

# The Judicial Remedy's Unfulfilled Potential: Curing the Pain of Historical Atrocities in the South Korean-Japanese Context

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## INTRODUCTION

With a nearly nuclear-capable North Korea and the increasingly assertive China and Russia, Northeast Asia has long been a place of crucial strategic concern for the United States.<sup>1</sup> But at this moment, Japan and South Korea—two of the most critical U.S. allies in the region—are fighting against each other. Ever since Japanese Prime Minister Shinzo Abe's government made a decision on July 4, 2019, to restrict the export of three chemicals essential to South Korea's all-important electronics industry, a trade war has been raging on between the neighbors.<sup>2</sup> However, in a world now growing accustomed to trade wars, this particular dispute stands out because it originates not from a commercial contention, but from a court of law's decision over a grave historical matter.

In December 2018, South Korea's Supreme Court handed down a decision against New Nippon Steel, a large Japanese corporation, ordering the company to compensate four Korean plaintiffs who worked for the defendant as forced laborers during the Second World War (the "New Nippon Steel Case").<sup>3</sup> While the plaintiffs and their families saw the high court's action as the belated work of justice, the defendant, as well as the Japanese government, protested against the

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1. See Jon Herskovitz & Jihye Lee, *North Korea Tests Trump with Missiles, Signals More Coming*, BLOOMBERG (Nov. 28, 2019), <https://www.bloomberg.com/news/articles/2019-11-28/north-korea-appears-to-have-fired-off-missile-japan-says> [<https://perma.cc/EYC6-739W>]; Andrew Osborn & Joyce Lee, *First Russian-Chinese Air Patrol in Asia-Pacific Draws Shots from South Korea*, REUTERS (July 22, 2019), <https://www.reuters.com/article/us-southkorea-russia-aircraft/first-russian-chinese-air-patrol-in-asia-pacific-draws-shots-from-south-korea-idUSKCN1UI072> [<https://perma.cc/PE8W-5R2S>].

2. See Mitsuru Obe & Kim Jaewon, *Inside the Lose-Lose Trade Fight Between Japan and South Korea*, NIKKEI ASIAN REV. (July 31, 2019), <https://asia.nikkei.com/Spotlight/Cover-Story/Inside-the-lose-lose-trade-fight-between-japan-and-south-korea> [<https://perma.cc/EQY9-2YUS>].

3. Supreme Court [S. Ct.], 2013Da61381, Oct. 30, 2018 (S. Kor.), *translated in 7 KOREAN J. INTL & COMP. L.* 88 (Seokwoo Lee & Seryon Lee eds., trans., 2019) [hereinafter *The New Nippon Steel Case*]. Future citations refer to the Lee & Lee translation. It is worth noting that a month later, the same court issued a decision in another forced labor case against Mitsubishi. Supreme Court [S. Ct.], 2013Da67587, Nov. 29, 2018 (S. Kor.). Given the similarity between the two decisions, this Note will only focus on the first case.

decision as an attempt to re-litigate an already settled matter.<sup>4</sup> This decision directly triggered the subsequent trade spat.<sup>5</sup>

Issues carrying historical weight have never ceased to haunt Japan and the Korean peninsula's relations in modern times. Industrializing long ahead of its Asian neighbors, Japan eventually managed to prevail in a 1905 struggle with Russia and colonize the Korean peninsula five years later—the colonial rule would persist for many decades until Japan's defeat in the Second World War in 1945.<sup>6</sup> In that time, especially during the Second World War, the relatively small island country faced an acute labor shortage in its attempt to leverage a continent- and ocean-wide military campaign.<sup>7</sup> Under a National Mobilization Law enacted in 1938, the Japanese government and many Japanese corporations imported somewhere between 280,000 and 1.2 million Korean laborers by coercion and deception to meet the demand.<sup>8</sup> Having lost personal liberty, suffered extremely harsh working conditions, and received little to no payment, the former forced laborers began to file suits in the 1990s, in a period when Asian nations invaded by Japan started to gain their own voice in international discussions of past atrocities.<sup>9</sup> However, as Part II below will explain, the New Nippon Steel Case turned not on the truth of these facts, but mostly on technical international law questions.

Prior to the New Nippon Steel Case, similar disputes arising from atrocities committed during the Second World War have emerged in the European context

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4. See *Supreme Court of Korea Decision Concerning Drafted Workers*, NIPPON STEEL & SUMITOMO METAL CORP. (Oct. 30, 2018), [https://www.nipponsteel.com/en/news/20181030\\_100.html](https://www.nipponsteel.com/en/news/20181030_100.html) [<https://perma.cc/ZM87-ELFR>] (calling the decision “deeply regrettable” and contrary to an earlier agreement between the two countries); Taro Kono, Minister of Foreign Affairs, *Regarding the Decision by the Supreme Court of the Republic of Korea, Confirming the Existing Judgments on the Japanese Company (Statement by Foreign Minister Taro Kono)*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Oct. 30, 2018), [https://www.mofa.go.jp/press/release/press4e\\_002204.html](https://www.mofa.go.jp/press/release/press4e_002204.html) [<https://perma.cc/ZTW5-44MD>] (claiming the forced labor issue is “settled completely and finally” and deeming the decision a “breach of international law”).

5. See Obe & Kim, *supra* note 2.

6. See generally E. TAYLOR ATKINS, *PRIMITIVE SELVES: KOREANA IN THE JAPANESE COLONIAL GAZE, 1910–1945* 22–52 (2010) (giving an overview of the history leading up to and during Japan's colonial rule over the Korean peninsula).

7. MICHAEL WEINER, *RACE AND MIGRATION IN IMPERIAL JAPAN 187* (1994).

8. *Id.* (estimating the number of laborers at 280,000 in the first year of “forced migration”); Choe Sang-Hun, *Remains of Nearly 2,750 Korean Wartime Laborers Found in Japan, South Says*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/world/asia/south-korea-forced-war-laborers-japan-world-war-ii.html> [<https://perma.cc/S8Q9-3MWP>] (reporting South Korean historians' estimate of 1.2 million forced Korean laborers in various Asian locations).

9. See SEBASTIAN CONRAD, *THE QUEST FOR THE LOST NATION: WRITING HISTORY IN GERMANY AND JAPAN IN THE AMERICAN CENTURY* 253 (Alan Nothnagle trans. 2010) (discussing and explaining a change in the global “landscape of memory” regarding the Second World War); see also Alexis Dudden, *Is History a Human Right? Japan and Korea's Troubles with the Past*, in *THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY* 311, 313 (Akira Iriye et al. eds., 2012) (discussing the particular effects of American policy during its occupation of Japan and the WWII emperor Hirohito's death in 1989).

against Germany, although the plaintiffs tended to lose on technical grounds.<sup>10</sup> But more broadly speaking, despite the technical nature of the issues decided in the New Nippon Steel Case, it should be clear that the emotional force of the substantive matter and the natural desire to find an answer to a grave historical wrong is the real pulsating heart of these cases.<sup>11</sup> In this regard, the experience of other parts of the world, especially that of Germany, can be quite instructive.<sup>12</sup> This Note takes as its theoretical basis the philosophy of Hannah Arendt, a prominent Jewish philosopher who survived and fled the Third Reich and promoted many critical ideas on the issue of evil-doing into international consciousness, examines the South Korean court's decisions on some of the technical international law matters, and draws upon these decisions in an attempt to propose an alternative legal remedy as a better solution for the substantive question of how to account for and move beyond a historical atrocity.

Part I of this Note will lay out the historical background of the forced labor issue, including (A) the Korean forced laborers' experience during the Second World War, (B) the history surrounding a 1965 treaty between South Korea and Japan which became the central issue of the New Nippon Steel Case, and (C) a brief comparative account of Germany's approach to atonement for and memorialization of atrocities, including some of Arendt's theoretical interpretation of the Holocaust. Part II will present and analyze the New Nippon Steel Case itself, including (A) some background information on the plaintiffs' unsuccessful prior suit in Japanese courts and in South Korean lower courts, (B) the critical 2012 reversal by South Korea's Supreme Court on a matter relating to *res judicata*, and (C) the 2018 decision's interpretation of the key 1965 treaty. Next, Part III will examine the issue of remedy, discussing (A) the limitations of monetary compensation, and (B) the possibility of using a court remedy to induce the defendant's engagement with history, to acknowledge the plaintiffs' pain and suffering, and to heal a societal wound. Then, Part IV will draw connections between the South Korean case and the history of slavery in the United States. Finally, this Note will conclude with the thesis that in the face of historical atrocities, a court of law should think beyond monetary damages, and exercise creativity to promote the defendant's engagement with history, in the hope of finding real reconciliation and closure for the victims.

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10. See, e.g., *Jurisdictional Immunity of the State (Ita. v. Ger.)*, Judgment, 2012 I.C.J. 99, 145 (Feb. 3) (Italian plaintiffs who sued the German state losing due to Germany's jurisdictional immunity in Italian courts).

11. See, e.g., Choe Sang-Hun & Rick Gladstone, *South Korean Ruling in Suit on Forced Labor Rekindles Old Tensions*, N.Y. TIMES (Oct. 30, 2018), at A10.

12. See, e.g., Elizabeth Kolbert, *The Last Trial*, NEW YORKER (Feb. 9, 2015), <https://www.newyorker.com/magazine/2015/02/16/last-trial> [<https://perma.cc/2LKY-WELH>] (discussing various stages of German prosecution and memorialization for the Holocaust, as well as a particular instance of memorialization).

## I. HISTORICAL BACKGROUND

### A. KOREAN FORCED LABOR IN JAPAN

Occupying and colonizing the Korean Peninsula under the Korea-Japan Annexation Treaty of 1910, Japan further expanded through the Manchurian Incident of 1931<sup>13</sup> and the Sino-Japanese War in 1937, eventually moving toward waging the Pacific War in 1941.<sup>14</sup> To counter a labor shortage for munitions production in the midst of these conflicts, Japan enacted the National Mobilization Law in 1938 and issued guidelines in 1942 for local governments to transfer Korean workers from all parts of the peninsula to Japan via job placements.<sup>15</sup> Starting in 1944, Japan “draft[ed] ordinary Koreans for military service” under the National Service Draft Ordinance.<sup>16</sup> The Pacific War ended in 1945 when the Japanese emperor unconditionally surrendered to the Allied Nations.<sup>17</sup>

Four plaintiffs initiated the present suit: YEO Woon Taek, SHIN Chun Soo, LEE Choon Sik, and KIM Kyu Soo.

#### 1. PLAINTIFFS YEO WOON TAEK AND SHIN CHUN SOO

Around 1943, Old Nippon Steel advertised in Pyongyang to recruit factory workers for the Osaka Steel Mill, which proclaimed that workers who worked for two years could acquire skills and become technicians in steel mills in Korea.<sup>18</sup> Seeing the advertisements, plaintiffs Yeo and Shin applied for the positions and became trainees.<sup>19</sup> The two plaintiffs “worked on three 8-hour shifts” and received permission to go out only “once or twice a month.”<sup>20</sup> In the meantime, each victim was earning a meager allowance of two to three Japanese yen (JPY), or about twelve modern-day United States dollars (USD), per month.<sup>21</sup> Although

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13. Manchuria is a historical region of northeastern China. See *Manchuria*, ENCYC. BRITANNICA (2016), <https://www.britannica.com/place/Manchuria> [<https://perma.cc/S6XZ-N3MR>].

14. The New Nippon Steel Case, *supra* note 3, at 91.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 92.

19. *Id.*

20. *Id.* This is not the full payment promised by Old Nippon Steel: Believing that the workers would waste their wages if paid in full, the company unilaterally deposited most of the wages into bank accounts under the workers’ names, but had the headmaster of their dormitory keep the bankbooks and seals. *Id.* After the forceful conscription of 1944 was completed, no wage was paid anymore. *Id.* at 93.

21. *Id.* at 92. It should be noted that this is a rough estimate, only given here to provide the reader with a rudimentary sense of the allowance’s value. As Japan’s economy went into emergency, JPY exchange rate data from the final years of the Second World War are simply unavailable. *The Japanese Yen History*, ROTHKO RES. (Nov. 11, 2014), <https://rothkoresearch.com/2014/11/11/the-japanese-yen-history/> [<https://perma.cc/2VFU-4LN3>]. But the Federal Reserve data indicates that as of 1941 (two years prior to the events here), 3 JPY was worth about 0.69 USD at the time. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., BANKING AND MONETARY STAT., 1914-1941 673 (1943). This amount in 1941 would be equivalent to around 12 USD in January of 2020. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) [<https://perma.cc/Z3FA-CKM8>] (last visited Feb. 21, 2020) [hereinafter *Inflation*].

the plaintiffs demanded their wages when they were assigned to different factories, the company refused to cooperate.<sup>22</sup>

The two plaintiffs performed tasks such as “breaking and mixing coal in a blast furnace and entering the steel pipes to remove coal waste,” but acquired little specialized skill.<sup>23</sup> They were watched in the dormitory and warned by a frequently visiting police officer not to run away.<sup>24</sup> The two plaintiffs escaped to Seoul in 1945 when Soviet forces attacked the factories where they worked.<sup>25</sup>

## 2. PLAINTIFFS LEE CHOON SIK AND KIM KYU SOO

Mobilized as a member of the national service corps in 1941, plaintiff Lee arrived in Japan following an Old Nippon Steel recruitment officer.<sup>26</sup> As a steel worker, Lee suffered from “severe dust inhalation” and was hospitalized for an injury to his abdomen after “tripping over impurities from the furnace.”<sup>27</sup> Lee was told that his wages were saved, but received none.<sup>28</sup> He was not allowed to go outside during the first six months of work, and had to report to a roll call by the Japanese Military Police every fifteen days to avoid physical punishment.<sup>29</sup> Lee was later drafted into the military and stationed within Japan.<sup>30</sup>

Drafted in 1943, plaintiff Kim went to Japan under the guidance of an Old Nippon Steel officer and worked in a steel mill at signal stations on the railroad line.<sup>31</sup> He attempted to escape but was caught, suffering about seven days’ severe beating with no food provision as consequence.<sup>32</sup>

## B. THE 1965 CLAIMS AGREEMENT AND ITS PROGENY

### 1. THE CLAIMS AGREEMENT

Following the end of the Pacific War, Japan and forty-eight Allied Nations signed the Treaty of Peace with Japan in San Francisco in 1951 (the “San Francisco Treaty”), which subjected the disposition of Japanese property to special arrangements between Japan and related countries.<sup>33</sup> Japan and South Korea’s discussion on the normalization of diplomatic relations and post-war

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*Calculator*]. As Japan slipped deeper into the war, it would not be surprising that the yen grew even weaker in the next few years.

22. The New Nippon Steel Case, *supra* note 3, at 93.

23. *Id.* at 92.

24. *Id.* The fact finding also indicated that Shin once said he wanted to flee and received physical punishment once this was known. *Id.*

25. *Id.* at 93.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.* at 94. *See also* Treaty of Peace with Japan art. 4(a), Sept. 8, 1951, No. 1832, 136 U.N.T.S. 45, 50.

compensation led to the “Treaty on Basic Relations between the Republic of Korea and Japan” as well as its annexed “Agreement on the Settlement of Problem Concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan” (the “Claims Agreement”) in 1965.<sup>34</sup>

According to Article 1 of the Claims Agreement, Japan would provide 300 million USD (2.48 billion USD today) on a non-repayable basis and 200 million USD (1.65 billion USD today) in loans.<sup>35</sup> Additionally, Article II provides that:

1. The Contracting Parties [Japan and South Korea] confirm that [the] problem concerning property, rights, and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, *is settled completely and finally*.

....

3. Subject to the provisions of paragraph 2 above, *no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals* . . . .<sup>36</sup>

Following the signing and ratification of the Claims Agreement, the Korean government enacted a series of laws to allow Koreans with claims against the Japanese government and its nationals to apply for compensation, leading to the issuance of just over 9 billion South Korean won (KRW) (roughly 18.6 million USD today) in compensation for a total of 83,519 claimed cases by 1977, of which about 2.5 billion KRW (roughly 5.2 million USD today) were issued in 8,552 claimed cases for deceased forced laborers.<sup>37</sup> However, the living forced laborers were deemed ineligible to file claims.<sup>38</sup>

Although not explicitly discussed by the court, it is worth noting that the 1965 agreement was devastatingly unpopular among Koreans at the time, many of whom mistrusted the government of Park Chung-hee, the dictator-ruler of South Korea.<sup>39</sup> They formed the June 3rd Resistance Movement, a popular uprising in

34. The New Nippon Steel Case, *supra* note 3, at 95; Treaty on Basic Relations between the Republic of Korea and Japan, Japan-S. Kor., Jun. 22, 1965, 583 U.N.T.S. 33; Agreement on the Settlement of Problem Concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan, Japan-S. Kor., Jun. 22, 1965, 583 U.N.T.S. 173 [hereinafter Claims Agreement].

35. Claims Agreement, *supra* note 34, at 258. The modern-day values of the grant and the loan are calculated via the online service of the U.S. Bureau of Labor Statistics. *Inflation Calculator*, *supra* note 21.

36. Claims Agreement, *supra* note 34, at 260 (emphasis added). Paragraph 2 excludes certain claims arising after 1945, which is not relevant to the New Nippon Steel Case.

37. The New Nippon Steel Case, *supra* note 3, at 97. Monetary values are calculated at 1975 to 1979 levels, when the exchange rate remained at 484 KRW per modern-day USD. *Official Exchange Rate (LCU per US\$, Period Average) - Korea, Rep., United States*, WORLD BANK (2019), <https://data.worldbank.org/indicator/PA.NUS.FCRF?locations=KR-US> [https://perma.cc/YN36-W68H].

38. The New Nippon Steel Case, *supra* note 3, at 97.

39. See Brian Kim, *Korea and Japan Clash over History and Law*, LAWFARE (Aug. 16, 2019), <https://www.lawfareblog.com/korea-and-japan-clash-over-history-and-law> [https://perma.cc/T76K-V68J].

1964, to challenge the two governments' "rapprochement attempt," and it took martial law and the arrest of thousands of protesters to pass the 1965 treaty in the end.<sup>40</sup> Eventually, the protesters' concern was partially validated when Japan's war reparations were largely channeled away from the victims to pay for industrialization under yet another military dictatorship—only this time the tyrant had a Korean face.<sup>41</sup>

## 2. THE TRUTH-SEEKING IN THE NEW MILLENNIUM

In 2005, a South Korean joint public-private committee working on the history of the Korea-Japan meetings during the 1950s released its findings that "the Claims Agreement was not intended to make a claim for compensation for Japan's colonial rule over Korea, but rather to resolve financial, civil debts and credit relations between Korea and Japan pursuant to Article 4 of the San Francisco Treaty . . . ."<sup>42</sup> However, the committee also found that because the Japanese government did not acknowledge its *legal* obligation to make reparations for forced labor, the Korean government had to demand *political* compensation instead, and this should be considered part of the purpose for the Japanese payment; furthermore, despite the difficulty of estimating the precise amount allocable to forced labor compensation, the committee considered it the South Korean government's "moral responsibility to use a substantial amount of the funds" on the victims of forced labor.<sup>43</sup> The government subsequently acted on this advice and compensated the victims.<sup>44</sup>

## C. A COMPARATIVE LENS: HANNAH ARENDT AND THE GERMAN EXPERIENCE

### 1. AN ARENDTIAN FRAMEWORK

It is common knowledge that Nazi Germany perpetrated numerous atrocities on innocent civilians during the Second World War, the most well-known of

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40. *Id.*

41. Victoria Kim, *Japan, Korea and the Messy Question of How to Pay for Historic Wrongs*, L.A. TIMES (Aug. 17, 2019), <https://www.latimes.com/world-nation/story/2019-08-17/japan-korea-and-the-tquestion-of-how-to-pay-for-historic-wrongs> [<https://perma.cc/EUH7-EXKL>]. Based on subsequent declassification of South Korean government documents in 2005, some historians also argue that Park's government took an additional 800 million USD on top of the amount stipulated in the 1965 treaty in exchange for extinguishing future Koreans' right to make claims against Japan. *See, e.g.*, ALEXIS DUDDEN, *TROUBLED APOLOGIES AMONG JAPAN, KOREA, AND THE UNITED STATES* 94–95 (2008).

42. The New Nippon Steel Case, *supra* note 3, at 98.

43. *Id.*

44. In 2006, the South Korean government acknowledged the insufficiency of the compensation to forced labor victims pursuant to the compensation legislation following the Claims Agreement of 1965. *Id.* at 99. In 2007, it passed the Act on Support for the Victims of Forced Labor Abroad around the Period of the Pacific War, and issued 20 million KRW to each surviving family of deceased or missing victim, up to 20 million KRW to each disabled victim (depending on the degree of injury), and 800,000 KRW annually to other former forced laborers in case of medical need. *Id.* Victims' unpaid wages were also paid by an exchange rate of 1 JPY to 2,000 KRW. *Id.*

which being the Holocaust. The Third Reich's monstrous policy disrupted millions of lives, and the Jewish thinker Hannah Arendt is one such example. Born into a German-Jewish family, Arendt witnessed the growth of the Nazi regime in person, was put into a detention camp in France, and narrowly managed to escape to the United States.<sup>45</sup> However, she also drew on her vivid personal experience as well as a relative abundance of documentary evidence to formulate groundbreaking theories on the essential question haunting the post-Second World War spiritual wasteland: why do people commit evil deeds?<sup>46</sup> In response to that question, Arendt coined and popularized the idea of the "banality of evil," the idea that it is not a dramatic evil intent but a certain inability to think and critically examine one's surrounding that tends to lead to great tragedies.<sup>47</sup> Her ideas opened a new chapter on the concept of evil and the cause of atrocities.<sup>48</sup>

While Arendt's specific theory will be discussed later after presenting the South Korean court's decision, it is worth noting now that the choice of her philosophy as the framework underlying this Note's analysis is a deliberate pull away from the (sometimes burning) urge for conclusive solutions. With the banality of evil, Arendt took a restrained approach, identifying her writing as a matter of observation rather than true theorizing.<sup>49</sup> In other words, Arendt held herself within the role of an observer simply attempting to see what happened—although with some truly unusual clarity—and avoided a great leap forward to any grand project to reshape the society and rid the problem once and for all.<sup>50</sup> Taking inspiration from Arendt's cautious approach, this Note aspires to imagine something different than the "pay and settle" model all too prevalent in modern legal remedy.

This intellectual caution, of course, stands somewhat in conflict with the real and often urgent need of the victims of any atrocity for a solution. But a hasty arrival at *some* solution often leads not to adequate closure, but to disappointment—the fact that many Korean plaintiffs are still pursuing their forced labor cases decades after the 1965 agreement is the best testament of the danger. This Note argues that the arc of justice better conceived would appear as a balancing act between the race against time—as, for many old victims of forced labor, this is a literal race

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45. Maurizio Passerin d'Entreves, *Hannah Arendt*, STAN. ENCYCLOPEDIA OF PHIL. (Fall 2019), <https://plato.stanford.edu/archives/fall2019/entries/arendt/> [<https://perma.cc/2E9C-2JQK>]; *About Hannah Arendt*, BARD U., <https://hac.bard.edu/about/hannaharendt/> [<https://perma.cc/4TDX-HNLE>] (last visited Apr. 19, 2020).

46. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM* (1964).

47. *Id.* at 287.

48. Todd Calder, *The Concept of Evil*, STAN. ENCYCLOPEDIA OF PHIL. (Fall 2019), <https://plato.stanford.edu/entries/concept-evil/> [<https://perma.cc/NV4A-UNBX>].

49. See ARENDT, *supra* note 46, at 287.

50. It is interesting to observe that this desire for effective problem solving, while common among many well-meaning minds, also stands perilously close to the Nazi Regime and other famous totalitarian governments' zealous projects of society-building. Consequently, her first-hand knowledge with totalitarianism may have further pushed Arendt toward the restrained approach to her study of the question of evil.



near the end of their lives—and the insistence on a solution that is fitting and proper.

## 2. THE GERMAN EXPERIENCE OF ATONEMENT AND MEMORIALIZATION

To approach the balance in justice mentioned above, it is appropriate to take a look at the German experience during and following Arendt's time, to see how Germany put theory into practice and managed to transform into one of the commonly recognized models of repentance and memorialization.<sup>51</sup> The limited space here necessarily requires much oversimplification of the complex and fascinating history, but for the purpose of this Note, the summary below should suffice.

Following the end of the Second World War, Germany came under the occupation of the Allied Powers, and the Cold War soon became the primary concern on both sides of the Iron Curtain, diverting attention from the memorialization of the recent past.<sup>52</sup> Although the Nuremberg and many subsequent trials examined Nazi war crimes, most of them tended to emphasize the perpetrator's conspiracy to aggression instead of the victims' suffering.<sup>53</sup> In response to this selective emphasis in the proceedings, many in West Germany tended to see the trials as the "victors' justice," and the memory of the Holocaust was largely suppressed.<sup>54</sup>

Critically, the German attitude began to shift as the public was made more aware of the Nazi atrocities, especially following the establishment of the Central Office for the Investigation of National Socialist Crimes in 1958 and a second wave of trials, most notably the 1961 Eichmann trial in Israel and the 1963 Frankfurt Auschwitz trials.<sup>55</sup> These trials prominently displayed the ordeals suffered by the victims of the Holocaust and, in the case of the Auschwitz trials, initiated the correction of Germany's "second guilt": the failure of its justice system to deal with German crimes during the Second World War.<sup>56</sup> Equally important was the fact that the history education in Germany began to cover the Hitler era in 1967, powerfully enhancing the public education on the Holocaust.<sup>57</sup> Lastly, memorialization overseas, such as the U.S. Holocaust Memorial Museum in Washington, D.C., also created an international atmosphere of scrutiny, facilitating Germany's facing up to its past and spurring businesses to make amends for their relations with the Nazi regime.<sup>58</sup>

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51. See CONRAD, *supra* note 9, at 252.

52. See JEREMY BLACK, *THE HOLOCAUST* 155 (2016).

53. See *id.*

54. See *id.* at 156. Commenting on this period of German history, the historian Jeremy Black even went so far as to say that "[m]any Germans appeared to have learned nothing about themselves." *Id.*

55. See *id.* at 162.

56. See ARENDT, *supra* note 46, at 229 (characterizing the spirit of presentation of the witnesses as "[e]veryone, everyone should have his day in court," albeit with a degree of derision); Volker Wagener, *Auschwitz Trial Ensured that Germany Would Never Forget*, DW NEWS (Aug. 18, 2015), <https://www.dw.com/en/auschwitz-trial-ensured-that-germany-would-never-forget/a-18654790> [<https://perma.cc/Y2TW-MXNR>].

57. See BLACK, *supra* note 52, at 164.

58. *Id.* at 164–65.

Of course, the path toward contrition and memorialization was neither linear nor straightforward. Most notably, a victim narrative, which claims that the majority or a particular group of Germans were not willing participants in the persecution of Jewish and other civilians, but rather deceived by the Nazi party and a small group of conspirators, persisted.<sup>59</sup> This type of narrative is not only stubborn but also widespread, as, for instance, seen in Poland, where the tragic history of the Polish nation is still used to negate the equally incontrovertible Polish role in facilitating the Nazi extermination of Jews.<sup>60</sup> One example of such narratives surrounded the German army, once painted as a patriotic force duped by the Nazi party into wrongdoing.<sup>61</sup> However, the *Wehrmacht* exhibition, which went on exhibit in Germany and Austria from 1995 displaying evidence and research products on the German army, police, and judiciary's Nazi responsibilities, powerfully refuted the army's narrative and eventually led to the convergence of army and SS history.<sup>62</sup>

Overall, the German experience is marked, among other things, by the continuous building of public knowledge on the Nazi atrocities committed during the Second World War. This is by no means a completed process, but as mentioned in the beginning of this subsection, the nation's achievement in atoning for its past still makes it one of the illustrative cases when it comes to dealing with historical atrocity such as the forced labor issue in the New Nippon Steel Case.

## II. THE LITIGATION IN KOREAN COURTS

### A. THE LITIGATION UP TO 2012

The Korean courts were not the first courts of law to see the confrontation between the plaintiffs and New Nippon Steel. Prior to the litigation in South Korea, two of the plaintiffs filed a suit against the defendant for forced labor in front of a district court in Osaka, Japan, in 1997, but the trial court dismissed the case in 2002, and the Osaka High Court dismissed the appeal in 2003; this was acknowledged and recorded in a subsequent Korean decision.<sup>63</sup> The Japanese

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59. See CONRAD, *supra* note 9, at 96.

60. See Anna Somer Schneider, *The Catholic Church, Radio Maryja, and the Question of Antisemitism in Poland*, in *STUDIES IN ANTISEMITISM: RESURGENT ANTISEMITISM: GLOBAL PERSPECTIVES* 236, 245–46 (Alvin H. Rosenfeld ed., 2013). See also Anna Somer Schneider, *The Ramifications of Poland's New "Holocaust Law"*, *GEO. J. INT'L AFFS.* (June 1, 2018), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/6/1/the-ramifications-of-polands-new-holocaust-law?rq=poland> [<https://perma.cc/6P57-F84M>].

61. BLACK, *supra* note 52, at 161.

62. *Id.* at 167–68. The exhibit caused great controversy, and it was not without cost: For example, in 1998, the extreme right went so far as to attack the exhibit building with a bomb in the western German city of Saarbrücken, partially damaging the exhibit. BILL NIVEN, *FACING THE NAZI PAST: UNITED GERMANY AND THE LEGACY OF THE THIRD REICH* 162 (2003). But while learning from such history and better anticipating violent reactions is surely important, extremist intimidating should not deter efforts to memorialize historical atrocities and educate the broader society.

63. Supreme Court [S. Ct.], 2009Da68620, May 24, 2012 (S. Kor.), *translated in* 2 *KOREAN J. INTL & COMP. L.* 93, 98 (Seokwoo Lee ed., trans., 2014) [hereinafter *The 2012 Decision*]. Future citations refer to the Lee translation.

courts deemed Old Nippon Steel guilty of unlawfully putting the plaintiffs into forced labor through false advertisement, but held that New Nippon Steel did not succeed Old Nippon Steel's liability, and that the 1965 Claims Agreement extinguished the plaintiffs' claims.<sup>64</sup>

However, as South Korea's truth commission worked on the forced labor issue in 2005, two more plaintiffs joined the pair to file the same claims in the Seoul Central District Court of Korea.<sup>65</sup> In the first instance, the court dismissed the case primarily on the ground that, as found by the earlier Japanese decision, the defendant was not identical to Old Nippon Steel who put the plaintiffs into forced labor, and the Japanese decision "does not violate good morals and other social order of the Republic of Korea," so as a matter of *res judicata*, the plaintiffs' case could not proceed.<sup>66</sup> Nevertheless, the court did not consider the plaintiffs' case extinguished by the Claims Agreement.<sup>67</sup> The plaintiffs' appeal was dismissed by the Seoul High Court.<sup>68</sup>

But in 2012, the highest court in South Korea quashed the Seoul High Court's decision and remanded the case.<sup>69</sup> Noting the fact that the Japanese decision was premised on the legality of Japan's colonial rule and the validity of its National Mobilization Law and National Conscription Order, the Supreme Court declared it contrary to the spirit of South Korea's Constitution and consequently in violation of "the good morals and other social order" of Korea.<sup>70</sup> Thus, the high court deemed it a mistake by the lower court to dismiss the case for *res judicata*.<sup>71</sup> Moreover, the court also confirmed the lower court's decision that the Claims

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64. *Id.* at 100–01.

65. *Id.* See also *supra* note 44 and accompanying text (details on the South Korean government's compensation scheme).

66. Seoul Central District Court [Dist. Ct.], 2005Ga-hap16473, April 3, 2008 (S. Kor.), translated in 2 KOREAN J. INTL & COMP. L. 68, 83–84 (Seokwoo Lee ed., trans., 2014) [hereinafter The Trial Decision]. Future citations to this case refer to the Lee translation. The phrase "the good morals and other social order of the Republic of Korea" originates from the country's Civil Procedure Act Article 217(3), which identifies the concept as one of the criteria for acknowledging the effect of foreign judgments. *Id.* at 78–79. The trial court also dismissed the claims on other grounds, but they are not the focus of this Note.

67. In its opinion, the court of first instance wrote that

According to [Article 2(3) of the Claims Agreement], it would be reasonable to presume that by concluding the Claims Agreement, Korea and Japan agreed not to exercise diplomatic protection towards domestic measures taken by the other state, nor for the property, rights, benefits and claims, but rather leave to the other state what domestic measures it would decide to take.

The Trial Decision, *supra* note 66, at 86.

68. Seoul High Court [Seoul High Ct.], 2008Na49129, Jul. 16, 2009 (S. Kor.), translated in 2 KOREAN J. INTL & COMP. L. 89, 92 (Seokwoo Lee ed., trans., 2014) [hereinafter The High Court Decision]. Future citations refer to the Lee translation.

69. The 2012 Decision, *supra* note 63, at 93.

70. *Id.* at 101. The court cited the Constitution's mention of Korea's Independence Movement of March 1, 1919, as evidence that the document forbids the recognition of Japanese colonial control as legal, and specifically called it "an unlawful possession by force." *Id.*

71. On this matter, having vacated the Japanese law exterminating the legal personality of Old Nippon Steel and constituting New Nippon Steel, the Supreme Court applied Korean law and found that the two *de facto* shared the identical nature. *Id.* at 103.

Agreement could not bar the plaintiffs' case, explaining that the Claims Agreement only addressed the "financial and civil debt/credit relationship" and did not touch upon the issue of reparation for colonization and associated wrongs, including forced labor.<sup>72</sup>

### B. THE 2018 DECISION

After the case was remanded to a lower court and the plaintiffs' claim of forced labor compensation of 100 million KRW per plaintiff granted in 2013, New Nippon Steel again appealed the case to the Supreme Court.<sup>73</sup> In a decision that would cause much controversy between South Korea and Japan, the high court reaffirmed its prior decision that *res judicata* does not apply, that Old Nippon Steel and its later incarnation shared the same legal personality, and that the Claims Agreement does not deal with or extinguish compensation for forced labor.<sup>74</sup>

This last claim was somewhat complicated: Overcoming the seemingly broad language of the Claims Agreement such as "settled completely and finally" and "no contention shall be made with respect to the measures on property, rights and interests," the court cited the San Francisco Treaty's emphasis on financial relations, documents during South Korea and Japan's negotiation, and the lack of acknowledgement of the "illegality of Japan's colonial rule" as evidence that the Claims Agreement was not intended to cover or extinguish the plaintiffs' private claims.<sup>75</sup>

Lastly, the Supreme Court summarily concluded that the lower court had the power to set the amount for forced labor compensation.<sup>76</sup> However, as will be explained below, this is a lost opportunity to fashion a remedy that is truly meaningful and adequate for the weight of the issue.

### III. THE ISSUE OF REMEDY: POST-WAR REPARATION, MONETARY COMPENSATION, AND RECONCILIATION

From 1997 to 2018, it was a long and meandering journey for the forced labor victims. However, not all plaintiffs had the chance to witness victory: Of the four plaintiffs, only one survived the long wait to hear the high court's decision at an advanced age of ninety-four.<sup>77</sup> Moreover, symbolic as it may be, the victory did

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72. *Id.* at 104.

73. Seoul High Court [Seoul High Ct.], 2012Na44947, Jul. 10, 2013 (S. Kor.), translated in 2 KOREAN J. INTL & COMP. L. 109 (Seokwoo Lee ed., trans., 2014) [hereinafter the Decision on Remand]. Future citations refer to the Lee & Lee translation.

74. See generally the New Nippon Steel Case, *supra* note 3.

75. *Id.* at 100–05 (explicating these arguments in Section 2.4 The Third Basis for the Final Appeal).

76. *Id.* at 106.

77. *South Korea Top Court Orders Japan Firm to Compensate for Forced Labor*, KYODO NEWS (Oct. 30, 2018), <https://english.kyodonews.net/news/2018/10/80a637adde3f-update1-s-korea-top-court-orders-japan-firm-to-compensate-for-forced-labor.html?phrase%E2%80%A6> [<https://perma.cc/RDR7-M9ZR>] (reporting Lee Chun Sik, the sole surviving plaintiff, telling reporters that "I feel so heartbroken to be the only one to see the final ruling.").

not mark the final chapter of the saga, since it remains a struggle for the plaintiffs or their estates to collect the compensation.<sup>78</sup> As the plaintiff and other potential plaintiffs' time slips away, one may reasonably question whether the monetary compensation is an adequate form of remedy in this case, and whether there is a better approach to give the former forced laborers' struggle a proper conclusion.

#### A. MONETARY COMPENSATION HAS LIMITED UTILITY IN FORCED LABOR CASES

In both practical and symbolic terms, solely relying on monetary compensation is inadequate for the remedial needs in forced labor cases.

##### 1. THE PRACTICAL CALCULATIONS

As the plaintiffs—and other similar victims of forced labor—pass away or arrive at extreme old age, the utility of monetary compensation becomes a valid issue for a number of reasons. First of all, following the investigations by a series of truth commissions, the South Korean government has at least partially accounted for many historical wrongs, including its failure to issue compensation to forced labor victims following the receipt of the Japanese financial assistance subject to the 1965 treaty.<sup>79</sup> In doing so, the forced labor victims already received a decent amount of monetary compensation, and for those with medical needs—potentially the most important cause of financial difficulties for the victims—the South Korean government's compensation scheme also has corresponding provisions.<sup>80</sup>

The Supreme Court makes it quite clear that it sees the prior government payment as compensation for lost wages as a financial settlement, while the defendant in the New Nippon Steel Case is to pay for the damage caused by its use of forced labor.<sup>81</sup> But as the plaintiff's post-decision struggle demonstrates, court decisions do not make compensations immediately materialize. Although the plaintiffs have managed to seize the defendants' stocks or intellectual property in South Korea,<sup>82</sup> it may not be any time soon that these properties will actually be liquidated and transformed into concrete compensation for the plaintiffs, as court procedures become further entangled with diplomatic resistance.<sup>83</sup>

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78. *S. Korea Wartime Labor Plaintiffs Press for Compensation from Japan*, KYODO NEWS (June 21, 2019), <https://english.kyodonews.net/news/2019/06/4dfba452c912-s-korea-wartime-labor-plaintiffs-press-for-compensation-from-japan.html?phrase=Nippon> [<https://perma.cc/UCF2-5WPC>] [hereinafter *Plaintiffs Press for Compensation*].

79. *See supra* note 44 and accompanying text (detailing the South Korean government's compensation scheme).

80. *Id.*

81. The New Nippon Steel Case, *supra* note 3, at 101.

82. *Court Approves Seizure of Japanese Steelmaker's Assets Over Forced Labor Ruling*, YONHAP (Jan. 8, 2019), <https://en.yna.co.kr/view/AEN20190108012051315?section=print> [<https://perma.cc/J2LM-7DSW>].

83. The plaintiffs requested that a local court liquidate nearly 200,000 shares belonging to Nippon Steel, and the court in turn wrote a letter to the defendant demanding a reply within sixty days, but the letter was delivered through the Supreme Court to the Japanese Foreign Ministry, who apparently never forwarded it to

It should be acknowledged that, even when the victims have passed away, there is still a fair argument that Japanese colonial rule, by exploiting the victims' labor and damaging their health, has put a burden on their families, so it is reasonable for the compensation to flow to the families of the deceased—potentially to their children, as the delay will surely take many years into the future. But again, this burden is partially alleviated by the Korean government's truth-finding and compensation schemes. Even for the victims' younger children, the promise of compensation remains elusive in the midst of a raging trade war between the countries.

At the same time, remedy is naturally a central concern for the defendants as well. Already, there are Japanese experts cautioning that the Korean court's logic may lead to the conclusion that "every person under [the Japanese colonial] rule without exception . . . has the right to seek compensation."<sup>84</sup> Indeed, following the Supreme Court decision, hundreds more plaintiffs have organized to launch new lawsuits against Japanese corporations that employed forced labor during the Second World War.<sup>85</sup> The fear of the inestimable monetary compensation is arguably one critical motivation for the Japanese corporations to harden their stance and sink great resources into fighting these cases, which only makes the plaintiffs' legal battles more onerous and compensation collection more difficult.<sup>86</sup>

## 2. IN SEARCH OF AN APOLOGY

This case is not just about getting the right amount of money, but instead, the plaintiffs have a greater point to make about justice. As an eighty-eight-year-old former forced laborer said, "I did not ask to be brought to Japan. Maybe [Japanese] Prime Minister Abe will come to his senses. *I want to hear him say 'I'm sorry.'*"<sup>87</sup> This fact is also made abundantly clear by the Supreme Court:

First and foremost, we have to make it clear that the plaintiffs' claim . . . refers to a claim by the victims of forced labor for compensation . . . which is premised on the inhumane and wrongful act of the Japanese corporation directly related to Japan's unlawful colonial rule over the Korean Peninsula and its war

Nippon Steel. Kim Min-Sang & Lee Su-Jeong, *Court Chips Away at Local Nippon Steel Assets*, JOONGANG (July 17, 2019), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3065592> [<https://perma.cc/2B8Y-E32D>].

84. Kan Kimura, Opinion, *A Profound Development in Tokyo-Seoul Relations*, JAPAN TIMES (Feb. 10, 2019), <https://www.japantimes.co.jp/opinion/2019/02/10/commentary/japan-commentary/profound-development-tokyo-seoul-relations/#.XXr6CGIKgWU> [<https://perma.cc/4PBL-V2LJ>].

85. *Hundreds of Korean Forced Labor Victims to Sue Japanese Firms for Damages*, YONHAP (Apr. 26, 2019), <https://en.yna.co.kr/view/AEN20190426008100315?section=print> [<https://perma.cc/Z433-Y2ZS>].

86. See *Plaintiffs Press for Compensation*, *supra* note 78.

87. Thomas Maresca, *Korean Wartime Forced Laborers Still Seeking Apology, Reparations from Japan*, UPI (Aug. 14, 2019), [https://www.upi.com/Top\\_News/World-News/2019/08/14/Korean-wartime-forced-laborers-still-seeking-apology-reparations-from-Japan/8231565778812/](https://www.upi.com/Top_News/World-News/2019/08/14/Korean-wartime-forced-laborers-still-seeking-apology-reparations-from-Japan/8231565778812/) [<https://perma.cc/Z23Q-KA2H>] (emphasis added).

of aggression. The plaintiffs did not make a claim against the defendant merely for unpaid wages . . . .”<sup>88</sup>

In distinguishing the New Nippon Steel Case from a mere claim for unpaid wages, the Court highlights the moral force underlying the plaintiffs’ claims: compensation is the means, but the end is a formal recognition of the wrongful nature of the Japanese corporation’s action during the Second World War.

The Court’s examination of the 1965 treaty further confirms the higher purpose of the case: the fact that the Japanese government never acknowledged the illegality of its colonial rule during the negotiation was key.<sup>89</sup> If the 1965 treaty ever represented any hope of concluding a long and treacherous episode of the Japanese-Korean relationship, it failed to do so because the parties, especially the Japanese government, thoroughly failed to confront the past.<sup>90</sup> Thus, it would be quite important to understand the forced labor cases as fully distinguished from the treaty negotiations before 1965. Unlike the treaty negotiation where “financial assistance” successfully obscured the gravity of the forced labor and an array of other issues, the decisions against New Nippon Steel is about acknowledging the wrong and obtaining apology.

As obvious as it seems, this distinction is in fact easily overlooked by some. For example, in the midst of the trade war, South Korean National Assembly Speaker Moon Hee Sang proposed a plan where Japanese and South Korean companies could voluntarily donate for the compensation of forced laborers and other victims of Japanese colonial rule.<sup>91</sup> But this plan will operate “under the name of economic cooperation, not as compensation for wartime labor.”<sup>92</sup> Unsurprisingly, the plaintiffs promptly protested this plan, claiming they were never consulted on the issue.<sup>93</sup> After all, it is the apology that lies at the heart of the victims.

But many on the defendant’s side may be quick to dismiss this argument, since, by a 2012 estimate, the Japanese government has issued at least twenty statements of “regret” and “heartfelt apology” for the past, but that did not seem to convince many victims of Japanese aggression of the former empire’s sincerity.<sup>94</sup>

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88. The New Nippon Steel Case, *supra* note 3, at 101.

89. The Court notes in the New Nippon Steel Case, “[d]uring the course of negotiations over the Claims Agreement, the Japanese government fundamentally denied legal compensation for the harm caused by forced labor while also failing to acknowledge the illegality of its colonial rule.” *Id.* at 104.

90. *Id.* (“The two governments of Korea and Japan, consequently did not reach a consensus on the nature of Japan’s control over the Korean Peninsula.”).

91. Ryotaro Nakamaru, *S. Korea’s Parliament Head Proposes Donations for Wartime Victims*, KYODO NEWS (Nov. 5, 2019), <https://english.kyodonews.net/news/2019/11/a70e34ef06a4-s-koreas-parliament-head-proposes-donations-for-wartime-victims.html?phrase=korea> [https://perma.cc/V746-DL8L].

92. *Japan, South Korea Weigh Creation of Fund Amid Spat over Wartime Labor*, KYODO NEWS (Oct. 29, 2019), <https://english.kyodonews.net/news/2019/10/a7f7cea07c05-update2-japan-s-korea-weigh-creation-of-fund-amid-spat-over-wartime-labor.html?phrase%E2%80%A6> [https://perma.cc/A5FD-ZYRM].

93. *Lawyers for Wartime Labor Plaintiffs Oppose New Compensation Plan*, KYODO NEWS (Nov. 6, 2019), <https://english.kyodonews.net/news/2019/11/dbdbe624bae2-lawyers-for-wartime-labor-plaintiffs-oppose-new-compensation-plan.html?phrase=korea> [https://perma.cc/HU4Y-HUW3].

94. Dudden, *supra* note 9, at 314.

The victims may be justified in their suspicion, since in all these apologies, the Japanese government has developed a model to soften the blow of its damning history during the Second World War. Much like the German self-conception as innocent victims deceived by a treacherous Nazi Party, the Japanese apology also carried a “double valence”—often apologizing to victims but bringing in apologies to the perpetrators as well.<sup>95</sup> The best example of this is the “Imperial Edict on Apology” of 2003 by Emperor Hirohito, whose heartfelt apology was long sought after by many victims. As it turned out, of all the potential subjects, that apology announced deep regret to the emperor’s non-colonial subjects, i.e., Japanese, “who lost their property abroad.”<sup>96</sup>

#### B. INDUCING THE PERPETRATOR’S ENGAGEMENT WITH HISTORY IS THE BETTER WAY FORWARD

If settling historical conflicts, not only in a financial sense but also in a moral sense, is the ultimate goal of adjudicating historical wrongs, then the adequate approach to remedy should not consist of monetary compensation alone. In a visceral sense, the victims’ injuries lie in the existence of “parallel universes” where despite the victims’ personal, concrete experience of pain and suffering, the very existence of their memory as such is denied by the perpetrators and their descendants.<sup>97</sup> However difficult it may be to bring the victims’ and perpetrator’s versions of history close to each other, a court presiding over a historical case at least needs to heed the weight of history in its search for a proper form of remedy. On this point, Hannah Arendt’s reflection on the Holocaust is highly poignant.

Having narrowly escaped the Holocaust, Arendt insisted on *comprehending* it—not meekly sweeping the unhappy memory under the rug, nor hastily drawing some conclusions from a glance over the facts, but boldly facing what happened, “examining and bearing consciously the burden which our century has placed on us.”<sup>98</sup> But how can a court concretely facilitate this comprehension of history via the choice of remedy?

#### 1. ARENDT ON THE BANALITY OF EVIL AND ON THINKING

While people commonly associate atrocities with an evil desire to be bad and do terrible deeds, Arendt observed the Israeli trial of Adolf Eichmann, an upper mid-level Nazi officer who organized the transportation of Jews to the concentration camps, and came to a different conclusion—famously, she posited the banality of evil.<sup>99</sup>

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95. *Id.* at 323.

96. *Id.* at 324.

97. The continued practice of worshipping class AAA war criminals by some of the Japanese officials is one such example. See *Cabinet Minister Visits Yasukuni Shrine for First Time in 2 Years*, ASAHI SHIMBUN (Oct. 17, 2019), <http://www.asahi.com/ajw/articles/AJ201910170029.html> [<https://perma.cc/PT8B-MYTE>]. See also CONRAD, *supra* note 9, at 245 (discussing “entangled memories”).

98. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* viii (1951).

99. See ARENDT, *supra* note 46, at 287.



By banality, Arendt meant the absence of a dramatic evil intent—in its place, she found Eichmann’s inability to think critically and speak independently beyond his role as a Nazi officer operating under a Nazi ideology.<sup>100</sup> Quite unlike a supposedly demonic anti-Semite who joined the Nazi Party with a great deal of fervor and sent countless Jewish people to their deaths with deviant enthusiasm, Eichmann was like “a leaf in the whirlwind of time,” and he had little sense of purpose until the Nazi Party coincidentally discovered his talent for a certain level of organization—in this case, the organization of the mass transportation of Nazi victims.<sup>101</sup> Throughout his career in the Nazi Party, Eichmann focused his attention on associating with influential local leaders in various territories under German occupation, and set his ambition on climbing the hierarchical ladder of the labyrinthine Nazi bureaucracy.<sup>102</sup> Sitting as a defendant at his trial and recounting his encounters with a number of Jewish acquaintances, Eichmann thoroughly failed to comprehend the heavy suffering endured by the Jewish people as they experienced it. Even as he recalled meeting one Jewish friend, a certain Mr. Storfer, at a concentration camp and hearing his desperate plea for help, Eichmann managed to pat himself on the back for helping assign the man to an easier chore in the camp.<sup>103</sup>

It should not be surprising that, on a practical level, the banality of evil would lead to one’s complete lack of ability to judge, even regarding some of the most consequential choices such as innocent victims’ lives and wellbeing. Eichmann did not manage to independently arrive at his judgments, but instead repeated the Nazi Party’s indoctrination through speech and action.<sup>104</sup> On this point, Arendt raised a contrasting figure, Anton Schmid. As an officer of the Nazi armed forces, Schmid extended helping hands to many Jewish people, saving hundreds before his eventual execution.<sup>105</sup> In a time when law and politics all pointed toward the exterminations of a race, Schmid, alone among many Germans, defied the world he knew and exercised his independent judgment to see that the opposite action—saving instead of killing—was the correct path.<sup>106</sup>

Returning to the context of the forced labor cases, the Eichmann-Schmid contrast raises two questions. First, looking back at the atrocities, how can a court make the perpetrator acknowledge and truly comprehend the crimes in an Arendtian sense? Second, looking forward, how can a court prepare more people to judge independently, and manage the courage to be like Schmid even in a world of completely disoriented moral compasses?

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100. *Id.* at 49.

101. *Id.* at 32–33.

102. *Id.* at 287.

103. *Id.* at 51.

104. *Id.* at 131 (“[H]e spoke in clichés that had nothing to do with the reality of the situation . . .”).

105. *Id.* at 230.

106. *Id.* at 231.

Arendt's response to both questions is "thinking," here understood not as following a set of pre-established categories to solve problems, but as opening oneself up to the actual events and allowing other people's perspectives into one's mind.<sup>107</sup> The ultimate test is quite simple: If I make this decision, would I be able to live with myself afterwards?<sup>108</sup>

When conducted this way, thinking is a form of suspension from the everyday rush for action, even a momentary paralysis.<sup>109</sup> However, the stop in time gives a person the crucial opportunity to reflect and appreciate the consequences underlying the decision to be made following that suspended moment—in other words, the person may finally engage in the type of thinking discussed above. Only by having such an appreciation could a person break through the impenetrable cocoon of a thoughtless perpetrator's complacency; only by attaining such an understanding could a person stand against the wildest "whirlwind."<sup>110</sup>

More than monetary compensation, a court adjudicating a historical wrong should actively foster the perpetrators' thinking by encouraging them to understand the victims' experience in history. After all, being understood on their own terms and receiving an apology accordingly is the forced laborer's ultimate desire.<sup>111</sup>

## 2. ON THE VIABILITY OF APOLOGY AS A FORM OF REMEDY

Despite a victim's understandable desire for an apology, apology as a form of remedy is not common among the jurisdictions in the world.<sup>112</sup> Some scholars have also questioned the viability of this particular form of remedy.<sup>113</sup> There are a few recognized points on which court-ordered apologies have been challenged.

Firstly, courts may understandably feel hesitant to employ an unorthodox form of remedy in defiance of long judicial traditions. This tendency appears to be more prevalent in the common law tradition than in civil law countries, where remedies involving apologies are sometimes statutorily provided.<sup>114</sup> Notably, apology has an established place in the Japanese justice system and has received scholarly recognition for its effectiveness in reducing rates of unlawful behaviors there, so the defendant in the New Nippon Steel Case would at least be culturally

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107. HANNAH ARENDT, *RESPONSIBILITY AND JUDGMENT* 37 (2003).

108. *Id.* at 97.

109. *Id.* at 121.

110. *See* ARENDT, *supra* note 46, at 32–33.

111. *See* Maresca, *supra* note 87.

112. *See, e.g.*, Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYDNEY L. REV. 317, 317 (2013) (showing common law courts' reluctance to exercise the power to order apologies despite having the ability to do so via equity); Andrea Zwart-Hink et al., *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 UNIV. W. AUSTRAL. L. REV. 100, 100 (2014).

113. *See, e.g.*, Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. REV. 1, 1 (2013).

114. Zwart-Hink et al., *supra* note 112, at 100.

familiar with this approach to dispute resolution.<sup>115</sup> Additionally, even if apology is truly novel as a legal remedy, legal progress has always involved the breaching of old beliefs and biases. Furthermore, a case involving wrongdoing of a historical scale is necessarily an extraordinary case, so it is more justifiable to find creative solutions to such extraordinary questions. Some court order moving the defendant toward a sincere apology is certainly a candidate for such a solution.

Secondly, some courts may also worry about infringing on the defendant's right to freedom of speech. With a robust First Amendment, this concern is especially apparent in the U.S. context. However, it is also true that in many other countries, freedom of speech does not automatically act as a protective umbrella for meaningfully impactful bigotry and hatred.<sup>116</sup> Again, in the context of atrocities during the Second World War, the importance of freedom of speech should be considered together with other crucial values of modern democracies, such as the prevention of Nazism's revival.

Last but not least, there is a question over the sincerity of a court-ordered apology. If the defendant only apologizes because of the court's coercive power, the argument goes, then there is little value in the apology, since the wrongdoer does not mean what he says in the apology. A party's subjective intent behind an action is always a difficult thing to gauge, and Japan's unsatisfactory apologies for its imperial past particularly highlights this concern.

This challenge highlights the sensibility of Arendt's intellectual restraint—again, the idea that one should not rush to a final solution, but instead steady one's mind and observe history as it truly happened. Instead of coercing the defendant into issuing an apology that can hardly reassure the victims of anything or forcefully translating the immense pain and suffering from forced labor into a definite and final sum of money, getting the defendant to engage with history, which is discussed next, may seem like a much humbler step. But it will be a meaningful step in the right direction.

### 3. MEMORIALIZATION IN THIS CONTEXT: IT ACCOUNTS FOR THE VICTIMS' NEEDS, PLACATES THE NATIONALIST ANGER, AND BRINGS THE POSSIBILITY OF CONFRONTING HISTORY

Eichmann's failing, by Arendt's account, was his lack of thinking. As millions of Jews were shoved onto a path of death and destruction, no voice from within reminded Eichmann that what was happening around him was history, or that history carried weight. But many projects in many countries' criminal justice

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115. See, e.g., John O. Haley, *Apology and Pardon: Learning from Japan*, 41 THE AM. BEHAV. SCIENTIST 842, 842 (Mar. 1998).

116. Mark Scott & Janosch Delcker, *Free Speech vs. Censorship in Germany*, POLITICO (Jan. 6, 2018), <https://www.politico.eu/article/germany-hate-speech-netzdg-facebook-youtube-google-twitter-free-speech/> [<https://perma.cc/W26M-YJ9A>].

systems have experimented in engaging the offenders and cultivating such voices, and some produced noticeable progress.

In an article published in 2016, British legal scholar Joanna Shapland conducted two empirical studies to explore the effect of conferencing between victims and offenders of very serious crimes on the offender's decision to apologize and the victims' decision to forgive.<sup>117</sup> The conferences took place at various stages of the criminal justice process, ranging from serving as a diversionary measure from prosecution to taking place before the offender's release.<sup>118</sup> The conferences take place "in the shadow of the formal criminal justice process," incentivizing the actors' (especially the offender's) participation, while the conferences also alleviate the stress on the system in the long run, as the victim, the offender, and the state/local community engage in a "triadic communication," and the conferences ultimately helps all parties integrate together and reduce the rate of new crimes.<sup>119</sup> Also important was the finding that both the victims and the offenders reported high levels of satisfaction as well as a sense of closure from the conferences.<sup>120</sup>

Although there is a recognizable difference between the very serious crimes in Shapland's study—"robbery, assault occasioning grievous bodily harm, and burglary"<sup>121</sup>—and the systematic forced labor under Old Nippon Steel and Imperial Japan, the study nonetheless provides a piece of valuable and tested knowledge on how confronting an unpleasant past with an appreciation of the victims' voice can help literally everybody move forward. This includes not only the particular offender and victim of the crime, but also the wider community as a whole. A meaningful translation of the Shapland model into the forced labor context may be the court encouraging the defendant to engage in memorialization of the wrong in the past, perhaps by constructing small museums or memorials, potentially as an alternative option to paying the victims lump sums of money.

First of all, memorialization is a more candid response to the needs of victims.<sup>122</sup> Instead of the often-haphazard procedure for a court to consider various factors, estimate the mental suffering of the victims, and arrive at a sum for compensation, memorialization directly addresses the wrongs that harmed the victims. At the same time, as victims of atrocities are often accused of litigating for the money, the court remedy of encouraging memorialization also prevents the smearing of the victims.

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117. Joanna Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94, 94 (2016).

118. *Id.* at 95–98.

119. *Id.* at 95, 98.

120. *Id.* at 102, 106.

121. *Id.* at 101.

122. See generally Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901 (2018).

Secondly, as the construction of a structure of memorialization necessarily involves the research of history, this provides an opportunity for the perpetrator, be it specific individuals or a less tangible organization, to engage with history. Of course, a court might choose to exercise some control over the narrative of the memorialization within reasonable bounds, but as this form of remedy provides a real opportunity for the defendant to improve relations with its victims and the market that surrounds them, the concern for a further distortion of history should not be too great.

Lastly, while the defendant has fought the New Nippon Steel Case tooth and nail to prevent the opening of the floodgate—that is, many other potential victims joining suits to claim compensation—participation in memorialization is a much better activity for the defendant in terms of improving public image, and creates fewer worries for armies of future litigants. This potentially reduces the intensity of the legal battles and allows both sides to move on to a proper closure.

#### IV. NOT “JUST A FARAWAY CURIOSITY”: BRINGING HOME THE LESSON

Beyond the intrigue intrinsic to the South Korean case, this consideration of alternative forms of remedy that a court of law may grant victims who suffered from a grave and widespread historical injustice bears direct relevance to the United States. It is common knowledge that from 1776 to 1861, it took the newly-founded union nearly a century to wean itself off slave labor, and even after the Civil War, Jim Crow and other direct legacies of slavery continued to haunt the United States.<sup>123</sup> Even today, racial problems such as the mass incarceration of African Americans continues to be a live debate—and arguably a lived experience—for many.<sup>124</sup>

Beginning in 2002, several groups of African American slave descendants filed federal lawsuits against a number of corporations that “are alleged to have been unjustly enriched through profits earned either directly or indirectly from the Trans-Atlantic Slave Trade and slavery between 1619 and 1865, as well as post-Emancipation slavery.”<sup>125</sup> These cases, alongside a state-level case, were collected into a federal class action suit, which was dismissed at both the trial and the appellate levels.<sup>126</sup> Discussing the judiciary’s historical view of the political question doctrine, Judge Richard Posner of the Seventh Circuit reaffirmed the idea that, where the question is of a political nature, the difficulty of formulating an adequate remedy tends to surpass the capability of the judiciary, and the issue should be passed on to the executive and legislative branches.<sup>127</sup> He also

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123. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

124. See generally *id.* (analyzing the effect of mass incarceration in modern United States and its connection with earlier forms of oppression against blacks in the country).

125. In re African-American Slave Descendants Litigation, 375 F. Supp. 2d 721, 738 (N.D. Ill. 2005).

126. See *id.* at 780; In re African-American Slave Descendants Litigation, 471 F. 3d 754, 763 (7th Cir. 2006) [hereinafter Appellate Slave Descendants Litigation].

127. Appellate Slave Descendants Litigation, 471 F. 3d, at 758.

highlighted the difficulty with calculating the present day financial loss of the slave descendants from the lost wages of the enslaved African Americans.<sup>128</sup> A memorialization-focused approach would have solved these problems. Instead of brutally marking up human suffering with particular prices, the court could mandate the defendants in this case—some of whom were direct participants in the slave trade—to engage in memorialization and public education efforts, which directly addresses the persisting pain of the United States’ slavery legacy.

Furthermore, despite the unwillingness of the judiciary to take any action, the effectiveness of historical re-examination and memorialization is still evident in other contexts. For example, Georgetown University, which hosts this respectable journal, has been engaging in a project of “Slavery, Memory, and Reconciliation” since 2015, assembling a working group of students, faculty, staff, and alumni to explore the university’s own involvement in slavery and slave trade.<sup>129</sup> The group has identified and engaged with the descendants of those victims, dedicating buildings to the truth discovered and hosting public lectures to educate the community.<sup>130</sup> In April 2019, students of the university spoke collectively through a referendum, deciding to set up a modest student fee alongside the tuition that would raise about 380,000 USD every year to establish a fund for reparation payments to slave descendants.<sup>131</sup> After all, it seems that institutional engagement, not a payment order by the court, can lead to not only spiritual but also tangible benefits to those harmed by historical forced labor. Of course, the mere fact that a few institutions are beginning to engage in memorialization efforts does not alleviate the judiciary, charged with upholding a Constitution that is supposed to “secure the Blessings of Liberty to ourselves and our Posterity,” from its duty.<sup>132</sup>

### CONCLUSION

For the former forced laborers as well as many others, the South Korea Supreme Court’s decision against New Nippon Steel in 2018 was a moment of great significance. But for many in the past, the signing of the 1965 treaty arguably carried great promise as well. It is in a dramatic and somewhat ironic fashion that the 1965 treaty continues to haunt the victims of WWII with its bombastic language of settling all claims “completely and finally,” while hindering their path toward an adequate accounting of history as they experienced it. Thus, it is

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128. *Id.* at 759.

129. *History: Slavery, Memory, and Reconciliation at Georgetown*, GEO. UNIV., <http://slavery.georgetown.edu/history/> [<https://perma.cc/B6SH-R5ED>].

130. *Id.*

131. Adeel Hassan, *Georgetown Students Agree to Create Reparations Fund*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/georgetown-reparations.html> [<https://perma.cc/395Y-2RH2>].

132. U.S. CONST. pmbl.

uniquely important to avoid making the same mistake twice. The South Korea Supreme Court adequately recognized the historical weight of the issue, but it could have also been more creative with the issue of remedy. An option for the corporations to engage with history through memorialization is a promising path forward both for the parties and for the public. It is so for South Korea and Japan, and it is so for the United States of America.