

The right to redress for victims of torture and other ill-treatment: will the new international guidelines provide better access to redress for victims at a domestic level?

1/2

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In December 2012, the United Nations Committee against Torture (CAT) adopted its third General Comment on the implementation of article 14 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UNCAT) (GC 3).¹ Article 14 enshrines the right of victims to obtain redress, including fair and adequate compensation and as full rehabilitation as possible.²

People deprived of their liberty and who are victims of acts of torture and other ill-treatment while in detention are equally entitled to seek redress as any other victim of such horrendous acts. The fact that they are in detention and that they may be in conflict with the law does not provide any justification for their suffering at the hands of state officials.

In 2006, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (also called the Van Boven and Bassiouni Principles, after its two authors).³ This document was the first international instrument laying out the rights of victims of gross human rights violations and the concomitant obligations lying on States to provide adequate redress to these victims. However, the Van Boven and Bassiouni Rules apply to all gross human rights violations and not only to torture, and CAT's general observations and decisions on communications in relation to redress indicated a need for it to clarify further the content of article 14 of UNCAT.

At the regional level, the Robben Island Guidelines (RIG), adopted by the African Commission on Human and Peoples' Rights in 2002, also encompass the right to redress for victims of torture and other ill-treatment, their families and communities.⁴

These three international instruments are soft law instruments, but provide authoritative international guidelines to States on the framework and mechanisms that should be put in place to adequately support victims of torture and other ill-treatment. Furthermore, and more fundamentally, article 14 of UNCAT, which is binding on States having adopted the Convention, imposes on State parties to provide redress, despite the term not being defined in the UNCAT.

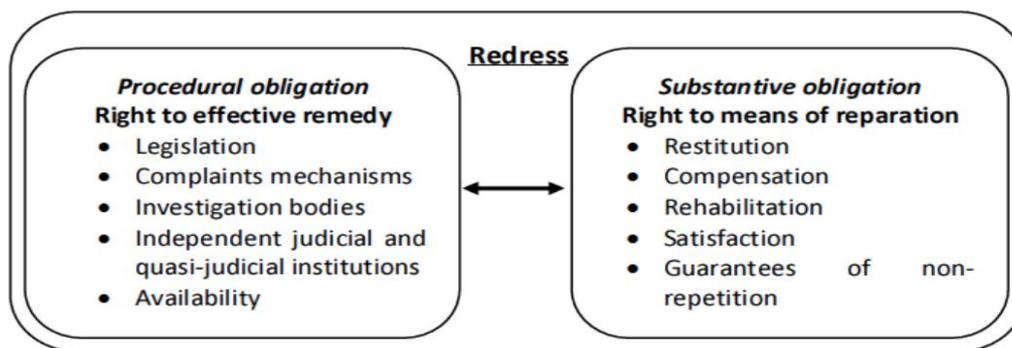
Parallel to the adoption of GC 3, the South African Parliament has been examining the Prevention and Combating of Torture of Persons Bill (Torture Bill).⁵ Disappointingly, the Bill fails to adequately include South Africa's international obligations in relation to victims' right to redress, restricting the right to redress of victims to instituting a civil claim for damages, and restraining the State's responsibility in relation to redress to set up programmes to 'provide assistance and advice to victims of torture'.⁶

The first part of this newsletter examines the scope of the international obligation to provide redress to victims of torture and other ill-treatment, as clarified by GC 3.⁷

1. General concepts on the right to redress

The most commonly held understanding of redress is monetary compensation and rehabilitation.

However, redress is a much broader concept, referring to all mechanisms and services that should be available to victims of gross human rights violations – in this case, torture and other ill-treatment – to be restored in their dignity. Redress, as outlined in GC 3, entails both a procedural dimension, referring to the types of remedies that effectively ensure access to means of reparation (legislation, complaints mechanisms, investigative bodies, and independent judicial and quasi-judicial institutions), and a substantive dimension, referring to the five forms of reparation victims should be entitled to (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition).⁸



The procedural obligations flowing from article 14 of UNCAT, as well as the five substantive obligations encompassed in the same international provision, will be outlined hereafter.

From the outset, GC 3 sets out a number of key concepts. Firstly, the obligation to provide redress is an obligation resting on the State party, and not on the individual perpetrator.⁹ Indeed, since torture and other ill-treatment can only take place 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity',¹⁰ the State under whose jurisdiction the official falls will ultimately bear the responsibility for the official's actions.

Secondly, GC 3 encompasses a broad definition of "victim" that includes both the direct victim and 'affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization'.¹¹ Furthermore, GC 3 provides that '[a] person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim'.¹² GC 3 also contains a broad definition of harm, and underlines that the harm may be collective.¹³

Thirdly, GC 3 expands, albeit slightly, the nature of the victims' relatives who are also entitled to redress. Under the wording used in article 14 of UNCAT, only 'dependants' were entitled to 'compensation' and only in the event of the death of the victim. CAT had given a literal interpretation to this part of the provision.¹⁴ GC 3 now provides that all victims (which includes affected families, dependants and those having suffered harm in assisting, as indicated in the previous paragraph) are entitled to full redress (and not only monetary compensation), whether the victim is deceased or not.

Fourthly, GC 3 clarifies that redress must be afforded to both victims of torture and of other ill-treatment, and not to victims of torture only. This follows CAT's General Comment No.2, in which it had indicated that the obligation to prevent torture and other ill-treatment was 'indivisible, interdependent and interrelated', including in relation to article 14 of UNCAT.¹⁵

Fifthly, GC 3 indicates that each form of reparation awarded to the victim must be assessed on a case-by-case basis, taking the particularities of the violation, of its gravity and of the victim's needs into account.¹⁶

Finally, GC 3 provides an integrated reading of the UNCAT, confirming the intrinsic links between article 14 and its other provisions. As will be highlighted below, compliance with article 14 of

UNCAT also requires compliance with other provisions of the UNCAT, in particular with articles 2 and 16 (prevention), 4 (criminalisation), 10 (public education and training of officials), 11 (systematic review of interrogation rules), 12 (State's obligation to investigate), and 13 (victim's right to complaint). CAT's confirmation that the UNCAT must be read as a whole leads to two conclusions: (i) that compliance with other provisions of the UNCAT leads State parties to begin to comply with article 14 and (ii) that compliance with article 14 bears the same weight as compliance with the other substantive provisions of the UNCAT. State parties' obligation to provide redress is not an obligation of secondary nature. Article 14 might have been previously neglected because of a lack of conceptual clarity, and it is hoped that the adoption of GC 3 will remedy this situation. CAT's detailed list of information that State parties should include in their state reports on measures adopted to implement article 14¹⁷ will also assist in framing policies aimed at assisting victims of torture and other ill-treatment.

2. Substantive obligations: which means of reparation?

As indicated above, reparation contains five elements, which should all be available to victims of torture and other ill-treatment: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution

Restitution aims at restoring the victim, as far as possible, in the situation that he or she was in before the acts of torture or other ill-treatment occurred.¹⁸ This could involve, for example, restoring a person's citizenship, property or employment, which the victim could have lost because of the torture suffered. However, the victim receiving restitution should not be placed in a position of re-victimisation.¹⁹

Compensation

Compensation awarded to an individual victim should be 'prompt, fair and adequate', proportionate to the harm suffered, and should cover 'any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary'.²⁰ Compensation should therefore cover past and future medical treatment and rehabilitative services needed, costs incurred to file a claim for reparation (and not only a claim for compensation), pecuniary and non-pecuniary damage suffered, including loss of earnings and opportunities. Therefore, compensation can, in part, cover rehabilitation services, which the State can also directly provide to the victim (see below).

However, CAT insists that the possibility to obtain monetary compensation as a sole means of reparation, and even more so obtainable only through lengthy and expensive court proceedings, is insufficient for State parties to meet their obligations under article 14 of UNCAT.²¹

Worth noting is that GC 3 encourages States to set up and finance compensation funds, which would increase the possibility to award compensation promptly. Such funds should be managed by an independent body, in a transparent manner and be effectively accessible.²²

Rehabilitation

Means of rehabilitation entail accessing medical and psychological care as well as legal and social services to allow the victim to be restored, as far as possible, with the 'functions' he or she possessed before the violation occurred, or be provided with 'new skills', in order for the victim to reintegrate society as fully as possible.²³ GC 3 details how rehabilitation should be made available (but provides less details on implementing other means of reparation), including the kind of measures States should put in place to ensure effective and adequate access to means of rehabilitation, and the fact that access to rehabilitation programmes cannot be limited to victims being allowed to pursue judicial remedies.²⁴

Finally, GC 3 insists that rehabilitation services should be either provided directly by the State, or provided by private institutions and NGOs, which should then be funded by the State without the State interfering in their work. GC 3 also underlines that State funding for rehabilitation programmes cannot be delayed or inadequate because of limited available resources.²⁵ GC 3 dissociates redress and available resources for rehabilitation only, which could, under a strict reading, be interpreted as CAT recognising that limited State resources can impair the full and

immediate development of all means of reparation, save for means of rehabilitation.

The last two means of reparation, satisfaction and guarantees of non-repetition, confirm the holistic dimension of the right to redress. Indeed, some of these measures, in particular guarantees of non-repetition, could be seen as prohibition and prevention measures not directly linked to the needs of a victim of torture or other ill-treatment. However, including them under redress confirms that the suffering of individual victims must bring broader action from the State, from holding perpetrators accountable to broad policy measures to combat the commission of torture and other ill-treatment in future.

Satisfaction

Satisfaction refers to various judicial and non-judicial measures that will contribute to recognising the gross human rights violations committed at the hands of state officials and the harm suffered by the victims. Such measures can be requested by the victim, or independently ordered by the State. One fundamental element of satisfaction is the right of victims to the truth. Indeed, without guaranteed transparency, accountability and honesty from the State, victims will not know what exactly has happened. Without transparency, there can be no accountability.

Most measures of satisfaction are inseparable from the obligations to investigate and prosecute (as provided for in articles 12 and 13), others should be seen as additions to these obligations. For example, measures of satisfaction could entail judicial and administrative sanctions against the perpetrator; the search, recovery, identification and appropriate burial of deceased victims of torture or other ill-treatment; a public apology by the perpetrator or by the State, or commemorations and tributes to the victim.²⁶

Guarantees of non-repetition

Guarantees of non-repetition refer to broader policy measures that the State should put in place to ensure the non-repetition of acts of torture and other ill-treatment in the future. They therefore constitute measures by which States are fulfilling their obligations under article 14 of UNCAT, but also under article 2 of UNCAT.²⁷ For example, guarantees of non-repetition could be achieved by, among other things, strengthening the independence of the judiciary; reinforcing the training of officials; ensuring that security forces and the military are under civilian control; protecting human rights defenders as well as legal and medical professionals who attend to torture victims and who are instrumental in ensuring successful prosecutions; ensuring that independent oversight mechanisms monitor all places of detention, and reviewing legislation contributing to impunity and human rights violations.²⁸

3. Procedural obligations: how to guarantee effective access to means of reparation?

The second part of GC 3 outlines the procedural obligations lying on States to fulfil their obligations under article 14 of UNCAT.

Adopt legislation

GC 3 imposes on States to adopt legislation, and first recalls the fundamental importance of criminalising torture and other ill-treatment contained in article 4 of the UNCAT, returning to the central principle underlying all measures of prohibition and prevention of torture and other ill-treatment.²⁹ GC 3 also highlights the need to adopt legislation that provides victims of torture and other ill-treatment with 'an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible'.³⁰ However, such legislation should ensure that victims are not subject to re-traumatisation when seeking redress.³¹

GC 3 also recommends the adoption of legislation to allow all victims, no matter where the violation took place and what the victim's nationality is, to exercise their right under article 14.³² In effect, this means that foreign victims should be able to access rehabilitation services and file a civil claim for damages in their country of residence. Although GC 3 is silent on the issue, it is difficult to see how CAT intended that a civil claim could be filed against the State of residence, if it bears no responsibility for the acts committed. Therefore, a civil claim should only be filed against the individual perpetrator (and therefore be filed in a country where he or she resides or has assets) or against the State that had jurisdiction over the perpetrator when the violation occurred.

Set up complaints and investigative mechanisms

The second procedural obligation lying on State parties is to set up effective complaints and investigative mechanisms. This reflects the obligations contained in articles 12 and 13 of UNCAT, but also constitutes an essential part of the right to redress, as these mechanisms will allow individual victims to bring the violation they suffered to the attention of police and prosecutorial authorities. Complaints mechanisms should be easily accessible and known to all, including to those deprived of their liberty. Investigations should be conducted promptly, effectively and impartially.³³ As the GC puts it, '[a] State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14'.³⁴

GC 3 also recognises the importance of individual complaints, and of not limiting the right to redress to collective mechanisms.³⁵ Furthermore, GC 3 asserts that civil claims should not be dependent upon successful criminal prosecutions, as is the case in some countries, in particular of civil law tradition. Where the two are interrelated, GC 3 insists that the investigation and prosecution should not be unduly delayed, so as to allow the victim to seek redress swiftly.³⁶

Ensure effective access to mechanisms for obtaining redress

The major hurdle to obtain redress, which will be outlined in the second part of this newsletter, is to set up mechanisms, with a certain level of coordination, to ensure that victims have access to, or can express their opinion and needs, in relation to all five means of reparation outlined in the preceding section.

GC 3 addresses some of the conceptual challenges related to obtaining effective redress. It highlights the importance of providing information on the various means of reparation and their access; of transparency in providing redress; of ensuring non-retaliation against victims and their families when they file a complaint;³⁷ of setting up non-discrimination and well as gender- and child-sensitive programmes when providing reparation; of providing adequate training to all personnel in contact with victims, and of setting up human rights offices within police offices.³⁸

GC 3 does not detail the kind of institution that can or should provide the various means of reparation, which is a challenge that will be discussed in the next newsletter. However, the GC focuses on the importance of making judicial remedies available to victims of torture and other ill-treatment in their search for redress. These judicial mechanisms, established by law, should render final decisions on the victims' claims, and allow the victim to access medical records and other evidence needed to prove that acts of torture and other ill-treatment took place. Finally, States should ensure that sufficient legal aid is available to victims of torture and other ill-treatment in order to allow them to seek redress.³⁹

4. Conclusion

The GC 3 is a welcome and long-awaited clarification on the kind of means of reparation, and the nature of the mechanisms providing an effective remedy, that should be put in place to allow for victims to seek redress, and fundamentally recognise the harm suffered at the hands of state officials. For a variety of reasons, victims are traditionally side-lined in the criminal justice system, and whereas it might be unwise for victims to take the centre stage in criminal proceedings, not providing them with any kind of services or recognition was another extreme which GC 3 begins to address. The South African Torture Bill is one example of a State showing a lack of willingness in including the victim in its fight against gross human rights violations such as torture.

However, many challenges remain in practically implementing the right to redress, in particular in developing countries with many conflicting priorities. The second part of this newsletter will address those.

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Footnotes:

1. Committee against Torture, General Comment No. 3 (2012), 'Implementation of article 14 by State parties', 13 December 2012, CAT/C/GC/3 (GC 3).
2. Article 14 of UNCAT reads as follows:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

3. UN General Assembly, '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', 21 March 2006, A/RES/60/147 (Van Boven and Bassiouni Principles), para 11.

4. 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (Robben Island Guidelines), 2002, Guideline 50.

5. B21-2012.

6. Prevention and Combating of Torture of Persons Bill, B 21-2012, clauses 7 and 8(2)(c). See also CSPRI Submission to the Portfolio Committee on Justice and Constitutional Development on the Prevention and Combating of Torture of Persons Bill B 21-2012, 31 July 2012.

7. The next newsletter will the practical challenges in providing redress to these victims, in particular in the context of developing countries emerging from conflict. This newsletter will also examine the extent to which the Torture Bill complies with the country's obligations under article 14 of UNCAT, with reference to GC 3.

8. GC 3, paras. 2 and 6. See also the Van Boven and Bassiouni Principles, para. 18.

9. GC 3, paras. 5 and 37.

10. Article 1 of UNCAT.

11. GC 3, para. 3.

12. Ibid.

13. GC 3, para. 3 reads that harm includes 'physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention'.

14. CAT had in its past decisions followed the language of the UNCAT with regards to the dependant nature of victims' relatives, and the fact that the victim had to be deceased for its relatives to be entitled to redress: see M. Nowak and E. McArthur (2008) *The United Nations Convention against Torture - A Commentary* Oxford: Oxford University Press at 487 and 488. However, CAT had also recognised that victims' dependents were entitled to more than strict monetary compensation: *O.R., M.M. and M.S. v. Argentina*, CAT Communications 1/1988, 2/1988 and 3/1988, 23 November 1989, para 9 and 10.

15. Committee against Torture, General Comment No. 2, 'Implementation of article 2 by States parties', 24 January 2008, CAT/C/GC/2, para 3.

16. GC 3, para. 6.

17. GC 3, paras. 45 and 46.

18. GC 3, para. 8.

19. Van Boven and Bassiouni Principles, para 19 and GC 3, para.8.

20. GC 3, para. 10.

21. GC 3, para. 9.

22. GC 3, para. 29.

23. GC 3, para. 11.

24. GC 3, paras. 13 and 15.

25. GC 3, paras. 12 and 15.

26. GC 3, paras. 16 and 17.

27. CAT clarified this provision of the UNCAT in its second General Comment, 'Implementation of article 2 by States parties', 24 January 2008, CAT/C/GC/2.

28. GC 3, paras. 18.

29. GC 3, para. 19. The blunt statement that ill-treatment should be criminalised presents many practical challenges, and appears to be a weakness of the GC, but which cannot be examined further here.

30. GC 3, para. 20.

31. GC 3, para. 21.

32. GC 3, para. 22.

33. GC 3, paras. 23 and 25.

34. GC 3, para. 17.

35. GC 3, para. 20.

36. GC 3, para. 27.

37. This is particularly relevant for torture victims, as they might be held in the same custodial setting at the time of the complaint and at the time of the occurrence of the violation; it is therefore of utmost importance that the authority receiving the complaint assesses the risk of retaliation and possibly moves the victim to another custodial setting where safety will be better guaranteed.

38. GC 3, paras 29 to 36.

39. GC 3, paras 5, 20 and 30.