Reparations and Reconciliation in East Asia:
Some Comparison of Jeju April 3rd Tragedy with Other Related Asian Reparations Cases*

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ABSTRACT

There are many reparations cases in East Asia, especially relating to Japanese invasion and colonization, such as those on forced slave labor, comfort women, Chinese massacres; and a number of related lawsuits have to date been filed. However, most of these legal cases have been turned down, even though a limited number of cases (e.g., the Hanaoka and Nishimatsu Chinese forced labor cases) have been resolved outside of the courts.

In this symposium, the Jeju April 3rd tragedy has been taken close up as one of the Asian reparations cases. Thus I'll try to discuss how to deal with this past injustice compared to other related reparations cases and point out the challenges we are facing relating to this horrifying historical injustice in the 1940s-50s in this peaceful Jeju island.

First, international as well as domestic reparation cases will be surveyed in depth. Second we'll deal with why the legal cases have been unsuccessful so far in Japan, and the ways to overcome legal obstacles.

Then we will discuss the mechanism of reparations and its goal: reconciliation and a change of the international and racial relationship. The important role of an apology will also be considered.

[Ⅰ] Introduction: Overview of the Jeju Tragedy

(A) The Aim of Reparations Research

Let me state by examining the purpose and the aim of the reparations study: it's related to the following questions.

First, how can we change the cycles of hatred to reconcile the relationship between antagonistic nations/groups?[1] How's the process of building normalized relationship? For the good example of the cycles of hatred, think about the recent tension between South and North Korea regarding the sinking of Korean patrol boat in March, 2010 and the bombardments at Yeonpyeongdo (延坪島) Islands in November, 2010! The recent

* This is an article based on my presentation at the Jeju massacre international conference held on October 29th, 2012 at the Jeju April 3rd Memorial Museum. I appreciate Professor Changhoon Ko's kindness to give me this precious occasion.

1) For this perspective, *see*, e.g., Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Beacon Press, 1998); Martha Minow ed., Breaking the Cycles of Hatred: Memory, Law, and Repair (Princeton U.P., 2002).

divided issue of the $970 million (9.8 trillion won) construction of the Gangjeong (江汀) Naval Base in Jeju as a home to 20 warships, including submarines: whether the peaceful island should be militarized to confront the arms race of China, North Korea, and the U.S. in an increasingly tense region is also based on the similar cycles of distrust.[2)]

If you look beyond Korea, there are abundant vengeance cases from Greek tragic mythology (e.g., Trojan war) through the September 11 terrorist attack of WTC in NY, then the Iraq, Afghanistan bombing, or the recent turmoil in Kirgiz (May, 2010), and the Northern Africa, especially Egypt (January - February, 2011) (the collapse of Mubarak government (February 11th)), Libya (February, 2011~) and Syria (March, 2011~) ! In the Asian context, think about the latest exacerbated tension between China and Japan regarding the ship accident near the Pinnacle Islands, i.e. Diaoyu in Chinese and Senkaku in Japanese (尖閣諸島) (September, 2010) and the announcement of acquisition by Tokyo Municipality and its nationalization afterwards (April, 2012), and the long-term tension between Japan and Korea regarding Liancourt Rocks and the related refusal of Japanese visit at Ulleung-do Island (鬱陵島) (July, 2011).

Then the second question is how reparations are related to reconciliation and peace building. Reparations are the term for remedies of mass tort. The purposes of tort law is usually considered in three ways: (ⅰ) (ex-post) monetary compensation, (ⅱ) (ex-ante) prevention of tortious behavior, and (ⅲ) punishments/sanctions of tortious act. However, there's another important function, that is, (ⅳ) atonement, even though it has been marginalized by usual legal practices. The importance of 'apology' as opposed to monetary compensations, especially in the reparations contexts has also been neglected. That's why there are a lot of unsuccessful legal remedies in this area.

(B) The Overview of the Jeju Mass Killing and its Recent Reparations Efforts

The Jeju mass killing in 1948-1954: the April 3rd Uprising and the Grand Massacre[3)] is the leading Korean reparations case. It's been told that 30,000 islanders were killed by September 1954, and 80,000 islanders were killed by the year of 1957. The Jeju mass killing had long been a taboo under the dictator government since 1961.

However, President Roh Moo-Hyun paid a visit to Jeju for the first time to make a sincere apology in October 2003, after special statute for the truth finding and the recovery of the reputation

2) On the Gangjeong Naval Base issue, see, Christine Ahn, *Unwanted Missiles for a Korean Island*, The New York Times, August 5th, 2011; Choe Sang-Hun, *Island's Naval Base Stirs Opposition in South Korea*, The New York Times, August 18th, 2011. See also, Gwisook Gwon, *National and International Protests Challenge Naval Base Construction on Jeju Island, South Korea*, The Asia-Pacific Journal: Japan Focus, August 14th, 2011. On top of the critical problem of the 'peace notion' in terms of arms race instead of demilitarization, in the Gangjeong case, there are some other crucial issues such as (1) the undemocratic procedure: the lack of the consent of Gangjeong villagers (e.g., 95% of local residents opposed to the base in the April 2007 poll, and even after the new governor Woo Keun-Min's win-win policy since July 2010, 75% of them are hard-line protesters) and (2) the insufficient investigation of the environmental effects by a decision to revise the designation of the coastal area' protected status. *Id*. at 9-11.

3) See, Chang-Hoon Ko & June-Ho Kim, *Jeju Island as the Center for Human Rights and Peace in the 21st Century*, 5 Peace Island 98 (2009). On the topic of the U.S. responsibility, see also, Chang Hoon Ko, *US Government Responsibility in Jeju April Uprising and Grand Massacre: Islanders' Perspective*, 8 (2) Korean J. of Local Gov't Stud. 123, at 130- (2003).

of the victims of the April 3rd massacre was made in December 1999. The report of the truth finding was publicized simultaneously (October 2003). The beautiful peace park, the inspiring memorial as well as the informative April 3rd museum have been established afterwards as parts of the reparations, the problems still exist: (a) the monetary compensations are very limited; (b) the left-wing victims still can't get any reparations because of their status as the core group of 'communist guerillas', how miserably they were slaughtered; (c) the U.S. secondary responsibility has not been discussed legally at depth yet, despite they also played an important role for this genocide! Unlike the Art. 14th of the San Franciscan Peace Treaty (1951) that has exempted the U.S. from legal responsibility, Art.23 section 5 of the U.S. –Korea SOFA Agreement (Status of Forces Agreement) in 1966, which promulgates the 1954 Mutual Defense Treaty, states that the U.S. takes the three fourths of the American responsibility ((e) (i)), while in the case of the joint responsi- bility, both governments take responsibility equally ((e) (ii)).

However, it doesn't apply to the Jeju tragedy that occurred before the enactment of SOFA and thus the U.S. should take full responsibility with regard to exculpatory clause of international treaty, although there might be other hurdles such as statutes of limitation and state immunity. Anyway, it's a remarkable case and late President Roh's apology address has been impressive!

Memorial Hall

Peace Park

Victims' Tombs

[II] Reparations Cases across the World

(A) Europe and Africa

For example, internationally, there are ① the holocaust studies, regarding slave labor/massacres,

confiscated bank accounts, unpaid insurance policies, and looted properties[4], ② the South African new nation building after Apartheid (abolished in 1994)(e.g., the Truth and Reconciliation Commission[TRC] by the Promotion of National Unity and Reconciliation Act in 1995)[5], ③ the Kosovo and other Yugoslav countries' tragedy and its legal solutions by the International Criminal Court, ④ the genocide in Rwanda in the mid 1990s and its aftermath: similar legal solution; ⑤ Australian Prime Minister Kevin Rudd' apology (in February 2008) for the past discriminatory policies against the Aborigine, such as (a) the compulsory separation of their children ('Stolen Generation') from their parents as a kind of assimilation policies from the 1870s to the 1970s; (b) the conquest of their land in Canberra; (c) sport hunting or other brutal killings etc.

(B) U.S. cases

In the U.S., ⑥ reparations for the internment of Japanese-Americans during WWII is the leading case of reparations in the U.S.[6] : about 120,000 Japanese-Americans were deported in 1942 under Executive Order 9066 of Franklin Roosevelt to 16 camp sites in deserted mountainous area (e.g., Manzanar concentration camp[relocation center] in California); in 1988, Ronald Reagan signed the Japanese-American Reparations Bill that includes (a) an apology by Congress, (b) $20,000 damages per person, and (c) education funds of $12.5 billion, totaling $14 billion.

⑦ Land claims and monetary compensation for indigenous people in the U.S., that is the American Indians and the native Hawaiians, are also outstanding cases.

In the case of Native Hawaiians[7], their kingdom was toppled down in 1893, and annexed by President Cleveland in 1898, in spite of opposition by the empress and the 29,000 native Hawaiians: they were evacuated to separate locations (e.g., Waimanalo), their land was taken with the support of the U.S. Army, and their culture was subordinated. Even though 200,000 acres of land were returned through trusts in 1921, their allotted land was underdeveloped, without any major infrastructure.

However, in 1993, the U.S. government admitted the damage caused by the colonization process, and an apology decision was made by Congress. Then in 1999, the Clinton administration, after hearing many testimonies by native Hawaiians, issued a reconciliation report that admitted moral responsibility and recognized self-determination principles of the native Hawaiians. Thereafter a series of legislation has been issued between the end of 1980s and 2000s, which includes (a) the return of the island (Kahoolawe) to the native Hawaiians, and (b) the $0.6 billion reparations: financial assistance for Native Hawaiian health, educational, and housing law. Although there

4) E.g., Michael Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts (NYU Press, 2003); Bazyler et al. eds., Holocaust Restitution: Perspectives on the Litigation and Its Legacy (NYU Press, 2006).

5) E.g., Prescilla Hayner, Unspeakable Truths: Facing the Challenges of Truth Commissions (Routledge, 2002); Francois Du Bois et al. eds., Justice and Reconciliation after Post-Apartheid South Africa (Cambridge U.P., 2008).

6) E.g., Peter Irons, Justice at War: The Story of the Japanese American Internment Cases (U. California P., 1983); Greg Robinson, By the Order of the President: FDR and the Internment of Japanese Americans (Harvard U.P., 2001); Eric Yamamoto et al., Race, Rights and Reparation: Law and the Japanese American Internment (Aspen, 2001) 96-.

7) See, e.g., Eric Yamamoto, Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America (NYU Press, 1999) 60-, 210-.

have been setbacks in the Bush administration era, the situation will get better in the future.

⑧ There are also lots of debates regarding slavery[8], inciting oppositions as well. The symbolic lawsuit of slavery reparations was filed in 2003 about the Tulsa case in 1921. Even though it was rejected, positive arguments including micro-reparations have been continuing.

On the other hand, the partiality, or the one-sidedness of American reparation discussions should also be noted: that is the lack of discussion over responsibility regarding the Vietnam War, Iraq War, Afghan War, as well as the atomic bombing in Hiroshima and Nagasaki, and the mass carpet bombing of Tokyo in 1945. The Jeju (Cheju) Grand Massacre is also a case in point in some senses. To put it differently, arguments about war responsibilities related to the U.S. Army is still scarce.

Furthermore, not a few past injustices with regard to Native Indians in the U.S. have been forgotten by many Americans. For example, Andrew Jackson, the 7th American President (1829-1837) adopted a scorch-earth policy, which was also adopted in the Jeju massacre by the U.S. and Korean Armies, and slaughtered Seminole Indians indiscriminately, including children and women (Seminole Wars (1817-1818, 1835-1842, 1855-1858)), and introduced the Indian Removal Act (1830) which brought about the Trail of Tears of Cherokee Indians. The population of Florida Seminole dramatically decreased from around 6000 to 200~300 through this brutal war[9]. However, present American citizens are likely to admire by frequently looking at him on $20 bill, in spite of his grave past injustice.

$ 20 bill and Andrew Jackson

[III] The Asian Reparations Cases

(A) Asian Domestic Turmoil (Civil War) Cases

(1) Korea

If you look at the Asian nations, besides the Jeju mass killing, the similar domestic mass tort cases are omnipresent! For example, in Korea,

8) E.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. Civil Rights-Civil Liberties L. Rev. 323 (1987); Randal Robinson, The Debt: What America Owes to Blacks (Plume, 2000); Roy Brooks, Atonement and Forgiveness: A New Model for Black Reparations (U. California P., 2004); Alfred Brophy, Reparations: Pro and Con (Oxford U.P., 2006). See also, Kaimipono David Wenger, *Injuries Without Remedies: "Too Big to Remedy?" Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOYOLA OF LAL. REV. 177, at 227- (2010).

9) For the massacre of Florida Seminole Indians, see, Jerald Milanich, Florida's Indians: From Ancient Times to the Present (U. P. Florida, 1995) 179-, esp. 180, 181, 182. Osceola, the famous chief of the Florida Seminole Indians, whose name is rather famous as a name for the beautiful campus lake of University of Miami, fought victoriously against the U.S. Army in 1835 at the 2nd Seminole War (1835-1842), but he was afterward invited to St. Augustine for truce by deceit and instantly enchained and sent to the prison in Charleston. After his death there in 1838, his head was cut off and exhibited in circus show for a while (Alejandro Portes & Alex Stepick, City on the Edge: The Transformation of Miami (U. Cal. P., 1993) 62-70; Jan Nijman, Miami: Mistress of the Americas (U. Pa. P., 2011) 141-).

① Kwangju Massacre in Chonnam province in May 1980 is another good example of Korean reparation cases. According to the official report, 170 people were killed and 380 people were injured, but the reparation by the May 18th Democratic Movement statute of 1995 has been admitted to about 5000 people so far! Kwangju is considered a center of the grass-root democratic movement in the 1980s and the impressive memorial park has been established and tombs with pictures of the victims have been extended.

And needless to say, ② Korean people also experienced the tragic Korean War[10] in 1950-53, and 4-5 million people were killed in total: 2.5million North Korean, 1.33 million South Korean, mainly ordinary citizens in both, 1 million Chinese soldiers, and 63,000 American soldiers.

In this context, we have to realize that the present war-ending situation is just a truce and that nothing has been done as reparation! Incidentally, when the diplomatic relation between China and Korea was opened in 1992, reportedly China might have made apology for the interference with Korean War, but China rejected the apology.

③ The poverty and starvation issue in North Korea after the denomination in November 2009, and the following increasing tension in Korean peninsula, that is contrasted with the situation in Sunshine Policy Era since President Kim Dae Jung (1925-2003), should be noticed from the international human right perspective.

(2) China

If we move on to the domestic turmoil in China, ④ the Cultural Revolution from the mid 1960s through 1970s, and its casualties are looming large[11]. Allegedly, 50-60 million people have been killed, a lot of cultural heritage destroyed and economic activities stagnated by this nation-wide tumult. ⑤ After the tip-toe democratization, Tiananmen Square Massacre occurred in June 1989 and it was a memorable tragedy for the people of my age.

It is true that economically China has become the 2nd largest nation in the world, we have to notice that no reparation talk for those past events has not been started yet, even though the Chinese government has officially admitted Cultural Revolution was a wrong policy. Of course, I have to add quickly that the sincere reparation talk is also required with regard to the brutal Japanese invasion of China during WWII.

(3) Cambodia

Then lastly, as the tragedy in South East Asia, to be more specific, in Cambodia, ⑥ the Pol Pot (1928-1998) (Khmer Rouge) genocide[12] in the late 1970s should not be omitted. 2 million people, one third of the nation, were slaughtered! The status and property of the ruling class, including former politicians, government officials, entrepreneur, technical experts, intellectuals etc., were confiscated and deported from Phnom Penh to rural village for forced agricultural labor.

10) See generally, Bruce Cummings, The Origins of Korean War vol.1 (Liberation and the Emergence of Separate Regimes) (Princeton U.P., 1981), vol.2 (The Roaring of the Cataract) (Princeton U.P., 1990); David Halberstam, The Fifties (Villard Books, 1993), do., The Coldest Winter: America and the Korean War (Hyperion, 2007).

11) See, for example, Jun Chang & Jon Halliday, Mao: The Unknown Story (Anchor Books, 2006) 493-; Roderick MacFarquhar & Michael Schoenhals, Mao's Last Revolution (Belknap, 2006); Philip Pan, Out of Mao's Shadow: The Struggle for the Soul of a New China (Simon & Shuster, 2008).

12) E.g., Ben Kiernan, The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79 (3rd ed.) (Yale U.P., 2008).

Especially the intellectuals, bourgeois capitalists, those studying and coming back from overseas were killed unconditionally. Even the Buddhism temples were destroyed.

There's some affinity between this Cambodian Khmer Rouge revolution and the Chinese Cultural Revolution, but Pol Pot genocide was much more brutal and violent.

The Pol Pot government was ousted by Vietnamese Army with the grass-root Cambodian refugees group (KNUFNS [Kampuchean National United Front for National Salvation]) in January 1979. The guerilla war by Khmer Rouge continued in the 1980s-90s, until all the remaining leaders finally surrendered in 1999. In December 1998, the top leader of Khmer Rouge made apologies for the mass slaughters in the 1970s.

The International Criminal Court (Khmer Rouge Court called specifically 'Extraordinary Chambers in the Courts of Cambodia', the joint court of the United Nations and Cambodia, started from July 2006, and delivered the decision in the summer of 2010. However the serious problems have been pointed out in terms of reconciliation, even though the huge budget ($56 million; $21.6 million provided by Japan) has been spent for the administration of this court: (a) lots of perpetrators escaped overseas from this court, and it's difficult to bring them back to the court; (b) the top leaders themselves, including Nuon Chea (1926-), leng Sary (1922-) & leng Thirith (1928-), Kang Kek lew (1942-), reportedly feel unhappy about this prosecution, by saying that they have performed their responsibilities by truth telling and that the long-term imprisonment will be against humanity.

Kang Kek lew (Kaing Guek Eav) named Duch was sentenced to 35 years' imprisonment on July 26th, 2010, but actually 5 years of illegal detention and 11 more years already served were deducted from 35 years. He was in charge of the Tuol Sleng prison, called the torture prison. The verdict took into account mitigating circumstances, such as (a) Duch's cooperation, (b) his admission of responsibility, (c) the limited expression of his remorse, (d) the coercive en- vironment of the Khmer Rouge period and (e) the possibility of his rehabilitation[13]. The case has now been appealed.

[IV] Japan Related Reparations Cases in the Asian context

Even though Japan is generally considered a peaceful nation with the famous war relinquishment clause of Art.9 of the Japanese Constitution after WWII, we must not forget that it used to be a key player in the past injustice in the East Asia and that its reparations efforts are un-successful, or I should say missing, and are far behind the goal of historical reconciliation with neighboring countries.

Concrete examples are countless: (a) slave labor cases; (b) massacres related to the invasion in China; (c) undiscriminating bombings and bacteriological war etc.

(A) Korean and Chinese slave labor cases in Hokkaido[14]

(1) Facts

Compared to the present touristic and pastoral image of Hokkaido, formerly, there used to be

13) Seth Mydans, *Khmer Rouge Figure Is Found Guilty of War Crimes*, The New York Times, July 26th, 2010.

14) Kunihiko Yoshida, Property, Housing Welfare and Reparation Problems in the Multi-Cultural Age (Tabunka Jidai to Shoyuu Kyojuuhukusi Hoshou Mondai) (Yuhikaku Pub. Co., 2006) chap.7.

lots of coal mines, most notably Yubari. There were lots of foreign laborers, especially Korean and Chinese slave laborers either in such coal mines or in secret airport for Japanese Army during WWII.

Shortly before the end of WWII, about 150,000 Korean laborers lived in Hokkaido as compared with 6,000 resident Koreans in Hokkaido nowadays. Allegedly more than 700,000 Korean people were deported to Japan for forced/slave labor in those days. (But notice that there were much more people for forced labor in Korean peninsula or in Sakhalin.) For Chinese forced laborers, in Hokkaido, there were 58 slave labor sites out of 135 sites in Japan. About 16,000 Chinese workers out of 40,000 were deported to Hokkaido.

There were a series of official governmental decisions delivered from the end of the 1930s through the 1940s: (a) For Korean labor force, three decisions were made, that is, decisions regarding, ① first, the semi-voluntary recruitment type of dispatch in July 1939, ② second, the official procurement type of dispatch in February 1942, and lastly, ③ official draft type of dispatch in September 1944; (b) For Chinese labor force, a couple of decisions were issued regarding ④ first for their deportation in November 1942, and ⑤ secondary for its facilitation in February 1944.

Their working conditions were generally miserable, managed by supervisors called 'Bogashira' violently, with the severity different depending on the regions. Especially the condition of Chinese slave laborers were worse: they could not take a bath for many years during their stay according to the testimony (in 2008) by Professor Emeritus Feng of Guang Zhou University Medical School, who experienced slave labor in Kakuta mine near Yubari at the age of 14; the death rate was 17.5% on average, but much higher depending on the region, for example, 42.4% at Hanaoka in Akita Prefecture, 42.4% at Ashio Copper mine in Tochigi Prefecture, 30.3% at Muroran Japan Steel Company in Hokkaido.

(2) Lawsuits

Many lawsuits were filed from neighboring countries' victim citizens. There's an organized network among Japanese legal attorneys, especially for Chinese slave workers, partly because of the finding and release in 1993 of the official report about Chinese forced laborers issued by the Ministry of Foreign Affairs.

However, the most of their legal efforts have been unsuccessful. The leading case is Japanese Supreme Court Decision (Nishimatsu Decision) of April 27th, 2007 for Chinese forced laborers in Hiroshima by Nishimatsu Construction Company, that has rejected legal reparation mainly because of their interpretation of the waiver clause of Sino-Japanese Joint Declaration in 1972. Chinese government has been strongly opposed to such interpretation. On the other hand, it's noteworthy that the Japanese Supreme Court Justices, on the other hand, have stressed the importance of moral responsibility of the construction company and that they've even urged the company to pay reparation voluntarily.

A similar judgment was also made in the Japanese Supreme Court Semi-Decision (Sakata Semi-Decision) of February 18th, 2011 for Chinese slave dock laborers in Sakata, Yamagata Prefecture, that has rejected the request of 150 million damages and apology by the waiver clause of the 1972 joint declaration. However the lower courts, especially the district court, admitted the infringement of the security obligations of the company (Sakata Transportation Co.) as well as the Japanese government and remarkably the

Sendai High Court in November 2009 suggested to the both parties that voluntary remedies should be done, considering the great loss the victims suffered physically and mentally in those days. Notice that the moral responsibility of the Japanese government is also implicated from this case.

Sakata Slave Labor Dock

Relatives of Victims in Tangshan, Hebei Province in China

The governmental responsibility in this case is much more important because the related private company is not financially big for reparations. However neither the Japanese government nor Sakata Transportation Co. has taken any actions toward reconciliation. Sakata City is traditionally famous for its marine commerce and it is overwhelmed by local merchants somewhat like a company town. Thus the reparations litigators and their supporters have been ostracized in this local conservative community of Sakata city and the reality there is far from international reconciliation.

(3) Settlements[15)]

Therefore, no wonder that the big reparations settlements regarding the Chinese forced labor by Nishimatsu Corporation, have been made successively/consecutively in 2010. I think the Nishimatsu Settlements have fared well with regard to reconciliation, with compared to Hanaoka Settlement with Kashima Corporation in 2000, because they include: ① the admittance of the past tragic events as well as of their responsibility, ② their sincere apology, ③ the monetary compensation (250 million yen in Hiroshima case, and 128 million yen in Niigata case), even though the monetary award, 0.7 million yen per each victim, was not big, compared to the 2 million yen reparations per person in the Japanese-American internment camp case.

On the other hand, the Hanaoka Settlement has caused the crucial criticism from the part of the victim group, including the group leader Geng Chun, because Kashima Corporation argued after the settlement that it would deny the reparation in spite of the provision of 500 million yen trust fund and this settlement lacked the sincerity of the apology in this sense.

(4) Remains[16)]

15) On this topic specifically, see, Kunihiko Yoshida, Urban Welfare, Disaster Recovery, War Reparations and a Critical 'ule of Law' (Toshikyojuu Saigaihukkou Sensouhoshou to Hihanteki Hou no Shihai)(Yuhikaku Pub. Co., 2011) chap.7.

16) On this issue, see, Kunihiko Yoshida, *supra* note 13, Chap.8 Section2; do., *The Remains Issues of the*

As for remains of forced labor victims, we should recognize that Korean labor cases have been generally neglected and that most of them still exist unnoticed in that sense in the land of Hokkaido, except for the returning effort in the mid 1970s.

On the contrary, the remains of the Chinese labor victims were returned in the 1950s and most of them are now stored in the memorial hall in Tian Jin. And those of Korean victims related to the Japanese Army have also been returned to Korea through Yuten Temple in Meguro, Tokyo, administered by the Ministry of Labor and Welfare.

In this big loophole, the NGOs, most notably Hokkaido Forum (established in 2002), have started the grass-root movement of returning the remains of the forced labor victims: so far those in Muroran, Akabira, and Shumarinai have been returned. Since 2005, they have also excavated nearly 40 remains dumped in the community graveyard of Asajino, one of the biggest airport bases for the Japanese Army in the 1940s in Northern Hokkaido, where more than 1200 Korean people got involved in the harsh slave labor in those days. According to the testimony by Mr. Chi Ok Ton who worked there in 1943 at the age of 19, it has turned out that their workplace and their miserable cabins were secretly excluded from the outside ordinary space, so that no local residents could see and know the realities of their slave labor. However, after the excavation, NGO members have encountered critical difficulties in identifying the excavated remains and finding their relatives to repatriate them.

Korean Slave Laborers in Asjino Airport in Northern Hokkaido: From the Civil Law Perspective(Hokkaido Asajino Hikoujou Kyouseiroudou no Kankoku-Chosenjin Ikotu Mondai), 68 War Reparation Rev. (Sensou Sekinin Kenkyuu) 2 (2010).

(5) Unpaid Salaries

Some of the foreign workers came to Japan to get a good salary. Nevertheless, in most cases, their salaries were nominal, and have got almost nothing up to present. For example, Ms. Yang's case of 99 Yen's return in December 2009 is ludicrous: Japanese social insurance bureau tried to get back her pension premium she had paid more than 65 years ago, when she was employed in Nagoya by Mitsubishi Steel Corporation. In the meetings at Busan and Ulsan in 2009 with the survivors of slave labor at the Asajino airport, all of them were complaining about their nominal or unpaid salaries.

On the other hand, the escrow money deposited by the related companies has amounted to 200 million yen, without any reevaluation. Formerly, according to the notice issued by the Ministry of Justice in 1946, or in 1956, it was argued by the government officials that the "prescription" doctrine similar to limitation of action doctrine should not be applied to the huge amount of unpaid salaries. However, after the Japan-Korea treaty in mid 1960s, the escrow money has strangely become the state property of Japan by the domestic special statute of 1965. I argue that there should be moral reparations to get back the salaries to the slave laborers, of course with reevaluation, just as the Japanese Supreme Court Justices argued in the Nishimatsu Decision, even if we admit the legal claim might be barred by the 1965 Treaty.

(B) Comfort women (Sex Slaves) for Japanese Soldiers[17)]

17) Elazar Barkan, The Guilt of Nations: Restitution and Negotiating Historical Injustices (Norton, 2000) Chap.3 Sex Slaves; Kunihiko Yoshida, *supra* note 14, Chap.5. On this topic, I organized a joint symposium of Hokkaido University and Seoul National University

(1) Discovery of the Problems

Although allegedly as many as 200,000 women in total all over in Asia had been deported as 'comfort women' the debates started belatedly, that is, from the 1990s owing to the devoted efforts by Professor Emeritus Yun Chung Ok of Ehwa Women's University and the NGO called "the Korean Comfort Woman Problem Resolution Council" that was established by her. The Comfort Women (Sex Slaves) Museum was established in the spring of 2012 and the exhibits have been moved there from the council.

It took long time for them to come forward because such women and their relatives would have been stigmatized and discriminated once they had spoken openly about their past miserable events in Korean society that had been influenced by Confucian ethics. Therefore, the comfort women issues were not the subject matter discussed in the process of making the Japan-Korean treaty of 1965. The number of Korean comfort women

Wednesday Protest

Statues of Comfort Women at the House of Sharing

is the biggest, but comfort women were drafted from other counties as well, such as Taiwan, China, Philippine etc. To avoid the sex related diseases, Korean women were favored because of their Confucian chastity and faithfulness. On the other hand, we have to notice that even after WWII, sex slaves were provided by the Korean army in Korean War and Vietnam War as well. It's really a negative legacy in the East Asian countries!

(2) Lawsuits

The first comfort women lawsuit was filed by Ms. Kim Hak Sun in December 1991, and many others followed. The victim women pursued in the lawsuit, ① the admission of their past infamous events, ② the official legal responsibility of the Japanese government which organized such semi-official prostitution, and ③ their official apology.

However, almost all the lawsuits have turned out to be unsuccessful, except for the Yamaguchi District Court (Shimonoseki Division Court) decision of April 27th, 1998, that admitted 300,000 yen damages for failing to pass the legislative reparation for comfort women for a long time after the end of WWII. For example, all of the

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on March 27th 2012 at SNU under the title "Reparations and Reconciliation between Korea and Japan: Focusing on Comfort Women Issues" See, do., *The Comfort Women Reparations' Agenda: Reasons Why They Are Unsuccessful and Ways to Overcome the Obstacles—with Reference to Reparations and Reconciliation in East Asia*, PEACE ISLAND JOURNAL vol.6 (2012).

Japanese Supreme Court (Semi-) Decisions of March 25th, 2003 (the upper decision of the Shimonoseki case mentioned above); March 28th, 2003 (the Son Shin Do case); November 29th, 2004 rejected the legal remedies by mentioning the state immunity doctrine, the limitation of action, even though they admitted the existence of the tortious acts.

(3) The Asian Women's Fund

Nevertheless, on the other hand, after the expression of the Prime Minister Tomiichi Murayama's personal apology, the Asian Women's Fund (AWF) was established in 1995 by collecting monies from the ordinary Japanese citizens who felt the guilt about the comfort women issues. But it was not the governmental organization and was based on the denial of the legal responsibility of the Japanese government, although it included the letter of the prime minister's personal apology.

As a matter of course, the Asian Women Fund has been rejected by many comfort women, especially by almost all the Korean women organizationally. You can understand why they are not satisfied with the provision of the money itself. On the other hand, they have been protesting against the attitude of the Japanese government in front of the Japanese Embassy in Seoul every Wednesday more than 1000 since Prime Minister Kiichi Miyazawa visited Korea in 1992.

(4) The Recent Political Action of the Japanese Administrative Leader that was disgusting to Comfort Women and the Accusation Decision by U.S. Congress Afterwards

The international criticism of the Japanese government regarding the comfort women issues has been uplifted in the 21st century. For example, in the U.S. Congress, Representative Michael Honda, whose family experienced the internment camp in WWII as mentioned above, made a proposal that urged the Japanese government to admit the historical responsibility regarding sex slaves and to make an official apology in January 2007.

Against this background, the Abe administration started the counter-arguments: for instance, (ⅰ) former Foreign Minister Taro Aso argued that the testimonies by the comfort women in the U.S. Congress were false and (ⅱ) former Prime Minister Shinzo Abe himself denied the coerciveness in drafting comfort women and argued that they got involved in the prostitution voluntarily. *Notice that Aso's family ran the coal mining company by hiring a lot of Korean slave laborers and that Abe' grandfather was the Minister of Commerce & Industry Shinsuke Kishi who organized the foreign slave labor as a political leader during WWII and had been imprisoned after the war, but strangely enough, was released from Sugamo Prison afterwards and became a Prime Minister in the 1960s!

Such conservative remarks by the top political leaders of the Liberal Democratic Party in the Japanese Diet brought about the criticisms all over the world. Thus former Prime Minister Abe visited the U.S. in March 2007, he felt obligated to express his personal apology and he did without any withdrawal of his previous remarks, and funny enough, President George Bush, in return, "I'll accept his apology with warm heart". This strange political drama between the conservative political leaders of two nations without any presence of the victim women all the more exacerbated the feelings of them.

No wonder the Honda's accusation proposal

was passed in July 30th, 2007, in spite of the conservative political advertisement by some of the Japanese Liberal Democratic and Democratic Congressmen in the Wall Street Journal on June 30th and the shameful conservative lobbying using lot of money (40 million yen) to obstruct the American Congress decision. Many other foreign countries such as Canada, Netherland, EU follow suit. And don't forget there has been a similar movement even in Japan in the local governments, including Sapporo city, from the grass-root level.

However, the political & diplomatic negotiation has still reached a deadlock/stalemate even after the political change of the government, even though former Foreign Minister Katsuya Okada, now the Chief Secretary of the Democratic Party allegedly made some effort to set up an apology session with Korean comfort women without any avail.

But on the other hand, from the Korean side, the epoch-making judgment has been delivered recently. On August 30th, 2011, The Korean constitutional court gave a ruling that the diplomatic inaction of the Korean government regarding the comfort women issues infringes the basic human rights of the victims and thus is unconstitutional, because the legal opinions as to whether the Japan-Korea treaty of waiver clause covers the comfort women issues is divided and the diplomatic/political negotiation should be done according to the negative inter-pretation prominently argued in Korea. Considering that the number of the Korean comfort women survivors has now decreased dramatically to 69 people out of some 200,000, the political/legal solution should be needed any minute!

(C) Reparations for the Korean Victims by Atomic Bombing[18)]

But there's an exceptionally remarkable Korean reparations case: that is the reparations case for the Korean victims by atomic bombing in Hiroshima & Nagasaki in August 1945.

(1) Facts

It's not well known that one tenth of the atomic bomb victims in Japan were Korean: the number of the Korean victims was 23000, but only a tenth of them (2300 people) are alive at present. They moved to the Hiroshima region from the middle-southern Korea, that is, from Daegu (大邱) and especially from Hapcheon (陜川). It's called 'Hiroshima in Korea' and the sanatorium for atomic bomb Korean victims is located there. There's also the memorial for more than 900 atomic bomb victims at the time of my visit there in 2008. They died miserably and helplessly in the Hapcheon region without enough treatments. The meeting event with the patients in the sanatorium to pay tribute to the victims in the memorial shrine is my memorable experience.

In those days the Korean victims could not get the special medical treatment for the atomic bomb patients, once they left Japan, because the administrative notice #402 that supplanted the special statutes regarding the atomic bomb health treatments required 《the victim's residence in Japan》. Even in the Korean society, they (the Korean victims) faced discriminations and remained hidden and abandoned without getting any special treatment for the ordinary atomic bomb victims. Their miserable situation without any medical help from two countries continued for more than 30 years following the atomic bombing in 1945.

18) Kunihiko Yoshida, *supra* note 14, Chap. 6. *See also*, do., *Japan-Korea Reparation Issues and Civil Law (Nikkan Hoshou Mondai to Minpo) (2)*, 576 Window of Den (Shosai no Mado) 27- (2008).

(2) The Statutes for Special Health Care for the Atomic Bomb Victims and the Original Exclusion of Korean Victims (Notice #402)

The Statutes regarding medical treatments for the atomic bomb victims originally focused Japanese victims and the related official notice #402 (1974) (abolished in 2003) that stipulates the eligibility for the special free health care for the atomic victims, requires 《the residence in Japan》. Therefore the Korean victims who left Japan lost the opportunity to get the special health care for the bombing related diseases.

The government officials argued that the special medical treatment for the atomic bomb patients was the social welfare matter in each country as a rationale for restricting the eligibility for the Korean victims. They stressed that the Korean government should provide them! In my opinion, theoretically it is the U.S. who should be primarily responsible for the atomic bomb casualties, even though, at the international law level, the reparations right against U.S. has been waivered by the San Franciscan Peace Treaty of 1951 (effective in 1952).

However, on the other hand, it is not easy to say that Japanese government is not liable at all for the Korean victims, because some of the Korean victims were deported as slave laborers mentioned above at Mitsubishi Steel Corporation at Hiroshima Bay and therefore have been injured and killed by the atomic bomb: in such cases, the Japanese government and Japanese corporations could be secondarily responsible.

(3) Critical Interpretations of the related Statutes

It's remarkable that the Japanese judicial branch has been taking a progressive approach in recent years and has expanded the protection to cover the Korean bombing victims internationally, in spite of the original legislative and administrative negative position.

It already started in the mid 1970s. ① The Japanese Supreme Court decision of March 30th, 1978 has developed a critical interpretation that is different from the original position of the drafters of the related statutes. By the interpretation of Justice Shigemitsu Dandoh, Professor Emeritus of Tokyo University, and others, the statute includes the moment of war reparations and the Korean victims should also be protected equally. It ordered in that case the provision of the atomic bomb victim's notebook (special public health care insurance policy) and admitted the medical allowances, even if the Korean victim came to Japan illegally and stayed in Japan temporarily. This is really a revolutionary interpretation.

Regarding the #402 official notice of 1974, which orders to stop and reject the medical allowance for the Korean victims who leave and go back to their home country, Korea, a series of notable decisions have been issued recently:

First, ② The Osaka High Court decision of December 5th, 2001, canceled the administrative measures that had stopped the medical allowance for the Korean victims following the #402 administrative notice, by judging that the #402 official notice was illegal. Remind that the #402 administrative notification was abolished in 2003.

Second, in the lawsuits demanding the past medical allowances that had been stopped by #402 notice, the Supreme Court decisions of ③ February 6th, 2007 (Brazilian case) and ④ February 18th, 2008 (Korean case), denied the application of the short term prescription and ordered the retroactive payment of the medical allowances denied in the past.

Thirdly, for the damages lawsuit by the Korean victims whose medical allowances were discontinued by the #402 official notice and even by

those who have lost the chances to apply for the medical allowances because of the existence of the #402 notice, ⑤ the Supreme Court decision of November 1st, 2007 (Hiroshima Mitsubishi slave laborers' case), ordered the payment of pain and sufferings for them all from the Japanese government. This is exactly the governmental liability (governmental reparations), and by that score, this decision is extremely important, even though it is related to atomic bombing! From this progressive interpretation, the settlement movement for the further protection for the Korean victims in similar situations, is going on.

(D) Nanjing Massacre: the Forgotten Holocaust[19]

(1) The Cruelty of the Massacre

Let's move on to the reparations cases related to the Sino-Japan relationships. The Japanese invasion into mainland China in the 1930s to 40s caused a lot of tragedies and casualties. Among them the Nanjing massacre from December 1937 to February 1938 has been the most debatable and the most notorious tragedy for its cruelty and its size of casualties. In the Nanjing massacre memorial museum, there is a pole notifying the number of the slaughtered people: 300,000, whereas not a few Japanese historians argue the number is less than 300,000, for example, the mainstream Japanese historians argue it was about 200,000 and the conservative historians advocate the several tens of thousands. Even with such numbers this mass killing is horrible!

And the cruel and crazy way in which the Japanese soldiers killed the Nanjing citizens is beyond my imagination: for example, (a) the competition of 'Consecutive Hundred People's Killing' by Swords; (b) the stabbing of the babies of civilians to test the courage; (c) the burning of the thousands of people bundled and connected with each other by rope on the riverbed of Yangtze (Chang Jiang) River.

(2) The Massacre Forgotten by Japanese

But on the other hand, it is a remarkable fact that most of the Japanese including myself, especially youngsters nowadays, rarely have the chance to learn the detail of Nanjing massacre in spite of the detailed historical discussion among history experts. It's partly due to the agitation by the ultra-conservative group to deny and ignore the massacre, sometimes intimidatingly. They strongly oppose to the historical education of this tragedy and have become influential upon Japanese politicians as well. Their strategy is academically nonsensical, but pragmatically and strategically successful. As a result, it's stifling with regard to historical reconciliation in its true sense.

Anyway there's a great discrepancy between both nations in terms of historical knowledge of ordinary citizens. Even though the Nanjing museum is one of the famous spots for school excursions for Chinese, the number of the Japanese youngsters who visited there is still very limited. Most of the Japanese youth are still ignorant of this cruel massacre and take no interest in that at all.

(3) Reparations and Defamation Lawsuits and the Continuing Damage

19) *See* generally, e.g., Iris Chang, The Rape of Nanking: The Forgotten Holocaust of World War II (Basic Books, 2007); Zhu Chengshan et al. eds., Collective Drawings of Exhibitions of Memorial Hall of the Victims in Nanjing Massacre by Japanese Invaders (Great Wall Pub. Co., 2008). On the defamation case of Xia Shuqin, *see*, Kunihiko Yoshida, *Some Thoughts at the Tragic Site of Nanjing Massacre (Nankin Jiken Atochi deno Guukan)*, 95 Quarterly J. on China (Kikan Chuugoku) 49 (2009).

Talking of lawsuits regarding the Nanjing massacre, first, the reparations lawsuit was filed by Li Xiuying (李秀英) (1919-2004), who was stabbed by the Japanese soldier on the 37 spots in December 1937, but was luckily helped by Dr. Wilson at Gulou (鼓樓) Hospital and was alive until recently. ① The Supreme Court (semi-)decision of May 9th, 2007, endorsing the lower court decisions, rejected the claim by state immunity and by denying the application of Chinese civil law.

Second, the defamation cases are well-known. For the defamation lawsuit by Ms. Li mentioned above and the counter-lawsuit by Xia Shuqin (夏淑琴) (1930-), because they are described as false persons in the defamatory historian' book, the Supreme Court decisions of ② January 20th, 2004 (Li's case), and ③ February 5th, 2009 (Xia's case) awarded the damages: 1.5 million yens (②) and 4 million yens (③), but rejected the apology claims in both cases.

Ms. Xia told me her famous tragic case at her apartment of eastern Nanjing in 21 August 2008. According to her, Japanese soldiers raided her house in December 1937, seven of her nine family members killed at once and her mother and sister even raped just in front of her, when she was 7 years old. Only Ms. Xia Shuqin and her younger sister at the age of 4 survived. There's a special exhibit section of her tragedy in the Nanjing massacre museum. Although she was awarded damages and her case has been considered successful among the Japanese attorneys, she herself seems unsatisfied with the result. What she wanted most was the sincere apology by the defamatory conservative historian, who never showed up at the court. In that sense, her damaged feeling is still continuing! Listening to her talk in tears, I have realized that even the legally successful decision is still far from the reconciliation goal.

Third, on the other hand, the progressive historical description has been attacked by defamation lawsuits from conservative groups. Whereas ④ the Supreme Court [semi-]decision of December 22nd, 2006 (Katsuichi Honda's case) supported the progressive writing, it's a shame that ⑤ the Supreme Court [semi-]decision of January 21st, 2000 (Saburo Azuma's case), endorsed the conservative argument that the 'risky play'of burning and sinking bag as a way of killing Nanjing citizens was false, and awarded the pain and sufferings to the conservative group (perpetrators of the massacre)! What kind of dubious historical knowledge of the Nanjing massacre the related judges had in mind?

(E) (Appendix) Pingdingshan (平頂山) Massacre in 1932[20]

The village of Pindingshan near Fushun (撫順) was assaulted on the special holiday in mid-September 1932. The massacre there was the forerunner case before a series of mass slaughters by Japanese soldiers in WWII, but it was one of the most horrible mass killings in China. All of some 3000 villagers including women and children were summoned to an open square for taking pictures. But they were shot by guns disguised as cameras, and then stabbed to death without exception. The remains of mothers and children getting together in the Pingdingshan Museum draw tears.

Among several dozens of survivors from the Pingdingshan tragedy, only 5 people are alive at

20) Kunihiko Yoshida, *Legal Studies of War Reparation Regarding Japanese Invasion in China and the Sino-Japan Friendship-Building (Chuugoku Shinryaku no Sensou Higai Hosyou Hougaku Kenkyuu to Nichuu Yuukou)*, 105 Quarterly J. on China (Kikan Chuugoku) 21, at 23- (2011).

present. Ms. Fang Surong (方素榮) whom I met at Kunming in April 2011 is the most notable female survivor whose baby brother was stabbed to death and thrown in front of her. Ms. Yang Yufen (楊玉芬) who survived the tragedy with her injured father and her sister after her mother and the other siblings had been shot and stabbed told me the story in Fushun in September 2010.

Even though their reparations lawsuit was rejected finally by the Supreme Court semi-decision of May 16th, 2006, their attorneys have continued to make grassroots efforts in pursuit of reconciliation. The suggestion of moral reparations by the lower court judges should be focused from their writings of the Tokyo High Court decision of May 13th, 2005.

(F) Chongqing Bombing[21)]

(1) The Fact and its Uniqueness

The next case is the first big scale non-discriminatory bombing in the world: the bombing of Chongqing (the temporary capital of China from 1937 to 1945), that was much bigger than the Bombing of Gernika in 1937 and is called another 'Nanjing massacre from the sky'.

It started in December 1938 and continued until August 1943 for about 5 and a half years, most notably the attack of May 3rd and 4th of 1939 and the tragedy at the Dugout of 18 Steps of June 5th, 1941. (The Air Force attack started following the Imperial Ordinance of December 2nd, 1938.) Chongqin was hit more than 200 times, with more than 50,000 killed, more than 90% of the houses damaged, 500,000 to 600,000 citizens losing their houses. In Japan we have experienced the Great Bombing of Tokyo in March 1945 and the atomic bombings of Hiroshima and Nagasaki in August 1945, that were also nondiscriminatory and against the international law such as the Hague Treaty on Land Battle of 1907, Treaty Bill on Air Battle of 1923 and the Protocol Added to the Geneva Treaty on International Martial Conflict for the Protection of the Victims of 1977. However, the Chongqing Bombing was the forerunner of nondiscriminatory carpet bombings for such a long time, attacking the ordinary citizens of the city located far away from the actual battlefield: Chongqing is located 800 km west of Wuhan, and 1200 km west of Nanjing!, and was clearly against the international law mentioned above. The alleged purpose of the air force attack was to stop the resistance. The other intermittent bombings of Chengdu (成都) from 1938-1941, Leshan (樂山) in 1939, even the mountainous area of Sonpang (松潘) in 1941 are also noteworthy.

(2) Continuation of the victims'damage

Having interviews with some 50 injured victims at Chongqing and some other cities in Sichuan province in October and December of 2009, I have been impressed with the continuation of their damage, many having scars on the face, head, legs etc. still hurting and some even having part of the bullet in their bodies.

In addition to their physical damage, many of their family and relatives were killed simultaneously, and their property depleted dramatically for many of the victims, especially the commercial victims in Leshan, by these carpet bombings.

(3) Belated Lawsuits and the Reasons for Delay

The reparations lawsuits regarding the bombing of Chongqing and other areas in Sichuan province started just recently, from 2006 and there's no judgments delivered so far. The reasons for the

21) Kunihiko Yoshida, *supra* note 13, Chap.8.

delay of their lawsuits are as follows.

(ⅰ) First, Chongqing used to be a center of Chiang Kai-Shek (蒋介石) and other Kuomintang [KMT] political groups, that have moved to Taiwan after WWII. Thus there was a political tension between KMT and the present communist Chinese government and its harbinger in Chongqing in those days and the Chinese government is not interested in the protection of the damaged citizens in Chongqing.

(ⅱ) Second, Chongqing is an economic city, and the government officials, including city officials, are afraid that the lawsuits might harm the economically friendly relationship between two nations. This factor also explains the in-difference of the Chinese government, including Chongqing city government, to the Chongqing bombing lawsuit, even though the Chinese government has officially argued since the mid 1990s that the victims can make a lawsuit of reparations individually in spite of the waiver clause of the Sin-Japanese Joint Declaration of 1972, claiming that China has just relinquished the reparations at the nation level.

(ⅲ) Third, the plaintiffs of the Chongqing bombing lawsuits are generally poor, and politically powerless, or potentially too many to be well-organized, and it took long to set up an international lawsuit. They have had difficulty in acquiring the financial aid for litigations without any governmental help. But in the Leshan' case, on the other hand, there's a good coalition between plaintiffs and government and it explains why there are lots of Leshan's plaintiffs in the bombing litigations.

(4) Forgotten Bombings by Japanese and the ways to overcome

On the other hand, Japanese are ignorant of the Chongqing Bombing compared to Nanjing massacre in spite of these lawsuits. The historical knowledge of bombings in Chongqing and other areas is lacking in Japan, especially among the Japanese youngsters, because those facts are never taught in the modern history textbooks. For example, when the AFC (Asian Football Confederation) Asian Cup was held in 2004, and the Japanese soccer team faced the criticism from the Chongqing citizens, I suspect they could not understand the background of their anger.

It's exactly the first stage obstacle when we proceed toward the reconciliation regarding these tragedies. How shall we overcome this big gap of the knowledge of the Sino-Japanese modern history?

In this context, I think the educational role of the Chongqing litigation should be emphasized. I also think regarding the Chongqing lawsuit the state immunity doctrine should be reexamined and, even if the legal claim is rejected, the voluntary and political settlement outside of the court should also be reconsidered after Nishimatsu Supreme Court decision of 2007 by the active initiative from the Japanese government. In order to proceed in this way, the correct historical knowledge is critical.

(G) The Unit 731 Human Body Experimentation and Another Dismal Air Raid (Pest War[Biological War])[22]

(1) Facts

The 731 Unit (Ishii Troop), a group of medical professionals, established the laboratory for human body experimentations in the suburbs of Harbin

22) On the human experimentation, see, e.g., Seiichi Morimura, Devil's Satiation (Akuma no Housyoku) vol.1 (Koubunsya, 1981), vol.2 (Koubunsya, 1982); Sheldon Harris, Factories of Death (Routledge, 1994), and on the legal matters of the pest war, see, Kunihiko Yoshida, *supra* note 18, at 21-22, 24-.

in 1938. They executed the insane vivisection on the living human object called 'maruta' to develop the knowledge of virus and to bacterio-logical /biological war. It's been told that more than 3000 people were killed by these inhuman experimentations.

And they also started to do another thing by using their developed bacteria. The Unit 731 dispersed the pest germ and other viruses from the air in Zhejiang Province (浙江省) and Hunan Province (湖南省) from September 1940. Most notably the number of casualties at Changde (常德) in Hunan province was worst: in the region, as many as 7,643 people were killed by the release of pest germ in the area. In November 1941, Changde was hit by the pest germ air raid, and in November 1943, it was besieged by 100,000 Japanese soldiers and destructed completely. Another tragic example is the village of Chongshan (崇山) in Zhejiang province located about 50km south of Hangzhou (杭州), the hometown of the leader of the germ war litigation mentioned below. Nearly 400, one third of the villagers there ware killed by the pest germ air raid in September, 1942.

(2) No Responsibilities of the Related Medical Professionals

The 731 Unit and the related medical and biological professionals were not prosecuted in the Tokyo International War Tribunal for such insane acts and the resulting deaths of estimated 580,000 people. In exchange for the research data of biological warfare, the Ishii Troop got the secret immunity from the U.S. for the related physicians, because the U.S. believed that the information was valuable and didn't want other nations, especially the Soviet Union, to acquire these data.

Anyway, oddly enough, the related medical professionals could continue to play an important role at the Japanese medical establishments without any war responsibilities at the legal and ethical level after WWII. For example, Masaji Kitano led the leading pharmaceutical company, the Green Cross. It's ironic that the Green Cross produced the contaminated blood products and caused the crucial AIDS problems in Japan.

The legal reparations claim regarding the Unit 731's human body experimentation has also been rejected by the state immunity principle and by the limitation of action (the Supreme Court [semi-]decision of May 9th, 2007 and the Tokyo High Court decision of April 19th, 2005).

(3) The Germ War Litigation

The Pest War reparations lawsuit was finally filed in 1997 and the plaintiffs demanded Japanese government's tortious liability. Why did it take long time to make a lawsuit? It' because the Chinese government officially allowed the individuals' lawsuits recently in the mid 1990s. It's also because the way people infected by pest virus died, with their bodies deformed in changed color and with stinking smell, was so miserable that the victims didn't want to discuss their relatives' diseases openly for a long time.

Incidentally, the reaction by the Japanese govern-ment should be noticeable. The government officials didn't mention anything about the facts, instead they just attacked the legal claims of the plaintiffs!

However, the judicial judgments through the Japanese Supreme Court: The Supreme Court [semi-]decision of May 9th, 2007; Tokyo High Court decision of July 19th, 2005; Tokyo District Court decision of August 27th, 2002, all dismissed their requests, first by the state immunity doctrine before the Governmental Liability Act of 1947 was made, second, by the relinquishment

of the individual claim for responsibility by 1972 Sino-Japanese Treaty (the Sino-Japanese Joint Declaration).

In addition, as is often the case, the germ war in the Chinese Continent has not been known by most of the Japanese, especially among youngsters. On the other hand, the cumulative tragedies of the innocent pest victims and their relatives have been immense and they are not at all content with the present situation. Thus, the reconciliation in this context is far ahead!

[V] Japanese domestic reparations cases

Next we will cover the Japanese domestic reparations cases. Even though there are many mass torts cases, such as Minamata disease case and other public nuisance cases, here I'd rather deal with the cases that have to do with the ethnic conflicts or the regional discriminations: to be more specific, such as the cases of the Ainu, the indigenous people in Hokkaido, and Hansen' disease patients'discrimination.

(A) The Tragedy of the Ainu, the Indigenous people in Hokkaido and their Hidden Claim of Reparation[23)]

(1) Introduction: the Problem of the Ainu Communal Property

The first topic is the property dispute of the Ainu, the indigenous people in Hokkaido, regarding the recent nominal money return process as the payment for taking their communal lands more than 50 years ago (Art. 3 of the supplementary provisions to the Ainu Culture Enhancement Act in 1997). The process includes the reparations element. As regards this process, the administrative lawsuit was filed, and the Ainu plaintiffs argued that the process was invalid because of the briefness of the process, but their claim was dismissed by the court (see, the decisions of Sapporo District court on March 7th, 2002; Sapporo High court on May 27th, 2004; Supreme Court on March 24th, 2006)

(2) The Conquest of Ainu Property with the Reference to the Problems of their Statutes

Their property history is tragic. The Ainu were traditionally a nomadic ethnic group in northern Japan, basically in Hokkaido. Occupying spacious area, they had their own communal property notion, in terms of fishing and hunting, and paid high regards to the environmental ecosystem. However, they endured one after another hardship after the Meiji Restoration, through the introduction of the so-called modern individualistic private property system in Hokkaido.

First, through a series of land regulations in the Meiji era (1872, 1877, 1886, 1897), most of the unoccupied lands in Hokkaido became private property, whereas the indigenous Ainu' territory was confiscated and designated state land. The government then extravagantly allocated the state property to the immigrants from mainland Japan (Art. 6 of the Hokkaido Land Allotment Act of 1886 and Hokkaido Uncultivated Land Division Act of 1897). To make matters worse, the traditional hunting and fishery of Ainu were regulated and prohibited by legislation, which led to terrible starvation. This was nothing but the conquest of the Ainu lands!

23) Kunihiko Yoshida, *supra* note 13, Chap. 7; do., *Reparation Issues of Ainu People: A Critical Analysis of the Recent Commission's Report from Civil Law Perspective*, 28 Nomos (Kansai Univ.) 19 (2011).

Second, the Meiji government tried to encourage the Ainu to set up settled agriculture using a statute called the Hokkaido Former Natives Protection Act of 1899. This act was modeled on the General Allotment Act (Dawes Act) of 1887, which was an attempt by the U.S. government to turn American Indians into propertied citizens through land grants.

The Japanese statute was discriminatory in the following sense. First, the allotted land, mostly barren, was provided under the strict condition that its cultivation would be finished within 15 years (Art. 1, 3).* The size was supposed to be 49590 m^2 by law. On the other hand, according to the 1897 Act, the lands given to the entrepreneurs from mainland Japan was more than 100 times per person/ 200 times per corporation as large as the Ainu allotted land.

Second, as for the allotted land, alienation/ transfer and mortgage financing was prohibited, later allowed only by the permission of Hokkaido Governor (Director General) (Art. 2 and its Amendment in 1937). These criteria were in many ways similar to "redlining," the discriminatory housing financing practiced by Federal Housing Administration (FHA) in the United States between the 1930s and the 50s. And it had similarly disadvantageous effects for Ainu. They had no way to gain financial credit.

Furthermore, in certain Ainu neighborhoods, most prominently Chikabumi in Asahikawa, enforcement of the statute was postponed until the mid-1930s (the Asahikawa City Former Natives Land Provision Act of 1934), in part because the Ainu community there was located close to the 7^{th} Division military base. To make matters worse, four-fifths of their allotted lands were kept by the Governor (Director General) of Hokkaido as community lands (common property) and thereafter often used for schools, road construction, military factories and so on. The nominal monetary return for such takings has now been hotly debated, as I mentioned at the beginning.

(3) The Social and Political Problems of the Ainu People

Even from this brief overview of the Ainu's tragic property history, the astute audience here might find the reparation issues lurking at the basis of the recent litigations. But in face of the overwhelmingly daunting task at hand, we will realize the actual limitation of the role of law.

In other words, in the case of the Ainu context, the necessary political and social support is lacking to attain justice. For example, (i) many Ainu people, in this downward spiral, suffer from poverty, living from hand to mouth in low-income occupations, most typically as day laborers, and often rely on social welfare. (ii) Ainu are generally politically powerless, and they have often found themselves caught in double-bind, catch 22 dilemmas. For example, many Ainu ended up earning a living for a while, building the Nibutani dam, which destroyed part of their own cultural heritage and the ecosystem along the Saru River that Ainu traditionally esteemed, even though its construction was deemed illegal by the judiciary branch (by the decision of Sapporo District court on March 27^{th}, 1997). (iii) Because of the assimilation policy as well as past discrimination and oppression, Ainu racial identity, or race-consciousness is still low and their political leadership is almost non-existent. Furthermore, (iv) after the promulgation of Ainu Culture Advancement Act of 1997, Ainu claims are paradoxically likely to be depoliticized, in spite of their worsening situation. (v) We should add that, unlike in the U.S., pro bono legal services to support Ainu do not exist in the Japanese legal education system.

Civil law scholars are, in general, indifferent to the racially segregated, invisible matters.

(4) Reconsidering Ainu Reparations Problems: A Critical Analysis of the Recent Commission' Report

We can say that the recent epoch-making event is, the United Nation's Declaration on the Rights of the Indigenous Peoples made on September 13th, 2007, and it's been agreed with by the Japanese government. Then the government organized the group to reconsider the history and the present agendas for the Ainu people and the report was published in July 2009.

However, first, the apology was never mentioned at all for the conquest of their land and their resulting tragic property history! Second, it is good to stress the responsibility of the Japanese government as well as that of Hokkaido government with regard to the improvement of the Ainu status, but it didn't realize that the welfare policy was made as part of the reparations for their past deeds, and it could not effectively stop the budget- cut for the welfare policy for the Ainu people.

Third, it didn't point out any problems, in that sense, it just endorsed the ludicrously restrictive reparations process regarding the confiscation of the Ainu's communal property and its nominal monetary compensation.

In this sense, the Ainu policy is still biased and the reparations and reconciliation problems regarding the ethnic/racial conflict with the Ainu in Japan have not been solved in its true sense.

Then how can we overcome the welfare issues of the Ainu people related to various areas such as job creation, education, health care and housing from the reparations perspective? The reparations for the Ainu is similar to the slavery reparations with regard to the continuing discriminatory Jim Crow legal regime, in the sense that both of the Ainu and the African Americans have experienced the systemic disadvantages due to the long-term discriminations and property confiscations. Thus, within the limited budget, it is highly recommended that their various agendas should be prioritized depending on the pragmatic necessity of each topic: generally speaking the Ainu budget should be mainly expended for the welfare needs of the indigent Ainu people rather than for the expenditure of constructing museums and symbolic memorials the Commission Report has proposed.

The reparations for the indigenous people regarding the exploitation of their traditional knowledge as well as their genetic resources by way of modern intellectual property regime are also urgently needed.

(B) Reparations for the Segregation of Hansen's Disease Patients[24)]

(1) The Segregation of the Leprosy Patients in Japan

Japan has a shameful history in the treatment of leprosy patients. Through legislation (Leprosy Prevention Act of 1907, 1931, 1953), patients' residences were publicly segregated and their lives were regulated to an extreme. They were forced to enter one of 13 national sanatoriums situated from north in Aomori to south in Okinawa (Art. 6). They were not allowed to go outside of the sanatoriums, and their lives inside were severely disciplined (Art. 5, 16, 28 (sanctions)). They were also obligated to either be sterilized

24) See, for example, Kunihiko Yoshida, *supra* note 12, Chap. 5, Section 2; do., *Some Thought Squaring with the Residents in Sanatoriums at Oku and Nagashima in Okayama (Nyuusyosya to mukiatte no Guukan: Oku-koumyouenn Nagashima-aiseien wo tazunete)*, 518 Kaede (Oku-komyouen) 6 (2007).

or undergo abortions (Art. 3 Sect. 1 Subsec. 3, Art. 14 Sec. 1 Subsec. 3 of the Eugenic Protection Act of 1948).

Such statutes persisted for almost a century until the abolishment in March 1996, in spite of proposals to abolish such discriminatory practices made by the international medical conference on leprosy since the mid-1950s.

(2) The Exceptionally Progressive Reparation Development

Among the ubiquitous judicial passivism of recent years, one outstanding exception was provided by the Kumamoto lower court case, which cleared the legal obstacles of limitation of action (Art. 724 of Japanese Civil Code) by counting the term from the recent abolition of the Leprosy Prevention Act (by the decision of Kumamoto District Court on May 11th, 2001). As a result, it awarded more than 100 million yen damages in total; 8~14 million yens to each segregated leprosy patient plaintiff. Since the Koizumi government refrained from appealing against the decision, the court's ruling has been very important, leading to administrative reparations remedies for all the Hansen' disease patients (The Statute of the Reparation for the Inpatients & Residents of the Hansen's Disease in the Sanatoriums in 2001).

(3) The Aftermath of the Reparations Statute

However, the reparations statute of 2001 was not equally applied to the Hansen's Disease patients segregated to the sanatoriums in Korea and in Taiwan, which brought about a couple of litigations. The Korean case demanding the nondiscriminatory application was, unlike the Taiwan's case, dismissed by the court(the decision of Tokyo District court October 25th, 2005), even though the inpatients in the sanatorium of Sorokto (小鹿島), located in the south of Yeosu in Chonam province in Korea, were harshly handled and even got involved in the slave labor in those days. The criticism abounded and the reparations have been extended to the patients overseas eventually by its Amendment of 2006.

After 2001 legislation, the Commission Re-examining the Problems regarding the Hansen's Disease was established in October 2002, and the committee members observed laboriously the situation of the inpatients and residents of each sanatorium and pointed out, for example, the problem of showing the case of aborted babies that attracted attention, and finally finished the thick report in March 2005.

Then the Basic Statute on the Problems of the Hansen's Disease was made in June 2008 to normalize the segregated and discriminated status of the residents in the sanatorium.

Visiting the several sanatoriums, including that of Sorokto, I met with the residents there. However, it has turned out to be much more difficult to reconcile in its true sense, and to build normal relationships, that is, to change the discriminatory relationship back to normal, between the residents and the people surrounding them, compared to the provision of money. What is needed to attain the true reconciliation in this case?

[VI] Legal & Theoretical Analyses: Legal Obstacles and How to Overcome them[25)]

25) For the detailed version, *see*, Kunihiko Yoshida, *Reparations and Reconciliation in East Asia as a Hot Issue of Tort Law in the 21st Century: Case Studies, Legal Issues, and Theoretical Framework*, 11 JOURNAL OF KOREAN LAW 101 (2011).

(A) Results: From Case Analysis

If you follow the concrete analysis of Japan-related mass tort cases in the previous chapter, you'll understand that the extent to which reconciliation and reparation has been attained is very limited, especially in the cases of international and racial/ethnic conflicts, except for the Korean atomic bomb victims' case.

Specifically, (i) legal claims for reparation, in most of the cases, have been denied. Furthermore, (ii) even the historical facts of mass torts, for example, the Nanjing massacre, the Chongqing bombing and bio-war, are not known by most Japanese, especially among Japanese youngsters, and this is a crucial obstacle when we pursue what is called 'historical reconciliation' in Asia. Therefore, (iii) there are not many arguments about moral reparation, except for the limited Chinese slave laborers' settlement cases after the Nishimatsu Supreme Court decision of 2007.

On the other hand, (iv) the ultra-conservative (ultra-right) movement that tries to deny and ignore those historical tragedies is vocal, salient, and strategically influential among politicians in terms of lobbying, even though such movements are academically nonsensical. It's been emphasized that ultra-conservative groups such as 'Zaitokukai' have become active, and that they intimidate, harass, and oust racial minorities (for example, school kids of resident Koreans in Kansai, the Japan-Brazilian workers in the Chubu area).

(B) Contrasting World Trends towards Reparation and the Isolation of Japan[26)]

But notice that the Japanese position is isolated from world trends in historical reconciliation. As I mentioned regarding the many cases of reparation from all over the world at the beginning of this lecture, it is now the 'age of apology' and the moral shift in favor of historical reconciliation is going on, despite of course the many conflicts.

Reparations are at the juncture of civil law and international law, and more specifically, international human right law. Against this backdrop of a moral shift towards reconciliation, legislative reparations are increasing and thus the adjudicatory position should also be reexamined. But in this context, moral reparations should also be emphasized holistically[27)].

As is often said, there are conspicuous differences between Germany and Japan with regard to moral reparations, even though legal reparations have been unsuccessful in both nations. It' really puzzling! Why Japan cannot follow suit regarding reparation, even though it is called developed country and peaceful nation?

The key to this systemic problem, i.e., the systemic lack of movement towards reparations, in spite of its ubiquitous brutal deeds in neighboring countries, might be found in the process of drawing up the Japanese Constitution. According to Professor Shoichi Koseki[28)], when Douglas MacArthur (1880-1964) proposed the complete relinquishment of war clause, Article 9 of the Japanese Constitution, his real intention was to avoid/ hide the problem of war responsibility, especially the Emperor's responsibility, in order to maintain the Japanese Emperor System to

26) See, e.g., Barkan, *supra* note 16 (2000); Barkan et al. eds., Taking Wrongs Seriously: Apologies and Reconciliation (Stanford U.P., 2006).

27) In this respect, *see*, Brooks, *supra* note 8, at 141-(2004).

28) Shouichi Koseki, Why the Art. 9 of Japanese Constitution was Drafted? (Kenpou 9 Jou wa Naze Seitei saretaka) (Iwanami Booklet) (Iwanami, 2006).

integrate the Japanese nation. I think this concealment might be the harbinger of the present situation. * The argument regarding the responsibility of the Japanese Emperor had become taboo already by the late 1950s: For example, even Professor Emeritus Masao Maruyama stopped mentioning it at that time. However, putting aside the Emperor' liability, state responsibility can be & should be theoretically discussed separately.

(C) Legal Obstacles: Why Have Legal Claims Been Dismissed in Many Cases?

In the previous section, we can see that legal claims for reparation have been denied in most cases, except the Korean atomic victims' case, and the Hansen' disease patients's case.

The reasons why legal reparations have not been accorded easily are: (1) passing of time and lack of evidence as a factual matter, (2) legal principles related to the passage of time (prescription and limitation of action), (3) the other problem related to the passage of time, especially, the need for the re-evaluation of unpaid salaries, (4) the state immunity doctrine, (5) the waiver clause in international treaties.

But we have to realize that each reason can be critically reexamined. For example, as for prescription, the defendant has to 'refer' to the legal institution of prescription in order to be immunized from legal responsibility. However, in cases of the hideous mass tort, such as the holocaust, or the Nanjing massacre, we could argue that the defendant's right of 'referral' should be restricted. As a matter of fact, we have such an international treaty regarding the holocaust! Furthermore, the starting point for calculation could be postponed, considering the difficulties relating to litigations mentioned above. For example, in China, ordinary victims came to realize the possibility of filing litigations, at the grass-root individual level as opposed to the nation state level, only when the Chinese government officially admitted the possibility of private litigation in the mid 1990s. In these cases, we could calculate the term of prescription from that point instead of from the time of the mass tort!

The state immunity doctrine is also often quoted as a legal defense, when the defendant is Japanese government, for example, in the comfort women cases, Nanjing massacre case, Chongqing bombing case, and the bio war case. However, it is curious to make recourse to this outdated doctrine in the era of abundant governmental liability, to the effect that its application is against public policy in my opinion.

The interpretation of the waiver clause in international treaties has become one of the most critical issues, and has attracted a lot of attention lately. The leading Supreme Court decision in the Nishimatsu case mentioned above in 2007 has rejected the request for legal reparations by adopting this defense: the individual right of reparations, as well as the governmental right of reparations, has been nullified by the treaties. However, such a waiver clause is against public policy and invalid by the standards of domestic Japanese civil law. Is it OK to adopt a different position in cases of the interpretation of international law?

In conclusion, we should realize that legal reparations are partial, and sometimes contingent on many accidental factors. Of course, we have to re-examine the related legal doctrines critically, but it should be noted that legal reparations, even if they are important, are not a panacea for the past tragedies, and not the only solution for reconciliation.

(D) The Variety of the Reparation Remedies: Comparisons of Legal and Moral Reparation/ Responsibility

(1) Expansion of the Reparations Functions

The expansion/ change of the remedy functions leads to an increase in the kinds/types of remedies as follows: (a) when monetary compensation is the only function of the tort, monetary damages has been the only remedy as Art. 722 Sec.1 of the Japanese Civil Code indicates. (b) however, if the function of tort remedies is expanded to include the atonement function which presupposes the admission of tort and tortious responsibility by tortfeasors, then the kinds of remedies have also increased to include, in addition to monetary damages, for example, ① history education, or ② constructions of memorials, because of the importance of the acknowledgment of the past injustice by the perpetrators and the nation, as well as ③ symbolic actions of apology in front of victims themselves (ex. in front of comfort women themselves, instead of George Bush), ④ return of remains to relatives, or ⑤ rituals for tragedies and genocides, because of their importance for the consolation of the victims' damaged feelings and their forgiveness about past injustice.

In this sense, the educational function of reparation litigations should be emphasized more. Incidentally, the governmental action that is indifferent to fact-findings, even after governmental change, as in the cases of the Chongqing bombings, or of germ warfare should be strongly criticized in this context.

I think many lawyers, and even activists or advocates for victims are exclusively focused on the conventional thought of remedy, that is, what we might call 'monetary damages centralism'[29]. From this critical perspective, you can fully understand why the plaintiff leader of the Hanaoka litigation was upset about how his lawyers proceeded towards a damages-oriented settlement, and why all of the Korean comfort women rejected the proposal made by the Asian Women Fund in which a sincere apology with an admission of legal responsibility was lacking.

(2) Comparison of Moral and Legal Reparations

At this stage, let's compare legal reparation with moral reparation and point out the features of each. Of course, both of them are connected with each other and their consequences are overlapping, compared to the conventional distinctive understanding of both responsibilities. In my opinion, moral reparation is the base of legal reparation, whereas it has been regarded as non-legal responsibility until recently!

But there are several differences between them: (a) legal protection is partial, whereas moral responsibility is more holistic and basic, (b) legal responsibility is more official, and (c) legal reparation is coerced, whereas moral reparation is performed voluntarily. In this sense, the former could be performed without sincere regret (see, the insincere comment by the defendant, Kashima Corporation shortly after the Hanaoka settlement), while the latter presupposes the moral reflection /remorse, thus it is more foundational.

(E) Theoretical Frameworks: The Process of Reparation and Reconciliation

To make my theoretical assertions understood more clearly, I'll show you the theoretical framework for reparation and historical reconciliation as follows:

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29) Professor Brooks (*supra* note 8(2004)) calls this the 'tort model' as opposed to the 'atonement model'

(Ⅰ) Fact-findings → (Ⅱ) Admission of Past Injustice & Historical Responsibility → (Ⅲ) Reparation & Apology → (Ⅳ) Forgiveness by Victims

* Notice that the latter stage is presupposed by the former stage!

Through this theoretical framework, you can easily understand how badly and poorly Japan has been proceeding toward real reconciliation. For example, ① in the comfort women case, former Premier Abe and other cabinet members denied the facts of coerciveness, and even the existence of the notorious institution itself in spite of numerous testimonies by comfort women. Against this backdrop, you can imagine how empty the Abe' expression of apology to George Bush sounded to the victims. Furthermore, ② in other cases, such as the bombings cases, Japanese government officials have been trying to avoid dealing with factual issues, by attacking only the legal discourse.

[VII] Ending Remarks: Getting Back to the Jeju Mass Killing

(A) Internationalization of Reparations

Returning to the case of the Jeju April 3rd Uprising and Grand Massacre, Koreans are moving toward historical reconciliation in the right way, even though the present stage is still imperfect and unfinished! The same thing can be said about other countries' cases: for example, the post Apartheid situation.

On the other hand, we have to admit that the conservative movement is resilient, but I think that reparations should be extended to the international level in this era of globalization, the unification of multiple countries like in the EU, and in the era of moral enhancement of the 21st century.

In this context, Korean international cases such as the Jeju Massacre in 1948-54 mentioned above and the No Gun Ri (老斤里) massacre of 1950 are important. In No Gun Ri case, where around 300 civilians and another 1000 political prisoners were killed by the joint U.S. –Korean Army in central Korea, and their international solution of reparation could usher in the internationalization of the reparation debate. The special statute to redeem the victims' honor and provide them with reimbursement of their medical expenditure was made in 2004, but as in the Jeju mass killing, the debate on U.S. responsibility is still ongoing: Although the American government promised to build a memorial and scholarship program to honor the Korean War's civilian victims in 2001 under the Statement for Mutual Understanding of the U.S.-Korea governments and by the expression of sorrow of President Clinton, the apology and damages were rejected. The relatives of victims also rejected this proposal[30]. It is really an imminent topic in the 21st century!

Another quite recent international case is the disclosure of U.S. medical human experiments done in Guatemala from 1946-48, including a decision to re-infect a dying woman in a syphilis study that caused the deaths of 83 people[31]. President Obama has already semi-officially apologized to Guatemala' president for this

30) See, e.g., Takao Matsumura, *The Massacre of No Gun Ri, Korea in 1950 (Kankoku Nogunri niokeru Gyakusatsu)*, in: Matsumura et al. eds., The Social History of Mass Slaughters in the 20th Century (Tairyougyakusatsu no Syakaisi: Senritsu on 20 Seiki)(Minerva Pub. Co., 2007)119-.

31) See, e.g., The Associated Press, *Panel Reveals New Details of 1940's Experiment*, The New York Times, August 29th, 2011.

egregious fact and international reparation measures will be expected.

Slavery reparations could be internationalized. In Jamaica, where more than 90% of the population is African black and historically related to the slave labor in sugar plantations, a slavery reparations commission has been recently (November 2012) reconvened to examine their international reparations request to UK of trillions of dollars considering the vast difference of economies between the New World and Old World their slave labor contributed[32].

(B) The Need for Reparations in the Jeju Mass Killing case

Recently a critical theoretical argument has been made that reparations should be limited to cases where historical injustice endures as present injustice[33]. Jeju Island is presently famous as a resort island and the misfortune here is forgotten or unknown among many Koreans, let alone most of the Americans. And many islanders themselves lead their lives irrespective of the Jeju massacre. Thus, should the mass killing in Jeju be considered an event in the past which has little to do with income redistribution matters, unlike the slavery and Jim-Crow problems in the U.S., and therefore reparations should be neglected as Spinner-Halev suggests?

I disagree with his argument. It is true that the Jeju case is generally classified as a commemorative/symbolic reparations case as opposed to an anti-systemic/economic reparations case, according to the taxonomy of the famous reparations politics advocate John Torpey[34]. As he rightly describes, even in the former case, there is a strong need for reparations as Holocaust reparations and the Japanese-American internment cases show.

Jeju islanders are still wounded mentally by this sad event and distrust persists among their communities, even though it looks apparently calm and superficially peaceful with little sign of past violence as in the massacre sites of African-Americans in the early 20th century[35]. The enhancement of reparations as a social healing process is still required. It is also important to realize the meaning of peace for Jeju Island in a reconciliation process when a naval base is being constructed on Jeju despite the strong

32) See, The Associated Press (David McFadden), *Jamaica Revives Slavery Reparations Commission: Historians Say Slave Labor Made a Vast Difference to the New and Old World. In Jamaica, Most Were Forced to Work on Sugar Plantations*, The Miami Herald, November 2nd, 2012, 7A. In 2004, a coalition of Rastafarians (Jamaican Blacks) already asked Britain and other European countries formerly involved in the slave trade, to pay 72.5 billion British pounds to resettle 500,000 Jamaican Rastafarians in Africa. But British government rejected the claim, saying that it could not be held accountable for wrongs in past centuries.

33) Jeff Spinner-Halev, Enduring Injustice (Cambridge U.P., 2012) 5-6.

34) John Torpey ed., Politics and the Past: On Repairing Historical Injustices (Rowman & Littlefield Pub., Inc., 2003) 10-. See also, do., *Making Whole What Has Been Smashed: Reflections on Reparations*, 73 (2) Journal of Modern History 333 (2001). According to his classification, Spinner-Halev only admits the latter case.

35) There was a series of massacres of African-Americans in the early 20th century, most notably in Tulsa, Oklahoma (1921) and Rosewood, Florida (1923). Reparations efforts have been made: the reparations unsuccessful lawsuit in 2003 in the former case and legislative reparations under the name of restitution in 1994 in the latter case. By the Rosewood reparations, $150,000 each was paid for survivors totaling $2.1 million compensation, while there was no land return for displaced people. However, the mode of silence/reticence about past injustice is still dominant. See, e.g., Alfred Brophy, Reconstructing the Dreamland: The Tulsa Riot of 1921: Race, Reparations, and Reconciliation (Oxford U.P., 2002); AnneMarie Mingo, *Restoring Rosewood: Movements from Pain to Power to Peace*, 5 Practical Matters 1, at 7- (2012); Marvin Dunn, The Beast in Florida: A History of Anti-Black Violence (U.P. Florida, 2013) 97-.

opposition of the local residents, due to the cycle of anxiety/hatred in an era of exacerbated territorial disputes in East Asia.

Furthermore, because of the restrictions to the Jeju reparations legislation so far, which still does not recompense medical expenditure for the victims, not a few physically damaged residents and their families have fallen into poverty through this formidable mass-killings tragedy. In this sense, we must not forget there is a component of monetary reparations here.

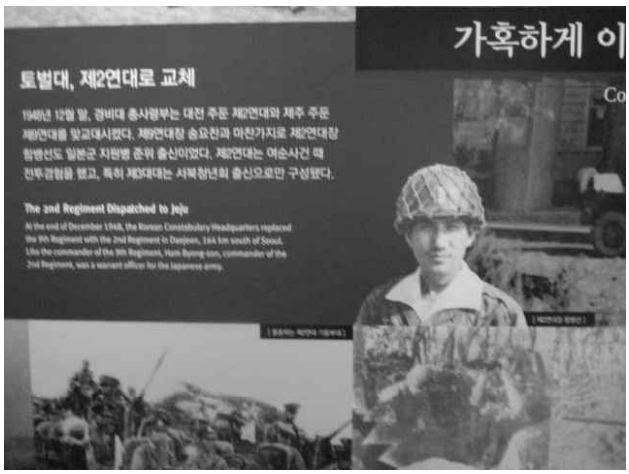
The massacre site in Rosewood

(C) The Problems of Bilateral Mass Torts

There is a different type of hurdle in the Jeju case. Japan-related reparations cases, such as the Japanese invasion and a series of massacres and air raids in China, the colonization of the Korean peninsula and the deportation of many Koreans and Chinese can be seen as unilateral mass torts, so to speak, in spite of the Japanese casualties. Thus it is not difficult to assume Japanese responsibility and reparation.

However, war is much more complex in many contexts. In the case of the Jeju April 3rd Uprising and Grand Massacre, around 90% of the victims were killed by the Korean Army and a supportive U.S. Army, but the rest (10%) were the victims of local protest guerrillas. In this sense, the mass violence is bilateral, and the same thing can be said about the Baltic War between the Serbian and Croatian people in 1992-95 and the tragedy of Rwanda between Hutu and Tutsi people in the mid 1990s, where

Fact-finding Reports on the Jeju Tragedy



Proof of the U.S. Backing toward the Jeju Tragedy

Memorial of the Bukchon Ri Massacre

more than a million people were massacred within 100 days and most of the victims were Tutsi people, but the moderate Hutus were also killed[36].

How can we proceed with reparations? Will the victims of local Jeju resident guerillas and their relatives have to give up reparation, whereas the victims of the Korean army can prosecute it? If so, isn't this a partial rescue of the victims of the tragedy? Or should all the victims refrain from monetary compensation, as the Special statute on the Jeju tragedy in 2003 proposes? I think such argument should be reconsidered critically in a positive direction.

First, the civil law discussion on the mutual torts should be referred to in this context. Off-setting in a tort law context is prohibited in civil law (Art. 509 of Japanese Civil Code; Art. 496 of Korean Civil Code) and this position is extended to mutual torts such as traffic accidents or ship accidents, according to the traditional scholars. Recent scholars also support this idea in order to gain the realistic protection of victims by taking account of insurance contracts. With this backdrop in mind, the factual reparation for the victims including the reimbursement for medical expenditure is also needed in the Jeju tragedy context.

Second, we have to consider guarantees for an individual soldier's liability, because of the difficulty of their identification and their funding capacity. Thus, it's easy to prosecute vicarious liability for brutal Korean soldiers' deeds against Korean and American government. But how do you handle the killings done by the local protesters? Were they really tortfeasors in its true sense? The Guerrilla themselves were also victims in a sense, besieged and surrounded by a U.S.-Korean joint Army and with flames of fire. There's an immunity clause in the case of legitimate self defense in Art. 723 of Japanese Civil Code (Art. 761 of Korean Civil Code), even though immunity with regard to the third party damage has been criticized by prominent scholars[37]. The application of such clauses to the desperate acts of the Jeju guerrillas might be a vulnerable argument, but it's worth reconsideration. If the dominant/prominent cause of the mass killing can be seen to be the overwhelming attack by the Korean-U.S. Army, then it can be argued that the victims of the guerillas should equally be protected by both governments' monetary compensation. Frankly stated, this is out of the ambit of ordinary tort law and is a matter of legislation.

Anyway, this is my proposal, and truth findings and redeeming the honor of the victims

36) On the Rwanda Genocide, see, e.g., Philip Gourevitch, We Wish to Inform You that Tomorrow We Will be Killed with Our Families: Stories From Rwanda (Farrar, Straus and Giroux, 1998) (Japanese translation: Hills of Genocide: Hidden Truth of Rwanda Massacres (1) (2) (Jenosaido no Oka) (Wave Pub. Co., 2003)).

37) See, Tooru Ikuyo, *The Legitimate Self Defense and Emergent Action and the Third Parties'Damage in Civil Law (Minji jouno Seitoubouei /Kinkyuhinan to Daisansya Higai)*, Hogaku vol. 48 no.3 (1984); do., *Japanese Tort Law Restatement Art. 720*, 918 Jurist 84-85 (1988).

by means of a sincere apology should be prioritized. In this sense, the former Roh government proceeded in the right direction and matches with the reparations process. But we should keep moving in the same direction pursuing the protection of victims in spite of the difficulty of bilateral wars.

* * * * *

Epilogue: After Listening to the Discussions on This Paper

Attending the April 3rd Jeju Massacre International Conference on October 29th, 2012, I have luckily received many comments on my paper[38]. Let me add some of my reactions to them at the end of my paper.

First of all, I have to clarify my definition and usage of reparations. Many lawyers and legal scholars still take reparations as monetary compensation, but I'm using the term differently, in a broader sense, which includes apologies, construction of memorials, what is called affirmative action in welfare and education, and historical education as well as monetary compensation. Especially, the importance of an apology should be emphasized in the field of reparations.

However, of course, as I stated in this paper, I agree with Mr. Hong's point in the sense that there is a strong need for individual monetary compensation in the case of the Jeju massacre, especially for those still physically and mentally scarred and with heavy medical expenditures. On the other hand, we have to admit that the infringement of human rights and the damage thereafter is too serious to be fully compensated through monetary means and thus damages in the case of reparations' cases cannot be more than symbolic, as with the $20,000 damages per family in the case of Japanese-American Internment.

Second, on the other hand, we have to acknowledge that damages themselves are not a panacea for attaining true reconciliation, because lawyers have been overwhelmed by 'monetary damages centrism' Think about why Mr. Gen Chun, the leader of Hanaoka Revolt, was shocked when he heard the reality of the Hanaoka settlement in 2000, whereas the related attorneys were exultant at the monetary transfer of 0.5 billion yens from the defendant Kashima corporation. He collapsed after realizing that the defendant company rejected its past actions and historical responsibility. And recall Korean comfort women themselves are not satisfied at all with the solution by the Asian Women' Fund. In this sense, I think to attain genuine historical reconciliation, we have to proceed along the 《four step process》 mentioned above and thus we can realize how hollow former Premier Abe's apology was, as he failed to recognize historical responsibility with regard to comfort women issues.

Third, then what can be done besides legal requests for monetary compensation? Mr. Hong mentions the weakness of communities on Jeju because of distrust and antagonism among Jeju islanders due to the tragedy occurring more than sixty years ago. I suspect this cycle of hatred might continue even if victims were to receive monetary compensation if they don't attain the reconciliation in its true sense. Interestingly Professor Ko Chang Hoon takes the 《tolerance》 approach and Ms. Lorenn Walker & Cheri

38) See, Jeju April 3rd Peace Foundation ed., For International Significance of Jeju 4.3 (2012). Especially, Lee Chang Soo, *Debate with Professor Yoshida on the Legal Reparations for the April 3rd Incident in Jeju: Proper Reparations as a Prerequisite for Reconciliation between the State and Victims, ibid.* 241-; Hon Seong-Su, *Is it Group Compensation or Individual Compensation?, ibid.* 196-.

Tarutani stress the importance of the《restorative justice》approach in their symposium papers[39].

In this context, the amnesty approach taken in South Africa after the abolishment of the egregious apartheid regime is inspiring. The Truth and Reconciliation Commission (TRC) exonerated perpetrators from punishment in exchange for their truth telling with atonement. The same thing can be said about the《renzui》(認罪) approach most notably in Fushun penitentiary advocated by late Prime Minister Zhou Enlai towards Japanese soldiers who perpetrated the invasion in China, which has been successful. Many of them repented and after their liberation from prison made efforts in pursuit of China- Japan friendship and related historical education. In such non-retributive approaches, it's important to distinguish moral/ legal responsibility from punish- ment. On that score, perpetrators could fully repent through their moral conscience.

Fourth, as for Mr. Lee's valuable comments and questions, the relationship between moral reparations and legal reparations should be reexamined. In my paper, I pointed out the differences between two types of reparations. But I don't think they are mutually exclusive. Rather, it should be noticed that they are intertwined and complementary and the importance of legal reparations should not be ignored. As I indicated in my paper, I'm critical of the generally negative stance taken by the Japanese judiciary branch regarding legal reparations, even though I also admit that legal reparations is partial solution in the sense that it cannot but depend on contingent factors, such as the amount of evidence, the existence of supportive groups etc.

I also agree with Mr. Lee that there should be some coercive and mandatory element to attain reconciliation. Moral reparations match with legislative reparations and we should conceive various legal devices to proceed along the process of reconciliation. In the Jeju tragedy context, Mr. Lee describes the difficult situation in which most of the perpetrators are indifferent to reconciliation and they reject collaboration for truth-seeking. They are not collaborative with reparations projects because they fear punishment as in the case of Khmer Rouge? But what if we adopt restorative justice practices here, and what if we bring those perpetrators forcibly to set up face-to-face meetings with facilitators. Some such legal devices are required in this sense.

The educational role of adjudication should also be mentioned in this regard. For example, in comfort women cases, all the litigants have been turned down by the Japanese Supreme Court, sad to say. However, we should note that the illegality and related facts regarding comfort women practices have been admitted in many decision at a lower level, and their factual judgment and judicial evaluation regarding tortiousness, has been supported by the Japanese Supreme Court Justices, in spite of their eventual negative decision through the waiver clause in the treaties, in sharp contrast to the stance of many conservative politicians. The obligatio naturalis reparations that the Nishimatsu decision has suggested can also be seen semi-legal reparations.

Fifth, as for Mr. Chae's paper[40], his description of the tragic Soktal massacre is moving.

39) Lorenn Walker & Cheri Tarutani, *Restorative Justice Promotes Healing and Reconciliation among Native Hawaiian Inmates Disproportionately Represented in Hawaii's Prison Population, supra* note 34, at 20-; Ko Chang Hoon, *Tolerant Philosophy of Jeju April 3rd Uprising: Logics of Apology Can Revive Tolerance Philosophy of Jeju Islanders over Trauma from 4.3 Tragedy?, ibid.* 36-.

But I suspect there are similarly tragic experiences amongst the Jeju islanders. Mr. Chae's lawsuit was vindicated by the Korean Supreme Court decision of September 8th, 2011, with the result that victim plaintiffs have been awarded considerable damages by the Seoul High Court decision of May 4th, 2012.

Then, I'm curious about what distinguishes his case from the Jeju massacre cases. If it is related to the existence of evidence and the special statute regarding the Korean War, his success might depend on contingent factors? The difference provided by the special statute regarding massacres at Kwangju and Jeju has often been pointed out. If it is due to the difference in the number of victims in each tragedy, then we have to admit that this is also a pragmatic and contingent factor. Thus, we have to look for more holistic protection with regard to the victims of the Jeju tragedy. To move forward with the reconciliation process, American secondary responsibility or the joint tort liability mentioned in this paper will be critical.

40) Chae Eui-jin, *State Reparation for the Soktal Massacre*, *supra* note 34, at 211-.