

Accountability Through the Specialized Criminal Chambers

Principles and Best Practices on the Collection, Admissibility and Assessment of Evidence

Practical Guide 3



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® **Accountability Through the Specialized Criminal Chambers**

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Table of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission on Human and Peoples' Rights
CAT	Committee against Torture
CCP	Code of Criminal Procedure
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACoMHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IVD	Instance Vérité et Dignité
OHCHR	Office of the High Commissioner for Human Rights
OPP	Office of the Public Prosecutor
SCC	Specialized Criminal Chambers
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
WHO	World Health Organization

Table of standards and guidance¹

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988.

Guidelines for medico-legal care for victims of sexual violence, World Health Organization, 2003.

Guidelines on Combating Sexual Violence and its Consequences in Africa, African Commission on Human and Peoples' Rights (2017).

Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, UK Foreign and Commonwealth Office, Second Edition, March 2017.

Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), UN Doc. HR/P/PT/8/Rev.1, 2004.

Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Office of the High Commissioner for Human Rights, New York/Geneva, 2017.

Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/1989/89, 1989.

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/55/89, 4 December 2000.

Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors Standards on 23 April 1999.

Human Rights Committee

General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984.

General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), UN Doc. HRI/GEN/1/Rev.9, 10 March 1992.

General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial), UN Doc. CCPR/C/GC/32, 23 August 2007.

¹ The list includes the instruments that are most cited throughout the Practical Guide.

General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018.

Committee against Torture

General Comment No. 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008.

Working Group on Enforced or Involuntary Disappearances

Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, 2010, UN Doc. A/HRC/16/48.

African Commission on Human and Peoples' Rights

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AComHPR Doc. OS(XXX)247, 2003.

General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 57th Ordinary Session, 4–18 November 2015.

International Criminal Court

Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 (corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002).

1. Introduction

The present Guide is the third volume in a series of International Commission of Jurists' (ICJ) Practical Guides that aim to assist practitioners to ensure accountability through the Specialized Criminal Chambers (SCC) in Tunisia.

The SCC were formally established by Decree No. 2014-2887 of 8 August 2014 and were set up within the Tribunals of First Instance of thirteen Courts of Appeal across Tunisia.² Under article 42 of the 2013 *Organic Law on Establishing and Organizing Transitional Justice* (the 2013 Law)³ and article 3 of the 2014 *Organic Law Relating to the Provisions Relating to the Transitional Justice and Affairs*,⁴ the SCC exercise jurisdiction over cases involving "gross human rights violations" referred by the Truth and Dignity Commission ("Instance Vérité et Dignité", IVD). The IVD referred 200 cases to the SCC by 31 December 2018.⁵ On 29 May 2018, the first hearing before the SCC was held in the Tribunal of First Instance in Gabès. While the opening of trials before the SCC constitutes a fundamental step in Tunisia's path toward justice and accountability, a number of legal obstacles may undermine their effective operation, and ultimately the right of victims to judicial remedies, which, in turn, would constitute a violation of international law and standards.⁶

Through an analysis of both the Tunisian legal framework and the relevant international law and standards, the ICJ Practical Guide series on "Accountability Through The Specialized Criminal Chambers" primarily aims to serve as a reference to assist SCC judges to effectively adjudicate cases involving gross human rights violations that constitute crimes under international law and prosecutors and lawyers involved in proceedings before the SCC to ensure respect for the rights to a fair trial and remedy in line with international law and standards. Civil society organizations may also find this series useful for raising awareness of how to implement the existing legal framework on the criminalization, investigation, prosecution, sanctioning of, and redress for serious human rights violations in accordance with international law and standards and, where necessary, advocate for its reform.

In this third Practical Guide, the ICJ addresses the principles and best practices under international law that apply to the collection, admissibility and evaluation of evidence during the investigation, prosecution and adjudication of gross human rights violations. It aims, in particular, to provide guidance to SCC practitioners on such law and standards, including by reviewing evidentiary standards in the transitional justice laws establishing the IVD and the SCC, namely the 2013 Law, the 2014 Law and the 2014 Decree, as well as in the Internal Rules and Procedures Manual ("IVD

² See Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 on the creation of the specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the courts of appeals of Tunis, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid, further amended by Decree No. 2016-1382 of 19 December 2016 to include additional chambers in Mednine, Monastir, Nabeul and Kairouan.

³ Article 42 of Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organization states that the IVD "shall refer to the Public Prosecution the cases in which commitment of gross human rights violations is proven and shall be notified of all the measures which are subsequently taken by the judiciary."

⁴ Article 3 of Law No. 2014-17 of 12 June 2014 on the provisions relating to the transitional justice and affairs related to the period going from 17 December 2010 to 28 February 2011 provides that "[i]n the event of transmission of the file to the public prosecutor by the authority of truth and dignity, in accordance with article 42 of the organic law n° 2013-53 dated 24 December 2013 relating to the establishment of transitional justice and its organization, the public prosecutor shall automatically send them to the specialized jurisdictional chambers mentioned in article 8 of the same organic law. Upon their sending to the specialized chambers by the public prosecutor, these files have priority regardless of the stage of the procedure."

⁵ IVD, Final report, Executive Summary, pp. 68-84 (Arabic version) and pp. 85-107 (English version).

⁶ In previous publications, the ICJ addressed the substantive and procedural legal challenges that might impede the SCC work and ability to adequately address the legacy of gross human rights violations in Tunisia. See ICJ: *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, May 2016; *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, November 2016; and *Tunisia: Procedures of the Specialized Criminal Chambers in Light of International Standards*, July 2017.

Internal Rules”),⁷ the IVD’s Procedures Guide (IVD Procedures Guide)⁸ and the IVD Investigation Committee’s Procedures Guide (IC Procedures Guide),⁹ adopted by the IVD to regulate its operations (together the “Transitional Justice Framework”).

The Tunisian Transitional Justice Framework, in particular the 2013 Law, sets up a special regime in which the procedures for the collection of evidence during investigations and trial differ in several respects from the existing criminal procedure under the Code of Criminal Procedure (CCP).¹⁰ This difference is apparent from both the text of the 2013 Law, which grants the IVD investigatory powers ordinarily within the remit of the Office of the Public Prosecutor (OPP), investigating judges and the Indictment Chamber, from the IVD Procedures Guide (IVD Procedures Guide)¹¹ and the Investigation Committee’s Procedures Guide (IC Procedures Guide)¹² adopted by the IVD, and from the IVD and SCC’s practice to date. Further, according to the information available to the ICJ, some of the cases referred by the IVD to the SCC via the OPP may require additional investigation or were transferred without an indictment.¹³

The guide is divided into three parts, (i) the collection of evidence; (ii) the admissibility of evidence; and (iii) the evaluation of evidence, following by a final part providing recommendations to be considered by SCC practitioners. Each part examines the applicable international law and standards and the Tunisian laws and practices governing under both general criminal procedure and the Transitional Justice Framework,¹⁴ and provides options for applying domestic law and procedures in accordance with international law and standards. The Guide is supplemented by annexes with excerpts from three authoritative sets of standards on the collection of evidence of gross human rights violations: the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (UN Principles on Extra-legal Executions),¹⁵ the Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol)¹⁶ and the UN Manual on the Effective Investigation and Documentation of

⁷ IVD, Internal Rules and Procedures Guide, adopted by the IVD on 22 November 2014, available at <http://www.ivd.tn/e-bibliotheque/textes-juridiques/http-ivdtnawcys-cluster023-hosting-ovh-net-wp-content-uploads-2018-01-%d8%a7%d9%84%d9%86%d8%b8%d8%a7%d9%85-%d8%a7%d9%84%d8%af%d8%a7%d8%ae%d9%84%d9%8a-2-pdf/>.

⁸ IVD, Procedures Guide, adopted by the IVD on 19 September 2014, available at <http://www.ivd.tn/ar/wp-content/uploads/2015/12/%D8%AF%D9%84%D9%8A%D9%84-%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%A7%D9%85%D9%91.pdf>.

⁹ IVD, Investigation Committee Procedures Guide, adopted by IVD Decision No. 6 of 20 January 2016, available at <https://www.docdroid.net/gShNixt/-pdf.html>.

¹⁰ See Pourzand Pejman, *L'évaluation des acteurs de la chaîne pénale engagés dans le cadre de la justice transitionnelle en Tunisie, eu égard à leur capacité de prendre en charge les dossiers d'atteintes graves aux droits de l'homme: analyse critique et recommandations*, published for the purpose of the United Nations Development Programme (UNDP) and Office of the High Commissioner for Human Rights (OHCHR) Training Programme for the SCC judges, July 2015, p. 17.

¹¹ IVD, Procedures Guide, issued based on IVD’s decision of 19 September 2014 and published in January 2016, available at <http://www.ivd.tn/ar/wp-content/uploads/2015/12/%D8%AF%D9%84%D9%8A%D9%84-%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%A7%D9%85%D9%91.pdf>.

¹² IVD, Investigation Committee Procedures Guide, issued on the basis of IVD’s Decision No. 6 of 20 January 2016, available at <https://www.docdroid.net/gShNixt/-pdf.html>.

¹³ IVD, Final report, Executive Summary, pp. 68-84 (Arabic version) and pp. 85-107 (English version).

¹⁴ The Tunisian laws quoted throughout the report are translations of the French or Arabic texts undertaken by the ICJ.

¹⁵ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/1989/89, January 1991 (“UN Principles on Extra-Legal Executions”), available in English at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ArbitraryAndSummaryExecutions.aspx> and Arabic at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/683/55/img/NR068355.pdf?OpenElement>.

¹⁶ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): the Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2017 (“Minnesota Protocol”), available in English and Arabic at <https://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtralLegalArbitrary.aspx>.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).¹⁷ To inform the content and analysis contained in this Guide, the ICJ gathered information from former IVD staff and SCC judges and information in the public domain.

The Guide should be read in conjunction with Practical Guide No. 2 on *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law*, which discusses the international standards governing the pre-trial and trial stages of SCC cases and rights of the accused and victims. In particular, it sets out the international fair trial rights law and standards governing the investigation, prosecution and adjudication of cases before the SCC, which are applicable to the collection, assessment and adjudication of evidence.

This Guide is also preceded by Practical Guide No. 1 on *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law*,¹⁸ which addresses the penalization of crimes over which the SCC have jurisdiction. It examines the principles of legality and non-retroactivity under international law and their application in the domestic system, and conducts an analysis of the definition of crimes under domestic law vis-à-vis international law for arbitrary deprivations of life, arbitrary deprivations of liberty, torture and other ill-treatment, enforced disappearance, rape and sexual assault and crimes against humanity. This Guide will also be followed by Practical Guide No. 4, which will discuss modes of liability under international law and their application before the SCC.

Each guide should be applied in the context of international law and standards governing the rights of the accused and the rights of victims in criminal proceedings.

¹⁷ Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), Professional Training Series No.8/Rev.1 of UN OHCHR, 2004, available in English and Arabic at <https://www.refworld.org/docid/4638aca62.html>.

¹⁸ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* - Practical Guide 1 (2019), available at <https://www.icj.org/tunisia-the-role-of-international-law-and-standards-in-proceedings-before-the-specialized-criminal-chambers/>.

2. Collection of evidence

As discussed in Practical Guide No. 2 on *The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law*, the Transitional Justice Framework established a specialized framework for the investigation, prosecution and adjudication of gross human rights violations in Tunisia, which differs in several respects from the general criminal procedure under the CCP. One of the main procedural differences relates to responsibility for the collection of evidence, insofar as the Transitional Justice Framework grants the IVD investigatory powers ordinarily within the remit of the OPP, investigating judges and the Indictment Chamber. Accordingly, the IVD is responsible for the collection of evidence upon which indictments were drafted and contained in the case files referred to the SCC. Despite this, the Transitional Justice Framework does not set out a distinct set of comprehensive rules of procedure for the collection of evidence, and the interplay between the Transitional Justice Framework and general criminal procedure is not clearly defined in the relevant laws. The IVD consequently supplemented the Framework with the IVD Procedures Guide and the IC Procedures Guide.

Practical Guide No. 2 discussed the best practices governing the investigation of the gross human rights violations under international law and standards and the related domestic legal frameworks which applies to cases before the ordinary courts and the SCC. This part of this Guide sets out the international law and standards that apply to the collection of evidence during investigations, whether by the IVD, OPP or SCC or other investigating authority in Tunisia.

a. Applicable international standards

This part provides an overview of the international standards and procedures that should be observed when collecting evidence. As discussed in detail in Practical Guide No. 2 on *The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law*,¹⁹ investigations must be: (i) prompt; (ii) effective and thorough; (iii) independent and impartial; and (iv) transparent.²⁰ Detailed criteria for ensuring an investigation meets these requirements are set out in, for example, the UN Principles on Extra-legal Executions, the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment),²¹ the Minnesota Protocol and the Istanbul Protocol. The requirements in these instruments also govern the collection of evidence during the investigative process. Although

¹⁹ ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law* – Practical Guide 2 (2020), part 2.

²⁰ Minnesota Protocol, para. 22; HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant* (“HRC, General Comment No. 31: Legal Obligation”), UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-16; Report of the UN Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, para. 1814; see also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, Principle III; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, Principles 22 and 23; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, Principle 2; Istanbul Protocol, para. 74; *Nydia Erika Bautista v. Colombia*, HRC, Communication No. 563/1993, Views of 13 November 1995, para. 8.6; *José Vicente and Amado Villafañe Chaparro and others v. Colombia*, HRC, Communication No. 612/1995, Views of 29 July 1997, para. 8.8; *Judgment of 22 November 2005*, IACTHR, *Gómez Palomino v. Peru*, Series C No. 136, para. 79; *Judgment of 27 August 2014*, IACTHR, *Landaeta Mejías Brothers and others v. Venezuela*, Series C No. 281, para. 254; *Amnesty International and others v. Sudan*, Application Nos. 48/90-50/91-52/91-89/93, AComHPR, 15 November 1999, para. 51; AComHPR, *General Comment No. 3: the Right to Life (Article 4)*, para. 7; International Convention on the Protection of all Persons from Enforced Disappearance (ICPPED), article 12(1). See also UN Women, *Handbook for Legislation on Violence against Women* (2010), pp. 19, 35-49; *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (Second Edition, March 2017) (International Protocol on Sexual Violence in Conflict), pp. 66-67.

²¹ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/55/89, 4 December 2000, available in English at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx>.

some of these sources apply to specific categories of crimes – the Minnesota Protocol, for example, applies to unlawful killings – many of the standards governing the collection of evidence outlined in them are equally applicable to other crimes. With respect to sexual violence crimes, additional guidance may be found in the UN Women’s Handbook for Legislation on Violence against Women²² and the United Kingdom’s International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (International Protocol on Sexual Violence in Conflict).²³

i. Exhaustive search for evidence

Investigations must be thorough and effective, and as such, exhaustive.²⁴ Investigators must take all reasonable steps to search for and collect all direct and circumstantial evidence that:

- Identifies the victim or victims (if known);
- Determines the method, cause, location, date and time of the crime and all of the surrounding circumstances; and
- Determines who was involved in the commission of the crime or contributed to it, and their associated individual and collective responsibility (i.e. their mode of liability).²⁵

The search for and collection of all direct and circumstantial evidence, as well as contextual elements, allows investigators to elaborate logical hypotheses and lines of inquiry that are genuinely oriented toward revealing the material facts, and identifying the responsible parties and their level of responsibility, as well as any exculpatory evidence. The purpose of establishing facts relevant to an alleged killing may pertain, for example, to the identity of political officials or military and paramilitary leaders; the identity and description of perpetrators; chains of command; communication codes and methods; details of official documentation linked to the killings; public announcements relevant to the crimes; interaction between military and political structures; the financing of military operations; and the chronology of events leading up to and following the killing.

Such investigations may collect “linkage” evidence, which is evidence that links persons, often other than the direct perpetrator, to crimes through different forms of responsibility such as command responsibility, ordering, and aiding and abetting. This can involve looking at documentary records, the testimony of “insider witnesses,” statements suspects have made including on social media, and the command structures of security forces. The UN Committee against Torture (CAT) has held that the investigation must pay “particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.”²⁶ In *Yasa v. Turkey*, the European Court of Human Rights (ECtHR) held an investigation was ineffective where “it did not allow the possibility that ... [state agents] might have been implicated” in the crimes committed by the direct perpetrators, and accordingly that Turkey breached article 2 of the European Convention on Human Rights (ECHR) protecting the right to life.²⁷

²² UN Women, *Handbook for Legislation on Violence against Women*, 2010, available in English and Arabic at <https://www.un.org/womenwatch/daw/vaw/v-handbook.htm>.

²³ International Protocol on Sexual Violence in Conflict, available in English at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf. Although the Protocol applies to conflict related sexual violence crimes, the principles and guidance are largely applicable to sexual violence crimes committed outside conflict.

²⁴ ICPPED, article 12(1); Declaration on the Protection of All Persons from Enforced Disappearance, article 13(1); UN Principles on Extra-Legal Executions, Principle 9; and Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment, Principle 2.

²⁵ See, e.g. Minnesota Protocol, para. 25; *Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment*, Principle 1; Istanbul Protocol, para. 78; ICCPR, articles 6 and 9. See also HRC, *General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 27.

²⁶ CAT, *General Comment No. 2: Implementation of Article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 7.

²⁷ *Yasa v. Turkey*, ECtHR, Application No. 22495/93, Judgment of 2 September 1998, para. 107; *Ergi v. Turkey*, ECtHR, Application No. 23818/94, Judgment of 28 July 1998, para. 83; *Assenov v. Bulgaria*, ECtHR, Application

In the context of certain crimes under international law, “contextual” facts also have to be established. For example, for a crime to constitute a crime against humanity, it has to have been committed as part of a widespread or systematic attack against any civilian population with knowledge of the attack.²⁸ This part of the investigation can be wide-ranging in its scope and will look at issues such as the scale of the attack, how organized it was, and whether it was carried out pursuant to a State or organizational policy.

Exhaustive investigations must also include a search for exculpatory evidence (or “*éléments à décharge*”). The right to adequate time and facilities to prepare a defence under article 14(b)(3) of the International Covenant on Civil and Political Rights (ICCPR), discussed in Practical Guide No. 2,²⁹ requires that the accused have access to documents and other evidence, including all materials that will be used in court against an accused person or that are exculpatory. Exculpatory material includes not only material establishing innocence but also other evidence that could assist the defence case, such as information affecting the weight of prosecution evidence (e.g. indications that a confession was not voluntary or information that undermines the credibility or reliability of a prosecution witness).³⁰

The notion of effectiveness refers to means and process, and not to outcome. According to the Minnesota Protocol, for instance, an investigation must be carried out “diligently and in accordance with good practice.”³¹ The Istanbul Protocol provides that complaints of torture and other ill-treatment must be “effectively investigated” using methods which “meet the highest professional standards.”³² The obligation to take reasonable steps to collect all relevant evidence was confirmed by the ECtHR, which held that:

The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.³³

The ECtHR has criticized States’ failure to take reasonable steps, including: shortcomings in forensic examinations that were cursory or did not provide explanations or conclusions regarding recorded marks on bodies or injuries;³⁴ a failure to identify weapons used in the commission of an offence, and how they were used;³⁵ autopsies which failed to identify key details regarding how a person was killed;³⁶ a failure to conduct a forensic examination of the crime scene;³⁷ the failure to interview all

No. 24760/94, Judgment of 28 October 1998, paras. 103, 105; *Mahmut Kaya v. Turkey*, ECtHR, Application No. 22535/93, Judgment of 28 March 2000, paras. 96, 105; *Kiliç v. Turkey*, ECtHR, Application No. 22492/93, Judgment of 28 March 2000, para. 80.

²⁸ Likewise, for war crimes, it will have to be established that the underlying acts were committed in the context of an international or non-international armed conflict.

²⁹ ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations under Tunisian and International Law – Practical Guide 2* (2020), part 3(a)(i)(d).

³⁰ HRC, *General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007 (“HRC, General Comment 32: Article 14”).

³¹ Minnesota Protocol, para. 27, citing: *Abubakar Amirov and others v. Russia*, HRC Communication 1447/2006, Views of 2 April 2009, para. 11.4 et seq.; *Judgment of 14 November 2014*, IACTHR, Rodríguez Vera and others (The Disappeared from the Palace of Justice) v. Colombia, Series C No. 287, para. 489.

³² Istanbul Protocol, para. 79.

³³ *Finucane v. the United Kingdom*, ECtHR, Application No. 29178/95, Judgment of 1 July 2003, para. 69. See also Council of Europe, *Guidelines on Eradicating Impunity for Serious Human Rights Violations*, Guideline VII.

³⁴ *Mahmut Kaya v. Turkey*, ECtHR, Application No. 22535/93, Judgment of 28 March 2000, para. 104.

³⁵ *Kaya v. Turkey*, ECtHR, Application No. 22729/93, Judgment of 19 February 1998, para. 89; *Ogur v. Turkey*, ECtHR, Application No. 21594/93, Judgment of 20 May 1999, para. 89.

³⁶ *Kaya v. Turkey*, ECtHR, Application No. 22729/93, Judgment of 19 February 1998, para. 89; *Ogur v. Turkey*, ECtHR, Application No. 21594/93, Judgment of 20 May 1999, para. 89; *Salman v. Turkey*, ECtHR, Application No. 21986/93, Judgment of 27 June 2000, para. 106.

³⁷ *Mahmut Kaya v. Turkey*, ECtHR, Application No. 22535/93, Judgment of 28 March 2000, para. 104.

witnesses at the crime scene;³⁸ and imprecise expert reports with findings unsupported by any established facts.³⁹

The Inter-American Court of Human Rights (IACtHR) has also stated that there are certain “guiding principles that must be observed in criminal investigations into human rights violations, which include, inter alia: the recovery and preservation of evidence in order to assist in a potential criminal investigation of the perpetrators; identification of possible witnesses; obtaining their statements; and determination of the cause, manner, place and time of the act investigated. In addition, there should be a thorough examination of the crime scene and a rigorous analysis of the evidence by competent professionals using the most appropriate procedures.”⁴⁰

Any investigative mechanism must have sufficient financial and human resources to do its job professionally, including qualified investigators and other relevant experts.⁴¹ If the State does not possess the requisite technical expertise it should seek it from others through international cooperation and assistance.⁴²

ii. Types of evidence

To meet the obligation to conduct an exhaustive investigation, investigators must, to the extent they are able to do so, collect and verify all relevant witness and non-witness evidence, including biological, documentary, digital, and physical evidence.⁴³ The ICJ’s Practitioners’ Guide No. 14 on *The Investigation and Prosecution of Potentially Unlawful Death* sets out detailed guidance on types of evidence, chain of custody, crime scene management and the recovery and identification of bodies and human remains, which is similarly applicable to other gross human rights violations. Critical aspects of ICJ’s Practitioners’ Guide No. 14, are set out below,⁴⁴ as well as international standards on applicable to other gross human rights violations.

a) Witness evidence

A key element in any investigation is to identify and interview individuals who might have information about the crime. As the Minnesota Protocol recalls, “[t]he purposes of witness interviews are to: (a) obtain as much relevant information as possible, through a systematic and fair process, to assist the investigators in objectively establishing the truth; (b) identify possible suspects; (c) allow individuals an opportunity to provide information that they believe is relevant to establishing the facts; (d) identify further witnesses; (e) identify victims; (f) establish the location of crime scenes and burial sites; (g) establish background information and facts relevant to an alleged killing(s); and (h) identify leads in the investigation.”⁴⁵

The investigation should involve preparing a list of the most significant witnesses and prioritizing interviews with them. These should include individuals who saw or heard the crime being committed and people with relevant knowledge of the victim or suspected perpetrator. Also of importance are people in the same organization or chain of command as the suspected perpetrator, since they may be able to provide information linking people other than the perpetrator to the death who may be

³⁸ *Assenov v. Bulgaria*, ECtHR, Application No. 24760/94, Judgment of 28 October 1998, para. 103.

³⁹ *Ogur v. Turkey*, ECtHR, Application No. 21594/93, Judgment of 20 May 1999, para. 89.

⁴⁰ *Judgment of 31 August 2010*, IACtHR, Rosendo Cantú et al v. Mexico, Series C No. 216, para. 178. See also *Judgment of 7 June 2003*, IACtHR, Juan Humberto Sánchez v. Honduras, Series C No. 99, para. 128; *Judgment of 23 September 2009*, IACtHR, Garibaldi v. Brazil, Series C No. 203, para. 115; and *Judgment of 16 November 2009*, IACtHR, Gonzalez, Monreal and Monarrez (“Cotton Field”) v. Mexico, Series C No. 205, para. 300.

⁴¹ *Judgment of 15 September 2005*, IACtHR, “Mapiripán Massacre” v. Colombia, Series C No. 134, para. 224.

⁴² Minnesota Protocol, para. 77.

⁴³ Minnesota Protocol, para. 24.

⁴⁴ For more detail, see ICJ, *The Investigation and Prosecution of Potentially Unlawful Death*, Practitioners’ Guide No. 14 (2019), pp. 90 et seq, available at <https://www.icj.org/the-investigation-and-prosecution-of-potentially-unlawful-death-icj-practitioners-guide-no-14/>.

⁴⁵ Minnesota Protocol, para. 70.

held criminally responsible through modes of liability such as command responsibility or ordering.⁴⁶ Additionally relevant are persons who can provide evidence of the suspected perpetrator's (whether direct or indirect) intent, and any contextual elements required to be proven.

The Istanbul Protocol sets out detailed guidance with respect to the conduct of interviews with victims and witnesses of torture and other ill-treatment, which may be applicable to interviews with victims and witnesses of other crimes, including with respect to: (i) informed consent; (ii) selection of the interviewer; (iii) the safety of witnesses and protective measures; (iv) the use of interpreters; (v) the information to be obtained from the witness; and (vi) taking statements from the alleged perpetrator.⁴⁷ With respect to the information to be collected from such witnesses, the Istanbul Protocol provides that the following should be collected:

- (ii) The circumstances leading up to the torture, including arrest or abduction and detention;
- (iii) Approximate dates and times of the torture, including when the last instance of torture occurred;
- (iv) A detailed description of the persons involved in the arrest, detention and torture, including whether he or she knew any of them prior to the events relating to the alleged torture, clothing, scars, birthmarks, tattoos, height, weight (the person may be able to describe the torturer in relation to his or her own size), anything unusual about the perpetrator's anatomy, language and accent and whether the perpetrators were intoxicated at any time;
- (v) Contents of what the person was told or asked;
- (vi) A description of the usual routine in the place of detention and the pattern of ill-treatment;
- (vii) A description of the facts of the torture, including the methods of torture used;
- (viii) Whether the individual was sexually assaulted;⁴⁸
- (ix) Physical injuries sustained in the course of the torture;
- (x) A description of weapons or other physical objects used; and
- (xi) The identity of witnesses to the events involving torture.⁴⁹

Only persons with specialist expertise and training should be tasked with interviewing and taking statements from children⁵⁰ and, ideally, victims and witnesses of sexual and gender-based violence.

b) Non-witness evidence

⁴⁶ Minnesota Protocol, para. 72.

⁴⁷ Istanbul Protocol, paras. 88-101, 120-157.

⁴⁸ As set out in the Istanbul Protocol, "[m]ost people will tend to answer a question on sexual assault as meaning actual rape or sodomy. Investigators should be sensitive to the fact that verbal assaults, disrobing, groping, lewd or humiliating acts or blows or electric shocks to the genitals are often not taken by the victim as constituting sexual assault. nothing or even deny any sexual assault. It is often only on the second or even third visit, if the contact made has been empathic and sensitive to the person's culture and personality, that more of the story will come out." See p. 21.

⁴⁹ Istanbul Protocol, p. 21.

⁵⁰ Minnesota Protocol, paras. 195(d) ("When interviewing children, consider the best interests of the child, including whether there are other ways to obtain the information than through the interview. Ensure that the child understands the purpose and intended use of the interview, and obtain his/her consent. Whenever possible, inform the child's parents or legal guardians of the interview, unless there are reasonable grounds not to do so. The child's parents or legal guardians, or another trusted person, may be present during the interview if the child so requests"), 218; International Protocol on Sexual Violence in Conflict, pp. 251-252, 256, 260. Particular care needs to be taken with respect to child victims and witnesses of crimes. Detailed guidance on interacting with child victims and witnesses is outside the scope of this Guide. For more detail see, for example, the UN Guidelines on Justice in Matters Involving Children Victims and Witnesses of Crime, UN Doc. E/RES/2005/20, 22 June 2005; Istanbul Protocol, paras. 310-315; International Protocol on Sexual Violence in Conflict, chapter 16.

An effective investigation involves the careful collection, analysis, and storage of forensic evidence. This part describes the different types of evidence that are collected and analysed and how they should be logged and stored (the “chain of custody”, also sometimes called the “chain of evidence”).

Forensic science “is concerned with establishing facts, obtained through scientific means ...[It is] one of the enabling tools to ensure the full implementation of the rule of law, and as such it needs to conform to the rule of law itself.”⁵¹ Forensic science encompasses medicine, genetics, forensic anthropology and archaeology as well as “other disciplines and technologies and methods, such as ballistics, graphology, [and] crime scene investigations, among others.”⁵² Forensic and other scientific evidence will help lessen reliance on confessions or other forms of evidence that are more readily manipulated or created by abusive police practices or corruption.⁵³

Several international instruments and standards set out clear requirements for collecting forensic evidence: Principles on Extra-legal Executions;⁵⁴ Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment;⁵⁵ the Minnesota Protocol;⁵⁶ the Istanbul Protocol;⁵⁷ the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).⁵⁸ The International Protocol on Sexual Violence in Conflict also sets out detailed guidance on the collection of forensic evidence of conflict-related sexual violence crimes.⁵⁹ Although some of these sources apply to specific categories of crimes – the Minnesota Protocol, for example, applies to unlawful killings – many of the standards governing the collection of evidence outlined in them are equally applicable to other crimes.

The importance of collecting forensic evidence, and meeting international law and standards for doing so, has been affirmed by international authorities, including the UN General Assembly,⁶⁰ the

⁵¹ Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights, UN Doc. A/HRC/15/26, 24 August 2010, para. 2.

⁵² Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/69/387, 23 September 2014, para. 20.

⁵³ Rule-of-law tools for post-conflict States, Prosecution initiatives, UN Doc. HR/PUB/06/4, New York/Geneva, 2006. See also Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/69/387, 23 September 2014, para. 19 (“Forensic specialists provide expert analysis of whether there is a correlation between the medical evidence and the allegations and can provide the evidentiary basis on which prosecutions can successfully be brought against those directly responsible and their superiors. Medical records can be instrumental in overcoming the otherwise lack of objective evidence with which survivors of torture are so commonly confronted, given that torture mostly takes place without witnesses. The work of a forensic scientist is germane to the efforts to address impunity for acts of torture, as the expert opinion forms the evidential basis for prosecution of allegations of torture”).

⁵⁴ Principles 9, 12, 13, 14, 16 and 17.

⁵⁵ Principle 6.

⁵⁶ Chapters IV-V. It includes protocols for investigation, autopsy, exhumation and analysis of skeletal remains, provides a basic framework that States must observe in the investigation of extrajudicial or arbitrary executions, “deaths from ‘forced disappearances’” as well as “all violent, sudden, unexpected or suspicious deaths”.

⁵⁷ Chapters IV-V.

⁵⁸ See article 19.

⁵⁹ Parts IV(10) and V.

⁶⁰ See, for example, UN General Assembly Resolutions 61/155 of 19 December 2006 and 68/165 of 18 December 2013.

former UN Commission on Human Rights,⁶¹ the UN Human Rights Council,⁶² the General Assembly of the Organization of American States,⁶³ the UN CAT,⁶⁴ and the IACTHR.⁶⁵

There are four main types of evidence that can be subject to forensic investigation: biological, digital, documentary, and physical.⁶⁶

(1) Biological evidence

Biological evidence encompasses organic substances collected from the human body or its surroundings. It can be collected directly from the human body or from items used by the person in question, such as toothbrushes, hair brushes, and unlaundered clothing. The identification and proper collection and preservation of biological samples⁶⁷ from a crime scene demand specialized training. Biological samples from bodies may also be collected at the morgue or forensic anthropology laboratory. The collection of biological reference samples from living persons, for comparison purposes, should be conducted by personnel trained in dealing with victims and their families, and this collection should be based on informed consent.⁶⁸ Biological samples are also a source of DNA.⁶⁹

Biological evidence may also be subject to toxicological analysis for drugs and poisons. This applies to biological samples from living persons as well as from the deceased.⁷⁰

The ICPPED further mandates that personal information collected and/or transmitted within the search for a disappeared person, including medical and genetic data, not be made available for any other purposes except use in related criminal proceedings or in the exercise of rights to reparation.⁷¹

(2) Digital evidence

Digital evidence has become increasingly important in investigations. Digital evidence is information and data that are stored on, received from, or transmitted by an electronic device. Digital evidence

⁶¹ See, for example, UN Commission on Human Rights Resolutions 1993/33 of 5 March 1993, 1994/31 of 4 March 1994, 1996/31 of 19 April 1996, 1998/36 of 17 April.

⁶² See, for example, UN Human Rights Council Resolutions 10/26 of 27 March 2009, and 15/5 of 29 September 2010.

⁶³ Organization of American States General Assembly Resolution No. AG/RES. 2717 (XLII-O/12) of 4 June 12 and Resolution No. AG/RES. 2794 (XLIII-O/13) of 5 June 2013.

⁶⁴ CAT, Conclusions and recommendations on Colombia, UN Doc. CAT/C/CR/31/1, 2004, para. 10(f) ("in cases of violation of the right to life any signs of torture, especially sexual violence, that the victim may show [must] be documented. That evidence should be included in forensic reports so that the investigation may cover not only the homicide but also the torture").

⁶⁵ *Judgment of 25 November 2003*, IACTHR, Myrna Mack-Chang v. Guatemala, Series C No. 101, para. 167 (the protection of the scene of crime, the preservation of fingerprints, the taking of blood samples and carrying out of respective laboratory tests, the examination of clothes and the photographing of the victim's wounds are essential parts of the investigations).

⁶⁶ Forensic accounting may be considered a fifth type of evidence or, more commonly, as a method of analysing digital and documentary evidence. Forensic accounting applies accounting, statistical, and economic analysis to a criminal investigation. In the investigation of a suspicious death, it may uncover information that helps to identify a motive for a killing and possible suspects or witnesses. Minnesota Protocol, para. 146.

⁶⁷ Sample sizes of both biological and nonbiological evidence for forensic testing need to be sufficient for laboratory analysis and should be such as to allow for repeat testing (Minnesota Protocol, para. 131). With respect to DNA222 profiling, the size of sample needed for analysis has reduced very significantly in the last 20 years. That said, "samples taken from a crime scene may be of low quality, having been subjected to heat, light, and moisture as well as other elements (such as the dye in denim) that degrade the DNA or inhibit the testing process. Even crime-scene samples in good condition can nonetheless behave erratically when there is a low quantity of material available to test." E. Murphy, "Forensic DNA Typing", *Annual Review of Criminology*, Vol. 1 (January 2018), pp. 497–515, citing J. M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology*, Academic, San Diego, CA, 2012.

⁶⁸ Minnesota Protocol, para. 133.

⁶⁹ See further ICJ, *The Investigation and Prosecution of Potentially Unlawful Death*, Practitioners' Guide No. 14 (2019), p. 92.

⁷⁰ Minnesota Protocol, para. 133.

⁷¹ ICPPED, article 19.

can be found in images on cameras, on the internet, computers, mobile phones, and other digital media, such as USB sticks. Internet and mobile phone service providers frequently keep their data (such as call records) for only a certain period of time, such that access to the data can be difficult if not impossible if there is a delay between the crime being committed and the commencement of the investigation.

In addition to the data itself, which may be recorded as digital photographs, audio recordings, video recordings, email communications, text messages, mobile phone applications, and social media, metadata can also provide valuable information. Metadata is information on who created the image or communication, when it was made, and where the device was located at the time. It is important to bear in mind, however, that metadata can also be easily manipulated. As the Minnesota Protocol emphasizes, authenticating digital evidence is a technical challenge. It therefore recommends that every effort be made to ensure that a qualified forensic expert recovers and/or examines digital evidence if it is expected to be important in an investigation.⁷²

Digital evidence should be collected, preserved, and analysed in accordance with international best practice.⁷³

(3) Documentary evidence

Important documentary evidence includes maps, photographs, staffing records, interrogation records, administrative records, financial papers, currency receipts, identity documents, phone records, letters of correspondence, and passports. In addition to the information they contain, there may be associated biological or physical evidence (e.g. fingerprints) that can be obtained and analysed from the documents.

(4) Physical evidence

There is a range of different forms of physical evidence, which may be found on the bodies of victims, witness or perpetrators, the place where a crime or violation is committed, any place where the perpetrators have been and the graves or places where bodies may be have been left at any time. Forensic chemistry is used to identify unknown substances that are recovered as evidence. This includes suspected drugs, toxic substances, gunshot residue from firearms, and explosive materials.⁷⁴ Physical evidence should only be collected by persons with the authority and expertise to do so.⁷⁵ The Minnesota Protocol,⁷⁶ the Istanbul Protocol⁷⁷ and the International Protocol on Sexual Violence in Conflict⁷⁸ set out guidance on the collection of physical evidence.

Firearms evidence is derived from the examination of guns and bullets that have been fired; and ballistic information, including the pattern and movement of projectiles from a firearm after discharge.⁷⁹ Analysis of items such as clothing can determine the distance between the impact and the position from which the gun was discharged.⁸⁰ Trained firearms examiners may also be able to

⁷² Minnesota Protocol, para. 145.

⁷³ See, e.g., Association of Chief Police Officers, *Good Practice Guide for Digital Evidence*, United Kingdom, March 2012, available at https://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf.

⁷⁴ Minnesota Protocol, para. 137.

⁷⁵ See, e.g. International Protocol on Sexual Violence in Conflict, p. 154.

⁷⁶ Minnesota Protocol, paras. 137-142.

⁷⁷ Istanbul Protocol, chapter V.

⁷⁸ International Protocol on Sexual Violence in Conflict, chapters 10(E) and 12.

⁷⁹ Minnesota Protocol, para. 138.

⁸⁰ Minnesota Protocol, para. 139.

link fired projectiles, cartridge casings, and related ammunition components to a particular firearm and which company manufactured the gun.⁸¹

Fingerprints are a long-established means by which persons are individually identified with a high level of probability (though the reliability of fingerprint analysis has been found wanting in some high-profile cases in recent years). The comparison is based on the unique patterns of friction ridges and furrows on fingers and thumbs, as well as on palms, feet and toes. Even identical twins have different fingerprints.⁸² Latent fingerprints can be seen on porous surfaces using chemical enhancement techniques that are particularly effective on paper.⁸³

Other relevant evidence includes military ordnance and weapons; fibre analysis; footwear impressions or tyre tracks; blood spatter analysis; burn patterns; tool marks; and car paint analysis. In all cases, care needs to be taken to ensure that the analysis of such evidence is underpinned by a validated scientific method.⁸⁴

Physical access to the location of the crime, particularly where the crime was committed in the context of physical custody and even long after the crime has occurred, is important for securing access to physical evidence. Investigators should seek to access any place, premises, vehicle or other location where the crime was committed to search for physical (as well as other forms of) evidence relevant to the investigation.⁸⁵

iii. The role and functions of experts

Experts witnesses who are professionals with specialist skills in, for example, medical or forensic science, psychology, sociology, information technology, sexual and gender-based violence and historical, cultural and other contexts, may provide evidence of gross human rights violations. International norms and standards emphasize that experts “must be able to function impartially and independently of any potentially implicated persons or organizations or entities.”⁸⁶ For expert evidence provided by the State, this arises from the State’s obligation to ensure investigations “by independent and impartial bodies.”⁸⁷

Expert evidence may be provided by experts affiliated with the State and external experts. The Special Rapporteur on Torture has stated that “[p]rosecutors and courts should not be limited to evaluating reports from officially accredited experts, irrespective of their institutional affiliation...” and that “[c]ourts should neither rule out non-State experts nor award State expert testimony more weight based solely on their ‘official’ status.”⁸⁸ Likewise, the Special Rapporteur has stated that: “[p]ublic forensic medical services should not have a monopoly with regard to expert forensic evidence for judicial purposes.”⁸⁹ States should ensure that independent forensic reports of non-governmental organizations or medical professionals may be accepted as proof in criminal proceedings, and non-State experts are entitled to review the State tests and to conduct their own independent evaluations.⁹⁰ The role of non-governmental organizations in the field of forensic

⁸¹ Minnesota Protocol, para. 138. At the time of drafting of the Minnesota Protocol, however, toolmark and firearms analysis lacked a precisely defined and universally accepted process.

⁸² Minnesota Protocol, para. 140.

⁸³ Minnesota Protocol, para. 141.

⁸⁴ Minnesota Protocol, para. 142.

⁸⁵ Istanbul Protocol, p. 21 *et seq*; International Protocol on Sexual Violence in Conflict, pp. 189-198.

⁸⁶ UN Principles on Extra-Legal Executions, Principle 14; Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment, Principle 2; Istanbul Protocol, para. 83.

⁸⁷ HRC, General Comment No. 31: Legal Obligation, para. 15.

⁸⁸ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/69/387, 23 September 2014, para. 53.

⁸⁹ Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68, 7 December 2002, para. 26(k).

⁹⁰ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/69/387, 23 September 2014, para. 53.

science is also very important.⁹¹ Therefore, intergovernmental bodies have recommended that States enhance cooperation and coordination with non-governmental organizations in the planning and conduct of investigations.⁹²

iv. Medical evidence of gross human rights violations

International standards governing the investigation of gross human rights violations emphasise the importance of collecting evidence of both the physical and psychological impacts of the crime, including through witness interviews and the collection of biological evidence. Medical experts play a particularly important role in this regard.

The Minnesota Protocol provides detailed guidance on the collection of biological evidence of unlawful killings,⁹³ including the recovery of human remains (discussed further in section 2(a)(v) below). The Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment and the Istanbul Protocol also provide detailed guidance on the collection of evidence of the physical and psychological impacts of torture and ill-treatment.⁹⁴ The International Protocol on Sexual Violence in Conflict sets out guidance on the collection of physical and psychological evidence of sexual violence.⁹⁵

The Istanbul Protocol sets out extensive guidance on the collection of physical and psychological evidence of torture and other ill-treatment by a medical expert proving the commission of the crime, even long after it occurred.⁹⁶ It states that a "medical examination should be undertaken regardless of the length of time since the torture... and the examination should include an assessment of the need for treatment of injuries and illnesses, psychological help, advice and follow-up."⁹⁷ It provides guidance on the questions medical experts should ask when formulating a clinical impression for the purpose of reporting physical and psychological evidence of torture:

- (a) Are the physical and psychological findings consistent with the alleged report of torture?
- (b) What physical conditions contribute to the clinical picture?
- (c) Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
- (d) Given the fluctuating course of trauma-related mental disorders over time, what is the time frame in relation to the torture events? Where in the course of recovery is the individual?
- (e) What other stressful factors are affecting the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role, etc.)? What impact do these issues have on the victim?
- (f) Does the clinical picture suggest a false allegation of torture?⁹⁸

In addition to photographs of the premises where torture allegedly occurred and other relevant physical evidence,⁹⁹ photographs of injuries should also be taken.¹⁰⁰

⁹¹ See, *inter alia*, former UN Commission on Human Rights, Resolution No. 2005/26, "Human rights and forensic science", 19 April 2005.

⁹² See, *inter alia*, Human Rights Council, Resolution No. 10/26, "Forensic genetics and human rights", 27 March 2009.

⁹³ Minnesota Protocol, chapters IV(F)(2), (G)-(H) and V(D)-(E).

⁹⁴ Istanbul Protocol, paras. 145, 149 and chapter VI (physical evidence) chapter V (psychological evidence).

⁹⁵ International Protocol on Sexual Violence in Conflict, pp. 25-26, 156-158, 204, 231-238 and Annexes 3-4.

⁹⁶ Istanbul Protocol, p. 22.

⁹⁷ Istanbul Protocol, para. 104.

⁹⁸ Istanbul Protocol, para. 105.

⁹⁹ See Istanbul Protocol, paras. 102-103.

¹⁰⁰ Istanbul Protocol, para. 106.

The Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment set out the requirements to be followed by medical experts involved in the investigation of torture or ill-treatment, stating that medical experts should prepare a written report containing, at a minimum:

- (i) Circumstances of the interview: name of the subject and name and affiliation of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g., detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g., nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors;
- (ii) History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
- (iii) Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
- (iv) Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given;
- (v) Authorship: the report shall clearly identify those carrying out the examination and shall be signed.¹⁰¹

The Istanbul Protocol sets out more extensive guidance regarding the conduct of physical examinations,¹⁰² which are also applicable to other crimes under international law.

Medical experts who are involved in the investigation must comply “with the highest ethical standards” and, in particular, must “obtain informed consent before any examination is undertaken.” They must carry out any examination according to “established standards of medical practice,” including by conducting them “in private under the control of the medical expert and outside the presence of security agents and other government officials.”¹⁰³

v. The recovery of bodies and human remains

International standards provide detailed guidance on the recovery and handling of human remains – the most important evidence at the scene of a potentially unlawful killing. Such evidence requires special attention and care, including respect for the dignity of the deceased and compliance with forensic best practices.¹⁰⁴ As set out in the Principles on Extra-legal Executions, a body must not be disposed of until an adequate autopsy is conducted.¹⁰⁵ If the body has been buried, and it later

¹⁰¹ Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment, Principle 6(b).

¹⁰² See Annex B (Istanbul Protocol, chapter V). See also p. 22 and Annexes II (Diagnostic testing), III (Anatomical drawings for documentation of torture and ill-treatment) and IV (Guidelines for the medical evaluation of torture and ill-treatment).

¹⁰³ Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment, Principle 6(a). See also part 2(a)(vi) below (sexual violence / do no harm discussion).

¹⁰⁴ *Judgment of 29 August 2002*, IACtHR, Caracazo Case v. Venezuela (Reparation), Series C No. 95, paras. 115, 124 (“The State must, therefore, locate, exhume, identify by means of undoubtedly suitable techniques and instruments, the remains of the victims..”).

¹⁰⁵ UN Principles on Extra-Legal Executions, Principle 11. See also HRC, *General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 28.

appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.¹⁰⁶

The recovery of human remains should, preferably, be conducted under the supervision and advice of an impartial forensic anthropologist (if the remains are of a skeleton) or forensic doctor (if they contain flesh), who must have access to all the relevant data.¹⁰⁷ When human remains are recovered by police or other untrained personnel, as is often the case, there may be challenges in identifying body parts and/or skeletal elements.¹⁰⁸

The autopsy must identify the deceased and the cause of death and all other relevant circumstances and describe all injuries including evidence of torture.¹⁰⁹

The Principles on Extra-legal Executions and the Minnesota Protocol,¹¹⁰ as well as the ICJ's Practitioners' Guide No. 14 on *The Investigation and Prosecution of Potentially Unlawful Death* provide detailed guidance on the exhumation of human remains, including on: the exhumation of bodies found in mass graves (i.e. containing two or more bodies), including the use of archaeological methods; the taking of photographs of human remains; the recording of observations during the exhumation process; the identification of bodies, in particular following their decomposition over the passage of time; and the assessment of physical characteristics and identification of personal effects as a secondary methods of identification.

They also provide detailed guidance on the conduct of an autopsy (also called a post-mortem examination) and the duties of forensic doctors in relation to death investigations and reporting.¹¹¹ Autopsies are generally central to any investigation of potentially unlawful death. Indeed, an autopsy is often the single most important and determining investigation for establishing the deceased person's identity and the cause, manner, and circumstances of death. It may also provide evidence of torture. The specific aims of an autopsy are to:

- Discover and record all the identifying characteristics of the deceased (where this is necessary);
- Discover and record all the pathological processes, including injuries, present;
- Draw conclusions about the identity of the deceased (where this is necessary); and
- Draw conclusions as to the cause of death and factors contributing to death.¹¹²

The Minnesota Protocol states that, given its importance to an investigation of potentially unlawful death, a decision not to undertake an autopsy should be justified in writing and should be subject to judicial review.¹¹³

¹⁰⁶ UN Principles on Extra-Legal Executions, Principle 12.

¹⁰⁷ UN Principles on Extra-Legal Executions, Principle 11.

¹⁰⁸ Minnesota Protocol, para. 90.

¹⁰⁹ Principles on Extra-Legal Executions, Principle 13.

¹¹⁰ See Annex A.

¹¹¹ Minnesota Protocol, Section V(D). The duties of forensic doctors in relation to death investigations are threefold, namely to: help ensure that the identity of the deceased is established; help ensure that the cause and circumstances of the death are revealed; and exercise care and skill in their work. Minnesota Protocol, para. 149.

¹¹² See, e.g., M. El-Nageh et al., "Ethical Practice in Laboratory Medicine and Forensic Pathology", World Health Organization (WHO) Regional Office for the Eastern Mediterranean, Alexandria, Egypt, 1999, pp. 38–39, at: www.emro.who.int/dsaf/dsa38.pdf.

¹¹³ Minnesota Protocol, para. 25.

vi. Collecting evidence of sexual violence crimes¹¹⁴

Particular care must be taken when investigating sexual violence crimes and engaging with victims and witnesses of sexual violence. In addition to the Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment and the Istanbul Protocol, which apply to rape (which constitutes torture) and other forms of sexual violence (constituting torture or other forms of ill-treatment), the AComHPR Guidelines on Combating Sexual Violence and its Consequences in Africa,¹¹⁵ World Health Organization (WHO) Guidelines for medico-legal care for victims of sexual violence,¹¹⁶ the WHO Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies,¹¹⁷ and the UN Handbook for Legislation on Violence against Women set out principles applicable to the investigation of sexual violence crimes. The International Protocol on Sexual Violence in Conflict, developed by the United Kingdom's Foreign and Commonwealth Office in consultation with a broad range of UN, NGO and State representatives, also contains extensive detailed guidance on documentation and investigation of sexual violence.

Generally recognized principles for conducting investigations into other crimes are particularly important in the context of sexual violence, including the principle of do no harm.¹¹⁸ Whether evidence of sexual violence is being provided in the context of court-room testimony or forensic examinations by medical experts, justice system actors and persons interacting with victims and witnesses must adhere to the principle of do no harm, which requires that they ensure the safety and security of all participants in the investigation;¹¹⁹ ensure the survivor has autonomy and can provide informed consent;¹²⁰ and mitigate the harm they might cause in their interactions with a survivor, including through re-traumatization, disclosure which can lead to stigma and isolation, and the use of inadequate investigation techniques which can negatively impact the survivor's ability to secure justice and reparations.¹²¹ Justice system actors should give due regard to the survivor's right to privacy,¹²² and minimize any adverse impacts including stigma that might arise from their interaction with the justice system. This should include giving due regard to the location of the interview with the victim to ensure their privacy is protected.¹²³ Any measures adopted throughout the investigation and prosecution, however, must also be balanced with the accused's right to a fair trial, and in particular the rights to examine and cross-examine witnesses, to equality of arms and to a public trial. As for other crimes, referral pathways should also be put in place to ensure the survivor can access wholistic support, such as medical assistance, psychosocial assistance, legal

¹¹⁴ The investigation, prosecution and adjudication of sexual violence crimes will be discussed extensively in a separate ICJ publication following the publication of this Guide. Accordingly, this Guide only sets out key principles for justice system actors to take into account when investigating sexual violence crimes.

¹¹⁵ AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017) (ACHPR Guidelines on Sexual Violence).

¹¹⁶ The WHO Guidelines for medico-legal care for victims of sexual violence (WHO Guidelines) provide detailed guidance for medical workers in treating victims of sexual violence and documenting and reporting sexual violence crimes. They do not constitute comprehensive guidelines for collecting medical evidence for use in criminal proceedings.

¹¹⁷ WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), available at https://apps.who.int/iris/bitstream/handle/10665/43709/9789241595681_eng.pdf?sequence=1.

¹¹⁸ See, e.g., Istanbul Protocol, paras. 57-73; International Protocol on Sexual Violence in Conflict, pp. 85-104; ACHPR Guidelines on Sexual Violence, p. 18.

¹¹⁹ See, e.g. Istanbul Protocol, paras. 95-97.

¹²⁰ See, e.g. Istanbul Protocol, paras. 63-73; ACHPR Guidelines on Sexual Violence, pp. 33-34; International Protocol on Sexual Violence in Conflict, pp. 89-91; WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), Part III(6).

¹²¹ International Protocol on Sexual Violence in Conflict, pp. 90-97; Istanbul Protocol, paras. 58-62, 146-149; ACHPR Guidelines on Sexual Violence, p. 18; WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), Part III(4).

¹²² International Protocol on Sexual Violence in Conflict, pp. 95-97; Istanbul Protocol, paras. 65, 68, 71, 217; WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), Part (iii)(5).

¹²³ See also ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law – Practical Guide 2* (2020), part 4.a.

assistance and protection assistance, to meet their needs.¹²⁴ In this regard, the gathering of medico-legal evidence should take place in a context of therapeutic assistance to the victim.

As for all other crimes, testimonial, documentary, digital and physical evidence are important sources with probative value in court proceedings, which may substantiate the commission of rape or other act of sexual violence, as well as the relevant contextual circumstances and responsibility of the perpetrator(s). Where biological evidence has not been collected immediately following the commission of the crime, evidence of long-term injuries resulting from sexual violence may be collected. Where such evidence is not available, witness evidence and other forms of forensic evidence, including evidence of the crime-scene, remain important.¹²⁵

With respect to rape and sexual violence in particular, investigators must pay particular attention to collecting evidence regarding the context in which the crime has been committed. The definition of rape under international law requires that consent “be given voluntarily, as a result of the person’s free will, assessed in the context of the surrounding circumstances,”¹²⁶ and other forms of sexual assault are broadly defined to include “other non-consensual acts of a sexual nature with a person.”¹²⁷ The circumstances in which the perpetrator committed such crimes are particularly relevant for determining whether they were coercive and whether consent was given voluntarily. As discussed in the ICJ’s Practical Guide No. 1 on *The Adjudication of Crimes Under Tunisian and International Law*, a context characterized by coercive circumstances, such as custodial settings, can negate consent.¹²⁸

An investigation team should include trained specialists in investigating sexual violence crimes, as well as interpreters (where necessary), of all genders.¹²⁹ Assumptions about the victim’s preference for the gender of the investigator, medical expert and interpreter with whom they interact during the criminal justice process should not be made, and the victim should be in a position to make their own choice where possible.¹³⁰

Any physical examination should also be carried out by persons who have expertise in documenting sexual assault; otherwise such persons should be consulted during such a physical examination.¹³¹ During an investigation, victims of rape may also prefer to speak with a medical professional rather than a non-medical investigator, even if the investigator is a woman and the medical professional a man.¹³² The Istanbul Protocol notes that in the context of evaluations conducted for legal purposes “the necessary attention to detail and precise questioning about history are easily perceived as a sign of mistrust or doubt on the part of the examiner.”¹³³ The aim in gathering medical evidence should be to provide “an objective service without sacrificing sensitivity or compassion.”¹³⁴

¹²⁴ International Protocol on Sexual Violence in Conflict, pp. 98-102; Istanbul Protocol, paras. 156, 174.

¹²⁵ The WHO *Guidelines for medico-legal care for victims of sexual violence* provide detailed guidelines on the collection of biological evidence. Given the crimes subject to SCC cases occurred years ago, detailed guidance on the collection of contemporaneous evidence has not been set out in this Guide. For more detail see WHO Guidelines, Part 4.

¹²⁶ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* – Practical Guide 1 (2019), pp. 71-73.

¹²⁷ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* – Practical Guide 1 (2019), pp. 75-76.

¹²⁸ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* – Practical Guide 1 (2019), pp. 71-73.

¹²⁹ International Protocol on Sexual Violence in Conflict, pp. 135, 166; ACHPR Guidelines on Sexual Violence, pp. 31-33.

¹³⁰ Istanbul Protocol, paras. 154-155, 270. See also ACHPR Guidelines on Sexual Violence, p. 32.

¹³¹ Istanbul Protocol, para. 270; Istanbul Protocol, para. 220.

¹³² Istanbul Protocol, para. 270.

¹³³ Istanbul Protocol, para. 270.

¹³⁴ WHO Guidelines, p. 20.

The International Protocol on Sexual Violence in Conflict sets out extensive guidance on interviewing victims and witnesses of sexual violence¹³⁵ and collecting non-witness evidence.¹³⁶

vii. Chain of custody

The chain of custody of a piece of evidence (“an exhibit”) refers to a process that enables the complete history of its custody to be tracked and recreated – who has had care and control of the evidence from the time it was first located and secured to the present (often up until it is ultimately produced by a witness in court).

All relevant material gathered by an investigation should be recorded in both documentary and photographic form. To recover evidence, investigators should be appropriately equipped, including with personal protective equipment; relevant packaging (bags, boxes, and plastic and glass vials/bottles); and recording materials, including photographic equipment.¹³⁷

Every stage of evidence recovery, storage, transportation, and forensic analysis, from crime scene to court and through to the end of the judicial process, needs to be effectively recorded to ensure the integrity of the evidence.¹³⁸ This requires the following key steps to be undertaken:

- Label the document or item appropriately.
- Make comprehensive notes, ideally on a single sheet of paper.
- Place the document or item in an evidence bag, envelope, or if appropriate, box.
- Seal the evidence bag or envelope and sign over the seal.
- Attach the notes to the evidence bag or envelope in which the document/item has been placed.
- Keep a transfer log of any transfer of the document or item between individuals or organizations.¹³⁹

Chain of custody requires that the identity and sequence of all persons who possessed, accessed or handled an item from the time of its acquisition by investigators to its presentation in court needs to be clearly attested,¹⁴⁰ and recorded in a transfer log.¹⁴¹ Any gap in the chain of custody may prevent the introduction of the item as evidence against a criminal defendant or may undermine its probative value.

Evidential material should therefore be transported in a manner that protects it from manipulation, degradation, and cross-contamination with other evidence. Each piece of evidence recovered needs to be uniquely referenced and marked to ensure its identification from the moment it is collected through to analysis and storage. The evidence should always include the investigator’s details.¹⁴²

Storage facilities for evidence should be clean, secure, and suitable for maintaining items in appropriate conditions, and protected against unauthorized entry and cross-contamination.¹⁴³

¹³⁵ International Protocol on Sexual Violence in Conflict, chapter 11.

¹³⁶ International Protocol on Sexual Violence in Conflict, chapters 10, 12.

¹³⁷ Minnesota Protocol, para. 64; International Protocol on Sexual Violence in Conflict, p. 199; Istanbul Protocol, paras. 102, 106.

¹³⁸ Minnesota Protocol, para. 65; International Protocol on Sexual Violence in Conflict, pp. 188-191, 199-200.

¹³⁹ International Protocol on Sexual Violence in Conflict, pp. 199-201.

¹⁴⁰ International Protocol on Sexual Violence in Conflict, pp. 199-200.

¹⁴¹ For the details that should be included in the transfer log, see International Protocol on Sexual Violence in Conflict, p. 201.

¹⁴² Minnesota Protocol, para. 65.

¹⁴³ Minnesota Protocol, para. 66; Istanbul Protocol, paras. 103, 222.

viii. Crime scene management

Every important physical location in the investigation needs to be located and identified, including the site of encounters between the victim or victims and any identified suspects, the location of any crimes, and possible burial sites. Any forensic analysis, including but not limited to the crime scene, requires documentation by photography, measurement, note-taking, and inventory. These should all be cross-referenced against each other, to improve the independent understanding of a death scene and increase the credibility of the collected evidence. The Minnesota Protocol, Istanbul Protocol¹⁴⁴ and the International Protocol on Sexual Violence in Conflict¹⁴⁵ set out guidance on crime scene management.

The examination of the scene should be conducted by forensic experts who have been trained in the legal and scientific identification, documentation, collection, and preservation of evidence.¹⁴⁶ Of course, forensic experts may not always be readily available. In particular, in situations where the rule of law has broken down, such as during armed conflict or while widespread atrocities are occurring, non-forensic experts, such as medical workers, journalists, or human rights practitioners, may be the first to come upon the scene. What they document may be important to future investigations even though they may have no formal legal mandate to identify, document or collect evidence.¹⁴⁷

In any event, critical documentation of a crime scene consists of photographic records, if possible with a reference scale and direction indicator. While video recording can supplement photographs, due to poor image resolution video should not be considered a primary means of capturing images. The Minnesota Protocol and, to a lesser extent, the International Protocol on Sexual Violence in Conflict, provide detailed guidelines, which are applicable to any crime scene, on how to search, document and secure them.¹⁴⁸

ix. Enforcement powers

Investigating authorities must have the necessary resources and powers required to carry out an effective investigation, including to compel witnesses¹⁴⁹ and require the production of information and documents and access to places.¹⁵⁰ Article 12 of the ICCPED requires States to ensure that investigating authorities can access documentation and other relevant information, as well as places of detention.¹⁵¹ The Principles on Extra-legal Executions also require that an investigating authority have the power to oblige all persons to testify and present evidence, including officials, and obtain all information necessary to the inquiry, including all physical and documentary evidence.¹⁵² The Minnesota Protocol states that any investigative mechanism conducting an investigation must have the power to compel witnesses and require the production of evidence. The Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment and Istanbul Protocol provide that

¹⁴⁴ Istanbul Protocol, para. 103.

¹⁴⁵ International Protocol on Sexual Violence in Conflict, pp. 189-191.

¹⁴⁶ Minnesota Protocol, para. 167; International Protocol on Sexual Violence in Conflict, p. 190. See also Istanbul Protocol, para. 103.

¹⁴⁷ Minnesota Protocol, para. 169.

¹⁴⁸ Minnesota Protocol, paras. 4-97, 168, 170-173, 176-177, 181; International Protocol on Sexual Violence in Conflict, pp. 190-198. See also ICJ, *The Investigation and Prosecution of Potentially Unlawful Death, Practitioners' Guide No. 14* (2019), pp. 78-112.

¹⁴⁹ With the exception of compelling witnesses / accused to testify against themselves. See Istanbul Protocol, para. 116.

¹⁵⁰ See, e.g., *Paul and Audrey Edwards v. United Kingdom*, ECtHR, Judgment of 14 March 2002, paras. 78-79.

¹⁵¹ ICCPED, article 12.

¹⁵² UN Principles on Extra-Legal Executions, Principles 9-10.

investigative bodies including commissions of inquiry have the necessary powers to compel testimony and order the production of documents.¹⁵³

This implies that the State must adopt a legal framework enabling authorities to exercise their investigative functions. In that sense, the IACtHR has stated that “it is essential that the entities responsible for the investigations are provided, both formally and substantively, with the appropriate and necessary powers and guarantees”¹⁵⁴ in order to carry out the investigations. Likewise, the State must provide the investigating authorities with “the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access to the documents and information relevant to the investigation of the facts denounced.”¹⁵⁵ Notwithstanding, the IACtHR has also stated that “these resources and elements contribute to the effective investigation, but the lack of them does not exonerate state authorities from making the necessary efforts to comply with this obligation.”¹⁵⁶

With respect to access to State records in particular, the Working Group on Enforced or Involuntary Disappearances has concluded that “[t]he right to the truth implies that the State has an obligation to give full access to information available allowing the tracing of disappeared persons;” that the powers of the investigating authorities should include “full access to the archives of the State;” and that “[a]fter the investigations have been completed, the archives of the said authority should be preserved and made fully accessible to the public.”¹⁵⁷

The IACtHR has stated that “[p]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the ‘clandestinity of the Executive branch’ and to perpetuate impunity.”¹⁵⁸

The UN Human Rights Committee (HRC) has rejected the use of state secrecy or privilege as a justification to restrict access to information to serious violations of human rights.¹⁵⁹

With respect to situations where the State denies the existence of documents, the IACtHR has stated that “the State cannot seek protection in arguing the lack of existence of the requested documents; rather, to the contrary, it must establish the reason for denying the provision of said information, demonstrating that it has adopted all the measures within its power to prove that, in effect, the information sought did not exist.”¹⁶⁰

¹⁵³ Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment, para. 3(a); Istanbul Protocol, paras. 80, 108, 115-116.

¹⁵⁴ *Judgment of 20 November 12*, IACtHR, Case of Gudiel Álvarez and others (Diario Militar) v. Guatemala, Series C No. 253, para. 251.

¹⁵⁵ *Judgment of 22 September 2009*, IACtHR, Case of Anzualdo Castro v. Peru, Series C No. 202, para. 135.

¹⁵⁶ *Judgment of 22 September 2009*, IACtHR, Case of Anzualdo Castro v. Peru, Series C No. 202, para. 135.

¹⁵⁷ Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, para. 9.

¹⁵⁸ *Judgment of 25 November 2003*, IACtHR, Case of Myrna Mack Chang v. Guatemala, Series C No. 101, para. 181. In this regard, see *Judgment of 22 September 2006*, IACtHR, Case of Goiburú et al v. Paraguay, Series C No. 153, para. 117. See also *Right to the Truth in the Americas*, IAComHR, OAS/Ser.L/V/II.152, Doc. 2, 13 August 2014, para. 113.

¹⁵⁹ See inter alia: HRC, Concluding Observations: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 16; and Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 18.

¹⁶⁰ *Judgment of 24 November 2010*, IACtHR, Case of Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil, Series C No. 219, para. 211. See also *Right to the Truth in the Americas*, IAComHR, OAS/Ser.L/V/II.152, Doc. 2, 13 August 2014, para. 114.

Several international norms and standards stipulate that measures must be available to prevent and sanction persons that hinder investigations.¹⁶¹ In this regard, the IACtHR has stated that “[p]ublic officials and private citizens who hamper, divert or unduly delay investigations tending to clarify the truth of the facts must be punished, rigorously applying, in this regard, provisions of domestic legislation.”¹⁶²

b. Tunisian Law

i. General criminal procedure

The CCP prescribes the authorities mandated to conduct an investigation, and provides limited rules with respect to the collection of exculpatory, expert and forensic evidence. It also sets out enforcement powers necessary to compel cooperation during an investigation or penalize non-cooperation. The legal framework governing the general criminal procedure in Tunisia does not contain explicit rules governing chain of custody or the management of crime scenes.

a) Investigative authorities and powers

As discussed in the ICJ’s Practical Guide No. 2 on *The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law*, the CCP grants judicial police officers,¹⁶³ *cheiks*¹⁶⁴ (within their territorial jurisdiction),¹⁶⁵ prosecutors,¹⁶⁶ investigative judges¹⁶⁷ and *juges rapporteurs* the power to collect evidence.¹⁶⁸ Upon receipt of a complaint, the OPP or judicial police officers to whom the task has been delegated can conduct a preliminary inquiry to determine the nature of the charge by collecting evidence, questioning the suspect, taking witness statements and writing a report.¹⁶⁹ If the alleged conduct constitutes a crime (rather than an infraction), the OPP must refer the case to an investigative judge,¹⁷⁰ who must conduct a full investigation to search for the truth and establish all the facts that will assist the trial chamber in its decision.¹⁷¹

The investigative judge can hear any witness whose testimony he or she deems useful and interrogate accused persons,¹⁷² and conduct searches and site visits, seize evidence, and order an expert report on any issue.¹⁷³ The order from the investigative judge defines the scope of an expert’s

¹⁶¹ See, inter alia, ICPPED, articles 12(4), 22 and 25(1)(b); and Declaration on the Protection of All Persons from Enforced Disappearance, article 13(5).

¹⁶² *Judgment of 29 August 2002*, IACtHR, Case of Caracazo v. Venezuela, Series C No. 95, para. 119.

¹⁶³ Code of Criminal Procedure, article 9.

¹⁶⁴ In Tunisia, *cheiks* are the equivalent of mayors in rural areas. The term appears in multiple articles in the Code of Criminal Procedure but is not formally defined.

¹⁶⁵ Code of Criminal Procedure, article 15.

¹⁶⁶ Code of Criminal Procedure, article 26.

¹⁶⁷ Code of Criminal Procedure, articles 50 and 53.

¹⁶⁸ Code of Criminal Procedure, articles 143 and 206. Paragraph 13 of article 143 of the Code of Criminal Procedure provides: “The court may appoint one of its members to carry out additional investigation. In this case, the proceedings are postponed to a fixed date.” Paragraph 4 of article 206 of the CCP further adds: “If the case is not ready for judgment, the court orders the remand of the case for further investigation at one of the following hearings, confirms the warrant, or if necessary, releases the accused provisionally with or without bail. It may also decline jurisdiction, and refer to the public prosecution who can decide to appeal.” Although this clause has rarely been applied by courts, it gives the court the power to postpone the hearing if the case is not ready for adjudication and to issue a preparatory order to the Prosecution or to a *juge rapporteur* to perform any further necessary investigatory acts.

¹⁶⁹ Code of Criminal Procedure, article 26. See also article 30.

¹⁷⁰ Code of Criminal Procedure, articles 28 and 47. In cases involving lesser offences, i.e. infractions, the OPP can investigate and the involvement of an investigative judge is optional. See article 47.

¹⁷¹ Code of Criminal Procedure, article 50.

¹⁷² Code of Criminal Procedure, articles 59 and 68. The accused must first be informed of the charges and given the opportunity to select or be assigned a lawyer.

¹⁷³ Code of Criminal Procedure, articles 53, 59, and 93-100. The investigative judge can appoint other investigative judges or the Judicial Police to carry out certain investigatory acts on his or her behalf, including hearing witnesses (Code of Criminal Procedure, article 57). However, the investigating judge cannot delegate the power to execute warrants.

powers and activities, including by defining the expected output.¹⁷⁴ The rules applying to experts include forensic experts, for whom no specific provisions apply. The OPP and accused persons can also request the investigative judge to execute any investigative acts it deems necessary for the determination of the truth.¹⁷⁵

Additionally, a *juge rapporteur* may be appointed by the trial chamber to conduct complementary investigations after the case has been referred to them, during which trial proceedings are postponed.¹⁷⁶ The CCP is silent regarding the powers the *juge rapporteur* must exercise in this regard.

b) Exculpatory evidence

The investigative judge has a duty to take all necessary acts to gather both incriminating and exculpatory evidence.¹⁷⁷ The accused and counsel's right to request the investigating judge conduct to certain investigatory acts includes the search for exculpatory evidence.¹⁷⁸ If the accused person points towards the existence of any potentially exculpatory evidence during interrogation, these leads must be pursued promptly.¹⁷⁹

c) Expert and forensic evidence

The investigative judge can appoint experts to advise on any technical issue,¹⁸⁰ whose duties and modalities of operation are set out in articles 102 and 103 of the CCP. There are no distinct provisions for forensic experts. Under the Expert Qualification Law, an expert must be a Tunisian national¹⁸¹ and a resident,¹⁸² hold a higher education degree in the field of expertise,¹⁸³ have worked in the requisite area of specialisation for at least five years for those who hold diplomas in the field and ten years for others,¹⁸⁴ and not exercise any activities that are incompatible with the independence required.¹⁸⁵ If the prosecution, civil parties or the accused object to the appointment of an expert,¹⁸⁶ the judge must issue a decision on the matter, without a right of appeal.¹⁸⁷

Under Tunisian law, exhumations are governed by Law No. 97-12 of 25 February 1997 on Cemeteries and Places of Burial (Exhumation Law). Article 17 of the Exhumation Law provides that judicial authorities can carry out exhumations in the context of investigations. In practice, this article has consistently been interpreted as meaning that the prosecutor must order an exhumation request.¹⁸⁸ The Law does not set out procedures with respect to conducting exhumations.

d) Enforcement powers

¹⁷⁴ ICJ interview with civil party lawyers on 23 September 2014.

¹⁷⁵ Code of Criminal Procedure, articles 55(1), 72. See also ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law – Practical Guide 2* (2020), part 2.b.i.b.1.

¹⁷⁶ Code of Criminal Procedure, articles 143 and 206.

¹⁷⁷ Code of Criminal Procedure, article 53.

¹⁷⁸ Code of Criminal Procedure, article 72.

¹⁷⁹ Code of Criminal Procedure, article 69.

¹⁸⁰ Code of Criminal Procedure, articles 53 and 101.

¹⁸¹ Law No. 93-61 of 23 June 1993 on judicial experts, article 4(1).

¹⁸² Law No. 93-61 of 23 June 1993 on judicial experts, article 4(6).

¹⁸³ Law No. 93-61 of 23 June 1993 on judicial experts, article 4(3). Someone who doesn't fulfil this condition can exceptionally be listed if they demonstrate competence in the field of expertise and a shortage of suitable experts (namely, educated in the relevant field) is also established.

¹⁸⁴ Law No. 93-61 of 23 June 1993 on judicial experts, article 4(4).

¹⁸⁵ Law No. 93-61 of 23 June 1993 on judicial experts, article 4(5). See article 4 for further criteria.

¹⁸⁶ Code of Criminal Procedure, article 101.

¹⁸⁷ Code of Criminal Procedure, article 101.

¹⁸⁸ ICJ interview with SCC judges, 18 November 2019.

An investigative judge has a range of compulsive and pecuniary measures available to ensure the attendance of witnesses and the accused during investigations, including powers to issue summons¹⁸⁹ and arrest warrants (“*mandat d’amener*”).¹⁹⁰

Any person summoned as a witness must appear, take the oath¹⁹¹ and give a statement.¹⁹² A summons must mention that non-appearance, refusal to testify and false testimony are punishable by law.¹⁹³ An accused person cannot be compelled to testify.¹⁹⁴ If called to testify at trial, a witness must again take the oath and be warned that he or she may be prosecuted for providing false testimony.¹⁹⁵ If it appears to the judge that a witness has altered the truth, they must record it in a statement (*procès-verbal*) and transmit to the OPP.¹⁹⁶ A summoned witness who does not appear or a witness who appears but refuses to take the oath or give a statement can be fined 10 to 20 dinars.¹⁹⁷ If they do not appear on summons a second time, the investigative judge can issue a warrant to secure their presence (“*mandat d’amener*”).¹⁹⁸

If an accused person does not appear before the investigative judge following an order of interrogation, the judge can issue a warrant to secure the person’s presence (“*mandat d’amener*”).¹⁹⁹

Finally, there are two provisions in Tunisia’s Penal Code that can be used to prosecute persons who conceal or alter the truth in order to assist those who committed the crimes. Article 32(4) of the Penal Code states that “anyone who knowingly assists criminals, through concealment or by any other means, in order to ensure either the gain of profit from the offense or the impunity of the authors of the offence, can be considered as an accomplice to the crime.”²⁰⁰ Article 241 of the Penal Code also provides that “anyone who knowingly alters the truth in a criminal case, either against the accused, or in his benefit, is punishable of the same penalty as the one established in the matter pursued, as long as the penalty does not exceed twenty years of imprisonment.”²⁰¹

ii. Transitional Justice Framework

The Transitional Justice Framework entrusted the IVD with a broad investigative mandate, but provided limited guidance on their evidence collection procedures. As discussed in Practical Guide No. 2, the Investigation Committee was tasked with carrying out investigations using a range of evidence collection powers, including by hearing witnesses, searching public and private places and seizing evidence, conducting exhumations and carrying out other forensic examinations, and seeking international cooperation. The ICJ was informed that the Investigation Committee collected witness statements, official records (*procès-verbaux officiels*), government records, expert and medical reports, exhumation reports (from previous cases), foreign official documents and official registers

¹⁸⁹ Code of Criminal Procedure, article. 59-61.

¹⁹⁰ Code of Criminal Procedure, articles 61 and 78.

¹⁹¹ Code of Criminal Procedure, article 64 (to tell the truth, the whole truth, and nothing but the truth).

¹⁹² Code of Criminal Procedure, articles 61 and 64. Certain exceptions related to professional secrecy apply.

¹⁹³ Code of Criminal Procedure, article 135.

¹⁹⁴ Code of Criminal Procedure, article 69. Article 74 provides that the, if the accused person refuses to answer the investigative judge, the judge must warn him that this will not prevent him from pursuing the investigation and recording such warning in the minutes.

¹⁹⁵ Code of Criminal Procedure, article 64. Article 241 of the Criminal Code provides that anyone who knowingly alters the truth in a penal matter, either against the accused person or in his favour, is subject to the same sentence as the one that applied in the initial case, as long as it does not exceed 20 years in prison, and possibly a fine of 3,000 dinars.

¹⁹⁶ Code of Criminal Procedure, article 64.

¹⁹⁷ Code of Criminal Procedure, article 61. See also Criminal Cassation Decision Number 10365, 6 December, 1975, available at http://jurisprudence.e-justice.tn/textes/pdf/juris/1975/JURIS_0001_010365_1975_12_06.pdf?fbclid=IwAR1L2pbAMHE3i-j0YtvmpPrGSg9GYxVXS5uIDmLqWV75DVegTkX2pwwDF1I.

¹⁹⁸ Code of Criminal Procedure, article 61.

¹⁹⁹ Code of Criminal Procedure, article 78.

²⁰⁰ Criminal Code, article 32(4).

²⁰¹ Criminal Code, article 241.

of organisations such as morgue registers and that, although suspects had the right to participate in IVD investigations, not all persons accused of committing crimes appeared before the IVD. Although the IVD had enforcement powers to facilitate access to evidence, the sanctions provisions of the 2013 Law were not applied.

a) Investigative authorities and powers

As discussed in Practical Guide No. 2 on *The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law*, the IVD established an Investigation Committee with four sub-units: the Sorting Unit,²⁰² the Confidential Hearing Unit²⁰³ and the Inquiry and Analysis Unit²⁰⁴ responsible for the pre-investigation phase and the Investigation Unit responsible for the full investigation of complaints.²⁰⁵

Article 39 of the 2013 Law generally required the IVD to, among other things, hold public or private hearings for victims and gather data as well as track, count, verify and document violations for its database.²⁰⁶ Article 40 also granted the IVD evidence collection powers, which were reiterated in articles 2 and 4 of the IVD Internal Rules, including to:

- Investigate²⁰⁷ all violations using all necessary means and mechanisms while ensuring defence rights;
- Have access to all public and private archives (regardless of legislative restrictions);
- Summon any person it deems necessary or of assistance irrespective of whether they are entitled to any immunities;
- Request any public authority staff to execute its tasks related to inspection, investigation and protection;
- Request administrative and judicial authorities, public commissions and any other natural person or legal entity to provide documents or information in their possession;
- Examine lawsuits brought before judiciary committees as well as the judgements or decisions issued by them;²⁰⁸
- Request information from official foreign authorities and non-governmental organizations in accordance with relevant international conventions and treaties and gather information from victims, witnesses, civil servants and other parties from other countries in coordination with the concerned authorities;
- Search public and private places and confiscate documents, movables and tools used in the commission of a violation pursuant to “the same powers as the judicial police, with the accompanying duty to safeguard procedural guarantees;”²⁰⁹ and
- Have recourse to any other procedure or mechanism that may contribute to revealing the truth.²¹⁰

As set out in article 40 of the 2013 Law, the Head of the Investigation Unit enjoyed the same prerogatives as judicial police officers with respect to carrying out inspections, seizing documents

²⁰² IC Procedures Guide, art. 9.

²⁰³ IC Procedures Guide, article 15. The Confidential Hearing Unit held hearings to interview victims whose files were determined as admissible. See also article 22.

²⁰⁴ IC Procedures Guide, article 23.

²⁰⁵ IC Procedures Guide, articles 30, 32, 39 and 40.

²⁰⁶ Law No. 2013-53 of 24 December 2013, article 39.

²⁰⁷ Using the French term “*instruction*,” which under the Code of Criminal Procedure, refers specifically to the role of an investigative judge.

²⁰⁸ In the Internal Rules and Procedures Manual of 22 November 2014 (discussed below), this is phrased as “cases published before judicial bodies and the judgments or decisions issued by them.”

²⁰⁹ Law No. 2013-53 of 24 December 2013, article 40(10).

²¹⁰ Law No. 2013-53 of 24 December 2013, article 40.

and objects and keeping records of all investigative acts.²¹¹ Articles 51 and 52 also imposed obligations on organisations and individuals to cooperate with the IVD, in particular on:

- State services, public bodies and commissions, local communities, public institutions and civil servants to provide the IVD President with declarations containing all facts they have knowledge of, as well as any other information or data that they may have collected in the scope of their functions, and that fall within the purview of the IVD's work, at their own initiative or at the Commission's request if necessary.²¹²
- Natural persons or legal entities to provide the IVD with all the documents or declarations with respect to facts they have knowledge of or experienced or information they collected that are relevant to the IVD's mission.²¹³

IVD requests for information or documents could not be opposed by invoking professional secrecy obligations, regardless of the nature or capacity of the natural person or legal entity in possession of the information or documents being requested by the Commission. Those entrusted with such secrets could not be punished for disclosing information or documents to the IVD.²¹⁴

The ICJ was informed that the IVD interpreted article 7 of the 2013 Law, which states that accountability falls within the remit of the judicial and administrative commissions and authorities pursuant to the law in force, as meaning that the IVD must refer to and/or rely upon the CCP wherever the Transitional Justice Framework was silent. According to such information, given the absence of specific procedural rules in the Transitional Justice Framework, investigations and the collection of evidence was carried out in accordance with the standards and procedures set out in the CCP.

b) Types of evidence collected

The ICJ was informed that the Investigation Committee, through its Inquiry and Analysis Unit to a limited extent, and its Investigation Unit mainly, collected witness statements, official records (*procès-verbaux officiels*), government records, expert and medical reports, exhumation reports (from previous cases), foreign official documents and official registers of organisations such as morgue registers. The IVD case files also relied on certain types of evidence, primarily to establish context, that investigative judges would not ordinarily include in a case file, such as books, NGO reports and "mapping" information available in the IVD database.

Witness statements: According to the information provided to the ICJ, the Investigation Committee collected witness statements (*procès-verbaux*) from victims, witnesses and accused persons, and all investigations were commenced by hearing victims and obtaining their statements.

Forensic and expert evidence: According to the information provided to the ICJ, IVD investigators did not perform or order any autopsies or exhumations but requested medico-legal experts ("*médecin-légiste*") to analyse medical certificates for potential irregularities and, for enforced disappearance cases, IVD investigations focused on evidence provided in witness and victim statements as corroborated by other facts or statements.

The IVD only appointed government-approved experts, according to the procedures prescribed by the CCP and the Expert Qualification Law. According to the information provided to the ICJ, there is only one case in which evidence provided by a non-government expert was included in the file transferred to the SCC. In this case, Fayçal Baraket was allegedly tortured to death at a police station in the coastal town of Nabeul on 8 October 1991. At the time, Tunisian authorities stated that he

²¹¹ IC Procedures Guide, article 39.

²¹² Law No. 2013-53 of 24 December 2013, article 51.

²¹³ Law No. 2013-53 of 24 December 2013, article 52.

²¹⁴ Law No. 2013-53 of 24 December 2013, article 54.

had died as a result of a car accident. However, after examining photos of injuries in the autopsy report in 1992, Dr Derrick Pounder, a British national and an independent medical examiner mandated by Amnesty International, concluded that his death was caused by torture.²¹⁵ In 2012, the case was reopened and the investigative judge in the Nabeul Criminal Court ordered that an exhumation and autopsy be performed in Dr Pounder's presence. The review of the case confirmed that Fayçal Baraket had died as a result of torture and not in a car accident.²¹⁶ The victim's family filed a complaint to the IVD, which was referred to the Nabeul SCC. The case file includes Dr Pounder's report challenging the official State report, giving it the status of a non-official medical report.²¹⁷

c) Defence participation in IVD investigations and collection of exculpatory evidence

The IC Procedures Guide invokes defence rights in two instances. First, it specifies that investigations must be conducted independently and impartially, while respecting the principles of transitional justice and the Constitution, in particular the presumption of innocence, the principle of confrontation and the rights of the defence.²¹⁸ Second, the Guide states that the alleged perpetrator can only be interrogated in the presence of their lawyer, unless he or she expressly renounces this right.²¹⁹ If the alleged perpetrator refuses to appoint a lawyer, however, the investigation could be conducted without their presence.²²⁰ According to the information provided to the ICJ, not all persons accused of committing crimes appeared before the IVD.

d) Enforcement powers

Article 66 of the 2013 Law imposes sanctions for non-compliance with the IVD's mandate and its orders. Any person who, *inter alia*, "hinders the Commission's work on purpose," "does not respond to the committee's summons to testify, or obstructs obtaining a needed document or information" shall be punished by six months' imprisonment and a 2,000 Tunisian Dinars fine. Article 66 further adds that the provisions of the Penal Code shall be applicable to whoever gives false testimony before the IVD, provides it with forged documents or destroys any document or material related to any of the investigations or procedures stipulated herein.²²¹

At no stage, however, were the sanctions provisions of article 66 of the 2013 Law applied. Non-collaboration was nonetheless mentioned in indictments transferred to the SCC, by naming the people or entities who refused to cooperate with the IVD's orders and specifying the information sought.

The Transitional Justice Framework is silent with regards to the SCC's enforcement powers: it neither specifically includes measures permitting the SCC to penalize persons who do not appear to testify before it, nor does it include any provisions addressing obstruction of justice.

²¹⁵ CAT, Views, Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, 24 January 2000, pp. 5-6. The CAT found Tunisia was in breach of its obligation to conduct an impartial investigation into Baraket's killing.

²¹⁶ Available at <https://www.justiceinfo.net/fr/tribunaux/tribunaux-nationaux/40277-tunisie-crainte-et-frustration-permanente-dans-l-affaire-faycal-baraket.html>.

²¹⁷ Fayçal Barraket case Number 1, Nabeul SCC.

²¹⁸ IC Procedures Guide, article 33.

²¹⁹ IC Procedures Guide, article 37.

²²⁰ IC Procedures Guide, article 37.

²²¹ Law No. 2013-53 of 24 December 2013, article 40. See section 2.b.3 above for applicable penalties under the CCP.

3. The admission and exclusion of evidence

The Transitional Justice Framework did not set out distinct rules for the admission and exclusion of evidence in cases referred to the SCC. As is often the case in civil law jurisdictions, the CCP also contains few rules guiding the admissibility and exclusion of evidence, where the principle of freedom of evidence applies. International law and standards governing the admission and exclusion of evidence, including the mandatory exclusion of evidence obtained through torture or other cruel, inhuman or degrading treatment or punishment or other coercive means, discretionary exclusion of evidence otherwise obtained unlawfully, and application of factors including probative value and reliability, are relevant to the question whether to admit or exclude evidence from consideration when assessing the guilt or innocence of an accused and, if it is admissible, the weight to be accorded to it (as relevant to part 4 on the assessment of evidence). This chapter provides guidance to SCC practitioners on the international law and standards governing the admission and exclusion of evidence in criminal cases.

a. International law and standards

International law and standards, including the ICCPR, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the ACHPR and the Arab Charter require States to exclude the admission of evidence obtained through torture or other cruel, inhuman or degrading treatment or punishment or other coercive means and to ensure judicial decision makers have discretion to determine whether to exclude evidence otherwise obtained unlawfully.²²² They also provide guidance regarding the application of factors determining the admissibility and exclusion of evidence, including probative value and reliability.

Before proceeding to trial, the prosecutor (or other designated authority, such as the investigating judge and/or indictment chamber) should review the investigation case file to ensure the evidence collected meets international law and standards and can be used at trial. This includes considering the degree to which, for example:

- The investigation was carried out independently and impartially;²²³
- Investigative processes and outcomes were transparent, including through openness to the scrutiny of the general public and of victims' families;²²⁴
- Every stage of evidence recovery, storage, transportation and forensic analysis, from crime scene to the court and through to the end of the judicial processes, was effectively recorded to ensure the integrity of the evidence (chain of custody);²²⁵
- All significant witnesses – including those who saw or heard the crime being committed, people with relevant knowledge of the victim(s) and/or suspected perpetrator(s), and people in the same organization or chain of command as the suspected perpetrator – have been interviewed;²²⁶
- Any technical gaps in the investigation have been identified and, where appropriate, international assistance has been sought;²²⁷
- A "living chronology" was created and reviewed each time new evidence was collected or obtained (para. 83); and
- An autopsy was performed where appropriate.²²⁸

²²² ICCPR, article 7; ACHPR, article 5; Arab Charter, article 8; CAT, article 15.

²²³ Minnesota Protocol, para. 28.

²²⁴ Minnesota Protocol, para. 32.

²²⁵ Minnesota Protocol, para. 65.

²²⁶ Minnesota Protocol, para. 72.

²²⁷ Minnesota Protocol, para. 77.

²²⁸ Minnesota Protocol, paras. 25, and 148-163 and detailed guidelines. For more guidance on applying these steps in practice, see ICJ, *The Investigation and Prosecution of Potentially Unlawful Death*, Practitioners' Guide No. 14 (2019), pp. 126-129.

Following such review, the prosecutor (or other designated authority as the case may be) may determine the admissibility of the evidence, and may advise that the prosecution be stayed or discontinued if the admitted evidence is not sufficient to justify the charge.²²⁹

i. Evidence obtained through torture, other ill-treatment or coercion

Articles 7 and 14 of the ICCPR and article 15 of the CAT provide that any and all confessions or statements by accused or witnesses that authorities know or believe on reasonable grounds were obtained through resource to unlawful methods, including torture or other cruel, inhuman or degrading treatment,²³⁰ should be inadmissible as evidence in judicial proceedings.²³¹ The requirement is inherent in the prohibition against torture and other ill-treatment and the right of accused persons not to be compelled to testify against themselves, protected in articles 7 and 14 of the ICCPR. The use of evidence obtained through torture is explicitly absolutely prohibited under article 15 of the CAT, which states that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”²³² The exclusionary rule also applies to cruel, inhuman or degrading treatment or punishment, as confirmed by the HRC, the UN Committee against Torture, other UN experts and regional human rights courts and bodies.²³³ The exclusionary rule applies to statements by the accused or by any other person, whether or not this person is being called to testify as a witness,

²²⁹ *Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, Guideline 13(a), (b) and 14; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle F(i) and (j). See also *International Association of Prosecutors Standards* (“IAP Standards”), para. 1(h).

²³⁰ For a discussion of the definitions of torture and other ill-treatment under international law and the forms such crimes can take, see ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law – Practical Guide 1* (2019), pp. 55-59. See also Amnesty International, *Fair Trial Manual*, 2014, Section 9.3.

²³¹ See also HRC, General Comment No. 32: Article 14, paras. 6, 41, 60; *International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families*, arts. 10 and 18.3.g; *Guidelines on the Role of Prosecutors*, Guideline 16; *African Charter of Human and Peoples’ Rights* (ACHPR), article 5; *Principles on Fair Trial in Africa*, Principle F; *Arab Charter on Human Rights*, articles 8 and 16.f; IAP Standards, para. 1(f). See also *American Convention on Human Rights* (ACHR), articles 5.2 and 8.3; *Inter-American Convention to Prevent and Punish Torture*, articles 5 and 10; ECHR, article 3; Council of Europe, *Guidelines on human rights and the fight against terrorism*, Guideline IV; *Edwards v. UK*, ECtHR, Applications Nos. 39647/98 and 40461/98, Judgment, 27 October 2004, p. 15.

²³² As set out in Practical Guide No. 1, torture and other cruel, inhuman or degrading treatment are prohibited under all circumstances under treaty and customary international law. See ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law – Practical Guide 1* (2019), pp. 55-59.

²³³ See ICCPR, article 7; ACHPR, article 5; *Arab Charter on Human Rights*, article 8; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, article 12; *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (Robben Island Guidelines), Guideline 29; Special Rapporteur on torture, UN Doc. A/54/426, 1999, para. 12(e); HRC: General Comment No. 20, para. 12, General Comment No. 32: Article 14, para. 60; CAT: General Comment No. 2, para. 6, Concluding Observations: Mongolia, UN Doc. CAT/C/MNG/CO/1, 2010, para. 18, *Söylemez v. Turkey*, ECtHR, Application No. 46661/99, Judgment of 21 December 2006, paras. 121-125. See *Malawi African Association and Others v. Mauritania*, AComHPR, Communication No. 54/91 et al, 11 May 2000, paras. 3, 8, 11, 115; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted under General Assembly resolution 43/173 (1998), Principles 21 and 27. See also ACHR, article 5; *Principles on Persons Deprived of Liberty in the Americas*, Principle V; ECHR, article 3; Amnesty International, *Fair Trial Rights Manual*, 2014, Section 17.1.

and regardless of where the ill-treatment occurred (including abroad)²³⁴ and the seriousness of the charges or context.²³⁵

Statements by an accused person obtained through other forms of coercion must also be excluded from evidence. Section N(6)(d)(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles on Fair Trial in Africa) explicitly prohibits the admission of confessions or other evidence obtained through any form of coercion or force.²³⁶ According to those Principles, the UN Committee Against Torture and the UN Special Rapporteurs on Torture and on Human Rights and Counter-Terrorism, any confession or admission obtained during incommunicado detention is considered to have been obtained by coercion.²³⁷

Statements by an accused in criminal proceedings should not be admitted unless they are proved to have been given voluntarily. More generally, once it is alleged that statements by an accused or any witness have been provided as a result of human rights violations, whether through torture or other coercive means, the burden of proof lies with the State to prove, beyond reasonable doubt, that it was obtained lawfully in a separate hearing before it is admitted at trial.²³⁸ This obligation requires State authorities to provide the accused and the Court with information about the circumstances in which the evidence was collected. According to the HRC, where evidence was allegedly obtained through torture or other cruel, inhuman or degrading treatment or punishment, "information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim."²³⁹ The Special Rapporteur on Human Rights and Counter-Terrorism has held that if there are doubts about the voluntariness of the statements by an accused or witness but no information about the circumstances under which it was obtained is provided, the statement should be excluded even in the absence of direct evidence of physical abuse.²⁴⁰

Other forms of evidence, including physical evidence which is derived from information obtained through torture or other ill-treatment, should also be excluded. Section N(6)(d)(i) of the Principles on Fair Trial in Africa states that "any confession or *other evidence* obtained by any form of coercion

²³⁴ ICCPR, article 14(2) and (3); HRC, General Comment No. 32: Article 14, para. 41; CAT, article 15; CAT: Concluding Observations: United Kingdom, UN Doc. CAT/C/CR/33/3 (2004), paras. 4(a)(i), 5(d), *P.E. v. France*, UN Doc. CAT/C/29/D/193/2001 (2002), para. 6.3, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002 (2003), paras. 6.9-6.10. See also *Judgment of 26 November 2010*, IACtHR, Cabrera-García and Montiel Flores v. Mexico, Series C No.220, para. 167; ECtHR: *El-Haski v. Belgium* Application No. 649/08, Judgment of 25 September 2012, paras. 87-88, 91; *Othman v. United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 9 May 2012, paras. 263-267, 282; Amnesty International, *Fair Trial Rights Manual*, 2014, Section 17.1.

²³⁵ See, CAT, General Comment No. 2, paras. 5, 6; CAT, Concluding Observations: United Kingdom, UN Doc. A/54/44. (1999) para. 76(d). See also Amnesty International, *Fair Trial Rights Manual*, 2014, Section 17.1.

²³⁶ See also AComHPR, Concluding Observations: Benin (2009), para. 50.

²³⁷ Principles on Fair Trial in Africa, section N(6)(d)(i); CAT, Concluding Observations: Chile, UN Doc. CAT/C/CR/32/5 (2004) paras. 6(j), 7(m); Special Rapporteur on torture, UN Doc. A/61/259 (2006), para. 56; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223, 6 August 2008, para. 45(d). See also HRC, Concluding Observations: Russia, UN Doc. CCPR/C/RUS/CO/6 (2009) para. 8; Special Rapporteur on torture: UN Doc. A/HRC/13/39/Add.5, 5 February 2010, para. 96, UN Doc. A/61/259, 14 August 2006, para. 46; IACtHR, Resolution No. 29/89: Nicaragua (10.198) (1990). According to the UN Special Rapporteur on Torture and the UN CAT, confessions not obtained through torture, other ill-treatment or coercion should only be admissible if they are recorded, made in the presence of competent and independent counsel and confirmed before a judge, and should never form the sole basis of a conviction. See Special Rapporteur on torture: UN Doc. A/56/156, 3 July 2001, para. 39(d), (f); UN Doc. A/HRC/13/39/Add.5, 5 February 2010, paras. 100-101. CAT, Concluding Observations: Chad, UN Doc. CAT/C/TCD/CO/1 (2009), para. 29.

²³⁸ *Nallaratnam Singarasa v. Sri Lanka*, HRC Communication No. 1033/2001, Views of 21 July 2004, para. 7.4; General Comment No. 32: Article 14, paras. 33, 41; *Idieva v. Tajikistan*, HRC Communication No. 1276/2004, Views of 31 March 2009, paras. 9.3, 9.6; Special Rapporteur on torture, UN Doc. A/56/156, 3 July 2001, para. 39(j); UN Doc. A/61/259, 14 August 2006, para. 65; UN Doc. A/HRC/13/39/Add.5, 5 February 2010, para. 98. CAT, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002, 12 May 2003, para. 6.10. State authorities must ensure the perpetrators of the unlawful methods are brought to justice: CAT, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002, 12 May 2003, para. 6.10; HRC, *Nallaratnam Singarasa v. Sri Lanka*, HRC Communication No. 1033/2001, Views of 21 July 2004, para. 7.4. The excluded evidence can be used against the person who used such methods to bring them to justice: Guidelines on the Role of Prosecutors, Guideline 16.

²³⁹ HRC, General Comment No. 32: Article 14, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 33.

²⁴⁰ Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223, 6 August 2008, para. 45(d).

or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing” (emphasis added). The HRC has confirmed that the exclusionary principle applies to all forms of evidence.²⁴¹ The UN Committee Against Torture has required States to ensure that their evidence exclusion rules include exclusion of all forms of evidence obtained through torture or other ill-treatment.²⁴²

ii. Exclusion of evidence obtained in violation of procedural requirements or other human rights standards

Evidence that has been collected through other means that raise questions about its reliability, including where it does not meet the applicable procedural or fair trial requirements or whose admission would damage the integrity of the proceedings by effectively condoning or taking benefit from violations of human rights, may also be excluded. The Special Rapporteur on human rights and counter-terrorism has stated that “[t]he use of evidence obtained otherwise in breach of human rights or domestic law generally renders the trial as unfair.”²⁴³ Principle N(6)(g) of the Principles on Fair Trial in Africa provide that “[e]vidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations.” Guideline 16 of the UN Guidelines on the Role of Prosecutors also require prosecutors to refuse to use evidence obtained through methods which violate the accused’s human rights. Principle 27 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “[n]on-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.”

The way in which such considerations are applied may differ from jurisdiction to jurisdiction. Under the Rome Statute, judges are permitted to consider “any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.”²⁴⁴ The Rome Statute also states that “evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”²⁴⁵ Similar rules have been applied at other international courts and tribunals.²⁴⁶ Rules such as these leave room for a judge to admit such evidence where its prejudicial impact is outweighed by other factors. For example, international courts and tribunals have admitted intercepted communications where prior legal authorisation was not obtained²⁴⁷ and documentary

²⁴¹ HRC, General Comment No. 32: Article 14, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 6.

²⁴² See CAT, Inquiry Report: Mexico, UN Doc. CAT/C/75 (2003) para. 220(d) and (f). For relevant cases from the ECtHR, see Amnesty International, Fair Trial Rights Manual, 2014, Section 17.2.1.

²⁴³ Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223, 6 August 2008, para. 45(d). See also IACoMHR, Venezuela (2003), para. 364(8).

²⁴⁴ Rome Statute of the International Criminal Court (Rome Statute), article 69(4). See also *Ruto case*, ICC Trial Chamber: Decision on the Prosecution’s Request for Admission of Documentary Evidence, Case No. ICC-01/09-01/11-1353, 10 June 2014, para. 16.

²⁴⁵ Rome Statute, article 69(7). See also *Lubanga case*, ICC Pre-Trial Chamber: Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06-1981, 29 January 2007, paras. 69, 78, 81, 89-90; *Lubanga case*, ICC Trial Chamber: Decision on the Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), Case No. ICC-01/04-01/06-1981, 21 October 2010, paras. 29-31.

²⁴⁶ See, e.g. International Criminal Tribunal for the former Yugoslavia (ICTY) Rules of Procedure and Evidence, rule 89(D) (“A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”); *Prosecutor v. Nahimana et al.*, International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-99-52-A, Judgment, 28 November 2007, para. 319 and fn. 764 (“A Trial Chamber can also exclude evidence whose admission could affect the fairness of the proceedings [and may] refuse to admit evidence whose probative value is significantly inferior to its prejudicial effect for the Defence”).

²⁴⁷ *Prosecutor v. Brđanin*, ICTY, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 3 October 2003, para. 53; *Mbarushimana case*, ICC Pre-Trial Chamber: Decision on the Confirmation of Charges, 16 December 2011, Case No. ICC-01/04-01/10, para. 74; *Bemba case*, ICC Trial Chamber: Decision on

evidence obtained during a search of the accused's property following procedural irregularities,²⁴⁸ but excluded statements by the accused in violation of their right to counsel²⁴⁹ or in circumstances where it was not given voluntarily.²⁵⁰ In reaching the conclusion that admission of evidence obtained through rights violations will not damage the integrity of the proceedings, international tribunals have sometimes cited the fact that their international legal authority is independent of the legal authority of the State that was responsible for the violations; such reasoning would presumably not, however, apply to courts of the State responsible for the violations in question.

Additional factors that may be considered when determining the admissibility of evidence include whether the evidence is relevant²⁵¹ and probative, and whether it is reliable.²⁵² As different legal systems adopt different approaches to the admission of evidence – some more permissive than others – an evaluation of the probative value and reliability of such evidence may, however, be seen as factors going to the weight of the evidence rather than their admissibility.²⁵³

Prosecution Request to Order the Disclosure of Material in the Possession of the Defence, Case No. ICC-01/05-01/08, 20 April 2016, paras. 27, 285, 333 (discussing the right to privacy).

²⁴⁸ *Prosecutor v. Lubanga*, ICC Trial Chamber, Case No. ICC-01/04-01/06-1981, Decision on the Admission of Material from the 'Bar Table', 24 June 2009, paras. 38, 41, 48 (concluding that a violation of the right to privacy does not necessarily require exclusion of documents seized); *Prosecutor v. Delalić et al.*, ICTY, Case No. IT-96-21-T, Decision on the Tendering of Prosecution Exhibits 104-108, 9 February 1998, paras. 18-20. See also *Prosecutor v. Lubanga*, ICC Pre-Trial Chamber: Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06-1981, 29 January 2007, paras. 69, 78, 81, 89-90; *Prosecutor v. Lubanga*, ICC Trial Chamber: Decision on the Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), Case No. ICC-01/04-01/06-1981, 21 October 2010, paras. 29-31.

²⁴⁹ *Prosecutor v. Karamera et al*, ICTR, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, paras. 23-32; *Prosecutor v. Delalić et al.*, ICTY, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 43.

²⁵⁰ See, e.g. *Prosecutor v. Delalić*, ICTY, Case No. IT-96-21-A, Judgment, 20 February 2001, para. 55 ("There is no doubt that statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95"); *Prosecutor v. Halilović*, ICTY, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, p. 23 (excluding the record of the accused's interview because the promise of provisional release or exemption from prosecution in exchange for full cooperation constituted inducement and because he was not represented by competent counsel at the time); *Prosecutor v. Sesay*, Special Tribunal for Sierra Leone (SCSL), Case No. SCSL-04-15-T, Oral Ruling On The Admissibility of Alleged Confessional Statements Obtained by Investigators of the Office of the Prosecutor from the First Accused, Issa Hassan Sesay, 5 July 2007, para. 4 (excluding statements by the accused during prosecution interviews because they "were not voluntary in that they were obtained by fear of prejudice and hope of advantage held out by persons in authority").

²⁵¹ See, e.g. *Prosecutor v. Bemba et al.*, ICC Trial Chamber, Judgment pursuant to Article 74, Case No. ICC-01/05-01/13, 19 October 2016, para. 195 ("to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused"); *Ruto case*, ICC Trial Chamber: Decision on the Prosecution's Request for Admission of Documentary Evidence, Case No. ICC-01/09-01/11, 10 June 2014, para. 15 ("item relates to a material issue or fact in the sense of making it more or less probable that a material fact or issue is proven or disproven").

²⁵² See, e.g., Rome Statute, article 69(4) ("The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence"); in the Katanga case at the ICC, the Trial Chamber found that factors relevant to reliability include (1) source; (2) nature and characteristics; (3) contemporaneity; (4) purpose; and (5) adequate means of evaluation. *Katanga case*, ICC Trial Chamber: Decision on the Prosecutor's Bar Table Motions, Case No. ICC-01/04-01/07, 17 December 2010, para. 27.

²⁵³ International courts and tribunals have adopted different approaches. For example, at the Special Tribunal for Sierra Leone, the reliability of evidence has been assessed at the conclusion of the trial. See *Prosecutor v. Norman, Fofana and Kondewa*, SCSL, Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 8 ("Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission"). An assessment of reliability at the admissibility stage may be subject to a lower threshold. *Ruto case*, ICC Trial Chamber: Decision on the Prosecution's Request for Admission of Documentary Evidence, Case No. ICC-01/09-01/11, 10 June 2014, para. 15 (only prima facie proof of indicia of reliability need be shown at the admissibility stage). The approach at the ICC differs between Trial Chambers. In the Bemba case, the Trial Chamber stated that "a trial chamber, upon the submission of an item of evidence by a party, has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of

b. Tunisian Law

i. General Criminal Procedure

As is often the case in civil law jurisdictions, the CCP contains few rules guiding the admissibility and exclusion of evidence. These appear in Section III of the CCP, titled: "On the administration of evidence." Article 150 sets out that charges may be proven by "all means of proof" (*tout mode de preuve*),²⁵⁴ a concept which is often referred to as the principle of "freedom of evidence."²⁵⁵ All evidence introduced in the case file is admissible by default unless specifically excluded. The concept of "all means of proof" is, of course, permissive in nature, meaning that there are very few restrictions on the admissibility of evidence: hearsay and opinion evidence are admissible and the determination of probative value, or the weight to be accorded to each piece of evidence, is left to the appreciation of the judge(s).

Section III of the CCP nonetheless provides some guidance as to the admissibility and exclusion of evidence. A judge can only base his or her decision on evidence that has been admitted into the case record and orally debated by the parties in adversarial proceedings before the judge.²⁵⁶ In practical terms, this means that judges cannot base their decision on evidence obtained or consulted outside of the case record, and that parties must be given the occasion to orally discuss or challenge any evidence which will form part of the judge's decision. The admission of confessions, like other evidence, is under Tunisian law left to the discretion of the judges.²⁵⁷

The CCP also identifies the specific circumstances in which evidence must be excluded from criminal proceedings. Like in many civil law jurisdictions, under Tunisia's CCP evidence is excluded through the procedural concept of nullity.²⁵⁸ Section X, Chapter II, Book II of the CCP, titled "Nullities," provides that all "acts or decisions contrary to the dispositions of public order, to the fundamental rules of procedure and to the legitimate interest of the defence are nullified."²⁵⁹ In addition, any statements made by the accused or a witness were obtained under torture or coercion must be deemed "null and void."²⁶⁰ Article 13*bis* also specifies the form a *procès-verbal* must take and the information it must contain; if the *procès-verbal* doesn't comply with these requirements, it is nullified.²⁶¹

While the CCP describes the circumstances which can lead to nullification of improperly-collected evidence, it does not specify the stage at which such exclusion or nullification decisions must or can be made. While the provisions governing nullity are broad enough that they could be interpreted as allowing the investigative judge, the indictment chamber or the trial chamber to render decisions declaring a piece of evidence null and void,²⁶² in practice the evidence ordinarily remains in the case file, sometimes accompanied by a statement from the investigative judge or indictment chamber declaring that it should be considered null and describing the circumstances why, and the final nullification decision is ultimately taken by the trial chamber. The CCP also allows the appeals

article 74(2), and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused." *Prosecutor v. Bemba et al.*, ICC Appeals Chamber: Case No. ICC-01/05-01/13, 8 March 2018, para. 598.

²⁵⁴ Code of Criminal Procedure, article 150.

²⁵⁵ In French systems, this is referred to as "*le principe de la liberté des preuves*".

²⁵⁶ Code of Criminal Procedure, article 151.

²⁵⁷ Code of Criminal Procedure, article 152.

²⁵⁸ Ho Hock Lai, "Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis" (citing Stephen C. Thaman, "Balancing Truth against Human Rights: A Theory of Modern Exclusionary Rules", in *Exclusionary Rules in Comparative Law* 403, 410-412, Stephen C. Thaman ed., 2013), September 2017, p.1. In some civil law systems, exclusion is achieved by way of the procedural concept of nullity.

²⁵⁹ Code of Criminal Procedure, article 199.

²⁶⁰ Code of Criminal Procedure, article 155. Added by Decree Law No. 2011-106 of 22 October 2011.

²⁶¹ Code of Criminal Procedure, article 13*bis*; See also Code of Criminal Procedure, article 155.

²⁶² Code of Criminal Procedure, article 13*bis*, 155 and 199.

chamber to determine that the procedure and record before it require a nullification decision which it can render before ruling on the merits.²⁶³

The CCP does not detail how, whether and to what extent judges should explain and justify their evidence exclusion – or nullification – decisions. The CCP only states that trial judgements should be motivated.²⁶⁴

ii. Transitional Justice Framework

The Transitional Justice Framework, as well as the IVD Internal Rules and IC Procedures Guide, are silent as to the admissibility and exclusion of evidence. According to the information available to the ICJ, in practice all items of evidence collected by the Investigation Committee, including informal witness statements collected by the Analysis Unit, were included in the case file that was transferred to the OPP for referral to the SCC.

²⁶³ Code of Criminal Procedure, article 218.

²⁶⁴ Code of Criminal Procedure, article 165.

4. Assessment of evidence

The Transitional Justice Framework is silent as to the standards to be applied to the assessment of evidence. Under the general criminal procedure, the CCP provides that the Indictment Chamber should issue an indictment if there is a "sufficient presumption of guilt." A final determination of the guilt or innocence of an accused is based on a judge's personal conviction (otherwise known as "*intime conviction*"). The CCP states that witness statements or reports taken by officers of the judicial police or public officers who can charge infractions are taken as evidence until proof to the contrary is presented and that witness statements or reports only have probative value if their form is regular and the author is acting within the exercise of his functions and reporting on matters within the competence of what he has personally seen or heard. It otherwise does not set out specific guidance regarding the factors that judicial authorities must take into account when assessing the evidence.

Under international law, the right to a fair and public hearing requires the presumption of innocence, which in turn requires that the accused is only convicted when the prosecution has proven their culpability "beyond reasonable doubt." The right to a fair trial also requires that judicial authorities issue a reasoned opinion, which includes "essential findings, evidence, legal reasoning and conclusions." While the *intime conviction* standard is not a violation of the presumption of innocence *per se*, its application requires particular regard to be paid to the requirement to issue a reasoned opinion to ensure the factual and legal findings and assessment of the evidence are well-founded, and ensure the accused can avail themselves of their right to appeal. This chapter provides guidance to SCC practitioners on the international law and standards governing the assessment of evidence in criminal cases.

a. Applicable international standards

The assessment of evidence is governed by the right to a "fair and public hearing" by a "competent, independent and impartial tribunal established by law" in all criminal and civil legal proceedings, which is recognized by article 14 of the ICCPR, article 13 of the Arab Charter on Human Rights, articles 7 and 26 of the African Charter on Human and Peoples' Rights and by other international human rights treaties to which Tunisia is a party.²⁶⁵ The presumption of innocence and right to a reasoned opinion are particularly relevant in the context of assessing evidence. A range of other fair trial rights and their application to the SCC in the investigation, prosecution and adjudication of evidence are discussed in the ICJ's Practical Guide No. 2. While not set out below, the section in Practical Guide No. 2 on the right of the accused to call and examine witnesses and defend oneself is relevant to the assessment of evidence, particularly insofar as judges should only rely on evidence which the accused has had an effective opportunity to challenge and judges are required to assess the relevance, probity and/or reliability of and weigh evidence upon which their decisions are based.

i. Presumption of innocence

A fundamental principle of the right to fair trial is the right of everyone charged with a criminal offence to be presumed innocent until and unless proven guilty according to law after a fair trial.²⁶⁶

²⁶⁵ *Universal Declaration of Human Rights* (UDHR), article 10; *American Declaration on the Rights and Duties of Man*, article XXVI; ACHR, article 8.1. Other standards applicable to Tunisia include *the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, adopted by the AComHPR, and the HRC General Comment No. 32: Article 14, which is an authoritative interpretation of the fair trial provisions under the ICCPR.

²⁶⁶ UDHR, article 11; ICCPR, article 14(2); *Convention on the Rights of the Child*, article 40(2)(b)(i); ACHPR, article 7(1)(b); Arab Charter on Human Rights, article 16; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted under General Assembly resolution 43/173 (1998), Principle 36(1); ICC Statute, article 66. See also IACHR, article 8(2); ECHR, article 6(2).

The right is a norm of customary international law from which no derogation is permitted.²⁶⁷ The right applies to suspects before charges are filed and continues until the exhaustion of appeal rights.

a) *Burden of proof at the trial stage*

(1) *Burden on the prosecution to prove the charges beyond reasonable doubt*

The presumption of innocence imposes the burden of proving the charges on the prosecution,²⁶⁸ and requires them to provide the accused's guilt beyond reasonable doubt. According to the HRC and other international authorities, if there is any doubt, the accused must be acquitted.²⁶⁹ The HRC stated that the presumption of innocence "imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and] ensures that the accused has the benefit of the doubt."²⁷⁰

The presumption of innocence means that, as found by the ECtHR, judges are prohibited from prejudging any case²⁷¹ and must act accordingly. The HRC has found the presumption of innocence was violated where a trial judge asked the prosecution a number of leading questions and refused to allow several defence witnesses to testify about the accused's alibi.²⁷²

The standard requires that there is no reasonable doubt regarding whether the accused committed the crime. In the *Tsatsu Tsikata* case, the African Commission on Human and Peoples' Rights (AComHPR) stated that proof beyond reasonable doubt "means the totality of evidence must push the allegation past the point below which it would reasonably be doubted if the accused is indeed guilty. Once the evidence surpasses that point, guilt will have been established."²⁷³ In the *Ken Saro-Wiwa Jr et al.* case, it found that the proceedings against Ken Saro-Wiwa and his co-accused violated the presumption of innocence because there was no direct evidence linking the accused to the murders for which they were charged and because the Nigerian Court had imposed the burden of proving innocence on the accused.²⁷⁴ The International Criminal Tribunal for the former Yugoslavia

²⁶⁷ HRC, General Comment No. 24, para. 8, General Comment No. 29, paras. 11, 16, General Comment No. 32, para. 6. See also ICRC, Study on Customary International Law, Volume 1, Rule 100, pp. 357-358.

²⁶⁸ HRC, General Comment No. 13: Article 14 (Administration of Justice), para. 7; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 36(1). See also *Allenet de Ribemont v. France*, ECtHR, Application No. 15175/89, Judgment of 10 February 1995, para. 41; *Capeau v. Belgium*, ECtHR, Application No. 42914/98, Judgment of 13 January 2005, para. 25; *Navalnyy and Ofitserov v. Russia*, ECtHR, Application No. 46632/14, Judgment of 23 February 2016, para. 105.

²⁶⁹ HRC, General Comment No. 13: Article 14 (Administration of Justice), para. 7, General Comment No. 32: Article 14, para. 30; Principles on Fair Trial in Africa, Section N(6)(e)(i). The Rome Statute imposes the onus on the Prosecutor to prove the guilt of the accused beyond reasonable doubt and prohibits any reversal of the burden of proof or placement of any onus of rebuttal on the accused. See Rome Statute, articles 66, 67(1)(i).

²⁷⁰ HRC, General Comment 32: Article 14, para. 30. See also *Barberà, Messegué and Jabardo v. Spain*, ECtHR Application No. 10590/83, Judgment of 6 December 1988, para. 77; *Telfner v. Austria*, ECtHR, Application No. 33501/96, Judgment of 20 June 2001, para. 15; *Judgment of 31 August 2004*, IACtHR, Ricardo Canese v. Paraguay, Series C No. 111, paras. 153-154.

²⁷¹ *Telfner v. Austria*, ECtHR, Application No. 33501/96, Judgment of 20 June 2001, paras. 15, 19-20.

²⁷² *Larrañaga v. The Philippines*, HRC, UN Doc. CCPR/C/87/D/1421/2005, 2006, para. 7.4. In the case, senior officials had also made widely reported public statements portraying the accused as guilty. See also *Barberà, Messegué and Jabardo v. Spain*, ECtHR, Application No. 10590/83, Judgment of 6 December 1988, para. 77, *Telfner v. Austria*, ECtHR, Application No. 33501/96, Judgment of 20 June 2001, para. 15; See *Judgment of 31 August 2004*, IACtHR, Ricardo Canese v. Paraguay, Series C No. 111, paras. 153-154. In the *Ongwen* case at the ICC, the Trial Chamber stated that "an accused must never be required to affirmatively disprove the elements of a charged crime or a mode of liability, as it is the Prosecution's burden to establish the guilt of the accused." *Ongwen case*, ICC Trial Chamber: Decision on Defence Request for the Chamber to make an Immediate Ruling on the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, Case No. ICC-02/04-01/15, 5 April 2019, para. 14.

²⁷³ *Tsatsu Tsikata v. Republic of Ghana*, AComHPR, Communication No. 322/2006, Decision, 15-29 November 2014, para. 124.

²⁷⁴ *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, AComHPR, Communications Nos. 137/94, 139/94, 154/96 and 161/97, 31 October 1998,

(ICTY) has also stated that the beyond reasonable doubt standard “requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.”²⁷⁵ The International Criminal Court (ICC) stated that, “[w]hen, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the Chamber has concluded that they have been established beyond reasonable doubt.”²⁷⁶

The standard should be applied to the facts necessary to prove each element of the crime and mode of liability charged. In the *Bemba* case, the ICC Appeals Chamber stated that “each element of the particular offence must be established ‘beyond reasonable doubt’ ... this standard is to be applied not to ‘each and every fact in the Trial Judgement’, but ‘only to facts constituting the elements of the crime and mode of liability of the accused as charged’”²⁷⁷ and facts “indispensable for entering a conviction.”²⁷⁸

(2) Reversal of the burden of proof

Laws sometimes provide for a reversal of the burden of proof, either (i) in relation to elements of the offence, sometimes called a statutory presumption, or (ii) in relation to the assertion of a defence by the accused. The ECtHR has specified that such reverse burdens are only permissible where states “confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”²⁷⁹ Placing a burden on the accused in relation to (i), the elements of the offence, will generally violate the presumption of innocence, however exceptions may apply where objective facts make out the offence, any defence is solely within the defendant’s knowledge and the presumptions are justified in the public interest.²⁸⁰ The objective facts must be made out by real evidence, rather than a witness’ account or the requirement of a particular intent of the suspect or accused person, and any such presumptions of fact must be rebuttable and should be deemed as rebutted when evidence is adduced to raise a reasonable doubt regarding the relevant element of the offence.

With respect to (ii), the assertion of a defence to a crime such as self-defence, duress or an alibi, may be made by the accused of their own volition or evidence of such is revealed by other witnesses. Such defences are not required to disprove the offence but, if raised, required the defence to bear the burden. With respect to both (i) and (ii), the accused has an evidential burden, i.e. a burden to adduce evidence that creates doubt about the presumption, not a burden to disprove the offence. Once evidence is adduced, the burden returns to the prosecution to provide beyond reasonable doubt that the defence is false.

para. 96. Before and during their trial, representatives of the government pronounced the accused guilty in press conferences and at the UN.

²⁷⁵ *Prosecutor v. Milan Martić*, ICTY, Case No. IT-95-11-A, Judgment, 8 October 2008, paras. 55, 61.

²⁷⁶ *Prosecutor v. Lubanga*, ICC Trial Chamber: Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06, 14 March 2012, para. 111.

²⁷⁷ *Prosecutor v. Bemba case*, ICC Trial Chamber: Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08, 21 March 2016, para. 215.

²⁷⁸ *Ngudjolo case*, ICC Trial Chamber: Judgment, Case No. ICC-01/04-02/12, 18 December 2012, para. 35; *Ngudjolo case*, ICC Appeals Chamber: Judgment on the Prosecutor’s Appeal against the “Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-02/12, 27 February 2015, para. 125.

²⁷⁹ *Radio France v. France*, ECtHR, Application No. 53984/00, Judgment of 30 March 2004, para 24, endorsing *Salabiaku v. France*, ECtHR, Application No. 10589/83, Judgment of 7 October 1988, para 28.

²⁸⁰ For instance, where drugs are found in the possession of the suspect or accused person and a reverse burden requires the person to show they were not aware of the drug: see *Salabiaku v. France*, ECtHR, Application No. 10589/83, Judgment of 7 October 1988, para 28; *Radio France v. France*, ECtHR, Application No. 53984/00, Judgment of 30 March 2004. Or where a driving offence caused by a car, which leaves the scene where the reverse burden requires the registered owner to show they were not the driver. *O’Halloran and Francis v. UK*, ECtHR, Application Nos. 15809/02 and 25624/02, Judgment of 29 June 2007. For further discussion, see ICJ, Justice & Nederlands Juristen Comité voor de Mensenrechten, *Briefing on the European Commission Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, COM(2013) 821, March 2015, available at <https://njcm.nl/wp-content/uploads/2015/03/PresumptionofInnocenceICJJUSTICENJCMbrief.pdf>.

Instances in which statutory presumptions have been found to violate the presumption of innocence include where an accused was required to prove an absence of intent,²⁸¹ where the definition of an offence was based on mere suspicion or association²⁸² and where an accused was required to prove their confession was provided involuntarily.²⁸³

(3) The concept of “intime conviction” and providing a reasoned opinion

In most civil law systems, the applicable burden of proof is based on the concept of *intime conviction*, also known as “intimate conviction” or “on his/her personal conviction.”²⁸⁴ Although there are different formulations of *intime conviction*, they commonly require that the judge or decision maker decides guilt according to his or her conscience, based on the evidence presented at the hearing, the truth of the facts, and the credibility of the witnesses. According to Sorvatzioti and Manson when assessing the French Code of Criminal Procedure, *intime conviction* “requires that the judge decides according to his conscience based on the evidence at the hearing including an evaluation of the truth of the facts and the credibility of witnesses [and i]n its purest form, there are no rules of evidence; all evidence in the dossier prepared for the trial is considered by the court.”²⁸⁵ *Intime conviction* differs from the standard of beyond reasonable doubt insofar as it does not assess the probability of the accused’s guilt, and as such is often characterized as a more subjective standard.²⁸⁶

The ECtHR, which has jurisdiction over many criminal justice systems in which *intime conviction* is used, has not directly ruled on its compliance with the presumption of innocence.²⁸⁷ However, in cases examining the French and Belgian criminal justice systems, which are similar to that adopted by Tunisia, the ECtHR has found the combination of an *intime conviction* standard and the absence or limited provision of reasons for a conviction, to have violated the right to fair trial (see also discussion of the right to a reasoned decision, below). Although the decisions were made in the context of jury trials, the principles enunciated by the Court are applicable more generally to convictions or acquittals issued in criminal cases. In *Taxquet v Belgium*, the ECtHR stated that States “enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the [European Convention on Human Rights] requirements of Article 6 [governing a fair trial].”²⁸⁸ It went on to state:

In proceedings conducted before professional judges, the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions. In such cases, the

²⁸¹ HRC, Concluding Observations: New Zealand, UN Doc. CCPR/C/NZL/CO/5, 2010, para. 17 (for further clarification see UN Doc. CCPR/C/NZL/Q/5, question 19. p.3); HRC, Concluding Observations: Australia, UN Doc. CCPR/C/AUS/CO/5, 2009, para. 11.

²⁸² Annual Report of the IACoMHR: Peru, OEA/Ser.L/V/II.95, Doc. 7 rev. (1996) Ch.V Section VIII.

²⁸³ *Nallarathnam Singarasa v. Sri Lanka*, HRC Communication No. 1033/2001, Views of 21 July 2004, para. 7.4. HRC, General Comment No. 32: Article 14, para. 41.

²⁸⁴ Italy and Belgium, for example, have adopted the “beyond a reasonable doubt standard” in criminal cases. See John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 Florida Law Review, 1569 (2016), n. 36 citing Legge 20 febbraio 2006, n. 46, article 5 (amending Codice di procedura penale article 533) (It.) & Loi relative à la réforme de la cour d’assises du 21 décembre 2009, article 137, Moniteur Belge, 11 January 2010, Ed. 1 (amending Code d’instruction criminelle, art. 327) (Belg.), available at: <http://scholarship.law.ufl.edu/flr/vol67/iss5/2>.

²⁸⁵ Demetra Fr. Sorvatzioti and Allan Manson, “Burden of Proof and L’intime conviction: Is the Continental Criminal Trial Moving to the Common Law?”, 23 Canadian Criminal Law Review, 2019, pp. 107, 113 quoting the French Code of Criminal Procedure and *Taxquet v. Belgium*, ECtHR (Grand Chamber), Application No. 926/05, Judgment of 16 November 2010, paras. 43-60.

²⁸⁶ Michael Karnavas, “Making Sense of the Standard & Burden of Proof in Hybrid Courts: Reflections on the Common Law & Civil Law Approaches to Proof — Part IV”, July 2016, available at <http://michaelgkarnavas.net/blog/2016/07/05/standard-burden-of-proof-hybrid-courts-part-iv/>.

²⁸⁷ Demetra Fr. Sorvatzioti and Allan Manson, “Burden of Proof and L’intime conviction: Is the Continental Criminal Trial Moving to the Common Law?”, 23 Canadian Criminal Law Review 107, 2019, p. 124: “Still, [the ECtHR] has not addressed the issue of whether *l’intime conviction* without a burden of proof violates the guarantee of a fair trial.”

²⁸⁸ *Taxquet v. Belgium*, ECtHR (Grand Chamber), Application No. 926/05, Judgment of 16 November 2010, para. 84.

national courts must indicate with sufficient clarity the grounds on which they base their decisions. Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case. While courts are not obliged to give a detailed answer to every question raised, it must be clear from the decision that the essential issues of the case have been addressed.²⁸⁹

Following the *Taxquet* decision, both the French and Belgian Criminal Procedure Codes were reformed to provide for more procedural safeguards ensuring to ensure that reasons for decisions are given, or at least a reference to which evidence was taken into account by judges and/or juries.

b) Burden of proof pre-conviction

A lower standard of proof may be applied in procedural decisions, including when determining whether to issue an indictment or proceed to the defence case. As found by the AComHPR in the *Tsatsu Tsikata* case:

The standard of proof beyond reasonable doubt would accordingly be inappropriate at the close of prosecution's case. Rather, as adopted by the Respondent State's courts, a lower standard of proof suffices for the purposes of deciding whether the case will proceed to defence. In the Commission's view, the lower standard ensures that the court does not form any firm view about guilt at that stage of trial. In turn that ensures that the accused enjoys the benefit of doubt as the case proceeds to defence.²⁹⁰

Similarly, the ECtHR has held that a lower standard of proof was sufficient at the pre-trial stages of a case. In *Murray v. the United Kingdom*, the ECtHR found that, during a criminal investigation, "the facts which raise suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process in the criminal investigation."²⁹¹

Under the Rome Statute of the ICC, for example, different and higher standards apply as the case progresses from a preliminary examination, to an arrest warrant, to trial, to close of the prosecution case and to conviction.²⁹² Only at the latter stage is the beyond reasonable doubt standard applied.²⁹³

²⁸⁹ *Taxquet v. Belgium*, ECtHR (Grand Chamber), Application No. 926/05, Judgment of 16 November 2010, para. 91. The ECtHR went on to find that, in cases involving lay juries, while the jury is not ordinarily required to give reasons for their conviction, the trial will be unfair unless, in the light of all the circumstances of the case, the proceedings afforded sufficient procedural safeguards against arbitrariness and made it possible for the accused to understand why he was found guilty. *Taxquet v. Belgium*, ECtHR (Grand Chamber), Application No. 926/05, Judgment of 16 November 2010, paras. 92-93. See also *Lhermitte v. Belgium*, ECtHR (Grand Chamber), Application No. 34238/09, Judgment of 29 November 2016, paras. 67, 69, Dissenting Judgment, para. 7.

²⁹⁰ *Tsatsu Tsikata v. Republic of Ghana*, AComHPR, Communication No. 322/2006, Decision, 15-29 November 2014, paras. 124-125.

²⁹¹ *Murray v. the United Kingdom*, ECtHR, Application No. 14310/88, Judgment of 28 October 1994, para. 55. See also *Ferrari-Bravo v. Italy* (dec.), ECtHR, Application No. 9627/81, Judgment of 14 March 1984, para. 3.

²⁹² See Rome Statute, articles 53(1) and (2), 58(1), 61(7), and 66(3).

²⁹³ Rome Statute, article 66(3).

ii. Right to a reasoned opinion²⁹⁴

An accused has the right to a reasoned opinion, which requires a reasoned judgement setting out the reasons for their conviction or acquittal.²⁹⁵ According to the UN HRC, this must include “essential findings, evidence, legal reasoning and conclusions.”²⁹⁶ The requirement to issue a reasoned judgement ensures the parties and appeals court can assess *inter alia* the trial chamber’s evaluation of the evidence.²⁹⁷

Judgments determined by judges (rather than juries) should address facts and issues essential to the determination of each aspect of the case.²⁹⁸ International tribunals, in which judges determine the accused’s guilt, have found that witness testimony identifying a specific perpetrator, in particular, should be evaluated in the judgement,²⁹⁹ particularly where there is a dispute regarding the witness’s credibility and their testimony is central to whether an element is proven.³⁰⁰ Coupled with the requirement that evidence going to each element of the crime and mode of liability should prove the accused’s criminal responsibility beyond reasonable doubt, a judgement should provide clear reasoning on each crime and mode liability and their constituent elements, and an assessment of the evidence supporting the factual and legal conclusions therein.³⁰¹ This includes factors that are relevant to determining the probative value and the reliability of evidence (if not determined at the admission stage), including decisions to rely on evidence that was obtained through unlawful or coercive means or did not comply with procedural requirements.

b. Tunisian Law

i. General Criminal Procedure

Under the CCP, an evaluation of evidence within a case can occur at different stages: at pre-trial, by the public prosecutor, the investigative judge, the indictment chamber and potentially the Cassation court; at trial by the Trial Chamber; and on appeal by the Court of Appeals and the Cassation Court. The standards applicable to their respective evaluations of evidence vary.

²⁹⁴ The requirement for judgments to be made public is set out in ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law* – Practical Guide 2 (2020), part 3.a.ii.b.

²⁹⁵ Principles on Fair Trial in Africa, ss. A(2)(i), N(3)(e)(vii); Rome Statute, article 74(5); *Hadjianastassiou v. Greece*, ECtHR, Application No 12945/87, Judgment of 16 December 1992, para. 33. See also Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223, 6 August 2008, para. 15; *Order of 25 November 2005*, IACtHR, *García-Asto and Ramírez-Rojas v. Peru*, Series C No. 137, para. 155; *Prosecutor v. Naletilić & Martinović*, ICTY, Case No. IT-98-34-A, Judgment, 3 May 2006, para. 603; *V. Francis v. Jamaica*, HRC, Communication No. 320/1988, Views of 24 March 1993, para. 12.2; *García Ruiz v. Spain*, ECtHR (Grand Chamber), Application No. 30544/96, Judgment of 21 January 1999, para. 26.

²⁹⁶ HRC, General Comment No. 32, Article 14, para. 29.

²⁹⁷ Principles on Fair Trial in Africa, Section N(3)(vii).

²⁹⁸ *Taxquet v. Belgium*, ECtHR (Grand Chamber), Application No. 926/05, Judgment of 16 November 2010, para. 91; ICTY Appeals Chamber: *Prosecutor v. Kvočka et al.*, Case No. IT- 98-30/1-A, Judgment, 28 February 2005, para. 23, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Judgment, 22 April 2008, para. 13; *Prosecutor v. Ntagerura et al.*, ICTR, Case No. ICTR-99-46-A, Judgment, 7 July 2006, para. 169.

²⁹⁹ *Prosecutor v. Kvočka et al.*, ICTY Appeals Chamber, Case No. IT-98-30/1-A, Judgment, 28 February 2005, para. 24.

³⁰⁰ See, e.g., ICTR: *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005, para. 61; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgment, 29 August 2008, paras. 142-148.

³⁰¹ *Prosecutor v. Kordić & Čerkez*, ICTY, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 383; *Prosecutor v. Kajelijeli*, ICTR, Case No. ICGTR-98-44A-A, Judgment, 23 May 2005, para. 60; *Prosecutor v. Kvočka et al.*, ICTY, Case No. IT-98-30/1-A, Judgment, 28 February 2005, para. 23; *Prosecutor v. Sesay et al.*, SCSL, Case No. SCDL-04-15-A, Judgment, 26 October 2009, paras. 345, 415. The ICTY found that this requirement does not necessarily necessitate the examination of each and every piece of evidence put before a trial chamber (see e.g. *Prosecutor v. Krajišnik*, ICTY, Case No. IT-00-39-T, Judgment, 27 September 2006, paras. 292, 889; *Prosecutor v. Strugar*, ICTY, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 24) or every legal argument made by a party (see, e.g., *Prosecutor v. Strugar*, ICTY, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 24), or every step of its legal reasoning (see, e.g. *Prosecutor v. Sesay et al.*, SCSL, Case No. SCDL-04-15-A, Judgment, 26 October 2009, para. 345).

a) *Burden of proof*

(1) Determination to investigate

The OPP must first appraise all complaints received by them³⁰² and can conduct a preliminary inquiry to determine the nature of the charge by collecting evidence, questioning the suspect, taking witness statements and writing a report.³⁰³ As there is no criteria in the CCP as to how this appraisal should be exercised, the OPP has significant discretion over whether to dismiss a complaint or report an offence to an investigative judge.³⁰⁴ Nothing in the relevant Tunisian legislation requires the OPP's decision to dismiss a complaint to be supported by any reasons, nor does the law provide explicitly for judicial review.

(2) Determination to refer for indictment

Once an investigation is completed, the investigative judge must submit their findings to the OPP with an order regarding how to proceed, which must be supported by reasons.³⁰⁵ The investigative judge can decide either that the investigated facts reveal the commission of a crime, in which case they refer the case to the indictment chamber,³⁰⁶ or order the dismissal of the case if they believe that the case is inadmissible, the facts do not constitute an offence, or there is insufficient evidence.³⁰⁷ This decision is based on the investigative judge's evaluation of the facts and whether they deem that the facts reveal a crime.³⁰⁸ The CCP does not provide more specificity as to the standard applied by the investigative judge other than his consideration of the facts.

Upon receipt of a case, the indictment chamber can dismiss the case if it determines the facts do not reveal the commission of a crime or there is insufficient evidence to charge the accused,³⁰⁹ or issue a written indictment for each accused person setting out the charges and legal qualification of the facts if there is a "sufficient presumption of guilt."³¹⁰ If necessary, the indictment chamber may also seek further information from one of its judges or the investigating judge or, after hearing from the OPP, order that new proceedings be initiated to investigate facts which have not yet been investigated.³¹¹ The decision of the indictment chamber can be appealed to the Court of Cassation by any of the parties within four days.³¹²

(3) Determination of guilt or innocence

The trial chamber makes the ultimate assessment of evidence at the conclusion of the trial. The trial chamber can only base its decision on evidence that has been presented in "debates" and "discussed orally" between the parties.³¹³ Under article 150 of the CCP, the principles of "freedom of evidence," such that the charges may be proven by "any means of proof," subject to the judges' assessment of evidence. In its assessment of the evidence, the trial chamber or the judge decides based on his

³⁰² Code of Criminal Procedure, article 30.

³⁰³ Code of Criminal Procedure, article 26. The judicial police may carry out these tasks where delegated by the OPP.

³⁰⁴ Code of Criminal Procedure, article 30.

³⁰⁵ Code of Criminal Procedure, article 104.

³⁰⁶ Code of Criminal Procedure, article 107.

³⁰⁷ Code of Criminal Procedure, article 106.

³⁰⁸ Code of Criminal Procedure, articles 106 and 107 ("si le juge d'instruction estime").

³⁰⁹ Code of Criminal Procedure, article 116.

³¹⁰ Code of Criminal Procedure, articles 116 and 119.

³¹¹ Code of Criminal Procedure, article 116.

³¹² Code of Criminal Procedure, articles 120, 258-260, and 262. The civil party can only appeal if the OPP appeals. See article 260.

³¹³ Code of Criminal Procedure, article 151. This provision partially imports an adversarial approach into an otherwise inquisitorial system.

personal conviction (“*intime conviction*”).³¹⁴ If the evidence is insufficient, the judge should order the immediate release of the accused.³¹⁵

An accused’s confession is subject to the same principles,³¹⁶ and does not dispense with the requirement imposed on the investigating judge to seek corroborating evidence³¹⁷ and assess it in light of other inculpatory or exculpatory evidence. Any statements made by the accused or a witness are “null and void” if the court determines they were obtained under torture or coercion.³¹⁸ The CCP does not specify who bears the burden of providing the statement was obtained voluntarily, and does not require any other evidence such as judicial police reports which contain minutes of any statement made by the accused or witness to be declared null and void.

(4) Specific guidance as to witness statements

Witness statements are only admissible if their form is regular and the author is acting within the exercise of their functions and reporting on matters within the competence of what they have personally seen or heard.³¹⁹ Accordingly, where statements are not already subject to the principle of nullity, which, as discussed in Section 3(b)(i) above, includes where they have been obtained by torture or coercion, they may nevertheless be excluded where they do not meet CCP requirements.

With respect to statements or reports by judicial police officers, the CCP reverses the burden of proof, placing the onus on the accused to rebut presumptions of fact. Article 154 of the CCP provides that, other than where specified otherwise by law, statements (*procès-verbaux*) or reports drafted by judicial police officers³²⁰ are taken as evidence until proof to the contrary is presented. This contrary proof must either come from a witness or be in written form.³²¹ Although the accused has the right at the investigation or trial stage to object to statements made by the judicial police officer in their witness statement or report, and the police and investigating judge are obligated to take note of the accused’s objection, the statement or report remains in the case file as evidence of fact until the contrary is proven. The CCP is silent as to the standard of proof imposed on the accused in such cases, such that it is not clear that the accused only has to raise doubt about the veracity of the fact stated in the judicial police officer’s statement or report rather than prove it is incorrect beyond reasonable doubt.

(5) Provision of a reasoned opinion

The CCP requires that judgements are written and signed by all judges rendering it within 10 days of pronouncement of the decision,³²² and include *inter alia* the ruling, the criminal charges and the “reasons in fact and in law for the decision” and the laws applied.³²³ There is no requirement that the judgment be published;³²⁴ in practice, they are not.

³¹⁴ Code of Criminal Procedure, article 150. “Intime Conviction” is a French term that means “reasonable conviction; reasonable certainty; state of being satisfied beyond reasonable doubt (personally convinced); personal conviction of the court (after considering all the evidence).” F.H.S. Bridge, *The Council of Europe French– English Legal Dictionary* 173 (2002).

³¹⁵ Code of Criminal Procedure, article 150.

³¹⁶ Code of Criminal Procedure, article 152 (Confession, like any other evidence, is left to the discretion of the judges).

³¹⁷ See Code of Criminal Procedure, article 69 (The confession of the accused does not dispense the requirement for the investigating judge to seek further evidence).

³¹⁸ Code of Criminal Procedure, article 155.

³¹⁹ Code of Criminal Procedure, article 155.

³²⁰ Or public officers or agents who can charge infractions.

³²¹ Code of Criminal Procedure, article 154.

³²² Code of Criminal Procedure, article 166.

³²³ Code of Criminal Procedure, article 168.

³²⁴ For further discussion, see parts 3.a.ii.b and 3.b.i.b of ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law – Practical Guide 2* (2020).

ii. Transitional Justice Framework

The Transitional Justice Framework and IVD Internal Rules and IC Procedures Guide provide no guidance as to the evaluation of evidence or the burden of proof. Article 42 of the 2013 Law simply states that the IVD shall refer cases in which gross human rights “are proven” to the OPP.

The ICJ was informed that, although unspecified in the 2013 Law, the IVD Board applied the “sufficient presumption of guilt” standard in the CCP when evaluating, at the conclusion of its investigative process, whether to send case files to the SCC. The standard applied by each of the various investigative units composing the Investigation Committee is not specified in law and unclear in practice.

5. Recommendations

As discussed in Practical Guide No. 1, the Tunisian Constitution is clear on the primacy of international treaties over domestic law, and there is nothing in the Constitution that precludes domestic courts, including the SCC, from applying such international treaties as well as relevant customary international law.³²⁵ This should enable the SCC to give due regard to international treaties and customary international law when assessing how the SCC should apply Tunisian law in a manner consistent with Tunisia's international obligations.

Under the general rules of State responsibility in international law, as well as under human rights treaties, the SCC is an organ of the State and its acts and certain forms of inaction can constitute or result in Tunisia violating its international legal obligations. The SCC consequently has a duty to exercise all means open to it to help ensure Tunisia complies with its obligations deriving from ratified international law treaties and customary international law. These obligations apply to, among other things, the conduct of criminal investigations and admissibility and assessment of evidence in criminal cases.

Accordingly, while investigating and adjudicating gross human rights violations that amount to crimes under international law, the SCC should, when exercising their powers, interpret domestic law consistently with Tunisia's international law obligations, including with respect to the collection, admission and assessment of evidence.

With respect to the collection of evidence, as State authorities, the IVD and SCC³²⁶ are under an obligation to conduct effective and thorough investigations of gross human rights violations, and accordant obligations to collect exculpatory evidence as well as all relevant non-witness evidence, including biological, documentary, digital, and physical evidence. Tunisia is also under an obligation to ensure the IVD and SCC are afforded the resources and powers required to carry out an effective investigation, and the IVD and SCC have a duty to use such resources and powers to such ends. In light of this, the SCC will need to examine each case file to make a determination regarding whether each investigation was exhaustive, as defined by international standards. If not, it will need to take steps to identify additional evidence to be collected, to collect such evidence and to exercise enforcement powers where information, evidence or other forms of cooperation are not provided. Particular regard could be had to typical areas of evidentiary gaps, including exculpatory evidence, linkage evidence and forensics (for example, the search for bodies, exhumations and autopsies). Options for conducting further investigations were set out in Practical Guide No. 2.³²⁷ With respect to the appointment of experts, such review will need to establish whether the investigations required the appointment of experts and where necessary, due either to the subject matter or the potential lack of independence of state-experts, appoint an independent expert.

With respect to the admissibility of evidence, the principle of legality requires State authorities to ensure all evidence, including expert reports, are validly and legally produced. Before proceeding to trial, the designated authority should review the investigation case file to ensure the evidence collected meets international law and standards as well as domestic requirements and can be used at trial. Any and all confessions or statements State authorities know or believe on reasonable grounds were obtained through torture or other cruel, inhuman or degrading treatment or other coercive means should be inadmissible as evidence in judicial proceedings. The application of the principle of freedom of evidence during IVD investigations and with respect to the transfer of case files to the SCC without review of compliance with CCP procedures raises the question whether

³²⁵ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* – Practical Guide 1 (2019), pp. 10-11.

³²⁶ ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law* – Practical Guide 2 (2020), part 5.

³²⁷ ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law* – Practical Guide 2 (2020), part 5.

some evidence may not have been gathered and transferred to the SCC in compliance with domestic legal requirements. This may require the SCC to consider whether the provisions on nullity, which render evidence null and void and effectively inadmissible, necessitate the exclusion of evidence from consideration when reaching conclusions on guilt or innocence.

With respect to the assessment of evidence, the presumption of innocence requires the prosecution to prove the accused's guilt beyond reasonable doubt. The standard should be applied to the facts necessary to prove each element of the crime and mode of liability charged. Any reversal of the burden of proof (statutory presumption), which international standards permit, at most, only in very limited circumstances, must be defined by law and capable of rebuttal. While the application of the *intime conviction* standard by the SCC does not necessarily violate the presumption of innocence *per se*, SCC judges are required to ensure they provide a reasoned opinion which contains their "essential findings, evidence, legal reasoning and conclusions,"³²⁸ and which addresses facts and issues essential to the determination of each aspect of the case. Coupled with the requirement that evidence going to each element of the crime and mode of liability should prove the accused's criminal responsibility beyond reasonable doubt, the judgement should provide clear reasoning on each crime and mode of liability and their constituent elements, and an assessment of the evidence supporting the factual and legal conclusions therein.

Given the obstacles to conducting an effective and exhaustive investigation by the IVD, limited participation of the accused in the investigation by the IVD, and application of the freedom of evidence principle which was expansively applied to the case files transferred to the SCC, it is particularly important in deliberations on the guilt or innocence of the accused to have particular regard to the need to (i) ensure the evidence can be tested and verified through oral testimony or other means during trial, (ii) conduct an assessment of evidence to determine if it was collected through unlawful means, (iii) determine any violation of procedural requirements that could affect its probative value or reliability (or would lead to a determination that it is null and void) and (iv) assess the weight to be accorded to each piece of evidence.

Accordingly:

- i. SCC judges should be aware of relevant international law and standards applicable to Tunisia. SCC judges should be aware that, as an organ of the State, an act (or failure to act) by the judge that is inconsistent with international law will place Tunisia in violation of its international obligations. SCC judges should accordingly seek to ensure that all their decisions and other acts or decisions not to act are consistent with Tunisia's international legal obligations.
- ii. To these ends, with respect to the collection of evidence:
 - a. SCC judges should be prepared to review each case file referred to them with a view to determining whether the IVD investigation was effective and thorough, and thereby exhaustive, and whether further investigative steps are needed to meet Tunisia's international obligation in this regard;
 - b. In particular, SCC judges should consider whether further exculpatory and documentary, biological, digital or other forensic evidence should be collected and whether independent experts should be appointed;
 - c. Where it is apparent from the case file that the IVD faced a lack of cooperation by a certain person or entity, including state entities, SCC judges should consider whether it is necessary to reiterate the request for cooperation;
 - d. SCC judges should consider whether any compulsive or pecuniary measures should be adopted to ensure the attendance of witnesses, including the accused, and provision of information or evidence or punish non-compliance with compulsive measures, including

³²⁸ HRC, General Comment No. 32: Article 14, para. 29.

referral to the Prosecution for prosecution under articles 32(4) and/or 241 of the Tunisian Penal Code;

- iii. With respect to the admission of evidence:
 - a. SCC judges should examine the case file to determine whether the evidence was collected lawfully and in compliance with Transitional Justice Framework and CCP requirements;
 - b. SCC judges should consider whether any evidence collected unlawfully, particularly through torture or other ill-treatment or other coercive means, or other violations of internationally-recognised human rights, should be nullified, in which case they should provide a reasoned opinion regarding such decision in the trial judgement or separate decision;
 - c. Where an accused alleges or evidence indicates that a confession, statement or other was obtained through torture or other ill-treatment or other coercive means, the SCC should conduct an investigation in which the burden of proof is on State authorities to prove, beyond reasonable doubt, the evidence was obtained lawfully;
 - d. SCC judges should consider whether any evidence that does not conform to the requirements of the CCP, including witness statements, should be nullified, taking into account whether the prejudice to the accused is outweighed by the interests of justice and whether witness statements can be used solely for witness credibility assessments;
- iv. With respect to the adjudication of evidence:
 - a. SCC judges should consider assessing whether the evidence in the case-file and any further evidence collected during trial is probative and reliable, and weigh such evidence in the context of determining the innocence or guilt of the accused;
 - b. SCC judges should not rely on evidence which the accused has not had the opportunity to challenge at trial;
 - c. SCC judges should ensure the burden of proof remains on the Prosecution to prove the charges beyond reasonable doubt, and any reversal of the burden is limited to (i) to elements of the offence where objective facts make out the offence, any defence is solely within the defendant's knowledge and the presumptions are justified in the public interest or (ii) an assertion of a defence by the accused which is within their knowledge; in both cases, the burden should be on the accused to adduce evidence that creates doubt about the presumption, not a burden to disprove the offence;
 - d. SCC judges should provide a reasoned decision clearly defining the *intime conviction* standard before applying it, motivating their judgment and ensuring an assessment of evidence is clearly set out in relation to the factual and legal findings applicable to each element of the crimes and modes of liability charged.

Annex A - UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions

Prevention

1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.
2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms.
3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.
4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.
5. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.
6. Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence.
7. Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.
8. Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation. Intergovernmental mechanisms shall be used to investigate reports of any such executions and to take effective action against such practices. Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall cooperate fully in international investigations on the subject.

Investigation

9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection

and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

12. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

14. In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

15. Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect. over complainants, witnesses and their families, as well as over those conducting investigations.

16. Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

Legal proceedings

18. Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

19. Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.

20. The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.

1 In resolution 1989/65, paragraph 1, the Economic and Social Council recommended that the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions should be taken into account and respected by Governments within the framework of their national legislation and practices.

Annex B - UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)

Extracts

CHAPTER III - LEGAL INVESTIGATION OF TORTURE

74. States are required under international law to investigate reported incidents of torture promptly and impartially. Where evidence warrants it, a State in whose territory a person alleged to have committed or participated in torture is present, must either extradite the alleged perpetrator to another State that has competent jurisdiction or submit the case to its own competent authorities for the purpose of prosecution under national or local criminal laws. The fundamental principles of any viable investigation into incidents of torture are competence, impartiality, independence, promptness and thoroughness. These elements can be adapted to any legal system and should guide all investigations of alleged torture.

75. Where investigative procedures are inadequate because of a lack of resources or expertise, the appearance of bias, the apparent existence of a pattern of abuse or other substantial reasons, States shall pursue investigations through an independent commission of inquiry or similar procedure. Members of that commission must be chosen for their recognized impartiality, competence and independence as individuals. In particular, they must be independent of any institution, agency or person that may be the subject of the inquiry.

76. Section A describes the broad purpose of an investigation into torture. Section B sets forth basic principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. Section C sets forth suggested procedures for conducting an investigation into alleged torture, first considering the decision regarding the appropriate investigative authority, then offering guidelines regarding collection of oral testimony from the reported victim and other witnesses and collection of physical evidence. Section D provides guidelines for establishing a special independent commission of inquiry. These guidelines are based on the experiences of several countries that have established independent commissions to investigate alleged human rights abuses, including extrajudicial killings, torture and disappearances.

A. Purposes of an investigation into torture

77. The broad purpose of the investigation is to establish the facts relating to alleged incidents of torture, with a view to identifying those responsible for the incidents and facilitating their prosecution, or for use in the context of other procedures designed to obtain redress for victims. The issues addressed here may also be relevant for other types of investigations of torture. To fulfil this purpose, those carrying out the investigation must, at a minimum, seek to obtain statements from the victims of alleged torture; to recover and preserve evidence, including medical evidence, related to the alleged torture to aid in any potential prosecution of those responsible; to identify possible witnesses and obtain statements from them concerning the alleged torture; and to determine how, when and where the alleged incidents of torture occurred as well as any pattern or practice that may have brought about the torture. B. Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

78. The following principles represent a consensus among individuals and organizations having expertise in the investigation of torture. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as torture or other ill-treatment) include the following:

- a. Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;
- b. Identification of measures needed to prevent recurrence;
- c. Facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

79. States must ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, must be competent and impartial. They must have access to or be empowered to commission investigations by impartial medical or other experts. The methods used to carry out these investigations must meet the highest professional standards, and the findings must be made public.

80. The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. The persons conducting the investigation must have at their disposal all the necessary budgetary and technical resources for effective investigation. They must also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same applies to any witness. To this end, the investigative authority is entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence. Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families must be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses or their families, as well as those conducting the investigation.

81. Alleged victims of torture or ill-treatment and their legal representatives must be informed of, and have access to, any hearing as well as to all information relevant to the investigation and must be entitled to present other evidence.

82. In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse, or for other substantial reasons, States must ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission should be chosen for their recognized impartiality, competence and independence as individuals. In particular, they must be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission must have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these principles. A written report, made within a reasonable time, must include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report must be made public. It must also describe in detail specific events that were found to have occurred, the evidence upon which such findings were based and list the names of witnesses who testified with the exception of those whose identities have been withheld for their own protection. The State must, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

83. Medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and, in particular, must obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations must be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials. The

medical expert should promptly prepare an accurate written report. This report should include at least the following:

- a. The circumstances of the interview. The name of the subject and name and affiliation of those present at the examination; the exact time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house, etc.); any appropriate circumstances at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor;
- b. The background. A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment was alleged to have occurred and all complaints of physical and psychological symptoms;
- c. A physical and psychological examination. A record of all physical and psychological findings upon clinical examination including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
- d. An opinion. An interpretation as to the probable relationship of physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment or further examination should also be given;
- e. A record of authorship. The report should clearly identify those carrying out the examination and should be signed.

84. The report should be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. The report should be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that the report is delivered securely to these persons. The report should not be made available to any other person, except with the consent of the subject or when authorized by a court empowered to enforce the transfer. For general considerations for written reports following allegations of torture, see chapter IV. Chapters V and VI describe in detail the physical and psychological assessments, respectively.

C. Procedures of a torture investigation

1. Determination of the appropriate investigative body

85. In cases where involvement in torture by public officials is suspected, including possible orders for the use of torture by ministers, ministerial aides, officers acting with the knowledge of ministers, senior officers in State ministries, senior military leaders or tolerance of torture by such individuals, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise or the impartiality of the investigators is called into question.

86. Factors that support a belief that the State was involved in the torture or that special circumstances exist that should trigger the creation of a special impartial investigation mechanism include:

- a. Where the victim was last seen unharmed in police custody or detention;
- b. Where the modus operandi is recognizably attributable to State-sponsored torture;
- c. Where persons in the State or associated with the State have attempted to obstruct or delay the investigation of the torture;

- d. Where public interest would be served by an independent inquiry;
- e. Where investigation by regular investigative agencies is in question because of lack of expertise or lack of impartiality or for other reasons, including the importance of the matter, the apparent existence of a pattern of abuse, complaints from the person or the above inadequacies or other substantial reasons.

87. Several considerations should be taken into account when a State decides to establish an independent commission of inquiry. First, persons subject to an inquiry should be guaranteed the minimum procedural safeguards protected by international law at all stages of the investigation. Second, investigators should have the support of adequate technical and administrative personnel, as well as access to objective, impartial legal advice to ensure that the investigation will produce admissible evidence for criminal proceedings. Third, investigators should receive the full scope of the State's resources and powers. Finally, investigators should have the power to seek help from the international community of experts in law and medicine.

2. Interviewing the alleged victim and other witnesses

88. Because of the nature of torture cases and the trauma individuals suffer as a result, often including a devastating sense of powerlessness, it is particularly important to show sensitivity to the alleged torture victim and other witnesses. The State must protect alleged victims of torture, witnesses and their families from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Investigators must inform witnesses about the consequences of their involvement in the investigation and about any subsequent developments in the case that may affect them.

(a) Informed consent and other protection for the alleged victim

89. From the outset, the alleged victim should be informed, wherever possible, of the nature of the proceedings, why his or her evidence is being sought, if and how evidence offered by the alleged victim may be used. Investigators should explain to the person which portions of the investigation will be public information and which portions will be confidential. The person has the right to refuse to cooperate with all or part of the investigation. Every effort should be made to accommodate his or her schedule and wishes. The alleged torture victim should be regularly informed of the progress of the investigation. The alleged victim should also be notified of all key hearings in the investigation and prosecution of the case. The investigators should inform the alleged victim of the arrest of the suspected perpetrator. Alleged victims of torture should be given contact information for advocacy and treatment groups that might be of assistance to them. Investigators should work with advocacy groups within their jurisdiction to ensure that there is a mutual exchange of information and training concerning torture.

(b) Selection of the investigator

90. The authorities investigating the case must identify a person primarily responsible for questioning the alleged victim. While the alleged victim may need to discuss his or her case with both legal and medical professionals, the investigating team should make every effort to minimize unnecessary repetitions of the person's story. In selecting a person as the primary investigator with responsibility for the alleged torture victim, special consideration should be given to the victim's preference for a person of the same gender, the same cultural background or the ability to communicate in his or her native language. The primary investigator should have prior training or experience in documenting torture and in working with victims of trauma, including torture. In situations where an investigator with prior training or experience is not available, the primary investigator should make every effort to become informed about torture and its physical and psychological consequences before interviewing the individual. Information about torture is available from sources including this manual, several professional and training publications, training courses

and professional conferences. The investigator should also have access to international expert advice and assistance throughout the investigation.

(c) Context of the investigation

91. Investigators should carefully consider the context in which they are working, take necessary precautions and provide safeguards accordingly. If interviewing people who are still imprisoned or in similar situations in which reprisals are possible, the interviewer should use care not to put them in danger. In situations where talking to an investigator may endanger someone, a “group interview” may be preferable to an individual interview. In other cases, the interviewer must choose a place for the private interview where the witness feels comfortable to talk freely. 92. Evaluations occur in a variety of political contexts. This results in important differences in the manner in which evaluations should be conducted. The legal standards under which the investigation is conducted are also affected by the context. For example, an investigation culminating in the trial of an alleged perpetrator will require the highest level of proof, whereas a report supporting an application for political asylum in a third country need provide only a relatively low level of proof of torture. The investigator must adapt the following guidelines according to the particular situation and purpose of the 20 evaluation. Examples of various contexts include, but are not limited to, the following:

- i. In prison or detention in the individual’s home country;
- ii. In prison or detention in another country;
- iii. Not in detention in the home country but in a hostile oppressive climate;
- iv. Not in detention in the home country during a time of peace and security;
- v. In another country that may be friendly or hostile;
- vi. In a refugee camp setting;
- vii. In a war crimes tribunal or truth commission.

93. The political context may be hostile towards the victim and the examiner, for example, when detainees are interviewed while they are held in prison by their governments or while they are detained by foreign governments in order to be deported. In countries where asylum-seekers are examined in order to establish evidence of torture, the reluctance to acknowledge claims of trauma and torture may be politically motivated. The possibility of further endangering the safety of the detainee is very real and must be taken into account during every evaluation. Even in cases where persons alleging torture are not in imminent danger, investigators should use great care in their contact with them. The investigator’s choice of language and attitude will greatly affect the alleged victim’s ability and willingness to be interviewed. The location of the interview should be as safe and comfortable as possible, including access to toilet facilities and refreshments. Sufficient time should be allotted to interview the alleged torture victim. Investigators should not expect to get the full story during the first interview. Questions of a private nature will be traumatic for the alleged victim. The investigator must be sensitive in tone, phrasing and sequencing of questions, given the traumatic nature of the alleged victim’s testimony. The witness must be told of the right to stop the questioning at any time, to take a break if needed or to choose not to respond to any question.

94. Psychological counsellors or those trained in working with torture victims should be accessible, if possible, to the alleged torture victim, witnesses and members of the investigating team. Retelling the facts of the torture may cause the person to relive the experience or suffer other trauma-related symptoms (see chapter IV, sect. H). Hearing details of torture may result in secondary trauma symptoms to interviewers, and they must be encouraged to discuss their reactions with one another, respecting their professional ethical requirements of confidentiality. Wherever possible, this should be with the help of an experienced facilitator. There are two particular risks to be aware of: first, there is a danger that the interviewer may identify with those alleging torture and not be sufficiently challenging of the story; second, the interviewer may become so used to hearing histories of torture that he or she diminishes in his or her own mind the experiences of the person being interviewed.

(d) Safety of witnesses

95. The State is responsible for protecting alleged victims, witnesses and their families from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture should be removed from any position of control or power, whether direct or indirect over complainants, witnesses and their families as well as those conducting investigations. Investigators must give constant consideration to the effect of the investigation on the safety of the person alleging torture and other witnesses.

96. One suggested technique for providing a measure of safety to interviewees, including prisoners in countries in conflict situations, is to write down and keep safe the identities of people visited so that investigators can follow up on the safety of those individuals at a future return visit. Investigators must be allowed to talk to anyone and everyone, freely and in private, and be allowed to repeat the visit to these same persons (thus the need for traceable identities of those interviewed) as the need arises. Not all countries accept these conditions, and investigators may find it difficult to obtain similar guarantees. In cases in which witnesses are likely to be put in danger because of their testimony, the investigator should seek other forms of evidence.

97. Prisoners are in greater potential danger than persons who are not in custody. Prisoners might have different reactions to different situations. In one situation, prisoners may unwittingly put themselves in danger by speaking out too rashly, thinking they are protected by the very presence of the “outside” investigator. This may not be the case. In other situations, investigators may come up against a “wall of silence”, as prisoners are far too intimidated to trust anyone, even when offered talks in private. In the latter case, it may be necessary to start with “group interviews”, so as to be able to explain clearly the scope and purpose of the investigation and subsequently offer to have interviews in private with those persons who desire to speak. If the fear of reprisals, justified or not, is too great, it may be necessary to interview all prisoners in a given place of custody, so as not to pinpoint any specific person. Where an investigation leads to prosecution or another public truth-telling forum, the investigator should recommend measures to prevent harm to the alleged torture victim by such means as expunging names and other information that identifies the person from the public records or offering the person an opportunity to testify through image or voice-altering devices or closed circuit television. These measures must be consistent with the rights of the accused.

(e) Use of interpreters

98. Working through an interpreter when investigating torture is not easy, even with professionals. It will not always be possible to have interpreters on hand for all different dialects and languages, and sometimes it may be necessary to use interpreters from the person’s family or cultural group. This is not ideal, as the person may not always feel comfortable talking about the torture experience through people he or she knows. Ideally, the interpreter should be part of the investigating team and knowledgeable about torture issues (see chapters IV, sect. I, and VI, sect. C.2).

(f) Information to be obtained from the person alleged to have been tortured

99. The investigator should attempt to obtain as much of the following information as possible through the testimony of the alleged victim (see chapter IV, sect. E):

- i. The circumstances leading up to the torture, including arrest or abduction and detention;
- ii. Approximate dates and times of the torture, including when the last instance of torture occurred. Establishing this information may not be easy, as there may be several places and perpetrators (or groups of perpetrators) involved. Separate stories may have to be recorded about the different places. Expect chronologies to be inaccurate and sometimes even confusing; notions of

time are often hard to focus on for someone who has been tortured. Separate stories about different places may be useful when trying to get a global picture of the situation. Survivors will often not know exactly to where they were taken, having been blindfolded or semi-conscious. By putting together converging testimonies, it may be possible to “map out” specific places, methods and even perpetrators;

- iii. A detailed description of the persons involved in the arrest, detention and torture, including whether he or she knew any of them prior to the events relating to the alleged torture, clothing, scars, birthmarks, tattoos, height, weight (the person may be able to describe the torturer in relation to his or her own size), anything unusual about the perpetrator’s anatomy, language and accent and whether the perpetrators were intoxicated at any time;
- iv. Contents of what the person was told or asked. This may provide relevant information when trying to identify secret or unacknowledged places of detention;
- v. A description of the usual routine in the place of detention and the pattern of ill-treatment;
- vi. A description of the facts of the torture, including the methods of torture used. This is understandably often difficult, and investigators should not expect to obtain the full story during one interview. It is important to obtain precise information, but questions related to intimate humiliation and assault will be traumatic, often extremely so;
- vii. Whether the individual was sexually assaulted. Most people will tend to answer a question on sexual assault as meaning actual rape or sodomy. Investigators should be sensitive to the fact that verbal assaults, disrobing, groping, lewd or humiliating acts or blows or electric shocks to the genitals are often not taken by the victim as constituting sexual assault. These acts all violate the individual’s intimacy and should be considered as being part and parcel of sexual assault. Very often, victims of sexual assault will say nothing or even deny any nothing or even deny any sexual assault. It is often only on the second or even third visit, if the contact made has been empathic and sensitive to the person’s culture and personality, that more of the story will come out;
- viii. Physical injuries sustained in the course of the torture;
- ix. A description of weapons or other physical objects used;
- x. The identity of witnesses to the events involving torture. The investigator must use care in protecting the safety of witnesses and should consider encrypting the identities of witnesses or keeping these names separate from the substantive interview notes.

(g) Statement from the person who is alleging torture

100. The investigator should tape-record a detailed statement from the person and have it transcribed. The statement should be based on answers given in response to non-leading questions. Non-leading questions do not make assumptions or conclusions and allow the person to offer the most complete and unbiased testimony. Examples of non-leading questions are “What happened to you and where?” rather than “Were you tortured in prison?”. The latter question assumes that what happened to the witness was torture and limits the location of the actions to a prison. Avoid asking questions with lists, as this can force the individual into giving inaccurate answers if what actually happened does not exactly match one of the options. Allow the person to tell his or her own story, but assist by asking questions that increase in specificity. Encourage the person to use all his/her senses in describing what has happened to him or her. Ask what he or she saw, smelled, heard and felt. This is important, for instance, in situations where the person may have been blindfolded or experienced the assault in the dark.

(h) Alleged perpetrator's statement

101. If possible, the investigators should interview the alleged perpetrators. The investigators must provide them with legal protections guaranteed under international and national law.

3. Securing and obtaining physical evidence

102. The investigator should gather as much physical evidence as possible to document an incident or pattern of torture. One of the most important aspects of a thorough and impartial investigation of torture is the collection and analysis of physical evidence. Investigators should document the chain of custody involved in recovering and preserving physical evidence in order to use such evidence in future legal proceedings, including potential criminal prosecution. Most torture occurs in places where people are held in some form of custody, where preservation of physical evidence or unrestricted access may be initially difficult or even impossible. Investigators must be given authority by the State to obtain unrestricted access to any place or premises and be able to secure the setting where torture allegedly took place. Investigative personnel and other investigators should coordinate their efforts in carrying out a thorough investigation of the place where torture allegedly occurred. Investigators must have unrestricted access to the alleged scene of torture. Their access must include, but not be limited to, open or closed areas, including buildings, vehicles, offices, prison cells or other premises where torture is alleged to have taken place.

103. Any building or area under investigation must be closed off so as not to lose any possible evidence. Only investigators and their staff should be allowed entry into the area once it has been designated as under investigation. Examination of the scene for any material evidence should take place. All evidence must be properly collected, handled, packaged, labelled and placed in safekeeping to prevent contamination, tampering or loss of evidence. If the torture has allegedly taken place recently enough for such evidence to be relevant, any samples found of body fluids (such as blood or semen), hair, fibres and threads should be collected, labelled and properly preserved. Any implements that could be used to inflict torture, whether they be destined for that purpose or used circumstantially, should be taken and preserved. If recent enough to be relevant, any fingerprints located must be lifted and preserved. A labelled sketch of the premises or place where torture has allegedly taken place must be made to scale, showing all relevant details, such as the location of the floors in a building, rooms, entrances, windows, furniture and surrounding terrain. Colour photographs must also be taken to record the same. A record of the identity of all persons at the alleged torture scene must be made, including complete names, addresses and telephone numbers or other contact information. If torture is recent enough for it to be relevant, an inventory of the clothing of the person alleging torture should be taken and tested at a laboratory, if available, for bodily fluids and other physical evidence. Information must be obtained from anyone present on the premises or in the area under investigation to determine whether they were witness to the incidents of alleged torture. Any relevant papers, records or documents should be saved for evidential use and handwriting analysis.

4. Medical evidence

104. The investigator should arrange for a medical examination of the alleged victim. The timeliness of such medical examination is particularly important. A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade. The examination should include an assessment of the need for treatment of injuries and illnesses, psychological help, advice and follow-up (see chapter V for a description of the physical examination and forensic evaluation). A psychological appraisal of the alleged torture victim is always necessary and may be part of the physical examination, or where there are no physical signs, may be performed by itself (see chapter VI for a description of the psychological evaluation).

105. In formulating a clinical impression for the purpose of reporting physical and psychological evidence of torture, there are six important questions to ask:

- a. Are the physical and psychological findings consistent with the alleged report of torture?
- b. What physical conditions contribute to the clinical picture?
- c. Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
- d. Given the fluctuating course of trauma-related mental disorders over time, what is the time frame in relation to the torture events? Where in the course of recovery is the individual?
- e. What other stressful factors are affecting the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role, etc.)? What impact do these issues have on the victim?
- f. Does the clinical picture suggest a false allegation of torture?

5. Photography

106. Colour photographs should be taken of the injuries of persons alleging that they have been tortured, of the premises where torture has allegedly occurred (interior and exterior) and of any other physical evidence found there. A measuring tape or some other means of showing scale on the photograph is essential. Photographs must be taken as soon as possible, even with a basic camera, because some physical signs fade rapidly and locations can be interfered with. Instantly developed photos may decay over time. More professional photos are preferred and should be taken as soon as the equipment becomes available. If possible, photographs should be taken using a 35-millimetre camera with an automatic date feature. The chain of custody of the film, negatives and prints must be fully documented.

CHAPTER IV GENERAL CONSIDERATIONS FOR INTERVIEWS

120. When a person who has allegedly been tortured is interviewed, there are a number of issues and practical factors that have to be taken into consideration. These considerations apply to all persons carrying out interviews, whether they are lawyers, medical doctors, psychologists, psychiatrists, human rights monitors or members of any other profession. The following section takes up this "common ground" and attempts to put it into contexts that may be encountered when investigating torture and interviewing victims of torture.

A. Purpose of inquiry, examination and documentation

121. The broad purpose of the investigation is to establish the facts related to alleged incidents of torture (see chapter III, sect. D). Medical evaluations of torture may be useful evidence in legal contexts such as:

- a. Identifying the perpetrators responsible for torture and bringing them to justice;
- b. Support of political asylum applications;
- c. Establishing conditions under which false confessions may have been obtained by State officials;
- d. Establishing regional practices of torture. Medical evaluations may also be used to identify the therapeutic needs of survivors and as testimony in human rights investigations.

122. The purpose of the written or oral testimony of the physician is to provide expert opinion on the degree to which medical findings correlate with the patient's allegation of abuse and to communicate effectively the physician's medical findings and interpretations to the judiciary or other

appropriate authorities. In addition, medical testimony often serves to educate the judiciary, other government officials and the local and international communities on the physical and psychological sequelae of torture. The examiner should be prepared to do the following:

- a. Assess possible injury and abuse, even in the absence of specific allegations by individuals, law enforcement or judicial officials;
- b. Document physical and psychological evidence of injury and abuse;
- c. Correlate the degree of consistency between examination findings and specific allegations of abuse by the patient;
- d. Correlate the degree of consistency between individual examination findings with the knowledge of torture methods used in a particular region and their common after-effects;
- e. Render expert interpretation of the findings of medical-legal evaluations and provide expert opinion regarding possible causes of abuse in asylum hearings, criminal trials and civil proceedings;
- f. Use information obtained in an appropriate manner to enhance fact-finding and further documentation of torture.

B. Procedural safeguards with respect to detainees

123. Forensic medical evaluation of detainees should be conducted in response to official written requests by public prosecutors or other appropriate officials. Requests for medical evaluations by law enforcement officials are to be considered invalid unless they are requested by written orders of a public prosecutor. Detainees themselves, their lawyers or relatives, however, have the right to request a medical evaluation to seek evidence of torture and ill-treatment. The detainee should be taken to the forensic medical examination by officials other than soldiers and police since torture and ill-treatment may have occurred in the custody of these officials and, therefore, that would place unacceptable coercive pressures on the detainee or the physician not to document torture or ill-treatment effectively. The officials who supervise the transportation of the detainee should be responsible to the public prosecutors and not to other law enforcement officials. The detainee's lawyer should be present during the request for examination and post-examination transport of the detainee. Detainees have the right to obtain a second or alternative medical evaluation by a qualified physician during and after the period of detention.

124. Each detainee must be examined in private. Police or other law enforcement officials should never be present in the examination room. This procedural safeguard may be precluded only when, in the opinion of the examining doctor, there is compelling evidence that the detainee poses a serious safety risk to health personnel. Under such circumstances, security personnel of the health facility, not the police or other law enforcement officials, should be available upon the medical examiner's request. In such cases, security personnel should still remain out of earshot (i.e. be only within visual contact) of the patient. Medical evaluation of detainees should be conducted at a location that the physician deems most suitable. In some cases, it may be best to insist on evaluation at official medical facilities and not at the prison or jail. In other cases, prisoners may prefer to be examined in the relative safety of their cell, if they feel the medical premises may be under surveillance, for example. The best place will be dictated by many factors, but in all cases, investigators should ensure that prisoners are not forced into accepting a place with which they are not comfortable.

125. The presence of police officers, soldiers, prison officers or other law enforcement officials in the examination room, for whatever reason, should be noted in the physician's official medical report. Their presence during the examination may be grounds for disregarding a negative medical report. The identity and titles of others who are present in the examination room during the medical evaluations should be indicated in the report. Medical legal evaluations of detainees should include the use of a standardized medical report form (see annex IV for guidelines that may be used to develop standard medical report forms).

126. The original, completed evaluation should be transmitted directly to the person requesting the report, generally the public prosecutor. When a detainee or a lawyer acting on his or her behalf requests a medical report, the report must be provided. Copies of all medical reports should be retained by the examining physician. A national medical association or a commission of inquiry may choose to audit medical reports to ensure that adequate procedural safeguards and documentation standards are adhered to, particularly by doctors employed by the State. Reports should be sent to such an organization, provided the issues of independence and confidentiality have been addressed. Under no circumstances should a copy of the medical report be transferred to law enforcement officials. It is mandatory that a detainee undergo a medical examination at the time of detention and an examination and evaluation upon release. Access to a lawyer should be provided at the time of the medical examination. An outside presence during examination may be impossible in most prison situations. In such cases, it should be stipulated that prison doctors working with prisoners should respect medical ethics, and should be capable of carrying out their professional duties independently of any third-party influence. If the forensic medical examination supports allegations of torture, the detainee should not be returned to the place of detention, but rather should appear before the prosecutor or judge to determine the detainee's legal disposition.

C. Official visits to detention centres

127. Visits to prisoners are not to be considered lightly. They can in some cases be notoriously difficult to carry out in an objective and professional way, particularly in countries where torture is still being practised. One-off visits, without follow-up to ensure the safety of the interviewees after the visit, may be dangerous. In some cases, one visit without a repeat visit may be worse than no visit at all. Well-meaning investigators may fall into the trap of visiting a prison or police station, without knowing exactly what they are doing. They may obtain an incomplete or false picture of reality. They may inadvertently place prisoners that they may never visit again in danger. They may give an alibi to the perpetrators of torture, who may use the fact that outsiders visited their prison and saw nothing.

128. Visits should best be left to investigators who can carry them out and follow them up in a professional way and who have certain weathered procedural safeguards for their work. The notion that some evidence is better than no evidence is not valid when working with prisoners who might be put in danger by giving testimony. Visits to detention facilities by well-meaning people representing official and non-governmental institutions can be difficult and, worse, can be counter-productive. In the case in point here, a distinction should be made between a bona fide visit necessary for the inquiry, which is not in question, and a non-essential visit that goes beyond that, which when made by non-specialists could cause more harm than good in a country that practises torture. Independent commissions constituted by jurists and physicians should be given ensured periodic access to visit places of detention and prisons.

129. Interviews with people who are still in custody, and possibly even in the hands of the perpetrators of torture will obviously be very different from interviews in the privacy and security of an outside, safe medical facility. The importance of obtaining the person's trust in such situations cannot be stressed enough. However, it is even more important not, even unwittingly, to betray that trust. All precautions should be taken to ensure that detainees do not place themselves in danger. Detainees who have been tortured should be asked whether the information can be used and in what way. They may be too afraid to allow use of their names, fearing reprisals for example. Investigators, clinicians and interpreters are bound to respect that which has been promised to the detainee.

130. A clear dilemma may arise if, for example, it is evident that a large number of prisoners have been tortured in a given place, but they all refuse to allow investigators to use their stories because of fear. The options are either betraying the prisoners' trust in the effort to stop torture or respecting trust and going away without saying anything; a useful way has to be found out of this dilemma.

When confronted with a number of prisoners with clear signs on their bodies of whippings, beatings, lacerations caused by canings, etc., but who all refuse mention of their cases out of fear of reprisal, it is useful to organize a "health inspection" of the whole ward in full view in the courtyard. In that way, the visiting medical investigator walking through the ranks and directly observing the very visible signs of torture on the backs of the prisoners is able to make a report on what he has seen and will not have to say that prisoners complained about torture. This first step ensures the prisoners' trust for future follow-up visits.

131. Other more subtle forms of torture, psychological or sexual, for example, clearly cannot be dealt with in the same way. In these cases, it may be necessary for investigators to refrain from comment for one or several visits until the circumstances allow or encourage detainees to be less afraid and to authorize the use of their stories. The physician and interpreter should provide their names and explain their role in conducting the evaluation. Documentation of medical evidence of torture requires specific knowledge by licensed health practitioners. Knowledge of torture and its physical and psychological consequences can be gained through publications, training courses, professional conferences and experience. In addition, knowledge about regional practices of torture and ill-treatment is important because such information may corroborate an individual's accounts of these. Experience in interviewing and examining individuals for physical and psychological evidence of torture and in documenting findings should be acquired under the supervision of experienced clinicians.

132. Those still in custody may sometimes be too trusting in situations where the interviewer simply cannot guarantee that there will be no reprisals, if a repeat visit has not been negotiated and fully accepted by the authorities or if the person's identity has not been recorded so as to ensure follow-up, for example. Every precaution should be taken to be sure that prisoners do not place themselves at risk unnecessarily, naively trusting an outsider to protect them.

133. Ideally, when visits are made to people still in custody the interpreters should be outsiders and not recruited locally. This is mainly to avoid them or their families being put under pressure from inquisitive authorities wanting to know what information was given to the investigators. The issue may be more complex when the detainees are from a different ethnic group than their jailers. Should the local interpreter be from the same ethnic group as the prisoner, so as to gain his/her trust, but at the same time arousing the mistrust of the authorities who would possibly attempt to intimidate the interpreter? Furthermore, the interpreter may be reluctant to work in a hostile environment, which would potentially place him or her at risk. Or should the interpreter come from the same ethnic group as the captors, thereby gaining trust, but losing that of the prisoner, while still leaving the interpreter vulnerable to intimidation by the authorities? The answer is obviously and ideally neither of the above. Interpreters should be from outside the region and seen by all to be as independent as the investigators.

134. A person interviewed at 8 p.m. deserves as much attention as one seen at 8 a.m. Investigators should arrange to have enough time and not overwork themselves. It is unfair to the 8 p.m. person (who in addition has been waiting all day to tell his or her story) to be cut short because of the time. Similarly, the nineteenth story about falanga deserves as much attention as the first. Prisoners who do not often see outsiders may never have had a chance to talk about their torture. It is an erroneous assumption to think that prisoners talk constantly among themselves about torture. Prisoners who have nothing new to offer the investigation deserve as much time as the other prisoners. D. Techniques of questioning

135. Several basic rules must be respected (see chapter III, sect. C.2 (g)). Information is certainly important, but the person being interviewed is even more so, and listening is more important than asking questions. If only questions are asked, all that are obtained are answers. To the detainee, it may be more important to talk about family than to talk about torture. This should be duly considered, and time should be allowed for some discussion of personal matters. Torture, particularly

sexual torture, is a very intimate subject and may not come up before a follow-up visit or even later. Individuals should not be forced to talk about any form of torture if they feel uncomfortable about it.

E. Documenting the background

1. Psychosocial history and pre-arrest

136. If an alleged torture victim is no longer in custody, the examiner should inquire into the person's daily life, relations with friends and family, work or school, occupation, interests, future plans and use of alcohol and drugs. Information should also be elicited regarding the person's post-detention psychosocial history. When an individual is still in custody, a more limited psychosocial history regarding occupation and literacy is sufficient. Inquire about prescription medication being taken by the patient; this is particularly important because such medications may be denied to a person in custody, with significant adverse health consequences. Inquiries into political activities, beliefs and opinions are relevant insofar as they help to explain why a person was detained or tortured, but such inquiries are best made indirectly by asking the person which accusations were made or why they think they were detained and tortured.

2. Summary of detention and abuse

137. Before obtaining a detailed account of events, elicit summary information, including dates, places, duration of detention, frequency and duration of torture sessions. A summary will help to make effective use of time. In some cases in which survivors have been tortured on multiple occasions, they may be able to recall what happened to them, but often they cannot recall exactly where and when each event occurred. In such circumstances, it may be advisable to elicit the historical account according to methods of abuse rather than relating a series of events during specific arrests. Similarly, in writing up the story it may often be useful to have "what happened where" documented as much as possible. Holding places are operated by different security, police or armed forces, and what happened in different places may be useful for a full picture of the torture system. Obtaining a map of where the torture occurred may be useful in piecing together the stories of different people. This will often prove very useful for the overall investigation.

3. Circumstances of detention

138. Consider the following questions: what time was it? Where were you? What were you doing? Who was there? Describe the appearance of those who detained you. Were they military or civilian, in uniform or in street clothes? What type of weapons were they carrying? What was said? Any witnesses? Was this a formal arrest, administrative detention or disappearance? Was violence used, threats spoken? Was there any interaction with family members? Note the use of restraints or blindfold, means of transportation, destination and names of officials, if known.

4. Place and conditions of detention

139. Include access to and descriptions of food and drink, toilet facilities, lighting, temperature and ventilation. Also, document any contact with family, lawyers or health professionals, conditions of overcrowding or solitary confinement, dimensions of the detention place and whether there are other people who can corroborate the detention. Consider the following questions: what happened first? Where were you taken? Was there an identification process (personal information recorded, fingerprints, photographs)? Were you asked to sign anything? Describe the conditions of the cell or room (note size, others present, light, ventilation, temperature, presence of insects, rodents, bedding and access to food, water and toilet). What did you hear, see and smell? Did you have any contact with people outside or access to medical care? What was the physical layout of the place where you were detained?

5. Methods of torture and ill-treatment

140. In obtaining background information on torture and ill-treatment, caution should be used about suggesting forms of abuse to which a person may have been subjected. This may help separate potential embellishment from valid experiences. However, eliciting negative responses to questions about various forms of torture may also help establish the credibility of the person. Questions should be designed to elicit a coherent narrative account. Consider the following questions. Where did the abuse take place, when and for how long? Were you blindfolded? Before discussing forms of abuse, note who was present (give names, positions). Describe the room or place. Which objects did you observe? If possible, describe each instrument of torture in detail; for electrical torture, the current, device, number and shape of electrodes. Ask about clothing, disrobing and change of clothing. Record quotations of what was said during interrogation, insults hurled at the victim, etc. What was said among the perpetrators?

141. For each form of abuse, note: body position, restraint, nature of contact, including duration, frequency, anatomical location and the area of the body affected. Was there any bleeding, head trauma or loss of consciousness? Was the loss of consciousness due to head trauma, asphyxiation or pain? The investigator should also ask about how the person was at the end of the "session". Could he or she walk? Did he or she have to be helped or carried back to the cell? Could he or she get up the next day? How long did the feet stay swollen? All this gives a certain completeness to the description, which a checklist of methods does not. The history should include the date of positional torture, how many times and for how many days the torture lasted, the period of each episode, the style of the suspension (reverse-linear, being covered by thick cloth-blanket or being tied directly with a rope, putting weight on the legs or pulling down) or position. In cases of suspension torture, ask which sort of material was used (rope, wire and cloth leave different marks, if any, on the skin after suspension). The examiner must remember that statements on the length of the torture session by the torture survivor are subjective and may not be correct, since disorientation of time and place during torture is a generally observed finding. Was the person sexually assaulted in any manner? Elicit what was said during the torture. For example, during electric shock torture to the genitals, perpetrators often tell their torture victims that they will no longer have normal sexual relations or something similar. For a detailed discussion of the assessment of an allegation of sexual torture, including rape, see chapter V, sect. D.8.

F. Assessment of the background

142. Torture survivors may have difficulty recounting the specific details of the torture for several important reasons, including:

- a. Factors during torture itself, such as blindfolding, drugging, lapses of consciousness, etc.;
- b. Fear of placing themselves or others at risk;
- c. A lack of trust in the examining clinician or interpreter;
- d. The psychological impact of torture and trauma, such as high emotional arousal and impaired memory, secondary to trauma-related mental illnesses, such as depression and post-traumatic stress disorder (PTSD);
- e. Neuropsychiatric memory impairment from beatings to the head, suffocation, near drowning or starvation;
- f. Protective coping mechanisms, such as denial and avoidance;
- g. Culturally prescribed sanctions that allow traumatic experiences to be revealed only in highly confidential settings.

143. Inconsistencies in a person's story may arise from any or all of these factors. If possible, the investigator should ask for further clarification. When this is not possible, the investigator should look for other evidence that supports or refutes the story. A network of consistent supporting details

can corroborate and clarify the person's story. Although the individual may not be able to provide the details desired by the investigator, such as dates, times, frequencies and exact identities of perpetrators, a broad outline of the traumatic events and torture will emerge and stand up over time.

G. Review of torture methods

144. After eliciting a detailed narrative account of events, it is advisable to review other possible torture methods. It is essential to learn about regional practices of torture and modify local guidelines accordingly. Questioning about specific forms of torture is helpful when:

- a. Psychological symptoms cloud recollections;
- b. The trauma was associated with impaired sensory capabilities;
- c. There is a case of possible organic brain damage;
- d. There are mitigating educational and cultural factors.

145. The distinction between physical and psychological methods is artificial. For example, sexual torture generally causes both physical and psychological symptoms, even when there has been no physical assault. The following list of torture methods is given to show some of the categories of possible abuse. It is not meant to be used by investigators as a checklist or as a model for listing torture methods in a report. A method-listing approach may be counter-productive, as the entire clinical picture produced by torture is much more than the simple sum of lesions produced by methods on a list. Indeed, experience has shown that when confronted with such a "packaged deal" approach to torture, perpetrators often focus on one of the methods and argue about whether that particular method is a form of torture. Torture methods to consider include, but are not limited to:

- a. Blunt trauma, such as a punch, kick, slap, whipping, a beating with wires or truncheons or falling down;
- b. Positional torture, using suspension, stretching limbs apart, prolonged constraint of movement, forced positioning;
- c. Burns with cigarettes, heated instruments, scalding liquid or a caustic substance;
- d. Electric shocks;
- e. Asphyxiation, such as wet and dry methods, drowning, smothering, choking or use of chemicals;
- f. Crush injuries, such as smashing fingers or using a heavy roller to injure the thighs or back;
- g. Penetrating injuries, such as stab and gunshot wounds, wires under nails;
- h. Chemical exposure to salt, chilli pepper, gasoline, etc. (in wounds or body cavities);
- i. Sexual violence to genitals, molestation, instrumentation, rape;
- j. Crush injury or traumatic removal of digits and limbs;
- k. Medical amputation of digits or limbs, surgical removal of organs;
- l. Pharmacological torture using toxic doses of sedatives, neuroleptics, paralytics, etc.;
- m. Conditions of detention, such as a small or overcrowded cell, solitary confinement, unhygienic conditions, no access to toilet facilities, irregular or contaminated food and water, exposure to extremes of temperature, denial of privacy and forced nakedness;
- n. Deprivation of normal sensory stimulation, such as sound, light, sense of time, isolation, manipulation of brightness of the cell, abuse of physiological needs, restriction of sleep, food, water, toilet facilities, bathing, motor activities, medical care, social contacts, isolation within prison, loss of contact with the outside world (victims are often kept in isolation in order to prevent bonding and mutual identification and to encourage traumatic bonding with the torturer);
- o. Humiliation, such as verbal abuse, performance of humiliating acts;
- p. Threats of death, harm to family, further torture, imprisonment, mock executions;

- q. Threats of attack by animals, such as dogs, cats, rats or scorpions;
- r. Psychological techniques to break down the individual, including forced betrayals, accentuating feelings of helplessness, exposure to ambiguous situations or contradictory messages;
- s. Violation of taboos;
- t. Behavioural coercion, such as forced engagement in practices against the religion of the victim (e.g. forcing Muslims to eat pork), forced harm to others through torture or other abuses, forced destruction of property, forced betrayal of someone placing them at risk of harm;
- u. Forcing the victim to witness torture or atrocities being inflicted on others.

H. Risk of re-traumatization of the interviewee

146. Taking into consideration that lesions of different types and levels may occur according to the methods of torture practised, the data acquired subsequent to a comprehensive medical history and physical examination should be assessed together with appropriate laboratory and radiological examinations. Providing information and making explanations for each process to be applied during the medical examination and ensuring detailed awareness about the laboratory methods play a significant role (see chapter VI, sect. B.2 (a)).

147. The presence of psychological sequelae in torture survivors, particularly the various manifestations of PTSD, may cause the torture survivor to fear experiencing a re-enactment of his or her torture experience during the interview, physical examination or laboratory test. Explaining to the torture survivor what he or she should expect prior to the medical examination is an important component of the process. Those who survive torture and remain in their country may experience intense fear and suspicion about being re-arrested, and they are often forced to go underground to avoid being arrested again. Those who are exiled or refugees may leave behind their native language, culture, family, friends, work and everything that is familiar to them.

148. The torture survivor's personal reactions to the interviewer (and the interpreter, in cases where one is used) can have an effect on the interview process and, in turn, the outcome of the investigation. Likewise, the personal reactions of the investigator towards the person can also affect the process of the interview and the outcome of the investigation. It is important to examine the barriers to effective communication and the understanding that these personal reactions might impose on an investigation. The investigator should maintain an ongoing examination of the interview and investigation process through consultation and discussion with colleagues familiar with the field of psychological assessment and treatment of torture survivors. This type of peer supervision can be an effective means of monitoring the interview and investigation process for biases and barriers to effective communication and for obtaining accurate information (see chapter VI, sect. C.2).

149. Despite all precautions, physical and psychological examinations by their very nature may re-traumatize the patient by provoking or exacerbating symptoms of post-traumatic stress by reviving painful effects and memories (see chapter VI, sect. B.2). Questions about psychological distress and, especially, about sexual matters are considered taboo in most traditional societies, and the asking of such questions is regarded as irreverent or insulting. If sexual torture was part of the violations incurred, the claimant may feel irredeemably stigmatized and tainted in his or her moral, religious, social or psychological integrity. The expression of a respectful awareness of these conditions, as well as the clarification of confidentiality and its limits, are, therefore, of paramount importance for a well-conducted interview. A subjective assessment has to be made by the evaluator about the extent to which pressing for details is necessary for the effectiveness of the report in court, especially if the claimant demonstrates obvious signs of distress in the interview.

I. Use of interpreters

150. For many purposes, it is necessary to use an interpreter to allow the interviewer to understand what is being said. Although the interviewer and the interviewee may share a little of a common language, the information being sought is often too important to risk the errors that arise from an incomplete understanding of one another. Interpreters must be advised that what they hear and interpret in interviews is strictly confidential. It is the interpreters who get all the information, first-hand and uncensored. Individuals must be given assurances that neither the investigator nor the interpreter will misuse information in any way (see chapter VI, sect. C.2).

151. When the interpreter is not a professional, there is always the risk of the investigator losing control of the interview. Individuals may be carried away talking to the person who speaks their language, and the interview may divert from the issues at hand. There is also a risk that an interpreter with a bias might lead the interviewee on or distort the replies. Loss of information, sometimes relevant, sometimes not, is inevitable when working through interpretation. In extreme cases, it may even be necessary for investigators to refrain from taking notes during interviews and carry out interviews in several short sessions, so as to have time to write down the main points of what has been said between sessions.

152. Investigators should remember to talk to the person and to maintain eye contact, even if he or she has a natural tendency to speak to the interpreter. It helps to use the second person when speaking through the interpreter, for example “what did you do next”, rather than the third person “ask him what happened next”. All too often, investigators write their notes during the time when the interpreter is either translating the question or the interviewee answering it. Some investigators do not appear to be listening, as the interview is going on in a language they do not understand. This should not be the case, as it is essential for investigators to observe not just the words but also the body language, facial expressions, tone of voice and gestures of the interviewee if they are to obtain a full picture. Investigators should familiarize themselves with torture-related words in the person’s language so as to show that they know about the issue. Reacting, rather than showing a blank face, when hearing a torture-related word such as submarino or darmashakra will add to the investigator’s credibility.

153. When visiting prisoners, it is best never to use local interpreters if there is a possibility of their being considered untrustworthy by those interviewed. It may also be unfair for the local interpreters, who may be “debriefed” by the local authorities after a visit, or otherwise put under pressure, to be involved with political prisoners. It is best to use independent interpreters, clearly seen as coming from elsewhere. The next best thing to speaking the local language fluently is to work with a trained interpreter with experience, who is sensitive to the issue of torture and to the local culture. As a rule, codetainees should not be used for interpretation, unless it is obvious that the interviewee has chosen someone he or she trusts. In the case of people who are not in detention, many of these same rules also apply, but it may be easier to bring in someone (a local person) from the outside, which is rarely possible in prison situations.

J. Gender issues

154. Ideally, an investigation team should contain specialists of both genders, permitting the person who says that they have been tortured to choose the gender of the investigator and, where necessary, the interpreter. This is particularly important when a woman has been detained in a situation where rape is known to happen, even if she has not, so far, complained of it. Even if no sexual assault takes place, most torture has sexual aspects (see chapter V, sect. D.8). The re-traumatization can often be worse if she feels she has to describe what happened to a person who is physically similar to her torturers, who will inevitably have been mostly or entirely men. In some cultures, it would be impossible for a male investigator to question a female victim, and this must be respected. However, in most cultures, if there is only a male physician available, many women would prefer to talk to him rather than a female of another profession in order to gain the medical information and advice that she wants. In such a case, it is essential that the interpreter, if used, be

female. Some interviewees may also prefer that the interpreter be from outside their immediate locality, both because of the danger of being reminded of their torture and because of the perceived threat to their confidentiality (see chapter IV, sect. I). If no interpreter is necessary, then a female member of the investigating team should be present as a chaperone throughout at least the physical examination and, if the patient wishes, throughout the entire interview.

155. When the victim is male and has been sexually abused, the situation is more complex because he too will have been sexually abused mostly or entirely by men. Some men would, therefore, prefer to describe their experiences to women because their fear of other men is so great, while others would not want to discuss such personal matters in front of a woman. K. Indications for referral

156. Wherever possible, examinations to document torture for medical-legal reasons should be combined with an assessment for other needs, whether referral to specialist physicians, psychologists, physiotherapists or those who can offer social advice and support. Investigators should be aware of local rehabilitation and support services. The clinician should not hesitate to insist on any consultation and examination that he or she considers necessary in a medical evaluation. In the course of documenting medical evidence of torture and ill-treatment, physicians are not absolved of their ethical obligations. Those who appear to be in need of further medical or psychological care should be referred to the appropriate services.

L. Interpretation of findings and conclusions

157. Physical manifestations of torture may vary according to the intensity, frequency and duration of abuse, the torture survivor's ability to protect him or herself and the physical condition of the detainee prior to the torture. Other forms of torture may not produce physical findings, but may be associated with other conditions. For example, beatings to the head that result in loss of consciousness can cause post-traumatic epilepsy or organic brain dysfunction. Also, poor diet and hygiene in detention can cause vitamin deficiency syndromes.

158. Certain forms of torture are strongly associated with particular sequelae. For example, beatings to the head that result in loss of consciousness are particularly important to the clinical diagnosis of organic brain dysfunction. Trauma to the genitals is often associated with subsequent sexual dysfunction.

159. It is important to realize that torturers may attempt to conceal their acts. To avoid physical evidence of beating, torture is often performed with wide, blunt objects, and torture victims are sometimes covered with a rug, or shoes in the case of falanga, to distribute the force of individual blows. Stretching, crushing injuries and asphyxiation are also forms of torture with the intention of producing maximal pain and suffering with minimal evidence. For the same reason, wet towels are used with electric shocks.

160. The report must list the qualifications and experience of the investigator. Where possible, the name of the witness or patient should be given. If this puts the person at significant risk, an identifier can be used that allows the investigating team to relate the person to the record, but that will not allow anyone else to identify the individual. The report must indicate who else was in the room at the time of the interview or any part of it. It should detail the relevant history, avoiding hearsay and, where appropriate, report the findings. It must be signed, dated and include any necessary declaration required by the jurisdiction for which it is written (see annex IV).

CHAPTER V - PHYSICAL EVIDENCE OF TORTURE

161. Witness and survivor testimony are necessary components in the documentation of torture. To the extent that physical evidence of torture exists, it provides important confirmatory evidence that a person has been tortured. However, the absence of such physical evidence should not be construed

to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars.

162. A medical evaluation for legal purposes should be conducted with objectivity and impartiality. The evaluation should be based on the physician's clinical expertise and professional experience. The ethical obligation of beneficence demands uncompromising accuracy and impartiality in order to establish and maintain professional credibility. When possible, clinicians who conduct evaluations of detainees should have specific essential training in forensic documentation of torture and other forms of physical and psychological abuse. They should have knowledge of prison conditions and torture methods used in the particular region where the patient was imprisoned and the common after-effects of torture. The medical report should be factual and carefully worded. Jargon should be avoided. All medical terminology should be defined so that it is understandable to lay persons. The physician should not assume that the official requesting a medical-legal evaluation has related all the material facts. It is the physician's responsibility to discover and report upon any material findings that he or she considers relevant, even if they may be considered irrelevant or adverse to the case of the party requesting the medical examination. Findings that are consistent with torture or other forms of ill-treatment must not be excluded from a medical-legal report under any circumstance.

A. Interview structure

163. These comments apply especially to interviews conducted with persons no longer in custody. The location of the interview and examination should be as safe and comfortable as possible. Sufficient time should be allotted to conduct a detailed interview and examination. A two to-four-hour interview may be insufficient to conduct an evaluation for physical or psychological evidence of torture. Furthermore, at any given time of an evaluation, situation-specific variables, such as the dynamics of the interview, a patient's feelings of powerlessness in the face of having his/her intimacy intruded upon, fear of future persecution, shame about events and survivor guilt may simulate the circumstances of a torture experience. This may increase the patient's anxiety and resistance to disclose relevant information. A second, and possibly a third, interview may have to be scheduled to complete the evaluation.

164. Trust is an essential component of eliciting an accurate account of abuse. Earning the trust of someone who has experienced torture or other forms of abuse requires active listening, meticulous communication, courtesy and genuine empathy and honesty. Physicians must have the capacity to create a climate of trust in which disclosure of crucial, though perhaps very painful or shameful, facts can occur. It is important to be aware that those facts are sometimes intimate secrets that the person may reveal at that moment for the first time. In addition to providing a comfortable setting, adequate time for the interviews, refreshments and access to toilet facilities, the clinician should explain what the patient can expect in the evaluation. The clinician should be mindful of the tone, phrasing and sequencing of questions (sensitive questions should be asked only after some degree of rapport has been developed) and should acknowledge the patient's ability to take a break if needed or to choose not to respond to any question.

165. Physicians and interpreters have a duty to maintain confidentiality of information and to disclose information only with the patient's consent (see chapter III, sect. C). Each person should be examined individually with privacy. He or she should be informed of any limits on the confidentiality of the evaluation that may be imposed by State or judicial authorities. The purpose of the interview needs to be made clear to the person. Physicians must ensure that informed consent is based on adequate disclosure and understanding of the potential benefits and adverse consequences of a medical evaluation and that consent is given voluntarily without coercion by others, particularly law enforcement or judicial authorities. The person has the right to refuse the evaluation. In such circumstances, the clinician should document the reason for refusal of an evaluation. Furthermore,

if the person is a detainee, the report should be signed by his or her lawyer and another health official.

166. Patients may fear that information revealed in the context of an evaluation may not be safely kept from being accessed by persecuting governments. Fear and mistrust may be particularly strong in cases where physicians or other health workers were participants in the torture. In many circumstances, the evaluator will be a member of the majority culture and ethnicity, whereas the patient, in the situation and location of the interview, is likely to belong to a minority group or culture. This dynamic of inequality may reinforce the perceived and real imbalance of power and may increase the potential sense of fear, mistrust and forced submission in the patient.

167. Empathy and human contact may be the most important thing that people still in custody receive from the investigator. The investigation itself may contribute nothing of specific benefit to the person being interviewed, as in most cases their torture will be over. The meagre consolation of knowing that the information may serve a future purpose will however be greatly enhanced if the investigator shows appropriate empathy. While this may seem self-evident, all too often investigators in prison visits are so concerned about obtaining information that they fail to empathize with the prisoner being interviewed.

B. Medical history

168. Obtain a complete medical history, including information about prior medical, surgical or psychiatric problems. Be sure to document any history of injuries before the period of detention and any possible aftereffects. Avoid leading questions. Structure inquiries to elicit an open-ended, chronological account of the events experienced during detention.

169. Specific historical information may be useful in correlating regional practices of torture with individual allegations of abuse. Examples of useful information include descriptions of torture devices, body positions, methods of restraint, descriptions of acute or chronic wounds and disabilities and identifying information about perpetrators and places of detention. While it is essential to obtain accurate information regarding a torture survivor's experiences, open-ended interviewing methods require that patients should disclose these experiences in their own words using free recall. An individual who has survived torture may have trouble expressing in words his or her experiences and symptoms. In some cases, it may be helpful to use these trauma event and symptom checklists or questionnaires. If the interviewer believes it may be helpful to use these, there are numerous questionnaires available; however, none are specific to torture victims. All complaints made by a torture survivor are significant. Although there may be no correlation with the physical findings, they should be reported. Acute and chronic symptoms and disabilities associated with specific forms of abuse and the subsequent healing processes should be documented.

1. Acute symptoms

170. The individual should be asked to describe any injuries that may have resulted from the specific methods of alleged abuse. These can be, for example, bleeding, bruising, swelling, open wounds, lacerations, fractures, dislocations, joint stress, haemoptysis, pneumothorax, tympanic membrane perforation, genito-urinary system injuries, burns (colour, bulla or necrosis according to the degree of burn), electrical injuries (size and number of lesions, their colour and surface characteristics), chemical injuries (colour, signs of necrosis), pain, numbness, constipation and vomiting. The intensity, frequency and duration of each symptom should be noted. The development of any subsequent skin lesions should be described indicating whether or not they left scars. Ask about health on release; was he or she able to walk or confined to bed? If confined, for how long? How long did wounds take to heal? Were they infected? What treatment was received? Was it a physician or a traditional healer? Be aware that the detainee's ability to make such observations may have been compromised by the torture itself or its after-effects and should be documented.

2. Chronic symptoms

171. Elicit information on physical ailments that the individual believes were associated with torture or ill-treatment. Note the severity, frequency and duration of each symptom and any associated disability or need for medical or psychological care. Even if the after-effects of acute lesions cannot be seen months or years later, some physical findings may still remain, such as electrical current or thermal burn scars, skeletal deformities, incorrect healing of fractures, dental injuries, loss of hair and myofibrosis. Common somatic complaints include headache, back pain, gastrointestinal symptoms, sexual dysfunction and muscle pain. Common psychological symptoms include depressive affect, anxiety, insomnia, nightmares, flashbacks and memory difficulties (see chapter VI, sect. B.2).

3. Summary of an interview

172. Torture victims may have injuries that are substantially different from other forms of trauma. Although acute lesions may be characteristic of the alleged injuries, most lesions heal within about six weeks of torture, leaving no scars or, at the most, non-specific scars. This is often the case when torturers use techniques that prevent or limit detectable signs of injury. Under such circumstances, the physical examination may be within normal limits, but this in no way negates allegations of torture. A detailed account of the patient's observations of acute lesions and the subsequent healing process often represents an important source of evidence in corroborating specific allegations of torture or ill-treatment.

C. The physical examination

173. Subsequent to the acquisition of background information and after the patient's informed consent has been obtained, a complete physical examination by a qualified physician should be performed. Whenever possible, the patient should be able to choose the gender of the physician and, where used, of the interpreter. If the doctor is not of the same gender as the patient, a chaperone who is should be used unless the patient objects. The patient must understand that he or she is in control and has the right to limit the examination or to stop it at any time (see chapter IV, sect. J).

174. In this section, there are many references to specialist referral and further investigations. Unless the patient is in detention, it is important for physicians to have access to physical and psychological treatment facilities, so that any identified need can be followed up. In many situations, certain diagnostic test techniques will not be available, and their absence must not invalidate the report (see annex II for further details of possible diagnostic tests).

175. In cases of alleged recent torture and when the clothes worn during torture are still being worn by the torture survivor, they should be taken for examination without having been washed, and a fresh set of clothes should be provided. Wherever possible, the examination room should be equipped with sufficient light and medical equipment for the examination. Any deficiencies should be noted in the report. The examiner should note all pertinent positive and negative findings, using body diagrams to record the location and nature of all injuries (see annex III). Some forms of torture such as electrical shock or blunt trauma may be initially undetectable, but may be detected during a follow-up examination. Although it will rarely be possible to record photographically lesions of prisoners in custody of their torturers, photography should be a routine part of examinations. If a camera is available, it is always better to take poor quality photographs than to have none. They should be followed up with professional photographs as soon as possible (see chapter III, sect. C.5).

1. Skin

176. The examination should include the entire body surface in order to detect signs of generalized skin disease including signs of vitamin A, B and C deficiency, pre-torture lesions or lesions inflicted by torture, such as abrasions, contusions, lacerations, puncture wounds, burns from cigarettes or heated instruments, electrical injuries, alopecia and nail removal. Torture lesions should be described by their localization, symmetry, shape, size, colour and surface (e.g. scaly, crusty, ulcerating) as well as their demarcation and level in relation to the surrounding skin. Photography is essential whenever possible. Ultimately, the examiner must offer an opinion as to the origin of the lesions: inflicted or self-inflicted, accidental or the result of a disease process.

2. Face

177. Facial tissues should be palpated for evidence of fracture, crepitation, swelling or pain. The motor and sensory components, including smell and taste of all cranial nerves, should be examined. Computerized tomography (CT), rather than routine radiography, is the best modality to diagnose and characterize facial fractures, determine alignment and diagnose associated soft tissue injuries and complications. Intracranial and cervical spinal injuries are often associated with facial trauma.

(a) Eyes

178. There are many forms of trauma to the eyes, including conjunctival haemorrhage, lens dislocation, subhyeloid haemorrhage, retrobulbar haemorrhage, retinal haemorrhage and visual field loss. Given the serious consequences of lack of treatment or improper treatment, ophthalmologic consultation should be obtained whenever there is a suspicion of ocular trauma or disease. CT is the best modality to diagnose orbital fractures and soft tissue injuries to the bulbar and retrobulbar contents. Nuclear magnetic resonance imaging (MRI) may be an adjunct for identifying soft tissue injury. High resolution ultrasound is an alternative method for evaluation of trauma to the eye globe.

(b) Ears

179. Trauma to the ears, especially rupture of the tympanic membrane, is a frequent consequence of harsh beatings. The ear canals and tympanic membranes should be examined with an otoscope and injuries described. A common form of torture, known in Latin America as *telefono*, is a hard slap of the palm to one or both ears, rapidly increasing pressure in the ear canal, thus rupturing the drum. Prompt examination is necessary to detect tympanic membrane ruptures less than 2 millimetres in diameter, which may heal within 10 days. Fluid may be observed in the middle or external ear. If otorrhea is confirmed by laboratory analysis, MRI or CT should be performed to determine the fracture site. The presence of hearing loss should be investigated, using simple screening methods. If necessary, audiometric tests should be conducted by a qualified audiometric technician. The radiographic examination of fractures of the temporal bone or disruption of the ossicular chain is best determined by CT, then hypocycloidal tomography and, lastly, linear tomography.

(c) Nose

180. The nose should be evaluated for alignment, crepitation and deviation of the nasal septum. For simple nasal fractures, standard nasal radiographs should be sufficient. For complex nasal fractures and when the cartilaginous septum is displaced, CT should be performed. If rhinorrhea is present, CT or MRI is recommended.

(d) Jaw, oropharynx and neck

181. Mandibular fractures or dislocations may result from beatings. Temporomandibular joint syndrome is a frequent consequence of beatings about the lower face and jaw. The patient should be examined for evidence of crepitation of the hyoid bone or laryngeal cartilage resulting from blows

to the neck. Findings concerning the oropharynx should be noted in detail, including lesions consistent with burns from electrical shock or other trauma. Gingival haemorrhage and the condition of the gums should also be noted.

(e) Oral cavity and teeth

182. Examination by a dentist should be considered a component of periodic health examination in detention. This examination is often neglected, but it is an important component of the physical examination. Dental care may be purposefully withheld to allow caries, gingivitis or tooth abscesses to worsen. A careful dental history should be taken, and, if dental records exist, they should be requested. Tooth avulsions, fractures of the teeth, dislocated fillings and broken prostheses may result from direct trauma or electric shock torture. Dental caries and gingivitis should be noted. Poor quality dentition may be due to conditions in detention or may have preceded the detention. The oral cavity must be carefully examined. During application of an electric current, the tongue, gums or lips may be bitten. Lesions might be produced by forcing objects or materials into the mouth, as well as by applying electric current. X-rays and MRI are able to determine the extent of soft tissue, mandibular and dental trauma.

3. Chest and abdomen

183. Examination of the trunk, in addition to noting lesions of the skin, should be directed towards detecting regions of pain, tenderness or discomfort that would reflect underlying injuries of the musculature, ribs or abdominal organs. The examiner must consider the possibility of intramuscular, retroperitoneal and intraabdominal haematomas, as well as laceration or rupture of an internal organ. Ultrasonography, CT and bone scintigraphy should be used, when realistically available, to confirm such injuries. Routine examination of the cardiovascular system, lungs and abdomen should be performed in the usual manner. Pre-existing respiratory disorders are likely to be aggravated in custody, and new respiratory disorders frequently develop.

4. Musculoskeletal system

184. Complaints of musculoskeletal aches and pains are very common in survivors of torture. They may be the result of repeated beatings, suspension, other positional torture or the general physical environment of detention. They may also be somatic (see chapter VI, sect. B.2). While they are non-specific, they should be documented. They often respond well to sympathetic physiotherapy. Physical examination of the skeleton should include testing for mobility of joints, the spine and the extremities. Pain with motion, contracture, strength, evidence of compartment syndrome, fractures with or without deformity and dislocations should all be noted. Suspected dislocations, fractures and osteomyelitis should be evaluated with radiographs. For suspected osteomyelitis, routine radiographs should be taken, followed by three-phase bone scintigraphy. Injuries to tendons, ligaments and muscles are best evaluated with MRI, but arthrography can also be performed. In the acute stage, this can detect haemorrhage and possible muscle tears. Muscles usually heal completely without scarring; thus, later imaging studies will be negative. Under MRI and CT, denervated muscles and chronic compartment syndrome will be imaged as muscle fibrosis. Bone bruises can be detected by MRI or scintigraphy. Bone bruises usually heal without leaving traces.

5. Genito-urinary system

185. Genital examination should be performed only with the consent of the patient and, if necessary, should be postponed to a later examination. A chaperone must be present if the examining physician's gender is different from that of the patient. For more information, see chapter IV, sect. J. See section D.8 below for further information regarding examination of victims of sexual assault. Ultrasonography and dynamic scintigraphy can be used for detecting genito-urinary trauma.

6. Central and peripheral nervous systems

186. The neurological examination should evaluate the cranial nerves, sensory organs and peripheral nervous system, checking for both motor and sensory neuropathies related to possible trauma, vitamin deficiencies or disease. Cognitive ability and mental status must also be evaluated (see chapter VI, sect. C). In patients who report being suspended, special emphasis on examination for brachial plexopathy (asymmetrical hand strength, wrist drop, arm weakness with variable sensory and tendon reflexes) is necessary. Radiculopathies, other neuropathies, cranial nerve deficits, hyperalgesia, parasthesias, hyperaesthesia, change in position, temperature sensation, motor function, gait and coordination may all result from trauma associated with torture. In patients with a history of dizziness and vomiting, a vestibular examination should be conducted, and evidence of nystagmus noted. Radiological evaluation should include MRI or CT. MRI is preferred over CT for radiological evaluation of the brain and posterior fossae. D. Examination and evaluation following specific forms of torture

187. The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

- a. Not consistent: the lesion could not have been caused by the trauma described;
- b. Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
- c. Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
- d. Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
- e. Diagnostic of: this appearance could not have been caused in any way other than that described.

188. Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story (see chapter IV, sect. G, for a list of torture methods).

1. Beatings and other forms of blunt trauma

(a) Skin damage

189. Acute lesions are often characteristic of torture, because they show a pattern of inflicted injury that differs from non-inflicted injuries, for example, their shape, repetition, distribution on the body. Since most lesions heal within about six weeks of torture, leaving no scars or nonspecific scars, a characteristic history of the acute lesions and their development until healing might be the only support for an allegation of torture. Permanent changes in the skin due to blunt trauma are infrequent, non-specific and usually without diagnostic significance. A sequel of blunt violence, which is diagnostic of prolonged application of tight ligatures, is a linear zone extending circularly around the arm or leg, usually at the wrist or ankle. This zone contains few hairs or hair follicles, and this is probably a form of cicatricial alopecia. No differential diagnosis in the form of a spontaneous skin disease exists, and it is difficult to imagine any trauma of this nature occurring in everyday life.

190. Among acute lesions, abrasions resulting from superficial scraping lesions of the skin may appear as scratches, brush-burn type lesions or larger scraped lesions. At times, abrasions may show a pattern that reflects the contours of the instrument or surface that inflicted the injury.

Repeated or deep abrasions may create areas of hypo or hyperpigmentation, depending on skin type. This occurs on the inside of the wrists if the hands have been tied together tightly.

191. Contusions and bruises are areas of haemorrhage into soft tissue due to the rupture of blood vessels from blunt trauma. The extent and severity of a contusion depend not only on the amount of force applied but also on the structure and vascularity of the contused tissue. Contusions occur more readily in areas of thin skin overlying bone or in fatty areas. Many medical conditions, including vitamin and other nutritional deficiencies, may be associated with easy bruising or purpura. Contusions and abrasions indicate that blunt force has been applied to a particular area. The absence of a bruise or abrasion, however, does not indicate that there was no blunt force to that area. Contusions may be patterned, reflecting the contours of the inflicting instrument. For instance, railshaped bruising may occur when an instrument, such as a truncheon or cane, has been used. The shape of the object may be inferred from the shape of the bruise. As contusions resolve, they undergo a series of colour changes. Most bruises initially appear dark blue, purple or crimson. As the haemoglobin in the bruise breaks down, the colour gradually changes to violet, green, dark yellow or pale yellow and then disappears. It is very difficult, however, to date accurately the occurrence of contusions. In some skin types, this can lead to hyperpigmentation, which can last several years. Contusions that develop in deeper subcutaneous tissues may not appear until several days after injury, when the extravasated blood has reached the surface. In cases of an allegation but an absence of a contusion, the victim should be re-examined after several days. It should be taken into consideration that the final position and shape of bruises bear no relationship to the original trauma and that some lesions may have faded by the time of re-examination.

192. Lacerations, a tearing or crushing of the skin and underlying soft tissues by the pressure of blunt force, develop easily on the protruding parts of the body, since the skin is compressed between the blunt object and the bone surface under the subdermal tissues. However, with sufficient force the skin can be torn on any part of the body. Asymmetrical scars, scars in unusual locations and a diffuse spread of scarring all suggest deliberate injury.

193. Scars resulting from whipping represent healed lacerations. These scars are depigmented and often hypertrophic, surrounded by narrow, hyperpigmented stripes. The only differential diagnosis is plant dermatitis, but this is dominated by hyperpigmentation and shorter scars. By contrast, symmetrical, atrophic, depigmented linear changes of the abdomen, axillae and legs, which are sometimes claimed to be torture sequelae, represent striae distensae and are not normally related to torture.

194. Burning is the form of torture that most frequently leaves permanent changes in the skin. Sometimes, these changes may be of diagnostic value. Cigarette burns often leave 5-10-millimetre-long, circular or ovoid, macular scars with a hyper or a hypopigmented centre and a hyperpigmented, relatively indistinct periphery. The burning away of tattoos with cigarettes has also been reported in relation to torture. The characteristic shape of the resulting scar and any tattoo remnants will help in the diagnosis.⁸¹ Burning with hot objects produces markedly atrophic scars which reflect the shape of the instrument and which are sharply demarcated with narrow hypertrophic or hyperpigmented marginal zones corresponding to an initial zone of inflammation. This may, for instance, be seen after burning with an electrically heated metal rod or a gas lighter. It is difficult to make a differential diagnosis if many scars are present. Spontaneously occurring inflammatory processes lack the characteristic marginal zone and only rarely show a pronounced loss of tissue. Burning may result in hypertrophic or keloid scars as is the case following a burn produced by burning rubber.

195. When the nail matrix is burnt, subsequent growth produces striped, thin, deformed nails, sometimes broken up in longitudinal segments. If a nail has been pulled off, an overgrowth of tissue may be produced from the proximal nail fold, resulting in the formation of pterygium. Changes in the nail caused by Lichen planus constitute the only relevant differential diagnosis, but they will

usually be accompanied by widespread skin injury. On the other hand, fungus infections are characterized by thickened, yellowish, crumbling nails, different from the above changes.

196. Sharp trauma wounds are produced when the skin is cut with a sharp object, such as a knife, bayonet or broken glass and include stab wounds, incised or cut wounds and puncture wounds. The acute appearance is usually easy to distinguish from the irregular and torn appearance of lacerations and scars found upon later examination that may be distinctive. Regular patterns of small incisional scars could be due to traditional healers. If pepper or other noxious substances are applied to open wounds, the scars may become hypertrophic. An asymmetrical pattern and different sizes of scars are probably significant in the diagnosis of torture.

(b) Fractures

197. Fractures produce a loss of bone integrity due to the effect of a blunt mechanical force on various vector planes. A direct fracture occurs at the site of impact or at the site where the force was applied. The location, contour and other characteristics of a fracture reflect the nature and direction of the applied force. It is sometimes possible to distinguish fracture inflicted from accidental injury by the radiological appearance of the fracture. Radiographic dating of relatively recent fractures should be done by an experienced trauma radiologist. Speculative judgements should be avoided in the evaluations of the nature and age of blunt traumatic lesions, since a lesion may vary according to the age, sex, tissue characteristics, the condition and health of the patient and the severity of the trauma. For example, well-conditioned, muscularly fit, younger individuals are more resistant to bruising than frail, older individuals.

(c) Head trauma

198. Head trauma is one of the most common forms of torture. In cases of recurring head trauma, even if not always of serious dimensions, cortical atrophy and diffuse axonal damage can be expected. In cases of trauma caused by falls, countercoup (location in opposition to the trauma) lesions of the brain may be observed. Whereas in cases of direct trauma, contusions of the brain may be observed directly under the region in which the trauma is inflicted. Scalp bruises are frequently invisible externally unless there is swelling. Bruises may be difficult to see in dark-skinned individuals, but will be tender upon palpation.

199. Having been exposed to blows to the head, a torture survivor may complain of continuous headaches. These are often somatic or may be referred from the neck (see section C above). The victim may claim to suffer pain when touched in that region, and diffuse or local fullness or increased firmness may be observed by means of palpation of the scalp. Scars can be observed in cases where there have been lacerations of the scalp. Headaches may be the initial symptom of an expanding subdural haematoma. They may be associated with the acute onset of mental status changes, and a CT scan must be performed urgently. Soft tissue swelling or haemorrhage will usually be detected with CT or MRI. It may also be appropriate to arrange psychological or neuropsychological assessment (see chapter VI, sect. C.4).

200. Violent shaking as a form of torture may produce cerebral injury without leaving any external marks, although bruises may be present on the upper chest or shoulders where the victim or his clothing has been grabbed. At its most extreme, shaking can produce injuries identical to those seen in the shaken baby syndrome: cerebral oedema, subdural haematoma and retinal haemorrhages. More commonly, victims complain of recurrent headaches, disorientation or mental status changes. Shaking episodes are usually brief, only a few minutes or less, but may be repeated many times over a period of days or weeks.

(d) Chest and abdominal trauma

201. Rib fractures are a frequent consequence of beatings to the chest. If displaced, they can be associated with lacerations of the lung and possible pneumothorax. Fractures of the vertebral pedicles may result from direct use of blunt force.

202. In cases of acute abdominal trauma, the physical examination should seek evidence of abdominal organ and urinary tract injury. However, the examination is often negative. Gross haematuria is the most significant indication of kidney contusion. Peritoneal lavage may detect occult abdominal haemorrhage. Free abdominal fluid detected by CT after peritoneal lavage may be from the lavage or haemorrhage; thus invalidating the finding. On a CT, acute abdominal haemorrhage is usually isointense or reveals water density unlike acute central nervous system (CNS) haemorrhage, which is hyperintense. Organ injury may be present as free air, extraluminal fluid or areas of low attenuation, which may represent oedema, contusion, haemorrhage or a laceration. Peripancreatic oedema is one of the signs of acute traumatic and nontraumatic pancreatitis. Ultrasound is particularly useful in detecting subcapsular haematomas of the spleen. Renal failure due to crush syndrome may be acute after severe beatings. Renal hypertension can be a late complication of renal injury.

2. Beatings to the feet

203. Falanga is the most common term for repeated application of blunt trauma to the feet (or more rarely to the hands or hips), usually applied with a truncheon, a length of pipe or similar weapon. The most severe complication of falanga is closed compartment syndrome, which can cause muscle necrosis, vascular obstruction or gangrene of the distal portion of the foot or toes. Permanent deformities of the feet are uncommon but do occur, as do fractures of the carpal, metacarpal and phalanges. Because the injuries are usually confined to soft tissue, CT or MRI are the preferred methods for radiological documentation of the injury, but it must be emphasized that physical examination in the acute phase should be diagnostic. Falanga may produce chronic disability. Walking may be painful and difficult. The tarsal bones may be fixed (spastic) or have increased motion. Squeezing the plantar (sole) of the foot and dorsiflexion of the great toe may produce pain. On palpation, the entire length of the plantar aponeurosis may be tender and the distal attachments of the aponeurosis may be torn, partly at the base of the proximal phalanges, partly at the skin. The aponeurosis will not tighten normally, making walking difficult and muscle fatigue may follow. Passive extension of the big toe may reveal whether the aponeurosis has been torn. If it is intact, the beginning of tension in the aponeurosis should be felt on palpation when the toe is dorsiflexed to 20 degrees; maximum normal extension is about 70 degrees. Higher values suggest injury to the attachments of the aponeurosis. On the other hand, limited dorsiflexion and pain on hyperextension of the large toe are findings of Hallux rigidus, which results from dorsal osteophyte at the first metatarsal head and/or base of the proximal phalanx.

204. Numerous complications and syndromes can occur:

- a. Closed compartment syndrome. This is the most severe complication. An oedema in a closed compartment results in vascular obstruction and muscle necrosis, which may result in fibrosis, contracture or gangrene in the distal foot or toes. It is usually diagnosed by measuring pressures in the compartment;
- b. Crushed heel and anterior footpads. The elastic pads under the calcaneus and proximal phalanges are crushed during falanga, either directly or as a result of oedema associated with the trauma. Also, the connective tissue bands that extend through adipose tissue and connect bone to the skin are torn. Adipose tissue is deprived of its blood supply and atrophies. The cushioning effect is lost and the feet no longer absorb the stresses produced by walking;
- c. Rigid and irregular scars involving the skin and subcutaneous tissues of the foot after the application of falanga. In a normal foot, the dermal and sub-dermal tissues are connected to the planter aponeurosis through tight connective tissue bands.

However, these bands can be partially or completely destroyed due to the oedema that ruptures the bands after exposure to falanga;

- d. Rupture of the plantar aponeurosis and tendons of the foot. An oedema in the post-falanga period may rupture these structures. When the supportive function necessary for the arch of the foot disappears, the act of walking becomes more difficult and foot muscles, especially the quadratus plantaris longus, are excessively forced;
- e. Planter fasciitis. May occur as a further complication of this injury. In cases of falanga, irritation is often present throughout the whole aponeurosis, causing chronic aponeurosis. Studies on the subject have shown that in prisoners released after 15 years of detention and who claimed to have been subjected to falanga application when first arrested, positive bone scans of hyperactive points in the calcaneus or metatarsal bones were observed.

205. Radiological methods such as MRI, CT scan and ultrasound can often confirm cases of trauma occurring as a result of the application of falanga. Positive radiological findings may also be secondary to other diseases or trauma. Routine radiographs are recommended as the initial examination. MRI is the preferred radiological examination for detecting soft tissue injury. MRI or scintigraphy can detect bone injury in the form of a bruise, which may not be detected by routine radiographs or CT.

3. Suspension

206. Suspension is a common form of torture that can produce extreme pain, but which leaves little, if any, visible evidence of injury. A person still in custody may be reluctant to admit to being tortured, but the finding of peripheral neurological deficits, diagnostic of brachial plexopathy, virtually proves the diagnosis of suspension torture. Suspension can be applied in various forms:

- a. Cross suspension. Applied by spreading the arms and tying them to a horizontal bar;
- b. Butchery suspension. Applied by fixation of hands upwards, either together or one by one;
- c. Reverse butchery suspension. Applied by fixation of feet upward and the head downward;
- d. "Palestinian" suspension. Applied by suspending the victim with the forearms bound together behind the back, the elbows flexed 90 degrees and the forearms tied to a horizontal bar. Alternatively, the prisoner is suspended from a ligature tied around the elbows or wrists with the arms behind the back;
- e. "Parrot perch" suspension. Applied by suspending a victim by the flexed knees from a bar passed below the popliteal region, usually while the wrists are tied to the ankles.

207. Suspension may last from 15 to 20 minutes to several hours. "Palestinian" suspension may produce permanent brachial plexus injury in a short period. The "parrot perch" may produce tears in the cruciate ligaments of the knees. Victims will often be beaten while suspended or otherwise abused. In the chronic phase, it is usual for pain and tenderness around the shoulder joints to persist, as the lifting of weight and rotation, especially internal, will cause severe pain many years later. Complications in the acute period following suspension include weakness of the arms or hands, pain and paresthesias, numbness, insensitivity to touch, superficial pain and tendon reflex loss. Intense deep pain may mask muscle weakness. In the chronic phase, weakness may continue and progress to muscle wasting. Numbness and, more frequently, paresthesia are present. Raising the arms or lifting weight may cause pain, numbness or weakness. In addition to neurologic injury, there may be tears of the ligaments of the shoulder joints, dislocation of the scapula and muscle injury in the shoulder region. On visual inspection of the back, a "winged scapula" (prominent vertebral border of the scapula) may be observed with injury to the long thoracic nerve or dislocation of the scapula.

208. Neurologic injury is usually asymmetrical in the arms. Brachial plexus injury manifests itself in motor, sensory and reflex dysfunction.

- a. Motor examination. Asymmetrical muscle weakness, more prominent distally, is the most expected finding. Acute pain may make the examination for muscle strength difficult to interpret. If the injury is severe, muscle atrophy may be seen in the chronic phase;
- b. Sensory examination. Complete loss of sensation or paresthesias along the sensory nerve pathways is common. Positional perception, two-point discrimination, pinprick evaluation and perception of heat and cold should all be tested. If at least three weeks later, deficiency or reflex loss or decrease is present, appropriate electrophysiological studies should be performed by a neurologist experienced in the use and interpretation of these methodologies;
- c. Reflex examination. Reflex loss, a decrease in reflexes or a difference between the two extremities may be present. In "Palestinian" suspension, even though both brachial plexi are subjected to trauma, asymmetric plexopathy may develop due to the manner in which the torture victim has been suspended, depending on which arm is placed in a superior position or the method of binding. Although research suggests that brachial plexopathies are usually unilateral, that is at variance with experience in the context of torture, where bilateral injury is common.

209. Among the shoulder region tissues, the brachial plexus is the structure most sensitive to traction injury. "Palestinian" suspension creates brachial plexus damage due to forced posterior extension of the arms. As observed in the classical type of "Palestinian" suspension, when the body is suspended with the arms in posterior hyperextension, typically the lower plexus and then the middle and upper plexus fibres, if the force on the plexus is severe enough, are damaged, respectively. If the suspension is of a "crucifixion" type, but does not include hyperextension, the middle plexus fibres are likely to be the first ones damaged due to hyperabduction. Brachial plexus injuries may be categorized as follows:

- a. Damage to the lower plexus. Deficiencies are localized in the forearm and hand muscles. Sensory deficiencies may be observed on the forearm and at the fourth and fifth fingers of the hand's medial side in an ulnar nerve distribution;
- b. Damage to the middle plexus. Forearm, elbow and finger extensor muscles are affected. Pronation of the forearm and radial flexion of the hand may be weak. Sensory deficiency is found on the forearm and on the dorsal aspects of the first, second and third fingers of the hand in a radial nerve distribution. Triceps reflexes may be lost;
- c. Damage to the upper plexus. Shoulder muscles are especially affected. Abduction of the shoulder, axial rotation and forearm pronation-supination may be deficient. Sensory deficiency is noted in the deltoid region and may extend to the arm and outer parts of the forearm.

4. Other positional torture

210. There are many forms of positional torture, all of which tie or restrain the victim in contorted, hyperextended or other unnatural positions, which cause severe pain and may produce injuries to ligaments, tendons, nerves and blood vessels. Characteristically, these forms of torture leave few, if any, external marks or radiological findings, despite subsequent frequently severe chronic disability.

211. All positional torture is directed towards tendons, joints and muscles. There are various methods: "parrot suspension", "banana stand" or the classic "banana tie" over a chair just on the ground, or on a motorcycle, forced standing, forced standing on a single foot, prolonged standing

with arms and hands stretched high on a wall, prolonged forced squatting and forced immobilization in a small cage. In accordance with the characteristics of these positions, complaints are characterized as pain in a region of the body, limitation of joint movement, back pain, pain in the hands or cervical parts of the body and swelling of the lower legs. The same principles of neurologic and musculoskeletal examination apply to these forms of positional torture as apply to suspension. MRI is the preferred radiologic modality for evaluation of injuries associated with all forms of positional torture.

5. Electric shock torture

212. Electric current is transmitted through electrodes placed on any part of the body. The most common areas are the hands, feet, fingers, toes, ears, nipples, mouth, lips and genital area. The power source may be a hand-cranked or combustion generator, wall source, stun gun, cattle prod or other electric device. Electric current follows the shortest route between the two electrodes. The symptoms that occur when electric current is applied have this characteristic. For example, if electrodes are placed on a toe of the right foot and on the genital region, there will be pain, muscle contraction and cramps in the right thigh and calf muscles. Excruciating pain will be felt in the genital region. Since all muscles along the route of the electric current are tetanically contracted, dislocation of the shoulder, lumbar and cervical radiculopathies may be observed when the current is moderately high. However, the type, time of application, current and voltage of the energy used cannot be determined with certainty upon physical examination of the victim. Torturers often use water or gels in order to increase the efficiency of the torture, expand the entrance point of the electric current on the body and prevent detectable electric burns. Trace electrical burns are usually a reddish brown circular lesion from 1 to 3 millimetres in diameter, usually without inflammation, which may result in a hyperpigmented scar. Skin surfaces must be carefully examined because the lesions are not often easily discernible. The decision to biopsy recent lesions to prove their origin is controversial. Electrical burns may produce specific histologic changes, but these are not always present, and the absence of change in no way mitigates against the lesion being an electrical burn. The decision must be made on a case-by-case basis as to whether or not the pain and discomfort associated with a skin biopsy can be justified by the potential results of the procedure (see annex II, sect. 2).

6. Dental torture

213. Dental torture may be in the form of breaking or extracting teeth or through application of electrical current to the teeth. It may result in a loss or breaking of the teeth, swelling of the gums, bleeding, pain, gingivitis, stomatitis, mandibular fractures or loss of fillings from teeth. Temporomandibular joint syndrome will produce pain in the temporomandibular joint, limitation of jaw movement and, in some cases, subluxation of this joint due to muscle spasms occurring as a result of the electrical current or blows to the face.

7. Asphyxiation

214. Near asphyxiation by suffocation is an increasingly common method of torture. It usually leaves no mark, and recuperation is rapid. This method of torture was so widely used in Latin America, that its name in Spanish, *submarino*, has become part of human rights vocabulary. Normal respiration might be prevented through such methods as covering the head with a plastic bag, closure of the mouth and nose, pressure or ligature around the neck or forced aspiration of dust, cement, hot peppers, etc. This is also known as "dry *submarino*". Various complications might develop, such as petechiae of the skin, nosebleeds, bleeding from the ears, congestion of the face, infections in the mouth and acute or chronic respiratory problems. Forcible immersion of the head in water, often contaminated with urine, faeces, vomit or other impurities, may result in near drowning or drowning. Aspiration of the water into the lungs may lead to pneumonia. This form of torture is called "wet *submarino*". In hanging or in other ligature asphyxiation, patterned abrasions or contusions can

often be found on the neck. The hyoid bone and laryngeal cartilage may be fractured by partial strangulation or from blows to the neck.

8. Sexual torture including rape

215. Sexual torture begins with forced nudity, which in many countries is a constant factor in torture situations. An individual is never as vulnerable as when naked and helpless. Nudity enhances the psychological terror of every aspect of torture, as there is always the background of potential abuse, rape or sodomy. Furthermore, verbal sexual threats, abuse and mocking are also part of sexual torture, as they enhance the humiliation and its degrading aspects, all part and parcel of the procedure. The groping of women is traumatic in all cases and is considered to be torture.

216. There are some differences between sexual torture of men and sexual torture of women, but several issues apply to both. Rape is always associated with the risk of developing sexually transmitted diseases, particularly human immunodeficiency virus (HIV). Currently, the only effective prophylaxis against HIV must be taken within hours of the incident, and it is not generally available in countries where torture occurs routinely. In most cases, there will be a lewd sexual component, and in other cases torture is targeted at the genitals. Electricity and blows are generally targeted on the genitals in men, with or without additional anal torture. The resulting physical trauma is enhanced by verbal abuse. There are often threats of loss of masculinity to men and consequent loss of respect in society. Prisoners may be placed naked in cells with family members, friends or total strangers, breaking cultural taboos. This can be made worse by the absence of privacy when using toilet facilities. Additionally, prisoners may be forced to abuse each other sexually, which can be particularly difficult to cope with emotionally. The fear of potential rape among women, given profound cultural stigma associated with rape, can add to the trauma. Not to be neglected are the trauma of potential pregnancy, which males, obviously, do not experience, the fear of losing virginity and the fear of not being able to have children (even if the rape can be hidden from a potential husband and the rest of society).

217. If in cases of sexual abuse the victim does not wish the event to be known due to sociocultural pressures or personal reasons, the physician who carries out the medical examination, investigative agencies and the courts have an obligation to cooperate in maintaining the victim's privacy. Establishing a rapport with torture survivors who have recently been sexually assaulted requires special psychological education and appropriate psychological support. Any treatment that would increase the psychological trauma of a torture survivor should be avoided. Before starting the examination, permission must be obtained from the individual for any kind of examination, and this should be confirmed by the victim before the more intimate parts of the examination. The individual should be informed about the importance of the examination and its possible findings in a clear and comprehensible manner.

(a) Review of symptoms

218. A thorough history of the alleged assault should be recorded as described earlier in this manual (see section B above). There are, however, some specific questions that are relevant only to an allegation of sexual abuse. These seek to elicit current symptoms resulting from a recent assault, for example bleeding, vaginal or anal discharge and location of pain, bruises or sores. In cases of sexual assault in the past, questions should be directed to ongoing symptoms that resulted from the assault, such as urinary frequency, incontinence or dysuria, irregularity of menstruation, subsequent history of pregnancy, abortion or vaginal haemorrhage, problems with sexual activity, including intercourse and anal pain, bleeding, constipation or incontinence.

219. Ideally, there should be adequate physical and technical facilities for appropriate examination of survivors of sexual violation by a team of experienced psychiatrists, psychologists, gynaecologists and nurses, who are trained in the treatment of survivors of sexual torture. An additional purpose

of the consultation after sexual assault is to offer support, advice and, if appropriate, reassurance. This should cover issues such as sexually transmitted diseases, HIV, pregnancy, if the victim is a woman, and permanent physical damage, because torturers often tell victims that they will never normally function sexually again, which can become a self-fulfilling prophecy.

(b) Examination following a recent assault

220. It is rare that a victim of rape during torture is released while it is still possible to identify acute signs of the assault. In these cases, there are many issues to be aware of that may impede the medical evaluation. Recently assaulted victims may be troubled and confused about seeking medical or legal help due to their fears, sociocultural concerns or the destructive nature of the abuse. In such cases, a doctor should explain to the victim all possible medical and judicial options and should act in accordance with the victim's wishes. The duties of the physician include obtention of voluntary informed consent for the examination, recording of all medical findings of abuse and obtention of samples for forensic examination. Whenever possible, the examination should be performed by an expert in documenting sexual assault. Otherwise, the examining physician should speak to an expert or consult a standard text on clinical forensic medicine.⁹⁰ When the physician is of a different gender from the victim, he or she should be offered the opportunity of having a chaperone of the same gender in the room. If an interpreter is used, then the interpreter may also fulfil the role of the chaperone. Given the sensitive nature of investigation into sexual assaults, a relative of the victim is not normally an ideal person to use in this role (see chapter IV, sect. I). The patient should be comfortable and relaxed before the examination. A thorough physical examination should be performed, including meticulous documentation of all physical findings, including size, location and colour, and, whenever possible, these findings should be photographed and evidence collected of specimens from the examination.

221. The physical examination should not initially be directed to the genital area. Any deformities should be noted. Particular attention must be given to ensure a thorough examination of the skin, looking for cutaneous lesions that could have resulted from an assault. These include bruises, lacerations, ecchymoses and petechiae from sucking or biting. This may help the patient to be more relaxed for a complete examination. When genital lesions are minimal, lesions located on other parts of the body may be the most significant evidence of an assault. Even during examination of the female genitalia immediately after rape, there is identifiable damage in less than 50 per cent of the cases. Anal examination of men and women after anal rape shows lesions in less than 30 per cent of cases. Clearly, where relatively large objects have been used to penetrate the vagina or anus, the probability of identifiable damage is much greater.

222. Where a forensic laboratory is available, the facility should be contacted before the examination to discuss which types of specimen can be tested, and, therefore, which samples should be taken and how. Many laboratories provide kits to permit physicians to take all the necessary samples from individuals alleging sexual assault. If there is no laboratory available, it may still be worthwhile to obtain wet swabs and dry them later in the air. These samples can be used later for DNA testing. Sperm can be identified for up to five days from samples taken with a deep vaginal swab and after up to three days using a rectal sample. Strict precautions must be taken to prevent allegations of cross-contamination when samples have been taken from several different victims, particularly if they are taken from alleged perpetrators. There must be complete protection and documentation of the chain of custody for all forensic samples.

(c) Examination after the immediate phase

223. Where the alleged assault occurred more than a week earlier and there are no signs of bruises or lacerations, there is less immediacy in conducting a pelvic examination. Time can be taken to try to find the most qualified person to document findings and the best environment in which to

interview the individual. However, it may still be beneficial to photograph residual lesions properly, if this is possible.

224. The background should be recorded as described above, then examination and documentation of the general physical findings. In women who have delivered babies before the rape, and particularly in those who have delivered them afterwards, pathognomonic findings are not likely, although an experienced female physician can tell a considerable amount from the demeanour of a woman when she is describing her history. It may take some time before the individual is willing to discuss those aspects of the torture that he or she finds most embarrassing. Similarly, patients may wish to postpone the more intimate parts of the examination to a subsequent consultation, if time and circumstances permit.

(d) Follow-up

225. Many infectious diseases can be transmitted by sexual assault, including sexually transmitted diseases such as gonorrhoea, chlamydia, syphilis, HIV, hepatitis B and C, herpes simplex and Condyloma acuminatum (venereal warts), vulvovaginitis associated with sexual abuse, such as trichomoniasis, Moniliasis vaginitis, Gardnerella vaginitis and Enterobius vermicularis (pinworms), as well as urinary tract infections.

226. Appropriate laboratory tests and treatment should be prescribed in all cases of sexual abuse. In the case of gonorrhoea and chlamydia, concomitant infection of the anus or oropharynx should be considered at least for examination purposes. Initial cultures and serologic tests should be obtained in cases of sexual assault, and appropriate therapy initiated. Sexual dysfunction is common among survivors of torture, particularly among victims who have suffered sexual torture or rape, but not exclusively. Symptoms may be physical or psychological in origin or a combination of both and include:

- i. Aversion to members of the opposite sex or decreased interest in sexual activity;
- ii. Fear of sexual activity because a sexual partner will know that the victim has been sexually abused or fear of having been damaged sexually. Torturers may have threatened this and instilled fear of homosexuality in men who have been anally abused. Some heterosexual men have had an erection and, on occasion, have ejaculated during non-consensual anal intercourse. They should be reassured that this is a physiological response;
- iii. Inability to trust a sexual partner;
- iv. Disturbance in sexual arousal and erectile dysfunction;
- v. Dyspareunia (painful sexual intercourse in women) or infertility due to acquired sexually transmitted disease, direct trauma to reproductive organs or poorly performed abortions of pregnancies following rape.

(e) Genital examination of women

227. In many cultures, it is completely unacceptable to penetrate the vagina of a woman who is a virgin with anything, including a speculum, finger or swab. If the woman demonstrates clear evidence of rape on external inspection, it may be unnecessary to conduct an internal pelvic examination. Genital examination findings may include:

- i. Small lacerations or tears of the vulva. These may be acute and are caused by excessive stretching. They normally heal completely, but, if repeatedly traumatized, there may be scarring;
- ii. Abrasions of the female genitalia. Abrasions can be caused by contact with rough objects such as fingernails or rings;

- iii. Vaginal lacerations. These are rare, but, if present, may be associated with atrophy of the tissues or previous surgery. They cannot be differentiated from incisions caused by inserted sharp objects.

228. It is rare to find any physical evidence when examining female genitalia more than one week after an assault. Later on, when the woman may have had subsequent sexual activity, whether consensual or not, or given birth, it may be almost impossible to attribute any findings to a specific incident of alleged abuse. Therefore, the most significant component of a medical evaluation may be the examiner's assessment of background information (for example, correlation between allegations of abuse and acute injuries observed by the individual) and demeanour of the individual, bearing in mind the cultural context of the woman's experience.

(f) Genital examination of men

229. Men who have been subjected to torture of the genital region, including the crushing, wringing or pulling of the scrotum or direct trauma to that region, usually complain of pain and sensitivity in the acute period. Hyperaemia, marked swelling and ecchymosis can be observed. The urine may contain a large number of erythrocytes and leucocytes. If a mass is detected, it should be determined whether it is a hydrocele, haematocele or inguinal hernia. In the case of an inguinal hernia, the examiner cannot palpate the spermatic cord above the mass. With a hydrocele or a haematocele, normal spermatic cord structures are usually palpable above the mass. A hydrocele results from excessive accumulation of fluid within the tunica vaginalis due to inflammation of the testis and its appendages or to diminished drainage secondary to lymphatic or venous obstruction in the cord or retroperitoneal space. A haematocele is an accumulation of blood within the tunica vaginalis, secondary to trauma. Unlike the hydrocele, it does not transilluminate.

230. Testicular torsion may also result from trauma to the scrotum. With this injury, the testis becomes twisted at its base, obstructing blood flow to the testis. This causes severe pain and swelling and constitutes a surgical emergency. Failure to reduce the torsion immediately will lead to infarction of the testis. Under conditions of detention, where medical care may be denied, late sequelae of this lesion may be observed.

231. Individuals who were subject to scrotal torture may suffer from chronic urinary tract infection, erectile dysfunction or atrophy of the testes. Symptoms of PTSD are not uncommon. In the chronic phase, it may be impossible to distinguish between scrotal pathology caused by torture and that caused by other disease processes. Failure to discover any physical abnormalities on full urological examination suggests that urinary symptoms, impotence or other sexual problems may be explained on psychological grounds. Scars on the skin of the scrotum and penis may be very difficult to visualize. For this reason, the absence of scarring at these specific locations does not demonstrate the absence of torture. On the other hand, the presence of scarring usually indicates that substantial trauma was sustained.

(g) Examination of the anal region

232. After anal rape or insertion of objects into the anus of either gender, pain and bleeding can occur for days or weeks. This often leads to constipation, which can be exacerbated by the poor diet in many places of detention. Gastrointestinal and urinary symptoms may also occur. In the acute phase, any examination beyond visual inspection may require local or general anaesthesia and should be performed by a specialist. In the chronic phase, several symptoms may persist, and they should be investigated. There may be anal scars of unusual size or position, and these should be documented. Anal fissures may persist for many years, but it is normally impossible to differentiate between those caused by torture and those caused by other mechanisms. On examination of the anus, the following findings should be looked for and documented:

- i. Fissures tend to be non-specific findings as they can occur in a number of “normal” situations (constipation, poor hygiene). However, when seen in an acute situation (i.e. within 72 hours) fissures are a more specific finding and can be considered evidence of penetration;
- ii. Rectal tears with or without bleeding may be noted;
- iii. Disruption of the rugal pattern may manifest as smooth fan-shaped scarring. When these scars are seen out of midline (i.e. not at 12 or 6 o’clock), they can be an indication of penetrating trauma;
- iv. Skin tags, which can be the result of healing trauma;
- v. Purulent discharge from the anus. Cultures should be taken for gonorrhoea and chlamydia in all cases of alleged rectal penetration, regardless of whether a discharge is noted.

E. Specialized diagnostic tests

233. Diagnostic tests are not an essential part of the clinical assessment of a person alleging having been tortured. In many cases, a medical history and physical examination are sufficient. However, there are circumstances in which such tests are valuable supporting evidence. For example, where there is a legal case against members of the authorities or a claim for compensation. In these cases, a positive test might make the difference between a case succeeding or failing. Additionally, if diagnostic tests are performed for therapeutic reasons, the results should be added to the clinical report. It must be recognized that the absence of a positive diagnostic test result, as with physical findings, must not be used to suggest that torture has not occurred. There are many situations in which diagnostic tests are not available for technical reasons, but their absence should never invalidate an otherwise properly written report. It is inappropriate to use limited diagnostic facilities to document injuries for legal reasons alone, when there are greater clinical needs for those facilities (for further details, see annex II).

CHAPTER VI - PSYCHOLOGICAL EVIDENCE OF TORTURE

A. General considerations

1. The central role of the psychological evaluation

234. It is a widely held view that torture is an extraordinary life experience capable of causing a wide range of physical and psychological suffering. Most clinicians and researchers agree that the extreme nature of the torture event is powerful enough on its own to produce mental and emotional consequences, regardless of the individual’s pre-torture psychological status. The psychological consequences of torture, however, occur in the context of personal attribution of meaning, personality development and social, political and cultural factors. For this reason, it cannot be assumed that all forms of torture have the same outcome. For example, the psychological consequences of a mock execution are not the same as those due to a sexual assault, and solitary confinement and isolation are not likely to produce the same effects as physical acts of torture. Likewise, one cannot assume that the effects of detention and torture on an adult will be the same as those on a child. Nevertheless, there are clusters of symptoms and psychological reactions that have been observed and documented in torture survivors with some regularity.

235. Perpetrators often attempt to justify their acts of torture and ill-treatment by the need to gather information. Such conceptualizations obscure the purpose of torture and its intended consequences. One of the central aims of torture is to reduce an individual to a position of extreme helplessness and distress that can lead to a deterioration of cognitive, emotional and behavioural functions. Thus, torture is a means of attacking an individual’s fundamental modes of psychological and social functioning. Under such circumstances, the torturer strives not only to incapacitate a victim physically but also to disintegrate the individual’s personality. The torturer attempts to destroy a

victim's sense of being grounded in a family and society as a human being with dreams, hopes and aspirations for the future. By dehumanizing and breaking the will of their victims, torturers set horrific examples for those who later come in contact with the victim. In this way, torture can break or damage the will and coherence of entire communities. In addition, torture can profoundly damage intimate relationships between spouses, parents, children, other family members and relationships between the victims and their communities.

236. It is important to recognize that not everyone who has been tortured develops a diagnosable mental illness. However, many victims experience profound emotional reactions and psychological symptoms. The main psychiatric disorders associated with torture are PTSD and major depression. While these disorders are present in the general population, their prevalence is much higher among traumatized populations. The unique cultural, social and political implications that torture has for each individual influence his or her ability to describe and speak about it. These are important factors that contribute to the impact that torture inflicts psychologically and socially and that must be considered when performing an evaluation of an individual from another culture. Crosscultural research reveals that phenomenological or descriptive methods are the most rational approaches to use when attempting to evaluate psychological or psychiatric disorders. What is considered disordered behaviour or a disease in one culture may not be viewed as pathological in another. Since the Second World War, progress has been made towards understanding the psychological consequences of violence. Certain psychological symptoms and clusters of symptoms have been observed and documented among survivors of torture and other types of violence.

237. In recent years, the diagnosis of PTSD has been applied to an increasingly broad array of individuals suffering from the impact of widely varying types of violence. However, the utility of this diagnosis in non-Western cultures has not been established. Nevertheless, evidence suggests that there are high rates of PTSD and depression symptoms among traumatized refugee populations from many different ethnic and cultural backgrounds. The World Health Organization's cross cultural study of depression provides helpful information. While some symptoms may be present across different cultures, they may not be the symptoms that concern the individual the most.

2. The context of the psychological evaluation

238. Evaluations take place in a variety of political contexts. This results in important differences in the manner in which an evaluation should be conducted. The physician or psychologist must adapt the following guidelines to the particular situation and purpose of the evaluation (see chapter III, sect. C.2).

239. Whether or not certain questions can be asked safely will vary considerably and depends on the degree to which confidentiality and security can be ensured. For example, an examination in a prison by a visiting physician, that is limited to 15 minutes, cannot follow the same course as a forensic examination in a private office that may last for several hours. Additional problems arise when trying to assess whether psychological symptoms or behaviours are pathological or adaptive. When a person is examined while in detention or living under considerable threat or oppression, some symptoms may be adaptive. For example, diminished interest in activities and feelings of detachment or estrangement would be understandable in a person in solitary confinement. Likewise, hypervigilance and avoidance behaviours may be necessary for persons living in repressive societies. The limitations of certain conditions for interviews, however, do not preclude aspiring to application of the guidelines set forth in this manual. It is especially important in difficult circumstances that governments and authorities involved be held to these standards as much as possible.

B. Psychological consequences of torture

1. Cautionary remarks

240. Before entering into a technical description of symptoms and psychiatric classifications, it should be noted that psychiatric classifications are generally considered to be Western medical concepts and that their application to non-Western populations presents, either implicitly or explicitly, certain difficulties. It can be argued that Western cultures suffer from an undue medicalization of psychological processes. The idea that mental suffering represents a disorder that resides in an individual and features a set of typical symptoms may be unacceptable to many members of non-Western societies. Nonetheless, there is considerable evidence of biological changes that occur in PTSD and, from that perspective, PTSD is a diagnosable syndrome amenable to treatment biologically and psychologically. As much as possible, the evaluating physician or psychologist should attempt to relate to mental suffering in the context of the individual's beliefs and cultural norms. This includes respect for the political context as well as cultural and religious beliefs. Given the severity of torture and its consequences, when performing a psychological evaluation, an attitude of informed learning should be adopted rather than one of rushing to diagnose and classify. Ideally, this attitude will communicate to the victim that his or her complaints and suffering are being recognized as real and expectable under the circumstances. In this sense, a sensitive empathic attitude may offer the victim some relief from the experience of alienation.

2. Common psychological responses

(a) Re-experiencing the trauma

241. A victim may have flashbacks or intrusive memories, in which the traumatic event is happening all over again, even while the person is awake and conscious, or recurrent nightmares, which include elements of the traumatic event in their original or symbolic form. Distress at exposure to cues that symbolize or resemble the trauma is frequently manifested by a lack of trust and fear of persons in authority, including physicians and psychologists. In countries or situations where authorities participate in human rights violations, lack of trust and fear of authority figures should not be assumed to be pathological.

(b) Avoidance and emotional numbing

- i. Avoidance of any thought, conversation, activity, place or person that arouses a recollection of the trauma;
- ii. Profound emotional constriction;
- iii. Profound personal detachment and social withdrawal;
- iv. Inability to recall an important aspect of the trauma.

(c) Hyperarousal

- i. Difficulty either falling or staying asleep;
- ii. Irritability or outbursts of anger;
- iii. Difficulty concentrating;
- iv. Hypervigilance, exaggerated startled response;
- v. Generalized anxiety;
- vi. Shortness of breath, sweating, dry mouth or dizziness and gastrointestinal distress.

(d) Symptoms of depression

242. The following symptoms of depression may be present: depressed mood, anhedonia (markedly diminished interest or pleasure in activities), appetite disturbance or weight loss, insomnia or hypersomnia, psychomotor agitation or retardation, fatigue and loss of energy, feelings of worthlessness and excessive guilt, difficulty paying attention, concentrating or recalling from memory, thoughts of death and dying, suicidal ideation or attempted suicide.

e) Damaged self-concept and foreshortened future

243. The victim has a subjective feeling of having been irreparably damaged and having undergone an irreversible personality change. He or she has a sense of foreshortened future without expectation of a career, marriage, children or normal lifespan.

(f) Dissociation, depersonalization and atypical behaviour

244. Dissociation is a disruption in the integration of consciousness, self-perception, memory and actions. A person may be cut off or unaware of certain actions or may feel split in two as if observing him or herself from a distance. Depersonalization is feeling detached from oneself or one's body. Impulse control problems result in behaviours that the survivor considers highly atypical with respect to his or her pre-trauma personality. A previously cautious individual may engage in high-risk behaviour.

(g) Somatic complaints

245. Somatic symptoms such as pain, headache or other physical complaints, with or without objective findings, are common problems among torture victims. Pain may be the only manifest complaint and may shift in location and vary in intensity. Somatic symptoms can be directly due to physical consequences of torture or psychological in origin. For example, pain of all kinds may be a direct physical consequence of torture or of psychological origin. Typical somatic complaints include back pain, musculoskeletal pain and headaches, often from head injuries. Headaches are very common among torture survivors and often lead to chronic post-traumatic headaches. They may also be caused or exacerbated by tension and stress.

(h) Sexual dysfunction

246. Sexual dysfunction is common among survivors of torture, particularly among those who have suffered sexual torture or rape, but not exclusively (see chapter V, sect. D.8).

(i) Psychosis

247. Cultural and linguistic differences may be confused with psychotic symptoms. Before labelling someone as psychotic, the symptoms must be evaluated within the individual's unique cultural context. Psychotic reactions may be brief or prolonged, and the symptoms may occur while the person is detained and tortured or afterwards. The following findings are possible:

- i. Delusions;
- ii. Auditory, visual, tactile and olfactory hallucinations;
- iii. Bizarre ideation and behaviour;
- iv. Illusions or perceptual distortions that may take the form of pseudo-hallucinations and border on true psychotic states. False perceptions and hallucinations that occur on falling asleep or on waking are common among the general population and do not denote psychosis. It is not uncommon for torture victims to report occasionally hearing screams, their name being called or seeing shadows, but not to have florid signs or symptoms of psychosis;
- v. Paranoia and delusions of persecution;
- vi. Recurrence of psychotic disorders or mood disorders with psychotic features may develop among those who have a past history of mental illness. Individuals with a past history of bipolar disorder, recurrent major depression with psychotic features, schizophrenia and schizoaffective disorder may experience an episode of that disorder.

(j) Substance abuse

248. Alcohol and drug abuse often develop secondarily in torture survivors as a way of obliterating traumatic memories, regulating affects and managing anxiety.

(k) Neuropsychological impairment

249. Torture can cause physical trauma that leads to various levels of brain impairment. Blows to the head, suffocation and prolonged malnutrition may have longterm neurological and neuropsychological consequences that may not be readily assessed during the course of a medical examination. As in all cases of brain impairment that cannot be documented through head imaging or other medical procedures, neuropsychological assessment and testing may be the only reliable way of documenting the effects. Frequently, the target symptoms for such assessments have significant overlap with the symptomatology arising from PTSD and major depressive disorder. Fluctuations or deficits in level of consciousness, orientation, attention, concentration, memory and executive functioning may result from functional disturbances as well as have organic causes. Therefore, specialized skill in neuropsychological assessment and awareness of problems in cross-cultural validation of neuropsychological instruments are necessary when such distinctions are to be made (see section C.4 below).

3. Diagnostic classifications

250. While the chief complaints and most prominent findings among torture survivors are widely diverse and relate to the individual's unique life experiences and his or her cultural, social and political context, it is wise for evaluators to become familiar with the most commonly diagnosed disorders among trauma and torture survivors. Also, it is not uncommon for more than one mental disorder to be present, as there is considerable co-morbidity among trauma-related mental disorders. Various manifestations of anxiety and depression are the most common symptoms resulting from torture. Not infrequently, the symptomatology described above will be classified within the categories of anxiety and mood disorders. The two prominent classification systems are the International Classification of Disease (ICD-10) classification of mental and behavioural disorders and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). For complete descriptions of diagnostic categories, the reader should refer to ICD-10 and DSM-IV. This review will focus on the most common trauma-related diagnoses: PTSD, major depression and enduring personality changes.

(a) Depressive disorders

251. Depressive states are almost ubiquitous among survivors of torture. In the context of evaluating the consequences of torture, it is problematic to assume that PTSD and major depressive disorder are two separate disease entities with clearly distinguishable aetiologies. Depressive disorders include major depressive disorder, single episode or major depressive disorder and recurrent (more than one episode). Depressive disorders can be present with or without psychotic, catatonic, melancholic or atypical features. According to DSM-IV, in order to make a diagnosis of major depressive episode, five or more of the following symptoms must be present during the same two-week period and represent a change from previous functioning (at least one of the symptoms must be depressed mood or loss of interest or pleasure):

1. depressed mood;
2. markedly diminished interest or pleasure in all or almost all activities;
3. weight loss or change of appetite;
4. insomnia or hypersomnia;
5. psychomotor agitation or retardation;
6. fatigue or loss of energy;

7. feelings of worthlessness or excessive or inappropriate guilt;
8. diminished ability to think or concentrate; and
9. recurrent thoughts of death or suicide.

To make this diagnosis the symptoms must cause significant distress or impaired social or occupational functioning, not be due to a physiological disorder and unaccounted for by another DSM-IV diagnosis.

(b) Post-traumatic stress disorder

252. The diagnosis most commonly associated with the psychological consequences of torture is PTSD. The association between torture and this diagnosis has become very strong in the minds of health providers, immigration courts and the informed lay public. This has created the mistaken and simplistic impression that PTSD is the main psychological consequence of torture.

253. The DSM-IV definition of PTSD relies heavily on the presence of memory disturbances in relation to the trauma, such as intrusive memories, nightmares and the inability to recall important aspects of the trauma. The individual may be unable to recall with precision specific details of the torture events but will be able to recall the major themes of the torture experiences. For example, the victim may be able to recall being raped on several occasions but not be able to give the exact dates, locations and details of the setting or the perpetrators. Under such circumstances, the inability to recall precise details supports, rather than discounts, the credibility of a survivor's story. Major themes in the story will be consistent upon re-interviewing. The ICD-10 diagnosis of PTSD is very similar to that of DSM-IV. According to DSM-IV, PTSD can be acute, chronic or delayed. The symptoms must be present for more than one month and the disturbance must cause significant distress or impairment in functioning. In order to diagnose PTSD, the individual must have been exposed to a traumatic event that involved life-threatening experiences for the victim or others and produced intense fear, helplessness or horror. The event must be re-experienced persistently in one or more of the following ways: intrusive distressing recollections of the event, recurrent distressing dreams of the event, acting or feeling as if the event were happening again including hallucinations, flashbacks and illusions, intense psychological distress at exposure to reminders of the event and physiological reactivity when exposed to cues that resemble or symbolize aspects of the event.

254. The individual must persistently demonstrate avoidance of stimuli associated with the traumatic event or show general numbing of responsiveness as indicated by at least three of the following: (1) efforts to avoid thoughts, feelings or conversations associated with the trauma; (2) efforts to avoid activities, places or people that remind the victim of the trauma; (3) inability to recall an important aspect of the event; (4) diminished interest in significant activities; (5) detachment or estrangement from others; (6) restricted affect; and (7) foreshortened sense of future. Another reason to make a DSM-IV diagnosis of PTSD is the persistence of symptoms of increased arousal that were not present before the trauma, as indicated by at least two of the following: difficulty falling or staying asleep, irritability or angry outbursts, difficulty concentrating, hypervigilance and exaggerated startle response.

255. Symptoms of PTSD can be chronic or fluctuate over extended periods of time. During some intervals, symptoms of hyperarousal and irritability dominate the clinical picture. At these times, the survivor will usually also report increased intrusive memories, nightmares and flashbacks. At other times, the survivor may appear relatively asymptomatic or emotionally constricted and withdrawn. It must be kept in mind that not meeting diagnostic criteria of PTSD does not mean that torture was not inflicted. According to ICD-10, in a certain proportion of cases PTSD may follow a chronic course over many years with eventual transition to an enduring personality change.

(c) Enduring personality change

256. After catastrophic or prolonged extreme stress, disorders of adult personality may develop in persons with no previous personality disorder. The types of extreme stress that can change the personality include concentration camp experiences, disasters, prolonged captivity with an imminent possibility of being killed, exposure to life-threatening situations, such as being a victim of terrorism, and torture. According to ICD-10, the diagnosis of an enduring change in personality should be made only when there is evidence of a definite, significant and persistent change in the individual's pattern of perceiving, relating or thinking about the environment and him or herself, associated with inflexible and maladaptive behaviours not present before the traumatic experience. The diagnosis excludes changes that are a manifestation of another mental disorder or a residual symptom of any antecedent mental disorder, as well as personality and behavioural changes due to brain disease, dysfunction or damage.

257. To make the ICD-10 diagnosis of enduring personality change after catastrophic experience, the changes in personality must be present for at least two years following exposure to catastrophic stress. ICD-10 specifies that the stress must be so extreme that "it is not necessary to consider personal vulnerability in order to explain its profound effect on the personality". This personality change is characterized by a hostile or distrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of "being on edge", as if constantly threatened, and estrangement.

(d) Substance abuse

258. Clinicians have observed that alcohol and drug abuse often develop secondarily in torture survivors as a way of suppressing traumatic memories, regulating unpleasant affects and managing anxiety. Although comorbidity of PTSD with other disorders is common, systematic research has seldom studied the abuse of substances by torture survivors. The literature on populations that suffer from PTSD may include torture survivors, such as refugees, prisoners of war and veterans of armed conflicts, and may provide some insight. Studies of these groups reveal that prevalence of substance abuse varies by ethnic or cultural group. Former prisoners of war with PTSD were at increased risk of substance abuse, and combat veterans have high rates of co-morbidity of PTSD and substance abuse. In summary, there is considerable evidence from other populations at risk of PTSD that substance abuse is a potential co-morbid diagnosis for torture survivors. (e) Other diagnoses 259. As is evident from the catalogue of symptoms described in this section, there are other diagnoses to be considered in addition to PTSD, such as major depressive disorder and enduring personality change. The other possible diagnoses include but are not limited to:

- i. Generalized anxiety disorder features excessive anxiety and worry about a variety of different events or activities, motor tension and increased autonomic activity;
- ii. Panic disorder is manifested by recurrent and unexpected attacks of intense fear or discomfort, including symptoms such as sweating, choking, trembling, rapid heart rate, dizziness, nausea, chills or hot flushes;
- iii. Acute stress disorder has essentially the same symptoms as PTSD but is diagnosed within one month of exposure to the traumatic event;
- iv. Somatoform disorders featuring physical symptoms that cannot be accounted for by a medical condition;
- v. Bipolar disorder featuring manic or hypomanic episodes with elevated, expansive or irritable mood, grandiosity, decreased need for sleep, flight of ideas, psychomotor agitation and associated psychotic phenomena;
- vi. Disorders due to a general medical condition often in the form of brain impairment with resultant fluctuations or deficits in level of consciousness, orientation, attention, concentration, memory and executive functioning;
- vii. Phobias such as social phobia and agoraphobia.

C. The psychological/psychiatric evaluation

1. Ethical and clinical considerations

260. Psychological evaluations can provide critical evidence of abuse among torture victims for several reasons: torture often causes devastating psychological symptoms, torture methods are often designed to leave no physical lesions and physical methods of torture may result in physical findings that either resolve or lack specificity. Psychological evaluations provide useful evidence for medico-legal examinations, political asylum applications, establishing conditions under which false confessions may have been obtained, understanding regional practices of torture, identifying the therapeutic needs of victims and as testimony in human rights investigations. The overall goal of a psychological evaluation is to assess the degree of consistency between an individual's account of torture and the psychological findings observed during the course of the evaluation. To this end, the evaluation should provide a detailed description of the individual's history, a mental status examination, an assessment of social functioning and the formulation of clinical impressions (see chapters III, sect. C, and IV, sect. E). A psychiatric diagnosis should be made, if appropriate. Because psychological symptoms are so prevalent among survivors of torture, it is highly advisable for any evaluation of torture to include a psychological assessment.

262. The assessment of psychological status and the formulation of a clinical diagnosis should always be made with an awareness of the cultural context. Awareness of culture-specific syndromes and native language-bound idioms of distress through which symptoms are communicated is of paramount importance for conducting the interview and formulating the clinical impression and conclusion. When the interviewer has little or no knowledge of the victim's culture, the assistance of an interpreter is essential. Ideally, an interpreter from the victim's country knows the language, customs, religious traditions and other beliefs that must be taken into account during the investigation. The interview may induce fear and mistrust on the part of the victim and possibly remind him or her of previous interrogations. To reduce the effects of retraumatization, the clinician should communicate a sense of understanding of the individual's experiences and cultural background. It is inappropriate to observe the strict "clinical neutrality" that is used in some forms of psychotherapy, during which the clinician is inactive and says little. The clinician should communicate that he or she is an ally of the individual and adopt a supportive, non-judgemental approach.

2. The interview process

263. The clinician should introduce the interview process in a manner that explains in detail the procedures to be followed (questions asked about psychosocial history, including history of torture and current psychological functioning) and that prepares the individual for the difficult emotional reactions that the questions may provoke. The individual needs to be given an opportunity to request breaks, interrupt the interview at any time and be able to leave if the stress becomes intolerable, with the option of a later appointment. Clinicians need to be sensitive and empathic in their questioning, while remaining objective in their clinical assessment. At the same time, the interviewer should be aware of potential personal reactions to the survivor and the descriptions of torture that might influence the interviewer's perceptions and judgements.

264. The interview process may remind the survivor of interrogation during torture. Therefore, strong negative feelings towards the clinician may develop, such as fear, rage, revulsion, helplessness, confusion, panic or hatred. The clinician should allow for the expression and explanation of such feelings and express understanding for the individual's difficult predicament. In addition, the possibility that the person may still be persecuted or oppressed has to be kept in mind. When necessary, questions about forbidden activities should be avoided. It is important to consider the reasons for the psychological evaluation, as they will determine the level of confidentiality to which the expert is bound. If an evaluation of the credibility of an individual's report of torture is

requested within the framework of a judicial procedure by a State authority, the person to be evaluated must be told that this implies lifting medical confidentiality for all the information presented in the report. However, if the request for the psychological evaluation comes from the tortured person, the expert must respect medical confidentiality.

265. Clinicians who conduct physical or psychological evaluations should be aware of the potential emotional reactions that evaluations of severe trauma may elicit in the interviewee and interviewer. These emotional reactions are known as transference and countertransference. Mistrust, fear, shame, rage and guilt are among the typical reactions that torture survivors experience, particularly when being asked to recount or remember details of their trauma. Transference refers to the feelings a survivor has towards the clinician that relate to past experiences but which are misunderstood as directed towards the clinician personally. In addition, the clinician's emotional response to the torture survivor, known as countertransference, may affect the psychological evaluation. Transference and countertransference are mutually interdependent and interactive.

266. The potential impact of transference reactions on the evaluation process becomes evident when it is considered that an interview or examination that involves recounting and remembering the details of a traumatic history will result in exposure to distressing and unwanted memories, thoughts and feelings. Thus, even though a torture victim may consent to an evaluation with the hope of benefiting from it, the resulting exposure may renew the trauma experience itself. This may include the following phenomena.

267. The evaluator's questions may be experienced as forced exposure akin to an interrogation. The evaluator may be suspected of having voyeuristic or sadistic motivations, and the interviewee may ask him or herself questions such as: "Why does he or she make me reveal every last terrible detail of what happened to me? Why would a normal person choose to listen to stories like mine in order to make a living? The evaluator must have some strange kind of motivation." There may be prejudices towards the evaluator because he or she has not been arrested and tortured. This may lead the subject to perceive the evaluator as being on the side of the enemy.

268. The evaluator is perceived as a person in a position of authority, which is often the case, and for that reason may not be trusted with certain aspects of the trauma history. Alternatively, as is often the case with subjects still in custody, the subject may be too trusting in situations where the interviewer cannot guarantee that there will be no reprisals. Every precaution should be taken to ensure that prisoners do not put themselves at risk unnecessarily, naively trusting the outsider to protect them. Torture victims may fear that information that is revealed in the context of an evaluation cannot be safely kept from persecuting governments. Fear and mistrust may be particularly strong in cases where physicians or other health workers have been participants in the torture.

269. In many circumstances, the evaluator will be a member of the majority culture and ethnicity, whereas the subject, in the situation of the interview, will belong to a minority group or culture. This dynamic of inequality may reinforce the perceived and real imbalance of power and may increase the potential sense of fear, mistrust and forced submission in the subject. In some cases, particularly with subjects still in custody, this dynamic may relate more to the interpreter than to the evaluator. Ideally, therefore, the interpreter should also be an outsider and not be recruited locally, so that he or she can be seen by all to be as independent as the investigator. Of course, a family member on whom the authorities can later apply pressure to find out what was discussed in the evaluation should not be used as an interpreter.

270. If the evaluator and the victim are of the same gender, the interview may be more readily perceived as directly resembling the torture situation than if the genders were different. For example, a woman who was raped or tortured in prison by a male guard is likely to experience more distress, mistrust and fear when facing a male evaluator than she might with a female interviewer. The

opposite is true for men who have been assaulted sexually. They may be ashamed to tell the details of their torture to a female evaluator. Experience has shown, particularly in cases of victims still in custody, that in all but the most traditionally fundamentalist societies (where it is out of the question for a male to even interview, let alone examine, a woman), it may be much more important that the interviewer be a physician to whom the victim can ask precise questions, rather than not being a male as in a case of rape. Victims of rape have been known to say nothing to non-medical female investigators, but to request to talk to a physician, even if male, so as to be able to ask specific medical questions. Typical questions are about possible sequelae, such as being pregnant, being able to conceive later on or about the future of sexual relations between spouses. In the context of evaluations conducted for legal purposes, the necessary attention to detail and precise questioning about history are easily perceived as a sign of mistrust or doubt on the part of the examiner.

271. Because of the psychological pressures mentioned earlier, survivors may be re-traumatized and overwhelmed by memories and, as a result, affect or mobilize strong defences that result in profound withdrawal and affective flattening during examination or interview. For the purposes of documentation, the withdrawal and flattening present special difficulties because torture victims may be unable to communicate their history and current suffering effectively, although it would be most beneficial for them to do so.

272. Countertransference reactions are often unconscious, and when a person is unaware of countertransference, it becomes a problem. Having feelings when listening to individuals speak of their torture is to be expected, although these feelings can interfere with the clinician's effectiveness, but when understood they can guide the clinician. Physicians and psychologists involved in the evaluation and treatment of torture victims agree that awareness and understanding of typical countertransference reactions are crucial because countertransference can have significantly limiting effects on the ability to evaluate and document the physical and psychological consequences of torture. Effective documentation of torture and other forms of ill-treatment requires an understanding of personal motivations for working in this area. There is a consensus that professionals who continuously conduct this kind of examination should obtain supervision and professional support from peers who are experienced in this field. Common countertransference reactions include:

- a. Avoidance, withdrawal and defensive indifference in reaction to being exposed to disturbing material. This may lead to forgetting some details and underestimating the severity of physical or psychological consequences;
- b. Disillusionment, helplessness, hopelessness and overidentification that may lead to symptoms of depression or vicarious traumatization, such as nightmares, anxiety and fear;
- c. Omnipotence and grandiosity in the form of feeling like a saviour, the great expert on trauma or the last hope for the survivor's recovery and well-being;
- d. Feelings of insecurity about professional skills when faced with the gravity of the reported history or suffering. This may manifest as lack of confidence in the ability to do justice to the survivor and unrealistic preoccupation with idealized medical norms;
- e. Feelings of guilt over not sharing the torture survivor's experience and pain or over the awareness of what has not been done on a political level may result in overly sentimental or idealized approaches to the survivor;
- f. Anger and rage towards torturers and persecutors are expectable, but may undermine the ability to maintain objectivity when they are driven by unrecognized personal experiences and thus become chronic or excessive;
- g. Anger or repugnance against the victim may arise as a result of feeling exposed to unaccustomed levels of anxiety. This may also arise as a result of feeling used by the victim when the clinician experiences doubt about the truth of the alleged torture

history and the victim stands to benefit from an evaluation that documents the consequences of the alleged incident;

- h. Significant differences between the cultural value systems of the clinician and the individual alleging torture may include belief in myths about ethnic groups, condescending attitudes and underestimation of the individual's sophistication or capacity for insight. Conversely, clinicians who are members of the same ethnic group as a victim might form a non-verbalized alliance that can also affect the objectivity of the evaluation.

273. Most clinicians agree that many countertransference reactions are not merely examples of distortion but are important sources of information about the psychological state of the torture victim. The clinician's effectiveness can be compromised when countertransference is acted upon rather than reflected upon. Clinicians engaged in the evaluation and treatment of torture victims are advised to examine countertransference and obtain supervision and consultation from a colleague, if possible.

274. Circumstances may require that interviews be conducted by a clinician from a cultural or linguistic group different from that of the survivor. In such cases, there are two possible approaches; each with advantages and disadvantages. The interviewer can use literal, word-for-word translations provided by an interpreter (see chapter IV, sect. I). Alternatively, the interviewer can use a bicultural approach to interviewing. This approach consists of using an interviewing team composed of the investigating clinician and an interpreter, who provides linguistic interpretation and facilitates an understanding of cultural meanings attached to events, experiences, symptoms and idioms. Because the clinician often does not recognize relevant cultural, religious and social factors, a skilled interpreter will be able to point out and explain these issues to the clinician. If the interviewer is relying strictly on literal, word-for-word interpretation, this type of in-depth interpretation of information will not be available. On the other hand, if interpreters are expected to point out relevant cultural, religious and social factors to the clinician, it is crucial that they do not attempt to influence in any way the tortured person's responses to the clinician's questions. When literal translation is not used, the clinician needs to be sure that the interviewee's responses, as communicated by the interpreter, represent exclusively what the person said without additions or deletions by the interpreter. Regardless of the approach, the interpreter's identity and ethnic, cultural and political affiliation are important considerations in the choice of an interpreter. The torture victim will have to trust the interpreter to understand what he or she is saying and to communicate it accurately to the investigating clinician. Under no circumstances should the interpreter be a law enforcement official or government employee. A family member should never be used as an interpreter, in order to respect privacy. The investigating team must choose an independent interpreter.

3. Components of the psychological/ psychiatric evaluation

275. The introduction should contain mention of the referral source, a summary of collateral sources (such as medical, legal and psychiatric records) and a description of the methods of assessment used (interviews, symptom inventories, checklists and neuropsychological testing).

(a) History of torture and ill-treatment

276. Every effort should be made to document the full history of torture, persecution and other relevant traumatic experiences (see chapter IV, sect. E). This part of the evaluation is often exhausting for the person being evaluated. Therefore, it may be necessary to proceed in several sessions. The interview should start with a general summary of events before eliciting the details of the torture experiences. The interviewer needs to know the legal issues at hand because that will determine the nature and amount of information necessary to achieve documentation of the facts.

(b) Current psychological complaints

277. An assessment of current psychological functioning constitutes the core of the evaluation. As severely brutalized prisoners of war and rape victims show a lifetime prevalence of PTSD of between 80 and 90 per cent, specific questions about the three DSM-IV categories of PTSD (re-experiencing of the traumatic event, avoidance or numbing of responsiveness, including amnesia, and increased arousal) need to be asked. Affective, cognitive and behavioural symptoms should be described in detail, and the frequency, as well as examples, of nightmares, hallucinations and startle response should be stated. An absence of symptoms can be due to the episodic or often delayed nature of PTSD or to denial of symptoms because of shame.

(c) Post-torture history

278. This component of the psychological evaluation seeks information about current life circumstances. It is important to inquire about current sources of stress, such as separation or loss of loved ones, flight from the home country and life in exile. The interviewer should also inquire about the individual's ability to be productive, earn a living, care for his or her family and the availability of social supports.

(d) Pre-torture history

279. If relevant, describe the victim's childhood, adolescence, early adulthood, his or her family background, family illnesses and family composition. There should also be a description of the victim's educational and occupational history. Describe any history of past trauma, such as childhood abuse, war trauma or domestic violence, as well as the victim's cultural and religious background.

280. The description of pre-trauma history is important to assess mental health status and level of psychosocial functioning of the torture victim prior to the traumatic events. In this way, the interviewer can compare the current mental health status with that of the individual before torture. In evaluating background information, the interviewer should keep in mind that the duration and severity of responses to trauma are affected by multiple factors. These factors include, but are not limited to, the circumstances of the torture, the perception and interpretation of torture by the victim, the social context before, during and after torture, community and peer resources and values and attitudes about traumatic experiences, political and cultural factors, severity and duration of the traumatic events, genetic and biological vulnerabilities, developmental phase and age of the victim, prior history of trauma and pre-existing personality. In many interview situations, because of time limitations and other problems, it may be difficult to obtain this information. It is important, nonetheless, to obtain enough data about the individual's previous mental health and psychosocial functioning to form an impression of the degree to which torture has contributed to psychological problems.

(e) Medical history

281. The medical history summarizes pre-trauma health conditions, current health conditions, body pain, somatic complaints, use of medication and its side effects, relevant sexual history, past surgical procedures and other medical data (see chapter V, sect. B).

(f) Psychiatric history

282. Inquiries should be made about a history of mental or psychological disturbances, the nature of problems and whether they received treatment or required psychiatric hospitalization. The inquiry should also cover prior therapeutic use of psychotropic medication.

(g) Substance use and abuse history

283. The clinician should inquire about substance use before and after the torture, changes in the pattern of use and whether substances are being used to cope with insomnia or

psychological/psychiatric problems. These substances are not only alcohol, cannabis and opium but also regional substances of abuse such as betel nut and many others.

(h) Mental status examination

284. The mental status examination begins the moment the clinician meets the subject. The interviewer should make note of the person's appearance, such as signs of malnutrition, lack of cleanliness, changes in motor activity during the interview, use of language, presence of eye contact, ability to relate to the interviewer and the means the individual uses to establish communication. The following components should be covered, and all aspects of the mental status examination should be included in the report of the psychological evaluation; aspects such as general appearance, motor activity, speech, mood and affect, thought content, thought process, suicidal and homicidal ideation and a cognitive examination (orientation, long-term memory, intermediate recall and immediate recall).

(i) Assessment of social function

285. Trauma and torture can directly and indirectly affect a person's ability to function. Torture can also indirectly cause loss of functioning and disability, if the psychological consequences of the experience impair the individual's ability to care for himself or herself, earn a living, support a family and pursue an education. The clinician should assess the individual's current level of functioning by inquiring about daily activities, social role (as housewife, student, worker), social and recreational activities and perception of health status. The interviewer should ask the individual to assess his or her own health condition, to state the presence or absence of feelings of chronic fatigue and to report potential changes in overall functioning.

(j) Psychological testing and the use of checklists and questionnaires

286. Little published data exist on the use of psychological testing (projective and objective personality tests) in the assessment of torture survivors. Also, psychological tests of personality lack cross-cultural validity. These factors combine to limit severely the utility of psychological testing in the evaluation of torture victims. Neuropsychological testing may, however, be helpful in assessing cases of brain injury resulting from torture (see section C.4 below). An individual who has survived torture may have trouble expressing in words his or her experiences and symptoms. In some cases, it may be helpful to use trauma event and symptom checklists or questionnaires. If the interviewer believes it may be helpful to use these, there are numerous questionnaires available, although none are specific to torture victims.

(k) Clinical impression

287. In formulating a clinical impression for the purposes of reporting psychological evidence of torture, the following important questions should be asked:

- i. Are the psychological findings consistent with the alleged report of torture?
- ii. Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
- iii. Given the fluctuating course of trauma-related mental disorders over time, what is the time frame in relation to the torture events? Where is the individual in the course of recovery?
- iv. What are the coexisting stressors impinging on the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role)? What impact do these issues have on the individual?
- v. Which physical conditions contribute to the clinical picture? Pay special attention to head injury sustained during torture or detention;

- vi. Does the clinical picture suggest a false allegation of torture?

288. Clinicians should comment on the consistency of psychological findings and the extent to which these findings correlate with the alleged abuse. The emotional state and expression of the person during the interview, his or her symptoms, the history of detention and torture and the personal history prior to torture should be described. Factors such as the onset of specific symptoms related to the trauma, the specificity of any particular psychological findings and patterns of psychological functioning should be noted. Additional factors should be considered, such as forced migration, resettlement, difficulty of acculturation, language problems, unemployment, loss of home, family and social status. The relationship and consistency between events and symptoms should be evaluated and described. Physical conditions, such as head trauma or brain injury, may require further evaluation. Neurological or neuropsychological assessment may be recommended.

289. If the survivor has symptom levels consistent with a DSM-IV or ICD-10 psychiatric diagnosis, the diagnosis should be stated. More than one diagnosis may be applicable. Again, it must be stressed that even though a diagnosis of a trauma-related mental disorder supports the claim of torture, not meeting criteria for a psychiatric diagnosis does not mean the person was not tortured. A survivor of torture may not have the level of symptoms required to meet diagnostic criteria for a DSM-IV or ICD10 diagnosis fully. In these cases, as with all others, the symptoms that the survivor has and the torture story that he or she claims to have experienced should be considered as a whole. The degree of consistency between the torture story and the symptoms that the individual reports should be evaluated and described in the report.

290. It is important to recognize that some people falsely allege torture for a range of reasons and that others may exaggerate a relatively minor experience for personal or political reasons. The investigator must always be aware of these possibilities and try to identify potential reasons for exaggeration or fabrication. The clinician should keep in mind, however, that such fabrication requires detailed knowledge about trauma-related symptoms that individuals rarely possess. Inconsistencies in testimony can occur for a number of valid reasons, such as memory impairment due to brain injury, confusion, dissociation, cultural differences in perception of time or fragmentation and repression of traumatic memories. Effective documentation of psychological evidence of torture requires clinicians to have a capacity to evaluate consistencies and inconsistencies in the report. If the interviewer suspects fabrication, additional interviews should be scheduled to clarify inconsistencies in the report. Family or friends may be able to corroborate details of the story. If the clinician conducts additional examinations and still suspects fabrication, the clinician should refer the individual to another clinician and ask for the colleague's opinion. The suspicion of fabrication should be documented with the opinion of two clinicians.

(I) Recommendations

291. The recommendations resulting from the psychological evaluation depend on the question posed at the time the evaluation was requested. The issues under consideration may concern legal and judicial matters, asylum, resettlement or a need for treatment. Recommendations can be for further assessment, such as neuropsychological testing, medical or psychiatric treatment, or a need for security or asylum.

4. Neuropsychological assessment

292. Clinical neuropsychology is an applied science concerned with the behavioural expression of brain dysfunction. Neuropsychological assessment, in particular, is concerned with the measurement and classification of behavioural disturbances associated with organic brain impairment. The discipline has long been recognized as useful in discriminating between neurological and psychological conditions and in guiding treatment and rehabilitation of patients suffering from the consequences of various levels of brain damage. Neuropsychological evaluations of torture survivors

are performed infrequently and to date there are no neuropsychological studies of torture survivors available in the literature. The following remarks are, therefore, limited to a discussion of general principles to guide health providers in understanding the utility of, and indications for, neuropsychological assessment of subjects suspected of being tortured. Before discussing the issues of utility and indications, it is essential to recognize the limitations of neuropsychological assessment in this population.

(a) Limitations of neuropsychological assessment

293. There are a number of common factors complicating the assessment of torture survivors in general that are outlined elsewhere in this manual. These factors apply to neuropsychological assessment in the same way as to a medical or psychological examination. Neuropsychological assessments may be limited by a number of additional factors, including lack of research on torture survivors, reliance on population-based norms, cultural and linguistic differences and re-traumatization of those who have experienced torture.

294. As mentioned above, very few references exist in the literature concerning the neuropsychological assessment of torture victims. The pertinent body of literature concerns various types of head trauma and the neuropsychological assessment of PTSD in general. Therefore, the following discussion and subsequent interpretations of neuropsychological assessments are necessarily based on the application of general principles used with other subject populations.

295. Neuropsychological assessment as it has been developed and practised in Western countries relies heavily on an actuarial approach. This approach typically involves comparing the results of a battery of standardized tests to population-based norms. Although norm-referenced interpretations of neuropsychological assessments may be supplemented by a Lurian approach of qualitative analysis, particularly when the clinical situation demands it, a reliance on the actuarial approach predominates. Moreover, a reliance on test scores is greatest when brain impairment is mild to moderate in severity, rather than severe, or when neuropsychological deficits are thought to be secondary to a psychiatric disorder.

296. Cultural and linguistic differences may significantly limit the utility and applicability of neuropsychological assessment among suspected torture victims. Neuropsychological assessments are of questionable validity when standard translations of tests are unavailable and the clinical examiner is not fluent in the subject's language. Unless standardized translations of tests are available and examiners are fluent in the subject's language, verbal tasks cannot be administered at all and cannot be interpreted in a meaningful way. This means that only non-verbal tests can be used, and this precludes comparison between verbal and non-verbal faculties. In addition, an analysis of the lateralization (or localization) of deficits is more difficult. This analysis is often useful, however, because of the brain's asymmetrical organization, with the left hemisphere typically being dominant for speech. If population-based norms are unavailable for the subject's cultural and linguistic group, neuropsychological assessment is also of questionable validity. An estimate of IQ is one of the central benchmarks that allow examiners to place neuropsychological test scores into proper perspective. Within the population of the United States, for example, these estimates are often derived from verbal subsets using the Wechsler scales, particularly the information subscale, because in the presence of organic brain impairment, acquired factual knowledge is less likely to suffer deterioration than other tasks and be more representative of past learning ability than other measures. Measurement may also be based on educational and work history and demographic data. Obviously, neither one of these two considerations applies to subjects for whom population-based norms have not been established. Therefore, only very coarse estimates concerning pre-trauma intellectual functioning can be made. As a result, neuropsychological impairment that is anything less than severe or moderate may be difficult to interpret.

297. Neuropsychological assessments may re-traumatize those who have experienced torture. Great care must be taken in order to minimize any potential re-traumatization of the subject in any form of diagnostic procedure (see chapter IV, sect. H). To cite only one obvious example specific to neuropsychological testing, it would be potentially very damaging to proceed with a standard administration of the Halstead-Reitan Battery, in particular the Tactual Performance Test (TPT), and routinely blindfold the subject. For most torture victims who have experienced blindfolding during detention and torture, and even for those who were not blindfolded, it would be very traumatic to introduce the experience of helplessness inherent in this procedure. In fact, any form of neuropsychological testing in itself may be problematic, regardless of the instrument used. Being observed, timed with a stopwatch and asked to give maximum effort on an unfamiliar task, in addition to being asked to perform, rather than having a dialogue, may prove to be too stressful or reminiscent of the torture experience.

(b) Indications for neuropsychological assessment

298. In evaluating behavioural deficits in suspected torture victims, there are two primary indications for neuropsychological assessment: brain injury and PTSD plus related diagnoses. While both sets of conditions overlap in some aspects, and will often coincide, it is only the former that is a typical and traditional application of clinical neuropsychology, whereas the latter is relatively new, not well researched and rather problematic.

299. Brain injury and resulting brain damage may result from various types of head trauma and metabolic disturbances inflicted during periods of persecution, detention and torture. This may include gunshot wounds, the effects of poisoning, malnutrition as a result of starvation or forced ingestion of harmful substances, the effects of hypoxia or anoxia resulting from asphyxiation or near drowning and, most commonly, from blows to the head suffered during beatings. Blows to the head are frequently inflicted during periods of detention and torture. For example, in one sample of torture survivors, blows to the head were the second most frequently cited form of bodily abuse (45 per cent) behind blows to the body (58 per cent). The potential for brain damage is high among torture victims.

300. Closed head injuries resulting in mild to moderate levels of long-term impairment are perhaps the most commonly assessed cause of neuropsychological abnormality. While signs of injury may include scars on the head, brain lesions cannot usually be detected by diagnostic imaging of the brain. Mild to moderate levels of brain damage might be overlooked or underestimated by mental health professionals because symptoms of depression and PTSD are likely to figure prominently in the clinical picture, resulting in less attention being paid to the potential effect of head trauma. Commonly, the subjective complaints of survivors include difficulties with attention, concentration and short-term memory, which can be the result of either brain impairment or PTSD. Since these complaints are common in survivors suffering from PTSD, the question whether they are actually due to head injury may not even be asked.

301. The diagnostician must rely, in an initial phase of the examination, on reported history of head trauma and the course of symptomatology. As is usually the case with brain-injured subjects, information from third parties, particularly relatives, may prove helpful. It must be remembered that brain-injured subjects often have great difficulty articulating or even appreciating their limitations because they are, so to speak, "inside" the problem. In gathering first impressions regarding the difference between organic brain impairment and PTSD, an assessment concerning the chronicity of symptoms is a helpful starting point. If symptoms of poor attention, concentration and memory are observed to fluctuate over time and to co-vary with levels of anxiety and depression, this is more likely due to the phasic nature of PTSD. On the other hand, if impairment seems to appear chronic, lacks fluctuation and is confirmed by family members, the possibility of brain impairment should be entertained, even in the initial absence of a clear history of head trauma.

302. Once there is a suspicion of organic brain impairment, the first step for a mental health professional is to consider a referral to a physician for further neurological examination. Depending on initial findings, the physician may then consult a neurologist or order diagnostic tests. An extensive medical work-up, specific neurological consultation and neuropsychological evaluation are among the possibilities to be considered. The use of neuropsychological evaluation procedures is usually indicated if there is a lack of gross neurological disturbance, reported symptoms are predominantly cognitive in nature or a differential diagnosis between brain impairment and PTSD has to be made.

303. The selection of neuropsychological tests and procedures is subject to the limitations specified above and, therefore, cannot follow a standard battery format, but rather must be case-specific and sensitive to individual characteristics. The flexibility required in the selection of tests and procedures demands considerable experience, knowledge and caution on the part of the examiner. As has been pointed out above, the range of instruments to be used will often be limited to non-verbal tasks, and the psychometric characteristics of any standardized tests will most likely suffer when population-based norms do not apply to an individual subject. An absence of verbal measures represents a very serious limitation. Many areas of cognitive functioning are mediated through language, and systematic comparisons between various verbal and non-verbal measures are typically used in order to arrive at conclusions regarding the nature of deficits.

304. What complicates matters further is evidence that significant inter-group differences in performances of non-verbal tasks have been found between relatively closely related cultures. For example, research compared the performance of randomly selected, community-based samples of English-speaking and Spanish-speaking elders on a brief neuropsychological test battery. The samples were randomly selected and demographically matched. Yet, while scores on verbal measures were similar, the Spanish-speaking subjects scored significantly lower on almost all non-verbal measures. These results suggest that caution is warranted when using nonverbal and verbal measures to assess non-English-speaking individuals, when tests are prepared for English speaking subjects.

305. The choice of instruments and procedures in neuropsychological assessment of suspected torture victims must be left to the individual clinician, who will have to select them in accordance with the demands and possibilities of the situation. Neuropsychological tests cannot be used properly without extensive training and knowledge in brain-behaviour relations. Comprehensive lists of neuropsychological procedures and tests and their proper application can be found in standard references.

(c) Post-traumatic stress disorder

306. The considerations offered above should make it clear that great caution is needed when attempting neuropsychological assessment of brain impairment in suspected torture victims. This must be even more strongly the case in attempting to document PTSD in suspected survivors through neuropsychological assessment. Even in the case of assessing PTSD subjects for whom population-based norms are available, there are considerable difficulties to consider. PTSD is a psychiatric disorder and traditionally has not been the focus of neuropsychological assessment. Furthermore, PTSD does not conform to the classical paradigm of an analysis of identifiable brain lesions that can be confirmed by medical techniques. With an increased emphasis on and understanding of the biological mechanisms involved in psychiatric disorders generally, neuropsychological paradigms have been invoked more frequently than in the past. However, as has been pointed out, "... comparatively little has been written to date on PTSD from a neuropsychological perspective".

307. There is great variability among the samples used for the study of neuropsychological measures in post-traumatic stress. This may account for the variability of the cognitive problems reported from

these studies. It was pointed out that “clinical observations suggest that PTSD symptoms show the most overlap with the neurocognitive domains of attention, memory and executive functioning”. This is consistent with complaints heard frequently from survivors of torture. Subjects complain of difficulties in concentrating and feeling unable to retain information and engage in planned, goal-directed activity.

308. Neuropsychological assessment methods appear able to identify the presence of neurocognitive deficits in PTSD, even though the specificity of these deficits is more difficult to establish. Some studies have documented the presence of deficits in PTSD subjects when compared to normal controls but they have failed to discriminate these subjects from matched psychiatric controls. In other words, it is likely that neurocognitive deficits on test performances will be evident in cases of PTSD, but insufficient for diagnosing it. As in many other types of assessment, interpretation of test results must be integrated into a larger context of interview information and possibly personality testing. In that sense, specific neuropsychological assessment methods can make a contribution to the documentation of PTSD in the same manner that they do for other psychiatric disorders associated with known neurocognitive deficits.

309. Despite significant limitations, neuropsychological assessment may be useful in evaluating individuals suspected of having brain injury and in distinguishing brain injury from PTSD. Neuropsychological assessment may also be used to evaluate specific symptoms, such as problems with memory that occur in PTSD and related disorders.

5. Children and torture

310. Torture can impact a child directly or indirectly. The impact can be due to the child’s having been tortured or detained, the torture of parents or close family members or witnessing torture and violence. When individuals in a child’s environment are tortured, the torture will inevitably have an impact on the child, albeit indirect, because torture affects the entire family and community of torture victims. A complete discussion of the psychological impact of torture on children and complete guidelines for conducting an evaluation of a child who has been tortured is beyond the scope of this manual. Nevertheless, several important points can be summarized.

311. First, when evaluating a child who is suspected of having undergone or witnessed torture, the clinician must make sure that the child receives support from caring individuals and that he or she feels secure during the evaluation. This may require a parent or trusted care provider to be present during the evaluation. Second, the clinician must keep in mind that children do not often express their thoughts and emotions regarding trauma verbally, but rather behaviourally. The degree to which children are able to verbalize thought and affect depends on the child’s age, developmental level and other factors, such as family dynamics, personality characteristics and cultural norms.

312. If a child has been physically or sexually assaulted, it is important, if at all possible, for the child to be seen by an expert in child abuse. Genital examination of children, likely to be experienced as traumatic, should be performed by clinicians experienced in interpreting the findings. Sometimes it is appropriate to videotape the examination so that other experts can give opinions on the physical findings without the child having to be examined again. It may be inappropriate to perform a full genital or anal examination without a general anaesthetic. Furthermore, the examiner should be aware that the examination itself may be reminiscent of the assault and it is possible that the child may make a spontaneous outcry or psychologically decompensate during the examination.

(a) Developmental considerations

313. A child’s reactions to torture depend on age, developmental stage and cognitive skills. The younger the child, the more his or her experience and understanding of the traumatic event will be influenced by the immediate reactions and attitudes of caregivers following the event. For children

under the age of three who have experienced or witnessed torture, the protective and reassuring role of their caregivers is crucial. The reactions of very young children to traumatic experiences typically involve hyperarousal, such as restlessness, sleep disturbance, irritability, heightened startle reactions and avoidance. Children over three often tend to withdraw and refuse to speak directly about traumatic experiences. The ability for verbal expression increases during development. A marked increase occurs around the concrete operational stage (8-9 years old), when children develop the ability to provide a reliable chronology of events. During this stage, concrete operations and temporal and spatial capacities develop. These new skills are still fragile, and it is not usually until the beginning of the formal operational stage (12 years old) that children are consistently able to construct a coherent narrative. Adolescence is a turbulent developmental period. The effects of torture can vary widely. Torture experiences may cause profound personality changes in adolescents resulting in antisocial behaviour. Alternatively, the effects of torture on adolescents may be similar to those seen in younger children.

(b) Clinical considerations

314. Symptoms of PTSD may appear in children. The symptoms can be similar to those observed in adults, but the clinician must rely more heavily on observations of the child's behaviour than on verbal expression. For example, the child may demonstrate symptoms of re-experiencing as manifested by monotonous, repetitive play representing aspects of the traumatic event, visual memories of the events in and out of play, repeated questions or declarations about the traumatic event and nightmares. The child may develop bedwetting, loss of control of bowel movements, social withdrawal, restricted affect, attitude changes towards self and others and feelings that there is no future. He or she may experience hyperarousal and have night terrors, problems going to bed, sleep disturbance, heightened startle response, irritability and significant disturbances in attention and concentration. Fears and aggressive behaviour that were non-existent before the traumatic event may appear as aggressiveness towards peers, adults or animals, fear of the dark, fear of going to the toilet alone and phobias. The child may demonstrate sexual behaviour that is inappropriate for his or her age and somatic reactions. Anxiety symptoms, such as exaggerated fear of strangers, separation anxiety, panic, agitation, temper tantrums and uncontrolled crying may appear. The child may also develop eating problems.

(c) Role of the family

315. The family plays an important dynamic role in persisting symptomatology among children. In order to preserve cohesion in the family, dysfunctional behaviours and delegation of roles may occur. Family members, often children, can be assigned the role of patient and develop severe disorders. A child may be overly protected or important facts about the trauma may be hidden. Alternatively, the child can be parentified and expected to care for the parents. When the child is not the direct victim of torture but only indirectly affected, adults often tend to underestimate the impact on the child's psyche and development. When loved ones around a child have been persecuted, raped and tortured or the child has witnessed severe trauma or torture, he or she may develop dysfunctional beliefs such as that he or she is responsible for the bad events or that he or she has to bear the parent's burdens. This type of belief can lead to long-term problems with guilt, loyalty conflicts, personal development and maturing into an independent adult.

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