

Sexual and Gender-based Violence Offences in Lebanon

Principles and Recommended Practices on Evidence



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February 2021

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1. INTRODUCTION

In its 2019 report on *Gender-based Violence in Lebanon*,¹ the International Commission of Jurists (ICJ) found that the Lebanese legislative framework governing the investigation, prosecution and adjudication of sexual and gender-based violence (SGBV) failed to comply with international human rights law and standards. The ICJ previously documented how obstacles in the administration of justice – namely the lack of gender-sensitive investigations, prosecutions and evidence-gathering procedures; inadequate competences and resources; and discriminatory gender stereotypes – continue to jeopardize the realization of women’s human rights,² including, in particular, their access to justice and effective remedies for SGBV offences.

In light of these obstacles, the ICJ identified a need to strengthen domestic investigation, prosecution and judicial capacities with respect to practices employed in the investigation, prosecution and adjudication of SGBV offences and the application of evidentiary rules. In the present publication, therefore, the organization seeks to provide guidance on these topics to criminal justice actors on relevant international human rights law and best practice standards. By doing so, the ICJ seeks to ensure SGBV victims/survivors are guaranteed effective, efficient and fair investigations and prosecutions, consistent with their right to access to justice and an effective remedy and reparation.

SGBV offences necessitate a criminal justice response that is tailored to the specific needs of SGBV victims/survivors. The criminal justice process can worsen the plight of SGBV victims/survivors, potentially exposing them to further abuses and compounding the harm and suffering they have already experienced. This additional predicament is commonly known as “secondary victimization.”³ In view of the considerable risk of revictimization in cases of SGBV, the ICJ has issued victim-centered guidance and recommendations for criminal justice actors in Lebanon that should underpin the investigation, prosecution and adjudication processes in cases that involve SGBV.⁴ Employing gender-sensitive approaches to evidence gathering and procedures will enhance the effectiveness of criminal justice interventions and case management, and by extension, accountability for SGBV.

In this memorandum, the ICJ uses the rules and recommended practice under international human rights law and standards that apply to the gathering, admissibility, exclusion and evaluation of evidence during the investigation, prosecution and adjudication of SGBV offences to assess domestic legislation, procedures and practices applicable to SGBV. In particular, the present publication reviews relevant provisions of the Code of Criminal Procedure (CCP); Law No. 293/2014 on the protection of women and other family members from domestic violence (Law No. 293/2014); and its ancillary guidelines governing “the rules of communication and

1. See generally, International Commission of Jurists (ICJ), *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, (Geneva: ICJ, 2019). See also ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, (Geneva: ICJ, 2020).

2. See, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), [*General Recommendation No. 35: gender-based violence against women, updating general recommendation No. 19*](#), UN Doc. CEDAW/C/GC/35 (2017), para. 14, where the CEDAW Committee observed: “Gender-based violence affects women throughout their life cycle” (footnotes in the original omitted). Accordingly, references to woman or women throughout this document should be understood to include girl/s unless otherwise specified. See also, Office of the High Commissioner for Human Rights (OHCHR), *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice*, (New York/Geneva: OHCHR, 2018), p. 7, where gender is referred to as: “the socially constructed identities, attributes and roles of persons in relation to their sex and the social and cultural meanings attached to biological differences based on sex. The meaning of such socially constructed identities, attributes and roles varies across societies, communities and groups and over time. This often results in hierarchical relationships between women and men and an unequal distribution of power and rights, favouring men and disadvantaging women and affecting all members of society. The social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors.”

3. ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 32-33.; United Nations General Assembly (UNGA), *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(c), stipulates that secondary victimization results not from the original offence itself, but from the inadequate response of institutions or individuals to victims/survivors.

4. ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 62-66.

treatment by Internal Security Forces⁵ officers in relation to complaints of domestic violence”⁶ (ISF General Memorandum). The memorandum aims, in particular, to provide guidance to Lebanese criminal justice actors on problematic procedural aspects detected in evidentiary rules and standards in the Lebanese framework relevant to in the investigation, prosecution and adjudication of SGBV offences.

The memorandum is divided in three parts: (i) evidence-gathering; (ii) the admissibility and exclusion of evidence; and (iii) the evaluation of evidence and burden of proof. Each part examines the applicable international human rights law and standards and the Lebanese laws and practices governing criminal procedure, making recommendations on how to enhance compatibility with international human rights law and standards in practice.

The memorandum recognizes where current Lebanese evidentiary rules and practices applicable to the investigation, prosecution and adjudication of SGBV offences comply with international human rights law standards, where they do not, and where, therefore, reforms are necessary. In acknowledgement of the fact that such reforms may not be forthcoming or implemented in the near future, the memorandum sets out practical guidance and recommendations for the interim period until such time that reforms may be introduced.

This memorandum was preceded by two additional publications on access to justice and effective remedies for victims/survivors of SGBV crimes. First, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*⁷ (July 2019 Report) addressed the legal framework governing gender-based violence in the country and its application in practice, identifying numerous *de jure* and *de facto* obstacles, which, combined, continue to hamper women’s effective access to justice in Lebanon. Second, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*⁸ (October 2020 Memorandum) explores the Lebanese procedural framework relating to SGBV and its limitations, furnishing criminal justice actors with specific guidance and recommendations drawn from international human rights law and standards and recommended practice that may be used throughout the criminal process, based on Lebanese law such as it exists today. Whenever the content of the present memorandum would have duplicated that of the aforementioned publications, duplication has been minimized by providing cross references to the relevant publication.

The current memorandum therefore builds on the ICJ’s research on SGBV in Lebanon, including analysis of the relevant legal and procedural frameworks, and previously reviewed judicial decisions. The factual elements contained in the present publication are based on a combination of key informant interviews and the findings of a two-day seminar on *recommended practice with respect to evidentiary standards in cases of SGBV* hosted by the ICJ in collaboration with the National Commission for Lebanese Women (NCLW) in October 2020. The seminar provided a platform to foster exchanges among Lebanese judges, prosecutors, police officers, lawyers, forensic practitioners and international experts, with a view to identifying how international human rights law and standards applicable to the identification, gathering, storing, admissibility, exclusion and evaluation of evidence may be used to fill gaps and strengthen domestic law and practice.

5. The national police agency of Lebanon.

6. Directorate General of Internal Security Forces, General Memorandum on the Rules of communication and treatment by ISF officers in relation to complaints of domestic violence, Doc. 316/204-4, 30 July 2018.

7. ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019.

8. ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020.

2. INTERNATIONAL HUMAN RIGHTS STANDARDS APPLICABLE TO EVIDENTIARY PRACTICES AND PROCEDURES IN CASES OF SGBV

A. Applicable international legal framework

Sexual and gender-based violence

Gender-based violence, defined by the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) as “violence that is directed against a woman because she is a woman or that affects women disproportionately,”⁹ incorporates multiple forms, acts, omissions and manifestations “that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion or other deprivations of liberty.”¹⁰

Sexual violence against women and girls is, as such, a manifestation of gender-based violence. The CEDAW Committee has also held that gender-based violence against women constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), seriously inhibiting “women’s ability to enjoy rights and freedoms on a basis of equality with men.”¹¹ The prohibition on gender-based violence against women is now recognized as a principle of customary international law,¹² which is binding on all States, irrespective of whether or not they are parties to international treaties codifying the prohibition in binding instruments.

Numerous international authorities, including courts and tribunals, have confirmed that rape constitutes a form of torture under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) when committed by or at the instigation of or with the consent or acquiescence of public officials because it causes serious physical and mental suffering not only when it might be inflicted to obtain information or a confession, or to punish or intimidate the victim, but also because its perpetration is rooted in gender discrimination.¹³ International authorities have also found that forms of sexual assault may constitute torture or other forms of cruel, inhuman or degrading treatment.¹⁴

Lebanon’s obligations under international and human rights law with respect to combatting and responding to SGBV,¹⁵ together with the State’s international human rights law obligations to respect, protect and fulfil human rights more generally,¹⁶ were discussed at length in the ICJ’s July 2019 Report. To reiterate in brief, human rights treaties and customary international law by which Lebanon is bound impose an obligation on the Lebanese State to adopt a range of measures, including effective legislative, judicial, administrative, educational and other appropriate measures, to respect, protect and fulfil the human rights of all.¹⁷

9. CEDAW Committee, *General recommendation No. 35*, para. 1.

10. CEDAW Committee, *General recommendation No. 35*, para. 14.

11. CEDAW Committee, *General recommendation No. 19: Violence against women*, UN Doc. A/47/38 (1992), para. 1.

12. CEDAW Committee, *General recommendation No. 35*, para. 2.

13. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/7/3 (2008), paras. 34-36; *Prosecutor v. Brđanin*, International Criminal Tribunal for the former Yugoslavia (ICTY), IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 523; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 633, 682, 698 (Vol. 1); *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 129 (perpetrator did not rape any male detainees); *Prosecutor v. Zejnil Delalić et al.*, ICTY, IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras. 941, and 963 (rapes were committed because the victims were female); *Prosecutor v. Brđanin*, ICTY, No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 523; *Aydin v. Turkey*, European Court of Human Rights (ECtHR) (Grand Chamber), Application No. 23178/94, Judgment of 25 September 1997, para. 836.

14. The UN Special Rapporteur on torture had already noted in 1986 that sexual abuse is one of the various methods of physical torture. See, *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119. See also CEDAW Committee, *General Recommendation No. 19*, para. 7.

15. ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019, pp. 5-6.

16. ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019, pp. 6-8.

17. Human Rights Committee (HRC), *General Comment No. 31: The Nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras. 7-8.

In particular, Lebanon's obligations under international human rights law require the repeal of all laws and standards, including those pertaining to criminal evidence and procedure, that discriminate against women, such as those endorsing, denying or justifying SGBV or perpetuating impunity for such acts.¹⁸ Equally, the State is duty-bound to ensure the prevention and eradication of discriminatory and prejudicial customs and practices commonly encountered at the executive and judicial levels, including those that justify or promote SGBV, and that are often based on harmful gender stereotypes and preconceived and stereotypical notions about what constitutes SGBV against women.¹⁹

Lebanon has an obligation to ensure women's genuine access to justice and effective remedies for SGBV offences,²⁰ and to exercise due diligence to prevent, investigate, criminally sanction and provide remedy and reparations for SGBV. Under international human rights law, where States fail to act with due diligence to prevent SGBV offences, or to investigate, prosecute, punish and provide reparation for such acts of violence committed against women by private actors, States may be held accountable for their failures.²¹

There is no single international instrument setting out evidentiary practices and procedures specifically applicable to the investigation, prosecution and adjudication of SGBV crimes. Several pertinent non-treaty instruments, however, provide detailed standards for the investigation, prosecution and adjudication of criminal offences. While these instruments are often customized for crimes distinct from SGBV offences, they articulate general legal principles and practices that are either directly applicable or applicable by analogy to such offences. With a view to bolstering SGBV investigation, prosecution and adjudication strategies and practices in Lebanon, the ICJ considers it necessary to analyze and draw inspiration from these instruments.

The present memorandum is also informed by instruments developed at the international level that provide guidance to States and key stakeholders, including declarations and resolutions adopted by United Nations (UN) bodies, as well as those emerging from UN conferences, on how to strengthen and consolidate legal and operational frameworks addressing SGBV. Protocols that specifically address appropriate and gender-sensitive responses to SGBV offences developed by UN agencies are also given due consideration, including, *inter alia*, those developed under the auspices of or by the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United Nations Office on Drugs and Crime (UNODC) and the World Health Organization (WHO).

B. Applicable domestic legal framework

i. SGBV offences under domestic law

The current Criminal Code is more than 70 years old. Despite the fact that several amendments have been proposed to the Lebanese Parliament, it has not evolved to meet international human rights law and standards. The Criminal Code not only fails to criminalize *all* forms of SGBV,²² but it legalizes acts of discrimination against women.

In its July 2019 Report and October 2020 Memorandum, the ICJ analyzed the SGBV-related legal framework, identifying where it conforms with, and falls short of, international law and standards, and made recommendations for legislative reform to the Lebanese authorities. Key findings of these publications are set out below.

18. CEDAW Committee, *General recommendation No. 35*, para. 26(a).

19. CEDAW Committee, *General recommendation No. 35*, para. 26(b) & (c).

20. ICCPR, arts. 2(3), 3 & 26; CEDAW, arts. 2(b) & (c), 3 & 15(1); CEDAW Committee, *General Recommendation No. 33: Women's Access to Justice*, UN Doc. CEDAW/C/GC/33 (2015), paras. 1, 2, 15, 16, 17, 19 & 20.

21. See, for example, CEDAW Committee, *Goekce (deceased) v. Austria*, UN Doc. CEDAW/C/39/D/5/2005 (2007), para. 12.1.1; and *V. K. v. Bulgaria*, UN Doc. CEDAW/C/49/D/20/2008 (2011), para. 9.4.

22. CEDAW Committee, *General recommendation No. 35: gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (2017), para. 14.

Rape and sexual assault

The definition of rape under the Criminal Code and Law No. 293/2014 does not comply with international law and standards.²³ In 2008, the CEDAW Committee called on Lebanon to ensure “that marital rape is criminalized,”²⁴ yet articles 503-504 of the Criminal Code penalizing rape explicitly exclude the spouse from their scope, and Law No. 293/2014 makes no reference to marital rape. Rather, the latter criminalizes a spouse’s use of threats or violence to claim a “marital right to intercourse” (article 7) but not the non-consensual violation of women’s right to personal security and bodily integrity.

The Criminal Code and Law No. 293/2014 do not adequately define other forms of sexual assault, falling short of international law and standards, including articles 1 and 2 of CEDAW and CEDAW Committee recommendations.²⁵ Law No. 293/2014 narrowly defines domestic violence in article 2 as “an act, act of omission, or threat of an act committed by any family member against one or more family members... related to one of the crimes stipulated in this law, and that results in killing, harming, or physical, psychological, sexual, or economic harm.” The crimes stipulated in article 3 of the Law, amending the Criminal Code, are forced begging, indecency, prostitution, homicide, adultery and causing or threatening harm to a spouse when “obtaining a marital right to intercourse.” In addition to rape, other forms of sexual assault, threats of assault, sexual harassment and non-physical harm, such as psychological and economic harms not based on acts defined in article 3, are among the acts that article 3 of the Law fails to cover. Acts that draw their source from some of the most deeply entrenched patriarchal traditions, such as forcing girls to marry or preventing women from leaving the house, are also not included.

The limited forms of rape and other forms of sexual assault that could be prosecuted are not recognized as a violation of women’s physical, sexual or psychological integrity in accordance with CEDAW Committee recommendations.²⁶ Rather, the Criminal Code addresses sexual offences as crimes against “public morality and decency,” thereby characterizing these offences as intrusions on the “honour” of the victim/survivor, their family and society. Conceiving and criminalizing sexual offences along these lines diminish their seriousness and are irreconcilable with international standards,²⁷ infringing on women’s human rights, including their right to personal security, autonomy, sexual autonomy, the right to bodily integrity and to be free from discrimination on the basis of sex/gender, and the right to access to justice and effective remedies.

Further, the repeal of article 522 of the Criminal Code in 2017, which enabled the authorities to cease a prosecution or suspend a conviction if a perpetrator of sexual assault married the victim, is an incomplete step towards adequately addressing SGBV against minors. Article 505 of the Criminal Code codifies the offence of statutory rape with a minor. However, a valid marriage between the perpetrator and a 16 to 18-year-old victim prevents the prosecution or imprisonment of the perpetrator. Similarly, article 518 of the Criminal Code provides that a valid marriage between a perpetrator who “seduces a [16 to 18-year-old] virgin girl with a promise of marriage” prevents the perpetrator’s prosecution or imprisonment. These provisions run counter to Lebanon’s obligations under international human rights law and standards.²⁸ They perpetuate patriarchal, archaic norms about the so-called “honour” of the victims and their families being restored through marriage, and shield offenders of sexual offences from accountability, entrenching impunity and subjecting women to secondary victimization and discrimination. Moreover, the CEDAW Committee and Committee on the Rights of the Child have noted that a child under 18 years has limited capacity, if any, to provide free, full and informed consent to marry.²⁹

23. CEDAW, articles 1, 2 & 16; CEDAW Committee, *General recommendation No. 35*, para. 29(e); CEDAW Committee, *General Recommendation No. 19*, para. 24(b).

24. CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Lebanon*, UN Doc. CEDAW/C/LBN/CO/3 (2008), para. 27.

25. CEDAW Committee, *General recommendation No. 35*, para. 2; CEDAW Committee, *General Recommendation No. 19*, paras. 6 & 7; Convention on the Rights of the Child (CRC), arts. 19(1) & 34.

26. CEDAW Committee, *General recommendation No. 35*, paras. 29(a) & (e).

27. CEDAW, articles 1, 2 & 15.

28. CEDAW, arts. 1, 2, 3, 5(a) and 15.

29. CEDAW Committee and Committee on the Rights of the Child (CRC Committee), *Joint General Recommendation No. 31 of the CEDAW Committee on the elimination of discrimination against women / General Comment No. 18 of the CRC Committee on harmful practices*, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014), para. 20.

"Virginity"

Articles 503-512 of the Criminal Code, treating "virginity" as an aggravating factor for sentencing, imply that rape committed against women who are not "virgins" is a "lesser" crime than that which is committed against "virgins," and confer an unwarranted preferential victimhood status on the latter. The legal framework should refrain from making such distinctions, which are based on harmful gender stereotypes perpetuating discrimination against women with the meaning of article 1 of CEDAW, and instead administer sentences that are commensurate with the gravity of the offence of rape.³⁰

Sexual harassment

The ICJ understands that in December 2020, following pressure and continued advocacy efforts from civil society, the Lebanese Parliament adopted legislation criminalizing sexual harassment. As of February 2021, the ICJ has not had the opportunity to review the legislation, but it hopes to be able to do so in the future.

Previous analysis undertaken by the organization on sexual harassment indicated that efforts to legislate against sexual harassment,³¹ including the approval of a draft law by the Lebanese Council of Ministers in 2017, were inadequate. The provisions contained in the draft law studied by the ICJ failed to meet international law and standards,³² which require a robust definition of sexual harassment, such as that formulated by the CEDAW Committee.³³ While the definition of sexual harassment in article 2 of the draft law made explicit reference to "undermin[ing] the... dignity of the victim," it simultaneously referred to acts that would undermine their "honour." Article 2 of the draft law, if adopted as it was then formulated, would amend article 535 of the Criminal Code, and consequently fall under the heading of "public morals and ethics." Criminalizing and characterizing sexual harassment as a violation of the victim's "honour" or "morality," as opposed to integrity, dignity and autonomy, perpetuate discrimination against women. Moreover, the draft legislation failed to explicitly envisage the wide set of circumstances in which sexual harassment may occur, including public spaces, educational institutions, receipt of services and sporting activities.

Adultery

Articles 487-489 of the Criminal Code, as amended by article 3 of Law No. 293/2014, criminalize adultery by a man or woman. In addition to violating international standards,³⁴ the criminalization of adultery has been found to amount to sex discrimination by the CEDAW Committee.³⁵

Sex work

While the Law on Public Health of 1931 permitted the sale of sex in licensed locations, no new licenses have been issued since 1975.³⁶ Article 523 of the Criminal Code criminalizes those who engage in "secret prostitution" or facilitate the practice, making sex work *per se* a criminal offence in Lebanon. Law No. 164/2011 also criminalizes engagement in "prostitution" by victims of trafficking,³⁷ unless the "victim [...]" proves that she was compelled to commit acts that are punishable by law or that she was compelled to violate the terms of residency or work," in which case the victim may avail of an amnesty from punishment.³⁸ The CEDAW Committee has found that the "criminalization of prostitution" acts as a barrier to women's effective access to justice.³⁹

30. CEDAW Committee, *General Recommendation No. 35*, para. 29(a).

31. This analysis is based on the July 2019 Report, October 2020 Memorandum and a joint submission on Lebanon to the 79th Pre-Sessional Working Group of the CEDAW by the International Commission of Jurists and ABAAD Resource Center for Gender Equality, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fICO%2fLBN%2f43478&Lang=en.

32. CEDAW, arts. 2(b)-(e).

33. CEDAW Committee, *General Recommendation No. 19*, para. 18.

34. CEDAW, arts. 1, 2 & 15.

35. CEDAW Committee, *General Recommendation No. 33*, para. 9.

36. See: <file:///Users/admin/Downloads/Lebanon%20Country%20Assessment%20-%20English.pdf>.

37. Criminal Code, art. 586(1), amended by Law No. 164/2011.

38. Criminal Code, art. 586(8), amended by Law No. 164/2011.

39. CEDAW Committee, *General Recommendation No. 33*, paras. 9 & 49.

Abortion

Pursuant to article 541 of the Criminal Code, abortion is a criminal offence and both women who undergo them and individuals who perform them are subject to severe penalties.⁴⁰ While there is no explicit exception to the criminalization of abortion in the Criminal Code, women who terminate pregnancies in order to preserve or “save their honour” may benefit from “attenuating circumstances” (article 545). It is not clear, however, whether such circumstances apply to victims/survivors of sexual assault, and in the event they do, the provision itself is a patriarchal construct that discriminates against women, contravening Lebanon’s obligations under international human rights law and standards.⁴¹ In order for victims/survivors of sexual assault to exercise their right to effective remedy and reparation, and to deter women from seeking unsafe abortions, Lebanon must ensure effective access to sexual and reproductive healthcare services and sexual and reproductive rights, including safe access to legal abortion and post-abortion care in all cases, and particularly in cases of rape.⁴²

40. Criminal Code, art. 541 stipulates that women who undergo abortions can be punished with a term of imprisonment ranging from six months up to three years.

41. CEDAW, arts. 1, 2 & 12(1).

42. CEDAW Committee, *General recommendation No. 35*, para. 18.

3. EVIDENCE-GATHERING

A. Applicable international human rights law and standards and recommended practice

International law, particularly international human rights law and standards prescribe that investigations of alleged human rights violations and abuses, such as SGBV, must be: (i) prompt; (ii) effective and thorough; (iii) independent and impartial; and (iv) transparent.⁴³ These obligations constitute fundamental requirements of any investigation into incidents of SGBV.

Detailed criteria for ensuring that investigations of alleged human rights violations and abuses, such as SGBV, meet these requirements are set out in, for example, the *UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (UN Principles on Extra-legal Executions),⁴⁴ the *UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment),⁴⁵ 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),⁴⁶ and the *United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol).⁴⁷ The investigative obligations outlined in these instruments govern the gathering of evidence in the investigation of SGBV offences.

Given that healthcare providers play a central role in gathering evidence necessary for proving SGBV, including evidence critical to identifying, apprehending, prosecuting and convicting perpetrators of SGBV and to documenting the immediate and long-term physical and mental health consequences on victims/survivors, the standards presented below are also informed by the WHO's *Guidelines for medico-legal care for victims of sexual violence* (WHO Guidelines).⁴⁸ The Guidelines describe the assessments and examinations that medical and forensic practitioners should undertake in their interactions with a victim/survivor of SGBV.

i. Search for evidence must be thorough and effective

In the context of SGBV offences, the broad purpose of a criminal investigation is to establish the facts relating to the alleged incident of SGBV, with a view to identifying those responsible for it and ultimately facilitating their prosecution. An investigation may also serve the purposes of other proceedings intended to secure redress for victims/survivors.⁴⁹

International standards prescribe that investigations must be thorough and effective, and as such, exhaustive.⁵⁰ Investigators must take all reasonable steps to search for and gather all direct and circumstantial evidence, including by:

43. See, *inter alia*, OHCHR, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (Minnesota Protocol), (New York/Geneva: OHCHR, 2017), paras. 15-16 & 22; HRC, *General Comment No. 31*; Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48 (2009), para. 1814; *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 (2005), principle. III; UN *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment), UN Doc. A/RES/55/89 (2000), principle 2.

44. UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (UN Principles on Extra-legal Executions), UN Doc. E/1989/89 (1991), principles 9-17.

45. UN *Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment*, principles 1-6.

46. Minnesota Protocol, paras. 19, 22 et seq.

47. OHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol), Professional Training Series No.8/Rev.1, (New York/Geneva: OHCHR, 2004), paras. 77-84.

48. World Health Organization (WHO), *Guidelines for medico-legal care for victims of sexual violence*, (Geneva: WHO, 2003).

49. Istanbul Protocol, para. 77.

50. UN *Principles on Extra-legal Executions*, principle 9; UN *Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment*, principle 2.

- Identifying the victim(s) in cases resulting in death⁵¹ or when seeking to obtain statements from the victim/survivor of the alleged crime;⁵²
- Determining the method, cause, location, date and time of the crime, and all of the surrounding circumstances;⁵³
- Recovering and preserving evidence, including medical evidence, related to the alleged crime to aid any ensuing prosecutions;⁵⁴
- Determining who was involved in the commission of the crime or contributed to it, and their associated individual and collective responsibility;⁵⁵
- Identifying possible witnesses and obtain statements from them concerning the alleged incident.⁵⁶

The European Court of Human Rights (ECtHR) has reiterated on numerous occasions the obligation to take reasonable steps to gather all relevant evidence. For example, the Court has held, “the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eyewitness 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.”⁵⁷

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;⁵⁸ a failure to identify weapons used in the commission of an offence, and how they were used;⁵⁹ autopsies that failed to identify key details regarding how a person was killed;⁶⁰ a failure to conduct a forensic examination of the crime scene;⁶¹ the failure to interview all witnesses at the crime scene⁶² and imprecise expert reports with findings unsupported by any established facts.⁶³

The Inter-American Court on 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.”⁶⁴

The search for and collection of all the direct and circumstantial evidence allows investigators to elaborate logical hypotheses and lines of inquiry that are genuinely oriented toward revealing the material facts, and identifying the responsible parties.

51. See, for example, Istanbul Protocol, para. 25(a).

52. See, for example, Istanbul Protocol, para. 77.

53. See, for example, Minnesota Protocol, para. 25(d).

54. See, for example, Istanbul Protocol, para. 77.

55. See, for example, Minnesota Protocol, para. 25(e).

56. See, for example, Istanbul Protocol, para. 77.

57. *Finucane v. the United Kingdom*, European Court of Human Rights (ECtHR), Judgment of 1 July 2003, para. 69. Council of Europe (CoE), *Guidelines on Eradicating Impunity for Serious Human Rights Violations*, (Strasbourg: Directorate of Human Rights and Rule of Law, Council of Europe, 2011), Guideline VII.

58. *Mahmut Kaya v. Turkey*, ECtHR, Judgment of 28 March 2000, Reports 2000- III, para. 104.

59. *Kaya v. Turkey*, ECtHR, Judgment of 19 February 1998, Reports 1998-I, para. 89; *Ogur v. Turkey*, Judgment of 20 May 1999, Reports 1999-III, para. 89.

60. *Kaya v. Turkey*, ECtHR, Judgment of 19 February 1998, Reports 1998-I, para. 89; *Ogur v. Turkey*, ECtHR, Judgment of 20 May 1999, Reports 1999-III, para 89; *Salman v. Turkey*, ECtHR, Judgment of 27 June 2000, Reports 2000-V, para. 106.

61. *Mahmut Kaya v. Turkey*, ECtHR, Judgment of 28 March 2000, Reports 2000-III, para 104.

62. *Assenov v. Bulgaria*, ECtHR, Judgment of 28 October 1998, Reports 1998-VIII, para 103.

63. *Ogur v. Turkey*, ECtHR, Judgment of 20 May 1999, Reports 1999-III, para. 89.

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

The notion of effectiveness with respect to a criminal investigation refers to means and process, and not to a particular outcome, such as the apprehension of the culprit. According to the Minnesota Protocol, for example, an investigation must be carried out “diligently and in accordance with good practice.”⁶⁵

International standards also require that States take measures to prevent and sanction persons who hinder investigations.⁶⁶ In this regard, the IACtHR has stated, “[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.”⁶⁷

ii. Legal powers and financial and human resources

Those presiding over and carrying out investigations into alleged human rights violations and abuses, such as SGBV, must be sufficiently empowered to do so.⁶⁸ Investigating authorities must have the necessary resources and powers required to carry out an effective investigation, including to compel witnesses and require the production of information and documents and access to places.⁶⁹ The Minnesota Protocol, for example, specifically states that any investigative mechanism conducting an investigation must have the power to compel witnesses and require the production of evidence.

This implies that the State must adopt a legal framework enabling authorities to exercise their investigative functions effectively. In this regard, the IACtHR has stated, “it is essential that the entities responsible for the investigations are provided, both formally and substantively, with the appropriate and necessary powers and guarantees,”⁷⁰ in order to carry out investigations into allegations of human rights violations and abuses (abuses, such as SGBV). 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 the documents and information relevant to the investigation of the facts denounced.”⁷¹ The IACtHR has further stated, “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.”⁷²

Investigative mechanisms must also have adequate financial and human resources, including qualified investigators and other relevant experts.⁷³ In cases of SGBV, and sexual assault more specifically, this would involve, among other things, ensuring requisite technical expertise by licensed forensic and health practitioners, including, in particular, with respect to the potential consequences of sexual assault on victims/survivors who may suffer physical effects, such as unwanted pregnancy or sexually transmitted infections (STIs), as well as experience anxiety, depression and post-traumatic stress disorder (PTSD) sometimes for a lengthy period of time.⁷⁴

iii. Types of evidence

Effective investigations into allegations of human rights violations and abuses, such as SGBV, require investigators, to the extent that is possible, to “collect and confirm (for example by triangulation) all testimonial, documentary and physical evidence.”⁷⁵ Inadequate evidence-

65. Minnesota Protocol, para. 27, citing: *Abubakar Amirov and others v. Russia*, HRC Communication 1447/2006, UN Doc. CCPR/C/95/D/1446/2006 (2009), para. 11.4 et seq; *Rodríguez Vera and others (The Disappeared from the Palace of Justice) v. Colombia*, IACtHR, Judgment of 14 November 2014, para. 489.

66. See, *inter alia*, the International Convention for the Protection of All Persons from Forced Disappearance (ICPPED), arts.12 (4), 22 & 25 (1)(b); the *Declaration on the Protection of All Persons from Enforced Disappearance*, Adopted by General Assembly resolution 47/133 of 18 December 1992, art. 13(5).

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

68. See, among others, the Minnesota Protocol, para. 27.

69. See, for example, *Paul and Audrey Edwards v. United Kingdom*, ECtHR, Judgment of 14 March 2002.

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

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

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

73. See, for example, Minnesota Protocol, para. 27.

74. See, for example, Istanbul Protocol, para. 131.

75. See, for example, Minnesota Protocol, para. 24.

gathering, including in cases of SGBV perpetrated against women, may result in systematic failures at the investigation stage and, as such, may constitute a barrier to victims'/survivors' access to justice and effective remedies.⁷⁶ For example, the ICJ has observed that in SGBV cases, witness evidence alone – at least as confined solely to statements of the victim/survivor and of the alleged perpetrator – is often insufficient to establish a sustainable criminal case.⁷⁷ Therefore, in conducting investigations into SGBV offences, it is crucial that, to the extent possible, witness evidence be supplemented with other forms of evidence.

In the context of the investigation and prosecution of potentially unlawful deaths, the ICJ has set out detailed guidance on: (a) types of evidence; (b) chain of custody; and (c) crime scene management. The critical and relevant aspects of this guidance are recapitulated below.⁷⁸ The following sections also consider and draw upon the WHO Guidelines and the Istanbul Protocol, which provide recommended practices for the gathering of evidence in cases of sexual assault, including rape. These cases may necessitate a meticulous examination to detect any physical injury, including areas of the body that would not be inspected in a routine medical examination (see below section iv, "evidence in cases of sexual assault").

a. Witness evidence

Witness evidence, which involves identifying and interviewing individuals with knowledge of or information about the crime, and evaluating the statements obtained as a result, is a key aspect of any investigation into allegations of human rights violations and abuses, such as SGBV. As recalled by the Minnesota Protocol, witness interviews may be used to: "(i) obtain as much relevant information as possible, through a systematic and fair process, to assist the investigators in objectively establishing the truth; (ii) identify possible suspects; (iii) allow individuals an opportunity to provide information that they believe is relevant to establishing the facts; (iv) identify further witnesses; (v) identify victims; (vi) establish the location of crime scenes [...]; (vii) establish background information and facts [...]; and (viii) identify leads in the investigation."⁷⁹

The investigation should involve preparing a list of the most significant witnesses and prioritizing interviews with them. These should include victims/survivors, alleged perpetrators where the survivor and/or a third person is able to identify them (or when the alleged perpetrators admit their involvement), and other individuals who saw or heard the crime being committed. Individuals with relevant knowledge of the victim/survivor or suspected perpetrator – that is, persons who can provide evidence about any contextual elements required to be proven – should also be interviewed, including family, friends, neighbours and professionals dealing with the victim and perpetrator, such as social workers and doctors.⁸⁰

The ECtHR has found that where investigators are caught between two irreconcilable versions of the facts, they must adopt "a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances,"⁸¹ and strive to assess the evidence. Accordingly, whenever the victims/survivors and alleged perpetrators have put forward irreconcilable versions of events in their respective witness evidence, investigators must attempt to test the credibility of these different versions, and that of any additional witnesses, and seek to establish the truth with precision.

Interviewing victims/survivors of SGBV, however, must be handled with a particular degree of sensitivity. Investigators must approach and frame interviews with SGBV victims/survivors in a manner that responds to their concerns and needs, and ensures they are not revictimized as a result of the interview. This may include, among other things, ensuring a female investigator

76. CEDAW Committee, *General Recommendation No. 33*, para. 25(vi).

77. ICJ, *Women's Access to Justice for Gender-based Violence – Practitioners' Guide No. 12*, (Geneva: ICJ, 2016), p. 216.

78. For more detail, see ICJ, *The investigation and prosecution of potentially unlawful death – Practitioners' Guide No. 14*, (Geneva: ICJ, 2019) pp. 90 et seq.

79. Minnesota Protocol, para. 70.

80. CEDAW Committee, *General Recommendation No. 33*, para. 51(i).

81. *M.C. v. Bulgaria*, ECtHR Judgment of 4 December 2003, para. 177.

conducts the interview, unless the victim/survivor prefers otherwise;⁸² upholding victims/survivors' agency by advising them of their rights;⁸³ affording protection to victims/survivors' where they are at risk;⁸⁴ and ensuring referral pathways are available to provide access to psycho-social, medical, legal or other forms of support the victim/survivor may require.⁸⁵

While victim/survivor testimony can play a critical role in criminal proceedings, there will be instances where victims/survivors opt not to provide testimony and/or written statements regarding the SGBV offence/s to which they have been subjected, owing to, among other things, fear prompted by threats made by the offender or shame or stigma stemming from patriarchal social norms prevalent within society, including from investigators, prosecutors, lawyers, members of the judiciary or the victim's/survivor's family.⁸⁶ The absence of victim/survivor testimony may prove challenging to the prosecution's case. States should ensure that their domestic legal frameworks provide for the possibility of prosecution even in instances where the victim/survivor does not wish to or is unable to give evidence.⁸⁷

b. Forensic evidence

An effective investigation involves the diligent, careful collection, analysis and storage of forensic evidence. This section describes the different types of evidence that are collected and analyzed and how they should be logged and stored, also known as the "chain of custody."

Chain of custody

The Minnesota Protocol defines chain of custody as "a legal, evidentiary concept requiring that any prospective item of evidence be conclusively documented in order to be eligible for admission as evidence in a legal proceeding."⁸⁸

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."⁸⁹ It 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."⁹⁰ Forensic and other scientific evidence may help lessen reliance on confessions or other forms of evidence. In addition, it may at times be critical to substantiating whether SGBV offences have been committed, or to corroborating suspicions by, for example, providing evidence that links a suspect to a crime, or eliminating them from an enquiry.⁹¹ The WHO Guidelines maintain that the ultimate objective

82. United Nations Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, UN Doc. ST/ESA/329 (2010), p. 16.

83. United Nations Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, UN Doc. ST/ESA/329 (2010), p. 34.

84. CEDAW Committee, *General Recommendation No. 33*, paras. 14(e) & 51(j); CEDAW Committee, *General Recommendation No. 35*, paras. 31(a)(i) & (ii).

85. CEDAW Committee, *General Recommendation No. 35*, paras. 31(a)(iii), (iv) & (v).

86. United Nations Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 40.

87. United Nations Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 40.

88. Minnesota Protocol, para. 65.

89. 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 (2010), para. 2.

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

91. OHCHR, *Rule-of-law tools for post-conflict States: Prosecution initiatives*, HR/PUB/06/4 (New York/Geneva: OHCHR, 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 (2014), para. 19, which stipulates: "[f]orensic 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." Analogous considerations apply in the investigation and prosecution of SGBV offences.

of collecting forensic evidence is to prove or disprove a physical connection between individuals and places or objects.⁹²

The importance of collecting forensic evidence generally, and complying with international law and standards for doing so, has been underscored by international authorities, including the UN General Assembly (UNGA),⁹³ the former UN Commission on Human Rights,⁹⁴ the UN Human Rights Council,⁹⁵ the General Assembly of the Organization of American States,⁹⁶ the Committee Against Torture⁹⁷ and the IACTHR.⁹⁸ Its direct bearing on legal proceedings involving cases of sexual assault, including rape, has been affirmed by the United Nations Secretary-General,⁹⁹ the CEDAW Committee¹⁰⁰ and UN Women.¹⁰¹

The intersection between justice and medicine requires a coordinated approach to forensic evidence collection, the execution of which is reliant on procedural protocols for all concerned agencies. The CEDAW Committee has therefore recommended that States develop protocols for police and healthcare providers for the collection and preservation of evidence in cases of SGBV, in addition to capacity-building for a sufficient number of investigators, legal and forensic personnel, so that they can competently conduct investigations into such cases.¹⁰²

Several international instruments and standards set out clear requirements for collecting forensic evidence: the Istanbul Protocol;¹⁰³ UN Principles on Extra-legal Executions;¹⁰⁴ the Minnesota Protocol;¹⁰⁵ and the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁰⁶ While these instruments are not specific to SGBV crimes, they reflect internationally recognized and recommended practices that may be employed in the context of SGBV investigations. The specialized examinations that yield forensic evidence critical to the successful investigation of cases of sexual assault, including rape, are contained in the WHO *Guidelines for medico-legal care for victims of sexual violence*, explored below (see below section iv, “evidence in cases of sexual assault”).

92. WHO, *Guidelines for medico-legal care for victims of sexual violence*, p. 57.

93. See, for example, UNGA Resolutions Nos. 61/155 of 19 December 2006 & 68/165 of 18 December 2013.

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

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

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

97. Committee against Torture (CAT Committee), *Conclusions and recommendations on Colombia*, UN Doc. CAT/C/CR/31/1 (2004), para. 10(f), which stipulates: “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.”

98. *Myrna Mack-Chang v. Guatemala*, IACTHR Judgment of 25 November 2003, 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).

99. UNGA, *In-depth study on all forms of violence against women: report of the Secretary-General*, 6 July 2006, A/61/122/Add.1, para. 323.

100. CEDAW Committee, *General Recommendation No.33*, para. 51(k).

101. United Nations Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 40.

102. CEDAW Committee, *General Recommendation No. 33*, para. 51(k).

103. See especially, Istanbul Protocol, paras. 215-232 on “sexual torture and rape.”

104. UN Principles on Extra-legal Executions, principles 9, 12, 13, 14, 16 & 17.

105. UN, *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Manual on Extra-legal Executions), UN Doc. E/ST/CSDHA/.12 (1991). 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.”

106. See, art. 19. In addition to the above and given that the victims of enforced disappearance and/or extrajudicial executions are also often victims of torture, ill-treatment and sexual violence, the following international standards are also relevant: UN Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment; Istanbul Protocol; and the International Protocol on the documentation and investigation of sexual violence in conflict (Commonwealth Protocol).

There are four main types of evidence that may be subject to forensic investigation: biological, digital, documentary and physical.¹⁰⁷

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, hairbrushes and unlaundered clothing. The identification and proper collection and preservation of biological samples¹⁰⁸ 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/survivors and their families, and this collection should be based on full, genuine, free and prior informed consent.¹⁰⁹ Biological samples are also a source of DNA.¹¹⁰

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.¹¹¹

In addition to those mentioned above, a number of forensic specimens are of particular interest in cases of sexual assault, including rape, such as semen, lubricant, saliva, hair and skin.¹¹² When collecting these specimens for forensic analysis, the WHO Guidelines outline a number of principles to which medical practitioners should strictly adhere so as to ensure that the specimens are not contaminated or tainted in any way during their procurement and handling.¹¹³ With a view to precisely collecting and preserving biological evidence, such as DNA sampling, blood samples, hair, saliva and sperm, medical practitioners are advised to observe particular methodologies that are explored in detail in the Istanbul Protocol and WHO Guidelines.¹¹⁴

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 may be found in images on cameras, on the internet, computers, mobile phones and other digital media, such as USB flash drives. Internet and mobile phone service providers frequently keep their data (such as call records) only for a certain period of time, such that access to the data may be difficult if not impossible if there is a delay between the crime being committed and the commencement of the investigation. States should therefore ensure that phone calls made by individuals to police and first responders to report crimes are recorded,¹¹⁵ including those made by victims/survivors to emergency services.

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

107. 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. See, for example, Minnesota Protocol, para. 146, which notes that 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.

108. 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.

109. Minnesota Protocol, para. 133.

110. See further, ICJ, *The investigation and prosecution of potentially unlawful death – Practitioners' Guide No. 14*, p. 92.

111. Minnesota Protocol, para. 133.

112. For an exhaustive list see, WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 59-60.

113. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 58-59.

114. See, for example, WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 58-62.

115. CEDAW Committee, *General Recommendation No.33*, para. 51(i).

media, metadata may 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. However, metadata may 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 recover and/or examine digital evidence if it is expected to be important in an investigation.¹¹⁶

Digital evidence should be collected, preserved, and analyzed in accordance with international recommended practice.¹¹⁷

Documentary evidence

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 may be obtained and analyzed from such documents.

Physical evidence

The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (International Protocol on the Documentation and Investigation of CRSV, which deals with the documentation of sexual violence as a crime or violation of international law) defines physical evidence as, “physical objects or matter that can provide relevant information to help establish that sexual violence took place, or provide a link between a crime and its victim or between a crime and its perpetrator.”¹¹⁸

Physical evidence, where detectable, appropriately recovered and preserved, may offer the best prospect for providing objective and reliable information about the incident under investigation.¹¹⁹ It is generally accompanied by testimony, including that provided by expert witnesses¹²⁰ (see below section v, “expert evidence”). Physical evidence is a particularly important means of corroboration where the victim/survivor is dead, unavailable or unwilling to provide witness testimony. Given that physical evidence is primarily retrieved from the crime scene, as well as from the bodies of victims/survivors, offenders and/or witnesses, either living or deceased, the successful retrieval of physical evidence is largely contingent upon on how long ago the incident occurred, and whether the crime scene is accessible to investigators.¹²¹

In cases of sexual violence, the International Protocol on the Documentation and Investigation of CRSV advises that physical evidence be accompanied, at all times, by other forms of corroborative evidence in order for it to serve its ultimate purpose, which is to corroborate a proposition or set of facts supported by initial evidence.¹²² For example, physical evidence may assist investigators in making a determination about the circumstances of the alleged act, including the presence of inherently coercive circumstances, such as those negating the victim/s/survivor’s consent, including the existence of drugs or alcohol in their system.¹²³

The International Protocol on the Documentation and Investigation of CRSV provides that typical physical evidence of sexual violence may include, *inter alia*:

116. Minnesota Protocol, para. 145.

117. See, for example, Association of Chief Police Officers, Good Practice Guide for Digital Evidence, United Kingdom, available at: http://www.digitaldetective.net/digital-forensicsdocuments/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf.

118. *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (International Protocol on the Documentation and Investigation of CRSV), Second Edition, March 2017, p. 154.

119. United Nations Office on Drugs and Crime (UNODC), *Crime scene and physical evidence awareness for non-forensic personnel*, (Vienna: UNODC, 2009), p. 4.

120. International Protocol on the Documentation and Investigation of CRSV, p. 155.

121. International Protocol on the Documentation and Investigation of CRSV, p. 155.

122. International Protocol on the Documentation and Investigation of CRSV, p. 155.

123. International Protocol on the Documentation and Investigation of CRSV, p. 155.

- Physical material: clothing, including that worn by the victim/witness or offender, blindfolds, bedding, towels, condoms, ligatures and rope/tape;
- Electronic/digital items: phones, computers and other communication paraphernalia. Information retrieved from such items may comprise digital evidence (see above);
- Traces evidence: fibers, hair, glass, soil, paint, metal and plaster;
- Documents for analysis: handwriting, typewriting, paper and ink analysis. The information recorded in the document may constitute digital evidence (see above);
- Weapons: firearms, knives, bullets, bullet/shell casings, explosives, shrapnel, torture devices and residue;
- Impressions: fingerprints, footwear impressions, tool marks and tyre tracks.¹²⁴

As recalled by the Minnesota Protocol, other forms of physical evidence that may arise in the context of evidence-gathering and necessitate the attention of investigators include: military ordnance and weapons; blood spatter analysis; burn patterns; and car paint analysis.¹²⁵ In all cases, care needs to be taken to ensure that the analysis of such evidence is underpinned by a validated scientific method.¹²⁶

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.¹²⁷

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.¹²⁸ Analysis of items such as clothing may determine the distance between the impact and the position from which the gun was discharged. Chemical traces on the hands or clothing of a suspect may indicate that he or she has fired a weapon.¹²⁹ Trained firearms examiners may also be able to link fired projectiles, cartridge casings, and related ammunition components to a particular firearm. In addition to matching a particular firearm to a fired projectile or used cartridge casing, a firearms examiner may also be able to identify which company manufactured the gun.¹³⁰ At the time of drafting of the Minnesota Protocol, however, toolmark and firearms analysis lacked a precisely defined and universally accepted process.¹³¹ This remains the case today.

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.¹³² Latent fingerprints may be seen on porous surfaces using chemical enhancement techniques that are particularly effective on paper.¹³³

iv. Evidence in cases of sexual assault

Priorities

The WHO states, “when caring for victims of sexual violence, the overriding priority must always be the health and welfare of the patient. The provision of medico-legal services thus assumes secondary importance to that of general health care services (i.e. the treatment

124. International Protocol on the Documentation and Investigation of CRSV, p. 154.

125. Minnesota Protocol, para. 142.

126. Minnesota Protocol, para. 142.

127. Minnesota Protocol, para. 137.

128. Minnesota Protocol, para. 138.

129. Minnesota Protocol, para. 139.

130. Minnesota Protocol, para. 138.

131. See, for example, Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, US Department of Justice, (Washington D.C., 2009), pp. 150–55, available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

132. Minnesota Protocol, para. 140.

133. Minnesota Protocol, para. 141.

of injuries, assessment and management of pregnancy and STIs). Performing a forensic examination without addressing the primary health care needs of patients is negligent.”¹³⁴

With a view to gathering and collecting necessary evidence and information sensitively, as well as accurately and effectively, the Istanbul Protocol recommends that investigation teams include both male and female specialists so that women have the option to be both interviewed and examined by an investigator and medical practitioner with a gender of their choosing.¹³⁵ The Istanbul Protocol notes that revictimization may be exacerbated when victims/survivors are examined and/or interviewed by individuals who physically resemble the perpetrator of the offence to which they have been subjected, which, in sexual assault cases, are often men.¹³⁶

Women who have been subjected to sexual assault, including rape, should be afforded a full medical-forensic examination in order to detect and treat any injuries sustained during the assault irrespective of the moment in time at which they attend any healthcare facility.¹³⁷ An assessment of victims’/survivors’ acute healthcare concerns – which can include serious or life-threatening injuries – and their safety and well-being should take precedence over examinations pertinent to yielding forensic evidence.¹³⁸ According to the WHO Guidelines, this examination should be carried out by a healthcare professional and encompass a range of components, including, *inter alia*:

- Obtaining the victim's/survivor's full, genuine, free and prior informed consent, preferably in writing;¹³⁹
- Taking a medical history, including by recording any known health problems, the victim's/survivor's immunization status and any medications they consume, which may relate to information about the sexual assault, but only with respect to medical symptoms and health issues that have resulted from it;
- Taking an account of the offence described as sexual assault;
- Conducting a physical examination;
- Conducting a detailed genito-anal examination related to penetration;
- Recording and classifying injuries, if any;
- Collecting indicated medical specimens for diagnostic purposes;
- Collecting forensic specimens [referred to above as biological evidence];
- Labelling, packaging and transporting forensic specimens to maintain the chain of custody of the evidence (see below section vii, “chain of custody”);
- Arranging follow-up care; and
- Providing a medico-legal report.¹⁴⁰

Genito-anal examinations may be a traumatic and painful experience for a victim/survivor who has just experienced a sexual assault. It is therefore crucial to ensure the victim/survivor is made to feel as comfortable and secure as possible in the circumstances.

Physical examinations documenting injuries, such as abrasions, bruises, lacerations and wounds, should be duly conducted and recorded.¹⁴¹ Documentation and interpretation of injuries, which is pivotal to investigations and any legal proceedings stemming therefrom, is a complex area that requires practitioners to have demonstrated expertise, reinforced by peer review, continuing education and quality assurance programmes.¹⁴² The WHO has noted, “without accurate documentation and expert interpretation of injuries, any conclusions drawn about how injuries occurred might be seriously flawed,” which, in turn, will have profound repercussions for both the victim/survivor and the alleged perpetrator of the sexual assault.¹⁴³

134. WHO, *Guidelines for medico-legal care for victims of sexual violence*, p. 17.

135. Istanbul Protocol, para. 154.

136. Istanbul Protocol, para. 154.

137. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 30-31.

138. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 31-32.

139. WHO, *Guidelines for medico-legal care for victims of sexual violence*, p. 34.

140. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 30-55.

141. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 44-48.

142. WHO, *Guidelines for medico-legal care for victims of sexual violence*, p. 44.

143. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 44-45.

Model service provision prescribes that the health, as well as the physical and psychological integrity of SGBV victims/survivors should be the foremost concern of medical practitioners.¹⁴⁴ This, for example, entails prioritizing the treatment of physical injuries and STIs and the management of pregnancies over forensic examinations.¹⁴⁵ In the interest of not subjecting the victim/survivor to protracted medical testing, medico-legal services should be provided simultaneously, at the same place, and be available 24-hours a day in a one-stop shop fashion or, where it is not feasible to provide a full-time service, on an on-call basis outside regular working hours.¹⁴⁶ Furthermore, medical practitioners must conduct examinations in an environment that is sensitized and conducive to the potential distressed state of the victim/survivor.

While forensic evidence may play a pivotal role in criminal investigations and prosecutions, prosecutors and judges must be alert to the fact that forensic evidence should not be a prerequisite for the conviction of an offender.¹⁴⁷ Forensic evidence may not be available in court proceedings for a number of reasons, including situations where: complainants have not given their full, free and informed consent to undergoing an examination; actions have been undertaken that inadvertently compromise evidence, such as douching or washing following the sexual assault; or a lack of available State-funded facilities or trained personnel qualified to carefully collect evidence in a manner that is not intrusive and is sensitive to the needs of the victim/survivor.¹⁴⁸ Investigators must therefore aim to gather a variety of evidence with a view to building a robust prosecution case.

v. Expert evidence

Expert evidence and testimony is used to furnish the court with information on issues that are likely beyond the scope of expertise and knowledge of a factfinder, something which, in turn, may negatively impact their ability to impartially evaluate the evidence presented at trial.¹⁴⁹

In the context of torture, the Istanbul Protocol affirms the purpose of written or oral testimony presented by expert physicians 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.”¹⁵⁰

The analysis, clarification and subsequent presentation of various forms of evidence discussed in this document may require testimonial intervention from skilled professionals, including, for example, forensic evidence, pathology and ballistics experts. Physical and psychological injury specific to cases of sexual assault, such as genital injuries or rape trauma syndrome,¹⁵¹ may prove crucial to a factfinder’s comprehension and subsequent assessment of the diverse and often complex behaviours and psychological consequences sexual assault may provoke in victims/survivors.

The UNODC has noted that in cases of SGBV against women, issues that prompt the need for expert testimony include:

- Issues relating to popular myths regarding violence against women;
- Issues relating to the victim’s perplexing behaviour, such as behaviour caused by post-traumatic stress disorder, dynamics of sexual violence or sexual abuse;

144. WHO, *Guidelines for medico-legal care for victims of sexual violence*, p. 17; African Commission on Human and Peoples’ Rights (ACoMHPR), *Guidelines on combatting sexual violence and its consequences in Africa*, 2017, principle 40.4 (a)(iii).

145. WHO, *Guidelines for medico-legal care for victims of sexual violence*, p. 17.

146. WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 17-18.

147. UN Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 40.

148. UN Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 40.

149. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 111.

150. Istanbul Protocol, para. 122.

151. See, WHO, *Guidelines for medico-legal care for victims of sexual violence*, pp. 14-15.

- Issues relating to medical or forensic issues, such as DNA evidence and fingerprints.¹⁵²

A number of jurisdictions have grappled with prevailing misconceptions and assumptions about sexual assault offences among criminal justice actors,¹⁵³ including stereotyped expectations about the behaviour of victims/survivors and offenders.¹⁵⁴ These misguided misconceptions may engender flawed credibility assessments about the victim/survivor, and by extension, the reliability of their evidence and account of the assault. Expert testimony aims to counteract myth-peddling, ensuring that factfinders may appropriately evaluate the evidence.¹⁵⁵ The UNODC has recalled, "expert witnesses can explain common victim behaviour, the effects of violence on victims and assist factfinders in evaluating their credibility when the victims' actions might not be what judges...expect."¹⁵⁶ In cases where victims/survivors are disinclined to participate in trial proceedings, or retract their statement, expert witnesses may be able to provide an explanation as to why this is, allowing the factfinder to examine the evidence without interference from bias.¹⁵⁷

The UNODC has recommended that the following considerations be taken into account by prosecutors calling on expert witnesses:

- Inform the factfinder of commonly-known characteristics of abuse victims so that they can compare the behaviour of the victim with that profile;
- Reduce the likelihood that the factfinder will develop negative feelings against the victim based on myths and misunderstandings;
- Enable the factfinder to examine the facts without interference of bias or emotion;
- Challenge the plausibility of the victim's account at trial, not to bolster the victim's own personal qualities of truth-telling or falsehood;
- Explain why victims retract and give the factfinder reason to assess in-court retractions;
- Assist the factfinder in evaluating credibility, not to enhance that credibility.¹⁵⁸

International norms and standards emphasize that forensic services and/or experts "must be able to function impartially and independently of any potentially implicated persons or organizations or entities."¹⁵⁹ This arises from the State's obligation to ensure investigations be conducted "by independent and impartial bodies."¹⁶⁰

The Special Rapporteur on Torture has stated, "[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."¹⁶¹ Likewise, the Special Rapporteur has stated, "[p]ublic forensic medical services should not have a monopoly with regard to expert

152. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, 2014, p. 111. See also generally, Dempsey, M., "The Use of Expert Witness Testimony in the Prosecution of Domestic Violence in England and Wales Crown Prosecution Service," 2004 (London).

153. See generally, Ellison, L., "Closing the accountability gap: The prosecutorial use of expert witness testimony in sexual assault cases," *The International Journal of Evidence & Proof*, (2005) E&P 239-268; Horan J., and Goodman-Delahunty J., "Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned," *The University of New South Wales Law Journal*, (2020) 43(2) 707-737.

154. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, 2014, p. 111.

155. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, 2014, p. 111.

156. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, 2014, pp. 111-112.

157. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, 2014, pp. 62 & 112.

158. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, 2014, p. 112.

159. UN Principles on Extra-legal Executions, principle 14; UN Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment, principle 2; Istanbul Protocol; International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions, standards 15 & 16 & recommendations for good practices No. 16.10.

160. HRC, *General Comment No. 31*, para. 15.

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

forensic evidence for judicial purposes.”¹⁶² 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 be entitled to review the State tests, and to conduct their own independent evaluations.¹⁶³

The role of non-governmental organizations in the field of forensic science is very important.¹⁶⁴ Therefore, intergovernmental bodies have recommended that States enhance cooperation and coordination with non-governmental organizations in the planning and conduct of investigations.¹⁶⁵

vi. Crime scene management

Every important physical location in the investigation needs to be located and identified, including the site of encounters between the victim and any identified suspects, the location of any crimes, and, where applicable, possible burial sites. Of course, the discovery of a body in a particular location may or may not be the place where the death actually occurred. Any forensic analysis, including but not limited to the crime scene, requires documentation by photography, measurement, note-taking and inventory. For example, investigators should record any physical injuries that the victim/survivor sustained as a result of SGBV offences, as well as her potentially shocked or frightened demeanour. This evidence should in turn be cross-checked with a view to enhancing understanding of the way in which the crime was committed in a particular location, and to boosting the accuracy and reliability of the physical evidence collected and the credibility of the victim’s/survivor’s account.

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.¹⁶⁶ Of course, forensic experts may not always be readily available. 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 may supplement photographs, due to poor image resolution video should not be considered a primary means of capturing images. The Minnesota Protocol provides detailed guidelines that are applicable to any crime scene on how to search, document and secure them.¹⁶⁷

vii. Chain of custody

The chain of custody of a piece of evidence or “an exhibit” refers to a process that enables the complete chronological history of its custody to be tracked and recreated – for example, who has had care and control of the evidence from the time it was first located and recovered to the time it may eventually be produced in court as part of the prosecution case. The “continuity” of possession or custody of evidence is crucial in that it determines the integrity of a piece of evidence and possibly its eligibility for admission as evidence in legal proceedings. Any gaps in the continuity or custody of evidence may give rise to claims relating to, for example, contamination, tainting and tampering, and may result in its exclusion¹⁶⁸ or seriously undermine its probative value.

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.¹⁶⁹

162. *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 (2002), para. 26(k).

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

164. See, *inter alia*, former UN Commission on Human Rights, Resolution No. 2005/26, “Human rights and forensic science,” of 19 April 2005.

165. See, *inter alia*, Human Rights Council, Resolution No. 10/26, “Forensic genetics and human rights,” of 27 March 2009.

166. Minnesota Protocol, para. 167.

167. Minnesota Protocol, paras. 4-97, 168, 170-173, 176-177, 181. See also, ICJ, *The investigation and prosecution of potentially unlawful death – Practitioners’ Guide No. 14*, pp. 78-112.

168. Minnesota Protocol, para. 65.

169. Minnesota Protocol, para. 64.

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.¹⁷⁰ 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. 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.¹⁷¹ Storage facilities for evidence should be clean, secure, and suitable for maintaining items in appropriate conditions, and protected against unauthorized entry and cross-contamination.¹⁷²

B. Domestic framework in light of international human rights law and standards and recommended practice

The use, collection, storage, retrieval and deployment of evidence for criminal offences, including SGBV, is governed by the Lebanese CCP.

i. Search for evidence and legal powers

The CCP vests investigatory powers, including powers relating to the gathering, storage and preservation of evidence, in a number of criminal justice actors, including Public Prosecutors,¹⁷³ General Advocates,¹⁷⁴ Investigating Judges¹⁷⁵ and Judicial Police.¹⁷⁶ Upon receipt of a criminal complaint, including allegations of SGBV, the OPP – or the Judicial Police officers to whom the task has been delegated by the OPP – have authority to conduct a preliminary inquiry by collecting evidence with a view to determining whether charges are appropriate and, if so, their nature.¹⁷⁷ They are empowered to conduct physical searches of the crime scene; undertake the scientific analysis of all relevant evidence; and take witness statements.¹⁷⁸

Where an *in flagrante delicto* offence has been committed,¹⁷⁹ the CCP dictates that the OPP must relinquish the investigation to an Investigating Judge. Investigating Judges are legally empowered to: (i) inspect and compile a record of the crime scene and any other relevant locations; (ii) seize weapons and other items used in the commission of the offence, in addition to other objects that may assist in establishing truth; (iii) interrogate any suspect(s) and question them about any seized evidence; and (iv) interview individuals who witnessed the offence or possess information about it.¹⁸⁰ Investigating Judges may also take any investigative measure they deem necessary for the determination of the truth, recording any step undertaken in writing.¹⁸¹

Several Judges participating in the October 2020 Seminar on the "Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases" hosted by the ICJ and NCLW expressed serious concerns about the extent to which SGBV investigations are thorough and effective, as

170. Minnesota Protocol, para. 65.

171. Minnesota Protocol, para. 65.

172. Minnesota Protocol, para. 66.

173. CPP, arts. 24 & 31.

174. CPP, art. 31.

175. CPP, arts. 55-58.

176. CPP, arts. 40 & 41. For further information see, ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, pp. 24-27.

177. CCP, art. 47 (as amended by Law No. 359/2001).

178. CCP, art. 47 (as amended by Law No. 359/2001).

179. CCP, art. 29 defines an offence discovered *in flagrante* as: (a) "an offence witnessed as it occurs; (b) an offence where the perpetrator is apprehended during or immediately after its commission; (c) an offence following which the suspect is chased by hue and cry [i.e., a situation where bystanders are summoned to assist the apprehension of an offender who has been witnessed in the act of committing an offence]; (d) an offence detected immediately after [it was] committed, within a time where traces of its commission are clearly discernable; (e) an offence where a person is caught in possession of objects, weapons or documents indicating that he is the perpetrator, within 24 hours of the occurrence of the offence."

180. CCP, arts. 56, 31, 32 & 98.

181. CCP, art. 61.

prescribed by international standards. In fact, one Judge remarked that investigations of this nature are “cursory,” likely owing, in his view, to the scarcity of resources afforded to investigators in practice.¹⁸² In practice, this means that case files transmitted to the Trial Chamber by the OPP are fragmentary, with critical types and pieces of evidence excluded altogether. Given the fact that investigations are often undertaken years before the case is actually adjudicated, it is often too late in the process to request another investigation or a search for supplementary evidence.

ii. Witness evidence

In conducting their inquiry, the OPP¹⁸³ and Investigating Judges¹⁸⁴ are legally empowered to interview witnesses under oath, duly recording and signing the final statement.¹⁸⁵ Investigating Judges may summon persons to hear their testimony, including those whose names appear on the criminal complaint, those whose names may arise in the course of the investigation, or others who possess information that may assist the investigation. Judicial Police officers are also authorized to interview witnesses, albeit witnesses interviewed by the Judicial Police are not required to take an oath before doing so.¹⁸⁶ This distinction may have bearing on the weight or persuasive value the Trial Chamber assigns to such statements compared with statements taken under oath.

Persons who fail to appear before an Investigating Judge when summoned to do so may be subject to a fine or enforceable summons issued by Investigating Judges compelling their attendance.¹⁸⁷ Witnesses who make false statements or conceal certain facts about the case may be referred to the OPP for prosecution pursuant to article 408 of the Criminal Code.¹⁸⁸

Minors, that is all persons under 18 years of age, may be heard by Investigating Judges “for information purposes” and cannot be held liable for false testimony.¹⁸⁹ “Ascendants and descendants” of the accused, including brothers and sisters, relatives by marriage and “informants” who received a financial reward for their testimony cannot testify before Investigating Judges,¹⁹⁰ or the Trial Chamber, but may be heard as sources of information.¹⁹¹

The CCP does not contain any specific guidance on interview techniques for victims/survivors of SGBV. As discussed in the October 2020 Memorandum,¹⁹² the ISF General Memorandum – ancillary to Law No. 293/2014 – furnishes ISF police units and officers responding to domestic violence complaints with guidelines on how to appropriately receive and conduct interviews for victims/survivors, including, for example, by receiving victims/survivors “with respect” and “in a separate interrogation room to ensure their privacy.”¹⁹³ The ICJ has previously recommended that these guidelines be strengthened further to include provisions that prevent the questioning of the victim/survivor multiple times, so as to avoid their secondary victimization.¹⁹⁴ It also remains unclear the extent to which these gender-sensitive considerations are used in practice, including whether they are given due regard when dealing with SGBV victims/survivors more generally.

182. Seminar on the “Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases,” 27-28 October 2020, hosted by the ICJ and National Commission for Lebanese Women (NCLW).

183. CCP, art. 31.

184. CCP, art. 56.

185. CCP, arts. 31(c) & 87.

186. CCP, arts. 41 & 47.

187. CCP, art. 95.

188. CCP, art. 89.

189. CCP, art. 91.

190. CCP, art. 91.

191. CCP, arts. 185, 256 & 257.

192. ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 28-33.

193. See Directorate General of Internal Security Forces, General Memorandum on the Rules of communication and treatment by ISF officers in relation to complaints of domestic violence, Doc. 316/204-4, 30 July 2018, Section III, paras. 1-9.

194. ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 32-22.

iii. Expert evidence

Aside from provisions that empower Investigating Judges to obtain medical expertise in order to assess the mental and physical health of defendants,¹⁹⁵ few provisions explicitly authorize the use of experts for other purposes. Article 41 of the CCP, for example, allows the Judicial Police conducting investigations into *in flagrante* delicto offences to seek “expert assistance,” if necessary. Article 34 of the CCP stipulates that where “the nature of the offence” requires a technical competency beyond that of the investigating authority, the Public Prosecutor or Investigating Judge may avail of the services of one or more “competent experts” to “clarify technical issues,”¹⁹⁶ including at the crime scene.¹⁹⁷ Article 34 also makes explicit reference to certain forms of expertise, including “forensic pathologists” and “physicians” for situations where the victim’s condition necessitates an “autopsy or medical assistance.” Experts must strictly adhere to the scope of their assignment as directed by the Public Prosecutor or Investigating Judge. Upon completion of their task, experts must issue a report documenting their findings, and the means by which they arrived at their conclusions.¹⁹⁸ In addition, the Court may “summon experts who performed forensic duties pertaining to the case” in order to seek clarification about their expert opinions provided in the case before the Court.¹⁹⁹

While article 34 refers to a number of circumstances in which investigators may resort to the assistance of experts, it does not meet international standards governing the use of forensic evidence in several respects. It fails to envisage the broader range of circumstances that may require the intervention of external expertise, including instances where victims/survivors do not require medical assistance *per se*, but the intervention of a specialized sexual assault team in order to yield important evidence. Moreover, article 34 neither mandates the proper collection, nor timely testing of material that could result in evidence.

Prosecutors participating in the October 2020 Seminar hosted by the ICJ and NCLW expressed concern about the willingness of forensic practitioners to respond to requests for examinations in a timely manner; they even recalled specific instances in SGBV cases where forensic expertise was forthcoming in a timely manner only when the victim/survivor paid the forensic practitioner a private fee for services rendered.²⁰⁰ Where victims/survivors were unable to provide such compensation, they were left waiting, sometimes for as long as one week,²⁰¹ a lapse of time that may render the whole exercise pointless or seriously undermine its effectiveness.

iv. Forensic evidence

According to the website of the Lebanese Ministry of Justice, the Department of Forensic Medicine and Criminal Evidence (DFMCE), regulated by Decree No. 7384/1946,²⁰² has a roster of 81 forensic doctors,²⁰³ including 13 forensic practitioners in Beirut; 11 in North Lebanon; 10 in Mount Lebanon; seven in South Lebanon; eight in Beqaa; and five in Nabatieh.²⁰⁴ Information available to the ICJ, however, indicates that, out of 81 registered forensic practitioners, only a dozen have received formal training in forensic medicine, which requires an additional year of academic study.²⁰⁵ Of the 12 forensic practitioners who possess the necessary skills to practice forensic medicine, only two are women.²⁰⁶

The ICJ is concerned that the remaining 69 forensic practitioners who lack formal training in their discipline are registered with the DFMCE. A Lebanese Prosecutor at the Court of Appeal informed the ICJ that prosecutors have encountered erroneous and unsound forensic reports that have

195. See, for example, CCP, art. 74.

196. CCP, art. 34.

197. CCP, art. 41.

198. CCP, art. 34.

199. CCP, art. 244.

200. Seminar on the “Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases,” 27-28 October 2020, hosted by the ICJ and NCLW.

201. Seminar on the “Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases,” 27-28 October 2020, hosted by the ICJ and NCLW.

202. Issued on 14 November 1946.

203. Ministry of Justice, available at: <https://www.justice.gov.lb/index.php/modernization-projects-details/9/2>.

204. Decree No. 7384, issued on 14 November 1946.

205. Interview conducted on 28 October 2019 with MD H.C., a forensic medicine practitioner based in Beirut.

206. Interview conducted on 28 October 2019 with MD H.C., a forensic medicine practitioner based in Beirut.

resulted in impunity.²⁰⁷ The high-profile case of Roula Yaccoub, previously examined by the ICJ, revealed that considerable gaps in the investigation, coupled with flawed methodologies employed by forensic practitioners, led them to misidentify the cause of the victim's death.²⁰⁸

Lack of formal training and credentials is but one of the critical issues hampering the credibility and competence of forensic practitioners in Lebanon. Several Judges informed the ICJ that they had seen falsified forensic reports issued by practitioners on the DFMCE's list of qualified forensic examiners.²⁰⁹ The fact that the Ministry of Justice continues to nominate forensic practitioners – who have been accused of producing false reports – to undertake forensic assessments raises serious concerns, including, among others, about the compatibility of investigations involving such practitioners with international human rights law and standards pertaining to investigations of human rights violations and abuses, such as SGBV, particularly with the requirement that such investigations be effective.

While efforts have been underway to improve the competence, authority and consequent ability of the DFMCE,²¹⁰ criminal justice actors have confirmed that the DFMCE competence and capacity remains limited and poorly resourced.²¹¹ International standards set forth obligations for the diligent and careful collection of forensic evidence. They indicate that the aim of forensic evidence is to alleviate dependency on confessions and other forms of evidence that may be subject to manipulation or other abusive practices, such as corruption. This highly technical branch of knowledge is therefore reliant on objective and transparent practices provided by licensed and experienced practitioners.

Given that only two women are formally educated in forensic medicine in Lebanon, it is likely that victims/survivors of sexual assault will be examined by a male practitioner. This runs contrary to recommended practices as outlined in the Istanbul Protocol, WHO Guidelines and guidance provided by UN Women, which provide that female victims/survivors of sexual assault should always be afforded care by female practitioners, unless they specifically request to be examined and interviewed by male practitioners.

v. Chain of custody

Evidence-gathering guidance for Investigating Judges is set out in article 98 of the CCP, which stipulates that any documentary evidence that is impounded must be labelled, signed, placed under the seal of the Investigation Department and recorded in writing. There is no obligation, however, to record evidence in photographic form as prescribed by international standards. Moreover, the CCP does not provide detailed guidance on the retrieval, storing and preservation of biological samples and forms of physical evidence, such as fingerprint and firearms evidence. The omission of specific procedures relating to the gathering of such crucial types of evidence highlights the shortcomings of the domestic procedural framework and, as a result, undermines the ability of criminal justice actors to conduct thorough and effective investigations.

Judges participating in the October 2020 Seminar told the ICJ that case files transmitted to them by the OPP rarely contained descriptions of the crime scene.²¹² When investigators were pressed to furnish the Court with such information, they were unable to do so.²¹³ This practice runs contrary to international standards, which specifically call for crime scenes to be recorded in both documentary and photographic form.

207. Interview conducted with a Public Prosecutor at the Court of Appeal in Mount Lebanon by the ICJ, 11 July 2019.

208. ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019, pp. 29-30; ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 48-49.

209. Seminar on the "Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases," 27-28 October 2020, hosted by the ICJ and NCLW.

210. Namely the establishment of a committee charged with examining the situation of forensic medicine and evidence in Lebanon.

211. Interview conducted with a Public Prosecutor at the Court of Appeal in Mount Lebanon by the ICJ, 11 July 2019.

212. Seminar on the "Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases," 27-28 October 2020, hosted by the ICJ and NCLW.

213. Seminar on the "Collection and Evaluation of Evidence in Sexual and Gender-based Violence Cases," 27-28 October 2020, hosted by the ICJ and NCLW.

4. ADMISSIBILITY AND EXCLUSION OF EVIDENCE

A. Applicable international human rights law and standards and recommended practice

Admissible evidence, in the context of criminal proceedings, refers to evidence that may be presented to a factfinder to support or bolster a set of facts in issue or elements presented by the prosecution or the defence with a view to proving such sets of facts to the factfinder. In order for evidence to be considered admissible by the court, and not inadmissible by virtue of statutory exclusionary rules, it must satisfy certain jurisdictional and admissibility criteria.

i. General requirements

Evidence, including expert reports, must have been legally obtained/produced. The evidence may be inadmissible where: (i) it was obtained by authorities that under domestic legislation were not empowered to undertake an investigation; (ii) it is collected by investigating authorities who are not vested with jurisdiction over the alleged offences; (iii) it is obtained through procedures that do not comply with the conditions established for the collection of admissible evidence under national legislation; and/or (iv) it has been obtained through illegal methods (principle of legality of evidence).²¹⁴

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 gathered meets international law and standards and may, therefore, be used at trial in a manner that upholds the right of the accused to a fair trial, the rule of law and the administration of justice. As delineated in the Minnesota Protocol, this review should include examining whether, for example:

- The investigation was carried out independently and impartially (para. 28);
- Investigative processes and outcomes were transparent, including through openness to the scrutiny of the general public and of victims' families (para. 32);
- Every stage of evidence detection, recovery, storage, transportation and forensic analysis, from crime scene to court and through to the end of the judicial processes, was effectively recorded to ensure the integrity and "continuity" of the evidence (chain of custody) (para. 65);
- 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) – have been interviewed (para. 72);
- Any technical gaps in the investigation have been identified and, where appropriate, international assistance has been sought (para. 77);
- A "living chronology" was created and reviewed each time new evidence was collected or obtained (para. 83); and
- An autopsy was performed in cases of death (paras. 25, 148 and detailed guidelines).²¹⁵

Following such review, the prosecutor (or other designated authority as the case may be) may advise that the prosecution be stayed or discontinued if the evidence is not sufficient to justify the charge.²¹⁶

ii. The prohibition on reliance on information gained through torture or other ill-treatment at trial

Should investigators, prosecutors or judges come into possession of evidence against a suspect they know or believe on reasonable grounds was obtained through recourse to unlawful methods that constitute a gross violation of the suspect's human rights, such as torture or other ill-treatment, they must refuse to use such evidence against anyone other than those who used

214. ICJ, *International Law and the Fight Against Impunity – Practitioners' Guide No. 7*, p. 214.

215. Minnesota Protocol. For more guidance on applying these steps in practice see, ICJ, *The investigation and prosecution of potentially unlawful death – Practitioners' Guide No. 14*, pp. 126-129.

216. UN Guidelines on the Role of Prosecutors, guideline 13(a), (b) & 14; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle F(i) & (j); CoM Recommendation (2000)19, paras. 24 & 27.

the methods.²¹⁷ International law establishes a prohibition on the use of evidence obtained through torture or other ill-treatment, or other forms of coercion. Article 15 of the Convention against Torture (CAT) stipulates, "[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." Like torture, other cruel, inhuman or degrading treatment is also prohibited under all circumstances by a range of treaty and non-treaty standards and by customary international law; the Human Rights Committee, the Committee against Torture, other UN experts and regional human rights courts and bodies have held that the exclusionary rule, therefore, applies also to evidence obtained as a result of cruel, inhuman or degrading treatment other than torture.²¹⁸

In terms of scope, the exclusionary rule applies to both statements by the accused or any other person, including whether or not this person is being called to testify as a witness; regardless of where the ill-treatment occurred (including abroad).²¹⁹ The rule also applies regardless of the seriousness of the charges or context.²²⁰

Once defendants allege that they have been tortured (or otherwise ill-treated), the burden of proof lies with the State to demonstrate beyond any reasonable doubt that the contested evidence was, in fact, not obtained through the use of torture, ill-treatment or duress or other coercion.²²¹ Thus, any and all confessions or statements obtained under torture or other cruel, inhuman or degrading treatment or through coercion is inadmissible as evidence in judicial proceedings.²²² This applies to such confessions or statements obtained from the accused person, as well as from anyone else.²²³ The evidence, however, may be used against the person who used such methods to bring them to justice.²²⁴

iii. Evidentiary requirements based on gender stereotypes

In many country contexts, negative gender stereotypes and cultural norms rooted in patriarchy continue to inform criminal justice actors' understanding of, and indeed frame their response to, SGBV offences. Such biases may deter SGBV victims/survivors from accessing justice, remedy and reparation for the harm suffered, as they, in turn, fear the prospective victim-blaming and/or scrutiny to which they may be subjected during criminal proceedings, including harmful gender stereotypes and biases about their background and behaviour, and that are generally invoked against them simply because they are women. For example, the UNODC has noted, "criminal justice professionals may condone or falsely believe that women and girls bring on violence by their actions, such as arguing with their spouse or boyfriend, dressing provocatively to go out, or walking alone at night."²²⁵

217. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle F(i).

218. See ICCPR, art. 7; ACHPR, art. 5; Arab Charter on Human Rights, art. 8; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 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; HRC, *General Comment No. 32*, para. 60; CAT: *General Comment No. 2*. See also Amnesty International, *Fair Trial Rights Manual*, (London: Amnesty International, 2014), section 17.1.

219. ICCPR, arts. 14(2) & (3); HRC, *General Comment No. 32*, para. 41; CAT, art. 15; CAT, Concluding Observations: United Kingdom, UN Doc. CAT/C/CR/33/3 (2004), paras. 4(a)(i), 5(d); CAT Committee, *P.E. v. France*, UN Doc. CAT/C/29/D/193/2001 (2002), para. 6.3; CAT Committee, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002 (2003), paras. 6.9-6.10. See also, IACtHR, Judgment of 26 November 2010, *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; ECtHR, *Othman v. United Kingdom*, Application No. 8139/09, Judgment of 9 May 2012, paras. 263-267, 282; Amnesty International, *Fair Trial Rights Manual*, (London: Amnesty International, 2014), section 17.1.

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

221. CAT Committee, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002 (2003), para. 6.10; HRC, *Nallaratnam v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004), para. 7.4.

222. CCPR, arts. 7, 15(2) & 14(3)(g); HRC, *General Comment No. 32*, para. 6; CAT, art. 15; International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families, arts. 10 & 18(3)(g); UN Guidelines on the Role of Prosecutors, guideline 16; ACHPR, art. 5; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle F; Arab Charter, arts. 8 & 16(f).

223. ICCPR, arts. 14(2) & 14(3)(g); HRC, *General Comment No. 32*, para. 41; CAT, art. 15.

224. UN Guidelines on the Role of Prosecutors, guideline 16.

225. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 29.

The CEDAW Committee has held that certain evidentiary requirements and practices, premised on gender stereotypes or prejudice, may impede women from exercising their right of access to justice.²²⁶ Indeed, certain evidentiary rules may further entrench gender bias and undermine the credibility of victims/survivors, particularly in cases of SGBV. Some examples are set out below.

a. The prompt complaint requirement

Delayed reporting of SGBV offences is often used to question or challenge the veracity of the allegations brought forth by the victim/survivor. Stereotypical assumptions that “genuine” SGBV victims/survivors will immediately report the incident to the authorities are deeply hurtful, harmful to victims/survivors and utterly misconceived; they fail to consider the many reasons for delays in the reporting of SGBV offences, including the victim’s/survivor’s:

- Fear of stigmatization, humiliation, not being believed, and retaliation;
- Being physically controlled by the perpetrator or others;
- Financial or emotional dependence on the perpetrator; and
- Distrust in, and/or lack of access to responsible institutions, resulting from geographically inaccessible courts and lack of specialized criminal justice personnel.²²⁷

The UNGA has called on States to ensure that courts do not draw any adverse inference from a delay of any length between the alleged commission of violence and the reporting thereof.²²⁸ The UN Handbook for Legislation on Violence against Women recommends that States adopt legislation prohibiting factfinders from holding delayed reporting against the victim/survivor.²²⁹

b. Prior actions

Evidence pertaining to the complainant’s (i.e., the victim’s/survivor’s) sexual history continues to be introduced at trial in some jurisdictions where it is considered an invaluable defence to sexual assault charges.²³⁰ Such evidence is often used to infer consent to sex on the victim’s/survivor’s part, discredit her and demonstrate her “bad character” before the trier of fact, seeking to impugn her credibility, and thus undermine the prosecution’s case. For example, evidence of a victim’s/survivor’s “promiscuity” may be introduced to undermine her credibility before a court and imply that the complainant consented to the sexual activity in question. Such inferences about women’s credibility and sexuality – that sexually active women are less credible as witnesses and more likely to provide consent – facilitate violations of women’s right to access justice and effective remedies and perpetuate stereotyped myths about women and SGBV offences. Moreover, the questioning or cross-examination of a victim/survivor about their sexual conduct may result in their “secondary victimization,” ultimately compounding the pain and suffering to which they have already been exposed.²³¹

International standards have thus sought to restrict the admissibility of evidence of victim’s/survivor’s prior sexual history. The Istanbul Convention stipulates, “[p]arties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.”²³² The UN Handbook for Legislation on Violence against Women underscores the merits of such legislative approaches, stating, “laws which prevent the introduction of a survivor’s sexual behaviour that is unrelated to the acts that are the subject of

226. CEDAW Committee, *General Recommendation No. 33*, paras. 3 & 23.

227. UN Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 41.

228. UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(e).

229. UN Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 41.

230. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 29.

231. UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(c).

232. Council of Europe, *Convention on combating violence against women and domestic violence* (Istanbul Convention), 11 May 2011, ETS 210, art. 54.

the legal proceeding can help protect women's privacy and avoid introduction of evidence that could prejudice the judge...against the survivor."²³³

Procedural restrictions can be found in the rules of procedure and evidence of international courts and tribunals. Rule 70(d) of the International Criminal Court's Rules of Procedure and Evidence, for example, stipulates, "[c]redibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness."

In England and Wales, the law prohibits the admissibility of evidence or questions about a victim's/survivor's sexual history by or on behalf of the accused, subject to certain exceptions. Guidance issued by the Crown Prosecution of England and Wales sets out some of these limited exceptions, which include, *inter alia*, instances where there is an alternative explanation for the physical conditions on which the prosecution relies to establish that intercourse took place.²³⁴ For example, evidence of a victim's/survivor's previous sexual liaison with a third party may explain why the complainant contracted an STI which the prosecution relies upon as evidence of penetration by the defendant.²³⁵

In Canada, the equivalent restriction on the admissibility of sexual history evidence in sexual offence proceedings is set out in provision 276 of the Criminal Code. Section 2 of the provision stipulates, "no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person."²³⁶ The provision also sets out the circumstances where sexual history evidence may be admissible, including where the judge determines that the evidence is: (i) of specific instances of sexual activity; (ii) relevant to an issue at trial; and (iii) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Prior acts of violence committed by the offender are important to establish the context of SGBV offences and may inform a number of assessments undertaken by criminal justice actors, including the potential risk of retaliation against the victim/survivor,²³⁷ charging decisions²³⁸ and recommendations for sentencing. The UNGA has recommended that States ensure that "evidence of prior acts of violence, abuse, stalking and exploitation by the perpetrator is considered during court proceedings, in accordance with the principles of national criminal law."²³⁹

The ICJ has noted that, in cases of domestic violence alleged to have been perpetrated as part of a long-term pattern of abuse, investigators should be alert to and record in detail the history of violence, and be especially conscious of any patterns of abusive conduct characterized by coercion or control imposed on the victim/survivor by the offender. Detailed documentation of each and every complaint by the victim/survivor should be ensured, so that any evidence of a pattern of assault, control or coercive behaviour spanning over a period of time may be made available as evidence on behalf of the prosecution.²⁴⁰

233. UN Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 42.

234. Crown Prosecution Service (England and Wales), *Rape and Sexual Offences – Chapter 4: Section 41 Youth Justice and Criminal Evidence Act 1999*, available at: <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-4-section-41-youth-justice-and-criminal-evidence>.

235. Crown Prosecution Service (England and Wales), *Rape and Sexual Offences – Chapter 4: Section 41 Youth Justice and Criminal Evidence Act 1999*, available at: <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-4-section-41-youth-justice-and-criminal-evidence>.

236. Canadian Criminal Code, *Evidence of complainant's sexual history*, article 276 (2), available at: <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-276.html>.

237. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, pp. 53-56.

238. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 82.

239. UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(g).

240. ICJ, *Women's Access to Justice for Gender-based Violence – Practitioners' Guide No. 12*, 2016, p. 217.

c. Misconceptions about sexual assault

Legal provisions that narrowly define sexual assault – by making it contingent on the use of force, violence or coercion, for example – in such a way as to require the production of evidence of the use of force in order to establish the commission of sexual assault offences, are highly problematic. Requiring evidence of a physical struggle or of the victim/survivor fleeing the scene, for example, as necessary to secure the conviction of a defendant on sexual assault charges reinforces the misconception that force is necessary to prove that the sexual act in question was committed without consent. It presumes that the victim/survivor must have struggled or attempted to flee, as opposed to considering more broadly circumstances where the victim/survivor did not consent to the sexual act. Ultimately, in such cases, victims/survivors are denied their right to justice and effective remedies. Such evidentiary requirements making it necessary for the prosecution to prove that the defendant used physical force against the victim/survivor, that the victim/survivor resisted or that the victim/survivor sought to escape reflect the erroneous belief that if sexual acts are genuinely non-consensual, the victim/survivor will always physically resist the assault and fight back. However, under international human rights law and standards, the presence of physical injury, use of force, resistance, etc. are not required to convincingly evidence the occurrence of sexual assault crimes; what ultimately matters, and what has to be proved beyond reasonable doubt to convict the perpetrator in sexual offence cases, is the absence/lack of consent or impossibility to consent on the part of the victim/survivor to the sexual conduct in question. Thus, the absence of physical injury that is detectable to the naked eye should not give rise to any presumption that the victim's/survivor's complaint of sexual assault is automatically implausible. Women who are raped, for example, may not struggle and physically resist out of fear. In such cases, it is possible that there will be no physical trace of assault.

B. Domestic framework in light of international human rights law and standards and recommended practice

i. General requirements

In domestic contexts, discriminatory attitudes and harmful gender stereotypes may undermine criminal justice actors' ability to assess the admissibility of evidence in SGBV criminal cases in a manner consistent with the right of victims/survivors to access justice and effective remedies without discrimination. Such attitudes and stereotyped beliefs may be codified in substantive law²⁴¹ – through, for example, the inadequate criminalization of conduct that amounts to SGBV or as a result of statutes of limitation for SGBV offences – and/or because of procedural rules curtailing victims'/survivors' access to justice for SGBV crimes. Criminal justice actors may also espouse prejudice and bias against women.

Discrimination, and failure to ensure equality before the law and equal protection of the law to all without discrimination, also explain the inadequacy or absence of protective measures for SGBV victims/survivors.²⁴² This holds particularly true in the case of Lebanon where the ICJ has found that criminal proceedings in SGBV cases continue to be undermined by attitudes that trivialize, minimize or deny SGBV crimes, in addition to manifestly inadequate and insufficient steps in the investigation and prosecution phases in SGBV cases, including a lack of gender-sensitive considerations and evidence-gathering procedures.²⁴³

Lebanon's CCP regulates the admissibility of evidence with respect to criminal trials generally.²⁴⁴ As is ordinarily the case in civil law jurisdictions, the CCP contains few rules regulating the admissibility and exclusion of evidence in criminal cases, and no specific rules for cases of SGBV. Nor are any such criteria set forth in Law No. 293/2014 concerning domestic violence offences.

241. For the case of Lebanon see, ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019, pp. 11-21; *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 14-24.

242. International Criminal Court (ICC), The Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 41.

243. See generally, ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019; *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020.

244. CCP, art. 1.

Generally, alleged offences may be “proved by any means,”²⁴⁵ and the assessment of the probative value of each piece of evidence, that is, the weight to be accorded to each item of evidence, is left to the appreciation of the judge(s). Accordingly, any lawfully obtained piece of evidence present in the case file is considered admissible by default, unless it is specifically excluded.

The CCP nonetheless provides some guidance as to the admissibility and exclusion of evidence. Judges may only base their decision on the admissibility of a piece of evidence that has been submitted into the record once they have heard oral submissions about whether it should or should not be admitted by the prosecution and the defence in adversarial proceedings.²⁴⁶ In practical terms, this means that judges may not base their decision on evidence obtained or consulted outside of the case record, and that both the prosecution and the defence must be given the opportunity to make oral submissions challenging the admissibility of any evidence that may eventually influence the Trial Chamber’s ultimate decision on the criminal charges against the defendant.

Items of evidence contained in the case file, including records and reports, may only be considered probative if they are “formally sound.”²⁴⁷ and the investigators who compiled the evidence in the case did so while discharging their duties, and provided that the evidence they collected was within their area of competence.”²⁴⁸

The Lebanese CCP also identifies specific circumstances under which evidence must be excluded from criminal proceedings. Pursuant to the CCP, evidence is excluded through the procedural concept of nullity,²⁴⁹ which refers to the annulment of a legal act or procedure. The cause of the nullity lies either in the absence of an element deemed essential to the effectiveness of the procedure, or in the failure to fully adhere to the legal procedure required. The concept of nullity of procedure is a civil law construct that performs a function similar to that of inadmissibility rules in common law jurisdictions.

Evidence-gathering measures that breach the rules of procedure delineated in the CCP, or the rights of the defence, may be subject to nullification. For example, if Judicial Police officers undertake a search of the home of a suspect or conduct a body search on an individual without first obtaining permission from the OPP, any evidence obtained in the course of that search is subject to nullification and thus excluded.²⁵⁰ Similarly, if Investigating Judges fail to inform the accused who appears before them for questioning of the charges against them and of their right to legal counsel, the interrogation shall be deemed null and inadmissible as evidence.²⁵¹

Section IV on “travelling, searching and the impounding of evidence,” contained in Chapter IV, Part III of the CCP sets out a number of investigative measures that may be undertaken by Investigating Judges. The same section also delineates the procedures by which Investigating judges are bound, including with respect to the search and seizure of evidence at the crime scene and chain of custody. Any search or investigative measure employed by Investigating Judges in breach of the rules of procedure stipulated in articles 98-104 of the CCP are subject to nullification.²⁵² However, “nullity shall not preclude the use of any available information that results from the search and is useful to the investigation, if it includes supporting evidence.”²⁵³

ii. The prohibition on reliance on information gained through torture or other ill-treatment at trial

There is no specific prohibition on the admissibility of evidence obtained through torture or other ill-treatment in the CCP. Provisions do stipulate, however, that the gathering of evidence must

245. CCP, art. 179.

246. CCP, arts. 179 & 250.

247. CCP, art. 190.

248. CCP, art. 190.

249. See, for example, CCP, arts. 43, 47, 73, 76, 78 & 79.

250. CCP, art. 47 (as amended by Law No. 359/2001).

251. CCP, art. 76.

252. CPP, art. 105.

253. CCP, art. 105.

be legal, and “must not be vitiated by moral or material coercion.”²⁵⁴ If it is established that Judicial Police officers “coerced” statements out of the accused or a witness during preliminary interrogations, such statements may be deemed null and void.²⁵⁵

iii. Prior actions

Lebanon’s legal framework does not currently contain provisions limiting the introduction of a victim’s/survivor’s sexual history as evidence in either civil or criminal proceedings. The ICJ is concerned that judges in Lebanon frequently rule that evidence relating to the sexual history of the victim/survivor is admissible at trial in circumstances that go beyond the limited exception to the prohibition against admitting such evidence, namely, that victim’s/survivor’s sexual history evidence may be deemed admissible exclusively when its introduction is necessary to safeguard the right of the accused to a fair trial and in the interests of justice. For example, extra-marital affairs, which are criminalized by virtue of articles 487-489 of the Criminal Code, are often used against SGBV victims/survivors to “legitimize” offences perpetrated against them by their spouse on the basis “provocation.”²⁵⁶

In accordance with international standards and recommended practice,²⁵⁷ the Lebanese authorities should ensure that legislation explicitly establishes rules limiting the admissibility of evidence relating to a victim’s/survivor’s sexual history, ensuring that such evidence is only permitted where both relevant and necessary, in line with the Istanbul Convention and recommended practice. Until such a time, Judges should exercise the wide discretionary powers afforded to them by the CCP to ensure that prejudicial evidence that aims to discredit SGBV victims/survivors on the basis of their sexual history be excluded unless its admissibility in the case is called for in light of the limited exception to the rule outlined above. By doing so, judges would ensure respect for the right of complainants of SGBV offences to access to justice and effective remedies for such crimes.

iv. Misconceptions about sexual assault

Problematically, the definition of rape in the Lebanese Criminal Code²⁵⁸ is based on “force,” “violence or the threat thereof,” completely omitting the notion of consent,²⁵⁹ which the CEDAW Committee has affirmed time and time again is the “essential element” of the crime of rape.²⁶⁰ Further, the CEDAW Committee has authoritatively opined that consent in the context of sexual conduct entails the existence of “unequivocal and voluntary agreement” to engage in such conduct.²⁶¹

While forensic evidence may play a transformative role in assisting to prove the commission of SGBV offences, the presence of physical injury on victims/survivors is not required to substantiate or corroborate the occurrence of such offences. The CEDAW Committee has stressed, “there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.”²⁶²

In this regard, the definition of rape in Lebanon’s Criminal Code, which implies that evidence of the use of force is necessary in order to establish that the offence of rape was committed, therefore, is inconsistent with international human rights law and standards and recommended practice. Even where courts accept the admission of a medical report that provides evidence of

254. CCP, art. 35.

255. CCP, art. 47.

256. See, for example, the case of Manal Assi, discussed in: ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019, pp. 43-44; ICJ, *Accountability for Sexual and Gender-based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, 2020, pp. 34-35.

257. UN Division for the Advancement of Women, Department for Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, p. 42.

258. Criminal Code, arts. 503-504.

259. ICJ, *Gender-based Violence in Lebanon: Inadequate Framework, Ineffective Remedies*, 2019, pp. 15-18.

260. *Karen Tayag Vertido v. Philippines*, Communication No. 018/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010), para. 8.7.

261. *Karen Tayag Vertido v. Philippines*, Communication No. 018/2008, para. 8.9.

262. *Karen Tayag Vertido v. Philippines*, Communication No. 018/2008, para. 8.5.

psychological damage inflicted against the victim/survivor, as opposed to evidence of physical injuries, few medical practitioners in Lebanon are qualified to conduct such an assessment and thus they are difficult to obtain.²⁶³ The ICJ was informed by at least two Judges that investigations into rape and sexual assault cases in Lebanon focus predominantly on unearthing items of evidence that corroborate the use of force or other means of coercion, and rarely solicit expert evidence elucidating psychological injury, which, as discussed above, may be pivotal in SGBV cases.

263. Interview conducted with a Public Prosecutor at the Court of Appeal in Mount Lebanon by the ICJ, 15 August 2020.

5. EVALUATION OF EVIDENCE AND BURDEN OF PROOF

A. Applicable international human rights law and standards and recommended practice

i. Presumption of innocence

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 is enshrined in article 14 of the ICCPR to which Lebanon is a State Party. The requirements of competence, independence and impartiality of a tribunal in the sense of article 14 is an absolute right that is not subject to any exception. The right to a fair trial is also reflected in article 13 of the Arab Charter, which Lebanon has ratified.²⁶⁴

Other standards applicable to Lebanon include the Human Rights Committee's (HRC) General Comment No. 32 on the Right to equality before the courts and tribunals to a fair trial, which is an authoritative interpretation and guidance on Lebanon's obligations under the fair trial provisions of the ICCPR.

A fundamental principle of the right to a fair trial is the right of everyone charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.²⁶⁵ The right is a norm of customary international law from which no derogation is permitted.²⁶⁶ The right applies to suspects before charges are filed and continues until the exhaustion of appeal rights.

ii. Burden and standard of proof at the trial stage

In the context of criminal proceedings, the presumption of innocence imposes the burden of proving the charges on the prosecution.²⁶⁷ Under international law and standards, the accused's guilt must be "proved beyond reasonable doubt," and where there is any doubt, the accused must be acquitted.²⁶⁸ For example, the HRC has explained 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."²⁶⁹

In the *Tsatsu Tsikata* case, the African Commission on Human and Peoples' Rights held, "'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."²⁷⁰ The International Criminal Tribunal for the former Yugoslavia has held 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."²⁷¹

264. Though not binding on Lebanon, other regional human rights treaties, such as the African Charter on Human and Peoples' Rights (ACHPR, art. 26) and the European Convention on Human Rights (ECHR, art. 6), codify the right to a fair trial.

265. Universal Declaration of Human Rights, art. 11; ICCPR, art. 14(2); Convention on the Rights of the Child, art. 40(2)(b)(i); Arab Charter, art. 7.

266. HRC, *General Comment No. 24*, para. 8; HRC, *General Comment No. 29*, paras. 11 & 16; HRC, *General Comment No. 32*, para. 6; International Committee of the Red Cross, *Study on Customary International Law*, Volume 1, Rule 100, pp. 357-358.

267. HRC, *General Comment No. 13*, in UN Compilation of General Comments, para. 7; UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Resolution 43/173 (1998), principle 36(1).

268. See, for example, *General Comment No. 13*, in UN Compilation of General Comments, para. 7; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(e)(i).

269. HRC, *General Comment No. 32*, para. 30; ECtHR, *Barberà, Messegue and Jabardo v. Spain*, Application No. 10590/83, Judgment of 6 December 1988, para. 77; ECtHR, *Telfner v. Austria*, Application No. 33501/96, Judgment of 20 June 2001, para. 15; IAtCHR Judgment of 31 August 2004, *Ricardo Canese v. Paraguay*, Series C No. 111, paras. 153-154 (2004) 153-154.

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

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

The presumption of innocence also prohibits judges from prejudging any case. This includes refraining from making public statements that assert the guilt of the accused.²⁷² Judges must preside over criminal trials in a manner that ensures at all times respect for the right of the accused to the presumption of innocence.

In most civil law systems, the applicable burden of proof is based on the concept of “*intime conviction*,” in French, “intimate conviction,” in English.²⁷³ Although there are different formulations of the *intime conviction* standard, they all require that judges decide guilt according to their conscience, based on the evidence presented at the hearing, the truth of the facts, and the credibility of the witnesses. According to studies about 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] in its purest form, there are no rules of evidence; all evidence in the dossier prepared for the trial is considered by the court.”²⁷⁴

ii. The right to a reasoned opinion

In the context of criminal trials arising from SGBV offences, the right of access to justice and to an effective remedy of SGBV victims/survivors comprises their right to a reasoned opinion, which, in turn, would require a reasoned judgment setting out the reasons for the conviction or acquittal of the defendant.

Convicted defendants too have a right to a reasoned judgment setting out the reasons for their conviction.²⁷⁵ According to the HRC, this must include “essential findings, evidence, legal reasoning and conclusions.”²⁷⁶ The requirement to issue a reasoned judgment ensures the parties and appeals court can assess *inter alia* the Trial Chamber’s evaluation of the evidence.²⁷⁷

Judgments handed down by judges (rather than juries) should address facts and issues essential to the determination of each aspect of the case.²⁷⁸ In light of the right of the accused to a fair trial and their right to be presumed innocent unless and until proven guilty beyond reasonable doubt, a verdict of guilt should provide clear a reasoning for each crime and mode liability and their constituent elements, and an assessment of the evidence supporting the factual and legal

272. HRC, *Gridin v. Russian Federation*, Communication No. 770/1997, UN Doc. CCPR/C/69/D/770/1997, paras. 3.5 & 8.3.

273. 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>.

274. *Demetra Fr. Sorvatzioti and Allan Manson, Burden of Proof and L'intime conviction: Is the Continental Criminal Trial Moving to the Common Law?*, (2018) 23 Canadian Criminal Law Review 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.

275. Principles on Fair Trial in Africa, ss. A(2)(i), N(3)(e)(vii); Rome Statute, article 74(5); ECtHR, *Hadjianastassiou v. Greece*, 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(2008), para. 15; IACtHR Order of 25 November 2005, *García-Asto and Ramírez-Rojas v. Peru*, Series C No. 137, para. 155; ICTY, *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-A, Judgment, 3 May 2006, para. 603; HRC, *V. Francis v. Jamaica*, Communication No. 320/1988 (1993), para. 12.2; ECtHR (Grand Chamber), *García Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, para. 26.

276. HRC, *General Comment No. 32*, para. 29.

277. Principles on Fair Trial in Africa, section N(3)(vii).

278. ECtHR (Grand Chamber), *Taxquet v. Belgium*, 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 of 28 February 2005, para. 23; ICTY, *Prosecutor v. Hadžhasanović and Kubura*, Case No. IT-01-47-A, Judgment of 22 April 2008, para. 13; ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgment of 7 July 2006, para. 169.

conclusions reached by the factfinder.²⁷⁹ 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. Domestic framework in light of international law and standards and recommended practice

In criminal cases in Lebanon, the burden of proof lies with the OPP. Under the CCP, the evaluation of evidence within a case may occur at different stages of the criminal process: during the pre-trial phase: by the Public Prosecutor, the Investigating Judge and the Indictment Chamber; at trial: by the Single Criminal Judge or Criminal Court; and eventually on appeal: by the Court of Appeal and the Cassation Court. The standards applicable to their respective evaluations of evidence vary.

i. Office of Public Prosecution

The OPP, and Judicial Police under its supervision, are responsible for examining complaints of alleged criminal offences.²⁸⁰ The OPP or Judicial Police officers to whom the task has been delegated may conduct a preliminary inquiry to determine the nature of the charge by gathering evidence, questioning the suspect and taking witness statements.²⁸¹

ii. Investigating Judge

Once an investigation is completed, Investigating Judges must submit their findings to the OPP with an order regarding how to proceed.²⁸² Investigating Judges may decide either that: (i) the investigated facts reveal the commission of a felony, in the event of which they refer the case to the Indictment Chamber;²⁸³ (ii) the investigated facts reveal the commission of a misdemeanour and are referable to the Single Criminal Judge;²⁸⁴ or (iii) order the dismissal of the case if they believe that the case is inadmissible, the facts do not constitute an offence under law, or there is insufficient evidence.²⁸⁵

Investigating Judges base their decisions on an evaluation of the facts and the evidence and whether, combined, they reveal a crime.²⁸⁶ Dismissals of cases arise where the Investigating Judge is unable to establish “a causal link” between the alleged offence and the accused,²⁸⁷ and are based on either “legal” or “factual” grounds defined in article 122 of the CCP. The CCP does not provide further guidance on the standard Investigating Judges apply, other than their consideration of the facts and evidence at their disposal. Investigations may be reopened where new evidence surfaces.²⁸⁸

279. ICTY, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment of 17 December 2004, para. 383; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICGTR-98-44A-A, Judgment, 23 May 2005, para. 60; ICTY, *Prosecutor v. Kvoča et al.*, Case No. IT-98-30/1-A, Judgment of 28 February 2005, para. 23; *Prosecutor v. Sesay et al.*, SCSL, Case No. SCDSL-04-15-A, Judgment of 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 of 27 September 2006, paras. 292, 889; *Prosecutor v. Strugar*, ICTY, Case No. IT-01-42-A, Judgment of 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 of 17 July 2008, para. 24), or every step of its legal reasoning (see, e.g. *Prosecutor v. Sesay et al.*, SCSL, Case No. SCDSL-04-15-A, Judgment of 26 October 2009, para. 345).

280. CCP, art. 40.

281. CCP, arts. 31-33.

282. CCP, art. 121.

283. CCP, art. 125.

284. CCP, art. 124.

285. CCP, art. 122.

286. CCP, arts. 122-125.

287. CCP, art. 122.

288. CCP, art. 127.

iii. Indictment Chamber

Upon receipt of a case file, the Indictment Chamber “shall deal with the case on the merits.”²⁸⁹ The Indictment Chamber may dismiss the case if it determines the facts do not reveal the commission of a felony or there is insufficient evidence to charge the accused.²⁹⁰

If the Indictment Chamber ascertains that the facts and the evidence amount to a felony, it issues a written indictment for each accused person setting out the charges against them, a detailed account of the facts of the case, an itemized list of the evidence and the link between the offence and the act charged, and a reasoned legal qualification and refers the case to the competent Criminal Court.²⁹¹ If necessary, the Indictment Chamber may also seek further information from one of its Judges and refer the case file to the OPP so that its submission may reflect new evidence.²⁹²

As is the case with Investigating Judges, the CCP does not specify the standard applied by the Indictment Chamber other than its consideration of the facts and the evidence in the case dossier.

iv. Trial

The Trial Chamber – that is, the Criminal Court in cases of felonies and the Single Criminal Judge in cases of misdemeanours – makes the ultimate assessment of evidence at the conclusion of the trial.

a. Single Criminal Judge

Charges may be “proved by any means,” subject to the Judge’s evaluation of the evidence that has been presented and “discussed adversarially” during the proceedings.²⁹³ The final assessment of the evidence is based on the Judge’s “personal conviction” (*intime conviction*).²⁹⁴ If the evidence is insufficient to convict the defendant, their immediate release must be ordered.²⁹⁵

b. Criminal Court

All evidence used to decide on the merits of the case must be aired “orally” in the presence of the parties, including in relation to “criminal exhibits” and any records relating to the seizure of such exhibits.²⁹⁶ Once the proceedings are closed, the Judges retire to “scrutinize” the indictment and evidence, making a determination about the defendant’s guilt or innocence on the basis of their firm “personal conviction” (*intime conviction*).²⁹⁷

With respect to the standard applied by Judges in reaching a determination of either guilt or innocence, the only guidance afforded by the CCP is that of a Judge’s “firm personal conviction” about the facts and evidence presented.

v. The evaluation of evidence and right to a reasoned opinion

Judicial decisions reviewed by the ICJ for the July 2019 Report and October 2020 Memorandum revealed that SGBV offenders often benefit from a considerable reduction in their sentence following sentencing Courts concluding that there were circumstances mitigating the seriousness of their offending. Such decisions provide no explicit explanation or reasoning as to why the Court saw fit to impose reduced sentences, likely owing to the absence of a legal requirement compelling Judges to do so.

289. CCP, art. 130.

290. CCP, art. 130(a).

291. CCP, arts. 130(c) & 131.

292. CCP, art. 132.

293. CCP, art. 179.

294. CCP, art. 179.

295. CCP, art. 197.

296. CPP, art. 250.

297. CCP, arts. 272-274 & 287.

Concern has been expressed, including in judicial circles in Lebanon, about the misapplication and arbitrary use of “mitigating circumstances” in cases involving SGBV and explained that the wide discretionary powers afforded to judges in Lebanon by virtue of “*intime conviction*” exacerbated incoherence in sentencing practices.

6. Recommendations

Under international human rights law, Lebanon has an obligation to exercise due diligence in order to prevent, investigate, prosecute, adjudicate and criminally sanction SGBV offences commensurately with the gravity of such offences. By discharging those obligations, Lebanon will also go some way towards meeting its obligations under international human rights law and standards to ensure access to justice and effective remedies for victims of SGBV.

Criminal justice actors in Lebanon must accordingly utilize and exercise all means available to them to help ensure Lebanon complies with its obligations under international law treaties and customary international law. These obligations apply to, *inter alia*, the conduct of SGBV investigations and admissibility and assessment of evidence in SGBV cases.

Accordingly, while investigating, prosecuting and adjudicating SGBV offences in Lebanon, criminal justice actors should, when exercising their powers, apply domestic law, in compliance with Lebanon's obligations under international law, including with respect to the gathering, admission and assessment of evidence.

In order to ensure the practical realization of these obligations, the ICJ calls on:

I. The Lebanese authorities, including the Council of Ministers and the Parliament, to:

- Provide investigating authorities with adequate human, logistic, scientific and financial resources to collect, process and store evidence;
- Ensure that investigation teams comprise female personnel and, to that end, train a sufficient number of women investigators, including forensic practitioners, to manage cases of SGBV;
- Reform the Department of Forensic Medicine and Criminal Evidence, with a view to ensuring that its roster of forensic practitioners is limited to individuals who have completed required training and have obtained and demonstrated the necessary expertise;
- Employ a sufficient number of licensed forensic practitioners within the Department of Forensic Medicine and Criminal Evidence, including female personnel, with relevant technical expertise on SGBV offences, including how to deal with victims/survivors of rape or sexual assault sensitively and professionally;
- Provide forensic practitioners registered with the Department of Forensic Medicine and Criminal Evidence with continuous education, including on the Istanbul Protocol and the WHO Guidelines for medico-legal care for victims of sexual violence;
- Adopt and institutionalize protocols predicated on the standards and guidance set forth in the Istanbul Protocol and the WHO Guidelines for medico-legal care for victims of sexual violence, in addition to quality assurance programmes to oversee the conduct of assignments referred to forensic practitioners and other experts by the OPP;
- Enable independent forensic practitioners, medical professionals and other experts not affiliated with the State to review State tests and analysis, and conduct their own independent evaluations, provided they have the relevant expertise to do so;
- Enhance cooperation and coordination with non-governmental organizations in the planning and conduct of investigations;
- Amend article 34 of the CCP so as to ensure it mandates the proper and timely testing of forensic evidence;
- Adopt provisions in the CCP that require crime scene photographic documentation, measurement, note-taking and inventory;
- Adopt detailed guidance on the retrieval, storing and preservation of biological samples and forms of physical evidence;
- Adopt legislation that prohibits factfinders from holding delayed reporting against the victim/survivor;
- Criminalize all acts of rape with a view to ensuring the production of evidence of the use of force is not a prerequisite to establishing the commission of sexual assault offences, including by:
 - Explicitly criminalizing marital rape;
 - Properly defining rape as a form of sexual assault, that is, a physical invasion of a sexual nature without consent or under coercive circumstances. Physical invasion includes penetration, however slight, of any part of the body of the victim/survivor with a sexual organ, or of the anal or genital opening of the victim/survivor with any object or any other part of the body;

- Adopt legislation that limits the introduction of a victim's/survivor's sexual history as evidence in either civil or criminal proceedings, ensuring that such evidence is only permitted where both relevant and necessary.

II. Criminal justice actors, including the Judicial Police, Investigating Judges, Public Prosecutors, General Advocates and Judges, to:

With respect to evidence-gathering:

- Conduct prompt, effective and thorough, independent and impartial, and transparent investigations;
- Take reasonable steps to search for and gather all direct and circumstantial evidence concerning the alleged incident with a view to building a robust prosecution case, including by:
 - Identifying the victim(s) in cases resulting in death;
 - Carrying out an autopsy in cases resulting in death;
 - Seeking to obtain statements from the victim/survivor of the alleged offence;
 - Determining the method, cause, location, date and time of the crime, and all of the surrounding circumstances;
 - Conducting a thorough examination of the crime scene;
 - Determining who was involved in the commission of the offence or contributed to it, and their associated individual or collective responsibility;
 - Identifying potential witnesses, obtaining statements from them concerning the alleged offence.
- Ensure that all relevant evidence is diligently and promptly gathered by competent professionals in compliance with good practice;
- Ensure the accurate, careful and proper recovery and preservation of all relevant forensic evidence, conducting rigorous analysis of any samples retrieved, including, where relevant, biological, digital, documentary and physical evidence;
- Ensure the methodical documentation of crime scenes, including by means of photography, measurement, note-taking and inventory;
- Ensure that where evidence is recovered from the victim/survivor, the collection of such evidence is based on their full, genuine, free and prior informed consent or, where applicable, that of their families, preferably in writing;
- Interpret article 34 of the CCP in broad terms with a view to ensuring all relevant forms of external expertise is sought by investigators, even in instances where sexual assault victims/survivors do not require medical attention *per se*, but the intervention of a specialized sexual assault team may be beneficial;
- Ensure that forensic practitioners and other experts are able to function impartially and independently of any potentially implicated persons, organizations or entities;
- Prioritize the acute health care concerns, safety and welfare of victims/survivors of rape and sexual assault, including the treatment of injuries, management of pregnancies and sexually transmitted infections, over yielding medico-legal evidence;
- Provide medico-legal services simultaneously, at the same location, and make available 24-hours a day in a one-stop fashion or, where it is not feasible to provide a full-time service, on an on-call basis outside regular working hours;
- Ensure that all interactions with the victim/survivor during the investigation phase, including interviews and medico-legal examinations, are guided and informed by victim-centered, gender-sensitive considerations, with a view to avoiding their secondary victimization;
- Ensure that in cases of sexual assault, including rape, medico-legal examinations fully comply with the guidance set out in the Istanbul Protocol and the WHO Guidelines for medico-legal care for victims of sexual violence;
- Ensure that the collection of forensic evidence is not a prerequisite for the conviction of an offender and accordingly gather as much evidence as possible to corroborate facts supported by initial evidence;
- Record every stage of evidence recovery, storage, transportation and forensic analysis with a view to ensuring the continuity of its possession or custody and to avoiding cross-contamination, including by:
 - Recording all evidence in documentary and photographic format;
 - Using proper equipment, including personal protective equipment and relevant packaging;
 - Recording the identity and sequence of persons who possessed, accessed or handled an item of evidence from the time of its acquisition to its presentation in court;

- Referencing each item of evidence;
- Ensuring that each item of evidence includes the investigator's details;
- Storing evidence in a location that is clean, secure and suitable for preserving items and protected against unauthorized entry and cross-contamination.
- Prevent and sanction person(s) who inhibit investigations.

With respect to the admission of evidence:

- Examine the investigation case file to determine whether the evidence was collected lawfully and in compliance with international standards;
- Consider whether any evidence collected unlawfully, particularly through torture or other ill-treatment or other coercive means, or other violations of internationally-recognized human rights, should be nullified, in which case ensure that a reasoned opinion regarding such a decision is provided in the trial judgment or in a separate decision;
- Conduct an investigation where an accused alleges or other evidence indicates that a confession, statement or other evidence was obtained through torture or other ill-treatment or other coercive means, in which the burden of proof is on State authorities to prove, beyond reasonable doubt, the evidence was obtained lawfully;
- 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;
- Refrain from drawing any adverse inference from a delay of any length between the alleged commission of an offence and the reporting thereof;
- Prohibit the admission of evidence concerned with the prior sexual history and conduct of the victim/survivor, unless both relevant and necessary;
- Consider evidence of prior acts of violence by the offender, as well as any history of coercion, abuse, harassment, stalking and/or exploitation;
- Prohibit the requirement to produce evidence of the use of force to corroborate sexual assault offences.

With respect to the evaluation of evidence:

- Solicit expert testimony to clarify medical or forensic issues, and to counteract stereotyped misconceptions and myths associated with SGBV and the behaviour of victims/survivors and offenders, with a view to ensuring factfinders appropriately evaluate the evidence without interference from bias.
- 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;
- Ensure the burden of proof remains on the OPP to prove the charges beyond reasonable doubt;
- Provide a reasoned decision clearly defining the *intime conviction* standard before applying it, motivating the verdict 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 as charged.

In addition to the recommendations outlined above, the ICJ considers that it is imperative that Lebanon continues to reform its legislative framework governing SGBV, in particular the Criminal Code and Law No. 293/2014, in line with international law and standards. In this regard, the ICJ reaffirms its recommendations published in the July 2019 Report and October 2020 Memorandum where the organization called on the Council of Ministers and the Parliament to remove obstacles impeding women's and girls' access to justice and effective remedies for SGBV.

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