensation Fund is Unacceptable for Sex Slaves: MOFA*, THE CHINA POST, para. 7 (March 10, 2016, 12:01 AM TWN), <http://www.chinapost.com.tw/taiwan/intl-community/2016/03/10/460333/Private-compensation.htm> [<https://perma.cc/T3HW-A5DH>].

¹⁰⁹ *Id.*

¹¹⁰ Ding, *supra* note 106.

¹¹¹ Shannon Tiezzi, *Taiwan Apply Pressure to Japan Over ‘Comfort Women’ Issue*, THE DIPLOMAT: CHINA POWER (Jan. 6, 2016), <http://thediplomat.com/2016/01/china->

media has “called for Japan to apologize to and compensate comfort women of all nationalities.”¹¹² Although unsuccessful, China continued to fight for international recognition of the comfort women by attempting “to have documents related to the comfort women issue inscribed in the UNESCO Memory of the World Register.”¹¹³

In the Philippines, Japanese Emperor Akihito visited with the Filipino president and “expressed remorse for the atrocities of the Japanese military during World War II, but . . . did not specifically mention the victims of sexual slavery.”¹¹⁴ In response, there has been a call, from the presidential office, for Japan to address the issue with the Philippines via “Prime Minister Shinzo Abe, and not the emperor, a largely ceremonial” figurehead.¹¹⁵ In comparison to Taiwan and China, however, the Philippine government has been criticized for its “poor advocacy” on the issue.¹¹⁶

In forecasting whether or not Taiwan, China, Indonesia, and the Philippines will get the apologies and compensation they deserve, we must analyze each country’s importance to Japan’s national interests. South Korea had the advantage of being Japan’s neighbor and an important party in Japan’s national security interests.¹¹⁷ The agreement was also heavily endorsed by the United States, who believed that Japan and South Korea needed to collaborate to “counterbalance China’s growing military and economic influence in the region, and help keep North Korean aggression in check.”¹¹⁸ The other Asian nations do not have the same strategic influence that South Korea holds.¹¹⁹ Historically, the comfort woman issue

taiwan-apply-pressure-to-japan-over-comfort-women-issue/ [https://perma.cc/BJ53-5M5P].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Whaley, *supra* note 5, at 14.

¹¹⁵ *Id.*

¹¹⁶ *See id.*

¹¹⁷ See Juliet Eilperin, *Agreement on ‘Comfort Women’ Offers Strategic Benefit to U.S. in Asia-Pacific*, WASH. POST (Jan. 9, 2016), https://www.washingtonpost.com/politics/agreement-on-comfort-women-offers-ancillary-benefit-to-us-in-asia-pacific/2016/01/09/41a03d84-b54c-11e5-a842-0feb51d1d124_story.html [https://perma.cc/9G7U-ATC3].

¹¹⁸ *Id.*

¹¹⁹ *See id.*

has been a minor issue in Taiwan-Japan relations.¹²⁰ Although both have a growing fear of territorial disputes with China, Taiwan and Japan have maintained a good relationship.¹²¹ Thus, the issue of comfort women is less of a bargaining chip to maintain the pleasant status quo.¹²² In the Philippines, it is suspected “that the close relationship between [the Filipino] government and Japan[—]the largest donor and trading partner with the Philippines and a major strategic ally[—]is preventing Manila [from] applying enough pressure” to force Japan to take the issue seriously.¹²³ Indonesia seems to fall under a similar situation.¹²⁴

Unfortunately, comfort women in nations other than South Korea are unlikely to see any more Japanese money or an apology on the issue.¹²⁵ Japan’s chief cabinet secretary has announced that “Tokyo does not, in fact, intend to start a new round of negotiations with other countries based on the South Korea deal Japan has dealt with the issue ‘in a sincere manner considering each circumstance’ in different countries.”¹²⁶ Japan believes that each country has a different situation that cannot be compared to South Korea’s situation.¹²⁷

By refusing to make any actions on an agreement, Japan is “impl[ying] some women are deserving of having their suffering recognized and acknowledged, while others are not.”¹²⁸ Japan’s lack of accountability has widespread implications for women’s rights.¹²⁹ By refusing to own up to its historical actions, Japan is setting a precedent for those who continue to act violently toward

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See id.*

¹²³ Jane McMullen, *The House Where the Philippines’ Forgotten ‘Comfort Women’ Were Held*, BRIT. BROADCASTING CORP. (June 17, 2016), <http://www.bbc.com/news/magazine-36537605> [<https://perma.cc/Q8EP-FXNG>].

¹²⁴ *See Indonesia’s trade ties with Japan have expanded in recent years*, OXFORD BUS. GROUP, <http://www.oxfordbusinessgroup.com/analysis/indonesias-trade-ties-japan-have-expanded-recent-years> [<https://perma.cc/X9EZ-BGXL>] (last visited Sep. 19, 2016).

¹²⁵ Pollmann, *supra* note 105 (“[T]he Japanese government is likely to resist calls by survivors from other countries to offer an apology and compensation.”); *see also* Tiezzi, *supra* note 111.

¹²⁶ Tiezzi, *supra* note 111.

¹²⁷ *Id.*

¹²⁸ Pollmann, *supra* note 105.

¹²⁹ *See id.*

women in warfare.¹³⁰

VI. Seeking Judicial Redress

The precedent of violence Japan is setting is further reinforced by the inaction of international courts.¹³¹ After decades of agonizing patience and waiting for apology and redress from the Japanese government, the comfort women attempted to proactively seek judicial remedies for their pain, starting in Japan and making their way to the United States.¹³²

Beginning in 1991, three comfort women filed the first lawsuit adjudicating the Japanese government's violation of the comfort women's basic human rights.¹³³ The women in this lawsuit—"the Asia-Pacific War Korean Victims Compensation Claim Case"¹³⁴—filed in the Tokyo District Court, and demanded:

- 1) an official apology; 2) compensatory payment to survivors in lieu of full reparation [about ¥20 million or \$154,000 per plaintiff]; 3) a thorough investigation of their cases; 4) the revision of Japanese school textbooks identifying this issue as part of the colonial oppression of the Korean people; and 5) the building of a memorial museum.¹³⁵

The judge acknowledged the plaintiffs' suffering, but denied that any redress could be given due to the 1965 Treaty.¹³⁶ On appeal, another judge ruled that the Japanese government had a duty "to protect the comfort women from danger," and failed to do so.¹³⁷ Although the court found the Japanese government liable, the court still dismissed the case because the comfort women's "right to demand compensation had already expired."¹³⁸ Following the Asia-Pacific War Korean Victims Compensation Claim Case, about

¹³⁰ *See id.*

¹³¹ *Korean Victims of the Asia-Pacific War (Including Kim Hak-soon)*, THE SIGUR CENTER FOR ASIAN STUDIES GEORGE WASH. U., https://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/haksun.html [<https://perma.cc/SR6K-9EGS>] [hereinafter *Korean Victims*].

¹³² *See id.*; Meade, *supra* note 23, at 217 (U.S. court).

¹³³ *Korean Victims*, *supra* note 131.

¹³⁴ ROY L. BROOKS, WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND THE REPARATIONS FOR HUMAN INJUSTICE 117 (1999).

¹³⁵ *Korean Victims*, *supra* note 131.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

thirty reparations claims involving comfort women from comfort women of other countries were filed in the Tokyo District Court.¹³⁹ This case became the first of the many disappointments that the comfort women faced in court.¹⁴⁰

Ultimately, the comfort women were blocked from any judicial remedy in Japan¹⁴¹ for a host of reasons, including: the unreasonableness of retroactively applying international criminal law that did not apply during World War II;¹⁴² the statute of limitations period running out; the women not having standing to bring their case; and/or the Japanese already settling all compensatory issues in the various post-war relation-normalizing treaties.¹⁴³ The courts would often admit that Japan had committed wrongs, but the court could not provide the comfort women with any remedy.¹⁴⁴ Only one of the many lawsuits resulted in a short-lived victory.¹⁴⁵ In *Ha v. Japan*,¹⁴⁶ three comfort women sought “an official apology and a total of ¥564 million (US\$6.66 million) [sic]

¹³⁹ BROOKS, *supra* note 134, at 118.

¹⁴⁰ See Byoungwook Park, *Comfort Women During WWII: Are U.S. Courts a Final Resort for Justice?*, 17 AM. U. INT'L L. REV. 403, 408 (2002).

¹⁴¹ *See id.*

¹⁴² Meade, *supra* note 23, at 235.

¹⁴³ See Song Shin-do, *Lawsuits Brought Against Japan by Former Korean “Comfort Women,”* CENTER FOR KOREAN LEGAL STUDIES COLUMBIA U., <http://web.law.columbia.edu/korean-legal-studies/sexual-slavery-during-wwi-comfort-women-issue/legal-documents-and-lawsuits/lawsuits-brought-former-korean-comfort-women> [https://perma.cc/3N9L-52JT] (last visited Sep. 19, 2016) [hereinafter *Lawsuits by Korean Comfort Women*]; *Lawsuits Brought Against Japan by Women of Asian Nations Other Than Korea, Including The Netherlands*, CENTER FOR KOREAN LEGAL STUDIES COLUMBIA U., <http://web.law.columbia.edu/korean-legal-studies/sexual-slavery-during-wwi-comfort-women-issue/legal-documents-and-lawsuits/lawsuits-brought-former-comfort-women-other-nations-asia-and-europe> [https://perma.cc/BZ4T-5EWR] (last visited Sep. 19, 2016) [hereinafter *Lawsuits by Other Comfort Women*]; Meade, *supra* note 23, at 233.

¹⁴⁴ Meade, *supra* note 23, at 233 (“At the time, the lawyers for the plaintiff hailed the ruling as the first time a Japanese court had acknowledged that Japanese agents violated international law during the war, and acknowledged the plaintiff’s suffering. The court accepted Song’s claim that she had been taken to a Japanese army camp in China in 1938 and forced to provide sexual services until the end of the war, and agreed that awarding compensatory damages would constitute an appropriate response. However, such action was held to be the responsibility of the legislature, not the courts.”).

¹⁴⁵ Park, *supra* note 140, at 408.

¹⁴⁶ James Ladino, *Ianfu: No Comfort Yet for Korean Comfort Women and the Impact of House Resolution 121*, 15 CARDOZO J.L. & GENDER 333, 338 (2009).

for . . . violat[ing] an international treaty banning forced labor,” claiming standing through State Redress Law of 1947 in the Japanese Constitution.¹⁴⁷ The State Redress Law of 1947 makes a state or public agency “liable for any damage caused by the unlawful action of public officials, either wilfully [sic] or negligently, in the exercise of their duty.”¹⁴⁸ There is a three-year statute of limitation “from the time the injured party or his legal representative became aware of such damage and of the identity of the person who caused it” or a twenty-year statute of limitation from the time the unlawful act was committed.¹⁴⁹

The Shimonoseki branch of the Yamaguchi District Court ruled that the Japanese government had a “legal duty” to attempt to provide reparations to the comfort women for their anguish.¹⁵⁰ The judge “stressed that the comfort women system was a clear case of sexual and ethnic discrimination, as well as a violation of the human rights enshrined in the constitution.”¹⁵¹ Despite the “clear case” of a violation of human rights, the Japanese government was only ordered to pay ¥300,000 (\$2,800.00) to each comfort woman in the case.¹⁵² This was the first case where the comfort women won any redress, but the result was more insulting than a plain dismissal of their claim.¹⁵³ Understandably angry, the comfort women appealed the ruling to the High Court for an genuine apology and reasonable compensation, claiming “that the amount awarded to them was an insult to women ‘who were treated lower than human beings.’”¹⁵⁴ Instead, the High Court judge shocked the comfort women by “reject[ing] the appeal and overturn[ing] the April 27, 1998 decision . . . , [claiming] compensation for wartime suffering [was] a matter for the Diet[, Japan’s legislative branch,] and not the

¹⁴⁷ *Pusan Comfort Women and Women’s Labor Corps Members*, THE SIGUR CENTER FOR ASIAN STUDIES GEORGE WASH. U., https://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/pusan.html [<https://perma.cc/C6MY-K8UK>] (last visited Sep. 19, 2016).

¹⁴⁸ *Reparation for Torture: Japan*, REDRESS 1, 15, www.redress.org/downloads/country-reports/Japan.pdf [<https://perma.cc/4QH4-TJMB>].

¹⁴⁹ *Id.* at 15.

¹⁵⁰ *Pusan Comfort Women and Women’s Labor Corps Members*, *supra* note 147.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *Id.*

judiciary.”¹⁵⁵ An appeal to the Japanese Supreme Court maintained the defeat.¹⁵⁶

Following the loss of *Ha v. Japan*, it became clear that the “successful resolution of lawsuits in Japanese domestic courts during the lifetimes of the former Comfort Women [would be] almost impossible, unless the Japanese government [took] legislative or executive action regarding reparations for the former Comfort Women.”¹⁵⁷ In desperation and further attempts to find justice, the comfort women have sought amends through U.S. courts.¹⁵⁸

The comfort women fight against the Japanese government was brought before the D.C. District Court in 2001 in the case *Hwang Geum Joo v. Japan*.¹⁵⁹ Bringing a suit against a foreign nation is complicated because of the international understanding that every nation has sovereign immunity, or the right to handle its own problems without being under the scrutiny of foreign courts.¹⁶⁰ Generally, a foreign sovereign has sovereign immunity in the courts of the United States, unless it falls under two exceptions:

- (1) . . . the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
- (2) . . . the [legal] action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial

¹⁵⁵ *Id.*

¹⁵⁶ *Pusan Comfort Women and Women’s Labor Corps Members*, *supra* note 147.

¹⁵⁷ Park, *supra* note 140, at 410.

¹⁵⁸ Meade, *supra* note 23, at 237.

¹⁵⁹ 172 F. Supp. 2d 52, 54 (D.D.C. 2001). In a 2015 case, *He Nam You v. Japan*, two comfort women attempted to bring claims against Japan through United States subsidiaries of Japanese corporations that had “provided war materiél [sic] to Japan during the Second World War and that each realized ‘huge profit’ from such conduct.” 150 F. Supp. 3d 1140, 1143 (N.D. Cal. 2015). These defendants were Mitsubishi Corporation (Americas), Toyota Motor Sales, U.S.A., Inc., Nippon Steel & Sumitomo Metal U.S.A., Inc., Nissan North America, Inc., and NYK Line (North America), Inc., and Hitachi America, Inc. *Id.* The claims were either dismissed or summary judgment granted for the defendant. *Id.* at 1142.

¹⁶⁰ 28 U.S.C. § 1602 (2012).

activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁶¹

The D.C. Circuit disagreed that Japan had fulfilled the first exception by either giving an explicit¹⁶² or implied waiver.¹⁶³ Although Japan broke at least three international treaties and *jus cogens* norms, or “principle[s] of international law that [are] ‘accepted by the international community of States as a whole . . . from which no derogation is permitted,’”¹⁶⁴ the court relied on precedent set by three other circuits and similarly did not interpret Japan’s violations as representing an implied waiver of sovereign immunity.¹⁶⁵ Japan’s action also did not fall under the commercial activity exception because the creation of the comfort stations was clearly not “the type of action[] by which a private party engages in ‘trade and traffic or commerce.’”¹⁶⁶ The court focused on whether the action of kidnapping women and engaging them in forced sexual activity could “‘be described as a commercial activity—without regard to its purpose’” or motives.¹⁶⁷ Although illegal, these acts do not fall under the commercial exception to sovereign immunity because the acts cannot be classified as normal commercial activity.¹⁶⁸ Moreover, the court ruled that the comfort women issue was a nonjusticiable political question.¹⁶⁹

The women appealed the case to the D.C. Circuit Court of Appeals but were unsuccessful.¹⁷⁰ Because the State Department is a part of the executive branch, had the Supreme Court adjudicated the claim, it would be overstepping its judiciary role and flouting

¹⁶¹ *Hwang*, 172 F. Supp. 2d at 58–59.

¹⁶² *Id.* at 59–60 (Japan had not given explicit waiver through the Potsdam Declaration because “case law states that such a waiver needs to be clear, intentional, and unambiguous, plaintiffs’ argument must be rejected.”).

¹⁶³ *Id.* at 60–61.

¹⁶⁴ Meade, *supra* note 23, at 260; *see supra* Part I.

¹⁶⁵ *Hwang*, 172 F. Supp. 2d at 60–61.

¹⁶⁶ *Id.* at 62 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

¹⁶⁷ *Id.* at 63 (quoting *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167 (D.C. Cir. 1994)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 64.

¹⁷⁰ *See Hwang Geum Joo v. Japan*, 332 F.3d 679, 680 (D.C. Cir. 2003); *see also Joo v. Japan*, 413 F.3d 45, 46 (D.C. Cir. 2005).

the separation of powers.¹⁷¹ The case then went to the United States Supreme Court twice, but was ultimately denied certiorari.¹⁷² Without even the United States as a haven,¹⁷³ the comfort women are left with little they can actively do to seek redress.

VII. Recommendations

The slow turn of diplomatic relations will not effect change quickly enough for the comfort women.¹⁷⁴ Currently, in Taiwan, there are only four surviving comfort women of fifty-eight that stepped forward and the 2,000 total estimated Taiwanese comfort women.¹⁷⁵ In the Philippines, approximately 1,000 women were comfort women in their youth and about seventy are still alive.¹⁷⁶ With most comfort women in their mid- to late-eighties, any movement on the issue of acknowledgement, apology, and compensation needs to be made swiftly¹⁷⁷ so the surviving comfort women do not leave this life with “unresolved grievances.”¹⁷⁸

Japan’s refusal to take legal responsibility for the issue is extremely costly both for the world’s understanding of violence against women¹⁷⁹ and for Japan’s reputation with the Asian nations.¹⁸⁰ The proper next step in Japan’s actions regarding the comfort women is to open communication between Japan and the

¹⁷¹ *Joo*, 413 F.3d at 48 (“Rather, we defer to the judgment of the Executive Branch of the United States Government, which represents, in a thorough and persuasive Statement of Interest, that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States.”).

¹⁷² *See Hwang Geum Joo v. Japan*, 124 S. Ct. 2835, 2835 (2004); *Hwang Geum Joo v. Japan*, 126 S. Ct. 1418, 1418 (2006).

¹⁷³ John Power, *For South Korea’s ‘Comfort Women,’ Justice in America?*, THE DIPLOMAT (July 4, 2015), <http://thediplomat.com/2015/07/for-south-koreas-comfort-women-justice-in-america/> [<https://perma.cc/Y7SE-5XYA>].

¹⁷⁴ *See* Pollmann, *supra* note 105; *see also* McMullen, *supra* note 123.

¹⁷⁵ Tiezzi, *supra* note 111.

¹⁷⁶ Whaley, *supra* note 5.

¹⁷⁷ *See* Mizuho Aoki, *Time running out for South Korean ‘comfort women’ as average age approaches 90*, THE JAPAN TIMES, http://www.japantimes.co.jp/news/2015/06/21/national/time-running-south-korean-comfort-women-average-age-approaches-90/#.V8cA_yMrI6g [<https://perma.cc/F22S-YUXE>].

¹⁷⁸ Ding, *supra* note 106.

¹⁷⁹ *See* Pollmann, *supra* note 105.

¹⁸⁰ *See* Yu, *supra* note 94, at 540.

other nations affected. The most beneficial platform for this communication is through a series of mediations. While communication can be, and has long been, done through bilateral treaties, a multilateral mediation would give all affected nations an equal bargaining position. Multilateral mediation would send an important message to the comfort women by showing them that their suffering and humanity is recognized equally. Furthermore, the comfort women need to be party to the negotiations and communications. As victims of the comfort women nightmare, the women's stories need to be presented first and their demands prioritized most highly.

In order to ensure that the mediation will be fair and accurate, there should be a panel of disinterested mediators allocated by the United Nations. Additionally, there should be a time allocated for the presentation of evidence, grievances, and defenses. Finally, to ensure that the mediations do not outlast the lives of the comfort women, there should be a defined period of time set aside for the mediation, which would be agreed upon by all parties. Like the agreement with South Korea, this mediation would be final and irreversible. The women should not be barred from sharing their experiences and speaking critically on the horrific events that transpired.

The resolution for the comfort women issue will likely involve a formal apology and compensation, but may also consider a shift in international attitude toward the women and subject of sexual slavery. Japan may be asked to amend its longstanding educational ignorance on the issue in their schools.¹⁸¹ The mediation is merely a starting point for further talks regarding education on sexual slavery, further international measures for the prevention of sex trafficking, and penalties for infringement.

¹⁸¹ Pressure may come from nongovernmental sources as well. See Alexander Martin, *U.S. Publisher Rebuffs Japan on 'Comfort Women' Revision*, THE WALL ST. J. (Jan. 15, 2015, 5:44 AM), <http://www.wsj.com/articles/u-s-publisher-rejects-japan-over-textbook-on-comfort-women-1421299438> [<https://perma.cc/XGW6-NW8B>].