



## **Submission on the African Commission on Human and Peoples' Rights Zero Draft of the General Comment on the Right to Redress for Victims of Torture or Ill-treatment under Article 5 of the African Charter on Human and Peoples' Rights**

**June 2016**

The SOAS Centre for Human Rights Law, University of London, commends the African Commission on Human and Peoples' Rights (Commission) on the draft General Comment on the Right to Redress for Victims of Torture or Ill-treatment. The General Comment addresses a crucial element of the prohibition of torture. The effective implementation of the right to redress not only provides justice for victims of torture or other ill-treatment but also contributes to the ultimate goal of the absolute prohibition, that is the eradication of torture. We expect the General Comment to make an important contribution both to the effective recognition and implementation of victims' rights in Africa and to the strengthening of the right to reparation for torture worldwide.

This submission has benefited from the contributions of several members of the SOAS Centre for Human Rights Law who have, in their respective field of expertise, worked on key areas pertaining to the right to redress for human rights violations such as torture.<sup>1</sup> It sets out general observations first before commenting on each section of the Zero Draft.

### **General observations:**

The Commission has developed an impressive body of jurisprudence on the prohibition of torture, the procedural right to an effective remedy and the substantive right to reparation for torture or other ill-treatment. This is both under article 5 of the African Charter on Human and Peoples' Rights (Charter) and, more broadly, under article 1 in respect of states' parties general obligations under the Charter. The Zero Draft references some of the jurisprudence, such as in footnotes 13 and 15. Additional references throughout to the Commission's jurisprudence, as well as to that of other courts and bodies which have applied and interpreted the Charter at the national, sub-regional or regional level, would demonstrate the wealth of jurisprudence on which the General Comment is to be based. It would also provide a valuable source of reference in its own right for anyone wishing to obtain a clear understanding of the relevant jurisprudence on the right to redress for torture in the African human rights context.

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<sup>1</sup> Professor Mashood Baderin, Professor Fareda Banda, Dr. Lutz Oette and Professor Lynn Welchman.

The Basic Principles 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 (Basic Principles), adopted by the United Nations (UN) General Assembly in 2005,<sup>2</sup> constitute an important

articulation of applicable principles. The Basic Principles have been referred to both in general comments, such as by the UN Committee against Torture,<sup>3</sup> and in jurisprudence, such as recently by the African Court on Human and Peoples' Rights.<sup>4</sup> We therefore suggest taking inspiration from the Basic Principles throughout the General Comment, and to draw upon and acknowledge them where appropriate.

## **Preface**

The General Comment is meant to “provide states parties and other stakeholders ... [with] a useful guide to the implementation of the right to redress in law and practice.” It focuses on the rights and obligations under the Charter, while also making repeated reference to the structural factors impacting the right to redress. In addition to this, mentioning the realities of torture and its adverse impact on victims, families and communities, in Africa and beyond, would serve as important reminder of the seriousness of the violation. It would also place victims' experiences at the heart of the General Comment, and thereby highlight the importance of redress. As emphasised by the UN Special Rapporteur on Torture: “it is crucial to identify the many aspects of the impact of torture on its victims in order to better appraise and address their needs, in particular from a medico-psychological point of view, and to make recommendations that would ensure the most adequate and effective reparation.”<sup>5</sup> In addition, we suggest that the Commission underscores the centrality of redress for the effective implementation of the prohibition of torture on the African continent.

### **I. Introduction**

The introduction emphasises that “[t]he right to redress is a fundamental right under the Charter.” The use of the term “fundamental” indicates that the right to redress is non-derogable. The Commission has clarified in its jurisprudence that the Charter obligations are not subject to derogation, which applies equally to the right to redress.<sup>6</sup> We suggest that the Commission recalls this interpretation in the General Comment, and draws attention to the importance of the right to redress for the effective protection of human rights generally.

The meaning and scope of the term “redress” is set out in paragraph 11. We suggest that this paragraph be moved up to clarify the Commission's understanding of the term when it is first used (in paragraph 1 or 2).

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<sup>2</sup> Resolution 60/147 adopted on 16 December 2005.

<sup>3</sup> Committee against Torture, General Comment No.3; Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3, 19 November 2012, para. 6.

<sup>4</sup> See e.g. In the Matter of Beneficiaries of Late Norbert Zongo and others v. Burkina Faso; Application No. 013/2011, African Court on Human and Peoples' Rights, Judgment on Reparations, 5 June 2015, para. 47 and p.21, fn.23.

<sup>5</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 44.

<sup>6</sup> Article 19 v Eritrea, Communication 275/03 (2007), para. 87.

## II. Purpose

The right to redress for torture and other ill-treatment serves a number of purposes. As stated already by the Permanent Court of International Justice in the *Chorzów Factory* case, reparation as a general legal concept seeks to restore the situation as it existed before the breach.<sup>7</sup> In the case of torture, the situation prior to the breach cannot be restored due to the nature of the violation and its lasting physical and/or psychological consequences. Reparation can thus be seen as having the dual objective of providing justice to victims in terms of undoing, as much as possible, the wrong done and reinforcing the prohibition of torture.<sup>8</sup>

Redress has multiple dimensions for victims, which are also reflected in the various forms of reparation that have been recognised in international law (see VII of the Zero Draft). These forms of reparation address the various interests and needs of victims. They are critical in enabling victims to restore their dignity and to rebuild their lives.<sup>9</sup> In addition to recognising victims as rights holders,<sup>10</sup> reparation can also signal societal recognition that individuals or communities suffered wrongs, serve to restore civic trust and express solidarity with the victims.<sup>11</sup> Healing, mentioned in paragraph 11, as the overarching goal of forms of reparation, is an important outcome to aim for, particularly as part of torture survivors' rehabilitation.<sup>12</sup> It forms part of the multiple goals that redress serves.

Impunity<sup>13</sup> is widely seen as one of the key factors perpetuating a climate that facilitates the commission of torture.<sup>14</sup> Redress entails a series of adverse consequences, or “costs”, for those responsible, that is both the individual perpetrators and the state (party to the Charter). The provision of adequate forms of reparation signals that a legal system condemns torture and does not tolerate impunity, and is therefore more likely to deter further acts of torture. By this token, effective redress serves the ultimate goal of the prohibition, namely to prevent torture. The preventive component of redress is mentioned in paragraph 12, which addresses the related but broader point of the need to tackle “systemic and structural inequalities”. We suggest setting out a holistic understanding of redress that reflects and emphasises its multiple objectives.

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<sup>7</sup> *The Factory at Chorzów*, (Merits), Judgment of 13 September 1928, PCIJ, Series A, No.17, p.47.

<sup>8</sup> See in respect of article 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 25.

<sup>9</sup> CAT, General Comment No.3, above note 3, para. 4, and Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/4/33, 15 January 2007, para. 64.

<sup>10</sup> See in the transitional justice context, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/69/518, 14 October 2014, para. 9.

<sup>11</sup> See on the recognition of, and respect for victims, Pablo de Greiff, ‘Justice and Reparations’, in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2005), 22-30.

<sup>12</sup> See on “healing bodies, minds and social ties”, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/65/273, 10 August 2010, paras. 63-64.

<sup>13</sup> Impunity has been defined as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to victims”. See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, p.6.

<sup>14</sup> Report of Special Rapporteur on Torture, UN Doc. A/65/273, above note 12, paras. 35-60.

Paragraph 10 concerns the question of adequate redress for torture in situations of conflict and transitional settings which is of particular relevance in the African context. The last sentence of the paragraph rightly highlights the need to consider a range of reparation measures. However, the phrase “more feasible forms of redress” may be read to imply that financial compensation is less, or least, feasible. While providing adequate forms of compensation in a conflict or post-conflict situation undoubtedly constitutes a challenge, the phrase used is liable to misinterpretations. We suggest clarifying this point here (it is explicitly stated in paragraph 36 of the Zero Draft) so as not to give states parties the false impression that financial compensation is not required where it is not considered feasible.

### **III. Place of Victim**

The increasing recognition of the rights of victims of serious human rights violations has been one of the most significant developments in the field of international human rights law.<sup>15</sup> Victims have not only been recognised as rights-holders but as key participants of justice processes, which are ultimately also for the benefit of victims.<sup>16</sup> Against this background, section III rightly places victims at the heart of the redress process.

A central question for the right to redress and its implementation is: who qualifies as a victim? According to paragraph 17, the identification of victims “should be guided by the ‘harm-based approach’”. The harm based approach appears to endorse the understanding of “victim” set out in the Basic Principles and the Committee against Torture’s General Comment 3.<sup>17</sup> If so, it would be useful to state more explicitly what is meant by the “harms-based approach” in order to provide states parties with detailed guidance on this crucial aspect of the right to redress. Paragraph 17 further states that “a person or community should be considered a victim with a right to reparation where there are reasonable grounds to believe that such person or community has been subjected to torture or ill-treatment.” We suggest that it also expressly recognises, in line with international jurisprudence, that indirect victims, i.e. individuals who suffered harm as a result of a violation of someone close to them, such as the family of someone who dies as a result of torture, have a right to redress.<sup>18</sup>

The Zero Draft adopts the approach of recognising “the community” as a victim of the prohibition of torture or other ill-treatment, which is an important step of acknowledging the collective dimension of torture. This approach raises a series of questions that merit further consideration. Does “the community” refer to a group of persons who suffer a violation of individual rights on a large scale and/or to the violation of collective rights? Further, who is or are the right-holder(s) and what are appropriate modalities for reparation in this context?<sup>19</sup> In view of these fundamental questions, we suggest clarifying

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<sup>15</sup> See M. Cherif Bassiouni, ‘International Recognition of Victims’ Rights’, *Human Rights Law Review* (2006) 2, 203-79.

<sup>16</sup> See in particular article 68 (3) of the ICC Rome Statute. See on the internal rules and decisions of the Extraordinary Chambers in the Courts of Cambodia (ECCC), discussed in Mahdev Mohan, ‘The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal’, *International Criminal Law Review* (2009) 9, 1-43. See also CAT, General Comment No.3, above note 3, para. 4.

<sup>17</sup> Basic Principles, para. 8, and CAT, General Comment No.3, above note 3, para. 3.

<sup>18</sup> CAT, General Comment No.3, above note 3, para. 3.

<sup>19</sup> See overview of jurisprudence by regional and international human rights treaty bodies and other tribunals in Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Germain Katanga, Redress Trust observations pursuant to Article 75 of the Statute, ICC-01/04-01/07, 15 May 2015, paras. 16-40.

in more detail what is meant by community, how such community (and its members) would be able to exercise its right to redress and what would constitute appropriate modalities for reparation.

Section III affirms the need for a victim-centred approach to redress. Paragraph 15 sets out a fundamental principle in this regard by emphasising that victims “must be enabled to play an active and participatory role in the process of obtaining redress and they must be provided with a sense of ownership.” We suggest providing further guidance to states parties on this point, including by setting out what rights and support mechanisms are required to enable victims to play a participatory role, and what is meant by a sense of ownership.

Paragraph 17 exhorts states parties “to put in place a framework that allows for the adequate documentation of torture and ill-treatment”. The importance of adequate documentation, to prove the commission of torture and its physical and psychological consequences, and to facilitate prosecution and “the need for full reparation and redress from the State”<sup>20</sup> is well established. We suggest addressing the issue of documentation in more detail in a separate paragraph, with particular reference to the Istanbul Protocol, which sets out recognised minimum standards of documentation and investigation of torture or other ill-treatment.<sup>21</sup> This includes the need to adequately document the psychological consequences of torture, which is often lacking in the practice of states.<sup>22</sup>

#### **IV. Vulnerable groups [alternative suggestion: Vulnerable Individuals and Groups]**

The purpose of this section appears to be twofold. It addresses both the heightened challenges faced by vulnerable individuals and members of vulnerable groups to access redress and the transformative nature of reparation to counter vulnerability.<sup>23</sup> We suggest exploring further how to link vulnerability to a victim-centred approach, that is, how does vulnerability influence the process, and the framework and specific measures that states parties need to put in place?

The concept of vulnerability, which is central to this section, is not defined or elaborated upon. Instead, a list of members of vulnerable groups is set out in paragraph 22. We suggest considering the notion of vulnerability further, particularly by stressing the heightened risk of being exposed to torture or other ill-treatment, and to impunity in the form of lack of redress.

The first sentence of paragraph 20 is ambiguous. Are all victims of torture and other ill-treatment vulnerable because they have been tortured, that is torture is in and of itself proof of vulnerability, or are they vulnerable to further rights violations because they have been tortured, including lack of redress? The last sentence of the paragraph indicates the understanding of the Commission on this point and we suggest that the first sentence of the paragraph is rephrased or put into context to avoid any ambiguity.

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<sup>20</sup> Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), submitted to the UN High Commissioner for Human Rights, 9 August 1999, Annex I, 1 (c).

<sup>21</sup> Ibid. See on the “Role of forensic and medical sciences in the investigation and prevention of torture and other ill-treatment”, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/69/387, 23 September 2014, paras. 19-57.

<sup>22</sup> Interim report, *ibid.*, para. 52.

<sup>23</sup> The latter is also addressed in paragraph 12, section II.

With regard to the list set out in paragraph 22, other groups of persons in situations of vulnerability recognised in UN special procedure mandates include minorities and persons living in extreme poverty.<sup>24</sup> We suggest that persons belonging to these groups be included in the list in paragraph 22.

In paragraph 23, we suggest stressing the importance of states parties guaranteeing the exercise of all rights guaranteed in the African Charter, as well as other African human rights treaties to which they are party.<sup>25</sup> This is both as a means of addressing structural or systemic inequalities and of empowering groups of persons in a situation of vulnerability.

## **V. Prompt, fair, accessible and effective redress**

The African Commission and other human rights treaty bodies have developed a growing body of jurisprudence on what constitute effective remedies for human rights violations such as torture. This includes examining the nature of remedies, for example that the availability of compensation is insufficient in the absence of criminal accountability,<sup>26</sup> and the conditions for their effective exercise.

The right to redress applies to all victims of torture. We suggest reaffirming this principle, and stressing that effective access to justice includes the right of victims who have been tortured in third countries to take legal action before the courts of the state party concerned.<sup>27</sup>

Human rights treaty bodies have recognised that victims of serious violations such as torture must have access to judicial remedies that guarantee effective redress.<sup>28</sup> This is without prejudice to making available other non-judicial remedies, including reparation schemes for mass violations following the end of conflict and/or a repressive regime. These remedies play an important role but should not exclude victims' recourse to judicial remedies.<sup>29</sup>

The adequate recognition of the right to redress in domestic legislation, both in constitutional law and statutory law, requires that the effectiveness of the right is not undermined by legal barriers to justice. Amnesties, immunities, and statutes of limitations are such barriers that, as recognised by the African Commission and other human rights treaty bodies, frustrate the right to an effective remedy.<sup>30</sup>

We suggest that the Commission recall its jurisprudence on the nature of effective remedies, explicitly set out the nature of remedies to be provided, both judicial and non-judicial, and provide guidance to states parties on the need to remove or not to erect legal barriers to effective access to justice.

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<sup>24</sup> See UN Special Rapporteur on minority issues and UN Special Rapporteur on extreme poverty and human rights.

<sup>25</sup> This includes the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

<sup>26</sup> *Guridi v. Spain*, UN Doc. CAT/C/34/D/212/2002 (17 May 2005), para. 6.7.

<sup>27</sup> CAT, General Comment 3, above note 3, para. 22.

<sup>28</sup> *Ibid.*, paras. 20 and 30, as well as *Vicente et al. v. Colombia*, UN Doc. CCPR/C/60/D/612/1995 (29 July 1997), para. 5.2.

<sup>29</sup> CAT, General Comment 3, above note 3, para. 20.

<sup>30</sup> See particularly *Zimbabwe Human Rights Forum v. Zimbabwe* (2006), paras. 188-215. See further CAT, General Comment 3, above note 3, paras. 40-42.

## **VI. Protection against intimidation, retaliation and reprisals**

Section VI affirms the centrality of protection as a precondition for the effective exercise of the right to redress. This includes compliance with provisional/interim measures, and we suggest that the list in paragraph 33 be broadened to include any other relevant bodies (including, for example, the African Court on Human and Peoples' Rights).

## **VII. Forms of reparation**

The forms of reparation give substance to the right to redress. State practice is frequently deficient when it comes to discharging the state's obligation to provide adequate reparation.<sup>31</sup> Providing detailed guidance to states parties on what constitutes adequate reparation and what measures to take is therefore of cardinal importance when stipulating states parties' obligations under article 5 of the Charter.

The notion of healing set out in paragraph 35 is an important objective of reparation. However, an over-emphasis on healing may, inadvertently, downplay the justice dimension of reparation. This includes its goal of guaranteeing non-repetition and preventing violations such as torture. In that regard, it is not self-evident how healing can help "in breaking the cycle of violence" at various levels, particularly if the violence takes the form of systematic or systemic torture and if the enabling framework, such as lack of respect for the rule of law and impunity, remain in place. We suggest clarifying this point to highlight that redress has several complementary objectives.

In relation to the forms of reparation discussed in paragraphs 37-41, we suggest reflecting on the following points when revising the draft.

The violation of torture itself is not amenable to restitution (paragraph 37) because of its life-changing nature. It would be useful to clarify that the causes and consequences of torture or other prohibited ill-treatment mentioned in the paragraph may in and of themselves constitute separate violations that trigger state responsibility under the African Charter to provide restitution.

Compensation (paragraph 38) is an important form of reparation on which specific guidance would be particularly helpful. This includes setting out in more detail the types of damages, including what heads of damage fall within the scope of pecuniary and non-pecuniary harm. In this context, the General Comment provides an opportunity to draw attention to the fact that states have repeatedly failed to provide adequate compensation even where recommended by the African Commission, and urge them to do so to discharge their obligations under article 5 of the Charter.

A number of important principles apply to compensation, such as that the provision of compensation for torture should not be subject to the status, identity and/or the prior conduct of the victim.<sup>32</sup> In addition,

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<sup>31</sup> See reference to the "scandalously poor level of compliance with national and international obligations concerning reparations", Report of the Special Rapporteur, A/69/518, above note 10, para. 80.

<sup>32</sup> Some national systems apply the rule that no one should benefit from a situation that he or she has brought about but such a qualification or restriction of the right to redress is not mentioned in either the Basic Principles or CAT, General Comment 3, and cannot apply to the absolute prohibition of torture.

while responsibility rests with the state party, the state retains the right to recover any compensation paid from the individual(s) held responsible for the act(s) of torture or other ill-treatment.<sup>33</sup>

The right to rehabilitation for victims of torture (paragraph 39) has been neglected, with states having limited if any services in place, and independent rehabilitation centres or other organisations frequently suffering from a lack of funding and/or other constraints.<sup>34</sup> In view of this reality, it is critical to provide states parties with specific guidance on the meaning of rehabilitation, and indicate how states parties should and could provide rehabilitation services for torture victims. The Committee against Torture's General Comment 3 provides valuable guidance in this regard.<sup>35</sup>

Satisfaction (paragraph 40) is an important element of reparation, which merits further elaboration.<sup>36</sup> This is both with regards to the various types of satisfaction, including the right to truth, apologies, and commemoration, and the function that it serves, particularly acknowledgment and accountability, in combating impunity.

Guarantees of non-repetition (paragraph 41) constitute a critical component of reparation that is closely linked to prevention, and states parties' obligations under article 1 of the Charter.<sup>37</sup> We suggest providing further guidance on what legislative, institutional and other measures states parties need to take to discharge their obligations in this regard, with particular reference to the Commission's jurisprudence

### **VIII. Redress for collective harm**

There has been a growing appreciation of the collective dimension of harm, and the need for reparation to reflect this.<sup>38</sup> Translating collective harm into adequate reparation processes poses considerable challenges;<sup>39</sup> as the Commission rightly highlights, this includes the risk that individual victims may not be fully recognised in any collective processes. Paragraph 46 addresses an issue of recurring concern, namely that states parties have described the taking of measures which effectively concern their primary obligations, that is to respect, protect and fulfil economic, social and cultural rights, as a form of reparation. This is frequently claimed even though measures taken lack victim-specific components.<sup>40</sup> In that regard, we suggest that the Commission provide further guidance to states parties on how collective measures, such as the building of a hospital, can have a reparation component, such as by providing priority access or specific rehabilitation programmes for victims of torture.

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<sup>33</sup> Basic Principles, para. 15.

<sup>34</sup> Report of the Special Rapporteur on Torture, A/65/273, above note 12, paras. 61-67, and IRCT, Conference Report: The Right to Rehabilitation for Torture Victims (Beirut/Lebanon, 27/28 June 2013).

<sup>35</sup> CAT, General Comment 3, above note 3, paras. 11-15.

<sup>36</sup> Ibid., paras. 16, 17, and Basic Principles, para. 22.

<sup>37</sup> CAT, General Comment 3, above note 3, para. 18 and Basic Principles, para. 23. See for a detailed analysis, with a particular focus on transitional justice contexts, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/30/42, 7 September 2015, paras. 14-121.

<sup>38</sup> See Situation in the DRC, above note 19.

<sup>39</sup> Report of the Special Rapporteur, A/69/518, above note 10, paras. 38-42.

<sup>40</sup> Ibid., paras. 59-61.

## IX. Sexual Violence

Sexual violence is recognised as a violation of the prohibition of torture and other ill-treatment, as well as the right to non-discrimination.<sup>41</sup> It is not the only form of gender-based violence that has been recognised as falling within the scope of the prohibition. We therefore suggest broadening the section by making explicit reference to other forms of gender-based violations, particularly ill-treatment of women in detention,<sup>42</sup> the denial of reproductive rights<sup>43</sup> as well as human trafficking, domestic violence, and other harmful practices such as female genital mutilation<sup>44</sup> and forced marriage.<sup>45</sup>

These violations are frequently met with, and perpetuated by, impunity in the context of structural conditions that are detrimental to women's rights. Reparation for victims of gender-based violence in violation of article 5 of the Charter plays an important role in breaking the cycle of impunity and disempowerment. It therefore, as recognised in the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, needs to move beyond the specific violation and equally seek to be transformative so as to strengthen its preventive function.<sup>46</sup> Victims of sexual and other gender-based violence face particular barriers to access effective remedies, which are often a reflection of their low social status, especially in situations of intersectional discrimination, and the lower status accorded to women in the country in question.<sup>47</sup>

In order to provide access to effective remedies for victims of sexual violence (and other forms of gender-based violence as applicable), states parties need to adopt a series of specific measures that counter factors preventing victims from complaining or taking other legal action. This includes measures such as adequate criminalisation of sexual violence; providing adequate support mechanisms, including in relation to the socio-economic impact of violence; ensuring adequate documentation for victims of sexual violence (Istanbul Protocol and the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict);<sup>48</sup> presence of trained female staff in the police, judiciary and other institutions; accessible and effective complaints procedures; protection of complainants, including from being subject to inadequate questions based on stereotyping; as well as broader changes to the system,

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<sup>41</sup> See further on “[g]ender perspectives on torture and other cruel, inhuman and degrading treatment or punishment”, Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, UN Doc. A/HRC/31/57, 5 January 2016, paras. 51-53.

<sup>42</sup> *Ibid.*, paras. 16-39.

<sup>43</sup> Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Manfred Nowak, UN Doc. UN Doc. A/HRC/7/3, 15 January 2008, paras. 37-39.

<sup>44</sup> UN Doc. A/HRC/7/3, *ibid.*, paras. 44-58 and UN Doc. A/HRC/31/57, above note 41, paras. 40-50, 54-64. See also Committee on the Rights of the Child, General Comment 13 (2011): The Right of the Child to be free from all forms of violence, UN Doc. CRC/C/GC/13, 18 April 2011, para. 29 (b).

<sup>45</sup> CRC, *ibid.*, paras. 25(d) and 29 (e). See further CEDAW and CRC, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014.

<sup>46</sup> UN Doc. A/HRC/7/3, above note 43, paras. 44-58, and UN Doc. A/HRC/31/57, *ibid.* para. 66, with explicit reference to the Nairobi Declaration and to the judgment of the Inter-American Court of Human Rights of 16 November 2009, Case of González et al. (“Cotton Field”) v. Mexico.

<sup>47</sup> See on intersectional discrimination, Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc. A/HRC/17/26, 2 May 2011, and UN Doc. A/66/215, 1 August 2011, paras. 43-46

<sup>48</sup> See Istanbul Protocol, above note 20, and the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law (June 2014), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319054/PSVI\\_protocol\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf)

such as having monitoring bodies in place, which are aimed at effectively combating sexual violence and its underlying causes,<sup>49</sup> including in the context of armed conflict.<sup>50</sup> Reparation for sexual violence and other gender-based violations constituting torture or other ill-treatment has to be gender-sensitive. This entails adopting measures that respond to the specific harms, providing adequate forms of rehabilitation,<sup>51</sup> and countering the stigmatisation, marginalisation and silencing that are both a cause and consequence of such violations.<sup>52</sup> Effective redress and prevention require a holistic approach that addresses challenges of access to justice faced by women and tackles systemic discrimination.<sup>53</sup> In the African context, the acceptance and effective implementation of the Maputo Protocol constitutes an important complementary means to this end, and we suggest that the Commission makes this link explicit.

In view of these considerations, we suggest setting out in more detail the types of measures to be taken by states parties. This is both with a view to countering stigmatisation and marginalisation, and to helping victims of sexual violence access effective remedies and obtain adequate forms of reparation.

Section IX rightly underscores that sexual violence may also be committed against men and boys, as well as LGBT persons. We suggest that the Commission broadens the latter category to include intersex persons (LGBTI), and recalls its 2014 resolution 275 on “Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.”

## **X. Redress in the context of armed conflict**

The right to reparation for serious violations of humanitarian law has been widely recognised.<sup>54</sup> This applies particularly to the prohibition of torture and other ill-treatment, which, as recalled in the Zero Draft, is absolute under international human rights law and “well established under International Humanitarian Law”. This is complemented by developments in international criminal law where several statutes, tribunals and national legal systems recognise reparation for victims of international crimes, which either directly relate to armed conflict (war crimes) or frequently have a close nexus to armed conflict.<sup>55</sup> Torture is a recognised element of crimes against humanity and war crimes, and may also form part of the *actus reus* of genocide.<sup>56</sup> We suggest referring to these developments while noting that international criminal law addresses individual, rather than state responsibility.

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<sup>49</sup> UN Docs. A/HRC/7/3, above note 43, paras. 61-64; A/HRC/31/57, above note 41, para. 67.

<sup>50</sup> CEDAW, General recommendation no.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.38.

<sup>51</sup> See e.g. CEDAW and CRC, Joint general recommendation No.31, above note 45, para. 52.

<sup>52</sup> UN Doc. A/HRC/31/57, above note 41, para. 66.

<sup>53</sup> See in particular article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and further, Committee on the Elimination of All Forms of Discrimination against Women, General recommendation No. 33 on women's access to justice, UN Doc. CEDAW/C/GC/33, 3 August 2015.

<sup>54</sup> See Basic Principles, particularly para. 3, and, further Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012).

<sup>55</sup> See in particular articles 75 and 79 of the ICC Rome Statute. See further Carla Ferstman, Mariana Goetz, and Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009) and Luke Moffett, *Justice for victims before the International Criminal Court* (Routledge, 2014).

<sup>56</sup> See recognition in articles 28A to 28D of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

The right to redress for torture or other ill-treatment in an armed conflict is of particular importance considering that violations are often widespread and that victims have limited opportunities to avail themselves of effective avenues to seek redress. Armed conflict and mass violations frequently render ordinary avenues for redress unavailable or ineffective, as has also been recognised in the Commission’s jurisprudence on massive violations.<sup>57</sup> In light of these realities, we suggest setting out in more detail, in paragraph 53, the specific measures that states parties should take to provide redress, such as provision of interim reparation and special rehabilitation measures.

We suggest revisiting the terminology used in paragraph 54, which refers to non-state security forces rather than the commonly used term non-state armed groups.

The responsibility of states parties for violations of article 5 in the context of armed conflict, referred to in the last sentence of paragraph 55, is central to section X, and we suggest moving it to the beginning of the section to locate it in a more prominent place.

## **XI. Redress and transitional justice**

We welcome the reading of Article 4(o) of the AU Constitutive Act according to which the transitional justice goals listed in paragraph 56 are among the principles governing the African Union. We note that the notion of transitional justice has prompted considerable debate but has equally been formally recognised, particularly by the UN Human Rights Council.<sup>58</sup> We therefore suggest that the Zero Draft sets out more clearly on which basis it adopts its understanding of transitional justice, and also refers (in paragraph 56) to reparation and guarantees of non-repetition (which are mentioned in paragraph 57) as goals of transitional justice.

Several states, in Africa and elsewhere, have contemplated the establishment of, or implemented reparation programmes for mass violations, including torture.<sup>59</sup> Such mechanisms raise a series of challenges, including: eligibility; evidentiary requirements; timelines; non-discrimination; forms of reparation, including quantum of compensation; nature of implementing bodies and decision-making; and their relationship with judicial proceedings, particularly whether availability of reparation programmes may exclude recourse to courts.<sup>60</sup> We suggest addressing this issue in a separate paragraph to provide states parties with guidance on the implementation of reparation programmes.

The processes mentioned in the last sentence of paragraph 57, such as truth seeking and reforms, fall within the scope of the broad understanding of “reparation” (see VII of the Zero Draft). We therefore suggest replacing the term “reparation” with a more specific term, such as “compensation for victims” if that is the intended meaning.

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<sup>57</sup> See e.g. Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan, Communication 279/03 and 296/05 (2009), para. 102.

<sup>58</sup> See for developments resolution adopted by the UN Human Rights Council, Human Rights and Transitional Justice, UN Doc. A/HRC/RES/21/15, 11 October 2012. See also the mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/RES/18/7, 13 October 2011.

<sup>59</sup> For example in Ghana, Morocco, Sierra Leone, South Africa, and Tunisia.

<sup>60</sup> Report of Special Rapporteur, A/69/518, above note 10, paras. 19-80.

Truth-seeking has become an important component of transitional justice processes and the right to truth has been recognised by the UN Human Rights Council and in the jurisprudence of human rights treaty bodies.<sup>61</sup> Paragraph 58 underscores the importance of the right to truth, which should be equally highlighted at VII, paragraph 40, considering that the right to truth applies equally at all times, including outside a transitional justice context. We further suggest that freedom of information acts are explicitly mentioned as one of the legislative measures that facilitate truth seeking and public accountability.

Paragraph 60 uses the term “structural lapses” that “allowed for the perpetuation of torture and other ill-treatment”. The terminology lends itself to being understood as referring to negligence rather than systemic causes for the perpetuation of torture, and may therefore inadvertently downplay the responsibility of states for such structural factors. We suggest using the term “structural conditions” instead, which captures both possibilities.

## **XII. Non-state actors**

Various non-state actors have been responsible for serious abuses, including torture or other ill-treatment, which may amount to international crimes and violations of international humanitarian law.<sup>62</sup> States parties may be responsible for torture or other ill-treatment committed by non-state actors, either where the state is complicit, or where the state fails in its positive obligations.<sup>63</sup> We suggest that the General Comment clearly stipulates the obligation of states parties to provide redress in relation to torture or other ill-treatment by non-state actors in these situations.

Considering their mandate, it needs to be clarified how National Preventive Mechanisms, mentioned in paragraph 64, would act as “agents of redress”. The reference to bodies and their mandate applies to responses to torture or other ill-treatment by both state and non-state actors. We suggest that reference to such bodies be made in section XIII as one of the measures to be taken by states parties to implement the General Comment and discharge their obligations under the Charter.

## **XIII. Implementation of the General Comment**

Paragraph 66 sets out an important system which, if adequately implemented, would contribute to enhancing transparency and awareness. We suggest providing states parties with further guidance on the modalities of such a system. It should consist of regular reporting and, in terms of evaluation, include a

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<sup>61</sup> See Basic Principles, para. 24, Human Rights Council resolution 21/7, Right to the truth, UN Doc. A/HRC/RES/21/7, 10 October 2012, and UN General Assembly resolution 68/165, Right to the truth, UN Doc. A/RES/68/165, 21 January 2014; article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance (2006); General Comment on the Right to Truth in Relation to Enforced Disappearances, Report of the Working Group on Enforced and Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2011, para. 39, and *Anzualdo Castro v. Peru*, (Preliminary Objection, Merits, Reparations and Costs), Judgment of 22 September 2009, Ser. C No. 202, para. 113, *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. no. 39630/09, European Court of Human Rights, Judgment of 13 December 2012, Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller.

<sup>62</sup> See REDRESS, *Not only the State: Torture by non-state actors* (REDRESS, 2007), and discussion in Manfred Nowak, ‘Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment’ in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014), 387-409.

<sup>63</sup> CAT, General Comment 2, above note.8, para. 18. See further on the notion of complicity, Sarah Fulton, ‘Cooperating with the enemy of mankind: can states simply turn a blind eye to torture’ *The International Journal of Human Rights*, (2012) 16(5), 773-795.

regular review of what measures need to be taken to strengthen victims' right to redress, including rehabilitation.