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The Long Tail of World War II

Jus Post Bellum in Contemporary East Asia

Timothy Webster*

I. Introduction

The shadow of World War II still looms over East Asia. As in the West, formal hostilities ended in 1945. But unlike the West, issues of state accountability, corporate liability, and individual reparation roil the victims, governments, and civil society organizations of the region. The events of the 1930s and 1940s still form a critical, often controversial, backdrop for international relations among China, Japan, Korea, and other Asian nations.¹ In the past twenty-five years, numerous diplomatic and popular initiatives have undertaken to lessen the tensions that World War II still stokes. This chapter examines the contribution that civil litigation is making towards resolving the tensions, recreating historical memory, and acknowledging the massive human rights violations of World War II.

Western readers may be familiar with the Holocaust litigation, a catch-all term to describe a series of transnational lawsuits brought in the US and Europe. Beginning in the mid-1990s, victims of World War II sued European governments and multinational corporations for war crimes ranging from forced labour to seized assets.² Tellingly, the lawsuits themselves did not bring about a resolution; they found for defendants, leaving victim-plaintiffs in the same position they had been. The lawsuits did, however, prod political actors, on both sides of the Atlantic, to focus on these issues. By 2001, government-brokered settlement funds and other mechanisms had resolved most of these issues.³ Though imperfect, these settlements afforded victims of serious World War II crimes a measure of reconciliation after more than half a century.

A very different scenario has unfolded in East Asia. Since 1990, well over one hundred lawsuits stemming from the war have been filed in China, Japan, Korea, the Philippines,

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¹ Most historians date World War II in Europe from 1939 to 1945. In China, World War II usually dates from 1937, with the initiation of full-scale war against Japan.

² See e.g. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1196 (CD Cal. 2001); *Re Holocaust Victim Assets Lit.*, 105 F. Supp. 2d 139 (EDNY 2000); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248 (DNJ 1999) (slave labour and seized gold from concentration camp victims); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (DNJ 1999) (slave labour in Ford's German factory); *LG (Dist Ct) Bremen*, 1 O 2889/90 (1998) (cited in *Iwanona*, 67 F. Supp. 2d at 441); *Krakauer v. Federal Republic of Germany*, LG (Dist. Ct) Bonn, 1 O 134/92 (1997) (cited in *Iwanona*, 67 F. Supp. 2d at 441) (revoking temporary immunity for German corporations under the 1953 London Debt Agreement).

³ See generally, Michael Bazzyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press 2003). Professor Bazzyler examines lawsuits in the US and Europe for various episodes from World War II, including art, gold, and other assets looted by Nazis; and slave labour used by German corporations.

and the US. As with their Western counterparts, Asian plaintiffs sued the government of Japan and Japanese corporations for forcible rape, slave labour, massacres, indiscriminate bombing, and other war crimes. The sheer number of lawsuits suggests that, for many victims, World War II has not been adequately resolved. Insofar as *jus post bellum* seeks to secure a ‘just and lasting peace’ among the parties to conflict, these lawsuits demand a re-examination of both World War II, and post-war efforts to bring about reconciliation, reconstruction, and reparation. In some sense, these lawsuits call into question the foundations of post-war peace erected by the post-war tribunals.⁴

This chapter fills an important gap by focusing attention on *jus post bellum* outside of the West. Specifically, the chapter examines the results, motivations, and achievements of approximately one hundred World War II reparations lawsuits filed in Japan. In so doing, it answers three related questions. First, why does World War II still generate controversy in the contemporary geopolitical triangle of China, Japan, and Korea? Second, how does litigation contribute to the reconciliation process? Third, what are the future prospects for reconciliation in the near future? Before answering these questions, we offer a few remarks about *jus post bellum*, and Asian efforts at reconciliation.

II. *Jus Post Bellum*

Jus post bellum fuses a set of legal, moral, and philosophical principles to bring about a lasting peace after the ravages of war.⁵ Most scholars would agree with such a generality, yet differ in specifying and prioritizing those principles.⁶ Some understand the task of *jus post bellum* as bringing about political reconciliation, ensuring individuals in war-torn countries have the capacity to educate themselves, and building political trust among the formerly warring states.⁷ Some view *jus post bellum* as an exercise in holding to account those most responsible for violating the laws of war.⁸ Still others direct the inquiry towards

⁴ A few months after the war, Judge Jerome Frank described Nuremberg in the following way: ‘For the maintenance of [world] peace a vigorous, organized world order is imperative. The Nuremberg trial signalizes [*sic*] the emergence of such a world order. It furnishes the precedent for a world court ready and able to punish disturbers of international peace’. Jerome Frank, ‘Punishment for Today—Precedent for Tomorrow’, (13 Oct. 1945) *Collier’s Weekly*, 11, 73. Recent scholarship acknowledges defects of the post-war tribunals, but still stresses their salience. Kirsten Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’ (2010) 21 *European Journal of International Law* 1085, 1086 (calling the tribunals ‘the lodestar of international criminal justice’).

⁵ See Brian Orend, ‘Jus Post Bellum’ (2000) 31 *Journal of Social Philosophy* 117. Orend lists five guiding principles: just cause for termination (aggressor submits to reasonable punishment), right intention (i.e. no revenge), public declaration by legitimate authority, distinguishing civilians from political and military leaders, and proportionality. *Ibid.* 128–9. See also George M. Clifford III, ‘Jus Post Bellum: Foundational Principles and a Proposed Model’ (2012) 11 *Journal of Military Ethics* 42. Clifford also lists five guiding principles: respect for persons, establishing justice (on philosophical grounds), ecological responsibility, multinational commitment, and progress towards closure. *Ibid.* 45–55.

⁶ See Jennifer S. Easterday, Jens Iverson, and Carsten Stahn, ‘Exploring the Normative Foundations of Jus Post Bellum: An Introduction’, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014).

⁷ See Colleen Murphy and Linda Reznik, ‘Jus Post Bellum and Political Reconciliation’, in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum & Transitional Justice* (Cambridge University Press 2015). In this account, political reconciliation would include *inter alia* the establishment of trust between the warring states, and individual’s trust in the state.

⁸ Michael Walzer, *Just & Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2006) 288 (‘There can be no justice in war if there are not, ultimately, responsible men and women’).

truth-telling, believing that the denial and obfuscation that follow conflicts often hinder longer-term prospects for reconciliation.⁹ On the other hand, some scholars doubt that *jus post bellum* amounts to a coherent legal concept, preferring instead to focus on existing legal regimes such as human rights law or the law of war.¹⁰

Since each conflict, and its ultimate resolution, is to some extent *sui generis*, scholars struggle to articulate the precise parameters of the field of *jus post bellum*. Nevertheless, Larry May and Elizabeth Edenberg have gleaned six principles that serve as a useful starting point: retribution, reconciliation, rebuilding, restitution, reparations, and proportionality.¹¹ To some extent, these principles overlap and interact with each other. Proportionality only makes sense by balancing one principle against another. Likewise, reconciliation requires some combination of restitution, reparation, retribution, and perhaps rebuilding. In other words, these categories may not be wholly distinct from one another. Moreover, these principles lavish attention on the state, arguably at the expense of victims. For example, retribution—holding accountable those most responsible for initiating or waging unjust war—usually requires a criminal trial, and by extension the resources and judicial machinery that only states possess. Rebuilding, likewise, hinges upon the deployment of resources normally available only to states, as the post-war reconstruction of Germany and Japan suggest.¹²

Tribunals, a key institution in many post-war reconciliation processes, promote this state-centric view. Certainly the post-war tribunals (Nuremberg and Tokyo) focused on state matters, prosecuting a narrow band of high-level government officials and military officers. The Tokyo Tribunal in particular devoted more attention to crimes against peace (preparing, initiating, and waging war) than it did to crimes against humanity (murder, enslavement, civilian killings, etc.).¹³ As criminal tribunals, these institutions focused on the planning and perpetration of crimes, at the expense of examining the damage or destruction caused thereby. This has prompted scholars to criticize the Tokyo Tribunal for neglecting the devastation suffered by Asian victims.¹⁴

By contrast, *jus post bellum* directs attention towards the needs of individual victims, as it is ‘their society that is going to be constructed in the name of just and stable peace.’¹⁵ Post-war reconciliation mechanisms must attend to the destruction, suffering, and damage caused by war, and the lives crushed thereunder. The guiding inquiry must protect and ultimately ‘empower the civilian population.’¹⁶ More broadly, *jus post bellum* asks how to undo

⁹ Cindy Holder, ‘Truthfulness in Transition: The Value of Insisting on Experiential Adequacy’, in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum & Transitional Justice* (Cambridge University Press 2015).

¹⁰ Eric De Brabandere, ‘The Responsibility for Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept’ (2010) 43 *Vanderbilt Journal of Transnational Law* 119, 149.

¹¹ Larry May and Elizabeth Edenberg, ‘Introduction’, in Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2015) 3–6.

¹² *Ibid.* 5.

¹³ Yuma Totani, ‘The Case against the Accused’, in Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds), *Beyond Victor’s Justice: The Tokyo War Crimes Tribunal Revisited* (Brill 2010) 147.

¹⁴ Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard 2009). Totani notes, inter alia, the Allied prosecutors’ failure to investigate Japan’s (i) medical experiments on Chinese subjects (Unit 731), (ii) war crimes against Koreans and Taiwanese (who were then Japanese colonial subjects), and (iii) use of poisonous gas in China. *Ibid.* 248–50. She also cites the ‘blanket immunity’ that Western powers extended to prevent scrutiny of wrong-doing against their own colonial subjects in Southeast Asia.

¹⁵ See Inger Österdahl, ‘The Gentle Modernizer of the Law of Armed Conflict?’, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 207, 219.

¹⁶ *Ibid.* 220.

the devastation of war, to rebuild broken societies, and to restore rule of law.¹⁷ This requires broad reflection on the types of damage visited upon civilians: property damage, sexual assault, forced labour, physical violence, and other ills.

Jus post bellum also has an important normative component. War efforts often involve propaganda efforts to demonize the enemy, whip up nationalist sentiment, and exaggerate differences between people. Post-war peace processes must reorient social norms away from antagonism and hatred, and towards co-operation and cohabitation.¹⁸ This normative inquiry may very well change over time, as more information about the causes, conduct, and consequences of the war emerge. It is doubtful that a single ‘truth’, satisfactory to all parties, will emerge.¹⁹ Instead, victims, historians, politicians, and activists will advance different, even contradictory, narratives about the causes of war, and apportion blame accordingly.

A final question involves the temporal limits of *jus post bellum*. When does the post-war period end, exactly? Most agree that *jus post bellum* begins when military hostilities end, even if it may be difficult to pinpoint that precise moment in time.²⁰ But when does it end? Scholars propose several possible dates for any given war, but recognize that the inquiry is, ultimately, subjective.²¹ It hinges upon the actors, the situation, the measures, and subsequent reception by the international community.²² Post-war settings have accommodated various mechanisms to build towards a sustainable peace. Regional integration, alleviation of racial tensions, compensation schema, and constitutional amendments have signified the end of the post-war period.²³ But there is neither a set formula, nor a single time frame, by which to demarcate ‘post-war’. This helps explain why we are still discussing World War II reparations well into the twenty-first century.

III. Models of Post-Conflict Justice

Various mechanisms of post-war reconciliation have emerged after the Cold War (1990-present). *Ad hoc* international tribunals, resurrected for the first time since World War II, presided over war crimes prosecutions concerning Yugoslavia, Rwanda, Sierra Leone, and Cambodia. It is still premature to confirm their impact or legacy, as several are ongoing at the time of this writing. Yet these tribunals have clarified jurisdictional principles, narrowed

¹⁷ Larry May, ‘*Jus Post Bellum* Proportionality and the Fog of War’ (2003) 24 *European Journal of International Law* 315, 324.

¹⁸ Jennifer S. Easterday, ‘Peace Agreements as a Framework for *Jus Post Bellum*’, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 379, 380.

¹⁹ Cindy Holder (n 9) 248–9.

²⁰ For instance, President Bush declared the end of ‘major combat operations in Iraq’ on 1 May 2003. He stood before a banner that read ‘Mission Accomplished’ on board the USS Abraham Lincoln. In 2010, the last US combat team left Iraq, and President Obama declared an end to the combat mission. In 2017, at the time this chapter was written, some 5,000 US troops were stationed in Iraq to fight Islamic State. See Michael R. Gordon, ‘U.S. to Send Over 200 More Soldiers to Iraq to Help Retake Mosul’, *New York Times* (27 March 2017).

²¹ See Martin Wählisch, ‘Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the “Post”’, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundation* (Oxford University Press 2014) 316, 330.

²² *Ibid.* 331 (listing a series of events from Libya, Lebanon and Bosnia-Herzegovina that signified the end of war).

²³ *Ibid.*

and reinforced legal doctrines, and ended impunity for *some* high-ranking officials.²⁴ They have also breathed new life into the study of international law (especially international criminal law and international humanitarian law), which has in turn spread norms of individual accountability across regions, and ultimately around the world.²⁵

Truth and reconciliation commissions (TRCs), based in part on South Africa's experience, have also formed in Liberia, East Timor, and Guatemala. These institutions collect testimony from victims and perpetrators, conduct independent investigations, and issue reports to facilitate reconciliation.²⁶ They may also recommend the prosecution of those persons most culpable of human rights abuses, or reparations for those peculiarly harmed during the conflict.²⁷ While not uncontroversial, TRCs usually provide a comprehensive account of the major events of the conflict, thus serving a valuable truth function.

A final, and relatively recent development, involves claims commissions. These institutions hear evidence about 'loss, damage and injury resulting from the conflict'.²⁸ Thereupon, they make awards to civilians, prisoners of wars, and those who suffer the destruction or seizure of property. Such institutions have been set up after conflicts such as the Iran Hostage Crisis, and wars such as the Eritrean–Ethiopian War.

While each mechanism has its particular strengths and weaknesses, all require enormous coordination. The Nuremberg Tribunal, for instance, required months of negotiations among four states (UK, US, Soviet Union, and France), each with its own legal traditions, modes of criminal procedure, and goals for the tribunal.²⁹ Likewise, the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in the 1990s required at least nine affirmative votes from the fifteen members of the UN Security Council, and none of the Permanent Five members to cast a veto.³⁰ Mechanisms such as TRCs similarly demand political will from a post-conflict government, and the courage to grapple with a fresh and painful chapter of history.³¹ Claims commissions may require two states, recently at war with one another, to come to the table, agree to a set of procedures, and submit to judgments by independent parties, often from third states. The rarity of such bilateral claims commissions bespeaks the difficulty of getting two sides to sit down and agree to such a mechanism.

²⁴ The Tadic decision held that international law can apply to internal armed conflict, as long as one government controls the military of one party to the dispute. *Prosecutor v. Tadic* (Judgment) Case No. IT-94-1-A (15 July 1999) para. 137. The ICTR has refined interpretations of genocide, incitement to genocide, and rape.

²⁵ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011) 5–6.

²⁶ The leading examples would be Liberia and Sierra Leone.

²⁷ South Africa's TRC proved somewhat unusual in this regard, providing amnesty to those who made full disclosure. The expression of remorse was not necessary. Lyn Graybill, *Truth and Reconciliation in South Africa? Miracle or Model* (Lynne Rienner 2002) 40.

²⁸ Michael J. Matheson, 'Eritrea-Ethiopia Claims Commission: Damage Awards' (2009) 13 *ASIL Insights*, <asil.org/insights/volume/13/issue/13/Eritrea-ethiopia-claims-commission-damage-awards>.

²⁹ Many of these issues were thrashed out in the London Conference, which took place from 26 June to 2 August 1945. But even in April 1945, Truman had the idea of a tribunal in mind, and approached Justice Robert Jackson about serving as a chief prosecutor for the US. See generally Nuremberg Trial, International Military Tribunal, 1945–1946, <<https://www.roberthjackson.org/nuremberg-timeline/>>

³⁰ All fifteen members of the UNSC voted to establish the ICTY in 1993. See UNSC Res. 827 (1993) UN Doc. S/RES/827. Thirteen members of the UNSC voted to establish the ICTR. China abstained and Rwanda voted against the resolution. See UNSC Res. 955 (1994) UN Doc. S/RES/955 (1994).

³¹ See generally Graybill (n 27) cit. 2–6. One of the most controversial elements of the TRC was the amnesty provisions, the 'outcome of various compromises that had been hammered out between the African National Congress and the National Party in the transition period leading to the adoption of an interim constitution in 1993, with input from twenty-six political parties'. *Ibid.* 2.

What if there is no consensus? States like to put wars behind them, particularly when they *lose*. State actors generally believe they fought for a just cause, and have spent years convincing the public of the reasonability, necessity, even desirability, of the war effort. After the war, one state may believe it has already done its penance; the prosecution of war—with its casualties, property damage, and civilian privation—may seem like punishment enough. Moreover, if the international community is either fractured or reluctant to intercede, both distinct possibilities, institutional paralysis may prevail. In this case, individual victims cannot reasonably expect an investigation of facts, reparations for property damages, or compensation for personal harm they suffered. In such a situation, they may take matters into their own hands.

One increasingly common response has been the resort to individual litigation. In the West, victims of a range of World War II crimes stepped forward in the 1990s to demand restitution of seized assets and property, and various types of reparation.³² These lawsuits did not result in compensation awards. But they did set in motion a chain of events that led, ultimately, to the establishment of large foundations that compensated thousands of Holocaust victims. The Swiss,³³ German,³⁴ and Austrian³⁵ settlement funds provided reparation to those who had performed unremunerated forced labour, who had their businesses liquidated, who had their assets seized, and many others. These settlement funds offer important precedents for resolving the lingering issues of World War II damage. But as with other post-war mechanisms, they require co-ordination across borders, diplomatic tact, willingness to face dark chapters of a nation's past, and other attributes. At least in the transatlantic context, civil litigation was the spark that brought the companies, and the governments, to the negotiating table.³⁶ This chapter explores the role of litigation in more detail below. But first it is helpful to understand the resonance of World War II in contemporary East Asia.

IV. World War II in Contemporary East Asia

World War II still generates controversy over East Asia. Seventy-five years after the war, scarcely a year goes by without a potent reminder of the war: another compensation lawsuit,

³² 'Reparations' is a general term used for redressing gross violations of international law. They may include restitution (restoring the victim to their *ex ante* status, including the return of property), compensation (economic loss, including physical and mental harm), rehabilitation (provision of social, medical psychological and other services), and satisfaction (measures to ensure non-repetition, return of remains of those killed). See Basic Principles & Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 (16 Dec. 2005) UN Doc. A/RES/60/147 paras 15–23.

³³ In August 2000, Swiss banks Credit Suisse and UBS, together with the Swiss government, established a \$1.25 billion fund to repay the accounts the banks had effectively stolen from victims of the Nazi regime. See Bazylar (n 3) 35.

³⁴ The German government—together with German banks, insurers and companies—established a 10 billion deutschmark (\$5.2 billion) fund in 2000. The redress aimed primarily at slave labourers in German factories, including Ford Werke (the German subsidiary of Ford), Siemens, and Daimler-Benz. Bazylar (n 3) 70–4.

³⁵ The Austrian government, without support from the private sector, established a \$480 million fund in 2000. The settlement would pay owners of lost property, liquidated businesses, real estate, bank accounts, insurance policies, and so on. See Claims Conference, Austrian General Settlement Fund (GSF), available at <<http://www.claimscon.org/about/history/closed-programs/general-settlement-fund>> accessed 19 May 2019.

³⁶ In introducing Germany's fund, Chancellor Gerhard Schroeder stated it would 'counter lawsuits, particularly class action lawsuits, and to remove the basis of the campaign being led against Germany industry and our country'. See Roger Cohen, 'German Companies Set up Fund' *New York Times* (17 Feb. 1999).

new discovery of war remains, or a controversial revision of the events of the war. In 2018, the Supreme Court of South Korea ordered two Japanese multinationals to pay damages awards to Korean men and women who performed forced labour during World War II.³⁷ The decision badly damaged bilateral relations between Seoul and Tokyo, inviting a trade war and various diplomatic spats.³⁸ In 2017, a South Korean historian was acquitted in a criminal defamation trial for her book, which advanced views about the comfort women that were out of step with mainstream Korean ones.³⁹ A year earlier, she lost a civil defamation lawsuit, which ordered her to pay each of nine former comfort women 10 million won (8,000 euros) in damages.⁴⁰ In 2016, Mitsubishi settled a lawsuit filed by dozens of Chinese men who had been forced to work in its Japanese factories during the war.⁴¹ In 2014, a graveyard containing bones of Korean workers who died during the war was discovered in Japan.⁴² In 2013, Prime Minister Abe Shinzo visited Yasukuni Shrine, which honours Japan's war dead, among them fourteen Class-A war criminals.⁴³ His visit provoked condemnations from South Korea and China, which have criticized Japan's lack of contrition about the war.⁴⁴ Even the US, Japan's long-time ally, offered a rare rebuke of Abe's visit.⁴⁵

During decennial anniversaries of the war—2015, 2005, 1995—the atmosphere is particularly tense, as a new set of remembrances, reinterpretations, and recriminations unfolds.⁴⁶ On the seventieth anniversary of Japan's surrender—14 August 2015—Prime Minister Abe made a wide-ranging statement about the war. He acknowledged the death and destruction Japan visited upon many Asian people, and expressed 'deepest remorse' and 'sincere condolences' for those acts.⁴⁷ But he did not issue a fresh apology, angering

³⁷ Choe Sang-hun, 'South Korean Court Orders Mitsubishi of Japan to Pay for Forced Wartime Labor' *New York Times* (29 Nov. 2018).

³⁸ Lindsay Maizland, 'The Japan-South Korea Trade Dispute: What to Know' *Council on Foreign Relations: In Brief* (5 Aug. 2019) (describing the diplomatic fallout occasioned by the Supreme Court decisions).

³⁹ Ms. Park Yu-ha presented a more complicated picture of the comfort women than has been conventionally accepted by mainstream South Korean society. See Choe Sang-hun, 'Professor Who Wrote of Korean "Comfort Women" Wins Defamation Case' *New York Times* (25 Jan. 2017). Unconventional accounts of the war have also spurred lawsuits in the China and Japan. A Beijing court ordered a Chinese historian to apologize to the sons of five war 'heroes' whose narratives he had questioned. According to Xinhua, the article both hurt the plaintiffs' feelings and harmed the public's sense of national identity. See 'Former magazine chief editor loses WWII-heros [sic] slander case', *Xinhua* (27 June 2016). In Tokyo, over 8,000 people sued the left-leaning *Asahi Shimbun* for 'spreading erroneous facts to international society'. 'Thousands of people sue Asahi for articles on wartime sex slavery', *San Diego Union-Tribune* (27 January 2015).

⁴⁰ See Choe Sang-hun, 'Professor Who Wrote of Korean "Comfort Women" Wins Defamation Case.'

⁴¹ 'Mitsubishi Materials, Chinese WWII slave workers reach deal' *Chicago Tribune* (1 June 2016).

⁴² Martin Fackler, 'Pressure in Japan to Forget Sins of War' *New York Times* (28 Oct. 2014).

⁴³ Former Prime Minister Koizumi Junichiro visited Yasukuni six times between 2001 and 2006.

⁴⁴ See Chico Harlan, 'Japanese prime minister's visit to Yasukuni war shrine adds to tensions in Asia' *Washington Post* (26 Dec. 2013); Shannon Tiezi, 'China, South Korea Not Convinced by Abe's WW2 Anniversary Speech' *Diplomat* (18 Aug. 2015).

⁴⁵ The US embassy said in a statement, '[T]he United States is disappointed that Japan's leadership has taken an action that will exacerbate tensions with Japan's neighbors'. See Embassy of the United States, Tokyo, Japan, 'Statement on Prime Minister Abe's December 26 Visit to Yasukuni Shrine' (26 December 2013) <<https://japan.usembassy.gov/e/p/tp-20131226-01.html>> accessed 20 June 2017.

⁴⁶ In 1995, Murayama Tomiichi offered what many consider as the sincerest apology by a Japanese prime minister for the war. See Ministry of Foreign Affairs of Japan, Statement by Prime Minister Tomiichi Murayama 'On the occasion of the 50th anniversary of the war's end' (15 August 1995), <<http://www.mofa.go.jp/announce/press/pm/murayama/9508.html>> accessed 12 June 2017. In 2005, Koizumi Junichiro offered his own statement. See Ministry of Foreign Affairs of Japan, Statement by Prime Minister Junichiro Koizumi (15 August 2005) <<http://www.mofa.go.jp/announce/announce/2005/8/0815.html>> accessed 15 June 2017.

⁴⁷ Justin McCurry, 'Japanese PM Shinzo Abe stops short of new apology in war anniversary speech', *Guardian* (14 Aug. 2015).

Japan's neighbours.⁴⁸ The Chinese government declaimed Abe's insincerity and ambiguity.⁴⁹ South Korea similarly expressed dissatisfaction, albeit in more measured terms.⁵⁰ A few weeks after Abe's public statement, Chinese president Xi Jinping—joined by Russian president Vladimir Putin and South Korea's then-president Park Geun-hye—presided over a military parade to commemorate China's victory over Japan.⁵¹

Beneath the political posturing—and under pressure from human rights groups, international organizations, foreign governments and victims themselves—the Japanese government has tried to address one aspect of the country's troubled war-time legacy: the 'comfort women'. In 1995, Japan launched the Asian Women's Fund, which channelled donations from the private sector to former comfort women. The Japanese government provided funds to cover medical and welfare expenses, but did not contribute to the monetary compensation scheme. Several hundred comfort women, mostly from the Philippines, accepted compensation. The fund provoked strong reactions from South Korean and Dutch comfort women, who believed that the compensation did not amount to state redress, as the Japanese government still avoided *legal* responsibility for the war.⁵²

In late 2015, the Japanese and South Korean governments announced they had reached a 'final and irreversible' agreement on the comfort women issue.⁵³ Prime Minister Abe Shinzo offered his 'most sincere apologies and remorse'. The scheme would provide money to surviving South Korean comfort women, and the families of deceased comfort women. But sitting South Korean president Moon Jae-in, after convening a commission to look into the agreement, formally dissolved the foundation in 2019.⁵⁴

Outside of officialdom, activists, historians, lawyers, and others have devoted significant attention to resolving lingering issues from the war.⁵⁵ Some comb historical archives

⁴⁸ Ibid.

⁴⁹ See e.g. Foreign Ministry Spokesman Hua Chunying's Remarks on Japanese Prime Minister Shinzo Abe's Statement on the 70th Anniversary of the End of the War, Min. For. Aff. People's Rep. China (15 Aug. 2015) ('Japan should have made an explicit statement on the nature of the war of militarism and aggression and its responsibility on the wars, made sincere apology to the people of victim countries, and made a clean break with the past of militarist aggression, rather than being evasive on this major issue of principle'), available at <http://www.fmprc.gov.cn/mfa_eng?xwfw_665399/s2510_665401/2535_665405/t1288969.shtml> accessed 15 Aug. 2017. See also 'Abe's watered-down apology fails sincerity test' *Xinhua* (14 Aug. 2015). (calling Abe's speech a 'retrogression from the 1995 statement' by Prime Minister Murayama, <http://www.chinadaily.com.cn/world/2015-08/14/content_21604800.htm> accessed 15 Aug. 2017.

⁵⁰ South Korean President Park Geun-hye noted Abe's statement 'did not quite live up to our expectations'. See Commemorative Address by President Park Geun-hye on the 70th Anniversary of Liberation, Republic of Korea Cheong Wa Dae (15 Aug. 2017), <http://english1.president.go.kr/activity/speeches.php?srh%5bboard_no%5d=24&srh%5bview_mode%5d=detail&srh%5bseq%5d=11748&srh%5bdetail_no%5d=43> accessed 15 Aug. 2017. Likewise, the Korea minister of foreign affairs urged 'the Japanese government to make proactive efforts to resolve as soon as possible the pending historical issues between the ROK and Japan, including that concerning the sexual slavery victims of Japan's Imperial Army during World War II'.

⁵¹ See Tom Phillips, 'China military parade shows might as Xi Jinping pledges 300,000 cut in army' *Guardian* (3 Sept. 2015).

⁵² Stephanie Wolfe, *The Politics of Reparations and Apologies* (Springer 2013) 264.

⁵³ The agreement would include an apology by Japanese prime minister Abe Shinzo, and the establishment of a 1 billion yen (8 million euro) fund to care for elderly comfort women.

⁵⁴ Kyodo News, 'South Korea formally closes Japan-funded "comfort women" foundation' *Japan Times* (5 July 2019).

⁵⁵ Franziska Seraphim, *War Memory and Social Politics in Japan, 1945–2005* (Harvard East Asian Press 2009) (outlining the contributions of various civil society groups to the proper commemoration of the war dead, manipulation of national symbols and the teaching of history).

to uncover how the Japanese government planned and executed campaigns or policies.⁵⁶ Others have held mock trials to flesh out the historical, moral, and legal treatment of Japan's war-time conduct.⁵⁷ Still others rally by the thousands to ensure Japan's pacifist constitution remains intact.⁵⁸ As we will see below, litigation has provided an additional track to hold the Japanese government, and corporate sector, to account.

V. Litigation After War

Courts have played a key role in reconciling World War II. The most famous of these are the Nuremberg Tribunal (1946–1947) and Tokyo Tribunal (1946–1948). In addition, many countries, including China, Netherlands, and Russia, held domestic military tribunals to try Japanese war criminals within their jurisdiction.⁵⁹ Yet, as with any post-conflict judicial mechanism, these tribunals selectively examined the war.⁶⁰ Many crimes, from the institutionalized rape of the comfort women, to the use of human subjects in medical experimentation, were either overlooked or inadequately addressed. Moreover, some of the harm—radiation sickness from the US bombing of Hiroshima and Nagasaki, unexploded ordnance left by the Japanese Army in Manchuria—emerged only years or decades after the war. Given advances in human rights and humanitarian law, as well as just war theory, a re-think of World War II's remedial mechanisms is both timely and necessary.

Lawsuits have long probed Japan's role, responsibility, and remediation efforts for the war.⁶¹ In the 1950s and 1960s, survivors of the atomic bombing of Nagasaki sued the Japanese government for waiving their rights to seek compensation from the US government in the San Francisco Peace Treaty.⁶² The Tokyo District Court determined that the bombing of Nagasaki violated international law; but it also held individuals did not have the standing to sue governments for violations of international law, a holding with significant consequences for subsequent lawsuits.⁶³ In the 1970s and 1980s, plaintiffs from former

⁵⁶ The best-known example is Professor Yoshimi Yoshiaki's discovery, in the library of Japan's Defense Agency, of documents that linked the military with the comfort women stations. See Norimitsu Onishi, 'In Japan, a Historian Stands by Proof of Wartime Sex Slavery' *New York Times* (31 Mar 2007). Less well known, Professor Kosho Tadashi found a cache of documents about Korean forced labor in the library of his home institution, Komazawa University. The documents included, inter alia, a report on Korean forced labour prepared by the general affairs division of the Nippon Steel company. See William Underwood, Names, Bones and Unpaid Wages (1): Reparations for Korean Forced Labor in Japan, *Asia-Pacific Journal / Japan Focus* (4 Sept. 2006), available at <<http://apjff.org/-William-Underwood/2219/article.html>> accessed 15 Aug. 2017.

⁵⁷ See Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, (4 Dec. 2001), available at <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/summary.html>> accessed 15 Aug. 2017.

⁵⁸ David McNeil, 'Japan's pacifist constitution: After 70 years, nation changes the rules so it can go to war' *Independent* (1 July 2014).

⁵⁹ Ling Yan, 'The 1956 Japanese War Crimes Trials in China', in Morten Bergsmo, Cheah Wui Ling, and Yi Ping (eds), *Historical Origins of International Criminal Law* (Torkel Opsah Academic EPublisher 2015) 215 (noting trials in China, Hong Kong, Indonesia, the Philippines, Russia, Singapore, and Vietnam).

⁶⁰ See Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2008) 40 ('[S]ome selectivity is inevitable given the large numbers generally implicated in modern state prosecution, scarcity of judicial resources in transitional societies and the high political and other costs of successor trials. Given these constraints, selective or exemplary trials, it would seem, can advance a sense of justice.')

⁶¹ Yasuhiro Okuda, 'Government Liability for Injuries to Foreign Individuals in Japan' (2001) 3 *Yearbook on Private International Law* 115, 116.

⁶² The plaintiffs posited that, by waiving their rights to seek reparations from the US in the San Francisco Peace Treaty, Japan became liable for their medical treatment.

⁶³ *Shimoda v. Japan*, translated in (1964) 8 *Japanese Annual of International Law* 212, 252 ('The dropping of the atomic bombs is a violation of international law, which can be interpreted as a tort under domestic law').

colonies Korea and Taiwan⁶⁴ demanded that the Japanese government extend them the same social welfare benefits as those provided to Japanese citizens.⁶⁵ While the courts generally did not find in plaintiffs' favour, the verdicts pressured Japan's diet (parliament) to introduce a new remedial scheme, which it did in 1987.

In the 1990s, World War II litigation entered a new phase. For the first time, victims of Japanese war crimes stepped forward to seek compensation, first from the Japanese government, and later from Japanese corporations.⁶⁶ They have since filed over one hundred lawsuits in Japan, China, Korea, the Philippines, and the US, spawning a veritable social movement known in Japanese as *senjo hoshō soshō* (or post-war compensation litigation, 'PCL'). The victims include former 'comfort women', forced labourers, victims of medical experimentation, family members of those killed and maimed during various massacres, as well as the heirs of these victims.

For most of the past three decades, Japan has been the epicentre of this movement, with over one hundreds cases filed at trial, appellate, and Supreme courts.⁶⁷ With a few exceptions, Japanese verdicts have favoured state and corporate defendants.⁶⁸ Japanese judges tend to dismiss claims either on statutes of limitation (for the corporations) or sovereign immunity (for the Japanese government).⁶⁹ Courts have also invoked post-war treaties to deny individuals the individual right to seek compensation. This, of course, obviates the possibility of court-ordered restitution, though Japanese courts are by no means unusual for dismissing claims in this way.⁷⁰

But Asian victims have also sought reparations elsewhere. In the US, federal and state courts have presided over, and ultimately dismissed, cases brought by comfort women from various countries, Korean and Chinese forced labourers, and US prisoners of war.⁷¹ In 2010, the Philippine Supreme Court dismissed a case brought by Filipina comfort women under the political question doctrine.⁷²

⁶⁴ Japan gained control of Taiwan after defeating China in the 1895 Sino-Japanese War. Japan formally annexed Korea in 1910.

⁶⁵ See generally Yuji Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law* (Oxford University Press 1998) 176–9. See also Susan Southward, *Nagasaki: Life After Nuclear War* (Penguin 2015) 225 (describing the efforts of Korean atomic bomb survivors to obtain medical care and compensation).

⁶⁶ See Tanaka Hiroshi, Nakayama Taketoshi, and Arimitsu Ken, 'Sengo Hoshō Nokosareta Kadai [Remaining Challenges in Postwar Compensation]', in Tanaka Hiroshi, Nakayama Taketoshi, and Arimitsu Ken (eds), *Mikaiketsu no Sengo Hoshō: Towareru Nihon no Kako to Mirai [Unresolved War Compensation: Questioning Japan's Past & Future]* (Soshisha 2012) 8, 15 (noting over seventy cases filed since 1990). In an appendix, the authors enumerate ninety post-war compensation lawsuits, eighty-one of which have been filed since 1990. *Ibid.* 208–13.

⁶⁷ Igarashi Masahiro, 'Nihon no "Sengo Hoshō Saiban" to Kokusaihō' [Japan's 'Postwar Compensation Lawsuits' and International Law] (2006) 105 *Kokusaihō Gaikō Zasshi* [Journal International Law & International Relations] 1, 12.

⁶⁸ The lawsuits began in Japan in the early 1990s. Since that time, war victims have filed suits in China, Korea, and the US. Korean courts have found Japan liable in two recent decisions.

⁶⁹ See Timothy Webster 'Sisyphus in a Coalmine' (2006) 91 *Cornell Law Review* 733, 750.

⁷⁰ See *Burger-Fischer v. Degussa AG* (n 2).

⁷¹ *Taiheiyō Cement Co. v. Superior Court of Los Angeles* [2004] Cal. Ct App. (dismissing claims brought by Korean forced labourer because California statute allowing World War II claims was unconstitutional); *Hwang Geum Joo v. Japan* [2003] DC Cir. (dismissing comfort women's claims against Japan on sovereign immunity grounds); *Re World War II Era Japanese Forced Labor Litigation* [2001] ND Cal. (striking down California statute permitted World War II claims); *Mitsubishi Materials Co. v. Dillman* [2003] Cal. Ct App. (post-war treaty waived US prisoner of war's claims against Japanese corporation).

⁷² *Vinuya v. Romulo* [2010] GR No. 162230 (dismissing case as a political question: one whose resolution falls to the executive branch, not the judicial branch). The decision is available at <<http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/162230.htm>> (last visited 20 June 2017).

In 2007, the Supreme Court of Japan rendered two decisions that foreclosed the possibility of individual compensation from Japanese courts, at least for certain types of claims.⁷³ These decisions have not completely halted the flow of lawsuits in Japan,⁷⁴ but have encouraged victims to sue elsewhere. Indeed, following a monumental decision rendered by the Korean Supreme Court in 2012, Korea has now become the hotspot of World War II litigation in Asia. As of May 2017, at least fourteen lawsuits are wending their way through the Korean judiciary.⁷⁵ Meanwhile, in China, a Beijing court accepted the country's first World War II lawsuit in March 2014.⁷⁶ This ultimately produced a large settlement with defendant Mitsubishi Materials in June 2016.⁷⁷

These experiences suggest a role for courts in remediating the harms of war, and ensuring legal peace—both central aims of *jus post bellum*. This is not necessarily a straightforward contribution; like many legal arguments, caveats apply. Let me address three. First, nationality, of courts and litigants, clearly matters. Japanese courts were largely unresponsive to claims brought by Chinese and Korean plaintiffs against Japanese corporations or the Japanese government. Conversely, Korean courts, following the 2012 decision, have shown far more sympathy to Korean victims suing Japanese corporations. While courts supposedly apply law in a dispassionate manner, the extraordinary political sensitivities raised by these lawsuits have led courts to jettison impartiality.

Second, the success of litigation in effectuating a damages award is hardly assured. Scores of lawsuits failed, including some brought in Korea, before one succeeded. In addition, nearly half a century elapsed between the end of the war (1945) and the filing of the first lawsuit (1990), and another two decades between that first case and the first unequivocal victory (2012). A seven-decade wait is hardly optimal. But it does point out the importance of the passage of time; a generation or two may be needed before a state can grapple with its own historic atrocities.

Third, domestic courts may prefer to keep a low profile in war crimes litigation. Separation of powers situates the authority to lead and conduct wars firmly in the political branches. Simply put, judges are reluctant to evaluate war policy, or its execution. It is generally quite rare that civilian judges weigh in on the conduct of war at all. Moreover, in the transnational context, judicial modesty may be appropriate. When sensitive issues of international affairs are at stake, particularly acts of foreign states (or acts coordinated by foreign

⁷³ Both decisions, using identical language, found that the 1972 Japan–China Joint Communique waived all individual claims brought by Chinese citizens. See Mark A. Levin, 'International Decisions: *Nishimatsu Const. v. Song Jixiao*' (2008) 102 *American Journal International Law* 148.

⁷⁴ For example, Chinese forced labourers sued the Japanese government in 2015 for abducting, transporting, and forcing them into labour at a mine in Akita prefecture. See Horikawa Takuya, 'Kyōsei Renkō Kuni o Teiso: Chūgokujinra 13-rin Baishō Motome' [Thirteen Chinese Sue the State for Forced Labour, Seeking Compensation] *Mainichi Shimbun* (27 June 2015).

⁷⁵ See Kung-nae Kang-je Dongweon Sonhe Pesang Sosong Hyeonhwang-pō [Chart on Current Status of Forced Labour Lawsuits in Korea], International Conference to Seek a Comprehensive Solution to the Problem of Japan's Forced Mobilization, 23, available at <<https://www.minjok.or.kr/wp-content/uploads/2017/05/170530->> accessed 27 July 2017.

⁷⁶ Chinese plaintiffs filed the first compensation lawsuits in Hebei and Shandong provinces as early as 2000. But the courts did not accept them. In February 2014, victims filed another lawsuit against Mitsubishi Materials and Nippon Coke (formerly Mitsui Mitsui), which the Beijing Intermediate Court accepted on 18 March 2014. Numerous class actions were then filed in Beijing and Hebei Province. Shuhe Yamada, 'True Face of Chinese plaintiffs seeking wartime compensation for forced labor' *Nikkei Asian Review* (16 May 2014).

⁷⁷ Austin Ramzy, 'Mitsubishi Materials Apologized to Chinese World War II Laborers' *New York Times* (Hong Kong, 1 June 2016).

states), the executive branch may be the preferred state actor.⁷⁸ How, then, can the judiciary contribute to peace after war?⁷⁹

First, it is possible that courts will find for plaintiffs, and order remediation. A handful of decisions in Japan, all of which were overturned ultimately on appeal, bear this out. Similarly, recent decisions in South Korea also have found for plaintiffs. Given the individualistic nature of litigation, pitting *this* particular victim against *that* particular corporation, courts can provide an ad hoc remedy to *this* set of plaintiffs. But a global settlement typically requires the involvement of the political branches, which have thus far been unable to get involved to any great extent.

Of course, even 'victorious' plaintiffs may express dissatisfaction with the verdict. In 1998, a Japanese trial court found against the Japanese government and ordered it to pay each of three former comfort women 300,000 yen in compensation (about US\$3,000). This is the only decision in Japan to find for the comfort women, and for that reason attracted significant media and scholarly attention.⁸⁰ Plaintiffs, however, were far from satisfied. They believed Japan still owed them a 'proper apology and compensation', and that the amount of money was an insult to their suffering.⁸¹ As plaintiff Yi Sun-dok explained, 'From ages 17 to 25, I was subjected to unspeakable acts. 300,000 yen—is that some kind of joke?'⁸² Thus, we cannot say that winning the case will necessarily restore the victims. In other lawsuits, however, plaintiffs have stated that the verdict restored some piece of their human dignity.⁸³

Second, litigation can be empowering. Individual victims can seek justice from the entities that tormented them, whether state or corporate, and caused immense physical, psychological, physiological, and emotional harm. They need not rely on their government to act on their behalf. Instead, the victim can assert agency and take action against the entity that caused such harm. Even if the lawsuit does not return a favourable verdict, the lawsuit itself constitutes an 'exercise in self-determination.'⁸⁴ As former comfort woman Chen Yabian told a press conference shortly after losing her compensation lawsuit, 'Japan acknowledges the bad things that the Army did on Hainan Island, like raping women. Why

⁷⁸ *Banco Nacional de Cuba v. Sabatino*, 376 US 423 (1964) (precluding US courts 'from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory'); Lee Keun-Gwan, 'Han-Il Ch'eonggugweon Hyeopjeong-sang Kangje Chingyong Paesang Ch'eonggugweon Cheori-e Taehan Kukje Peopjeok Keomto' [The Question of Individual Claims of the Korean Victims of Forced Labour Under the 1965 Claims Settlement Agreement between Korea and Japan from International Law Perspective] (2013) 54 *Seoul Law Journal* 327, 381–2 (arguing for judicial restraint in sensitive cases such as the 2012 decision rendered by the Korean Supreme Court).

⁷⁹ Stuart Eizenstat, who held key positions in the commerce, state and treasury departments during the Clinton administration, played a pivotal role in getting European governments and corporations to set up settlement funds. A lawyer by training, Eizenstat criticized 'the inadequacies of the American legal system to resolve complex political issues. U.S. courts are not the best places to resolve profound historical and political questions'. He cited procedural complexity, evidentiary rules, 'obdurate judges,' and various types of delays as the most pressing problems with litigation. Stuart Eizenstat, *Imperfect Justice* (Perseus Books 2003) 341.

⁸⁰ The decision was translated into English, and appeared in many English language newspapers. See Teihei Okada (trans.), 'The "Comfort Women" Case: Judgment of April 27, 1998 Shimonoseki Branch, Yamaguchi Prefectural Court, Japan' (1999) 8 *Pacific Rim Law & Policy Journal* 63.

⁸¹ See Comfort Women: Japan, Pusan Comfort Women and Women's Labor Corps members, Filed, 25 Dec. 1992, Memory and Reconciliation in the Asia-Pacific, available at <https://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/pusan.html> accessed 19 May 2019.

⁸² See 'Kanpu Soshō no Hanketsu: Hanbun no Ryōshin' [Verdict in Pusan Litigation: A Half Measure of Conscience] *Kyodo News* (5 May 1998).

⁸³ One victorious plaintiff, Zhang Lianxin, said 'This is great, this is great. All the pain and toil we endured in Japan has finally paid off. No matter what you may say, there is still justice in this world.' Dai Xiaolin, 'Zhongguo Laogong Shouhaizhe Lūshi: Women Huode le Quanmian Shengsu' [Chinese Forced Labor Lawyer: We Got a Complete Victory] *Beijing Zhenbao* [Beijing Morning News] (27 Mar. 2004) (describing the reaction of plaintiffs, family members and the lawyers of a case against a Japanese transportation company).

⁸⁴ Beth Van Schaack, 'With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change' (2004) 57 *Vanderbilt Law Review* 2318.

doesn't Japan give us compensation? Why does Japan not apologize to us?'⁸⁵ When reporters pressed her on the difficulty of winning in civil litigation, Chen replied 'the Japanese government has superficially admitted its atrocities. But no matter what the Japanese courts decide, I will keep on suing.'⁸⁶

Third, lawsuits often generate significant media attention. This raises awareness among the public, which may pressure companies and governments to assume a more conciliatory posture vis-à-vis victims. During the discovery period of civil litigation, plaintiffs' attorneys may unearth new information about the underlying human rights abuses. For example, in 1998 lawsuits against the German subsidiary of Ford Motor Company, lawyers discovered a 1945 US Army report calling it 'the arsenal of Nazism' for its manufacture of war material.⁸⁷ The report also contradicted Ford's justification that it had 'lost all contact' with its German subsidiary in 1941.

In other words, litigation helps set the factual record straight.⁸⁸ In Europe, many countries have criminalized Holocaust denial, and prosecuted people who have published accounts that deny historical facts. Japan has no such laws, and a more contested relationship with the factual basis of World War II. Japanese politicians, including current prime minister Abe Shinzo, have made numerous statements either denying Japan's role in wartime atrocities, or downplaying the severity of these crimes.⁸⁹ Not that Japan is alone in this situation. Members of many post-conflict societies subscribe to an interpretation of history that differs radically from that of their neighbours, or former enemies, or from basic reality. The contemporary Balkan states epitomize this interpretive fragmentation. Each ethnic group 'has its own ethnic truth—an interpretation of the past that is enslaved to dominant interests and thereby has perpetuated the conflict. The fierce political battle between competing truths, memories and ethnic identities has intensified in the past decade.'⁹⁰ Given the multiple truths at stake, trials can play a role here in fact-finding, and truth-assertion, though the success of such efforts is by no means assured. The ICTY provides a cautionary tale. Particularly in Serbia, where 'denialism is mainstream', the tribunal 'failed to persuade the relevant target populations that the findings in its judgments are true.'⁹¹

In Japan, judges pen elaborate factual findings in their opinions. Given the contested discursive terrain that surrounds Japanese discussions of World War II, the judicial opinions provide a factual anchor in the quicksand of historical memory. Japanese courts have found that the Japanese Army was involved in the abduction, transportation, and forcible rape of the comfort women, as well as taking measures to ensure their hygiene.⁹² Other opinions have assiduously outlined Japan's slave labour programme, rescuing it from historical obscurity and cultural amnesia.⁹³ In light of the Japanese government's wilful attempts to alter

⁸⁵ Wang Xinli, 'Hainan "Weianfu" Yuangao Huiguo: Guansi Shu le Hai Zai Gao' [Hainan "Comfort Women" Plaintiff Returns Home: Lost the Suit But Will Appeal], *Xinhua* (2 Sept. 2006).

⁸⁶ *Ibid.*

⁸⁷ Ken Silverstein, 'Ford and the Fuhrer' *The Nation* (24 Jan. 2010).

⁸⁸ See Holder (n 9) 248–9.

⁸⁹ See Timothy Webster, 'Discursive Justice' (2018) 50 *New York University Journal of International Law & Policy* 1261.

⁹⁰ Elazar Barkan and Belma Becirbasic, 'The Politics of Memory, Victimization and Activism in Postconflict Bosnia & Herzegovina', in Klaus Neumann and Janna Thompson (eds), *Historical Justice & Memory* (Wisconsin 2015) 95, 98.

⁹¹ Marko Milanovic, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post Mortem' (2016) 110 *American Journal of International Law* 213.

⁹² *Ha Sun-nyo et al. v. Japan*. An English translation is available at Taihei Okada (trans.), 'The "Comfort Women" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan' (1999) 8 *Pacific Rim Law & Policy Journal* 64, 68

⁹³ *Cai Shujing v. Mitsui Mining Co.*, 1098 Hanrei Taimuzu 267 (Fukuoka D. Ct, 26 Apr. 2002).

history, by claiming reports were lost (when in fact they were simply hidden in government archives), litigation can help concretize the past.

Fourth, civil litigation brings legal judgment to historical events. Judges determine whether state conduct violated domestic and international law, reinserting the voice of reason into the chaos of war. As Lawrence Douglas has argued about Nuremberg, trials can ‘both show the world the facts of astonishing crimes, and demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense.’⁹⁴

In the post-war compensation lawsuits, Japanese judges have found that the state and corporate sector violated domestic tort and contract law, as well as international treaty and customary international law. Such niceties may mean little to victims, who would prefer apologies and damage awards. But lawyers and scholars take note. Even in robust democracies, courts rarely hold that their militaries or executive branches violated domestic law, to say nothing of international law.⁹⁵ So when a court finds its own government violated international humanitarian law or international human rights law, it helps end impunity, right a historical wrong, and bend the world, however slightly, to the arc of justice.

VI. Conclusion

Civil litigation—with its focus on individual grievances, rules of evidence, and procedural complexity—may not provide the ideal forum to resolve complicated issues of remediation after armed conflict. But in the absence of political will by state actors—the ones that would set up a tribunal, or a claims commission—litigation can make a positive and incremental contribution to peace. Attention to victims’ suffering, damage to property, and fidelity to facts, elude many post-conflict societies.

Civil litigation can address, if not redress, some of these concerns. The judicial opinion renders a version of events that might contradict or challenge revisionist narratives espoused by political classes, especially if those classes remain in power. Or an opinion can lend credence to denialist accounts by either not finding facts, or finding them in a particularly tendentious manner. Civil suits assign blame—even if indirectly—by holding certain conduct tortious, or finding a state violated international law. It can empower individuals to work through the violence and trauma of war, giving an officially sanctioned platform to discuss events that have been ignored, suppressed, or repressed.

Given the numerous historical, legal, and moral *omissions* that haunt post-conflict societies, civil litigation has helped write, rewrite, and reinforce the legacies of the war. To be sure, litigation could also catalyze a broader conversation about reparation among state actors in East Asia, as the Holocaust litigation did for Europe and the US. But given a more nationalist political class in Japan, and the disinterest of US government actors, civil litigation may remain the final word on the issues of legal liability, state redress, and individual reparation in East Asia for decades to come.

⁹⁴ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trial of the Holocaust* (Yale 2001) 3.

⁹⁵ Justice Rehnquist found the forcible abduction of a Mexican national, by the US Drug Enforcement Agency, did not violate an extradition treaty between the two countries. See *United States v. Alvarez-Machain*, 504 US 655, 670 (1992). Justice Stevens took the opposite view in his dissent, calling the abduction a ‘flagrant violation of international law.’ *Ibid.* 682.