

# A Reexamination of the Republic of Korea-Japan Claims Agreement of 1965 from the Perspective of International Law

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## **A Reexamination of the Republic Korea-Japan Claims Agreement of 1965 from the Perspective of International Law**

The Japanese government's stance reflected in the 1965 Republic of Korea-Japan Claims Agreement stems from the perception that its annexation of Korea was legal although the "1910 annexation treaty" was proven to have been coerced and hence declared null and invalid by Korean and Japanese intellectuals in 2010. The Claims Agreement was intended to settle the problems caused by Imperial Japan's illegal occupation and colonial rule of Korea, but the difference between this intention and the stance of the Japanese government has left a number of issues unresolved, demanding its reexamination in light of the coming fiftieth anniversary of the signing of the Agreement to establish a new relationship between the two countries.

The 1965 Claims Agreement has the following problems from the perspective of international law. First, the essential purpose of the Claims Agreement should have been a settlement for the Imperial Japan's illegal occupation and colonization of Korea that had been accomplished by the invalid forced annexation treaty, but it was altered to economic cooperation between the two countries, abandoning the issue of postwar reparations. Consequently, the problems that should have been settled by the Agreement still remain unresolved, and the Japanese military "comfort women" victims, who were not included in the negotiations, are left unredeemed with no compensation paid, paving the way to the current-day dispute of individual claims rights. Second, individual claims rights are an essential part of human rights, and a serious violation of such rights cannot be extinguished by a claims agreement between two States. Moreover, Japan's domestic "Law No. 144," legislation made in preparation for the enforcement of the Claims Agreement, also stipulates that rights to claim cannot be extinguished since they are "executory rights." In addition, the "Draft Articles on Diplomatic Protection" adopted by the United Nations International Law Commission in 2006 declares that individuals not be sacrificed to maintain amity between States, and it has brought a significant change in international law.

In line with the aforesaid developments, on August 30, 2011, the Constitutional Court of the Republic of Korea issued a historic ruling that the nonfeasance of the Korean government is unconstitutional since it is its duty to restitute the violated fundamental human rights of the "comfort women" victims by means of diplomatic negotiation or arbitration as stipulated in Article 3 of the

Claims Agreement.

As the year 2010, the centennial of Japan's "forced annexation of Korea" was the year that nullified and invalidated the annexation treaty, it is hoped that the year 2015, the fiftieth anniversary of the Claims Agreement, becomes the first year of the "establishment of true historical reconciliation."

**Keywords:** Korea-Japan Annexation Treaty, Korea-Japan Claims Agreement, Individual claim rights, Japanese military "comfort women," Constitutional court, Diplomatic protection

# A Reexamination of the Republic of Korea-Japan Claims Agreement of 1965 from the Perspective of International Law\*

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## I. Introduction

Japan's annexation of Korea marked the centennial year in 2010, offering an opportunity to realize that investigating the fundamental cause of historical conflict between Korea and Japan and finding a solution to this conflict is not only a historical obligation that our time has imposed upon us, but also a mission of justice. The centenary of the annexation has led us to a shared awareness about "historical justice" that we should pursue by seeking true historical reconciliation on the foundation of rightful history. In other words, if the meaning of justice

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\* This paper is a longer, more comprehensive version of the paper "The Reexamination of the Agreement on Settlement of Claims from the Perspective of International Law" presented on August 12, 2011, at the international conference hosted by the Northeast Asian History Foundation entitled "The 100th Anniversary of Japan's Annexation of Korea: Its History and Reexamination of Our Tasks."

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that history tries to teach us is rediscovered through an unending dialogue between the present and the past, then the jurisprudence of international law should commit to the realization of justice and ensure its continuous development as shared principles of international society (Doh See-hwan, 2010b).

The most memorable of the incidents in reexamining the centennial of Japan's annexation of Korea is the joint communiqué on July 28, 2010, a few weeks before the sixty-fifth celebration of Korea's liberation day, which proclaimed "the 1910 Annexation Treaty between Korea and Japan was null and void from the start" on the grounds of "historical justice." The communiqué was first issued by 214 Korean and Japanese intellectuals on May 10, 2010, but over a period of ten weeks was joined by 1,118 people from the two countries. Nevertheless, Kan Naoto, the then-Prime Minister of Japan, released a statement on August 10, 2010, to the effect that the 1910 Japanese annexation of Korea was in line with international law even though it might have been ethically problematic, saying, "Although it was against the will of the Korean people, the annexation itself was valid."

The Japanese government has been holding the position that the Japanese annexation of Korea was legal based on the principle of intertemporal law, that is, the international law of the time that the annexation treaty was concluded. Thus hiding the coercion with essential intent on aggression practiced during the process of the agreement, which is grounds for the invalidity of the annexation treaty, Japan tried to furnish the conditions to make the annexation treaty legal in form and process under international law. However, even under the international law of that period, an inter-country agreement without a commission of plenipotentiary authority and an instrument of ratification from the head of the country is proved to be illegal. This is a historical irony and a pending issue that requires reconsideration from the perspective of "historical justice."

The Japanese government's position based on the perception that

the 1910 annexation was legal is projected onto the 1965 treaty of basic relations and normalization between the Republic of Korea and Japan. In light of the fiftieth anniversary of this treaty in 2015, it is time to reexamine the unresolved issues to establish a new relationship between South Korea and Japan.

Moreover, on August 30, 2011, the Constitutional Court of the Republic of Korea ruled it unconstitutional on the grounds of Article 3 of the “Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan” (hereinafter, the Claims Agreement) as it being a breach of duty to act if the government does not actively seek to resolve the problem of compensation for the Japanese military “comfort women” victims via diplomatic negotiation or arbitration (“Ruling of the Constitutional Court of the Republic of Korea” [Constitutional Court Ruling], August 30, 2011; *Donga Ilbo*, August 31, 2011). This ruling of the Korean Constitutional Court has significant implications.

Among many issues concerning the 1965 Claims Agreement between Korea and Japan, the claims rights was the most dominant issue during the agreement process<sup>1</sup> and has been drawing the most controversy between the two countries to this day. Therefore, this paper reexamines the Claims Agreement, whereby it attempts at finding solutions for the remaining problems for historical reconciliation to achieve the peace and prosperity of the two countries.

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<sup>1</sup> Kim Yeong-mi (2008, p. 103) describes the process thus: “In the Korea-Japan Normalization Talks, if the problem of basic relations concerned the mental aspects of the settlement of past history, the problem of claims rights concerned the material aspects. In fact, the main agenda of the Talks was the issue of the claims rights, and the matter of basic relations was simply a secondary issue.”

## II. The Story behind the Republic of Korea-Japan Claims Agreement

### 2.1 The Process of the Agreement

The main purpose of the Republic of Korea-Japan talks was to normalize the diplomatic relations between the two countries by settling and resolving various problems caused by Japan's colonial rule of Korea. During this process, the most significant agenda item concerning Japan's postwar reparations was the claims settlement. However, the claims settlement between the Republic of Korea and Japan was discussed not in terms of compensation or indemnification for the damages from the colonial rule but with the logic of economic cooperation (Lee Hyeon-jin, 2008, p. 73).

At the conclusion of World War II in 1945, the aim of United States policy toward East Asia was emasculating Japan and building a peace regime along with the Soviet Union and China. However, after encountering a series of postwar developments such as the Soviet Union's expansionism, the communization of Eastern Europe, the communist party seizing power in China, and the Korean War, the United States changed its policy, taking Japan as a partner in the Cold War regime and as a member in the alliance against the expansion of the Communist bloc. Specific examples that illustrate this change of American policy are "the San Francisco Peace Treaty" and "the United States-Japan Security Treaty"<sup>2</sup> signed in September 1951, in which the United States advised Japan to normalize diplomatic relations with South Korea and form a regional cooperation bloc. This intention of the United

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<sup>2</sup> After signing the San Francisco Peace Treaty, Japan became a member state of the International Bank for Reconstruction and Development in August 1952, of the General Agreement on Tariffs and Trade in September 1955, and of the United Nations in 1956, thus quickly joining the capitalist world and establishing a firm position in the world order (Hong In-suk, 1995).

States was the force that instigated the normalization talks between South Korea and Japan in October 1951 (Chung Jae-jeong, 2006, p. 240).

In the late 1950s, an economic recession increased the necessity for a system of regional cooperation in Northeast Asia, and the United States government changed its foreign aid policy in the 1960s to reduce its burden in Asia by forming a cooperation partnership with Japan and performing the role of mediator between South Korea and Japan. Against this backdrop, the American government was actively involved in settling the problem of the compensation claims, urging the two countries to reach a political compromise and proposing a scheme of economic cooperation that linked Japan's economic aid with Korea's reparation claims. The Claims Agreement in the 1960s, after all, was finalized in the form of economic cooperation as the interests of the three countries, that is, the United States' motive to reduce its financial burden of aid, Japan's demand for places to invest its radically increased monopoly capital, and the South Korean government's desire to secure its unstable political base with economic development, coincided with each other (Lee Hyeon-jin, *op. cit.*, p. 94).

## 2.2. The Claims Agreement and the San Francisco Peace Treaty

The San Francisco Peace Treaty, which marked its sixtieth year in 2011, was forged in 1951 and enacted in 1952. The treaty had substantial impact on the 1965 Korea-Japan Claims Settlement Agreement and has been a target of controversy in this regard. Article 2, paragraph 1 of the Claims Agreement<sup>3</sup> refers to Article 4 (a) of the San Francisco Peace Treaty.<sup>4</sup> (See note 4.)

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<sup>3</sup> The 1965 Republic of Korea-Japan Claims Agreement, Article 2, paragraph 1: "The claims between the High Contracting Parties and their peoples, including those stipulated in Article 4 (a) of the Peace Treaty with Japan signed at the city of San Francisco on September 8, 1951, have been settled completely and finally."

Assuming that the 1965 Republic of Korea-Japan Claims Agreement is subordinate to the San Francisco Peace Treaty (Nam Gi-jeong, 2008, p. 37), one interpretation defines the legal grounds of South Korea's claims rights against Japan in terms of Article 4 (a) of the San Francisco Peace Treaty, limiting the items of the Claims Agreement within the provisions of the Article (Jeong Il-yeong, 1965, p. 254; Jeong In-seop, 1994, p. 514). According to this interpretation, since its claims rights are provided solely by Article 4 but precluded from the application of Article 14 of the San Francisco Peace Treaty, South Korea cannot make compensation claims against Japan and can make claims only to matters pertaining strictly to debts and credits (Jeong Il-yeong, *op. cit.*, pp. 244-245).

However, a treaty, in principle, has legal force only for the signatories and cannot create any right or obligation for a third State without the consent of the State.<sup>5</sup> Therefore, the interpretation of Article 4 (a) of the San Francisco Peace Treaty must be that it applies only with the consent of the Republic of Korea, legally binding South Korea and Japan to comply with the Article's stipulation on property and claims. Therefore, one cannot conclude that the preclusion of South Korea from the provisions of Article 14 concerning war reparations does not automatically and legally preclude Korea from exercising its rights. It is more accurate to characterize the San Francisco Peace Treaty as a political stepping stone that facilitated the talks between South Korea and

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<sup>4</sup> The 1951 San Francisco Peace Treaty, Article 4 (a): "The disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities."

<sup>5</sup> The 1969 Vienna Convention on the Law of Treaties, Article 34: "A treaty does not create either obligations or rights for a third State without its consent" and Article 35: "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

Japan. And even though Article 4 of the Treaty was instrumental to the Claims Agreement between the two countries, it does not warrant the logic that only the matters stipulated in Article 4 of the Peace Treaty are subject to discussion. It is solely up to the two sovereign States to decide the issues for negotiation, whether to limit to the matters stipulated in Article 4 of the Treaty or include more issues concerning the normalizations of their relations.

Accordingly, the simple logic such that the claims rights in the Republic of Korea-Japan Claims Agreement are limited to compensation claims since the legal grounds of the Agreement are provided by Article 4 of the Treaty<sup>6</sup> is not feasible (Jeong In-seop, *op. cit.*, pp. 514-515). In light of the joint declaration of “the invalidity of the 1910 Korea-Japan Annexation Treaty” made in 2010 by South Korean and Japanese intellectuals on the ground of “historical justice,” the claims settlement between the two countries should have included claims rights to reparations for Japan’s illegal colonization of Korea achieved via the forced annexation treaty, which was in essence imperialistic and therefore null and invalid.<sup>7</sup>

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<sup>6</sup> Jeong In-seop (*op.cit.*, p. 21) describes the different interpretations of “claims rights” between Korea and Japan: “During the Normalization Talks, Korea used the term ‘claims rights’ to refer to all the substantive rights that Korea and its people can demand of Japan on legal grounds, and its ‘Eight Items’ (i.e. ‘Outline of the Claims of the Republic of Korea against Japan’) describes specific claims in accordance with this interpretation. However, as codifying the Agreement, Japan insisted that the ‘claims rights’ be understood not as ‘substantive rights’ but as ‘rights to claim,’ and this interpretation was adopted and reflected in Article 2 of the final form of the Claims Agreement.” Also, Park Bae-geun (2006, p. 329) describes how the Republic of Korea tried to specify its interpretation of “claims rights” by adding it in the Minutes: “Against this backdrop, Paragraph 2 (a) of the Agreed Minutes (I) to the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan came to stipulate thus on the claims rights, ‘It is understood that ‘property, rights and interests’ means all kinds of substantial rights which are recognized under law to be of property value.’”

<sup>7</sup> For further details see Mushakoji Kinhide (2009), who argued that the concept of “the crime of colonialism” needed to be established at the 2001 World Conference against Racism in Durban, South Africa, and Doh See-hwan (2010a, pp. 362-363).

### III. Signing of the Republic of Korea-Japan Claims Agreement and Japanese Law No. 144

Important stipulations in the 1965 Agreement on the “Settlement of Problem concerning Property and Claims and the Economic Cooperation” between the Republic of Korea and Japan are provided in Article 1, paragraph 1<sup>8</sup> and Article 2, paragraphs 1 and 3<sup>9</sup> of the Claims Agreement, and paragraph 2 of the Agreed Minutes.<sup>10</sup>

In relation to Article 2, paragraph 3 of the Claims Agreement concerning “the measures relating to the property, rights, and interests of either High Contracting Party and its people which were brought under the control of the other High Contracting Party on the date of the signing

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<sup>8</sup> The 1965 Claims Agreement, Article 1, paragraph 1: “Japan shall supply the Republic of Korea with: (a) Products of Japan and the services of Japanese people, free of charge, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars (\$300,000,000).....;(b) Long-term and low-interest loans up to so much in yen as shall be equivalent to two hundred million United States dollars (\$200,000,000), ... which will be covered by procuring the products of Japan and the services of Japanese people necessary for implementing the enterprises ... within a period of ten years of the date on which the present Agreement enters into force.”

<sup>9</sup> The 1965 Claims Agreement, Article 2, paragraph 3: “... no claims shall be made with respect to the measures relating to the property, rights, and interests of either High Contracting Party and its people which were brought under the control of the other High Contracting Party on the date of the signing of the present Agreement, or to all the claims of either High Contracting Party and its people arising from the causes which occurred prior to that date.”

<sup>10</sup> Agreed Minutes to the 1965 Claims Agreement (I), paragraph 2: “(a) It is understood that “property, rights and interests” means all kinds of substantial rights which are recognized under law to be of property value; (e) It is agreed that measures to be taken in accordance with the provisions of paragraph 5 mean the internal measures of the respective countries which would be taken for the settlement of problem concerning property, rights and interests of the two countries and their nationals and problem concerning the claims between the two countries and their nationals, referred to in paragraph 1; (g) It is confirmed that problem concerning property, rights and interests of the two countries and their nationals and concerning the claims between the two countries and their nationals, which is settled completely and finally as mentioned in paragraph 1, includes any claim falling within the scope of the ‘Outline of the Claims of the Republic of Korea against Japan’ (the so-called “Eight Items”), which was submitted by the Korean side at the Japan-Republic of Korea negotiations and that, therefore, no contention can be made with respect to the above-mentioned Outline of the Claims of the Republic of Korea against Japan.”

of the present Agreement,” Japan enacted Law No. 144, namely, “Law regarding Measures to be Taken with respect to the Property Rights of the Republic of Korea upon Enforcement Article 2 of the Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea,” on December 17, 1965. With this legislation, Japan claimed that the “measures relating to the property, rights, and interests” in Article 2, paragraph 3 of the Claims Agreement, among “the property of the Republic of Korea or its people (including juridical persons)” are “extinguished from the date of June 22, 1965.”

The rights of the Koreans purportedly extinguished by Law No. 144 specifically include creditor’s rights, liens, proprietary rights, and rights to securities, which apparently refer to “property, rights, and interests” of the Koreans stipulated in Article 2, paragraph 1 of the Claims Agreement. Also, it is apparent that Law No. 144 has not extinguished the “claims rights” stipulated in Article 2, paragraph 1 of the Agreement. There is no stipulation in Law 144 concerning the extinguishment of the “claims rights,” and the “claims rights” in Article 2, paragraph 1 of the Claims Agreement are executory rights that cannot be extinguished. Therefore, no Japanese domestic law has ever been able to extinguish the “claims rights” of Koreans (Park Bae-geun, *op. cit.*, p. 333).

This fact can be also confirmed by the official stance that the Japanese government pronounced at the Japanese Diet. Director-General Tanba Minoru of the Ministry of Foreign Affairs Treaties Bureau made it clear that waiving claims rights does not entail the extinguishment of an individual’s right of action.<sup>11</sup> Takeuchi Yukio, the Deputy Director-

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<sup>11</sup> Meeting Minutes of the Japanese House of Councilors, 12th Diet, Committee on Foreign Affairs, April 6, 1993, No. 3, p. 11: Tanba answered, “The extinguishment of so-called individual claims rights does not entail the extinguishment of the rights to sue at a domestic court of the other country. ... Therefore, if an individual, in this case a Philippine or a Korean citizen, comes to

General of the Ministry of Foreign Affairs, also affirmed in relation to Article 2, paragraph 1 of the Claims Agreement that the State of an individual, in this case the Republic of Korea, cannot exercise its right of diplomatic protection, acknowledging the claims rights of individuals.<sup>12</sup>

That is, based on the fact that the South Korean government has waived its right of diplomatic protection and guaranteed that it would not make any claims against Japan's domestic decisions ("Claims Agreement," Article 2, paragraph 3), the Japanese government has extinguished the property, rights, and interests of Korean nationals by enacting a domestic legislation. In addition, Law No. 144 contains no provisions for the claims rights of Korean nationals. Therefore, it is clearly the case that the Law has not extinguished the claims rights of Koreans.

## **IV. International Law Problems of the Republic of Korea-Japan Claims Agreement**

### **4.1. The Nature of Claims Funds in the Claims Agreement**

According to Article 1 of the Claims Agreement, it was agreed that Japan would supply "products of Japan and the services of Japanese people" equivalent to US \$300 million dollars free of charge, and Article 2 announced, "... the claims ... have been settled completely and finally."

With regard to Article 1 and 2 of the Claims Agreement, the

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Japan and files a lawsuit here, the matter will lie entirely in the hands of the judiciary; so the administration is looking closely at the development..."

<sup>12</sup> Meeting Minutes of the Japanese House of Councilors, 129th Diet, Committee on Cabinet, March 25, 1994, No. 1, p. 8: Takeuchi, answered, "The mechanism of the treaty does not permit a State, in this case Korea, to exercise diplomatic protection for its citizen in the domestic judiciary process of our country [Japan]. Therefore, with regard to individual claims rights ... the terms of the treaty itself do not extinguish individual property rights or their claims rights directly within the meaning of domestic law."

Japanese government claims that no legal reciprocity exists between the two States although the same Agreement imposes the promotion of economic cooperation and settlement of the problem of claims rights. In other words, the Japanese government has been interpreting the free US \$300 million to be a “liberation gift” or “economic cooperation funds” (Tanida et al., 1966, p. 62). This interpretation of the Japanese government is in line with its stance that the Republic of Korea-Japan Claims Agreement is not about taking responsibility for the colonial rule of Korea.

To summarize, regarding the Korea-Japan Annexation Treaty and the Claims Agreement, the Japanese government has been making the following assertions: (1) The 1910 Annexation Treaty was valid at the time of signing but was annulled on August 15, 1945. (2) Thus, Japan’s rule of Korea for 35 years was legal. (3) Therefore, Japan has not offered anything *in compensation for* Japan’s rule of Korea through the 1965 Claims Agreement. (4) But the problem of claims rights concerning “Joseon’s secession and independence” has been settled (Kim Chang-rok, 2010, pp. 204-205).

#### 4.2. Individual Claims Rights in the 1965 Republic of Korea-Japan Claims Agreement

The Japanese government has consistently claimed that Article 2 (1) of the Claims Agreement has extinguished the State’s right of diplomatic protection, but not the individual’s rights to claim. Meanwhile, Japan has also extinguished the “property, rights, and interests” that Korean nationals have towards the Japanese government and Japanese people through domestic legislation by enacting Law No. 144. The South Korean government promised not to contend against Japan’s domestic legislation that extinguishes such rights of Korean nationals in the Agreement, and what this promise specifically entails is the relinquishment of its right of diplomatic protection (Park Bae-geun, op.

cit., p. 340).

In March 2010, the media released to the public three confidential documents made by the Japanese Ministry of Foreign Affairs around the time of the Claims Agreement in 1965: (1) “The Legal Definition of the Waiver of People’s Property and Claims Rights in the Peace Treaty” (April 6, 1965); (2) “Article 2 of the Republic of Korea-Japan Claims Agreement and the Problem of Seized Fishing Vessels” (May 28, 1965); and (3) “The Republic of Korea-Japan Claims Agreement and the Domestic Compensation Problem concerning Private Property Held in the Republic of Korea” (September 1, 1965). These documents also acknowledge individual claims rights. The Japanese government prepared these documents in case Japanese fishermen file compensation suits against the South Korean government which has seized their vessels crossing the Peace Line declared by the Syngman Rhee government of South Korea, and all three deem the matter of individual claims rights to be separate from the Republic of Korea-Japan Claims Agreement. In order to protect the property rights of Japanese fishermen, the Japanese government prepared a legal interpretation that individual claims rights are valid regardless of the signing of the Claims Agreement. In this line of interpretation, since the principles of the Claims Agreement should apply equally to the citizens of both countries, the same individual claims rights should be allowed to Koreans who seek compensations for their damages incurred by the Imperial Japan even after the signing of the Republic Korea-Japan Claims Agreement.

As stated in the aforementioned documents of the Japanese Ministry of Foreign Affairs, in 1965, Japan seems to have maintained the position that the Claims Agreement only extinguishes the State’s right of diplomatic protection, to protect their interests. However, entering the 1990s, with the collapse of the Cold War world order, the issue of Japan’s responsibility for its past history, which had been sealed in the geopolitics of the cold-war era, arose and Japan came to face strong demands from Korean colonial victims including the Japanese military

“comfort women” for compensation and pressure from international society. The Japanese government actively acknowledged the “possible existence” of individual claims rights and defined the right to claim specifically to be “a status that allows one to make a claim if a legal ground for the claim itself is in dispute, excluding rights to ‘property, rights, and interests,’”<sup>13</sup> interpreting the “judgment of the court”<sup>14</sup> to be what determines the validity of a claim.

However, in the 2000s were issued rulings, in particular from Japanese lower courts, which preclude “prescription” and “the jurisprudence of State responsibility” and more Korean victims bringing lawsuits to American and South Korean courts. Being pressured by this development, the Japanese government presented a new interpretation that Japan has no legal obligation to respond to the claims by Korean nationals that are made based on the “claims rights” stipulated in the Claims Agreement. This new interpretation seems to have been adopted because, at that time, the State of California in the United States passed legislation that precludes “prescription” and because Japan’s particular logic of “the jurisprudence of waiver of State responsibility” failed to persuade American courts.<sup>15</sup>

#### 4.3. The Decision of the Republic of Korea’s Citizen and Government Joint Committee in 2005

On August 26, 2005, the joint committee of citizens and government led

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<sup>13</sup> Meeting Minutes of the Japanese House of Representatives Budget Committee, May 26, 1993, No. 26, pp. 36-37: Director-General Tanba’s answer.

<sup>14</sup> Minutes of the Japanese House of Representatives Budget Committee, March 9, 1992, No. 15, p. 11: the answer by Kudō Atsuo (工藤敦夫), Secretary of the Cabinet Legislation Bureau.

<sup>15</sup> This position of the Japanese government is a result not only of victims’ continuous demands but also of the Japanese government’s trust in its domestic courts that have been ruling against the plaintiffs, following the government’s “prescription” and “the jurisprudence of waiver of state responsibility.” See Kim Chang-rok (2007, pp. 340-348) for further details.

by South Korea's then-Prime Minister Lee Hae-chan, announced the following assessments and policy directions to deal with the aftermaths of the public release of the 1965 Republic of Korea-Japan Claims Agreement documents:

- (1) The purpose of the 1965 Republic of Korea-Japan Claims Agreement fundamentally was not to make claims to reparations for Japan's colonial rule, but to settle the problems of finances and civil liabilities between South Korea and Japan based on Article 4 of the San Francisco Peace Treaty.
- (2) Crimes against humanity such as the Japanese military "comfort women" that the Japanese government or military was involved in cannot be said to have been settled by the Claims Agreement, and the Japanese government still has legal responsibility for these crimes.
- (3) The matters regarding Sakhalin Koreans and Korean atomic bomb victims are not settled by the Claims Agreement, either.
- (4) During the Claims Agreement negotiations, since the Japanese government refused to pay legal reparations for forced mobilization, the South Korean government demanded political compensation on the grounds of the "historical damage of suffering," and this situation of the two countries is reflected in the free funds stipulated in the Claims Agreement.
- (5) The free 300 million dollars paid by Japan pursuant to the Claims Agreement covers "the funds to settle the problems of private property (insurances and savings), claims rights that the South Korean government can exercise as a State including the Japanese bonds owned by the Government-General of Korea, and reparations for forced mobilization."
- (6) Since the Claims Agreement determined the amount of payment through a political agreement not in terms of the items of claim, it is difficult to calculate the amount for each item of claim; but the South Korean government has a moral obligation to use a significant amount of

the received free funds for the forced mobilization victims.

(7) The South Korean government must continue its efforts to seek diplomatic measures regarding the issues of crimes against humanity committed under the Imperial Japan's colonial rule, and continue to raise the issue of the Japanese military "comfort women" at international organizations including the United Nations Human Rights Council.

The supra interpretation of the committee on the Republic of Korea-Japan Claims Agreement has its significance in the following areas:

(1) clearly acknowledging the rights of victims by distinguishing legal and moral obligations; (2) making clear that the Japanese government still has legal responsibility for the crimes against humanity victims of the Imperial Japan's government and military, including the "comfort women," Sakhalin Koreans left stranded, and atomic bomb victims.<sup>16</sup>

#### 4.4. The 2006 UN International Law Commission Draft Articles on Diplomatic Protection

What should be taken noticed concerning the individual claims rights in the Republic of Korea-Japan Claims Agreement is the discussion regarding the Draft Articles on Diplomatic Protection that the UN ILC (United Nations International Law Commission) deliberated and adopted at its fifty-eighth meeting in 2006. The UN ILC Draft Articles on Diplomatic Protection (hereinafter, "ILC Draft") comes under ILC Draft Article 44 of the Implementation Act. The International Court of Justice immediately applied this draft to the case concerning Ahmadou Sadio Diallo in 2007 (Kim Dae-sun, 2007, pp. 204-205) and announced that over the past several decades, international law has seen great development in

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<sup>16</sup> The Constitutional Court also cited the arguments made by the Joint Committee when it ruled the South Korean government guilty of nonfeasance pursuant to Article 3 of the Claims Agreement with regard to the "comfort women." Refer to the "Constitutional Court Ruling" (August 30, 2011).

the direction of giving more individual rights, and this development has extended the provisions of diplomatic protection, which used to cover just the minimum scale of violations against foreigners, to include the violations of human rights that are “in particular” internationally established (Kim Dae-sun, 2011, pp. 655-656).

Under international law, “diplomatic protection” has been used as a means for a State to call another State to take international responsibility for damages done to individuals of its nationality, taking them as damages to the State, since individuals could not exercise claims rights in international law. However, the 2006 ILC Draft Articles on Diplomatic Protection has brought important changes in the system of diplomatic protection with the increase of continuous interdependence in international society, development of human rights protection, and endeavors to elevate the position of individuals under international law (Kim Bu-chan, 2005, p. 75).<sup>17</sup> As is well-known, diplomatic protection as a traditional instrument (Kim Bu-chan, 2001, pp. 77-104; Kim Seong-jun, 2001, pp. 1-16; Lee Jin-gyu, 2011, pp. 117-140) has its roots in the proposition made by Emmerich de Vattel in 1758: “Whoever ill-treats a citizen indirectly injures the State, which must protect the citizen.”<sup>18</sup> This concept is closely related with the South Korean government’s diplomatic protection of its nationals since the problem of Japan’s international responsibility for the victims of forced labor and “comfort women” suffered at the hands of the Japanese government during the colonial era has not been resolved (Kim Bu-chan, op. cit., p. 75).

In this regard, according to Article 19 and its footnote in the ILC

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<sup>17</sup> See Kim Seok-ho (2007, pp. 407-434) and Kim Chang-rok (2009b, pp. 341-344) for more discussion of theoretical flaws and practical risks of diplomatic protection.

<sup>18</sup> “Whoever ill-treats a citizen indirectly injures the state, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him ....” (de Vattel, 1758/1916, p. 136). See also the United Nations Report of the International Law Commission on the work of its fifty-eighth session, 1 May-9 June and 3 July-11 August 2006, UN Doc. A/61/10(2006), p. 25.

Draft on Diplomatic Protection,<sup>19</sup> these practices are already included in customary international law or can be considered a set of exercises in progressive development (“ILC Draft,” 2006, pp. 97-100).

#### 4.5. The Constitutional Court Ruling in 2011: Violation of the Constitution by Nonfeasance

On August 30, 2011, the Constitutional Court of the Republic of Korea made a historic decision concerning the rights to compensation claims under the Republic of Korea-Japan Claims Agreement in relation to the violation of basic rights of the Japanese military “comfort women” victims. The important points of the Constitutional Court ruling on “the Violation of the Constitution by Nonfeasance under Article 3 of the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan” (“Constitutional Court Ruling,” August 30, 2011) are explicated in the following paragraphs.

Under the provisions of Article 2, paragraph 2 of the Preamble of the Constitution, Article 10 of the Constitution, and Article 2 of the Claims Agreement, the South Korean government, the claimant, has a duty to act in accordance with Article 3 of the Agreement to settle disputes raised by the claimant. The Constitution demands the South Korean government to assist and protect South Korean nationals who have suffered damages to their human dignity and value by organized wrongful acts continually committed by the State of Japan to succeed with their compensation claims. Forsaking this duty can lead to a severe

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<sup>19</sup> Article 19, Recommended Practice: “A State entitled to exercise diplomatic protection according to the present draft articles, should: (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.”

infringement of the claimant’s fundamental rights. Therefore, the claimant’s duty to act is prescribed by the Constitution and specified in the ordinance.

Although the South Korean government did not directly commit acts of infringement of the basic rights of the “comfort women” victims, it has brought circumstances to obstruct the realization of their rights to claim compensation against Japan and the restoration of their human dignity and value by signing the Claims Agreement without clear specification on claims rights, using instead the generic wording “all the claims.”<sup>20</sup> Therefore, the ruling emphasized that the South Korean government has a specific responsibility to remove the obstructive circumstances.

The nonfeasance of the State’s duty to enter into a process of dispute settlement under Article 3 of the Claims Agreement infringes upon the fundamental rights of the claimant, and therefore is unconstitutional. The unconstitutionality of the nonfeasance is determined in accordance with whether or not the infringement has been within the scope of discretionary power of the State authority, considering the following four criteria: (1) the importance of the infringed fundamental rights; (2) the urgency of the infringed rights; (3) the remediability of the infringed rights; and (4) national interests conflicting the duty to act.

With the aforementioned criteria, the Constitutional Court ruled the nonfeasance of the Korean government for the cause of the Japanese military “comfort women” unconstitutional on the following grounds. First, the compensation claims made by the “comfort women” victims for the crimes against humanity extensively committed by the State of Japan are a property right guaranteed by the Constitution. Moreover, the

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<sup>20</sup> This concept is generally defined in Article 2, paragraph 3 of the Claims Agreement and Paragraph 2 (g) of the Agreed Minutes to the same agreement.

success of the claims means reclaiming *a posteriori* the human dignity and value as well as physical liberty that were cruelly and continuously violated. Therefore, the fundamental rights infringed by the claimer's nonfeasance are very important. Second, all of the "comfort women" victims are of a very advanced age, and more delay in time can render it forever impossible to win the compensation claims and thereby rectify historical justice and restore violated human dignity and value. Therefore, it can be concluded that redeeming their violated rights in this case is very urgent. Third, judging from the circumstances involving the process and signing of the Claims Agreement and a series of movements inside and outside the country, there is not a small chance to remedy the violated rights. Fourth, even considering the characteristics of diplomacy that requires strategic decisions based on the understanding of the geopolitical situations, reasons that the claimer cited for the nonfeasance such as "the possibility to develop into consumptive legal disputes" or "uneasy diplomatic relations" are very vague and abstract. Therefore, they cannot be deemed valid reasons or serious national interests to forsake the duty to act for the claimants, who are in severe danger of their fundamental rights being violated.

To summarize the *supra* arguments, entering into the course of dispute settlement pursuant to Article 3 of the Claims Agreement is the only reasonable exercise of the discretionary power of the State authority that matches its Constitutional provisions of the fundamental rights. Therefore, the Constitutional Court determined the nonfeasance of the Korean government to be unconstitutional, since its inaction can bring a serious infringement of fundamental rights of the claimants.

## V. Conclusion

The Japanese government's position on the claims against the Japanese colonial rule stems from its perception that Japan's annexation of Korea itself was legal. This perception is fully reflected in the Republic of

Korea-Japan Claims Agreement of 1965 that was made to settle the problems of Imperial Japan's colonial era and normalize the basic diplomatic relations between the Republic of Korea and Japan, leading to the current disputes between the two countries.

In other words, the essential nature of the Claims Agreement has been altered to economic cooperation instead of the settlement for Imperial Japan's illegal occupation and colonial rule of Korea, which was accomplished by the invalid "forced annexation treaty," abandoning the problem of postwar reparations. Consequently, the problems that should have been settled in the Claims Agreement still remain unresolved, and the Japanese military "comfort women" victims, who have not been included in the negotiations, are left unredeemed with no compensation paid, leading to the current-day dispute of individual claims rights.

The Japanese government cites Article 2, paragraph 1 of the Claims Agreement as grounds for the settlement for all wrongful acts committed during the period of its illegal occupation and colonial rule of Korea, and has been denying its legal obligation. That is, Japan has maintained the position that all claims to property have been settled and finalized by the Claims Agreement, for the purpose of the Agreement was to settle the past colonization issues and normalize the diplomatic relations between the two countries.<sup>21</sup> The following criticisms can be made of this position of Japan.

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<sup>21</sup> The Japanese government presents the following four arguments for its position. First, the problems concerning property, rights, and interests of the two High Contracting States and their peoples and the claims between the two States and between their peoples have been settled completely and fully, as confirmed by the stipulation in Article 2, paragraph 1 of the Claims Agreement. Second, either High Contracting State and its people which were brought under the control of the other High Contracting State on the date of the signing of the present Agreement, or to all the claims of either High Contracting State and its people arising from the causes which occurred prior to that date ("Claims Agreement," Article 2, paragraph 3). Third, although the "Eight Items," submitted by the Korean side, were simply concrete examples of claims, Japan interprets them to cover all the claims and insists that all the claims have been fully and completely settled ("Agreed Minutes to the Claims Agreement, Paragraph 2 (g)"). Fourth, there is no provision on additional compensation in the Agreement.

First, Article 2, paragraph 3 of the Claims Agreement has extinguished the diplomatic protection of the States, but not individual claims rights. Therefore, individual claims rights are still effective (Lee Jang-hui, 1998, pp. 38-39). Moreover, the UN ILC adopted the “Draft Articles on Diplomatic Protection” at its fifty-eighth meeting in 2006, bringing an important change of view in international law. The Draft departs from the traditional interpretation of diplomatic protection that regards infringement upon individuals as infringement upon the State, characterizing it as an illusion or a subject of discussion, and declares that an individual must not be sacrificed to maintain amity between States.

Second, the Claims Agreement did not waive the right to compensation claims. Since the Agreement was finalized under the implicit understanding that the 1910 Korea-Japan Annexation Treaty was legal, its scope of compensation does not cover any damage to Korea or Korean people under the colonial rule, but is limited to losses resulting from the secession of territory after Korea’s independence, such as the rights to property and civil claims.<sup>22</sup> The joint statement made by South Korean and Japanese intellectuals that “the 1910 Korea-Japan Annexation Treaty was null and void” eloquently pronounces the illegality of Japan’s colonial rule and unfinished compensation for the crimes by Imperial Japan.

Third, as an organized war crime against humanity by the Japanese government and military,<sup>23</sup> the issue of the “comfort women” should have been an essential part of the negotiations for the Claims Agreement.

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<sup>22</sup> The Claims Agreement contains no provisions on compensation for human rights violation or criminal charges for international crimes; therefore, Japan’s civil compensation liability and international criminal liability have not been extinguished for the human rights violation of the ‘comfort women,’ one of the most atrocious crimes against humanity Imperial Japan committed. Refer to the “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity” adopted by the United Nations General Assembly on November 26, 1968.

But it was left unsettled because the contracting parties did not intend to settle the problem, making it a valid case for the termination of the treaty under *clausula rebus sic stantibus* (lit., things thus standing) or pursuant to Article 62 of the 1969 Vienna Convention on the Law of Treaties. With Kim Hak-sun's testimony in August 1991, the Japanese military's exploitation of women as sex slaves was revealed, and this serious violation of human rights should be an essential part of the treaty that necessitates an agreement and creates fundamental changes in the circumstances of the treaty.<sup>24</sup>

Fourth, as discussed above, even if the Claims Agreement is subordinate to the San Francisco Peace Treaty, according to the third State effect, it does not mean that the legal grounds of claims rights against Japan should be limited to Article 4 of the Treaty (compensation for loss), precluding Article 14 of the same treaty (compensation for damage). Rather, since the Claims Agreement was enacted to resolve the problems aroused by Japan's illegal occupation and colonization of Korea induced by the illegal and invalid "forced annexation treaty," it should include provisions for the right to claim damage compensation for

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<sup>23</sup> *Donga Ilbo* (January 11, 1992, p. 1): Yoshimi Yoshiaki, a professor of modern Japanese history at Chuo University discovered in the "Confidential Daily Reports of the Army" (*J. Riku shimitsu dainisshi*, 陸支密大日誌) a file of confidential documents transmitted between the Imperial Army Headquarters and troops stationed in China, "notices," and a "wartime diary" that reveal the Japanese army directed, managed, and controlled the installation of the "comfort women" houses and recruitment of "comfort women." The documents have been in the possession of the Ministry of Defense National Institute for Defense Studies Library.

<sup>24</sup> *Donga Ilbo* (June 24, 1992, p. 1): Former Minister of Foreign Affairs Kim Yong-sik claimed that since the problem of compensation for damage has never been discussed in the Republic of Korea-Japan talks, South Korea could certainly demand Japan to reopen the negotiations. Despite Japan's position that all the claims have been settled by the Republic of Korea-Japan Claims Agreement, he argued that Japan's insistence that it paid *all* reparations, although it has not paid damage compensation, means that it is acknowledging the wrongful acts against the "comfort women," the compensation for which should be included in the reparations, but Japan has never officially acknowledged these acts. Also, the South Korean government has not distributed any of the funds of the free 300 million dollars and the loan 200 million dollars received from Japan to the "comfort women" or other victims.

the wrongful acts committed by Japan against Korea and Korean people during the illegal colonial rule of Korea.

Fifth, there is a precedent for demanding more reparations on the grounds of *clausula rebus sic stantibus* after a treaty or an agreement was finalized. France signed “the Franco-German Agreement on the Compensation of French Victims of Nazi Persecution” with West Germany on July 15, 1960, and received 400 million marks from West Germany. Article 3 of the Agreement contains final provisions that ensure the complete settlement of compensation claims to all the French victims who suffered deprivation of freedom or physical injuries under Nazi persecution or their surviving family members. Despite this stipulation that declares the complete settlement of all current and future claims, France demanded of West Germany more reparations for the “forced laborers,” which West Germany paid on March 13, 1981, for the purpose of improving the Franco-German understanding, by signing a new treaty called “The Bilateral Treaty on the Establishment of a Foundation for the Improvement of Franco-German Understanding” and establishing a fund of 250 million marks for the foundation. This example indicates that the South Korean government can also demand a new treaty for additional reparations (Lee Jang-hui, *op. cit.* p. 59).

Sixth, major international law associations and the United Nations Human Rights Council also demand Japan to take “State” responsibility for the Japanese military “comfort women” victims. The International Commission of Jurists, for example, recognized all the aforesaid legal arguments for Japan’s legal responsibility and State compensation, in its final report of November 22, 1994. In particular, the International Commission of Jurists pointed out that the Japanese government has responsibility for State compensation for its abandonment of the duty to punish war criminals and criminals against humanity. Also, United Nations Special Rapporteurs on Violence against Women, Radhika Coomaraswamy (1996) and Gay J. McDougall (1998) submitted to the United Nations Human Rights Council reports on the Japanese military

“comfort women,” which characterized the “comfort women” as “victims of systematic rape for military purposes” and the case as “the situation of systematic rape, sexual slavery and slavery-like practices during wartime.” These reports recommended Japan to apologize for the “comfort women” victims, pay compensation, punish all the perpetrators, and include this historical reality in education curricula. In addition, in 2007, legislature bodies of the United States, the Netherlands, Canada, and the European Union endorsed a resolution that recommends the Japanese government to recognize its legal responsibility for the Japanese military “comfort women” and to apologize in a manner acceptable to most of the victims (Doh See-hwan, 2008, pp. 41-68).

Seventh, as mentioned in the ruling of the Republic of Korea Constitutional Court, Article 3 of the Claims Agreement stipulates that any dispute concerning the interpretation or the implementation of the Claims Agreement should be settled through diplomatic channels or an arbitral commission. First, the South Korean government must officially demand the Japanese government to accept the recommendations by the United Nations Human Rights Council from the date of April 19, 1996. If this does not settle the problem, it should make various efforts to resolve the issue, by referring the matter to the arbitration or drawing the attention of international society, for example, the United Nations, to the “comfort women” issue (Lee Jang-hui, *op. cit.*, p. 60).

Experiencing 100 years of history since the annexation of Korea and nearly fifty years of history since the Korea-Japan Claims Agreement, the Japanese government must learn that its denial of the wrongfulness of the past colonial history is not only a denial of historical justice but also a refusal to peace. Therefore, with the universal justice and conscience of humanity, the Japanese government must actively endeavor to resolve the essential problem of historical conflict, thus reintroducing itself as a member of the international community pursuing peace. If the year 2010 was the first year of the “realization of historical justice” after Japan’s forced annexation of Korea, it is hoped that the year

2015 will be the first year of the “true historical reconciliation” (Doh See-hwan, August 31, 2011).

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