EXECUTIVE SUMMARY

Handbook to Prevent and Combat Torture and Ill-treatment for Detention Control Hearings

DEPEN
Departamento Penitenciário Nacional
UNODC
Escritório das Nações Unidas sobre Drogas e Crime
PNUD
CNJ
CONSELHO NACIONAL DE JUSTIÇA

SERIES FAZENDO JUSTIÇA

COLLECTION STRENGTHENING THE DETENTION CONTROL HEARING

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Coordination of the Series Fazendo Justiça
Luis Geraldo Sant'Ana Lanfredi
Natalia Albuquerque Dino de Castro e Costa
Renata Chiarinelli Laurino
Valdirene Daufemback
Talles Andrade de Souza
Débora Neto Zampier

Fact Sheet

Preparation
Raquel da Cruz Lima

Based on the Handbook prepared by
Felipe da Silva Freitas
Julianne Melo dos Santos
Marina Lacerda e Silva
Natasha Brusaferro Riquelme Elbas Neri
Rafael Barreto Souza
Raquel da Cruz Lima

General supervision
Marina Lacerda e Silva
Rafael Barreto Souza
Luis Gustavo Cardoso

Collaboration
Ana Luíza Bandeira
Ana Paula Nunes
Daniela Dora Eilberg
Flora Moara Lima
Igo Gabriel dos Santos Ribeiro
Iuri de Castro Torres
Luis Gustavo Cardoso
Mariana Cretton
Marília Mundim da Costa
Nara Denilse Araújo
Tatiany dos Santos Fonseca
Vinícius Couto

Revision
Janaina Camelo Homerin
Marina Lacerda e Silva
Luis Gustavo Cardoso

Diagramming
Diego Santos

Technical support for the translation and diagramation
Bié Tradução de Línguas e Eventos Eireli

Translation from Portuguese to English
Wilsomar Lozeiro de Araújo Júnior

Presentation

The Brazilian Constitution underpins our aspirations as a society grounded on the rule of law while promoting social advancement with respect to fundamental rights and human dignity. In this regarding, it is the indelible duty of the institutions, especially the judiciary as guardian of our Magna Carta in the last instance, to ensure that our actions point to this civilizing north, not only repelling deviations, but acting already to transform the present that we aim for.

In 2015, the Federal Supreme Court recognized that almost 1 million Brazilians within our prisons live outside the protection that the Constitution provides, with unfortunate effects on the degree of inclusive development to which we commit ourselves through the UN 2030 Sustainable Development Agenda. It is for the definitive overcoming of this scenario that the Programme Fazendo Justiça works, in a partnership between the National Council of Justice (CNJ) and the United Nations Development Programme (UNDP), with the support of the Ministry of Justice and Public Security, represented by the National Penitentiary Department.

Even during the Covid-19 pandemic, the Programme has been carrying out structuring deliverables from collaboration and dialogue between different institutions across the federal level. There are 28 actions developed simultaneously for phases and needs of the criminal cycle and the socio-educational cycle, which include the facilitation of services, strengthening of the normative framework and production and dissemination of knowledge. It is in the context of this latter objective that this publication is inserted, now an integral part of a robust listing that gathers advanced technical knowledge in the field of accountability and guarantee of rights, with practical guidance for immediate application throughout the country.

The volume is part of the collection Strengthening the Detention Control Hearing, prepared by the Criminal Proportionality hub of the Programme Fazendo Justiça (Hub 1) to ground the entry point to the prison system on national and international standards and in light of CNJ Resolution No. 213/2015 and recent changes in the Brazilian Code of Criminal Procedure. Through partnership with UNDP and the United Nations Office on Drugs and Crime (UNODC), the CNJ promotes the legality of detentions, proportionality in criminal responses and social inclusion, aiming at reducing overpopulation and prison overcrowding.

This Executive Summary presents the core of the **Handbook to Prevent and Combat Torture and Ill-treatment for Detention Control Hearings**, published in 2020. The publication seeks to contribute to the full realization of detention control hearings in a global way, with emphasis on the structuring concepts of torture and ill-treatment, the listening of the account during the detention control hearing, the forensic medical evaluation and other relevant information for the evidence gathering of torture and ill-treatment. The repercussions of this account and the referrals and procedures determined by the judge presiding the hearing, as well as the judicial management of non-custodial and monitoring measures by the judiciary and other institutions are also addressed.

Luiz Fux

President of the Federal Supreme Court and the National Council of Justice

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Executive Director DMF/CNJ: Natalia Albuquerque Dino de Castro e Costa
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Hub 1 Coordination (technical team): Fabiana de Lime Leite
Hub 1 Deputy Coordinator (technical team): Rafael Barreto Souza

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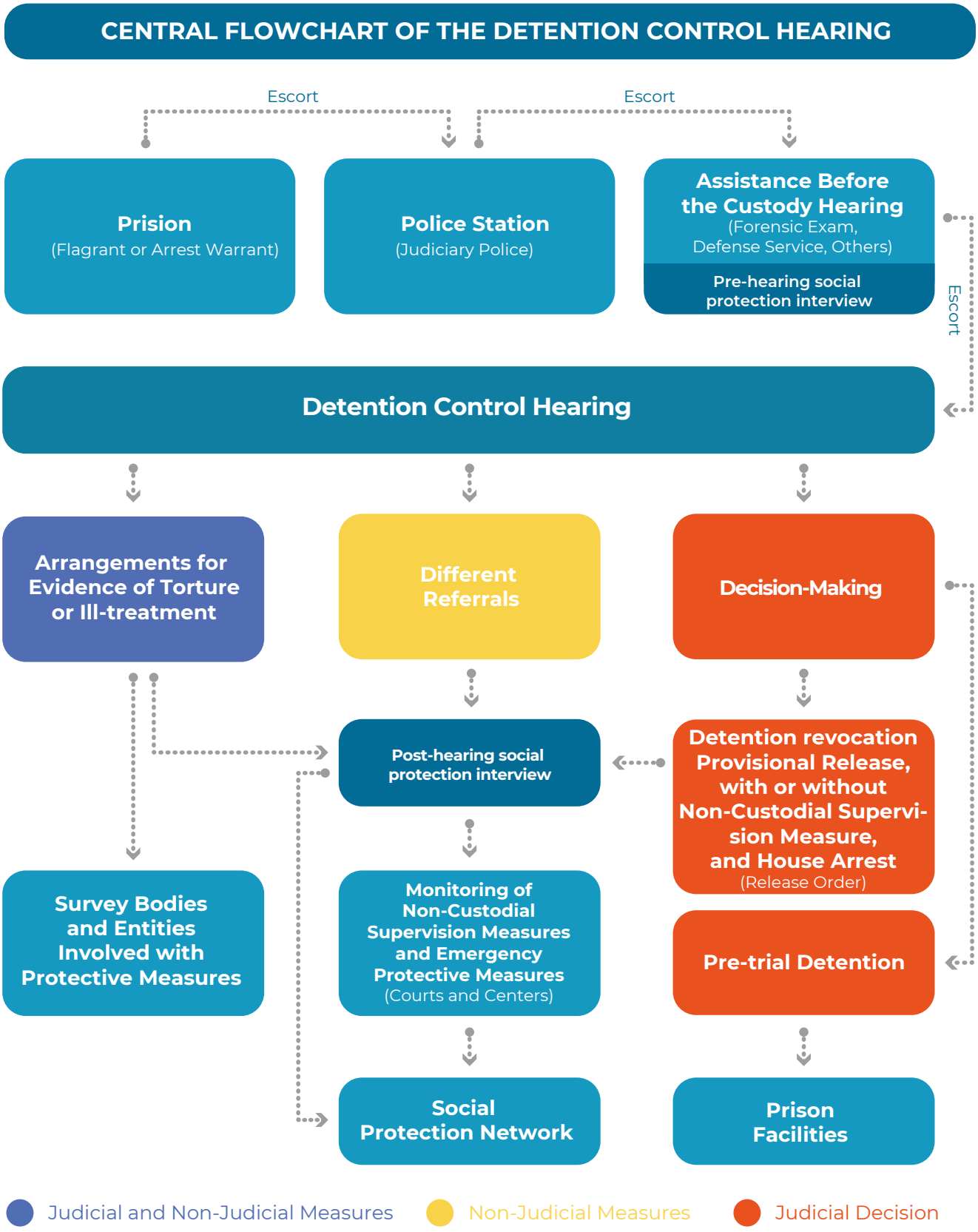
Coordination Advisor: Igo Gabriel dos Santos Ribeiro
Legal Supervisor: Marina Lacerda e Silva
Social Protection Supervisor: Nara Denilse de Araújo
Data and Information Supervisor: Vinicius Assis Couto

SUMMARY


CENTRAL FLOWCHART OF THE DETENTION CONTROL HEARING
Escort
Escort
Prision
(Flagrant or Arrest Warrant)
Police Station
(Judiciary Police)
Assistance Before the Custody Hearing
(Forensic Exam, Defense Service, Others)
Pre-hearing social protection interview
Escort
Detention Control Hearing
Arrangements for Evidence of Torture or Ill-treatment
Different Referrals
Decision-Making
Post-hearing social protection interview
Detention revocation Provisional Release, with or without Non-Custodial Supervision Measure, and House Arrest
(Release Order)
Survey Bodies and Entities Involved with Protective Measures
Monitoring of Non-Custodial Supervision Measures and Emergency Protective Measures
(Courts and Centers)
Pre-trial Detention
Social Protection Network
Prison Facilities
Judicial and Non-Judicial Measures
Non-Judicial Measures
Judicial Decision

INTRODUCTION

This Executive Summary composes a set of actions of the Project Strengthening Detention Control Hearings, implemented by the United Nations Office on Drugs and Crime (UNODC) under the Programme Fazendo Justiça, an initiative of the National Council of Justice of Brazil (CNJ) in partnership with the United Nations Development Programme (UNDP) and the National Penitentiary Department of Brazil (DEPEN). In order to strengthen the detention control hearing, the Programme develops a national action in collaboration with the United Nations Office on Drugs and Crime (UNODC).

Its purpose is to disseminate and disclose nationally and internationally, the content of the **Handbook to Prevent and Combat Torture and Ill-treatment for Detention Control Hearings**[1], from the collection Strengthening the Detention Control Hearing, which systematizes efforts and results of the Programme Justiça Presente, executed between 2019 and 2020 and whose initiatives since then, continue to be developed, expanded and deepened by the Programme Fazendo Justiça, with an important focus on strengthening detention control hearings.

Detention control hearing is the act in which the arrested person is presented before the judge for him/her to decide on the legality of the arrest, the need for non-custodial measures, to collect evidence of torture or ill-treatment committed against the detainee and promote referrals related to social protection. Its rationale goes back to the American Convention on Human Rights (Pact of San José), the International Covenant on Civil and Political Rights, the Code of Criminal Procedure and the CNJ resolutions, among which Resolution No. 213/2015 stands out.

The Handbooks constitute highly qualified and up-to-date material, which addresses, in a comprehensive and detailed manner, the public services and the most relevant topics for the detention control hearing: judicial decision-making, social protection, prevention and combat of torture, and the use of handcuffs and other instruments of restraint, according to national and international standards.

Before the challenges that reality imposes, this Executive Summary is an invitation for the public to know the new standards of the detention control hearing and follow

1 https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_tortura-web.pdf

its institutional strengthening and its definitive establishment as an institute capable of guaranteeing the safeguards of due process of law and the rights of persons submitted to State custody.

The Handbook that this Executive Summary synthesizes is based on national and international regulations and jurisprudence, as well as on data gathered by the Project Strengthening Detention Control Hearings, and provides subsidies to improve the conduct of the detention control hearing and the due diligence arising in light of CNJ Resolution No. 213/2015, especially its Protocol II.

This document is divided into five topics, which address from the concept of torture and ill-treatment (1), through the conditions for the hearing of the account and the specific guidelines on how the judge should conduct the hearing to provide a reliable record of the circumstances in which the arrest occurred (2). There is also a presentation of the criteria for the assessment of records and additional information regarding indications of torture and ill-treatment (3), the legal impacts (4) and relevant referrals arising from their finding (5). Finally, the document presents some aspects of judicial management that ensure that actions to prevent and combat torture are articulated (6).

It is important to note that this is an overview document and that it is strongly recommended to consult the Handbook to deepen the topics covered.

1. STRUCTURING CONCEPTS

The persistence of police and institutional violence in Brazil has been the subject of constant concern on the part of international bodies, which identify that torture and ill-treatment are common practices in the country, but suffer from underreporting and impunity of those responsible[2]. Data from *Disque 100*, the human rights violations registry service managed by the National Ombudsman for Human Rights, indicate that complaints of police violence have increased, from 447 complaints in 2011, to 1491 complaints in 2019, of which the majority (52%) involved population deprived of liberty[3].

Although systemic, the problem of the practice of torture and ill-treatment disproportionately **affects the black population and people in situations of social vulnerability**, deepening the historical experience of inequality and violations of rights experienced by these individuals. Furthermore, the black population is overrepresented in the national prison population and also in detention control hearings. While in 2019 black persons (black and brown) represented 56.2% of the Brazilian population, information presented in the Detention Control Hearing System (SISTAC) in July 2020 indicated that 67.4% of the people reported were black.

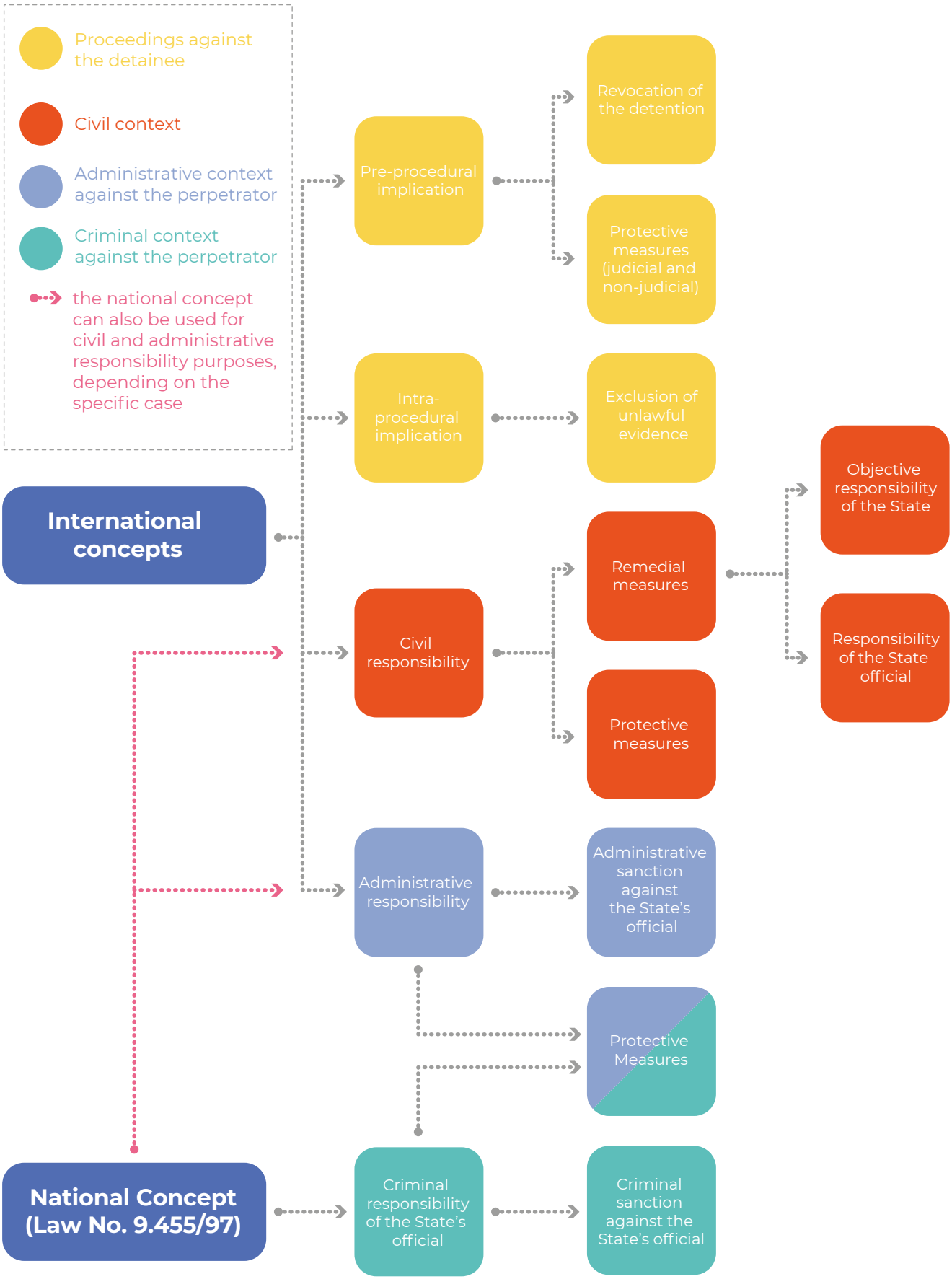
The immediate conduct of the detainee to the judge is an important mean of preventing and suppressing the practice of torture at the time of arrest. In this sense, one of the purposes of the detention control hearing provided for by CNJ Resolution No. 213/2015 and its Protocol II **is to identify evidence[4] of torture or ill-treatment**, and adopt the necessary immediate measures. **It is not a question of proving the occurrence of torture**, but of promoting the documentation of these indications, and thus favoring the prompt and effective start of the processes of accountability, in addition to the other legal repercussions illustrated in flowchart 1.

2 <https://undocs.org/A/HRC/31/57/Add.4> e <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A_HRC_31_57_E.doc>.

3 <https://www.gov.br/mdh/pt-br/acesso-a-informacao/ouvidoria/balanco-disque-100>.

4 According to art. 239 of the Code of Criminal Procedure: "It is considered a clue the known and proven circumstance, which, having relation to the fact, authorizes, by induction, to conclude the existence of another or other circumstances"" Maria Thereza Rocha de Assis Moura, in the 2009 book "Evidence by clue in criminal proceedings" indicates that "evidence is every trace, track, sign and, in general, every known fact, duly proved and susceptible to lead to discover the unknown fact, related to it, through reasoning operation"

MULTI-LEGAL CONCEPT OF TORTURE



In order to understand what torture or ill-treatment means[5], a **multi-legal perspective of torture** must be adopted, that is, a more protective conceptual understanding based on the systematic reading of three normative acts: (i) the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of United Nations, ratified by Decree No. 40 of February 15th, 1991; (ii) The Inter-American Convention to Prevent and Punish Torture, ratified by Decree No. 98.386 of December 9th, 1989; and (iii) Law No. 9.455 of April 7th, 1997. Thus, it can be said that for the identification of **evidence of torture** at the detention control hearing **four** elements must be considered:

(i) infliction of **pain** or **suffering** → (ii) carried out **intentionally** → (iii) to achieve a **purpose** → (iv) through the **action** or **omission** of a **public officer**.

Some remarks are important about each of these elements:

1. Regarding the **infliction of pain or suffering, understood as physical or mental,** it is an element that is understood from the personal characteristics of the victim – race, gender, ethnicity, health condition –, which can influence the degree of pain or suffering that the treatment received causes.
2. On **intentionality**, it must be recognized from objective elements in the circumstances of the case, and is not confused with a subjective analysis about the public officials to whom torture is attributed.
3. As for the **purpose**, among the most common are obtaining information or confession, punishment, intimidation and discrimination. Brazilian legislation also provides that, in the case of a person arrested or subjected to a security measure subjected to suffering through a practice not provided for in law or not resulting from a legal measure, **there is no need for a specific purpose** in the conduct of the officer to characterize torture.
4. In relation to the **officer**, the judge should focus on public officials. In cases of aggression by individuals (lynchings, for example) it is possible that public officials can be held responsible for failing to prevent torture, ill-treatment or failing to ascertain it.

5 In this document the term "ill-treatment" is used as a synonym for "other cruel, inhuman and degrading treatment", as a concept adopted by the UN Convention Against Torture, which are also absolutely prohibited. It is the same wording used by CNJ Resolution No. 213/2015.

2. HEARING OF THE ACCOUNT OF TORTURE OR ILL-TREATMENT

The main element evaluated in the detention control hearing to identify indications of torture or ill-treatment **is the hearing of the detainee,** whose structure is illustrated in flowchart 2. If, on the one hand, an unwelcome environment inhibits speech and may lead to **underreporting** of cases of torture, on the other hand, a judicial approach based on **active listening** and showing genuine **empathy** favors obtaining a reliable account of the facts. Objectively, it is recommended that the judge use simple **language, avoid technical terms, reinforce the main questions with easy words, and ask open-ended questions**.

2.1. RECOGNITION OF THE APPROPRIATE CONDITIONS OF THE DETAINEE PRESENTATION

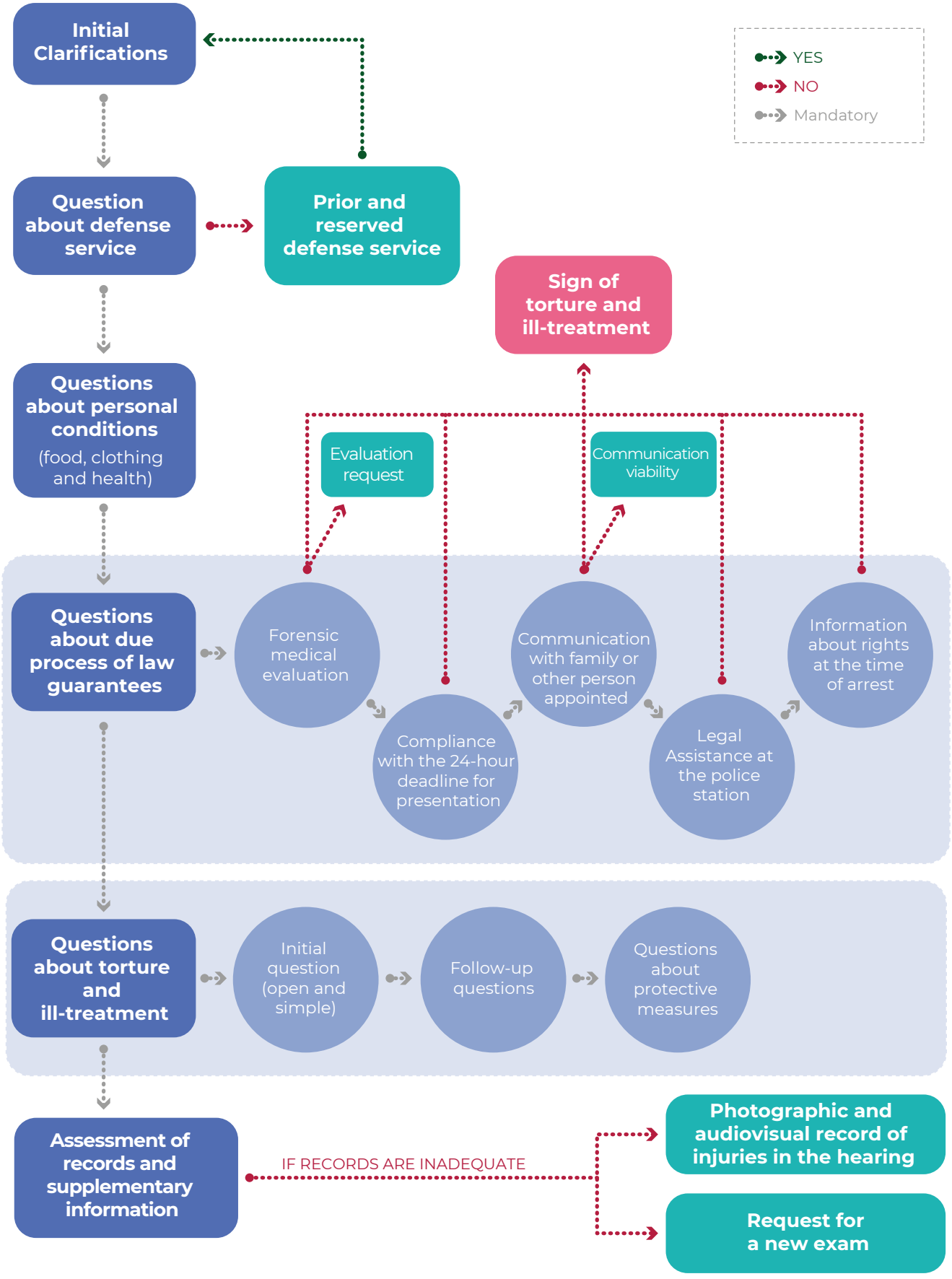
In order to ensure that the detention control hearing is an appropriate environment for listening to reports of torture, attention should be paid to the following conditions, even before the hearing is initiated.

2.1.1 Personal conditions: food, clothing and health

The profile of the detainee is mostly black, poor, with low education and, often, in a **situation of considerable vulnerability**. Thus, the judge must make sure that the legal services include measures to ensure (i) **access to drinking water and food;** (ii) **the availability of a place for bathing or cleaning;** (iii) access to **footwear** and **clothing** items consistent with the forensic environment and **thermal comfort**; and (iv) access to **adequate health care**, including access to medicines[6].

6 More on pages 91 to 93 of the Handbook of Social Protection in Detention Control Hearings: <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_protecao_social-web.pdf>.

HEARING OF THE TORTURE OR ILL-TREATMENT ACCOUNT



Specifically in relation to clothing, the detainee must preferably be presented with the clothes he/she was wearing at the time of arrest. It is recommended that the detainee never wear prison system uniforms or garments associated with serving sentences, since such identification may violate the principle of the presumption of innocence.

REMINDER

Hospitalized people

If a person is not presented to the detention control hearing due to hospitalization after arrest, the judge should be aware of the possibility that the injuries are the result of torture or ill-treatment.

2.1.2 Use of handcuffs or other instruments of restraining

The **exceptionality of the use of handcuffs** – signed in Binding Abridgement No. 11 of the Federal Supreme Court – must be **accentuated** in a controlled environment such as that of a detention control hearing. In addition to the damage that the use of handcuffs causes to the guarantees of due process of law, it may compromise the demonstration of how acts of torture occurred or, yet, constitute itself a practice of torture or ill-treatment depending on the instrument and technique adopted. It should be emphasized that one should not use dorsal application for handcuffs, ankle cuffs (iron) and joint handcuffs of one person to another[7], since they are inadequate techniques, cause risk to physical integrity, and represent a form of stigmatization.

If the detainee has entered the hearing room handcuffed or restrained, the judge must observe if, after the removal of the handcuffs, there is a sign of injury and, if applicable, refer the detainee for medical attention, in addition to including questions in the hearing to verify whether the use of handcuffs was abusive, disproportionate and caused suffering.

2.1.3 Presence of the security officer

To prevent threats or intimidation from inhibiting accounts of torture practices, security officers acting in the context of the detention control hearing should be **organizationally separate and independent from the officers responsible for arresting and investigating the crime of which the detainee is accused.** In addition to this administrative and organizational dimension of each Court, the judge must observe that (i) the officer responsible for custody, arrest or crime investigation is not present during

7 More guidance on pages 17-19; 29-30 and 40-58 of the Handbook on Handcuffs and Other Instruments of Restraint in Court Hearings: <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_algemas-web.pdf>.

the interview of the detainee; (ii) the security officers of the hearing do not carry lethal weapons; and (iii) that the officers do not express themselves at the hearing or express an opinion about the detainee in the forensic environment.

The restriction on the carrying of lethal weapons refers to the entire space intended for holding detention control hearings and aims mainly to guarantee the personal integrity of members of the Judiciary, Public Prosecutor's Office, Public Defender's Office, the detainee, other actors and security officers themselves.

2.2 INITIAL CLARIFICATIONS

It is the role of the judge to initiate the interview of the detainee clarifying what the detention control hearing is and **informing that one of its purposes is to prevent and suppress torture**. It is important for the detainee to understand that **torture is a prohibited and unacceptable practice** and that, if they **agree** to provide an account that points to some unlawful conduct, measures will be taken to investigate and hold the officers involved accountable.

In addition, the detainee must be informed about the possibility of protective measures to ensure his/her safety, and that the information provided may also be used to identify patterns of violence and prevent future cases.

2.3 QUESTIONS ABOUT DUE PROCESS GUARANTEES

There is a correlation between the prevention of torture and the effective application of due process guarantees during deprivation of liberty[8]. Therefore, after the initial clarifications, the judge should ask about respect for the following guarantees:

To be informed of his/her rights at the time of the arrest, including: the right to remain silent; to consult with a lawyer or public defender; the right to be seen by a doctor; to communicate with family members or another person of his/her choice; and the right to be brought to justice within 24 hours after the arrest.

Have access to legal assistance, whenever the presence of a lawyer or representative of the Public Defender's Office has been requested. In addition, **prior to the presentation of the detainee before the judge, preliminary and reserved legal assistance must be ensured, without the presence of police officers, in a room capable of guaranteeing the confidentiality of the interview**.

8 ASSOCIATION FOR THE PREVENTION OF TORTURE (APT). "Yes, torture prevention works". Perspectives of a global survey on 30 years of torture prevention. Genebra: [s. n.], 2018. E-book. Available at: <https://www.apt.ch/sites/default/files/publications/apt_briefing-paper_yes--torture-prevention-works_pr_final%20%282%29.pdf>.

REMINDER
OTHER ASSISTANCE AT THE POLICE STATION
Interpreter

If the detainee is not fluent in the Portuguese language, the presence of an interpreter is a condition of validity of the statement to the police authority[9]. Access to an interpreter must also be guaranteed in advance care and during the detention control hearing.

Consular assistance

The detainee who does not hold Brazilian nationality should be consulted on whether he/she wishes to contact the consulate of his/her country of origin and, if so, the consular authority of the respective country will be notified.

Assistance to indigenous persons

From the self-declaration of the person held as indigenous, the judge must be aware of the repercussions on the right to be assisted by an interpreter, the referral to the indigenous jurisdiction and the other guarantees and procedures regulated by Resolution CNJ No. 287/2019[10].

Communicate with family members or other persons appointed, which results from the constitutional prohibition to incommunicability, and provide assistance in access to relevant information and documents. It is recommended that in the context of the detention control hearing, the presence of family members in the hearing room should be granted.

Be examined by a doctor, through a public health service or by expert departments of forensic medicine, without the presence of police officers.

Be presented in 24 hours to the judge, which can be estimated by comparing the information on time gathered in the interview with those entered in the *in flagrante delicto* arrest record.

The breach of any of these guarantees must be considered evidence of torture or ill-treatment, as established by Protocol II of Resolution No. 213/2015[11].

9 Art. 193 of the Code of Criminal Procedure.

10 <https://www.cnj.jus.br/wp-content/uploads/2020/08/Resolucao_287-2019.pdf>.

11 Other situations that should be treated as evidence of torture according to Protocol II are: the existence of recorded and not transcribed statements in their entirety, the improper alteration of statements or when there is information that the public officer offered benefits through favors or money payment by the detainee. In addition, if the police authority has been notified of the occurrence of possible crime of torture and does not require forensic medical evaluation, it may be necessary to investigate the occurrence of torture by omission.

2.4 QUESTIONS ABOUT TORTURE AND ILL-TREATMENT

The judge should favor **open-ended questions** that stimulate a broad account of the detention and its circumstances, elaborating questions about the detail of the facts. In Annex I, there are suggestions on how to formulate the questions during the hearing.

REMINDER

Seemingly contradictory information provided by the detainee is sometimes nothing more than a manifestation of the lack of understanding about a question or word used by the judge. They can also be a consequence of an emotional state triggered by torture or ill-treatment.

The hearing must allow the detainee to express himself/herself freely and expose what they consider relevant. The detention control hearing is not an interrogation and the posture, body language and approach of the actors present in the hearing room must communicate that it is a procedure whose **essence is to welcome the speech of the detainee**. Thus, it is important to respect the manner and speed with which the detainee organizes the chronology of the events experienced, which may include the need for some moments of silence.

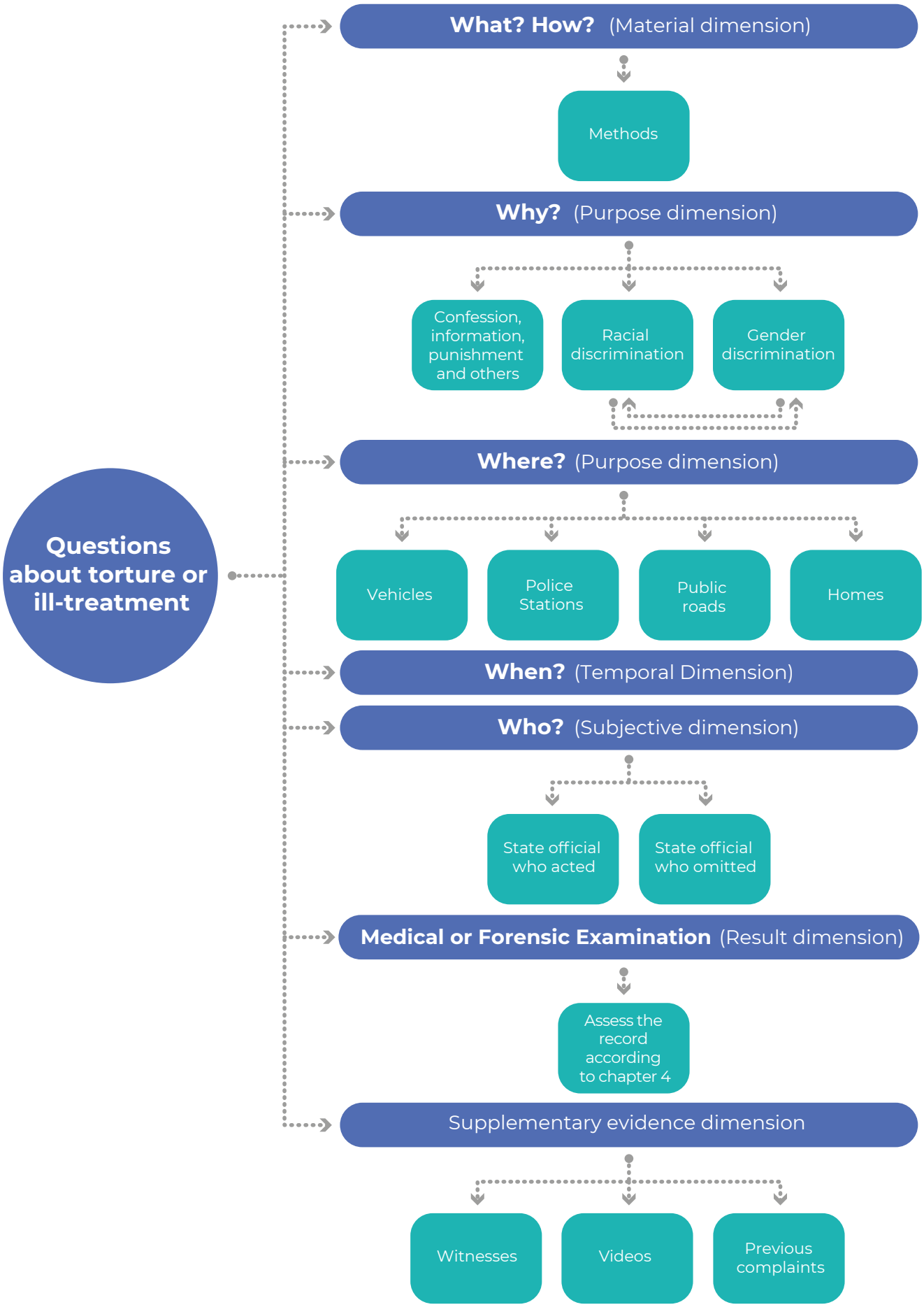
POSSIBLE DILEMMA

During the detention control hearing, the judge may question the boundary between the reporting of the circumstances of the arrest, including torture, and questions that may go into the merits of the facts. When in doubt about how to proceed, **it is recommended that the judge always favor a complete and detailed report on the evidence of torture over a stance that interrupts the hearing**.

Even conducting the hearing with open-ended questions, there are seven central dimensions on which information should be sought. As flowchart 3 illustrates, the judge should ask **what** happened and **how**, **why**, **where**, **when**, **who** performed and **what** other **sources of evidence** may exist, including expert reports.

To understand **"what"** and **"how"** it occurred, one should question the facts **from the police approach to the moment of the hearing** (material dimension), detailing the conduct of the officers, the use of force and the methods and instruments used. In this sense, the different formats (methods) that police violence can assume deserve attention.

DIMENSIONS OF QUESTIONS ABOUT TORTURE OR ILL-TREATMENT

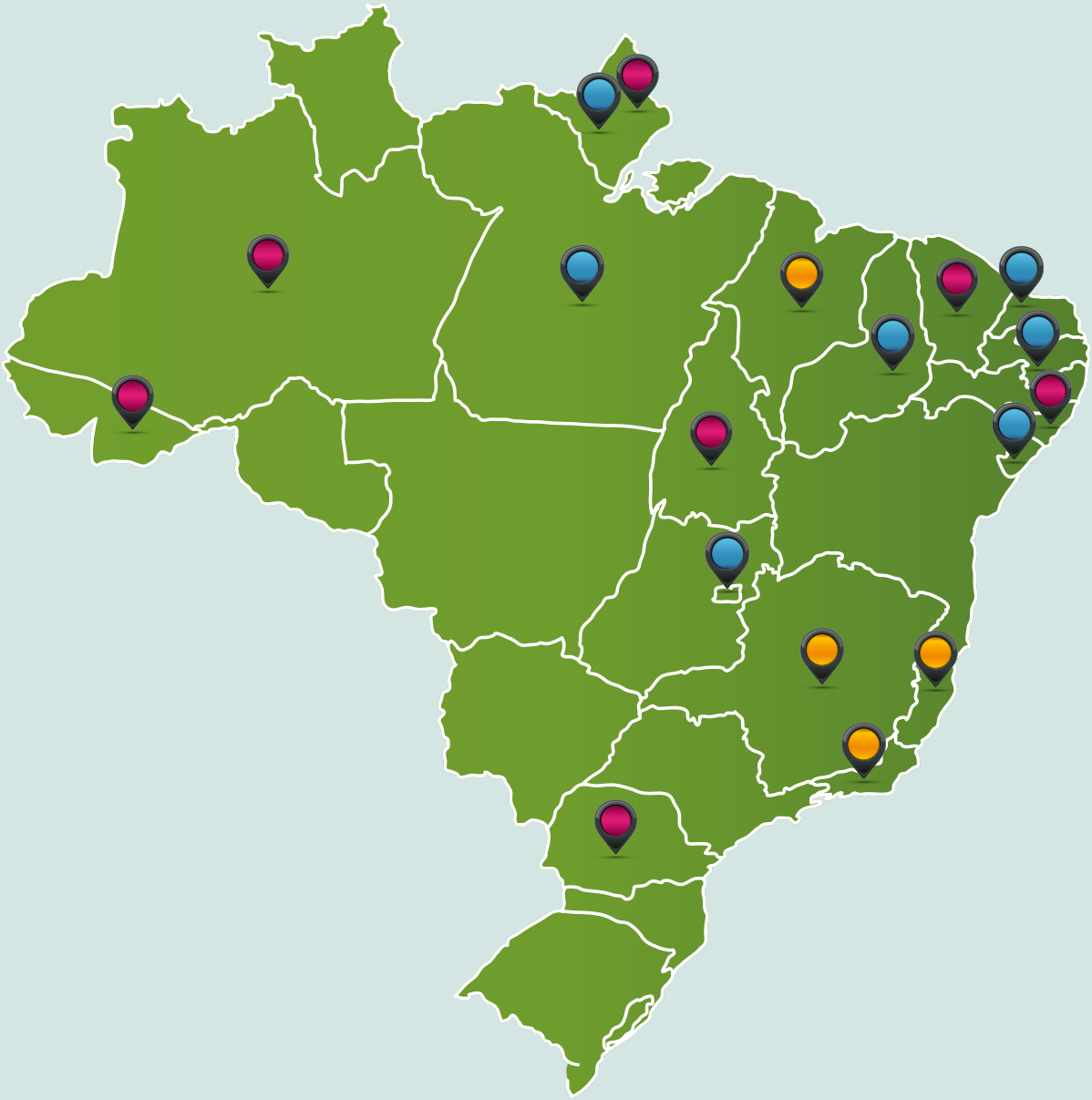


PROMISING PRACTICE

In the capitals of 18 states (Amapá, Alagoas, Amazonas, Amapá, Ceará, DisTrito Federal, Espírito Santo, Maranhão, Minas Gerais, Pará, Paraíba, Piauí, Paraná, Rio de Janeiro, Rio Grande do Norte, Santa Catarina, Sergipe and Tocantins), there is some established flow so that the forensic medical evaluation reports are available to the judge at the detention control hearing.

From these states, in 7 (Amapá, Distrito Federal, Pará, Paraíba, Piauí, Rio Grande do Norte and Sergipe) the reports are always available with the *in flagrante delicto* arrest records.

In seven other states in this group (Acre, Alagoas, Amazonas, Amapá, Ceará, Paraná andTo- cantins), reports are accessed by electronic system or digital document.



In addition to the conduct itself, information on the **purpose** (purpose dimension) of the act committed should be sought at the detention control hearing. For this, **it is recommended to question what was said by the accused officer before, during or after practicing violence, what the officers commented among themselves and whether questions were asked to the detaineey**.

In the field of purposes, the **"why"** of the conduct deserves emphasis the practice of torture based on **discrimination**, which must be understood in the sense established by the Supreme Court in the Direct Action of Unconstitutionality by Omission 26, which accepted the thesis that racism is a practice that affects other vulnerable groups in conditions of downgrading and stigmatization, regardless of biological aspects.

With regard to discrimination based on **race/color**, it is considered **indications of racial discrimination the detention** of black persons based on "suspicious attitude"[12] and the use of words of pejorative connotation towards black persons, as well as swearing and verbal assaults that denote racist posture.

From a **gender** perspective, more women than men mention the occurrence of sexual violence in prison. Sexual violence is configured with actions of a sexual nature that are committed against a person without his/her consent and, in addition to covering the physical invasion of the human body, it can include acts that do not imply penetration or even physical contact at all. Sexual violence can be practiced based on gender discrimination or lgbtphobia, for example, characterizing **torture**. One way sexual violence can manifest itself at the time of arrest is the strip search, which consists in requiring total or partial undressing for the body inspection. This practice is often carried out on women visitors in penitentiary units, but it can also occur in police approaches in public spaces. Any **reporting of sexual violence requires great care, welcoming posture, sensitivity and respect for gender identity**.

In relation to LGBTQI+ people[13], in addition to sexual violence, attention should be paid to their greater vulnerability to extortion, harassment and discriminatory cursing. In addition, effective allocation or the threat of **transfer to certain cells or wards** can be a tool for subjecting an LGBTQI+ person to the imminent risk of being raped, assaulted or killed, which is a deliberate way of inflicting suffering.

12 More information on the illegality of detention based on "suspicious attitude" on pages 21, 22, 45 and 46 of the Handbook on Decision-Making in Detention Control Hearings: General Standards: <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_juridico_1-web.pdf>.

13 The acronym LGBTQI+ is related to the recognition of people who are historically discriminated because of their sexual orientation (lesbian, gay, bisexual) and gender identity or expression (such as transvestites and transsexuals). More information on pages 56-59 of the Handbook of Social Protection in Detention Control Hearings: <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_protecao_social-web.pdf>.

It should also be noted that certain personal conditions, such as gender, race or ethnicity, sexual orientation, when intersectional, exposes a detainee to extreme vulnerability to violence and discriminatory practices.

Within the scope of the questions about **"where"** the violence occurred (territorial dimension), it is recommended that information be collected questioning, in a specific and strong way, if there was any conduct that generated pain or suffering in **each of the places which the detainee went through**, which includes from the approach on the street, the prisons through which he/she passed and the vehicles in which the transportation was carried out. This information can assist in identifying the officer and monitoring the possibility of retaliation. In the case of arrest carried out at home, it is important that the judge asks questions about possible violation of domicile.

REMINDER

Regarding the place, Protocol II of CNJ Resolution No. 213/2015 considers possible indications of torture or ill-treatment: (I) the maintenance of the detainee in an unofficial, secret place of detention, including deserted, disabled places and vacant lots; (ii) the stay of the person in official vehicles or police escort for a longer period than necessary for their direct transportation between institutions.

Another dimension to be contemplated in the statement of the detainee is related to **"when"** the facts occurred (temporal dimension), that is, the approximate date and time, as well as the duration of the approach, the torture itself and the subsequent deprivation of liberty.

The judge must also ask questions related to the probable **authorship or "who" carried out** the act of torture or ill-treatment (subjective dimension). This does not mean identifying above all doubt who the perpetrator was, but understanding whether the violence was perpetrated by a public official and gathering information that contributes to the most accurate identification.

REMINDER

The inability of the detainee to identify the officials who practiced torture or ill-treatment does not prevent the follow-up of the investigation and subsequent responsibility. There are other elements that make accurate identification possible.

The assessment of the possible perpetrators of torture **should consider not only the officer who directly performed the action, but all public security officers present in the situation or who were communicated about the facts**.

IN PRACTICE

In Brazil, it is common for the judge to question whether the victim knew the police officers who committed the violence. Behind this question is usually the intention of the judge to understand what the motivation for torture would be. However, the characterization of torture is not based on the personal motivation of the person who practiced it. In any case, the fact that the detainee knows the officers beforehand or not does not impact the credibility of their account or weaken the configuration of possible torture scenario.

Finally, there are two more dimensions of torture that should be questioned in the hearing: the outcome dimension and the complementary probative dimension. For the evaluation of the **result** generated by the conduct practiced, it is essential that in the first hours of detention a forensic medical evaluation is carried out centered on the interview of the person about the facts that would have occurred, the effects felt and possible injuries. It is a legal duty of the judge of the detention control hearing to ensure that the forensic medical evaluation has been arranged within the relevant baselines, notably the Istanbul Protocol of the United Nations[14].

The hearing should also question **other evidence elements** (complementary probative dimension), such as the indication of witnesses, videos, photos, documentary records, clothing and statements of complaints before the hearing, in particular in front of the police chief.

2.5 QUESTIONS ABOUT PROTECTIVE MEASURES

It is also up to the judge to question the detainee about their perception of possible risks to their own integrity or that of another person who has been aware of the facts. If necessary and the detainee agrees, **protective measures** of their physical and psychological integrity can be adopted, which will be explored in topic 4.3.

14 The Istanbul Protocol is the main framework of international guidelines for the investigation and documentation of torture and ill-treatment. Its text includes general considerations for conducting interviews with victims of torture and ill-treatment and detailed standards for arranging the forensic medical evaluation. The Protocol was approved by the UN General Assembly in December 2000 and, in Brazil, was recognized as a guideline for corpus delicti examinations of crime victims by CNJ Recommendation No. 49/2014 and CNMP Recommendation No. 31/2016.

3. ASSESSMENT OF REGISTRATIONS AND ADDITIONAL INFORMATION

The information provided by the detainee during the detention control hearing about the act of torture or ill-treatment may subsequently be confronted with the documentary records available at the detention control hearing, in particular: (I) the medical report or the medical report or forensic medical evaluation *ad cautelam* and (ii) other documentary records including the *in flagrante delicto* arrest record, charge note and available media.

REMINDER

All registrations must be available to the judge, the representative of the Prosecutor's Office and the defense at the time of the detention control hearing, including the medical report or expert report. Several Brazilian states make the report available before the hearing.

If the forensic medical evaluation has been carried out, but the report is not available at the detention control hearing, the re-evaluation must be determined.

3.1 ANALYSIS OF THE FORENSIC MEDICAL EVALUATION REPORT

During the detention control hearing, it should be verified whether the detainee has undergone a physical examination, and the examination should be arranged when (i) it was not arranged before the hearing; (ii) the records are insufficient; (iii) the allegation of torture and ill-treatment refers to the time after the examination was arranged; or (iv) the examination was arranged in the presence of a police officer.

For the assessment of the adequacy of the registrations, the report or record shall contain at least the following elements:

(i) **Official written request**, which is usually made through the corpus delicti examination request.

(ii) **transportation of the detainee made by officers organizationally separated from the accused public security body**.

(iii) **adequate space that guarantees privacy**, and the space in which the examination was performed must be accurately stated in the report, for example mentioning the room number.

(iv) **absence of police or security officer in the medical examination room**, which if it is not complied with is the cause of absolute nullity of the evaluation carried out[15]. Moreover, the presence of any other people in the examination room – relatives, lawyers, health students, etc. - must be registered, pointing out their identification.

(v) **interpreter support, if necessary**.

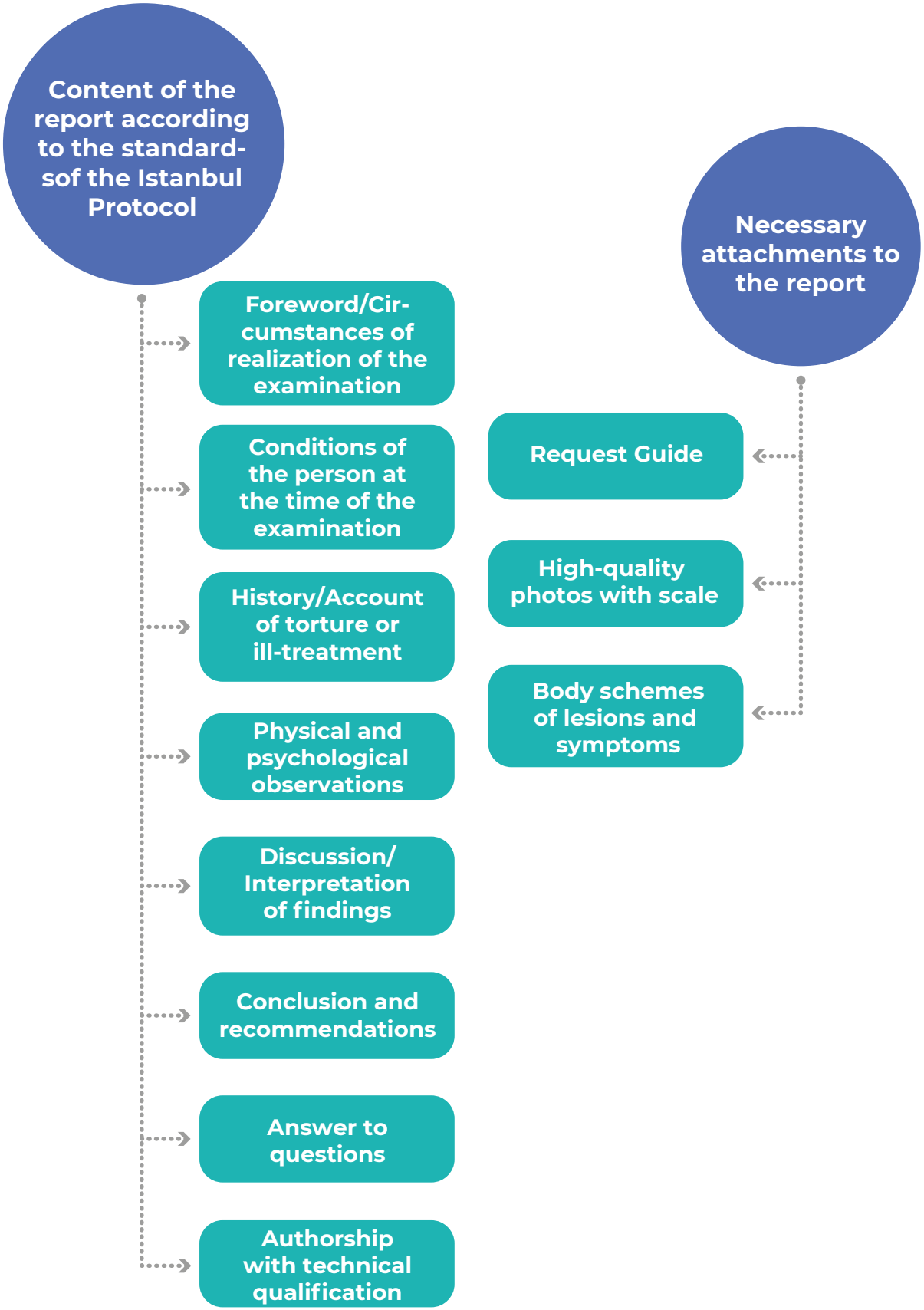
(vi) **expert report prepared following the guidelines of Annex IV of the Istanbul Protocol,** as illustrated by flow chart 4.

(vii) **Photographs attached to the expert report**, in which an image scale tool, such as a tape measure or forensic ruler, must appear. It is preferable that professional quality photographs are made, including with automatic dating devices.

15 Exceptionally, at the request of the health professional, a security officer "can make eye contact with the patient, but not hear what he is saying". This circumstance must necessarily be recorded in the report.

ANALYSIS OF THE FORENSIC MEDICAL EVALUATION REPORT

Detention Control Hearing



Regarding the conclusion of the report, it should be considered that torture and ill-treatment **are legal definitions**, which should be concluded from the analysis of the judge, and it is not up to the physician to conclude whether or not torture or ill-treatment occurred. What a medical report can do is demonstrate that injuries, symptoms, or patterns of behavior recorded are more or less consistent with the reported practice of torture or mistreatment.

REMINDER

The absence of visible injuries does not mean that there was no torture. Many methods of torture are practiced with the intention of not leaving visible marks on the body.

If there are visible marks at the hearing that have not been recorded in the report, it is likely that the assault occurred after the personal integrity examination and that it is necessary to conduct a new examination. It is also possible that there was omission or failure in the preparation of the report, which may indicate connivance with acts of torture or ill-treatment.

If the records resulting from the report or expert report are not adequate, the judge shall arrange for the immediate photographic and audiovisual record during the detention control hearing, in accordance with the same technical guidelines mentioned for the photographs attached to the report, ensuring the prior agreement of the detainee and respect for his/her privacy. In addition, these images must be stored securely and at the same time accessible to the competent bodies, such as the Public Prosecutor's Office, the Public Defender's Office and the Justice Comptroller's Office.

If it is necessary to require a corpus delicti examination, queries should be formulated, that is, questions addressed to the physician, or multidisciplinary team related to the symptoms, physical conditions and psychological evaluation of the detainee. The queries enable the experts to answer objective questions according to the expert methods and metrics. In addition to standard questions, **it is recommended to formulate own and specific questions, which are related to the peculiarities of the actual case**.

3.2 ASSESSMENT OF OTHER CASE RECORDS

Other relevant evidence for the identification of torture or ill-treatment are the flaws, irregularities and significant discrepancies between the arrest record and the interview of the detainee, or between the different records available.

3.3 ASSESSMENT OF SUPPLEMENTARY INFORMATION

The indications of torture may be confronted with information available to the judge from sources other than the records and hearing of the detainee, such as information on blocking visits by supervisory bodies to certain places of deprivation of liberty and on patterns of torture in the locality. Access to this type of information can be facilitated through the creation of **inter-agency dialogue**, as mentioned in item 6.

4. LEGAL REPERCUSSIONS OF ACCOUNTS OF TORTURE AND REFERRALS

The detainee's account of being a victim of torture or the existence of other evidence of such acts has repercussions in multiple spheres, judicial and non-judicial, in addition to different areas of accountability, as illustrated in flowchart 5.

4.1 DECISION ON ARREST REVOCATION

The identification of evidence of torture in the detention control hearing impacts the analysis on the legality of the arrest. If, on the one hand, judicial cognition at the detention control hearing is limited, on the other, there is a constitutional imperative to control the legality of arrests and the absolute prohibition of torture. Furthermore, **the judicial decision for the revocation of illegal detention at the detention control hearing pervades a less rigorous** *onus probandi* **than that required for the criminal conviction of an officer accused of torture.**

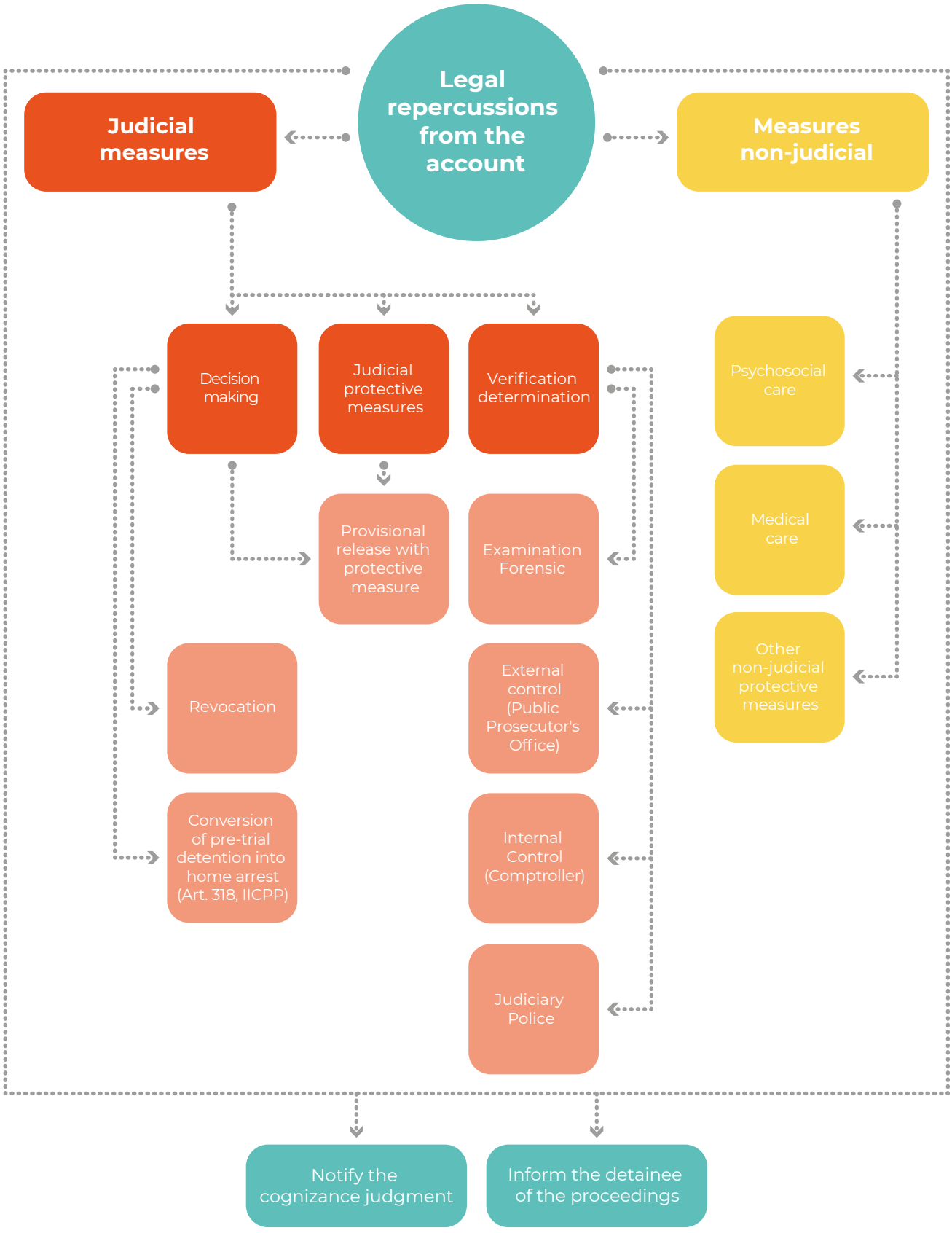
REMINDER

During the police approach, the use of force must follow criteria of legality, necessity, proportionality, moderation and convenience[16]. It is up to the police authorities to document in the respective arrest record how the use of force took place and from what criteria. Since injuries occurred at the time of arrest, **the burden of proving the legitimate use of force lies with the State.**

16 BRAZIL. Inter-ministerial Ordinance No. 4.226, of December 31st, 2010, which establishes guidelines on the use of force by public security officers. Ministry of Justice; Secretariat of Human Rights of the presidency of the Republic. Brasília, 2010.; BRAZIL. Law No. 13.060 of December 22, 2014. It regulates the use of instruments of lower offensive potential by public security officers throughout the national territory. Federal Official Gazette from 04.11.2019. Brasilia: 2014.

LEGAL REPERCUSSIONS FROM THE ACCOUNT AND OTHER INDICATIONS OF TORTURE OR ILL-TREATMENT

Detention Control Hearing



In the light of the principle of immediacy and the fundamental *in dubio pro reo* guideline of criminal law, the judge must acknowledge evidence of torture or ill-treatment when deciding on the revocation of the unlawful detention of the detainee. Thus, whenever the conduct that inflicts suffering is related to the *in flagrante delicto* arrest or to the evidence gathering of the materiality or authorship of a crime attributed to the detainee, the detention should be revoked.

REMINDER

Evidence obtained through torture or ill-treatment is unlawful and inadmissible, due to international standards and the prohibition expressed in the Constitution. The rule to exclude evidence obtained under torture or other forms of degrading treatment is absolute and indelible.

It is appropriate for the judge to always consider the possibility of revoking the detention, in the light of the *pro persona* principle, the absolute prohibition of torture and the risk of rewarding torture by maintaining the detention, regardless of whether the practice has made the detention illegal or not. It should be remembered that **Protocol II of CNJ Resolution No. 213/2015 recognizes that the court can grant provisional release, regardless of the requirements of pretrial detention**, as a protective measure to guarantee the security and integrity of the detainee.

If the indications of torture or ill-treatment point to a time after the *in flagrante delicto* arrest or the entering of the respective record, the legal consequences of these indications must be evaluated in relation to the need and enforcement of any non-custodial measures[17]. If it is understood that there is a need to apply measures to protect the application of criminal law, criminal Investigation or evidence gathering, it is recommended that less restrictive measures be used that consider the impacts on integrity and health that affect every victim of torture or ill-treatment.

When the **detainee** is **seriously injured**, has been **hospitalized** or demonstrates a state of **mental confusion**, it is important that stricter criteria be adopted to analyze the appropriateness of pretrial detention, giving **priority to provisional release** with or without non-custodial measure or, furthermore, converting pretrial detention into house arrest.

17 Step 3 indicated on Page 68 of the Handbook on Decision-Making in Detention Control Hearings: General Standards: <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_juridico_1-web.pdf>.

4.2 JUDICIAL MEASURES OF ASCERTAINMENT DETERMINATION

One of the consequences of the absolute prohibition of torture is the duty to initiate *ex officio* and without delay the necessary steps for a serious, impartial and effective investigation, which is not seen as a mere formality or a discretionary faculty. Thus, **it is up to the detention control hearing court to determine the measures for ascertaining the facts, and this activity should not be delegated to the future evaluation by the trial court of the criminal case**.

REMINDER

Every account or other evidence of torture or ill-treatment should be referred to the competent authorities for investigation. The evaluation of the solidity or deficiency of the evidence falls on the competent bodies for the investigation and it is not up to the detention control hearing court to establish types of cases filtering.

Thus, the judge of the detention control hearing must, at least, determine two judicial measures: (I) the arrangement of a forensic medical evaluation, when appropriate, as previously discussed, and (ii) the activation of the internal and external control bodies competent for the investigation of the conduct of the public officers involved, and the judicial police.

REMINDER

Internal control and external control bodies play autonomous, complementary and important roles in preventing and combatting torture and ill-treatment. It is not possible to choose to forward the report only to certain bodies to the detriment of others or to wait for the case to be resolved within the internal framework for sending to external control or judicial police

4.2.1 Referral to internal (administrative) control bodies: the Justice Comptroller's Office

Accounts of torture or ill-treatment arising from detention control hearings should be forwarded to the control departments of the police forces to which the suspected officers belong for the proper investigation of administrative offenses or military crimes. The arrangements may vary among the federation units, sometimes dealing with specific Justice Comptroller Officers of each corporation, sometimes with the General Justice Comptroller. In addition, the judge may send a copy to the respective Ombudsman, if any, for follow-up and other due proceedings within their duties.

4.2.2 Referral to external control bodies: Public Prosecutor's Office

All cases in which there are indications of torture or ill-treatment in the hearings must be referred to the Public Prosecutor's Office, as the body responsible for external control of police activity. In addition to acting in the administrative and criminal accountability of the officers who perpetrated torture or ill-treatment, the Public Prosecutor's Office may file civil actions against the accused and the institutions to which they belong, aiming to stop offenses against administrative probity and systematic violations against detainee's rights.

REMINDER

Law No. 13.491/2017, which expanded the jurisdiction of the military justice to trial crimes provided for in the common criminal legislation when practiced by military personnel, is under question before the Federal Supreme Court through two direct actions of constitutionality (ADI 5804 and ADI 5901). The Attorney General's Office has already expressed the unconstitutionality of the law and, from this manifestation, the 7th Coordination and Review Chamber issued in 2019 Guideline No. 7, indicating that members of the Federal Prosecutor's Office must act in the criminal prosecution of crimes committed by military personnel of the Armed Forces against civilians[18].

4.2.3 Referral to the Judicial Police

The judge of the detention control hearing shall also notify the competent judicial police for the proper investigation of criminal acts. When evidence of torture has been identified that compromises the legality of the prison, the judge must request the establishment of a police investigation, according to Article 5th of the Code of Criminal Procedure.

4.3 PROTECTIVE MEASURES

In the context of the detention control hearing, the judge may adopt protective measures to preserve the physical and psychological safety of the victim, possibly of family members and witnesses, as well as of the official who has noted the occurrence of the abusive practice. In addition to the measures expressly listed in CNJ Resolution No. 213/2015 – immediate transfer of custody, granting provisional freedom and imposition of information secrecy – the detention control hearing court may enforce other relevant measures, in light, for instance, of the Maria da Penha Law[19].

18 <http://www.mpf.mp.br/atuacao-tematica/ccr7/dados-da-atuacao/orientacoes/orientacoes/ORIENTAAO_7_Assinada.pdf>

19 A list of protective measures is on pages 152 and 153 of the Handbook to Prevent and Combat Torture and Ill-treatment for Detention

Based on the consideration of the priority of protecting the life and personal integrity of the victim of torture, the judge may determine judicial measures with direct effects on the state officer suspected of the practice of torture or ill-treatment, such as, the prohibition of approaching the person who reported the practice of torture, his/her family members and witnesses, setting the minimum limit of distance to proximity, including their homes and workplaces[20].

4.4 NON-JUDICIAL MEASURES FOR MEDICAL AND PSYCHOSOCIAL CARE

In general, CNJ Resolution No. 213/2015 already indicates the relevant role of the detention control hearing court in the referral of the detainee to protection or social inclusion policies, once the demand has been identified. In the case of reports of torture or ill-treatment, the resolution is even more precise, expressly providing for the application of non-judicial measures, such as specialized medical and psychosocial care and inclusion of the person in programmes to protect the victim or witness, as well as family members or witnesses.

To carry out such referrals, the court may rely on subsidies and recommendations contained in the report from the Detainee Social Protection Service, as provided for in the Handbook of Social Protection in Detention Control Hearings.

It is important that all these different developments be properly communicated to the detainee, orally and in writing, in order to provide that he/she and his/her family members can follow the progress of the measures adopted. In the same way, they must be communicated to the trial court to which the detainee responds to ensure, among other purposes, compliance with the absolute and indelible rule of exclusion of evidence obtained under torture or other forms of degrading treatment.

Control Hearings: <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_tortura-web.pdf>.

20 For a list of other measures directed to the suspected officer, see page 153 of the Handbook to Prevent and Combat Torture and Ill-treatment for a Detention Control Hearings. <https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_tortura-web.pdf>.

5. RECORDS AND PROCEEDINGS FOLLOWING THE DETENTION CONTROL HEARING

The proper recording of the account or evidence of torture is fundamental for these referrals to be effective. In addition to the photos and videos of the visible injuries mentioned in topic 3, there are two other important means of documentation: the **minutes of the hearing** and the **summary report of the torture hearing**. As for the judicial decision minutes, the existence of an account of torture and other possible evidence (such as a forensic medical evaluation) should always be mentioned regardless of the request of the parties.

The summary report is a document that will be created only in cases where there is an account of torture, and it must include the following information: (i) the dynamics and method of infliction of pain or suffering; (ii) the results caused, from a medical-legal point of view, and any records documenting them; (iii) the identification of the perpetrators or other useful information for identification; (iv) the approximate place, date and time of the facts; (v) the indication of other means of proof mentioned; and (vi) referrals made. Such a report should stick to the allegations and other evidence of torture or ill-treatment, without prejudging the guilt of the detainee.

These documents, however, will not be sent to all actors involved in the referrals. These differences arise from the need to preserve secrecy and intimacy, preserve particular institutional attributions and avoid procedural and criminal damages. Considering the **letter** of the judge of the detention control hearing as the quintessentially referral document, the variations regarding the Annexes of the aforementioned document comply with the following scheme.

Table 1: Scheme on submission of documents after detention control hearing							
	Letter	Forensic medical evaluation form	Hearing record	Torture account report	Recording media	Hearing photos	Forensic medical evaluation report
Forensics							
Administrative correctional authority							
Public Prosecutor's Office							
Judicial Police							
Institutions involved with protective measures							
Health and protection network							
Trial Court							

REMINDER

Neither the summary report on torture or ill-treatment, nor the media of the recording of the detention control hearing can be sent to the criminal proceedings court knowledge, under penalty of characterizing anticipation of the interrogation of the detainee and generating procedural nullity.

The Justice Comptroller's Office, the Public Prosecutor's Office and other bodies to which the documents indicated in the previous table are intended have particular forms of organization in the various locations of Brazil. In order to identify within each of the institutions the most appropriate recipient to receive referrals from detention control hearings, it is encouraged to create spaces for **dialogue between the detention control hearing court and the relevant institutions, which can take the form of working groups**, committees, periodic meetings and inter-institutional protocols of action in cases of torture or ill-treatment.

Some of the referrals resulting from the report or evidence of torture imply the sending of responses to the detention control hearing court, even if its competence has ended. In this scenario, it is up to the detention control hearing court to forward these new documents according to the following scheme:

Table 2: Flow of documents sent to the detention control court

	The Trial Court	Defense	Detainee	Public's Prosecutor Office	Other investigation bodies
Forensic medical evaluation					
The decision of internal control bodies on the establishment of administrative procedures					
Decision of the Public Prosecutor's Office to initiate an inquiry or other proceedings					
Recommendation for inclusion in victim and witness protection programmes					

6. JUDICIAL MANAGEMENT

Detention control hearings have among their main purposes the prevention of torture and, in this sense, need to be articulated with the other prevention measures adopted especially by the judiciary, but also by the Public Prosecutor's Office, the Public Defender's Office and the Committees and Mechanisms to Prevent and Combat Torture. Thus, this final topic presents some important initiatives that should be the object of the attention of the detention control hearing court that goes beyond the performance of the solemn acts with the detainee.

6.1 SECURITY AND APPROPRIATE CONDITIONS IN ENVIRONMENTS RELATED TO THE DETENTION CONTROL HEARING

To ensure that the detention control hearing is a more welcoming and safer environment, as addressed in topic 2.1.3, it is recommended that a **protocol of use of force** be drawn up either by the judicial unit of the detention control hearing or by the Court. This protocol should regulate the use of less lethal weapons, establish guidelines for the use of handcuffs and other instruments of restraint, provide for the guidelines of action of security officers, among other measures related to the **control of legality over the acts carried out from the arrival of the detainee to the later final referrals**. Such a protocol should be periodically reviewed and adapted to comply with changes in space or routines.

In addition, it is recommended that the detention control hearing court establish **internal procedures for managing the** detention control hearing cells, with particular attention to the provision of **periodic internal visits** to verify compliance with the required conditions of any space of deprivation of liberty, such as ventilation, lighting, access to water, level occupation and sanitation. Similarly, it is pertinent that the detention control hearings court provides for visits to police stations, provisional detention centers and expert bodies. Such visits have both the function of identifying possible irregularities related to ill-treatment, as well as understanding the flows and procedures of these bodies.

6.2 ROLE OF MONITORING AND SURVEILLANCE GROUPS

CNJ Resolution No. 214/2015 assigns to the **Monitoring and Supervision Groups of the Prison System and the System of Socio-Educational Measures Execution (GMF) of the Courts**, among other activities, to watch over and supervise the regularity and functioning of detention control hearings. To this end, one of the means available to the GMF is the monitoring of the **Detention Control Hearing System** (SISTAC), which facilitates the data gathering produced at the hearing, provides for the monitoring of flows and also the identification of patterns of the detention control hearing, the justice system and the practices of torture and ill-treatment.

In addition to the implementation of data **monitoring methodologies**, the GMF is assigned to **standardize the flows** and procedures related to the prevention of torture in detention control hearings – especially in the interior regions, which usually have dynamics different from the capitals –, the monitoring of **emblematic cases** and the **planning of actions to prevent torture**, such as training and communication campaigns on human rights and institutional violence.

6.3 INTER-AGENCY COORDINATION

It is recommended that spaces for inter-agency dialogue be fostered or strengthened, and that judges responsible for detention control hearings participate in working groups and permanent discussion forums on the topic of torture and ill-treatment. Courts may also propose the creation of working groups or forums for the implementation of promising practices, the monitoring and follow-up of complaints, for the adoption of preventive measures, as well as for conducting joint inspections in detention control hearing cells.

The first step to be taken is to create a map of the institutions that make up the local network for the prevention and combat against torture. Among the counterparts with whom the Justice should establish the exchange of information are the experts of the State and National Mechanisms for the Prevention and Combat Against Torture and members of the local Committees, the Public Defender's Office, the Public Prosecutor's Office, the expert bodies, the police, the secretariats of public security and prison administration, the Brazilian Bar Association (OAB), civil society organizations for the defense of human rights, the rights councils and international bodies.

From the establishment of inter-agency meetings, the courts and other institutions will be able to agree on common methodologies of action in the prevention and combat against torture and ill-treatment, establishing programmes, implementing **inter-agency protocols** and agreeing on the flows of information and monitoring of cases.

FAZENDOJUSTIÇA

DEPEN Departamento Penitenciário Nacional

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PNUD

CNJ CONSELHO NACIONAL DE JUSTIÇA