



*Ending Torture. Seeking Justice for Survivors*

## DRAFT GENERAL COMMENT ON ARTICLE 14

### COMMENTS OF REDRESS

September 2011

<b>I. INTRODUCTION</b> .....	<b>2</b>
<b>II. OVERALL COMMENTS</b> .....	<b>2</b>
<b>III. DETAILED SUGGESTIONS FOR FURTHER STRENGTHENING</b> .....	<b>4</b>
<b>a. Terminology</b> .....	<b>4</b>
<b>b. Comments on specific sections and paragraphs of the draft</b> .....	<b>4</b>
KEY PRINCIPLES AND SCOPE OF THE OBLIGATION (paras. 1-5).....	4
SUBSTANTIVE OBLIGATIONS (paras. 6-16).....	5
Restitution (para. 7).....	5
Compensation (para. 9).....	6
Rehabilitation (paras. 10-12) .....	7
Satisfaction and the right to truth and guarantees of non-repetition (paras. 15-16) .....	9
‘Satisfaction and the right to truth’ .....	9
‘Guarantees of non-repetition’ .....	10
PROCEDURAL OBLIGATIONS (paras. 17-38) .....	12
Obligation to implement through legislation .....	12
Legislation to provide for the substantive right to reparation and to establish institutions competent to enable victims to secure it (paras. 18 and 22).....	12
States’ positive obligations to ensure redress, even in the absence of a claim (para. 25) .....	13
Access to justice for those outside the jurisdiction where the torture took place (para. 20) .....	14
Obligation to ensure remedies and reparation are provided and effective in practice.....	14
Effective mechanisms for complaints and investigations (paras. 21, 23 and 24) .....	14
Access to mechanisms for obtaining redress (paras. 26-31).....	15
Removing obstacles to the right to redress (paras.32-38) .....	16
MONITORING AND REPORTING (paras. 39-40) .....	17
<b>IV. OTHER AREAS TO CONSIDER ADDRESSING</b> .....	<b>18</b>
VIOLATIONS BY NON-STATE ACTORS: THE LINKAGES BETWEEN REDRESS AND DUE DILIGENCE.....	18
REPARATIONS FOR MASS VIOLATIONS .....	18
PROMPT AND FAIR ADMINISTRATION OF JUSTICE IN TORTURE CASES.....	19
<b>V. CONCLUSION</b> .....	<b>20</b>
<b>APPENDIX ONE: SUMMARY OF DETAILED POINTS BY PARAGRAPH OF DRAFT</b> .....	<b>21</b>
<b>APPENDIX TWO: SUGGESTED AMENDED STRUCTURE</b> .....	<b>24</b>

## I. INTRODUCTION

1. These comments are provided to the Committee on its Working Document on Article 14, released after its 46<sup>th</sup> session in June 2011 (referred to as the “draft” or the “draft General Comment”).

### About REDRESS

2. REDRESS is an international human rights non-governmental organisation, based in the United Kingdom, with a mandate to assist torture survivors to seek justice and other forms of reparation. The organisation was started by Keith Carmichael, a torture survivor, who found that while the right to redress existed in law – most strikingly in Article 14 of the Convention Against Torture – the practical difficulties in obtaining it proved difficult to overcome. REDRESS was created as an organization dedicated to changing this.
3. REDRESS fulfils its mandate through a variety of means, including casework, law reform, research and advocacy. It has accumulated wide experience on the various facets of the right to reparation for victims of torture under international law and regularly takes up cases on behalf of victims of torture before national, regional and international human rights mechanisms and courts and tribunals.

## II. OVERALL COMMENTS

4. REDRESS commends the Committee for having the foresight to address this central issue in a General Comment. We recognise the great challenges involved in adopting a General Comment on such a broad and complex right, given the range of technical issues involved.
5. REDRESS also commends the Committee for setting out such a well considered and wide-ranging draft, addressing the many varied aspects that are essential for states to implement and/or address to ensure that victims of torture obtain redress as required under Article 14, and welcomes the opportunity to provide comments on the draft.
6. REDRESS is particularly heartened to see the key and very early statement about the importance of **victim participation** in the reparation process, and the recognition that the **restoration of dignity to the victim** is the overarching objective in the provision of redress (para. 4). It is also apparent that the Committee has carefully considered this perspective throughout the rest of the draft. This is fundamental to achieving the purpose of the Article, and indeed the purpose of the Convention as a whole, and its importance cannot be overstated.
7. REDRESS also strongly supports the draft’s explicit adoption of an understanding of the word “redress” to encompass the concepts of “**reparation**” and “**effective remedy**” (para. 2). As the Committee has demonstrated throughout the draft General Comment, both the process and substance must be fully compatible with the overall aim of providing victims of torture with effective redress to enable the Article’s purpose to be achieved in any real sense.
8. This broad and victim-centred understanding of redress has allowed the Committee to develop through the draft a comprehensive guide for states as to their obligations under the Article. REDRESS considers this to be a strong draft true to the object and purpose of the Article and reflecting the considerations that impact on the effective achievement of redress for victims of torture in practice.

9. In the following sections REDRESS provides a number of suggestions for ways in which it considers the draft may be strengthened even further, which it hopes that the Committee will find helpful in the process of finalising the draft. Detailed suggestions are set out in the next section (and summarised in Appendix 1) in the order of and by reference to the numbering of paragraphs in the current draft. Key suggestions are as follows:

- that the Committee emphasise the centrality of Article 14 to the object and purpose of the Convention as a whole, and in particular the **link between the provision of redress to victims and the prevention of torture**, at the beginning of the General Comment (see paras. 12-13 of this submission);

#### Substantive obligations

- that the Committee emphasise that the type of substantive reparations which are adequate and appropriate will be different in each case, and – where structural discrimination plays a role in the violation in the first place – **should go beyond the aim of restitution to correction** of the underlying inequalities (paras. 16-17);
- that the **definition of restitution** adopted in the draft be reconsidered (paras. 18-22) and the discussion of **rehabilitation** be framed in a more holistic manner (paras. 27-29);
- that the discussion of **measures of satisfaction** and **guarantees of non-repetition** be developed further (paras. 34-44);

#### Procedural obligations

- that the Committee stress that there must always be the opportunity to access a **judicial remedy** for acts of torture, although it is desirable to have other mechanisms in place which can also provide redress (para. 50);
- that the Committee **spell out in more detail** how **administrative mechanisms** for redress operate in practice and their relationship with judicial remedies (paras. 51-52);
- that the comment explore further the **difficulties that may be faced in accessing justice by those from marginalised and/or vulnerable groups** including lesbian, gay, bisexual and transgender individuals, foreign nationals, refugees, the mentally ill, ethnic minorities, indigenous people and people considered of lower caste, and states' positive obligations to ensure access to a remedy (para. 65), and address general barriers to justice that women and girls face (para. 67);
- that the Committee address **evidentiary hurdles** to obtaining redress (paras.69-70);
- that the Committee include a section on the need to ensure the **prompt and fair administration of justice** in torture cases, referring to issues of corruption, delays in court processes, and enforcement of judgments (paras. 81-82).

#### Additional issues

- that the Committee address the link between Article 14 and states' **obligations of due diligence for violations by non-state actors** (para. 75) and the application of Article 14 in relation to **mass violations** of human rights (paras. 76-80).

### III. DETAILED SUGGESTIONS FOR FURTHER STRENGTHENING

#### a. Terminology

10. In a number of places throughout the draft the phrase “*redress*” is followed by the words “*compensation and rehabilitation*” or “*including compensation and rehabilitation*”.<sup>1</sup> As “*redress*” is defined at the beginning of the draft, we suggest simply referring to “*redress*” throughout the General Comment. We are concerned that the additional references to “*compensation*” and “*rehabilitation*” detract from the importance of other forms of reparation, as recognised by the Committee.

#### b. Comments on specific sections and paragraphs of the draft

##### **KEY PRINCIPLES AND SCOPE OF THE OBLIGATION (paras. 1-5)**

11. REDRESS suggests re-naming the section currently entitled “Obligation to Implement” as “Key principles and scope of the obligation”. This is because the substantive paragraphs on how the state should implement its obligations under the Article appear in the procedural section of the draft.
12. We also suggest that the Committee stresses in this section that adherence to Article 14 is central to achieving the object and purpose of the Convention to “*make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment*”.
13. As the Special Rapporteur on Torture has recognised: “*reparation, beyond the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, has an inherent preventive and deterrent aspect*”.<sup>2</sup> Ensuring access to remedies for victims which allow the truth of violations to be revealed and acknowledged, and crafting reparation measures that address the underlying factors leading to those violations, are crucial aspects to the struggle to eliminate torture.
14. The Committee might also wish to stress in this opening section that the right to reparation is a fundamental right of general international law; the breach of an obligation under international law gives rise to an obligation to make reparations.<sup>3</sup> The right to a remedy for victims of violations of human rights and international humanitarian law has been referred not only as a basic principle of general international law but as one of the basic pillars of the rule of law and a democratic society.<sup>4</sup>

---

<sup>1</sup> **Para. 18** (“and the right to obtain redress, including compensation and as full rehabilitation as possible”); **para. 22** (“to secure redress, including adequate compensation and rehabilitation”); **para. 23** (“to obtain redress, including fair and adequate compensation and the means for as full rehabilitation as possible”); **para. 27** (“to seek redress, compensation, and rehabilitation”); **para. 30** (“in any proceedings, civil or criminal, to determine the victim’s right to redress, including compensation”); **para. 35** (“these deprive victims of the redress, compensation, and rehabilitation”); **para. 37** (“of providing redress, compensation, and as full rehabilitation”); **para. 39** (“right to redress, including fair and adequate compensation and as full rehabilitation as possible among other forms of redress”).

<sup>2</sup> ‘Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment’, (2000) A/55/290, para. 58.

<sup>3</sup> PCIJ, *Factory at Chorzow, Jurisdiction*, Judgment No. 8, 1927, Series A, no. 17, p. 29; ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep. 1949, p. 184; ICJ, *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase*, avis consultatif, Recueil, 1950, p. 228. See also Art. 1 of the Articles on State Responsibility adopted by the International Law Commission in 2001, A/CN.4/L.602/Rev1 (“ILC Articles on State Responsibility”).

<sup>4</sup> Council of Europe, Resolution 78 (8) of the Committee of Ministers, cited by G Meleander (1992), ‘Article 8’, in Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, p.143; IACtHR, *Blake v Guatemala* (Reparations and Costs) (1999) para. 63; See also IACtHR, *Castillo Paez v Peru* (Merits) (1997) paras. 82, 83; IACtHR, *Castillo Paez v Peru* (Reparations) (1998) para. 106.

## **SUBSTANTIVE OBLIGATIONS (paras. 6-16)**

15. States must award forms of reparation that are adequate, effective, appropriate and proportionate to the gravity of the crime and the physical and mental harm suffered.<sup>5</sup> They must be holistic and comprehensive.<sup>6</sup> We suggest that these general points could usefully be made in paragraph 6 at the beginning of this section.
16. We would also encourage the Committee to stress that a holistic appreciation of the adequacy and appropriateness of reparation measures requires consideration of survivors' perspectives. What may be an appropriate form of reparation in one case may not be appropriate in another. For example, compensation may not be an appropriate remedy to provide to a married woman in a society where she cannot hold property or open a bank account. Restitution may not be appropriate if it puts a person back in a situation of danger of the violation recurring.
17. We would also encourage the Committee to explicitly refer to the transformative potential of reparation in situations where structural discrimination has led to the violation (either the infliction of the harm itself or in a failure to respond to the violation). Such an approach has been developed by the Inter-American Court of Human Rights to respond to violations connected to systemic gender-based discrimination.<sup>7</sup> Reestablishment of the situation that existed before the violation, or the situation that would have existed if the violation had not occurred, is not necessarily the aim of reparation for human rights violations, including torture.<sup>8</sup> Where structural discrimination has led to the violation in the first place reparations should be "*designed to identify and eliminate the factors that cause discrimination*", thus aspiring not only to restitution but also to rectification.<sup>9</sup>

## ***Restitution (para. 7)***

18. REDRESS suggests revisiting the explanation of "restitution" provided in the draft; as it currently stands, it does not appear to sufficiently distinguish the concept of restitution from that of rehabilitation.
19. Restitution is defined in different ways – on one definition it is reestablishing the *status quo ante* (for example, by restoring rights that were taken away), on another, it is the establishment or reestablishment of the situation that *would have* existed if the wrongful act had not been

---

<sup>5</sup> 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, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 ("Basic Principles"), Principle 15: ("*Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered*"). The Committee has referred to the need for particular forms of reparation to be "*adequate*" and "*appropriate*": see, eg. Conclusions and recommendations on Russia (2007) (UN Doc CAT/C/RUS/CO/4), para. 20. See also HRCtee, General Comment No. 31, paras. 16 and 20, referring to "*appropriate*" remedies.

<sup>6</sup> See the Basic Principles, Principle 18. See also Juan Mendez, Remarks at conference on "Strengthening the Prohibition against Torture: The Evolution of the UN Committee against Torture", Panel II: Ensuring Reparations for Victims of Torture and Other Ill Treatment, reproduced in (2010) 17 *Human Rights Brief* 26-27 at 26, referring to the work of Theo Van Boven, as Independent Expert concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, and subsequently reaffirmed in the reports of Rapporteurs Joinet, Bassiouni and Orentlicher.

<sup>7</sup> IACtHR, *González et al. ("Cotton Field") v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) (2009) paras. 450-451.

<sup>8</sup> IACtHR, *Cotton Field Case*, *ibid.* at para. 450 ("*bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable*"). See also the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, para. 3, available at: [http://www.womensrightscoalition.org/site/reparation/signature\\_en.php](http://www.womensrightscoalition.org/site/reparation/signature_en.php).

<sup>9</sup> IACtHR, *Cotton Field Case*, *ibid.*, paras. 450 and 451. See also the Report of the Special Rapporteur on violence against women, its causes and consequences, (2010) A/HRC/14/2, para. 78.

committed.<sup>10</sup> International law has generally adopted the former, narrower, notion.<sup>11</sup> In this way restitution is *separate from* the other forms of reparation. REDRESS suggests that the Committee adopts this definition of “restitution” in the draft General Comment.

20. Restitution in this narrower sense cannot repair the infliction of torture or cruel, inhuman or degrading treatment or punishment, because the *status quo ante* cannot be restored: the act of committing torture or ill-treatment, once it has been committed, cannot be reversed.<sup>12</sup>
21. However, restitution may have an important role to play in redressing the violation of other rights connected to (or part of) the violation amounting to torture. Redress necessary for those wrongs may include, for example, restitution by restoration of liberty, vacating criminal judgments based on evidence obtained by torture or through denial of fair trial rights,<sup>13</sup> reinstatement of employment<sup>14</sup> and return of assets and property.<sup>15</sup>
22. We agree with the Committee’s emphasis that restitution must not be used to place the victim in a position where he or she is at risk of repetition of torture or other ill-treatment.

### **Compensation (para. 9)**

23. We suggest rephrasing the first sentence of this paragraph because the list includes general categories of damage alongside specific examples falling within those categories. The general categories of economically assessable damage are material and moral damage resulting from the violation/s.<sup>16</sup> It may therefore be clearer to separate the general from the specific as follows: “...economically assessable damage resulting from torture or ill-treatment, whether material or moral. This might include reimbursement of medical expenses...etc”.<sup>17</sup>
24. We also suggest including “damages for mental anguish, emotional distress and pain and suffering” in the list of examples as these are key in cases of torture,<sup>18</sup> but are not uniformly available in all legal systems for victims of torture.
25. The draft refers, in line with the Convention, to “*fair and adequate*” compensation. The General Comment provides an opportunity for the Committee to clarify that what is “*fair and adequate*” should reflect the egregious nature of the violation and the physical and mental harm suffered.<sup>19</sup> The value of compensation awarded may diminish in relative terms over time where there is a

---

<sup>10</sup> See the ILC Commentary on the Articles on State Responsibility, Art. 35, para. 2: “The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself”.

<sup>11</sup> See *Chorzow Factory case*, above n. 3, para. 125; the Basic Principles, para. 19.

<sup>12</sup> See, eg. D Shelton (2005) *Remedies in International Human Rights Law*, OUP: Oxford, p. 272; M Nowak & E McArthur (2008) *The United Nations Convention Against Torture: A Commentary*, OUP: Oxford, p. 483.

<sup>13</sup> See, eg. IACtHR, *Castillo Petruzzi et al v Peru* (Merits, Reparations and Costs) (1999) para. 226.13; IACtHR, *Cantoral Benavides v Peru* (Reparations and Costs) (2001) paras. 77-78; IACtHR, *Loayza Tamayo v Peru* (Reparations and Costs) (1998) paras. 121-2.

<sup>14</sup> IACtHR, *Loayza Tamayo v Peru* (Reparations and Costs), *ibid.*, para. 113; IACtHR, *Baena-Ricardo et al v Panama* (Merits, Reparations and Costs) (2001) para. 214.

<sup>15</sup> Basic Principles, para. 19. See, for example, post-Holocaust restitution of property, and restitution programmes in post-conflict Bosnia Herzegovina and Iraq: discussed in C Ferstman et al (eds.) (2009), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff: Leiden, Chapters 4, 18 and 19.

<sup>16</sup> See, eg. the ILC Articles on State Responsibility, Art. 31; see also the commentary to Art. 35.

<sup>17</sup> And removing “*material and moral damage resulting from the physical and mental harm caused*” from the list.

<sup>18</sup> For a discussion of the Inter-American Court’s approach to awarding moral damages for pain and suffering see: A Carrillo (2006) ‘Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past’, in Pablo de Grieff (ed.), *The Handbook of Reparations*, OUP: Oxford, pp. 504-538, at pp. 519-524, in particular at pp. 523-4 relating to cases of torture.

<sup>19</sup> Basic Principles, para. 20. See also eg. Committee member Voyame’s comment that a maximum awardable amount of \$20,000 under the relevant Australian legislation was “*meagre*” (CAT/C/SR.96, para. 19).

delay in payment: standard bank interest should therefore be awarded on any delays in payment.<sup>20</sup>

26. We suggest that the Committee also considers whether this section might usefully clarify that the state has a primary obligation to provide compensation and other forms of reparation, without the victim first having to attempt to recover it from the individual perpetrator. As the Committee has recognised, in torture cases – where by definition the acts involve some action or acquiescence on the part of the state – the state is liable, and that liability should not be subsidiary to the liability of the individual.<sup>21</sup>

### **Rehabilitation (paras. 10-12)**

27. REDRESS supports the draft's adoption of a holistic understanding of rehabilitation, and would encourage the Committee to use the word 'holistic' in the first paragraph of this section and spell out in even greater detail what that means.
28. It would be particularly helpful if the Committee were to explain in the initial paragraph (para. 10) what is meant by "*legal and social services*".<sup>22</sup> Does the Committee consider employment and education as part of "*social services*" or separate categories as understood by the UN Convention on the Rights of Persons with Disabilities?<sup>23</sup> If they are separate categories, it would be helpful if they are specifically referred to.
29. REDRESS would support the adoption of an even broader definition of rehabilitation in paragraph 10. We suggest that the Committee could draw upon the understanding of habilitation and rehabilitation contained in the Convention on the Rights of Persons with Disabilities, which refers to enabling persons with disabilities to "*attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life*".<sup>24</sup> This definition could be adjusted for victims of torture to allow the victim to "*regain, as far as possible, their independence, full physical, mental social and vocational ability, and full inclusion and participation in all aspects of life*".
30. It would also be helpful if the Committee could distinguish between:
- (i) the need to establish a framework in legislation for the adoption of a set of policies, funding, and treatment infrastructure which reliably delivers effective rehabilitation services and programmes that incorporate at least physical and psychological services, and social and legal services. These should be available to any victim of

---

<sup>20</sup> On the practice of the Inter-American Court on Human Rights see D Cassel (2005), 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights', in K De Feyter et al (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia: Antwerp, pp. 191-223 at p. 208 and see, eg. IACtHR, *Myrna Mack-Chang v Guatemala* (Merits, Reparations and Costs) (2003) paras. 301.13 and 301.18.

<sup>21</sup> See, eg. the concerns expressed by the Committee in its concluding observations in relation to Brazil (2001), UN Doc A/56/44, para. 115-120, para. 120(f); and Paraguay (1997), UN Doc A/52/44, paras. 189-213, para. 203.

<sup>22</sup> For a description of assistance provided by the UN Voluntary Fund for Victims of Torture ("UNVFVT") under these headings see UNVFVT, 'Assistance', available at: <http://www.ohchr.org/EN/Issues/Pages/TortureFundAssistance.aspx> ("Social assistance complements the above-mentioned forms of assistance by providing various services to reduce the sense of marginalization that many victims experience. Social assistance ensures that victims have access to a minimum of basic services, including housing, health care, education, language classes and employment training. Legal assistance may be provided in a number of ways including covering the costs of lawyers, courts, translations and legal proceedings. ...").

<sup>23</sup> Art. 26(1) "*States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services*". Contrast the UNVFVT understanding of social assistance, which does include education and employment training, *ibid*.

<sup>24</sup> Art. 26(1).

torture who might need them, regardless of whether or not they make a claim for reparation (as is addressed in para. 14);<sup>25</sup> and

- (ii) the fact that the direct provision of specific rehabilitation measures or services can and should be awarded by courts or other bodies to victims of torture who make a claim for reparation.<sup>26</sup>

31. Both are required to ensure that a victim of torture and ill-treatment “*obtains redress*” and has an “*enforceable right to ...the means for as full rehabilitation as possible*”.

32. In relation to (i):

- a. It may be helpful for the Committee to clarify in paragraph 14 that effective rehabilitation services and programmes must be accessible to all victims of torture in their jurisdiction, regardless of where the torture took place or the victim’s immigration status.
- b. The Committee might consider specifying that states should establish through legislation and policy a positive programme to identify victims of torture. It is conceivable that such a programme could involve referral to and assessment by accredited medical and psychosocial practitioners, in line with the procedures of the Istanbul Protocol (or other appropriate criteria) and the provision of status recognised in law of a ‘torture victim’, leading to the provision of (at least) rehabilitation services set out in law. Such recognition of status must never preclude access to a judicial remedy, including in the future.
- c. REDRESS agrees that states may fulfil their obligations towards victims under Article 14 by funding private medical, legal and vocational facilities, including those administered by NGOs, as set out in paragraph 14 of the draft. Indeed, in cases of torture, where victims have lost trust in the state, there may be good reasons to do so.<sup>27</sup> However, it should be stressed that such provision of funding will only fulfil a state’s obligations under Article 14 in relation to those victims tortured within the jurisdiction where it is underpinned by an acknowledgement that the provision of such funding is a legal obligation based on the state’s responsibility for the torture inflicted. Such an acknowledgment can be at the heart of the legislation establishing the framework for the funding.

---

<sup>25</sup> Conclusions and Recommendations: Ecuador (2006) (CAT/C/ECU/CO/3), para. 26; Georgia (2008), (CAT/C/GEO/CO/3), para. 20; Korea (2006) (CAT/C/KOR/2), para. 8. See also Conclusions and Recommendations: Slovenia (2011) (CAT/C/SVN/CO/3), para. 16(c) (recommending that the state party improve “*the identification of victims of trafficking and provid[e] them with appropriate rehabilitation programmes, genuine access to health care and counselling, and institutionalizing such services*”).

<sup>26</sup> Either by providing compensation to pay for rehabilitation costs, including medical and psychological treatment: eg. IACtHR, *Suárez Rosero v Ecuador*, Judgment on Reparations and Costs (1999) para. 60.c; IACtHR, *Blake v Guatemala* (Reparations and Costs), above n.4, para. 44.d; IACtHR, *Cantoral Benavides v Peru* (Reparations and Costs), above n.13, para. 51(b); or by ordering the direct provision of services or scholarships: see, eg. IACtHR, *Barrios Altos case (Chumbipuma Aguirre et al. v Peru)* (Reparations and Costs), (2001) paras. 42-43, by which Peru agreed as part of the reparations owing to the victims “*to cover, through the Ministry of Health, the health service expenses of the beneficiaries of the reparations, granting them free care at the respective health centre according to their place of residence and at the respective specialized institute or hospital of referral, in the areas of out-patient consultation, diagnostic support procedures, medicine, specialized care, diagnostic procedures, hospitalization, surgery, childbirth, traumatological rehabilitation, and mental health,*” and in relation to education to provide some scholarship, support and educational materials; IACtHR, *Cantoral Benavides v Peru* (Reparations and Costs), above n.13, para. 54(i), where the Court awarded an education scholarship to the victim; see also Separate Opinion by Judge Cançado Trindade, para. 10; see also IACtHR, *Mapiripán Massacre v Colombia* (Merits, Reparations and Costs) (2005) paras. 12 and 56.

<sup>27</sup> See remarks of Miriam Reventlow of the International Rehabilitation Centre for Victims of Torture (IRCT) at conference hosted by REDRESS and the University of Essex Transitional Justice Network in September 2010 on ‘Rehabilitation as a form of Reparation: Opportunities and Challenges’, report of the conference available at: [http://www.redress.org/downloads/publications/Report\\_of\\_the\\_Expert\\_Seminar\\_on\\_Rehabilitation\\_October\\_2010.pdf](http://www.redress.org/downloads/publications/Report_of_the_Expert_Seminar_on_Rehabilitation_October_2010.pdf), see p. 8.



33. The Committee encourages states to establish methods for assessing the effectiveness of rehabilitation programmes and services, including by developing relevant indicators and benchmarks (para. 14). REDRESS suggests that this is broadened and tied specifically to the issue of the extent to which it may be determined whether a state has provided “adequate” and “effective” rehabilitation services to an individual victim. States should be encouraged to develop standard and objectively verifiable indicators (i) to monitor and assess the impact of rehabilitation measures in individual cases, and to determine when a victim of torture has achieved the maximum rehabilitation possible; and (ii) to demonstrate the effectiveness of rehabilitation programmes for torture survivors as a whole.

***Satisfaction and the right to truth and guarantees of non-repetition (paras. 15-16)***

34. Satisfaction and guarantees of non-repetition are vitally important reparative measures in cases of torture, both to achieve the overall aim of restoring a survivor’s dignity, and as part of the State’s obligation to take measures to prevent acts of torture under Article 2 of the Convention. We suggest that the specifics of these reparation measures as they apply to torture could be elaborated in more detail in this part of the draft General Comment.

***‘Satisfaction and the right to truth’***

35. In our experience, measures of satisfaction, such as full and public disclosure of the facts (including the identity of the perpetrator), apology (including acknowledgement of the facts and acceptance of responsibility for a wrong committed), and judicial and administrative sanctions against those responsible, are very often of central importance to victims of torture. By encouraging a state to confront and acknowledge its actions, measures of satisfaction may also provide impetus for reform.
36. Acknowledgement of what happened plays a key role in restoring the victim’s dignity and can be very important for the healing process.<sup>28</sup> As one victim represented by REDRESS who recently had his complaint before the Human Rights Committee upheld expressed:

*“Vindication! I felt for once vindicated and relieved from the constant necessity to explain what happened to me and its consequences on my psychological wellbeing. To be recognized as a victim of torture, someone deprived of his liberty, treated with contempt and subjected through a kangaroo judicial system is more than exoneration from the nagging sense of bewilderment and self-criticism”.*<sup>29</sup>

37. Identification and punishment of the perpetrators can also play a key role in restoring the balance in favour of victims, enabling them to look ahead with confidence and dignity.<sup>30</sup> Although prosecution and punishment is already required by Article 7 of the Convention, it is nevertheless important to see this obligation from the victim’s perspective as a key element of the redress owed to them. Judgments and orders calling for the investigation, prosecution and

---

<sup>28</sup> See N Sveaass and NJ Lavik (2000), “Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation” 69 *Nordic Journal of International Law* 35, pp. 48-49. See also generally REDRESS (2001) ‘Torture Survivors’ Perception of Reparation’, in particular at pp. 40-41, 43-44, 46, 49, available at: <http://www.redress.org/downloads/publications/TSPR.pdf>; M Schotsmans (2005) ‘Victims’ Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations’ in K De Feyter et al (eds.), *Out of the Ashes*, above n.20, pp. 105-133 at pp. 114-120.

<sup>29</sup> Ebenezer Akwanga’s first recollections on learning of the positive decision by the Human Rights Committee in *Akwanga v Cameroon* (2011) CCPR/C/101/D/1813/2008.

<sup>30</sup> See REDRESS (2001), ‘Torture Survivors’ Perceptions of Reparation’, above n.28 at p. 60-61; N Sveaass and NJ Lavik (2000), above n.28, pp. 49-50. See also Nowak & McArthur, above n. 12, p. 483 (“the criminal prosecution of perpetrators is often perceived by torture victims as the most effective means of satisfaction. Since torture constitutes a particularly serious violation of human rights, justice for the victim deserves appropriate punishment of the perpetrator”). See, also Y Danieli (2009), ‘Massive Trauma and the Healing Role of Reparative Justice’, in Ferstman et al (eds), *Reparation*, above n.15, pp. 41-78 at p. 45.

punishment of perpetrators can be a powerful tool for holding states to their obligations under the Convention, while also restoring the dignity of victims.

38. Measures of satisfaction referred to in the Basic Principles that we would consider particularly relevant to torture and ill-treatment are:

- effective measures aimed at the cessation of continuing violations;
- verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected to the victim;
- public apology, including acknowledgement of the facts and acceptance of responsibility;
- judicial sanctions against persons liable for the violations;
- the establishment of commemorations or memorials recounting an accurate report of the violations that occurred.

39. We suggest that (i) the importance of these measures for the recovery and reintegration of victims of torture, and (ii) the link between measures of satisfaction and preventing further violations, are highlighted in the General Comment. We also suggest that the illustrative list of measures of satisfaction be tailored to include those most relevant to the specific circumstances of torture and ill-treatment, such as those set out above.<sup>31</sup>

#### 'Guarantees of non-repetition'

40. Guarantees of non-repetition are another powerful reparative tool both to restore dignity to victims and to encourage states to abide by their already existing obligations under the Convention to prevent torture and ill-treatment.

41. As the Committee is only too well aware, torture – where it occurs – is rarely a 'one-off' or exceptional event: the violations are very often widespread and systemic. Guarantees of non-repetition in individual cases addressing those systemic issues are therefore crucial to address the wider aim of preventing torture.

42. Guarantees of non-repetition ordered by courts or other mechanisms have proved effective in promoting change to prevent further violations. For example, strong decisions by the Inter-American Commission and Inter-American Court of Human Rights requiring the removal or deprivation of effect of amnesty provisions have played a key role in the overturning or non-application of amnesty laws in Argentina, Chile and Peru that violated victims' right to a remedy.<sup>32</sup> The Inter-American Court has also ordered states to enact legislative reforms (including on legislation concerning terrorism,<sup>33</sup> registers of prisoners,<sup>34</sup> and juvenile detention<sup>35</sup>)

---

<sup>31</sup> Although we recognise that very often torture will involve violation of other rights meaning that all of the examples currently listed are potentially relevant to states' obligations under the Convention.

<sup>32</sup> See SA Canton (2007), 'Amnesty Laws' in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, Due Process of Law Foundation, pp. 167-190, available at: <http://www.dplf.org/uploads/1190403828.pdf>; in particular see the decisions of the Inter-American Court of Human Rights in the *Barrios Altos* case (*Chumbipuma Aguirre et al. v Peru*) (Merits) (2001) para. 44; and *Almonacid-Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) (2006) para. 171(6).

<sup>33</sup> IACtHR, *Loayza Tamayo v Peru* (Reparations and Costs), above n.13, para. 192.5; IACtHR, *Castillo Petruzzi v Peru* (Merits, Reparations and Costs), above n.13, para. 226.14; IACtHR, *Lori Berenson Mejía v Peru* (Merits, Reparations and Costs) (2004) par 248.1.

and administrative and policy measures (including training of military, police and judicial personnel,<sup>36</sup> developing records of detainees,<sup>37</sup> developing policies on juvenile detention,<sup>38</sup> improving conditions at a prison and transfer of prisoners who do not belong there).<sup>39</sup> Both the African Commission<sup>40</sup> and the European Court of Human Rights<sup>41</sup> have also called on states to take general measures at a national level to prevent further violations as a result of individual cases.

43. Types of guarantees of non-repetition particularly relevant in cases of torture and ill-treatment include:

- training: eg. providing training for law enforcement officials and military and security forces on human rights law; providing specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials;
- legislative and policy changes: eg. requiring the legislature to criminalise torture; promoting the introduction and observance of custodial safeguards (including the requirement to keep accurate records of those in detention, that prisoners are brought before a judge within a short period of time of arrest and are questioned about any potential mistreatment, requiring independent medical examinations within a short period of arrest, requiring questioning of detainees to be tape or video recorded, and for detainees to be questioned only in the presence of their lawyer);
- monitoring: eg. setting up a system of regular independent monitoring of places of detention;
- reforming police and security services: eg. including by improving the capacity of law enforcement officials to use modern methods of forensic evidence collection and examination;
- strengthening the independence of the judiciary;
- strengthening international commitments, including ratifying the Optional Protocol to the Convention Against Torture.<sup>42</sup>

44. We suggest that the important way in which orders of courts and other bodies for guarantees of non-repetition may contribute to the prevention of torture and ill-treatment is highlighted in the draft General Comment. We would also suggest that torture-specific examples of the types of measures that may be ordered, such as those identified above, be set out in a non-exhaustive list of potential measures.

---

<sup>34</sup> *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala* (Reparations and Costs) (2001), para. 229.4.

<sup>35</sup> IACTHR, *Bulacio v. Argentina* (Merits, Reparations and Costs) (2003) para. 162.5.

<sup>36</sup> IACTHR, *Bámaca-Velásquez v. Guatemala* (Reparations and Costs) (2002) para. 86, 106.4; IACTHR, *Trujillo-Oroza v. Bolivia* (Reparations and Costs) (2002) para. 121, 141.5; IACTHR, *Caracazo v. Venezuela* (Reparations and Costs) (2002) para 143.4.

<sup>37</sup> IACTHR, *Juan Humberto Sánchez v. Honduras* (Preliminary Objection, Merits, Reparations and Cost) (2003) para. 201.12.

<sup>38</sup> IACTHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs) (2004), para. 340.11.

<sup>39</sup> See generally Douglas Cassel (2005), 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights', in K De Feyter et al (eds.), *Out of the Ashes*, above n.20, pp. 191-223 at pp. 203-207 and on the substantial degree of compliance with the Court's reparations awards see pp. 212 and 214.

<sup>40</sup> See eg. ACHPR, *Purohit and Moore v Gambia*, decision of May 2003, no. 241/2001, 16<sup>th</sup> Annual Activity Report of the African Commission on Human and People's Rights (2002-03), Annex VII, para. 43.

<sup>41</sup> See, eg. ECtHR, *Broniowski v Poland* [GC], Judgment of 22 June 2004, § 188-194, 2005-IX.

<sup>42</sup> For a list of best practices to prevent torture compiled by the Special Rapporteur on Torture in 2001 see UN Doc A/56/44, para. 39.

## **PROCEDURAL OBLIGATIONS (paras. 17-38)**

### ***Obligation to implement through legislation***

#### **Legislation to provide for the substantive right to reparation and to establish institutions competent to enable victims to secure it (paras. 18 and 22)**

45. This section of the submission deals with paras. 18 and 22, which refer to state parties' obligations (i) to enact legislation to provide a victim of torture with an effective remedy and the right to obtain redress, and (ii) to establish institutions competent to render decisions enabling victims to secure redress through a procedure established by law. Both of these are crucial steps for the state party to fulfil its obligation to abide by its treaty commitments in good faith and to enable the right to redress to operate effectively in practice.
46. Below we set out some points which in our view could come through more strongly in relation to state parties' obligations to implement the right to redress in its legal system.

(i) *The need for comprehensive legislation granting the right to "adequate" and "appropriate" reparation in line with international law*

47. In the first sentence of paragraph 18, we suggest that the words "adequate" and "appropriate" are inserted before the word "redress".
48. Domestic courts often fail to provide reparation as required and envisaged by international standards because rulings on reparation claims in torture cases have been mainly based on general national laws without taking international standards into account. For example, compensation awards often fail to include damages for mental torture, and the amount of compensation awarded is often very small.<sup>43</sup>
49. The implementing legislation must recognize a victim of torture or ill treatment's right to claim reparation from the state and must grant courts and other bodies the power to award the full range of substantive reparation measures.<sup>44</sup> Such legislation must ensure that they can be awarded in an "adequate" and "appropriate" manner proportionate to the harm suffered, and should not, for example, put an arbitrary cap on the amount of compensation which can be awarded.<sup>45</sup>

(ii) *The need for a judicial remedy*

50. REDRESS is concerned that one aspect that is not explicitly raised in paragraphs 18 and 22 is the primary need to ensure that victims have access to a *judicial* remedy for acts of torture and ill-treatment. This is clearly recognized in the Basic Principles<sup>46</sup> and has been stressed by other

---

<sup>43</sup> See *Ibid.*, p. 86.

<sup>44</sup> Contrast, eg. Nepal, where the only remedy available for torture under legislation is the provision of compensation under the Compensation Relating to Torture Act (1996).

<sup>45</sup> See, eg. Committee member Voyame's comment that a maximum awardable amount of \$20,000 under the relevant Australian legislation was "meagre" (CAT/C/SR.96, para. 19). See also the views of the Human Rights Committee in the case of *Albert Wilson v the Philippines*, Communication no. 868/1999, UN Doc. CCPR/C/79/D/868/199 (2003) (which involved a finding that the author had been tortured) ("*although compensation may differ from country to country, adequate compensation excludes purely 'symbolic' amounts of compensation*").

<sup>46</sup> Principle 12.

international and regional human rights bodies.<sup>47</sup> While it may be practical and desirable to establish other mechanisms that can also deal with claims for redress to enable states to fulfil their obligations under Article 14, these must be complementary to, and not in substitution for, access to a remedy before the courts.

(iii) *Existence of institutions competent to render enforceable decisions through a procedure established by law*

51. However, states should be encouraged to provide other mechanisms through which a victim of torture or ill-treatment can secure redress, including acknowledgement of state responsibility, through a procedure established by law. Judicial remedies by their nature and formal procedures may take time and may be demanding on victims, so there are good reasons to provide alternative avenues of redress. States wishing to encourage non-judicial remedies must not discourage or limit access to courts but instead make non-judicial avenues attractive alternatives.
52. The draft lists national human rights commissions, ombudsman institutions and special reparation bodies as non-judicial institutions that may be established to provide a forum for a claim for redress. We suggest that the Committee stress that such mechanisms must be impartial and independent, and their decisions must be directly enforceable.

*States' positive obligations to ensure redress, even in the absence of a claim (para. 25)*

53. The Committee has recognized in paragraph 25 of the draft that states have positive obligations to ensure that victims obtain redress, even in the absence of a claim by the victim. REDRESS supports this statement, which is in line with the Committee's previous jurisprudence.
54. The Committee has recognised that where "*reasonable grounds exist*" to believe that a person has been tortured, the State has an obligation under Article 14 to provide redress.<sup>48</sup> It has also recognised that States have positive obligations to provide redress, including rehabilitation, outside the context of formal legal proceedings. Its conclusions and recommendations on State reports regularly refer to the State's *positive obligation* to establish specific programmes for providing redress for victims of torture, including rehabilitation.<sup>49</sup> It has also recommended that states take measures to improve the identification of victims of particular types of torture, and provide them with "*appropriate rehabilitation programmes, genuine access to health care and counselling, and institutionalizing such services*".<sup>50</sup>

---

<sup>47</sup> HRCtee, *Nydia Erika Bautista v Colombia*, Communication no. 563/1993, CCPR/C/55/D/563/1993 (1995), para. 8 (2) ("*administrative remedies cannot be deemed to constitute adequate and effective remedies [...] in the event of particularly serious violations of human rights [...]*"); HRCtee, *Jose Vicente and Ors v Colombia*, Communication No. 612/1995, CCPR/C/60/D/612/1995 (1997), para. 8(2); and HRCtee, *Giri v Nepal*, Communication no. 1761/2008, CCPR/C/101/D/1761/2008 (2011), which states that proceedings before national human rights institutions are not to be considered judicial remedies (para. 6.3). See also the African Charter on Human and Peoples' Rights, which provides that all remedies should be judicial (Art. 7).

<sup>48</sup> Committee's recommendations in relation to Namibia (UN Doc. A/52/44), para. 247: "*The Committee recommends that the specific allegations of ill-treatment which have been brought to its attention be investigated and that the results of such investigations be transmitted to the Committee. The Committee also recommends that the cases of disappearance of former members of the South West Africa People's Organisation (SWAPO) be, according to Article 12 of the Convention, promptly and impartially investigated. In all situations where reasonable grounds exist to believe that those disappearances amounted either to torture or to other forms of cruel, inhuman or degrading treatment, the dependants of the deceased victims should, according to Article 14 of the Convention, be afforded fair and adequate compensation. The perpetrators of those acts should be brought to justice.*" (emphasis added).

<sup>49</sup> The Human Rights Committee also recognises that states need to take positive measures to provide redress to victims of human rights violations – see, eg.: Finland, ICCPR, A/53/40 vol. I (1998) 40 at para. 260: "*Criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms. Priority should continue to be given to positive measures and to civil processes which are able to determine issues of compensation or other remedies, especially in cases of discrimination*" (emphasis added).

<sup>50</sup> See, eg. Conclusions and recommendations on Slovenia (2011) (CAT/C/SVN/CO/3), para. 16(c) in relation to victims of trafficking.

55. REDRESS submits that this positive obligation arises from the words “*ensure in its legal system that the victim of an act of torture obtains redress*” rather than the words “*enforceable right*”, which denotes some action on the part of the victim to enforce the right. We would therefore suggest removing the reference to “*enforceable right*” from this paragraph.

*Access to justice for those outside the jurisdiction where the torture took place (para. 20)*

56. REDRESS welcomes the Committee’s statement in the draft that the obligations of states parties under Article 14 are not limited to victims who were harmed in the territory of the state party or by or against nationals of the state party.
57. This interpretation is entirely “*in accordance with the ordinary meaning to be given to the terms of [the Convention] in their context and in the light of its object and purpose*”.<sup>51</sup> In contrast to certain other provisions of the Convention, Article 14 contains no geographic limitation, such as a limitation to torture committed in the territory of a state party or subject to its jurisdiction.<sup>52</sup> The word “*victim*” is not limited by any words suggesting that the obligations are only owed to those victims tortured by the relevant state: the ordinary meaning of the provision is that states have obligations to ensure that *all* victims of torture obtain redress. This interpretation is also squarely in line with the object and purpose of the Convention, which is to make the struggle against torture more effective, including by requiring states to take action on torture where the state responsible fails to do so.
58. The interpretation is also entirely in line with the Committee’s prior jurisprudence. The Committee has on a number of occasions criticised states that fail to provide or restrict civil remedies for torture, irrespective of where the torture was carried out.<sup>53</sup>

***Obligation to ensure remedies and reparation are provided and effective in practice***

*Effective mechanisms for complaints and investigations (paras. 21, 23 and 24)*

59. We agree that effective mechanisms for complaints and investigations are a vital prerequisite to the provision of redress under Article 14, and agree with the Committee’s highlighting of the issues in paragraphs 12, 23, and 24. We suggest that this section could be renamed “*Effective mechanisms for complaints and investigations*”.
60. We suggest that paragraph 24 could equally be characterised as an obstacle to redress, and may fit more logically in that section. We also suggest that the final sentence of **paragraph 24** is amended. As it currently stands it could be interpreted to mean that it may be permissible to have legislation requiring criminal proceedings to be carried out before civil compensation can be sought, as long as those criminal proceedings are carried out promptly. Although it is clear from the first sentence of paragraph 24 that this is not the case, this could be further clarified in the last sentence (eg. by including the words “*contrary to the state party’s obligations under Article 14,*” after the words “*can be sought*”). This is a real issue in many countries hindering

---

<sup>51</sup> Vienna Convention on the Law of Treaties, Art. 31.

<sup>52</sup> See CK Hall (2007), ‘The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad’ 18 *European Journal of International Law* 921-937 at 293-294.

<sup>53</sup> See, e.g., Conclusions and recommendations on Japan (2007) (CAT/C/JPN/CO/1, para. 23); Nicaragua (2009) (CAT/C/NIC/CO/1, para. 25); and Canada (2005) (CAT/C/CR/34/CAN, para. 5(f)).

access to reparation,<sup>54</sup> and we would encourage the Committee to be as clear as possible on this point.

*Access to mechanisms for obtaining redress (paras. 26-31)*

61. We strongly support the Committee's emphasis on states' obligations to take positive steps to ensure that victims of torture obtain access to justice. Victims of torture are very often from the most marginalised groups in society, and the principle of equal access to justice requires that steps are taken to ensure that they can access their rights.

*(i) Information*

62. In **paragraph 26**, we suggest that the word "*compensation*" is replaced by the word "*redress*".

*(ii) Protection of parties connected to a proceeding*

63. In **paragraph 28** we suggest that victims' lawyers and non-governmental organisations supporting victims are added to the list of people who should be protected from intimidation and retaliation before, during and after proceedings. We have all too frequently been involved in cases where a victim's lawyer or the NGO representing or providing services to them has been targeted because of their connection to a case for redress and reparation.<sup>55</sup> The Committee may also consider including a reference to protection of the victim's community where appropriate.<sup>56</sup>

64. We also suggest the word "witness" is removed from the beginning of the second sentence ("*Failure to provide witness protection...*"); as is recognised in the first sentence, there are categories of people other than witnesses that may be equally in need of protection in human rights cases.

*(iii) Principle of non-discrimination (para. 29)*

65. REDRESS supports what is stated in **paragraph 29** about the importance of the principle of non-discrimination. We would suggest that the Committee acknowledge in this section that those from vulnerable and marginalised groups – including (without limitation) women, lesbian, gay, bisexual and transgender individuals, foreign nationals, refugees, the mentally ill, those from ethnic minorities, indigenous people and those considered to be of lower caste – may face special difficulties in accessing justice which states must take positive steps to address. For example, criminalisation of the victims themselves may militate against them coming forward – where homosexual acts are criminalised, a person subjected to torture on the basis of their sexual orientation will be understandably reluctant to complain.

---

<sup>54</sup> See, eg. the case of *Rajapakse v Sri Lanka*, discussed in REDRESS (2008), 'Waiting for Justice: The politics of delay in the administration of justice in torture cases: Practice, standards and response', pp. 32-33, available at:

[http://www.redress.org/downloads/publications/WAITING\\_FOR\\_JUSTICE\\_Mar%2008%20Fin%20\\_2\\_.pdf](http://www.redress.org/downloads/publications/WAITING_FOR_JUSTICE_Mar%2008%20Fin%20_2_.pdf),

<sup>55</sup> For a discussion of these issues see REDRESS (2009), 'A Call to Action: Ending Threats and Reprisals Against Victims of Torture and Related International Crimes', in particular pp. 12-15, available at:

<http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

<sup>56</sup> See the 'Peace Community' case where the Inter-American Court of Human Rights agreed to provide provisional measures for an entire Colombian village: *Matter of the Peace Community of San José de Apartadó regarding Colombia* (Provisional Measures) (2000).

(iv) *Access to justice for women and girls (paras. 30 and 34)*

66. REDRESS fully agrees with what is included in draft paragraphs 30 and 34 about barriers to justice for women and state's obligations to take positive measures to ensure that these are addressed. Some of the statements in these paragraphs could usefully be moved to the relevant general section of the General Comment (for example, the statement about gender sensitive proceedings could be included in paragraph 19 of the current draft, and the statement about complaints mechanisms could be included in paragraph 21 of the draft).

67. We suggest that in this section the Committee emphasises that women and girls may face specific barriers to access to justice in relation to all types of torture – not just sexual violence, and states have a positive duty to address these. These include:

- women's relative lack of political and public voice has meant they typically have less information on rights and remedies, and how to access them;
- where violations are committed by non-state actors they may be downplayed by women and girls themselves and within their families; victims may be faced with the unenviable choice of maintaining harmony within their families or communities (and many are conditioned to do so) rather than pursuing justice for what happens to them specifically;
- police in some countries regularly encourage the informal settlement or mediation of domestic violence and other forms of gender based violence during the investigation phase;<sup>57</sup>
- local human rights groups working on legal challenges for victims often do not adopt a gendered approach. Consequently women are typically less able to benefit from programmes and services, which reduces the number of cases that are taken up.

(v) *Training (para. 31)*

68. We suggest that lawyers and law students be included in the list of those who should receive training on the Istanbul Protocol.

*Removing obstacles to the right to redress (paras.32-38)*

(i) *Evidentiary hurdles*

69. Another obstacle to the right to redress which we suggest the Committee refers to in this section is the existence of practically insurmountable evidentiary requirements to prove allegations of torture. These should also be removed in relation to claims of torture to ensure that victims are provided with effective means to obtain redress.

70. Torture is often perpetrated without witnesses, and torture methods are designed to avoid visible scars. International principles have reflected these difficulties by devising special rules of evidence to substantiate allegations of torture and other ill-treatment in claims for redress. In *Aksoy v Turkey*, the European Court of Human Rights held that "*where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear*

---

<sup>57</sup> See, eg. the Committee's concern at the high settlement rate for domestic violence and other forms of gender based violence in its conclusions and recommendations on Korea (2006) (CAT/C/KOR/C/2, para. 17).



*issue arises under [the Article on the prohibition of torture and ill-treatment]*".<sup>58</sup> Similarly, Principle 16(d) of the Robben Island Guidelines requires that parties ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody. REDRESS suggests the Committee considers including a similar statement in the draft General Comment as this can be a crucial difficulty faced by victims trying to achieve redress.

#### **MONITORING AND REPORTING (paras. 39-40)**

71. REDRESS welcomes the detailed list of information that states should provide to allow the Committee to monitor compliance with their obligations under Article 14.
72. REDRESS makes the following small suggestions on some of the measures set out in the following paragraphs:
  - (e) the Committee asks states to provide information on the types of measures of satisfaction and guarantees of non-repetition awarded by courts and other bodies, broken down by frequency awarded, and statistics as to their implementation or otherwise within a defined period of time;
  - (h) the data is also broken down by nationality of the victim;
  - (j) the data provided under (j) is also disaggregated by age, gender, nationality, location and alleged violation. In terms of the data on how many victims actually obtained redress, REDRESS suggests that this should be broken down by the number of victims who obtained redress within specified periods of bringing the issue to the relevant institution;
  - (k) the words "*witness protection available to victims and witnesses of torture or ill-treatment*" be replaced with "*protection available to victims of torture or ill-treatment, their families, witnesses and those connected with any proceedings*";
  - (l) that this also include data on decisions taken by national human rights institutions;
73. We suggest that the Committee also asks for information on the positive measures adopted by states to ensure equal access to redress by victims of torture from vulnerable groups, including women and girls, lesbian, gay, bisexual and transgender individuals, migrant workers, and members of ethnic minorities, seeking to access the rights guaranteed under Article 14 of the Convention.
74. We suggest that states are also asked to indicate legislation and policy measures designed to positively identify victims of torture in order to provide them with redress.

---

<sup>58</sup> ECtHR, *Aksoy v Turkey*, judgment of 18 December 1996, §61, 1996-VI, no. 26, referring to ECtHR, *Tomasi v France*, judgment of 27 August 1992, Series A, 241-A and ECtHR, *Ribitsch v Austria*, judgment of 4 December 1995, Series A, 336.

## IV. OTHER AREAS TO CONSIDER ADDRESSING

### **VIOLATIONS BY NON-STATE ACTORS: THE LINKAGES BETWEEN REDRESS AND DUE DILIGENCE**

75. The Committee has clearly stated in its General Comment No. 2 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 consistently with the Convention, the state bears responsibility*”.<sup>59</sup> It would be helpful if the Committee recalled this in this General Comment, and drew attention to the links between providing the means for access to redress for violations committed by non-state actors and the state’s duty to exercise due diligence to prevent those acts. REDRESS would also suggest that the Committee clearly states that, where a state is responsible for torture by non-state actors because of a failure of due diligence, the state bears a primary responsibility to provide substantive reparations to the victim of such violation.<sup>60</sup> This could logically be done in the first section of the draft General Comment.

### **REPARATIONS FOR MASS VIOLATIONS**

76. Paragraph 18 of the draft states that while collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress. As outlined above at paragraph 50, REDRESS entirely agrees with this statement, and would add the word “*judicial*” before remedy.
77. However, given the particular challenges posed by providing adequate and effective reparation to victims of mass violations of human rights, including torture, REDRESS would welcome further guidance from the Committee on what states’ obligations are in such circumstances, and the principles that administrative reparations programmes should follow to best enable victims to obtain redress.
78. The obligation to ensure that all torture victims are provided with the right to seek and obtain reparation still applies during periods of transition.<sup>61</sup> Nonetheless, ensuring adequate and effective reparations for mass violations poses a particular challenge, taking into account that most societies coming out of a period of mass violations, even with the best of will, will have weak legal infrastructures, competing demands for scarce resources and a vast number of victims with a range of rights and needs.
79. In response to these challenges, some states have developed policies and specific administrative programmes to deal with reparation for mass claims. These can only ever complement rather than substitute access to the courts: ideally, the design of administrative reparation programmes will be sufficiently inclusive, responsive to the wishes and needs of victims, transparent, easy to use, efficient and seen as just, that the advantages of using the programmes will outweigh the prospect of gaining reparation before the courts or other established mechanisms.

---

<sup>59</sup> Paragraph 18.

<sup>60</sup> Eg. IACtHR, *Cotton Field Case*, above n.7; ECtHR, *Opuz v Turkey*, judgment of 9 June 2009, [2009] ECHR 870.

<sup>61</sup> See, eg. HRCtee, General Comment No. 29, para. 14 (right to a remedy is non-derogable and applies even during a state of emergency); HRCtee, *Giri v Nepal*, above n.47, para.7.10; IACtHR, *Barrios Altos case (Reparations and Costs)*, above n.26, §41–44.

80. To be compatible as a mechanism for delivering redress under the Convention, an administrative reparations programme for mass violations should: involve broad participation of a wide range of victims and other citizens in its design; explicitly acknowledge that reparations are a moral, political and legal obligation of the state and that recognition of victims as human beings whose fundamental rights were violated is “the central goal” of reparations;<sup>62</sup> be comprehensive in the sense that it makes reparations available to all victims of serious violations, including torture, and provides for a spectrum of reparation measures, including satisfaction and guarantees of non-repetition; be transparent and accessible; have directly enforceable recommendations;<sup>63</sup> provide “adequate” and “fair” reparation;<sup>64</sup> and allow individuals to pursue individual judicial remedies if that is their preference.<sup>65</sup>

### **PROMPT AND FAIR ADMINISTRATION OF JUSTICE IN TORTURE CASES**

81. The draft general comment refers to the need to ensure that investigations into torture are carried out promptly, however REDRESS suggests that the broader point should be made that access to justice must be fair and prompt,<sup>66</sup> and that reparation itself must be provided promptly.<sup>67</sup>

82. General issues about fairness and delays in the general administration of justice in a country are often heightened in situations of torture, and – in such cases – must be addressed if states are to fulfil their obligations under Article 14. Particular issues of concern in relation to torture cases are:

a. **Delays in court proceedings:** Claims for reparation in torture cases may be subject to the same delays as ordinary compensation claims in civil cases where the system suffers from systemic shortcomings in the administration of justice.<sup>68</sup> These delays can have a heightened impact on victims of torture: the ongoing stress and uncertainty caused can hinder recovery from the torture, and can prolong concerns about and occurrence of reprisals.<sup>69</sup> A sustained effort is needed to minimise delays and their adverse impact on torture victims’ right to a remedy and reparation.

b. **Corruption:** Again general concerns about systemic corruption in the administration of justice may be heightened in relation to torture cases because the state is implicated in the violation.<sup>70</sup> This can lead to difficulties or added expense in accessing judicial mechanisms, pressure to withdraw claims, concerns about protection of victims and witnesses and the violation of the right to a fair hearing.

---

<sup>62</sup> Such as in the programme proposed by the Truth and Reconciliation Commission in Peru (the Comprehensive Reparations Plan “PIR”): See, Truth and Reconciliation Commission of Peru, ‘Summary of the Comprehensive Reparations Plan (PIR)’, English translation available at: [http://www.aprodeh.org.pe/sem\\_verdad/informe\\_final/english/reparations\\_plan.pdf](http://www.aprodeh.org.pe/sem_verdad/informe_final/english/reparations_plan.pdf), para. 2.2.2.1.

<sup>63</sup> See, eg. the Committee’s concerns that recommendations of the Peruvian Truth and Reconciliation Commission had not been implemented, especially in relation to vulnerable groups (CAT/C/PER/CO/4, para. 21).

<sup>64</sup> See the Committee’s concern in relation to the National Commission on Political Imprisonment and Torture in Chile, that “*austere and symbolic*” reparation is not the same as “*adequate and fair*” reparation as set out in Art. 14 (CAT/C/CR/32/5, para. 6(g)(v)).

<sup>65</sup> For an overview of some of these best practices see ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, By Professor Diane Orentlicher’ (2004) E/CN.4/2004/88. See also Report of the Special Rapporteur on violence against women, its causes and consequences (2010) A/HRC/14/2.

<sup>66</sup> See Basic Principles, para. 1(2)(b).

<sup>67</sup> See Basic Principles, para. 1(2)(c), para. 11.

<sup>68</sup> See REDRESS (2008), ‘Waiting for Justice’, above n.54 pp.33-34.

<sup>69</sup> See, for example, the case of Chamila Bandara in Sri Lanka: REDRESS (2008), ‘Waiting for Justice’, above n.54, p. 8.

<sup>70</sup> See, for example the Committee’s Conclusions and Recommendations on Cambodia (2003) (CAT A/58/44), para. 98(e). For a detailed examination of corruption in judicial systems see Transparency International (2007), ‘Global Corruption Report 2007: Corruption in Judicial Systems’, available at: [http://www.transparency.org/publications/gcr/gcr\\_2007#book](http://www.transparency.org/publications/gcr/gcr_2007#book).

- c. **Delays and non-enforcement of awards:** Another serious problem in torture cases is non-enforcement of reparation awards granted by national and international human rights bodies and courts, either because of lack of enforcement procedures, lack of assets, or – in the case of enforcement of judgments against the state – simple failure to comply.<sup>71</sup> The swift enforcement of awards is an integral element of the rule of law, and vital to ensure redress that is practical and effective, rather than theoretical and illusory. This is particularly true in cases of human rights violations, such as torture, where the recognition of liability carries a public acknowledgment that the torture victim’s version of events was true or at least partly true and that the state was, either directly or indirectly, responsible. Prolonged delays in the enforcement of judgments are therefore not only a source of frustration preventing torture survivors from enjoying the benefits deriving from a judicial award, but are also prone to undermine if not negate altogether the acknowledgment inherent in the judgment.<sup>72</sup> States therefore have an obligation under Article 14 to comply with reparation awards made against them, and to ensure the framework for enforcement of awards made against individuals.

## V. CONCLUSION

83. REDRESS welcomes the Committee’s draft general comment which comprehensively and substantively explains states’ obligations under Article 14, which is so crucial to victims and survivors of torture, and central in itself to the eradication of torture.
84. We reiterate our appreciation to the Committee for the opportunity to provide input which we hope will assist in strengthening an already very strong and wide-ranging General Comment. We wish the Committee the best of success in finalising the draft.
85. We would be very happy to provide any further information on particular issues or to meet with members of the Committee or Secretariat at the upcoming session in Geneva, or at any other time, to discuss these comments.

---

<sup>71</sup> See, REDRESS (2008), ‘Waiting for Justice’ above n.54, pp. 35-36.

<sup>72</sup> *Ibid.*

**APPENDIX ONE: SUMMARY OF DETAILED POINTS BY PARAGRAPH OF DRAFT**

Para. (Draft)	Topic	Summary comments	Paras. (Submission)
<b>The obligation of States parties to implement Article 14</b>			
	General points	<ul style="list-style-type: none"> <li>Rename section “Key principles and scope”</li> </ul>	11
	Additional points to highlight	<ul style="list-style-type: none"> <li>The link between redress and prevention and the centrality of Article 14 to achieving the object and purpose of the Convention</li> </ul>	12-13
		<ul style="list-style-type: none"> <li>Article 14 reflects obligations under international law</li> </ul>	14
		<ul style="list-style-type: none"> <li>Include paragraph on link between state responsibility for non-state actor torture and providing remedy and redress</li> </ul>	76
<b>Substantive obligations</b>			
	Additional points to highlight	<ul style="list-style-type: none"> <li>Forms of reparation provided must be adequate, appropriate, and proportionate: importance of survivor’s perspective in tailoring measures</li> </ul>	15-16
		<ul style="list-style-type: none"> <li>Reparation should be transformative and aim at correction, not just rectification</li> </ul>	17
7	Restitution	<ul style="list-style-type: none"> <li>Reconsider definition of restitution</li> </ul>	18-22
18	Compensation	<ul style="list-style-type: none"> <li>Rephrase examples of damage for which compensation can be provided to separate the general from the specific</li> </ul>	23
		<ul style="list-style-type: none"> <li>Include damages for mental anguish, emotional distress and pain and suffering in the illustrative list</li> </ul>	24
		<ul style="list-style-type: none"> <li>Explain “<i>fair and adequate</i>” compensation</li> </ul>	25
		<ul style="list-style-type: none"> <li>Address state’s primary obligation to provide compensation and other forms of reparation without the victim having to recover it from the individual perpetrator</li> </ul>	26
10-12	Rehabilitation	<ul style="list-style-type: none"> <li>Explain what is meant by “<i>legal and social services</i>”</li> </ul>	28
		<ul style="list-style-type: none"> <li>Adopt broader meaning of rehabilitation which goes beyond the clinical definition</li> </ul>	29
		<ul style="list-style-type: none"> <li>Distinguish (i) need to establish rehabilitation system through legislation and (ii) awards by courts and other bodies awarding the direct provision of rehabilitation measures</li> </ul>	30-31
		<ul style="list-style-type: none"> <li>Clarify that effective rehabilitation services and programmes must be accessible to all victims of torture in their jurisdiction, regardless of where the torture took place or the victim’s immigration status</li> </ul>	32
		<ul style="list-style-type: none"> <li>Stress provision of funding to private providers and NGOs will only fulfil obligations under Article 14 if matched by acknowledgment of legal responsibility to provide</li> </ul>	32
		<ul style="list-style-type: none"> <li>Require states to develop objectively verifiable outcome assessment in individual cases to assist in the determination of whether “<i>adequate</i>” and “<i>effective</i>” rehabilitation has been provided in individual cases</li> </ul>	33
15	Satisfaction	<ul style="list-style-type: none"> <li>Explain why satisfaction is important for victims of torture and may contribute to prevention</li> </ul>	35-37
		<ul style="list-style-type: none"> <li>Tailor list of example measures to those most relevant to torture</li> </ul>	38
16	Guarantees of	<ul style="list-style-type: none"> <li>Explain how guarantees of non-repetition are essential to</li> </ul>	41-42

	non-repetition	<p>address systemic problems leading to torture</p> <ul style="list-style-type: none"> <li>Tailor list of example measures to those most relevant to preventing torture</li> </ul>	43
<b>Procedural obligations</b>			
<b>(i) Obligation to implement through legislation</b>			
18	Enact legislation	<ul style="list-style-type: none"> <li>Stress need for comprehensive and detailed legislation granting the substantive right to “adequate” and “appropriate” reparation in line with international law</li> </ul>	47-49
22	Ensure existence of institutions	<ul style="list-style-type: none"> <li>Stress need for a judicial remedy</li> <li>Spell out how judicial and other remedies relate to each other and operate in practice</li> <li>Stress that such mechanisms must be impartial and independent, and their decisions must be directly enforceable</li> </ul>	50 51 52
	Additional points to address	<ul style="list-style-type: none"> <li>Reparations for mass violations</li> </ul>	76-80
<b>(ii) Obligation to ensure remedies are effective</b>			
<b>(a) <u>Link to obligation of prompt and effective investigation</u></b>			
	General points	<ul style="list-style-type: none"> <li>Move paragraph 22 to previous section on implementing framework</li> <li>Move paragraph 24 to section on obstacles to redress</li> <li>Move paragraph 25 to section on implementing through legislation</li> </ul>	45 60 53-32.b
24	Civil remedies not dependent on conclusion of criminal proceeding	<ul style="list-style-type: none"> <li>Amend final sentence to clarify that legislation requiring criminal proceedings to be carried out first is not in line with obligations under Article 14</li> </ul>	60
25	Positive obligations to ensure victim obtains redress, even in the absence of a claim	<ul style="list-style-type: none"> <li>Remove reference to “<i>enforceable right</i>” in this paragraph</li> <li>Spell out how mechanisms to fulfil this positive obligation should be set out in legislation and policy</li> </ul>	55
<b>(b) <u>Positive duty to ensure access</u></b>			
26	Information	<ul style="list-style-type: none"> <li>Replace the word “<i>compensation</i>” with the word “<i>redress</i>” in each case.</li> </ul>	62
28	Protection	<ul style="list-style-type: none"> <li>Include victims’ lawyers and organisations assisting them in list of those who should benefit from protection</li> <li>Include victims’ communities, where appropriate, in list of those who may need to benefit from protection</li> <li>Remove the word “witness” qualifying the word “protection” in the first part of the second sentence</li> </ul>	63 64
29	Non-discrimination	<ul style="list-style-type: none"> <li>Emphasise that those from vulnerable and marginalised groups may face specific difficulties accessing justice and that states must take positive steps to ensure access</li> <li>List examples of vulnerable groups who often face specific difficulties accessing justice for torture (eg. lesbian, gay, bisexual and transgender individuals, foreign nationals, the mentally ill, ethnic minorities, those from lower caste groups)</li> </ul>	65
30 / 34	Gender sensitive approach	<ul style="list-style-type: none"> <li>Move sections on gender sensitive proceedings to paragraph 19</li> <li>Move section on complaints mechanisms and investigations</li> </ul>	66

		to previous section <ul style="list-style-type: none"> <li>Explore particular difficulties accessing remedies faced by women</li> </ul>	67
31	Training	<ul style="list-style-type: none"> <li>Include lawyers and law students in list of those who should be trained in the Istanbul Protocol</li> </ul>	68
<b>(c) <u>Removal of obstacles to redress</u></b>			
	General points	<ul style="list-style-type: none"> <li>Move paragraph 32 on need for acknowledgment of responsibility to section on substantive reparations</li> <li>Move paragraph 33 on obligation to ensure right to redress is effective to beginning of this the overall section on effective remedies</li> </ul>	
	Additional points to address	<ul style="list-style-type: none"> <li>Evidentiary hurdles</li> </ul>	69-70
<b>(d) <u>Prompt and fair administration of justice in torture cases</u></b>			
	Additional points to address	<ul style="list-style-type: none"> <li>The need to reduce delays in court proceedings</li> <li>The impact of corruption on the administration of justice</li> <li>Enforcement of judgments</li> </ul>	81-82
<b>Monitoring and Reporting</b>			
40	Measures for monitoring and reporting	<ul style="list-style-type: none"> <li>See paras. 72-74 of submission</li> </ul>	71-74

## APPENDIX TWO: SUGGESTED AMENDED STRUCTURE

### Key principles and the scope of the obligation

- paras. 1-5 (current paras.)
- new paragraph on link to non-state actor torture

### Substantive obligations: what amounts to redress

- paras. 6 -16 (current paras.)
- para. 32 (different to development measures)

### Ensuring the right to redress in law and in practice

Obligation to implement the right through legislation (“ensure in its legal system”...“enforceable right”)

- para. 17 (torture must be criminalised and punishable)
- para. 18 (legislation is required to implement Article 14)
- para. 22 (existence of institutions and procedures in law to determine rights)
- para. 19 (special consideration in legislation to avoid retraumatisation)
- para. 25 (ex officio obligations established in law)
- para. 20 (access outside the state where the torture took place)
- new paragraph on reparation in transitional justice setting

Remedies and reparation must be provided effectively in practice (“obtains redress”)

- introductory paragraph similar to the current para. 33

*Effective mechanisms for complaints and investigations & relationship with criminal proceedings*

- para. 21 (importance of obligations under Articles 12 and 13 to achieving right)
- para. 23 (importance of acting promptly and impartially)

*Access to mechanisms for obtaining redress*

- paras. 26-31 (current paras.)

*Removal of obstacles in law to the right to redress*

- paras. 35-38 (current paras.)
- para. 24 (civil proceedings not contingent on criminal proceedings)

*Prompt and fair administration of justice*

- new paragraph

### Monitoring and Reporting

- paras. 39-40 (current paras.)