PART VII – REPARATIONS

A. INTRODUCTION

1054. Reparation is a crucial form of redress which should be afforded to victims of crimes. The obligation to respect and enforce international law has been the subject of many reports and there is no doubt that every state has the legal duty to respect and enforce human rights and humanitarian law. This obligation includes the duty to “afford remedies and reparation to victims.” In the 1928 Chorzow Factory case, the Permanent Court of International Justice regarded the obligation to make reparation for an international wrongful act as “a general principle of international law.” That general principle has developed into a legal and moral duty.

1055. Any violation of human rights or humanitarian law gives rise to a right of reparation for the victim, although “[p]articular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide, slavery and slavery-like practices . . . and systematic discrimination, in particular based on gender.”

1056. In accordance with our finding that the crimes committed against the “comfort women” were international wrongful acts attributable to the government of Japan, the state incurs civil and criminal responsibility for the violations. In conformity with the longstanding principle of international law that the state must provide a remedy for its wrongs, the government of Japan is accordingly obliged to provide reparation to the former “comfort women” for the crimes committed against them by or with the complicity of the Japanese government and military.

1057. In addition, in light of the continuing violation, we apply the evolving concept of reparations under international law. Thus, having identified the rape and sexual slavery committed herein as internationally wrongful acts during 1937-1945, we examine the state’s responsibility to provide compensation, restitution, rehabilitation, satisfaction, and

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801 Most particularly, the subject of reparations has been addressed by Mr. Theo van Boven, who was tasked by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of human rights abuses (E/CN.4/Sub.2/1993/8 of 2 July 1993), and this draft report resulted in two subsequent reports on basic principles and guidelines (E/CN.4/Sub.2/1996/17 of 24 May 1996; E/CN.4/1997/104 of 16 January 1997.) The reports of Mr. Louis Joinet, Special Rapporteur of the Sub-Commission on the question of impunity of perpetrators of violations of human rights also elaborated basic principles and guidelines on impunity, including two reports addressing reparation for victims of human rights violations (E/CN.4/Sub.2/1997/20 of 26 June 1997; and E/CN.4/Sub.2/1997/20/Rev. 1 of 2 October 1997). Additionally, the Commission on Human Rights commissioned Mr. M. Cherif Bassiouni to report on the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (E/CN.4/1999/65 of 8 February 1999; and E/CN.4/2000/62 of 18 January 2000.)


803 Chorzow Factory (Indemnity) Case, (Germany v. Poland), 1928 PCIJ, Series A, No. 17, at 29 (Sept. 13).


guarantees of non-repetition as these concepts have been articulated in more recent UN
documents.

1058. In examining the scope of the government of Japan’s obligation to provide reparations,
we refer to a fundamental principle of international law that “the breach of an
international duty involves an obligation to make reparation in an adequate form.”807 To
fulfil this obligation, the reparation must be “adequate, effective and prompt.”808 In order
to be deemed fair, the reparations or other remedies provided must be “proportional to the
gravity of the violations and the harm suffered.”809

1059. The form of reparations due is dependent upon the particular facts of the case, but may
include restitution, compensation, rehabilitation, and satisfaction. These encompass such
things as an acknowledgement of illegality and responsibility, a formal apology, access to
justice (criminal, civil, and administrative), and access to factual information concerning
the violations. The government must also take steps to protect the identity of those
survivors/victims who do not want to be identified.

1060. The applicants are seeking reparations for two kinds of harm inflicted on the survivors of
Japan’s military sexual slavery: harm that flows from the original violations and harm
incurred from subsequent acts and omissions that are contrary to the Japanese
government’s obligations to provide full and adequate reparations. This case gives
powerful meaning to the concept of continuing violation and indeed the testimony of the
survivors reveals the constant reiteration of pain and the reinforcement of secrecy and
shame as a result of the government of Japan’s concealment, denials, and obfuscation of
the truth and its failure to fulfil its fundamental responsibility. We note that for over 56
years, successive governments of Japan have continually failed in their obligation to
provide remedies expeditiously.810

1061. We agree that the victim/survivor is the appropriate “moral and conceptual point of
departure” for the development of a legal framework of international guidelines
governing the right to reparation.811 Atrocities perpetrated intentionally, systematically,
and against a huge number of victims, as here, are especially egregious and deserve
proper censure.

1062. Reparations promote justice by providing certain means of redress for the violations.812
Reparations may be claimed by direct victims, their immediate families, dependants, or
“other persons or groups of persons connected with the direct victim.”813 A “victim” is
one who, individually or collectively, has suffered harm. This harm encompasses, among

807  Chorzow Factory (Jurisdiction) Case, op cit at n 1. supra Chorzow Factory (Merits), Permanent Court of International
Justice (PCIJ), Judgement No. 13, Series A, No. 8-17, 1927.
808  Bassiouni Final Report, para. 15.
809  Bassiouni Final Report, para. 15.
810  Bassiouni Final Report, para. 15.
and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni,
[Bassiouni 1999 Report], paras. 83, 84.
separately “the right to know,” “the right to justice,” and “the right to reparation.”
813   United Nations Commission on Human Rights, Basic Principles and Guidelines on the Right to Reparation for Victims of
Gross Violations of Human Rights and humanitarian Law, UN Doc. E/CN.4/Sub.2/1996/17, para. 6 [van Boven Principles,
1996].
other things, “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”

1063. The law of state responsibility “requires a state to make reparations when it fails to comply, through an act or omission attributable to it, with an obligation under international law.” Moreover, the forms of remedies available from the state are not necessarily discretionary, particularly when the violation is the result of intentional state wrongdoing. That the crimes were committed by or attributable to the state is especially disturbing. This is not a case of a state failing to protect – the state of Japan aggressively and intentionally caused the harm. Thus, “[t]he remedies afforded should reflect the breach of trust involved because, in general, the more outrageous the wrongdoer’s conduct, the more outraged and distressed the victim will be and the greater the harm that will be suffered.” The reparations should be comprehensive and include any or all forms that are applicable to the situation and cover all injuries suffered by the victims.

1064. The most common forms of reparation – satisfaction, restitution, compensation, and rehabilitation – must all be considered, as the needs of the large victim group may vary greatly. Further, the extended period of time over which the crimes occurred, covering years in some instances, coupled with the excessive time period during which additional violations have accrued as a direct result of the failure of the government of Japan to take responsibility for the crimes and provide reparation after the war, necessitates a broad scope of applicable remedies, including reparation.

1. Satisfaction

1065. The concept of satisfaction encompasses public acknowledgement of the state’s wrongdoing together with concrete steps to repair the relationship between the victim and the state and civil society as a whole. Satisfaction encompasses symbolic measures taken for “moral and collective reparation,” and arises in part from the “duty to remember.” Satisfaction can include any or all of the following measures, which are not exhaustive:

(a) Cessation of continuing violations;
(b) Verification of the facts and full public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

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815 Dinah Shelton, Remedies in International Human Rights Law, 1999, p. 93.
(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely associated with the victim;
(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
(f) Judicial or administrative sanctions against persons responsible for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that have occurred in international human rights and humanitarian law training and in educational material at all levels;
(i) Preventing the recurrence of violations . . . 819

2. Official and Full Acknowledgement

1066. As previously set forth in this Judgement, successive governments of Japan have continually violated the duty to acknowledge its wrongdoing concerning the “comfort system.” This violation continues until this day. The guarded admissions of the state of Japan continue to minimise the harm inflicted while its failure to countermand the denials continues to exacerbate the survivors’ suffering. Many of the survivor-witnesses underscored their need for a meaningful apology. A sincere apology fully acknowledging the wrongdoing and clearly accepting full legal responsibility is required. Verifying the facts and publicly disclosing the truth must be done “to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others.”820 Revealing the truth is a fundamental requirement of justice.821

1067. Despite its obligations, the Tribunal finds that the official position of Japan has moved from the destruction of incriminating documents to denial to acknowledgment of culpability that remains partial and ambiguous. Confronted with allegations, instead of acknowledging the crimes the government of Japan initially denied any involvement in the “comfort stations,” and implied that the women were voluntary prostitutes. Only in the face of undeniable evidence of the government of Japan’s military involvement in the “comfort stations” did the government belatedly offer a general “apology” while simultaneously denouncing that it had incurred or continued to owe any legal responsibility.

1068. The Tribunal finds that the state of Japan’s continuing resistance to fully acknowledging its wrongdoing and its efforts to shift blame onto the victims has perpetuated the shame and silence, inflicted indescribable pain upon the survivors, and deprived them of the possibility of living in peace with themselves and with their families and communities. As the Secretary-General of the United Nations recently said in relation to an historic judgement of the International Criminal Tribunal for Rwanda: “There can be no healing without peace, there can be no peace without justice, and there can be no justice without

819 Bassiouni Final Report, para. 25. In addition, satisfaction includes preventing the recurrence of violations by such means as: Ensuring effective civilian control of military and security forces; …; strengthening the independence of the judiciary; protecting persons in the legal, media and other related professions and human rights defenders; conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; creating mechanisms for monitoring conflict resolution and preventive intervention. Bassiouni Final Report, para. 25(f).

820 Bassiouni Final Report, para. 25(b).

821 See e.g., van Boven 1993 Final Report.
respect for human rights and the rule of law.”\textsuperscript{822} The partial admissions of the state of Japan continue to minimize the harm inflicted while its failure to countermand the denials continues to exacerbate the survivors’ suffering. Until the government of Japan acknowledges that it was the victimizer and that the “comfort women” were innocent and blameless pawns victimised by the state and its military, full redress is impossible.

3. Preservation of Memory

1069. Closely related to apology, which facilitates healing and acknowledges responsibility, preservation of memory concerns disclosing fully the factual records and other evidence of the “comfort system” and creating a public historical record for telling, investigating, and retelling the full story. During this process, efforts must be made to ensure that the privacy of victims is respected. Accurately recording and preserving the memory of wrongdoing and the harm to victims serves to rehabilitate the victims in the public eye and ensure the non-recurrence of such horrific behaviour in future generations.

1070. The Tribunal finds that the efforts of the government of Japan to educate the people of Japan and future generations are sorely lacking in regard to the formal education through textbooks, official memorials, and commemorative days devoted to examining the history and engendering respect for the victimised women. Jose Zalaquett, a member of the Chilean Commission for Truth and Reconciliation, noted that if the “ghosts of the past [are] not exorcised to the fullest extent possible, [they] will continue to haunt the nation.”\textsuperscript{823} This was true in Latin America and it is true in Asia and elsewhere.

4. Gender Training, Empowerment, and Equality

1071. The brutal expropriation of women’s bodies, sexuality, youth, fertility, self-esteem, security, future and hope is more likely to occur in a culture that devalues females and which sanctions the subordination and dehumanisation of girl-children and women. This treatment is usually based on women’s gender as well as their perceived inferiority and vulnerability due to national and racial identity, including indigenous status, and poverty. Unfortunately, the Japanese culture of rendering women, particularly outside the home, invisible or less significant than men, is not at all unique.

1072. It is critical that the sexual enslavement of the “comfort girls and women” not be treated as an anomaly. Rather, the underlying ideology and political, economic and social structures which combine to validate women’s inequality and subordination and, thereby, immunise violence against women and girls in the public and private arenas and must be addressed at all levels of society. Efforts must be made to expose the attitudes and conditions contributing to the devaluation of women and to reverse such attitudes through broad education, training and support to women and girls to enable them to overcome the legacy of gender inequality.

5. Access to Judicial Redress

1073. In addition to civil remedies, it is appropriate to apply criminal sanction to individuals who commit crimes. Fundamental responsibility rests with those responsible for establishing and maintaining the “comfort system” and their agents, physical perpetrators,
station owners or managers, and superiors on the hierarchical ladder who had a duty to prevent, halt, or punish crimes committed by subordinates under their authority and control, but who failed to take the necessary and reasonable steps to do so. Administrative sanction, truth-telling and public shaming may in some circumstances be more appropriate than criminal prosecution.

6.  Restitution

1074. The purpose of restitution is to “restore the victim to the original situation before the violations…occurred.” It includes restoration of liberty, … enjoyment of family life and citizenship, return to one’s place of residence, restoration of employment, and return of property.” In the law of remedies, restitution is preferable when possible, so as to restore the victim to her pre-injury position. When restitution is impossible, money is usually awarded as a substitute. Clearly, a state cannot bring a dead person back to life, “nor can a rape or torture victim have the rape or torture expunged. In such cases, money becomes a substitute for the pre-injury status.” While it is impossible to restore the former “comfort women” to their situation before the violence inflicted upon them, it may be possible to return them to their country of residence if they wish; to provide them with some of the material well-being including long-delayed health care, they might otherwise have enjoyed; and to erase any criminal records of, for example, prostitution or unlawful immigration, which may have resulted from their victimisation as “comfort women.”

1075. It is incumbent on the government of Japan to take vigorous measures, in consultation with the survivors, to restore the honour and social status of survivors. They must be restored in not only their own eyes, but also the eyes of society. Additionally, restitution of material losses, such as repatriation of survivors who wish to be, return of any property taken, or return of the remains of the deceased, would also provide a measure of remedy.

7.  Compensation

1076. This form of remedial provision is appropriate for “any economically assessable damages” both material and emotional, which includes physical or mental harm, including pain, suffering and emotional damage from the initial violence and enslavement and continuing violations; lost opportunities, including education; material damages, including loss of education and earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services. Physical and emotional suffering should be recognized as encompassing the lifelong loss of pleasure from sex or sexuality, the loss of reproductive capacity or health and the harm to children, the loss of security in the world and trust in others, the loss of the sense of integrity and belonging in one’s body, and the long period of isolation from family and society, and the impact of this atrocity on future generations.

1077. To be in compliance with international law, compensation must come from the source of the wrongdoer, the government of Japan and any other responsible party. The

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824 Bassiouni Final Report, para. 22.
825 Bassiouni Final Report, para. 22.
827 Bassiouni Final Report, para. 23. Article 3 of 1907 Hague Convention IV recognizes that states may be required to pay compensation for violations of international humanitarian law.
compensation must be adequate to the material harm, lost opportunities and emotional suffering of the victims, their families and close associates for the crimes committed and the ensuing harms resulting from the denial of truth and timely remedial measures. The Tribunal considers that the Asian Women’s Fund, vehemently rejected by many of the survivors, is neither appropriate nor adequate. Determination of the proper amount of compensation should be made in consultation with survivors, the families of those who are deceased, and appropriate advocates and experts, and may draw upon international practice for similar or related atrocities.828

1078. The Inter-American Court of Human Rights recognised that abuses committed by governments may have a more harmful effect on the victim than abuses committed by non-state actors. In Loayza Tomayo v. Peru (Reparations), the Court emphasised that the state has a duty to protect individuals and it found that crimes committed by the state are exceptionally egregious and destructive.829

1079. The Tribunal finds that the delay in making reparations and acknowledging the crimes exacerbated the injuries and caused additional and continuing suffering in the nature of shame, ostracism, anger, sorrow, despair, isolation, the inability to find peace, economic hardship and impoverishment, loss of companionship, and unredressed health problems. These profound losses are also subject to compensation to the present, as are the lost opportunities.

8. Rehabilitation

1080. Rehabilitation may include services afforded to both the victim and the victimizer. It includes medical and psychological care as well as legal and social services.830 In the present case, the continuing nature of the violations intensifies the need and urgency for all applicable forms of reparation. The murder or abandonment of the women at the end of the war, the destruction of evidence that would reveal the full extent of these crimes, the denial and attempted erasure of the women’s experience of sexual slavery and rape by naming it “prostitution,” the refusal to take legal or moral responsibility for the crimes or to provide fair reparations, have inflicted an additional layer of harm on the survivors and other victims. Trauma, especially when resulting from mass violence and sexual violence, often results in long-lasting post traumatic stress which may require special care and treatment.

1081. The conditions to which the “comfort women” were subjected were extreme and some of the most vile imaginable: Many survivors reported seeing their families abused, being raped in front of their family members, being abducted or tricked and taken to a different country, being enslaved to effectuate continuous rape over a period of weeks, months, or years, and then being shunned by society, left without a means to support themselves. The assistance that would need to be provided to survivors of such atrocities is considerable. The physical violence alone would typically result in severe damage to the body, such harm having been exacerbated by aging without health care.

1082. Rehabilitation may require educating, training, and treating the victimiser to ensure that the victimisation will not continue or be repeated. Victimisers too may need to come to

828 For a full review of state and international practices regarding remedies for violations of human rights and humanitarian law, see Shelton, Remedies in International Human Rights Law.
terms with their guilt and the causes of the crimes and their participation in them, in order to be more productive members of society.

1083. The testimony of the survivors demonstrates that the physical and mental violence inflicted upon the “comfort women” has not healed, and that efforts need to be taken to ensure that, to the extent possible, comfort and reduction of pain is finally afforded after all these years. This may also include providing living conditions that are comfortable and supportive, and supplies that ensure an adequate standard of living. This is particularly important as the victims were denied educational opportunities and work experiences that would have facilitated their earning capacity. The abuses also resulted in many survivors having difficulty in marrying; particularly in patriarchal societies where males are given job preference and unmarried women are scorned in public and private life, such results would have devastating consequences.

1084. It has previously been recognized that there is no statute of limitations for gross violations of human rights, whether committed during wartime or peacetime: “Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations.”831

1085. In sum, we find that the government of Japan owes a duty to provide reparation in various forms. There should be a dialogue between the government, the survivors and their representatives, and experts to ensure that the general and specific voices and needs of all women are heard. An appropriate remedy for one may not be appropriate for another. Individual needs and wants of the victim-survivors should be taken into account. The magnitude and scope of the harm demand extraordinary efforts to reverse long denied redress.

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B. **RECOMMENDATIONS**

1086. The Tribunal holds that in order to fulfil its responsibility, the government of Japan must provide each of the following remedial measures:

1. Acknowledge fully its responsibility and liability for the establishment of the “comfort system,” and that this system was in violation of international law.

2. Issue a full and frank apology, taking legal responsibility and giving guarantees of non-repetition.

3. Compensate the victims and survivors and those entitled to recover as a result of the violations declared herein through the government and in amounts adequate to redress the harm and deter its future occurrence.

4. Establish a mechanism for the thorough investigation into the system of military sexual slavery, and allow for public access and historical preservation of the materials.

5. Consider, in consultation with the survivors, the establishment of a Truth and Reconciliation Commission that will create an historical record of the gender-based crimes committed during the war, transition, occupation, and colonisation.

6. Recognize and honour the victims and survivors through the creation of memorials, museums, and libraries dedicated to their memory and the promise of “never again.”

7. Sponsor both formal and informal educational initiatives, including meaningful inclusion in textbooks at all levels and support for scholars and writers. Efforts should be made to educate the population and, particularly, the youth and future generations concerning the violations committed and the harm suffered; research should endeavour to examine the causes of the crimes, societies ignoring of the crimes, and ways to prevent reoccurrence.

8. Support training in the relationship between the military and gender inequality and the prerequisites for realizing gender equality and respect for the equality of all the peoples of the region.

9. Repatriate survivors who wish to be repatriated.

10. Disclose all documents or other material in its possession with regard to the “comfort stations.”

11. Identify and punish principal perpetrators involved in the establishment and recruitment of the “comfort stations.”

12. Locate and return the remains of the deceased upon the request of family members or close associates.
1087. The Tribunal further recommends that the former Allied nations:

1. Immediately declassify all military and governmental records concerning the establishment and operation of the “comfort system” and the reasons why it was not prosecuted before IMTFE.

2. Immediately declassify all military and governmental records concerning the failure to prosecute the Emperor HIROHITO before the IMTFE.

3. Acknowledge their own failures to investigate and prosecute the crimes committed against the former “comfort women” initially in the post-war trials and in the intervening 56 years, and take measures to investigate, disclose and, in appropriate cases, prosecute surviving perpetrators.

1088. The Tribunal further recommends that the United Nations and all the states thereof:

1. Take all steps necessary to ensure that the government of Japan provides full reparations to the survivors and other victims and those entitled to recover on account of the violations committed against them.

2. Seek an advisory opinion of the International Court of Justice as to the illegality and continuing liability of the government of Japan in regards to the former “comfort women.”