

## **Briefing Paper to the UN Committee Against Torture**

### **The Need for Independence in the Protection of Victims and Witnesses under Article 13 of the UNCAT**

#### **Background**

From 2014-2016, DIGNITY – Danish Institute against Torture and the University of Edinburgh carried out research to examine the status of documentation of torture and ill-treatment in low-income settings.<sup>1</sup> Large-scale surveys were carried out in Nairobi, Kathmandu and Dhaka to uncover the practical realities faced by victims of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment), and the relevance of the international human rights standards for documentation of such violations in these settings. Among the key findings of this research is the impact that the absence of effective victim and witness protection has on victims’ willingness to report their cases and have them documented. Unsurprisingly, many survey participants reported that they would choose or had chosen not to report an incident of torture or ill-treatment, due to fear of being subjected to further violence as a result. In all three countries, where levels of intimidation and threats against victims are high, survivors of torture and ill-treatment reported that they feared for their life if they dared to report their case to the police.<sup>2</sup> In addition, very few participants said they would report or seek protection from a human rights organisation, which raises important questions regarding which kinds of organisations are best-placed to help support protective measures. As a result of these findings, DIGNITY has explored the availability of protection mechanisms for victims and witnesses of torture and ill-treatment in States characterised by absence of rule of law, in particular within criminal justice institutions, with a view to identifying how such systems can be made more effective and accessible to a wider range of victims and witnesses.

#### **Introduction**

The protection of victims and witnesses of torture and ill-treatment from threats and reprisals is a fundamental component for accessing justice and reparation. This is acknowledged in Article 13 of the UN Convention Against Torture (UNCAT), which provides that “...Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” By including this obligation alongside the provision to ensure victims of torture have the right to complain and to have their case promptly and impartially examined, the drafters of the Convention recognized the importance of protecting victims and witnesses and its centrality to the fight against impunity for torture. Victims’ right to protection is also central to the realization of the right to redress and reparation under Article 14 of the UNCAT, as elaborated in the Committee Against Torture’s General Comment 3, which recognizes the failure to ensure protection as not only a violation of article 13, but also of

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<sup>1</sup> DIGNITY and University of Edinburgh, *Documentation of Torture in Low-Income Countries*, 2014-2016. More information available at: <https://www.dignityinstitute.org/what-we-do/urban-violence/projects/documentation-of-torture-and-ill-treatment-in-low-income-countries/>. ‘Low-income settings’ were selected based on the OECD DACS list.

<sup>2</sup> Kelly, T., Sharma, J., Jensen, S., Koch Andersen, M. & Christiansen, C. 2016, ‘Torture and ill-treatment under perceived human rights documentation and the poor,’ *Human Rights Quarterly* (forthcoming); Kelly, T., Sharma J., Jensen, S., Koch Andersen, M. & Christiansen, C. 2016, ‘A Comparative Study of the Use of the Istanbul Protocol Amongst Civil Society Organizations in Low-Income Countries,’ *Torture: Journal on Rehabilitation of Torture Victims and Prevention of Torture* (forthcoming).

article 14 as well as other articles in the Convention.<sup>3</sup> The importance of protection for victims and witnesses has also been addressed by a number of important UN bodies and agencies, including the Office of Drugs and Crime (UNODC), the High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human Rights (OHCHR), the International Criminal Court (ICC) and international criminal tribunals, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, as well as at the national level in many jurisdictions.

It is clear that the absence of effective protection for victims has a direct impact on their willingness to submit complaints, which allows impunity for torture to prevail. As articulated by REDRESS in its seminal report on the issue, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action*,

Silencing victims through fear is one of the worst forms of impunity. It maintains the illusion of the rule of law and a legal system capable of following up wrongdoing, but somehow – even in the countries in which torture is thought to be endemic – very few, if any, complaints are made [...]. Silence denies the existence of the problem [...].<sup>4</sup>

It is also important to note that protection is a right in and of itself. Indeed, regional and international human rights bodies have found the lack of victim and witness protection to constitute a violation of the right to security of the person and the right to life, as well as the right to a remedy.<sup>5</sup>

Despite the centrality of victim and witness protection for the fight against torture and impunity, and its status as a UNCAT obligation, in all too many States such protection is lacking or ineffective. Providing States with elaborated guidelines as to what constitutes effective victim and witness protection as envisioned under Article 13 of the UNCAT would be a significant step towards better implementation of the obligation to ensure the protection of victims and witnesses. This is particularly important considering the absence of rule of law and the consequent dysfunction within criminal justice institutions seen in many States parties. This briefing paper and the 4 August 2016 briefing organized by DIGNITY and REDRESS seek to elaborate on some of the key guiding principles which should be applied to protection for victims and witnesses of torture and ill-treatment, as well as some features of protection systems which are better suited for such cases.

### **Challenges in Protecting Victims and Witnesses of Torture and Ill-Treatment**

In many States parties, victim and witness protection mechanisms are either entirely absent, or where they do exist they are ineffective. In some States, protection is absent due to alleged insufficient resources, while in others protection systems are in place but are simply ineffective when it comes to victims of torture and ill-treatment, and other human rights violations.<sup>6</sup>

In States where they are provided for in law or policy, traditional victim and witness protection measures and systems used in cases of crime committed by private actors such as organized crime, will often not be appropriate for victims of torture and ill-treatment, and other human rights violations.<sup>7</sup> Firstly, comprehensive victim and witness protection mechanisms have narrow admissions criteria as they are usually designed to

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<sup>3</sup> UN Committee Against Torture, General Comment No. 3 (2012), UN DOC: CAT/C/GC/3, para. 31: “The State party should also take measures to prevent interference with victims’ privacy and to protect victims, their families and witnesses and others who have intervened on their behalf against intimidation and retaliation at all times before, during and after judicial, administrative or other proceedings that affect the interests of victims. Failure to provide protection stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy.”

<sup>4</sup> REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International crimes: A Call to Action* (December 2009), p. 6. Retrieved from: <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

<sup>5</sup> Ibid, p. 45.

<sup>6</sup> Ibid, p. 32-36.

<sup>7</sup> Ibid, p. 33.

protect criminal insiders, most often those considered to be of ‘high value’, who are cooperating with law enforcement and who are victims or witnesses of crime perpetrated by private actors.<sup>8</sup> However victims and witnesses of human rights violations are usually outsiders—“regular people, sometimes from excluded or marginalized communities, at times human rights defenders or activists.”<sup>9</sup> Secondly, in many contexts, law enforcement are heavily involved in providing protection to victims and witnesses, often in collaboration with other criminal justice institutions. However, in many cases, torture is carried out by law enforcement officials—indeed, the very nature of torture, which is inflicted by agents of the State, means that traditional victim and witness protection mechanisms established for victims of crimes by private actors may not be appropriate and effective, and that there is therefore a need for a specialized approach to protecting victims of violations carried out by State agents.

While the Committee Against Torture has consistently recommended that States take steps to ensure that victims and witnesses are protected, there has been little guidance provided as to what such protection systems should consist of. The Committee’s jurisprudence and concluding observations, as well as that of other human rights bodies, have provided little elaboration on the question of what constitutes effective victim and witness protection, or what the essential features of such a system are. The need for further clarity in this regard was highlighted by the UN Human Rights Council at its 12<sup>th</sup> Session in 2009 during which it adopted a resolution on the right to truth, that included a call on the OHCHR to:

prepare a report, to be presented to the Council at its fifteenth session, on the basis of information, including from States, on programmes and other measures for the protection of witnesses implemented within the framework of criminal procedures related to gross violations of human rights and serious violations of international humanitarian law, with a view to determine the need to develop common standards and promote best practices that would serve as guidelines to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations and serious violations of international humanitarian law.<sup>10</sup>

As discussed below, the resulting OHCHR report provided some guidance on the basic principles that should be adopted in the provision of victim and witness protection in the case of human rights violations, though the report falls short of providing common standards to serve as guidelines for States.<sup>11</sup> Further relevant guidance can be found in the UN Office of Drugs and Crime Report on Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, which provides some useful insight regarding essential features for victim and witness protection systems.<sup>12</sup> Similarly, reports from several UN special procedures have addressed this issue, elaborating on important features for an effective system.<sup>13</sup> A common theme that has arisen in this regard is the need for protection for victims and witnesses of torture and ill-

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<sup>8</sup> Office of the High Commissioner for Human Rights, *Report of the UN High Commissioner for Human Rights on the Right to Truth* (2010), UN Doc: A/HRC/15/33. Retrieved from: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/151/73/PDF/G1015173.pdf?OpenElement>.

<sup>9</sup> Ibid.

<sup>10</sup> Human Rights Council, Council Resolution on the Right to the Truth (2009), UN Doc. A/HRC/12/L.27, para 8.

<sup>11</sup> Report of the UN High Commissioner for Human Rights on the Right to Truth, (2010).

<sup>12</sup> UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime* (2008). Retrieved from: <https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

<sup>13</sup> Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Philip Alston, Mission to Brazil (2009), UN Doc: A/HRC/11/2/Add.2. Retrieved from:

<https://documents-ddsny.un.org/doc/UNDOC/GEN/G09/126/22/PDF/G0912622.pdf?OpenElement>; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Brazil, Cameroon, China (People’s Republic of), Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal, Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo (2010). UN Doc: (A/HRC/13/39/Add.6).

treatment, and other human rights violations, to be carried out by institutions or bodies exercising organizational, functional and financial independence from State institutions.<sup>14</sup>

### **The Need for Independent Victim and Witness Protection**

The need for victim and witness protection systems to exercise organizational, functional and financial independence or autonomy from State institutions arises from the fact that human rights violations, including torture, are by definition carried out by agents of the State, and victims of these crimes will therefore be justifiably apprehensive to rely on State institutions to protect them from further reprisals (see footnote for clarification on the terms independence and autonomy).<sup>15</sup> The importance of independence of victim and witness systems cannot be underestimated. Though the UNCAT imposes obligations on the State to ensure victims and witnesses are protected from reprisals, it is a peculiar contradiction that they should be expected to entrust their protection as victims and witnesses to State authorities, which in many cases are the same ones responsible for carrying out the violation which has resulted in their need for protection.

The need for independence of protection mechanisms for victims of human rights violations was highlighted by the then-UN High Commissioner for Human Rights, Navanethem Pillay, in her 2009 statement on the issue. She argued that “a system of witness protection *independent from State mechanisms* may be better suited to inspire the confidence and trust of all those concerned. Such a system could be funded by the State, but not closely controlled by the machinery of State organs.”<sup>16</sup> The UNODC Good Practice Report also discusses the importance of autonomy, specifically in the context of victim and witness protection systems which are housed within the police institution: “Cohabitation of witness protection agencies with the police may lead to an uneasy relationship. Police officers are inquisitive by nature and the security of the information may be compromised.”<sup>17</sup> The UNODC Report specifies that in cases where victim and witness protection is located within the police institution, it is of “paramount importance” that the unit is isolated and exercises organizational, administrative and operational autonomy from the rest of the police force.

There are a number of ways in which the independence and autonomy of protection mechanisms can be ensured. For example, victim and witness protection systems can be established as separate institutions exercising financial and functional independence from State institutions. Another format is victim and witness protection systems working in close collaboration with independent civil society organisations (CSOs) to fulfil their protection mandate.<sup>18</sup>

There is precedence to the notion of States working with private entities, such as CSOs, to fulfil their obligations under the UNCAT. General Comment 3 on Article 14 of the UNCAT, the Committee Against Torture states:

The obligation in article 14 to provide for the means for as full rehabilitation as possible can be fulfilled through the direct provision of rehabilitative services by the State, or through the funding of private medical, legal and other facilities, including those administered by NGOs in

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<sup>14</sup> Report of the UN High Commissioner for Human Rights on the Right to Truth (2010).

<sup>15</sup> For the purposes of this paper, independence refers to the state or condition of being free from governmental dependence, subjection, or control; free from outside control; not subject to another’s authority. Independence is the term usually used by human rights bodies. Autonomy is a similar concept, referring to the freedom to act independently, and is used by non-human rights bodies such as the UNODC. (Black’s Law Dictionary; Oxford English Dictionary).

<sup>16</sup> UN High Commissioner for Human Rights, “Introductory Remarks by Navanethem Pillay at the OHCHR Expert meeting on witness protection for successful investigation and prosecution of gross human rights violations and international crimes,” (2009) (Emphasis added).

<sup>17</sup> UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime* (2008).

<sup>18</sup> For the purposes of this briefing paper, civil society organisations (CSOs) refers to voluntary organisations with governance and direction coming from citizens and without the involvement, participation or representation from government. The term subsumes non-governmental organisations (NGOs) as well as community-based organisations, religious organisations, women’s rights groups, professional associations, etc.

which case the State shall ensure that no reprisals or intimidation are directed to them. The victim participation in the selection of the service provider is essential.

In clarifying that rehabilitation services can be provided through State-funded programmes administered via private entities, including NGOs, the Committee Against Torture has recognised that many victims of torture and ill-treatment would be wary and fearful of accessing rehabilitation services through a State-administered facility, or that State facilities are not appropriately equipped to provide this kind of specialized service. The Committee should explore the possibility of employing the same reasoning in the context of victim and witness protection under Article 13.

### **Role of CSOs in Protecting Victims and Witnesses of Torture**

In light of the difficulties that arise in ensuring effective protection of victims and witnesses in cases of human rights violations, as outlined in the previous section, there is a case to be made for CSOs to play a role in providing protection to victims and witnesses. It is important to emphasize that protection provided by CSOs in no way replaces or undermines the State obligation to ensure victims and witnesses are protected. Rather, the State should engage CSOs to assist it in ensuring that the obligation to protect victims and witnesses is effectively implemented, as this can bolster the independence (and hence effectiveness) of protection systems. It is also important to highlight that while CSOs are not obligated to provide protection to victims and witnesses, they have a professional responsibility to “do no harm”, which requires them to carefully assess their actions and ensure they do not risk jeopardizing the victim’s safety or expose him/her to further risk.<sup>19</sup> However, it is imperative that States are made acutely aware that working with CSOs to ensure victims and witnesses are protected must not shift the focus away from the State’s obligations under Article 13.<sup>20</sup> Although the protection work of CSOs may be essential, there is a need for State-coordinated and funded efforts to ensure durable protection programmes that are accessible to all victims of torture.<sup>21</sup> The existence of CSO protection provides an opportunity which States can capitalise on to put in place the necessary independent protection systems. An example of this can be seen in Brazil’s PROVITA protection system, described in more detail below, which developed out of an NGO programme established to protect victims and witnesses in cases where perpetrators were state actors.<sup>22</sup>

Though not an official part of the State protection apparatus, in many contexts CSOs already play a role in protecting victims of torture and ill-treatment, and indeed other human rights violations. For example, BALAY Rehabilitation Center, an NGO in the Philippines, works with CSO partners such as religious groups, the International Committee of the Red Cross (ICRC) and other NGOs to come up with improvised protection systems and shelters for victims and witnesses of violations by public officials.<sup>23</sup> Similarly, CSO initiatives are in place around the world for the protection of human rights defenders,<sup>24</sup> and in many national jurisdictions, CSOs provide protection to victims of domestic violence in the form of safe houses. This work is crucial when the State is unable or unwilling to provide protection to its citizens or when the State itself is the primary source of such violations.<sup>25</sup>

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<sup>19</sup> The Center for Victims of Torture (CVT), New Tactics Online Conversation: Protection Survivors and Witnesses. *Roles of State vs Civil Society* (2016); Petrigh, C., *Protection of Witnesses, Victims, and Staff in Monitoring, Reporting, and Fact-finding Mechanisms*; Mills K. and Karp, D. J., *Human rights protection in global politics: responsibilities of states and non-state actors* (2015); OHCHR, *Manual on Human Rights Monitoring: Chapter 14*.

<sup>20</sup> The Center for Victims of Torture (CVT), New Tactics Online Conversation: Protection Survivors and Witnesses. *Managing Risk*. (2016).

<sup>21</sup> *Documentation of Torture in Low-Income Countries Project*, 'Human Rights, Poverty and Violence: Expert Meeting 12 May 2016', Geneva.

<sup>22</sup> Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Philip Alston, *Mission to Brazil* (2009). , UN Doc: A/HRC/11/2/Add.2.

<sup>23</sup> Interview with human rights activist in the Philippines. Telephone Call (2016).

<sup>24</sup> For examples of CSO protection of human rights defenders, see: Worldwide Movement for Human Rights (FIDH), <https://www.fidh.org/en/issues/human-rights-defenders/> and Frontline Defenders, <https://www.frontlinedefenders.org/>.

<sup>25</sup> Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring: Chapter 14: Protection of Victims, Witnesses and Other Cooperating Persons*, 2011. Retrieved from:

National CSOs will often be best-placed to assist the State with implementing protection measures, as they best comprehend the political situation and structures of their country.<sup>26</sup> However, where this role is carried out informally, that is, not as part of the State victim and witness protection structure, there are significant challenges. Many CSOs lack the resources necessary to carry out this protective role, which prevents them from responding to incidents more quickly. Maintaining confidentiality and protecting the information obtained and the identity of the victim and witnesses is critical, but also a challenge for some CSOs, again due to resource issues and lack of knowledge and expertise regarding confidentiality. Information and identities must be properly secured so that survivors are not exposed to further risk.<sup>27</sup> Additionally, activists themselves are often confronted with threats when working with survivors and witnesses.<sup>28</sup> However, many of these challenges could be successfully mitigated through an engaged collaboration with the State.

### **Examples of the Role NGOs can Play in Helping States Fulfil their Article 13 Obligations**

#### *Brazil: PROVITA Victim and Witness Protection*

The federal victim and witness protection mechanism in Brazil, known as PROVITA (Programa de Assistência a Vítimas e a Testemunhas Ameaçadas) was established under Law No. 9807/1999.<sup>29</sup> The programme is funded at the federal and de-centralised state level, and is administered at the state level. It provides a range of protection possibilities, which include: securing victims' or witnesses' residence (including communications control); escorting victims or witnesses during movement (e.g. to work or when traveling to court); transferring a victim or witness to a new place of residence or temporary accommodation in a protected place; monthly financial aid to provide the costs of individual or family subsistence (if the protected person is unable to work or in the case of absence of any source of income); social, medical and psychological support; and guarantees confidentiality with respect to protective measures carried out. These measures are highly resource intensive, which has been a challenge for the successful implementation of the programme.

From 1999, when it was established, until 2013, the programme relied heavily on NGO partners in the day-to-day running of the programme, and this collaboration is provided for in article 1.1 of the establishing legislation. NGOs were involved in providing assistance and protection to victims and witnesses in the form of accompanying them to court during proceedings, carrying out relocation, and helping them with integrating into new communities after being relocated. NGOs received funding from state governments to play this protective role, and in this way, the State was fulfilling its obligations to ensure victims and witnesses are protected against reprisals, but doing so through independent bodies. According to the UN Special Rapporteur on summary, arbitrary and extrajudicial killings, "This innovative structure, in which government officials are not actually informed of the witness's location, has provided witnesses to crimes committed by government agents a much higher level of protection than most systems that rely solely on the Government to provide protection."<sup>30</sup> The programme did face challenges in some aspects due to insufficient funding from the State, and also faced criticism for being unsustainable, however it provided victims of crimes perpetrated by State agents greater confidence in the protection system available.<sup>31</sup>

This is only one example of the ways in which NGOs can play an important role in protecting victims and witnesses from reprisals, and there are no doubt others which could also be examined. In many cases, CSOs

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<http://www.ohchr.org/Documents/Publications/Chapter1456pp.pdf>; CVT, New Tactics Online Conversation: Protection Survivors and Witnesses. Managing Risk.

<sup>26</sup> Moskalenko, K., De Vos, C. M. and Sainna, E. C., "Panel III : challenges in the implementation of the decisions of the Committee against Torture," (2011), American University. Washington College of Law.

<sup>27</sup> Tepina, P., *The Torture Reporting Handbook: How to document and respond to allegations of torture within the international system for the protection of human rights*, (2015), Human Rights Centre, University of Essex.

<sup>28</sup> 'Human Rights, Poverty and Violence: Expert Meeting 12 May 2016', Geneva.

<sup>29</sup> Brazil Law No. 9807 of 13 July 1999 on the Protection of Witnesses. Retrieved from: <http://legis.senado.gov.br/legislacao/ListaTextoIntegral.action?id=213960&norma=226958>.

<sup>30</sup> Report of the UN Special Rapporteur on summary, arbitrary and extrajudicial killings, Philip Alston (2009).

<sup>31</sup> Ibid.

providing protective measures may not even construe their actions as being protective but rather to meet the needs of victims and witnesses who present themselves. The potential scope for CSO involvement and participation in State efforts to ensure victims and witnesses are protected is wide, and this has potential to go a very long way in helping to ensure the independence and autonomy of protection for victims and witnesses of crimes perpetrated by State agents. It cannot be emphasized enough, however, that the obligation to ensure victims and witnesses are protected against reprisals falls to States, and any role played by CSOs must be seen as complementary to rather than in the place of State efforts.

#### **Recommendations to the Committee Against Torture**

- Consider holding a thematic session focusing on victim and witness protection under Article 13 to obtain a clearer picture regarding the challenges faced in fulfilling this obligation and of the different models used by States parties to ensure victims and witnesses are protected;
- Consider including more pointed questions in the Lists of Issues regarding the specific models of victim and witness protection used in States parties, and their effectiveness. Such questions could include:
  - numbers of victims/witnesses of human rights violations who have benefited from protection;
  - steps taken by States parties to build public confidence in the victim and witness protection system in place);
  - how the State is working with CSOs and other non-state actors in facilitating and promoting protection of witnesses, victims and human rights defenders;
  - steps taken by the State to ensure that CSOs playing a complementary role of protecting victims, witnesses and human rights defenders are not intimidated or hindered from effectively executing their mandate.
- Consider providing more elaborated recommendations to States parties regarding steps they must take to guarantee the effectiveness of victim and witness protection systems, including ensuring their independence.
- Consider adopting a General Comment on Article 13 to provide States parties with elaborated guiding principles for what constitutes effective victim and witness protection systems, in particular the need for these to be independent or fully autonomous from State institutions.