

Reflections on Accountability: The United States' Violations of International Law on Jeju Island in the Aftermath of World War II

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Abstract

This essay is a reflection on the significance of U.S. accountability to the struggles of Jeju Islanders for reparations. Under international law, a strong case can be made for the United States' obligation to acknowledge its role in the Jeju atrocities and to provide compensation to the victims.¹ Addressing the United States' responsibility for complicity in these actions will prove controversial, no doubt, for it has significant implications not for U.S. actions in other parts of the world but for all states engaged in military occupations or acting through surrogate governments. These legal and political ramifications diminish the likelihood of voluntary remedial action by the United States, and the international legal system is ill-suited to compel compliance. Nonetheless, even if Jeju Islanders are ultimately unable to obtain full satisfaction from the United States government for its role in the atrocities to which they have been subjected, I believe that recognition of the international legal obligations incurred by the U.S. in that process can reinforce the legitimacy of their claims, thereby aiding in the restoration of their dignity and supporting their on-going struggles for self-determination.

Key words :

Reflections on Accountability, the United States' Violations of International Law on Jeju Island in the Aftermath of World War II, the likelihood of voluntary remedial action by the United States, recognition of the international legal obligations, the restoration of their dignity

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1) See generally Kunihiro Yoshida, Reparations and Reconciliation in East Asia: Some Comparison of Jeju April 3rd Tragedy with Other Related Asian Reparations Cases, 2 WORLD ENVIRON. & ISLAND STUD. 79 (2012).

Introduction

On April 3, 1948, during the United States' postwar occupation of southern Korea, Korean military and police forces began a series of attacks that ultimately resulted in the massacre some 30,000 residents of Jeju Island and the destruction of hundreds of the island's villages.² Thousands of people were arbitrarily detained and beaten or tortured, and tens of thousands forced into exile.³ For fifty years the Korean government suppressed discussion of these realities, only acknowledging its responsibility in 2003 after decades of grassroots efforts to bring what has been termed a "grand tragedy during 'peacetime'" to light.⁴ The Investigative Report documenting this tragedy was finally translated into English in 2013,⁵ but the story remains largely hidden from history.

Jeju Islanders have succeeded in obtaining an apology and minimal reparations from the Korean government, recognition of April 3 as a national Memorial Day, and the establishment of a Peace Park and Peace Foundation to honor the victims and to promote respect for human rights.⁶ Nonetheless, numerous victims remain unaccounted for and many elderly survivors are in need of medical and financial assistance.⁷ Perhaps most significantly, there has been no acknowledgement of the integral role played by the United States military in these massive violations of human rights.⁸ As a result, the full truth remains suppressed and the redress required to fully restore the rights and dignity of Jeju Islanders remains elusive.

This essay is a reflection on the significance of

U.S. accountability to the struggles of Jeju Islanders for reparations. Under international law, a strong case can be made for the United States' obligation to acknowledge its role in the Jeju atrocities and to provide compensation to the victims.⁹ Addressing the United States' responsibility for complicity in these actions will prove controversial, no doubt, for it has significant implications not for U.S. actions in other parts of the world but for all states engaged in military occupations or acting through surrogate governments. These legal and political ramifications diminish the likelihood of voluntary remedial action by the United States, and the international legal system is ill-suited to compel compliance.¹⁰ Nonetheless, even if Jeju Islanders are ultimately unable to obtain full satisfaction from the United States government for its role in the atrocities to which they have been subjected, I believe that recognition of the international legal obligations incurred by the U.S. in that process can reinforce the legitimacy of their claims, thereby aiding in the restoration of their dignity and supporting their on-going struggles for self-determination.

Jeju Island: Repression and Resistance

Jeju, the largest island off the Korean peninsula, is now best known as a prime tourist destination.¹¹ However, Jeju has a complex history of autonomy, exclusion, and exploitation.¹² Known as Tamra until 1211, its people were organized in self-governing villages and had a unique and apparently matriarchal culture, remnants of which have survived invasion and/or colonization by an ancient Korean kingdom, Mongols, the Joseon dynasty of Korea, the Japanese empire, and the United States.¹³ Thus, according to Jung Eun Sophia Park, Jeju Island has long "been a borderland, both as a periphery and a margin," with a distinct identity and a history of struggles for independence.¹⁴ From the perspective of mainland

2) See Chang Hoon Ko, *A New Look at Jeju 4.3 Grand Tragedy during "peacetime" Korea: A Journey from Tragedy to World Peace Island* in Chang Hoon Ko et al., *JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT* (1947-2016), 3-43, 14, *Peace Island Book Series 2* (Jeju, Republic of Korea: C&P, 2016); Eric K. Yamamoto, Miyoko Pettit and Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 *ASIAN-PAC. L. & POL'Y J.* 1, 51 (2014). See also Hun Joon Kim, *Seeking Truth after 50 Years: The National Committee for Investigation of the Truth about the Jeju 4.3 Events*, 3 *INT'L J. TRANSITIONAL JUSTICE* 406 (2009).

3) See George Katsiaficas, *ASIA'S UNKNOWN UPRISINGS, VOL. I: SOUTH KOREAN SOCIAL MOVEMENTS IN THE 20TH CENTURY* 86-97 (Oakland, CA: PM Press, 2012); see also Hun Joon Kim, *THE MASSACRES AT MT. HALLA: SIXTY YEARS OF TRUTH SEEKING IN SOUTH KOREA* 28-36 (Ithaca, N.Y.: Cornell University Press, 2014).

4) See generally Ko, *A New Look*, supra note 1.

5) *NAT'L COMMISSION FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APRIL 3 INCIDENT, THE JEJU APRIL 3 INCIDENT INVESTIGATION* (Jeju Apr. 3 Peace Found. Trans., 2013) [hereinafter *TRANSLATED REPORT*].

6) Ko, *A New Look*, supra note 1 at 5.

7) *Ibid.*

8) See Yamamoto et al., *Unfinished Business*, supra note 1 at 35-36.

9) See generally Kunihiko Yoshida, *Reparations and Reconciliation in East Asia: Some Comparison of Jeju April 3rd Tragedy with Other Related Asian Reparations Cases*, 2 *WORLD ENVIRON. & ISLAND STUD.* 79 (2012).

10) For an overview of this problem, see generally Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Righteousness*, 50 *Emory L.J.* 775 (2001).

11) See generally Anne Hilty, *JEJU ISLAND: REACHING TO THE CORE OF BEAUTY* (Seoul, ROK: Korea Foundation, 2011).

12) See Jung Eun Sophia Park, *BORDER-CROSSING SPIRITUALITY: TRANSFORMATION IN THE BORDERLAND* 35-36 (Eugene, OR: Pickwick, 2016).

13) *Ibid.*, 36-37; on its "long tradition of self-governing villages," see Katsiaficas, *ASIA'S UNKNOWN UPRISINGS*, supra note 2 at 90.

14) Park, *BORDER-CROSSING SPIRITUALITY*, supra note 11 at 35, 37-38.

Korea, Jeju has been “a place of exile for dangerous and disloyal elites; ... a land of forgotten people and social death.”¹⁵ Under Japanese occupation, many Jeju Islanders were actively involved in the Korean independence movement, and they continued to work for independence in the wake of World War II.

In September 1945, after 35 years of colonial occupation by Japan, the southern portion of the Korean peninsula was placed under the control of the United States Military Government in Korea (USMGK), which ruled until mid-August 1948.¹⁶ In August 1948 the Republic of Korea (ROK) was proclaimed in Seoul, with Syngman Rhee as its first president, and a few weeks later the Democratic People’s Republic of Korea (DPRK) was proclaimed in Pyongyang.¹⁷ Less than two years later, Koreans would find themselves embroiled in a war that would kill some five million people.¹⁸

In the spring of 1948 the emerging Cold War dominated U.S. political and military priorities, and the USMGK was intent on consolidating an independent South Korea under the control of a “friendly” regime.¹⁹ There was widespread concern among Jeju Islanders that the separate elections scheduled in the south for May 1948 would permanently divide the country.²⁰ Resistance not only to the elections but also to police violence and a range of harsh governmental policies led to increasingly repressive responses by the U.S. military government.²¹ Although U.S. investigations found few communists among the islanders, American officials depicted their political demonstrations and labor strikes as evidence of a communist insurgency and encouraged the Korean army and police to violently suppress these movements.²²

According to historian Bruce Cumings, on March 1,

1948 there was a demonstration on Jeju against the holding of separate elections on the mainland, after which some 2,500 young people were arrested. Soon thereafter, residents recovered the body of one of those arrested from a river and found that he had been tortured to death.²³ This incident is believed to have provoked the April 3 uprising against police brutality and in support of a unified Korean government: an uprising that was met by attacks from U.S.-authorized police, military, and paramilitary forces.²⁴ Over the next few years, tens of thousands of Jeju islanders were murdered, over half of the island’s villages were destroyed, and some 40,000 islanders fled to Japan.²⁵ As summarized by law professor Erik Yamamoto, “[a]fter the Republic of Korea was established in August 1948 under Syng-man Rhee, with American military leadership supervising and overseeing South Korean military and national police actions, and with American military forces still in place to support the new government, suppression of the Jeju people accelerated with a ‘scorched earth operation.’”²⁶

For decades thereafter, succeeding South Korean governments destroyed evidence about these atrocities, intimidating and imprisoning those who dared to speak out about them.²⁷ The truth about the actions of Korean authorities did not begin to be publicly discussed until the 1980s, as activists associated with the Korean democracy movement held public commemorations and began calling for a national investigation.²⁸ The role played by U.S. authorities has yet to be publicly discussed, other than in very general terms. Nonetheless, we know that the United States established a Provisional Military Advisory Group (PMAG) to “advise” the nascent Rhee administration in August 1948, and

15) *Ibid.*, 37.

16) See Bruce Cumings, *THE KOREAN WAR: A HISTORY* 103–146 (New York: Random House, 2010); see generally Hakjoon Kim, *The American Military Government in South Korea, 1945–1948: Its Formation, Policies, and Legacies*, 12 *ASIAN PERSPECTIVE* 51 (1988).

17) See Katsiaficas, *ASIA’S UNKNOWN UPRISINGS*, *supra* note 2 at 86.

18) *Ibid.*, 87; see also Cumings, *THE KOREAN WAR*, *supra* note 15 at 35.

19) See Katsiaficas, *ASIA’S UNKNOWN UPRISINGS*, *supra* note 2 at 87.

20) Yamamoto et al., *Unfinished Business*, *supra* note 1 at 25.

21) See Katsiaficas, *ASIA’S UNKNOWN UPRISINGS*, *supra* note 2 at 87–94.

22) See Yamamoto et al., *Unfinished Business*, *supra* note 1 at 25–26; Bruce Cumings, *The Question of American Responsibility for the Suppression of the Chejudo Uprising, Korean International War Crimes Tribunal: Report and Final Judgment on US Crimes in Korea 1945–2001*, Int’l Action Ctr. (June 23, 2001), <http://www.iacenter.org/Koreafiles/ktccumings.htm>. As reflected in Cumings’s piece, Jeju is sometimes spelled “Cheju.”

23) Cumings, *The Question of American Responsibility*, *supra* note 21.

24) See *ibid.* (attributing the connection to the March 1 demonstration to the Korean military commander on the island at the time); see also Yamamoto et al., *Unfinished Business*, *supra* note 1 at 26–27.

25) See Cumings, *The Question of American Responsibility*, *supra* note 21 (noting that as many as 80,000 people may have been killed); Cumings, *THE KOREAN WAR*, *supra* note 15 at 121–131.

26) Yamamoto et al., *Unfinished Business*, *supra* note 1 at 27, quoting Moo Yong Kim, *The Strategy of Civilian Victimization and Massacre in Jeju 4.3 Subjugation Operation, TRUTH & RECONCILIATION COMM., REPUBLIC OF KOREA* (Apr. 10, 2008).

27) See Yoshida, *Reparations and Reconciliation*, *supra* note 8 at 80–81.

28) See Chang Hoon Ko, *USA Government Responsibility in the “peacetime” Jeju Grand Tragedy* in Ko, et al., *JEJU 4.3 GRAND TRAGEDY* *supra* note 1, 191–206, 198–199; see also Kim, *THE MASSACRES AT MT. HALLA*, *supra* note 2 at 61–82.

that in July 1949 PMAG was formally converted into the United States Military Advisory Group to the Republic of Korea (KMAG).²⁹

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KMAG saw its primary goal as the organization and training of the ROK Army, and described one of the obstacles it faced as the “guerrilla activity [that] was increasing in the interior of the country,” beginning in Jeju.³⁰ By 1950 KMAG officials were meeting with the Korean Army and National Police forces “to formulate antiguerrilla plans.”³¹ The U.S. “advisors” hoped that internal security could quickly be turned over to the police forces, thereby freeing Army units for more intensive training, but apparently the transition was “agonizingly slow.”³² The units charged with suppressing “insurrection” on Jeju as well as on the mainland were armed, trained, and advised by KMAG.³³ While the details may not be readily available, it is clear that the United States was deeply involved in the suppression of what it perceived as internal political dissent during the period between the formal end of its military occupation and the commencement of the Korean War.

United States Accountability

The South Korean democracy movement that began in the 1980s led to sweeping governmental changes that facilitated heightened awareness of the atrocities committed on Jeju Island, passage of legislation authorizing investigation of the “April 3 Incident,”³⁴ and “a healing process that included a concise presidential apology, government-sponsored museum and extensive public memorial and gravesite and limited financial and medical subsidies for victims.”³⁵ What is striking, however, is that despite the United States’ influence and

control over the Korean forces perpetrating the Jeju atrocities, there has been little recognition of, or accounting for, the United States’ role and, according to Yamamoto, “the United States thus far has been uncooperative or absent at all stages of the reparative justice process.”³⁶ The struggles of Jeju Islanders for recognition of and redress for the massive violations of human rights inflicted upon them cannot be complete until this glaring omission is directly and publicly confronted.

In light of the United States’ political, military, and economic power, this is a difficult task and a sensitive subject for the South Korean government. As the U.S. State Department notes, the two governments have worked closely for over sixty years “to combat regional and global threats and to strengthen their economies,” a relationship that “has expanded into a deep, comprehensive global partnership.”³⁷ In addition to strong trade and investment relations, the United States has “Army, Air Force, Navy, and Marine personnel in the R.O.K. ... to help the R.O.K. defend itself against external aggression.”³⁸ For Jeju Islanders this alliance has contemporary as well as historic implications, for they have been engaged in a struggle to convert their homeland into a “Peace Island” even as the South Korean government has been constructing a major new naval base on the island.³⁹ According to Ann Wright, a former U.S. Army Reserve Colonel, “[m]any on the island call it a U.S. naval base since it will be a key part of the U.S. ‘pivot’ to Asia and the worldwide U.S. missile defense system.”⁴⁰

With tensions mounting between North Korea and United States,⁴¹ there are many reasons why

29) Major Robert K. Sawyer, *MILITARY ADVISORS IN KOREA: KMAG IN PEACE AND WAR* 34–35, 45 (ed. Walter G. Hermes) (Washington DC: United States Army, Center of Military History, 1988 [1962]). KMAG was described by the U.S. Army’s Chief of Military History as a “one of the pioneers” in the Army’s postwar efforts to serve “as ally, friend, and counselor” in “lands whose peoples speak alien tongues and observe strange customs.” *Ibid.* at iii (foreword by Brigadier General William H. Harris). See also Ko, *USA Government Responsibility*, *supra* note 27 at 129–130 (discussing PMAG).

30) Sawyer, *MILITARY ADVISORS IN KOREA*, *supra* note 28 at 73.

31) *Ibid.* at 76.

32) *Ibid.* at 77–78 (quote at 77).

33) *Ibid.* at 93.

34) See *TRANSLATED REPORT*, *supra* note 4

35) Yamamoto et al., *Unfinished Business*, *supra* note 1 at 33.

36) *Ibid.* at 34. See generally Eric K. Yamamoto, Sara Lee, and Yea Jin Lee, *The United States’ Role in the Korea Jeju April 3rd Tragedy and Its Responsibility for “Social Healing Through Justice,”* 2 *WORLD ENVIRON. & ISLAND STUD.* 49 (2012).

37) U.S. Department of State, *U.S. Relations With the Republic of Korea*, Fact Sheet, Jan. 25, 2017, <https://www.state.gov/r/pa/ei/bgn/2800.htm>.

38) *Ibid.*

39) See Euan Graham, *A Glimpse into South Korea’s New Naval Base on Jeju Island*, *THE NATIONAL INTEREST*, June 1, 2016, <http://nationalinterest.org/blog/the-buzz/glimpse-south-koreas-new-naval-base-jeju-island-16415>; for back ground on the opposition, see Ann Wright, *S. Korean Villagers Sued for Anti-Base Protests*, *CONSORTIUMNEWS.COM*, June 10, 2016, <https://consortiumnews.com/2016/06/10/s-korean-villagers-sued-for-anti-base-protests/>; Choe Sang-Hun, *Island’s Naval Base Stirs Opposition in South Korea*, *NY TIMES*, Aug. 18, 2011.

40) Ann Wright, *Jeju island and the war mindset in Asia and the Pacific*, 50.50 *INCLUSIVE DEMOCRACY*, June 17, 2015, <https://www.opendemocracy.net/5050/ann-wright/war-mindset-in-asia-and-pacific>.

U.S. and South Korean political leaders might resist inquiries into the Jeju “April 3 Incident,” as it is officially described.⁴² The term “incident” implies an isolated occurrence, but the uprising and the subsequent repression of Jeju Islanders took place in a context that calls into question the legitimacy of the division of the Korean peninsula and implicates the United States in both the suppression of Korean movements for unification and the conduct of repressive South Korea regimes from 1948 to 1987.⁴³ As of mid-March 2017, the United States is openly threatening military action against North Korea, based not only upon its apparently expanding nuclear capacity but also its record of serious and on-going human abuses.⁴⁴ Under these circumstances, calling attention to human rights violations by either the U.S. or South Korean governments will be particularly unwelcome. Nonetheless, according to the U.S. State Department, the close ties between the United States and South Korea “are based on common values of democracy, human rights, and the rule of law.”⁴⁵ For both governments, the legitimacy of this claim rests on a willingness to confront and acknowledge historical truths.

An honest accounting of the United States’ role in the Jeju “Grand Tragedy” first requires access to information, and that entails a thorough investigation of U.S. involvement. Almost fifty years after the fact, previously inaccessible documents were made available in the U.S. National Archives, revealing active participation by U.S. officials in the repression of Jeju Islanders.⁴⁶ The commander of the U.S. occupation characterized Jeju as a peaceful “communal area” not particularly sympathetic to the communists, but the USMGK supported the repressive policies

of rightwing Korean authorities as they carried out a “campaign of terrorism” on the island,⁴⁷ and it promoted the myth, still prevalent, that the atrocities committed on Jeju were in response to a communist uprising.⁴⁸

U.S. officials were directly involved in the training and supervision of the Korean forces, and were well aware of the “guerilla extermination campaign” being waged.⁴⁹ According to the Translated Report, U.S. military commanders ordered some of the attacks directly and, as one Korean author reported, during this period, “the American reconnaissance planes are flying in the sky, the American cruisers are on guard, turning searchlights on the sea, and the American officers are directly at the front line, riding a horse or a jeep.”⁵⁰ After the transition from military occupation to South Korean rule in August 1948, there was “close U.S. oversight” over the “‘scorched earth’ operations” conducted by the new government and, pursuant to an Executive Agreement on Interim Military and Security Matters during the Transitional Period, the U.S. military maintained operational control over the South Korean police and military forces.⁵¹

Accountability and meaningful redress for Jeju Islanders will remain elusive until the specifics of American officials’ knowledge of, participation in, and support for the repressive measures employed on Jeju Island are incorporated into the historical record. In the meantime, however, it is clear that massive violations of fundamental human rights occurred on Jeju Island, with the knowledge and apparent support of U.S. officials, first while the island was directly under U.S. occupation and then during the transition to a government whose president, Syngman Rhee, had been handpicked by the Office of Strategic Services (the predecessor to the Central Intelligence Agency).⁵² As Cumings observes, by 1949 “Americans [were singing] the praises of the Rhee regime’s counterinsurgency campaign, even as internal accounts recorded nauseating atrocities.”⁵³

41) See David E. Sanger and William J. Broad, Trump Inherits a Secret Cyberwar Against North Korean Missiles, *NY TIMES*, Mar. 4, 2017; Carol E. Lee and Alastair Gale, White House Options on North Korea Include Use of Military Force, *WALL ST. JOURNAL*, Mar. 1, 2017.

42) See TRANSLATED REPORT, supra note 4; see also Yamamoto et al., Unfinished Business, supra note 1 at 3fn2.

43) For background see generally Katsiaficas, *ASIA’S UNKNOWN UPRISINGS*, supra note 2.

44) See Rex Tillerson on North Korea: Military action “an option”, *BBC NEWS*, Mar. 17, 2017, <http://www.bbc.com/news/world-asia-39297031>; U.S. blacklists North Korean officials over human rights abuses, *REUTERS*, Jan. 11, 2017, <http://www.reuters.com/article/us-usa-northkorea-sanctions-idUSKBN14V2HS>.

45) U.S. Department of State, U.S. Relations With the Republic of Korea, supra note 36.

46) See Cumings, *The Question of American Responsibility*, supra note 21.

47) Cumings, *THE KOREAN WAR*, supra note 15 at 122.

48) See Chang-Hoon Ko, US Government Responsibility on the Jeju April Third Uprising and Grand Massacre: Islanders’ Perspective, 8 *LOCAL GOV’T STUD.* 123, 126 (2004); Kim, *THE MASSACRES AT MT. HALLA*, supra note 2 at 2 (describing the “Jeju 4.3 events” as “a series of Communist armed uprisings and counterinsurgency actions”).

49) Cumings, *THE KOREAN WAR*, supra note 15 at 129 (quoting a U.S. Embassy official’s report of May 1949).

50) Yamamoto et al., Unfinished Business, supra note 1 at 58; quoted text at 58 fn287.

51) *Ibid.*, 58–59 (citing the TRANSLATED REPORT); see generally Ko, *US Government Responsibility*, supra note 47.

52) Cumings, *THE KOREAN WAR*, supra note 15 at 106. Rhee, in fact, was brought to Korea from his residence in New Jersey, to fulfill this role. See Katsiaficas, *ASIA’S UNKNOWN UPRISINGS*, supra note 2 at 10.

Until there is a full investigation of the United States' role in these atrocities, it will be difficult to pinpoint individual or collective responsibility. However, the facts that have been revealed through the testimonies of victims, their relatives or others in their communities, the documentation provided by the Translated Report, and the available U.S. records establish that the majority of villages on Jeju Island were destroyed, tens of thousands of civilians were murdered, thousands more arbitrarily detained and tortured, and tens of thousands driven into exile—all during a time of “peace” either under the United States' postwar occupation of Korea or under the Rhee administration which it put in place.⁵⁴ This information suffices to establish that international law was violated and that, under then-applicable international law, the United States bears significant responsibility for these violations and has a duty to provide appropriate redress.

International Legal Obligations

Redress for massive violations of fundamental rights can take many forms.⁵⁵ As Eric Yamamoto, Miyoko Pettit, and Sara Lee have explained, the “social healing through justice” still needed with respect to the Jeju Island massacres and related violations of rights encompass “truth telling, criminal prosecutions or amnesty and economic justice,” constructs they spell out in considerable detail.⁵⁶ Their analysis is grounded in the perspectives and needs of the Jeju Islanders, illustrating the more general point that to the extent possible the nature and extent of reparations should be determined not by the perpetrators but by the needs of those whose rights have been violated.⁵⁷

In reality, of course, reparations are most often the result of political negotiations, driven by public pressure, and shaped by the power dynamics of the moment.⁵⁸ In other words, redress for large-scale injustices has rarely been determined in strictly legal terms. Nonetheless, in considering and evaluating the options, and in generating the public awareness and political will to address historic wrongs, the legal underpinnings of obligation and breach, and the law

governing state responsibility, provide an important foundation. A thorough analysis of applicable international legal obligations in the case of Jeju Island is beyond the scope of this short essay, but a strong case can be made that the treatment of Jeju Islanders violated international law both during and after the U.S. occupation. To the extent this is true, the United States had legal obligations to ensure compliance with that law and the United States now has a duty to provide redress for its breach of those obligations. This section considers the applicable law, the doctrine of state responsibility, and the legal duty to provide reparations.

(i) Violations of Law

Many actions encompassed by the “Jeju 4.3 tragedy” were clearly proscribed by international law at the time they occurred. International humanitarian law protects civilians during armed conflict and has clear provisions regarding military occupations, regardless of whether they are met with armed resistance.⁵⁹ The Regulations annexed to the Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land, for example, state that “[f]amily honour and rights, the lives of persons, and private property... must be respected” by an occupying power.⁶⁰ Even when such treaties do not explicitly address a particular situation, the “Martens Clause” included in the preamble to the 1907 Hague Conventions notes that “in cases not included in [these Regulations], the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”⁶¹

According to the comprehensive database of customary international law governing armed conflict compiled by the International Committee of the Red Cross (ICRC), customary law prohibits attacks on civilians, acts or threats of violence intended to terrorize civilian populations, murder, torture, enforced disappearance, arbitrary deprivation of liberty, collective punishments, and attacks on towns and villages that are not militarily defended by enemy forces.⁶² The ICRC documents,

53) Cumings, *THE KOREAN WAR*, supra note 15 at 136.

54) See supra notes 22–25 and accompanying text.

55) For numerous relevant examples, see generally Yoshida, *Reparations and Reconciliation*, supra note 8.

56) Yamamoto et al., *Unfinished Business*, supra note 1 at 38.

57) See generally Natsu Taylor Saito, *At the Heart of the Law: Remedies for Massive Wrongs*, 27 *REV. LITIG.* 281 (2008).

58) See Katrina Miriam Wyman, *Is there a Moral Justification for Redressing Historical Injustices?* 61 *VAND. L. REV.* 127, 135 (2008) (noting that redress claims for historical injustices have generally been addressed to the legislative and political branches of government and that, at least in the U.S., redress is “rarely . . . a result of a judicial decision”).

59) See Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 20 *VAND. J. TRANSNAT'L L.* 469, 501 (1993) (noting the applicability of the Geneva Conventions to occupations, including those not met with armed resistance).

60) Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 46. The Hague, 18 October 1907, http://www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf. This Convention was ratified by the United States in 1909. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195.

61) Hague Convention (IV), supra note 59, preamble.

in addition, an obligation to account for dead and missing persons, and to provide their families with any available information as to their fate.⁶³ These are rules increasingly viewed as applicable to both international and non-international armed conflict,⁶⁴ and would presumptively apply to military occupations. While the history of each rule would need to be studied to be sure that it was applicable in the late 1940s, most if not all of these norms can be traced to the late nineteenth and early twentieth centuries.

One could argue that these customary and treaty-based legal norms apply only to periods of armed conflict and/or belligerent occupations, but it is difficult to imagine why conduct that cannot be engaged in by hostile forces would be lawful by virtue of a “friendly” military occupation. This issue was discussed by Nisuke Ando in his consideration of the legality of confiscations of private property by the U.S. occupation in postwar Japan—an occupation contemporaneous to that of the USMGK and perhaps most closely analogous.⁶⁵ While observing that there is insufficient state practice to definitively establish customary norms specifically applicable to nonbelligerent occupations, Ando argues that the “principle of humanity” enshrined in the Hague Regulations should apply because “the interests of civilian populations of all belligerents must be protected irrespective of the existence or non-existence of hostilities.”⁶⁶ In addition, as law professors Richard Bilder, Jessica Heslop, and Joel Roberto note:

Ando discusses the significance of the fact that many occupation measures directed by the Allies were actually taken by the Japanese, and asks whether this should affect U.S. responsibility. He concludes that it should not, because in every case the Japanese Government was merely the agent for the occupying forces, which were always ready to intervene and implement their orders themselves.⁶⁷

Both of these arguments would appear to apply to

the United States’ postwar occupation of Korea.

Should the laws governing armed conflict be deemed inapplicable to a postwar nonbelligerent occupation, the provisions of international law that, as of 1948, constrained the actions of governments with respect to the peoples over whom they exercised jurisdiction would apply. Much of this law, today described in terms of human rights, is found in treaties that have come into force since 1950.⁶⁸ To a large extent, however, these treaties articulate preexisting customary law that was binding on all states prior to the Jeju 4.3 atrocities. The Nuremberg and Tokyo Tribunals tried and punished German and Japanese officials not only for violating the laws of war, but also crimes against humanity committed against persons under their own jurisdiction. These included “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war.”⁶⁹ Countering arguments that these convictions were based upon an *ex post facto* application of law, the principles of international law articulated in the Charter of the International Military [Nuremberg] Tribunal were formally endorsed by the United Nations (UN) General Assembly in 1946.⁷⁰

The Universal Declaration of Human Rights, proclaimed by the UN General Assembly on December 10, 1948, states that all persons, without distinction, are entitled to “life, liberty and security of person”; that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” or to “arbitrary arrest, detention or exile”; and that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”⁷¹ While there is dispute about whether the Declaration as a whole embodies customary law and, therefore, is legally binding,⁷² it has been recognized by the International Court of Justice as articulating some preexisting and binding norms of customary law.⁷³ Given that the provisions

62) See International Committee of the Red Cross (ICRC), Customary IHL Database, Rules 1, 2, 37, 89, 90, 98, 99, 103. These rules, with explanations and citations, are available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

63) *Ibid.*, Rules 116, 117.

64) *Ibid.*, Introduction.

65) See generally Nisuke Ando, *SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW: AN EVALUATION OF U.S. PRACTICE IN JAPAN* (Oxford, UK: Clarendon, 1991).

66) Richard B. Bilder, Jessica Heslop, and Joel Roberto, *Book Review: Surrender, Occupation, and Private Property in International Law: An Evaluation of U.S. Practice in Japan*, 87 *AM. J. INT’L L.* 684, 686 (1993) (quoting Ando, *SURRENDER, OCCUPATION*, at 77). Bilder et al. also note that while Ando believes the Hague Regulations should apply, even if they do not “the limit on the scope of occupational measures is provided by the right to self-determination—the local population must favor the social change, because otherwise the occupation would in fact be subjugation.” *Ibid.*

67) *Ibid.*

68) See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (proscribing, among other things, arbitrary deprivation of life, torture, and arbitrary arrest or detention, and protecting the right to freedom of thought, opinion, expression, assembly, and association with others).

69) Charter of the International Military Tribunal, art. 6(c), <http://avalon.law.yale.edu/imt/imtconst.asp#art6>. On the tenuous nature of the nexus between war and crimes against humanity, see generally Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 *COLUM. J. TRANSNAT’L L.* 787 (1999).

70) G.A. Res. 177, U.N. Doc. A/519, at 111–12 (1947).

71) Universal Declaration of Human Rights, G.A. Res. 217(A), 3 U.N. GAOR Res., at 71–77, U.N. Doc. A/810 (1948), arts. 2, 3, 5, 9, 12.

72) While most commentators do not consider the Declaration as a whole to constitute binding law, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *AM. U.L. REV.* 1 (1982) (arguing that it has been accepted as customary law).

referenced above closely parallel longstanding norms of customary law governing armed conflict, and the extent to which the Nuremberg and Tokyo Tribunals invoked extant law as the basis for their legitimacy, a strong case can be made that the actions taken by U.S. officials on Jeju Island during the occupation contravened then-applicable and accepted norms of international law applicable during peacetime.

After the Republic of Korea was established in August 1948, the authorities on Jeju Island were bound by customary international human rights law as well as any treaties, including the UN Charter, to which they were parties. In other words, the norms discussed above as applicable to the U.S. occupation should the laws of armed conflict not apply are the same as those binding upon the new South Korean state as well as the U.S. government, post-independence. While much information about this period is missing from the historical record, the available data indicates that Jeju Islanders were subjected to massive human rights violations during the early years of the Rhee regime.⁷⁴

(ii) State Responsibility

While Korean military, paramilitary, or police officials may have been the direct perpetrators of the horrors inflicted upon Jeju Islanders, the United States bears some responsibility for their actions. This is true both for the period prior to August 1948 when Jeju Island, like the rest of southern Korea, was under the direct rule of the USMGK, and for the period immediately thereafter, when Jeju was governed by the purportedly independent South Korean state, given the United States' extraordinary influence over the latter.

The International Law Commission (ILC)'s Articles on Responsibility of States for internationally wrongful acts, commended to the attention of UN member states by the General Assembly in 2001, 2004, 2007, and 2010, provide a concise summary of state responsibility.⁷⁵ As these Articles make clear, "[e]very internationally wrongful act of a State entails the international responsibility of that State"; these include acts or omissions attributable to a state that breach an international obligation; and

73) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1972 I.C.J. 16, 76 (Advisory Opinion, June 21, 1971) (finding the right to equality to be one such preexisting norm).

74) See Cumings, *THE KOREAN WAR*, supra note 15 at 126–131; Ko, *US Government Responsibility*, supra note 47 at 129–130.

75) International Law Commission (ILC), *Responsibility of States for Internationally Wrongful Acts* (2001), see UNGA Res. 56/83 (2002), *Responsibility of States for internationally wrongful acts* (incorporating the ILC's Articles in its Annex), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83. On the history of these Articles, see James Crawford, *Historical background and development of codification*, <http://legal.un.org/avl/ha/rsiwa/rsiwa.html>.

their characterization as "internationally wrongful" is governed by international law, regardless of whether the same act violates the state's internal law.⁷⁶ Moreover, when acting with knowledge of the circumstances, a state is responsible when it "directs and controls" another state in the commission of an internationally wrongful act, and when it "aids or assists" another state in committing such an act.⁷⁷

Customary international law requires states to investigate violations of humanitarian law in both international and non-international armed conflicts.⁷⁸ In the case of the Jeju Island atrocities, such an investigation will allow for an accurate assessment of U.S. responsibility for the actions of Korean forces. States are responsible for the conduct of persons or entities "empowered [to exercise] governmental authority," provided they are acting in that capacity, and "[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law" if the organ is exercising the governmental authority of that state.⁷⁹ State responsibility is not necessarily avoided by the fact that such persons, entities, or organs have exceeded their authority or contravene instructions.⁸⁰

The acts of Korean forces cannot be attributed to the United States simply by virtue of the Korean officials' or government's "dependency" on the United States. Rather, as the International Court of Justice explained in the Nicaragua case, "effective control" by the United States would have to be established.⁸¹ Thus, the full extent of United States' responsibility for the Jeju Island massacres and

76) ILC, *Responsibility of States*, supra note 74, arts. 1–3. For an analysis of U.S. responsibility for more contemporary acts of omission, see generally Jennifer Lane, *The Mass Graves at Dasht-E Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 *CAL. WESTERN INT'L L.J.* 145 (2003) (addressing violations of humanitarian law with respect to deaths that might have been prevented by U.S. forces).

77) ILC, *Responsibility of States*, supra note 74, arts. 16–17 (also requiring that the act be internationally wrongful if committed by the directing, controlling, or aiding state).

78) See Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 *HARV. NAT'L SEC. J.* 31, 44–48 (2011).

79) ILC, *Responsibility of States*, supra note 74, arts. 5–6.

80) *Ibid.*, art. 7.

81) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, para. 115; see also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 108, paras. 403–405. The requirements are discussed in more detail in Michael N. Schmitt and Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 *HARV. NAT'L SEC. J.* 349, 368–370 (2014). Criminal responsibility for war crimes or crimes against humanity may attach in the absence of effective control, where one in a position of superior power or authority had actual knowledge of a subordinate's criminal conduct, but that is a subject beyond the scope of this essay. See Gregory Raymond Bart, *Special Operations Forces and Responsibility for Surrogates' War Crimes*, 5 *HARV. NAT'L SEC. J.* 513, 524–528 (2014).

attendant violations of fundamental rights cannot be assessed without a thorough investigation, but the facts currently available indicate that the United States bears a significant degree of international liability for these actions.⁸²

(iii) Duty to Provide Reparations

A final point of note is that under international law there is a well-established right to a remedy for violations of legal obligations. This is a “fundamental principle of customary law,” recognition of which “clearly pre-dates World War II.”⁸³ States have “an obligation to make full reparation for the injury caused by [an] international wrongful act”; “injury” being defined to “include[] any damage, whether material or moral,” caused by the wrongful act.⁸⁴ Full reparation encompasses restitution, where possible, and compensation for any financially assessable damage not addressed by restitution. If restitution and compensation cannot sufficiently repair the harm, satisfaction—which “may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality”—is prescribed.⁸⁵ Statutes of limitation are not to apply to “gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law,” and civil claims should not be subject to “unduly restrictive” time limitations.⁸⁶

In 2005 the UN General Assembly adopted and proclaimed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

Rights Law and Serious Violations of International Humanitarian Law formulated by the UN Human Rights Commission.⁸⁷ These principles summarize a wide array of norms foundational to both human rights and humanitarian law and, thus, are explicitly applicable to periods of both armed conflict and peacetime.⁸⁸ Significantly, these Basic Principles begin by emphasizing the duty of states to “[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, to take action against those allegedly responsible in accordance with domestic and international law,” and to “[p]rovide effective remedies to victims.”⁸⁹ Victims include those “who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” and may include, where appropriate, the immediate family or dependents of those directly suffering such harm.⁹⁰

Restitution, the remedy of choice in international law, is intended to restore the parties to the status quo ante, the situation as it existed prior to the wrongful acts. With respect to the atrocities perpetrated against Jeju Islanders seven decades ago, restitution does not appear to be a particularly promising option. However, other forms of redress identified in the Basic Principles and Guidelines are worth quoting at length, as they encompass much of what is currently being sought by Jeju Islanders:

20. Compensation should be provided for any economically assessable damage... such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of

82) See Cumings, *The Question of American Responsibility*, supra note 21.

83) Karen Parker and Jennifer F. Chew, *Compensation for Japan's World War II War Rape Victims*, 17 *Hastings Int'l & Comp. L. Rev.* 497, 524 (1994); see also Isamu Carlos Shibayama et al. v. United States, Inter-American Commission on Human Rights, Report No. 26/06, Admissibility (2006), para 55, <http://cidh.org/annualrep/2006eng/USA.434.03eng.htm>. In the Shibayama case the Inter-American Commission found Japanese Peruvian petitioners' claims based on their seizure and internment by the United States during World War II admissible. Hearings on the merits were scheduled for March 21, 2017, <http://www.oas.org/en/iachr/sessions/docs/Calendario-161-audiencias-en.pdf>.

84) ILC, *Responsibility of States*, supra note 74, art. 31.

85) *Ibid.*, arts. 34-37.

86) U.N.G.A. Res. 60/147 (16 December 2005), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, paras. 6, 7, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>. In addition, one could make the argument that the failure to acknowledge, investigate, and compensate for such serious violations of international legal obligations constitutes an on-going violation of international law. See *Shibayama v. United States*, supra note 82; Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 *B.C. L. REV.* 275, 313 (1998).

87) U.N.G.A. Res. 60/147, *Basic Principles and Guidelines*, supra note 85. For background, see Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 *HASTINGS INT'L & COMP. L. REV.* 157 (2004).

88) See Preamble to G.A. Res. 60/147, *Basic Principles and Guidelines*, supra note 85; see also Eric K. Yamamoto and Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States–Native Hawaiian and Japan–Ainu Reconciliation Initiatives*, 16 *ASIAN AM. L.J.* 5 (2009).

89) U.N.G.A. Res. 60/147, *Basic Principles and Guidelines*, supra note 85, para. 3(a),(c).

90) *Ibid.*, para. 8.

continuing violations;

- (b) Verification of the facts and full and public disclosure of the truth... ;
- (c) The search for the whereabouts of the disappeared, . . . and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies... ;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.⁹¹

To briefly summarize, when we view currently available facts through the lens of international law, a strong case can be made that with respect to the harms inflicted upon Jeju Islanders in the postwar period, the United States is responsible for violations of numerous provisions of then-applicable law and that it has a legal obligation to provide exactly the forms of redress being requested by the affected survivors and their communities. We turn, in conclusion, to a brief assessment of the implications of this analysis.

Concluding Thoughts

The United States has a poor record of acknowledging that it has violated international law or attempting to remedy large-scale violations of human rights,⁹² and its current administration appears resistant to participating in international human rights mechanisms. Government officials have threatened to drastically reduce U.S. participation in the United Nations and other international organizations, and to withdraw from multilateral treaties.⁹³ In March 2017, the Secretary of State threatened withdrawal from the UN Human Rights Council.⁹⁴ Just a week later, the U.S. government failed to appear at a session of the Inter-American Commission on Human Rights, where its current immigration enforcement

and detention policies, its approval of the Dakota Access Pipeline across unceded treaty territory of American Indian nations, and its internment of Japanese Peruvians during World War II were under scrutiny.⁹⁵ These developments do not bode well for the Jeju Island redress movement.

Notwithstanding its consistent invocation of American exceptionalism in the international arena, some observers note that the United States has provided some—largely symbolic—redress to Japanese Americans interned during World War II.⁹⁶ However, the Supreme Court’s 1944 opinion upholding the constitutionality of the internment has never been overturned⁹⁷ and today we see the Japanese American internment increasingly normalized as politicians debate measures to remove or exclude peoples deemed potential threats to the national security.⁹⁸ In 1993 Congress apologized for the admittedly “illegal overthrow of the Kingdom of Hawaii on January 17, 1893... which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people,” but did not express any intent to remedy the resultant harm.⁹⁹ In 2009, President Obama apologized “for the many instances of violence, maltreatment, and neglect inflicted on Native peoples by citizens of the United States” but even this watered down statement, accompanied by a disclaimer of legal liability, was buried in a defense appropriations bill and not announced publicly.¹⁰⁰ The United Nations’ Working Group of Experts on People of African Descent concluded in 2016 that the United States owes reparations to people of African descent for slavery, extrajudicial killings, and mass incarceration, but even efforts to obtain even an apology for centuries of enslavement have been consistently rebuffed.¹⁰¹

91) *Ibid.*, paras. 20–22

92) See generally NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW* (New York: New York University Press, 2010).

93) See Max Fisher, *Trump Prepares Orders Aiming at Global Funding and Treaties*, *NY TIMES*, Jan. 25, 2017.

94) Rachael Revesz, *Rex Tillerson threatens to withdraw from the Human Rights Council to improve human rights*, *INDEPENDENT*, Mar. 15, 2017.

95) Jamil Dakwar, *In an Unprecedented No-Show, the U.S. Pulls Out of Planned Human Rights Hearing*, *American Civil Liberties Union*, Mar. 21, 2017, <https://www.aclu.org/blog/speak-freely/unprecedented-no-show-us-pulls-out-planned-human-rights-hearing>.

96) *Civil Liberties Act of 1988*, Pub. L. No. 100–383, 102 Stat. 903. For an insightful critique of the redress provided, see generally Chris K. Iijima, *Reparations and the “Model Minority” Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 *B.C. L. REV.* 385 (1998).

97) *Korematsu v. United States*, 323 U.S. 283 (1944).

98) See, e.g., Amy Wang, “No time to ask questions”: Lawmaker appears to defend use of WWII Japanese internment camps, *WASH. POST*, Mar. 23, 2017.

99) *Apology Resolution of 1993*, Pub. L. No. 103–150, 107 Stat. 1510. For analysis, see generally Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarch, Hawai’i’s Annexation, and Possible Reparations*, 17 *U. HAW. L. REV.* 463 (1995).

100) See Rob Capriccioso, *A sorry saga: Obama signs Native American apology resolution; fails to draw attention to it*, *INDIAN COUNTRY TODAY*, Jan. 13, 2010.

Does legal responsibility matter when powerful states are unlikely to acknowledge their responsibility or provide redress for significant violations of fundamental human rights? We are often told that legal remedies are “impractical” because effective redress would be too costly, the actions at issue occurred too long ago, or the evidence necessary to establish culpability is likely unavailable.¹⁰² As a lawyer, I find this perspective deeply troubling, not only because it disrespects the victims but also because it calls into question the legitimacy of the legal project itself. If a legal system can provide remedies only for small-scale wrongs but not the most egregious violations of rights, it is undermining rather than furthering the rule of law. As I have said elsewhere, it becomes “a political machine masquerading as law to preserve a status quo that accepts fundamental violations of human rights as inevitable.”¹⁰³

Preconceived notions about the practicability of legal redress must not preclude honest and thorough legal analysis. Support for the continued efforts of Jeju Islanders to obtain compensation and satisfaction from the United States government for its part in the destruction of their lives and communities will benefit us all, for this movement strengthens respect for human rights and the rule of law. This is not to say that we should pin all of our hopes on receiving justice from what John Marshall, the Chief Justice of the United States Supreme Court, acknowledged (in the context of denying American Indian property rights) to be the “Courts of the conqueror.”¹⁰⁴ Rather, its strength lies in demonstrating the “objective” legitimacy of the claims made by those who have suffered from the abuse of state power. In turn, this can restore the dignity of those whose rights have been violated and empower them to decide, on their own terms, how to move forward.

Reflecting on the United States’ responsibility for its actions on Jeju Island between 1945 and 1953, historian Bruce Cumings observes that “it was on that hauntingly beautiful island that the postwar world first witnessed the American capacity for unrestrained violence against indigenous peoples fighting for self-determination and social justice.”¹⁰⁵ Jeju Islanders have long been known for their fierce

independence, their resistance to colonization, and their struggles to maintain a unified Korean state. They have kept the history of the Jeju 4.3 atrocities alive, obtained significant redress from the South Korean government, and continue to envision their homeland as a Peace Island rather than the site of increased militarization. The work being done by Jeju Islanders and their supporters demonstrates the potential for envisioning and implementing programs of social reparation and reconstruction that are not dependent upon governmental action but derive their power from peoples exercising their right to self-determination. As such, this is a movement for justice that benefits us all.

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101) See Ishaan Tharoor, U.S. owes black people reparations for a history of “racial terrorism,” says U.N. panel, WASH. POST, Sept. 27, 2016; on efforts to obtain apologies, see generally Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181 (2004).

102) I discuss this question in more detail in Saito, *At the Heart of the Law*, supra note 56 at 281–283.

103) *Ibid.*, 282.

104) *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823).

105) Cumings, *The Question of American Responsibility*, supra note 21.

In accordance with international jurisprudence, war crimes in non-international armed conflict may include serious violations of Common Article 3, of relevant provisions of Additional Protocol II, and of customary international law.¹² Crimes against Humanity. 17. Pursuant notably to customary international criminal law, inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health, if committed as part of a widespread or systematic attack against a civilian population, may constitute crimes against humanity.¹³ Crimes against humanity are general