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***Desk study: Combating torture
with medical evidence***

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TORTURE

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Language editing

Monica Lambton, MA, BA

Correspondence to

IRCT

Borgergade 13, P.O. Box 9049

DK-1022 Copenhagen K, Denmark

Telephone: (+45) 33 76 06 00

Telefax: (+45) 33 76 05 00

Email: irct@irct.org

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Foreword

Combating torture with medical evidence – the use of medical evidence and expert opinions in international and regional judicial mechanisms and in selected domestic jurisdictions

Impunity and insufficient evidence in cases against alleged perpetrators are still among the most serious impediments to the prevention of torture. Too often perpetrators of torture can commit their crimes without risk of arrest, prosecution or punishment. Besides adding to the suffering of the victims, such a situation leads to a general lack of trust in justice and the rule of law. Consequently, few complaints are brought forward and few actual prosecutions are made.

While it is often no easy task to prove that a person has been tortured, specialised health professionals can, by means of methodical examination of physical and psychological sequelae, establish medical evidence that may be used by prosecutors and judges in legal proceedings against alleged perpetrators.

Since 2001 the IRCT has been increasingly engaged in capacity development among health and legal professionals on the investigation and documentation of torture according to the standards contained in the UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Istanbul Protocol”). In parallel, we have joined others in repeatedly reminding governments of their obligations to promptly and effectively investigate complaints and reports of torture and ill-treat-

ment, and have emphasized the importance of the Istanbul Protocol in this respect. Today, ten years after its inception, the Istanbul Protocol is enjoying increasing international recognition and has been applied in legal proceedings in national and regional courts.

Close collaboration between the health and legal professions is crucial in the effective investigation of alleged cases of torture and in establishing procedures on how to recognise and document symptoms of torture in order that the documentation may serve as valid evidence in court. As yet there are far too few examples of legal cases which have resulted in the prosecution of perpetrators and successful reparation for survivors. In recognition of this we have, in the past year, intensified our efforts to increase victims’ access to the justice system by helping to generate medical evidence for legal proceedings. Central to these efforts is support to strategic litigation cases that could benefit from complementary medical and psychological expertise and have the potential of increasing courts’ awareness and use of medical and psychological documentation in torture allegations.

To support cases around the world, the IRCT, along with the Forensic Department of the University of Copenhagen, has set up an international focal point for forensic

expertise. We are fortunate and proud that more than thirty eminent forensic experts from sixteen countries have joined this effort. In particular, we aim to support those cases where medical documentation and analysis of the physical and psychological lesions of torture can increase the likelihood of success and provide the victim and their lawyers, as well as prosecutors and judges, with expert opinions that can be used as evidence.

The present issue of TORTURE has been developed to support this work. The desk study on “The use of medical evidence and expert opinions in international and regional judicial mechanism and in selected domestic jurisdictions” aims to provide an insight into how medical evidence is viewed and evaluated in court proceedings on alleged torture cases today. The study looks into the procedural rules as well as the practice relating to evaluation of medical evidence and expert opinions by the relevant tribunals. The special issue further features studies on investigations and evidence collection in selected domestic jurisdictions in torture cases. These studies have been conducted in five countries from different regions and with differing legal systems – Ecuador, Georgia, Lebanon, The Philippines and Uganda. In these countries the IRCT has, for a number of years, worked with local members and partners to promote the value and use of medical documentation of torture.

Our hope is that the study may serve as a reference document for those involved in legal cases seeking to prove allegations of torture through the submission of medical evidence or wishing to advocate legal changes in this area.

Brita Sydhoff
Secretary-General IRCT

Combating torture with medical evidence

The use of medical evidence and expert opinions in international and regional human rights tribunals

Asger Kjærum, L.L.M.*

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*)

International Rehabilitation Council for Torture Victims,
Denmark, akj@irct.org

List of abbreviations

ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
CAT	Committee Against Torture
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
UNCAT	United Nations Convention Against Torture and Other forms of cruel, inhuman or degrading treatment or punishment

1. Introduction

Between 6th and 9th May 1992, the Peruvian government of Alberto Fujimori ordered an attack against the Miguel Castro Castro prison, which resulted in widespread torture and extrajudicial killings committed against the prison population consisting largely of political prisoners. More than 14 years later, the victims of this massacre obtained recognition of the injustice done to them before the Inter-American Court of Human Rights. The final judgement of the Court, issued 25 November 2006, established that torture and mistreatment, including rape and sexual assault in the aftermath of the attack, had occurred. Faced with an uncooperative Peruvian government, which only provided incomplete and superficial information about the event, the Court reached the conclusions above mainly on the basis of independently collected forensic evidence and medical expert testimonies. Supported by the IRCT, experts in documentation of physical and psychological consequences of torture provided expert opinions on the trauma suffered by both the victims and their families. Acknowledging the value of the expert evidence of physical and psychological damages endured by the victims and their families, the Court awarded a broad range of reparations, including medical and psychological rehabilitation for survivors and their families.

Traditionally, the focus of torture prevention activities has evolved around the establishment and implementation of effective

legal frameworks and monitoring mechanisms. These efforts have significantly increased the protection against torture through the emergence of national, regional and international legal standards, whose implementation is monitored by either judicial or independent expert bodies. However, as seen in the example above, effective legislative frameworks must be supplemented by effective means for investigating allegations of torture. Both in international human rights tribunals¹ and in domestic courts, documentary medical evidence and expert opinions play an essential role in substantiating allegations of torture. The successful substantiation of an allegation of torture or ill-treatment² by use of medical evidence requires three crucial elements to be present: Competent and independent medical professionals to conduct the examination and evaluation; a legal procedural framework, which allow the effective introduction of such evidence; and the necessary technical knowledge of judges and prosecutors to enable an effective evaluation of medical evidence in a process ensuring that it is afforded due probative value.³

Since 2001, the International Rehabilitation Council for Torture Victims (IRCT) has been increasingly engaged with capacity building of medical and legal professionals in effective documentation of torture in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).⁴

1) This term will be used as a generic reference to all international and regional judicial mechanisms that receive and process complaints relating to human rights violations.

2) For the purpose of this study the term torture is used as a general reference to all acts covered by Articles 2 and 16 of the UN Convention Against Torture.

3) This term refers to the weight or importance that judicial bodies will attach to a certain piece of evidence.

4) Multiple Authors, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Istanbul Protocol (HR/P/PT/8/Rev.1) United Nations Publication (2004).

This, along with general advances in the field of forensic medicine, has created a situation where medical professionals are increasingly becoming capable of providing quality medical evidence to prove or disprove allegations of torture. While the technical knowledge about torture documentation is advancing in the medical field, this development is not mirrored in the legal profession, where many countries lack effective procedural frameworks and judicial mechanisms with sufficient technical capacity to adequately process such evidence.

The objective of this desk study is three fold. Firstly, it provides an overview of how international and regional human rights tribunals use and evaluate medical evidence in torture cases. Secondly, it gives an insight into some of the key issues related to the introduction of medical evidence, and thirdly, it aims to serve as a reference document for persons wishing to engage with one or more of the mechanisms under review.

When exploring the highly technical elements of substantiating a torture allegation through medical evidence, one must, however, be careful not to shift attention away from the real centre of any torture case – the victim. It cannot be repeated frequently enough that there should be no medical documentation without the informed consent of the victims and if at all possible the simultaneous provision of adequate rehabilitation services to avoid re-traumatisation. In general, both legal and medical professionals involved in torture cases should strictly observe established medical ethical principles, especially that of *primum non nocere* – first do no harm. It happens too often that the participation in legal proceedings not only generates additional distress for the torture survivor, but also witnesses, lawyers and health professionals receive threats and are put under pressure to cease the case. There-

fore, it is important that anyone engaging in such cases is aware of the risks and takes precautionary measures to limit exposure to such risks.⁵

2. Methodology

The target audience is any person engaged in legal cases seeking to prove allegations of torture through the submission of medical evidence to one of the mechanisms under review or persons wishing to advocate legal changes in this area. The study is narrowly focused on medical evidence and does not intend to provide a comprehensive overview of the procedural conduct of cases before the relevant mechanisms. This issue is already adequately analysed by many legal scholars and in handbooks on bringing torture cases to international human rights tribunals.⁶

Before venturing into the analysis of the use of medical evidence in human rights tribunals, it is necessary to elaborate on some general concepts and terminology related to evidence evaluation. Based on these general observations, the subsequent chapter will analyse the legislative framework and practice of selected international human right tribunals in relation to evidence evaluation. The first section will provide a detailed analysis of the regional bodies established in Africa, Europe, and the Americas. This will be followed by an analysis of the mechanisms established under the UN treaty body system, notably the Committee against Torture and the Human Rights Committee. Criminal tribunals

5) A number of organisations focus on the protection of human rights defenders. For reference see <http://www.irct.org/for-torture-survivors/urgent-actions.aspx>.

6) OMCT handbook series (<http://www.omct.org/index.php?id=UTB&lang=eng&articleSet=Publication>).

on the international level are the last subject of analysis, focussing on the identification of good practices in areas not substantively dealt with by the human right tribunals. In a final section, common tendencies and best practices will be highlighted.

Getting access to all the relevant information necessitates the employment of different research techniques. In relation to the international tribunals, the main sources of information have been official tribunal documents, such as rules of procedure and other guidelines, and the relevant case law. This information is very easily accessible through online resources and often produced in multiple languages. The information is however limited by a lack of public access to the complaint procedure in some tribunals and by the limited written analysis on issues of procedure and evidence evaluation in many tribunal decisions. This shortcoming has, to some extent, been remedied through the use of secondary literature analysing the different bodies and through the conduct of personal interviews with staff and other experts on the relevant tribunals. However, a full picture of the workings of each body would require a significant practical insight, a methodology, which is outside the scope of this study.

3. Introductory remarks on concepts and terminology

Before venturing into detailed analysis of the international and domestic practice in relation to use of medical evidence and expert opinions in torture cases, it is important to have a clear understanding of some general considerations of evidence evaluation in

torture cases and the specific nature and distinction between the two types of evidence in focus: Documentary evidence and expert opinions.

3.1. General considerations

When receiving a piece of evidence, the first task of the judicial body is to decide whether it is admissible or not. This is essentially an exercise in assuring the relevance and reliability of the evidence. If a piece of evidence is admitted, the next step is to determine its probative value.⁷ The determination of probative value may be guided by a set of more or less formalised rules depending on the specific legal system. Before commencing the substantive evaluation of evidence it is necessary to make a clear distinction between documentary evidence and expert opinions because this determination impacts the intensity of the evaluation under admissibility and probative value respectively.

In relation to medical evidence of torture, the term documentary evidence covers the observation and documentation of medical symptoms on an alleged victim. This can include photographs, x-rays, graphic indications of physical location of injuries, and other forms of medical documentation. It is important to note that the documentary part of medical evidence collates all medical findings but does not provide an analysis on context of the injuries and symptoms. With this type of evidence a judicial body will first look at the admissibility considerations, relevance and reliability. Here, the primary focus is likely to be on the authenticity of the evidence and the independence of the medical examiner.⁸ The

7) It is worth noting that many international tribunals have taken a very liberal approach to the admissibility determination by essentially allowing the introduction of all evidence and subsequently including the admissibility consideration in the determination of probative value.

8) The independence criteria can either relate to the person or to the specific examination. If an examination is carried out by a fully independent examiner but in the presence of police officers, the examination might be considered not independent.

probative value of documentary evidence varies greatly depending on a number of factors including the quality of the examination, the findings of the evidence, and the context of the alleged torture – did it happen in police custody or in a situation of possible excessive use of force. For example, in situations where a person enters police custody in good health and leaves with documented injuries the documentary evidence will often be afforded a high probative value.

The purpose of expert opinions is to inform the tribunal on issues of a technical nature outside the tribunal's area of expertise. In relation to medical evidence of torture, expert opinions commonly come in the form of analysis of the nature and possible causes of the injuries, conclusions on the consistency between the documented symptoms and the alleged acts of torture as presented by the victims; information on physical and psychological consequences of torture; as well as medical standards. These analytical exercises require a certain degree of expert knowledge; a general practitioner can often conduct the basic analysis of symptoms while the conclusions on consistency will require more intimate knowledge about common symptoms of different forms of torture. However, common for both is that they cannot be conducted by a layman. The primary criterion for admitting an expert opinion into evidence is that the person providing the opinion is in fact an expert. If this is not the case, the opinion is authored by a layman and thus typically not relevant nor reliable for its intended purpose. If the author is accepted as an expert, the probative value of the opinion will depend on the

degree of certainty that that expert attaches to the opinion⁹ and the existence of supporting or conflicting expert opinions.

The considerations of the tribunal are thus very different depending on whether the evidence being evaluated is of a documentary nature or an expert opinion and these considerations are important to bear in mind when producing and presenting evidence. The challenge is, as will be illustrated in the following section, that the distinction between documentary evidence and expert opinion is not always clear.

3.2. Practical distinctions between documentary evidence and expert opinions

A medical report in accordance with the Istanbul Protocol will often contain elements both of documentary evidence and of expert opinion in the form of analysis of the symptoms as a conclusion on the consistency between the symptoms and the acts of torture alleged by the victim. This complicates the evaluation of comprehensive medical reports since different parts are to be evaluated against different criteria. This means that if a comprehensive medical report is submitted to a tribunal and the tribunal determines that the medical examiner is not qualified to provide an expert opinion on the consistency between allegations and the symptoms, the tribunal must still consider the documentary part of the report under the normal admissibility criteria and possibly the general symptoms analysis part of the expert opinion.

Another challenge regarding evaluation of evidence in torture cases relates to how psychological evidence is evaluated. Evidence collected by a forensic psycholo-

9) Multiple Authors, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Istanbul Protocol (HR/P/PT/8/

Rev.1) United Nations Publication (2004), Para 187.

gist inevitably involves elements of analysis and it must thus be categorised as an expert opinion. Due to the intangible nature of psychological symptoms, laymen will often perceive this type of evidence as less concrete and less accurate than physical evidence. A forensic psychiatrist, on the other hand, might argue that the process of identifying psychological symptoms and diagnosing psychological trauma is similar to an analysis of physical symptoms conducted by a regular physician. As will be illustrated by the analysis in this study, some international human rights tribunals have taken noticeable positive steps toward more equal recognition of psychological evidence. However, this is an area where there is still a need for significant improvements.

In conclusion, it is very important for anyone who intends to submit or challenge medical based evidence in torture cases to be aware of the specific nature of evidence submitted because the nature of the evidence determines the evaluation procedure. Further, knowing the specifics of the evaluation process greatly eases the task of building evidence, which will effectively influence the court, or challenging evidence produced by the counterpart.

4. International Tribunals

4.1. General observations on international human rights tribunals

International human rights tribunals are established by multilateral treaties with the objective of ensuring that signatory states comply with the international obligations the specific tribunal is mandated to monitor. The tribunals can have a large variety of dif-

ferent functions but the focus of this study is their mandate to hear applications¹⁰ where an individual or group claims to be victims of a violation of the right to freedom from torture. Most international tribunals operate in accordance with the fourth instance principle, which dictates that the tribunals should not take the role of a national appeals body. As a consequence, the tribunals will generally exercise restraint in their re-evaluation of domestically collected and evaluated evidence based on the assumption that national mechanisms are better placed to undertake these tasks. However, as will be illustrated in this study, this principle is usually narrowly applied in cases relating to allegations of torture.

The nature of the human rights tribunals is distinctly different from that of the international criminal tribunals and domestic criminal proceedings in that they do not seek to establish individual criminal responsibility for a violation but solely focus on whether a state has failed to fulfil its obligations under a given human rights treaty. This distinction between criminal and non-criminal procedures is important because it has significant effects on the procedural conduct of a case. Since the remedies and reparations awarded by human rights tribunals carry less severe implications compared to traditional criminal sanctions, the requirement for legal certainty is less dominant in proceedings before human rights tribunals. Furthermore, the human rights tribunals are often required to rule in cases where the state has a significant procedural advantage due to its exclusive access to all evidence in a case. Based on these consid-

10) The international human rights tribunals do not use a consistent set of terminology when referring to the cases brought before them. To avoid confusing the reader, the present desk study will

adopt the fixed term “application” as a reference to any case brought to the attention of any of the international human rights tribunals.

erations and to remedy this “inequality of arms”,¹¹ the human rights tribunals will make use of presumptions¹² and reversal of the burden of proof, which initially lies on the applicant¹³ with the objective of strengthening the position of the individual. If the state fails to cooperate with the tribunal in providing evidence that it can reasonably be expected to provide, the tribunal will to some extent presume the allegations of the applicant to be true. Where the applicant has established a *prima facie*¹⁴ case, the burden of proof may shift to the state to disprove the allegations of the applicant. This is a noticeable feature of the human rights tribunals and one that is especially prevalent in cases of torture in custody. While this does not affect the criteria for evaluating evidence, it does make it considerably easier for an applicant to satisfy the burden of proof.¹⁵

11) This term refers to the procedural strength of the parties to a case. E.g. in torture cases the state will often be the only party with full access to the evidence. This creates an “inequality of arms” in favour of the state since it can essentially decide what evidence to make available.

12) The probative value of presumptions and the degree to which the tribunal will conduct an *ex officio* evaluation of the applicant’s evidence is different between the tribunals and may also depend on the specific facts of a case. A full analysis of the use of presumptions in the different tribunals is outside the scope of this study.

13) The international human rights tribunals do not use coherent terminology when referring to the persons bringing cases before them. To avoid confusing the reader, the present desk study will adopt the fixed term “applicant” as a reference to any person or group of persons bringing a case before any of the international human rights tribunals.

14) This requirement entails a responsibility to establish a case, which “at first instance” looks like

4.1.1. Procedure and fact-finding

The procedure before the human rights tribunals will usually consist of three main stages. First is the admissibility stage, where the tribunal will assess whether it is competent to hear a case on the basis of a set of admissibility criteria specific to the individual tribunal.¹⁶ When faced with a choice between different overlapping mechanisms it is important to consider which mechanisms has the most favourable admissibility criteria. The second phase is the consideration on merits where the tribunal will conduct its primary evidence evaluation and render a decision on the substantive question of an application. Third is the reparations stage where the tribunal will decide what type of remedy and reparation the State should afford the victim. The tribunal procedures are not unified and it is often relevant for an applicant to consider the specifics of the procedure before making a choice

a violation of the Convention. Subsequently, the case will be examined in more detail to establish whether a violation has in fact occurred.

15) For a full analysis of the application of the burden of proof in international tribunals, please see Camille Giffard and Nigel Rodley, *The approach of international tribunals to medical evidence in cases involving torture*, in Michael Peel and Vincent Iacopino, *Greenwich Medical Media Limited* (2002) pp. 19-45.

16) Such criteria may include: The exhaustion of domestic remedies; a time limitation running from the finalisation of domestic proceedings; a prohibition of anonymity; a requirement that the case is not being processed in other international mechanisms; and a requirement that the application is not manifestly ill-founded or an abuse of the right to complain. See ECHR, Article 35; ACHPR, Article 56; ACHR, Article 46; CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 107; and HRC, Rules of Procedure of the Human Rights Committee (22 September, CCPR/C/3/Rev.8) Rule 96.

of tribunal. Such consideration could include the length of the procedure, the admissibility criteria, the chance of a successful decision on merits and the different forms of remedies available to a tribunal.

There are two basic schools for establishing the facts of a case, the inquisitorial and the adversarial procedure. In the inquisitorial procedure it is primarily the responsibility of the Court to investigate the facts of a case and the Court exercises a high level of control with the procedure. Conversely, in an adversarial procedure, the Court has the role of a referee determining the facts on the basis of adversarial submissions of the parties. In practice, the international human rights tribunals will conduct their fact-finding in a procedure, which contains elements of both the inquisitorial and the adversarial school. They have an extensive focus on establishing the material truth with very limited consideration for rigid procedural rules and principles traditionally employed to ensure a high degree of legal certainty. This flexible approach has a significant impact on the evaluation of evidence and it has materialised into certain fixed practices, which will be analysed in the sections below.

4.2. *The European Court of Human Rights*

4.2.1. Mandate and jurisdiction

The European Court of Human Rights (the Court) is established by the European

Convention on Human Rights (ECHR)¹⁷ under the auspices of the Council of Europe (CoE). The objective of the Court is to ensure the compliance by contracting states with their obligations under the ECHR and its protocols. The geographical jurisdiction of the Court extends to the geographical jurisdiction of the contracting states.¹⁸

The Court is competent to receive applications from contracting states alleging a breach of the ECHR by another state and from individuals, non-governmental organisations, and groups of individuals claiming to be victims of a violation of the ECHR by a contracting state.¹⁹ The processing time on torture cases before the ECHR is relatively long and the time from application to final decision will often be more than three years.²⁰ In the period from 1959 to 2009 the Court has found 691 violations of Article 3.²¹

In general, the Court does not see itself as a fourth instance body, meaning that it is generally reluctant to conduct a detailed evaluation of evidence, a task which is best carried out by domestic courts.²² However, in most cases relating to torture the essential question is whether the alleged victims suffered a certain abuse or not. In such cases, the Court has consistently conducted a rather thorough review of the evidence placed before it.

recent torture cases was on an average approximately 5 years.

21) These are divided into three types of violations: Torture; cruel, inhuman or degrading treatment or punishment; or procedural violation/lack of effective investigation.

22) ECtHR [PI], *Edwards v. the United Kingdom* (16 December 1992, App. No. 13071/87) § 34 and ECtHR [PI], *Vidal v. Belgium* (22 April 1992, App. No. 12351/86) §33.

17) ECHR. Article 19.

18) ECHR, Article 1. In its case-law, the Court has extended its jurisdiction to cover all territories under the effective control of a contracting state, currently 47 states. The scope of this extraterritorial jurisdiction is still unclear and it will not be elaborated on further in this study.

19) ECHR, Articles 33 and 34.

20) The processing time for 10 randomly selected

4.2.2. Procedural rules

The Court operates with a set of rules of procedure, which, *inter alia*, provides a framework for the conduct of hearings and more specifically for the collection and introduction of evidence and expert opinions. The starting point for any application is a written adversarial procedure, meaning that it is the responsibility of the parties to a case to submit all relevant information in writing.²³ However, the obligation of contracting states to cooperate with the Court and the fact that in many cases, the state will be the only part with access to all evidence has led the Court²⁴ to adopt a more inquisitorial practice.²⁵ The parties can submit information in the form of legal observations and evidence but there are no formal requirements as to the form of such evidence.²⁶ If deemed necessary the Court has the possibility of conducting oral hearings on the merits of a case either upon request or at its own motion.²⁷ Such hearings will be under the procedural control of the Court.²⁸

In addition to the written proceedings and oral hearings, the Court can hold fact-finding hearings and instigate on-site investigative measures, if these are necessary for the Court to discharge its functions and to clarify the facts of a case. Such measures, which can be requested by all parties to the

case, may include the submission of additional documentary evidence and the hearing of witnesses, experts, or any other person whose evidence or testimony can contribute to the illumination of the case.²⁹ During such proceedings, the Court will decide on any dispute relating to witnesses or expert status.³⁰

In the absence of explicit rules of procedure guiding the evaluation of evidence and expert status, the specific criteria for this evaluation will be left to the practice of the Court.

4.2.3. The practice relating to evaluation of medical evidence and expert opinions

As a point of departure, the Court has consistently held that it will examine all evidence placed before it on the basis of the Court's free evaluation of evidence.³¹ This means that the Court does not see itself as bound by any formal rules regulating the admissibility and probative value of specific types of evidence. Instead the Court will base its evaluation on the *sana critica*³² of the Judges. In torture cases, it has been the practice of the Court to attach special importance to medical evidence. Depending on the specificity of the allegations and the diligence of the domestic investigation it can reject claims that are not supported by med-

23) ECtHR, Rules of Court, Rules 45(1), 47(1)(h), and 54.

24) ECHR, Article 38(1)(a).

25) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) p. 17.

26) ECtHR, Rules of Court, Rules 54(2)(a) and 59(1).

27) ECtHR, Rules of Court, Rule 59(3).

28) ECtHR, Rules of Court, Rule 64.

29) ECtHR, Rules of Court, Rules 54(3), 59(3) and A1(1).

30) ECtHR, Rules of Court, Rules A7(5).

31) ECtHR [GC], *Nachova and Others v Bulgaria* (6 July 2005, App. nos. 43577/98 and 43579/98) §147.

32) Also referred to as “sound judgement”.

ical or other types of tangible evidence.³³ The Court has repeatedly observed that the nature of the right to freedom from torture requires it to perform a “*particular thorough scrutiny even if certain domestic proceedings and investigations have already taken place*”.³⁴ In addition, the Court has clearly indicated that it views the collection of medical evidence as an integral part of the procedural obligation under Article 3 to conduct an effective investigation.³⁵ This means that the Court will first assess the quality of the domestic fact finding procedure and the diligence of the domestic proceedings. That assessment will then determine the intensity of the Court’s re-evaluation of domestically collected medical evidence. The Court can also receive new evidence provided that this could not possibly have been introduced during the domestic proceedings.³⁶ In this regard it is important to be aware of the potential conflict with the requirement for exhaustion of domestic remedies that can arise in connection with introduction of new evidence.

The Court will usually consider all types of medical evidence placed before it including evidence of a psychological nature. Due to this principle and the fact that psychological evidence will often be introduced in conjunction with physical medical evidence, it is unclear how much probative value the Court will attach to psychological evidence alone. In a few cases, the Court has found a violation of Article 3 solely on the basis of psychological evidence.³⁷ In a recent case, the Court rejected the entire body of state produced physical medical evidence as unreliable and based its decision on the psychological evidence submitted by the applicant and collected in accordance with the European Committee for the Prevention of Torture (CPT) and Istanbul Protocol standards.³⁸ It should be noted that this is a dissenting (votes 4-3) plenary judgment, which renders its prejudicial value³⁹ limited and it remains to be seen if this will be used as a future source of reference. In their dissenting opinion, the three dissenting judges strongly

33) ECtHR [PI], Juhnke v. Turkey (13 May 2008, App. no. 52515/99) § 67; ECtHR [PI], Satik v. Turkey (No.2) (8 July 2008, App. no. 60999/00) § 34; and ECtHR [PI], Protopapa v. Turkey (24 February 2009, App. no. 16084/90) §§ 47-51 where the claims were rejected. See in general ECtHR [GC], Cakici v. Turkey (8 July 1999, App. no. 23657/94) §§ and Camille Giffard and Nigel Rodley, *The approach of international tribunals to medical evidence in cases involving torture*, in Michael Peel and Vincent Iacopino, *Greenwich Medical Media Limited* (2002) p. 27.

34) ECtHR [PI], Muradova v. Azerbaijan (2 April 2009, App. no. 22684/05) § 99; ECtHR [PI], Ribitsch v. Austria (4 December 1995, App. no. 18896/91) § 32; Ugur Erdal and Hasan Bakirci, *Article 3 of the European Convention on Human Rights – a practitioner’s handbook*, OMCT Handbook Series Vol. 1 (2006) p. 233; and Philip Leach, *Taking a case to the European Court of Human Rights*, second edition, Oxford University Press (2005) p. 63.

35) ECtHR [PI], Salmanoğlu and Polattaş v. Turkey (17 March 2009, App. no. 15828/03) § 79 and ECtHR [PI], Muradova v. Azerbaijan (2 April 2009, App. no. 22684/05) §101.

36) ECtHR [PI], K.A. v. Finland (14 January 2003, App. no. 27751/95) § 89.

37) ECtHR [PI], Akkoc v. Turkey (10 October 2000, App. nos. 22947/93 and 22948/93) §§ 107 and 116 and ECtHR [PI], Salmanoğlu and Polatta, s v. Turkey (17 March 2009, App. no. 15828/03) §§ 85-95.

38) ECtHR [PI], Salmanoğlu and Polatta, s v. Turkey (17 March 2009, App. no. 15828/03) §§ 85-95.

39) The prejudicial value of a judgement refers to its potential value as a future source of law. This determination is based on the level of agreement among the judges, the quality of the legal reasoning and the hierarchical status of the Chamber rendering the judgement.

criticised the psychological evidence for not being concrete and accurate enough to form the basis for finding a violation.⁴⁰ While this judgment indicates a general openness to accept psychological evidence, it is still unclear how the Courts will evaluate such evidence in relation to its probative value.

In its case-law, the Court has made clear that an effective medical examination must include both documentation of all findings and an expert opinion on the specific nature of the symptoms and their consistency with the concrete allegations. However, due to the nature of free evaluation of evidence and the Court's reluctance to explicitly pronounce itself on if or how it addresses the issue of determination of expert status, it is difficult to identify clear criteria guiding the process. Nevertheless, some criteria have emerged as guiding the evaluation process. When evaluating documentary medical evidence, the Court has specifically focused on the promptness of the examination, its level of detail, and whether it could be relied on as being collected independently.⁴¹ This entails an examination conducted at the earliest possible point in time, which is individual and detailed and conducted without the presence of police officers or other state officials that

might pose a threat to the independence of the medical examiner.

In its evaluation of the expert opinion elements of medical reports, the Court has focused on issues of timeliness, the diligence and quality of the analysis, and the qualifications of the expert.⁴² This entails that the expert providing the opinion should preferably do this as early as possible on the basis of documentary evidence collected by that expert. Further, the process of analysis and the conclusions must be clear and logical, and the expert must possess certain qualifications ensuring the rendering of an informed and reasoned conclusion. If the Court finds that the expert opinion is unscientific, it will reject it as unreliable. This suggests that the Court might focus more on the *de facto* quality of medical reports than the formal competence of the expert.⁴³

In general, there seems to be a tendency in the Court towards a more systematic approach to evaluation of medical evidence, following the standards provided by the CPT and Annex 1 to the Istanbul Protocol.⁴⁴ In a number of recent judgments, the Court has specifically referred to the standards provided by the CPT⁴⁵ and the Istanbul Protocol as setting the benchmark for assessing the credibility of documentary

40) ECtHR [Pl], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03), partly dissenting opinion of judges Sajó, Tsotsoria and Karaka, s.

41) ECtHR [Pl], *Akkoç v. Turkey* (10 October 2000, App. nos. 22947/93 and 22948/93) § 118; *Böke and Kandemir v. Turkey* (10 March 2009, App. nos. 71912/01, 26968/02 and 36397/03) § 56.

42) ECtHR [Pl], *Muradova v. Azerbaijan* (2 April 2009, App. no. 22684/05) §§ 116-119 and ECtHR [Pl], *Akkoç v. Turkey* (10 October 2000, App. nos. 22947/93 and 22948/93) § 118.

43) ECtHR [Pl], *Muradova v. Azerbaijan* (2 April 2009, App. no. 22684/05) § 119.

44) See the systematic process of evidence evaluation in ECtHR [Pl], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03) §§ 85-95.

45) European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT standards – “Substantive sections of the CPT’s General Reports (CPT/Inf/E (2002) 1, Rev. 2006).*

medical evidence and expert opinions.⁴⁶ This has led the Court to reject medical reports not complying with the CPT and Istanbul Protocol standards as unreliable.⁴⁷

While in practice the Court has the opportunity to supplement its written procedure with oral hearings, this is not done frequently. During 2005, the Court held 20 plenary and 25 Grand Chamber hearings.⁴⁸ In accordance with the principle of free evaluation of evidence, the Court will consider all oral evidence placed before it. The hearing of witnesses and experts during normal hearings and fact-finding activities is under the procedural control of the Court.⁴⁹ The practical conduct of such hearings is rather flexible and it will in general allow the Court and both parties to the case to question the person giving testimony.

The Court has exercised restrictions on its conduct of fact-finding hearings and on-site investigations, possibly based on its subsidiary role and logistical limitations. Such activities are mainly carried out where the Court finds the domestic fact finding to be inadequate to an extent necessitating individual fact finding by the Court in order

to fulfil its functions.⁵⁰ The factors relevant to the decision to conduct fact finding activities include: “*the nature or seriousness of the case; the insufficiency of attempts made within the national system to fully establish the facts; a prima facie view that the allegations made by the applicant could be true and that there were real prospects that a fact-finding hearing could be successful in establishing the facts; and the passage of time.*”⁵¹ In general it seems that when the available evidence is inadequate, the Court will often choose to decide the case on the basis of the evidence available and if necessary draw presumption to the disfavour of the state if it is responsible for the lack evidence.⁵² Consequently, since the new court structure was introduced in 1998, fact-finding activities have only been conducted in 18 cases.

4.2.4. Observations on the evaluation of medical evidence

On the basis of the analysis above, the following observations can be made about the admissibility and evaluation of medical evidence and expert opinions in the European Court of Human Rights

46) ECtHR [Pl], *Salmanoğlu and Polat, s v. Turkey* (17 March 2009, App. no. 15828/03) § 89; ECtHR [Pl], *Böke and Kandemir v. Turkey* (10 March 2009, App. nos. 71912/01, 26968/02 and 36397/03) § 48; ECtHR [Pl], *Mehmet Eren v. Turkey* (14 October 2008, App. no. 32347/02) §§ 40-42; and ECtHR [Pl], *Gülbahar and Others v. Turkey* (21 October 2008, App. no. 5264/03) § 53.

47) ECtHR [Pl], *Mehmet Eren v. Turkey* (14 October 2008, App. no. 32347/02) §42 and ECtHR [Pl], *Salmanoğlu and Polat, s v. Turkey* (17 March 2009, App. no. 15828/03) § 89.

48) Ugur Erdal and Hasan Bakirci, Article 3 of the European Convention on Human Rights – a practitioner’s handbook, OMCT Handbook Series Vol. 1 (2006) p. 70.

49) ECtHR, Rules of Court, Rule A7(2).

50) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) pp. 22-32.

51) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) p. 38.

52) ECtHR [Pl], *Salmanoğlu and Polat, s v. Turkey* (17 March 2009, App. no. 15828/03) §§ 94-98.

- The Court applies the principle of free evaluation of evidence. The basic divide between admissibility considerations and determination of probative value is subsumed under the latter category and any relevant considerations relating to admissibility will have to be taken into account during the substantive evaluation of the evidence.
- All types of medical evidence are admissible. Particularly in torture cases the decision will often depend on the quality of this evidence. All evidence submitted to the Court will be evaluated based on the principle of the Court's free evaluation of evidence. The level of scrutiny exercised by the Court will generally depend on the Court's assessment of the domestic fact-finding procedure and the diligence of the domestic proceedings. In most torture cases, the critical question is not one of law but one of fact, which requires the Court to exercise a high level of scrutiny.
- The Court has clearly stated that an effective medical examination must include both documentary evidence and an expert opinion on the nature of the symptoms and their consistency with concrete allegations. Despite not always explicitly distinguishing between documentary evidence and expert opinions, the Court has utilised specific criteria for the evaluation of each of these two types of evidence.
- In recent case-law there is a tendency to conduct a more explicit evaluation of medical evidence on the basis of the standards elaborated by the CPT and in the Istanbul Protocol. This indicates a move away from the traditional free evaluation towards a more structured approach.
- Recent case-law indicates that it is possible to find a violation of article 3 solely based on psychological evidence. It remains unclear how much probative value the Court will afford evidence of a psychological nature. However, the prejudicial value of the recent case-law is limited and it is unclear how the Court will assess psychological evidence in cases where reliable physical evidence is also presented.
- Under the rules of procedure, the Court has the opportunity to hold oral hearings and instigate fact-finding hearings and on-site investigations. However, due to the subsidiary nature of the Court and logistical considerations, the Court appears to work through a written procedure in cases where oral hearings and fact-finding is not strictly necessary due to deficient domestic fact-finding.

4.3. The Inter-American Human Rights system

4.3.1. Mandate and jurisdiction

The Inter-American human rights complaints mechanism is established as a two-instance system featuring the Inter-American Commission on Human Rights (the Commission) at first instance and the Inter-American Court of Human Rights (the Court) as a second instance body. This mechanism established by the American Convention on Human Rights (ACHR) under the auspices of the Organisation of the American States. The objective is to ensure the fulfilment by contracting states of their obligations under the Convention and a number of other regional human rights treaties including the Inter-American Convention to Prevent and Punish Torture.⁵³

53) ACHR, Article 33 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 25. For further elaboration see IACtHR, "Street Children" (Villagrán-Mo-

rales et al.) v. Guatemala (Merits), (19 November 1999, No. 63) §§ 247-252 and IACtHR, The "Panel Blanca" (Paniagua-Morales et al.) v. Guatemala (Merits), (8 March 1998, No. 37) § 136.

The mechanism has jurisdiction in all contracting states, which have recognised its competence.⁵⁴

The Commission is competent to hear applications from individuals, groups of individuals, or any non-governmental entity legally recognised in a contracting state relating to rights protected by the ACHR or other regional human rights obligations undertaken by the state in question.⁵⁵ There is no requirement for victim status as seen in the European regional system. In addition, the Commission is competent to hear inter-state complaints provided that all states involved have explicitly recognised this competence.⁵⁶

The Court is competent to hear cases submitted by the Commission or a contracting state, but not the original applicant, provided that the state subject of the complaint has explicitly recognised the jurisdiction of the Court.⁵⁷ When deciding on a possible referral of a case to the Court, the Commission is obliged to hear and give due consideration to the opinion of the original applicant.⁵⁸

The average processing time of cases before the Commissions is approximately 6.5 years,⁵⁹ while the Court will use an average of 19 months on each contentious case.⁶⁰

The Commission and Court do not consider themselves as fourth instance appeals bodies, but it is clear both from the legal framework and the practice of the two that where necessary, they will conduct an extensive review of the facts of a given case. The level of scrutiny applied seems to depend on the existence and quality of fact-finding and decision-making by domestic courts.⁶¹

4.3.2. Procedural rules

The Commission and the Court operate on the basis of rules of procedure, which amongst other issues regulate the conduct of oral hearings, assessment of evidence, and the undertaking of fact-finding activities. As a point of departure, the procedure is written and adversarial but both entities have the possibility of holding oral hearings.⁶² Furthermore, based on the obligation of contracting states to cooperate with the

54) ACHR, Article 1.

55) ACHR, Article 44 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 23. The relevant regional human rights standards are: American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

56) ACHR, Article 45.

57) ACHR, Articles 61 and 62.

58) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 43(3) and 44(2)(a).

59) The number is calculated on the basis of the ten most recent torture related cases published by the Commission.

60) IACtHR, Annual Report of the Court 2008, p. 65. This figure relates to all cases regardless of their subject.

61) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 93.

62) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 15 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 59.

mechanism, the proceedings might take a more inquisitorial nature.⁶³

In proceedings before the Commission both parties to the case are requested to submit their legal arguments and supporting documentation in writing.⁶⁴ If considered necessary, the Commission can, either *ex officio* or at the request of a party to the case, instigate hearings “to advance in its consideration of the case”.⁶⁵ The purpose of such hearings is to bring new facts or information forward in addition to what has already been presented in writing and the Commission may focus on all relevant stages of the proceedings.⁶⁶ All forms of information including expert reports and opinions are admissible but it is for the Commission to decide whether it wishes to hear witnesses and experts during the hearing.⁶⁷ All witnesses and experts are required to take an oath or make a solemn promise to tell the truth. The Commission is also competent to undertake on-site visits when this is considered necessary and advisable and subject to the approval of the State Party.⁶⁸ However, for logistical and economic reasons such activi-

ties are not common.⁶⁹ The Commission’s rules of procedure do not provide any guidance on how written and oral evidence is to be evaluated.

The aim of the Commission is to evaluate the case and issue recommendations to the Court.⁷⁰ When the Commission has finalised its procedure, the case can be referred to the Court at the request of the contracting state or the Commission.⁷¹ When deciding on the referral, the Commission is obliged to hear the position of the original applicant and base its decision on the following elements: The position of the applicant; the nature and seriousness of the violation; the need to develop or clarify the case-law of the system; the future effect of the decision within the legal systems of the member states; and, the quality of the evidence available.⁷² If the Court admits the application, the original applicant will be allowed to participate in the proceedings autonomously from the Commission.⁷³

During the proceedings before the Court, all evidence received by the Commission through adversarial proceedings

63) IACtHR, *Velasquez Rodriguez v. Honduras (Merits)*, (29 July 1988, No. 4) §138 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 39.

64) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 30(5) and 38(1).

65) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 30(5) and 38(5).

66) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 62(1).

67) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 63(1), (4) and (8).

68) ACHR. Article 48 (1)(d) and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 40.

69) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 142.

70) ACHR, Articles 48 and 50.

71) ACHR. Article 61.

72) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 43(3) and 44(2).

73) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 24(1).

shall form part of the case file unless the Court considers it essential for the evidence to be repeated.⁷⁴ The adversarial proceedings requirement essentially entails that both parties have had an opportunity to challenge the evidence but does not require that this was in fact done.⁷⁵ New evidence can be submitted by the Commission, the original applicant, and the contracting state during the relevant stages of the procedure and within the time limits established by the Court's Rules of Procedure.⁷⁶ In addition, the Court is competent to obtain any evidence it considers helpful and necessary on an *ex officio* basis or through requests to the parties or a third party.⁷⁷ These proceedings are also open to independent submission of legal arguments by third parties.⁷⁸

The Court is mandated to instigate oral hearings as it finds necessary and the rules of procedure seem to indicate that some form of oral proceedings is an integral part of the procedure.⁷⁹ Indeed, the Court has generally held more than one oral hearing

in each case.⁸⁰ During these hearings the Court can hear testimony from victims, witnesses, experts or any other person whose testimony the Court deems relevant.⁸¹ All parties to the case can request the hearing of an individual subject to the final approval of the Court.⁸² Expert witnesses must fulfil certain requirements for independence⁸³ and qualifications and it is left for the Court to determine whether these are fulfilled.⁸⁴ However, the Rules of Procedure do not provide any specifics on what level of qualification is required for a person to be awarded expert status. The hearings are under the procedural control of the President of the Court, who can grant the right to all parties to question any person providing oral testimony to the Court.⁸⁵ While the Court does not have a formal possibility of conducting fact-finding investigations, the procedural rules governing the Court's *ex officio* collection of evidence provide ample space to undertake such activities.⁸⁶ However, these powers are rarely utilised by the Court.⁸⁷

74) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 46(2).

75) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 187.

76) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 46(1).

77) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 47.

78) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 41. This comes in the form of an *Amicus Curiae* brief.

79) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 42.

80) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 194.

81) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 47.

82) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 50.

83) Criteria provided in IACtHR, Statute of the Inter-American Court of Human Rights, Article 19.

84) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 53.

85) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 44.

86) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 47.

87) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) p. 31.

4.3.3. The practice relating to evaluation of medical evidence and expert opinions
The Inter-American Commission and Court function within the same legal framework in a quasi-two-instance system. However, due to their different functions in the system, it cannot be assumed that the procedural practices of the two bodies are similar. Nevertheless, to avoid repetition the following section will address the practice of the two bodies collectively while pointing out differences as they appear.

The basis of evidence assessment in the Inter-American system is the principle of free evaluation of evidence.⁸⁸ While this principle is clearly utilised by both bodies it is much more prevalent in the Commission, which will generally avoid commentary on the probative value of specific pieces of evidence. Adversely, the Court will often address each piece of evidence independently. The Court does not consider itself bound by the findings of the Commission⁸⁹ but as mentioned above, evidence received by the commission through adversarial proceedings can be accepted as part of the case file. The burden of proof will initially lie with the applicant but depending on the circumstance

of the specific case and the type and quality of evidence provided by the applicant, this might shift to the state.⁹⁰

The Court can essentially hear testimony from any person it deems can provide information relevant to the case mostly in oral hearings. Expert witnesses can be heard at all stages of the proceedings and will often be instrumental at the reparations stage for evaluating the injured party.⁹¹ Oral expert opinions will usually limit their focus to the main contentious issues of the case and to issues deemed important for the development of the Court's jurisprudence. In the Commission procedure, oral hearings are not mandatory and much less frequent than in the Court procedure.⁹² There is some indication that the Commission might be obliged to hold a hearing if this is requested by one of the parties.⁹³ In the absence of oral hearings, the parties before the Commission will more frequently make use of written expert reports to support their case. The procedure during oral hearings is adversarial and witnesses are not allowed to read out set piece statements during the hearings.⁹⁴

In torture cases in the Inter-American

88) IACHR, Rafael Ignacio Cuesta Caputi v. Ecuador (Merits), (18 July 2008, Case 12.487, Report No. 36/08) § 38; IACtHR, Loayza Tamayo v. Peru (Reparations), (27 November 1998, No. 42) §57; and IACtHR, Cantoral-Benavides v. Peru (Merits), (18 August 2000, No. 69) §52.

89) IACtHR, Velasquez Rodrigues v. Honduras (Merits), (29 July 1988, No. 4) §29.

90) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) pp. 210-212.

91) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press (2003) p. 203.

92) IACtHR, Velasquez Rodrigues v. Honduras (Preliminary Objections), (26 June 1987, No. 1) § 51 and Christina Cerna, *The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications*, in David J. Harris and Stephen Livingstone, *The Inter-American System of Human Rights*, Clarendon Press (1998), p. 97.

93) IACtHR, Velasquez Rodrigues v. Honduras (Preliminary Objections), (26 June 1987, No. 1) §53.

94) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press (2003) pp. 141-146.

system, medical evidence takes a key role in the proceedings. The two bodies will regularly be asked to evaluate both documentary evidence and expert opinions including evaluations of previously collected medical evidence. As already explained, the level of re-evaluation of evidence will depend on the existence and quality of the domestic decisions and fact-finding. Considering that collection and evaluation of evidence is often a central contentious element of torture cases, a high degree of re-evaluation will normally be exercised.⁹⁵ For the Court, this observation may also relate to the findings of the Commission.⁹⁶ Medical evidence will usually be utilised both in the merits and the reparations stage of the proceedings.

Psychological evidence will often play an important role both in relation to proving allegations of torture of the primary victims but often also in relation to proving torture/ ill-treatment against the dependents of victims. From the case law, it does not seem that the Court has any reservations towards relying on psychological evidence and it will often find separate violations regarding psychological torture.⁹⁷ Furthermore, psychological evidence is frequently utilised in the reparations proceedings as an effective means of evaluating the injury.⁹⁸ Due to the lack of

explicit evaluation of evidence in the Commission's procedure it is difficult to determine how the Commission evaluates psychological evidence. From the analysis of its case law, it appears that the Commission usually takes psychological evidence into consideration when presented as part of a comprehensive examination according to the standards of the Istanbul Protocol examination.⁹⁹

As a consequence of the Inter-American system's flexible approach to evidence evaluation it is very difficult to identify clear criteria guiding this process. The Court has expressed some vague limitations on the flexibility by stating that it will respect the principles of legal certainty and the procedural equality of the parties. General considerations that may guide the evaluation of medical evidence include the source, the credibility and proficiency of the author, the context of the evidence collection and the quality of the evidence.¹⁰⁰ Other, more specific considerations can also be drawn from the Court's case-law: Uncontested evidence will be accepted as fact if this is consistent with the remaining evidence;¹⁰¹ and circumstantial and presumptive evidence will be accepted if this is coherent, mutually reaffirming, and lead to conclusions consistent with the facts under examination.¹⁰² However,

95) IACHR, *Emiliano Castro Tortrino v. Argentina (Admissibility)*, (2 March 1998, Case 11.597, Report No. 7/98) §§17-18.

96) IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru (Merits)*, (25 November 2006, No. 160) §169.

97) IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru (Merits)*, (25 November 2006, No. 160) §§287-88 and 293;

98) IACtHR, *Gutiérrez-Soler v. Colombia* (12 September 2005, No. 132) §§ 79(a) and 84(a).

99) IACHR, *Ana, Beatriz and Celia Gonzalez*

Perez v. Mexico (Merits), (4 April 2001, Case 11.565, Report No. 53/01) § 39.

100) Personal interview with Legal Advisor from the IACHR.

101) IACtHR, *"Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, (19 November 1999, No. 63) § 68 and IACHR, *Rafael Ignacio Cuesta Caputi v. Ecuador (Merits)*, (18 July 2008, Case 12.487, Report No. 36/08) § 35-37.

102) IACtHR, *"Street Children" (Villagrán-Morales et al.) v. Guatemala (Merits)*, (19 November 1999, No. 63) §§ 69-71.

these indications relate to specific categories of evidence and thus do not provide any contribution to the more general evaluation exercise. The Court has established certain requirements for a person to qualify for expert status. These include independence and expert qualifications. The qualifications element has been framed by the court as a requirement that expert “*reports are to be prepared by professionals who are competent in their field and include, in proper form, the information that the Court requires*”.¹⁰³ In addition, the evaluation of expert status will be based on the free evaluation with due consideration to adversarial observations of the parties to the case. This means that if the expert status or the contents of the opinion is not contested, it is likely to be accepted as valid.¹⁰⁴ In one case, it seems that the applicant has attempted to challenge the competence of an expert witness through reference to his lack of knowledge about the Istanbul Protocol.¹⁰⁵ However, the Court did not pronounce itself on the issue and concretely accepted the expert opinion. No specifications were made on how the necessary qualification can be acquired to ensure access for non-academic experts.¹⁰⁶

The Court has on several occasions made reference to the Istanbul Protocol in its case-law. While the Istanbul Protocol has

not been explicitly utilised as a minimum standard for evaluation of medical evidence, it has been utilised in a range of different functions including as a reference tool for experts delivering expert opinions;¹⁰⁷ as a benchmark for assessing the effectiveness of the domestic fact-finding;¹⁰⁸ and as a means of redress through its implementation in the domestic torture investigation framework.¹⁰⁹ This very diverse utilisation of the Istanbul Protocol without explicitly adopting it as a minimum standard for medical reporting suggests that the Court is not yet ready to let its evidence evaluation be bound by any fixed standard. However, when it utilises the Istanbul Protocol as a benchmark for evaluating the domestic fact-finding, the Court comes very close to setting a formal criteria for evidence evaluation. The Commission has seemingly gone one step further and made specific reference to the Istanbul Protocol when evaluating medical evidence. In the case in question, the Commission accepted independently collected evidence on the basis that the examination procedure was in compliance with the standards of the Istanbul Protocol.¹¹⁰ The Commission further noted that the “reliable [medical] report” should be timely, presented directly to the examination subject and include the following information: Circumstances of the

103) IACtHR, *Loayza Tamayo v. Peru* (reparations), (27 November 1998, No. 42) § 81 and Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press (2003) p. 202.

104) IACtHR, *Bamaca-Velasquez v. Guatemala* (merits), (25 November 2000, No. 70) § 113.

105) IACtHR, *Tibi v. Ecuador*, (7 September 2004, No. 114) §76.

106) Personal interview with Legal advisor from IACHR

107) IACtHR, *Gutiérrez-Soler v. Colombia* (12 September 2005, No. 132) §42.

108) IACtHR, *Vargas-Areco v. Paraguay* (Merits and Reparations), (26 September 2006, No. 155) §§ 91-94.

109) IACtHR, *Gutiérrez-Soler v. Colombia* (12 September 2005, No. 132) §§100 and 109-110 and IACtHR, *Tibi v. Ecuador*, (7 September 2004, No. 114) §252(m).

110) IACHR, *Ana, Beatriz and Celia Gonzalez Perez v. Mexico* (Merits), (4 April 2001, Case 11.565, Report No. 53/01) §§ 39-41.

interview; a detailed history of the subject's story; records of all physical and psychological findings; an opinion on consistency between the subject's story and the physical and psychological findings; and a clear indication of authorship.¹¹¹ This indicates that the Commission utilises the Istanbul Protocol as a minimum standard for assessing medical reports.

4.3.4. Observations on the evaluation of medical evidence

While the evaluation of evidence in the Inter-American system is largely similar to the European regional system, there are certain particularities of the Inter-American system, which will be highlighted below.

- Evidence evaluation in the Inter-American system is based on the principle of free evaluation of evidence. Due to this flexible approach it is difficult to draw clear criteria guiding the Commission and the Court in their assessment of documentary evidence and expert opinion.
- In most cases relating to torture the Commission and Court will rely greatly on medical evidence both in its decisions on the merits of a case and when determining the reparations. At the outset, it is the responsibility of the parties to submit the relevant evidence but in cases where the state is not complying with its obligation to cooperate with the Commission/Court they have the possibility of either initiating investigations, which are more inquisitorial in nature or drawing presumptions.
- The Court has consciously chosen to

refrain from elaborating clear criteria for evaluating documentary evidence as well as expert opinions, where it has been particularly careful to avoid excluding non-academic experts. In general, when the Court evaluates medical evidence, it will consider elements such as the source, the credibility and proficiency of the author, the context of the evidence collection and the quality of the evidence. In addition the Court requires both independence and competence for a person to qualify as an expert. This expert status can be challenged by all parties to a case.

- The Court has made continuous reference to the Istanbul Protocol in its evaluation of documentary evidence and expert opinions but it has not yet adopted it as a fixed standard. However, the Istanbul Protocol has been used as a reference tool for experts delivering opinions; as a benchmark for evaluating the effectiveness of the domestic fact-finding; and as a means of redress through its implementation in the domestic torture investigation framework. However, given the courts insistence on maintaining a flexible evidence evaluation, it is unlikely that it will be afforded a more formalised role. On this issue the Commission seems to have gone one step further and adopted the Istanbul Protocol as a minimum standard for "reliable [medical] reports"
- While both Commission and Court are generally willing to evaluate psychological evidence and often do so, it is unclear whether it is viewed as documentary or opinion based. The structure of most cases indicate that it is seen as opinion based but this could be due to the fact that most psychological evidence include both diagnosis and opinion, which is then subsumed in the latter category.

111) IACHR, Ana, Beatriz and Celia Gonzalez Perez v. Mexico (Merits), (4 April 2001, Case 11.565, Report No. 53/01) § 39.

- While the Commission has shown some restriction in holding oral hearings, this seems to be an integral procedure of the Court procedure. Oral expert testimony will usually be limited to focusing on the key contentious issues of a case and on issues deemed important for the development of the Court's jurisprudence.

4.4. *The African Commission on Human and Peoples Rights*

4.4.1. The mandate and jurisdiction:

The African Commission on Human and Peoples Rights (the Commission) is established by the African Charter on Human and Peoples Rights (ACHPR) under the auspices of the Organisation of African Unity (OAU), which was succeeded by the African Union (AU) in July 2002.¹¹² The main objective of the Commission is to promote and protect human and peoples rights in Africa through a broad range of activities including studies, standard setting and consideration of communications.¹¹³ The activity in focus of this study will be the consideration of communications.

The Commission is competent to receive applications from states, private individuals and organisations.¹¹⁴ In practice, the group of applicants is very diverse and many of the applications originate from human rights

NGOs. There is no requirement for victim status in the African system.

The mandate of the Commission is distinctly different from the two other regional systems discussed above in that it does not have the power to issue legally binding decisions.¹¹⁵ Instead, the Commission will largely focus on facilitating amicable solutions;¹¹⁶ a process, which has a less prevalent position in the other regional systems.¹¹⁷ If this process is not successful, the Commission will submit a report containing its recommendations to the Assembly of Heads of state and Government (the Assembly)¹¹⁸ for its adoption.¹¹⁹ The publication of the report and recommendations is subject to the approval by the Assembly.¹²⁰

In addition to the Commission, the African regional system also features the African Court on Human and Peoples Rights. The Court held its first meeting in July 2006 and has so far decided on one case.¹²¹

4.4.2. Procedural rules

The Commission conducts its work on the basis of a set of Rules of Procedure, which, *inter alia*, provide guidance on how to implement the communications procedure. However, the rules are very broadly framed and provide no information on evaluation of evidence or expert opinions.

112). ACHPR, Article 30.

113) ACHPR, Articles 45 and 55.

114) ACHPR, Articles 48 and 55.

115) Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights – a Handbook for Victims and their Advocates*, OMCT Handbook Series Vol. 3 (2006) pp. 27-28.

116) Commonly known as “friendly settlements”.

117) ACHPR, Articles 47 and 52.

118) With the establishment of the African Union, the name of this body changed to “the African Union Assembly”.

119) ACHPR, Articles 52 and 53.

120) ACHPR, Article 59(2).

1219 Last checked on 26 February 2010.

The rules of procedure stipulate that the parties to a case can submit information and observations both during the admissibility procedure and the subsequent consideration of the merits.¹²² Further, the section dealing with inter-state applications also open the possibility of oral hearings during which the Commission is mandated to determine the specific procedure of the hearings.¹²³ This procedure is not formally available for individual complaints to the Commission. However, the Commission has employed a very wide interpretation of the ACHPR Article 46 text “The Commission may resort to any appropriate method of investigation”. This provision allows the Commission to conduct ex officio investigations,¹²⁴ on-site investigations,¹²⁵ and possibly also oral hearings.¹²⁶ In addition, the Commission can request the approval of the Assembly to undertake country visits as part of its investigative process where a number of cases concerning the same state indicate “the existence of a series of serious or massive violations”.¹²⁷

4.4.3. The practice relating to evaluation of medical evidence and expert opinions

In general, the decisions of the Commission

offer very little, if any, reflection on its methods for evaluating evidence. It can safely be assumed that the starting point is the same free evaluation of evidence as employed by the other international human rights mechanisms.¹²⁸ The only relatively clear indication on evidence evaluation relates to the situation where the state does not provide substantive replies to the allegations of the applicant. In this situation, the Commission claims that it will take the allegations “as proven, or at the least probable or plausible”¹²⁹. This has two significant modifications. The fact that the complainant’s allegations were not contested, or were partially contested by the state does not mean that the Commission will accept their veracity. Further, the Commission can conduct ex officio examination based on its competence to resort to any appropriate method of investigation.¹³⁰ In addition, the Commission has willingly extended its own deadlines for submitting information and observations,¹³¹ leading to significant delays in the procedure with no certainty of state participation.¹³²

It seems that in practice, the Commission will allow all types of evidence provided

122. ACmHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rules 117 and 119.

123. ACmHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rule 100.

124. ACmHPR, Info sheet No.3, p. 8.

125. Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights – a Handbook for Victims and their Advocates*, OMCT Handbook Series Vol. 3 (2006) p. 86.

126. ACmHPR, Info sheet No.3, p. 8.

127. ACHPR, Article 58.

128. Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples’ Rights – The System in Practice, 1986 - 2000*, Cambridge University Press (2002) pp. 109-110.

129. ACmHPR. *Amnesty International and others v. Sudan* (1999, Comm. No. 48/90, 50/91, 52/91, 89/93) § 52.

130. ACmHPR, Info sheet No.3, p. 8.

131. ACmHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rule 119. This rule provides a 3 months time limit on the initial submission by the state.

that it contributes to the substantiation of an allegation.¹³³ It is clear from the Commission's practice that it will allow evidence in the form of witness statements, doctors' testimonies, post mortem reports and expert reports.¹³⁴ The Commission has not pronounced itself on the admissibility and evaluation of psychological evidence but in one decision it has shown its awareness of the psychological consequences of torture.¹³⁵ Due to the lack of transparent evaluation criteria, it is unclear to which extent the Commission relies on medical evidence in its decisions and whether it distinguishes between documentary and opinion based evidence in its evaluation. However, considering that it has rejected unsubstantiated allegations of torture¹³⁶ and that a medical report might be a very effective method of substantiating such allegations, it is likely that medical evidence will play an important role. The Commission further employs in its case law a concept of expert opinion, at least in relation to legal questions, even though it

does not elaborate any evaluation criteria.¹³⁷ It has not been possible to identify references to the Istanbul Protocol or any other clear standards for evaluation of evidence in the practice of the Commission.

The Commission will frequently hear oral submissions¹³⁸ and despite the absence of procedural rules governing this practice, it seems to be viewed as an entitlement for both parties of the case.¹³⁹ Such hearings can take place at all stages of the process including prior to and during the admissibility consideration.¹⁴⁰ The procedure during an oral hearing is largely inquisitorial starting with opening statements by the parties followed by questioning by the Commissioners. The parties are not allowed to question each other. The hearings are closed and will usually only see participation of the parties to the case. However, on some occasions the Commission has heard expert witness statements at the request of the parties.¹⁴¹ This indicates that in theory the Commission should be able to hear and consider medical expert opinions.

132) Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000*, Cambridge University Press (2002) p. 115.

133) ACmHPR, Info Sheet No. 2. Such evidence may include letters, legal documents, photos, autopsies and tape recordings.

134) ACmHPR, *Amnesty International and others v. Sudan* (1999, Comm. No. 48/90, 50/91, 52/91, 89/93) § 5; ACmHPR, *Dawda Jawara v. The Gambia* (2000, Comm. Nos. 147/95 and 149/96) §15; and ACmHPR, *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (1996, Comm. No. 71/92) §§ 14 and 16.

135) ACmHPR, *Curtis Francis Doebbler v. Sudan* (2003, Comm. No. 236/2000) §§ 36-38.

136) ACmHPR, *Kazeem Aminu v. Nigeria* (2000, Comm. No. 205/97) §16 and ACmHPR, *John D. Ouko v. Kenya*, (2000, Comm. No. 232/99) § 26.

137) ACmHPR, *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (1996, Comm. No. 71/92) §§ 14 and 16 and ACmHPR, *John K. Modise v. Botswana* (2000, Comm. No. 97/93) § 56.

138) Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights – a Handbook for Victims and their Advocates*, OMCT Handbook Series Vol. 3 (2006) p. 60.

139) ACmHPR, Info sheet No.3, p. 8 and ACmHPR, Info Sheet No. 2, p. 5.

140) ACmHPR, *Curtis Francis Doebbler v. Sudan* (2003, Comm. No. 236/2000) §§ 13, 16 and 20.

141) Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000*, Cambridge University Press (2002) pp. 106-107.

However, some cases are heard in closed private sessions of the Commission and there is little elaboration on legal reasoning in the decisions. It is therefore difficult to identify how the Commission evaluates evidence presented at oral hearings and how much of this information is novel in nature as opposed to mere restatement of positions.

In addition to oral hearings, the Commission also has the opportunity to conduct on-site investigations subject to the approval of the host country.¹⁴² While this measure appears to be mandated in the Commission's broad investigatory powers, it is unclear whether the activity is an integral part of a case or if it's considered to be a part of the more general promotional activities of the Commission.¹⁴³ While it seems that the Commission will be able to receive documentary evidence and expert opinions during on-site investigations, it is unclear whether such information would be directly admissible in connection with an application against that state or whether it would only feature in the promotional activities of the Commission.

4.4.4. Observations on the evaluation of medical evidence

Due to the limited written legal reasoning in the Commission's decisions it is very difficult to identify a method for admitting and evaluating medical evidence. The Commission's quasi-judicial nature and its extensive focus on friendly settlement of disputes

make it a difficult subject of analysis of legal procedures. Based in the present analysis it is possible to draw the following general conclusions:

- It seems likely that the Commission will work on the basis of the same flexible free evaluation of evidence principle as in the other regional systems.
- A key feature of the Commission is the possibility for any person or organisation to submit applications on behalf of a victim without that person's formal consent. This is especially important when dealing with disappearances, torture survivors who may fear reprisals, or cases with high numbers of possibly unidentified victims. Here organisations can take the responsibility for pursuing the cases without needing the active participation of the victim if this person is unable or for other reasons not interested in participating.
- In practice the Commission will admit very diverse types of evidence including medical reports. It is not possible to identify criteria guiding the evaluation of the evidence besides from the indication that in cases where the state does not respond to allegations, the Commission can draw presumptions.
- There are vague indications that medical evidence does play an important role in the substantiation of torture allegations. In its evaluation of such evidence, the Commission formally distinguishes be-

142) ACmHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* (1995, Comm. No. 74/92) §§ 10-11.

143) Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights – The System in Practice, 1986 - 2000*, Cambridge University Press (2002) pp. 108-109. There are no clear guidelines or procedures governing

the conduct of on-site investigations, which is an issue that has prompted harsh criticism from certain states: ACmHPR, *Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003-2004*, Annex II. Here the Government of Zimbabwe strongly criticizes the procedural conduct of a fact-finding mission to the country.

tween documentary evidence and expert opinions but there are no clear indications of how these different types of evidence are evaluated.

- The Commission will often hear oral submissions from both parties to the case and there are certain indications that this is viewed as an entitlement of both parties. During these hearings, which are largely inquisitorial, the parties can call persons to provide witness testimony or expert opinions but cross examination is not allowed. Again, there is no indication on how the Commission evaluates this evidence.

The analysis above has left many unanswered questions relating to the practice of the Commission. The legal framework guiding its procedure is very generally framed and neglects to address important aspects of legal procedure. In addition, the decisions rendered by the Commission, are very short and detailed legal reasoning almost absent. It is therefore not possible to draw any clear conclusions on how the Commission practically conducts its procedure and evaluates evidence. This absence of legal reasoning also weakens the prejudicial value of the Commission's decisions, which again limits its preventive effects.

4.5. UN Treaty based mechanisms

4.5.1. Mandate and jurisdiction

The UN human rights treaty monitoring

system currently consists of eight primary Committees with the responsibility to monitor state compliance with their respective treaties. Six of these Committees have the mandate to consider individual communications against states who have ratified the relevant treaty and explicitly recognised this competence of the Committee.¹⁴⁴ In relation to torture cases, the two main bodies of interest are the Committee against Torture (CAT) and the Human Rights Committee (HRC) both of which have rendered a high number of decisions on torture related issues. Since the procedures of the two bodies are largely similar, they will be analysed collectively with specific references to points of difference. In addition, the two Committees have a history of taking inspiration from the practice of the other, which makes it likely that a practice found in one Committee will be followed by the other where relevant.

First, it is worth noting that both bodies have a relatively strict victim status requirement meaning that only the victim or a person authorised by the victim can file an application. If the victim is physically prevented from filing, the victim's family will acquire this competence.¹⁴⁵

Both bodies have clearly expressed the view that they are not fourth instance appellate courts and that as a starting point it is the prerogative of domestic courts to evaluate the evidence in a given case.¹⁴⁶ However, in cases where the domestic procedure is

144) The formal recognition is either done through the ratification of an optional protocol or through declaration under a specific provision of the core treaty.

145) Sarah Joseph, Katie Mitchell, Linda Gyorki, *Seeking Remedies for Torture Victims – a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, OMCT Handbook Series Vol. 4 (2006) p. 57

146) HRC, *R.M. v. Finland* (23 March 1989, Comm. No. 301/1988) § 6.4; CAT, *N.Z.S. v. Sweden* (22 November 2006, Comm. No. 277/2005) § 8.6; and CAT, General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22 (21 November 1997, A/53/44, annex IV) § 9.

found to be “manifestly arbitrary or amounting to a denial of justice”, the Committees will conduct a thorough review of the evidence placed before it.¹⁴⁷ While this cannot be conclusively confirmed, this seems to be a higher threshold than what is seen in the regional mechanisms.

4.5.2. Procedural rules

Both Committees operate on the basis of fairly elaborate rules of procedure, which regulate how the Committees are to implement their different mandates.¹⁴⁸ When considering individual communications, the procedure is written and adversarial and the Committees are obliged to consider all information placed before them by the parties to the case.¹⁴⁹ In addition, the Committee against Torture has the mandate to invite the parties to oral hearings but in practice this has never been done.¹⁵⁰ The parties are given the opportunity to comment on each other’s submissions and in practice some cases end up with multiple exchanges between the parties before the Committee will

feel equipped to render its decision. In addition, the Committees can request the parties to elaborate on certain issues or provide specific evidence including expert opinions.¹⁵¹ With regard to the evidence collection, the Committee against Torture is also mandated to “obtain any document from United Nations bodies, specialized agencies, or other sources that may assist in the consideration of the complaint”.¹⁵² The rules of procedure do not provide any further guidance on how the Committees will evaluate evidence placed before it.

4.5.3. Practice relating to medical evidence

Similar to the other international human rights tribunals, the two UN Committees base their decisions on the principle of free evaluation of evidence. This is clear from the Committees’ obligation to consider all evidence and the lack of formal rules for its evaluation combined with the flexible approach taken by the two bodies. Initially, the burden of proof is on the applicant to establish a *prima facie* case but after this

147) HRC, *G. v. Canada* (17 July 2000, Comm. No. 934/2000) § 4.3; HRC, *R.M. v. Finland* (23 March 1989, Comm. No. 301/1988) § 6.4; CAT, *Falcón Ríos v. Canada* (23 November 2004, Comm. No. 133/1999) § 8.5; CAT, *Pelit v. Azerbaijan* (1 May 2007, Comm. No. 281/2005) § 7.11; and Sarah Joseph, Katie Mitchell, Linda Gyorki, *Seeking Remedies for Torture Victims – a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, OMCT Handbook Series Vol. 4 (2006) p. 81.

148) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) and HRC, Rules of Procedure of the Human Rights Committee (22 September, CCPR/C/3/Rev.8).

149) CAT, Article 22(4) and the Optional Protocol to ICCPR, Article 5(1).

150) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 111(4) and Sarah Joseph, Katie Mitchell, Linda Gyorki, *Seeking Remedies*

for Torture Victims – a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies, OMCT Handbook Series Vol. 4 (2006) p. 95. In CAT, *S.N.A.W. et al. v. Switzerland* (24 November 2005, Comm. No. 231/2003) §§ 5.3 & 7.8 a hearing was requested but denied by the Committee.

151) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 111(2) and HRC, Rules of Procedure of the Human Rights Committee (22 September, CCPR/C/3/Rev.8) Rule 97(4). In CAT, *Halimi-Nedzibi v. Austria* (18 November 1993, Comm. No. 8/1991) § 10, the Committee Against Torture requested the State Party to “appoint, in consultation with the author’s counsel, an independent expert in ophthalmology in order to determine the date of and the origin of the eye injury”.

152) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 112(2).

point the application of the burden of proof depends on the specifics of the case. In cases where the applicant establishes a *prima facie* case of torture or ill-treatment and the State Party does not provide an effective response to the allegations specifically addressing questions of law and refuting evidence, the Committees can draw the presumption that the allegations presented by the applicant are true.¹⁵³

The Committees will often see medical evidence introduced in torture cases and while it is not determinative for the outcome of the case,¹⁵⁴ medical evidence can play an important role in proving allegations of torture or ill-treatment. Further, there are examples of the Committee against Torture considering psychological evidence of torture. While the probative value attached to such evidence is unclear, it is evident that the Committee recognises the value of such evidence.¹⁵⁵ Indeed, the Committee against Torture has utilised a psychological certificate showing a neuropsychological disorder issued 10 years after the fact as the basis for finding a viola-

tion of the right to an effective investigation.¹⁵⁶

Due to the confidential proceedings of the Committees and their reluctance to explicitly comment on their evaluation of evidence in the written decisions, it is difficult to identify clear criteria guiding this evaluation.¹⁵⁷ In addition, based on the principle of free evaluation, the Committees will most likely be reluctant to let the evidence assessment be directed by rigid criteria.¹⁵⁸ However, a few guiding principles can be identified in the practice of the two Committees: Medical reports must illustrate a clear link between the symptoms and the allegations by the alleged victims and the forensic expertise of the examining doctor will affect the probative value afforded expert opinions.¹⁵⁹ This indicates that the Committees do distinguish clearly between documentary evidence and expert opinions and that a thorough evaluation of the factual expertise of proposed experts will be conducted. Both Committees have specifically recommended the implementation of the Istanbul Protocol as a torture documentation

153) HRC, *Weismann and Perdomo v. Uruguay* (3 April 1980, Comm. No. 8/1977) § 15; HRC, *Valcada v. Uruguay* (26 October 1979, Comm. No. 9/1977) § 10; HRC, *Massera et al. v. Uruguay* (15 August 1979, Comm. No. 5/1977 (R.1/5)) § 9; CAT, *Dimitrijevic v. Serbia and Montenegro* (24 November 2004, Comm. No. 207/2002) § 5.3.

154) CAT, *Blanco Abad v. Spain* (14 May 1998, Comm. No. 59/1996) § 8.8. In the present case, the Committee rejected that forensic reports indicating no signs of torture could be relied on by domestic courts as a justification for not initiating an effective investigation.

155) CAT, *Bouabdallah Ltaief v. Tunisia* (14 November 2003, Comm. No. 189/2001) § 10.5 and CAT, *Falcón Ríos v. Canada* (23 November 2004, Comm. No. 133/1999) §§ 8.4 & 8.5.

156) CAT, *Bouabdallah Ltaief v. Tunisia* (14

November 2003, Comm. No. 189/2001) §§ 8.8 & 10.5.

157) The evaluation of evidence during non-refoulement proceedings is more thoroughly described in case-law and academic writing. However, since the object of consideration in such cases is inherently different from traditional torture cases, it is not possible to draw allegoric conclusions from this practice.

158) The Committee against Torture has recently established a working group on evaluation of facts and evidence. Since the working group has not commenced its work it is not clear what the aim and scope of its work will be.

159) HRC, *Fuenzalida v. Ecuador* (12 July 1996, Comm. No. 480/1991) § 9.4 and CAT, *Ristic v. Yugoslavia* (11 May 2001, Comm. No. 113/1998) §§ 9.4 & 9.5.

tool during their state review procedures.¹⁶⁰ While this is an important recognition of the value of the Protocol, there are no signs that the Committees are using it as a standard for their own evaluation of medical evidence. Criticism has been expressed that the limitation to a written procedure is restricting the possibilities for adequate taking of evidence. It is asserted that that the written procedure is insufficiently equipped to conduce a proper evaluation where there are conflicting versions of fact. To remedy this situation, it has been suggested that the use of sworn depositions and independent expert opinions is increased in order to clarify contested issues.¹⁶¹

4.5.4. Observations on the evaluation of medical evidence

Due to the closed procedure of the Committees and the limited written observations on evaluation of evidence, it is very difficult to identify clear criteria for this evaluation. The following more generalised conclusions can be drawn on the basis of the analysis above:

- Similar to other international human rights tribunals, the UN Committees work on the basis of free evaluation of all evidence placed before them. The Committees do not see themselves as fourth instance appellate bodies but in cases where the domestic procedure is found to be “manifestly arbitrary or amounting to a denial of justice” they will conduct a thorough review of all the evidence placed before them. In cases where the state fails to respond effectively to allegations, which have been found *prima facie*

substantiated, the Committees can base their decision on the presumption that the allegations are true.

- The Committees recognise written medical evidence of a physical and psychological nature but it is not determinative for the outcome of a case. The Human Rights Committee is only mandated to conduct a written procedure and while the Committee against Torture has a formal mandate to conduct oral hearings this is not done in practice. Thus, all evidence submitted to the Committee must be in written form.
- When evaluating evidence, the Committees have paid particular attention to whether a qualified forensic medical expert conducts the medical examination and whether the report establishes a clear link between the physical and psychological findings and the allegations of the victim. While there is very limited explicit distinction between documentary evidence and an expert opinion it is clear that the distinction is being employed.
- The Committees have promoted the Istanbul Protocol as an effective domestic torture documentation tool but has stopped short of utilising it for their own evidence evaluation.
- It has been recommended that the Committees increase their use of sworn depositions and independent expert opinions to facilitate a more adequate evaluation of evidence under the written procedure.

4.6. *The International Criminal tribunals*

Due to the distinct difference between international criminal and human rights tribunals

160) CAT, Concluding Observations: Serbia, (19 January 2009, CAT/C/SRB/CO/1) § 14 and HRC, Concluding Observations: Uzbekistan, (CCPR/C/UZB/CO/3) § 11.

161) Manfred Nowak, CCPR Commentary: U.N. Covenant on Civil and Political Rights, 2nd edition, N.P. Engel Verlag (2005) pp. 873-874.

a direct comparison of the two approaches to evaluation of evidence cannot be applied. The two systems balance the interests of legal certainty and materially correct decisions differently and especially the human rights tribunals seek a very high degree of flexibility to ensure that all voices are heard. Nevertheless, the systematic approach of the criminal tribunals, illustrated below, should contribute to a better understanding of the structure of expert status evaluation that lies behind the more flexible approach of the human rights tribunals.

International criminal tribunals will generally decide on indictments against key perpetrators of criminal acts in cases where the evidence is overwhelming. Individual pieces of evidence are therefore rarely evaluated and it is thus difficult to find indications of how these tribunals approach the evaluation of evidence in torture cases.¹⁶² While the international criminal tribunals have neglected to elaborate on their criteria for evaluation of evidence they have provided ample practice on the determination of expert status. The following illustration cannot be directly transferred to the procedure before international human rights tribunals, but it does provide a set of general considerations that should be

taken into account when seeking to present expert opinions before these tribunals.¹⁶³

The International Criminal Tribunal for the former Yugoslavia (ICTY) has defined an expert as a person who “by virtue of some specialised knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute.”¹⁶⁴ This entails three distinct requirements: (1) the person must have specialised skills, (2) which can contribute to the illumination of an issue, (3) which is disputed by the parties. This could for example be a forensic medical expert testifying on whether the medical symptoms of an alleged torture victim are consistent with his account of events, where the state subject of a complaint disputes this.

The admissibility decision of international criminal tribunals is guided by five main criteria. The following text will describe each criterion and subsequently provide a few considerations for the process of determining probative value:

1. *The objective test:* The persons’ previous experience and knowledge will be evaluated through an examination of present and former positions, professional experience, and publication of scholarly articles.¹⁶⁵

162) Camille Giffard and Nigel Rodley, The approach of international tribunals to medical evidence in cases involving torture, in Michael Peel and Vincent Iacopino, Greenwich Medical Media Limited (2002) p. 26.

163) The following analysis is largely inspired from the article: Renate Winter and Stephen Kostas, Bringing Medical Evidence of Torture to the International Criminal Tribunals, in International Rehabilitation Council for Torture Victims, Shedding Light on a Dark Practice – Using the Istanbul Protocol to Document Torture, (2009), pp. 18-21.

164) Prosecutor v. Galić, Case No. ICTY-98-29-T, Decision Concerning the Expert Witnesses Ewa

Tabeau and Richard Philipps, 3 July 2002, p. 2. See also Prosecutor v. Brđanin, Case No. ICTY-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4; Prosecutor v. Strugar, Case No. IT-01-42-PT, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 bis, 1 April 2004, p. 4; Prosecutor v. Martić, Case No. ICTY-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis”, 13 January 2006, para. 37.

165) ICTY, Prosecutor v. Slobodan Milošević (Decision), (1 March 2006, Case No. ICTY-02-54-T).

2. *Reliability and transparency*: The tribunals will examine whether the expert knowledge is sufficiently recognised by the persons' peers and whether the opinion delivered is prima facie reliable.¹⁶⁶ Furthermore, the tribunals require full transparency as to the methodology and fact relied upon in forming the opinion. This ensures that the basis of the opinion can be fully scrutinised by the tribunal and the opposition.¹⁶⁷
3. *Relevance*: The tribunal must determine whether the subject of the opinion is an issue that the judges are technically capable of solving on the basis of their own knowledge and common sense. This would leave an expert opinion irrelevant since the need for technical expertise would be absent.
4. *The "ultimate issue" rule*: The tribunal must examine if the opinion will effectively decide the case before the tribunal. Expert opinions are therefore not allowed to address the criminal liability of the accused or most other legal issues.¹⁶⁸ The tribunals have applied this criterion quite rigorously and non-compliance may result in the complete rejection of the opinion depending on the prevalence of "ultimate issue" conclusions in the opinion.¹⁶⁹
5. The tribunal must only admit those parts of an opinion, which are within the ex-

perts' field of expertise and based on the experts' own observations.¹⁷⁰ Due to the presumption of a high probative value of expert opinions, this criterion is a key element in ensuring that the expert does not go beyond his "mandate", thus protecting the basic fair trial rights of both parties.

This illustrates the challenge in determining the scope of opinions expressed by the experts. In determining the probative value of an expert opinion, the tribunals will not always be in a position to judge the reliability of the substantive contents. Therefore, focus will be on objective elements such as the impartiality of the expert and the application of an academic methodology in drawing conclusions. Here it is essential that the expert avoid making statements that are argumentative or otherwise indicate a lack of impartiality. One of the key pitfalls for medical experts providing opinions in torture cases is the risk of pronouncing themselves on issues of law. This could either be through the attempted identification of the perpetrator or the labelling of a certain treatment as torture. This can either lead to a total dismissal of the expert opinion or a significant decrease in the probative value afforded the opinion.

It is very important to remember that the crime of torture has four elements: se-

166) ICTY, Prosecutor v. Popović et al. (Decision), (30 January 2008, Case No. ICTY-05-88-AR73.2) § 22.

167) ICTY, Prosecutor v. Galić (Decision), (27 January 2003, Case No. IT-98-29-T).

168) ICTY, Prosecutor v. Hadzihasanović and Kubura (Decisions), (11 February 2004, Case No. ICTY-01-47-T).

169) ICTY, Prosecutor v. Kordić and Čerkez

(Transcript of proceedings on 28 January 2000), (28 January 2000, Case No. ICTY-95-14/2-T) Transcript pp. 13305-13307 (complete rejection of opinion) and ICTY, Prosecutor v. Boskoski and Tarculovski (Decision), (17 May 2007, Case No. ICTY-04-82-T) §§ 13-14 (noted scarcity of "ultimate issue" conclusions and accepted the report, in part).

170) ICTY, Prosecutor v. Dragomir Milošević (Decision), (21 August 2007, Case. No. IT-98-29/1) § 10.

vere pain or suffering; intentional infliction; for a specific purpose; and committed by a state agent. The medical expert can provide advice on a range of issues, such as on the link between the symptoms and the alleged treatment, physical and psychological torture methods and symptoms, examination and treatment methods and possibly also the level of pain and suffering incurred by the alleged victim. However, the medical expert does not have expert knowledge in determining the identity of the perpetrator, the possible intent and purpose of the treatment suffered or what level of suffering legally amounts to torture.

4.7. General tendencies and best practices

The objective of the present section is to provide a thematically based analysis of the international human rights tribunals in focus. An attempt will be made to illustrate key differences and similarities and if possible identify best practices. Due to their similar nature, the tribunals will often base their work on similar or identical practices, which have often been adopted with cross-references to the practice of the other tribunals. However, their working methods still differ on significant points. The following analysis will focus on four key issues: The application of the fourth instance principle in torture cases; the concept of free evaluations of medical evidence; criteria used for evaluation of forensic medical evidence; and the use and conduct of oral hearings.

4.7.1. The application of the fourth instance principle in torture cases

As a point of departure, all the tribunals in focus reject having a role as fourth instance appellate courts implying that it is outside their mandate to substitute the domestic evaluation of evidence with their own. However, in torture cases where the establish-

ment of the facts is often the key contentious issue, the tribunals will be rendered almost irrelevant if they are not mandated to re-evaluate evidence which has already been presented before domestic courts. This has led the tribunals to limit the application of the fourth instance principle on the basis of two elements: First, the fundamental nature of the right not to be tortured, which merits thorough scrutiny; and second, a requirement of absence of an effective domestic fact-finding procedure. Since the first condition is omnipresent, focus is on the effectiveness of the domestic fact-finding. It is unclear if the procedural deficiency requirement is applied with the same intensity in all the tribunals but in practice it seems that applications which establish a prima facie case will usually see scrutiny of the evidence introduced. This indicates that the tribunals are generally willing to conduct a thorough re-evaluation of the facts if a prima facie case is established.

This practice means that in torture cases the tribunals will often find themselves in an unfamiliar situation of establishing the facts of an incident which took place years earlier in a local context. This complication is exacerbated by the often technical nature of the evidence and the highly contentious conduct of most cases where it is not uncommon to see the introduction of “false” evidence and incompatible versions of fact. The tribunals are therefore faced with the dilemma of preserving legal certainty while ensuring an effective protection of the right not to be tortured. One way of remedying this problem could be to increase the use of independent expert opinions to clarify contentious issues.

4.7.2. The concept of free evaluation of forensic medical evidence

All of the tribunals conduct their fact-find-

ing on the basis of free evaluation of evidence. This very flexible approach is often explained by the fact that the tribunals are not focused on establishing individual guilt but only concerned with state compliance with human right standards. This evaluation of evidence according to the *sana critica* of the judge may be very well suited for evaluating the majority of evidence submitted to the tribunals but there are certain specific complications related to evaluating medical evidence in torture cases. The medical evidence will often be of a highly technical nature and may involve both physical and psychological findings. Due to the limited medical knowledge of a judge, such evidence can be very difficult to assess if the judge can only use his sound criticism as the base of the evaluation. In addition, the delicate nature of torture often renders the proceedings highly contentious and it is not uncommon that the parties submit several conflicting medical reports pointing towards opposite conclusions. In some cases it will be necessary for the judge to completely discard one medical report over the other. While this can sometimes be done based on pure logical reasoning, the judge will often be required to evaluate the entire examination procedure and the conclusions of the medical professional in order to properly determine the probative value to be afforded a certain report.

It is therefore only natural that many of the tribunals have introduced more or less formalised criteria to guide the evaluation of medical evidence. This tendency is most visible in the European and the Inter-American systems where the tribunals will frequently revert to either formalised standards or court established criteria when deciding either on direct violations or in their evaluation of the domestic fact-finding procedure. While difficult to confirm, the evaluation of

medical evidence seems to be stricter when it is introduced by the state than when introduced by the applicant. The African and the UN system is noticeably more closed in its proceedings and deliberations, which makes it difficult to determine if they base their evaluation on fixed criteria or strictly on sound criticism. In the UN system the Committees do seem to utilise, as a minimum, some broadly framed criteria for evidence evaluation.

Here, the tribunals are faced with a similar problem to that described above relating to re-evaluation of evidence. The tribunals will have to prioritise between the flexibility of *sana critica* and the reliability and effectiveness of utilising more fixed criteria.

4.7.3. Criteria for evaluation of forensic medical evidence

The process of evidence evaluation is essentially an exercise to determine whether a specific piece of evidence can be considered by the tribunal and how much probative value it will be afforded. However, the international human rights tribunals have generally avoided conducting separate admissibility considerations and instead subsumed the admissibility considerations in the determination of probative value. This means that if a piece of evidence is deemed unreliable, the tribunal can either choose to disregard it entirely or afford it a lesser probative value. This weighing of the evidence will eventually lead to a tribunal decision as to whether the applicant has sufficiently substantiated his claim or not. The availability of medical evidence is not a prerequisite for the successful substantiation of a claim but it will often be an important element. In the absence of medical evidence the main factor determining the outcome are the specificity of the allegations held against the diligence of the domestic investigation.¹⁷¹ In cases

where medical evidence is produced, the key determining factor is whether that evidence establishes a causal link between injury and allegation with a sufficient degree of certainty. If this is not the case, the tribunals will usually limit themselves to finding a procedural violation.¹⁷¹

The level of distinction between documentary evidence and expert opinions varies greatly between the tribunals with the Inter-American system employing a much clearer distinction than the rest. The criteria utilised for evaluating documentary medical evidence have certain common features in most of the tribunals. The tribunals will generally seek to evaluate whether the domestic investigation process was carried out in a way which ensured a prompt, independent and effective examination of the alleged victim. Some of the disqualifying elements that have caught the tribunals' attention are time gaps between the alleged incident and the medical examination, examinations conducted in the presence of law enforcement personnel, and cursory or group examinations. When the tribunals evaluate expert opinions, they do not seem to employ a clear distinction between admissibility considerations and evaluation of probative value, which lead to the utilisation of criteria encompassing both elements. There seem to be a tendency for the tribunals to focus on three elements: The independence of the expert; the qualifications of the expert; and the quality of the analysis contained in the opinion. It is especially interesting to note that the European and Inter-American systems seem to

afford the Istanbul Protocol a key role in the evaluation of the quality of an expert analysis as indicated by the extensive focus on the coherence of the conclusions and the establishment of a causal link between allegations and the documentary evidence. Furthermore, a case before the Inter-American court saw an Istanbul Protocol based challenge to an expert's qualification. Another interesting feature of the Inter-American system is the expansion of the qualification criterion to also cover non-academic expertise such as that gathered through prolonged personal experience.

In addition to these commonly used and relatively broad criteria, the European system, the Inter-American system and the UN Committees have all made reference to the Istanbul Protocol but in very different ways. The ECHR seems to be moving towards consistently utilising the Istanbul Protocol as a minimum standard for assessing medical evidence. This at least applies to state produced evidence where the Court has dismissed medical reports for not being in accordance with the Istanbul Protocol and CPT standards. The Inter-American Court has stopped just short of utilising the Istanbul Protocol as a standard for assessing evidence. Instead it is used as a reference tool for evaluating expert opinions, as a training tool and as a benchmark for assessing the state's compliance with its procedural obligations to investigate. Notably, the Inter-American Commission has gone one step further and fully utilised the Istanbul Protocol as a minimum standard. Lastly, the UN Committees will often recommend States to implement the Istanbul Protocol through training and sometimes as a torture documentation tool but do not utilise it in their decisions.

The different tribunals have differed in their approach to psychological evidence.

171) Camille Giffard and Nigel Rodley, The approach of international tribunals to medical evidence in cases involving torture, in Michael Peel and Vincent Iacopino, Greenwich Medical Media Limited (2002) pp. 27-30.

The Inter-American system seems to fully accept psychological evidence and will often hear such evidence both in relation to the merits and the subsequent determination of reparations. The European Court has been a little more conservative in its approach and has generally avoided commenting on the probative value of psychological evidence. However, in a recent case the ECHR found a violation solely based on psychological evidence collected in accordance with the Istanbul Protocol. While this decision has limited prejudicial value, it is an indication of an increased willingness to give effective consideration to such evidence. The Committee against Torture has also seen psychological evidence on several occasions both relating to procedural and substantive violations, but it is unclear how the Committee determines its probative value.

While all tribunals have consistently rejected using formalised criteria, it is clear that the evaluation of medical documentary evidence and expert opinions is moving towards an increased utilisation of informal criteria to guide the process. Especially in the European and Inter-American systems, these criteria seems to be largely similar to those elaborated in the Istanbul Protocol and decisions often make specific reference to the Protocol. The question is how far the tribunals can go in utilising fixed criteria without officially departing from the principle of free evaluation of evidence.

4.7.4. The use of oral hearings

The extent to which oral hearings are used varies between the tribunals depending on their mandate and logistical considerations such as availability of resources and the amount of cases pending before a tribunal. In addition to oral hearings, some of the tribunals can also conduct fact-finding missions but this procedure is rarely resorted to.

Only the regional tribunals will practically hold oral hearings and the starting point of these is an inquisitorial procedure under the control of the tribunal. However, in practice, all three regional systems allow some level of adversarial elements during the hearings. Oral hearings are used very differently in the three regional systems. The Inter-American Court holds more than one hearing per case, where it will frequently hear both witness testimony and expert opinions pertaining to the merits and the assessment of reparations. Expert opinions are frequently used to determine the psychological injuries of torture victims when assessing reparations and during the merits proceedings. In the African Commission and the European Court, the focus of the oral hearings seems to be strictly on the merits and it is unclear how frequently these hearings will see expert opinions.

While the use of oral hearings is generally recommendable to ensure a proper illumination of all factual and legal questions of a case, the international human rights tribunals generally suffer from a significant lack of resources. Due to the time and resource consuming nature of oral proceedings, the use of these is limited in almost all the tribunals under review. This is an unfortunate reality since oral proceedings often play an important role in facilitating the judges' evidence evaluation. However, there are no indications that this practice will change.

5. Conclusion

It is evident that the majority of the bodies analysed are constrained by limited capacity and funding, which limits their ability to institute more effective procedures. Furthermore, the international human rights tribunals have consciously chosen to maintain a high level of flexibility in its evidence evaluation to ensure that they have the necessary

procedural freedom to reach materially correct conclusions. For these reasons, the following section will not issue specific recommendations but instead seek to identify the key issue areas where each body needs to improve its practice and procedures in order to be able to more effectively evaluate medical evidence in torture cases.

The Bodies in the Inter-American system are the ones taking the most comprehensive approach to evidence evaluation including forensic medical evidence. This is partly based in the extensive use of witnesses including expert witnesses but it is also due to the very systematic approach to evidence evaluation taken by especially the Inter-American Court of Human Rights. The main shortcoming in the Inter-American system is the absence of the explicit utilisation by the Court of the Istanbul Protocol as a benchmark for evaluating medical evidence in relation to substantive violations of the torture prohibition. It might be relevant for the two bodies in the Inter-American system to study the case law of the European Court of Human Right to draw inspiration.

While the European system has given more formal recognition to the Istanbul Protocol as a benchmark for evaluating medical evidence of torture, there are a number of other shortcomings worth highlighting. The European Court of Human Rights does not clearly distinguish between documentary and expert evidence and there is very limited use of oral expert opinions. This causes confusion in relation to how the court evaluates the different types of evidence and especially which criteria it utilises for determining expert status. This confusion is exacerbated when the Court is presented with evidence of a psychological nature and there is a clear need for the Court to pronounce it self more clearly on this issue in future judgements. Lastly, there is room for improvement in

the Court's practice in relation to reparations which are generally limited to a fixed monetary compensation. While recognising that the Court's award of reparations is done in strict observance of the subsidiarity principle, the Court may be able to draw inspiration from the case-law of the Inter-American Court of Human Rights, which has frequently utilised the Istanbul Protocol to evaluate the more exact damages suffered by torture victims.

Due to the closed nature of the procedure before the African Commission on Human and Peoples Rights and the Commission's practice of not explicitly reasoning and justifying its decisions it is difficult to identify specific shortcomings and areas for improvement. This opacity limits the development of jurisprudence, which seems to be one of the main challenges to the development of a more effective evidence evaluation. While the procedure in the UN treaty bodies is similarly closed, the judgements are somehow more elaborate and thus provide some insight into the reasoning of these tribunals. Among the key challenges faced by both the Human Rights Committee and the Committee Against Torture is the difficulty in effectively determining the facts of a case before them partly due to severe time constraints on the examination of individual cases. This difficulty is exacerbated by the absence of clear criteria for evidence evaluation and the practice of the Committee Against Torture of not using expert witnesses. The Committee Against Torture has recently established a working group on working group on evaluation of facts and evidence and it will be important for this group to look carefully at the practices from the European and Inter-American systems for inspiration.

6. Appendix

6.1. Ecuador

Carlos Poveda Moreno, J.D.*

6.1.1. Introduction to the national legal system
The Ecuadorean legal system is based in the Constitution of the Republic of Ecuador, which was adopted through a referendum in October 2008. Constitutional provisions are directly applicable and there is thus no need to codify them in secondary legislation. The Constitution prohibits torture and cruel, inhuman or degrading treatment.¹ However, up to this date, the Penal Code has not been made compatible with the international definition of torture contained in the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).² The incompatibility mainly relates to the low penalties for torture provided in the Penal Code (2-6 years)³ and the narrow scope of the definition, which does not encompass psychological forms of torture.

Ecuador ratified the UNCAT in 1988 and is therefore under an international obligation to adopt a definition and absolute prohibition of torture in its domestic law, in conformity with the Convention. The Constitution stipulates that “*Los derechos y*

garantías establecidos en la Constitución y en los instrumentos internacionales de derechos humanos son de directa e inmediata aplicación”.⁴ This principle of direct application suggests that the UNCAT’s definition of torture can invalidate the narrower definition of the Penal Code and provide a definition that complements the constitutional prohibition. However, according to the principle of *nullum crimen sine lege*, the definition is not applicable to the Penal Code, creating a situation in which the Constitution provides an exhaustive prohibition of torture without the possibility of criminal sanctions. This defect was strongly criticised by the Committee against Torture during its examination of Ecuador in 2005.⁵

To ensure an effective implementation of the prohibition, it is recommended to include a prohibition and a precise definition

1) Art. 66 (3)(c) of the Constitution of the Republic of Ecuador.

2) Art. 1 of UNCAT.

3) Art. 187 and 205 of the Penal Code.

4) Art. 11 (3) of the Constitution of the Republic of Ecuador.

5) CAT/C/EQU/CO/3.

*) University Andina Simón Bolívar,
Ecuador
consorciojuridico51@yahoo.es

of the crime of torture in accordance with international obligations. This becomes even more relevant in light of the recent ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).⁶

6.1.2. The Administration of Justice

The system for the administration of justice is structured as follows: Constitutional Court, Supreme Court of Justice, Provincial Courts of Justice with specialised chambers, Administrative and Fiscal Litigation District Tribunals, Penal Guarantees Tribunals, and Judges of First Instance specialised by theme. The Public Prosecutor's Office is responsible for investigating and prosecuting criminal offences either *ex officio* or by request with due regard to the public interest and the rights of the victim.⁷ Further it is a constitutional duty of the Prosecutor's Office to ensure the protection of victims and witnesses, and the accreditation and functioning of experts testifying to the courts.

The Ecuadorean criminal procedure is largely adversarial but several reforms have introduced some inquisitorial elements. This means that in addition to the Prosecutor's Office, the victim or his/her relatives can initiate private penal action. The Criminal procedure consists of five phases.

Pre-trial inquiry phase – This is a preliminary investigation with the objective of identifying

evidence of the existence of an offence and of the participation of alleged perpetrators and accomplices. In this stage, anticipated or pre-constituted evidence hearings can be implemented. This phase may last up to one or two years depending on the severity of the offence. During this phase, precautionary measures can be requested, such as provisional detention, which should not last more than twenty-four hours. This shall be used exclusively for investigative purposes and shall be granted by a judge of penal guarantees after an oral hearing.

Evidentiary phase – This is the stage of formal investigation. It is initiated through a hearing where formal charges are formulated, indicating concretely the type of offence that will be investigated. The Public Prosecutor sets the duration of this period. However, it should not exceed 90 days. It is possible to resort to personal precautionary measures, such as preventive detention, which should be ordered by a judge of penal guarantees after an oral hearing.

Intermediate phase – Once the previous phase is formally concluded, the judge of penal guarantees calls the participants of the proceedings to a hearing where the prosecutor will orally deliver his/her opinion with a motivated decision to accuse or not. The participants of the proceedings: The defendant and the accusing parties will be allowed to pronounce themselves on the opinion. In this hearing, the judge will eventually decide to issue an order of committal to trial, or dismiss the proceedings (definitively or provisionally).

Trial phase – This phase is governed by the principles of orality, contradiction, publicity, immediacy, celerity, the dispositive principle and procedural loyalty. In this stage, the

6) Published in the RO. 175, 28 April 2010. Executive Decree no. 309, 5 April 2010. Ratification was officially registered with the UN on 20 July 2010.

7) Art. 195 of the Constitution of the Republic of Ecuador.

Prosecutor should deliver his/her plausible claim through bringing all pertinent evidence, which may be: Material, testimonial, documentary or expert-based. The other participants in the proceedings may also request evidence. The oral proceedings will be largely controlled by the parties with the judge's role mainly focused on ensuring respect for the Constitution. Subsequently, the Guarantee Tribunal will deliberate and make a decision to either acquit or convict.⁸

Contestation phase – In this phase the parties may present an appeal either on grounds of mistake of law or fact, emergence of new evidence, procedural mistakes, and violations of Constitutional rights or due process.

Despite the insufficient domestic criminalisation of torture, victims do have some remedies available to them. They can be summarised as follows:

Constitutional remedies – Art. 78 of the Constitution provides that victims of penal offences will receive special protection measures to prevent them from being re-victimised, threatened or intimidated, particularly in the process of evidence gathering and assessment. This provision also provides for comprehensive reparation including disclosure of the truth, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The justice system has been reformed to provide better constitutional protection. This means that decisions from regular courts can be reviewed by the Constitutional Court to

ensure that Constitutional principles are upheld.⁹ This protection also covers decisions handed down in the indigenous judicial system. Further, Art. 11(9) of the Constitution provides an obligation of the state to provide remedies for all violations committed by its agents including those that are related to arbitrary detention and wrongful sentences.

Penal remedies – In addition to the constitutional prohibition, the Ecuadorian legal system contains a number of other remedies for torture victims to obtain justice. The Penal Code establishes that those responsible for a criminal offence must pay damages to the victim, but only after the respective condemnatory sentence has been determined.¹⁰ Further, the Criminal Procedure code provides an opportunity for obtaining compensation from the state for the application of wrongful sanctions in the administration of criminal justice.¹¹ Public servants may also be subject to disciplinary sanctions, which may range from fines to temporary or permanent dismissal.

The Police and Military Penal Codes codify the crime of torture in the chapters on acts against labour unions and individual liberty, but the penalties are not commensurate to the gravity of the crime. However, in accordance with the principle of jurisdictional unity enshrined in the Constitution, these actions and omissions are brought before and resolved under civilian jurisdiction.¹²

Moral damage claims against the state

8) Cfr. The system of proof assessment in Ecuador is called *sana crítica*. The basis and motivation of public power resolutions is an imperative of constitutional character. Art. 86 of the Code of Penal Procedure.

9) Art. 94 of the Constitution of the Republic of Ecuador.

10) Art. 67 of the Penal Code.

11) Art. 416,417,418,419 and 420 of the Code of Penal Procedure.

12) Eighth transitory clause of the Constitution of the Republic of Ecuador.

are processed in an ordinary trial that verifies the tort responsibility of the state and/or public servants in the exercise of their functions. In this regard, the chambers of Civil and Administrative Litigation of the former Supreme Court of Justice has defined the size of monetary reparation as based on the average cost of living and the life expectancy of Ecuadorians.¹³

The Ombudsman's Office – The Ombudsman's Office is an organ of public law with national jurisdiction, legal personality and administrative and financial autonomy. It has a decentralised structure and comprises delegates in each province.¹⁴ Its main functions are the protection and promotion of the rights of the inhabitants of Ecuador and persons with dual nationality living abroad.

Among its competences are the following:

1. The legal *representation*, ex officio or by request, of the actions of protection, habeas corpus, access to public information, habeas data, non-compliance, citizen action and complaints due to the poor quality or inadequate provision of public or private services.¹⁵
2. Implement measures of obligatory and immediate compliance in regards to the protection of rights, and request the competent authority for judgment and sanction in case of non-compliance.¹⁶
3. Investigate and resolve, within the framework of its competences, actions or omis-

sions of natural or juridical persons that offer public services.¹⁷

4. Exercise and promote the observance of due process, and prevent, and immediately halt torture and cruel, inhuman or degrading treatment in all their forms.¹⁸

The ombudsman is also working to develop a National Preventive Mechanism as required by the OPCAT and it has collaborated with Priva Foundation on developing the first handbook for prison visits in Ecuador.

6.1.3. Forensic investigations and evaluation of evidence.

In penal cases, the courts accept any type of testimonial, material, documentary, or expert-based evidence. This evidence should be introduced in the intermediate phase in which the Public Prosecutor substantiates his/her opinion. The evidence will subsequently be presented during the trial hearing in the Guarantees Tribunal. Testimonies may also be taken at an earlier phase but this evidence must still be recorded with judicial control and in observance of the immediacy, contradiction and dispositive principles. The initial intervention of medical, psychological, psychiatric or social experts is generally done during the phases before the trial, but these professionals are obliged to appear during the trial hearing to provide oral testimony before the Guarantees Tribunal. As all other evidence, it is evaluated in accordance with the principle of *sana critica* of the judge. In

13) Currently, the average cost of living is around 500 American dollars and the average life expectancy is seventy years.

14) Art. 214 of the Constitution of the Republic of Ecuador.

15) Art. 215 *Ibidem*.

16) Art. 215 *Ibidem*.

17) Art. 215 *Ibidem*.

18) Art. 215 *Ibidem*.

Ecuador, the Istanbul Protocol is not formally recognised as a standard for collection and evaluation of forensic medical evidence of torture.

The State Prosecutor's Office and the Judicature Council are responsible for directing and coordinating the activities of experts of all sciences and specialised fields.¹⁹ The selection of experts is done through an accreditation system requiring specialised knowledge in the relevant scientific field, which is validated by professional title and other related documents. The prosecutor or judge is responsible for designating experts for specific cases but *ex officio* interventions of independent and non-accredited experts may be admissible when the first professional contact with the victim took place in public or private health systems.²⁰ The Prosecutors are obligated to inform the State Prosecutor's Office about the performance of experts and experts will be required to renew their accreditation annually.

There has been a tendency for members of the Judicial Technical Police to specialise themselves in legal medicine and criminalist issues. Here, recognition of specialisation may be acquired after a prolonged and appropriately assessed course. Despite possibly being adequately trained, this practice presents serious concerns with regard to the independence of these experts who are practically and hierarchically under the authority of the National Police. This concern is a reflection of a broader concern about the overall independence and impartiality of investigations of torture allegations. The prosecutor will often delegate both the competence to investigate torture allegations and to take

custody of evidence to the Judicial Technical Police, who will often end up being investigator and suspect at the same time.²¹ This problem is exemplified in cases of extrajudicial executions in which the members of the National Police have been suspects while being tasked with the investigation of the crime and custody of the evidence.

As previously mentioned, assistance and protection to victims and witnesses is the responsibility of the State Prosecutor's Office, which has specified the support to be provided in a separate regulation. However, these measures are incapable of providing the necessary protection. There is no possibility for identity change and the persons assigned for protection are from the very same police, who are often the primary suspect.

6.1.4. Conclusions and recommendations

Despite certain defects in the judicialisation of torture crimes, the juridical framework does provide measures for torture victims to exercise their rights. However, in practice, torture victims in Ecuador are very far from having practical access to these rights. From an overall level, the adversarial nature of the criminal procedure makes it difficult for persons with limited financial means to participate effectively in the process. Further, fear of reprisals may prevent their appearance in court to provide testimony. In order to remedy these deficiencies, the Government of Ecuador should ensure the adoption of a definition of torture in the Criminal Code, which is compatible with Article 1 of UN-CAT. This especially relates to increasing severity of the penalties and broadening the scope of the crime to include psychological

19) Executive Decree No. 977, 21 December 2005. Substitutive Regulation in lieu of the Regulation for Accreditation System of Experts.

20) Art. 95, para. 2 of the Code of Penal Procedure.

21) Art. 216 no. 8 *Ibidem*.

torture. Further, it must provide effective support measures to victims and witnesses including legal aid and protection from reprisals.

The lack of independence in almost all phases of a torture investigation constitutes a key obstacle to ending impunity for torture in Ecuador. There is a system of experts available to inform the criminal investigation but unfortunately most experts are hierarchically placed under the National Police, which raises serious concerns about their ability to perform independently. Similar concerns apply to the chain of custody and the investigators. To eliminate these serious shortcomings, a judicial reform process should be undertaken with the objective of removing investigative responsibilities in torture cases from the police and to allow for personally and structurally independent forensic medical examinations of all alleged torture victims. More specifically, the Judicial Technical Police should become part of the State Prosecutor's Office and no longer be under the authority of the National Police.

One tool to ensure effective investigations, the Istanbul Protocol, is still mainly used for training and has not yet been institutionalised as a standard for effective investigations and evidence assessment. This institutionalisation should be made a priority and be complemented by the training of the police, judicial and penitentiary servants, as well as doctors and psychologists, on how to document torture in accordance with the Istanbul Protocol. This process should aim at ensuring that all alleged torture victims receive a prompt, effective and independent medical examination to ensure a proper evaluation of their claims.

To fully eradicate torture in Ecuador, it is necessary to address both the historical and thematic context of torture in Ecuador.

First, it is essential that the recently finalised investigation by Ecuador's Truth Commission results in judicial proceedings providing full and effective reparations for victims of systematic and institutionalised human rights violations including torture committed by the Government of Ecuador. Second, the Government of Ecuador should effectively implement the recommendations of the Special Procedures of the Organisation of American States and the UN Human Rights Council relating to issues of detention and extrajudicial executions since these violations are closely connected with the practice of torture. In addition to these legislative and practical initiatives, the Government of Ecuador should announce and implement a public campaign of no tolerance for torture and related offences to ensure that this message resonates through all relevant government agencies.

6.2. The Philippines

Ibarra M. Gutierrez III, L.L.M.*

6.2.1. Introduction to domestic legal system
 Due to several periods of colonial rule in the Philippines, the legal system has developed as a mix of common and civil law, which has resulted in a general practice of codifying laws, which remain subject to the interpretation of the judiciary. The 1987 Constitution is the supreme law of the Philippines and it provides that the judicial power is vested in the Supreme Court and subsequently all other courts established by law.¹ This power includes the promulgation of procedural rules directing the conduct of proceedings before lower courts.²

The Philippines acceded to UNCAT in 1986 and it is thus under an international obligation to adopt a domestic definition and an absolute prohibition of torture in accordance with UNCAT.³ In addition to a constitutional provision⁴ this obligation is observed in the recent “Anti-Torture Act of 2009”.⁵ While this law largely provides a criminalisation of torture in accordance with UNCAT, it does have a few notable shortcomings. The requirements for forensic medical examinations prescribe standards,

which fall short of those provided by the Istanbul Protocol on several accounts. Particularly problematic is the public nature of the forensic examinations and the lack of detail and proper conclusions required of the medical reports.⁶ Another potential problem relates to the imposition of penalties, which seems to require that the victim suffered specific physical or psychological injuries.⁷ This would exclude the possibility of punishing acts of attempted and actual torture, which have caused physical or psychological trauma unforeseen by the current law. Nevertheless, the adoption of the Anti-Torture Act is a positive step towards improved

1) Constitution, article 8(1).

2) Constitution, article 8(5)(5). The procedural conduct of all court cases is regulated by the “Rules of Court” promulgated by the Supreme Court.

3) Articles 1 and 2, UNCAT.

4) Constitution, Article 3 (12)(2).

5) Republic Act No. 9745, “An Act Penalising Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and Prescribing Penalties Therefore”, 10 November 2010.

6) Anti-Torture Act of 2009, Section 12.

7) Anti-Torture Act of 2009, Section 14.

*) University of the Philippines
 Institute of Human Rights,
 Philippines,
 ihr.claw@up.edu.ph

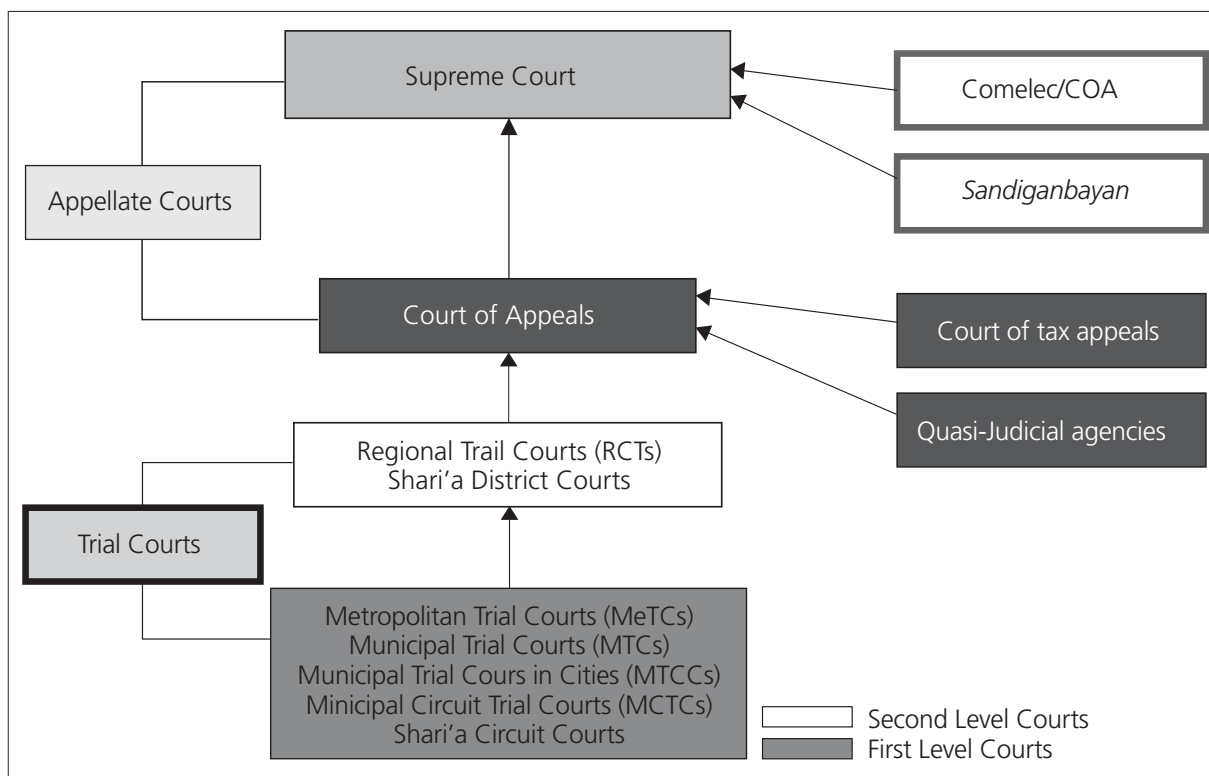


Fig. 1. Torture victims in the Philippines have several different remedies available to them.

protection and access to justice for torture victims in the Philippines.

Philippine Courts are organized according to an ascending hierarchy. At the lowest level are Metropolitan/Municipal/Municipal Circuit Trial Courts (MTCs), which exercise original, trial-level jurisdiction over civil cases involving small monetary claims and minor criminal offenses. At the next level are the Regional Trial Courts (RTCs), which exercise original jurisdiction over all other civil and criminal cases that fall beyond the scope of the MTCs. This is followed by an intermediate appellate level, the Court of Appeals, which handles initial appeals from the trial courts. At the top is the Supreme Court, the court of final appeal.⁸

8) See Batas Pambansa Blg. 129, or the Judiciary Reorganization Act of 1980

6.2.2. Remedies

Criminal remedies – under the Anti-Torture Act, victims of torture may initiate criminal investigations against suspected perpetrators. Initially, these criminal complaints are brought before the prosecutorial service, which conducts a preliminary determination of the strength and/or validity of the complaint. If it finds sufficient grounds to prosecute, a criminal case will then be brought before the Regional Trial Court.⁹

Civil remedies – under Philippine Law, when a criminal action is instituted, the civil action for recovery of civil liability for the same offense is deemed automatically instituted along with it.¹⁰ However, victims may also

9) Revised Rules of Criminal Procedure, rule 112.

10) Revised Rules of Criminal Procedure, Rule 111.

file civil claims for damages directly with trial courts without the intervention of the national prosecution service.¹¹

Administrative remedies – in addition, the Office of the Ombudsman, an independent agency tasked with ensuring good government and oversight over public officials, may receive complaints against respondents who are public officers, e.g. police or military personnel. The Ombudsman may then initiate administrative cases, i.e. involving suspension or dismissal from the service, or criminal cases against these respondents.¹² Unfortunately, the Ombudsman's institution is described as lacking independence and largely inactive in implementing its mandate.¹³ While the Commission on Human Rights is empowered to conduct investigations into alleged violations of civil and political rights¹⁴ it is not granted the authority to impose criminal or administrative sanctions on persons it finds liable as a result of such investigations.¹⁵ At best it can only refer its findings to the appropriate agency, typically the national prosecution service or the Ombudsman.¹⁶

The Criminal procedure in the Philippines is a mix between inquisitorial and adversarial elements. Complaints are initiated by the victims and reported to the national

prosecution services or the Ombudsman's office for further investigation. This investigation is largely conducted in accordance with inquisitorial principles but does allow the accused to present contravening evidence.¹⁷ Conversely, the actual trial procedure is based on an adversarial procedure but with some procedural control exercised by the Court such as the possibility to pose clarifying questions.¹⁸ The evaluation of evidence is conducted in accordance with the general rules provided by the Rules of Court¹⁹ and specifically elaborated rules such as those guiding evaluation of DNA evidence. However, in practice, the Courts still largely rely on the principle of free evaluation.

Besides initiating the criminal investigation, the main role of the victim in criminal proceedings is to provide testimony to the Court. Further, the victim may participate as an intervener in relation to claims of civil damages which are directly linked to the criminal case.²⁰ In this capacity, the victim is allowed to participate actively in the procedure including through the submission of evidence. If the victim has resolved to only seek civil damages, the case will be processed in accordance with the civil procedure where the victim is a natural part. Some free legal aid schemes are avail-

11) Revised Rules of Criminal Procedure, Rule 111 in relation to Rule 2 of the 1997 Rules of Civil Procedure, Article 20-21 and 2176, Civil Code of the Philippines (Republic Act No. 386), and Article 100, Revised Penal Code.

12) Republic Act No. 6770, the Ombudsman Act of 1989.

13) Alston, paras 56-58.

14) Constitution, Article XIII, Section 18(1).

15) *Cariño v. Commission on Human Rights*, G.R. No. 96681. 2 December 1991.

16) *Ibid.*

17) Revised Rules of Criminal Procedure, rule 112.

18) Revised Rules of Criminal Procedure, rule 119(11).

19) Rule of Court, rules 128 – 134.

20) Rule of Court, rule 110(16).

able through the Public Attorney's Office. Furthermore, the Commission on Human Rights is mandated specifically to support torture victims in the investigation of the crimes committed against them.²¹

Witnesses and victims are currently protected by a general witness protection scheme and, in addition, the new Anti-Torture Act clearly stipulates the right of victims, witnesses and other persons related to a case to receive sufficient protection by relevant government agencies. Unfortunately, the law does not address more specifically how such protection should be provided and how to address the inherent problem of threatened groups not trusting state authorities. Both local actors and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions describe the system as deeply flawed.²²

6.2.3. Forensic investigation and evaluation of evidence

The Courts generally accept medical evidence of both a physical and psychological nature. Medical evidence can be introduced at the investigation stage and during the actual conduct of the trial.²³ However, no new evidence can be introduced on appeal. The introduction and evaluation is governed by the Rules of Court²⁴ and through specialised legislation such as the Rule on DNA Evidence. Forensic examination related to criminal investigations is conducted primarily by the Philippine National Police

(PNP) through its Scene of the Crime Operatives (SOCO), and the Crime Laboratory Service.²⁵ Forensic services may also be provided by the National Bureau of Investigation (NBI), an agency under the Department of Justice,²⁶ the Commission on Human Rights (CHR),²⁷ an independent agency tasked with protection of human rights, and other government laboratories, such as the DNA laboratory of the University of the Philippines. In addition, victims of torture may obtain an independently collected medical report, which can be submitted in connection with the original act of denunciation. It is, however, unclear whether such evidence will be relied on by the prosecution. Personnel conducting forensic examinations are almost invariably members of the law enforcement service – police officials or government agents. They are employed by the state and are under the supervision and control of government officials such as the Director-General of the Philippine National Police or the Secretary of Justice. All their work is subject to the review and approval of these superior officers.

This lack of formal and practical independence from the institutions most likely to be subject of a torture inquiry poses a significant obstacle to ensuring effective medical examinations. In addition to lacking independence, the forensic services also suffer from a significant lack of capacity, especially outside Manila.²⁸ This forces the investigating authorities to largely rely on eye-witness

21) Anti-torture Act of 2009, section 11.

22) Alston, paras 52-54.

23) Rules of Court, rule 112.

24) Rules of Court, Rules 128 – 134.

25) Republic Act No. 8551.

26) See Republic Act No. 157.

27) Article XIII, Section 17 of the Philippine Constitution.

28) Alston report, para 55.

statements, which are often not available due to the lack of security for witnesses and victims. With investigating authorities afraid of suffering reprisals from the original perpetrators, the lack of documentary and testimonial evidence offer a good excuse to close most investigations at the investigatory stage.²⁹ This problem is exacerbated by the absence of a truly independent authority with a general mandate to investigate allegations against public officials.³⁰

The general introduction and evaluation of evidence is regulated in the Rules of Court.³¹ The main admissibility criteria is a requirement for relevancy of the evidence meaning that it must have such a relation to the fact in issue as to induce belief in its existence or non-existence.³² There are no explicit rules regulating the general evaluation of evidence, which suggests that this will be done in accordance with the principle of free evaluation unless more specific rules are provided in special legislation. Forensic medical evidence is categorised as expert opinion and may be collected and introduced by both government and private medical experts, whose expert status will be evaluated by the Court during the trial.³³ In order for an expert opinion to be admissible, the proposed expert needs to establish that he/she possess the necessary special knowledge, skill, experience or training.³⁴ Such expertise does not have to be acquired through

academic studies but can also be obtained through practical experience.³⁵ This can be shown through the submission of a curriculum vitae and corresponding documents to prove that the person possess the relevant expertise. There is no general regulation of how to evaluate expert evidence. However, one might find inspiration in the rules regulating DNA Evidence.³⁶ The following general considerations for assessing probative value can be subtracted from the specific rules in relation to DNA evidence: Authenticity; scientific validity of the testing procedure used in the specific case; qualifications and credibility of the examining institution and the individual expert conducting the examination; and the general reliability of the testing methods utilised.³⁷ These considerations are also confirmed by domestic case law dealing with non-DNA evidence.³⁸ The evaluation will be conducted by the Court during the hearing of the expert witness and it is largely the responsibility of the two parties to the case to bring the relevant challenges during examinations and cross-examinations of the witness.³⁹ In 2008 the Supreme Court issued a decision in a landmark torture case. One of the main pieces of evidence relied on by the Supreme Court was a forensic medical examination of the victims conducted in accordance with the Istanbul Protocol. In this case, the Supreme Court affirmed the high value of fo-

29) Alston report, paras 50-59.

30) As described above relating to the ombudsman.

31) Rules of Court, Rules 128 – 134.

32) Rules of Court, Rule 128(3+4).

33) Rules of Court, Rule 130, sections 48-50.

34) Rules of Court, Rule 130, section 49.

35) *People v. Rubio*, G.R. No. 66875, 19 June 1986, 142 SCRA 329.

36) Rules on DNA Evidence.

37) Rules of DNA Evidence, section 7.

38) *People v. Rubio*, G.R. No. 66875, 19 June 1986, 142 SCRA 329.

39) *People v. Rubio*, G.R. No. 66875, 19 June 1986, 142 SCRA 329.

rensic medical examinations and recognised the expertise of the medical expert partly on the basis of his adherence to the Istanbul Protocol.⁴⁰ It remains to be seen whether domestic courts and authorities will follow this up with a more systematic use of the Istanbul Protocol for documenting torture as recommended by the UN Committee Against Torture in May 2009.⁴¹

6.2.4. Conclusions and recommendations

Despite significant problems with regard to the effective prosecution of torture cases in the Philippines, certain positive developments have taken place in recent years. Especially, the adoption of the Anti-Torture Act in late 2009 is a significant improvement of the protection against torture in the Philippines due to its explicit criminalisation of torture. The next phase for increased protection against torture is the effective implementation of the law. Forensic medical documentation plays an important role because it can help victims in providing courts with effective proof of their allegations. While some structures are already in place to provide effective access for victims to forensic medical examination, the present analysis has identified a number of deficiencies. These must be remedied in order for torture victims to enjoy effective access to bringing forensic medical evidence of torture before domestic courts.

The pre-trial investigation procedure suffers from significant deficiencies, which prevents many cases from ever reaching the courts. The lack of forensic medical capacity, the fear of victims and witnesses to testify,

and the reluctance of the investigating authorities to prosecute create an environment where it is very easy to discard cases even before they reach the courts. In addition to improving the protective measures for all parties involved in cases against public officials, it is advisable to increase the availability of forensic services in all parts of the country and to establish a functional independent body mandated to investigate all allegations against public officials.

While the legislative framework saw significant developments with the Anti-torture Act, there is still room for improvement. In practice, the judiciary should utilise their mandate to interpret the codified legislation to ensure that adequate penalties are provided for all acts of torture whether specifically mentioned in the law or not. Further, the forensic medical services should not limit their examinations to the standards provided by the Anti-Torture Law but instead conduct full Istanbul Protocol compliant examinations in all cases of torture allegations. Lastly, torture victims must be given the opportunity for a confidential medical examination where the report is only made public with the express consent of the victim. Many of these deficiencies can be remedied through the elaboration of adequate Implementing Rules and Regulations accompanying the new law.

Similar to the general investigations services, the official forensic medical services also suffer from a lack of independence. Combined with the reluctance to utilise independent medical experts, this severely limits the access to such examination in

40) The Secretary of National Defense, the Chief of Staff, Armed Forces of the Philippines, petitioners, vs. Raymond Manalo and Reynaldo Manalo, respondents, G.R. No. 180906, 7 October 2008.

41) CAT/C/PHL/CO/2, para 20.

most geographical locations in the Philippines. At the outset, the Government should ensure that all state forensic services enjoy structural independence from the authorities that they might find themselves investigating – notably the police and the army. This could be done by moving these services from the control of the Department of Justice to the Department of Health. Furthermore, it should consider to invest in civil society actors either through financial support or the creation of a roster of recognised independent experts who can be commissioned on a consultancy basis to conduct the necessary examinations.

While the Philippines court system faces serious problems such as prolonged case processing and allegations of corruption, at least the higher courts seem to be relatively well equipped to evaluate forensic medical evidence. However, there are still improvements to be made. The Courts could facilitate the active participation of victims and witnesses through a more speedy and effective process and through being more accommodating to physical relocation to court meetings.⁴² Further, the Courts continue to develop their case law on evaluation of forensic evidence through an increased utilisation of the Istanbul Protocol. This might have a positive effect on the conduct of investigating authorities.

The initiatives proposed above would significantly improve the access of torture victims to adequate medical examinations and to bring formal complaints of torture without having to rely on authorities that they might not trust or that might present a continuing threat to them. Furthermore, it

will ensure that future improved investigations will not only help the victims access reparation but also ensure that perpetrators are brought to justice and thus discourage potential future perpetrators from crossing the line.

42) Alston, para 59.

6.3. Uganda

Charlotte Oloya, LL.M.*

6.3.1. Introduction to domestic legal system, court structure and available remedies

The legal system in Uganda is a Common Law system with elements of African customary law. The hierarchy of legal sources is stipulated as follows in the Judicature act:¹ Statutory law, common law and doctrines of equity, and customary law. The Constitution is the supreme law in Uganda and any law or custom that is in conflict with it will be considered null and void to the extent of the inconsistency.² Uganda has adopted three constitutions since its independence, with the most recent being the 1995 Constitution. Legal reporting in Uganda has been very weak and thus very few law reports have been published in Uganda since 1958. The Law Development Center Uganda is mandated to prepare and publish law reports and other legal materials³ but so far they have published only High Court Bulletins.⁴ As a result there has been a void in the availability of published judgments as lawyers and other stake holders are forced to depend on photocopies of judgments which they request from the Courts.⁵

*) African Center for Treatment and Rehabilitation of Torture Victims, Uganda
legal@actvuganda.org

Uganda acceded to UNCAT in 1986 and it is thus under an international obligation to adopt a definition and an absolute prohibition of torture in accordance with the

1) Section 14, Judicature Act cap 13 Laws of Uganda.

2) Article 2 Constitution of the Republic of Uganda, 1995.

3) <http://www ldc.ac.ug/homepage/index.php/component/content/article/1-latest-news/6-vision.html> last accessed 27th August, 2010.

4) The first law reports to be published were 1971-1972 Uganda Law Reports. A third volume of 1973 was worked upon but Volume 1 has been published. However, in 1998, the Centre was accredited to carry out editing and publishing of the Uganda Law Reports from 1958 – 1994 (first phase). Publication of the manuscripts for the period 1958 – 1977 and the subsequent volumes of the Law Reports is expected to be funded under the Justice, Law and Order Sector (JLOS). The Department compiles and edits the High Court Bulletin (HCB). The Bulletin contains digests of judgments from the superior courts of record i.e. High Court, Court of Appeal and the Supreme Court, that are of legal importance. The Department has produced the Bulletin since 1968. Further to the above, the Department prepares a Consolidated Index of Judgments and cases reported in the Bulletin for ease of reference. <http://www ldc.ac.ug/homepage/index.php/law-reportings.html>

5) <http://www.nyulawglobal.org/globalex/uganda.htm> (last accessed August 30th, 2010.)

Convention in its domestic law.⁶ While torture is prohibited in the Constitution,⁷ the terrorism act⁸ and the police act,⁹ these laws are not in compliance with the requirements in UNCAT. The terrorism act only applies to authorised officers who are designated by the minister and expires after ninety days¹⁰ and the police act only prohibits the admission of severely tortured persons in bad health but does not prohibit the act of torture itself. There is no criminalisation in the Penal Code or in legislation regulating places of detention. Combined with the absence of any clear definition of torture, this makes it difficult to effectively prosecute torture offences in Uganda. This shortcoming was harshly criticised by the Committee against Torture during its 2005 review of Uganda's compliance with the Convention. Nevertheless, torture victims in Uganda do have a set of more or less effective remedies available to them. They can be summarised as follows:

Administrative remedies – the Police Act provides for the investigation by a magistrate of complaints of torture by persons in police custody and for the prosecution of persons found to be responsible following such investigation.¹¹ The Police Act also provides

for a disciplinary code of conduct applicable to all employees of the force, which inter alia criminalises unnecessary exercise of authority including the use of violence against any prisoner or person. Possible sanctions include dismissal, discharge, severe reprimand or communal labour.

Constitutional remedies – the constitution enjoins any person who feels that his rights have been violated to petition a court of competent jurisdiction for redress, which includes compensation.¹²

Criminal Remedies – while there is no explicit prohibition of torture in the Penal Code, it does prohibit various criminal offences related to causing physical injury on other persons including the excess use of force by persons mandated by law.¹³

Civil law suits and Public interest Litigation – article 20 of the Constitution expressly states that fundamental rights and freedoms of the individual are inherent and not granted by the state and that the rights and freedoms shall be respected and promoted by all organs and agencies of the government. Article 137 provides the right of any person to petition the Constitutional Court in order

6) Articles 1 and 2, UNCAT.

7) Section 24 and 44(a), Constitution of the Republic of Uganda, 1995.

8) Section 21(e) any authorized officer who engages in torture, inhuman and degrading treatment commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine.

9) Section 58(3) prohibits a police officer from taking into custody a person who has been tortured and is in bad health condition. Section 81 (2) prohibits stripping a person naked in a cell, depriving him/ her of food and administering corporal punishment and torture.

10) Section 18 Anti Terrorism act.

11) Section 25(4), Police Act Cap 303 Laws of Uganda.

12) Article 50, Ugandan Constitution. In Joseph Tumushabe Vs Attorney General (Misc Application No 63 of 2003) the applicant brought a public interest litigation pursuant to article 50 of the Constitution against the Attorney General on the basis of fundamental rights violations against a group of detainees.

13) Sections 216-252, Penal Code.

to obtain recognition and redress for acts in contravention of the Constitution. In combination these two provisions provide for both individual civil suits and public interest litigation against the government.

Uganda Human Rights Commission

– the Uganda Human Rights Commission (UHRC) is mandated to investigate, at its own initiative or at the request of any person or group, any allegation of a human rights violation¹⁴ and to order compensations or other legal remedies or redress.¹⁵ However, it cannot conduct criminal investigations or prosecutions.

The Ugandan court system consists of a Supreme Court, an Appeals Court, a High Court and several different levels of Magistrates Courts. In parallel to the regular court system, there are military and other specialised courts and the Uganda Human Rights Commission as a quasi-judicial tribunal. The initial jurisdiction in criminal cases including those relating to torture is with the Magistrates Courts with the possibility of appeal either to a higher Magistrates Court or to the High Court.¹⁶ However, since the High Court has unlimited original jurisdiction, this may also act as the first instance court in torture cases.¹⁷ In cases relating to constitutional remedies and civil suits based in the Constitution, the competent body will be the Court of Appeal sitting as a Constitutional Court. Lastly, decision made by the UHRC

relating to compensation and other forms of reparations may be appealed to the High Court. As indicated above, torture victims do have several avenues for pursuing redress, despite the absence of an effective criminalisation of torture in Ugandan law.

The criminal procedure in Uganda contains elements of both inquisitorial and adversarial systems. The Director of Public Prosecutions is formally leading investigations and prosecutions of criminal acts but the material investigations are carried out by the police. The DPP sanctions files that have been investigated by the police and advises the police on actions to be taken in particular cases. The police are required to forward police case files where offences have been committed to the office of DPP for advice on who should be prosecuted and for what offence.¹⁸ Once the office of the DPP has taken this decision, the police carry out more inquiries if required and summon witnesses and the office of the DPP conducts the prosecution.¹⁹

During the trial stage the judge will conduct a free evaluation of evidence and will exercise significant procedural control over the trial especially by ensuring that a sufficient body of evidence is available to obtain proper proof of relevant facts.²⁰ The Judge is thus mandated to summon any evidence that might be relevant to the determination of fact.²¹ This provides two venues for the introduction of independently collected forensic medical evidence, either through the

14) Article 52(1), Constitution.

15) Article 53(2), Constitution.

16) Sections 161 and 204, Magistrates Court Act.

17) Section 14, Judicature Act.

18) Article 120, Constitution.

19) http://www.dpp.go.ug/interviews_assistant.php (last accessed August 30th, 2010)

20) Article 164, Evidence Act.

21) Section 164, Evidence Act.

Director of Public Prosecution or through the trial judge.

The procedure followed by the UHRC for evaluation of evidence is less formal and significantly more flexible than the one employed in the normal criminal procedure. The procedure in the UHRC is more inspired from adversarial traditions and it is mainly the responsibility of the two parties to the case to present the necessary evidence.

Uganda currently does not have a witness protection law, which is a significant obstacle to the effective prosecution of perpetrators of torture. Witnesses are often afraid to testify and victims reporting torture allegations often find themselves harassed or arrested on false charges as a direct reaction to their complaint, which will often have to be made to the very same authorities who allegedly committed the offence.

6.3.2. The system of forensic investigation and evaluation including actors, procedure and effectiveness

Medical evidence may be introduced and utilised during all three main stages of the criminal trial: The preliminary hearings; the evaluation of facts; and the determination of reparations.²² The evidence submitted will most often be of a physical nature such as treatment notes, photographs, and a “police form 3”, which is the official medical examination report. In addition, the courts are also open to accepting evidence of a psychological nature as long as this is supported

by an expert opinion. It is usually required that the person who conducted the medical examination presents the findings in court but the law opens the opportunity for other persons presenting and interpreting evidence if the original author is not reasonably available.²³

The main body responsible for forensic medical examinations in Uganda is the Government Analytical Laboratory (GAL) under the Ministry of Internal Affairs. The GAL is mandated to assist in criminal investigations and trials through examination, analysis and comparison of exhibits and samples by application of the relevant branches of science.²⁴ This function is carried out partly by pathologists attached to Makerere University, by pathologists and medical officers employed by the government and by medical officers attached to hospitals. In Uganda, all types of unnatural deaths will be investigated through medico-legal post mortem reports. There are currently five qualified forensic pathologists in Uganda.

While it is envisaged that the GAL will conduct forensic medical examinations, the Trial on Indictments Act provides that any person who appears to be in possession of material evidence can be called to submit the evidence of witness in court. This seems to effectively open the possibility of introducing independently collected forensic medical evidence to the extent that the court finds this relevant. However, there are indications that the investigative authorities, especially the police, prefer to rely on their

22) Sections 33, 66 and 126, Trial on Indictments Act.

23) Section 30, Evidence Act. In the case of *Tibahika Johnson Vs Uganda* CRIMINAL APPEAL No.38 OF 2001 the judges relied on the evidence given by the medical doctor who had not exam-

ined the patient in the absence of the doctor who had examined him.

24) Website of Government Analytical Laboratory (http://www.mia.go.ug/page.php?1=about_gal&&2=About%20GAL).

own medical examiners and are generally reluctant to allow any independent examination. Furthermore, the availability of police medical examiners and alternative forensic medical expertise is limited, which severely impedes victims' access to proper forensic medical examinations. This situation is further exacerbated by a wide spread practice of police charging victims for the "police form 3" and medical examiners charging for the subsequent examination.

As an exception to this general situation, the adversarial nature of UHRC cases allows the victim to present his own evidence before the tribunal. While this approach gives the victims more flexibility, it is dependent on the victim's ability to pay for or otherwise obtain the necessary forensic medical examinations. In practice, experts from the African Centre for Treatment and Rehabilitation of Torture Victims (ACTV) frequently conduct such examinations in accordance with the Istanbul Protocol and provide evidence and testimony to the UHRC.

Determination of expert status

Expert evidence is recognised as an integral part of evaluation of fact and it is frequently used in the criminal procedure and in cases before the UHRC.²⁵ More specifically, medical expert evidence is a common feature in all cases involving assault and death and the domestic courts thus have good experience with evaluating such evidence. It is unclear to which extent non-government experts can collect and present expert evidence since the procedural regulation of the Magistrates and High Courts only focus on Government

experts,²⁶ while the Evidence Act deals with expert opinions in General.²⁷ Since none of the texts provide a specific exclusion of the use of non-government experts such opinions must be assumed to be admissible, in theory. This assumption is also supported by the general right of the judges to request any evidence they deem necessary to establish the facts of a case. Based on the evidence act, the basic requirement to qualify for expert status seem to be the possession of specialised skills within the relevant area of science.²⁸ This should prompt the court to require the expert to demonstrate his qualifications and experience before the court. While the courts are formally open to expert evidence presented by both government and non-government employed experts, there seems to be a general reluctance among non-government experts to provide evidence due to the fear of appearing in court.

6.3.3. Conclusions and recommendations

Despite the absence of an effective criminalisation of torture, several legal remedies are available to torture victims in Uganda. However, these are mainly of a civil nature through civil law suits, public interest litigation and the UHRC. In the criminal procedure, torture victims are left with the option of seeking prosecution for other less serious offences that might have been committed as a part of the torture. While adequate reparations is an important remedy for torture victims, it has very limited preventive effects and it is therefore crucial that Uganda adopts an effective criminalisation of torture in its domestic law through a clear definition

25) Section 43, Evidence Act.

26) Section 42, Trial on Indictments Act and Section 103, Magistrates Courts Act.

27) Section 43, Evidence Act.

28) Section 43, Evidence Act.

and the specific prohibition of the offence in the penal code.

Another aspect with severe implications for the fight against impunity for torture in Uganda is the lack of adequate measures to protect victims and witnesses speaking out against perpetrators. Denunciation of torture will usually have to be done directly to the police, which will often be the same persons who committed the offence. This, in combination with the frequent harassment and unjustified re-arrest of persons reporting abuse is an important dissuading factor. Furthermore, there is no domestic law on protection of witnesses, which prevents this group from providing the necessary evidence to effectively prosecute the perpetrators. This is also a valid concern for non-government employed doctors who are reluctant to present their medical evidence in courts due to fear of reprisals. The Ugandan authorities should ensure that adequate legal protection is afforded to all victims and witnesses and that the right to report instances of torture is made effective through the establishment of an independent body mandated to receive complaints about the conduct of public officials.

Forensic medical evidence is an essential part of proving torture and the domestic legal system and the judiciary are relatively well equipped to ensure an effective introduction and evaluation of such evidence. There are, however, significant problems in ensuring that all victims have access to forensic medical documentation of an adequate quality. These problems are mainly related to a very low capacity of government forensic services, the de facto obstacles to introducing independently collected medical evidence and the wide spread practice of demanding payment for the necessary medical forms (police form 3) and for the forensic medical examination. While the problems

relating to the capacity of government forensic medical services may be difficult to address due to economic restraints, it would be advisable for the Ugandan government to ensure that all torture victims have the opportunity of selecting an expert of their own choice to conduct the medical examination and present the evidence in court. Furthermore, the government of Uganda should ensure that all forensic medical investigations of torture allegations are conducted in accordance with the principles of the Istanbul Protocol and that adequate examination forms are widely available for free.

The initiatives proposed above would significantly improve the access of torture victims to adequate medical examinations and to bring formal complaints of torture without having to rely on authorities that they might not trust or that might present a continuing threat to them. Furthermore, it will ensure that future improved investigations will not only help the victims access reparation but also ensure that perpetrators are brought to justice and thus discourage potential future perpetrators from crossing the line.

6.4. Lebanon

Jad Tohme, L.L.M.*

6.4.1 Introduction to domestic legal system, court structure and available remedies

Lebanon acquired the main elements of its judicial and legal system under the French mandate (1920-1943) and has retained most of them to date. The system is dominated legally by the centrality of codes, following the pattern of the so-called “civil law family”, as apposed to common law as in the United Kingdom and the United States. The Lebanese equivalent of the French Civil Code is the Code of Obligations and Contracts of 1932, and there are similar pieces of comprehensive legislation in such fields as civil and criminal procedure, commercial and criminal law. Other areas are also codified, notably land law, where the statutes are less comprehensive. As in France, a special area of administrative law involves most rules dealing with the administration as *Puissance*, and is developed by a separate system of tribunals known as administrative tribunals.

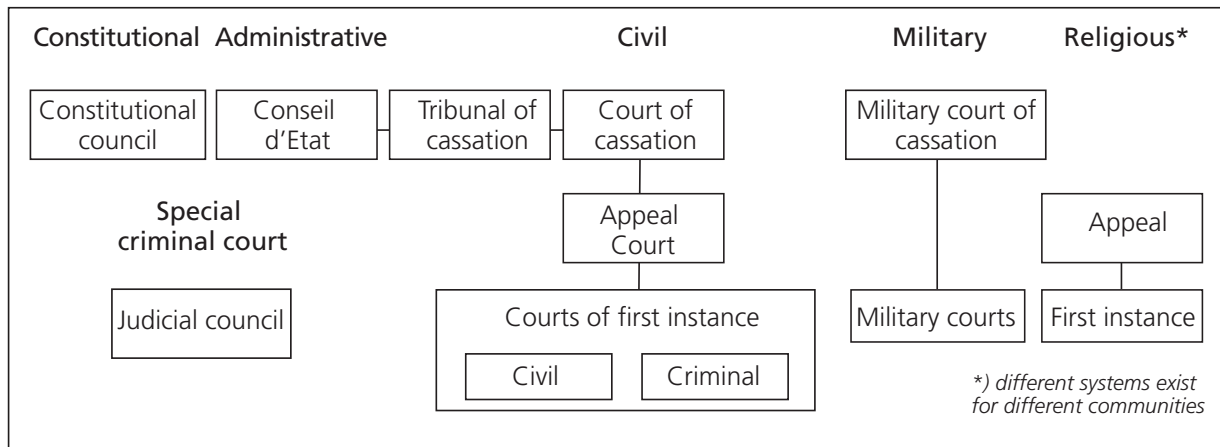
There are two judicial systems in the hierarchy of courts: The civil system, which includes criminal, commercial and civil courts, and which is headed by the court of

Cassation; and the Administrative system, at the core of which sits the *Conseil d’Etat*, which is comprised of six chambers. Alongside these courts is the military judicial system, which was traditionally confined to matters involving military personnel in the call of duty. Military tribunals must, in theory, deal with cases involving the armed forces.

When the Lebanese war started in 1975, the judicial system was the first victim of the collapse of law and order. In the ill-fated period of peace lasting from October 1982 to June 1983, the search for legitimacy and the concomitant effort of the judiciary to catch up with changes in society resulted in the rapid redrafting and passing of numerous “decree-laws”. Several of Lebanon’s central codes (notably in civil and criminal law) date from that period, but the legitimacy has been slowly reasserted since 1990. Following the long war, major constitutional revisions were adopted. This represented the first important revision of the Constitution since the independence in 1943. As regards the judiciary, the most remarkable change was the creation of a Constitutional Council.

Depending on the pecuniary importance of a case, first-degree courts consist either of one judge or of a bench of three judges. There are five chambers in Beirut plus one or more chambers in each of the six gov-

*) Restart center for Rehabilitation of Victims of Violence and Torture, Lebanon
info@restartcenter.com



The Civil jurisdiction takes the form of a pyramid.

ernorates. The Court of Appeals consist of two or more appellate chambers. The Court of Cassation, composed of eight chambers, sits in Beirut. This is the highest court for all civil law cases, which includes criminal, commercial law and some personal status matters for non-Muslim communities). The Court of Cassation also provides the judges for a newly-activated court known as the “Judicial Council”, which operates as an original and final jurisdiction for especially sensitive criminal offenses of a political nature. Criminal expertise is otherwise included under “Civil” jurisdiction in special chambers, which deal with crimes. The state is represented by the public prosecutor’s office, together with investigative judges. There is no jury system in Lebanon.

In rare cases of jurisdictional uncertainty or conflict between administrative and civil jurisdictions, a tribunal of conflicts composed of judges from the Court of Cassation and from the Conseil d’Etat solves the issue of competence. Special tribunals include military courts (of First Instance and Cassation), Labour tribunals, and personal status for matters of family law, which are the prerogative of each of Lebanon’s recognized religious communities (these tribunals deal

with the questions of marriage, divorce, custody, inheritance and wills). A superior judicial council is presided over by the first president of the Court of Cassation, and is responsible for the smooth internal functioning of the judiciary. It does not include administrative judges.

The Civil Procedure Code (Ci.P.C) provides that any international treaties ratified by Lebanon are directly applicable in the domestic legal system and these treaties will be considered superior to domestic laws in case of conflict. Lebanon ratified the UNCAT on October 5, 2000 under the Law 185, which means that civil courts can rely on the provisions of UNCAT in domestic torture cases. The Criminal Procedure Code (Cr.P.C) and the Penal Code contain no explicit prohibition of torture but the Cr.P.C prohibits physical or moral violence during interrogations. The Lebanese Penal Code features some violations, which could cover acts of torture such as unlawful deprivation of liberty¹ and extortion of a confession by unlawful means.²

1) Penal Code, Article 569

2) Penal Code, Article 401

Two key remedies are available to torture victims wishing to seek justice: The criminal procedure where a victim can ask for prosecution of the perpetrator or the civil procedure where the victim asks only for compensation. However, in both cases the victim will face difficulties of providing the necessary evidence. If the victim proceeds in the civil procedure and then asks for criminal prosecution of the perpetrator, the civil court will freeze the case until the criminal court announces its decision in the case, but the victim also has the opportunity of requesting civil compensation as an integral part of the criminal procedure.³ Lebanon has not recognised the right of individuals to submit complaints under any of the international frameworks such as UNCAT or ICCPR and since there is no regional human rights system, torture victims in Lebanon have no access to international judicial remedies.

6.4.2 The System of forensic investigation and evaluation including actors, procedure and effectiveness

The Cr.P.C gives any person in custody the right to be examined by a doctor and allow for the criminal judge to ask for a doctor's help.⁴ In principle this doctor must be a forensic doctor. At the investigation level, this measure must be requested from the general procurator and during the trial stage from the presiding judge. However, in practice, the authorities are not responding positively to requests for the exercise of this right.

Medical evidence of both physical and psychological nature is generally accepted in criminal proceedings but there is no specific

elaboration on how to evaluate this type of evidence. In practice, the courts will often make use of physical evidence, while evidence of a psychological nature is rarely or never used. Both the victim, the accused and third parties including non-governmental organisations may submit medical evidence to the court.

All persons with a medical background are allowed to collect and present medical evidence in court cases. However, the court will draw a clear distinction between those that are accredited as experts by the Ministry of Justice and those that are not. In order to be an accredited forensic doctor in Lebanon a person must acquire membership of the Department of Forensic Medicine in the Ministry of Justice. Membership in this department can only be obtained through a presidential decree but it is in practice decided by a committee of judges. There are no clear criteria guiding this accreditation process.

The Lebanese court system employs the principle of free evaluation of evidence leaving the determination of probative value to the appreciation of judges. The evaluation of an expert or a forensic medical report as an evidence is governed by the Cr.P.C. which provides that the judge can accept the report and take it into consideration as evidence or totally ignore it.⁵

The integrity of the Lebanese judiciary is unfortunately challenged by constant interference by the legislative and executive branches and a lack of independence and impartiality of medical experts. Unfortunately, there is no inquisitorial evaluation of the independence and impartiality of the

3) Cr.P.C, Article 8

4) Cr.P.C, Articles 34, 42, 47, 77, 253 and 421

5) Cr.P.C, Articles 326 and 327

medical experts and it is thus left for the parties to investigate and challenge such inconsistencies.

6.4.3 Conclusion

There are several avenues in need of significant change in order to ensure an effective protection against torture in Lebanon. One key element is to ensure that credible and effective forensic examinations are conducted in all cases of torture allegations. Among the initiatives needed to support this are:

- Development of a program to ensure that all allegations of torture are documented promptly, independently and effectively. This should include a mandatory medical examination by forensic doctors to all detainees and persons in police custody.
- Civil society support for the forensic doctors to ensure that they can perform the functions in effectively and independently.
- Introduce clear criteria guiding the selection of experts and forensic doctors including criteria specifically focused on professional and academic qualifications.
- Establishment of a cooperation mechanism between judges and forensic doctors in order to develop the process of torture documentation into an integrated element of the criminal procedure.
- Development of an accountability system for public officials and to ensure that all functions are performed in accordance with the law. This mechanism should publish periodic reports on its work.

Further, Lebanese and International Human Rights NGOs are appealing for an urgent approval of a draft law for the establishment of the National Preventative Mechanism in accordance with the Optional Protocol of the UNCAT. For that the Lebanese authori-

ties take the necessary measure to put an end to the practice of torture in detention centers, prisons and comply the international obligations specially that Lebanon acceded to OPCAT on December 22, 2008. These measures should include incorporation of the provisions of the UNCAT into domestic laws with a focus on amendments to the criminal code to specifically include a definition, criminalisation of all forms of torture and penalties commensurate to the gravity of the crime.

6.5. Georgia

Besarion Bochorishvili, L.L.M*, Miriam Jisjkariani, MD

6.5.1. Introduction to domestic legal system
Georgia is a post Soviet State, which restored its independence in 1991. The current government has been in power since 23 November 2003 and was last re-elected in 2008. Georgia acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1994 and ratified its Optional Protocol (OPCAT) in 2005. In 1999 Georgia became a member state of the Council of Europe and accepted all relevant documents and Conventions, among them the European Convention on Human Rights. Despite some efforts to bring domestic law and practice in line with the UNCAT, Georgia is far from full implementation of the Convention. An area of special concern is the lack of effective, prompt and impartial investigations as stipulated by articles 12 and 13 of the Convention. The OPCAT entered into force in 2006 and since December 2009, the Public Defender has been designated as the National Preventive Mechanism (NPM) with support from a Special Preventive Group. So far the NPM has conducted

a number of detention visits but it is still too early to assess its overall effectiveness.

Torture is prohibited in the Georgian Constitution and since 2005, the Criminal Code has contained a separate prohibition.¹ However, there are concerns that the prohibition is not in compliance with UNCAT, especially pertaining to the non-inclusion of discrimination as a qualifying purpose and the ambiguous group of potential perpetrators included in the provision.² In 2008, a new Anti-Torture Plan was elaborated and adopted by Presidential Order N30.³ This plan of action includes the implementation of the Istanbul Protocol⁴ by using it as a training manual for health and legal profes-

1) Georgia Constitution, Article 17 and Criminal Code of Georgia, article 144.

2) Unlike traditional anti-torture legislation, Article 144(1) is not limited to cover acts by public officials. These acts are only included as an aggravating circumstance but without including acts instigated or committed with the consent or acquiescence of public officials.

3) An unofficial translation is available at [http://www.justice.gov.ge/files/Documents/saertashoriso_sajaro/Action_Plan_ENG_\(2\).pdf](http://www.justice.gov.ge/files/Documents/saertashoriso_sajaro/Action_Plan_ENG_(2).pdf).

4) The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

*) EMPATHY/RCT,
Georgia
centre@empathy.ge

sionals. Unfortunately, the Istanbul Protocol has not been adopted as a mandatory investigative tool. In October 2010 a new criminal procedure code will take effect. This new law will transform the Georgian criminal procedure from an inquisitorial procedure towards a more adversarial procedure. The transformation will be gradual and it will therefore be difficult to give a clear indication of the status quo on certain procedural issues, which are subject to changes in the new law. To avoid confusion between the past and the future procedure, the following description of available remedies will be kept on a general level with some reflection on the future adversarial system.

The Georgian court system is structured in three levels: District and city courts; a court of appeal; and a court of cassation. Torture cases will start in the District or City Courts with the possibility of appeal and in rare circumstance a final hearing before the Court of Cassation. In recent years, Georgian courts have been criticized for lacking independence and having too close links with the prosecution. A clear indication of this came in a 2008 Ombudsman's report, which notes that out of 17,555 criminal cases in 2007, only 20 ended in acquittals.⁵ Similarly, there are indications that the prosecution is generally unwilling to properly investigate cases against police officers or other public officials. This makes investigation and prosecution of torture cases in Georgia a complicated activity and complaints frequently end in procedural agreements between the prosecution and the victim ensuring impunity for both parties.

5) See reports by the Public Defender of Georgia for the second half of 2007, p. 118 (<http://www.ombudsman.ge/index.php?page=21&lang=1>).

6.5.2. Remedies

Criminal remedies – in accordance with the new criminal procedure code the responsibility for investigation and prosecution of torture allegations is vested with the Prosecutors Office.⁶ Refusal to initiate investigations or prosecution cannot be appealed to any judicial body but only to a superior prosecutor. There are concerns that the investigations of the Prosecutor's Office into torture allegations are not effective and special attention has been drawn to the lack of promptness. The new criminal procedure code does not recognize the victims as a party to the criminal procedure and it is thus very difficult for persons who have suffered human rights abuses to effectively exercise their rights in the criminal procedure. Furthermore, the criminal procedure code does not stipulate time limitations on investigations or mandatory medical and psychiatric examinations of the victim, which limits its contribution to the effectiveness of torture investigations.

Civil remedies – the new criminal procedure code provides two possibilities for torture victims to obtain civil remedies. They can seek compensation for the direct damage suffered or on the basis of procedural misconduct by the prosecution.⁷ Considering the lack of effective access to justice in the criminal procedure, this is a welcome opportunity for torture victims to claim compensation but it still does not alleviate the need for improvements in the criminal procedure.

6) New Criminal Procedure Code, Article 55(1).

7) New Criminal Procedure Code, Article 92.

Administrative remedies – the public defender is mandated to monitor the domestic human rights situation and to receive individual complaints about human rights violations.⁸ In order to decide on individual complaints, the public defender has wide evidence collection authority including the right to order expert examinations.⁹ The sanctions available to the public defender include: Recommendation of specific remedies; referral for criminal investigation; and ordering re-examination of final court decisions.

With the new criminal procedure code, the participation of the victims in criminal cases will be limited. However, there is still a possibility to appeal the final court decision and to file civil claims as explained above. Articles 67 and 71 provide for special witness and victims protection measures. The 2009 Criminal Justice Reform Action Plan envisages the elaboration of a comprehensive witness and victims' protection programme during the years 2010 to 2012.

6.5.3. Forensic investigation and evaluation of evidence

The National Forensic Bureau (NFB) is the main body responsible for conducting forensic medical examinations of alleged torture victims. Previously, this institution was structurally placed under the Ministry of Justice (MoJ),¹⁰ but in 2009 the NFB became independent from the Government. In addition to the NFB, there is one fully independent forensic centre named "Vektori", which has limited capacity. Until 2005, forensic investigations in torture cases were mandatory according to the criminal procedure code.

However, these investigations were only initiated in case of physical injuries and were limited to an external physical examination. Now, the prosecution, investigatory authorities and examining judges have discretionary powers to order such investigations. A victim is thus required to request the permission of a judge before an alternative examination can be conducted. Considering the previously mentioned concerns about lack of independence in the judiciary, this may prove to be a significant obstacle to conducting effective investigations of torture allegations.

The absence of mandatory forensic investigations is a key structural concern in the Georgian system of forensic investigations and a severe setback in implementation of prompt, effective and impartial investigations of torture allegations. In practice, it is not uncommon that prosecutors will either order forensic examinations with a significant delay or not at all. Further, when independent actors such as detention monitors seek to ensure access for independent forensic experts, these efforts are often blocked or delayed by prison staff. Georgia has established a National Preventive Mechanism to conduct detention monitoring and this mechanism does possess adequate medical expertise. However, it remains to be seen whether this mechanism will have positive effects on the general access of alleged victims to forensic medical examinations.

Forensic examinations must be conducted by a person who has recognised skills in the relevant field of forensic science. According to Ministry of Health (MoH) regulations all professionals who have the

8) Organic Law of Georgia on the Public Defender, Articles 12 and 13.

9) Organic Law of Georgia on the Public Defender, Article 18.

10) Order #1549 issued on December 8, 2004 by the MoJ, Article 6(1).

State Certificate in Forensic Medicine have the right to participate in a forensic medical evaluation and in accordance with the same regulations any psychiatrist has a right to participate in forensic psychiatry evaluations. The court makes the final selection of the expert to conduct the examination but, at the request of the victim, the court may decide that the examination shall be conducted by both a state and an independent expert. Foreigners with relevant and recognized qualifications may practice in Georgia upon obtaining proper accreditation, which is given on an ad-hoc basis for periods up to six months. The regulation of forensic medical and psychiatric examinations is provided by the criminal procedure code and further detailed in two MoH orders.¹¹ This legal framework further regulates when examination and re-examination can be conducted and provides that forensic reports should contain three key elements: Introduction, descriptive part and conclusions. Unfortunately, the very elaborate examination requirements lack a significant element of the Istanbul Protocol in that they fail to clearly stipulate an obligation to draw conclusions on the consistency between the allegations and the medical findings. While such analysis can reasonably be subsumed under the conclusions category, the current practice indicates that such analysis is not carried out. In line with the objective in the domestic anti torture action plan on using the Istanbul Protocol, it would be a welcome improvement if forensic examination practices are brought in compliance with the Istanbul Protocol.

Another significant shortcoming in the system of forensic examinations is the approach taken to forensic psychiatric evidence. It is clear from the MoH regulation of forensic examinations that psychiatric examinations are mainly focused on evaluating the mental capacity of the subject to stand trial and act as a legal person. It is thus not intended to be used for criminal investigative purposes. The regulations do not explicitly exclude such use of forensic psychiatric examinations but the lack of explicit focus on this role constitutes a serious obstacle. Furthermore, the state forensic experts of the NFB traditionally have a very limited understanding of the role of forensic psychiatric evidence in proving torture and will usually have a strict focus on physical findings. It would be advisable to amend the current guidelines on forensic psychiatric examinations to include an increased focus on the substantive questions instead of the current sole focus on procedural aspects. Furthermore, state forensic experts should be sensitised to the psychiatric aspects of documenting torture to ensure a more comprehensive investigation.

The collection of forensic medical evidence is usually conducted on the basis of an order by the prosecution, investigatory authorities or examining judges, possibly at the instigation of the victim. These actors generally lack an adequate understanding of how forensic medical/psychiatric evidence can be used in torture cases. This further exacerbates the problems described above because the questions forming the basis of the forensic examinations often fail to provide

11) Order No 245/n of the Minister of Health, Labor and Social Protection on Rules of Conducting of Forensic Medical Examination and activities of Medical Staff and Order No 142/n of

the Minister of Health, Labor and Social Protection on Rules of Conducting of Forensic-psychiatric Examination.

adequate direction to the examiner. This is particularly visible in relation to the lack of specificity of the questions and the absence of questions relating to the psychiatric symptoms of the alleged victim. This highlights a clear need for training of judges, prosecutors and lawyers on the fundamental principles of forensic examinations of torture allegations.

Despite an elaborate structural set-up, the practical implementation of torture investigations and forensic examinations in Georgia is severely lacking. In a recent case, a juvenile was arrested and allegedly exposed to both physical and psychological torture or ill-treatment during two days in police custody and in a preliminary detention centre of the Ministry of Interior. Despite visible signs of beatings on his body, neither the prosecutor nor the examining judge took any measure to investigate the origin of these bruises and no forensic medical evaluation was ordered. Only when the juvenile entered pre-trial detention, he was evaluated by a doctor on duty who produced a report, which included the victim's allegations of torture. However, this did not prompt the prosecutor to initiate investigations and an independent forensic medical evaluation was only made after the intervention of a lawyer from EMPATHY. After approximately five months the prosecutor has opened an investigation under the less severe prohibition of excessive use of force, but no active investigative steps have been taken. This case example clearly illustrates a serious gap between the domestic legal framework and the practical conduct of prosecutors and judges when it comes to investigating allegations of torture. This trend is even more worrying in the context of the new criminal procedure code which will give judges the final decision on initiation of any forensic medical evaluation whether conducted by state or independent experts.

6.5.4. Conclusions and recommendations

Despite a generally worrying situation with regard to torture in the country, Georgia has seen some positive developments in recent years. An anti-torture action plan has been adopted, a NPM has been established, there is a vibrant civil society working against torture and within this, there is a high skill level in the documentation of torture area. Recently, training on documentation of torture in accordance with the Istanbul Protocol has been implemented as an integral part of university courses in psychiatry and such training is also envisaged in the anti-torture action plan. Georgia is thus strengthening the structural framework and capability to prevent and document torture but there is still much implementation needed before the situation will significantly change.

Georgia faces serious problems with regard to independence in the criminal procedure, where there are serious concerns about the independence of the courts and the prosecutors. This affects the general credibility of the entire criminal procedure and thus exacerbates many of the other institutional problems, which will be outlined below. In recent years the NFB has undergone many structural changes leading to noticeable improvements and it is crucial that a variable solution is found, which guarantees the independence of this important investigative body. Furthermore, the ongoing criminal justice reform process should ensure that the good intentions go beyond the paper on which they are written and lead to increased de facto independence for the courts.

One of the most significant deficiencies in the Georgian criminal procedure is the absence of prompt investigations into allegations of torture. In general there is a tendency towards neglecting these inves-

tigations, which ends up complicating the evidence collection. More specifically, there is no provision in the criminal procedure code for mandatory and prompt forensic examinations. In practice these examinations are either conducted with significant delays or not at all, and independent doctors have problems achieving timely access to alleged victims who find themselves in detention. The criminal justice reform process should ensure that the requirement for mandatory and prompt forensic examinations is reinserted into the criminal procedure code and provide clear procedures for timely access for independent doctors to any person in detention. This could reasonably be done in collaboration with the new NPM to ensure that the right expertise is included in this work.

In order to ensure that forensic examinations of alleged torture victims are conducted effectively, the government of Georgia should ensure training on the Istanbul Protocol for all medical and legal professionals who come in contact with torture cases. This would ensure the capacity to order and conduct adequate forensic medical/psychiatric examinations of torture allegations. To strengthen the use of the Istanbul Protocol, the criminal procedure code should be amended to include a provision stipulating the Istanbul Protocol as the domestic standard when health professionals conduct and legal professionals evaluate forensic examinations of alleged torture victims.

To live up to its obligations under UNCAT Article 14, the government should provide for a full compensation and rehabilitation scheme for torture survivors. This could be done through the establishment of a torture victim's compensation and rehabilitation fund, which would also send a very clear signal that the government does not condone or tolerate torture. Lastly, on a

more general note, the government should seek to foster a culture of human rights in the police and prisons system through human rights and education programmes.

Preventing torture through investigation and documentation

The IRCT promotes torture documentation and the Istanbul Protocol through training, advocacy, university collaboration and facilitation of forensic exams and reports.

On www.preventingtorture.org you can find more information and guidance on the investigation and documentation of torture as a means to combat impunity, ensure reparation for survivors and prevent torture.

The following practical guides to the Istanbul Protocol for medical doctors, lawyers and psychologists are available from the IRCT: Medical physical examination of alleged torture victims, Action against Torture, and Psychological evaluation of torture allegations. All three guides are available in English, French and Spanish. Please refer to www.irct.org for more information.

Request for donations

TORTURE is distributed anonymously and free of cost to those who are most in need of knowledge on treatment and other services, namely torture survivors and their families.

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Priority will be given to articles that give new knowledge and information with comparative and interesting perspectives.

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Combating torture with medical evidence – The use of Medical evidence and expert opinions in international and regional human rights tribunals

Asger Kjærum, Carlos Poveda Moreno, Ibarra M. Gutierrez III, Charlotte Oloya, Jad Tohme, Besarion Bochorishvili, Miriam Jishkariani

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The IRCT is an independent, international health professional organisation that promotes and supports the rehabilitation of torture victims and the prevention of torture through nearly 200 rehabilitation centres and programmes around the world.

The objective of the organisation is to promote the provision of specialised treatment and rehabilitation services for victims of torture and to contribute to the prevention of torture globally. To further these goals, the IRCT seeks on an international basis:

- to develop and maintain an advocacy programme that accumulates, processes and disseminates information about torture as

well as the consequences and the rehabilitation of torture

- to establish international funding for rehabilitation services and programmes for the prevention of torture
- to promote the education and training of relevant professionals in the medical as well as social, legal and ethical aspects of torture
- to encourage the establishment and maintenance of rehabilitation services
- to establish and expand institutional relations in the international effort to abolish the practice of torture, and
- to support all other activities that may contribute to the prevention of torture

Combating torture with medical evidence

The use of medical evidence and expert opinions in international and regional human rights tribunals

Asger Kjærum, L.L.M.*

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*)
International Rehabilitation Council for Torture Victims,
Denmark, akj@irct.org

List of abbreviations

ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
CAT	Committee Against Torture
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
UNCAT	United Nations Convention Against Torture and Other forms of cruel, inhuman or degrading treatment or punishment

1. Introduction

Between 6th and 9th May 1992, the Peruvian government of Alberto Fujimori ordered an attack against the Miguel Castro Castro prison, which resulted in widespread torture and extrajudicial killings committed against the prison population consisting largely of political prisoners. More than 14 years later, the victims of this massacre obtained recognition of the injustice done to them before the Inter-American Court of Human Rights. The final judgement of the Court, issued 25 November 2006, established that torture and mistreatment, including rape and sexual assault in the aftermath of the attack, had occurred. Faced with an uncooperative Peruvian government, which only provided incomplete and superficial information about the event, the Court reached the conclusions above mainly on the basis of independently collected forensic evidence and medical expert testimonies. Supported by the IRCT, experts in documentation of physical and psychological consequences of torture provided expert opinions on the trauma suffered by both the victims and their families. Acknowledging the value of the expert evidence of physical and psychological damages endured by the victims and their families, the Court awarded a broad range of reparations, including medical and psychological rehabilitation for survivors and their families.

Traditionally, the focus of torture prevention activities has evolved around the establishment and implementation of effective

legal frameworks and monitoring mechanisms. These efforts have significantly increased the protection against torture through the emergence of national, regional and international legal standards, whose implementation is monitored by either judicial or independent expert bodies. However, as seen in the example above, effective legislative frameworks must be supplemented by effective means for investigating allegations of torture. Both in international human rights tribunals¹ and in domestic courts, documentary medical evidence and expert opinions play an essential role in substantiating allegations of torture. The successful substantiation of an allegation of torture or ill-treatment² by use of medical evidence requires three crucial elements to be present: Competent and independent medical professionals to conduct the examination and evaluation; a legal procedural framework, which allow the effective introduction of such evidence; and the necessary technical knowledge of judges and prosecutors to enable an effective evaluation of medical evidence in a process ensuring that it is afforded due probative value.³

Since 2001, the International Rehabilitation Council for Torture Victims (IRCT) has been increasingly engaged with capacity building of medical and legal professionals in effective documentation of torture in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).⁴

1) This term will be used as a generic reference to all international and regional judicial mechanisms that receive and process complaints relating to human rights violations.

2) For the purpose of this study the term torture is used as a general reference to all acts covered by Articles 2 and 16 of the UN Convention Against Torture.

3) This term refers to the weight or importance that judicial bodies will attach to a certain piece of evidence.

4) Multiple Authors, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Istanbul Protocol (HR/P/PT/8/Rev.1) United Nations Publication (2004).

This, along with general advances in the field of forensic medicine, has created a situation where medical professionals are increasingly becoming capable of providing quality medical evidence to prove or disprove allegations of torture. While the technical knowledge about torture documentation is advancing in the medical field, this development is not mirrored in the legal profession, where many countries lack effective procedural frameworks and judicial mechanisms with sufficient technical capacity to adequately process such evidence.

The objective of this desk study is three fold. Firstly, it provides an overview of how international and regional human rights tribunals use and evaluate medical evidence in torture cases. Secondly, it gives an insight into some of the key issues related to the introduction of medical evidence, and thirdly, it aims to serve as a reference document for persons wishing to engage with one or more of the mechanisms under review.

When exploring the highly technical elements of substantiating a torture allegation through medical evidence, one must, however, be careful not to shift attention away from the real centre of any torture case – the victim. It cannot be repeated frequently enough that there should be no medical documentation without the informed consent of the victims and if at all possible the simultaneous provision of adequate rehabilitation services to avoid re-traumatisation. In general, both legal and medical professionals involved in torture cases should strictly observe established medical ethical principles, especially that of *primum non nocere* – first do no harm. It happens too often that the participation in legal proceedings not only generates additional distress for the torture survivor, but also witnesses, lawyers and health professionals receive threats and are put under pressure to cease the case. There-

fore, it is important that anyone engaging in such cases is aware of the risks and takes precautionary measures to limit exposure to such risks.⁵

2. Methodology

The target audience is any person engaged in legal cases seeking to prove allegations of torture through the submission of medical evidence to one of the mechanisms under review or persons wishing to advocate legal changes in this area. The study is narrowly focused on medical evidence and does not intend to provide a comprehensive overview of the procedural conduct of cases before the relevant mechanisms. This issue is already adequately analysed by many legal scholars and in handbooks on bringing torture cases to international human rights tribunals.⁶

Before venturing into the analysis of the use of medical evidence in human rights tribunals, it is necessary to elaborate on some general concepts and terminology related to evidence evaluation. Based on these general observations, the subsequent chapter will analyse the legislative framework and practice of selected international human right tribunals in relation to evidence evaluation. The first section will provide a detailed analysis of the regional bodies established in Africa, Europe, and the Americas. This will be followed by an analysis of the mechanisms established under the UN treaty body system, notably the Committee against Torture and the Human Rights Committee. Criminal tribunals

5) A number of organisations focus on the protection of human rights defenders. For reference see <http://www.irct.org/for-torture-survivors/urgent-actions.aspx>.

6) OMCT handbook series (<http://www.omct.org/index.php?id=UTB&lang=eng&articleSet=Publication>).

on the international level are the last subject of analysis, focussing on the identification of good practices in areas not substantively dealt with by the human right tribunals. In a final section, common tendencies and best practices will be highlighted.

Getting access to all the relevant information necessitates the employment of different research techniques. In relation to the international tribunals, the main sources of information have been official tribunal documents, such as rules of procedure and other guidelines, and the relevant case law. This information is very easily accessible through online resources and often produced in multiple languages. The information is however limited by a lack of public access to the complaint procedure in some tribunals and by the limited written analysis on issues of procedure and evidence evaluation in many tribunal decisions. This shortcoming has, to some extent, been remedied through the use of secondary literature analysing the different bodies and through the conduct of personal interviews with staff and other experts on the relevant tribunals. However, a full picture of the workings of each body would require a significant practical insight, a methodology, which is outside the scope of this study.

3. Introductory remarks on concepts and terminology

Before venturing into detailed analysis of the international and domestic practice in relation to use of medical evidence and expert opinions in torture cases, it is important to have a clear understanding of some general considerations of evidence evaluation in

torture cases and the specific nature and distinction between the two types of evidence in focus: Documentary evidence and expert opinions.

3.1. General considerations

When receiving a piece of evidence, the first task of the judicial body is to decide whether it is admissible or not. This is essentially an exercise in assuring the relevance and reliability of the evidence. If a piece of evidence is admitted, the next step is to determine its probative value.⁷ The determination of probative value may be guided by a set of more or less formalised rules depending on the specific legal system. Before commencing the substantive evaluation of evidence it is necessary to make a clear distinction between documentary evidence and expert opinions because this determination impacts the intensity of the evaluation under admissibility and probative value respectively.

In relation to medical evidence of torture, the term documentary evidence covers the observation and documentation of medical symptoms on an alleged victim. This can include photographs, x-rays, graphic indications of physical location of injuries, and other forms of medical documentation. It is important to note that the documentary part of medical evidence collates all medical findings but does not provide an analysis on context of the injuries and symptoms. With this type of evidence a judicial body will first look at the admissibility considerations, relevance and reliability. Here, the primary focus is likely to be on the authenticity of the evidence and the independence of the medical examiner.⁸ The

7) It is worth noting that many international tribunals have taken a very liberal approach to the admissibility determination by essentially allowing the introduction of all evidence and subsequently including the admissibility consideration in the determination of probative value.

8) The independence criteria can either relate to the person or to the specific examination. If an examination is carried out by a fully independent examiner but in the presence of police officers, the examination might be considered not independent.

probative value of documentary evidence varies greatly depending on a number of factors including the quality of the examination, the findings of the evidence, and the context of the alleged torture – did it happen in police custody or in a situation of possible excessive use of force. For example, in situations where a person enters police custody in good health and leaves with documented injuries the documentary evidence will often be afforded a high probative value.

The purpose of expert opinions is to inform the tribunal on issues of a technical nature outside the tribunal's area of expertise. In relation to medical evidence of torture, expert opinions commonly come in the form of analysis of the nature and possible causes of the injuries, conclusions on the consistency between the documented symptoms and the alleged acts of torture as presented by the victims; information on physical and psychological consequences of torture; as well as medical standards. These analytical exercises require a certain degree of expert knowledge; a general practitioner can often conduct the basic analysis of symptoms while the conclusions on consistency will require more intimate knowledge about common symptoms of different forms of torture. However, common for both is that they cannot be conducted by a layman. The primary criterion for admitting an expert opinion into evidence is that the person providing the opinion is in fact an expert. If this is not the case, the opinion is authored by a layman and thus typically not relevant nor reliable for its intended purpose. If the author is accepted as an expert, the probative value of the opinion will depend on the

degree of certainty that that expert attaches to the opinion⁹ and the existence of supporting or conflicting expert opinions.

The considerations of the tribunal are thus very different depending on whether the evidence being evaluated is of a documentary nature or an expert opinion and these considerations are important to bear in mind when producing and presenting evidence. The challenge is, as will be illustrated in the following section, that the distinction between documentary evidence and expert opinion is not always clear.

3.2. Practical distinctions between documentary evidence and expert opinions

A medical report in accordance with the Istanbul Protocol will often contain elements both of documentary evidence and of expert opinion in the form of analysis of the symptoms as a conclusion on the consistency between the symptoms and the acts of torture alleged by the victim. This complicates the evaluation of comprehensive medical reports since different parts are to be evaluated against different criteria. This means that if a comprehensive medical report is submitted to a tribunal and the tribunal determines that the medical examiner is not qualified to provide an expert opinion on the consistency between allegations and the symptoms, the tribunal must still consider the documentary part of the report under the normal admissibility criteria and possibly the general symptoms analysis part of the expert opinion.

Another challenge regarding evaluation of evidence in torture cases relates to how psychological evidence is evaluated. Evidence collected by a forensic psycholo-

9) Multiple Authors, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Istanbul Protocol (HR/P/PT/8/

Rev.1) United Nations Publication (2004), Para 187.

gist inevitably involves elements of analysis and it must thus be categorised as an expert opinion. Due to the intangible nature of psychological symptoms, laymen will often perceive this type of evidence as less concrete and less accurate than physical evidence. A forensic psychiatrist, on the other hand, might argue that the process of identifying psychological symptoms and diagnosing psychological trauma is similar to an analysis of physical symptoms conducted by a regular physician. As will be illustrated by the analysis in this study, some international human rights tribunals have taken noticeable positive steps toward more equal recognition of psychological evidence. However, this is an area where there is still a need for significant improvements.

In conclusion, it is very important for anyone who intends to submit or challenge medical based evidence in torture cases to be aware of the specific nature of evidence submitted because the nature of the evidence determines the evaluation procedure. Further, knowing the specifics of the evaluation process greatly eases the task of building evidence, which will effectively influence the court, or challenging evidence produced by the counterpart.

4. International Tribunals

4.1. General observations on international human rights tribunals

International human rights tribunals are established by multilateral treaties with the objective of ensuring that signatory states comply with the international obligations the specific tribunal is mandated to monitor. The tribunals can have a large variety of dif-

ferent functions but the focus of this study is their mandate to hear applications¹⁰ where an individual or group claims to be victims of a violation of the right to freedom from torture. Most international tribunals operate in accordance with the fourth instance principle, which dictates that the tribunals should not take the role of a national appeals body. As a consequence, the tribunals will generally exercise restraint in their re-evaluation of domestically collected and evaluated evidence based on the assumption that national mechanisms are better placed to undertake these tasks. However, as will be illustrated in this study, this principle is usually narrowly applied in cases relating to allegations of torture.

The nature of the human rights tribunals is distinctly different from that of the international criminal tribunals and domestic criminal proceedings in that they do not seek to establish individual criminal responsibility for a violation but solely focus on whether a state has failed to fulfil its obligations under a given human rights treaty. This distinction between criminal and non-criminal procedures is important because it has significant effects on the procedural conduct of a case. Since the remedies and reparations awarded by human rights tribunals carry less severe implications compared to traditional criminal sanctions, the requirement for legal certainty is less dominant in proceedings before human rights tribunals. Furthermore, the human rights tribunals are often required to rule in cases where the state has a significant procedural advantage due to its exclusive access to all evidence in a case. Based on these consid-

¹⁰ The international human rights tribunals do not use a consistent set of terminology when referring to the cases brought before them. To avoid confusing the reader, the present desk study will

adopt the fixed term “application” as a reference to any case brought to the attention of any of the international human rights tribunals.

erations and to remedy this “inequality of arms”,¹¹ the human rights tribunals will make use of presumptions¹² and reversal of the burden of proof, which initially lies on the applicant¹³ with the objective of strengthening the position of the individual. If the state fails to cooperate with the tribunal in providing evidence that it can reasonably be expected to provide, the tribunal will to some extent presume the allegations of the applicant to be true. Where the applicant has established a *prima facie*¹⁴ case, the burden of proof may shift to the state to disprove the allegations of the applicant. This is a noticeable feature of the human rights tribunals and one that is especially prevalent in cases of torture in custody. While this does not affect the criteria for evaluating evidence, it does make it considerably easier for an applicant to satisfy the burden of proof.¹⁵

11) This term refers to the procedural strength of the parties to a case. E.g. in torture cases the state will often be the only party with full access to the evidence. This creates an “inequality of arms” in favour of the state since it can essentially decide what evidence to make available.

12) The probative value of presumptions and the degree to which the tribunal will conduct an *ex officio* evaluation of the applicant’s evidence is different between the tribunals and may also depend on the specific facts of a case. A full analysis of the use of presumptions in the different tribunals is outside the scope of this study.

13) The international human rights tribunals do not use coherent terminology when referring to the persons bringing cases before them. To avoid confusing the reader, the present desk study will adopt the fixed term “applicant” as a reference to any person or group of persons bringing a case before any of the international human rights tribunals.

14) This requirement entails a responsibility to establish a case, which “at first instance” looks like

4.1.1. Procedure and fact-finding

The procedure before the human rights tribunals will usually consist of three main stages. First is the admissibility stage, where the tribunal will assess whether it is competent to hear a case on the basis of a set of admissibility criteria specific to the individual tribunal.¹⁶ When faced with a choice between different overlapping mechanisms it is important to consider which mechanisms has the most favourable admissibility criteria. The second phase is the consideration on merits where the tribunal will conduct its primary evidence evaluation and render a decision on the substantive question of an application. Third is the reparations stage where the tribunal will decide what type of remedy and reparation the State should afford the victim. The tribunal procedures are not unified and it is often relevant for an applicant to consider the specifics of the procedure before making a choice

a violation of the Convention. Subsequently, the case will be examined in more detail to establish whether a violation has in fact occurred.

15) For a full analysis of the application of the burden of proof in international tribunals, please see Camille Giffard and Nigel Rodley, *The approach of international tribunals to medical evidence in cases involving torture*, in Michael Peel and Vincent Iacopino, *Greenwich Medical Media Limited* (2002) pp. 19-45.

16) Such criteria may include: The exhaustion of domestic remedies; a time limitation running from the finalisation of domestic proceedings; a prohibition of anonymity; a requirement that the case is not being processed in other international mechanisms; and a requirement that the application is not manifestly ill-founded or an abuse of the right to complain. See ECHR, Article 35; ACHPR, Article 56; ACHR, Article 46; CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 107; and HRC, Rules of Procedure of the Human Rights Committee (22 September, CCPR/C/3/Rev.8) Rule 96.

of tribunal. Such consideration could include the length of the procedure, the admissibility criteria, the chance of a successful decision on merits and the different forms of remedies available to a tribunal.

There are two basic schools for establishing the facts of a case, the inquisitorial and the adversarial procedure. In the inquisitorial procedure it is primarily the responsibility of the Court to investigate the facts of a case and the Court exercises a high level of control with the procedure. Conversely, in an adversarial procedure, the Court has the role of a referee determining the facts on the basis of adversarial submissions of the parties. In practice, the international human rights tribunals will conduct their fact-finding in a procedure, which contains elements of both the inquisitorial and the adversarial school. They have an extensive focus on establishing the material truth with very limited consideration for rigid procedural rules and principles traditionally employed to ensure a high degree of legal certainty. This flexible approach has a significant impact on the evaluation of evidence and it has materialised into certain fixed practices, which will be analysed in the sections below.

4.2. *The European Court of Human Rights*

4.2.1. Mandate and jurisdiction

The European Court of Human Rights (the Court) is established by the European

Convention on Human Rights (ECHR)¹⁷ under the auspices of the Council of Europe (CoE). The objective of the Court is to ensure the compliance by contracting states with their obligations under the ECHR and its protocols. The geographical jurisdiction of the Court extends to the geographical jurisdiction of the contracting states.¹⁸

The Court is competent to receive applications from contracting states alleging a breach of the ECHR by another state and from individuals, non-governmental organisations, and groups of individuals claiming to be victims of a violation of the ECHR by a contracting state.¹⁹ The processing time on torture cases before the ECHR is relatively long and the time from application to final decision will often be more than three years.²⁰ In the period from 1959 to 2009 the Court has found 691 violations of Article 3.²¹

In general, the Court does not see itself as a fourth instance body, meaning that it is generally reluctant to conduct a detailed evaluation of evidence, a task which is best carried out by domestic courts.²² However, in most cases relating to torture the essential question is whether the alleged victims suffered a certain abuse or not. In such cases, the Court has consistently conducted a rather thorough review of the evidence placed before it.

17) ECHR, Article 19.

18) ECHR, Article 1. In its case-law, the Court has extended its jurisdiction to cover all territories under the effective control of a contracting state, currently 47 states. The scope of this extraterritorial jurisdiction is still unclear and it will not be elaborated on further in this study.

19) ECHR, Articles 33 and 34.

20) The processing time for 10 randomly selected

recent torture cases was on an average approximately 5 years.

21) These are divided into three types of violations: Torture; cruel, inhuman or degrading treatment or punishment; or procedural violation/lack of effective investigation.

22) ECtHR [PI], *Edwards v. the United Kingdom* (16 December 1992, App. No. 13071/87) § 34 and ECtHR [PI], *Vidal v. Belgium* (22 April 1992, App. No. 12351/86) §33.

4.2.2. Procedural rules

The Court operates with a set of rules of procedure, which, *inter alia*, provides a framework for the conduct of hearings and more specifically for the collection and introduction of evidence and expert opinions. The starting point for any application is a written adversarial procedure, meaning that it is the responsibility of the parties to a case to submit all relevant information in writing.²³ However, the obligation of contracting states to cooperate with the Court and the fact that in many cases, the state will be the only part with access to all evidence has led the Court²⁴ to adopt a more inquisitorial practice.²⁵ The parties can submit information in the form of legal observations and evidence but there are no formal requirements as to the form of such evidence.²⁶ If deemed necessary the Court has the possibility of conducting oral hearings on the merits of a case either upon request or at its own motion.²⁷ Such hearings will be under the procedural control of the Court.²⁸

In addition to the written proceedings and oral hearings, the Court can hold fact-finding hearings and instigate on-site investigative measures, if these are necessary for the Court to discharge its functions and to clarify the facts of a case. Such measures, which can be requested by all parties to the

case, may include the submission of additional documentary evidence and the hearing of witnesses, experts, or any other person whose evidence or testimony can contribute to the illumination of the case.²⁹ During such proceedings, the Court will decide on any dispute relating to witnesses or expert status.³⁰

In the absence of explicit rules of procedure guiding the evaluation of evidence and expert status, the specific criteria for this evaluation will be left to the practice of the Court.

4.2.3. The practice relating to evaluation of medical evidence and expert opinions

As a point of departure, the Court has consistently held that it will examine all evidence placed before it on the basis of the Court's free evaluation of evidence.³¹ This means that the Court does not see itself as bound by any formal rules regulating the admissibility and probative value of specific types of evidence. Instead the Court will base its evaluation on the *sana critica*³² of the Judges. In torture cases, it has been the practice of the Court to attach special importance to medical evidence. Depending on the specificity of the allegations and the diligence of the domestic investigation it can reject claims that are not supported by med-

23) ECtHR, Rules of Court, Rules 45(1), 47(1)(h), and 54.

24) ECHR, Article 38(1)(a).

25) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) p. 17.

26) ECtHR, Rules of Court, Rules 54(2)(a) and 59(1).

27) ECtHR, Rules of Court, Rule 59(3).

28) ECtHR, Rules of Court, Rule 64.

29) ECtHR, Rules of Court, Rules 54(3), 59(3) and A1(1).

30) ECtHR, Rules of Court, Rules A7(5).

31) ECtHR [GC], *Nachova and Others v Bulgaria* (6 July 2005, App. nos. 43577/98 and 43579/98) §147.

32) Also referred to as "sound judgement".

ical or other types of tangible evidence.³³ The Court has repeatedly observed that the nature of the right to freedom from torture requires it to perform a “*particular thorough scrutiny even if certain domestic proceedings and investigations have already taken place*”.³⁴ In addition, the Court has clearly indicated that it views the collection of medical evidence as an integral part of the procedural obligation under Article 3 to conduct an effective investigation.³⁵ This means that the Court will first assess the quality of the domestic fact finding procedure and the diligence of the domestic proceedings. That assessment will then determine the intensity of the Court’s re-evaluation of domestically collected medical evidence. The Court can also receive new evidence provided that this could not possibly have been introduced during the domestic proceedings.³⁶ In this regard it is important to be aware of the potential conflict with the requirement for exhaustion of domestic remedies that can arise in connection with introduction of new evidence.

The Court will usually consider all types of medical evidence placed before it including evidence of a psychological nature. Due to this principle and the fact that psychological evidence will often be introduced in conjunction with physical medical evidence, it is unclear how much probative value the Court will attach to psychological evidence alone. In a few cases, the Court has found a violation of Article 3 solely on the basis of psychological evidence.³⁷ In a recent case, the Court rejected the entire body of state produced physical medical evidence as unreliable and based its decision on the psychological evidence submitted by the applicant and collected in accordance with the European Committee for the Prevention of Torture (CPT) and Istanbul Protocol standards.³⁸ It should be noted that this is a dissenting (votes 4-3) plenary judgment, which renders its prejudicial value³⁹ limited and it remains to be seen if this will be used as a future source of reference. In their dissenting opinion, the three dissenting judges strongly

33) ECtHR [PI], *Juhnke v. Turkey* (13 May 2008, App. no. 52515/99) § 67; ECtHR [PI], *Satik v. Turkey (No.2)* (8 July 2008, App. no. 60999/00) § 34; and ECtHR [PI], *Protopapa v. Turkey* (24 February 2009, App. no. 16084/90) §§ 47-51 where the claims were rejected. See in general ECtHR [GC], *Cakici v. Turkey* (8 July 1999, App. no. 23657/94) §§ and *Camille Giffard and Nigel Rodley, The approach of international tribunals to medical evidence in cases involving torture, in Michael Peel and Vincent Iacopino, Greenwich Medical Media Limited* (2002) p. 27.

34) ECtHR [PI], *Muradova v. Azerbaijan* (2 April 2009, App. no. 22684/05) § 99; ECtHR [PI], *Ribitsch v. Austria* (4 December 1995, App. no. 18896/91) § 32; Ugur Erdal and Hasan Bakirci, Article 3 of the European Convention on Human Rights – a practitioner’s handbook, OMCT Handbook Series Vol. 1 (2006) p. 233; and Philip Leach, *Taking a case to the European Court of Human Rights*, second edition, Oxford University Press (2005) p. 63.

35) ECtHR [PI], *Salmanoğlu and Polattaş v. Turkey* (17 March 2009, App. no. 15828/03) § 79 and ECtHR [PI], *Muradova v. Azerbaijan* (2 April 2009, App. no. 22684/05) §101.

36) ECtHR [PI], *K.A. v. Finland* (14 January 2003, App. no. 27751/95) § 89.

37) ECtHR [PI], *Akkoc v. Turkey* (10 October 2000, App. nos. 22947/93 and 22948/93) §§ 107 and 116 and ECtHR [PI], *Salmanoğlu and Polattaş v. Turkey* (17 March 2009, App. no. 15828/03) §§ 85-95.

38) ECtHR [PI], *Salmanoğlu and Polattaş v. Turkey* (17 March 2009, App. no. 15828/03) §§ 85-95.

39) The prejudicial value of a judgement refers to its potential value as a future source of law. This determination is based on the level of agreement among the judges, the quality of the legal reasoning and the hierarchical status of the Chamber rendering the judgement.

criticised the psychological evidence for not being concrete and accurate enough to form the basis for finding a violation.⁴⁰ While this judgment indicates a general openness to accept psychological evidence, it is still unclear how the Courts will evaluate such evidence in relation to its probative value.

In its case-law, the Court has made clear that an effective medical examination must include both documentation of all findings and an expert opinion on the specific nature of the symptoms and their consistency with the concrete allegations. However, due to the nature of free evaluation of evidence and the Court's reluctance to explicitly pronounce itself on if or how it addresses the issue of determination of expert status, it is difficult to identify clear criteria guiding the process. Nevertheless, some criteria have emerged as guiding the evaluation process. When evaluating documentary medical evidence, the Court has specifically focused on the promptness of the examination, its level of detail, and whether it could be relied on as being collected independently.⁴¹ This entails an examination conducted at the earliest possible point in time, which is individual and detailed and conducted without the presence of police officers or other state officials that

might pose a threat to the independence of the medical examiner.

In its evaluation of the expert opinion elements of medical reports, the Court has focused on issues of timeliness, the diligence and quality of the analysis, and the qualifications of the expert.⁴² This entails that the expert providing the opinion should preferably do this as early as possible on the basis of documentary evidence collected by that expert. Further, the process of analysis and the conclusions must be clear and logical, and the expert must possess certain qualifications ensuring the rendering of an informed and reasoned conclusion. If the Court finds that the expert opinion is unscientific, it will reject it as unreliable. This suggests that the Court might focus more on the de facto quality of medical reports than the formal competence of the expert.⁴³

In general, there seems to be a tendency in the Court towards a more systematic approach to evaluation of medical evidence, following the standards provided by the CPT and Annex 1 to the Istanbul Protocol.⁴⁴ In a number of recent judgments, the Court has specifically referred to the standards provided by the CPT⁴⁵ and the Istanbul Protocol as setting the benchmark for assessing the credibility of documentary

40) ECtHR [PI], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03), partly dissenting opinion of judges *sajó, tsotsoria and karaka, s.*

41) ECtHR [PI], *Akkoç v. Turkey* (10 October 2000, App. nos. 22947/93 and 22948/93) § 118; *Böke and Kandemir v. Turkey* (10 March 2009, App. nos. 71912/01, 26968/02 and 36397/03) § 56.

42) ECtHR [PI], *Muradova v. Azerbaijan* (2 April 2009, App. no. 22684/05) §§ 116-119 and ECtHR [PI], *Akkoç v. Turkey* (10 October 2000, App. nos. 22947/93 and 22948/93) § 118.

43) ECtHR [PI], *Muradova v. Azerbaijan* (2 April 2009, App. no. 22684/05) § 119.

44) See the systematic process of evidence evaluation in ECtHR [PI], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03) §§ 85-95.

45) European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT standards – "Substantive sections of the CPT's General Reports (CPT/Inf/E (2002) 1, Rev. 2006).*

medical evidence and expert opinions.⁴⁶ This has led the Court to reject medical reports not complying with the CPT and Istanbul Protocol standards as unreliable.⁴⁷

While in practice the Court has the opportunity to supplement its written procedure with oral hearings, this is not done frequently. During 2005, the Court held 20 plenary and 25 Grand Chamber hearings.⁴⁸ In accordance with the principle of free evaluation of evidence, the Court will consider all oral evidence placed before it. The hearing of witnesses and experts during normal hearings and fact-finding activities is under the procedural control of the Court.⁴⁹ The practical conduct of such hearings is rather flexible and it will in general allow the Court and both parties to the case to question the person giving testimony.

The Court has exercised restrictions on its conduct of fact-finding hearings and on-site investigations, possibly based on its subsidiary role and logistical limitations. Such activities are mainly carried out where the Court finds the domestic fact finding to be inadequate to an extent necessitating individual fact finding by the Court in order

to fulfil its functions.⁵⁰ The factors relevant to the decision to conduct fact finding activities include: “*the nature or seriousness of the case; the insufficiency of attempts made within the national system to fully establish the facts; a prima facie view that the allegations made by the applicant could be true and that there were real prospects that a fact-finding hearing could be successful in establishing the facts; and the passage of time.*”⁵¹ In general it seems that when the available evidence is inadequate, the Court will often choose to decide the case on the basis of the evidence available and if necessary draw presumption to the disfavour of the state if it is responsible for the lack evidence.⁵² Consequently, since the new court structure was introduced in 1998, fact-finding activities have only been conducted in 18 cases.

4.2.4. Observations on the evaluation of medical evidence

On the basis of the analysis above, the following observations can be made about the admissibility and evaluation of medical evidence and expert opinions in the European Court of Human Rights

46) ECtHR [PI], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03) § 89; ECtHR [PI], *Böke and Kandemir v. Turkey* (10 March 2009, App. nos. 71912/01, 26968/02 and 36397/03) § 48; ECtHR [PI], *Mehmet Eren v. Turkey* (14 October 2008, App. no. 32347/02) §§ 40-42; and ECtHR [PI], *Gülbahar and Others v. Turkey* (21 October 2008, App. no. 5264/03) § 53.

47) ECtHR [PI], *Mehmet Eren v. Turkey* (14 October 2008, App. no. 32347/02) §42 and ECtHR [PI], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03) § 89.

48) Uğur Erdal and Hasan Bakirci, Article 3 of the European Convention on Human Rights – a practitioner’s handbook, OMCT Handbook Series Vol. 1 (2006) p. 70.

49) ECtHR, Rules of Court, Rule A7(2).

50) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) pp. 22-32.

51) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) p. 38.

52) ECtHR [PI], *Salmanoğlu and Polatta, s v. Turkey* (17 March 2009, App. no. 15828/03) §§ 94-98.

- The Court applies the principle of free evaluation of evidence. The basic divide between admissibility considerations and determination of probative value is subsumed under the latter category and any relevant considerations relating to admissibility will have to be taken into account during the substantive evaluation of the evidence.
- All types of medical evidence are admissible. Particularly in torture cases the decision will often depend on the quality of this evidence. All evidence submitted to the Court will be evaluated based on the principle of the Court's free evaluation of evidence. The level of scrutiny exercised by the Court will generally depend on the Court's assessment of the domestic fact-finding procedure and the diligence of the domestic proceedings. In most torture cases, the critical question is not one of law but one of fact, which requires the Court to exercise a high level of scrutiny.
- The Court has clearly stated that an effective medical examination must include both documentary evidence and an expert opinion on the nature of the symptoms and their consistency with concrete allegations. Despite not always explicitly distinguishing between documentary evidence and expert opinions, the Court has utilised specific criteria for the evaluation of each of these two types of evidence.
- In recent case-law there is a tendency to conduct a more explicit evaluation of medical evidence on the basis of the standards elaborated by the CPT and in the Istanbul Protocol. This indicates a move away from the traditional free evaluation towards a more structured approach.
- Recent case-law indicates that it is possible to find a violation of article 3 solely based on psychological evidence. It remains unclear how much probative value the Court will afford evidence of a psychological nature. However, the prejudicial value of the recent case-law is limited and it is unclear how the Court will assess psychological evidence in cases where reliable physical evidence is also presented.
- Under the rules of procedure, the Court has the opportunity to hold oral hearings and instigate fact-finding hearings and on-site investigations. However, due to the subsidiary nature of the Court and logistical considerations, the Court appears to work through a written procedure in cases where oral hearings and fact-finding is not strictly necessary due to deficient domestic fact-finding.

4.3. *The Inter-American Human Rights system*

4.3.1. Mandate and jurisdiction

The Inter-American human rights complaints mechanism is established as a two-instance system featuring the Inter-American Commission on Human Rights (the Commission) at first instance and the Inter-American Court of Human Rights (the Court) as a second instance body. This mechanism established by the American Convention on Human Rights (ACHR) under the auspices of the Organisation of the American States. The objective is to ensure the fulfilment by contracting states of their obligations under the Convention and a number of other regional human rights treaties including the Inter-American Convention to Prevent and Punish Torture.⁵³

53) ACHR, Article 33 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 25. For further elaboration see IACtHR, "Street Children" (Villagrán-Mo-

rales et al.) v. Guatemala (Merits), (19 November 1999, No. 63) §§ 247-252 and IACtHR, The "Panel Blanca" (Paniagua-Morales et al.) v. Guatemala (Merits), (8 March 1998, No. 37) § 136.

The mechanism has jurisdiction in all contracting states, which have recognised its competence.⁵⁴

The Commission is competent to hear applications from individuals, groups of individuals, or any non-governmental entity legally recognised in a contracting state relating to rights protected by the ACHR or other regional human rights obligations undertaken by the state in question.⁵⁵ There is no requirement for victim status as seen in the European regional system. In addition, the Commission is competent to hear inter-state complaints provided that all states involved have explicitly recognised this competence.⁵⁶

The Court is competent to hear cases submitted by the Commission or a contracting state, but not the original applicant, provided that the state subject of the complaint has explicitly recognised the jurisdiction of the Court.⁵⁷ When deciding on a possible referral of a case to the Court, the Commission is obliged to hear and give due consideration to the opinion of the original applicant.⁵⁸

The average processing time of cases before the Commissions is approximately 6.5 years,⁵⁹ while the Court will use an average of 19 months on each contentious case.⁶⁰

The Commission and Court do not consider themselves as fourth instance appeals bodies, but it is clear both from the legal framework and the practice of the two that where necessary, they will conduct an extensive review of the facts of a given case. The level of scrutiny applied seems to depend on the existence and quality of fact-finding and decision-making by domestic courts.⁶¹

4.3.2. Procedural rules

The Commission and the Court operate on the basis of rules of procedure, which amongst other issues regulate the conduct of oral hearings, assessment of evidence, and the undertaking of fact-finding activities. As a point of departure, the procedure is written and adversarial but both entities have the possibility of holding oral hearings.⁶² Furthermore, based on the obligation of contracting states to cooperate with the

54) ACHR, Article 1.

55) ACHR, Article 44 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 23. The relevant regional human rights standards are: American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

56) ACHR, Article 45.

57) ACHR, Articles 61 and 62.

58) IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Articles 43(3) and 44(2)(a).

59) The number is calculated on the basis of the ten most recent torture related cases published by the Commission.

60) IACtHR, Annual Report of the Court 2008, p. 65. This figure relates to all cases regardless of their subject.

61) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 93.

62) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 15 and IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 59.

mechanism, the proceedings might take a more inquisitorial nature.⁶³

In proceedings before the Commission both parties to the case are requested to submit their legal arguments and supporting documentation in writing.⁶⁴ If considered necessary, the Commission can, either *ex officio* or at the request of a party to the case, instigate hearings “to advance in its consideration of the case”.⁶⁵ The purpose of such hearings is to bring new facts or information forward in addition to what has already been presented in writing and the Commission may focus on all relevant stages of the proceedings.⁶⁶ All forms of information including expert reports and opinions are admissible but it is for the Commission to decide whether it wishes to hear witnesses and experts during the hearing.⁶⁷ All witnesses and experts are required to take an oath or make a solemn promise to tell the truth. The Commission is also competent to undertake on-site visits when this is considered necessary and advisable and subject to the approval of the State Party.⁶⁸ However, for logistical and economic reasons such activi-

ties are not common.⁶⁹ The Commission’s rules of procedure do not provide any guidance on how written and oral evidence is to be evaluated.

The aim of the Commission is to evaluate the case and issue recommendations to the Court.⁷⁰ When the Commission has finalised its procedure, the case can be referred to the Court at the request of the contracting state or the Commission.⁷¹ When deciding on the referral, the Commission is obliged to hear the position of the original applicant and base its decision on the following elements: The position of the applicant; the nature and seriousness of the violation; the need to develop or clarify the case-law of the system; the future effect of the decision within the legal systems of the member states; and, the quality of the evidence available.⁷² If the Court admits the application, the original applicant will be allowed to participate in the proceedings autonomously from the Commission.⁷³

During the proceedings before the Court, all evidence received by the Commission through adversarial proceedings

63) IACtHR, *Velasquez Rodriguez v. Honduras (Merits)*, (29 July 1988, No. 4) §138 and IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Article 39.

64) IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Articles 30(5) and 38(1).

65) IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Articles 30(5) and 38(5).

66) IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Articles 62(1).

67) IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Articles 63(1), (4) and (8).

68) ACHR, Article 48 (1)(d) and IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Article 40.

69) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 142.

70) ACHR, Articles 48 and 50.

71) ACHR, Article 61.

72) IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Articles 43(3) and 44(2).

73) IACtHR, *Rules of Procedure of the Inter-American Court of Human Rights*, Article 24(1).

shall form part of the case file unless the Court considers it essential for the evidence to be repeated.⁷⁴ The adversarial proceedings requirement essentially entails that both parties have had an opportunity to challenge the evidence but does not require that this was in fact done.⁷⁵ New evidence can be submitted by the Commission, the original applicant, and the contracting state during the relevant stages of the procedure and within the time limits established by the Court's Rules of Procedure.⁷⁶ In addition, the Court is competent to obtain any evidence it considers helpful and necessary on an *ex officio* basis or through requests to the parties or a third party.⁷⁷ These proceedings are also open to independent submission of legal arguments by third parties.⁷⁸

The Court is mandated to instigate oral hearings as it finds necessary and the rules of procedure seem to indicate that some form of oral proceedings is an integral part of the procedure.⁷⁹ Indeed, the Court has generally held more than one oral hearing

in each case.⁸⁰ During these hearings the Court can hear testimony from victims, witnesses, experts or any other person whose testimony the Court deems relevant.⁸¹ All parties to the case can request the hearing of an individual subject to the final approval of the Court.⁸² Expert witnesses must fulfil certain requirements for independence⁸³ and qualifications and it is left for the Court to determine whether these are fulfilled.⁸⁴ However, the Rules of Procedure do not provide any specifics on what level of qualification is required for a person to be awarded expert status. The hearings are under the procedural control of the President of the Court, who can grant the right to all parties to question any person providing oral testimony to the Court.⁸⁵ While the Court does not have a formal possibility of conducting fact-finding investigations, the procedural rules governing the Court's *ex officio* collection of evidence provide ample space to undertake such activities.⁸⁶ However, these powers are rarely utilised by the Court.⁸⁷

74) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 46(2).

75) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 187.

76) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 46(1).

77) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 47.

78) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 41. This comes in the form of an *Amicus Curiae* brief.

79) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 42.

80) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) p. 194.

81) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 47.

82) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 50.

83) Criteria provided in IACtHR, Statute of the Inter-American Court of Human Rights, Article 19.

84) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 53.

85) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 44.

86) IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Article 47.

87) Philip Leach, Costas Paraskeva, and Gordana Uzelac, *International Human Rights & Fact-Finding – an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University (2009) p. 31.

4.3.3. The practice relating to evaluation of medical evidence and expert opinions
The Inter-American Commission and Court function within the same legal framework in a quasi-two-instance system. However, due to their different functions in the system, it cannot be assumed that the procedural practices of the two bodies are similar. Nevertheless, to avoid repetition the following section will address the practice of the two bodies collectively while pointing out differences as they appear.

The basis of evidence assessment in the Inter-American system is the principle of free evaluation of evidence.⁸⁸ While this principle is clearly utilised by both bodies it is much more prevalent in the Commission, which will generally avoid commentary on the probative value of specific pieces of evidence. Adversely, the Court will often address each piece of evidence independently. The Court does not consider itself bound by the findings of the Commission⁸⁹ but as mentioned above, evidence received by the commission through adversarial proceedings can be accepted as part of the case file. The burden of proof will initially lie with the applicant but depending on the circumstance

of the specific case and the type and quality of evidence provided by the applicant, this might shift to the state.⁹⁰

The Court can essentially hear testimony from any person it deems can provide information relevant to the case mostly in oral hearings. Expert witnesses can be heard at all stages of the proceedings and will often be instrumental at the reparations stage for evaluating the injured party.⁹¹ Oral expert opinions will usually limit their focus to the main contentious issues of the case and to issues deemed important for the development of the Court's jurisprudence. In the Commission procedure, oral hearings are not mandatory and much less frequent than in the Court procedure.⁹² There is some indication that the Commission might be obliged to hold a hearing if this is requested by one of the parties.⁹³ In the absence of oral hearings, the parties before the Commission will more frequently make use of written expert reports to support their case. The procedure during oral hearings is adversarial and witnesses are not allowed to read out set piece statements during the hearings.⁹⁴

In torture cases in the Inter-American

88) IACHR, Rafael Ignacio Cuesta Caputi v. Ecuador (Merits), (18 July 2008, Case 12.487, Report No. 36/08) § 38; IACtHR, Loayza Tamayo v. Peru (Reparations), (27 November 1998, No. 42) §57; and IACtHR, Cantoral-Benavides v. Peru (Merits), (18 August 2000, No. 69) §52.

89) IACtHR, Velasquez Rodrigues v. Honduras (Merits), (29 July 1988, No. 4) §29.

90) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2003) pp. 210-212.

91) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press (2003) p. 203.

92) IACtHR, Velasquez Rodrigues v. Honduras (Preliminary Objections), (26 June 1987, No. 1) § 51 and Christina Cerna, *The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications*, in David J. Harris and Stephen Livingstone, *The Inter-American System of Human Rights*, Clarendon Press (1998), p. 97.

93) IACtHR, Velasquez Rodrigues v. Honduras (Preliminary Objections), (26 June 1987, No. 1) §53.

94) Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press (2003) pp. 141-146.

system, medical evidence takes a key role in the proceedings. The two bodies will regularly be asked to evaluate both documentary evidence and expert opinions including evaluations of previously collected medical evidence. As already explained, the level of re-evaluation of evidence will depend on the existence and quality of the domestic decisions and fact-finding. Considering that collection and evaluation of evidence is often a central contentious element of torture cases, a high degree of re-evaluation will normally be exercised.⁹⁵ For the Court, this observation may also relate to the findings of the Commission.⁹⁶ Medical evidence will usually be utilised both in the merits and the reparations stage of the proceedings.

Psychological evidence will often play an important role both in relation to proving allegations of torture of the primary victims but often also in relation to proving torture/ ill-treatment against the dependents of victims. From the case law, it does not seem that the Court has any reservations towards relying on psychological evidence and it will often find separate violations regarding psychological torture.⁹⁷ Furthermore, psychological evidence is frequently utilised in the reparations proceedings as an effective means of evaluating the injury.⁹⁸ Due to the lack of

explicit evaluation of evidence in the Commission's procedure it is difficult to determine how the Commission evaluates psychological evidence. From the analysis of its case law, it appears that the Commission usually takes psychological evidence into consideration when presented as part of a comprehensive examination according to the standards of the Istanbul Protocol examination.⁹⁹

As a consequence of the Inter-American system's flexible approach to evidence evaluation it is very difficult to identify clear criteria guiding this process. The Court has expressed some vague limitations on the flexibility by stating that it will respect the principles of legal certainty and the procedural equality of the parties. General considerations that may guide the evaluation of medical evidence include the source, the credibility and proficiency of the author, the context of the evidence collection and the quality of the evidence.¹⁰⁰ Other, more specific considerations can also be drawn from the Court's case-law: Uncontested evidence will be accepted as fact if this is consistent with the remaining evidence;¹⁰¹ and circumstantial and presumptive evidence will be accepted if this is coherent, mutually reaffirming, and lead to conclusions consistent with the facts under examination.¹⁰² However,

95) IACHR, *Emiliano Castro Tortrino v. Argentina (Admissibility)*, (2 March 1998, Case 11.597, Report No. 7/98) §§17-18.

96) IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru (Merits)*, (25 November 2006, No. 160) §169.

97) IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru (Merits)*, (25 November 2006, No. 160) §§287-88 and 293;

98) IACtHR, *Gutiérrez-Soler v. Colombia* (12 September 2005, No. 132) §§ 79(a) and 84(a).

99) IACHR, *Ana, Beatriz and Celia Gonzalez*

Perez v. Mexico (Merits), (4 April 2001, Case 11.565, Report No. 53/01) § 39.

100) Personal interview with Legal Advisor from the IACHR.

101) IACtHR, "*Street Children*" (*Villagrán-Morales et al.*) *v. Guatemala (Merits)*, (19 November 1999, No. 63) § 68 and IACHR, *Rafael Ignacio Cuesta Caputi v. Ecuador (Merits)*, (18 July 2008, Case 12.487, Report No. 36/08) § 35-37.

102) IACtHR, "*Street Children*" (*Villagrán-Morales et al.*) *v. Guatemala (Merits)*, (19 November 1999, No. 63) §§ 69-71.

these indications relate to specific categories of evidence and thus do not provide any contribution to the more general evaluation exercise. The Court has established certain requirements for a person to qualify for expert status. These include independence and expert qualifications. The qualifications element has been framed by the court as a requirement that expert “reports are to be prepared by professionals who are competent in their field and include, in proper form, the information that the Court requires”.¹⁰³ In addition, the evaluation of expert status will be based on the free evaluation with due consideration to adversarial observations of the parties to the case. This means that if the expert status or the contents of the opinion is not contested, it is likely to be accepted as valid.¹⁰⁴ In one case, it seems that the applicant has attempted to challenge the competence of an expert witness through reference to his lack of knowledge about the Istanbul Protocol.¹⁰⁵ However, the Court did not pronounce itself on the issue and concretely accepted the expert opinion. No specifications were made on how the necessary qualification can be acquired to ensure access for non-academic experts.¹⁰⁶

The Court has on several occasions made reference to the Istanbul Protocol in its case-law. While the Istanbul Protocol has

not been explicitly utilised as a minimum standard for evaluation of medical evidence, it has been utilised in a range of different functions including as a reference tool for experts delivering expert opinions;¹⁰⁷ as a benchmark for assessing the effectiveness of the domestic fact-finding;¹⁰⁸ and as a means of redress through its implementation in the domestic torture investigation framework.¹⁰⁹ This very diverse utilisation of the Istanbul Protocol without explicitly adopting it as a minimum standard for medical reporting suggests that the Court is not yet ready to let its evidence evaluation be bound by any fixed standard. However, when it utilises the Istanbul Protocol as a benchmark for evaluating the domestic fact-finding, the Court comes very close to setting a formal criteria for evidence evaluation. The Commission has seemingly gone one step further and made specific reference to the Istanbul Protocol when evaluating medical evidence. In the case in question, the Commission accepted independently collected evidence on the basis that the examination procedure was in compliance with the standards of the Istanbul Protocol.¹¹⁰ The Commission further noted that the “reliable [medical] report” should be timely, presented directly to the examination subject and include the following information: Circumstances of the

103) IACtHR, *Loayza Tamayo v. Peru* (reparations), (27 November 1998, No. 42) § 81 and Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press (2003) p. 202.

104) IACtHR, *Bamaca-Velasquez v. Guatemala* (merits), (25 November 2000, No. 70) § 113.

105) IACtHR, *Tibi v. Ecuador*, (7 September 2004, No. 114) §76.

106) Personal interview with Legal advisor from IACHR

107) IACtHR, *Gutiérrez-Soler v. Colombia* (12 September 2005, No. 132) §42.

108) IACtHR, *Vargas-Areco v. Paraguay* (Merits and Reparations), (26 September 2006, No. 155) §§ 91-94.

109) IACtHR, *Gutiérrez-Soler v. Colombia* (12 September 2005, No. 132) §§100 and 109-110 and IACtHR, *Tibi v. Ecuador*, (7 September 2004, No. 114) §252(m).

110) IACHR, *Ana, Beatriz and Celia Gonzalez Perez v. Mexico* (Merits), (4 April 2001, Case 11.565, Report No. 53/01) §§ 39-41.

interview; a detailed history of the subject's story; records of all physical and psychological findings; an opinion on consistency between the subject's story and the physical and psychological findings; and a clear indication of authorship.¹¹¹ This indicates that the Commission utilises the Istanbul Protocol as a minimum standard for assessing medical reports.

4.3.4. Observations on the evaluation of medical evidence

While the evaluation of evidence in the Inter-American system is largely similarly to the European regional system, there are certain particularities of the Inter-American system, which will be highlighted below.

- Evidence evaluation in the Inter-American system is based on the principle of free evaluation of evidence. Due to this flexible approach it is difficult to draw clear criteria guiding the Commission and the Court in their assessment of documentary evidence and expert opinion.
- In most cases relating to torture the Commission and Court will rely greatly on medical evidence both in its decisions on the merits of a case and when determining the reparations. At the outset, it is the responsibility of the parties to submit the relevant evidence but in cases where the state is not complying with its obligation to cooperate with the Commission/Court they have the possibility of either initiating investigations, which are more inquisitorial in nature or drawing presumptions.
- The Court has consciously chosen to

refrain from elaborating clear criteria for evaluating documentary evidence as well as expert opinions, where it has been particularly careful to avoid excluding non-academic experts. In general, when the Court evaluates medical evidence, it will consider elements such as the source, the credibility and proficiency of the author, the context of the evidence collection and the quality of the evidence. In addition the Court requires both independence and competence for a person to qualify as an expert. This expert status can be challenged by all parties to a case.

- The Court has made continuous reference to the Istanbul Protocol in its evaluation of documentary evidence and expert opinions but it has not yet adopted it as a fixed standard. However, the Istanbul Protocol has been used as a reference tool for experts delivering opinions; as a benchmark for evaluating the effectiveness of the domestic fact-finding; and as a means of redress through its implementation in the domestic torture investigation framework. However, given the courts insistence on maintaining a flexible evidence evaluation, it is unlikely that it will be afforded a more formalised role. On this issue the Commission seems to have gone one step further and adopted the Istanbul Protocol as a minimum standard for “reliable [medical] reports”
- While both Commission and Court are generally willing to evaluate psychological evidence and often do so, it is unclear whether it is viewed as documentary or opinion based. The structure of most cases indicate that it is seen as opinion based but this could be due to the fact that most psychological evidence include both diagnosis and opinion, which is then subsumed in the latter category.

111) IACHR, Ana, Beatriz and Celia Gonzalez Perez v. Mexico (Merits), (4 April 2001, Case 11.565, Report No. 53/01) § 39.

- While the Commission has shown some restriction in holding oral hearings, this seems to be an integral procedure of the Court procedure. Oral expert testimony will usually be limited to focusing on the key contentious issues of a case and on issues deemed important for the development of the Court's jurisprudence.

4.4. *The African Commission on Human and Peoples Rights*

4.4.1. The mandate and jurisdiction:

The African Commission on Human and Peoples Rights (the Commission) is established by the African Charter on Human and Peoples Rights (ACHPR) under the auspices of the Organisation of African Unity (OAU), which was succeeded by the African Union (AU) in July 2002.¹¹² The main objective of the Commission is to promote and protect human and peoples rights in Africa through a broad range of activities including studies, standard setting and consideration of communications.¹¹³ The activity in focus of this study will be the consideration of communications.

The Commission is competent to receive applications from states, private individuals and organisations.¹¹⁴ In practice, the group of applicants is very diverse and many of the applications originate from human rights

NGOs. There is no requirement for victim status in the African system.

The mandate of the Commission is distinctly different from the two other regional systems discussed above in that it does not have the power to issue legally binding decisions.¹¹⁵ Instead, the Commission will largely focus on facilitating amicable solutions;¹¹⁶ a process, which has a less prevalent position in the other regional systems.¹¹⁷ If this process is not successful, the Commission will submit a report containing its recommendations to the Assembly of Heads of state and Government (the Assembly)¹¹⁸ for its adoption.¹¹⁹ The publication of the report and recommendations is subject to the approval by the Assembly.¹²⁰

In addition to the Commission, the African regional system also features the African Court on Human and Peoples Rights. The Court held its first meeting in July 2006 and has so far decided on one case.¹²¹

4.4.2. Procedural rules

The Commission conducts its work on the basis of a set of Rules of Procedure, which, inter alia, provide guidance on how to implement the communications procedure. However, the rules are very broadly framed and provide no information on evaluation of evidence or expert opinions.

112). ACHPR, Article 30.

113) ACHPR, Articles 45 and 55.

114) ACHPR, Articles 48 and 55.

115) Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights – a Handbook for Victims and their Advocates*, OMCT Handbook Series Vol. 3 (2006) pp. 27-28.

116) Commonly known as “friendly settlements”.

117) ACHPR, Articles 47 and 52.

118) With the establishment of the African Union, the name of this body changed to “the African Union Assembly”.

119) ACHPR, Articles 52 and 53.

120) ACHPR, Article 59(2).

1219 Last checked on 26 February 2010.

The rules of procedure stipulate that the parties to a case can submit information and observations both during the admissibility procedure and the subsequent consideration of the merits.¹²² Further, the section dealing with inter-state applications also open the possibility of oral hearings during which the Commission is mandated to determine the specific procedure of the hearings.¹²³ This procedure is not formally available for individual complaints to the Commission. However, the Commission has employed a very wide interpretation of the ACHPR Article 46 text “The Commission may resort to any appropriate method of investigation”. This provision allows the Commission to conduct ex officio investigations,¹²⁴ on-site investigations,¹²⁵ and possibly also oral hearings.¹²⁶ In addition, the Commission can request the approval of the Assembly to undertake country visits as part of its investigative process where a number of cases concerning the same state indicate “the existence of a series of serious or massive violations”.¹²⁷

4.4.3. The practice relating to evaluation of medical evidence and expert opinions
In general, the decisions of the Commission

offer very little, if any, reflection on its methods for evaluating evidence. It can safely be assumed that the starting point is the same free evaluation of evidence as employed by the other international human rights mechanisms.¹²⁸ The only relatively clear indication on evidence evaluation relates to the situation where the state does not provide substantive replies to the allegations of the applicant. In this situation, the Commission claims that it will take the allegations “as proven, or at the least probable or plausible”¹²⁹. This has two significant modifications. The fact that the complainant’s allegations were not contested, or were partially contested by the state does not mean that the Commission will accept their veracity. Further, the Commission can conduct ex officio examination based on its competence to resort to any appropriate method of investigation.¹³⁰ In addition, the Commission has willingly extended its own deadlines for submitting information and observations,¹³¹ leading to significant delays in the procedure with no certainty of state participation.¹³²

It seems that in practice, the Commission will allow all types of evidence provided

122. ACmHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rules 117 and 119.

123. ACmHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rule 100.

124. ACmHPR, Info sheet No.3, p. 8.

125. Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights – a Handbook for Victims and their Advocates*, OMCT Handbook Series Vol. 3 (2006) p. 86.

126. ACmHPR, Info sheet No.3, p. 8.

127. ACHPR, Article 58.

128. Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples’ Rights – The System in Practice, 1986 - 2000*, Cambridge University Press (2002) pp. 109-110.

129. ACmHPR. *Amnesty International and others v. Sudan* (1999, Comm. No. 48/90, 50/91, 52/91, 89/93) § 52.

130. ACmHPR, Info sheet No.3, p. 8.

131. ACmHPR, Rules of Procedure of the African Commission on Human and Peoples’ Rights, Rule 119. This rule provides a 3 months time limit on the initial submission by the state.

that it contributes to the substantiation of an allegation.¹³³ It is clear from the Commission's practice that it will allow evidence in the form of witness statements, doctors' testimonies, post mortem reports and expert reports.¹³⁴ The Commission has not pronounced itself on the admissibility and evaluation of psychological evidence but in one decision it has shown its awareness of the psychological consequences of torture.¹³⁵ Due to the lack of transparent evaluation criteria, it is unclear to which extent the Commission relies on medical evidence in its decisions and whether it distinguishes between documentary and opinion based evidence in its evaluation. However, considering that it has rejected unsubstantiated allegations of torture¹³⁶ and that a medical report might be a very effective method of substantiating such allegations, it is likely that medical evidence will play an important role. The Commission further employs in its case law a concept of expert opinion, at least in relation to legal questions, even though it

does not elaborate any evaluation criteria.¹³⁷ It has not been possible to identify references to the Istanbul Protocol or any other clear standards for evaluation of evidence in the practice of the Commission.

The Commission will frequently hear oral submissions¹³⁸ and despite the absence of procedural rules governing this practice, it seems to be viewed as an entitlement for both parties of the case.¹³⁹ Such hearings can take place at all stages of the process including prior to and during the admissibility consideration.¹⁴⁰ The procedure during an oral hearing is largely inquisitorial starting with opening statements by the parties followed by questioning by the Commissioners. The parties are not allowed to question each other. The hearings are closed and will usually only see participation of the parties to the case. However, on some occasions the Commission has heard expert witness statements at the request of the parties.¹⁴¹ This indicates that in theory the Commission should be able to hear and consider medical expert opinions.

132) Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000*, Cambridge University Press (2002) p. 115.

133) ACmHPR, Info Sheet No. 2. Such evidence may include letters, legal documents, photos, autopsies and tape recordings.

134) ACmHPR, *Amnesty International and others v. Sudan* (1999, Comm. No. 48/90, 50/91, 52/91, 89/93) § 5; ACmHPR, *Dawda Jawara v. The Gambia* (2000, Comm. Nos. 147/95 and 149/96) §15; and ACmHPR, *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (1996, Comm. No. 71/92) §§ 14 and 16.

135) ACmHPR, *Curtis Francis Doebbler v. Sudan* (2003, Comm. No. 236/2000) §§ 36-38.

136) ACmHPR, *Kazeem Aminu v. Nigeria* (2000, Comm. No. 205/97) §16 and ACmHPR, *John D. Ouko v. Kenya*, (2000, Comm. No. 232/99) § 26.

137) ACmHPR, *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (1996, Comm. No. 71/92) §§ 14 and 16 and ACmHPR, *John K. Modise v. Botswana* (2000, Comm. No. 97/93) § 56.

138) Frans Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights – a Handbook for Victims and their Advocates*, OMCT Handbook Series Vol. 3 (2006) p. 60.

139) ACmHPR, Info sheet No.3, p. 8 and ACmHPR, Info Sheet No. 2, p. 5.

140) ACmHPR, *Curtis Francis Doebbler v. Sudan* (2003, Comm. No. 236/2000) §§ 13, 16 and 20.

141) Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000*, Cambridge University Press (2002) pp. 106-107.

However, some cases are heard in closed private sessions of the Commission and there is little elaboration on legal reasoning in the decisions. It is therefore difficult to identify how the Commission evaluates evidence presented at oral hearings and how much of this information is novel in nature as opposed to mere restatement of positions.

In addition to oral hearings, the Commission also has the opportunity to conduct on-site investigations subject to the approval of the host country.¹⁴² While this measure appears to be mandated in the Commission's broad investigatory powers, it is unclear whether the activity is an integral part of a case or if it's considered to be a part of the more general promotional activities of the Commission.¹⁴³ While it seems that the Commission will be able to receive documentary evidence and expert opinions during on-site investigations, it is unclear whether such information would be directly admissible in connection with an application against that state or whether it would only feature in the promotional activities of the Commission.

4.4.4. Observations on the evaluation of medical evidence

Due to the limited written legal reasoning in the Commission's decisions it is very difficult to identify a method for admitting and evaluating medical evidence. The Commission's quasi-judicial nature and its extensive focus on friendly settlement of disputes

make it a difficult subject of analysis of legal procedures. Based in the present analysis it is possible to draw the following general conclusions:

- It seems likely that the Commission will work on the basis of the same flexible free evaluation of evidence principle as in the other regional systems.
- A key feature of the Commission is the possibility for any person or organisation to submit applications on behalf of a victim without that person's formal consent. This is especially important when dealing with disappearances, torture survivors who may fear reprisals, or cases with high numbers of possibly unidentified victims. Here organisations can take the responsibility for pursuing the cases without needing the active participation of the victim if this person is unable or for other reasons not interested in participating.
- In practice the Commission will admit very diverse types of evidence including medical reports. It is not possible to identify criteria guiding the evaluation of the evidence besides from the indication that in cases where the state does not respond to allegations, the Commission can draw presumptions.
- There are vague indications that medical evidence does play an important role in the substantiation of torture allegations. In its evaluation of such evidence, the Commission formally distinguishes be-

142) ACmHPR, Commission Nationale des Droits de l'Homme et des Libertés v. Chad (1995, Comm. No. 74/92) §§ 10-11.

143) Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights – The System in Practice, 1986 - 2000*, Cambridge University Press (2002) pp. 108-109. There are no clear guidelines or procedures governing

the conduct of on-site investigations, which is an issue that has prompted harsh criticism from certain states: ACmHPR, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003-2004, Annex II. Here the Government of Zimbabwe strongly criticizes the procedural conduct of a fact-finding mission to the country.

tween documentary evidence and expert opinions but there are no clear indications of how these different types of evidence are evaluated.

- The Commission will often hear oral submissions from both parties to the case and there are certain indications that this is viewed as an entitlement of both parties. During these hearings, which are largely inquisitorial, the parties can call persons to provide witness testimony or expert opinions but cross examination is not allowed. Again, there is no indication on how the Commission evaluates this evidence.

The analysis above has left many unanswered questions relating to the practice of the Commission. The legal framework guiding its procedure is very generally framed and neglects to address important aspects of legal procedure. In addition, the decisions rendered by the Commission, are very short and detailed legal reasoning almost absent. It is therefore not possible to draw any clear conclusions on how the Commission practically conducts its procedure and evaluates evidence. This absence of legal reasoning also weakens the prejudicial value of the Commission's decisions, which again limits its preventive effects.

4.5. *UN Treaty based mechanisms*

4.5.1. Mandate and jurisdiction

The UN human rights treaty monitoring

system currently consists of eight primary Committees with the responsibility to monitor state compliance with their respective treaties. Six of these Committees have the mandate to consider individual communications against states who have ratified the relevant treaty and explicitly recognised this competence of the Committee.¹⁴⁴ In relation to torture cases, the two main bodies of interest are the Committee against Torture (CAT) and the Human Rights Committee (HRC) both of which have rendered a high number of decisions on torture related issues. Since the procedures of the two bodies are largely similar, they will be analysed collectively with specific references to points of difference. In addition, the two Committees have a history of taking inspiration from the practice of the other, which makes it likely that a practice found in one Committee will be followed by the other where relevant.

First, it is worth noting that both bodies have a relatively strict victim status requirement meaning that only the victim or a person authorised by the victim can file an application. If the victim is physically prevented from filing, the victim's family will acquire this competence.¹⁴⁵

Both bodies have clearly expressed the view that they are not fourth instance appellate courts and that as a starting point it is the prerogative of domestic courts to evaluate the evidence in a given case.¹⁴⁶ However, in cases where the domestic procedure is

144) The formal recognition is either done through the ratification of an optional protocol or through declaration under a specific provision of the core treaty.

145) Sarah Joseph, Katie Mitchell, Linda Gyorki, *Seeking Remedies for Torture Victims – a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, OMCT Handbook Series Vol. 4 (2006) p. 57

146) HRC, *R.M. v. Finland* (23 March 1989, Comm. No. 301/1988) § 6.4; CAT, *N.Z.S. v. Sweden* (22 November 2006, Comm. No. 277/2005) § 8.6; and CAT, General Comment No. 01: *Implementation of article 3 of the Convention in the context of article 22* (21 November 1997, A/53/44, annex IV) § 9.

found to be “manifestly arbitrary or amounting to a denial of justice”, the Committees will conduct a thorough review of the evidence placed before it.¹⁴⁷ While this cannot be conclusively confirmed, this seems to be a higher threshold than what is seen in the regional mechanisms.

4.5.2. Procedural rules

Both Committees operate on the basis of fairly elaborate rules of procedure, which regulate how the Committees are to implement their different mandates.¹⁴⁸ When considering individual communications, the procedure is written and adversarial and the Committees are obliged to consider all information placed before them by the parties to the case.¹⁴⁹ In addition, the Committee against Torture has the mandate to invite the parties to oral hearings but in practice this has never been done.¹⁵⁰ The parties are given the opportunity to comment on each other’s submissions and in practice some cases end up with multiple exchanges between the parties before the Committee will

feel equipped to render its decision. In addition, the Committees can request the parties to elaborate on certain issues or provide specific evidence including expert opinions.¹⁵¹ With regard to the evidence collection, the Committee against Torture is also mandated to “obtain any document from United Nations bodies, specialized agencies, or other sources that may assist in the consideration of the complaint”.¹⁵² The rules of procedure do not provide any further guidance on how the Committees will evaluate evidence placed before it.

4.5.3. Practice relating to medical evidence

Similar to the other international human rights tribunals, the two UN Committees base their decisions on the principle of free evaluation of evidence. This is clear from the Committees’ obligation to consider all evidence and the lack of formal rules for its evaluation combined with the flexible approach taken by the two bodies. Initially, the burden of proof is on the applicant to establish a *prima facie* case but after this

147) HRC, *G. v. Canada* (17 July 2000, Comm. No. 934/2000) § 4.3; HRC, *R.M. v. Finland* (23 March 1989, Comm. No. 301/1988) § 6.4; CAT, *Falcón Ríos v. Canada* (23 November 2004, Comm. No. 133/1999) § 8.5; CAT, *Pelit v. Azerbaijan* (1 May 2007, Comm. No. 281/2005) § 7.11; and Sarah Joseph, Katie Mitchell, Linda Gyorki, *Seeking Remedies for Torture Victims – a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, OMCT Handbook Series Vol. 4 (2006) p. 81.

148) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) and HRC, Rules of Procedure of the Human Rights Committee (22 September, CCPR/C/3/Rev.8).

149) CAT, Article 22(4) and the Optional Protocol to ICCPR, Article 5(1).

150) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 111(4) and Sarah Joseph, Katie Mitchell, Linda Gyorki, *Seeking Remedies*

for Torture Victims – a Handbook on the Individual Complaints Procedures of the UN Treaty Bodies, OMCT Handbook Series Vol. 4 (2006) p. 95. In CAT, *S.N.A.W. et al. v. Switzerland* (24 November 2005, Comm. No. 231/2003) §§ 5.3 & 7.8 a hearing was requested but denied by the Committee.

151) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 111(2) and HRC, Rules of Procedure of the Human Rights Committee (22 September, CCPR/C/3/Rev.8) Rule 97(4). In CAT, *Halimi-Nedzibi v. Austria* (18 November 1993, Comm. No. 8/1991) § 10, the Committee Against Torture requested the State Party to “appoint, in consultation with the author’s counsel, an independent expert in ophthalmology in order to determine the date of and the origin of the eye injury”.

152) CAT, Rules of Procedure (9 August 2002, CAT/C/3/Rev.4) Rule 112(2).

point the application of the burden of proof depends on the specifics of the case. In cases where the applicant establishes a prima facie case of torture or ill-treatment and the State Party does not provide an effective response to the allegations specifically addressing questions of law and refuting evidence, the Committees can draw the presumption that the allegations presented by the applicant are true.¹⁵³

The Committees will often see medical evidence introduced in torture cases and while it is not determinative for the outcome of the case,¹⁵⁴ medical evidence can play an important role in proving allegations of torture or ill-treatment. Further, there are examples of the Committee against Torture considering psychological evidence of torture. While the probative value attached to such evidence is unclear, it is evident that the Committee recognises the value of such evidence.¹⁵⁵ Indeed, the Committee against Torture has utilised a psychological certificate showing a neuropsychological disorder issued 10 years after the fact as the basis for finding a viola-

tion of the right to an effective investigation.¹⁵⁶

Due to the confidential proceedings of the Committees and their reluctance to explicitly comment on their evaluation of evidence in the written decisions, it is difficult to identify clear criteria guiding this evaluation.¹⁵⁷ In addition, based on the principle of free evaluation, the Committees will most likely be reluctant to let the evidence assessment be directed by rigid criteria.¹⁵⁸ However, a few guiding principles can be identified in the practice of the two Committees: Medical reports must illustrate a clear link between the symptoms and the allegations by the alleged victims and the forensic expertise of the examining doctor will affect the probative value afforded expert opinions.¹⁵⁹ This indicates that the Committees do distinguish clearly between documentary evidence and expert opinions and that a thorough evaluation of the factual expertise of proposed experts will be conducted. Both Committees have specifically recommended the implementation of the Istanbul Protocol as a torture documentation

153) HRC, *Weismann and Perdomo v. Uruguay* (3 April 1980, Comm. No. 8/1977) § 15; HRC, *Valcada v. Uruguay* (26 October 1979, Comm. No. 9/1977) § 10; HRC, *Massera et al. v. Uruguay* (15 August 1979, Comm. No. 5/1977 (R.1/5)) § 9; CAT, *Dimitrijevic v. Serbia and Montenegro* (24 November 2004, Comm. No. 207/2002) § 5.3.

154) CAT, *Blanco Abad v. Spain* (14 May 1998, Comm. No. 59/1996) § 8.8. In the present case, the Committee rejected that forensic reports indicating no signs of torture could be relied on by domestic courts as a justification for not initiating an effective investigation.

155) CAT, *Bouabdallah Ltaief v. Tunisia* (14 November 2003, Comm. No. 189/2001) § 10.5 and CAT, *Falcón Ríos v. Canada* (23 November 2004, Comm. No. 133/1999) §§ 8.4 & 8.5.

156) CAT, *Bouabdallah Ltaief v. Tunisia* (14

November 2003, Comm. No. 189/2001) §§ 8.8 & 10.5.

157) The evaluation of evidence during non-refoulement proceedings is more thoroughly described in case-law and academic writing. However, since the object of consideration in such cases is inherently different from traditional torture cases, it is not possible to draw allegoric conclusions from this practice.

158) The Committee against Torture has recently established a working group on evaluation of facts and evidence. Since the working group has not commenced its work it is not clear what the aim and scope of its work will be.

159) HRC, *Fuenzalida v. Ecuador* (12 July 1996, Comm. No. 480/1991) § 9.4 and CAT, *Ristic v. Yugoslavia* (11 May 2001, Comm. No. 113/1998) §§ 9.4 & 9.5.

tool during their state review procedures.¹⁶⁰ While this is an important recognition of the value of the Protocol, there are no signs that the Committees are using it as a standard for their own evaluation of medical evidence. Criticism has been expressed that the limitation to a written procedure is restricting the possibilities for adequate taking of evidence. It is asserted that that the written procedure is insufficiently equipped to conduct a proper evaluation where there are conflicting versions of fact. To remedy this situation, it has been suggested that the use of sworn depositions and independent expert opinions is increased in order to clarify contested issues.¹⁶¹

4.5.4. Observations on the evaluation of medical evidence

Due to the closed procedure of the Committees and the limited written observations on evaluation of evidence, it is very difficult to identify clear criteria for this evaluation. The following more generalised conclusions can be drawn on the basis of the analysis above:

- Similar to other international human rights tribunals, the UN Committees work on the basis of free evaluation of all evidence placed before them. The Committees do not see themselves as fourth instance appellate bodies but in cases where the domestic procedure is found to be “manifestly arbitrary or amounting to a denial of justice” they will conduct a thorough review of all the evidence placed before them. In cases where the state fails to respond effectively to allegations, which have been found *prima facie*

substantiated, the Committees can base their decision on the presumption that the allegations are true.

- The Committees recognise written medical evidence of a physical and psychological nature but it is not determinative for the outcome of a case. The Human Rights Committee is only mandated to conduct a written procedure and while the Committee against Torture has a formal mandate to conduct oral hearings this is not done in practice. Thus, all evidence submitted to the Committee must be in written form.
- When evaluating evidence, the Committees have paid particular attention to whether a qualified forensic medical expert conducts the medical examination and whether the report establishes a clear link between the physical and psychological findings and the allegations of the victim. While there is very limited explicit distinction between documentary evidence and an expert opinion it is clear that the distinction is being employed.
- The Committees have promoted the Istanbul Protocol as an effective domestic torture documentation tool but has stopped short of utilising it for their own evidence evaluation.
- It has been recommended that the Committees increase their use of sworn depositions and independent expert opinions to facilitate a more adequate evaluation of evidence under the written procedure.

4.6. *The International Criminal tribunals*

Due to the distinct difference between international criminal and human rights tribunals

160) CAT, Concluding Observations: Serbia, (19 January 2009, CAT/C/SRB/CO/1) § 14 and HRC, Concluding Observations: Uzbekistan, (CCPR/C/UZB/CO/3) § 11.

161) Manfred Nowak, CCPR Commentary: U.N. Covenant on Civil and Political Rights, 2nd edition, N.P. Engel Verlag (2005) pp. 873-874.

a direct comparison of the two approaches to evaluation of evidence cannot be applied. The two systems balance the interests of legal certainty and materially correct decisions differently and especially the human rights tribunals seek a very high degree of flexibility to ensure that all voices are heard. Nevertheless, the systematic approach of the criminal tribunals, illustrated below, should contribute to a better understanding of the structure of expert status evaluation that lies behind the more flexible approach of the human rights tribunals.

International criminal tribunals will generally decide on indictments against key perpetrators of criminal acts in cases where the evidence is overwhelming. Individual pieces of evidence are therefore rarely evaluated and it is thus difficult to find indications of how these tribunals approach the evaluation of evidence in torture cases.¹⁶² While the international criminal tribunals have neglected to elaborate on their criteria for evaluation of evidence they have provided ample practice on the determination of expert status. The following illustration cannot be directly transferred to the procedure before international human rights tribunals, but it does provide a set of general considerations that should be

taken into account when seeking to present expert opinions before these tribunals.¹⁶³

The International Criminal Tribunal for the former Yugoslavia (ICTY) has defined an expert as a person who “by virtue of some specialised knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute.”¹⁶⁴ This entails three distinct requirements: (1) the person must have specialised skills, (2) which can contribute to the illumination of an issue, (3) which is disputed by the parties. This could for example be a forensic medical expert testifying on whether the medical symptoms of an alleged torture victim are consistent with his account of events, where the state subject of a complaint disputes this.

The admissibility decision of international criminal tribunals is guided by five main criteria. The following text will describe each criterion and subsequently provide a few considerations for the process of determining probative value:

1. *The objective test:* The persons’ previous experience and knowledge will be evaluated through an examination of present and former positions, professional experience, and publication of scholarly articles.¹⁶⁵

162) Camille Giffard and Nigel Rodley, The approach of international tribunals to medical evidence in cases involving torture, in Michael Peel and Vincent Iacopino, Greenwich Medical Media Limited (2002) p. 26.

163) The following analysis is largely inspired from the article: Renate Winter and Stephen Kostas, Bringing Medical Evidence of Torture to the International Criminal Tribunals, in International Rehabilitation Council for Torture Victims, Shedding Light on a Dark Practice – Using the Istanbul Protocol to Document Torture, (2009), pp. 18-21.

164) Prosecutor v. Galić, Case No. ICTY-98-29-T, Decision Concerning the Expert Witnesses Ewa

Tabeau and Richard Philipps, 3 July 2002, p. 2. See also Prosecutor v. Brđanin, Case No. ICTY-99-36-T, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4; Prosecutor v. Strugar, Case No. IT-01-42-PT, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 bis, 1 April 2004, p. 4; Prosecutor v. Martić, Case No. ICTY-95-11-T, Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis”, 13 January 2006, para. 37.

165) ICTY, Prosecutor v. Slobodan Milošević (Decision), (1 March 2006, Case No. ICTY-02-54-T).

2. *Reliability and transparency*: The tribunals will examine whether the expert knowledge is sufficiently recognised by the persons' peers and whether the opinion delivered is prima facie reliable.¹⁶⁶ Furthermore, the tribunals require full transparency as to the methodology and fact relied upon in forming the opinion. This ensures that the basis of the opinion can be fully scrutinised by the tribunal and the opposition.¹⁶⁷
3. *Relevance*: The tribunal must determine whether the subject of the opinion is an issue that the judges are technically capable of solving on the basis of their own knowledge and common sense. This would leave an expert opinion irrelevant since the need for technical expertise would be absent.
4. *The "ultimate issue" rule*: The tribunal must examine if the opinion will effectively decide the case before the tribunal. Expert opinions are therefore not allowed to address the criminal liability of the accused or most other legal issues.¹⁶⁸ The tribunals have applied this criterion quite rigorously and non-compliance may result in the complete rejection of the opinion depending on the prevalence of "ultimate issue" conclusions in the opinion.¹⁶⁹
5. The tribunal must only admit those parts of an opinion, which are within the ex-

perts' field of expertise and based on the experts' own observations.¹⁷⁰ Due to the presumption of a high probative value of expert opinions, this criterion is a key element in ensuring that the expert does not go beyond his "mandate", thus protecting the basic fair trial rights of both parties.

This illustrates the challenge in determining the scope of opinions expressed by the experts. In determining the probative value of an expert opinion, the tribunals will not always be in a position to judge the reliability of the substantive contents. Therefore, focus will be on objective elements such as the impartiality of the expert and the application of an academic methodology in drawing conclusions. Here it is essential that the expert avoid making statements that are argumentative or otherwise indicate a lack of impartiality. One of the key pitfalls for medical experts providing opinions in torture cases is the risk of pronouncing themselves on issues of law. This could either be through the attempted identification of the perpetrator or the labelling of a certain treatment as torture. This can either lead to a total dismissal of the expert opinion or a significant decrease in the probative value afforded the opinion.

It is very important to remember that the crime of torture has four elements: se-

166) ICTY, Prosecutor v. Popović et al. (Decision), (30 January 2008, Case No. ICTY-05-88-AR73.2) § 22.

167) ICTY, Prosecutor v. Galić (Decision), (27 January 2003, Case No. IT-98-29-T).

168) ICTY, Prosecutor v. Hadzihasanović and Kubura (Decisions), (11 February 2004, Case No. ICTY-01-47-T).

169) ICTY, Prosecutor v. Kordić and Čerkez

(Transcript of proceedings on 28 January 2000), (28 January 2000, Case No. ICTY-95-14/2-T) Transcript pp. 13305-13307 (complete rejection of opinion) and ICTY, Prosecutor v. Boskoski and Tarculovski (Decision), (17 May 2007, Case No. ICTY-04-82-T) §§ 13-14 (noted scarcity of "ultimate issue" conclusions and accepted the report, in part).

170) ICTY, Prosecutor v. Dragomir Milošević (Decision), (21 August 2007, Case. No. IT-98-29/1) § 10.

vere pain or suffering; intentional infliction; for a specific purpose; and committed by a state agent. The medical expert can provide advice on a range of issues, such as on the link between the symptoms and the alleged treatment, physical and psychological torture methods and symptoms, examination and treatment methods and possibly also the level of pain and suffering incurred by the alleged victim. However, the medical expert does not have expert knowledge in determining the identity of the perpetrator, the possible intent and purpose of the treatment suffered or what level of suffering legally amounts to torture.

4.7. *General tendencies and best practices*

The objective of the present section is to provide a thematically based analysis of the international human rights tribunals in focus. An attempt will be made to illustrate key differences and similarities and if possible identify best practices. Due to their similar nature, the tribunals will often base their work on similar or identical practices, which have often been adopted with cross-references to the practice of the other tribunals. However, their working methods still differ on significant points. The following analysis will focus on four key issues: The application of the fourth instance principle in torture cases; the concept of free evaluations of medical evidence; criteria used for evaluation of forensic medical evidence; and the use and conduct of oral hearings.

4.7.1. The application of the fourth instance principle in torture cases

As a point of departure, all the tribunals in focus reject having a role as fourth instance appellate courts implying that it is outside their mandate to substitute the domestic evaluation of evidence with their own. However, in torture cases where the establish-

ment of the facts is often the key contentious issue, the tribunals will be rendered almost irrelevant if they are not mandated to re-evaluate evidence which has already been presented before domestic courts. This has led the tribunals to limit the application of the fourth instance principle on the basis of two elements: First, the fundamental nature of the right not to be tortured, which merits thorough scrutiny; and second, a requirement of absence of an effective domestic fact-finding procedure. Since the first condition is omnipresent, focus is on the effectiveness of the domestic fact-finding. It is unclear if the procedural deficiency requirement is applied with the same intensity in all the tribunals but in practice it seems that applications which establish a prima facie case will usually see scrutiny of the evidence introduced. This indicates that the tribunals are generally willing to conduct a thorough re-evaluation of the facts if a prima facie case is established.

This practice means that in torture cases the tribunals will often find themselves in an unfamiliar situation of establishing the facts of an incident which took place years earlier in a local context. This complication is exacerbated by the often technical nature of the evidence and the highly contentious conduct of most cases where it is not uncommon to see the introduction of “false” evidence and incompatible versions of fact. The tribunals are therefore faced with the dilemma of preserving legal certainty while ensuring an effective protection of the right not to be tortured. One way of remedying this problem could be to increase the use of independent expert opinions to clarify contentious issues.

4.7.2. The concept of free evaluation of forensic medical evidence

All of the tribunals conduct their fact-find-

ing on the basis of free evaluation of evidence. This very flexible approach is often explained by the fact that the tribunals are not focused on establishing individual guilt but only concerned with state compliance with human right standards. This evaluation of evidence according to the *sana critica* of the judge may be very well suited for evaluating the majority of evidence submitted to the tribunals but there are certain specific complications related to evaluating medical evidence in torture cases. The medical evidence will often be of a highly technical nature and may involve both physical and psychological findings. Due to the limited medical knowledge of a judge, such evidence can be very difficult to assess if the judge can only use his sound criticism as the base of the evaluation. In addition, the delicate nature of torture often renders the proceedings highly contentious and it is not uncommon that the parties submit several conflicting medical reports pointing towards opposite conclusions. In some cases it will be necessary for the judge to completely discard one medical report over the other. While this can sometimes be done based on pure logical reasoning, the judge will often be required to evaluate the entire examination procedure and the conclusions of the medical professional in order to properly determine the probative value to be afforded a certain report.

It is therefore only natural that many of the tribunals have introduced more or less formalised criteria to guide the evaluation of medical evidence. This tendency is most visible in the European and the Inter-American systems where the tribunals will frequently revert to either formalised standards or court established criteria when deciding either on direct violations or in their evaluation of the domestic fact-finding procedure. While difficult to confirm, the evaluation of

medical evidence seems to be stricter when it is introduced by the state than when introduced by the applicant. The African and the UN system is noticeably more closed in its proceedings and deliberations, which makes it difficult to determine if they base their evaluation on fixed criteria or strictly on sound criticism. In the UN system the Committees do seem to utilise, as a minimum, some broadly framed criteria for evidence evaluation.

Here, the tribunals are faced with a similar problem to that described above relating to re-evaluation of evidence. The tribunals will have to prioritise between the flexibility of *sana critica* and the reliability and effectiveness of utilising more fixed criteria.

4.7.3. Criteria for evaluation of forensic medical evidence

The process of evidence evaluation is essentially an exercise to determine whether a specific piece of evidence can be considered by the tribunal and how much probative value it will be afforded. However, the international human rights tribunals have generally avoided conducting separate admissibility considerations and instead subsumed the admissibility considerations in the determination of probative value. This means that if a piece of evidence is deemed unreliable, the tribunal can either choose to disregard it entirely or afford it a lesser probative value. This weighing of the evidence will eventually lead to a tribunal decision as to whether the applicant has sufficiently substantiated his claim or not. The availability of medical evidence is not a prerequisite for the successful substantiation of a claim but it will often be an important element. In the absence of medical evidence the main factor determining the outcome are the specificity of the allegations held against the diligence of the domestic investigation.¹⁷¹ In cases

where medical evidence is produced, the key determining factor is whether that evidence establishes a causal link between injury and allegation with a sufficient degree of certainty. If this is not the case, the tribunals will usually limit themselves to finding a procedural violation.¹⁷¹

The level of distinction between documentary evidence and expert opinions varies greatly between the tribunals with the Inter-American system employing a much clearer distinction than the rest. The criteria utilised for evaluating documentary medical evidence have certain common features in most of the tribunals. The tribunals will generally seek to evaluate whether the domestic investigation process was carried out in a way which ensured a prompt, independent and effective examination of the alleged victim. Some of the disqualifying elements that have caught the tribunals' attention are time gaps between the alleged incident and the medical examination, examinations conducted in the presence of law enforcement personnel, and cursory or group examinations. When the tribunals evaluate expert opinions, they do not seem to employ a clear distinction between admissibility considerations and evaluation of probative value, which lead to the utilisation of criteria encompassing both elements. There seem to be a tendency for the tribunals to focus on three elements: The independence of the expert; the qualifications of the expert; and the quality of the analysis contained in the opinion. It is especially interesting to note that the European and Inter-American systems seem to

afford the Istanbul Protocol a key role in the evaluation of the quality of an expert analysis as indicated by the extensive focus on the coherence of the conclusions and the establishment of a causal link between allegations and the documentary evidence. Furthermore, a case before the Inter-American court saw an Istanbul Protocol based challenge to an expert's qualification. Another interesting feature of the Inter-American system is the expansion of the qualification criterion to also cover non-academic expertise such as that gathered through prolonged personal experience.

In addition to these commonly used and relatively broad criteria, the European system, the Inter-American system and the UN Committees have all made reference to the Istanbul Protocol but in very different ways. The ECHR seems to be moving towards consistently utilising the Istanbul Protocol as a minimum standard for assessing medical evidence. This at least applies to state produced evidence where the Court has dismissed medical reports for not being in accordance with the Istanbul Protocol and CPT standards. The Inter-American Court has stopped just short of utilising the Istanbul Protocol as a standard for assessing evidence. Instead it is used as a reference tool for evaluating expert opinions, as a training tool and as a benchmark for assessing the state's compliance with its procedural obligations to investigate. Notably, the Inter-American Commission has gone one step further and fully utilised the Istanbul Protocol as a minimum standard. Lastly, the UN Committees will often recommend States to implement the Istanbul Protocol through training and sometimes as a torture documentation tool but do not utilise it in their decisions.

The different tribunals have differed in their approach to psychological evidence.

171) Camille Giffard and Nigel Rodley, *The approach of international tribunals to medical evidence in cases involving torture*, in Michael Peel and Vincent Iacopino, *Greenwich Medical Media Limited* (2002) pp. 27-30.

The Inter-American system seems to fully accept psychological evidence and will often hear such evidence both in relation to the merits and the subsequent determination of reparations. The European Court has been a little more conservative in its approach and has generally avoided commenting on the probative value of psychological evidence. However, in a recent case the ECHR found a violation solely based on psychological evidence collected in accordance with the Istanbul Protocol. While this decision has limited prejudicial value, it is an indication of an increased willingness to give effective consideration to such evidence. The Committee against Torture has also seen psychological evidence on several occasions both relating to procedural and substantive violations, but it is unclear how the Committee determines its probative value.

While all tribunals have consistently rejected using formalised criteria, it is clear that the evaluation of medical documentary evidence and expert opinions is moving towards an increased utilisation of informal criteria to guide the process. Especially in the European and Inter-American systems, these criteria seems to be largely similar to those elaborated in the Istanbul Protocol and decisions often make specific reference to the Protocol. The question is how far the tribunals can go in utilising fixed criteria without officially departing from the principle of free evaluation of evidence.

4.7.4. The use of oral hearings

The extent to which oral hearings are used varies between the tribunals depending on their mandate and logistical considerations such as availability of resources and the amount of cases pending before a tribunal. In addition to oral hearings, some of the tribunals can also conduct fact-finding missions but this procedure is rarely resorted to.

Only the regional tribunals will practically hold oral hearings and the starting point of these is an inquisitorial procedure under the control of the tribunal. However, in practice, all three regional systems allow some level of adversarial elements during the hearings. Oral hearings are used very differently in the three regional systems. The Inter-American Court holds more than one hearing per case, where it will frequently hear both witness testimony and expert opinions pertaining to the merits and the assessment of reparations. Expert opinions are frequently used to determine the psychological injuries of torture victims when assessing reparations and during the merits proceedings. In the African Commission and the European Court, the focus of the oral hearings seems to be strictly on the merits and it is unclear how frequently these hearings will see expert opinions.

While the use of oral hearings is generally recommendable to ensure a proper illumination of all factual and legal questions of a case, the international human rights tribunals generally suffer from a significant lack of resources. Due to the time and resource consuming nature of oral proceedings, the use of these is limited in almost all the tribunals under review. This is an unfortunate reality since oral proceedings often play an important role in facilitating the judges' evidence evaluation. However, there are no indications that this practice will change.

5. Conclusion

It is evident that the majority of the bodies analysed are constrained by limited capacity and funding, which limits their ability to institute more effective procedures. Furthermore, the international human rights tribunals have consciously chosen to maintain a high level of flexibility in its evidence evaluation to ensure that they have the necessary

procedural freedom to reach materially correct conclusions. For these reasons, the following section will not issue specific recommendations but instead seek to identify the key issue areas where each body needs to improve its practice and procedures in order to be able to more effectively evaluate medical evidence in torture cases.

The Bodies in the Inter-American system are the ones taking the most comprehensive approach to evidence evaluation including forensic medical evidence. This is partly based in the extensive use of witnesses including expert witnesses but it is also due to the very systematic approach to evidence evaluation taken by especially the Inter-American Court of Human Rights. The main shortcoming in the Inter-American system is the absence of the explicit utilisation by the Court of the Istanbul Protocol as a benchmark for evaluating medical evidence in relation to substantive violations of the torture prohibition. It might be relevant for the two bodies in the Inter-American system to study the case law of the European Court of Human Right to draw inspiration.

While the European system has given more formal recognition to the Istanbul Protocol as a benchmark for evaluating medical evidence of torture, there are a number of other shortcomings worth highlighting. The European Court of Human Rights does not clearly distinguish between documentary and expert evidence and there is very limited use of oral expert opinions. This causes confusion in relation to how the court evaluates the different types of evidence and especially which criteria it utilises for determining expert status. This confusion is exacerbated when the Court is presented with evidence of a psychological nature and there is a clear need for the Court to pronounce it self more clearly on this issue in future judgements. Lastly, there is room for improvement in

the Court's practice in relation to reparations which are generally limited to a fixed monetary compensation. While recognising that the Court's award of reparations is done in strict observance of the subsidiarity principle, the Court may be able to draw inspiration from the case-law of the Inter-American Court of Human Rights, which has frequently utilised the Istanbul Protocol to evaluate the more exact damages suffered by torture victims.

Due to the closed nature of the procedure before the African Commission on Human and Peoples Rights and the Commission's practice of not explicitly reasoning and justifying its decisions it is difficult to identify specific shortcomings and areas for improvement. This opacity limits the development of jurisprudence, which seems to be one of the main challenges to the development of a more effective evidence evaluation. While the procedure in the UN treaty bodies is similarly closed, the judgements are somehow more elaborate and thus provide some insight into the reasoning of these tribunals. Among the key challenges faced by both the Human Rights Committee and the Committee Against Torture is the difficulty in effectively determining the facts of a case before them partly due to severe time constraints on the examination of individual cases. This difficulty is exacerbated by the absence of clear criteria for evidence evaluation and the practice of the Committee Against Torture of not using expert witnesses. The Committee Against Torture has recently established a working group on working group on evaluation of facts and evidence and it will be important for this group to look carefully at the practices from the European and Inter-American systems for inspiration.

6. Appendix

6.1. Ecuador

Carlos Poveda Moreno, J.D.*

6.1.1. Introduction to the national legal system
The Ecuadorean legal system is based in the Constitution of the Republic of Ecuador, which was adopted through a referendum in October 2008. Constitutional provisions are directly applicable and there is thus no need to codify them in secondary legislation. The Constitution prohibits torture and cruel, inhuman or degrading treatment.¹ However, up to this date, the Penal Code has not been made compatible with the international definition of torture contained in the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).² The incompatibility mainly relates to the low penalties for torture provided in the Penal Code (2-6 years)³ and the narrow scope of the definition, which does not encompass psychological forms of torture.

Ecuador ratified the UNCAT in 1988 and is therefore under an international obligation to adopt a definition and absolute prohibition of torture in its domestic law, in conformity with the Convention. The Constitution stipulates that “*Los derechos y*

garantías establecidos en la Constitución y en los instrumentos internacionales de derechos humanos son de directa e inmediata aplicación”.⁴ This principle of direct application suggests that the UNCAT’s definition of torture can invalidate the narrower definition of the Penal Code and provide a definition that complements the constitutional prohibition. However, according to the principle of *nullum crimen sine lege*, the definition is not applicable to the Penal Code, creating a situation in which the Constitution provides an exhaustive prohibition of torture without the possibility of criminal sanctions. This defect was strongly criticised by the Committee against Torture during its examination of Ecuador in 2005.⁵

To ensure an effective implementation of the prohibition, it is recommended to include a prohibition and a precise definition

1) Art. 66 (3)(c) of the Constitution of the Republic of Ecuador.

2) Art. 1 of UNCAT.

3) Art. 187 and 205 of the Penal Code.

4) Art. 11 (3) of the Constitution of the Republic of Ecuador.

5) CAT/C/ECU/CO/3.

*) University Andina Simón Bolívar,
Ecuador
consorciojuridico51@yahoo.es

of the crime of torture in accordance with international obligations. This becomes even more relevant in light of the recent ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).⁶

6.1.2. The Administration of Justice

The system for the administration of justice is structured as follows: Constitutional Court, Supreme Court of Justice, Provincial Courts of Justice with specialised chambers, Administrative and Fiscal Litigation District Tribunals, Penal Guarantees Tribunals, and Judges of First Instance specialised by theme. The Public Prosecutor's Office is responsible for investigating and prosecuting criminal offences either *ex officio* or by request with due regard to the public interest and the rights of the victim.⁷ Further it is a constitutional duty of the Prosecutor's Office to ensure the protection of victims and witnesses, and the accreditation and functioning of experts testifying to the courts.

The Ecuadorean criminal procedure is largely adversarial but several reforms have introduced some inquisitorial elements. This means that in addition to the Prosecutor's Office, the victim or his/her relatives can initiate private penal action. The Criminal procedure consists of five phases.

Pre-trial inquiry phase – This is a preliminary investigation with the objective of identifying

evidence of the existence of an offence and of the participation of alleged perpetrators and accomplices. In this stage, anticipated or pre-constituted evidence hearings can be implemented. This phase may last up to one or two years depending on the severity of the offence. During this phase, precautionary measures can be requested, such as provisional detention, which should not last more than twenty-four hours. This shall be used exclusively for investigative purposes and shall be granted by a judge of penal guarantees after an oral hearing.

Evidentiary phase – This is the stage of formal investigation. It is initiated through a hearing where formal charges are formulated, indicating concretely the type of offence that will be investigated. The Public Prosecutor sets the duration of this period. However, it should not exceed 90 days. It is possible to resort to personal precautionary measures, such as preventive detention, which should be ordered by a judge of penal guarantees after an oral hearing.

Intermediate phase – Once the previous phase is formally concluded, the judge of penal guarantees calls the participants of the proceedings to a hearing where the prosecutor will orally deliver his/her opinion with a motivated decision to accuse or not. The participants of the proceedings: The defendant and the accusing parties will be allowed to pronounce themselves on the opinion. In this hearing, the judge will eventually decide to issue an order of committal to trial, or dismiss the proceedings (definitively or provisionally).

Trial phase – This phase is governed by the principles of orality, contradiction, publicity, immediacy, celerity, the dispositive principle and procedural loyalty. In this stage, the

6) Published in the RO. 175, 28 April 2010. Executive Decree no. 309, 5 April 2010. Ratification was officially registered with the UN on 20 July 2010.

7) Art. 195 of the Constitution of the Republic of Ecuador.

Prosecutor should deliver his/her plausible claim through bringing all pertinent evidence, which may be: Material, testimonial, documentary or expert-based. The other participants in the proceedings may also request evidence. The oral proceedings will be largely controlled by the parties with the judge's role mainly focused on ensuring respect for the Constitution. Subsequently, the Guarantee Tribunal will deliberate and make a decision to either acquit or convict.⁸

Contestation phase – In this phase the parties may present an appeal either on grounds of mistake of law or fact, emergence of new evidence, procedural mistakes, and violations of Constitutional rights or due process.

Despite the insufficient domestic criminalisation of torture, victims do have some remedies available to them. They can be summarised as follows:

Constitutional remedies – Art. 78 of the Constitution provides that victims of penal offences will receive special protection measures to prevent them from being re-victimised, threatened or intimidated, particularly in the process of evidence gathering and assessment. This provision also provides for comprehensive reparation including disclosure of the truth, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The justice system has been reformed to provide better constitutional protection. This means that decisions from regular courts can be reviewed by the Constitutional Court to

ensure that Constitutional principles are upheld.⁹ This protection also covers decisions handed down in the indigenous judicial system. Further, Art. 11(9) of the Constitution provides an obligation of the state to provide remedies for all violations committed by its agents including those that are related to arbitrary detention and wrongful sentences.

Penal remedies – In addition to the constitutional prohibition, the Ecuadorian legal system contains a number of other remedies for torture victims to obtain justice. The Penal Code establishes that those responsible for a criminal offence must pay damages to the victim, but only after the respective condemnatory sentence has been determined.¹⁰ Further, the Criminal Procedure code provides an opportunity for obtaining compensation from the state for the application of wrongful sanctions in the administration of criminal justice.¹¹ Public servants may also be subject to disciplinary sanctions, which may range from fines to temporary or permanent dismissal.

The Police and Military Penal Codes codify the crime of torture in the chapters on acts against labour unions and individual liberty, but the penalties are not commensurate to the gravity of the crime. However, in accordance with the principle of jurisdictional unity enshrined in the Constitution, these actions and omissions are brought before and resolved under civilian jurisdiction.¹²

Moral damage claims against the state

8) Cfr. The system of proof assessment in Ecuador is called *sana critica*. The basis and motivation of public power resolutions is an imperative of constitutional character. Art. 86 of the Code of Penal Procedure.

9) Art. 94 of the Constitution of the Republic of Ecuador.

10) Art. 67 of the Penal Code.

11) Art. 416,417,418,419 and 420 of the Code of Penal Procedure.

12) Eighth transitory clause of the Constitution of the Republic of Ecuador.

are processed in an ordinary trial that verifies the tort responsibility of the state and/or public servants in the exercise of their functions. In this regard, the chambers of Civil and Administrative Litigation of the former Supreme Court of Justice has defined the size of monetary reparation as based on the average cost of living and the life expectancy of Ecuadoreans.¹³

The Ombudsman's Office – The Ombudsman's Office is an organ of public law with national jurisdiction, legal personality and administrative and financial autonomy. It has a decentralised structure and comprises delegates in each province.¹⁴ Its main functions are the protection and promotion of the rights of the inhabitants of Ecuador and persons with dual nationality living abroad.

Among its competences are the following:

1. The legal *representation*, ex officio or by request, of the actions of protection, habeas corpus, access to public information, habeas data, non-compliance, citizen action and complaints due to the poor quality or inadequate provision of public or private services.¹⁵
2. Implement measures of obligatory and immediate compliance in regards to the protection of rights, and request the competent authority for judgment and sanction in case of non-compliance.¹⁶
3. Investigate and resolve, within the framework of its competences, actions or omis-

sions of natural or juridical persons that offer public services.¹⁷

4. Exercise and promote the observance of due process, and prevent, and immediately halt torture and cruel, inhuman or degrading treatment in all their forms.¹⁸

The ombudsman is also working to develop a National Preventive Mechanism as required by the OPCAT and it has collaborated with Priva Foundation on developing the first handbook for prison visits in Ecuador.

6.1.3. Forensic investigations and evaluation of evidence.

In penal cases, the courts accept any type of testimonial, material, documentary, or expert-based evidence. This evidence should be introduced in the intermediate phase in which the Public Prosecutor substantiates his/her opinion. The evidence will subsequently be presented during the trial hearing in the Guarantees Tribunal. Testimonies may also be taken at an earlier phase but this evidence must still be recorded with judicial control and in observance of the immediacy, contradiction and dispositive principles. The initial intervention of medical, psychological, psychiatric or social experts is generally done during the phases before the trial, but these professionals are obliged to appear during the trial hearing to provide oral testimony before the Guarantees Tribunal. As all other evidence, it is evaluated in accordance with the principle of *sana critica* of the judge. In

13) Currently, the average cost of living is around 500 American dollars and the average life expectancy is seventy years.

14) Art. 214 of the Constitution of the Republic of Ecuador.

15) Art. 215 *Ibidem*.

16) Art. 215 *Ibidem*.

17) Art. 215 *Ibidem*.

18) Art. 215 *Ibidem*.

Ecuador, the Istanbul Protocol is not formally recognised as a standard for collection and evaluation of forensic medical evidence of torture.

The State Prosecutor's Office and the Judicature Council are responsible for directing and coordinating the activities of experts of all sciences and specialised fields.¹⁹ The selection of experts is done through an accreditation system requiring specialised knowledge in the relevant scientific field, which is validated by professional title and other related documents. The prosecutor or judge is responsible for designating experts for specific cases but *ex officio* interventions of independent and non-accredited experts may be admissible when the first professional contact with the victim took place in public or private health systems.²⁰ The Prosecutors are obligated to inform the State Prosecutor's Office about the performance of experts and experts will be required to renew their accreditation annually.

There has been a tendency for members of the Judicial Technical Police to specialise themselves in legal medicine and criminalist issues. Here, recognition of specialisation may be acquired after a prolonged and appropriately assessed course. Despite possibly being adequately trained, this practice presents serious concerns with regard to the independence of these experts who are practically and hierarchically under the authority of the National Police. This concern is a reflection of a broader concern about the overall independence and impartiality of investigations of torture allegations. The prosecutor will often delegate both the competence to investigate torture allegations and to take

custody of evidence to the Judicial Technical Police, who will often end up being investigator and suspect at the same time.²¹ This problem is exemplified in cases of extrajudicial executions in which the members of the National Police have been suspects while being tasked with the investigation of the crime and custody of the evidence.

As previously mentioned, assistance and protection to victims and witnesses is the responsibility of the State Prosecutor's Office, which has specified the support to be provided in a separate regulation. However, these measures are incapable of providing the necessary protection. There is no possibility for identity change and the persons assigned for protection are from the very same police, who are often the primary suspect.

6.1.4. Conclusions and recommendations

Despite certain defects in the judicialisation of torture crimes, the juridical framework does provide measures for torture victims to exercise their rights. However, in practice, torture victims in Ecuador are very far from having practical access to these rights. From an overall level, the adversarial nature of the criminal procedure makes it difficult for persons with limited financial means to participate effectively in the process. Further, fear of reprisals may prevent their appearance in court to provide testimony. In order to remedy these deficiencies, the Government of Ecuador should ensure the adoption of a definition of torture in the Criminal Code, which is compatible with Article 1 of UN-CAT. This especially relates to increasing severity of the penalties and broadening the scope of the crime to include psychological

19) Executive Decree No. 977, 21 December 2005. Substitutive Regulation in lieu of the Regulation for Accreditation System of Experts.

20) Art. 95, para. 2 of the Code of Penal Procedure.

21) Art. 216 no. 8 *Ibidem*.

torture. Further, it must provide effective support measures to victims and witnesses including legal aid and protection from reprisals.

The lack of independence in almost all phases of a torture investigation constitutes a key obstacle to ending impunity for torture in Ecuador. There is a system of experts available to inform the criminal investigation but unfortunately most experts are hierarchically placed under the National Police, which raises serious concerns about their ability to perform independently. Similar concerns apply to the chain of custody and the investigators. To eliminate these serious shortcomings, a judicial reform process should be undertaken with the objective of removing investigative responsibilities in torture cases from the police and to allow for personally and structurally independent forensic medical examinations of all alleged torture victims. More specifically, the Judicial Technical Police should become part of the State Prosecutor's Office and no longer be under the authority of the National Police.

One tool to ensure effective investigations, the Istanbul Protocol, is still mainly used for training and has not yet been institutionalised as a standard for effective investigations and evidence assessment. This institutionalisation should be made a priority and be complemented by the training of the police, judicial and penitentiary servants, as well as doctors and psychologists, on how to document torture in accordance with the Istanbul Protocol. This process should aim at ensuring that all alleged torture victims receive a prompt, effective and independent medical examination to ensure a proper evaluation of their claims.

To fully eradicate torture in Ecuador, it is necessary to address both the historical and thematic context of torture in Ecuador.

First, it is essential that the recently finalised investigation by Ecuador's Truth Commission results in judicial proceedings providing full and effective reparations for victims of systematic and institutionalised human rights violations including torture committed by the Government of Ecuador. Second, the Government of Ecuador should effectively implement the recommendations of the Special Procedures of the Organisation of American States and the UN Human Rights Council relating to issues of detention and extrajudicial executions since these violations are closely connected with the practice of torture. In addition to these legislative and practical initiatives, the Government of Ecuador should announce and implement a public campaign of no tolerance for torture and related offences to ensure that this message resonates through all relevant government agencies.

6.2. The Philippines

Ibarra M. Gutierrez III, L.L.M.*

6.2.1. Introduction to domestic legal system
Due to several periods of colonial rule in the Philippines, the legal system has developed as a mix of common and civil law, which has resulted in a general practice of codifying laws, which remain subject to the interpretation of the judiciary. The 1987 Constitution is the supreme law of the Philippines and it provides that the judicial power is vested in the Supreme Court and subsequently all other courts established by law.¹ This power includes the promulgation of procedural rules directing the conduct of proceedings before lower courts.²

The Philippines acceded to UNCAT in 1986 and it is thus under an international obligation to adopt a domestic definition and an absolute prohibition of torture in accordance with UNCAT.³ In addition to a constitutional provision⁴ this obligation is observed in the recent “Anti-Torture Act of 2009”.⁵ While this law largely provides a criminalisation of torture in accordance with UNCAT, it does have a few notable shortcomings. The requirements for forensic medical examinations prescribe standards,

which fall short of those provided by the Istanbul Protocol on several accounts. Particularly problematic is the public nature of the forensic examinations and the lack of detail and proper conclusions required of the medical reports.⁶ Another potential problem relates to the imposition of penalties, which seems to require that the victim suffered specific physical or psychological injuries.⁷ This would exclude the possibility of punishing acts of attempted and actual torture, which have caused physical or psychological trauma unforeseen by the current law. Nevertheless, the adoption of the Anti-Torture Act is a positive step towards improved

1) Constitution, article 8(1).

2) Constitution, article 8(5)(5). The procedural conduct of all court cases is regulated by the “Rules of Court” promulgated by the Supreme Court.

3) Articles 1 and 2, UNCAT.

4) Constitution, Article 3 (12)(2).

5) Republic Act No. 9745, “An Act Penalising Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and Prescribing Penalties Therefor”, 10 November 2010.

6) Anti-Torture Act of 2009, Section 12.

7) Anti-Torture Act of 2009, Section 14.

*) University of the Philippines
Institute of Human Rights,
Philippines,
ihr.claw@up.edu.ph

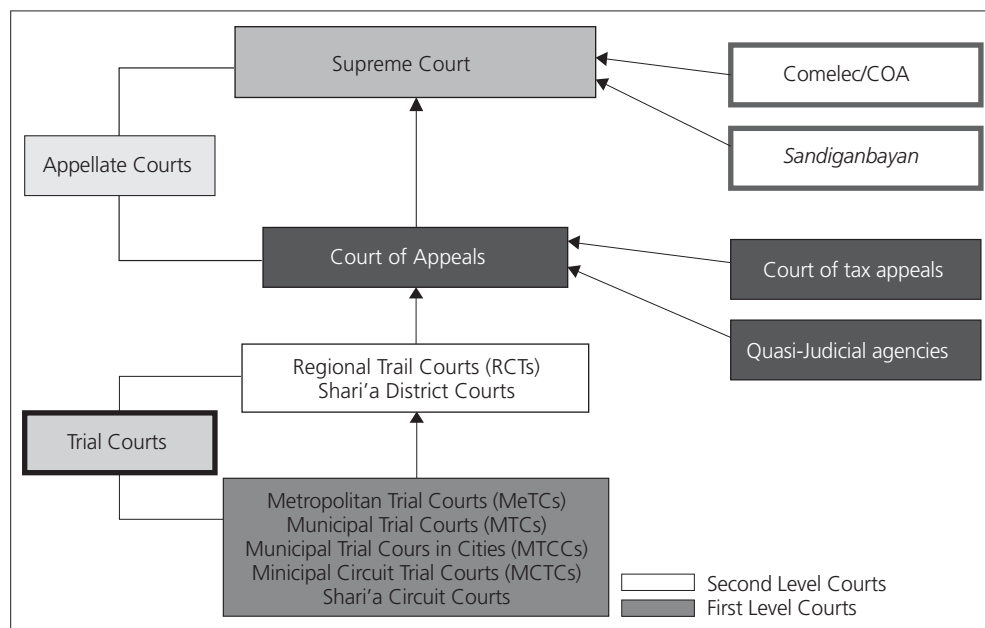


Fig. 1. Torture victims in the Philippines have several different remedies available to them.

protection and access to justice for torture victims in the Philippines.

Philippine Courts are organized according to an ascending hierarchy. At the lowest level are Metropolitan/Municipal/Municipal Circuit Trial Courts (MTCs), which exercise original, trial-level jurisdiction over civil cases involving small monetary claims and minor criminal offenses. At the next level are the Regional Trial Courts (RTCs), which exercise original jurisdiction over all other civil and criminal cases that fall beyond the scope of the MTCs. This is followed by an intermediate appellate level, the Court of Appeals, which handles initial appeals from the trial courts. At the top is the Supreme Court, the court of final appeal.⁸

8) See Batas Pambansa Blg. 129, or the Judiciary Reorganization Act of 1980

6.2.2. Remedies

Criminal remedies – under the Anti-Torture Act, victims of torture may initiate criminal investigations against suspected perpetrators. Initially, these criminal complaints are brought before the prosecutorial service, which conducts a preliminary determination of the strength and/or validity of the complaint. If it finds sufficient grounds to prosecute, a criminal case will then be brought before the Regional Trial Court.⁹

Civil remedies – under Philippine Law, when a criminal action is instituted, the civil action for recovery of civil liability for the same offense is deemed automatically instituted along with it.¹⁰ However, victims may also

9) Revised Rules of Criminal Procedure, rule 112.

10) Revised Rules of Criminal Procedure, Rule 111.

file civil claims for damages directly with trial courts without the intervention of the national prosecution service.¹¹

Administrative remedies – in addition, the Office of the Ombudsman, an independent agency tasked with ensuring good government and oversight over public officials, may receive complaints against respondents who are public officers, e.g. police or military personnel. The Ombudsman may then initiate administrative cases, i.e. involving suspension or dismissal from the service, or criminal cases against these respondents.¹² Unfortunately, the Ombudsman's institution is described as lacking independence and largely inactive in implementing its mandate.¹³ While the Commission on Human Rights is empowered to conduct investigations into alleged violations of civil and political rights¹⁴ it is not granted the authority to impose criminal or administrative sanctions on persons it finds liable as a result of such investigations.¹⁵ At best it can only refer its findings to the appropriate agency, typically the national prosecution service or the Ombudsman.¹⁶

The Criminal procedure in the Philippines is a mix between inquisitorial and adversarial elements. Complaints are initiated by the victims and reported to the national

prosecution services or the Ombudsman's office for further investigation. This investigation is largely conducted in accordance with inquisitorial principles but does allow the accused to present contravening evidence.¹⁷ Conversely, the actual trial procedure is based on an adversarial procedure but with some procedural control exercised by the Court such as the possibility to pose clarifying questions.¹⁸ The evaluation of evidence is conducted in accordance with the general rules provided by the Rules of Court¹⁹ and specifically elaborated rules such as those guiding evaluation of DNA evidence. However, in practice, the Courts still largely rely on the principle of free evaluation.

Besides initiating the criminal investigation, the main role of the victim in criminal proceedings is to provide testimony to the Court. Further, the victim may participate as an intervener in relation to claims of civil damages which are directly linked to the criminal case.²⁰ In this capacity, the victim is allowed to participate actively in the procedure including through the submission of evidence. If the victim has resolved to only seek civil damages, the case will be processed in accordance with the civil procedure where the victim is a natural part. Some free legal aid schemes are avail-

11) Revised Rules of Criminal Procedure, Rule 111 in relation to Rule 2 of the 1997 Rules of Civil Procedure, Article 20-21 and 2176, Civil Code of the Philippines (Republic Act No. 386), and Article 100, Revised Penal Code.

12) Republic Act No. 6770, the Ombudsman Act of 1989.

13) Alston, paras 56-58.

14) Constitution, Article XIII, Section 18(1).

15) *Cariño v. Commission on Human Rights*, G.R. No. 96681. 2 December 1991.

16) *Ibid.*

17) Revised Rules of Criminal Procedure, rule 112.

18) Revised Rules of Criminal Procedure, rule 119(11).

19) Rule of Court, rules 128 – 134.

20) Rule of Court, rule 110(16).

able through the Public Attorney's Office. Furthermore, the Commission on Human Rights is mandated specifically to support torture victims in the investigation of the crimes committed against them.²¹

Witnesses and victims are currently protected by a general witness protection scheme and, in addition, the new Anti-Torture Act clearly stipulates the right of victims, witnesses and other persons related to a case to receive sufficient protection by relevant government agencies. Unfortunately, the law does not address more specifically how such protection should be provided and how to address the inherent problem of threatened groups not trusting state authorities. Both local actors and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions describe the system as deeply flawed.²²

6.2.3. Forensic investigation and evaluation of evidence

The Courts generally accept medical evidence of both a physical and psychological nature. Medical evidence can be introduced at the investigation stage and during the actual conduct of the trial.²³ However, no new evidence can be introduced on appeal. The introduction and evaluation is governed by the Rules of Court²⁴ and through specialised legislation such as the Rule on DNA Evidence. Forensic examination related to criminal investigations is conducted primarily by the Philippine National Police

(PNP) through its Scene of the Crime Operatives (SOCO), and the Crime Laboratory Service.²⁵ Forensic services may also be provided by the National Bureau of Investigation (NBI), an agency under the Department of Justice,²⁶ the Commission on Human Rights (CHR),²⁷ an independent agency tasked with protection of human rights, and other government laboratories, such as the DNA laboratory of the University of the Philippines. In addition, victims of torture may obtain an independently collected medical report, which can be submitted in connection with the original act of denunciation. It is, however, unclear whether such evidence will be relied on by the prosecution. Personnel conducting forensic examinations are almost invariably members of the law enforcement service – police officials or government agents. They are employed by the state and are under the supervision and control of government officials such as the Director-General of the Philippine National Police or the Secretary of Justice. All their work is subject to the review and approval of these superior officers.

This lack of formal and practical independence from the institutions most likely to be subject of a torture inquiry poses a significant obstacle to ensuring effective medical examinations. In addition to lacking independence, the forensic services also suffer from a significant lack of capacity, especially outside Manila.²⁸ This forces the investigating authorities to largely rely on eye-witness

21) Anti-torture Act of 2009, section 11.

22) Alston, paras 52-54.

23) Rules of Court, rule 112.

24) Rules of Court, Rules 128 – 134.

25) Republic Act No. 8551.

26) See Republic Act No. 157.

27) Article XIII, Section 17 of the Philippine Constitution.

28) Alston report, para 55.

statements, which are often not available due to the lack of security for witnesses and victims. With investigating authorities afraid of suffering reprisals from the original perpetrators, the lack of documentary and testimonial evidence offer a good excuse to close most investigations at the investigatory stage.²⁹ This problem is exacerbated by the absence of a truly independent authority with a general mandate to investigate allegations against public officials.³⁰

The general introduction and evaluation of evidence is regulated in the Rules of Court.³¹ The main admissibility criteria is a requirement for relevancy of the evidence meaning that it must have such a relation to the fact in issue as to induce belief in its existence or non-existence.³² There are no explicit rules regulating the general evaluation of evidence, which suggests that this will be done in accordance with the principle of free evaluation unless more specific rules are provided in special legislation. Forensic medical evidence is categorised as expert opinion and may be collected and introduced by both government and private medical experts, whose expert status will be evaluated by the Court during the trial.³³ In order for an expert opinion to be admissible, the proposed expert needs to establish that he/she possess the necessary special knowledge, skill, experience or training.³⁴ Such expertise does not have to be acquired through

academic studies but can also be obtained through practical experience.³⁵ This can be shown through the submission of a curriculum vitae and corresponding documents to prove that the person possess the relevant expertise. There is no general regulation of how to evaluate expert evidence. However, one might find inspiration in the rules regulating DNA Evidence.³⁶ The following general considerations for assessing probative value can be subtracted from the specific rules in relation to DNA evidence: Authenticity; scientific validity of the testing procedure used in the specific case; qualifications and credibility of the examining institution and the individual expert conducting the examination; and the general reliability of the testing methods utilised.³⁷ These considerations are also confirmed by domestic case law dealing with non-DNA evidence.³⁸ The evaluation will be conducted by the Court during the hearing of the expert witness and it is largely the responsibility of the two parties to the case to bring the relevant challenges during examinations and cross-examinations of the witness.³⁹ In 2008 the Supreme Court issued a decision in a landmark torture case. One of the main pieces of evidence relied on by the Supreme Court was a forensic medical examination of the victims conducted in accordance with the Istanbul Protocol. In this case, the Supreme Court affirmed the high value of fo-

29) Alston report, paras 50-59.

30) As described above relating to the ombudsman.

31) Rules of Court, Rules 128 – 134.

32) Rules of Court, Rule 128(3+4).

33) Rules of Court, Rule 130, sections 48-50.

34) Rules of Court, Rule 130, section 49.

35) *People v. Rubio*, G.R. No. 66875, 19 June 1986, 142 SCRA 329.

36) Rules on DNA Evidence.

37) Rules of DNA Evidence, section 7.

38) *People v. Rubio*, G.R. No. 66875, 19 June 1986, 142 SCRA 329.

39) *People v. Rubio*, G.R. No. 66875, 19 June 1986, 142 SCRA 329.

rensic medical examinations and recognised the expertise of the medical expert partly on the basis of his adherence to the Istanbul Protocol.⁴⁰ It remains to be seen whether domestic courts and authorities will follow this up with a more systematic use of the Istanbul Protocol for documenting torture as recommended by the UN Committee Against Torture in May 2009.⁴¹

6.2.4. Conclusions and recommendations

Despite significant problems with regard to the effective prosecution of torture cases in the Philippines, certain positive developments have taken place in recent years. Especially, the adoption of the Anti-Torture Act in late 2009 is a significant improvement of the protection against torture in the Philippines due to its explicit criminalisation of torture. The next phase for increased protection against torture is the effective implementation of the law. Forensic medical documentation plays an important role because it can help victims in providing courts with effective proof of their allegations. While some structures are already in place to provide effective access for victims to forensic medical examination, the present analysis has identified a number of deficiencies. These must be remedied in order for torture victims to enjoy effective access to bringing forensic medical evidence of torture before domestic courts.

The pre-trial investigation procedure suffers from significant deficiencies, which prevents many cases from ever reaching the courts. The lack of forensic medical capacity, the fear of victims and witnesses to testify,

and the reluctance of the investigating authorities to prosecute create an environment where it is very easy to discard cases even before they reach the courts. In addition to improving the protective measures for all parties involved in cases against public officials, it is advisable to increase the availability of forensic services in all parts of the country and to establish a functional independent body mandated to investigate all allegations against public officials.

While the legislative framework saw significant developments with the Anti-torture Act, there is still room for improvement. In practice, the judiciary should utilise their mandate to interpret the codified legislation to ensure that adequate penalties are provided for all acts of torture whether specifically mentioned in the law or not. Further, the forensic medical services should not limit their examinations to the standards provided by the Anti-Torture Law but instead conduct full Istanbul Protocol compliant examinations in all cases of torture allegations. Lastly, torture victims must be given the opportunity for a confidential medical examination where the report is only made public with the express consent of the victim. Many of these deficiencies can be remedied through the elaboration of adequate Implementing Rules and Regulations accompanying the new law.

Similar to the general investigations services, the official forensic medical services also suffer from a lack of independence. Combined with the reluctance to utilise independent medical experts, this severely limits the access to such examination in

40) The Secretary of National Defense, the Chief of Staff, Armed Forces of the Philippines, petitioners, vs. Raymond Manalo and Reynaldo Manalo, respondents, G.R. No. 180906, 7 October 2008.

41) CAT/C/PHL/CO/2, para 20.

most geographical locations in the Philippines. At the outset, the Government should ensure that all state forensic services enjoy structural independence from the authorities that they might find themselves investigating – notably the police and the army. This could be done by moving these services from the control of the Department of Justice to the Department of Health. Furthermore, it should consider to invest in civil society actors either through financial support or the creation of a roster of recognised independent experts who can be commissioned on a consultancy basis to conduct the necessary examinations.

While the Philippines court system faces serious problems such as prolonged case processing and allegations of corruption, at least the higher courts seem to be relatively well equipped to evaluate forensic medical evidence. However, there are still improvements to be made. The Courts could facilitate the active participation of victims and witnesses through a more speedy and effective process and through being more accommodating to physical relocation to court meetings.⁴² Further, the Courts continue to develop their case law on evaluation of forensic evidence through an increased utilisation of the Istanbul Protocol. This might have a positive effect on the conduct of investigating authorities.

The initiatives proposed above would significantly improve the access of torture victims to adequate medical examinations and to bring formal complaints of torture without having to rely on authorities that they might not trust or that might present a continuing threat to them. Furthermore, it

will ensure that future improved investigations will not only help the victims access reparation but also ensure that perpetrators are brought to justice and thus discourage potential future perpetrators from crossing the line.

42) Alston, para 59.

6.3. Uganda

Charlotte Oloya, LL.M.*

6.3.1. Introduction to domestic legal system, court structure and available remedies

The legal system in Uganda is a Common Law system with elements of African customary law. The hierarchy of legal sources is stipulated as follows in the Judicature act:¹ Statutory law, common law and doctrines of equity, and customary law. The Constitution is the supreme law in Uganda and any law or custom that is in conflict with it will be considered null and void to the extent of the inconsistency.² Uganda has adopted three constitutions since its independence, with the most recent being the 1995 Constitution. Legal reporting in Uganda has been very weak and thus very few law reports have been published in Uganda since 1958. The Law Development Center Uganda is mandated to prepare and publish law reports and other legal materials³ but so far they have published only High Court Bulletins.⁴ As a result there has been a void in the availability of published judgments as lawyers and other stake holders are forced to depend on photocopies of judgments which they request from the Courts.⁵

Uganda acceded to UNCAT in 1986 and it is thus under an international obligation to adopt a definition and an absolute prohibition of torture in accordance with the

1) Section 14, Judicature Act cap 13 Laws of Uganda.

2) Article 2 Constitution of the Republic of Uganda, 1995.

3) <http://www ldc.ac.ug/homepage/index.php/component/content/article/1-latest-news/6-vision.html> last accessed 27th August, 2010.

4) The first law reports to be published were 1971-1972 Uganda Law Reports. A third volume of 1973 was worked upon but Volume 1 has been published. However, in 1998, the Centre was accredited to carry out editing and publishing of the Uganda Law Reports from 1958 – 1994 (first phase). Publication of the manuscripts for the period 1958 – 1977 and the subsequent volumes of the Law Reports is expected to be funded under the Justice, Law and Order Sector (JLOS). The Department compiles and edits the High Court Bulletin (HCB). The Bulletin contains digests of judgments from the superior courts of record i.e. High Court, Court of Appeal and the Supreme Court, that are of legal importance. The Department has produced the Bulletin since 1968. Further to the above, the Department prepares a Consolidated Index of Judgments and cases reported in the Bulletin for ease of reference. <http://www ldc.ac.ug/homepage/index.php/law-reportings.html>

5) <http://www.nyulawglobal.org/globalex/uganda.htm> (last accessed August 30th, 2010.)

*) African Center for Treatment and Rehabilitation of Torture Victims, Uganda
legal@actvuganda.org

Convention in its domestic law.⁶ While torture is prohibited in the Constitution,⁷ the terrorism act⁸ and the police act,⁹ these laws are not in compliance with the requirements in UNCAT. The terrorism act only applies to authorised officers who are designated by the minister and expires after ninety days¹⁰ and the police act only prohibits the admission of severely tortured persons in bad health but does not prohibit the act of torture itself. There is no criminalisation in the Penal Code or in legislation regulating places of detention. Combined with the absence of any clear definition of torture, this makes it difficult to effectively prosecute torture offences in Uganda. This shortcoming was harshly criticised by the Committee against Torture during its 2005 review of Uganda's compliance with the Convention. Nevertheless, torture victims in Uganda do have a set of more or less effective remedies available to them. They can be summarised as follows:

Administrative remedies – the Police Act provides for the investigation by a magistrate of complaints of torture by persons in police custody and for the prosecution of persons found to be responsible following such investigation.¹¹ The Police Act also provides

for a disciplinary code of conduct applicable to all employees of the force, which inter alia criminalises unnecessary exercise of authority including the use of violence against any prisoner or person. Possible sanctions include dismissal, discharge, severe reprimand or communal labour.

Constitutional remedies – the constitution enjoins any person who feels that his rights have been violated to petition a court of competent jurisdiction for redress, which includes compensation.¹²

Criminal Remedies – while there is no explicit prohibition of torture in the Penal Code, it does prohibit various criminal offences related to causing physical injury on other persons including the excess use of force by persons mandated by law.¹³

Civil law suits and Public interest Litigation – article 20 of the Constitution expressly states that fundamental rights and freedoms of the individual are inherent and not granted by the state and that the rights and freedoms shall be respected and promoted by all organs and agencies of the government. Article 137 provides the right of any person to petition the Constitutional Court in order

6) Articles 1 and 2, UNCAT.

7) Section 24 and 44(a), Constitution of the Republic of Uganda, 1995.

8) Section 21(e) any authorized officer who engages in torture, inhuman and degrading treatment commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine.

9) Section 58(3) prohibits a police officer from taking into custody a person who has been tortured and is in bad health condition. Section 81 (2) prohibits stripping a person naked in a cell, depriving him/ her of food and administering corporal punishment and torture.

10) Section 18 Anti Terrorism act.

11) Section 25(4), Police Act Cap 303 Laws of Uganda.

12) Article 50, Ugandan Constitution. In Joseph Tumushabe Vs Attorney General (Misc Application No 63 of 2003) the applicant brought a public interest litigation pursuant to article 50 of the Constitution against the Attorney General on the basis of fundamental rights violations against a group of detainees.

13) Sections 216-252, Penal Code.

to obtain recognition and redress for acts in contravention of the Constitution. In combination these two provisions provide for both individual civil suits and public interest litigation against the government.

Uganda Human Rights Commission

– the Uganda Human Rights Commission (UHRC) is mandated to investigate, at its own initiative or at the request of any person or group, any allegation of a human rights violation¹⁴ and to order compensations or other legal remedies or redress.¹⁵ However, it cannot conduct criminal investigations or prosecutions.

The Ugandan court system consists of a Supreme Court, an Appeals Court, a High Court and several different levels of Magistrates Courts. In parallel to the regular court system, there are military and other specialised courts and the Uganda Human Rights Commission as a quasi-judicial tribunal. The initial jurisdiction in criminal cases including those relating to torture is with the Magistrates Courts with the possibility of appeal either to a higher Magistrates Court or to the High Court.¹⁶ However, since the High Court has unlimited original jurisdiction, this may also act as the first instance court in torture cases.¹⁷ In cases relating to constitutional remedies and civil suits based in the Constitution, the competent body will be the Court of Appeal sitting as a Constitutional Court. Lastly, decision made by the UHRC

relating to compensation and other forms of reparations may be appealed to the High Court. As indicated above, torture victims do have several avenues for pursuing redress, despite the absence of an effective criminalisation of torture in Ugandan law.

The criminal procedure in Uganda contains elements of both inquisitorial and adversarial systems. The Director of Public Prosecutions is formally leading investigations and prosecutions of criminal acts but the material investigations are carried out by the police. The DPP sanctions files that have been investigated by the police and advises the police on actions to be taken in particular cases. The police are required to forward police case files where offences have been committed to the office of DPP for advice on who should be prosecuted and for what offence.¹⁸ Once the office of the DPP has taken this decision, the police carry out more inquiries if required and summon witnesses and the office of the DPP conducts the prosecution.¹⁹

During the trial stage the judge will conduct a free evaluation of evidence and will exercise significant procedural control over the trial especially by ensuring that a sufficient body of evidence is available to obtain proper proof of relevant facts.²⁰ The Judge is thus mandated to summon any evidence that might be relevant to the determination of fact.²¹ This provides two venues for the introduction of independently collected forensic medical evidence, either through the

14) Article 52(1), Constitution.

15) Article 53(2), Constitution.

16) Sections 161 and 204, Magistrates Court Act.

17) Section 14, Judicature Act.

18) Article 120, Constitution.

19) http://www.dpp.go.ug/interviews_assistant.php (last accessed August 30th, 2010)

20) Article 164, Evidence Act.

21) Section 164, Evidence Act.

Director of Public Prosecution or through the trial judge.

The procedure followed by the UHRC for evaluation of evidence is less formal and significantly more flexible than the one employed in the normal criminal procedure. The procedure in the UHRC is more inspired from adversarial traditions and it is mainly the responsibility of the two parties to the case to present the necessary evidence.

Uganda currently does not have a witness protection law, which is a significant obstacle to the effective prosecution of perpetrators of torture. Witnesses are often afraid to testify and victims reporting torture allegations often find themselves harassed or arrested on false charges as a direct reaction to their complaint, which will often have to be made to the very same authorities who allegedly committed the offence.

6.3.2. The system of forensic investigation and evaluation including actors, procedure and effectiveness

Medical evidence may be introduced and utilised during all three main stages of the criminal trial: The preliminary hearings; the evaluation of facts; and the determination of reparations.²² The evidence submitted will most often be of a physical nature such as treatment notes, photographs, and a “police form 3”, which is the official medical examination report. In addition, the courts are also open to accepting evidence of a psychological nature as long as this is supported

by an expert opinion. It is usually required that the person who conducted the medical examination presents the findings in court but the law opens the opportunity for other persons presenting and interpreting evidence if the original author is not reasonably available.²³

The main body responsible for forensic medical examinations in Uganda is the Government Analytical Laboratory (GAL) under the Ministry of Internal Affairs. The GAL is mandated to assist in criminal investigations and trials through examination, analysis and comparison of exhibits and samples by application of the relevant branches of science.²⁴ This function is carried out partly by pathologists attached to Makerere University, by pathologists and medical officers employed by the government and by medical officers attached to hospitals. In Uganda, all types of unnatural deaths will be investigated through medico-legal post mortem reports. There are currently five qualified forensic pathologists in Uganda.

While it is envisaged that the GAL will conduct forensic medical examinations, the Trial on Indictments Act provides that any person who appears to be in possession of material evidence can be called to submit the evidence of witness in court. This seems to effectively open the possibility of introducing independently collected forensic medical evidence to the extent that the court finds this relevant. However, there are indications that the investigative authorities, especially the police, prefer to rely on their

22) Sections 33, 66 and 126, Trial on Indictments Act.

23) Section 30, Evidence Act. In the case of *Tibahika Johnson Vs Uganda CRIMINAL APPEAL No.38 OF 2001* the judges relied on the evidence given by the medical doctor who had not exam-

ined the patient in the absence of the doctor who had examined him.

24) Website of Government Analytical Laboratory (http://www.mia.go.ug/page.php?1=about_gal&&2=About%20GAL).

own medical examiners and are generally reluctant to allow any independent examination. Furthermore, the availability of police medical examiners and alternative forensic medical expertise is limited, which severely impedes victims' access to proper forensic medical examinations. This situation is further exacerbated by a wide spread practice of police charging victims for the "police form 3" and medical examiners charging for the subsequent examination.

As an exception to this general situation, the adversarial nature of UHRC cases allows the victim to present his own evidence before the tribunal. While this approach gives the victims more flexibility, it is dependent on the victim's ability to pay for or otherwise obtain the necessary forensic medical examinations. In practice, experts from the African Centre for Treatment and Rehabilitation of Torture Victims (ACTV) frequently conduct such examinations in accordance with the Istanbul Protocol and provide evidence and testimony to the UHRC.

Determination of expert status

Expert evidence is recognised as an integral part of evaluation of fact and it is frequently used in the criminal procedure and in cases before the UHRC.²⁵ More specifically, medical expert evidence is a common feature in all cases involving assault and death and the domestic courts thus have good experience with evaluating such evidence. It is unclear to which extent non-government experts can collect and present expert evidence since the procedural regulation of the Magistrates and High Courts only focus on Government

experts,²⁶ while the Evidence Act deals with expert opinions in General.²⁷ Since none of the texts provide a specific exclusion of the use of non-government experts such opinions must be assumed to be admissible, in theory. This assumption is also supported by the general right of the judges to request any evidence they deem necessary to establish the facts of a case. Based on the evidence act, the basic requirement to qualify for expert status seem to be the possession of specialised skills within the relevant area of science.²⁸ This should prompt the court to require the expert to demonstrate his qualifications and experience before the court. While the courts are formally open to expert evidence presented by both government and non-government employed experts, there seems to be a general reluctance among non-government experts to provide evidence due to the fear of appearing in court.

6.3.3. Conclusions and recommendations

Despite the absence of an effective criminalisation of torture, several legal remedies are available to torture victims in Uganda. However, these are mainly of a civil nature through civil law suits, public interest litigation and the UHRC. In the criminal procedure, torture victims are left with the option of seeking prosecution for other less serious offences that might have been committed as a part of the torture. While adequate reparations is an important remedy for torture victims, it has very limited preventive effects and it is therefore crucial that Uganda adopts an effective criminalisation of torture in its domestic law through a clear definition

25) Section 43, Evidence Act.

26) Section 42, Trial on Indictments Act and Section 103, Magistrates Courts Act.

27) Section 43, Evidence Act.

28) Section 43, Evidence Act.

and the specific prohibition of the offence in the penal code.

Another aspect with severe implications for the fight against impunity for torture in Uganda is the lack of adequate measures to protect victims and witnesses speaking out against perpetrators. Denunciation of torture will usually have to be done directly to the police, which will often be the same persons who committed the offence. This, in combination with the frequent harassment and unjustified re-arrest of persons reporting abuse is an important dissuading factor. Furthermore, there is no domestic law on protection of witnesses, which prevents this group from providing the necessary evidence to effectively prosecute the perpetrators. This is also a valid concern for non-government employed doctors who are reluctant to present their medical evidence in courts due to fear of reprisals. The Ugandan authorities should ensure that adequate legal protection is afforded to all victims and witnesses and that the right to report instances of torture is made effective through the establishment of an independent body mandated to receive complaints about the conduct of public officials.

Forensic medical evidence is an essential part of proving torture and the domestic legal system and the judiciary are relatively well equipped to ensure an effective introduction and evaluation of such evidence. There are, however, significant problems in ensuring that all victims have access to forensic medical documentation of an adequate quality. These problems are mainly related to a very low capacity of government forensic services, the de facto obstacles to introducing independently collected medical evidence and the wide spread practice of demanding payment for the necessary medical forms (police form 3) and for the forensic medical examination. While the problems

relating to the capacity of government forensic medical services may be difficult to address due to economic restraints, it would be advisable for the Ugandan government to ensure that all torture victims have the opportunity of selecting an expert of their own choice to conduct the medical examination and present the evidence in court. Furthermore, the government of Uganda should ensure that all forensic medical investigations of torture allegations are conducted in accordance with the principles of the Istanbul Protocol and that adequate examination forms are widely available for free.

The initiatives proposed above would significantly improve the access of torture victims to adequate medical examinations and to bring formal complaints of torture without having to rely on authorities that they might not trust or that might present a continuing threat to them. Furthermore, it will ensure that future improved investigations will not only help the victims access reparation but also ensure that perpetrators are brought to justice and thus discourage potential future perpetrators from crossing the line.

6.4. Lebanon

Jad Tohme, L.L.M.*

6.4.1 Introduction to domestic legal system, court structure and available remedies

Lebanon acquired the main elements of its judicial and legal system under the French mandate (1920-1943) and has retained most of them to date. The system is dominated legally by the centrality of codes, following the pattern of the so-called “civil law family”, as apposed to common law as in the United Kingdom and the United States. The Lebanese equivalent of the French Civil Code is the Code of Obligations and Contracts of 1932, and there are similar pieces of comprehensive legislation in such fields as civil and criminal procedure, commercial and criminal law. Other areas are also codified, notably land law, where the statutes are less comprehensive. As in France, a special area of administrative law involves most rules dealing with the administration as *Puissance*, and is developed by a separate system of tribunals known as administrative tribunals.

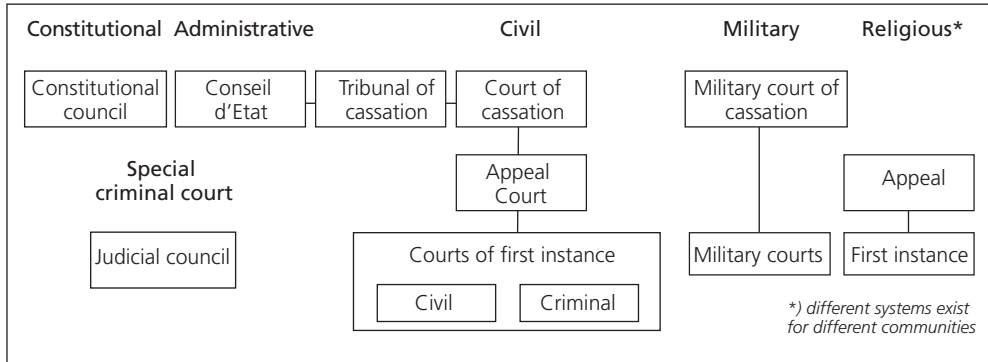
There are two judicial systems in the hierarchy of courts: The civil system, which includes criminal, commercial and civil courts, and which is headed by the court of

Cassation; and the Administrative system, at the core of which sits the *Conseil d’Etat*, which is comprised of six chambers. Alongside these courts is the military judicial system, which was traditionally confined to matters involving military personnel in the call of duty. Military tribunals must, in theory, deal with cases involving the armed forces.

When the Lebanese war started in 1975, the judicial system was the first victim of the collapse of law and order. In the ill-fated period of peace lasting from October 1982 to June 1983, the search for legitimacy and the concomitant effort of the judiciary to catch up with changes in society resulted in the rapid redrafting and passing of numerous “decree-laws”. Several of Lebanon’s central codes (notably in civil and criminal law) date from that period, but the legitimacy has been slowly reasserted since 1990. Following the long war, major constitutional revisions were adopted. This represented the first important revision of the Constitution since the independence in 1943. As regards the judiciary, the most remarkable change was the creation of a Constitutional Council.

Depending on the pecuniary importance of a case, first-degree courts consist either of one judge or of a bench of three judges. There are five chambers in Beirut plus one or more chambers in each of the six gov-

*) Restart center for Rehabilitation of Victims of Violence and Torture, Lebanon
info@restartcenter.com



The Civil jurisdiction takes the form of a pyramid.

ernorates. The Court of Appeals consist of two or more appellate chambers. The Court of Cassation, composed of eight chambers, sits in Beirut. This is the highest court for all civil law cases, which includes criminal, commercial law and some personal status matters for non-Muslim communities). The Court of Cassation also provides the judges for a newly-activated court known as the “Judicial Council”, which operates as an original and final jurisdiction for especially sensitive criminal offenses of a political nature. Criminal expertise is otherwise included under “Civil” jurisdiction in special chambers, which deal with crimes. The state is represented by the public prosecutor’s office, together with investigative judges. There is no jury system in Lebanon.

In rare cases of jurisdictional uncertainty or conflict between administrative and civil jurisdictions, a tribunal of conflicts composed of judges from the Court of Cassation and from the Conseil d’Etat solves the issue of competence. Special tribunals include military courts (of First Instance and Cassation), Labour tribunals, and personal status for matters of family law, which are the prerogative of each of Lebanon’s recognized religious communities (these tribunals deal

with the questions of marriage, divorce, custody, inheritance and wills). A superior judicial council is presided over by the first president of the Court of Cassation, and is responsible for the smooth internal functioning of the judiciary. It does not include administrative judges.

The Civil Procedure Code (Ci.P.C) provides that any international treaties ratified by Lebanon are directly applicable in the domestic legal system and these treaties will be considered superior to domestic laws in case of conflict. Lebanon ratified the UNCAT on October 5, 2000 under the Law 185, which means that civil courts can rely on the provisions of UNCAT in domestic torture cases. The Criminal Procedure Code (Cr.P.C) and the Penal Code contain no explicit prohibition of torture but the Cr.P.C prohibits physical or moral violence during interrogations. The Lebanese Penal Code features some violations, which could cover acts of torture such as unlawful deprivation of liberty¹ and extortion of a confession by unlawful means.²

1) Penal Code, Article 569

2) Penal Code, Article 401

Two key remedies are available to torture victims wishing to seek justice: The criminal procedure where a victim can ask for prosecution of the perpetrator or the civil procedure where the victim asks only for compensation. However, in both cases the victim will face difficulties of providing the necessary evidence. If the victim proceeds in the civil procedure and then asks for criminal prosecution of the perpetrator, the civil court will freeze the case until the criminal court announces its decision in the case, but the victim also has the opportunity of requesting civil compensation as an integral part of the criminal procedure.³ Lebanon has not recognised the right of individuals to submit complaints under any of the international frameworks such as UNCAT or ICCPR and since there is no regional human rights system, torture victims in Lebanon have no access to international judicial remedies.

6.4.2 The System of forensic investigation and evaluation including actors, procedure and effectiveness

The Cr.P.C gives any person in custody the right to be examined by a doctor and allow for the criminal judge to ask for a doctor's help.⁴ In principle this doctor must be a forensic doctor. At the investigation level, this measure must be requested from the general procurator and during the trial stage from the presiding judge. However, in practice, the authorities are not responding positively to requests for the exercise of this right.

Medical evidence of both physical and psychological nature is generally accepted in criminal proceedings but there is no specific

elaboration on how to evaluate this type of evidence. In practice, the courts will often make use of physical evidence, while evidence of a psychological nature is rarely or never used. Both the victim, the accused and third parties including non-governmental organisations may submit medical evidence to the court.

All persons with a medical background are allowed to collect and present medical evidence in court cases. However, the court will draw a clear distinction between those that are accredited as experts by the Ministry of Justice and those that are not. In order to be an accredited forensic doctor in Lebanon a person must acquire membership of the Department of Forensic Medicine in the Ministry of Justice. Membership in this department can only be obtained through a presidential decree but it is in practice decided by a committee of judges. There are no clear criteria guiding this accreditation process.

The Lebanese court system employs the principle of free evaluation of evidence leaving the determination of probative value to the appreciation of judges. The evaluation of an expert or a forensic medical report as an evidence is governed by the Cr.P.C. which provides that the judge can accept the report and take it into consideration as evidence or totally ignore it.⁵

The integrity of the Lebanese judiciary is unfortunately challenged by constant interference by the legislative and executive branches and a lack of independence and impartiality of medical experts. Unfortunately, there is no inquisitorial evaluation of the independence and impartiality of the

3) Cr.P.C, Article 8

4) Cr.P.C, Articles 34, 42, 47, 77, 253 and 421

5) Cr.P.C, Articles 326 and 327

medical experts and it is thus left for the parties to investigate and challenge such inconsistencies.

6.4.3 Conclusion

There are several avenues in need of significant change in order to ensure an effective protection against torture in Lebanon. One key element is to ensure that credible and effective forensic examinations are conducted in all cases of torture allegations. Among the initiatives needed to support this are:

- Development of a program to ensure that all allegations of torture are documented promptly, independently and effectively. This should include a mandatory medical examination by forensic doctors to all detainees and persons in police custody.
- Civil society support for the forensic doctors to ensure that they can perform the functions in effectively and independently.
- Introduce clear criteria guiding the selection of experts and forensic doctors including criteria specifically focused on professional and academic qualifications.
- Establishment of a cooperation mechanism between judges and forensic doctors in order to develop the process of torture documentation into an integrated element of the criminal procedure.
- Development of an accountability system for public officials and to ensure that all functions are performed in accordance with the law. This mechanism should publish periodic reports on its work.

Further, Lebanese and International Human Rights NGOs are appealing for an urgent approval of a draft law for the establishment of the National Preventative Mechanism in accordance with the Optional Protocol of the UNCAT. For that the Lebanese authori-

ties take the necessary measure to put an end to the practice of torture in detention centers, prisons and comply the international obligations specially that Lebanon acceded to OPCAT on December 22, 2008. These measures should include incorporation of the provisions of the UNCAT into domestic laws with a focus on amendments to the criminal code to specifically include a definition, criminalisation of all forms of torture and penalties commensurate to the gravity of the crime.

6.5. Georgia

Besarion Bochorishvili, L.L.M*, Miriam Jisjkariani, MD

6.5.1. Introduction to domestic legal system
Georgia is a post Soviet State, which restored its independence in 1991. The current government has been in power since 23 November 2003 and was last re-elected in 2008. Georgia acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1994 and ratified its Optional Protocol (OPCAT) in 2005. In 1999 Georgia became a member state of the Council of Europe and accepted all relevant documents and Conventions, among them the European Convention on Human Rights. Despite some efforts to bring domestic law and practice in line with the UNCAT, Georgia is far from full implementation of the Convention. An area of special concern is the lack of effective, prompt and impartial investigations as stipulated by articles 12 and 13 of the Convention. The OPCAT entered into force in 2006 and since December 2009, the Public Defender has been designated as the National Preventive Mechanism (NPM) with support from a Special Preventive Group. So far the NPM has conducted

a number of detention visits but it is still too early to assess its overall effectiveness.

Torture is prohibited in the Georgian Constitution and since 2005, the Criminal Code has contained a separate prohibition.¹ However, there are concerns that the prohibition is not in compliance with UNCAT, especially pertaining to the non-inclusion of discrimination as a qualifying purpose and the ambiguous group of potential perpetrators included in the provision.² In 2008, a new Anti-Torture Plan was elaborated and adopted by Presidential Order N30.³ This plan of action includes the implementation of the Istanbul Protocol⁴ by using it as a training manual for health and legal profes-

1) Georgia Constitution, Article 17 and Criminal Code of Georgia, article 144.

2) Unlike traditional anti-torture legislation, Article 144(1) is not limited to cover acts by public officials. These acts are only included as an aggravating circumstance but without including acts instigated or committed with the consent or acquiescence of public officials.

3) An unofficial translation is available at [http://www.justice.gov.ge/files/Documents/saertashoriso_sajaro/Action_Plan_ENG_\(2\).pdf](http://www.justice.gov.ge/files/Documents/saertashoriso_sajaro/Action_Plan_ENG_(2).pdf).

4) The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

*) EMPATHY/RCT,
Georgia
centre@empathy.ge

sionals. Unfortunately, the Istanbul Protocol has not been adopted as a mandatory investigative tool. In October 2010 a new criminal procedure code will take effect. This new law will transform the Georgian criminal procedure from an inquisitorial procedure towards a more adversarial procedure. The transformation will be gradual and it will therefore be difficult to give a clear indication of the status quo on certain procedural issues, which are subject to changes in the new law. To avoid confusion between the past and the future procedure, the following description of available remedies will be kept on a general level with some reflection on the future adversarial system.

The Georgian court system is structured in three levels: District and city courts; a court of appeal; and a court of cassation. Torture cases will start in the District or City Courts with the possibility of appeal and in rare circumstance a final hearing before the Court of Cassation. In recent years, Georgian courts have been criticized for lacking independence and having too close links with the prosecution. A clear indication of this came in a 2008 Ombudsman's report, which notes that out of 17,555 criminal cases in 2007, only 20 ended in acquittals.⁵ Similarly, there are indications that the prosecution is generally unwilling to properly investigate cases against police officers or other public officials. This makes investigation and prosecution of torture cases in Georgia a complicated activity and complaints frequently end in procedural agreements between the prosecution and the victim ensuring impunity for both parties.

6.5.2. Remedies

Criminal remedies – in accordance with the new criminal procedure code the responsibility for investigation and prosecution of torture allegations is vested with the Prosecutors Office.⁶ Refusal to initiate investigations or prosecution cannot be appealed to any judicial body but only to a superior prosecutor. There are concerns that the investigations of the Prosecutor's Office into torture allegations are not effective and special attention has been drawn to the lack of promptness. The new criminal procedure code does not recognize the victims as a party to the criminal procedure and it is thus very difficult for persons who have suffered human rights abuses to effectively exercise their rights in the criminal procedure. Furthermore, the criminal procedure code does not stipulate time limitations on investigations or mandatory medical and psychiatric examinations of the victim, which limits its contribution to the effectiveness of torture investigations.

Civil remedies – the new criminal procedure code provides two possibilities for torture victims to obtain civil remedies. They can seek compensation for the direct damage suffered or on the basis of procedural misconduct by the prosecution.⁷ Considering the lack of effective access to justice in the criminal procedure, this is a welcome opportunity for torture victims to claim compensation but it still does not alleviate the need for improvements in the criminal procedure.

5) See reports by the Public Defender of Georgia for the second half of 2007, p. 118 (<http://www.ombudsman.ge/index.php?page=21&lang=1>).

6) New Criminal Procedure Code, Article 55(1).

7) New Criminal Procedure Code, Article 92.

Administrative remedies – the public defender is mandated to monitor the domestic human rights situation and to receive individual complaints about human rights violations.⁸ In order to decide on individual complaints, the public defender has wide evidence collection authority including the right to order expert examinations.⁹ The sanctions available to the public defender include: Recommendation of specific remedies; referral for criminal investigation; and ordering re-examination of final court decisions.

With the new criminal procedure code, the participation of the victims in criminal cases will be limited. However, there is still a possibility to appeal the final court decision and to file civil claims as explained above. Articles 67 and 71 provide for special witness and victims protection measures. The 2009 Criminal Justice Reform Action Plan envisages the elaboration of a comprehensive witness and victims' protection programme during the years 2010 to 2012.

6.5.3. Forensic investigation and evaluation of evidence

The National Forensic Bureau (NFB) is the main body responsible for conducting forensic medical examinations of alleged torture victims. Previously, this institution was structurally placed under the Ministry of Justice (MoJ),¹⁰ but in 2009 the NFB became independent from the Government. In addition to the NFB, there is one fully independent forensic centre named “Vektori”, which has limited capacity. Until 2005, forensic investigations in torture cases were mandatory according to the criminal procedure code.

However, these investigations were only initiated in case of physical injuries and were limited to an external physical examination. Now, the prosecution, investigatory authorities and examining judges have discretionary powers to order such investigations. A victim is thus required to request the permission of a judge before an alternative examination can be conducted. Considering the previously mentioned concerns about lack of independence in the judiciary, this may prove to be a significant obstacle to conducting effective investigations of torture allegations.

The absence of mandatory forensic investigations is a key structural concern in the Georgian system of forensic investigations and a severe setback in implementation of prompt, effective and impartial investigations of torture allegations. In practice, it is not uncommon that prosecutors will either order forensic examinations with a significant delay or not at all. Further, when independent actors such as detention monitors seek to ensure access for independent forensic experts, these efforts are often blocked or delayed by prison staff. Georgia has established a National Preventive Mechanism to conduct detention monitoring and this mechanism does possess adequate medical expertise. However, it remains to be seen whether this mechanism will have positive effects on the general access of alleged victims to forensic medical examinations.

Forensic examinations must be conducted by a person who has recognised skills in the relevant field of forensic science. According to Ministry of Health (MoH) regulations all professionals who have the

8) Organic Law of Georgia on the Public Defender, Articles 12 and 13.

9) Organic Law of Georgia on the Public Defender, Article 18.

10) Order #1549 issued on December 8, 2004 by the MoJ, Article 6(1).

State Certificate in Forensic Medicine have the right to participate in a forensic medical evaluation and in accordance with the same regulations any psychiatrist has a right to participate in forensic psychiatry evaluations. The court makes the final selection of the expert to conduct the examination but, at the request of the victim, the court may decide that the examination shall be conducted by both a state and an independent expert. Foreigners with relevant and recognized qualifications may practice in Georgia upon obtaining proper accreditation, which is given on an ad-hoc basis for periods up to six months. The regulation of forensic medical and psychiatric examinations is provided by the criminal procedure code and further detailed in two MoH orders.¹¹ This legal framework further regulates when examination and re-examination can be conducted and provides that forensic reports should contain three key elements: Introduction, descriptive part and conclusions. Unfortunately, the very elaborate examination requirements lack a significant element of the Istanbul Protocol in that they fail to clearly stipulate an obligation to draw conclusions on the consistency between the allegations and the medical findings. While such analysis can reasonably be subsumed under the conclusions category, the current practice indicates that such analysis is not carried out. In line with the objective in the domestic anti torture action plan on using the Istanbul Protocol, it would be a welcome improvement if forensic examination practices are brought in compliance with the Istanbul Protocol.

Another significant shortcoming in the system of forensic examinations is the approach taken to forensic psychiatric evidence. It is clear from the MoH regulation of forensic examinations that psychiatric examinations are mainly focused on evaluating the mental capacity of the subject to stand trial and act as a legal person. It is thus not intended to be used for criminal investigative purposes. The regulations do not explicitly exclude such use of forensic psychiatric examinations but the lack of explicit focus on this role constitutes a serious obstacle. Furthermore, the state forensic experts of the NFB traditionally have a very limited understanding of the role of forensic psychiatric evidence in proving torture and will usually have a strict focus on physical findings. It would be advisable to amend the current guidelines on forensic psychiatric examinations to include an increased focus on the substantive questions instead of the current sole focus on procedural aspects. Furthermore, state forensic experts should be sensitised to the psychiatric aspects of documenting torture to ensure a more comprehensive investigation.

The collection of forensic medical evidence is usually conducted on the basis of an order by the prosecution, investigatory authorities or examining judges, possibly at the instigation of the victim. These actors generally lack an adequate understanding of how forensic medical/psychiatric evidence can be used in torture cases. This further exacerbates the problems described above because the questions forming the basis of the forensic examinations often fail to provide

11) Order No 245/n of the Minister of Health, Labor and Social Protection on Rules of Conducting of Forensic Medical Examination and activities of Medical Staff and Order No 142/n of

the Minister of Health, Labor and Social Protection on Rules of Conducting of Forensic-psychiatric Examination.

adequate direction to the examiner. This is particularly visible in relation to the lack of specificity of the questions and the absence of questions relating to the psychiatric symptoms of the alleged victim. This highlights a clear need for training of judges, prosecutors and lawyers on the fundamental principles of forensic examinations of torture allegations.

Despite an elaborate structural set-up, the practical implementation of torture investigations and forensic examinations in Georgia is severely lacking. In a recent case, a juvenile was arrested and allegedly exposed to both physical and psychological torture or ill-treatment during two days in police custody and in a preliminary detention centre of the Ministry of Interior. Despite visible signs of beatings on his body, neither the prosecutor nor the examining judge took any measure to investigate the origin of these bruises and no forensic medical evaluation was ordered. Only when the juvenile entered pre-trial detention, he was evaluated by a doctor on duty who produced a report, which included the victim's allegations of torture. However, this did not prompt the prosecutor to initiate investigations and an independent forensic medical evaluation was only made after the intervention of a lawyer from EMPATHY. After approximately five months the prosecutor has opened an investigation under the less severe prohibition of excessive use of force, but no active investigative steps have been taken. This case example clearly illustrates a serious gap between the domestic legal framework and the practical conduct of prosecutors and judges when it comes to investigating allegations of torture. This trend is even more worrying in the context of the new criminal procedure code which will give judges the final decision on initiation of any forensic medical evaluation whether conducted by state or independent experts.

6.5.4. Conclusions and recommendations

Despite a generally worrying situation with regard to torture in the country, Georgia has seen some positive developments in recent years. An anti-torture action plan has been adopted, a NPM has been established, there is a vibrant civil society working against torture and within this, there is a high skill level in the documentation of torture area. Recently, training on documentation of torture in accordance with the Istanbul Protocol has been implemented as an integral part of university courses in psychiatry and such training is also envisaged in the anti-torture action plan. Georgia is thus strengthening the structural framework and capability to prevent and document torture but there is still much implementation needed before the situation will significantly change.

Georgia faces serious problems with regard to independence in the criminal procedure, where there are serious concerns about the independence of the courts and the prosecutors. This affects the general credibility of the entire criminal procedure and thus exacerbates many of the other institutional problems, which will be outlined below. In recent years the NFB has undergone many structural changes leading to noticeable improvements and it is crucial that a variable solution is found, which guarantees the independence of this important investigative body. Furthermore, the ongoing criminal justice reform process should ensure that the good intentions go beyond the paper on which they are written and lead to increased de facto independence for the courts.

One of the most significant deficiencies in the Georgian criminal procedure is the absence of prompt investigations into allegations of torture. In general there is a tendency towards neglecting these inves-

tigations, which ends up complicating the evidence collection. More specifically, there is no provision in the criminal procedure code for mandatory and prompt forensic examinations. In practice these examinations are either conducted with significant delays or not at all, and independent doctors have problems achieving timely access to alleged victims who find themselves in detention. The criminal justice reform process should ensure that the requirement for mandatory and prompt forensic examinations is reinserted into the criminal procedure code and provide clear procedures for timely access for independent doctors to any person in detention. This could reasonably be done in collaboration with the new NPM to ensure that the right expertise is included in this work.

In order to ensure that forensic examinations of alleged torture victims are conducted effectively, the government of Georgia should ensure training on the Istanbul Protocol for all medical and legal professionals who come in contact with torture cases. This would ensure the capacity to order and conduct adequate forensic medical/psychiatric examinations of torture allegations. To strengthen the use of the Istanbul Protocol, the criminal procedure code should be amended to include a provision stipulating the Istanbul Protocol as the domestic standard when health professionals conduct and legal professionals evaluate forensic examinations of alleged torture victims.

To live up to its obligations under UNCAT Article 14, the government should provide for a full compensation and rehabilitation scheme for torture survivors. This could be done through the establishment of a torture victim's compensation and rehabilitation fund, which would also send a very clear signal that the government does not condone or tolerate torture. Lastly, on a

more general note, the government should seek to foster a culture of human rights in the police and prisons system through human rights and education programmes.