

### INVESTIGATIONS AS INDISPENSABLE

Under Article 12 of the UN Convention Against Torture, States parties are obligated to **promptly, impartially, and effectively** investigate acts where there are reasonable grounds to believe that any form of ill-treatment has been committed,<sup>1</sup> in any territory under its jurisdiction,<sup>2</sup> even in the absence of a formal complaint (*ex officio*) or physical marks.<sup>3</sup>

Reasonable grounds are assessed on the context, where in some contexts any allegation will be considered to amount to such, whereas, in other contexts, a higher standard of proof may be needed. Moreover, the information justifying an investigation may be sourced from those other than the victim including witnesses, doctors (especially during medical screenings),<sup>4</sup> family members, NGOs or lawyers.<sup>5</sup>

This is central to affecting prosecution and redress.<sup>6</sup> Complaint and investigative mechanisms need to be established and accessible under domestic law. Any criminalization is clearly ineffective without effective investigation and prosecution.<sup>7</sup> The burden of investigating an allegation of torture rests with the state.

#### ELEMENTS OF AN INVESTIGATION: PROMPT, IMPARTIAL, EFFECTIVE

**Prompt:** Initiating an investigation within hours or days of complaint limits time and opportunity for tainting evidence and the intimidation of victims and witnesses.<sup>8</sup> The failure to promptly investigate may also constitute 'a de facto denial of redress and therefore violation of article 14'.<sup>9</sup> In terms of medico-legal documentation, access to a forensic doctor should be immediately granted upon request as traces of torture and ill-treatment can disappear.<sup>10</sup>

**Impartial:** The authority responsible for conducting the investigation should be neutral (or external)<sup>11</sup>, and if possible independent, from the authority being accused by the victim (e.g. police) or prosecuting (e.g. Director of Public Prosecutions) a case against the victim. Also, there should be 'no institutional or hierarchical connection between the investigators and the alleged perpetrators'.<sup>12</sup> Impartiality also requires thoroughness taking all reasonable steps to obtain and examine all relevant information.<sup>13</sup>

**Effective:** has been defined as needing to be 'capable of leading to the identification and punishment of those responsible'.<sup>14</sup> Investigators are also to be conferred with the sufficient powers to this end, including power to: obtain all the information necessary;<sup>15</sup> summon and compel testimony;<sup>16</sup> access to or power to commission impartial medical or other experts.<sup>17</sup> Importantly, the investigators must also be provided with the 'necessary budgetary and technical resources'.<sup>18</sup> The investigation should be transparent and engage with the victims and their lawyers and with the public to ensure accountability.<sup>19</sup> This is essential if justice is not only done but also seen to be done.

### COMPLAINT MECHANISMS

Article 13 of the UNCAT provides victims with the 'right to complain to competent authorities, and to have their case promptly and impartially examined'. Complaints need not be filed for an investigation to be initiated. Officials such as judges and prosecutors should exercise their official capacity to order investigations (*ex officio*).

Basic principles guiding effective complaint mechanisms are:<sup>20</sup> i. **availability:** any detainee or interested parties should have the right to lodge a formal complaint to a designated authority; ii. **accessibility:** ability to make both oral and/or written statements, both internally and/or externally to their place of detention, freely and through a user-friendly process; iii. **confidentiality:** direct and confidential access to the designated authority with steps taken to avoid intimidation and reprisals; iv. **effectiveness:** processing to be independent, prompt and thorough, leading to redress and accountability; v. **traceability:**<sup>21</sup> requires a record of complaints in a specific register and a system for compiling statistics.

#### VICTIM AND WITNESS PROTECTION

Article 13 provides that steps should be taken so that complainants and witnesses are protected against ill-treatment or intimidation.<sup>22</sup> The alleged perpetrators of torture or ill-treatment are to be removed from positions of power over victims, witnesses and investigators.<sup>23</sup> The suspect must be suspended or re-assigned pending investigation.<sup>24</sup>

#### PURPOSES OF AN INVESTIGATION: CLARIFY, IDENTIFY, PROSECUTE, REDRESS

The *Principles of the Effective Investigation and Documentation of Torture* set out the purposes of an investigation as being to i. clarify facts and establish responsibility, ii. identify measures needed to prevent recurrence, and iii. facilitate prosecution and redress.<sup>25</sup> Those ill-treated by state authorities rarely have access to corroborative documentation.<sup>26</sup>

#### MOREOVER

- Related investigatory mechanisms include more systemic, reform-oriented approaches such as parliamentary inquiries, commissions, internal investigations.
- In addition to the *Principles*, the *Istanbul Protocol* and *Principles for the Investigation of Arbitrary Executions* provide guidance on effective investigations.
- Obligations to investigate are arguably further strengthened where public officials are also required to formally report whenever they are made aware of allegations.<sup>27</sup>
- Similarly, prosecutorial and judicial authorities are in positions and therefore have a responsibility to initiate investigations where there are indications, whether explicit or not, that those being brought before them could have been subjected to ill-treatment.<sup>28</sup>

## REFERENCES

- <sup>1</sup> UN Convention Against Torture, Articles 12, 13, 16; UN Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), CCPR/C/21/Rev.1/Add.13, para. 15; *Assenov v. Bulgaria*, 90/1997/874/1086, 28 October 1998, European Court of Human Rights, para. 102; Inter-American Convention Against Torture, Article 8.
- <sup>2</sup> Manfred Nowak and Elizabeth McArthur (eds.). *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), p. 414. ('Nowak')
- <sup>3</sup> *Principles on the Effective Investigation and Documentation of Torture Other Cruel, Inhuman or Degrading Treatment or Punishment*, para 2. ('Principles'); CPT Standards, 2004, 'Combating impunity' CPT/Inf(2004)28-part, para. 27. ('CPT Standards 2004')
- <sup>4</sup> For medical screenings, see Nowak p. 432.
- <sup>5</sup> Nowak, p. 431.
- <sup>6</sup> *Aksoy v. Turkey*, 100/1995/606/694, 18 December 1996, European Court of Human Rights, para. 98: 'Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13'.
- <sup>7</sup> *Principles*, 2.
- <sup>8</sup> Nowak, p. 434; UN Committee Against Torture, *Evloev v Kazakhstan*, CAT/C/51/D/441/2010 (2013), para. 9; UN Committee Against Torture, *Blanco v Spain*, CAT/C/20/D59/1996 (1998): three weeks delay was held not to be prompt.
- <sup>9</sup> UN Committee Against Torture, General Comment No. 3, 2012: Implementation of article 14, para. 17.
- <sup>10</sup> CPT Standards 2004, para. 30.
- <sup>11</sup> Nowak, pp. 436-438.
- <sup>12</sup> UN Special Rapporteur on Torture, Report, A/68/295 (2013), para. 64: 'Although article 12 of the Convention against Torture does not exclude the possibility of the investigation being carried out by prison administration, in most cases internal investigations lack transparency and are marred by a conflict of interest. Allegations of torture and other ill-treatment should be investigated by an external investigative body, independent from those implicated in the allegation and with no institutional or hierarchical connection between the investigators and the alleged perpetrators.'; see also UN Special Rapporteur on Torture, Mission to Mexico, 29 December 2014, A/HRC/28/68/Add.3, para. 82(e).
- <sup>13</sup> UN Committee Against Torture, *Blanco v Spain*, CAT/C/20/D59/1996 (1998), para. 8.8; UN Committee Against Torture, *M'Barek v. Tunisia*, CAT/C/23/D/60/1996 (1996), para. 11.10; CPT Standards 2004, para. 33.
- <sup>14</sup> *Assenov v Bulgaria*, para 102.
- <sup>15</sup> *Principles*, 3.
- <sup>16</sup> *Principles*, 2.
- <sup>17</sup> *Principles*, 2.
- <sup>18</sup> *Principles*, 3(a).
- <sup>19</sup> *Principles*, 4; see Nowak, p. 437.
- <sup>20</sup> CPT Standards, 'Complaints Mechanisms', CPT/Inf(2018)4-part, paras. 75-91. ('CPT Standards 2018')
- <sup>21</sup> UN Committee Against Torture, Report of the Committee, Supplement No. 44, A/56/44, para. 97(e).
- <sup>22</sup> UNCAT, Article 16; see also *Principles* 3(b):
- <sup>23</sup> See also *Principles*, 3(b).
- <sup>24</sup> UN Committee Against Torture, Report on Nepal, CAT/C/NPL/CO/2 (2007), para. 24.
- <sup>25</sup> *Principles*, 1 (a)-(c).
- <sup>26</sup> Freedom From Torture, 'Proving Torture: Demanding the impossible, Home Office mistreatment of expert medical evidence', November 2016, p.11.
- <sup>27</sup> CPT Standards 2004, para. 27.
- <sup>28</sup> CPT Standards 2004, para. 28.