

How can we strengthen the obligation to protect from reprisals under Article 13 of the Convention against Torture?

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Abstract: Protection from reprisals plays a fundamental role in enabling victims of human rights violations to seek accountability and redress. Despite its relevance to the fight against torture and impunity, this protection is ineffective or lacking in many states where torture is practiced. This article considers the state's obligation to protect under Article 13 of the UN Convention against Torture and how this has been interpreted by the Committee against Torture. It discusses whether there is a need to elaborate on what the obligation to protect from reprisals entails. The article then compares the interpretative guidance from other UN treaty bodies and experts on similar protection obligations under their respective treaties. In doing so it provides examples that could guide the Committee against Torture in elaborating on its interpretation of Article 13 UNCAT to strengthen the protection for victims and witnesses of torture.

Keywords: Protection from reprisals, UN Convention against Torture, Committee against Torture, Article 13 UNCAT, victims and witnesses of torture.

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Introduction

Protection sits at the core of international human rights law. The imperative to protect works to both restrain states from violating human rights and compel them to act to protect individuals against violations by state actors or other individuals. It is imbued in the notion that states should ensure a safe and enabling environment for the enjoyment of rights.¹ Protection is no less critical when we take the prohibition of torture and ill-treatment. It is recognised that Article 13 of the UN Convention against Torture (UNCAT) places a duty on the state to protect from ill-treatment or intimidation.² In the context of the UNCAT, the term ‘reprisals’ is used to describe ill-treatment or intimidation that a victim or witness of torture or ill-treatment is exposed to on account of reporting or providing evidence in relation to the violation. Protection is also an integral component of other rights under the UNCAT such as the right to justice and remedy and the right to rehabilitation.³ The former UN Special Rapporteur on Torture (Manfred Nowak) highlighted the critical role that protection from reprisals plays as a deterrent to others who may consider raising allegations in the future and the major impact it has on the general credibility and therefore functioning of the complaints mechanism. Nowak underlined that states are obliged ‘to inquire into all reported cases of intimidation and set up a program that protects complainants, witnesses and those who might be further endangered’. Despite the critical nature of protection, Nowak stated that he could ‘hardly think of any other safeguard where the legally required protection and the actual reality differ in such a glaring and devastating way’.⁴

It is apparent that the reality remains unchanged since Nowak’s remarks in 2010. Firstly, the fear of reprisals is one of the main reasons that so few complaints of torture or ill-treatment are lodged in many countries.⁵ Reprisals can take many forms, including being falsely charged for a criminal offence, receiving threats or harassment from local law enforcement officials, or stigmatisation that can lead to a loss of livelihood or alienation from the community. Secondly, as noted by Nowak, ‘most victims of torture are ... ordinary persons suspected of having committed criminal offences. They usually belong to disadvantaged, discriminated and vulnerable groups, above all those suffering from poverty’.⁶ Yet, efforts at the international level to provide

¹ Forst, M. (2016: 21).

² Convention against Torture and other Cruel, Degrading and Inhuman Treatment and Punishment (1984).

³ The UN Committee against Torture recognises that a failure to provide protection ‘stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy’ in its General Comment no. 3 on Article 14 (2012).

⁴ Nowak, M. (2010: paras. 112–113).

⁵ Nowak, M., Birk, M. & Monina, G. (2019: 367).

⁶ Nowak, M. (2010: para. 251).

guidelines on protection from intimidation and reprisals have tended to focus on protection for human rights defenders, individuals in places of detention or individuals who cooperate with the human rights work of the UN.⁷ This leaves many ‘ordinary’ victims of torture or ill-treatment unable or unwilling to access formal protection mechanisms, even if such mechanisms do exist.⁸ Finally, victims of torture and ill-treatment perpetrated by state actors will be expectedly wary of seeking protection from the same state authorities responsible for their suffering.⁹ These factors underline the many challenges that states face when implementing the obligation to protect from reprisals under Article 13.

In response to these challenges, this article considers whether more attention needs to be given to the critical role that protection from reprisals plays. It considers whether there is a need for more guidance from the Committee against Torture (hereafter ‘CAT’) and other experts on the scope of the obligation to protect under Article 13 UNCAT to encourage states to implement their obligations to protect in ways that more effectively meet the needs of ‘ordinary’ victims and witnesses. The article first considers the interpretative guidance of CAT and the UN Special Rapporteur on Torture on the obligation to protect from reprisals. It then explores how other international human rights treaties address the obligation to protect and whether the interpretation of similar protection obligations under other human rights treaties presents opportunities or inspiration for elaborating on the scope of protection obligations under Article 13 UNCAT. By focusing on the obligation to protect from reprisals (as one limb of state parties’ obligations under Article 13 UNCAT), the article aims to start a discussion on how CAT and anti-torture experts could encourage states to implement protection mechanisms that better serve the needs of victims, witnesses and others who report on torture and ill-treatment as part of the wider debate on strengthening complaints mechanisms.

⁷ Discussion of these groups is outside the scope of this article. Examples of guidelines include: Office of the United Nations High Commissioner for Human Rights (2004), *Human Rights Defenders: Protecting the Right to Defend Human Rights* (Fact Sheet No. 29); Chairpersons of Human Rights Treaty Bodies (2015), *Guidelines against Intimidation or Reprisals*, San José Guidelines; UN Committee against Torture (2015), *Guidelines on the receipt and handling of allegations of reprisals against individuals and organisations cooperating with the Committee against Torture under articles 13, 19, 20 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Sub-Committee on Prevention of Torture (2016), *Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate*.

⁸ See key research findings from Kenya, Bangladesh and Nepal in: Jensen, S., Kelly, T., Koch Andersen, M., Christiansen, C. & Raj Sharma, J. (2017).

⁹ DIGNITY—Danish Institute Against Torture (2016).

The article provides a legal analysis of protection from reprisals under international human rights law. It focuses on state obligations to protect as interpreted in individual cases, state reviews or soft law instruments, such as general comments/recommendations or thematic reports. The discussion on the obligation to protect from reprisals under Article 13 UNCAT includes an analysis of the state reviews conducted by CAT between 2016 and 2019.¹⁰ In addition, the article gives a comparative analysis of related protection obligations under the Convention for the Protection of All Persons from Enforced Disappearance (CED), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) to illustrate similarities or differences in the approach taken to the obligation to protect from reprisals under other human rights treaties.

Protection under Article 13 UNCAT

This section considers state obligations to protect victims and witnesses from ill-treatment and intimidation in Article 13 UNCAT, as interpreted by CAT and the UN Special Rapporteur on Torture. It questions whether enough attention has been given to the obligation to protect in Article 13 and whether there is a need for more guidance on what the obligation to protect from reprisals entails to encourage states to implement these obligations more effectively.

Article 13 UNCAT acknowledges the fundamental role that the protection of victims and witnesses from threats and reprisals plays in the exercise of their right to complain and to have their case promptly and impartially examined. By including the obligation to protect against reprisals in Article 13, the drafters recognised that a lack of effective protection for victims of torture and ill-treatment will directly impact on their willingness to file a complaint, thereby reducing their ability to access justice and reparation, and allowing impunity to prevail.¹¹ The obligation to protect is also central to the realisation of the right to redress and reparation under Article 14 UNCAT, as affirmed in CAT's General Comment no. 3, which recognises that the '[f]ailure to provide protection stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy'.¹²

But how has the obligation been interpreted to date and has sufficient interpretative guidance been given to states on what the obligation entails?

¹⁰ Between 2016 and 2019, the UN Committee against Torture conducted 66 country reviews of states parties' implementation of the UNCAT. It addressed the issue of reprisals or victim and witness protection in 35 of the concluding observations in this period.

¹¹ DIGNITY (2016: 8).

¹² UN Committee against Torture (2012: para. 31).

Firstly, there is a clear understanding of the type of harm and individuals that fall under the obligation to protect in Article 13 UNCAT. In terms of harm, CAT has clarified that ‘reprisals constitute a form of cruel treatment or punishment under article 16 of the Convention and may amount to torture in certain circumstances’.¹³ The reference to ‘ill treatment or intimidation’ in Article 13 obliges states to protect victims from treatment falling below the threshold for ill-treatment. For example, CAT has held in individual complaints that a violation of Article 13 may occur where the victim received threats and attempts at bribery following the filing of a complaint.¹⁴ In terms of the individuals to be protected, Article 13 refers narrowly to ‘the complainant and witnesses’. However, CAT has interpreted the obligation to protect under Article 13 more broadly to also cover other actors such as journalists, lawyers, medical experts, and human rights defenders who report on torture or ill-treatment and subsequently face harassment and intimidation from the authorities.¹⁵ CAT has also provided recommendations on the protection of specific groups of victims, including victims of domestic and sexual violence and asylum-seekers and refugees.¹⁶ Further, the broader definition of victim used by CAT when interpreting state obligations under Article 14 UNCAT extends the obligation to protect to include ‘immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization’.¹⁷

This takes us to the question of whether there is sufficient interpretative guidance on what the obligation to protect from reprisals entails from CAT and other experts. It is submitted that on closer examination of CAT’s concluding observations and recommendations, there is a lack of clarity and detail in the guidance provided to states on how to fully implement state obligations to protect from reprisals under

¹³ UN Committee against Torture (2015).

¹⁴ *Asfari v. Morocco* (2014) UN Doc CAT/C/59/D/606/2014, para. 13.5 (threats); *Gerasimov v Kazakhstan* (2010) UN Doc CAT/C/48/D/433/2010, paras. 5.4, 5.10, 8.8 & 12.6 (threats and attempts at bribery).

¹⁵ UN Committee against Torture, UN Doc CAT/C/CZE/CO/6 (2018: para. 13); UN Doc CAT/C/QAT/CO/3 (2018: para. 48); UN Doc CAT/C/TJK/CO/3 (2018: para. 22); UN Doc CAT/C/AFG/CO/2 (2017: para. 44); UN Doc CAT/C/ARG/CO/5–6 (2017: para. 24); UN Doc CAT/C/BHR/CO/2–3 (2017); UN Doc CAT/C/PAK/CO/1 (2017: para. 23); UN Doc CAT/C/LKA/CO/3–4 (2011: para. 13); UN Doc CAT/C/MDA/CO/2 (2010: para. 19); *Asfari v Morocco* (2014) UN Doc CAT/C/59/D/606/2014, para. 13.5 (lawyer); *Niyonzima v Burundi* (2012) UN Doc CAT/C/53/D/514/2012, para. 8.5 (family and lawyer).

¹⁶ UN Committee against Torture, UN Doc CAT/C/GRC/CO/7 (2019: para. 17) (asylum-seekers and migrants); UN Doc CAT/C/COD/CO/2 (2019: para. 33) (sexual violence); UN Doc CAT/C/IRL/CO/2 (2017: para. 32); UN Doc CAT/C/BHR/CO/2–3 (2017: para. 35) (victims of domestic and sexual violence). This is also reflected in the overarching principle of non-discrimination whereby states are obligated to protect certain minority or marginalised individuals or populations especially at risk of torture (see the UN Committee against Torture, (2008) General Comment No. 2: Implementation of article 2 by State parties, para. 21).

¹⁷ UN Committee against Torture (2012: para. 3).

Article 13 UNCAT. Nowak et al., note that '[t]he Committee has regularly criticised the lack of victim and witness protection in law and practice and called on states to take adequate measures ... without further elaborating on what this means'.¹⁸ There are very few examples where CAT has provided more detailed recommendations on the specific measures that a state party should take to fully implement the obligation to protect under Article 13.¹⁹ As outlined in Nowak et al. (2019), specific measures could include: suspension of the suspected officials from duty; moving the person who made the complaint to a safe location; change of identity; providing on-site security, hotlines, and judicial orders of protection to prevent violence and harassment against complainants, witnesses, or close associates of such parties; assigning special personnel to victims and witnesses; arranging for regular examinations by doctors in places of detention.

An analysis of the state reviews between 2016 and 2019 shows that the most frequent measure that CAT urged states to take in relation to their protection obligations was to immediately suspend suspected perpetrators from duty to prevent them from committing reprisals, repeating the alleged act, or obstructing the investigation.²⁰ On several occasions, CAT has recommended in general terms that a state party revises its legislation, or strengthens the implementation of protection measures, or allocates more resources to the state's witness protection agency.²¹

On only two occasions (in 2016), CAT made more detailed recommendations in its state reviews of Sri Lanka and the Philippines. Firstly, it called on Sri Lanka to 'ensure that complainants can file their complaints safely without risk of reprisals'. It also recommended that Sri Lanka revise the relevant legislation to 'ensure that witnesses to and victims of human rights violations, including torture, sexual violence and trafficking, are effectively protected and assisted, in particular by ensuring that the Victims and Witness Protection Division is an autonomous entity independent of the police hierarchy and that its members are fully vetted ... [and] take prompt criminal and disciplinary action against police officers responsible for threats or reprisals against victims of and witnesses to torture'.²² In relation to the Philippines, CAT recognised the holistic nature of the protection needs of victims, witnesses and others

¹⁸ Nowak, M., Birk, M. & Monina, G. (eds) (2019): 369).

¹⁹ Nowak, M., Birk, M. & Monina, G. (eds) (2019): 369).

²⁰ UN Committee against Torture, UN Doc CAT/C/SEN/CO/4 (2019: para. 20); UN Doc CAT/C/QAT/CO/3 (2018: para. 24); UN Doc CAT/C/CMR/CO/5 (2017: para. 24); UN Doc CAT/C/ITA/CO/5-6 (2017: para. 41); UN Doc CAT/C/RWA/CO/2 (2017: para. 23); UN Doc CAT/C/TLS/CO/1 (2017: para. 17); UN Doc CAT/C/PAN/CO/4 (2017: para. 23); UN Doc CAT/C/ARG/CO/5-6 (2017: para. 30); UN Doc CAT/C/ISR/CO/5 (2016: para. 31); UN Doc CAT/C/TUR/CO/4 (2016: para. 9).

²¹ See for example, UN Committee against Torture, UN Doc CAT/C/ECU/CO/7 (2016: para. 38); UN Doc CAT/C/LBN/CO/1 (2017: para. 45); UN Doc CAT/C/BIH/CO/6 (2017: para. 17).

²² UN Committee against Torture, UN Doc CAT/C/LKA/CO/5 (2016: para. 18).

supporting them. Its recommendations included providing ample protection in light of the urgency of the protection needs; strengthening the witness protection programme through legislative amendments and by prioritising its funding; expanding benefits to witnesses such as secure housing, financial or livelihood assistance; and ensuring health professionals documenting torture and ill-treatment are adequately protected from intimidation and reprisals and are able to examine victims independently and confidentially.²³ None of the other state reviews between 2016 and 2019 include recommendations on specific measures for protection to this level of detail.

As mentioned in the introduction, previous UN Special Rapporteurs on Torture have highlighted the critical nature of protection from reprisals, pointing to the glaring gap between the protection legally required to be provided by states and the reality on the ground. The analysis of state reviews by CAT highlights that many states lack an independent body to receive and investigate complaints regarding torture and ill-treatment by law enforcement officials, let alone an independent victim and witness programme which would encourage victims to come forward.²⁴ Where victim and witness programmes do exist, these often have restrictive admission criteria, for example requiring that the person is involved in a significant or high-profile criminal trial or considered to be a crucial witness. However, despite the critical role that protection against reprisals plays, the analysis of state reviews by CAT suggests that the importance of fully implementing this obligation is somewhat overlooked. The paucity of interpretative guidance and lack of attention given to the implementation of this obligation in state reviews is unlikely to improve the poor implementation record of states. Therefore, there is an argument that more detailed guidance from CAT and other experts in the anti-torture field is needed that draws on the experiences and challenges on the ground and which would help to better frame this obligation. Further, in addressing this obligation in more detail, we may find that the interpretation of protection obligations under other treaties presents opportunities or inspiration for elaborating on the scope of the protection obligations under Article 13 UNCAT. This is explored in the next section.

Alternative ways of interpreting the obligation to protect from reprisals

This section looks at how the obligation to protect from reprisals under other international human rights treaties has been interpreted by the relevant UN treaty bodies or other experts. The section explores whether any of these comparative interpretations

²³ UN Committee against Torture, UN Doc CAT/C/PHL/CO/3 (2016: para. 25).

²⁴ For example, recommendations on this issue were made to the following states (2016–2019): the Philippines, Kuwait, Honduras, Turkey, Tunisia, Israel, Sri Lanka (2016); Panama, Timor-Leste, Rwanda, Cameroon (2017), Senegal, Qatar (2018).

could contribute to a more detailed discussion on the obligation to protect under Article 13 UNCAT.

Protection under Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance (CED)

The obligation to protect under Article 12 CED is very similar to the obligation in Article 13 UNCAT and is directly linked to the participation of the individual in an investigation into an enforced disappearance. Article 12 CED explicitly extends the obligation to protect to a wider group of beneficiaries than is covered by Article 13 UNCAT by including relatives of disappeared (i.e. secondary victims), defence counsel and persons involved in an investigation.²⁵ The CED goes further than the UNCAT by explicitly placing an obligation on states to ‘take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation’ and ensure those implicated in the violation are not in a position to influence the investigation ‘by means of pressure or acts of intimidation or reprisal’.²⁶

The Working Group on Enforced and Involuntary Disappearances (WGEID) assists families to discover the whereabouts of family members reportedly disappeared and acts as a conduit between families, other sources of support and the government concerned. It presented a report on standards and public policies for the effective investigation of enforced disappearances at the 45th session of the Human Rights Council in 2020. The report highlighted the importance of prompt investigations led by autonomous and independent authorities, in part to protect witnesses and relatives from intimidation, reprisals and to prevent revictimisation.²⁷ It also underlined the key role that victims, civil society and other NGOs play in investigating cases of enforced disappearance and highlighted the important protective role that family or civil society organisations play by reducing victims’ exposure to risks, both physical and psychological.²⁸ The report emphasised that there is an essential need for adequate protection programmes and incentives for witness testimony, particularly when relatives are afraid to file complaints or testify. In the report, the WGEID considered it of paramount importance that states establish adequately funded institutions to protect and assist victims, their families, witnesses and other stakeholders. In addition, the report emphasised that protection programmes ‘should be established within functional independent institutions’.²⁹

²⁵ International Convention for the Protection of All Persons from Enforced Disappearance (2006: Article 12(1)).

²⁶ International Convention for the Protection of All Persons from Enforced Disappearance (2006: Article 12(4)).

²⁷ Working Group on Enforced and Involuntary Disappearances (2020: paras. 14, 17, 37 & 63).

²⁸ *Ibid* (2020: para. 61).

The report recommended that ‘comprehensive witness protection measures [are] guaranteed’ by states. Measures should include informing witnesses of the opportunity to benefit from identity protection, informing them when their testimony is to be disclosed to the defence or made public. States should also consider the use of witness relocation schemes in situations where serious danger exists and ensure that procedures and mechanisms facilitate continued communication between authorities and witnesses to allow authorities to respond effectively to the concerns of witnesses.³⁰

The WGEID’s report clearly outlines the essential role that protection plays in ensuring accountability and provides useful guidance that is of relevance to elaborating on the obligations under Article 13 UNCAT. The challenges in providing effective protection in cases of enforced disappearance are similar to those relating to victims of torture because of the dual role played by state authorities in the alleged violation and as the duty-bearer responsible for providing protection. Therefore, of particular significance to the context of victims of torture is the WGEID’s strong recommendation that protection programmes must function independently of the investigative authorities and receive adequate funding from the state. In addition, the important protective role that family and civil society play in reducing risks to the safety of victims is particularly relevant to contexts where torture and ill-treatment is prevalent, yet formal protection mechanisms are lacking.

Protection under the International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) places a duty on states to protect, *inter alia*, the right to life and the right to security of person.³¹ The Human Rights Committee (hereafter ‘HRC’) which monitors the implementation of state obligations under the ICCPR has developed several general comments to guide states on how they should interpret their obligations under Article 6 and Article 9 ICCPR. In particular, the most recent General Comment no. 36 on Article 6 goes far beyond the HRC’s own jurisprudence in explaining the scope of the right to life, in contrast to the HRC’s previous general comments.³²

²⁹ Ibid (2020: para. 65).

³⁰ Ibid (2020: paras. 65–67).

³¹ International Covenant on Civil and Political Rights (1966). Article 6 (Right to Life) and Article 9 (Right to Liberty and Security) are both fundamental rights. The latter is broader in scope as it also addresses injuries that are not life-threatening. See, also: UN Human Rights Committee (2014: para. 55).

³² Joseph, S. (2019: 348).

Protection obligations under the right to life (Article 6 ICCPR)

As with the UNCAT, the duty to protect the right to life is closely linked to the duty to investigate, prosecute and provide an effective remedy.³³ The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialise.³⁴ The HRC has emphasised the particular duty placed on states to investigate alleged violations of Article 6 ICCPR ‘whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict’. This includes exploring whether superior officials are legally responsible for violations of the right to life committed by their subordinates.³⁵ This is especially significant in countries where law enforcement officials are the main perpetrators of acts of torture or ill-treatment and extra-judicial killings. The HRC also draws on the recommendations of the WGEID and UN Special Rapporteur on extrajudicial, summary or arbitrary executions in relation to the protection obligations associated with investigations into violations of the right to life, clarifying that ‘[s]tate parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation’.³⁶

Given the fundamental nature of the right to life and the fact that it must not be interpreted narrowly, the HRC has also elaborated on the measures that states should take to combat threats to life arising from non-state actors by adopting an appropriate criminal framework. In General Comment no. 36, the HRC considers that states are required to ‘take special measures of protection towards *persons in situation of vulnerability* whose lives have been placed at particular risk because of *specific threats or pre-existing patterns of violence*’ (emphasis added).³⁷ Persons in situation of vulnerability are considered by the HRC to include, human rights defenders, officials fighting corruption and organised crime, humanitarian workers, journalists, prominent public figures, witnesses to crime,³⁸ victims of domestic and gender-based violence and human trafficking, children (especially in situations of armed conflict, street

³³ UN Human Rights Committee (2019: para. 19).

³⁴ Ibid (2019: para. 27). This is reflected in jurisprudence of regional human rights courts e.g. European Court of Human Rights, *Acar et al. v. Turkey* (2005), para. 77; Inter-American Court of Human Rights, *Rochela Massacre v. Colombia* (2007), para. 127.

³⁵ UN Human Rights Committee (2019: paras. 27 & 29).

³⁶ Ibid (2019: paras. 27–28).

³⁷ Ibid (2019: para. 23). With reference to ‘specific threats’, the Human Rights Committee drew on the Inter-American Court’s judgment in *Barrios Family v. Venezuela* (2011: para. 124), where the claimants and their families had suffered threats and acts of violence committed against them meaning that the ‘State’s obligation of diligence to prevent the violation of their right to life became more specific and more precise’. See also, Forst, M. (2019: para. 30).

³⁸ UN Human Rights Committee, UN Doc CCPR/C/COL/CO/6 (2010: para. 14).

situations and unaccompanied migrants), members of ethnic or religious minorities and indigenous peoples, LGBTI persons, displaced persons, asylum seekers, refugees and stateless persons.³⁹ According to the HRC, states have an obligation to respond ‘urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures’. These may include around-the-clock police protection, protection and restraining orders, and protective custody (in exceptional circumstances, with the consent of the victim).⁴⁰

Protection obligations under the right to security of person (Article 9 ICCPR)

Protecting the right to security of the person includes the obligation on states ‘to take reasonable and appropriate measures’ and to protect individuals who have received threats to their life, whether or not they are detained.⁴¹ In its General Comment no. 35 on Article 9, the HRC clarifies that this obliges state parties ‘to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors’. The HRC confirms that states must take measures to prevent future injury, for example by ‘respond[ing] appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities’.⁴²

The HRC has found violations of Article 9 ICCPR where there was an objective need for protection measures to guarantee a person’s security, but the state failed to provide protection. In individual complaints, the HRC has identified an ‘objective need for protection’ where for example, human rights workers were threatened in the past,⁴³ victims were threatened by police officers after filing a complaint,⁴⁴ and in circumstances where an individual received threats, an attack on his/her person, and experienced the murder of a close associate.⁴⁵

³⁹ UN Human Rights Committee (2019): para. 23).

⁴⁰ Ibid.

⁴¹ UN Human Rights Committee, *Delgado Páez v. Colombia* (1985) UN Doc CCPR/C/39/D/195/1985, para. 5.5; *Peiris v. Sri Lanka* (2009) UN Doc CCPR/C/103/D/1862/2009, para. 7.5.

⁴² UN Human Rights Committee (2014): para. 9).

⁴³ UN Human Rights Committee, *Marcellana and Gumanoy v. Philippines* (2007) UN Doc CCPR/C/94/D/1560/2007, para. 7.7.

⁴⁴ UN Human Rights Committee, *Rajakakse v. Sri Lanka* (2004) UN Doc CCPR/C/87/D/1250/2004, paras. 9.7 & 11.

⁴⁵ UN Human Rights Committee, *Delgado Páez v. Colombia* (1985), para. 5.6.

The obligations placed on states to protect individuals in relation to the right to life and to personal security extend far beyond the obligations to protect under Article 13 UNCAT. Of particular interest to the context of ‘ordinary’ victims of torture or ill-treatment is the broad interpretation of ‘persons in situation of vulnerability’ whose lives are at risk due to the nature of threats or pre-existing patterns of violence. The obligation under Article 6 ICCPR is couched in terms of protection from violence perpetrated by non-state actors, but there is an argument that CAT should consider a broader categorisation of ‘persons in situation of vulnerability’ in relation to victims of torture and ill-treatment to ensure the obligation to protect from reprisals is more effective and its scope broadened to not only cover victims or witnesses who have filed a complaint. If such an approach is sustainable, the question of independence will be key to the effectiveness of ‘special measures’ in cases where the state is both the perpetrator of the violation and bears primary responsibility for providing protection.

Protection of women against violence under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴⁶

Women’s right to a life free from gender based violence (hereafter ‘GBV’) is indivisible from and interdependent on other human rights, including the rights to life, liberty and security of the person, and freedom from torture, cruel, inhumane or degrading treatment.⁴⁷ In certain situations, GBV may amount to torture or cruel, inhuman or degrading treatment but even where it does not, the obligations under CEDAW will be engaged where an act of violence (or discrimination) is perpetrated against a woman.⁴⁸

As with other international human rights treaties discussed in this article, the obligation to protect in CEDAW is closely linked to the duty on the state to investigate, prosecute and punish perpetrators and provide remedies once a victim has lodged a complaint. Yet this overlooks the challenges that many victims have in reporting violations in the first place, for fear of humiliation, stigmatisation, arrest, torture, including at the hands of law enforcement officials.⁴⁹ In view of the broad nature of duty-bearers’ obligations under CEDAW, the Committee on the Elimination of Discrimination against Women (hereafter ‘CEDAW Committee’) has insisted in individual complaints that the state is additionally obligated to investigate the existence of failures, negligence or omissions on the part of public authorities, which may have caused a victim to be deprived of protection.⁵⁰

⁴⁶ Convention on the Elimination of All Forms of Discrimination against Women (1979).

⁴⁷ UN Committee on the Elimination of Discrimination against Women (2017: para. 15).

⁴⁸ UN Committee on the Elimination of Discrimination against Women (2017: paras. 16, 18 & 21). See also, Mendez, J. (2016: para. 8).

⁴⁹ UN Committee on the Elimination of Discrimination against Women (2015: para. 10).

⁵⁰ UN Committee on the Elimination of Discrimination against Women, *González Carreño v. Spain* (2014) Communication No. 47/2012.

The CEDAW Committee has provided very detailed guidance to state parties on what it considers to be effective protective measures for victims of GBV, perpetrated either by state or private actors in a number of general recommendations—most recently General Recommendation no. 35 (adopted in 2017).⁵¹ The CEDAW Committee recommends that in order for protection to be effective, implementation measures must ensure victim and witness privacy and safety, provide appropriate and accessible mechanisms ‘without the precondition that victims/survivors initiate legal action’ and irrespective of the victim’s ability or willingness to cooperate in legal proceedings against the alleged perpetrator. Such mechanisms should include an immediate risk assessment and where appropriate the issuance and monitoring of a court order against the alleged perpetrator, including adequate sanctions for non-compliance. In addition, protective measures should not place any undue financial, bureaucratic or personal burden on the victim;⁵² they must respect and strengthen the victim’s autonomy and be accessible to all—taking into account particular needs (e.g. dependants) or challenges in accessing measures faced by some victims.⁵³ The CEDAW Committee has also recommended that states cooperate fully with non-governmental organisations when implementing protection measures, by ‘establishing and implementing appropriate multisectoral referral mechanisms to ensure effective access to comprehensive services’.⁵⁴

The CEDAW Committee has provided detailed guidance to state parties on the obligation to protect against forms of violence perpetrated by both state and non-state actors. While on paper the obligation is closely linked to duties to investigate, prosecute and provide redress to victims, the CEDAW Committee and UN Special Rapporteur on violence against women have both underlined that protection must be provided irrespective of the victim’s participation in legal proceedings. States have been guided on how to implement measures that ensure that protection is effective through the issuance of a general recommendation and a thematic report. In addition, the CEDAW Committee’s recommendation that state and civil society actors need to collaborate and take an interdisciplinary and holistic approach to protection

⁵¹ UN Committee on the Elimination of Discrimination against Women (2017): para. 31). This consolidates the previous work of the Committee in its General Recommendation no. 19 and the work of the UN Special Rapporteur on violence against women and other UN treaty bodies and experts. See also, Šimonović, D. (2017).

⁵² UN Committee on the Elimination of Discrimination against Women (2017).

⁵³ UN Committee on the Elimination of Discrimination against Women (2017). The Committee emphasises that protective and support measures must be provided to women in institutions, including residential care homes, asylum centres and places of deprivation of liberty.

⁵⁴ UN Committee on the Elimination of Discrimination against Women (2017): para. 31).

is highly relevant to the way in which the protection from reprisals for victims of torture and ill-treatment could be more effectively implemented in many contexts.

Protection of children under the Convention on the Rights of the Child (CRC)

Several articles in the CRC establish high standards for the protection of children. The core provision—Article 19—places a broad obligation on states to take legislative, administrative, social and educational measures to protect children from violence.⁵⁵ Torture and ill-treatment is a form of violence specifically covered in Article 19 and explicitly in Article 37 CRC.⁵⁶ The Committee on the Rights of the Child (hereafter ‘CRC Committee’) emphasises that child victims of torture and ill-treatment are often marginalised, disadvantaged and discriminated against and lack the protection of adults responsible for defending their rights and best interests.⁵⁷ The state obligations to protect child victims and witnesses from human rights violations under the CRC are closely linked to obligations to investigate, punish those responsible and provide access to redress.⁵⁸

The state’s obligations to protect child victims and witnesses in criminal justice processes are clearly outlined in provisions of the Optional Protocol to the CRC (in relation to proceedings regarding sale of children, child prostitution and pornography) and in the Economic and Social Council resolution 2005/20.⁵⁹ Both emphasise the importance of protective measures being available throughout the legal process, including measures to protect the privacy and confidentiality of the victim/witness and that provide for the safety of the victim, family and witnesses from intimidation or retaliation. Resolution 2005/20 recommends that safety measures include avoiding direct contact with the alleged perpetrator; using court-ordered restraining orders; ordering pre-trial detention or house arrest for the accused; providing protection by the police or other relevant agencies and safeguarding the victim’s whereabouts from disclosure.

The CRC Committee provides guidance on the ‘appropriate measures’ that states should take to implement their obligations under Article 19 CRC in its General

⁵⁵ Convention on the Rights of the Child (1989). See also articles 28 (school discipline), 32–36 (protection from various forms of exploitation), 38 (armed conflict) and 40 (juvenile justice).

⁵⁶ Convention on the Rights of the Child (1989). See also, UN Committee on the Rights of the Child (2011: paras. 26 & 36) on ‘Torture and ill-treatment’ and ‘Perpetrators of violence’.

⁵⁷ UN Committee on the Rights of the Child (2011: para. 26). Victims of torture and ill-treatment often include: ‘children in conflict with the law, children in street situations, minorities and indigenous children, and unaccompanied children’. See also, UN Committee on the Rights of the Child (2017: para. 32).

⁵⁸ UN Committee on the Rights of the Child (2011: para. 5).

⁵⁹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000), Article 8; Economic and Social Council (2005: paras. 19, 26, 32–34).

Comment No. 13. For example, it considers that '[a]n integrated, cohesive, interdisciplinary and coordinated system is required', noting that isolated programmes and activities will have limited impact. It emphasises the essential role that child participation should play in the development, monitoring and evaluation of protective measures.⁶⁰ The CRC Committee reiterates that legislative measures must include those that '[e]nsure the protection of child victims and witnesses and effective access to redress and reparation'.⁶¹ It provides detailed guidance on the types of administrative measures it considers appropriate at different levels of government, highlighting the importance of coordination across government and provision of support to independent national human rights institutions.⁶² Moreover, the CRC Committee emphasises the importance of participation between government, professional and civil society institutions in a number of places. For example, it highlights that while targeted protection services should be initiated and implemented by both state and civil society actors, the state remains primarily responsible for implementation.⁶³ It also recognises the need to develop and implement protection policies 'through participatory processes which encourage ownership and sustainability'.⁶⁴ In a separate general comment the CRC Committee highlights the need for '[s]pecific, immediate and urgent measures' to protect children in street situations. It recommends that '[s]pecial mechanisms might have to be established to deal with individuals reported by these children as threats to their well-being, such as some members of the police and those involved in organized crime and drug trafficking'.⁶⁵ However, it does not expand on what these special mechanisms should include.

The CRC Committee has provided detailed interpretative guidance on state obligations to protect child victims and witnesses involved in criminal justice processes but also broader guidance on how to implement effective and targeted protection services. The CRC Committee's recommendations highlight the importance of the participation of various stakeholders, in particular the victim. It also underlines the importance of collaboration between the state and professional and civil society institutions to ensure that there is an interdisciplinary, holistic and coordinated response to protection. These recommendations would be relevant in the context of providing more elaborate guidance to states on how to implement their obligations to protect victims of torture and ill-treatment from reprisals.

⁶⁰ UN Committee on the Rights of the Child (2011: para. 39).

⁶¹ UN Committee on the Rights of the Child (2011: para. 41).

⁶² UN Committee on the Rights of the Child (2011: para. 42).

⁶³ UN Committee on the Rights of the Child (2011: para. 43).

⁶⁴ UN Committee on the Rights of the Child (2011: para. 42).

⁶⁵ UN Committee on the Rights of the Child (2017: para. 57).

Revisiting protection from reprisals under Article 13 UNCAT—a way forward

This article considers the critical role that the protection of victims and witnesses of torture and ill-treatment from reprisals plays in the fight against impunity. The importance of the obligation to protect from reprisals is evidenced by its explicit inclusion in Article 13 UNCAT, alongside the obligation to provide complaints mechanisms. The obligation to protect from reprisals is also closely linked to state obligations to investigate, prosecute and provide redress for human rights violations. The close relationship between these state obligations is also reflected in the other UN human rights treaties considered.

In the first part of this article, it is argued that there is very little guidance from CAT (or other experts) on what the obligation to protect from reprisals entails or how it should be implemented by states. This is despite the fundamental role that protection from reprisals plays in encouraging victims to file a complaint and thereby enabling them to access justice and reparations and contribute to the fight against impunity.

The analysis of state reviews by CAT in the first part of this article shows that although more than half (35 out of 66) included recommendations relating to reprisals or witness protection, only two (on Sri Lanka and the Philippines) provided detailed recommendations that would enhance implementation at the state level. The lack of detailed recommendations addressing how states should fulfil their obligations to protect from reprisals arguably contributes to the poor implementation of these obligations. This is particularly concerning in countries where torture is widespread and systemic, meaning that victims are easily deterred from filing complaints due to distrust of authorities and concerns for their safety. The need for more detailed interpretative guidance on what the obligation to protect from reprisals in Article 13 UNCAT entails is further supported when you consider the interpretative guidance that has been provided to state parties on similar protection obligations under other human rights treaties, as discussed in the second part of this article.

It is arguable that despite its critical role, the obligation to protect from reprisals deserves—and would benefit from—more attention from CAT and other anti-torture experts. Moreover, there is a strong argument that more guidance is needed on how the protection obligations under Article 13 UNCAT should be interpreted and implemented by state parties to ensure that the protection needs of torture victims and witnesses are adequately met at the earliest point in time after a violation occurs.

A way forward

These concluding remarks propose how to move forward and some key elements that could be included in future guidance on state obligations, taking inspiration in part from the analysis of other human rights treaties in the second part of this article.

Firstly, in terms of a way forward, it would be of great benefit if CAT addressed the interpretation of Article 13 UNCAT—including the obligation to protect from reprisals—as the topic of a general comment. This would provide an opportunity to consolidate the jurisprudence on Article 13 and draw on comparative material from other UN treaty bodies and experts, including those outlined in this article. By taking a progressive approach, CAT could build on its own jurisprudence, using the jurisprudence of other UN treaty bodies, regional human rights courts, special rapporteurs etc. to fill the gaps and strengthen the framework relating to state parties' obligations to protect from reprisals. As part of the consultation process to formulate interpretative guidance, state actors, other UN institutions and experts, national human rights institutions, academia, and civil society (particularly organisations directly representing victims) would have an opportunity to provide input and enrich the discussion.

Secondly, in terms of the key elements that should be included in guiding principles from CAT, several areas stand out. Firstly, the types of individuals that are covered by protection obligations under Article 13 UNCAT should be clarified. Article 13 focuses on protection of victims and witnesses who have lodged complaints or are participating in investigations or criminal justice proceedings. States often implement these obligations by introducing strict admission criteria for victim and witness protection programmes which a large proportion of 'ordinary' victims of torture and ill-treatment will not meet. In revisiting the types of individuals covered by Article 13, CAT should consider how to ensure that a broader range of victims—particularly those not eligible for formal victim and witness protection programmes—are more explicitly included in the obligation to protect from reprisals. In doing so, it should consider the approach taken by other UN treaty bodies, for example the HRC's reference to 'persons in situations of vulnerability'.

Thirdly, guidance must recognise that protection needs are holistic, encompassing not only physical security but also protection of livelihood, socioeconomic status, physical and mental health and wellbeing. In addition, protection needs are gender-sensitive and culturally appropriate. It is important that victims and their representatives participate in the development of guidance to ensure their needs are reflected. If state obligations to protect under Article 13 reflected a more holistic approach this would also align more closely with state obligations under Article 14 UNCAT on access to redress and reparations for victims. In exploring this element, inspiration can be drawn from the guidance of the CEDAW and CRC committees. Both committees emphasise that state and civil society actors should take a collaborative and interdisciplinary approach when developing formal protection mechanisms.

Fourthly, guidance should highlight that state obligations to protect from reprisals encompass the implementation of effective protection mechanisms which are independent and autonomous from the authorities implicated in the violation. This is essential when victims are hesitant about relying on state authorities to ensure their

protection despite having valid and often urgent protection needs. This requirement also distinguishes the protection framework appropriate for victims of human rights violations perpetrated by state actors from the framework appropriate for victims of crime perpetrated by private actors. Again, inspiration can be drawn from the guidance adopted by other UN treaty bodies. The need for independence and autonomy is explored explicitly by the WGEID in relation to protecting victims and witnesses of enforced disappearances. In addition, other treaty bodies emphasise the importance of collaboration between state and non-state actors. This could mean protection mechanisms are funded by the state but administered by other actors, thereby maintaining a degree of independence and autonomy that helps to build trust.

Finally, domestic stakeholders play a critical role in revisiting state obligations to protect torture victims and witnesses from reprisals. The contribution of victims, civil society actors, experts from national human rights institutes, academia and relevant state authorities is essential to encourage a rich, interdisciplinary discussion on how to elaborate on state obligations to protect from reprisals in a way that meets the protection needs of victims, and witnesses and those supporting them. These domestic actors are well-placed to provide insight on the gaps and challenges in providing protection from reprisals at state level. They also play a critical role in enhancing implementation of state obligations by using the guidance from UN treaty bodies and experts to pressure and persuade their respective governments to act. In doing so, they too can look at the other protection frameworks for inspiration—including those discussed in this article.

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