



## VICTIMS OF TORTURE AND ACCESS TO JUSTICE

### *A Primer<sup>1</sup>*

This Primer was written by the REDRESS TRUST as Part of the ***Prevention through Documentation Project***, an initiative of the International Rehabilitation Council for Torture Victims (IRCT), the World Medical Association (WMA), the Human Rights Foundation of Turkey (HRFT), and Physicians for Human Rights USA (PHR USA)



**For further information on this primer, please contact REDRESS at:**

87 Vauxhall Walk, London SE11 5HJ

Tel: +44 (0)20 7793 1777 Fax: +44 (0)20 7793 1719

[info@redress.org](mailto:info@redress.org) (general correspondence)

---

<sup>1</sup> This document was researched and written by REDRESS [www.redress.org]

## 1. Introduction

Traditionally, the rights and interests of victims of torture have largely been ignored in national and international law.<sup>2</sup> Victims were largely seen as a means to serve the prosecution needs of the State, in particular to provide information that a crime has been committed, and help to identify the perpetrator(s) and secure evidence.<sup>3</sup> They were often effectively left out of the process and far too little was done to ensure that they were not alienated and further traumatised. Where the perpetrator(s) were tried, victims often felt to be on the margins, not having the opportunity to present their views and concerns in proceedings.<sup>4</sup>

However, in the past 30 years there has been an increased focus on the victims of international violations, including torture.<sup>5</sup> Two UN instruments in particular address the right to reparation from a victim-based perspective, the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (*1985 Declaration*), and the more recent UN 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 (*Basic Principles*).<sup>6</sup>

### Definition of “victim”<sup>7</sup>

Based on the *1985 Declaration*, Section V of the *Basic Principles* defines “victims” as:

“... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

## 2. Victims’ rights and treatment

The *Basic Principles* focus on the standards to be applied to the most serious violations, such as torture, and the right to an effective remedy and adequate forms of reparation for any breach of human rights or international law.<sup>8</sup>

The *Basic Principles* recognise that victims are entitled to:

---

<sup>2</sup> See Gabriela Echeverria, *Redressing torture: a genealogy of remedies and enforcement*, Journal on Rehabilitation of Torture Victims and Prevention of Torture, Volume 16, No. 3, 2006, p.152.

<sup>3</sup> Liberty, *The Rights of Crime Victims: A Manifesto for Better Treatment of Victims in the Criminal Justice System*, February 2003, p.6.

<sup>4</sup> UNODCCP, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1999 p.1, at <http://www.uncjin.org/Standards/9857854.pdf>

<sup>5</sup> For example, Art 14 UNCAT guarantees the rights of torture victims to obtain reparation, including redress, fair and adequate compensation and the means for as full rehabilitation as possible. The Statute of the International Criminal Court also guarantees victims’ right to protection, to participate in proceedings and to apply for reparation, see in particular Articles 68 (1), 68 (3), 75 and 79 of the Rome Statute.

<sup>6</sup> For an in-depth discussion of the *Basic Principles* see REDRESS, *Implementing Victims’ Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, March 2006, available at <http://www.redress.org/publications/Reparation%20Principles.pdf>

<sup>7</sup> See *ibid.*, pp.15-19.

<sup>8</sup> Principle 26 of the *Basic Principles*.

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered; and
- (c) Access to relevant information concerning violations and reparation mechanisms.<sup>9</sup>

Reparation consists of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>10</sup>

While exercising their right to an effective remedy, it is important that victims are not subjected to treatment which may cause “secondary victimisation”. This refers to the victimisation that occurs, not as a direct result of the criminal act, but through the response of institutions and individuals to the victim, such as the conduct by police, prosecution or the judiciary, or the nature of the whole process of investigation and trial.<sup>11</sup>

*“Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation.”<sup>12</sup>*

### **3. Access to justice for victims of torture**

Victims of criminal offences often face significant barriers when seeking to access justice. The national legal system may be undermined by long delays, prohibitive costs, lack of available, affordable and trustworthy legal representation and insufficient enforcement of laws.<sup>13</sup>

Victims of human rights violations face the additional problem of seeking justice from a system which may have sanctioned the breach in the first place. It is common for individuals who have had their human rights infringed by the State to have no confidence in the State machinery and to view the instigation of legal proceedings as a futile exercise. Remedies for violations of such rights often require the intervention of lawyers with the necessary expertise. Costs associated with the services of legal counsel and legal processes tend to discourage those who cannot afford them from seeking just remedies. Moreover, problems relating to access to justice in crisis and post-conflict countries, i.e. situations in which violations tend to take place and in which victims are seeking reparation, are usually more pronounced than in non-crisis contexts, especially relating to the criminal justice system.

Torture victims and their families commonly find it extremely difficult to obtain any reparation.<sup>14</sup> Many States’ laws do not provide an express right to reparation for serious human rights violations such as torture.<sup>15</sup> On the occasion where there is an investigation into acts of torture, it

---

<sup>9</sup> See Principle 11 of the Basic Principles.

<sup>10</sup> See Principles 19-23 of the Basic Principles and generally, REDRESS, *Implementing Victims’ Rights*, supra, pp.33-41.

<sup>11</sup> UNODCCP, *Handbook on Justice for Victims*, supra, p.9 <http://www.uncjin.org/Standards/9857854.pdf>

<sup>12</sup> Principle 10 of the Basic Principles.

<sup>13</sup> UNDP, *Access to Justice*, Practice Note 9/3/2004 p.4.

<sup>14</sup> In a recent study on 30 countries, it was found that the overwhelming majority of torture victims and/or their families receive no reparation at all, REDRESS, *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries*, April 2003, at p.3.

<sup>15</sup> *Ibid*, p.47.

is likely that this will be carried out by bodies such as the police who may lack sufficient independence from the perpetrator of the offence and follow a protective culture.<sup>16</sup> As a result, it will be extremely difficult to identify the perpetrators and to prove torture, which lessen the prospects of a favourable outcome for any reparation claims raised by victims.

**The following measures can improve access to justice for all victims of human rights violations:**

- States should ratify the major human rights treaties and protocols and implement the international standards contained within them in the domestic legal system;
- The capacity and independence of the judiciary should be strengthened;
- The general public must be educated about their legal and human rights. This may be done by community awareness campaigns involving community leaders and gender representatives, the use of mass media and outreach programmes by local NGOs;
- Legal aid centres should be established to help victims take legal action in support of their rights;
- Governments should make sure that victims, witnesses and human rights defenders are adequately protected from intimidation.

***Marginalised groups***

When preventing torture, States have an obligation to take special measures to protect marginalised individuals or groups especially at risk of torture.<sup>17</sup> Groups that are traditionally in need of special measures include women, children, poor and disadvantaged people, indigenous communities, ethnic minorities, internally displaced persons and foreign nationals. In practice, these groups do not have the same level of access to justice as others.<sup>18</sup>

***Lawyers and human rights activists can support and assist marginalised groups by:***

- Being aware of and highlighting marginalisation and its consequences through various media with a view to fostering respect for the rights of marginalised groups;
- Taking up cases on behalf of interest groups or communities who are particularly at risk of torture on a pro bono basis;
- Urging States to publish reports providing data on complaints of torture disaggregated by age, gender and other key factors, to see if there are patterns of victimisation.

***(i) Women***

---

<sup>16</sup> See REDRESS, *Taking Complaints of Torture Seriously, Rights of Victims and Responsibility of Authorities*, November 2004.

<sup>17</sup> See Committee Against Torture, Draft General Comment No 2, Implementation of article 2 by State Parties, Thirty-Eighth Session, made public 16 May 2007, para. 21, available at <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.GC.2.CRP.1.Rev.2.pdf>

<sup>18</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy UN Doc. E/CN.4/2004/60, 31 December 2003, at para. 50.

Many women are victims of State-sponsored torture, mainly committed by men, which frequently takes the form of gender-based violence fuelled by discrimination.<sup>19</sup> Victims of such acts often have a distrust of national government institutions and this lack of confidence in the system often militates against seeking recourse.<sup>20</sup> Women may also be reluctant to access the national justice system due to a well-founded fear of being mistreated when trying to access remedies.<sup>21</sup> For example, where they have been the victim of a sexual crime, women may have to contend with the insensitive handling of cases by the predominantly male officials and judges. In some cases victims of sexual crimes have to face intimidating treatment by the authorities.<sup>22</sup> As found by the Inter-American Commission on Human Rights in examining access to justice for women victims of violence in the Americas: "Overall, many judicial systems do not adequately protect women victims' dignity and privacy during the investigation process. These women end up being re-victimised by the lack of sensitivity to their plight, their sex and the seriousness of the facts alleged."<sup>23</sup> These detrimental factors are aggravated where the sexual violence was committed in custody or in other circumstances by or with the involvement of public officials.

Women who openly say that they have been raped often face rejection by their families and others.<sup>24</sup> This stigmatisation may be more pronounced if the victim contracts HIV/AIDS as a result of the violation.<sup>25</sup> For those women who do bring proceedings after a sexual assault, they may have to bear an unduly heavy burden of proof. Victims of sexual violence are often treated differently from victims of other crimes by the exercise of judicial discretion that requires corroboration of a victim's testimony despite the testimony's strength. In Sudan, for example, rape victims are required to produce four male witnesses to prove rape.<sup>26</sup> Furthermore, victims of sexual violence have been subjected to unfair lines of questioning about their private lives, in particular prior sexual conduct, and concerning proof of consent which has prompted changes to the principles of evidence in cases of sexual violence.

According to the rules of procedure and evidence of the International Criminal Court, "evidence of the prior or subsequent sexual conduct of a victim or witness" shall not be admitted.<sup>27</sup> Consent cannot be inferred where there was force, a threat of force or a coercive environment or where the victim was not capable of genuinely consenting. Equally, "consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence" and "credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of victim or witness."<sup>28</sup>

Women have less opportunities for education than men and this will adversely affect their awareness of their legal rights . As they are usually less financially independent than men,

---

<sup>19</sup> See General Recommendation No.19, "Violence against Women", adopted by the Committee on the Elimination of Discrimination against Women at its 11<sup>th</sup> session in 1992.

<sup>20</sup> REDRESS, *Torture in Uganda: A Baseline Study on the Situation of Torture Survivors in Uganda*, April 2007, p.26.

<sup>21</sup> Inter-American Commission on Human Rights: *Access to Justice for Women Victims of Violence in the Americas* OEA/Ser.L/V/II. Doc. 68 20 January 2007, p. viii, para. 6.

<sup>22</sup> OHCHR report, *Access to Justice for Victims of Sexual Violence*, 29 July 2005 p.2.

<sup>23</sup> Inter-American Commission on Human Rights: *Access to Justice for Women Victims of Violence in the Americas* OEA/Ser.L/V/II. Doc. 68 20 January 2007, para.141.

<sup>24</sup> See e.g. Amnesty International, *Burundi: Rape-the hidden human rights abuse*, AI Index: AFR 16/006/2004, 24 February 2004, p.13.

<sup>25</sup> According to a study conducted in Africa, "the worst blame and other forms of stigma are reserved for those women thought to be responsible for HIV through 'improper' or immoral sexual behaviour." International Center for Research on Women (ICRW), *Disentangling HIV and AIDS Stigma in Ethiopia, Tanzania and Zambia*, (2003), p. 34.

<sup>26</sup> See Adrienne Fricke with Amira L. Khair, *Laws without Justice: An Assessment of Sudanese Laws Affecting Survivors of Rape*, Refugees International, June 2007.

<sup>27</sup> Rule 71 of the ICC Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, First session, New York, 3-10 September 2002, Official Records ICC-ASP/1/3.

<sup>28</sup> Rule 70 *ibid*.

women are less likely to be able to afford to pay for a lawyer, especially in cases involving sexual violence.<sup>29</sup>

***Lawyers and human rights activists should be:***

- Aware of the gender-specific violations and consequences, both physically and mentally, of torture and ensure that any interviews or correspondence with the victims of such violence does not result in secondary traumatisation;
- Aware of, and invoke as appropriate the principles of evidence in cases of sexual violence, in particular by objecting to unfair lines of questioning;
- Engage in strategic litigation that tackles systemic obstacles to access to justice experienced by women.

**In addition, lawyers, human rights activists and others should call upon the governments of their countries to:**

- Implement relevant international standards in domestic laws and procedures, in particular by removing discriminatory laws that impact on women's rights, in particular women's access to justice;
- Train the police, other investigatory services and the judiciary to be sensitive to women who are victims of torture, and ensure that they are not subjected to further victimisation, including by questioning that violates principles of evidence in cases of sexual violence;
- Put in place specific gender-sensitive units that deal with sexual violence against women;
- Set up adequate protection and support services for women who are victims of torture, including shelters;
- Adopt rules of evidence that give equal weight to testimony given by men and women;
- Advocate for women to have a key role in any reparation programmes, in particular in respect of gender-specific violations.

***(ii) Children***

Children<sup>30</sup> are often particularly vulnerable, especially where they either belong to marginalised groups in society and/or have lost the protection and support of their families. This applies in particular to children working in exploitative situations, street children and those held or being cared for in institutions.<sup>31</sup> Children who become uprooted in the course of war often either

---

<sup>29</sup> See e.g. the Ugandan Justice, Law and Order Sector Programme Study on Gender and Access to Justice <http://www.ijos.go.ug/pdfs/Executive%20Summary%20Gender%20Study%202002.pdf>.

<sup>30</sup> See Article 1 of the UN Convention on the Right of the Child of 1989: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

<sup>31</sup> See the report of the Special Rapporteur on Torture, UN Doc. A/55/290, 11 August 2000, paras.10 et seq., in which he highlights that: "Children being cared for in institutions can also be particularly vulnerable to torture and ill-treatment, not only because of their

become impoverished refugees or child soldiers who may also have been put in situations in which they have been forced to commit serious abuses against others. Irrespective of their criminal responsibility, their involvement in abuses can have a devastating impact on their well-being and those around them.<sup>32</sup>

What characterises children in these situations is that they are not only more likely to become victims of torture<sup>33</sup> but have little awareness and clout to defend their rights against State authorities. Children who are subjected to torture will often have no knowledge or contacts enabling them to defend their rights, and will often refrain from doing so for fear of further retribution. Complaints and judicial procedures do not traditionally accommodate the needs of children, and children can easily view the entire process as alien and intimidating.

New international standards recognise the special rights and needs of children in legal proceedings. These standards are contained in particular in the UN Convention on the Rights of the Child, especially Articles 37 and 40,<sup>34</sup> and the UN Guidelines on Justice for Child Victims and Witnesses of Crime.<sup>35</sup> The statute of the International Criminal Court also recognises children's rights in the course of proceedings.<sup>36</sup>

---

young age, but also because of the over-representation of children from particularly vulnerable groups among those institutionalised [para.14]."

<sup>32</sup> See REDRESS, *Child Soldiers, Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, September 2006.

<sup>33</sup> Nathalie Man, *Children, Torture and Power, The torture of children by states and armed opposition groups*, OMCT and Save the Children, 2000.

<sup>34</sup> Article 37: States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40: 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

<sup>35</sup> The Guidelines were adopted by ECOSOC Resolution 2005/20 of 22 July 2005, UN Doc. E/2005/INF/2/Add.1 of 10 August 2005.

<sup>36</sup> See in particular Articles 42 (9) and 54 (1) (b) of the Rome Statute.

## **Lawyers and human rights activists should:**

- At all times, be sensitive to the personal state of development, needs and interests of children who are victims of torture, and consult with experts on child psychology as appropriate;
- Provide children with adequate information about their rights, the nature of legal proceedings and the role they are likely to play during such proceedings;
- Provide children with legal aid or pro bono services as appropriate;
- Call on the government to implement its obligations under the UN Convention on the Rights of the Child and other relevant international standards, in particular to ensure that legal proceedings are sensitive to the particular circumstances pertaining to children;
- Call on authorities to set up complaints hotlines and complaints mechanisms for children who have been tortured, which should be staffed with persons having the required expertise in dealing with children and to make similar arrangements for investigations and judicial proceedings, in particular trials;
- Call on the government to establish a body responsible for the observance and implementation of children's rights, in particular freedom from torture, or to set up special units within existing national human rights institutions to this end;
- Advocate for children who have been victims of human rights violations, in particular torture, to be heard and to be able to participate in any reparation programmes.

### ***(iii) Poor and disadvantaged people***

Studies have shown that access to financial resources is the most important factor in determining whether people are able to use available legal remedies.<sup>37</sup> Using lawyers and legal institutions tends to be expensive and, in addition, victims may face hidden costs for not being able to work while pursuing their cases.<sup>38</sup> It is likely that they will have to travel to the larger cities where the courts are located and remain there while the proceedings take place and this can present a significant barrier to seeing a claim through to its conclusion. Poor and disadvantaged people are particularly affected when justice is corrupted as they have to pay bribes exceeding their means.<sup>39</sup>

Another hurdle often faced by poor and disadvantaged people is a lack of information concerning their rights. They tend to have a low level of institutional skill – the ability to understand and use the system. Thus they are unaware of what their rights are, where to go and who to speak to as they do not have contacts or access to lawyers who could help in ensuring their rights and preventing torture.<sup>40</sup>

---

<sup>37</sup> Anderson, *Access to justice and legal process: making legal institutions responsive to poor people in LDCs*, IDS Working Paper 178, February 2003 p.16 <http://www.ids.ac.uk/ids/bookshop/wp/wp178.pdf>

<sup>38</sup> Ibid.

<sup>39</sup> Human Rights Tribune, 29 May 2007. [http://www.humanrights-geneva.info/article.php3?id\\_article=1729](http://www.humanrights-geneva.info/article.php3?id_article=1729)

<sup>40</sup> REDRESS, *Torture in Uganda*, supra, p.18.

Often there will be reluctance among poor and disadvantaged people to become entangled with the law. For example, they may be living or working in conditions of illegality on public land which make them vulnerable to legislation that prohibits “public nuisance” or vagrancy.<sup>41</sup> This makes them less likely to draw attention to their status by seeking out contact with the legal system. There may be a general distrust of the law by poor and disadvantaged people whose only contact with it has been negative. They may see the law as “a tool which the wealthy and well-connected can use against them.”<sup>42</sup>

As found by the Special Rapporteur on Torture: “The experience of missions in several parts of the world has led the Special Rapporteur to observe...that the overwhelming majority of those subjected to torture and ill-treatment are ordinary common criminals from the lowest strata of society. They are the ones who cannot afford good lawyers, or who may have access only to less-than-diligent lawyers provided, in some instances, by the State, or who may not have access to any lawyer at all; whose families do not have the connections to be taken seriously by the police, prosecutors or judges, or event he means of securing life-saving health care that may be obtained outside the place of detention, or of providing food fit to eat when the detaining authorities and institutions fail to make these available; and who do not have any idea of what their rights are, even the right not to be torture, or how those rights may be secured. Indeed, they are often members of the lowest level of an underclass that is disconnected from all opportunity of leading decent lives as productive economic citizens.”<sup>43</sup>

#### **Lawyers and human rights activists should:**

- Reach out to impoverished communities and provide legal aid services to those who cannot afford it and urge their governments to set up free legal aid clinics. These should be established in the poorer areas of the country where their need is greatest;
- National Bar associations and university law faculties should consider establishing volunteer projects where qualified lawyers and law students assist poor clients for free;
- National Human Rights Institutions should establish outreach programmes in poorer areas to inform individuals of their rights and what to do if they have been the victim of a violation.

#### ***(iv) Ethnic minorities and indigenous peoples***

Members of ethnic minorities and indigenous peoples often belong to the most marginalised groups in society. Thus, they generally face the obstacles to justice already mentioned. In addition, ethnic minorities and indigenous peoples will often not be able to understand legislation that has been drafted in the language of the majority and not translated into local indigenous languages,<sup>44</sup> further hindering access to justice.

Members of these groups are also likely to be subject to increased hostility on the part of government officials. This may be due to perceptions that members of these groups are inferior in status, which is often because their culture and language differs from the ones of the

---

<sup>41</sup> Anderson, *Access to justice and legal process*, supra, p.18.

<sup>42</sup> Hardoy, J.E. and Satterthwaite, D., 1989, *Squatter Citizen: life in the urban third world*, London: Earthscan, p.16.

<sup>43</sup> Report by the Special Rapporteur on Torture, UN Doc. A/55/290, 11 August 2000, para.35.

<sup>44</sup> Interights, Judicial Colloquium in Suva, FIJ 6 – 8 August 2004, *Access to Justice in a Changing World: Collection of Papers and Suva Statement on the Principles of Judicial Independence and Access To Justice*, p.137.

dominant group making up state officials. Hostility becomes accentuated where ethnic minorities or indigenous groups assert their rights, in particular by way of armed struggle or political activism. In these instances, members of these groups, in particular young men, are more likely to be victimised.<sup>45</sup>

Ethnic minorities and indigenous peoples will find it more difficult to assert their rights in a system that is not responsive to their language and culture.<sup>46</sup> Moreover, where the State apparatus is perceived as alien and oppressive, members of these groups will be reluctant to use the system and to seek remedies through existing mechanisms.

#### **Lawyers and human rights activists should:**

- Identify patterns of discrimination and marginalisation of ethnic minorities and indigenous groups, and raise public awareness thereof;
- Build a relationship of trust and networks with members of ethnic minorities and indigenous groups;
- Raise awareness amongst ethnic minorities and indigenous groups of the legal system and their rights within the system;
- Strengthen the capacity of lawyers and human rights activists belonging to ethnic minorities and indigenous populations;
- Build a rapid response system of localised legal assistance to members of ethnic minorities and indigenous populations;
- Advocate for legislative reforms and institutional changes that remove obstacles to access to justice, such as the ability to use multiple languages, and obligating law enforcement institutions to hire personnel and liaison officials that is reflective of ethnic groups and indigenous populations;
- Advocate for ethnic minorities and indigenous populations to play a key role in any reparation programmes, including in the design, implementation and monitoring of the effectiveness of programmes, and in particular in respect of violations targeting members of the community or the community as a whole.

#### ***(v) Internally displaced persons (IDPs) and refugees***

IDP's and refugees will have been forced to leave their homes, primarily due to conflicts or lack of security, or forcible measures of displacement. Some IDP's and refugees will live in camps where they are vulnerable to attacks by military forces, both governmental, militias and/or rebel forces, such as in Sudan and Uganda.<sup>47</sup> Where their rights are violated, IDP's and refugees enjoy little protection, living in an exposed environment. Refugees in particular will have poor

---

<sup>45</sup> For example young Tamil males in Sri Lanka, see Human Rights Watch, *Sri Lanka: Return to War, Human Rights under Siege*, August 2007, in particular p.72.

<sup>46</sup> See on these rights, the Declaration on the Rights of Indigenous Peoples, adopted by the UN Human Rights Council on 29 June 2006.

<sup>47</sup> See for example Report by the Inter-Agency Internal Displacement Division (IDD) mission to Sudan (24 August-2 September 2004), and Report by the Inter-Agency Internal Displacement Division (IDD) mission to Uganda (30 August-3 September 2004).

access to legal services in their country of refuge, and will often have neither the awareness nor the means of asserting their rights. Often, local lawyers and human rights organisations will be less inclined to take up the cases of refugees, having the view that their cases are less important or directly relevant to local human rights concerns.

Human rights lawyers, paralegals, community groups and others should:

- Inform IDP's and refugees about their rights;
- Put into place protection measures, including self-help groups;
- Provide legal services on a pro-bono basis;
- Call on the state, as appropriate, to put into place legislation that provides for protection of IDP's and refugees, refrain from violations, protect IDP's and refugees from violations by non-state actors and provide access to justice and adequate forms of reparation for any torture or other serious violations that IDP's and refugees may have suffered;
- Advocate for IDP's and refugees as appropriate to play a key role in any reparation programmes, in particular concerning procedures and measures that affect their rights.

#### **4. Diplomatic and consular protection**

Individuals who have been detained abroad are particularly vulnerable as they are unlikely to have knowledge of the local law and may not have any local contacts who can assist in obtaining legal representation. These individuals will be looking for some form of consular support (*consular protection*) in the period immediately following arrest and/or assistance at a later stage when they are seeking remedies and reparation for the harm suffered (*diplomatic protection*).<sup>48</sup>

*Consular protection* is governed by the 1963 Vienna Convention on Consular Relations (Vienna Convention)<sup>49</sup> which regulates the rights, duties and privileges of consulates and their officials. Upon arrest, the detaining authority must inform the consular post of the "sending State" without delay if requested by the detainee<sup>50</sup> and the consular officers shall have the right (subject to local laws which should not be inconsistent with the purposes of the convention) to visit the detained individual and arrange for his legal representation.<sup>51</sup> It has been established from a number of cases brought before international courts and tribunals that these consular rights are conferred on *both* consular officers and the detained individuals.<sup>52</sup>

The exercise of *diplomatic protection* often arises after the survivor has returned to their home country and is claiming reparation; his or her government is asked to deal directly with the foreign state to have the claim effectively processed and satisfactorily dealt with. The traditional view was that diplomatic protection is a discretionary right of the injured alien's State of

---

<sup>48</sup> See REDRESS, *The Protection of British Nationals Detained Abroad: A Discussion Paper concerning Consular and Diplomatic Protection*, February 2005 p.3.

<sup>49</sup> U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963.

<sup>50</sup> Art 36(b) Vienna Convention.

<sup>51</sup> Art 36(c) Vienna Convention.

<sup>52</sup> See e.g. *Germany v U.S.A.* ICJ (2001), para. 77 and *Mexico v U.S.A.*, ICJ (2004), para. 40.

nationality to assert against a foreign state<sup>53</sup>, although many states have constitutions indicating that the individual does have a right to diplomatic protection.<sup>54</sup>

Human rights lawyers should seek to prompt their governments to exercise consular and/or diplomatic protection, and, where they fail to do so, call for a judicial review or public inquiry, as appropriate.

## **5. Victims and witness protection**

Investigations in torture cases often fail because of the well-founded fear of victims and witnesses that they may face harassment and intimidation at the hands of the perpetrators, leading them to fail to make a complaint in the first place or to withdraw the complaint as a result of reprisals. Many victims and witness, but also human rights defenders, have been targeted for lodging complaints or bringing cases against individuals or the authorities, be it before national, regional or international courts and human rights bodies. The measures taken by the perpetrators and those supporting them can range from making threatening phone calls to physical assault and murder, as, for example, in the case of Gerard Perera in Sri Lanka.<sup>55</sup>

It is for these reasons, and to effectively guarantee victims' right to complain and to an effective remedy, that States have a duty to provide victims and witnesses with adequate protection. International treaties and jurisprudence recognise that the relevant State organs, including the courts, law-enforcement personnel or others need to take the requisite measures to ensure effective protection against any retribution for bringing complaints or giving evidence, for example by suspending suspected perpetrators of torture.<sup>56</sup> Protective measures may range from keeping records confidential to providing physical protection, relocation and to rigorously investigating and prosecuting anyone responsible for threats, harassment, intimidation or any such acts.<sup>57</sup>

Victims and witnesses of crimes before the International Criminal Court are eligible to receive protection from the Court in the areas of their safety, physical and psychological well being, dignity and privacy.<sup>58</sup> The Victims and Witnesses Unit within the Registry is obligated to provide protective measures and security arrangements, counselling and other appropriate assistance for victims and witnesses who appear before the Court.<sup>59</sup> Such measures should be incorporated into the national system.

### **Lawyers and human rights activists should:**

---

<sup>53</sup> See REDRESS, *The Protection of British Nationals Detained Abroad: A Discussion Paper concerning Consular and Diplomatic Protection*, February 2005 pp. 8-9.

<sup>54</sup> *Ibid*, p.10.

<sup>55</sup> Asian Centre for Human Rights, *SAARC Human Rights Report, 2006*: Sri Lanka: "Gerard Mervin Perera was taken into custody on suspicion in connection with a triple murder that had taken place four years ago at Hendala Alwis Town. He was allegedly assaulted by the police and treated in an inhuman manner. He had filed a fundamental rights case against seven police officers of Wattala Police Station and the Negombo High Court had ordered the accused police officials to pay him compensation of one million rupees.[Footnote omitted] On 21 November 2004, an identified gunman shot at [and killed] Gerard Mervyn Perera. He was scheduled to testify in a fundamental rights case against seven police officers of Wattala police station before the Negombo High Court on 2 December 2004."

<sup>56</sup> See Article 13 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, 3 July 2001, para 39(j). See also, Istanbul Protocol, Annex I .

<sup>57</sup> See for example South Africa, Witness Protection Act, 1998.

<sup>58</sup> Art 68(1) of the Rome Statute.

<sup>59</sup> Article 43(6) of the Rome Statute.

- At all times evaluate the security risks of victims and witnesses in torture cases;
- Ensure utmost confidentiality to protect the identity and/or location of the victim unless 'going public' is adopted as a suitable strategy to counter any threats;
- Provide victims and/or witnesses with the resources to seek protection;
- Request the authorities to suspend suspected perpetrators of torture and to provide adequate measures of protection;
- File separate complaints against those believed to be responsible for any threats or against unknown perpetrators;
- Identify patterns of threats, harassment and intimidation of victims and witnesses and raise public awareness thereof;
- Advocate for legislative reforms and institutional changes with a view to putting in place an effective system of victims and witness protection.