Reconciliation between Korea and Japan
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Abstract

Although Japan and Korea formally normalized their relations in 1965, these neighbours remain wary of each other because of their awkward history during the first half of the twentieth century, when Japan annexed Korea and oppressed the Koreans in many ways. Korean scholars believe strongly that this annexation was “illegal” and that it constituted a violation of international law when it occurred. Japanese scholars tend to admit that the Japanese occupation of Korea was brutal and caused enormous suffering, but they are reluctant to acknowledge that the annexation was “illegal”, because other great powers were annexing small countries during that period. The US action supporting the overthrow of the Kingdom of Hawaii in 1893 and annexing Hawaii in 1898 may be helpful in finding an appropriate resolution to the Japan–Korea standoff. In 1993, the US Congress enacted a joint resolution formally apologizing to the Native Hawaiian people and calling for a “reconciliation” between the United States and the Native Hawaiians. This resolution acknowledged that the US diplomatic and military support for the 1893 overthrow was “illegal” and was in violation of “international law”. This strong statement seems to be an application of “inter-temporal law”, whereby present views of international law are applied to the events of the 1890s, but, in any event, it is a powerful acknowledgment that a wrong occurred, causing injuries that can still be felt today. The reconciliation process between the United States and Native Hawaiians is now under way and, to be complete, it will require the restoration of the sovereignty of the Native Hawaiians and a return of land and resources to them. Japanese officials have offered apologies to the Koreans, but the reconciliation between the two countries can become complete only if these apologies are accompanied by a transfer of items of real value. This paper proposes that proper payments to the Korean comfort women and a renunciation by Japan of its claim to Dokdo/Takeshima (the tiny islands claimed by both countries) could serve to formalize the reconciliation between these two neighbours.

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I. The problem

How can some level of true understanding and closure be reached with regard to the Japanese annexation of Korea and the hardship imposed upon the Korean people during this occupation? It is clear to all observers that this annexation, which lasted until 1945, caused enormous hardship and suffering to the Koreans and that it was an exercise in power politics and imperialism that would not be legitimate under today’s standards of international law. But some commentators argue nonetheless that it is not appropriate to characterize the annexation as “illegal” or “in violation of international law”, because the standards of international law that were applicable a century ago were less clear regarding the legitimacy of acquiring territory through force.

Korean scholars insist that the annexation was “illegal” and point to numerous technical irregularities with regard to the formal acts leading to annexation, particularly with regard to the November 1905 “Protectorate Convention”, to support their position. Japanese scholars, on the other hand, while frequently expressing regret for the hardship and suffering experienced by the Korean people during the annexation, generally dismiss the formal irregularities as of limited importance, and point out that other major powers were also conquering weaker countries and annexing territory during this period. They argue that because international law is based in large part on the practices of States and because the practice of the major powers during that period was to engage in imperialistic pursuits, it is impossible to argue that such activity would have been viewed as “illegal” or “in violation of international law” at the time.

Given the emotional dimension of this disagreement and the continuing sense of hurt experienced by the Korean people, it may not be possible to reach consensus on the ultimate question of whether the Japanese annexation should be characterized as “illegal”, even though such action would clearly be illegal today. But it is important to try to come to some agreed understanding about this difficult historical episode in order to move forward constructively as neighbours and build a better relationship for the generations to come. It is important, therefore, to reach an appropriate “reconciliation” regarding this historical episode, which can enable both Koreans and Japanese to look forward rather than to dwell on the past.

II. Was the annexation of Korea by Japan “illegal”?

Japan established total control over Korea through a gradual process that began at the end of the nineteenth century and accelerated in the early years of the twentieth century, leading to the 1905 Protectorate Convention and to the formal annexation in 1910. Looking back at

1 Korea was forced, for instance, to sign a Protocol on 23 February 1904, agreeing to accept the advice of Japanese advisors on a wide range of issues, and some commentators view this as the moment when Korea “was deprived of its rights to conduct diplomacy and its sovereignty and independence”. Han Key Lee, Korea’s Territorial Rights to Tokdo in History and International Law, 29 Korea Observer (1998), 1, 58, translated and reprinted from Lee Han-key, Chapter II: Tokdo, in Han’guk ui Yongt’o (Korea’s Territory) (Seoul, Seoul National University Press, 1969), 227–303.
this process today, can we characterize this process as “illegal” or a violation of “international law”? To answer this question, we must examine the state of international law at the time at which these events took place and then consider whether we must apply the international law principles that governed at that time or should find the answer by applying the principles that would govern such action today. This issue is usually referred to as the problem of “inter-temporal law”.

III. Did international law prohibit the acquisition of territory by force in the 1895–1910 period?

In the late-nineteenth century, Western international law was even more primitive than it is today. No global institutions existed, and only a few special-purpose regional organizations had been created. Some topics, such as diplomatic immunity, were fairly well defined and consensus had also been reached on the important goals of stopping piracy and slavery. War was still viewed by many as an acceptable instrument of foreign policy, but the dramatic increase in destructive weaponry resulting from the industrial revolution caused many to realize that constraints were needed on the use of force. Major international meetings were called, the most significant being the 1899 and 1907 Hague Conferences, which were designed to codify the laws of armed conflict and establish limits on certain types of military activities.

The rules governing the use of force formed a central part of the international law of the nineteenth century, and these rules evolved dramatically during the first half of the twentieth century. Military action and the acquisition of territory by conquest were generally accepted as a part of the international legal system in the early years, but some restrictions had been agreed to by end of the nineteenth century. The British scholar Ian Brownlie has said that the nineteenth century “was still dominated by an unrestricted right of war and the recognition of conquests”, but has also explained that “[i]n the latter part of the period new trends in favour of peaceful settlement of disputes appeared”.2 Brownlie cited the US acquisition of the Philippines and Puerto Rico in 1898 as examples of the recognition of the right “to obtain territory by right of conquest”, and further explained that “[m]any contemporary works of authority stated . . . that the right to resort to war was a question of morality and policy outside the sphere of law or that it was a means of change aiding the evolution of international society”.3 But by the end of the nineteenth century, countries had to provide justifications for resort to war because democracy was growing, “[c]heap newspapers with mass circulation increased the flow of ideas and discussion of policy”, “[w]ar ceased to be the affair of despots and professional armies” and “public opinion had become a force to be reckoned with”.4

3 Ibid.
4 Ibid., 1150.
Countries began utilizing force in more limited contexts, such as “reprisals, pacific blockades, certain justifiable interventions, and naval demonstrations”, and justified such use of force by arguments such as “provocation, self-defence, self-preservation, defence of vital interests, and necessity”.5 The US occupation of Cuba in 1898, for instance, was justified by US scholars “as a case of humanitarian intervention, intervention to protect the property of nationals, . . . or abatement of a nuisance”.6

In the years preceding the First World War, the world was becoming more of a true “community of states”, non-European countries were being accepted as “civilized nations” and developments in communication and transportation were creating a “universal economic system”.7 The need to limit the use of force thus became important in order to promote stability, protect the sovereign State system, respect other democracies and protect investments. The Hague Peace Conferences of 1899 and 1907 were convened during “a high tide of idealism”8 to address the increased firepower created by the industrial revolution, and they marked important efforts to articulate the laws of armed conflict, limit the scourge of war, and promote the peaceful settlement of disputes.

Twenty-five nations attended the 1899 Hague Conference, which was convened by Czar Nicholas II of Russia, and a larger number ratified the documents produced by the meeting, which included conventions for the Peaceful Settlement of International Disputes, on the Laws and Customs of War on Land, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864, Prohibiting the Launching of Projectiles and Explosives from Balloons and declarations on the use of projectiles to transmit poisonous gases, and on the prohibition of dum-dum bullets.9 Although European nations dominated the negotiations, 19 Latin-American nations signed or ratified one or more of the documents, as did China, Japan, Korea, Persia, Siam and Turkey.10

The 1907 Hague Conference, called again by the Russian Czar, Nicholas II, upon the initiative of US President Theodore Roosevelt, produced conventions on the Pacific Settlement of International Disputes, the Limitation of Employment of Force for Recovery of Contract Debts, the Opening of Hostilities, the Laws and Customs of War on Land, the Rights and Duties of Neutral Powers and Persons in Case of War on Land, the Status of Enemy Merchant Ships at the Outbreak of Hostilities, the Conversion of Merchant Ships into War-Ships, the Laying of Automatic Submarine Contact Mines, Bombardment by Naval Forces in Time of War, Adaptation to Maritime War of the Principles of the Geneva Convention, Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, the Creation of an International Prize Court (never entered into

5 Ibid.
6 Ibid., 1154.
7 Ibid.
9 See generally the website of The Avalon Project (www.yale.edu/lawweb/avalon/lawofwar/hague99/haguemen.htm).
force) and the Rights and Duties of Neutral Powers in Naval War. The European nations again dominated the negotiations, but 18 Latin-American nations signed or ratified one of more of the conventions, as did China, Japan, Persia, Siam and Turkey (with Korea missing because it had been placed under a protectorate by Japan). Liberia also adhered to many of the Conventions. These important meetings demonstrated that the countries of the world were greatly concerned about the misuse of force, but did they establish that the acquisition of territory by force was prohibited?

The First World War marked a dramatic breakdown on the efforts to limit warfare, but after this terrible war, efforts were undertaken to establish that the premeditated aggression of the Central Powers violated established principles of international law prohibiting aggressive warfare and protecting neutrality. Further efforts led to formal agreements prohibiting the resort to force, including the establishment of the League of Nations, the 1928 Kellogg–Briand Pact and the United Nations. Professor Brownlie’s characterization of nineteenth-century opinions regarding the legitimacy of the use of force reflected a common view, but it failed to recognize the agonizing reappraisals undertaken by scholars and diplomats during this period about the nature of warfare and the legitimacy of acquiring territory by force. For hundreds of years, commentators were grappling with the question of whether a war can be “just” and thus legitimate. Until relatively recent times, private wars were common, and so it was a matter of some significance for the British scholar T.J. Lawrence to write in 1910 that war “is restricted to contests carried on under state authority directly or indirectly given. Private war has long ago disappeared from civilized societies”. Scholars writing a century ago devoted pages to the question whether a formal declaration of war must precede military action, arguing that a declaration is appropriate to make it “clear that the war is not undertaken by private persons, but by the will of the whole community”.

11 Avalon Project, above n.9.
12 Signatures, above n.10, 8–11.
14 The General Treaty for the Renunciation of War (Kellogg–Briand Pact), 27 August 1928, 28 Stat., 2343, T.S. No.796; 2 Bevans, 732; 94 LNTS, 57. This treaty has been ratified by 66 countries, including the United States and Japan, and is still in effect. In Art.I, the Contracting Parties “condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”.
15 Article 2(4) of the United Nations Charter says that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”.
16 See, e.g. Grotius, De Jure Belli ac Pacis, bk I, Chap.II, and bk II, Chaps I, XX–XXVI (cited in T.J. Lawrence, The Principles of International Law (5th edn, 1910), 333). Among the other authors who tried to develop and define the concept of just wars were St Augustine and the Spanish writers Vitoria, Ayala and Suarez. See Janis, above n.8, 171–2.
17 Lawrence, above n.16, 332.
18 F.E. Smith and N.W. Sibley, International Law as Interpreted During the Russo–Japanese War (1905), 51 (citing Grotius, De Jure Belli et Pacis, Liii.c.iii).
Neutrality was also a central concern. In 1815, the European powers agreed to respect the perpetual neutrality of Switzerland and, in 1817, the United States and the United Kingdom agreed to limit their naval forces on the Great Lakes, leading to a demilitarization of the United States–Canada border.\(^\text{19}\) Other demilitarized zones established during this era included those on the Åland Islands in the Baltic Sea, established in 1856 by a treaty between Sweden, Finland and Russia (which remains demilitarized at present);\(^\text{20}\) the southern shore of the Strait of Gibraltar, demilitarized in 1904 by agreement between France and the United Kingdom, which was reiterated in the Treaty of 12 November 1912 between France and Spain (and lasting until 1956, when the international status of this area ended);\(^\text{21}\) and Sakhalin Island and the Gulf of Tartary, which were demilitarized in the 1905 Treaty of Portsmouth\(^\text{22}\) after the defeat of Russia by Japan (remaining in effect for more than 30 years, probably because of the reciprocal nature of the treaty).

Consensus had also been reached that non-combatants should be spared the scourges of warfare. Grotius wrote eloquently on this topic in “his celebrated treatise, De Jure Belli ac Pacis”, which was written when “the Thirty Years’ War was in the full tide of its destructive progress” marked by “[m]assacre, pillage and famine”, with “[n]either age nor sex” being spared.\(^\text{23}\) Grotius “protested” “against this brutal infatuation”, and gradually “[t]he distinction between combatants and non-combatants [became] the vital principle of the modern law of war”.\(^\text{24}\) Diplomat and Columbia University Law Professor John Bassett Moore attributed this recognition to a “moral revolt” resulting from “a loftier conception of the destiny and rights of man and of a more humane spirit”,\(^\text{25}\) but it also resulted from the mutual realization that destruction of non-combatants is not militarily advantageous to either side.\(^\text{26}\)

Moore wrote in 1906 that territory could be acquired by conquest, but added that such acquisition should not be considered to be complete until it is acknowledged in a treaty of peace or cession or has been confirmed by “a long and permanent possession”.\(^\text{27}\)

\(^{19}\) Janis, above n.8, 172; Major General J.H. Marshall-Cornwall, Geographic Disarmament: A Study of Regional Demilitarization (1935), 54–5.

\(^{20}\) See generally Anders Gardberg, Åland Islands: A Strategic Survey (Finland National Defence College, 1995); Convention on Demilitarization of the Åland Islands, 30 March 1856, reprinted in ibid., 87.


\(^{22}\) The Treaty of Portsmouth, 5 September 1905, Japan–Russ. (www.lib.byu.edu/~rdh/wwi/1914_m_portsmouth.html).

\(^{23}\) John Bassett Moore, International Law and Other Current Illusions and Other Essays (New York, MacMillan, 1924), viii (hereafter cited as Moore, Illusions).

\(^{24}\) Ibid.

\(^{25}\) Ibid., 13.

\(^{26}\) The US Supreme Court adopted from Vattel, for instance, the view that “Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals; ... should he burn and ravage, they will follow his example; the war will become cruel, horrible, and every day more destructive to the nation”. The Prize Cases, 67 US, 635, 667 (1862).

\(^{27}\) 1 John Bassett Moore, A Digest of International Law (1906), 290–1 (hereafter cited as Moore, Digest).
He objected to the view that international law had somehow “legalized war”, and explained instead that the scholars and diplomats working to develop international law had “sought to ameliorate the evils of an institution which [they] could not destroy”. 28

Professor Lawrence described acquisition of territory by conquest as a legitimate means of acquiring property after “successful military operations”, 29 but also devoted a number of pages in his 1910 treatise to the growing “sentiment of horror and reprobation of war”. 30 In this section, he stated that “[t]he doctrine that nations cannot long retain the manly virtues of courage and endurance unless their populations are from time to time disciplined in the hard school of war is obviously false”. 31 Perhaps based on his occasional teaching assignments at the University of Chicago, Professor Lawrence reported that “[a]cross the Atlantic we find another people [i.e. the United States], among whom intense patriotism and a most jealous regard for the honor of the flag is kept alive without the existence of a standing army of sufficient size to be an appreciable factor in the national life”. 32

With some pride in the telling of these insights, Lawrence noted that “[t]he destruction and waste caused by war, the passions it stirs up, and the suffering and vice which follow in its train, are a terrible price to pay for noble qualities that may be gained in other ways. Men can be manly without periodical resort to the occupation of mutual slaughter”. 33 And in an intriguing anticipation of the now-accepted principle that well established democracies do not engage in warfare with each other, Lawrence explained that “[w]ith the advance of democracy”, whereby decisions regarding warfare are passing from kings to “the control of peoples”, wars will not be undertaken to promote “personal or dynastic ambitions” and will be avoided because of the realization that “every unnecessary conflict [is] at once a blunder and a crime”. 34 Lawrence recognized that countries resorted to war in order to protect those values that they “hold more dear than material prosperity—their independence, their honor, their position of influence in the world”, but hoped that a day would come when war was not necessary and countries’ vital interests could be protected against “overbearing and unscrupulous states . . . by international tribunals and a strong international police force”. 35

Efforts to prohibit the legitimacy of resorts to force during the nineteenth century were particularly strong in the Western Hemisphere, perhaps because it was the first area where

28 Moore, Illusions, above n.23, 37.
29 Lawrence, above n.16, 165. Also frequently cited is the statement that “[i]n international law, force and intimidation are permitted means of obtaining redress for wrongs”, found in W.E. Hall, International Law (3rd edn, 1890), 325–6. Note, however, that even this statement is carefully limited by the requirement that the use of force be utilized as a means for “obtaining redress for wrongs”. Proportional military reprisals have been allowed as a means of enforcing rights under international law after a demand for reparations has been unsatisfied, but using force to acquire territory or resources is substantially different and cannot be justified based on this statement.
30 Lawrence, above n.16, 572.
31 Ibid.
32 Ibid.
33 Ibid., 573.
34 Ibid., 573–4.
35 Ibid., 575.
decolonization had occurred, thus producing regional arrangements not totally dominated by the major powers. 36 US Secretary of State James G. Blaine denounced Chile’s annexation of Peruvian provinces and the Bolivian seacoast during the 1879–83 Pacific War, stating that “the exercise of the right of absolute conquest is dangerous to the best interest of all the republics of this continent”. 37 In 1883, Latin-American republics met with Simon Bolivar in Caracas, and adopted the Caracas Protocol, which rejected “the so-called right of conquest”. 38

The United States convened the International American Conference in Washington in 1890, at which a concerted effort was undertaken to establish a mandatory arbitration treaty accompanied by a commitment to reject the legitimacy of acquisitions of territory through conquest. The initial US position at the conference was offered in the following resolution:

Whereas, in the opinion of this conference, wars waged in the spirit of aggression or for the purpose of conquest should receive the condemnation of the civilized world: Therefore

Resolved, That if anyone of the nations signing the treaty of arbitration proposed by the conference, shall wrongfully and in disregard of the provisions of said treaty, prosecute war against another party thereto, such nations shall have no right to seize or hold property by way of conquest from its adversary. 39

Secretary of State, Blaine, then offered a more formal draft of an arbitration treaty stating explicitly that “the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law” and that “all cessions of territory made during the continuance of the treaty of arbitration shall be void if made under threats of war or the presence of an armed force”. 40 The conference accepted this proposal, with only Chile abstaining, but the plan for the treaty of arbitration adopted by the conference never became operative. 41 Also instructive are the voices of opposition to US annexation of Hawaii that emerged from the Canadian Parliament at the time. 42

37 Ibid., 479 (citing William J. Hough, III, Baltic State Annexation, 6 NYL Sch. Int’l and Comp. L., 300, 314–15 (1985)).
38 Ibid., 478 (citing Alice Felt Tyler, The Foreign Policy of James G. Blaine (1927), 317).
39 1 Moore, Digest, above n.27, 292 (quoting text from the International American Conference in Washington, 1990).
40 Ibid.
41 Ibid., 293. The Hawaiian Minister (Ambassador) to the United States, Mr Carter, was appointed by his government to attend the International American Conference, but his instructions arrived too late to allow him to participate. Chock, above n.36, 496. See also 7 Moore, Digest, above n.27, 315–16.
42 Chock, above n.36, 492 (quoting from Canadians Don’t Like It: They Think Annexation Would Mean Trouble for US, NY Times, 16 February 1893, 1): “Members of the Canadian parliament similarly objected to
Japan also originally opposed the US annexation of Hawaii, arguing in late 1897 that “the maintenance of the status quo in Hawaii was essential to the good understanding of the powers having interests in the Pacific” and that the rights and claims of Japanese subjects residing and working in Hawaii might be jeopardized (adding also that it entertained no designs itself to the islands). This expression of Japanese concern was followed by US assurances to the Japanese government that Japanese subjects would be treated fairly and without discrimination in an annexed Hawaii. In December 1897, “Japan withdrew its protest against annexation and ultimately settled its difficulties with the Republic [of Hawaii] in return for an indemnity of $75,000, after Washington had exerted pressure to end the disagreement prior to annexation”.

The question of what the content of international law was in the 1890–1910 period regarding the acquisition of territory by force is thus a complicated one. In his 1998 article, Professor Sakamoto Shigeki said that “At that time, international law did not prohibit war as a means of resolving international conflicts, and therefore a strong state’s forcing a weak state through military threats or exercises did not invalidate a treaty”. That statement is too categorical and ignores the many actions and voices pointing toward a rejection of that view. The law was changing, and those nations that continued to dominate their weaker neighbours through force or threats of force were violating emerging norms that developed into binding principles of international law in the years immediately following this period.

IV. The annexation of Hawaii by the United States

As explained above, the end of the nineteenth and beginning of the twentieth centuries was a time of turmoil and transition when perspectives of idealism and limitless progress clashed with the old-fashioned habits of greed, selfishness, great-power competition and imperialism. The United States had fulfilled its self-image of “manifest destiny”, had stretched its borders across North America, was emerging as a land of opportunity and innovation, and was becoming more active in world affairs.

In November 1896, William McKinley—a Republican Senator from Ohio—defeated Democrat Grover Cleveland as President, and he took office four months later in March 1897. A year later, in 1898, the United States engaged in the Spanish–American War, annexation actions by the United States. Parliament member N.F. Davin stated: ‘[t]o annex forcibly on the part of any power would be contrary to modern ideas of the obligations which control the actions of the great powers.’ Parliament member Alexander McNeill added: ‘If it be true that the native population is opposed to a change, any interference by the United States would be contrary to [the United States’] own principles’.

43 1 Moore, Digest, above n.27, 504; Sylvester K. Stevens, American Expansion in Hawaii 1842–1898 (1945, reissued 1968), 287.

44 1 Moore, Digest, above n.27, 505–09. Great Britain did not issue “a single protest” or even ask an “annoying question” at the time of the 1898 annexation, apparently because of “the growing identity of interests between her and the United States”. Merze Tate, Great Britain and the Sovereignty of Hawaii, 31 Pacific Historical Review, 327, 348 (1962).

45 Stevens, above n.43, 288.

46 Sakamoto Shigeki, Korea and Japan Should Not Fall in the Pitfall of the Old Treaties: An Answer to the Treatise by Prof. Yi Tae-jin, Sekai, No.652 (September 1998), 5.
which was the central event in a period of major imperialistic expansion. After the mysterious explosion of the USS Maine in Havana harbor, US public sentiment—fanned by a jingoistic press campaign—turned sharply against Spain. Even though Spain agreed to every condition laid down by President McKinley with respect to Cuba, McKinley nonetheless sought and obtained authority from the US Congress to send troops against Spanish land and naval forces in Cuba. After about four months of fighting in the Caribbean and the Philippines, the United States prevailed, and Spain agreed to cede Puerto Rico, Guam and the Philippines to the United States, and to withdraw its forces from Cuba. The United States emerged from this episode as a world power with political and economic interests in distant areas. The annexation of Hawaii also occurred in 1898, and must be seen as part of this spasm of US global expansion. The annexation occurred five years after the 1893 military overthrow of the Kingdom of Hawaii, which would not have not been successful without the support of military troops and key diplomats of the United States, as the United States acknowledged 100 years later.

IV.A. The 1993 apology resolution

On the occasion of the 100th anniversary of the overthrow of the Kingdom of Hawaii, the US Congress adopted a joint resolution apologizing to Native Hawaiians on behalf of the people of the United States for the participation of US diplomats and military personnel in the 1893 overthrow and characterizing this action as “illegal”, in violation of “treaties between the two nations and . . . international law.” It also acknowledged that this action denied to the Native Hawaiian people their “inherent sovereignty through self-government and . . . their right to self-determination, their lands, and their ocean resources.” That same

47 Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub.L. No.103–50, 107 Stat., 1510 (1993) (hereafter cited as Apology Resolution). The Apology Resolution was formally enacted by the US Congress, passing the Senate by a roll-call vote of 65 to 34, and was signed by President Clinton on 23 November 1993. Among the key provisions in this enactment are:

- Whereas, without the active support and intervention by the United States diplomatic and military representatives, the [January 1893] insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms;

- Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

- The Congress—
  (1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people. . . . [Emphasis added.]

48 Ibid., whereas para.8.

49 Ibid., whereas para.23. The Apology Resolution is a statute of the United States, and the courts have taken judicial notice of its findings. See, e.g. State v. Lorenzo, 77 Hawaii, 219, 221, 883 P.2d, 641, 643 (Haw.App. 1994) (“The United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event. P.L. 103–150, 107 Stat., 1510 (1993)”). A “joint resolution” enacted by Congress as a public law and signed by the President is a statute of the United States and has the same effect as any other law enacted by Congress. See, e.g. Ann Arbor R. Co. v. United States, 281 US, 658, 666 (1930) (treating a joint resolution just as any other legislation enacted by Congress); Jack Davies, Legislative
year, the Hawaii State Legislature also characterized the 1893 overthrow as having occurred “without the consent of the Native Hawaiian people or the lawful Government of Hawaii in violation of treaties between [the United States and the Kingdom of Hawaii] and of international law”.

The US Congress expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people, and urged the President of the United States to support reconciliation efforts between the United States and the Native Hawaiian people. This reconciliation process is now under way. In 2000, the US federal government released a substantial study of the current plight of Native Hawaiians; in 2004, Congress established the Office of Native Hawaiian Relations in the Office of the Secretary of the Interior with the responsibility to “continue the process of reconciliation with the Native Hawaiian people”, and the US Congress is now considering a Bill that would establish formal federal recognition of the Native Hawaiian people as indigenous people under US law and lead to negotiations that would return lands and resources to a re-established autonomous Native Hawaiian Nation.

V. Intertemporal law

When it reached the conclusion in 1993 that the participation of US military and diplomatic personnel in the 1893 overthrow of the Kingdom of Hawaii was “illegal” and in violation of “international law”, the US Congress may have been applying modern concepts of international law to historical events. The propriety of undertaking this type of transformation is viewed as a question of “intertemporal law”, and discussions of this practice usually start with an examination of the 1928 decision by Max Huber in the *Island of Palmas* case.

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51 See Apology Resolution, above n.47, s.1: Acknowledgment and Apology, paras 4–5.

52 US Dept of the Interior and US Dept of Justice, From Mauka to Makai: The River of Justice Must Flow Freely (2000) (www.doi.gov/nativehawaiians/pdf/1023fin.pdf). The principal recommendation contained in this Report is as follows: “As matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes . . . To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians’ political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.”


54 The “Native Hawaiian Government Reorganization Act of 2005”, which is generally referred to as the “Akaka Bill”, after Hawaii’s Senator, Daniel Akaka.

55 The Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting
That arbitration concerned an isolated islet\textsuperscript{56} claimed by both the United States (which, as the colonial power then governing the Philippine Islands, succeeded to the claim of Spain after the 1898 Spanish–American War) and the Netherlands (the colonial power governing Indonesia). The United States based its claim on Spain’s earlier “discovery” of the island and the island’s “contiguity” or proximity to Mindanao, in the Philippine archipelago. The Netherlands invoked its contact with the region and its agreements with native princes, focusing on specific activities after the mid-1800s, intensifying and including displays of sovereignty in the years preceding 1898. Judge Huber\textsuperscript{57} awarded the island to the Netherlands, based on its peaceful and continuous display of authority over Palmas and on the acquiescence to the Dutch activities by Spain and later by the United States.

The “intertemporal law” issue arose because the United States argued that the original Spanish title based on discovery in the sixteenth century must be evaluated on the basis of the then-existing rules of international law. The Netherlands argued, on the other hand, that “a title to territory is not a legal relation in international law whose existence and elements are a matter of one single moment . . . the changed conceptions of law developing in later times cannot be ignored in judging the continued legal value of relations which, instead of being consummated and terminated at one single moment, are of a permanent character”.\textsuperscript{58} Judge Huber began the analysis by noting that even though “international law underwent profound modifications between the end of the Middle Ages and the end of the nineteenth century, as regards the right of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilized peoples[,] both parties are agreed that a juridical fact must be appreciated in the light of the law contemporaneous with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.\textsuperscript{59} But then he went on to explain that such an “appreciation” did not end the analysis, because “a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”.\textsuperscript{60}

Based on this approach, Judge Huber applied the law as it existed in 1898—the “critical date” on which the dispute was recognized by the two countries, rather than the law as of the sixteenth century, when Spanish navigators originally claimed the island for Spain. The law in the sixteenth century may have allowed nations to claim territory based on “discovery” alone, but by 1898, additional acts of sovereignty were required to confirm possession. In other words, by 1898, claims of sovereignty based on “occupation” “must be effective,
that is offer guarantees to other states and their nationals”.61 “For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas.”62

Judge Huber’s approach was apparently followed by the US Congress when it enacted the Apology Resolution in 1993 and acknowledged that the participation of US military and diplomatic personnel which led to the 1893 overthrow of the Kingdom of Hawaii was “illegal” and in violation of “international law”. If this approach is also followed with regard to the Japanese annexation of Korea, it necessarily leads to conclusion that the Japanese annexation was also “illegal” and in violation of “international law”, because international law now certainly prohibits the acquisition of territory by force.63 Because something occurred that we now view as “illegal”, it is imperative that a “reconciliation” take place to address the consequences of the illegal act.

VI. What constitutes a “reconciliation”?

The word “reconciliation” plays a central role in the effort to bring closure to violations of fundamental norms of international law. This word is sometimes thought of as weak and meaningless—a feel-good word requiring nothing more than admissions of sorrow and some hugs, handshakes and smiles, but actually it is a very powerful word, requiring more. A “reconciliation” requires action to make amends, to mend the wound, to make right the wrong that has occurred, and it almost always will require the transfer of something of value. In a traditional Pacific Island community, the family of the wrongdoer will offer animals and other products of value to the family of the victim. In our modern world, reconciliation requires a full and fair acknowledgment of the wrong, followed by a real settlement that will almost always include the transfer of land, money or other valuable property, as well as punishment and/or disgrace of those who committed the wrongs.

A “reconciliation” is thus a complicated process requiring some formal steps to recognize the wrong, to describe and thereby to acknowledge the injuries caused and the suffering of the victims, and to provide for some level of redress or “reparations” to “repair” these injuries.64 The strategies utilized to bring a sense of closure and reconciliation generally include some or all of the following four elements: (1) an apology for the wrong; (2) an investigation and accounting; (3) compensation for the victims, either through a general class approach, or through individual determinations, or both; and (4) prosecution of the wrongdoers. In light of the passage of time, prosecution of any individual for the annexation of Korea and the suffering of the Koreans is out of the question, but the other elements can be pursued to

61 Ibid.
62 Ibid., 884. This approach has been criticized, in, e.g. Jessup, above n.56, and R.Y. Jennings, Acquisitions of Territory in International Law (1963), 28.
63 See, e.g. United Nations Charter, above n.15, art.2(4); Kellogg–Briand Pact, above n.14; Nuremberg Charter, Art.6(a).
64 Some of the material that follows is adapted from Jon M. Van Dyke, The Fundamental Human Right to Prosecution and Compensation, 29 Denver JIL and Policy, 77 (2001).
structure an appropriate closure. A reconciliation between Japan and Korea must include a full and formal apology and an acknowledgment that violations of international law norms occurred. Some statements of apology have been offered, but Japanese leaders have not acknowledged that the annexation violated present-day norms of international law. A reconciliation must also include a systematic examination of the past plus an exchange of information and views, as is going on at present. Some form of appropriate and agreed-upon reparations or accounting should follow, to bring this matter to a proper closure and to set the stage for amicable future relations between the two neighbours. These elements are described below, with examples from recent history and a brief discussion of the Korea–Japan situation.

VI.A. Apology

The apology is a crucial underpinning for every process designed to bring closure to human rights abuses or any other festering and unresolved injury. When, on 12 March 2000, Pope John Paul II issued his sweeping apology for the errors of the Roman Catholic Church during the previous 2,000 years, acknowledging intolerance and injustice toward Jews, women, indigenous peoples, immigrants and the poor, it had the effect of clearing the air and establishing the basis for a new relationship with members of the injured groups. In 1988, the United States apologized for the internment of Japanese-Americans during the Second World War. As discussed above, the 1993 Apology issued by the US Congress for the participation by its military and diplomats in the illegal overthrow of the Kingdom of Hawaii 100 years earlier set in motion a process of “reconciliation” designed to provide an appropriate settlement and heal the wounds. In 1999, President Clinton apologized for the US support of the military in Guatemala, and, in 2000, US Secretary of State, Madeleine Albright, apologized for the US support for the 1953 coup that restored Shah Mohammed Riza Pahlevi to power in Iran and for the US backing of Iraq during the war with Iran in the 1980s. In January 2004, Germany took “moral responsibility” for the 1904 massacre of 65,000 Hereros in its former colony of South-West Africa and pledged more aid to the now-independent country of Namibia. Although an apology is not sufficient, it is a necessary step toward resolving wrongs.

Some statements of apology have been offered by Japanese leaders. These are important, but the words used fail to acknowledge that Japan’s annexation of Korea violated today’s
international law standards and involved conduct that many viewed as wrong when it occurred.

In August 1993, Japanese Prime Minister Tomiichi Murayama made a personal apology to the comfort women, saying “On the issue of the treatment of the many comfort women, and the damage done to their honor and dignity, I would like to take this opportunity once again to express my profound and sincere remorse and apologies”.71 Two years later, in August 1995, Prime Minister Murayama issued a statement on the 50th anniversary of the end of the Second World War, apologizing for “Japan’s colonial rule and aggression” and acknowledging that it inflicted “immense harm and suffering upon people in many countries, especially in other Asian countries”.72 In October 1998, Japanese Prime Minister, Keizo Obuchi, apologized more specifically for Japan’s occupation of Korea, in a statement that gained added importance because it was included in a joint declaration issued after his meeting with Korean President, Kim Dae-jung. Prime Minister Obuchi acknowledged that “the Japanese colonial rule inflicted unbearable damage and pain on Korean people” and he “expressed remorseful repentance and heartfelt apology for the ordeal”.73 On 15 October 2001, Japanese Prime Minister, Junichiro Koizumi, said “I sincerely regret and apologize from my heart for the losses and pain inflicted on the Korean people by Japan’s colonial rule” when paying respect at a memorial tablet at the Seoul Independence Park, which had once been a prison where Japan had tortured and killed Koreans fighting against the Japanese occupation.74 Later, in 2002, when Prime Minister Koizumi visited North Korea, he made a similar statement, saying “The Japanese side regards, in a spirit of humility, the facts of history that Japan caused tremendous damage and suffering to the people of Korea through its colonial rule in the past, and expresses deep remorse and heartfelt apology”.75

These statements are significant, but are not sufficient. “In Japan, while the apology is a central form of resolving disputes, an apology without accompanying reparations is often considered to be an empty gesture.”76

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73 Nicholas D. Kristof, Japanese Leader Apologizes for Occupation of Korea, NY Times, 9 October 1998.


76 Galvin, above n.72, 113 (citing Hiroshi Wagatsuma and Arthur Rosett, The Implications of Apology: Law and Culture in Japan and the United States, 20 Law and Society Review, 461, 462, 486 (1986)).
VI.B. Investigation and accounting

Victims of human rights abuses and other injuries have a strong need to understand what happened and to identify the wrongdoers. Based in part on the model set by the South African Truth and Reconciliation Commission, some 23 other countries have set up such commissions to provide some documentation for previous human-rights abuses. Some have been much more successful than others. In the Philippines, for instance, then-President Corazon Aquino gave broad power in 1986 to the seven-member Presidential Committee on Human Rights to investigate human rights violations attributed to the military during the 1972–86 rule of President Ferdinand Marcos, but the committee never issued a final report.

In Chile, after General Augusto Pinochet allowed elections to take place in the late 1980s, but retained firm control over the military and kept a watchful eye on the new government, the new civilian President, Patricio Aylwin, appointed a Commission of Truth and Reconciliation which prepared a comprehensive report documenting 2,000 cases involving persons who had been murdered or disappeared. In February 1991, the eight-member National Commission for Truth and Reconciliation released its report describing each case in some detail. As the years went by, and as General Pinochet’s power declined, the Chilean public demanded even further documentation, focusing on those that had been tortured, and so a second effort was undertaken describing those cases. On 29 November 2004, the Chilean Presidential Commission issued a report detailing some 27,000 cases of torture in the 1973–90 period. More than 18,000 persons were tortured in the four months after General Pinochet took power in September 1973, and another 5,266 individuals were tortured between January 1974 and August 1977. Like the relatives of those summarily executed or forcibly disappeared, the 27,000 torture victims will receive health, education,

77 Truth and Reconciliation Commission of South Africa Report (5 volumes, 1999). This Commission met for two-and-a-half years to document as many of the human-rights abuses as possible and issued a report blaming both sides for abuses. Persons who came forward with truthful accounts of their participation in violent acts linked to a political objective were pardoned as part of the national healing effort, but those unwilling to acknowledge responsibility have been prosecuted for their role in these atrocities. A challenge to the legitimacy of granting amnesties was rejected in Azanian Peoples Organization v. The President of the Republic of South Africa, 1996(4) South Africa Law Reports, 637 (Constitutional Court of South Africa, 1996). The court justified its conclusion by explaining that the amnesty was not “a uniform act of compulsory statutory amnesia”, but was appropriately linked to promoting “a constructive transition towards a democratic order” and was “available only where there is a full disclosure of all facts” and for acts committed “with a political objective”. Ibid., para.[32].

78 The countries that have set up some form of a truth and reconciliation commission include Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Haiti, Malawi, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay and Zimbabwe.


housing benefits and a monthly pension, which was set at US$190—substantially less than
the amount that has been provided to the heirs of those who were murdered or
disappeared.82

What would a full accounting of the suffering imposed upon the Korean people during
the annexation period look like? One recent commentator has proposed a Japanese Truth
Commission looking at the range of Second-World-War-era Japanese war crimes, and has
argued that such an effort would be good for both Japan and the victims of the crimes.83
This writer has explained that Japan’s aggrieved neighbours have frequently played
the “Japan card”, to “repeatedly blame Japan over and over for its past, regardless of what
apologies or actions Japan takes to rectify the situation”.84 He wrote that Japan’s response
must be to “take bold steps to put all of its cards on the table, in order to try to finally
trump the ‘Japan card’”.85 A truth commission based on the South African model might
enable Japan to “seek regional reconciliation with its neighbors by finally coming to
terms with its past”.86

A non-governmental effort to begin the accounting process took place in December 2000,
when a private tribunal was constituted in Tokyo’s Kudan Kaikan auditorium (located at the
base of a shrine for the war dead) for three days to hear the statements of about 75 of the
some 200,000 women who had been forced into wartime prostitution as “comfort
women”, but this event received little press coverage in Japan.87

Japan’s reluctance to document the past is reflected in the periodic flaps over history text-
books used in Japan’s schools. In 2001, for instance, the Korean Foreign Minister, Lee
Joung-binn, summoned the Japanese Ambassador, Terusuke Terada, to express deep
concern about textbooks that appeared to justify Japan’s occupation of its Asian neighbours
and omitted all reference to the comfort women issue.

VI.C. Compensation for the victims

International law has always been clear that reparations are essential whenever damages result
from illegal actions for which the State bears responsibility, and compensatory payments are
also frequently required when damage follows from an action that may be lawful in some
contexts but has nonetheless caused harm. This principle is securely rooted in the 1927
decision of the Permanent Court of International Justice in the Chorzow Factory case,88

82 See Law Nr. 19,123 Creating the National Corporation for Reparation and Reconciliation (Chilean National
83 Galvin, above n.72.
84 Ibid., 112.
85 Ibid., 113.
86 Ibid.
87 Deutsche Presse-Agentur, War-time Japanese Leaders Among Those Accused at Comfort Women Trial Tokyo,
8 December 2000.
88 Factory at Chorzow, Merits, Judgment No.13, PCIJ, Series A, No.17, 47 (1927).
and it was reaffirmed in 1999 by the International Tribunal for the Law of the Sea in the *M/V Saiga* case.\(^8^9\) Even if some differences of opinion may remain regarding the illegality of the act of annexation at the time it occurred, the cruelties imposed upon the Korean people by Japan clearly violated the international law principles that governed at the time of the annexation. The requirement of appropriate compensation has been increasingly recognized in a wide variety of contexts:

- In 1992, after more than 2,000 human-rights abuses were documented by a Chilean commission, the Chilean Legislature enacted a law providing a wide range of economic benefits for the victims and their families.\(^9^0\)
- The Japanese-Americans interred in the Second World War received US$20,000 each,\(^9^1\) and those persons of Japanese ancestry brought to camps in the United States from Latin-American have received $5,000 each.\(^9^2\)
- Canada’s “Statement of Reconciliation”, issued on 7 January 1998, established a US$245 million “healing fund” to provide compensation for the thousands of indigenous children who were taken from their homes and forced to attend boarding schools, where they were sometimes physically sexually abused.\(^9^3\) In August 1998, Canada transferred 750 square miles in British Columbia, just south of Alaska, to the 5,000-member Nisga’a Tribe, in an effort to achieve reconciliation with this group of natives.\(^9^4\) And in November 2005, Canada announced that more than $5 billion (Canadian dollars) would be spent during the coming five years to close the gap between Canada’s natives and other Canadians in education, health, housing and economic opportunities.\(^9^5\)
- New Zealand established a process to address the wrongs committed by the British against the Maori people in the late 1800s, and has returned lands and transferred factories, fishing vessels and fishing rights to the Maori groups to compensate them for their losses.\(^9^6\)

\(^8^9\) The *M/V Saiga* Case (Saint Vincent and the Grenadines v. Guinea), para.170 (ITLOS, 1 July 1999). (The text of this opinion can be found at www.un.org/Depts/los/ITLOS/Saiga_cases.htm.)

\(^9^0\) Law Nr. 19,123 Creating the National Corporation for Reparation and Reconciliation (Chilean National Congress, 1992).


\(^9^3\) See Benjamin C. Hoffman, The Search for Healing, Reconciliation, and the Promise of Prevention (presented to the Reconciliation Process Implementation Committee in 1995, and documenting physical and sexual abuse at St Joseph’s and St John’s Training Schools for Boys), and Douglas Roche and Ben Hoffman, The Vision to Reconcile (1993).


\(^9^6\) For an example of the settlement obtained by one Maori group, see Ngai Tahu: New Zealand Maori Tribe Website (www.ngaitahu.iwi.nz/).
• In Puerto Rico, Governor Pedro J. Rossello publicly apologized and offered restitution of up to US$6,000 each to thousands of “independentistas” and others who were spied on by a police intelligence unit starting in the late 1940s.  

• In 1994, Florida Governor, Lawton Chiles, signed into law a Bill providing for the payment of US$2.1 million in reparations to the descendants of the black victims of the Rosewood massacre, in which white lynch mobs killed six black people and drove others from their homes, to destroy a prosperous black community.  

• Lawsuits have been filed in the United States by victims of human-rights abuses for compensation. One of the prominent cases was brought by 9,500 victims of human-rights abuses in the Philippines against Ferdinand E. Marcos when he was exiled to Hawaii in 1986, and continued against his estate after he died in 1989. A federal court jury ruled that Marcos was liable for the torture, murder and disappearances that these victims suffered, and ordered his estate to pay US$775,000,000 in compensatory damages and US$1,200,000,000 in exemplary damages.  

• The German government has funded various compensation programmes to pay victims of the Second World War Holocaust, and has made payments directly to the State of Israel as well. More recently, lawsuits were filed in US courts by the victims of slave and forced labour during the Second World War against the German banks and companies that profited from such abuses, and, in December 1999, the German businesses agreed to provide $5.1 billion to the 250,000 members of this victimized class.  

• Similarly, Austria settled a claim brought by the thousands of individuals (mostly Jews) whose property was systematically looted during the Nazi era, agreeing to pay more than US$200,000,000 to claimants, with payments beginning in 2006. The United States has also recently settled the World War II “Gold Train” looting claims.  

What form and level of compensation would be appropriate in the case of Japan’s annexation of Korea? Because of the passage of time, individual payments would probably not be

97 Mireya Navarro, Freed Puerto Rican Militants Revel in Life on the Outside, NY Times, 27 January 2000, A14, col.3 (nat’l ed.).  


appropriate, except to members of specific groups injured in a unique way, such as the comfort women forced to provide sexual services to the Japanese military. Well meaning individual Japanese have worked through the Asian Women’s Fund to raise private donations, with some limited governmental assistance, to provide payments to 285 of the comfort women in Korea, Taiwan and the Philippines, out of the 200,000 thought to have been subjugated in this fashion, but this gesture has been viewed as empty by most.

VII. A proposal for reconciliation

The many situations described above illustrate the complexity of these issues. No one approach works for every historical event. Just as prosecutors exercise discretion to refrain from prosecuting in certain situations, and accept plea agreements for reduced charges in many others, some historical episodes seem to justify a merciful approach, with reduced reparations or simply a full description of what actually happened. But in each situation, a full investigation and disclosure of what occurred are essential to ensure that the suffering is understood by all. And for a true “reconciliation”, the transfer of property from those who have benefited to those who have suffered is necessary to bring the matter to a just resolution.

The “comfort women” (jugun ianfu) atrocities are perhaps the most visible remaining legacy of the Japanese control of the Korean peninsula. It has been estimated that more than 80 per cent of all the women commandeered to service the Japanese soldiers fighting in Asia were Koreans. The Japanese apparently considered the Koreans to be an inferior race and suitable for prostitution. Many of the Korean women were forced to the frontlines where conditions were harshest and many were killed by Japanese soldiers at the end of the war.

On 27 April 1998, the Simonoseki Branch of the Yamaguchi Prefectural Court ruled that the Japanese government should pay 300,000 yen (US$2,272) in compensation to three

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104 This programme and the payments made under it are described at the website of the Asian Women’s Fund (www.awf.or.jp); see also Park, above n.71, 44–6; Kristof, above n.73. According to the Fund’s website, a total of 570,000,000 yen (about US$5.7 million) has been distributed to 285 of the comfort women in Korea, Taiwan and the Philippines, with each woman receiving 2,000,000 yen (about US$20,000) in “atone- ment money” plus a letter of apology from the Japanese Prime Minister. Related medical and welfare support projects were financed by the Japanese government in Indonesia and the Netherlands.


108 Ibid., 153–4; see generally Park, above n.71, 24–9.
Korean comfort women, but this decision was subsequently reversed on appeal. Also in April 1998, the South Korean government announced that it would pay US$27,400 to each Korean woman forced into sexual slavery, and would not seek compensation from Japan, but would ask the Japanese government to make a heartfelt apology for its treatment of the women.

Japan’s official position on this matter has been summarized as follows:

(a) recent developments in international criminal law may not be applied retroactively; (b) the comfort station system did not involve the crime of slavery, and even if it did, the prohibition of slavery was not a customary norm of international law at the that time; (c) rape was not prohibited during wartime by either the Hague Convention or by customary norms of international law; and (d) in any event, since Korea was annexed to Japan during World War II and therefore not an adversary, the laws of war are inapplicable to Korean nationals.

Many scholars and international bodies have rejected these arguments and have concluded that Japan’s treatment of the comfort women did violate international law as it existed at the time.

To bring closure and reconciliation to the festering injuries caused by the Japanese annexation of Korea will require a full, honest and forthright apology, an accounting that will acknowledge and describe the types of wrongs and suffering that occurred, and a transfer of something valuable that will give the Koreans a sense that the Japanese contrition is genuine. Certainly, a forthright accounting and apology related to the comfort women accompanied by an appropriate governmental payment to all those forced to suffer in that capacity are an essential component of any reconciliation package.

Another component that might serve to promote a genuine reconciliation would be for Japan to give up its claims to disputed territory, which continue to haunt relations between the two countries. The tiny islands of Dokdo/Takeshima are claimed by both the Republic of Korea and Japan, the boundary in the East Sea/Sea of Japan remains unresolved because of the dispute over Dokdo and other issues, and the ocean boundary south of Japan’s main islands and south of Korea’s Cheju Island also remains unresolved. If Japan were to give up its claims in these areas, which are weak with regard to Dokdo in any event, that action might constitute a significant step towards a genuine reconciliation. The more symbolic dispute over the name of the “Sea of Japan”/“East Sea” would be another

110 In March 2001, the Hiroshima High Court overturned the Shimonoseki ruling, declaring that the courts had no power to require the government to make a payment to the comfort women. High Court Reverses Ruling Favoring Comfort Women, Daily Yomiuri, 30 March 2001, 1; CNN, Japan Court Rules Against “Comfort Women”, 29 March 2001.
111 Kyodo, S. Korea to Pay Money to Japan’s Former Sex Slaves, 21 April 1998.
112 Vanderweert, above n.105, 164 (footnotes omitted).
113 See, e.g. summaries of international studies in ibid., 157–60, and in Nearey, above n.105, 122.
area in which Japan might act to respect the Korean views, and perhaps find a neutral name that both countries could agree to use.

VII.A. Dokdo/Takeshima

These two tiny rocky islands situated midway between the main land territories of Japan and Korea have a combined land area of 0.23 square kilometres, or 58 acres.¹¹⁴ They have limited water sources, and have been uninhabited historically.¹¹⁵ Since 1954, about 45 South Korean marine police have been stationed there (and one family stays there in the summer) in order to support Korea’s claim to sovereignty over the islands. Once a year, “Japan sends a protest note rejecting South Korea’s claim to ownership of these features”.¹¹⁶ Their location in the middle of the East Sea/Sea of Japan—50 miles east of Korea’s Ullungdo and 90 miles northwest of Japan’s Oki Islands—gives them an importance and status if they were deemed to have an effect on the delimitation of marine space. They have served as a fishing station for harvesting abalone and seaweed and hunting seals, and they are near rich fishing grounds.

Korea’s claim to sovereignty over the islands is stronger than that of Japan, based on the historical evidence of the exercise of sovereignty and the principle of contiguity (because the islets are closer to Korea’s Ullungdo than to Japan’s Oki Islands), but most importantly because of Korea’s reiteration of its sovereignty over the islands just prior to its annexation by Japan and because of Korea’s actual physical control of the islands during the past 60 years.¹¹⁷ Korea was not in a position to exercise control during most of the first part of the twentieth century, because it was being subjugated by Japan, but as soon as it regained its independence after the Second World War, it asserted control over the islands, and has continued to exercise sovereignty over them since then.¹¹⁸ This actual control over the disputed territory is extremely significant in determining sovereignty. In the recent

¹¹⁴ The rugged beauty of these rocky islands and their surrounding flora and fauna are brought to life in Ministry of Maritime Affairs and Fisheries (Republic of Korea), Beautiful Island, Dokdo (2000).
¹¹⁵ In a 1966 publication, the Dokdo features were described as follows: “Both islets are barren and rocky, with the exception of some grass on the eastern islet, and their coasts consist of precipitous rocky cliffs. There are numerous caves where sea-lions resort. These islets are temporarily inhabited during the summer by fishermen”. Hydrographer of the Navy, 1 Japan Pilot 200 (HMSO, London, 1966). See also Douglas M. Johnston and Mark J. Valencia, Pacific Ocean Boundary Problems: Status and Solutions (1991), 113 (“These islets are uninhabitable, and under Article 121 of the 1982 U.N. Convention on the Law of the Sea should not have an EEZ or continental shelf”).
¹¹⁸ In July 2001, the South Korean National Maritime Police Agency announced it would commission a 5,000-ton-class vessel carrying a crew of 97—entitled the Sambong, the name of Dokdo during the Choson Dynasty—to patrol the waters around Dokdo, beginning in February 2002. Yonhap News Agency, South Korea Commissions New Patrol Boat for Disputed Isle Area, 13 July 2001.
Eritrea–Yemen Arbitration, for instance, the arbitral tribunal explained that “The modern international law of acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.”

A second dispute related to Dokdo involves whether it should be permitted to generate an exclusive economic zone (EEZ) at all. Article 121(3) of the 1982 United Nations Law of the Sea Convention says that “rocks” that “cannot sustain human habitation or economic life of their own” are entitled to a 12-nautical-mile territorial sea, but not to an EEZ or a continental shelf. The language in Article 121(3) does not appear to support a claim of an EEZ around these disputed islands, because they have never been inhabited, and the United Kingdom has recently renounced any claim to an EEZ or continental shelf around its barren granite feature named Rockall which juts out of the ocean northwest of Scotland.

But Japan nonetheless apparently takes the position that the Dokdo features are “islands” that are entitled to generate such zones, and has apparently claimed an EEZ around the islands in its 1996 EEZ declaration.

The better approach is that since these islands are archetypal examples of “rocks” under the rule laid down in Article 121(3) of the Law of the Sea Convention, they should not be entitled to generate an EEZ or a continental shelf. If the maritime boundary eventually becomes the equidistance line between Korea’s Ullungdo and Japan’s Oki Gusto, then Dokdo would be on the Korean side and should not affect the boundary delimitation.


120 United Nations Convention on the Law of the Sea, Art.121(3), 10 December 1982, UN doc. A/CONF.62/122, reprinted in 21 ILM (1982), 1261 and The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, UN Sales No.E.83.V.5 (1983). See generally Jon M. Van Dyke, Joseph R. Morgan and Jonathan Gurish, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ? 25 San Diego LR (1988), 425. The terms in Art.121 are not defined elsewhere in the Convention, and commentators have debated whether a geological feature must literally be a “rock” to be denied an EEZ or continental shelf or whether all features that “cannot sustain human habitation or economic life of their own” are in this category. Judge Budislav Vukas of the International Tribunal for the Law of the Sea has recently explained that the latter interpretation is the correct one, because of the underlying purposes of establishing the EEZ regime. “Volga” (Russian Federation v. Australia), Prompt Release, Judgment, Declaration of Judge Vukas, ITLOS Reports 2002 (www.itlos.org/starts2_en.html). The reason for giving exclusive rights to the coastal States was to protect the economic interests of the coastal communities that depended on the resources of the sea, and thus to promote their economic development and enable them to feed themselves, ibid., paras 3–5. This rationale does not apply to uninhabited islands, because they have no coastal fishing communities that require such assistance, ibid., para.6. The EEZ regime may also be “useful for the more effective preservation of the marine resources”, ibid., para.7, but it is not necessary to give exclusive rights to achieve this goal, and multilateral solutions such as the 1980 Convention on the Conservation of Antarctic Marine Living Resources can serve to protect fragile resources. Ibid., para.8.

Since the Japanese claim is weak in any event, and because this dispute prevents other matters from being addressed and resolved, Japan’s renunciation of its claim over Dokdo/Takeshima could prove to be a very useful gesture to promote a genuine reconciliation between the countries. This renunciation would allow Japan and Korea to delimit their EEZ boundary utilizing the equidistance line between Korea’s Ullungdo and Japan’s Oki Islands, which would also allow the two countries to resolve their fishing disputes.

VII.B. The Japan–Korea joint development zone

Another unresolved maritime boundary lies south of Cheju Island, where Japan and Korea established a joint development zone to permit each country to explore for hydrocarbons. Korea argued that Japan’s “Tori-Shima group [of islands], separated by a deep trench on the seabed from the main Japanese islands, was not entitled to claim a continental shelf” and thus that, using the natural-prolongation principle, Korea’s boundary should extend almost to these Japanese islands. Japan disagreed, advocating use of an equidistance line. It took protracted negotiations to develop a joint development zone in the disputed area. Korea ratified the agreement right away in 1974, but Japan’s ratification did not occur until 1978. That same year, Japan and Korea established an agreed framework whereby both countries agreed to engage in joint exploration of the continental shelf until 2028. This joint exploration has been under way and, in August 2002, the Korea National Oil Corporation agreed with the Japan National Oil Corporation to resume the co-operation that had begun in 1986.

The natural prolongation theory utilized by Korea in the earlier negotiations has not gained much adherence in recent boundary delimitation agreements, so Korea might be in a weakened position when this area is up for renegotiation in 2028. If Japan were to extend this agreement indefinitely, or for another 50 years, it might also constitute a genuine gesture that would promote a reconciliation between the two countries.

VIII. Conclusion

Relations between Japan and Korea have improved in recent years. Korea no longer bans Japanese movies and music from the peninsula. Japan and Korea worked together to co-sponsor the World Cup in 2002.

123 The small Japanese islets called Danjo Gunto, located on the 32nd parallel just east of 128° latitude, are awkwardly located from Korea’s perspective. “South Korea does not dispute Japan’s ownership of Danjo Gunto, but takes the view that these are Japanese islands standing on South Korea’s continental shelf”. Prescott, above n.116, 37.
124 See Johnston and Valencia, above n.115, 66.
125 Yonhap News Agency, South Korea, Japan to Resume Joint Exploration for Oil, Gas Reserves, BBC Monitoring Asia Pacific—Political, 1 August 2002.
But additional steps, including a transfer of things of real value, must take place before a full and final reconciliation will be possible. As described above, the elements of such a reconciliation could include:

- A full accounting of the suffering that took place as a result of the Japanese annexation and occupation through a process similar to the South African Truth and Reconciliation Commission.
- A forthright recognition of the wrongfulness of the conscription of and abuses to the comfort women, accompanied by a substantial payment to those remaining alive and the heirs of those who have died.
- A renunciation of the Japanese claim to Dokdo, an acceptance of an exclusive economic zone boundary drawn as the equidistance line between Korea’s Ullungdo and Japan’s Oki Islands, an agreement to continue the Japan–Korea Joint Development Zone south of Cheju Island indefinitely, or at least until 2078, and a willingness to search for a neutral name for the East Sea/Sea of Japan which both countries could accept and use.

These substantial steps would demonstrate genuine contrition and understanding of the suffering imposed by Japan on its neighbour. They might then enable the next generation of Japanese and Koreans to live as co-operative neighbours, working to assist each other towards prosperity, peace and environmental integrity in their shared region.