

Strengthening accountability through the Specialized Criminal Chambers in Tunisia

Principles and Recommended Practices on the
investigation, prosecution and adjudication of
sexual and gender-based crimes

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Strengthening accountability through the Specialized Criminal Chambers in Tunisia

Principles and Recommended Practices on the investigation, prosecution and adjudication of sexual and gender-based crimes

© Copyright International Commission of Jurists, June 2021

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

Strengthening accountability through the Specialized Criminal Chambers in Tunisia

Principles and Recommended Practices on the investigation, prosecution and adjudication of sexual and gender-based crimes

Table of Contents

- Table of abbreviations..... 5**
- Introduction..... 6**

- I. Tunisia’s duty to investigate, prosecute and punish instances of sexual and gender-based violence amounting to crimes under international law..... 9**
 - A. The duty to investigate, prosecute and punish gross human rights violations under international law..... 9
 - B. The duty to investigate, prosecute and punish sexual and gender-based crimes under international law..... 12

- II. Sexual and gender-based crimes within the SCC’s jurisdiction..... 14**
 - A. The prohibition of rape and other forms of sexual assault under international law..... 14
 - i. Rape as an autonomous crime..... 14
 - ii. Rape as torture or other ill-treatment..... 16
 - iii. Other forms of sexual assault..... 18
 - iv. Rape and other forms of sexual assault as crimes against humanity..... 19
 - B. The prohibition of rape and other forms of sexual assault under Tunisian law..... 19
 - i. The application of international law in Tunisia..... 19
 - ii. The specificities of the Transitional Justice Framework..... 20
 - iii. The criminalization of sexual and gender-based violence under Tunisian criminal law..... 20

- III. The investigation, prosecution and adjudication of sexual and gender-based crimes..... 23**
 - A. Inherent challenges in investigating, prosecuting and adjudicating sexual and gender-based crimes..... 23
 - i. Misconceptions on the nature and gravity of sexual and gender-based crimes..... 23
 - ii. Misconceptions on sexual and gender-based violence against men and boys..... 24
 - B. International standards for the investigation, prosecution and adjudication of sexual and gender-based crimes..... 26
 - i. The need to adopt a gender specific approach in investigating, prosecuting and adjudicating sexual and gender-based crimes..... 26
 - ii. Sexual and gender-based crimes must be accurately characterized and recognized as serious crimes..... 27
 - iii. Pursuing a victim-centred approach during investigations, prosecutions and adjudication
 - iv. Evidence..... 28
 - v. Sentencing practices..... 32

- IV. Tunisian law in light of international standards on investigation and prosecution of SGB crimes..... 38**
 - A. Gaps in Tunisian law with regard to the rights of the victims of sexual and gender-based crimes and their families..... 38
 - i. General criminal procedures..... 38
 - ii. Transitional Justice Framework..... 38
 - B. Gaps in Tunisian Law with regard to the protection of victims and witnesses of sexual and gender-based crimes..... 39

- Recommendations..... 41**

Table of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACoMHR	African Commission on Human and Peoples' Rights
CAT	Committee against Torture
CCP	Code of Criminal Procedure
CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination Against Women
CSOs	Civil society organizations
ECHR	European Convention on Human Rights
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
GBV	Gender-based violence
HRC	Human Rights Committee
HRDs	Human Rights Defenders
IACoMHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IVD	Instance Vérité et Dignité
OPP	Office of the Public Prosecutor
SCC	Specialized Criminal Chambers
SGB crimes	Sexual and gender-based crimes
SGBV	Sexual and gender-based violence
UN	United Nations
WGEID	Working Group on Enforced or Involuntary Disappearances

Introduction

Following the establishment of the Truth and Dignity Commission (Instance Vérité et Dignité, IVD) in 2014, over 60,000 cases arising from human rights violations perpetrated during the years of the authoritarian regime of Habib Bourguiba and Ben Ali were filed by or on behalf of victims and their families with the IVD.¹ Of those, more than 795 cases concerned instances of rape of both men and women, with a prevalence of male victims, and 3,274 related to other forms of sexual abuse.²

Under international law, Tunisia has an obligation to criminalize, investigate and, where there is sufficient evidence, prosecute gross human rights violations, including the most serious instances of sexual and gender-based violence (SGBV),³ and ultimately guarantee the victims' right to access to justice and to an effective remedy.

Under Article 7 of Organic Law No. 53 of 24 December 2013 on *Establishing and Organizing Transitional Justice* (the 2013 Law), Tunisia's judicial and administrative authorities are charged with ensuring accountability for past, gross human rights violations. Article 8 of the 2013 Law provides for the establishment of Specialized Criminal Chambers (SCC) entrusted with adjudicating "cases related to gross violations of human rights, as defined in international conventions ratified by Tunisia and in the provisions of the Law", committed by State actors,⁴ between 1 July 1955 and the issuance of the Law on 24 December 2013. According to the same article, such violations include, but are not limited to, "murder, rape and other forms of sexual violence, torture, enforced disappearances, and the imposition of death penalty without fair trial guarantees", as well as cases referred by the IVD concerning "election fraud, financial corruption, misappropriation of public funds, and forced exile⁵ for political reasons."⁶

The SCC were formally established within the Tribunals of First Instance of 13 Courts of Appeal across Tunisia pursuant to Decree No. 2014-2887 of 8 August 2014. Under article 42 of the 2013 Law⁷ and article 3 of the Organic Law No. 17 of 12 June 2014 on *Transitional Justice and Cases linked to the period from 17 December 2010 to 28 February 2011* (the 2014 Law),⁸ the SCC exercise jurisdiction over cases involving "gross human rights violations" referred to them by the IVD.

1. See ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2* (2020), p. 22, available at <https://www.icj.org/wp-content/uploads/2020/12/Tunisia-SSC-guide-series-no2-Publications-Reports-The-matic-reports-2020-ENG.pdf>.

2. IVD, Final Report, Executive Summary, pp. 59-60.

3. Gender-based violence (GBV) is defined as any harmful act that is perpetrated against a person's will and that is based on socially ascribed (i.e., gender) differences between males and females. The term "sexual and gender-based violence" (SGBV) is used to emphasize sexual violence from acts that are not of sexual nature, which are also included in the broader term gender-based violence. For a more detailed definition of SGBV, see Chapter II, section B of the present Legal Briefing.

4. Pursuant to article 3 of the 2013 Law, for the purposes of SCC jurisdiction, violations mean crimes committed by "organs of the State", "organized groups" or "groups or individuals who acted on its behalf or under its protection, even if they did not possess the quality or the authority to act".

5. In the French text, this is "la contrainte à migration forcée pour des raisons politiques."

6. Article 8, paras. 2 and 3 of the 2013 Law.

7. In the French text the name of the law reads "Loi organique n° 2014-17 du 12 juin 2014, portant dispositions relatives à la justice transitionnelle et aux affaires liées à la période du 17 décembre 2010 au 28 février 2011". Article 42 of the 2013 Law states that the IVD "shall refer to the Public Prosecution the cases in which the commission of gross human rights violations is proven and shall be notified of all the measures that are subsequently taken by the judiciary."

8. Article 3 of the 2014 Law provides that "[i]n the event of transmission of the file to the public prosecutor by the authority of truth and dignity, in accordance with article 42 of the organic law n° 2013-53 dated 24 December 2013 relating to the establishment of transitional justice and its organization, the public prosecutor shall automatically send them to the specialized jurisdictional chambers mentioned in article 8 of the same organic law. Upon their sending to the specialized chambers by the public prosecutor, these files have priority regardless of the stage of the procedure."

By 31 December 2018, the IVD had referred 200 of the over 60,000 cases filed with it by or on behalf of victims and their families to the SCC.⁹ Of these, 25 cases relate to violations of bodily integrity, including instances of torture and rape, according to the table featured in the IVD's final report, which shows such violations in a non-disaggregated manner.¹⁰ The IVD has referred 18¹¹ of these 25 cases to the SCC on indictment and seven¹² without. The total number of victims identified as having been subjected to sexual and gender-based crimes (SGB crimes) is estimated to be around 99, among the cases referred on indictment; while the number of victims of such crimes among the cases not referred on indictment remains unknown.¹³

As it is the case in other contexts of widespread, gross human rights violations, the perpetration of SGBV is often the archetype of unequal power relations, domination and abuse of authority,¹⁴ and is usually perpetrated along with other crimes, such as unlawful killings, arbitrary deprivation of liberty, torture and other ill-treatment. While women and girls are specifically at greater risk of SGB crimes than men and boys, the latter may too be victims of these crimes, as the Tunisian transitional justice context clearly illustrates. Indeed, of the 25 cases concerning SGB crimes referred on indictment to the SCC, 17% involved female victims and 83% involved male victims.¹⁵ The vast majority of charges in cases before the SCC involve rape and other forms of sexual assaults carried out by State officials against detainees predominantly in custodial settings.¹⁶

This Legal Briefing¹⁷ focuses solely on the SGBV-related cases that were referred to the SCC comprising mainly instances of rape and other forms of sexual assault perpetrated in custodial settings and, as a result, prevalently against male victims.¹⁸ In light of this, the present document by no means purports to describe, let alone do justice to, the phenomenon of State-perpetrated sexual and gender-based violence as a whole during the authoritarian regimes of Habib Bourguiba and Ben Ali in Tunisia.

On 29 June 2018, the first hearing of a SCC trial arising from charges of rape and other

9. Out of the 200 cases referred to the SCC, 131 were transferred without a bill of indictment because the investigative procedures were not completed. In its final report, the IVD explains that the reason for this is "either because the ministries (particularly the Ministry of the Interior), the military court and the apparatuses to which the alleged violator belongs failed to send the documentation in compliance with the deadlines (December 31), despite the extensive correspondence dispatched by [IVD]'s Presidency to that effect, or because the General Commissioner in Charge of State Litigation refused to deal with [IVD]" adding that "To safeguard the rights of the victims who filed their cases, TDC's Council decided to refer in the form of referral decision a number of these cases, along with the supporting evidence justifying the occurrence of violations, to the specialized chambers." IVD, Final Report, Executive Summary, pp. 95-96.

10. IVD, Final Report, Executive Summary, pp. 93-94.

11. For a total of 99 victims of rape and sexual assault, IVD, Final Report, Executive Summary, p. 85.

12. For a total of 18 victims of torture and rape, disaggregated data is not available. IVD, Final Report, Executive Summary, pp. 96 and 100-101.

13. The number of cases of SGB crimes could be higher given the fact that such offences were often charged as acts of torture and ill-treatment alone and not reported as SGB offences.

14. Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, in *International Review of the Red Cross* (2014), 96 (894), p. 505; see also Dara Kay Cohen, Amelia Hoover Green and Elisabeth Jean Wood, "Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward", Special Report of the United States Institute of Peace, No. 323, February 2013, available at <https://www.usip.org/publications/2013/02/wartime-sexual-violence-misconceptions-implications-and-ways-forward>, p. 6.

15. This figure is to be found in the IVD extensive version of the report, Women's section, and was provided during an interview with a Tunisian judge that took place on 24 February 2021.

16. ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1* (2019), p. 78. available at <https://www.icj.org/wp-content/uploads/2019/12/Tunisia-Accountability-series-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

17. This Legal Briefing should be read in conjunction with ICJ Practical Guide 1 and Practical Guide 2.

18. It should be acknowledged that by virtue of almost exclusively focusing on custody cases there is an inherent gender bias in the sense that the majority of SGBV-related cases referred to the SCC concerned male victims since the large majority of people taken into custody as in transported to and held by the authorities in detention were men and boys. However, it is likely that SGBV-related human rights violations committed at the time were much more widespread and comprised many instances of rape and other forms of sexual assaults perpetrated by State agents on the streets, in peoples' homes, etc., where many of the victims would have been women and girls.

forms of sexual violence, among others, was held in the Tribunal of First Instance in Nabeul.¹⁹ While the opening of trials before the SCC constitutes a fundamental step in Tunisia's path toward justice and accountability, a number of legal obstacles continue to undermine the SCC's effective operation, and ultimately the right of victims to access to justice and effective judicial remedies.²⁰ To this day, for instance, none of the SCC has delivered a verdict. In addition, with regard to SGB crimes, the SCC's ability to try and adjudicate these cases is adversely impacted by a number of factors, including the inherent challenges related to the investigation and prosecution of SGB crimes, including when they amount to crimes under international law; the inadequate criminalization of SGBV under domestic law in Tunisia; the absence of a detailed legal framework and institutional structures for SGB victims/survivors and the lack of a victim and witness protection program.

Relying on international law and standards, this Legal Briefing seeks to offer guidance on how to address and overcome these obstacles to SCC judges and prosecutors, as well as lawyers, human rights defenders (HRDs) and civil society organizations (CSOs). In addition, in pursuit of the same objective, the present document formulates recommendations on legislative, policy and practical reforms necessary to prevent recurrence of and impunity for SGB crimes in the future.

19. This is the Rachid Chammakhi case, for more details about the case and the ongoing trial, see World Organisation Against Torture (OMCT), *La justice d'abord! - Quel bilan de la Justice transitionnelle après deux ans d'existence des chambres spécialisées*, May 2020, p. 25, available at <https://omct-tunisie.org/wp-content/uploads/2020/06/Rapport-Justice-Transitionnelle-Aladala-Awalan-%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A3%D9%88%D9%91%D9%84%D8%A7-VF.pdf>.

20. See ICJ, Tunisia: *Strengthening Accountability Through the Specialized Criminal Chambers*, October 2020, pp. 6-15, available at <https://www.icj.org/wp-content/uploads/2020/10/Tunisia-Strengthening-Accountability-SCC-Advocacy-Analysis-brief-2020-ENG.pdf>; see also ICJ, Association des Magistrats Tunisiens (AMT), Avocats Sans Frontières (ASF), and the OMCT, *Pas de Réconciliation sans Justice: Bilan et perspectives des chambres spécialisées en Tunisie*, December 2020, available at <https://www.icj.org/wp-content/uploads/2020/12/Tunisia-SCC-assess-Advocacy-Analysis-brief-2020-FRA.pdf>, pp. 10-23.

I. Tunisia's duty to investigate, prosecute and punish instances of sexual and gender-based violence amounting to crimes under international law

Under international law, rape and other forms of sexual assault are prohibited under any circumstances, and States are under an obligation to investigate, prosecute and punish them. Although the great majority of human rights treaties do not feature explicit provisions prohibiting rape and other forms of sexual assault, the general prohibition of torture or other cruel, inhuman or degrading treatment or punishment enshrined by most human rights treaties provides in its own right a prohibition of virtually all forms of sexual violence at all time.²¹ Moreover, under international human rights law, instances of SGBV also constitute violations of one's right to freedom from discrimination, security of person, privacy, sexual autonomy and bodily and psychological integrity, and, in turn, disclose evidence of -- and may therefore be prosecuted as -- a multiplicity of criminal offences, including crimes of violence against personal, mental, sexual and bodily integrity (e.g., sexual and physical assault), as well as abduction and false imprisonment as crimes against one's liberty and security of person. Rape and other forms sexual assault may also amount to crimes under international law, including crimes against humanity and war crimes.²²

Accountability for SGBV in the context of gross human rights violations is fraught with significant challenges arising from the combined impact of harmful gender stereotypes and other misconceptions, as well as structural legal barriers. Understanding the complex interplay of factors impacting upon SGBV investigations and prosecutions, such as the erroneous perceptions about the nature and impact of SGBV in the context of widespread human rights violations,²³ the difficulty of obtaining evidence, as well as the plethora of factors that can influence the reactions and the level of participation of SGBV victims/survivors in such proceedings,²⁴ is crucial in the pursuit of accountability for such heinous crimes.²⁵

The remainder of the present chapter provides an overview of Tunisia's duties to investigate, prosecute and punish gross human rights violations, including SGB crimes, under international law.

A. The duty to investigate, prosecute and punish gross human rights violations under international law

Under international law, States have an obligation to investigate, prosecute, punish, and provide an effective remedy and reparations for human rights violations that constitute crimes under international law. The obligation arises under numerous international treaties,²⁶ customary

21. Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, in *International Review of the Red Cross* (2014), 96 (894), p. 521.

22. E.g., rape, sexual slavery, enforced prostitution, forced pregnancy or any other form of sexual violence of comparable gravity, according to articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute of the International Criminal Court (ICC), may constitute crimes against humanity and war crimes. For more details, see ICJ, *Practical Guide 1*, Chapter 3, section f.

23. For more details, see Chapter III, section A(i) of the present Legal Briefing.

24. For more details, see Chapter III, sections A (ii) and B of the present Legal Briefing.

25. Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 68. The inherent challenges in investigating and prosecuting SGB crimes will be further developed in Chapter III, section A of the present Legal Briefing.

26. International Convention on the Protection of all Persons from Enforced Disappearance (ICPPED), articles 3, 10, 12, and 13; International Covenant on Civil and Political Rights (ICCPR), article 2(3) (as interpreted by the HRC in *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.15); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 12; Convention on the Rights of Persons with Disabilities (CRPD), New York, 13 December 2006, 2515 UNTS 3, article 16. See also Preamble, Rome Statute of the ICC ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

international law²⁷ and declaratory instruments and other international legal documents.²⁸ International and regional authorities, including the African Commission on Human and Peoples' Rights (ACoMHR), have confirmed that States have a duty to investigate alleged gross human rights violations and punish the perpetrators.²⁹ The UN Human Rights Committee (HRC) also has repeatedly affirmed this duty and observed that mere administrative proceedings are not sufficient in cases of gross human rights violations, which require the instigation of criminal proceedings.³⁰

The duty to investigate is a duty of conduct and means and not one of result.³¹ This means that the duty may be fulfilled if the investigation was capable of leading to the identification and, if appropriate, the punishment of the perpetrator(s) of the violations, and the authorities carry out the investigation according to international standards, even if the investigation does not ultimately lead to the identification, let alone apprehension, prosecution and punishment of the perpetrator(s). A State may establish special mechanisms of investigation, including some

with specialized competencies, provided they are based in law and comply with international

-
27. This obligation has been extensively upheld in international jurisprudence. See e.g., Judgment of 27 February 2002, IACtHR, *Trujillo Oroza v. Bolivia*, Series C No. 92, para. 99; Judgment of 22 September 2006, IACtHR, *Goiburú and others v. Paraguay*, Series C No. 153, para. 128; Judgment of 26 September 2006, IACtHR, *Almonacid Arellano and others v. Chile*, Series C No. 154, para. 100. International and regional authorities have also underlined that this duty is imposed on States because of the jus cogens prohibition on committing such gross human rights violations. See e.g., Judgment of 22 September 2009, *Anzualdo Castro v. Peru*, Series C No. 202, para. 59; Judgment of 26 September 2006, IACtHR, *Almonacid Arellano and others v. Chile*, Series C No. 154, para. 100; see also jurisprudence from the European Court of Human Rights (ECtHR) e.g., *McCann and others v. United Kingdom*, ECtHR (Grand Chamber), Application no. 18984/91, Judgment of 27 September 1995, para. 161; *El-Masri v. the former Yugoslav Republic of Macedonia*, ECtHR (Grand Chamber), Application No. 39630/09, Judgment of 13 December 2012, para. 182; *Marguš v. Croatia*, ECtHR (Grand Chamber), Application No. 4455/10, Judgment of 27 May 2014, paras. 125 and 127; and *Ceesay v. Austria*, ECtHR, Application No. 72126/14, Judgment of 16 November 2017, paras. 88-91. The International Committee of the Red Cross (ICRC) has also held that this obligation is a customary international law norm applicable in both international and non-international armed conflicts. See ICRC Customary International Humanitarian Law Database, rule 158. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7 (2015).
28. *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, ("UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity"), principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, January 1991 ("UN Principles on Extra-Legal Executions"), principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000 ("UN Principles on Investigation and Documentation of Torture and other Ill-treatment"), principle 2; Geneva C (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, art. 146(1-2); *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, UN General Assembly resolution 43/173 of 9 December 1988 ("Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment"), principles 33 and 34; *The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/10034 (1975), art. 9. See also HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, Guidelines VIII.1.
29. ACoMHR, *Malawi African Association et al v. Mauritania*, Communications No. 54/91 et al, recommendations, lit.1. For further support, see ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, (Revised Edition, 2018), pp 88-96.
30. HRC, *General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 27; HRC, *General Comment No. 6 on Article 6 (Right to Life)*, UN Doc. HRI/GEN/1/Rev.9 (Vol I) 30 April 1982, p.176, para. 4; HRC, *General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc. HRI/GEN/1/Rev.9, 10 March 1992, paras. 13-14; HRC, *General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-18. See also *Bautista de Arellano v. Colombia*, HRC, Communication No. 563/1993, Views of 27 October 1995, paras. 8.2 and 10; and *Coronel et al v. Colombia*, HRC, Communication No. 778/1997, Views of 24 October 2002, paras. 6.2 and 10.
31. Judgment of 29 July 1988, IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No. 4, paras. 166 and 174; *Finucane v. the United Kingdom*, ECtHR, Application No. 29178/95, Judgment of 1 July 2003, para. 69.

standards governing the conduct of investigations.³²

As discussed at length in the ICJ Practical Guide No. 2 on *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law* (Practical Guide 2),³³ international law requires that investigations in cases of gross human rights violations be: prompt; effective; thorough; independent; impartial; and transparent.³⁴ Detailed criteria for ensuring an investigation meets these requirements are set out in, for example, the UN Principles on Extra-legal Executions,³⁵ the UN Principles on Investigation and Documentation of Torture and other Ill-treatment,³⁶ the Minnesota Protocol,³⁷ and the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).³⁸

The duty to prosecute and punish the perpetrators of gross human rights violations is equally established in numerous international treaties³⁹ and standards.⁴⁰ International and regional authorities, including the AComHPR, have held that this duty arises both from the duty to guarantee human rights and effective remedies for related violations established in these treaties and under general principles of international law.⁴¹ Further, this duty is directly related to the right of victims of gross human rights violations to an effective remedy.⁴²

The obligation to prosecute and punish implies the obligation for States to criminally proscribe as domestic crimes in their national criminal law gross human rights violations and other crimes

32. UN Principles on Extra-Legal Executions, principle 11; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): the Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2017 ("Minnesota Protocol"), paras. 38-40 (The duty to investigate does not necessarily call for one particular investigative mechanism in preference to another. States may use a wide range of mechanisms consistent with domestic law and practice, provided those mechanisms meet the international law requirements of the duty to investigate. In specific circumstances a State may establish a special mechanism, such as a commission of inquiry or another transitional justice mechanism).

33. ICJ, Practical Guide 2, pp. 9-19.

34. UN Principles on Extra-Legal Executions, principles 1-6. For more detailed information about the requirements of an investigation under international law, see ICJ, Practical Guide 2, pp. 11-16.

35. UN Principles on Extra-Legal Executions, principles 9 – 17.

36. UN Principles on Investigation and Documentation of Torture and other Ill-treatment, principles 1-6.

37. Minnesota Protocol, paras. 19, 22 *et seq.*

38. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), Professional Training Series No.8/Rev.1 of UN OHCHR, 2004.

39. See e.g., Convention on the Prevention and Punishment of the Crime of Genocide, articles IV, V and VI; CAT, articles 4 and 5; ICCPR, articles 4, 6 and 7.

40. See e.g., Declaration on the Elimination of Violence against Women, UN General Assembly resolution 48/104 of 20 December 1993, article 4; Declaration on the Protection of All Persons from Enforced Disappearances, UN General Assembly resolution 47/133 of 18 December 1992, article 4; Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 3452 (XXX) of 9 December 1975, articles 3, 7 and 10; UN Principles on Extra-Legal Executions, principle 18; and the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity.

41. See, e.g., HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; *Nydia Erika Bautista v. Colombia*, HRC, Communication No. 563/1993, Views of 27 October 1995, para. 8.6; Judgment of 29 July 1988, IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 174; Judgment of 21 July 1989, IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No. 7, para. 34; Judgment of 21 July 1989, IACtHR, *Godínez Cruz v. Honduras*, Series C No. 8, para. 30 *et seq.*; Judgment of 8 December 1995, IACtHR, *Caballero Delgado y Santana v. Colombia*, Series C No. 22, para. 69; Judgment of 14 September 1996, *El Amparo v. Venezuela*, Series C No. 28, para. 61; AComHPR, *African Association of Malawi et al v. Mauritania*, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (27th Ordinary Session, May 2000); and AComHPR, *Center for Action for Social and Economic Rights and Center for Economic Rights v. Nigeria*, Communication 155/96 (30th Ordinary Session, October 2001).

42. Judgment of 22 January 1999, IACtHR, *Nicholas Blake v. Guatemala*, Series C No. 48, paras. 61 and 63; Judgment of 29 November 2006, IACtHR, *La Cantuta v. Peru*, Series C No. 162, para. 160.

under international law.⁴³ The characterization of conduct prohibited by international law as crimes under domestic law is an essential element of effective compliance with the overall obligation to investigate, prosecute and punish such crimes.⁴⁴ Importantly, when classifying grave human rights violations and other crimes under international law as crimes in their domestic legislation, States must scrupulously observe two things: the principle of legality, including its corollary about the non-retroactivity of the criminal law, and the definitions and core elements of crimes provided by international law with regard to the proscribed conduct.⁴⁵ Accordingly, when including gross human rights violations and crimes under international law as criminal offences in their domestic penal legislation, States must observe the definitions of the crimes established by international law.⁴⁶ The domestic definition of the crime must reflect the core elements that characterize the definition of the crime established by international law.⁴⁷

B. The duty to investigate, prosecute and punish sexual and gender-based crimes under international law

Sexual and gender-based violence

Gender-based violence (GBV) is defined as any harmful act that is perpetrated against a person's will and that is based on socially ascribed (i.e., gender)⁴⁸ differences between males and females. It includes acts (against both females or males) that inflict physical, sexual or mental harm or suffering, threats of such acts, coercion, and other deprivations of liberty.⁴⁹

Sexual violence is a form of gender-based violence. It encompasses acts of a sexual nature against one or more persons or that cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons'

43. See e.g., CAT, article 4; ICPPED, articles 7 and 25; UN Principles on Extra-Legal Executions, principle 1; Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly resolution 47/133 of 18 December 1992, art. 4; Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 3452 (XXX) of 9 December 1975, article 7.

44. ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7 (2015), pp. 200-207. International and regional authorities confirmed this obligation on numerous occasions: see e.g., Conclusions and recommendations of the Committee against Torture on Zambia, CAT/C/XXVII/Concl.4, 23 November 2001, para. 8 (a); Saudi Arabia, CAT/C/CR/28/5, 28 May 2002, para. 8 (a); Indonesia, CAT/C/XXVII/Concl.3, 22 November 2001, para. 10 (a); Judgment of 22 September 2009, IACtHR, *Anzaldo Castro v. Peru*, Series C No. 202, para.165; and Judgment of 29 November 2006, IACtHR, *La Cantuta v. Peru*, Series C No. 162, para. 172.

45. ICJ Practical Guide 1, pp. 18-26, 94-97. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No.7 (2015), pp. 202-203.

46. See e.g., Concluding observations of the Committee against Torture on: Senegal, CAT/C/SEN/CO/3, of 17 January 2013, para. 8; Guatemala, CAT/C/GTM/CO/5-6, of 24 June 2013, para. 8; Chile, CAT/C/CHL/CO/5, of 23 June 2009, para. 10; Russia, CAT/C/RUS/CO/5 of 11 December 2012, para. 7; and Peru, CAT/C/PER/CO/5-6, of 21 January 2013, para. 7; CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 8 and 9; Report of the Working Group on Enforced or Involuntary Disappearances (WGEID) – Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, paras. 9-11; WGEID, Report, UN Doc. E/CN.4/1996/38, para. 54; WGEID, Report, UN Doc. A/HRC/7/2, para. 26, (paragraph 3 of the General Comment on the definition of enforced disappearance).

47. Judgment of 22 September 2006, IACtHR, *Goiburú et al v. Paraguay*, Series C No. 153, para. 92.

48. "Gender", in accordance with article 7(3) of the Rome Statute of the International Criminal Court (ICC), refers "to both sexes, male and female, within the context of society." This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys. See, ICC, Office of The Prosecutor (OTP), Policy Paper on Sexual and Gender-Based Crimes, June 2014, p. 3.

49. Inter-Agency Standing Committee, *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Reducing Risk, Promoting Resilience and Aiding Recovery* (2015) Geneva: IASC, p. 5.

incapacity to give genuine consent.⁵⁰ Forms of sexual violence include rape, attempted rape, sexual mutilation, forced prostitution, trafficking for the purpose of sexual exploitation, child pornography, child prostitution, sexual slavery, forced marriage, forced pregnancy, forced nudity and forced “virginity testing”.⁵¹

The term “**sexual and gender-based violence**” (SGBV) is used to emphasize sexual violence from acts that are not of sexual nature, which are also included in the broader term gender-based violence.⁵²

Under international law, rape and other forms of sexual assault may constitute torture or other ill-treatment, crimes against humanity or autonomous crimes.⁵³ The obligation to guarantee respect for international human rights norms, including the prohibition on discrimination, the right to be free from torture and other ill-treatment and the right to privacy, among others, gives rise to an obligation to criminalize, investigate, prosecute and sanction rape and other forms of sexual assault.⁵⁴ International human rights law thus requires that all forms of sexual assault, including rape, be adequately criminalized under domestic criminal law.

At the domestic level, criminal law should identify and proscribe rape and other acts constituting sexual assault as criminal offences against the physical and mental integrity and sexual autonomy of the victim, not crimes against morality, public decency or honour.⁵⁵ Domestic criminal provisions defining rape and other forms of sexual assault as crimes should be gender-neutral. Accordingly, rape, for example, may be committed against and by anybody, regardless of the perpetrator’s or the victim’s gender (e.g., against males by men and women, and against females by men and women).⁵⁶

50. ICC Statute, Elements of Crimes.

51. 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. 9.

52. *Ibid.*, p. 9.

53. As stated by the European Court of Human Rights (ECtHR), whether in custodial settings or not, rape perpetrated by State actors, such as members of the army or police officers, constitute torture. See, e.g., *Aydin v. Turkey*, ECtHR (Grand Chamber), Application No. 23178/94, Judgment of 27 September 1997, paras. 74-86.

54. E.g. ICCPR, article 2(2); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 2(a); Convention on the Rights of the Child (CRC), article 4; CAT, article 2(1); American Convention on Human Rights (ACHR), article 1; African Charter on Human and Peoples’ Rights (ACHPR), article 1; 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, 26 May 2004, para. 18. See also, ICJ, *Practical Guide 1*, pp. 9-34.

55. CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 33; Istanbul Convention, article 36 (1).

56. See, for example, according to article 7(3) of the ICC statute, “the term ‘gender’ refers to the two sexes, male and female, within the context of society.” With regard to the crime of rape, the ICC Elements of Crimes specify that “[t]he concept of ‘invasion’ [of the victim’s body by the perpetrator] is intended to be broad enough to be gender-neutral.” ICC Elements of Crimes, article 7(1)(g)-1, footnote 15, article 8(2)(b)(xxii)-1, footnote 50, and article 8(2) (e)(vi)-1, footnote 63. See also Judgment of 21 March 2016, ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber III, para. 100. For further detail, see Chapter III, section A of this Legal Briefing.

II. Sexual and gender-based crimes within the SCC's jurisdiction

The analysis presented in this Legal Briefing focuses solely on the offences over which the SCC may exercise jurisdiction in a manner consistent with Tunisian domestic law, as well as with the country's obligations under international law.

As previously mentioned, the SCC were granted jurisdiction to adjudicate cases of gross human rights violations, including rape and other forms of sexual assault, perpetrated by State actors.

The sections below focus on the characterization of these offences under international law and Tunisian law.

A. The prohibition of rape and other forms of sexual assault under international law

The charges in the SGBV cases referred to the SCC include mostly rape and other forms of sexual assault perpetrated by State actors in the context of detention or other custodial settings, which, in turn, may disclose evidence of:

- a. rape as an autonomous crime;
- b. rape as torture or other ill-treatment;
- c. other forms of sexual assault; and
- d. rape and other forms of sexual assault as crimes against humanity⁵⁷

i. Rape as an autonomous crime

As discussed in ICJ Practical Guide No. 1 on *Accountability through the Specialized Criminal Chambers, The Adjudication of Crimes Under Tunisian and International Law* (Practical Guide 1),⁵⁸ international law and standards as well as relevant jurisprudence emanating from international courts and tribunals, have established a comprehensive definition of rape based on the following elements:

- (i) the intentional penetration, however slight, of a sexual nature of the body of another person (of the victim, of a third person or of the perpetrator themselves) with any bodily part (of the perpetrator or of a third person) or object;
- (ii) the lack, absence or impossibility of consent or the fact that consent is vitiated;
- (iii) the presence of coercive circumstances negates consent; and
- (iv) the ability to consent to engage in sexual activity is integrally related to the concept of legal capacity, without which, some sexual acts may entail criminal liability (e.g., age-related incapacity; incapacity as a result of intoxication).⁵⁹

The first definition of rape under international law was espoused by the International Criminal Tribunal for Rwanda (ICTR) in 1998, which defined it as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."⁶⁰ In the subsequent *Kunarac et al. case*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) provided a more detailed definition of rape under international law:

The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim's free

57. International and regional authorities have drawn heavily on the jurisprudence of international criminal tribunals in cases of rape as an autonomous crime or as torture or other ill-treatment; this jurisprudence, in turn, has also clarified the scope and definition of rape as a crime against humanity. Even where discussing rape as an underlying act of crimes against humanity, the jurisprudence of international courts and tribunals provides clear interpretive guidance on the constitutive elements of rape and other forms of sexual assault. Accordingly, such jurisprudence is relied upon in the sections below on rape as an autonomous crime and on rape as torture or other ill-treatment.

58. ICJ, Practical Guide 1, pp. 70-74.

59. Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, March 2011, pp. 9-30.

60. *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 688. See also *Prosecutor v. Delalić et al.*, ICTY, ICTR-96-4-T, Trial Chamber, Judgment, 16 November 1998, paras. 478-479.

will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.⁶¹

This definition is reflected in article 36, sub-paragraph 1(a) of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), the first comprehensive treaty-based framework dedicated to combatting violence against women. It defines rape as “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.”⁶²

The 2011 International Criminal Court (ICC) Elements of Crimes define rape as war crime and as a crime against humanity as:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁶³

Many domestic legal systems have recognized an act of rape only where there has been complete penetration of the vagina by the penis of the perpetrator. This restrictive understanding omits various other forms of conduct that logically must constitute rape, such as partial penetration of the vagina with the penis; oral penile penetration; anal penile penetration; vaginal or anal penetration of the victim with another body part of the perpetrator such as fingers or fists; or penetration of the victim’s anus or vagina with an object. These are significant omissions as they also tend to leave out rape of men and boys from the definition in criminal law.⁶⁴ Avoiding this restrictive approach, the International Criminal Court regime defines rape as a non-consensual:

[invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.⁶⁵

This definition also covers situations where a male victim is forced to penetrate another victim, the perpetrator or a third person. Forcing family members to rape each other has been documented among the patterns of gross human rights violations perpetrated in the context of armed conflict.

The element of absence of consent deserves an attentive analysis. Consent must be given voluntarily, as a result of the person’s free will, assessed in the context of the surrounding circumstances.⁶⁶ In the *Kunarac et al. case*, the ICTY stated that “[f]orce or threat of

61. Prosecutor v. Kunarac, Kovać and Vuković, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 460. See also Prosecutor v. Gacumbitsi, ICTR, ICTR-2001-64-1, Appeals Chamber, Judgment, 7 July 2006, paras. 155, 157.

62. Istanbul Convention, article 36(1)(a). Sexual violence, including rape, may include “causing another person to engage in non-consensual acts of a sexual nature with a third person” under article 36(1)(c). See also ICC Elements of Crimes, elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under article 7(1)(g)-1, p. 8, and the war crime of rape in international and non-international armed conflicts under article 8(2)(b)(xxii)-1, p. 28, and article 8(2)(e)(vi)-1, pp. 36-37.

63. Rome Statute, article 7; ICC Elements of Crimes, article 7 (1)(g)-1, Crime against humanity of rape, elements 1 and 2, and article 8(2) (e)(vi) (as a war crime), elements 1 and 2.

64. For further information, see ICJ, *Women’s Access to Justice for Gender-Based Violence*, Practitioners’ Guide No. 12 (2016), pp. 203-204.

65. ICC Elements of Crimes, relating to article 7(1)(g)-1, article 8(2)(b)(xxii)-1 and article 8(2)(e)(vi)-1.

66. *M.C. v. Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003, para. 163. See also *Karen Tayag Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 22 September 2010, para. 8.9(b)(ii)(a); Istanbul Convention, article 36 (2); CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women*, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017 para. 33; UN Handbook for Legislation on Violence against Women, 2012, p. 24. In this context, it is worth underscoring that even when the sexual activity in question starts off as consensual, consent may be withdrawn at any stage, rendering the continuation of the said activity non-consensual.

force provides clear evidence of non-consent.”⁶⁷ Also, a context characterized by coercive circumstances, including, for example, custodial settings, negates consent.⁶⁸

Rule 70 of the Rules of Procedure and Evidence of the ICC recognize that a main point of inquiry for the Court in rape trials is whether a perpetrator used “force, threat of force, coercion” or was “taking advantage of a coercive environment.”⁶⁹ In the presence of such force, threat of force or coercion, or in circumstances amounting to a coercive environment, consent cannot be inferred from silence, lack of resistance, or by any words or conduct of a victim.⁷⁰ In its jurisprudence, the ICC clarified that coercion⁷¹ may be inherent in certain circumstances, such as armed conflict, military presence,⁷² or other coercive settings of which a perpetrator may take advantage to commit rape.⁷³

Coercion – and thus evidence of lack of consent – may also result from abuse of power, for example, where the perpetrator is in a position of political, military or other power over the victim.⁷⁴

ii. Rape as torture or other ill-treatment

International law prohibits torture and other ill-treatment in all circumstances.⁷⁵ The adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) attests to the absolute and non-derogable character of this prohibition, which is also recognized as fundamental principle of customary international law and a *jus cogens* norm.⁷⁶

67. *Prosecutor v. Kunarac, Kovać and Vuković*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 129.

68. For further details on the issue of “coercive circumstances” see ICJ, Practical Guide 1, pp. 72-73.

69. ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70. See also Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, 2011, pp. 17- 31.

70. ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70(a) and (c). For more details on the determination of consent based on the victim’s behaviour, see ICJ, Practical Guide 1, p. 74.

71. The term “coercion” does not require physical force but includes threats, intimidation, extortion, and other forms of duress which prey on fear or desperation, see Decision on the Confirmation of Charges, ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 440; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 162. In *M.C. v. Bulgaria*, the ECtHR confirmed that an absence of violence does not mean the victim consented, *M.C. v. Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003, paras. 163-166 and 180.

72. Decision on the Confirmation of Charges, ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 440; Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 162.

73. Several factors may contribute to creating a coercive environment, for instance, the number of people involved in the commission of the crime, or where the rape is committed during or immediately following a combat situation or is committed together with other crimes, see Judgment of 21 March 2016, ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber III, para. 104. In relation to the existence of a “coercive environment,” it must be proven that the perpetrator’s conduct involved “taking advantage” of such a coercive environment, see *Ibid.*, para. 104.

74. *Prosecutor v. Musema*, ICTR, ICTR-96-13-A, Trial Chamber, Judgment, 27 January 2000, paras. 880-881. Also, the ICC Elements of Crimes recognize abuse of power as a type of conduct that would constitute coercion, see ICC Elements of Crimes, article 7(1)(g)-1, para. 2; see also Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, March 2011, pp. 23-26. Abuse of power or official capacity can also constitute an aggravating circumstance, which the Court may consider in sentencing, see *Prosecutor v. Delalić et al.*, ICTY, IT-96-21, Trial Chamber, Judgment, 16 November 1998, para. 495. See also ICC Rules of Procedure and Evidence, rule 145(2)(b)(ii).

75. See CAT, articles 2 and 16; ICCPR, articles 7 and 4(2); ACHPR, article 5; Arab Charter on Human Rights, articles 4(2) and 8. See also Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 5-7.

76. See HRC, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8; Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 1 and 3. See also ICRC Customary IHL Database, 2005, rule 90 and commentary; and *Prosecutor v. Furundzija*, ICTY, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 153.

The qualification of rape as torture or other ill-treatment has evolved over time. For example, in 1976, the European Commission on Human Rights (EComHR) found that rapes perpetrated during the 1974 invasion by Turkey of Cyprus constituted "inhuman treatment".⁷⁷ Further, in some cases involving rape or attempted rape of men in custody as one of a series of violent acts, the HRC found that the victim had been subjected to "torture and inhuman treatment", but it did not provide any further analysis.⁷⁸ In 1986, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment had already noted that rape and other forms of sexual abuse are one of the various methods of physical torture.⁷⁹ Moreover, the case law of numerous international authorities, including courts and tribunals, have subsequently confirmed that rape constitutes a form of torture⁸⁰ under the ICCPR, the ACHPR and the CAT, in particular, when committed by or at the instigation of or with the consent or acquiescence of public officials⁸¹ 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,⁸² but also because its perpetration is rooted in gender discrimination.⁸³

For rape to constitute torture, the harm inflicted as a result of its perpetration needs not be solely or even predominantly for one of the prohibited purposes,⁸⁴ provided one of the purposes for which it is inflicted is a prohibited purpose.⁸⁵ In the *De Mejía v. Peru* case in 1996, the Inter-American Commission on Human Rights (IACoHR) was the first international body to determine that rape constituted torture. It stated that:

Rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community. ... Rape causes physical and mental suffering in the victim. In addition to the violence at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.⁸⁶

77. *Cyprus v Turkey*, EComHR, 10 July 1976. In 1994, the IACoHR also held rape to amount to inhumane treatment in IACoHR, *Flor De María Hernández Rivas v. El Salvador* (1994) Case No.10.911, Decision of 1 February 1994, Report No. 7/94.

78. See *Motta Et Al v. Uruguay*, HRC, Communication No. 11/1977, Views of 29 July 1980, para. 16; *Casafranca De Gómez v Peru*, HRC, Communication No. 981/2001, Views of 22 July 2003, para. 7.1.

79. Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.

80. For a comprehensive definition of torture and other ill-treatment, see ICJ, Practical Guide 1, pp. 57-60.

81. It is important to note that while this Legal Briefing is only focused on SGBV committed by State actors, the Human Rights Committee, among others, has made clear that it is "implicit in article 7 [of the ICCPR, enshrining the prohibition of torture or other ill-treatment] that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power", see, 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, 26 May 2004, para. 8. In light of this, rape may constitute torture even when inflicted by non-State actors. Violence, particularly sexual violence and rape, committed by private citizens, where the State fails to exercise due diligence to prevent, investigate, and prosecute is also a breach of the right not to be subjected to torture and ill-treatment for which the State is responsible. See, e.g., *M.C. v. Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003, para. 651; *Vertido v Philippines*, CEDAW Communication No 18/2008, Views of 22 September 2010.

82. See e.g., *Malawi African Association and Others v. Mauritania*, AComHPR, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, 11 May 2000, paras. 117 and 18. See also ICJ, Practical Guide 1, pp.73-75.

83. Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3, 15 January 2008, paras. 34-36; *Prosecutor v. Brđanin*, 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).

84. According to customary international law, prohibited purposes include obtaining information or a confession; punishing, intimidating, or coercing the victim or a third person; and discriminating on any ground against the victim or a third person. For further details on prohibited purposes, see ICJ, Practical Guide 1, pp. 56-60.

85. *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 153, 155; *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-A, Appeal Chamber, Judgment, 28 February 2005, para. 369-370; see also, *Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Giulia Pinzauti*, Chapter 6: *Contextualizing Sexual Violence: Selection of Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited By: Baron Serge Brammertz, Michelle Jarvis Cambridge University Press, April 2016, p. 189.

86. See Report No. 5/96 of 1 March 1996, IACoHR, *Raquel Martín de Mejía v. Peru*, Case No. 10.970.

In the *Aydin v. Turkey* case in 1997 concerning the custodial rape of a 17-year-old girl detained by security forces on the grounds of suspicion of collaboration by herself or members of her family with members of the PKK, the ECtHR noted that “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”⁸⁷ The Court went on to add that “the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed, the Court would have reached this conclusion on either of these grounds taken separately.”⁸⁸

The ICTY has also confirmed in multiple cases that rape necessarily reaches the threshold level of pain and suffering required for the purposes of establishing torture under general international law.⁸⁹ In addition, in the *Simić et al.* case, the ICTY held that certain acts, which, in light of the jurisprudence cited above, can properly be characterized as acts of rape, such as “ramming a police truncheon in the anus of a detainee” and “forcing male prisoners to perform oral sex on each other and on Stevan Todorović, sometimes in front of other prisoners” constituted torture.⁹⁰

iii. Other forms of sexual assault

As confirmed by the Istanbul Convention, other forms of sexual assault, short of rape, should be criminalized and broadly defined to include “other non-consensual acts of a sexual nature with a person.”⁹¹ Moreover, by virtue of article 36(1)(c) of the Istanbul Convention, sexual violence, including but not limited to rape, may include “causing another person to engage in non-consensual acts of a sexual nature with a third person”. Albeit in the context of determining whether acts of sexual violence constituted crimes against humanity, in the *Akayesu* case the ICTR defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”,⁹² adding that it “is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”⁹³ International authorities have found that other forms of sexual assault, short of rape, may constitute torture or other ill-treatment,⁹⁴ including: the touching of sexual organs and threats of rape,⁹⁵ being forced to watch sexual violence committed against an acquaintance

87. See *Aydin v. Turkey*, ECtHR (Grand Chamber), Application No. 23178/94, Judgment of 25 September 1997, para. 83. See also, Judgment of 25 November 2016, IACtHR, *Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 311.

88. See *Aydin v. Turkey*, ECtHR (Grand Chamber), Application No. 23178/94, Judgment of 25 September 1997, para. 86.

89. For example, although in the context of determining whether torture as a crime against humanity had been committed, in the *Kunarac et al.* case the ICTY Trial Chamber stated: “Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture”, *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 150-151; see also *Prosecutor v. Zejnil Delalić et al.*, ICTY, IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras. 495-496; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, para. 48 (Vol. 1); *Prosecutor v. Akayesu*, ICTR, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 597.

90. *Prosecutor v. Simić, Tadić and Zarić*, ICTY, IT-95-9, Trial Chamber, Judgment, 17 October 2003, para. 778.

91. Istanbul Convention, article 36(1)(b).

92. *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 598.

93. *Ibid.*, para. 688. See also *Prosecutor v. Alfred Musema*, ICTR, ICTR-96-13, Trial Chamber, Judgment, 27 January 2000, para. 965; *Prosecutor v. Rukundo*, ICTR, ICTR-2001-70-T, Trial Chamber, Judgment, 27 February 2009, paras. 379-380.

94. 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: Violence against Women, UN Doc. A/47/38, 1992, para. 7.

95. *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, paras. 560-561.

or relative,⁹⁶ forced mutual masturbation,⁹⁷ kicking a (male) prisoner in the genitals⁹⁸ and forced nudity.⁹⁹

iv. Rape and other forms of sexual assault as crimes against humanity

Rape and other forms of sexual assault, including sexual slavery, enforced prostitution may constitute an underlying act of crimes against humanity, provided the chapeau elements of the crime are met.¹⁰⁰ Notably, under the ICC definition of crimes against humanity,¹⁰¹ when the victim is raped or subjected to other forms of sexual assault while in the custody or control of the perpetrator, that criminal conduct could be charged as torture which, in turn, can be charged as a crime against humanity. This is consistent with the jurisprudence of the ICTY, according to which any form of sexual assault committed both during arrests and in detention settings and which causes "severe physical and psychological suffering"¹⁰² constituted torture even when not directly aimed at obtaining information.¹⁰³

B. The prohibition of rape and other forms of sexual assault under Tunisian law

i. The application of international law in Tunisia

As discussed in ICJ Practical Guide 1,¹⁰⁴ the Tunisian Constitution is clear on the primacy of international treaties over domestic law,¹⁰⁵ and there is nothing in the Constitution that precludes domestic courts, including the SCC, from relying on international treaties, as well as relevant customary international law.¹⁰⁶ This should enable the SCC, whenever relevant, to give due regard to international treaties and customary international law with a view to ensuring that they interpret and apply Tunisian domestic law in a manner consistent with Tunisia's international law obligations.

Under the general rules of State responsibility in international law, as well as under international human rights treaties, certain acts and certain forms of inaction on the part of the SCC, as

96. *Prosecutor v. Furundžija*, ICTY, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras. 267-268; *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 149; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 1214, 1235, 1246 (Vol. 1).

97. *Prosecutor v. Martić*, ICTY, IT-95-110T, Trial Chamber, Judgment, 12 June 2007, paras. 288, 413, footnote 899.

98. *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, paras. 498, 500. See also *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 613, 698 (Vol. 1).

99. *Valasinas v. Lithuania*, ECtHR, Application No. 44558/98, Judgment of 24 July 2001, paras. 117-118; Judgment of 25 November 2016, IACtHR, *Miguel Castro-Castro Prison v. Peru*, Series C No. 160, paras. 306, 308.

100. For an in-depth analysis of the chapeau elements of crimes against humanity and elements of each underlying act see, ICJ, Practical Guide 1, pp. 79-93.

101. See, ICJ, Practical Guide 1, pp. 79-93.

102. *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 489, 698 (Vol. 1).

103. *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 489 (Vol. 1): "The Trial Chamber has found that assaults, both sexual and physical, and rapes carried out variously by Serb soldiers, the Banja Luka CSB Special Police Detachment, and Kotor Varo policemen against Muslim and Croat detainees, both during arrests and in detention centres, caused them severe physical and psychological suffering and that the assaults were carried out as a form of intimidation and discrimination, and in some cases with the aim of obtaining information. Having found that the general requirements of both Article 3 and Article 5 are satisfied, the Trial Chamber finds that Serb Forces committed torture against Muslim and Croat detainees, both as a crime against humanity and as a violation of the laws or customs of war."; *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 518; *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 654.

104. ICJ, Practical Guide 1, pp. 10-12.

105. In terms of the relationship between binding international law and domestic law, article 20 of the Constitution provides that ratified treaties are superior to national legislation but inferior to the Constitution.

106. The Constitution is silent on whether treaties ratified by Tunisia can be applied directly in national courts, leaving the issue to be determined by domestic institutions. Furthermore, the status of other sources of international law, such as customary international law and general principles of law, is not explicitly mentioned in the Constitution. For further details see ICJ, Practical Guide 1, pp. 10-11.

themselves organs of the State, may constitute violations of or result in Tunisia violating its international legal obligations. The SCC consequently have a duty to exercise all means open to them to help ensure Tunisia complies with its obligations under binding international law treaties and customary international law. These obligations apply to: a) the criminalization of conduct under international law, b) the duty to conduct prompt, effective, thorough, independent, impartial and transparent investigations into crimes under international law, c) the duty to prosecute those allegedly responsible where the evidence so warrants, and d) the duty to respect, protect and fulfill the victims' rights to effectively participate in the investigation, in the criminal proceedings and to effective remedies, including judicial ones.¹⁰⁷

Accordingly, while investigating, prosecuting and adjudicating cases involving gross human rights violations that amount to crimes under international law, including rape and other forms of sexual assault, the SCC should always strive to interpret domestic law consistently with Tunisia's international law obligations, including with respect to the scope of criminal conduct and the principle of legality, as well as with regard to investigation of cases and the conduct of trials.

ii. The specificities of the Transitional Justice Framework

As discussed at length in Practical Guide 2, the Tunisian Transitional Justice laws of 2013 and 2014 granted special powers to the IVD to investigate gross human rights violations and other crimes under Article 8 of the 2013 Law.¹⁰⁸ However, the Transitional Justice Framework does not contain any specific provisions on whether or how general Tunisian criminal procedure applies to proceedings before the SCC.

Under Tunisia's general criminal procedure, the authority to investigate, prepare indictments for and prosecute gross human rights violations rests with investigative judges, the indictment chamber and the Office of the Public Prosecutor (OPP). However, under the Transitional Justice Framework, the IVD had exclusive responsibility for conducting investigations and preparing indictments and the OPP was required to "automatically" transfer any cases referred to it by the IVD to the SCC. The conduct of investigations and the preparation of indictments were guided by the IVD Investigation Committee Procedures Guide¹⁰⁹ that supplemented the 2013 Law and 2014 Law, which contained few provisions on criminal procedure.¹¹⁰

According to the information available to the ICJ, the OPP played no or a minimal role in the investigation of cases by the IVD and referral of cases to the SCC. References to the OPP in the 2013 Law and 2014 Law set out above are the only explicit references in the Transitional Justice Framework to their role in SCC cases.¹¹¹ Further, the Transitional Justice Framework contains few provisions regarding the conduct of trials before the SCC.¹¹²

iii. The criminalization of sexual and gender-based violence under Tunisian criminal law

The Tunisian Criminal Code criminalizes rape and "indecent assault." The definitions of these crimes that applied prior to 2017 were largely inconsistent with international law and standards. The Code was amended in 2017 by Law No. 58 of 2017 on Eliminating Violence Against Women (the 2017 Law),¹¹³ bringing some of these crimes, in particular the definition of rape, in line with international law. However, they continue to be addressed in the Criminal Code in the chapter

107. Practical Guide 2, pp. 78.

108. Practical Guide 2, pp. 22-25.

109. The IVD Investigation Committee Procedures Guide, consisting in a set of internal rules of procedures, were adopted by the IVD Council on 26 January 2016.

110. For more details on the broad investigative power of the IVD under the Transitional Justice Framework see ICJ Practical Guide 2, pp. 22-25.

111. ICJ Practical Guide 2, p. 25.

112. ICJ Practical Guide 2, pp. 51-52.

113. Law No. 2017-58 of 26 July 2017 on violence against women. The law entered into force on 1 February 2018. Article 3 defining terms in the Law provided for a definition of "sexual violence" – "any act or word whose objective is to subject the woman to his own sexual desires or the sexual desires of others, by (means of) duress, fraud, pressure or other means, such as to weaken or impair the will, regardless of the relationship of the author with the victim." However, neither article 3 or the remainder of the 2017 Law provide for criminalization of sexual violence per se.

on “crimes against decency”, as opposed to serious crimes against the person, physical integrity and sexual autonomy.¹¹⁴

As mentioned above, the SCC temporal jurisdiction extends from 1955 until 2013; as a result, in the first instance, the SCC will have regard to SGB offences, including rape, and their respective definitions under Tunisia’s criminal law prior to the 2017 Law, notwithstanding the fact that such definitions under domestic criminal law prior to 2017 were largely inconsistent with international law and standards. In light of this, the following analysis covers how these domestic definitions evolved over time in the Criminal Code and illustrates the potential challenges that the SCC may face in their application.

Article 227 of the Criminal Code proscribes rape. Prior to Law No. 58 of 2017, article 227¹¹⁵ stated:

“Shall be punished by death anyone who:

- (1) forces a woman to sexual intercourse through violence or arms or threat thereof;
- (2) forces a girl under the age of 10 years to sexual intercourse, even without the use of violence or arms or threat thereof.

Sexual intercourse without the women’s consent committed outside of the above-mentioned cases is punishable by life imprisonment.

Consent shall be considered absent if the victim is under the age of 13 years.”

The above definition of rape is evidently not in line with international law and standards since it does not include rape committed against men and is confined to “sexual intercourse”, which may be defined narrowly as vaginal penal penetration only; such a definition falls short of the proscription of rape under international law and standards, which, in turn, encompasses the “[invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”.¹¹⁶

Law No. 28 of 2017 amended the above-mentioned provision to bring it in line with international law. Article 227 now defines rape as “any act of sexual penetration, whatever its nature and by whatever means, committed against a woman or a man without their consent,” and is punishable either by a sentence of 20 years’ imprisonment, or by life imprisonment where aggravating circumstances, including violence or the use or threat of use of a weapon to commit the crime, or rape committed on a person who is under the age of 16 years, exist and are proven.¹¹⁷

Article 228 of the Criminal Code (as amended by Law No. 93 of 1995)¹¹⁸ provides that, the commission of an act defined as “indecent assault” against an adult male or female without his consent shall be punished upon conviction by a sentence of six years’ imprisonment. The provision was defined to include the sexual penetration of a men (excluded until 2017 from the definition of rape)¹¹⁹ and any other sexual act on the body of a victim.¹²⁰ The penalty is

114. The UN Handbook for Legislation on Violence against Women, recommends that States define sexual assault as a violation of bodily integrity and sexual autonomy, see Handbook for Legislation on Violence against Women, 2012, p. 24.

115. As amended by Law No. 9 of 1985 and Law No. 23 of 1989.

116. ICC Elements of Crimes, relating to article 7(1)(g)-1, article 8(2)(b)(xxii)-1 and article 8(2)(e)(vi)-1.

117. Criminal Code, article 227, paras. 1, 3, as amended by the 2017 Law. Violence or the use or threat of use of a weapon to commit the crime, or rape committed on a person who is under the age of 16 years, or through abuse of power may each constitute aggravating circumstances of the crime of rape. The legal age of majority in Tunisia however is 18 years, see article 153 of the Personal Status Code. A victim cannot consent if they are under the age of 16. Criminal Code, article 227, para. 2.

118. As amended by Law No. 93 of 1995.

119. This was the judicial practice before the amendment of article 227 Penal Code. Although it was not clearly defined by the abrogated version of article 227, rape was always considered in jurisprudence as “natural penetration” made by a male on a female body. See Cour de Cassation Decision N. 6417 on 16 June 1969 (“The crime of rape is characterised only in the case where sexual natural penetration occurs, i.e. vaginal penetration”).

120. Cour de Cassation, Decision No. 34524 of 16 June 1981 (“sexual assault is committed by any act over the body of the victim to sexually intimidate them”).

increased to twelve years' imprisonment if the victim is under 18 years of age (pre-2017).¹²¹ The penalty becomes life imprisonment if the offence "was committed by use of a weapon, threat, abduction or by inflicting injury or mutilation or disfigurement or any other act likely to put the life of the victim in danger".¹²²

To sum up, Tunisia's criminal provisions proscribing rape and "indecent assault" – the two provisions through which acts of sexual violence are to be adjudicated by the SCC – do not conform with international law and standards. The pre-2017 definition of rape, applicable to the period over which the SCC has temporal jurisdiction, does not include rape committed against men and is confined to "sexual intercourse", which may be defined narrowly as vaginal penal penetration only; such a definition would fall short of the proscription of rape under international law and standards. The post-2017 definition of rape complies with international law, provided it is applied consistently with international jurisprudence on the meaning of "consent."

In any event, to this day, Tunisian criminal law does not criminalize other forms of "sexual assault" per se, except to the extent that the domestic criminal provisions on "indecent assault" may be interpreted by criminal justice actors in an as inclusive as possible manner so as to capture all acts that would constitute sexual assault under international law, that is, non-consensual (broadly interpreted to include coercive circumstances) sexual conduct not involving penetration.

To conclude, it is also worth noting that Tunisia has not criminalized crimes against humanity as such in domestic law.¹²³ Although a number of underlying acts are, to varying extents, criminalized in domestic law, including rape and some other forms of sexual assault, the Tunisian Criminal Code does not explicitly recognize that, when committed in the context of a systematic or widespread attack against a civilian population, these underlying crimes become even more serious, as provided for by international law. Moreover, as discussed above, the Tunisian definitions of the crimes of rape and "indecent assault" do not always accord with definitions of the underlying acts under international law, whether under the Rome Statute or customary international law.¹²⁴

However, as discussed in depth in ICJ Practical Guide 1,¹²⁵ in the context of cases before the SCC, there is scope to interpret and apply the domestic criminal law provisions predating the 2017 Law in accordance with international law and standards so as to capture all proscribed conduct constituting either rape or other forms of sexual assault in line with such law and standards, including the definitions of such crimes under international law, as well as with the principle of legality, and its corollary with respect to the non-retroactivity of the criminal law, the right of the accused to a fair trial and the right of victims of SGB crimes to access to justice and effective remedies.

121. Criminal Code, article 228, para 2. The 2017 Law amended the provision to aggravate the offence where committed against a child but without violence.

122. Criminal Code, article 227, para. 3.

123. For more detail, see ICJ, Practical Guide 1, pp. 92-93.

124. Ibid.

125. See ICJ, Practical Guide 1, pp. 94-97.

III. The investigation, prosecution and adjudication of sexual and gender-based crimes

Due to a multitude of factors, including harmful gender stereotypes and other misconceptions about the nature and seriousness of the offences, the increased difficulty in gathering evidence as well as the social stigma endured by victims and their communities, sexual and gender-based crimes have been often overlooked or under-prioritized by the international and domestic criminal law systems, resulting in even greater impunity for the perpetrators of such offences than for other crimes. In the last decades, international courts and tribunals, international expert human rights bodies and national courts, among other entities, have made great progress in beginning to address systemic impunity for gender-based crimes by clarifying norms in international human rights law, international humanitarian law and international criminal law, affirming that such legal norms clearly proscribed SGBV offences, and imposed obligations on States to investigate, prosecute and sanction those responsible for them. The same courts, tribunals, expert bodies, etc. have also identified standards and documented recommended practices to address such crimes and ensure the accountability of their perpetrators.

A. Inherent challenges in investigating, prosecuting and adjudicating sexual and gender-based crimes

Along with the general challenges of investigating and prosecuting a majority of crimes that occurred in a fairly distant past, over a lengthy period of time characterized by large-scale, gross human rights violations, the investigation, prosecution and adjudication of SGB crimes pose their own, specific challenges. These include: the under- or non-reporting of such offences due to societal, cultural or religious factors;¹²⁶ the heavy stigma and blame often attached to victims; the failure to adequately characterize and classify SGB crimes; the lack of or increased difficulty in gathering evidence owing among others to the passage of time.¹²⁷ Against this background, this section analyzes some of the factors that are likely to be more relevant to the criminal proceedings before the SCC in Tunisia arising from gross human rights violations disclosing evidence of SGB crimes.

i. Misconceptions on the nature and gravity of sexual and gender-based crimes

As put forward by some scholars, whether in the context of an armed conflict or in “peace time” situations characterized by gross human rights violations committed on a large scale, SGBV

126. As explained by the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, developed by the United Kingdom's Foreign and Commonwealth Office in consultation with a broad range of UN, NGO and State representatives: “Some survivors do not come forward because of societally imposed stigma, shame and humiliation, and because of debilitating trauma experienced by survivors and their families. Others fear being ostracized by spouses, other family members and their community. Some are afraid of further violence, such as retaliation or honour killings. Victims also have a lack of trust in authorities, such as the national police, or international peacekeepers or investigators”, see *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (International Protocol on Sexual Violence in Conflict), Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office, Second Edition, March 2017, pp. 20 and 267; see also Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 42. For further details, specifically on the issue of under-reporting for SGB crimes against male victims, see Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, p. 39; and Oosterveld, Valerie, “Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals” (2014), *Law Publications*, p. 119.

127. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p. 6; and Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 42-43; see also ICTJ, *Gender and Transitional Justice - A Training Module Series, Module 4 on Criminal Justice*, October 2018, p. 34.

generally takes place “across a spectrum”,¹²⁸ including “opportunistic” SGBV,¹²⁹ “strategic” SGBV,¹³⁰ as well as SGBV occurring as part of a “practice” tolerated by superiors.¹³¹ Adequately contextualizing SGBV to be able to identify these crucial connections is extremely important to investigate, prosecute and sanction such crimes effectively. However, ascribing these crimes to their proper context may prove particularly challenging because of the common misconceptions attached to SGB crimes.

The most common misconceptions about SGB crimes revolve around the failure to consider rape and other forms of sexual assault as violent crimes against the person or as serious criminal offences as other violent crimes altogether. Sometimes, the assumption that sexual violence is an ‘incidental’ by-product of other forms of violence occurring, for example, in the context of custodial interrogations, leads investigators and prosecutors to overlook the specific character of these offences, namely, their sexual nature. In addition, in periods characterized by widespread human rights violations where often SGB offences do not occur in isolation but as part of a broad campaign of crimes (e.g., extra-judicial executions, torture and other ill-treatment), the risk that the investigative and prosecutorial authorities will de-prioritize these offences increases tremendously. Indeed, the extensive volume of crimes to be investigated and prosecuted, or alternatively the complex nature of SGB crimes as autonomous offences, in conjunction with the limited time and resources available to investigators and prosecutors, may lead them to perceive SGB crimes as less “serious” than others and, as a result, to overlook them.¹³²

Other misconceptions, generally resulting from harmful gender stereotypes against women, concern the notion that rape and other forms of sexual assault are considered more as a sexual matter “staining” a female victim’s honour and dignity, rather than causing her harm as crimes of violence.¹³³ This, in turn, may lead criminal justice actors to see these offences as “opportunistic” acts, as opposed to crimes connected to a broader pattern of violent conduct, and to discount their seriousness, especially if the offences do not occur in a widespread and systematic manner.¹³⁴ These misconceptions are also reflected in domestic legal frameworks proscribing rape and other forms of sexual assault as “crimes against decency”, such is the case in Tunisia.¹³⁵

ii. Misconceptions on sexual and gender-based violence against men and boys

The investigation and prosecution of SGBV against men and boys does not usually give rise to the same misconceptions as SGBV against women and girls. However, such crimes are

128. Elisabeth Jean Wood, Conflict-related sexual violence and the policy implications of recent research, in the *International Review of the Red Cross* (2014), 96 (894), pp. 459-462; see also Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Giulia Pinzauti, *Chapter 6: Contextualizing Sexual Violence: Selection of Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited By: Baron Serge Brammertz, Michelle Jarvis Cambridge University Press, April 2016, p. 173.

129. Defined by E.J. Wood as: sexual violence that is “carried out for private reasons rather than organization objectives”, see *Ibid.*, p. 470.

130. Defined by E.J. Wood as: sexual violence that is “purposefully adopted in pursuit of organization objectives”, see *Ibid.*, p. 470.

131. Defined by E.J. Wood as: sexual violence that is “not ordered (even implicitly) but is tolerated by commanders”, see *Ibid.*, p. 471.

132. As rightly pointed out by Baron Serge Brammertz and Michelle Jarvis, “investigators and prosecutors will always have to make judgment calls about what crimes to prioritize. (...) However, this assessment must be made on the basis of valid criteria and must not be improperly influenced by misconceptions that distort the nature and seriousness of sexual violence crimes”, see Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 37.

133. Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Serge Baron Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 33.

134. For further details, see Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 33-45.

135. In the Tunisian Criminal Code, rape and other forms of sexual assault continue to be addressed under the chapter on “crimes against decency”. For further detail, see Chapter II, section B (iii) of this Legal Briefing.

very often marginalized and underestimated in their own right,¹³⁶ and indeed present their own challenges, including their very own set of misconceptions, that need to be understood, acknowledged and addressed to ensure their effective investigation and prosecution.¹³⁷

In a context of armed conflict or large-scale human rights violations, the main driver of SGBV against men is generally considered to be the will to “emasculate” the victims, disempower and humiliate them to assert domination¹³⁸ and crush their masculine identity.¹³⁹ In many societies, cultural norms of masculinity and gendered assumptions are still deeply entrenched to the point that it might be difficult for the population to even envisage the possibility of a man as a victim of SGBV.¹⁴⁰ In fact, this misconception draws from other harmful gender stereotypes that see the concept of masculinity as irreconcilable with the notion of vulnerability to sexual violence and victimhood.¹⁴¹ Indeed, the misogyny that until today permeates all societies may lead some to think “what could be worse for a man than to be treated like a woman?” Such misconceptions and harmful gender stereotypes are also often reflected in domestic legislation, where criminal codes do not recognize nor proscribe sexual violence against men.¹⁴² All these factors combined may lead to a failure by the criminal justice actors to properly acknowledge, investigate and prosecute sexual offences against men, including as a result of their mischaracterization in law.¹⁴³

Commonly, SGB crimes against men have been classified as torture, cruel treatment or inhumane acts, often ignoring completely the sexual nature of these offences.¹⁴⁴ While SGBV often does meet the severity threshold of pain or suffering, whether physical or mental, required to constitute torture, characterizing acts of SGBV against men only as constituting the crime of torture, without recognizing their sexual nature raises some concerns.¹⁴⁵ First, obscuring the sexual nature of such crimes may lead to neglecting the resulting sexual and gendered consequences of such offences and further hamper access to gender and sex-specific health and psychological services for male victims.¹⁴⁶ Second, the lack of reporting of SGB crimes against men as such may contribute to the continuing marginalization and underestimation of such offences.¹⁴⁷ This misrepresentation can sometimes result also from the victim’s own account, which often omits entirely or fails to properly account for the actual sexual nature of the crimes

136. UN Security Council explicitly recognized men and boys as victims of sexual violence in conflict for the first time in Resolution 2106 of June 2013, see UN Security Council Res 2106, UN Doc. S/RES/2106, para. 6; see also Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, p. 44.

137. See Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases, from Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 41-42.

138. Oosterveld, Valerie, “Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals” (2014), *Law Publications*, p. 117. Oosterveld further notes that “Men and boys are most likely to experience sexual violence during conflict or atrocity while in detention”.

139. Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, pp. 43-44; see also International Protocol on Sexual Violence in Conflict, p. 271.

140. International Protocol on Sexual Violence in Conflict, p. 265.

141. Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, pp. 43-44; see also International Protocol on Sexual Violence in Conflict, p. 265.

142. In Tunisia for example, before the adoption of the 2017 Law, rape could only be perpetrated against women, see Chapter II, section B (iii) of this Legal Briefing. For further information on this issue, see Oosterveld, Valerie, “Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals” (2014), *Law Publications*, p. 109; and Sandesh Sivakumaran, “Prosecuting Sexual Violence Against Men and Boys” in Anne-Marie de Brouwer et al, eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Antwerp: Intersentia, 2013), pp. 82-83.

143. Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases, from Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 41-42.

144. Oosterveld, Valerie, “Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals” (2014), *Law Publications*, p. 109.

145. Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, p. 34; see also Michelle Jarvis, *Chapter 1: Overview: The Challenge of Accountability for Conflict-related Sexual Violence Crimes*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 7-8.

146. Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, p. 34.

147. Oosterveld, Valerie, “Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals” (2014), *Law Publications*, pp. 109 and 112.

out of an unwillingness to be labelled a “victim of sexual violence” to avoid the adverse social consequences of such label.¹⁴⁸ Indeed, in certain societies being a victim of torture may not have the same stigma and damaging impact on male victims/survivors that the imputed lack of masculinity associated with being a male victim/survivor of SGB crimes carries.¹⁴⁹

B. International standards for the investigation, prosecution and adjudication of sexual and gender-based crimes

i. The need to adopt a gender specific approach in investigating, prosecuting and adjudicating sexual and gender-based crimes

Ensuring accountability for SGB crimes not only requires investigations that are thorough, gender-sensitive and free from harmful gender stereotypes discriminating against women and men,¹⁵⁰ but also effective prosecution and judicial strategies that adhere to, and are modelled on, international human rights law.¹⁵¹ Gender constructions of femininity and masculinity are likely to have an impact on the consequences suffered by victims of SGB crimes.¹⁵² It is thus paramount for criminal justice actors to understand the relevance of gender factors¹⁵³ to their work to be able to accurately characterize SGB crimes and to ensure that the full nature of the harm inflicted on the victim as a result of such offences be recognized during a) the investigation; b) in the actual selection of the crimes as charged, which ought to reflect their gravity and the harm such offending has caused to the victim; c) in the prosecutorial efforts made to ensure that the evidence at trial truly accounts for the severity of the crimes as charged; d) in the prosecution submissions about the appropriateness of sanctions called for (i.e., commensurate to the offending’s severity); and e) in the actual sentencing imposed by judges upon a conviction, which must reflect, on the one hand, the offence’s gravity and its impact on the victim and, on the other, the existence or absence of both mitigating and aggravating circumstances, as well as the defendant’s antecedents, if any.¹⁵⁴

To adequately address these issues, it is important to adopt an apply a gender analysis¹⁵⁵ while investigating and prosecuting SGB crimes. This analysis requires “consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities”,¹⁵⁶ and how they might differently impact on men and women victims. This can be done by integrating a gender perspective and ensuring the necessary gender expertise be at hand in all aspects of the work, from investigations to the selection and handling of victims and witnesses, to the prosecution and sentencing phases.¹⁵⁷ For instance, an investigation team should include trained specialists in investigating sexual violence crimes, as well as interpreters

148. Oosterveld, Valerie, “Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals” (2014), *Law Publications*, p. 119.

149. Also, many male victims of SGBV fear being ostracized or worse as homosexuals, see Philipp Schulz, *Male Survivors of Wartime Sexual Violence - Perspectives from Northern Uganda*, November 2020, pp. 43-44; see also International Protocol on Sexual Violence in Conflict, p. 267.

150. See, inter alia, Michelle Jarvis, Najwa Nabti, *Chapter 4: Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 82-90.

151. For further detail see, inter alia, Michelle Jarvis, Najwa Nabti, *Chapter 4: Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 90-92 and 108-110.

152. OHCHR, *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (New York/Geneva, OHCHR 2018), pp. 43-47.

153. OHCHR, *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (New York/Geneva, OHCHR 2018), pp. 26-29 and 32-35.

154. Michelle Jarvis, *Chapter 1: Overview: The Challenge of Accountability for Conflict-related Sexual Violence Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 11.

155. The Office of the Prosecutor of the ICC defines gender analysis as examining “the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes”, see ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p. 4.

156. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, pp. 12-13.

157. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p. 25.

(where necessary), of all genders.¹⁵⁸ Assumptions about the victim's preference for the gender of the investigator, medical expert and interpreter with whom they interact during the criminal justice process should not be made, and the victim/survivor should be in a position to make their own choice where possible.¹⁵⁹

While the creation of gender focal points and other SGBV dedicated mechanisms may be important in some contexts,¹⁶⁰ criminal justice systems should not solely rely on gender experts to deal with SGBV cases. It would be important, for instance, for SCC judges and prosecutors to undergo SGBV relevant training on an ongoing basis,¹⁶¹ and to develop, adopt and implement a comprehensive gender policy and operational guidelines, as well as specialized approaches to investigating and prosecuting SGB crimes.¹⁶²

ii. Sexual and gender-based crimes must be accurately characterized and recognized as serious crimes

To minimize the risk that the misconceptions analyzed above will negatively affect the adjudication of SGBV cases, SCC judges and prosecutors should first of all identify whether sexual violence related crimes have taken place and understand the connections between these crimes and the broader context of violence in which they have occurred. Acknowledging links between sexual violence and other criminal behaviour is essential to facilitate the recognition of rape and other forms of sexual assault as violent crimes.¹⁶³

Ideally,¹⁶⁴ charges for SGB crimes must be brought explicitly as crimes that per se properly characterize the sexual nature of the criminal behaviour in question and properly reflect its gravity, in addition to charging these acts as other crimes, e.g. charging rape as torture.¹⁶⁵ Even when using more general crime categories attention should be given to ensuring that the sexual

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

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

160. For further examples of SGBV dedicated mechanisms, see Michelle Jarvis, Najwa Nabti, *Chapter 4: Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 105-110.

161. For example, staff members in charge of interacting with victims should receive training on how to engage with victims of SGBV in a way that will be respectful of their sensitivity. See, ICTJ, *Gender and Transitional Justice - A Training Module Series, Module 4 on Criminal Justice*, October 2018, p. 36.

162. Michelle Jarvis, Najwa Nabti, *Chapter 4: Policies and Institutional Strategies for Successful Sexual Violence Prosecutions*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 105; see also ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p. 14.

163. Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Giulia Pinzauti, *Chapter 6: Contextualizing Sexual Violence: Selection of Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 217.

164. As interestingly noted by the former deputy to the prosecutor of the ICTY, Michelle Jarvis, "Separating sexual violence into a distinct category can be important to ensure fair labelling of criminal conduct and to ensure sexual violence is not overlooked, particularly until our overall gender competence improves. However, in our experience, viewing sexual violence as a special category can increase the risk of different – and usually narrower – approaches to these crimes. This is a difficult issue for any prosecution office to navigate, but perhaps the most important thing is to be aware of the potential tension between these two objectives. Our experience strongly underscores the importance of contextualizing sexual violence in international criminal law cases and prosecuting it under general crime categories, such as torture, enslavement, persecution, and genocide, as appropriate, albeit alongside available crime categories that expressly reference sexual violence where possible", see Michelle Jarvis, *Chapter 1: Overview: The Challenge of Accountability for Conflict-related Sexual Violence Crimes*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 7-8.

165. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 72; see also International Protocol on Sexual Violence in Conflict, p. 56, "the same act of sexual violence can satisfy the substantive elements of various underlying crimes, and practitioners are encouraged to document both crimes which always involve sexual violence, such as rape, enforced pregnancy or sexual slavery, and other crimes which can be committed by sexual and non-sexual conduct, such as torture or murder"; and Oosterveld, Valerie, "Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals" (2014), *Law Publications*, p. 112, "The better approach is to charge rape as rape, in addition to other forms of harm (if the rape also fulfills the elements of crime for those other forms). When rape is categorized solely under non-rape categories, the sexual nature of the harm is obscured and therefore potentially lost when determining liability."

component disclosed by the evidence is not obscured.¹⁶⁶ Cumulative charges should be brought so as to “reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by the evidence in each case”.¹⁶⁷

Last but not least, in the process of selecting the crimes to charge, efforts should be made to accurately reflect the potentially distinct harms suffered by both men and women victims.¹⁶⁸

iii. Pursuing a victim-centred approach during investigations, prosecutions and adjudication

For SGBV victims/survivors, the pursuit of justice may prove a traumatic endeavour, including because it may give rise to the risk of exposing them to further human rights violations and abuses with the result of aggravating the harm and suffering they have already endured. This is commonly referred to as “secondary victimization.” According to the UN General Assembly, secondary victimization occurs not as a direct result of the criminal act, but through the inadequate response of institutions and individuals to the victim.¹⁶⁹ States are thus strongly encouraged to develop comprehensive practices and strategies that ensure supportive and sensitive responses throughout the investigation and prosecution of SGB crimes. Sensitive and victim-centred approaches, in turn, “increase the likelihood of successful apprehension, prosecution and conviction of the offender, contribute to the well-being and safety of the victim and prevent secondary victimization.”¹⁷⁰

As a priority, justice system actors and persons interacting with victims and witnesses must adhere to the “do no harm” principle,¹⁷¹ which requires that they ensure the safety and security of all participants in the investigation;¹⁷² ensure the victim has autonomy and can provide informed consent;¹⁷³ and mitigate the harm they might cause in their interactions with a victim, including through re-traumatization, and the use of inadequate investigation techniques, which, in turn, may negatively impact the victim’s ability to secure justice and reparations.¹⁷⁴

Furthermore, justice system actors should give due regard to the victim’s right to privacy,¹⁷⁵ and minimize any adverse impact they may endure, including stigma that might arise from

166. Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Giulia Pinzauti, *Chapter 6: Contextualizing Sexual Violence: Selection of Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 217-218.

167. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 72.

168. Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Giulia Pinzauti, Chapter 6: Contextualizing Sexual Violence: Selection of Crimes, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 218.

169. UN General Assembly (UNGA), *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, UN Doc. A/RES/65/228, 31 March 2011, para. 15(c). For example, “interviewing victims/survivors several times or obliging them to relay and recount their statement repeatedly during the same investigation, can greatly contribute to their secondary victimization and should be avoided”, see ICJ, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, (2020), p. 32.

170. UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 16(b).

171. See, e.g., Istanbul Protocol, paras. 57-73; International Protocol on Sexual Violence in Conflict, pp. 85-104; ACHPR Guidelines on Sexual Violence, p. 18; ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras. 60-61; OHCHR, *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (New York/Geneva, OHCHR 2018), p. 25.

172. See, e.g. Istanbul Protocol, paras. 95-97; ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 61.

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

174. International Protocol on Sexual Violence in Conflict, pp. 90-97; Istanbul Protocol, paras. 58-62, 146-149; ACHPR Guidelines on Sexual Violence, p. 18; WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), Part III(4); OHCHR, *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (New York/Geneva, OHCHR 2018), p. 25.

175. International Protocol on Sexual Violence in Conflict, pp. 95-97; Istanbul Protocol, paras. 65, 68, 71, 217; WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), Part (iii)(5); ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 60.

their interaction with the justice system.¹⁷⁶ In this regard, as a general rule, assumptions should not be made about victims' willingness to come forward and testify about the harm they have suffered. Nevertheless, the likelihood that some victims will be discouraged or opposed to disclose their experience should be taken into due consideration by justice system actors and time and resources should be designated to seek to address their concerns.¹⁷⁷ In a like manner, criminal practitioners should not preemptively assume that SGBV victims always experience shame and stigma but, at the same time, they should take appropriate measures and devise strategies to surmount their unwillingness to testify, which may be rooted in shame and stigma, while making sure not to reinforce these feelings.¹⁷⁸ Indeed, the difficulty in striking the correct balance between acknowledging the reality of socially constructed harm for the victim based on harmful gender stereotypes and misconceptions, while not reinforcing it, needs to be duly addressed.¹⁷⁹ Overall, criminal justice sector actors should aim to collectively create a "safe, private and supportive environment in which victims and witnesses of sexual violence feel sufficiently secure and comfortable to come forward and report crimes."¹⁸⁰

Such comprehensive engagement on the part of the criminal justice system with SGBV victims/survivors is often critical in enabling them to provide more convincing and effective testimony, and in assisting with securing reliable and compelling evidence of the offence(s) more broadly, thus enhancing the chances that the prosecution's case will ultimately be successful at trial, both in securing the conviction of the perpetrator in just and fair proceedings, and in the imposition of punishments truly commensurate with the gravity of such offences.¹⁸¹

Any measures adopted throughout the investigation and prosecution, however, must also be consistent with the principle of equality of arms and the accused's right to a fair trial and, in particular, the right of the defence to full disclosure of the prosecution case, the right to time and facility to prepare a defence, the right to examine and cross-examine witnesses and the right to a public trial.¹⁸²

a) Assessment and management of the risks that victims and witnesses may face

The opening of criminal investigations and the subsequent unfolding of prosecutions of SGB crimes often give rise to a real risk of acts of retaliation against victims and/or witnesses who testify against the alleged perpetrator.¹⁸³ International standards and recommended practices require that special measures should be taken to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses (and their families, if

176. ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 65.

177. See Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 70; UN Women, *Handbook for Legislation on Violence against Women*, p. 40; ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 65; and ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence*, (2021), p. 15.

178. Baron Serge Brammertz and Michelle Jarvis, *Chapter 3: Challenges to Successful Outcomes in Sexual Violence Cases*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, p. 70; International Protocol on Sexual Violence in Conflict, p. 20. As put forward by ICTJ, some victims and witnesses may find the process of providing evidence to be empowering, see ICTJ, *Gender and Transitional Justice - A Training Module Series, Module 4 on Criminal Justice*, October 2018, pp. 37-38.

179. Michelle Jarvis, *Chapter 1: Overview: The Challenge of Accountability for Conflict-related Sexual Violence Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 13-14; International Protocol on Sexual Violence in Conflict, pp. 20 and for more detail on the notion of victim's "autonomy" see pp. 88-89.

180. International Protocol on Sexual Violence in Conflict, pp. 20 and 231-242.

181. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, pp. 53-54. For this purpose, also adopting measures with a view to prepare victims/witnesses for their testimony is crucial to facilitating the complete provision of evidence pertaining to SGB crimes, ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 84.

182. For more detail on the right of the accused to a fair trial see ICJ, *Practical Guide 2*, pp. 26-44.

183. International Protocol on Sexual Violence in Conflict, pp. 115-116.

need be).¹⁸⁴ Potential SGBV victims/witnesses should undergo a preliminary “psychosocial and risk assessments and screenings”.¹⁸⁵ The psychosocial assessment, which should be compulsory for all victims/witnesses of SGB crimes, should be conducted by a psychosocial expert, who will consider the well-being of the victims/witnesses, and their capacity to both be subjected to an interview process and testify “without undue personal or psychological harm”.¹⁸⁶ The screening will focus on assessing the individual’s personal circumstances, willingness to assist the investigation, evidential value of their testimony, and will seek to establish a relationship of trust and respect.¹⁸⁷ The risk assessment will be conducted with a focus on specific risks for the victims/witnesses and the available protection measures.¹⁸⁸ It should take place at the very initial stages of the criminal process, and be reviewed methodically throughout,¹⁸⁹ as risk levels and types of risk may change over time.¹⁹⁰

In order to protect SGBV victims/witnesses during criminal proceedings, a wide range of protection mechanisms may be provided to the extent necessary and in a manner compatible with the right of the accused to a fair trial.¹⁹¹ Some of these protective measures may include: (a) exceptions to the disclosure of evidence to the media and the public;¹⁹² (b) proceedings taking place in camera instead of publicly¹⁹³ or allowing the presentation of evidence by electronic or other special measures to protect victims and witnesses’ exposure to the media and the public;¹⁹⁴ (c) the use of pseudonyms, voice and image distortion during trial in order to shield the victims/witnesses identity from the media and/or general public;¹⁹⁵ and (d) the use of testimony by video-link to minimize the trauma associated with being in the same room as the accused,¹⁹⁶ or for other witnesses who are unable or unwilling to travel to the court where their testimony is indispensable;¹⁹⁷ Moreover, during trials relating to rape or other forms of sexual assault, the defendant may attempt to draw attention to a victim’s/survivor’s previous sexual history with a view to discrediting or diminishing the victim’s/survivor’s claim, which the ICJ has argued, “is humiliating for the victim, and, usually, irrelevant in respect of its probative

184. See *Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principles 10 and 12(b); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Res 40/34, November 1985, article 6; Amnesty International, *Fair Trials Manual*, 1998, pp. 134-135.

185. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 61; United Nations Office on Drugs and Crime (UNODC), *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 52; Amnesty International, *Fair Trials Manual*, 1998, pp. 134-135.

186. *Ibid.* “The expert may be present during the interview itself in order to monitor the interview and advise the interviewer. The expert or an accompanying person may also provide support to the witness, as requested.”

187. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 62-63, “The screening of witnesses of sexual and gender-based crimes will generally be conducted during a face-to-face meeting, with the necessary support for the witnesses provided.”

188. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras. 64 and 70; For further detail, see International Protocol on Sexual Violence in Conflict, pp. 115-117.

189. ICJ, Morocco: *Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls* (2017), p. 20.

190. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 56. For more detail, see ICJ, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (2020), pp. 43-44.

191. For a comprehensive list of protective measures see, International Protocol on Sexual Violence in Conflict, pp. 63 and 116; ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras. 85-101; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Res 40/34, November 1985, article 6.

192. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 87; International Protocol on Sexual Violence in Conflict, p. 63.

193. This does not mean that the defendant isn’t present and properly represented, it simply means that the public is not present.

194. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras. 88-89; International Protocol on Sexual Violence in Conflict, p. 63.

195. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 89; International Protocol on Sexual Violence in Conflict, p. 63.

196. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 89; International Protocol on Sexual Violence in Conflict, p. 63.

197. International Protocol on Sexual Violence in Conflict, p. 63.

value in establishing guilt or innocence of the crime for which the person is accused.”¹⁹⁸ As a general principle, lines of questioning that revolve around a victim’s/survivor’s sexual history should ordinarily be prohibited, unless and until it has been established they are both relevant and probative.¹⁹⁹

The UNODC has developed a number of victim-centric measures, reproduced below,²⁰⁰ that prosecutors and judges can employ with a view to easing the experience of victims/survivors and facilitating their testimony, in a manner compatible the right to a fair trial of the accused.

Confidentiality measures	Privacy measures	Victim support measures
Measures designed to protect the identity of the victim from the press and public	Special evidentiary rules designed to limit the questions that can be posed to a victim during her trial	Measures designed to ease victim’s experience during their testimony
<ul style="list-style-type: none"> • Removing any identifying information such as names and addresses from the court’s public records and preventing media access to such information • Using a pseudonym for the victim • Prohibiting disclosure of the identity of the victim or identifying information to a third party • Permitting victims to testify behind screens or through electronic or other special methods • Allowing in camera proceedings or closed sessions during all or part of the trial, i.e. during victim’s testimony (excluding public) 	<ul style="list-style-type: none"> • Prohibiting questions about the victim’s prior or subsequent sexual conduct • Not requiring corroboration of the victims’ testimony (according to national laws) 	<ul style="list-style-type: none"> • Permitting victims to testify in a manner that allows her to avoid seeing the accused (i.e. closed circuit TV or screens) • Limiting the frequency, manner and length of questioning • Permitting a support person, such as a family member or friend, to attend the trial with the victim • A video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness’s evidence-in-chief

Criminal proceedings taking place in national jurisdictions may present additional challenges because existing victims/witnesses protection infrastructure may be deficient, such as in Tunisia, or even nonexistent.²⁰¹ In these cases, national prosecutors and judges could use their discretion in providing victims/witnesses protection in collaboration with other actors, such as civil society organizations that supply psychosocial support and physical rehabilitation services.²⁰²

198. ICJ, *Women’s Access to Justice for Gender-based Violence*, Practitioners’ Guide No. 12 (2016), p. 235. See also, UN Women, *Handbook for Legislation on Violence against Women*, 2012, p. 42 for the view that: “[i]n many countries, complainant/ survivor’s prior sexual history continues to be used to deflect attention away from the accused onto the complainant.”

199. Even in such circumstances, it is of paramount importance that the victim/survivor’s right to be treated with respect, privacy and confidentiality are consistently adhered to, and that no harmful gender stereotypes are peddled to influence the proceedings, see Istanbul Convention, article 42; UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(e). In addition, in several jurisdictions, criminal trial judges are empowered to prohibit defendants from cross-examining the victim in sexual offences cases themselves, that is, directly not through the assistance of their counsel.

200. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 119.

201. See Chapter IV of this Legal Briefing.

202. ICTJ, *Gender and Transitional Justice - A Training Module Series, Module 4 on Criminal Justice*, October 2018, p. 40.

b) Minimize victims' and witnesses' exposure and possible re-traumatization

As mentioned above, by participating in criminal proceedings, SGBV victims/witnesses may face the additional risk of being exposed to re-traumatization.²⁰³ In order to minimize such risk, any engagement with victims/witnesses of SGBV, such as investigation interviews, must be handled with great sensitivity.²⁰⁴ This may include, among other things, ensuring that a same-sex investigator conducts the interview, unless the victim/witness prefers otherwise;²⁰⁵ upholding victims/witnesses' agency by advising them of their rights;²⁰⁶ affording protection to victims/witnesses where they are at risk;²⁰⁷ and ensuring referral pathways are available to provide access to psycho-social, medical, legal or other forms of support the victim may require.²⁰⁸

During trial, the risk of re-traumatization for SGBV victims/witnesses may be even higher due to, among others, the unfamiliarity with the court setting and trial proceedings, the requirement that they give evidence through live testimony to the Court, as well as their having to confront the alleged perpetrator, or their being exposed to intense cross-examination.²⁰⁹ Prosecutors and judges can play an invaluable role in mitigating and reducing these pressures by employing a number of victim-centered measures such as: informing victims of their rights and the remedies available to them; prohibiting or objecting to improper or aggressive cross-examination by the defence; as well as other measures to provide appropriate support to the victim, such as allowing an accompanying person to be present for psychological support.²¹⁰ These measures operate not only to ease the mounting pressures on victims and make them feel safe, but enable them to give the best evidence possible.²¹¹

Another important point to take into consideration to avoid re-traumatization is the need to manage expectations of victims and witnesses about their involvement in the criminal proceedings.²¹² In this regard, it is paramount to keep witnesses informed, *inter alia*, of the procedures for protection and participation in the proceedings, the prosecution's approaches and objectives, the realistic time frames and outcomes of the proceedings, the developments in the case and reparations.²¹³

iv. Evidence

As mentioned in the sections above, particular care must be taken when investigating and prosecuting SGB crimes, including during the collection, admissibility and evaluation of

203. OHCHR, *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (New York/Geneva, OHCHR 2018), pp. 18 and 25.

204. For more detail, see ICJ, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (2020), p. 32, and ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence* (2021), pp. 14-18.

205. International Protocol on Sexual Violence in Conflict, pp. 161-166; UN Women, *Handbook for Legislation on Violence against Women*, p. 16; Istanbul Protocol, para. 154.

206. UN Women, *Handbook for Legislation on Violence against Women*, p. 16.

207. International Protocol on Sexual Violence in Conflict, pp. 115-116.

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

209. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, pp. 60 and 119; UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 18(a); ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 90.

210. For more detail, see ICJ, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors*, (2020), pp. 56-57; see also UN Women, *Handbook for Legislation on Violence against Women*, p. 39; see also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Res 40/34, November 1985, article 6.

211. UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series, 2014, p. 119;

212. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras. 70 and 90; International Protocol on Sexual Violence in Conflict, pp. 183 and 239.

213. For more detail on the issue of managing expectations of SGBV victims and witnesses, see ICTJ, *Gender and Transitional Justice - A Training Module Series, Module 4 on Criminal Justice*, October 2018, pp. 45-46.

evidence,²¹⁴ and engaging with victims and witnesses of SGBV.²¹⁵ Whether evidence of sexual violence is being provided in the context of court-room testimony or in other settings, justice system actors and persons interacting with victims and witnesses must seek to abide by the principle of “do no harm”.²¹⁶

As for all other crimes, witness evidence,²¹⁷ documentary,²¹⁸ digital²¹⁹ and physical evidence²²⁰ are important sources with probative value in court proceedings, which may corroborate and help proving the commission of rape or other acts of sexual violence and the responsibility of the perpetrator(s), as well as evidencing relevant contextual circumstances. However, acts of sexual violence, such as rape and other forms of sexual assault, often leave no detectable physical signs and are difficult to prove with forensic evidence, especially in the SGBV cases under the SCC jurisdiction dealing with crimes that have happened a long time ago.²²¹ While forensic

-
214. This section will mainly focus on the type of evidence that are more likely to serve the work of the SCC judges in investigating and prosecuting SGB crimes. For an in-depth account of collecting evidence of large-scale gross human rights violations, see ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and Best Practices on the Collection, Admissibility and Assessment of Evidence – Practical Guide 3* (2020), pp. 9-24, available at <https://www.icj.org/wp-content/uploads/2020/12/Tunisia-SSC-guide-series-no3-Publications-Reports-Thematic-reports-2020-ENG.pdf>. See also ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence*, (2021), pp. 11-39; and International Protocol on Sexual Violence in Conflict, pp. 141-156 and 213-224; and ICJ, *The investigation and prosecution of potentially unlawful death – Practitioners’ Guide No. 14* (2019) pp. 90 et seq.
215. In addition to the Principles on the Effective Investigation and Documentation of Torture and Ill-Treatment and the Istanbul Protocol, which apply to rape (which constitutes torture) and other forms of sexual violence (constituting torture or other forms of ill-treatment), the AComHPR Guidelines on Combating Sexual Violence and its Consequences in Africa (ACHPR Guidelines on Sexual Violence) (2017), World Health Organization (WHO) *Guidelines for medico-legal care for victims of sexual violence* (WHO Guidelines) (2003), the WHO *Ethical and safety recommendations for researching, documenting a monitoring sexual violence in emergencies* (2007), and the UN Women *Handbook for Legislation on Violence against Women* set out principles applicable to the investigation of sexual violence crimes. The International Protocol on Sexual Violence in Conflict also contains extensive detailed guidance on documentation and investigation of sexual violence.
216. See, Istanbul Protocol, paras. 57-73; International Protocol on Sexual Violence in Conflict, pp. 85-104; ACHPR Guidelines on Sexual Violence, p. 18.
217. 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 gross human rights violations, 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. ”, see Minnesota Protocol, para. 70.
218. Important documentary evidence includes maps, photographs, staffing records, interrogation records, administrative records, financial papers, currency receipts, identity documents, phone records, letters of correspondence, and passports. In addition to the information they contain, there may be associated biological or physical evidence (e.g. fingerprints) that can be obtained and analyzed from the documents, see ICJ, *The investigation and prosecution of potentially unlawful death – Practitioners’ Guide No. 14* (2019) p. 93.
219. Digital evidence is information and data that are stored on, received from, or transmitted by an electronic device. Digital evidence can be found in images on cameras, on the internet, computers, mobile phones, and other digital media, such as USB sticks. Internet and mobile phone service providers frequently keep their data (such as call records) for only a certain period of time, such that access to the data can be difficult if not impossible if there is a delay between the crime being committed and the commencement of the investigation, see ICJ, *Practical Guide 3*, p. 16.
220. There is a range of different forms of physical evidence, which may be found on the bodies of victims, witness or perpetrators, the place where a crime or violation is committed, any place where the perpetrators have been and the graves or places where bodies may have been left at any time. Forensic chemistry is used to identify unknown substances that are recovered as evidence. This includes suspected drugs, toxic substances, gunshot residue from firearms, and explosive materials, see Minnesota Protocol, para. 137. Physical evidence should only be collected by persons with the authority and expertise to do so, see *International Protocol on Sexual Violence in Conflict*, p. 154.
221. For more detail see, ICJ, *Practical Guide 3*, pp. 21-23; see also Istanbul Protocol, paras. 57-73 and 95-97; ACHPR Guidelines on Sexual Violence, pp. 18 and 33-34; International Protocol on Sexual Violence in Conflict, pp. 89-91; WHO, *Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (2007), Part III(6).

evidence²²² 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.²²³ Where biological evidence²²⁴ has not been collected immediately following the commission of the crime, evidence of long-term injuries resulting from sexual violence may be collected. Where such evidence is not available, witness evidence and other forms of forensic evidence remain important.²²⁵

Witness evidence,²²⁶ 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 SGB crimes.²²⁷ The investigation should involve preparing a list of most significant witnesses and prioritizing interviews with them. These should include victims, alleged perpetrators where the victim and/or a third person is able to identify them, and other individuals who saw or heard the crime being committed. Individuals with relevant knowledge of the victim 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.²²⁸

With respect to rape and sexual violence, in particular, investigators must pay specific attention to collecting evidence regarding the context in which the crime has been committed. Under international law, the definitions of rape and other forms of sexual violence require that consent be given voluntarily, “as a result of the person’s free will, assessed in the context of the surrounding circumstances”.²²⁹ The circumstances in which the perpetrator is said to have committed such crimes are particularly relevant for determining whether, for example, they may have been inherently coercive or whether consent may have been given voluntarily: determining the age of the victim at the time of the commission of the crime for instance could automatically invalidate any form of consent.²³⁰ Furthermore, as discussed in Chapter II, section A (i) of this Legal Briefing, a context characterized by coercive circumstances, such as custodial settings, negates consent.²³¹

222. 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”, see Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights, UN Doc. A/HRC/15/26, 24 August 2010, para. 2. Forensic and other scientific evidence will help lessen reliance on confessions or other forms of evidence that are more readily manipulated or created by abusive police practices or corruption, see *Rule-of-law tools for post-conflict States, Prosecution initiatives*, UN Doc. HR/PUB/06/4, New York/Geneva, 2006. See also Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/69/387, 23 September 2014, para. 19.

223. UN Women *Handbook for Legislation on Violence against Women*, p. 40; see also ICC, Rules of Procedure and Evidence (2013), Rule 63(4).

224. Biological evidence encompasses organic substances collected from the human body or its surroundings. It can be collected directly from the human body or from items used by the person in question, such as toothbrushes, hair brushes, and unlaundered clothing. The identification and proper collection and preservation of biological samples from a crime scene demand specialized training, see Minnesota Protocol, para. 133.

225. The WHO Guidelines provide detailed guidelines on the collection of biological evidence. Given the crimes subject to SCC cases occurred years ago, detailed guidance on the collection of contemporaneous evidence has not been set out in this Legal Briefing. For more detail see WHO Guidelines, Part 4.

226. For further information on the issue of witness evidence, see ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence* (2021), pp. 14-15.

227. 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, see Minnesota Protocol, para. 70.

228. CEDAW Committee, *General Recommendation No. 33: Women’s Access to Justice*, UN Doc. CEDAW/C/GC/33 (2015), para. 51(i).

229. See Chapter II, section A (i); see also Practical Guide 1, pp. 71-77.

230. For more detail, see ICC Rules of Procedure and Evidence, Rule 70; see also ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 94, see also paras. 95-96.

231. See Chapter II, section A (i); see also Practical Guide 1, pp. 71-73.

Any physical examination should also be carried out by persons who have expertise in documenting sexual assault; otherwise such persons should be consulted during such a physical examination.²³² During an investigation, victims of rape may also prefer to speak with a medical professional rather than a non-medical investigator, even if the investigator is a woman and the medical professional a man.²³³ The Istanbul Protocol notes that in the context of evaluations conducted for legal purposes “the necessary attention to detail and precise questioning about history are easily perceived as a sign of mistrust or doubt on the part of the examiner.”²³⁴ The aim in gathering medical evidence should be to provide “an objective service without sacrificing sensitivity or compassion.”²³⁵ The International Protocol on Sexual Violence in Conflict sets out extensive guidance on interviewing victims and witnesses of sexual violence²³⁶ and collecting non-witness evidence.²³⁷

A number of both immediate and long-term psychological health impairments can manifest in victims of SGBV, including rape trauma syndrome, post-traumatic stress disorder, depression, social phobias and suicidal behaviour.²³⁸ Psychological injuries can be much more insidious and subtler and thus difficult to detect, in particular because they do not necessarily emerge immediately. Nevertheless, in the course of collecting and documenting evidence of SGBV-related offences, efforts should be made so as to ensure psychological problems are not overlooked, but, rather, given consideration equal to that of physical injuries. Criminal justice actors must assist and support traumatized victims and make appropriate referrals to specialized service providers for rehabilitation.²³⁹

Criminal trials arising from SGBV offences also require particular attention be given to the admissibility and exclusion of evidence, as well as with respect to the evaluation of evidence and burden of proof.

With regard to admissibility and exclusion of evidence, it is important to note that 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. Accordingly, stereotypical assumptions and evidentiary requirements that question or challenge the veracity of the allegations brought forth by the victim/survivor or alternatively pertain to the complainant’s (i.e., the victim’s/survivor’s) sexual history should be prohibited.²⁴⁰

In a similar vein, with regard to the evaluation of evidence and applicable burden of proof, international law and standards demand that the accused’s guilt must be “proved beyond reasonable doubt,” and where there is any doubt, the accused must be acquitted. Further, 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, based on the evidence presented at trial, for the conviction or acquittal of the defendant.²⁴¹

232. Istanbul Protocol, paras. 220 and 270.

233. Istanbul Protocol, para. 270.

234. Istanbul Protocol, para. 270.

235. WHO Guidelines, p. 20.

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

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

238. WHO Guidelines, pp. 13-16.

239. For more detail, see ICJ, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (2020), p. 52.

240. See ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence* (2021), pp. 29-32. For more details on international standards on the admissibility and exclusion of evidence in general, see ICJ, *Practical Guide 3*, pp. 39-47.

241. See ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence* (2021), pp. 36-38.

Convicted defendants too have a right to a reasoned judgment setting out the reasons for their conviction.²⁴² Accordingly, judgments should address facts and issues essential to the determination of each aspect of the case.²⁴³ 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 conclusions reached by the factfinder.²⁴⁴ 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.²⁴⁵

v. Sentencing practices

As a general rule under international law, sentences must always be commensurate with the gravity of the crime(s) committed, and are designed to ensure accountability, deter further violence and promote victim and community safety, while also promoting offenders' rehabilitation and reintroduction into society.²⁴⁶

With regard to SGB crimes, sentences should "give due consideration to the sexual and gender dimensions of the crimes charged, including the impact on victims, families, and communities,²⁴⁷ as an aggravating factor²⁴⁸ and reflective of the gravity of the crimes committed."²⁴⁹ In particular, sentences for SGB crimes should reflect the physical, psychological and social harm caused to the victims, their families and communities. Sentences that are commensurate with the severity of the offence are part and parcel of the right to an effective remedy and ensure accountability for human rights violations.²⁵⁰ To guarantee full compliance with the rights of the defendant, when passing sentences, SCC judges should also take into consideration mitigating circumstances – "those factors that do not exonerate the convicted person but serve to reduce

-
242. Principles on Fair Trial in Africa, sections A(2)(i), N(3)(e)(vii); Rome Statute, article 74(5); *Hadjianastassiou v. Greece*, ECtHR, Application No 12945/87, Judgment of 16 December 1992, para. 33. See also Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223, 6 August 2008, para. 15; Order of 25 November 2005, IACtHR, *García-Asto and Ramírez-Rojas v. Peru*, Series C No. 137, para. 155; *Prosecutor v. Naletilić & Martinović*, ICTY, Case No. IT-98-34-A, Judgment, 3 May 2006, para. 603; *V. Francis v. Jamaica*, HRC, Communication No. 320/1988, Views of 24 March 1993, para. 12.2; *García Ruiz v. Spain*, ECtHR (Grand Chamber), Application No. 30544/96, Judgment of 21 January 1999, para. 26.
243. *Taxquet v. Belgium*, ECtHR (Grand Chamber), Application No. 926/05, Judgment of 16 November 2010, para. 91; ICTY Appeals Chamber: *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 23; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgment, 22 April 2008, para. 13; *Prosecutor v. Ntagerura et al.*, ICTR, ICTR-99-46-A, Judgment, 7 July 2006, para. 169.
244. *Prosecutor v. Kordić & Čerkez*, ICTY, IT-95-14/2-A, Judgment, 17 December 2004, para. 383; *Prosecutor v. Kajelijeli*, ICTR, ICGTR-98-44A-A, Judgment, 23 May 2005, para. 60; *Prosecutor v. Kvočka et al.*, ICTY, IT-98-30/1-A, Judgment, 28 February 2005, para. 23; *Prosecutor v. Sesay et al.*, SCSL, SCDSL-04-15-A, Judgment, 26 October 2009, paras. 345, 415. The ICTY found that this requirement does not necessarily necessitate the examination of each and every piece of evidence put before a trial chamber (see e.g. *Prosecutor v. Krajišnik*, ICTY, IT-00-39-T, Judgment, 27 September 2006, paras. 292, 889; *Prosecutor v. Strugar*, ICTY, IT-01-42-A, Judgment, 17 July 2008, para. 24) or every legal argument made by a party (see, e.g., *Prosecutor v. Strugar*, ICTY, IT-01-42-A, Judgment, 17 July 2008, para. 24), or every step of its legal reasoning (see, e.g. *Prosecutor v. Sesay et al.*, SCSL, SCDSL-04-15-A, Judgment, 26 October 2009, para. 345).
245. ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence* (2021), p. 38.
246. ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 217-222; see also UNGA, Resolution on strengthening crime prevention and criminal justice responses to violence against women, 2011, para. 17; International Protocol on Sexual Violence in Conflict, p. 82.
247. For more detail, see Laurel Baig, *Chapter 8: Sentencing for Sexual Violence Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 277-279.
248. For more detail on "aggravating circumstances" in SGB crimes, see Laurel Baig, *Chapter 8: Sentencing for Sexual Violence Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 281-285.
249. ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 99.
250. For more detail on sentencing practices for SGB crimes, see ICJ, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (2020), pp. 57-61.

their sentence²⁵¹- such as cooperation with the prosecution, guilty plea or showing remorse during trial.²⁵²

Once they have been imposed, sentences should be made fully accessible to the victims and affected communities and disseminated widely, e.g., through radio, social media or other popular platforms. This will allow victims and affected communities, especially in transitional justice contexts, to take ownership of their own truth and get recognition of the risks and suffering they have endured to seek justice.²⁵³

251. See Laurel Baig, *Chapter 8: Sentencing for Sexual Violence Crimes*, from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Edited by Baron Serge Brammertz and Michelle Jarvis, Cambridge University Press, April 2016, pp. 285-289.

252. Ibid.

253. ICTJ, *Gender and Transitional Justice - A Training Module Series, Module 4 on Criminal Justice*, October 2018, p. 46.

IV. Tunisian law in light of international standards on investigation and prosecution of SGBV crimes

A. Gaps in Tunisian law with regard to the rights of the victims of sexual and gender-based crimes and their families

i. General criminal procedure

International law and standards require the respect of the rights of SGBV victims and families at all stages of the proceedings. Particularly in a system where effective remedy and reparation for victims depends on their standing as civil parties in criminal proceedings, international law and standards require that they be able to participate in the proceedings effectively.²⁵⁴

In the Tunisian domestic system, under the Code of Criminal Procedure (CCP), a right of “civil action” belongs to “all those who personally suffered the harm caused directly by the offence.”²⁵⁵ Civil parties have the right to apply to participate in criminal proceedings or to institute a civil action and they may exercise such rights during both the pre-trial and trial phases of the proceedings, including by obtaining information about the case, providing information to the relevant authority, submitting their conclusions on the case to the First Instance Tribunal and filing appeals in relation to some (but not all) decisions.²⁵⁶

ii. Transitional Justice Framework

In the Transitional Justice Framework, the 2013 Law granted victims of SGBV the right to file complaints about gross human rights violations with the IVD,²⁵⁷ and to provide testimony in confidential hearings before the IVD. However, the 2013 Law does not otherwise address the rights of SGBV victims and those of their families at trial.

This lack of guidance poses problems both with regard to the pre-trial and trial stage in SCC proceedings.

At the pre-trial stage, the application of the transitional justice framework to the exclusion of the CCP risks hampering the fulfilment of international law obligations upholding the rights of the victims of SGBV. Accordingly, victims’ rights to participate in SCC proceedings, in particular, to present and request evidence and access evidence in sufficient time to make submissions on it at trial may be negatively affected.²⁵⁸

At the trial stage, the CCP provides the only current source within Tunisian law of a set of codified rules for victims’ participation. Adopting an ad hoc process may constitute discrimination in access to justice, particularly if victims were not to enjoy the same rights in SCC proceedings as they would enjoy in other proceedings under the CCP, with respect to, for instance, presenting and requesting evidence, including witness testimony, examining and cross-examining witnesses, questioning or challenging the evidence and witnesses presented by the defence, involving expert witnesses, and appealing SCC decisions and judgments.²⁵⁹

This is why SCC judges will need to have regard to the more detailed provisions under the CCP and international law and standards to ensure victims of SGB crimes, their families and other affected persons are accorded the right to an effective remedy and guaranteed the right to participate effectively in the proceedings.

254. For an in-depth analysis of international law and standards on the rights to victims and their families, see ICJ, Practical Guide 2, pp. 53-56.

255. Code of Criminal Procedure, article 7. Since September 2011, civil society organizations can also apply to become a civil party. See Law decree 88 of 24 September 2011, article 14. For an in-depth analysis of the rights to victims and their families under Tunisian Code of Criminal Procedure, see ICJ, Practical Guide 2, pp. 56-57.

256. CCP, articles 38, 75, 101, 109, 114, 143, 144, 160 and 193.

257. For more detail, see ICJ, Practical Guide 2, pp. 23-25.

258. ICJ, Tunisia: *Strengthening Accountability Through the Specialized Criminal Chambers* (October 2020), p. 10.

259. *Ibid.*, pp.10-12.

B. Gaps in Tunisian Law with regard to the protection of victims and witnesses of sexual and gender-based crimes

The CCP makes provisions for the protection of law enforcement officers, judicial officers, victims, witnesses and others in terrorism related cases,²⁶⁰ and human trafficking cases,²⁶¹ including protection of the identity of the victim or witness and the holding of hearings *ex officio*,²⁶² as well as measures to protect the rights of the accused.²⁶³

With regard to victims and witnesses of SGB crimes, the 2017 Law on the elimination of violence against women provides for protective measures for victims of sexual and gender-based violence.²⁶⁴ These include the fact that “confrontation with the accused can only take place with the consent of the victim of the violent offense, unless the confrontation is the only means that guarantees the right to be exonerated”²⁶⁵ and that a victim of SGB offences may request to be interviewed in the presence of a psychologist or social worker.²⁶⁶ The 2017 Law further contemplates the allocation of separate spaces within the First Instance courts for judges and prosecutors specialized in investigating and prosecuting SGBV cases and the creation of specialized units within each police station in charge of conducting investigations on alleged offences related to violence against women.²⁶⁷ It also protects child victims and witnesses through “safeguarding” their voice and image during the recording of their testimony and prohibiting confrontation with the accused.²⁶⁸ Unfortunately, to this day, the application of the 2017 Law faces numerous obstacles both in terms of resources and coordination among the different stakeholders responsible for its implementation rendering its positive advances almost nonexistent in practice.²⁶⁹

As far as the Transitional Justice Framework is concerned, with respect to the protection of victims and witnesses of SGBV, article 40 of the 2013 Law tasked the IVD, in collaboration with the competent services and entities, with the mandate to protect a broad category of persons coming into contact with the IVD, including victims, witnesses, and experts, and all persons interviewed, regardless of their role in any violations.²⁷⁰ The IVD protective mandate was broad, and included protection in terms of security and against “incrimination” and aggression, and preservation of confidentiality.²⁷¹ The Transitional Justice Framework is otherwise silent with respect to the protection of victims and witnesses of SGBV at trial.

260. Articles 46 and 71 to 78 of Organic Law No. 26-2015 of 7 August 2015 on the fight against terrorism and the suppression of money laundering, as amended by Law No. 9-2019 of 23 January 2019, include provision for the protection of a victim or witness’s identity, the holding of hearings *ex officio* and restrictions on the accused’s right to confront the witness (provided their evidence is not the only or most important element to prove the crime charged), as well as measures to protect the rights of the accused.

261. Articles 50-58 of Law No. 61-2016 of 3 August 2016 relating to the prevention and fight against trafficking in persons provide that victims and witnesses of trafficking, as well as their family members where appropriate, may request the application of protective measures during criminal proceedings, including the provision of testimony by audiovisual means, anonymity and the delayed disclosure of their identity to the accused.

262. Convening a hearing on its own initiative.

263. Code of Criminal Procedure, arts. 71-78.

264. See the 2017 Law, articles 22-24. The 2017 Law also amends or adds articles 208, 218-219, 221-224, 224bis, 227, 227bis, 228 of the Criminal Code to criminalize or increase the penalties for acts of violence against women and children. It also inserts article 226ter to criminalize sexual harassment. Additionally, it penalizes “voluntarily hinder[ing] a woman in a public place, by any act, word or gesture likely to undermine their dignity, their consideration or their modesty” (article 17), “political violence” (article 18), “economic violence of discrimination” (article 19), the employment of children as domestic workers (article 20) and discrimination against women (article 21, read in conjunction with article 3).

265. 2017 Law, article 28.

266. 2017 Law, articles 24 and 28. The Law also instructs the Ministries of Justice and of the Interior to develop integrated programs on combating violence against women in educational and training curricula in the institutions under their authority, article 10.

267. 2017 Law, article 23.

268. 2017 Law, article 29.

269. See, Mobilising for Rights Associates (MRA), *Marsadnissa: Analyzing gender justice and judicial stereotypes in Tunisia*, March 2021, available at: <https://mrawomen.ma/wp-content/uploads/doc/Final%20Revised%20Tunisian-Observatory-doc-1-english.pdf>, pp. 13-15 and 48.

270. 2013 Law, art. 40(5).

271. 2013 Law, art. 40(5).

The lack of clear guidance on the application of protective measures in SCC proceedings related to SGB crimes poses problems with regard to the imperative to protect the security of the victim, witness or other person, the need to ensure the right of the accused to a fair trial, and the right of victims to an effective remedy under international law. However, the ICJ understands that there is nothing within the Transitional Justice Framework or Tunisia's ordinary criminal procedure that would bar criminal justice actors from considering recommended practices and relevant international standards as described in Chapter III, section B (iii) of this Legal Briefing in relation to protective measures in SCC proceedings.

Recommendations

With respect to the adjudication of SGBV cases amounting to crimes under international law:

- **Tunisia should ensure that, in the context of SCC proceedings, domestic law is interpreted and applied in accordance with international law²⁷² and standards so as to capture all conduct constituting rape and other forms of sexual assault in line with such law and standards. To this end, the ICJ recommends that:**
 - **When criminal justice actors are confronted with a definition of a SGB crime under domestic law ostensibly inconsistent with international law, they should consider whether the domestic definition may be interpreted and applied consistently with the definition applicable under international law (e.g., international treaty or customary international law). If it is not possible to apply the domestic definition consistently with international law, they should consider whether the specialised provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply instead the definitions and elements of the crimes under international law directly;**
 - **When criminal justice actors involved in SSC proceedings are confronted by the lack of criminal proscription of SGBV conduct at the time of its commission under domestic law, they should consider whether the SGBV conduct concerned was a crime under international law at the time it occurred. In so doing, they should establish whether, at the time of its commission, the conduct was criminalized by virtue of a treaty norm binding on Tunisia so proscribing it or, if the conduct was not explicitly proscribed by such a norm, whether it was so under customary international law. If so, they should consider whether the specialized provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply the definition and elements of the crime under international law in the case at hand.**
 - **If neither of the above approaches is available in order to apply the international definition of a SGB crime under international law, the SCC should determine whether other “ordinary” criminal offences that were proscribed under domestic law at the time would in principle apply to the same conduct, and if so, seek to apply the national law offences capturing the SGB crime under international law in the manner that best avoids or minimizes impunity, while abiding by the principle of legality and the right of the accused to a fair trial.**

With respect to the investigation and prosecution of SGBV cases:

- **Tunisia should ensure that, in the context of SCC proceedings, SGB crimes are considered as “serious crimes” and are accurately charged as such in compliance with international law and standards. To these ends, the ICJ recommends that:**
 - **Criminal justice actors should adopt a gendered specific approach free from harmful gender stereotypes that discriminate against women and men;**
 - **SCC judges and prosecutors should integrate a gender perspective and expertise in all aspects of their work from the investigation to the prosecution, trial and sentencing phases;**
 - **All criminal justice actors should undergo adequate and continuous training on the application of international law and standards that are relevant for the investigation, prosecution, adjudication and sentencing of SGB crimes.**
- **Tunisia should adopt a victim-centered, gender-sensitive approach in the investigation, prosecution, and adjudication of SGB crimes at all stages of the SCC proceedings, in a manner compatible with the rights of SGBV victims to an effective remedy and reparation and the right of the accused to a fair trial. Accordingly, the ICJ recommends that:**
 - **SCC judges and prosecutors should adopt gender-sensitive measures that prioritize the well-being and safety of SGBV victims/survivors consistently, throughout the investigation and prosecution stages so as to prevent secondary victimization, including by:**
 - **Limiting the number of times a victim of SGBV is interviewed, as well as the**

272. This includes treaties, customary international law as well as case-law which has judicially interpret both treaties and customary international law.

- number of people who interview him/her so as to minimize re-traumatization;
- Interviewing SGBV victims in a separate room, preferably by an officer of the same sex of the victims, unless the victims prefer otherwise;
- Refraining from making biased assumptions about SGBV victims, their behaviours and practices;
- Ensuring referral pathways are available to provide access to psycho-social, medical, legal or other forms of support the victim may require.
- SCC judges and prosecutors should minimize victims' and witnesses' exposure to risk and to re-traumatization in conformity with international law and standards. To these ends, they should:
 - Ensure SGBV victims/witnesses are informed about their rights, the remedies at their disposal and their role in criminal proceedings;
 - Conduct a risk-assessment and risk-management analysis for SGBV victims/witnesses consistently throughout the investigation and prosecution phases, with a view to identifying danger and acting to prevent reprisals and retaliatory acts by the offender;
 - Protect the privacy, identity and dignity of victims of SGBV;
 - Adopt the necessary protective measures, on a case-by-case basis, applying clearly defined criteria and always ensuring the right of the accused to a fair trial;
 - Manage expectations of victims and witnesses about their engagement with criminal proceedings.
- SCC judges and prosecutors should exercise due care in the collection, admissibility and evaluation of evidence related to SGB crimes in conformity with international law and standards. To these ends, they should:
 - Abide by the "do no harm" principle while engaging with victims and witnesses of SGBV and dealing with evidence of SGB crimes;
 - Refrain from making stereotypical assumptions and questioning or challenging the veracity of the allegations brought forth by the victim/survivor or alternatively pertain to the complainant's (i.e., the victim's/survivor's) sexual history;
 - Ensure that the accused's guilt must be "proved beyond reasonable doubt," and where there is any doubt, the accused be acquitted;
 - Ensure that the right of access to justice and to an effective remedy of SGBV victims/survivors comprises their right to a reasoned decision, which, in turn, requires a reasoned judgment setting out the reasons for the conviction or acquittal of the defendant based on evidence presented at trial;
 - Ensure that convicted defendants too have a right to a reasoned judgment setting out the reasons for their conviction. Accordingly, judgments should address facts and issues essential to the determination of each aspect of the case, and a verdict of guilt should provide a clear reasoning for each crime and mode liability and their constituent elements, and an assessment of the evidence supporting the factual and legal conclusions reached by the factfinder;
- SCC judges should impose sentences that are commensurate with the gravity of the SGBV offence committed, ensuring accountability and deterrence for the violence perpetrated in conformity with international law and standards. Sentences for SGB crimes should also reflect the physical, psychological, and social harm caused to the victims, their families and communities. In particular:
 - When imposing sentences, SCC judges should take into consideration both aggravating and mitigating circumstances in line with recognized international standards.
 - Criminal justice actors should ensure that sentences should be made fully accessible to the victims and affected communities by disseminating them widely.

In addition to the above recommendations, and with a view to ensuring Tunisia's full compliance with international law and standards on the investigation, prosecution and adjudication of SGBV, and preventing recurrence of and impunity for SGB crimes in the future, the ICJ recommends that the Tunisian authorities should adopt the following legislative, policy and practical reforms:

- Reform the Criminal Code, the Code of Criminal Procedure and other relevant domestic law to guarantee that all perpetrators of sexual and gender-based offences amounting to gross human rights violations constituting crimes under international law be held criminally responsible and victims' rights to an effective remedy for

violations of their human rights be upheld in SCC proceedings. In particular, Tunisia should:

- Ensure a progressive interpretation of the Criminal Code and other relevant domestic law defining and criminalizing all acts of rape in a manner consistent with its definition under international law;**
- Reform the Criminal Code and other relevant domestic law to adequately define and criminalize all other forms of sexual assault short of rape and in so doing ensure compliance with the definitions of corresponding crimes under international law;**
- Introduce in the Criminal Code crimes against humanity as criminal offences ensuring compliance with their definition as crimes under international law;**
- Adopt comprehensive, victim-centered and gender-sensitive policies and operational guidelines in the investigation, prosecution and adjudication of SGB crimes; and**
- Reform the Code of Criminal Procedure and other relevant domestic law to guarantee the rights of SGBV victims to an effective remedy and reparation in legal proceedings.²⁷³**

273. For more detail, see ICJ, Practical Guide 2, p. 62.

Commission Members

March 2019 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O’Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.o. Box 1270
Rue des Buis 3
1211 Geneva 1
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org