

MODULE 5

Introduction

States are bound by an obligation to provide effective protection of the rights and freedoms recognised by international law, including the prohibition of torture and ill-treatment, to all persons under their jurisdiction. This obligation comprises the due diligence duties to effectively prevent, investigate, prosecute, punish, and provide redress for human rights violations. Each of these encompasses positive obligations that are inherent to this effective protection (see *Module 2: UNCAT and the Definition of Torture*).

Duty to investigate

States Parties to the UN Convention against Torture (UNCAT) have the duty to ensure that all allegations of torture are heard by the competent authorities in a prompt and impartial manner (Art. 13). This individual right is two-fold: it consists both of the right to lodge a complaint to the competent authorities, and of the right to have the complaint investigated promptly and impartially. This obligation comprises a duty to ensure that investigations are effective.

Promptness

A prompt response by the authorities to allegations of torture is essential to protect the victim from being subjected to further acts of torture. It allows for the proper documentation of physical traces of torture or ill-treatment which can quickly disappear and strengthens the rule of law.

The opening of investigations does not require the submission of a formal complaint. State parties to UNCAT are under an obligation to carry out prompt and impartial *ex officio* investigations, wherever there is reasonable ground to believe that an act of torture or cruel, inhuman or degrading treatment or punishment has been committed (Art.12). It is sufficient that the victim or their next-of-kin has alleged acts of torture, or that there are reasonable grounds to believe that acts of torture have been committed. The Istanbul Protocol provides guidance on effective investigations into torture allegations.

In the case of Linda Loaiza López Soto v. Venezuela the Inter-American Court of Human Rights (IACtHR) stated the importance of prompt and effective responses by the authorities in the protection of human rights. The victim was held captive and abused by a private actor over a period of four months. Her sister immediately reported her abduction to the authorities and provided the police with the perpetrator's address and phone number. Despite this and other attempts to report the abduction, the police refused to start an investigation. The victim was eventually able to escape. As a result of her injuries, she had to undergo multiple surgeries and spent over a year hospitalised. The investigation and judicial process that followed the attack was tainted with irregularities, including the authority's inability to quickly gather evidence from the place where the victim was held captive. The trial against her kidnapper only began much later.

Impartiality

An impartial investigation must be carried out by an organ other than the one implicated in the alleged violations and by competent and qualified individuals.

In the case of Ana, Beatriz and Celia González Pérez v. Mexico, two sisters had been arbitrarily detained and raped by military personnel. The case, supported by gynaecological examinations and testimony of the victims, was referred to the Office of the Public Prosecutor for Military Justice (OPPMJ). The victims opposed this transfer, arguing the OPPMJ's lack of impartiality. The OPPMJ dismissed the submitted evidence and ordered new gynaecological examinations, which the victims refused to undergo. The OPPMJ closed the investigation stating the evidence lacked credibility. The IAComHR stated that investigations conducted by entities with possible involvement in the events are clearly partial and lead to *de facto* impunity. It also held that military courts inherently lack independence and impartiality. It found a violation of the right to a fair trial and to judicial protection.

Effectiveness

To be effective, an investigation must be capable of establishing the truth, as well as of identifying the perpetrators. It must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation.

The effectiveness of an investigation might be compromised in a particular context of marginalisation of a vulnerable group or minority.

In the case of Aghdgomelashvili and Japaridze v. Georgia, the European Court of Human Rights considered a police raid of an LGBT+ organisation in Tbilisi. The applicants were subjected to degrading and humiliating treatment, through invasive strip searches and the use of homophobic and transphobic insults by the police. Upon lodging a complaint with the authorities, the applicants specifically requested an investigation on the discriminatory nature of the police abuse. The ECtHR held that authorities must take reasonable steps to investigate the possibility of discriminatory motives behind allegations of torture and ill-treatment. It found that the Georgian government was unwilling to investigate the discriminatory motive of the raid, despite the obvious need for it in the Georgian context.

The Istanbul Protocol provides tools for investigating and assessing allegations of torture effectively by medical and legal professionals. It sets international legal standards for such investigations, providing a legal basis for practitioners to litigate when those standards are not being met.

Duty to prosecute and punish

When States are unable to prevent HR violations, States have a duty to prosecute and punish alleged perpetrators of such offences. The failure to investigate and prosecute allegations jeopardises victims' right to redress.

In the case of Maria da Penha Fernandes v. Brazil the applicant had been a victim of domestic violence for several years, culminating in two murder attempts by her former partner, leaving her paraplegic. She argued that the Brazilian government was complacent to these crimes, since the domestic judicial system was inefficient and discriminatory. The IACoHR found that women faced hurdles to lodge domestic violence complaints, without guarantees of a response from the authorities (para.47). The use of the "honour defence" was still prevalent in Brazil, creating a general pattern of impunity. The IACoHR concluded that the State condoned such practices and created an environment conducive to domestic violence. It found that Brazil was in violation of its duties to prevent, prosecute, and punish perpetrators of domestic violence.

When faced with allegations of torture, practitioners should bear in mind the importance of documenting the allegations through medical and psychological reports. CSOs and NGOs can also help initiating prosecutions by assisting in the documentation process and producing public reports on the violations suffered by their clients. Practitioners should seek their client's consent to represent them and ensure that it remains valid throughout the proceedings. This includes ensuring that the client understands the proceedings and what they entail, the time they are likely to take, and the possible costs and risks involved. Practitioners should also ensure the security and wellbeing of their client throughout the process (see *Module 14: Ethics and Client Care*).

Practitioners should bear the State obligations in mind (to prevent, protect, investigate, and redress). When domestic proceedings fail or are not viable, litigation at the regional or

international level against the State host of the violations should be considered (see *Module 1: Holistic Strategic Litigation against Torture*, and *Module 8: Forum Choice*). When domestic remedies are ineffective, the requirement to exhaust them before filing a claim before regional and international fora is lifted.

Strong litigation and advocacy plans are key aspects of strategic litigation. Advocacy should be a concerted effort with NGOs and relevant stakeholders.

To this aim, documentation of both the violations and the failures of the State are essential. Documentation should include gathering evidence and information of systemic State failures, which demonstrate that the State supports a 'pattern of impunity' for instance. These can include refusals by the police to investigate, media and news items highlighting similar cases, testimonies, etc.