cspri newsletter
CIVIL SOCIETY PRISON REFORM INITIATIVE
Project of the Community Law Centre
CSPRI Newsletter March 2013 Issue No. 43

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?
2/2

Gwen Dereymaeker

CSPRI newsletter No. 42[1] analysed the third General Comment (GC 3) of the UN Committee against Torture (CAT), adopted in December 2012, on the implementation of article 14 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UNCAT).[2] Article 14 places an international obligation on State Parties to provide redress to victims of torture and other ill-treatment, including fair and adequate compensation and as full rehabilitation as possible.[3] A General Comment of this nature is much needed, due to the complexities involved in giving practical application to article 14.

This newsletter examines the practical challenges in implementing GC 3 at a domestic level, in particular in post-conflict developing states.

1. Scope of the right to redress

From the outset, it is key to recall that the duty to provide redress lies on every State party that has ratified the UNCAT. The obligations contained in article 14 have the same value and weight as any other substantive obligation contained in the UNCAT. The content of the obligations contained in article 14 ere outlined in CSPRI newsletter no. 42, and are briefly summarised here.

Redress, as outlined in GC 3, entails two dimensions. Firstly, its substantive dimension refers to the content of the right to redress. The right to redress encompasses five forms of reparation. Each form should be made available by the State to each victim for it to comply with its international obligations under UNCAT. These five forms of reparation are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[4]

Secondly, the procedural dimension of redress refers, primarily, to the types of remedies to be put in place by the State to ensure that victims can effectively access the means of reparation listed above, i.e. by setting up effective judicial and quasi-judicial bodies to look into claims of torture and other ill-treatment, including complaints mechanisms and investigative bodies.[5] Other procedural obligations resting on State parties under article 14 are to adopt legislation and to ensure accessibility of mechanisms for obtaining redress.[6]

This newsletter focuses on the procedural aspect of the right to redress, i.e. the requirement to provide comprehensive remedies at a domestic level to obtain redress.[7] It examines the nature of domestic institutions that could provide effective redress to victims of torture and other ill-treatment, as well as the challenges in providing comprehensive redress. This newsletter briefly examines the extent to which the South African Prevention and Combating of Torture of Persons Bill[8] complies with the country's obligations under article 14 of UNCAT, with reference to GC 3.

2. Challenges in providing redress at a domestic level

a. General challenges in providing effective redress

GC 3 provides some guidance to State Parties on giving effect to the right to redress, and highlights some of the obstacles in obtaining redress.[9] However, GC 3 fails to explicitly outline how each form of reparation can be implemented. Furthermore, it fails to examine some obstacles specific to post-conflict developing countries, a situation that might further hamper the effective realisation of the right to redress. This section highlights some of these challenges.

The primary obstacle often cited by government authorities in fully implementing the right to redress is a lack of financial resources. GC 3 partially dismisses this claim, stating that, in relation to access to rehabilitation, the lack of state resources cannot be an obstacle to effectively realising this form of reparation.[10] However, the lack of state resources is a material obstacle to many jurisdictions, and GC 3 provides limited guidance, except by recommending that civil society organisations seek funding from the UN Voluntary Fund for Victims of Torture,[11] on how States could overcome their lack of state resources. Therefore, one could defend the idea that developing comprehensive rehabilitation services, which will certainly be costly to the State, could be subject to progressive realisation, provided the State develops from the outset a plan on how this right will realised over a certain period of time. Furthermore, singling out rehabilitation from the four other forms of reparation in GC 3 makes it unclear whether CAT intended that ensuring access to the other forms of reparation are subject to available state funds.

A second challenge not addressed in GC 3 is the question of whether or not victims of torture and other ill-treatment should be singled out from other victims of violent crime. At the international level, the Van Boven and Bassiouni Principles[12] echo the forms of reparation outlined in GC 3 for victims of all gross international human rights violations. However, at the domestic level, all victims of violent crime would want to benefit from a comprehensive plan developed by the State to address their need for redress. This said, because the obligation on the state to provide redress to victims of torture clearly stems from the UNCAT (because torture and other ill-treatment can only be committed at the hands or with the knowledge or acquiescence of state officials), it must be seen as more than a mere crime management tool. Although the fact that the State would prioritise the development of redress mechanisms for victims of torture over mechanisms for victims of other violent crime would certainly bear criticism in the eyes of the general population, it should be the case because the State has an international obligation to do so.

A third challenge not outlined in GC 3 emerges from the fact that the historical burden of torture and other ill-treatment, when committed on a mass scale during a conflict, might be addressed through transitional justice mechanisms. However, many countries emerging from conflict retain this legacy of violence, and see further incidents of torture and other ill-treatment taking place after the conflict ended. This then raises two obstacles not addressed in GC 3. Firstly, torture can invariably be committed on a large scale or against individuals in specific incidents. Secondly, and related to this, is the fact that a State would have to deal with violations committed during the conflict and after the conflict. These different contexts might require different answers from the State. In particular, States will often primarily focus on redressing violations committed in conflict before addressing those committed after the conflict. Also, large-scale incidents of violence committed in times of war or peace might bring the State to develop collective reparation schemes, which are not always in line with victims' wishes or needs. Overall, those suffering from specific incidents of torture committed in times of peace run the risk of not being "catered for" at all, signalling that their suffering is less important than that suffered by others because of the context in which it occurred.

A last obstacle not highlighted in GC 3 is the situation where some States have limited skills and capacity to provide assistance to victims of torture, including doctors, psychologists or pro bono lawyers, and are therefore technically unable to provide redress.

The challenges highlighted in this section illustrate why developing comprehensive mechanisms for redress can be extremely complex, and that further research, advocacy, and possibly technical assistance, is needed to conceptualise the realisation of the right to redress, and bring States to comply with their international obligation to provide redress to victims of torture and other ill-treatment.

b. Which remedy for which form of redress?

The following paragraphs examine the types of remedies that could be put in place to respond effectively to each of the five forms of reparation identified in GC 3. The analysis is limited to domestic remedies, and do not examine international and regional judicial mechanisms available.[13]

1. Measures of restitution[14] could be ordered by a court following a complaint by a victim, but will require

the intervention of administrative authorities, independently of a court action. One particular measure of restitution that might be swiftly needed by a detainee having complained of torture is for that person to be moved to another detention facility to prevent intimidation and secondary victimisation. Ideally, this measure of restitution would require prompt intervention by a court or another authority capable of assessing the risk of retaliation and ordering a subsequent transfer, if necessary.

2. Monetary compensation is traditionally ordered to the benefit of an individual victim by a court, following a civil claim for damages. Whereas courts constitute an excellent avenue for those who can access them, accessing monetary compensation only via the courts raise issues of access to justice (examined below) as well as, in some cases, issues of fairness and reasonableness. Indeed, the few victims who are able to access courts might obtain significant amounts of money through the courts. This, however, leaves many victims with nothing. Furthermore, many perpetrators of torture and other ill-treatment are indigent, and not all jurisdictions provide that the State can be held liable for damages for acts of omissions committed by its officials. However, the State should be responsible for compensating victims who have suffered gross human rights violations, such as torture, at the hands of its officials. This said, it should also fall upon the State to recover all or part of the amounts paid to the victim from the perpetrator, so as to demonstrate the individual accountability of the perpetrator.

As part of reconciliation processes, many post-conflict States have set up collective reparation schemes, usually in the form of a compensation fund that have also been available to torture victims. Questions such as who should be entitled to access the fund (or who qualifies), how amounts for compensation are to be determined (assessed on a case-by-case basis or the same amount for everyone), how it is funded (by the State, by individual or institutional donations, or by fines paid either on a general basis or specifically by convicted perpetrators of torture and other ill-treatment) who should run such a fund, are notable challenges faced by previous initiatives to set up such funds. This said, compensation funds might be fairer and more accessible mechanisms than courts. They may not be ideal, but can provide some immediate recognition and relief for the harm suffered.

Compensation funds could also be set up to compensate those who have suffered from torture and other ill-treatment even after the conflict ended. The reason why an "open-ended" compensation fund accessible to all victims of torture and other ill-treatment does not appear to have been set up anywhere in the world probably lies in the fact that the State, funding the fund, would be wary to finance a fund without being able to assess the extent of the its cost in future, as it is unable to assess the extent of the violations to occur. This is indeed one of the major reasons why attempts to set up such an open-ended fund in South Africa have, so far, failed (see below).

3. It is unlikely that a court would order measures of rehabilitation, but institutions providing rehabilitation services, such as medical, psycho-social and legal assistance, should be set up or adequately funded by the State, without it interfering in their work. In many developing countries, rehabilitation services are often the only form of reparation available. However, these services are mostly provided by NGOs who raise their own funds (and would probably prefer not to receive State funding by fear of interference in their work). This places a limitation on their capacity to render services to many victims.

4. Some measures of satisfaction[15] and guarantees of non-repetition[16] can be ordered by courts, but mostly require policy intervention and a broader assessment of the independence and adequacy of the existing security apparatus. These measures can also be ordered at a specific time, by a transitional justice mechanism, following a mass violation such as a conflict. Therefore, a legislature, or another broad oversight mechanism, could ensure, with the required political will, that the necessary measures of satisfaction and guarantees of non-repetition are put in place.

c. Viewing redress holistically

This examination of the nature of the institutions most apt at providing redress highlights the fact that courts are not the only, and not always the most adequate, remedy available to provide redress. However, courts are still presented as the preferred individual remedy available to seek redress, as reflected in GC 3,[17] in the manner in which most victims seek reparation (in particular monetary compensation), and in academic literature.[18]

Courts are indeed currently the best-equipped institution in most countries to provide monetary compensation, which often constitutes one of the primary demands of victims. Looking at existing institutions that can provide the different forms of reparation, courts probably constitute the institution that can potentially best guarantee fair trial rights.[19]

However, there exist many challenges in accessing the formal justice system in developing countries. These relate to the cost and length of proceedings, the location of courts, and the complexity of procedures. If courts constitute the only avenue to obtain monetary compensation and that other forms of reparation are not available at all, it leaves victims without any means to seek redress.

Furthermore, courts constitute the only avenue to try alleged perpetrators of torture and other ill-treatment, which is a measure of satisfaction; courts could constitute a preferred avenue to obtain monetary compensation (despite the many challenges identified earlier in relation to access to justice and to insolvent perpetrators), and courts could order some measures of restitution and of satisfaction. However, courts cannot be seen as the sole avenue to seek redress. They fail to address the needs of victims in a holistic manner, and cannot respond to all forms of reparation comprehensively, for example their inability to fulfil the need for rehabilitation measures or guarantees of non-repetition.

Therefore, alternative mechanisms, which could provide faster means of restitution, monetary compensation to a wider number of victims, adequate rehabilitative services and required means of satisfaction and guarantees of non-repetition, should be explored. Furthermore, in order to ensure that the needs of victims of torture and other ill-treatment are assessed holistically, a central institution could regularly review existing institutions providing reparation, and make recommendations for improvement. This role could be taken up by the executive, the legislature or a human rights commission, or by a newly created dedicated institution.

3. Is the South African Torture Bill compliant with the Republic's international obligations under article 14 of UNCAT?

The last question to be examined in this newsletter is the extent to which the South African Prevention and Combating of Torture of Persons Bill, which is currently being examined by the National Council of Provinces, complies with the requirements of article 14. Will the Bill allow victims of torture and other ill-treatment to obtain redress and to have an enforceable right to 'fair and adequate compensation' and 'the means for as full rehabilitation as possible'?

Unfortunately, the Bill does not cover all the requirements of article 14 of the UNCAT, and even less as understood by CAT in its recently adopted GC 3. Indeed, monetary compensation is the only form of reparation expressly reflected in the Torture Bill. Section 7 of the Bill reads that '[n]othing contained in this Act affects any liability which a person may incur under the common law or any other law'. In addition, section 8(2)(c) of the Bill imposes on the executive to 'cause programmes to be developed in order to… provide assistance and advice to alleged victims of torture'. One must hope that the necessary Regulations will be adopted swiftly after the enactment of the Bill. Furthermore, it is unclear what these programmes will entail. They could include effective services to be provided to victims, or provide an assessment of the range of reparations effectively needed, and available, to victims of torture. But they could also be limited to mere information being made available to victims of torture in parts of the country. Notably, the Bill does not apply to victims of ill-treatment, who would therefore be excluded from the programmes envisaged in the draft legislation.

Therefore, the Torture Bill does not create a new system for victims to access compensation, but confirms the status quo, which is the possibility for victims to file a civil claim for compensation against the alleged perpetrator and/or the relevant Department. However, the challenges identified above in relation to courts being the only available avenue for redress (or, in this case, compensation), and the issue of access to justice, including the typical length of proceedings aimed at obtaining civil damages, would certainly warrant a more in-depth examination of the adequacy of the current system.

An illustration of one of the overall challenges identified above is the tension between providing redress to victims who suffered in times of conflict and after a conflict. In South Africa, a President's Fund was set up to compensate victims who suffered gross human rights violations at the hands of state officials under Apartheid. However, 17 years into democracy and 10 years after the publication of the Final Report of the Truth and Reconciliation Commission, there continues to be major challenges in relation to those who should benefit from the Fund, and the paying out of the compensation that was promised.[20] The unresolved issue of the President's Fund came up during the parliamentary debate on the Torture Bill,[21] indicating that, at a strict political level, it would also be difficult to set up a compensation fund for victims of torture and other ill-treatment, and therefore for South Africa to fully comply with its obligations under article 14 of the UNCAT, as long as the issues surrounding payments to be made from the President's Fund are not resolved.

The Torture Bill also fails to adequately address the need for means of rehabilitation and measures of

restitution, satisfaction and guarantees of non-repetition to be set up. The programmes referred to in section 8(2)(c) of the Torture Bill do not appear to suffice to be able to holistically assess the needs of victims and make recommendations for policy and other systemic changes needed to ensure that individuals no longer suffer from torture and other ill-treatment at the hands of state officials.

Conclusion

The adoption by CAT of GC3 is a welcome step forward in clarifying the nature of the right to redress that victims of torture and other ill-treatment are entitled to under the UNCAT. However, as CSPRI newsletter no. 42 and this newsletter have highlighted, redress remains a complex and technical concept, and there are many challenges in ensuring effective implementation of the right to redress. Furthermore, such implementation requires several measures on the part of the State, from an assessment of existing institutions to setting up several mechanisms that should complement each other in order to serve those that have suffered from torture and other ill-treatment. While this newsletter recalls that States have an international obligation to provide, and while merely criminalising torture, without ensuring that those suffering at the hands of state officials are provided services and remedies, one can also see why, politically, serving this particular (and rather small) category of individuals might not be seen as a priority.

There exist very few examples, if any, of States with mechanisms in place that can be said to fully comply with the requirements of article 14 of the UNCAT, as interpreted by CAT in its GC 3. Unfortunately, GC 3 does not provide the necessary practical guidance for developed and developing States to fully implement article 14 at a domestic level. The risk is that, without practical guidelines, CAT will not have the necessary tools to pressure States into complying with article 14. The upcoming concluding observations adopted by CAT following the examination of state reports will determine the extent to which GC 3 might improve the realities of victims of torture and other ill-treatment. One must hope that, either from concluding observations or from practical guidelines developed by CAT or by other stakeholders, such improvement will take place.

Gwen Dereymaeker is a researcher at CSPRI (gdereymaeker@uwc.ac.za).

Footnotes:
1.The newsletter is available at http://cspri.org.za/publications/newsletter/DecJan%20Newsletter.pdf/download
2. Committee against Torture, General Comment No. 3 (2012), 'Implementation of article 14 by State parties', 13 December 2012, CAT/C/GC/3.
3. 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.
4. CAT/C/GC/3, paras. 2 and 6. See also 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 5. Humanitarian Law', 21 March 2006, A/RES/60/147, para. 18.
5. This highlights, again, the strong relationship between article 14 of UNCAT and other obligations under the Convention, such as, here, the obligations contained in article 12 and 13 of the UNCAT.
6. CAT/C/GC/3, paras. 19 to 22 and 29 to 36.
7. For an analysis of some international remedies available, see S Djajic, "Victims and promise of remedies: International law fairytale gone bad", San Diego Intl L.J. 2007-2008 at 329.
8. B21-2012.
9. CAT/C/GC/3, paras. 37 to 43, and in particular para. 38.
10. CAT/C/GC/3, para. 12.
11. CAT/C/GC/3, para. 44.
12. 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.
13. See for example, S Djajic, "Victims and promise of remedies: International law fairytale gone bad", San Diego Intl L.J. 2007-2008 at 329 and JC Von Bonde, "Victims of crime in international law and constitutional law: Is the state responsible for establishing restitution and state-funded compensation schemes?", SACJ 2010 at 183.
14. Measures of restitution include restoring a person's citizenship, property or employment, which the victim could have lost because of the torture suffered: CAT/C/GC/3, para. 8.
15. Measures of satisfaction can 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; commemorations and tributes to the victim, or other measures aimed at discovering the truth. See CAT/C/GC/3, paras. 16 and 17.
16. 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. CAT/C/GC/3, para. 18.

17. See in particular paragraphs 5 and 20 of CAT/C/GC/3.
18. See the references in footnote 13, as well as T Van Boven, "The need to repair", IJHR 2012, 694 at 695.
19. These include the right to be heard by an independent and impartial tribunal, the right to be heard within a reasonable time, the right to be tried in public, the right to access a lawyer, and the presumption of innocence. Article 7(3) of the UNCAT stipulates that those suspected of having committed, and prosecuted for, acts of torture and other ill-treatment must be afforded those rights.
20. See for example, Mail and Guardian, "Victims' groups mad over reparations", 20 May 2011, available at http://mg.co.za/article/2011-05-20-victims-groups-mad-over-reparations/; ICTJ, "Ignoring cries for justice, South Africa fails victims of Apartheid-era crimes", 7 January 2013, available at http://ictj.org/news/ignoring-cries-justice-south-africa-fails-victims-apartheid-era-crimes and Daily Maverick, "The TRC's unfinished business: Old wounds, new oppressor", 25 March 2013, available at http://www.dailymaverick.co.za/article/2013-03-25-the-trcs-unfinished-business-old-wounds-new-oppressor/#.UVC3P4XhpJN
21. Ms Dene Smuts indicated that full redress had yet to be provided to victims who testified before the Truth and Reconciliation Commission: Portfolio Committee on Justice and Constitutional Development, public hearings on the Prevention and Combating of Torture of Persons Bill, 4 September 2012, summary of proceedings available at http://www.pmg.org.za/report/20120904-prevention-and-combating-torture-persons-bill-b21-2012-public-hearing

---