

DIGNITY Fact Sheet Collection

Legal N° 6 – Prosecuting Torture



ACCOUNTABILITY

State parties to the UN Convention against Torture (UNCAT) are duty-bound to hold perpetrators to account by means of a fair trial. This includes any person involved in torture whether their involvement has been one of 'encouraging, ordering, tolerating or perpetrating'.¹ (See 'Investigating Torture' and 'Criminalising Torture' factsheets respectively).

CULPABILITY

Varying degrees of involvement for which one could be prosecuted must be recognized and pursued. Besides the act or attempt of committing the torture, **complicity** and **participation** must also be prosecuted. **Complicity** and **participation** have been held to include: ordering, soliciting, inducing, inciting, encouraging, aiding and abetting. Joint prosecutions are also envisaged. Those in positions of power who failed to prevent (acquiesced) or report cases of torture should also be prosecuted.²

PROTECTION IN PROCESS

Fair trial rights under international and national laws must be fully adhered to in prosecuting suspected perpetrators of torture. Article 7(3) of the UNCAT provides that suspects are to be 'guaranteed fair treatment at all stages of the proceedings'. This includes access to effective legal representation.

UNCAT Article 13 provides that steps should be taken so that complainants and witnesses are protected against ill-treatment or intimidation.³ It is important those conducting the investigation are also afforded protection.⁴

EVIDENCE & PROOF

Prosecutors are duty-bound to bring charges against those identified by investigations as suspected perpetrators. Yet, a number of factors can hinder effective prosecution. Standard of proof for criminal convictions (**beyond reasonable doubt**), given the usual lack of direct evidence in torture cases, renders prosecution difficult. In most cases, it is unusual to have anything other than the testimony of the victim.⁵ This is because, the control of the evidence, be it through witnesses or official documentation, is generally guarded by the authorities responsible, and for this reason, international law has recognized the need for the burden of proof to shift to the state in cases where torture takes place in a context of custody (see next section).

Importance of corroborative evidence, therefore, must be borne in mind, namely in terms of registers, CCTV, witness statements. This is especially key where the victim was detained in a secret or unofficial facility, incommunicado or in prolonged isolation; where custody records were not properly kept; where the detainee was not fully informed of their rights, i.e.

denied access to a lawyer or doctor or to notify a third person; where medical examinations did not occur immediately upon detention and release. Systematic documentation is also of demonstrable value.

BURDEN OF PROOF

Direct evidence of torture is scarce.⁶ The burden of proof should, in instances of evidentiary imbalance, evasiveness or absence, be directly shifted onto the authorities. Illustrating this is the *Selmanni* principle which states that: 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused'.⁷ Whilst this has been the practice of human rights litigation, it should inform criminal prosecutions with respect to the crime of torture particularly where there has been state inaction (whether due to unwillingness or inability) in documenting, investigating and prosecuting alleged violations.

'NECESSITY' & 'SUPERIOR ORDERS'

International law prohibits the use of torture for any reason including 'necessity'.⁸ Given the ineffectiveness of torture or CIDT for any purpose, their use in a so-called 'ticking-bomb scenario' contravenes the prohibition and must never be accepted by a court as a legitimate defence. 'Superior orders' is similarly rejected as a legitimate defence.⁹ In other words, where an act amounts to torture or CIDT, no defence can ever be recognised.¹⁰

MOREOVER

- It is deemed to be a violation of the UNCAT where a prosecutor elects to prosecute a lesser crime of ill-treatment where all elements of torture are present.¹¹
- Public officials must be suspended while the prosecution is pending.¹²
- Various forms of redress (restitution, compensation, rehabilitation, non-satisfaction etc.) are to be made available to victims in an accessible and effective way (see factsheet on 'Redressing Torture').
- Punishment should be proportionate to the gravity of the crime (see factsheet on 'Criminalising Torture').
- Universal jurisdiction requires that any suspected perpetrator, regardless of nationality or location of crime, must be prosecuted by the state on whose territory the suspect is found or, alternatively, extradited for prosecution.
- Statute of limitations, i.e. a time-limit before which prosecutions are to be brought, must not be applied to the crime of torture.¹³

REFERENCES

¹ UN Human Rights Committee (HRC), General Comment 20, paras. 13 and 14.

² See also HRC, General Comment 20, para. 13.

³ UNCAT, Article 16; see also Principles 3(b) Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000.

⁴ Principle 3(b).

⁵ Gabriela Echeverria, Mario López-Garelli, Hari Phuyal, Juan E. Méndez, 'Panel IV: Challenges to Proving Cases of Torture before the Committee against Torture' (2013) 20 Human Rights Brief 4 (5) as relating to American University Washington College of Law, Seminar: 'Litigation before the UN Committee against Torture: Strengthening this Important Tool against Torture', 15 April 2013

⁶ Ibid.

⁷ *Selmouni v. France*, 25803/94, 28 July 1999, para. 87.

⁸ Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights.

⁹ Art 2(3) UNCAT; see Manfred Nowak and Elizabeth McArthur (eds.), *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), pp. 100-105.

¹⁰ Nowak, p. 100, A/57/44, para 34(f).

¹¹ GC II, para. 10.

¹² Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, E/CN.4/2003/68, 17 December 2002, Annex 1, para. j.

¹³ See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/CO/3 (2013) §8; Guatemala, UN Doc. CAT/C/GTM/CO/5-6 (2013) §8; Japan, UN Doc. CAT/C/JPN/CO/2 (2013) §8; see also Prosecutor v Furundzija, Yugoslavia Tribunal (1998) §157; Principle 23 of the Updated Impunity Principles; Basic Principles on Reparation, §6; Article 29 of the Rome Statute.