



## Reparations and Remedies for Victims of Torture

Geneva, 24 January 2013

### **Panel 2: Effective Remedies for Victims of Torture**

#### **Introduction to Key Concepts in Providing an Effective Remedy for Victims of Torture**

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Before delving into the notion of “redress”, that encompasses both the concepts of an “effective remedy” and “reparation”, I would like to first bring to life what and who we are talking about.

#### **1. Who are the victims?**

- From recent research we have done through a global series of conferences, sharing expertise on anti-torture legislation and litigation, we have put together a fascinating but also daunting picture of the patterns and incidences of torture.<sup>1</sup> Certain groups of individuals appear to be more vulnerable to torture than others. One of the most notable vulnerable groups are individuals in detention or individuals suspected of crimes, who are subjected to torture as a routine method of obtaining confessions in order to expedite crime solving. In and amongst the most vulnerable to torture, socially marginalised groups are commonly targeted due to discrimination and their disempowered status in society. These include women, migrants, ethnic minorities, lesbian, gay, bisexual or transgender individuals, domestic workers, sex workers or those living in abject poverty. Equally, those in political opposition, protesters, human rights activists as well as other types of dissenters are also regular targets.
- There is also a range of gender violence that amounts to torture,<sup>2</sup> where severe pain and suffering is inflicted on the basis of discrimination, and state authorities know or have reasonable grounds to believe that acts of torture are being committed by non-State officials and fail to exercise due diligence to prevent, investigate, prosecute and punish such acts consistently with the Convention Against Torture.<sup>3</sup>

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<sup>1</sup> See REDRESS & ECCR, *Torture in Europe: The Law and Practice, Regional Conference Report*, September 2012; and REDRESS and Independent Medico Legal Unit (IMLU-Kenya), *Torture in Africa: The Law and Practice, Regional Conference Report*, September 2012; available at: [www.redress.org/reports/reports](http://www.redress.org/reports/reports)

<sup>2</sup> See the International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v Kunarac et. Al.* 12 June 2002, paras. 151-152: “severe pain or suffering as required by the definition of the crime of torture can thus be said to be established once raped is proven, since the act of rape necessarily implies pain or suffering”.

<sup>3</sup>The Committee against Torture has indicated that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors

- In cases of domestic violence, where there has been severe pain and suffering, and where there has been discrimination by the State with regards to its due diligence obligations (to prevent, investigate, prosecute, punish), the European Court of Human Rights has found the State to be in violation of its anti-torture obligations.<sup>4</sup>
- With respect to the rights of victims to an effective remedy and reparation, these rights apply not just to the direct victims who may have suffered harm individually or collectively; but also to those who have suffered harm indirectly, including family members or dependants who have been affected; or those who have intervened to prevent or assist victims.<sup>5</sup>

## 2. Remedy and Reparation = Redress

- The notion of redress for victims of torture, as expressed in Article 14 of CAT and clearly set out in the Committee's recent General Comment 3, incorporates both the concepts of "effective remedy" and "reparation". These are often described as the *procedural right* to access justice on the one hand, and the *substantive right* to compensation, rehabilitation or other forms of reparation on the other. However, these two aspects of are part of a whole. Ultimately the process of seeking redress is to restore the dignity of the victim and this includes both his or her moral integrity in terms of acknowledgment of the harm as well as the physical, psychological or social aspects. The two components reflect this integrative approach.
- With regard to remedies and reparation for torture, a judicial remedy is always required. Simply providing compensation or other social services to victims will not satisfy victims' right to redress on its own. A judicial remedy is fundamental to victims' need for acknowledgment, recognition and justice.
- Indeed, in some circumstances, the judicial remedy may in and of itself provide full or partial reparation. But the same is not true the other way around. There are numerous instances, where torture has been committed and where a State has sought to provide compensation to victims, perhaps in the mistaken belief that victims merely want money, or could be appeased with money. However, time and time again, our experience is that for many victims, money, while helpful, is not the first form of reparation that comes to mind. In many instances, victims will be living in dire physical, psychological or social conditions and

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consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking. See UN Committee against Torture, General Comment No 2, UN Doc CAT/C/GC/2 (2008), para.18.

<sup>4</sup> In *Opuz v Turkey*, ECHR (Application No.33401/02) [2009] ECHR 870, 9 June 2009.

<sup>5</sup> UN Committee Against Torture, General Comment No. 3, UN Doc. CAT/C/GC/3 (2012), para. 3.

have immediate as well as long term needs, both for themselves but also for their dependents. They may need services or the financial means to access services; and in addition to these needs, there is always the gaping hole of the wrong-doing, the moral injury that remains to be rectified through acknowledgment, justice and accountability.

### **3. Effective Remedies as “Access to Justice”**

- In order to meet their procedural obligations to enable effective remedies, States need to enact a legislative framework to ensure access to justice that includes appropriate laws, complaints mechanisms, investigation bodies and independent judicial organs.
- There is significant jurisprudence on what is meant by “effective”, given that in order to take a case to a regional or international human rights body, the victim will need to show that domestic remedies have been exhausted. If it is shown that there are no domestic remedies available, or if no “effective remedies” are available, the victim will be able to take his case directly to the regional or international level. For instance, in terms of providing a legislative framework that is accessible and consistent:
  - If a victim wants to file a complaint, but torture does not exist as a crime under domestic law, by definition there is no effective remedy for torture that the victim can avail himself or herself of.
  - If a victim wants to file a complaint but there is a time limit that makes it impossible for the victim to access justice, there is again no effective remedy available. Indeed, statutes of limitation are not applicable to torture.
  - If the victim wants to file a complaint but is impecunious, and has to pay a court fee or has to travel a significant distance that is prohibitive, again there is no effective remedy available. In this respect, legal aid should be afforded to victims in order to access justice and for the remedies to be available.
  - The same applies where there are inordinate delays in the system – so that the victim would be waiting for unreasonable amounts of time for his or her case to progress; or if there are unreasonable evidential barriers;
  - If a victim wants to file a complaint but measures have not been taken to enable equal access to the law by all persons, regardless of race, gender, ethnicity, age, religious belief or affiliation, political or other opinion, nationality, mental or other disability, health status or any other status or adverse distinction, this would imply that no remedy or effective remedy is available;
  - Additionally, if perpetrators are immune, or if amnesty laws are in place that protect perpetrators, there are no effective remedies available.

### **4. Prompt, effective and impartial mechanisms**

In order to be effective, mechanisms that enable remedies must:

- be known and accessible not only to members of the public but also to those in all types of detention facilities – as well as by the victims’ families. If procedures for seeking reparation are not transparent or equally accessible to all, (or indeed publicised) these will be ineffective;
- investigations should include as a standard measure an independent physical and psychological forensic examination (Istanbul Protocol);
- if there are systemic delays in initiating or concluding investigations, then these will not be deemed effective;
- if there is a culture of intimidation or retaliation (reprisals) when complaints are filed, and there are no adequate measures to protect victims, then the measures are in practical terms ineffective; cases will go unreported; redress will be dangerous if not impossible;
- if measures are not gender sensitive, and make no provision for the social implications of testimony for victims of sexual violence (men and women) to the extent that such victims tend not to come forward; then the measures are again ineffective. The Committee Against Torture, in its General Comment 3 has stated that complaints mechanisms and investigations require specific positive measure to enable victims of sexual violence to be able to come forward.
- Finally, if the relevant police or other staff are so insensitive to the impacts of torture that victims tend not to come forward for fears of re-victimisation or stigmatisation, then, again, the measures are not effective. Indeed, all such personnel require training on trauma and prevention of re-traumatisation.

## **5. Access to justice for widespread violations**

- While collective and administrative reparation programmes may be acceptable, these do not detract from the victims’ individual right to a judicial remedy and to obtain redress. States wishing to encourage national justice and reconciliation processes in the form of non-judicial remedies must not discourage or limit access to courts; they might instead make non-judicial alternatives attractive options.
- Another issue that often comes up in the context of widespread violations and attempts to address these through collective measures, is the substitution of reparation measures with development or humanitarian assistance. Such measures can not constitute redress on their own, particularly if justice is denied or unavailable.