Gender Perspectives on Torture:

Law and Practice

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW
Anti-Torture Initiative

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Disclaimer

Cover art by Aleksandra Jevtovic.

Preface

I once asked a Guatemalan public defender how she knew when a woman's murder was the result of gender-based violence and not a simple homicide. She showed me several pictures of women's half or fully naked bodies exhibiting obvious signs of torture, mutilation, and violent sexual assault prior to their deaths. She said that was how women's bodies were usually found. That was the difference between gender-based violence and simple homicide. Women's bodies are often used as instruments to send messages of terror, or as instruments of pleasure, or as instruments of experimentation. In all of these cases, gender-based violence is recognizable because of its profound denial of personhood. The common thread running through the collection of articles presented in this publication is that women's bodies are still looked at and treated as instruments, or means to achieving a goal, rather than as autonomous individuals. Killing a body to end a life is different than killing a body to send a signal. In both cases, the person is refused her or his basic right to life, but in the latter, the person is a mark, a sign for others to see and use.

The first chapter of this volume elaborates on the notion of gender-based violence, the need to incorporate a gender perspective in legal systems in general, and the responsibilities of States with regard to those at the margins of legal protections. Although gender-based violence has existed since the beginning of time, it has only entered the realm of human rights as a specific issue within the last decades. International human rights law, traditionally, has not protected women from the harms they have suffered as a result of being women. As with the rest of legal and political institutions, women have had to struggle for their experiences to be recognized. The invisibility of women's harms has also included a lack of reparations with a gender perspective; if the suffering women have endured is not understood, its consequences cannot be adequately addressed. Owing to the inclusion of a gender perspective, human rights treaty bodies have started to include reparations that put women, and not only their families or communities, at the center of their analyses. The new trends in international human rights are welcome by the international community, but they have not necessarily translated into substantive protection of women's and girl's rights, and States must work to ensure that they carry through with their obligations to investigate incidents of gender-based violence and provide redress for victims.

Chapter two examines specific forms of violence that women and girls experience throughout the world, including honor killings, female genital mutilation, pregnancy and virginity testing, and the use of forced contraception and addresses the need to advance the humanization of women's rights. States have been reluctant to introduce laws opposing these forms of violence on grounds that certain practices are based on culture or religion. Although international human rights law protects the right to freedom of religion, sexual-based violence cannot be excused on religious grounds, and it has taken too long for laws to begin to act against practices that constitute torture or ill-treatment. The chapter invites readers to view women as the protagonists of human rights standards rather than continually framing men as the central figures of such rights; the standard of protection cannot always be viewed through the lens of male actors. The chapter then moves beyond the gender perspective as a tool to protect women and analyzes the need for the specific recognition of harms suffered by trans and intersex individuals. Perhaps one of the most important

challenges that legal systems face is the deconstruction of the male-female binary, and international human rights is not shielded from this challenge. The chapter reinforces the need for human rights to go beyond the binary with regard to the protection of individuals by analyzing how torture and ill-treatment has played an intricate role in the lives of a whole category of individuals. For many trans and intersex persons, torture and ill-treatment are a constant in their lives and this chapter invites us to better understand what torture and ill-treatment means from the perspective of these individuals.

The third chapter focuses specifically on deprivation of liberty, and the torture and ill-treatment that often take place under custodial settings. Vulnerability increases in detention facilities, even when the detention is considered lawful. In the cases of LGBTI individuals, who are at greater risk of being in contact with the criminal justice system, once in custodial settings they are subject to brutality and abuse by prison authorities and fellow inmates. This violence is usually underreported and tends to be ignored by State officials because of the underlying assumption that people of diverse sexualities "deserve punishment" for not conforming to traditional gender roles. For custodial settings to cease being places of torture and ill-treatment for LGBTI individuals, violence must be understood from a gender and sexuality perspective. For prison officials, this means not placing trans individuals, whose legal names may not correspond to the gender with which they identify, in solitary confinement because they are unsure of where to house them—it simply replaces one form of violence with another form.

The chapter also addresses how criminal justice systems are structured around the idea of a male detainee. Incarcerated women—and their visitors—often endure invasive and humiliating searches, where the women are forced to undress in front of unqualified male officers who may also perform unnecessary body cavity searches. These techniques are not used with the legitimate purpose of ensuring safety within the detention facility, but rather to dehumanize and assert power over the already powerless. This is even more serious when it affects young girls. Criminal justice systems are also not structured with families in mind; "ideal perpetrators" are not only male but also single and with no dependents. Women detainees tend to be mothers with children and usually in a position of vulnerability with nobody to care for their children. In these conditions, it is not uncommon to find detention facilities and jails where children live with their mothers for some time, increasing the incarcerated population to include children, who at a young age, develop their first connections with the world through the prism of a detention facility. A gender perspective requires legal frameworks that look at detained persons not as isolated beings, but as individuals with dependents and family connections.

Chapter four considers torture and ill-treatment within the context of women's health care and reproductive rights. Women face mistreatment when seeking maternal health care, undergo forced sterilizations, can face criminal repercussions for self-inducing abortions, and are often denied safe and legal abortion services. It is not uncommon for women in custodial settings to deliver their babies while in shackles, and this chapter explores how the lack of adequate maternal health care can amount to ill-treatment or torture. Depriving women of their right to reproductive self-determination is an additional example of how States have long-ignored the needs of women as citizens. A traditional concept of torture does not allow for an understanding of the common experiences of women, and this chapter expands on the idea that torture and ill-treatment not only occur in situations where government actors themselves are the perpetrators of harm, but when the government allows harms to occur out of a complete disregard for women's bodies. To understand how the lack of adequate maternal care or reproductive rights can be so severe that it amounts to ill-treatment

and even torture, one simply has to compare the experiences of women—be it forced sterilization, lack of access to painkillers during childbirth, or lack of abortion regulations—with international human rights standards, and it becomes clear that often ill-treatment, torture, and the experiences of women are all the same. In that sense, this volume expands on the important and influential report by the former Special Rapporteur on Torture on the issue of women and torture.

Restrictions on reproduction have long been used to control women's bodies and entire populations, and legal systems, including the norms, standards, and rules of international law, have denied women from seeing their harms recognized as such. Rape was not considered torture until recently; it was not worth the time of special war crime tribunals or worth the time of international treaty bodies. But this is changing, and this publication is a testament to that change. Seeing torture as a gendered practice requires a specific gaze that for most people is a learned process. Only recently have our legal systems started viewing and treating women as individuals. Only recently have legal systems understood and given a name to women's specific harms. In the case of LGBTI persons, those strides are still in their infancy. Despite how widespread and deep-rooted violence against women has been for centuries, torture and ill-treatment were primarily viewed and analyzed through a "male as the main victim" lens. This publication takes a formidable step toward debunking the myth of heterosexual cisgender men as exclusive victims and reinforces the need to integrate women's rights and sexuality perspectives into the mainstream of international human rights.

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Introduction

A comprehensive understanding of the unique ways in which society's most vulnerable persons are affected by torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment) requires the recognition of a gendered analysis and framework that fully encapsulates these atrocities. Historically, the framework underrepresented this perspective, as the torture and ill-treatment framework emerged in response to practices and situations disproportionately affecting men. Full incorporation of a gendered analysis brings with it the acknowledgment of structural gender discrimination, patriarchal and heteronormative power structures, and socialized gender stereotypes. Incorporation of a gendered analysis also allows the torture and ill-treatment framework to more effectively qualify and address human rights violations committed against all people across sexual and gender norms. In this way, a gendered analysis is important for a comprehensive understanding of torture as much as a study of torture is important for gender studies, and the full recognition of the lived realities of the world's most disenfranchised people.

This publication is a follow-up to the report I presented to the United Nations Human Rights Council (HRC) in March 2016 (A/HRC/31/57). The report examined how the prohibition of torture and other ill-treatment in international law must take into account the unique experiences of women, girls, and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons. The report was a reminder to States of their obligation to prevent and combat gender-based violence and discrimination against women, girls, and LGBTI persons that amount to torture or ill-treatment, irrespective of whether the acts are committed in the private or public spheres. Moreover, my report underscored that States must look at the totality of the circumstances of women, girls, and LGBTI persons in order to account for the lived realities and compounded forms of oppression that include race, social status, ability to pursue life goals, and extant discriminatory legal, normative, and legislative frameworks. Reparations for harms suffered should be comprehensive and accompanied by diverse measures and reforms designed specifically to combat gender-based discrimination.

This volume is a compilation of articles and essays submitted by global experts, activists, scholars, and practitioners, invited to reflect and expound upon various areas of my report, its recommendations, and on the diverse contexts women, girls, and LGBTI persons experience violence, often in the form of torture and other ill-treatment. The articles within the publication span the different topical areas that stand at the intersection of gender and torture and re-centers the narratives. They are both academic and advocacy pieces, covering, *inter alia*, gender-based violence, gender and sexuality as the basis for specific harms, conditions of confinement, and healthcare and reproductive rights. I am proud to present this compilation, which reflects and expands upon the way the traditional torture and ill-treatment framework failed to account for the experiences of women and LGBTI persons for too long.

The key topical areas from my report further expanded upon in this volume include:

Gender-Based Violence

Gender-based violence is globally prevalent and can occur against any person due to their sex and socially constructed gender roles. Whether in peacetime or during conflict, women, girls, lesbian, gay, bisexual, transgender persons, and sexual minorities and gender non-conforming individuals are the predominant targets of gender-based violence. Men and boys can also be victims of gender-based violence, including sexual violence. As the Committee against Torture noted in its general comment No. 2 (2007), gender-based violence can take the form of sexual violence and many other forms of physical violence and mental torment.

This publication builds on my report, which introduced the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes to identify gaps in the torture and ill-treatment framework. More specifically, the report provided guidance to States on their obligations and recommendations to bridge the gaps in prevention, protection, and access to justice and remedies. The articles within this publication each contribute to many different ways in which women, girls, and LGBTI persons experience violence due to their sex, socially constructed gender role, and sexual orientation. Furthermore, the articles emphasize States' obligations to prevent and combat such violence, including investigation and prosecution of gender-based crimes and provision of reparations.

Specific Harms

Women and girls disproportionality suffer from harmful practices or forms of behavior grounded in discrimination on the basis of sex, gender, and age. Harmful practices are often justified under the basis of social norms, cultural beliefs, tradition, or religion, but harmful practices are motivated in part by societal sex and gender-based roles. Such practices are harmful in that the practice can cause physical or psychological harm or suffering, including short and long-term consequences to victim's dignity, physical and psychological integrity and development, health, education, and socioeconomic status. The articles addressing this key topical area focus on practices, such as honor killings, female genital mutilation, and mandatory pregnancy or virginity testing of girls. The articles stress not only eradication of such harmful practices, but also the importance of incorporating a gender perspective to both international and domestic legal frameworks.

As my report states, it is estimated that 35 percent of women worldwide have experienced physical or sexual intimate-partner or non-partner violence, with significantly higher figures reported in some States. Torture and ill-treatment of persons on the basis of actual or perceived sexual orientation or gender identity is rampant, with rape and other forms of sexual violence sometimes being used as a form of "moral cleansing" of LGBTI persons (S/2015/203, A/HRC/25/65). Today, rape and other forms of sexual violence are recognized by international law as torture and ill-treatment. The authors in this publication address the urgency of States' due diligence obligations to ensure redress from the disproportionate effect of violence against women, girls, and LGBTI persons. Recognizing all forms of gender-based violence as torture or ill-treatment, whether in the public or private sphere, is essential not only to the full understanding of torture, but to upending deep-rooted power dynamics, thus allowing for the full realization of human rights for all.

Deprivation of Liberty

The articles addressing conditions of confinement highlight the ways in which women, girls, and LGBTI persons are particularly at risk of torture and ill-treatment when deprived of liberty, both within the criminal justice systems and within other, non-penal settings. Oppressive criminal justice systems worldwide are perhaps one of the leading global examples of structural inequity, which disproportionately and unequivocally affect women, girls, and LGBTI persons. The articles also highlight the ways in which torture in detention intersects with and impacts reproductive justice, migrant rights, and the rights of people living with HIV/AIDS. Consistent with my report to the HRC, the articles expound on this particularly urgent injustice and call these acts what they are: instances of torture and ill-treatment.

Healthcare and Reproductive Rights

Central to women's full autonomy, agency, and realization of human rights is sexual and reproductive health and rights. The articles in this compilation expand upon the findings of my report, most notably that the lack of legal and policy frameworks that effectively enable women to assert their rights to access reproductive health services enhances their vulnerability to torture and ill-treatment. Furthermore, the broad gamut of reproductive issues including the access to abortion and related care, forced and coerced sterilization, forced contraception, and other abusive practices in healthcare and educational settings are all gendered crimes which for too long have gone unnoticed as the torture that it is. The fact that health-care providers tend to exercise considerable authority over clients, placing women in a position of powerlessness, further exacerbates women and LBGTI's unique vulnerabilities, susceptibility to torture, and the global system of power inequity. The articles in this volume present examples from Kenya to Iraq to the United States, underscoring the universality of these abuses against women and LGBTI persons specifically.

Aims of the Present Volume

It is with the greatest of hope that readers view this compilation as a vehicle via which the global conversation on gender and torture shall continue so that women, girls, and LGBTI persons attain access to justice and reparations and the full realization of their human rights. The recognition of the unique forms of torture endured by women, girls and LGBTI persons is both vital and urgent because it links the full realization of human rights to redress and reparations. The articles in this publication explore what this means, and what it potentially can mean. The authors stress the report's conclusion that "reparations must be premised on a full understanding of the gendered nature and consequences of the harm suffered and take existing gender inequalities into account to ensure that they are not themselves discriminatory" (A/HRC/14/22, para. 32).

My goal is that this volume will serve as a resource for practitioners, advocates, policy makers, and other stakeholders invested in incorporating gendered perspectives and experiences into the torture and ill-treatment framework. It is imperative that policies, practices, and legislative frameworks function effectively in order to prevent the violence, discrimination, and other serious harms

that inhibit women, girls, and LGBTI persons from exercising their fundamental human rights, including the right to be free from torture and ill-treatment.

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Foreword

Dr. Dubravka Šimonović*

Violence against women endures, so long as societies ignore, accept, or tolerate such violence as a norm. In 2003, the United Nations Commission on Human Rights extended the Special Rapporteur for Violence Against Women's mandate and affirmed that violence against women "impairs or nullifies" women's enjoyment of human rights and fundamental freedoms.[1] As discrimination and inequality continue to make women vulnerable to violence, the fight to eliminate violence against women necessitates that certain violent acts be recognized as amounting to torture or cruel, inhuman, or degrading treatment or punishment. As recently recognized in the Committee on the Elimination of Discrimination against Women's General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, in which I actively participated, "Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances […] in determining when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, a gender-sensitive approach is required to understand the level of pain and suffering experienced by women, and […] the purpose and intent requirements for classifying such acts as torture are satisfied when acts or omissions are gender-specific or perpetrated against a person on the basis of sex."[2]

Women are often targets and victims of trafficking, sexual violence, femicide, mutilation, forced marriage and domestic violence, precisely *because they are women*. In his 2016 thematic report (A/HRC/31/57), the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment highlighted the lack of gender perspectives in the torture and ill-treatment framework. As the torture and ill-treatment framework developed in response to situations primarily affecting men, it largely failed to account for gender based discrimination, stereotypes, and power structures impacting female experiences with torture and ill-treatment. The Special Rapporteur's report therefore concentrates on integrating gendered perspectives, including violence against women, into the torture and ill-treatment framework.[3]

Both States and private actors are capable of perpetrating violence against women. States' obligations to prevent and combat violence against women include not only the due diligence of investigating and punishing acts of violence against women, but requiring that services be provided to

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1 United Nations Commission on Human Rights Resolution 2003/45.

2 CEDAW General Recommendations No. 19 and 35 on gender-based violence against women.

3 A/HRC/31/57, ¶ 9

victims and those at risk of violence—populations that are often vulnerable, marginalized, and limited in access to resources. Therefore, when States fail to prosecute perpetrators of violence, they neglect victims, perpetuate impunity, and become complicit in the cycle of violence.

Femicide or gender-based killings of women include honor killings, and killings related to crimes of passion that flagrantly disregard women's rights to life and physical and mental integrity. These killings arise from continuously experienced violence, occur mostly within the family, especially from intimate partner, and constitute the most extreme forms of violence against women. Around the world, the majority of female homicide victims are killed by intimate male partners or family members. With global femicide rates increasing, impunity for femicides, regrettably, remains the norm including because the perpetrator may also kill himself. (A/HRC/20/16). Femicide prevention therefore requires global, regional, and national mechanisms, such as the establishment of a "Femicide Watch" in every country. Implementation of national "Femicide Watches" requires States to develop and adopt methods of collecting data, establishing indicators, training police and other personnel, and referring cases for prosecution in situations related to violence against women. "Femicide Watch" methods are both responsive and preventative mechanisms that help to identify gaps in the intervention, criminal justice, and criminal procedure systems in order to more effectively combat femicide and violence against women. Last year, I presented a full report on modalities to establish gender-related killing or femicide watch, which provides suitable and concrete recommendations to States (A/71/398).

Shelters are an integral resource in a vulnerable or victimized woman's support network. Shelters are temporary emergency safe accommodations for women and children who have experienced or are at risk of being victims of domestic violence. Shelters not only support women who have experienced domestic violence, but also provide support for women and girls who are migrants, victims of trafficking, or asylum seekers fleeing violence. Both States and civil society organizations provide and operate shelters; however, austerity policies and budget cuts have inhibited access to shelters causing many of them to be shut down. Owing to the vital role shelters play, States should therefore establish and maintain shelters as part of their human rights obligations, not simply as charitable measures. These shelters should be safe, confidential, and allow women and children to stay for extended periods of time, affording them the opportunity to access legal, psychological, and medical help and participate in empowerment programs.

Protection orders also serve as a valuable resource for women at risk of violence. Protection orders are judicial instruments meant to ensure the safety of a victim of any form of gender-based violence, including by requiring the perpetrator to leave the shared residence or to stay away from the victim. Protection orders and shelters are part of States' human rights obligations, as I developed in my latest report to the Human Rights Council (A/HRC/35/30), and are complementary protection measures, as often when a woman takes out a protection order she is at an increased risk for violence and may need to seek refuge. While these measures should work in tandem, insufficient coordination between social services and the justice system jeopardizes the protective nature of these instruments. Moreover, protection orders often focus more on the treatment of perpetrators than on the protection of victims, which should be the central concern.

Women who are active in political and public spheres are often the targets of violence. As they exercise their citizenship, these women confront verbal abuse, threats, sexual harassment, rape, and in extreme cases are murdered for their commitment to political and public life. Violence against

women active in politics and in public life impacts all women, discouraging them from exercising their voices and agency, and ultimately deprives them of their civil and political rights.

In 2015, the United Nations General Assembly adopted the 2030 Sustainable Development Agenda. Sustainable Development Goal 5 calls upon States and private actors to combat and prevent discrimination and violence against women and girls in order to achieve gender equality and empower all women and girls. Accomplishing Goal 5 is integral to the success and implementation of the remaining sixteen Sustainable Development Goals and to achieve their objective of realizing human rights for all.

My work in this field and this collection of articles analyzing gender-based violence and violence against women contributes to the eradication of violence against women by recognizing that specific acts of violence may constitute torture and ill-treatment. Connecting violence against women with torture, a rights violation that is more uniformly rejected, will help to eradicate violence against women across the health, law enforcement, social services and other sectors within which it permeates. Recognizing that different acts of violence against women may constitute an act of torture is a profound step towards creating a culture that does not perpetrate or tolerate violence against women as the status quo. Cases of rape, domestic violence, harmful practices, forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are all forms of gender-based violence that, according to CEDAW General recommendation No. 35, may amount, depending on the circumstances, to torture or cruel, inhuman or degrading treatment.

I.
Gender-Based Violence: State Responsibility

The Vital Voices Justice Institute: Helping States Combat Gender-Based Violence

Gigi Scoles and Anupama Selvam*

Abstract

This article proposes the Institute Model, implemented internationally by Vital Voices, as a tool for States to meet due diligence obligations. The Institute is a multidisciplinary training model designed to reach all types of adult learners and to coordinate effective responses to domestic vio-

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Anupama Selvam holds a Juris Doctor from American University Washington College of Law where she graduated cum laude and a Masters from the American University School of International Service. She earned a Bachelor of Science in Foreign Service from the Edmund A. Walsh School of Foreign Service at Georgetown University where she majored in International Politics and received a certificate in International Development. Her coursework included a focus on women's and gender studies as they apply to international law and policy, including in depth research on the use of rape as a weapon of war. Following her time at Georgetown, Ms. Selvam conducted research for Tshwaranang Legal Advocacy Centre, a rape crisis center located in Johannesburg, South Africa, where she contributed to a nationwide Rape Attrition Study helping to understand the low reporting and high withdrawal rates of rape cases in South Africa. Later, Ms. Selvam worked as a co-chair of the gender-equality committee at CIVICUS: World Alliance for Citizen Participation. Following her return to the United States, Ms. Selvam worked for Professor Antony D'amato of the Northwestern University Pritzker School of Law, working as a legal case manager and researcher on civil cases seeking restitution for victims of the Holocaust. Ms. Selvam has years of experience as both a medical and legal advocate for Chicago's largest stand-alone rape crisis center, Rape Victim Advocates, where she supported and guided sexual assault survivors through their interactions with the medical and legal systems, including the processes of reporting, attending criminal trials, as well as pursuing civil remedies and injunctions. Ms. Selvam most recently has worked on issues of gender-based violence as they effect immigrant communities in the United States through her work with the National Immigration Women's Advocacy Project (NIWAP) as well as a case before the United States Court of Appeals for the Fourth Circuit. Ms. Selvam worked as a member of the Human Rights team of Vital Voices Global Partnership in 2016.

lence, sexual assault, trafficking, and other forms of gender-based violence. Participants include judges, prosecutors, law enforcement, advocates, social service providers, and other stakeholders. Tailored to each community it is held in, and in consultation with local experts, the Institute has the dual purpose of training participants while creating a network of criminal justice actors who are encouraged to continue working together after the training ends. This article describes the history and development of the model, details proper implementation methods, discusses the impact of these trainings, and posits the Institute Model as a solution for States to meet their due diligence obligations to end gender-based violence. The article draws upon experience and data that has been collected and analyzed on the success of the Institute Model.

I. Introduction

Global efforts to combat gender-based violence have grown exponentially in the last twenty years.[1] With the growing understanding that women's rights are human rights,[2] the international community has started to analyze laws and policies with a gendered perspective, in the hope that doing so will ensure that these policies address the needs of victims.[3] Although there has been a shift from systemic neglect of victims of gender-based violence to an acknowledgment of the need to eradicate gender-based violence on the part of some governments, the question of how to do so remains controversial.

In response to a growing desire to eradicate gender-based violence, the international human rights law framework created State accountability for gender-based violence. State parties sought to develop standards surrounding gender-based violence in the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). Along with this new treaty law, the international community began applying existing tools to address gender-based violence. One example of this is the United Nations Special Rapporteur on Torture's report on gender perspectives on torture where the then Special Rapporteur Juan Mendez defined gender-based violence as a form of torture under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT), a key instrument that encapsulates one of the most respected and established international legal standard.[4] This characterization and the legal consequences it carries are fundamental, as they create States' responsibility to approach the prevention and punishment of gender-based violence as they would all other types of torture. It thus emerges that States not only have an obligation to ensure that State actors are aware of the gravity of gender-based violence and how to address it, but also to protect people from the violence of private actors who commit gender-based violence. Thus emerges a due diligence obligation for States to address gender-based violence. This obligation requires States to prevent, protect against, prosecute, and punish acts of gender-based violence while providing adequate remedies to victims.[5]

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1 *See Statement by Dubravka* Šimonović, *Special Rapporteur on violence against women, its causes and consequences at the sixty session of the Commission on the Status of Women*, New York, (14 March 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18524&LangID=E#sthash.rq6xaAlj.dpuf

2 *See* Hillary Rodham Clinton, *Remarks to the U.N. 4th World Conference on Women Plenary Session: Women's Rights Are Human Rights* (1995) *http://www.americanrhetoric.com/speeches/hillaryclintonbeijingspeech.htm*

3 *See* Šimonović, *supra* note 1.

4 *See generally*, U.N. Special Rapporteur on Torture, Juan E. Mendez, Report of the Special Rapporteur on Torture, U.N. Doc. A/HRC/31/57, (Jan 5, 2016).

5 *See id.*

II. Due Diligence Standard

The due diligence standard is a complex standard within international human rights law.[6] Though the principle can be derived from various international instruments,[7] for the purposes of this article, the pertinent instruments we are referring to are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT).[8] Both CEDAW and CAT require States to meet a due diligence standard in order to fulfill their treat obligations. Under CAT, due diligence is defined as the obligation of State Parties to prohibit, prevent, and redress torture and other cruel, inhuman or degrading treatment. The U.N. Special Rapporteur on Torture has interpreted this to include the duty to prevent, investigate, and punish gender-based violence.[9] Similarly, under CEDAW due diligence requires States to protect against, investigate, punish and provide redress to eliminate discrimination against women.[10] Though constructed slightly differently, both frameworks require that State parties take steps to prevent, protect against, prosecute, punish and provide adequate redress where gender-based violence occurs.[11]

The 1993 Declaration on the Elimination of Violence against Women adopted the concept of due diligence, establishing that under the due diligence obligation, States have a duty to take positive action to prevent and protect women from violence, punish perpetuators of violent acts and compensate victims of violence.[12] In CEDAW's General Recommendation No. 19, CEDAW called on States to act with due diligence to prevent and respond to violence against women.[13] This provision was reiterated in paragraph 125 (b) of the 1995 Beijing Platform for Action.[14]

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[6] For a full and detailed analysis of the due diligence standard as it applies to gender-based violence, please refer to, U.N. Special Rapporteur on Violence Against Women, Yakin Ertürk, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, ¶ 44 U.N. Doc. E/CN.4/2006/61, (Jan. 20, 2006), available at: http://www.refworld.org/docid/45377afb0.html; *see also* Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*, International Human Rights Initiative, 2014.

[7] *See* J. Hessbruegge, *The Historical development of the doctrines of attribution and due diligence in international law*, 36 New York Univ. Journal of Int'l Law, 265-306 (2004) (documenting the long history of the due diligence standard in international law that date back to Grotius and other seventeenth century writers); *see also* U.N. Special Rapporteur on Violence Against Women, Yakin Ertürk, *supra* note 6 (stating that human rights bodies such as the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, the different special procedures of the Commission and regional human rights institutions have also elaborated on the requirements of the due diligence standard in relation to specific country situations as well as on a more general level. The standard of due diligence has been increasingly applied to various human rights issues ranging from trafficking in persons to the obligations of transnational corporations and other businesses).

[8] *See generally* Convention on the Elimination of All Forms of Discrimination Against Women, December 1979, 1249 U.N.T.S. 13; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[9] *See generally*, U.N. Special Rapporteur on Torture, Juan E. Mendez, Report of the Special Rapporteur on Torture, U.N. Doc. A/HRC/31/57, (Jan 5, 2016).

[10] *See* UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19,* 1992, A/47/38.

[11] See Abdul Aziz and Moussa, *supra* note 6 at 11; *See also* U.N. Special Rapporteur on Violence Against Women, Yakin Ertürk, *supra* note 6 at ¶ 19 (referring to slightly different wording/formulation of due diligence: prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by private or State actors).

[12] U.N. Special Rapporteur on Violence Against Women, Yakin Ertürk, *supra* note 6 at ¶ 14

[13] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations No. 19,* 1992, A/47/38.

[14] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, A/CONF.177/20.

Along with the international treaties that have defined due diligence, regional courts have provided guidance for States to meet due diligence obligations.[15] In a landmark decision of the Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*,[16] the Court concluded that:

> *An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*[17]

In 2001, the Inter-American Commission on Human Rights applied this principle to gender-based violence, concluding that Brazil failed to exercise due diligence to prevent and respond to domestic violence despite clear evidence against the accused and the seriousness of the charges. The Commission found that the case could be viewed as "part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors" and that it involved "not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices."[18]

To fulfill due diligence obligations, States must provide survivors of gender-based violence with sufficient access to justice, ensuring that investigation and prosecution of these crimes is conducted consistently and thoroughly. To ensure this, regional human rights courts emphasize the need for formalized and specialized training of State actors including judges, prosecutors, and law enforcement.[19] In fact, the Inter-American Commission of Human Rights emphasized the importance of these trainings applying a gender lens.[20] In the case of Jessica Lenahan, the Inter-American Commission for Human Rights, specifically recommended the implementation of "training programs for the law enforcement and justice system officials who will participate in [the] execution" of domestic violence prevention programs as a way for the State to fulfill its due diligence obligation to prevent violence against women, noting the importance of confronting "traditional patriarchal gender roles" that are entrenched within legal systems.[21]

The United Nations Special Rapporteurs on violence against women and torture support the approaches taken by regional human rights courts.[22] Specifically, States are obliged to create systemic processes that protect, prosecute, punish, provide reparations for and prevent gender-based

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[15] *See Velazquez Rodriguez v. Honduras,* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (Jul. 29, 1988); Maria Da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, Annual Report 2000, OEA/Ser.L.V.II.111 Doc.20 rev. ¶ 55 and 56 (2000); Gonzalez et. al. v. Mexico, Judgment, Inter-Am. Ct. H.R. (Nov. 16 2009); *see also* Osman v. the United Kingdom, § 115, Reports 1998-VIII, ECHR, Judgment stated 28 October 1998; Opuz v. Turkey, App. No. 33401/02, 02 Eur. Ct. H.R. (2009).

[16] *See Velazquez Rodriguez*, Judgement, ¶ 172.

[17] *See id*.

[18] *Maria Da Penha v. Brazil* at ¶ 55 and 56 (The European Court of Human Rights (ECHR) also applied a version of the due diligence standard in the *Osman v. United Kingdom* case and developed its case law in relation to the obligations of States to provide protection against human rights violations by non-State actors in *Z and Others v. the United Kingdom*, App. No. 29392/95, 95 Eur. Comm'n H.R. 333, (2001); *E and Others v. the United Kingdom*, App. No. 33218/96, 96 Eur. Comm'n H.R. 590, (2002).

[19] *See generally Lenahan (Gonzales) et. al v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.98, doc. 7 rev. ¶ 122-6 (2011).

[20] *See ibid.*

[21] *See Lenahan (Gonzales) et. al v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.98, doc. 7 rev. ¶ 97, 201 (2011).

[22] U.N. Special Rapporteur on Violence Against Women, Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, ¶ 70-71U.N. Doc. A/HRC/23/49, (May 14 2013), available at: http://www.refworld.org/docid/51b86a684.html.

violence. States have fulfilled this due diligence obligation where they have implemented holistic and systemic processes that are available and accessible to all individuals.[23]

III. Introduction to the Justice Institute Model

The mere development of the due diligence standard did not build capacity or understanding within States to properly investigate and punish acts of gender-based violence.[24] In many States, there does not seem to be sufficient political will to live up to these standards.[25] Where political will exists, however, some steps have been taken, with varying levels of success, to address lack of capacity and understanding of gender-based violence amongst State actors, government officials, and governing bodies.[26] Training and awareness-raising programs surrounding the investigation, prosecution, and punishment of gender-based violence for law enforcement and prosecutors have been developed by many States. Others have developed training materials for health care professionals, including doctors, nurses, and social workers training this healthcare workers to best respond to survivors of gender-based violence.[27] These efforts demonstrate that some States are making legitimate attempts to fulfill international legal obligations to address gender-based violence.[28]

The Justice Institute Model designed and used by the Vital Voices Global Partnership To End Violence Against Women (Vital Voices) is one example of such training, which will be addressed for the remainder of this article.[29] This multi-disciplinary model is a training for law enforcement, prosecutors, judges, and victim service providers working to address gender-based violence designed to improve implementation and operationalization of local laws addressing gender-based violence, with the aim of ensuring accountability and preventing incidences of gender-based violence within communities. Generally lasting four days, the Justice Institute is a training that utilizes discussion, role play, multimedia and other tools to create an environment where participants from across different disciplines can learn from each other. Vital Voices leads the design of these trainings alongside government officials from within the State, working with them to create a workshop that fits within the timeframe that the State requests. These workshops strengthen institutional capacity to implement laws while hoping to also create political will to eradicate gender-based violence. This article will describe the history and development of the Justice Institute Model, detail implementation methods; discuss the impact of trainings; and posit the Justice Institute Model as a strong solution for States to meet their international legal obligations to end gender-based violence.

The Global Partnership to End Violence Against Women was a collaboration between Vital Voices, the Avon Foundation for Women, and the United States Department of State committed to

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[23] *See Osman v. the United Kingdom*, § 115, Reports 1998-VIII, ECHR, Judgment sated 28 October 1998.
[24] *See* Šimonović, *supra* note 1.
[25] *See generally* Aziz and Moussa, *supra* note 6.
[26] *See id.*
[27] Ertürk, *supra* note 6 at ¶ 44
[28] Manjoo, *supra* note 22 at ¶ 18-19 (stating that the majority of efforts are focused on providing victims greater access to justice, a significant part of due diligence, which only fulfills part of due diligence obligations).
[29] Vital Voices Global Partnership is the preeminent non-governmental organization (NGO) that identifies, trains and empowers emerging women leaders and social entrepreneurs around the globe, enabling them to create a better world for us all. We are at the forefront of international coalitions to combat human trafficking and other forms of violence against women and girls. We enable women to become change agents in their governments, advocates for social justice, and supporters of democracy and the rule of law. We equip women with management, business development, marketing, and communications skills to expand their enterprises, help to provide for their families, and create jobs in their communities. For more information, please visit: https://www.vitalvoices.org/.

working with multi-disciplinary, international teams of experts striving to end all forms of violence against women. This unique partnership connected experts from all corners of the world who are dedicated to eradicating the scourge of gender-based violence with a focus on the power of collaboration and a strong belief that a multi-sector approach is crucial to reducing violence against women. While differences in cultures, laws, and resources result in unique challenges for each country, universal patterns, opportunities, and solutions have emerged. Among the most daunting challenges advocates share globally are the enormous difficulties in enforcing legislation, statutes, policies, and protocols that have been signed into law. Many countries have passed legislation specifically pertaining to gender-based violence, and the vast majority of all countries have the ability to use general assault and rape statutes to hold perpetrators accountable. Despite the presence of policies and statutes that can be used to protect women and prevent impunity, very few countries are effectively implementing domestic legislation. The unfortunate result is that laws fail to achieve their promise, leaving victims unprotected and perpetrators unaccountable.

To address this critical need, Vital Voices established the Justice Institute on Gender-Based Violence (Justice Institute Model) capitalizing on the experiences, expertise, and network of the Global Partnership, and incorporating an international training program based on adult learning principles.[30] Vital Voices provides innovative and interactive training programs which facilitate the creation of a more holistic response to gender-based violence.

a. History and Background of the Justice Institute Model

Vital Voices adapted the Justice Institute Model from an effective Model that was originally designed to train judges, prosecutors, and advocates on handling domestic violence cases in the United States, in the late 1990s.[31] Vital Voices modified this training Model to ensure applicability to the international context, and it has been implementing it around the world since 2011 in eighteen different trainings throughout the world.[32]

The Model is based on Kolb's Theory of Learning Styles and Experiential Learning,[33] and looks at learning along two different axes, "concrete experience" and "abstract conceptualization" helping examine whether learners respond more to experience, perception, cognition, or behavior. In 2010, Vital Voices worked with partners to adapt the training to address gender-based violence in various jurisdictions internationally, specifically focusing on the issues of domestic violence, sexual assault, and human trafficking.

Participants in a Justice Institute receive training on a victim-centered approach to offender accountability, focusing on the needs and safety of victims. Participants also receive training on how to collaborate across disciplines and why this is beneficial to them and to the victims, with particular attention being paid to the benefits of women's leadership in the NGO community. Significantly, the training teaches participants not only *how* to identify, investigate and prosecute cases involving gender-based violence, but also *why* it is important for them to do so. Vital Voices posits that the most effective response to violence against women is a coordinated one. This requires that members of the criminal justice system (law enforcement officers, prosecutors, judges, etc.) work collaboratively with women leaders who provide services to victims and engage in

[30] Created by Vital Voices and partner FUTURES Without Violence (FWV)
[31] https://www.futureswithoutviolence.org/judicial-education/
[32] To date, there have been eighteen (18) Justice Institutes held, in various contexts including: Argentina, Mexico, Nepal, South Africa, India, Colombia, Brazil, Chile, and The Philippines.
[33] *See generally*, David A. Kolb, *Experiential learning: Experience as the source of learning and development* (1984).

advocacy —whether by means of advocating for the passage of legislation, or demanding that laws be enforced in a victim-friendly, survivor-centered fashion—in their communities. Collaboration across disciplines ensures that the safety, security, and dignity of victims are the first priorities. No single sector, working alone, can effectively address the complex issue of violence against women. Significantly, NGOs can provide direct services, women leaders and advocates can lobby for comprehensive legislation, businesses can provide jobs to reduce survivors' vulnerability to violence; but only the government, and particularly actors in the criminal justice system, can implement the laws and hold offenders accountable for their crimes. These sectors must work together in order to protect victims, to prevent future victimization, and to deny impunity for perpetrators.[34]

b. Justice Institute Methodology

Though each Justice Institute is designed with a country-specific context in mind, the general methodology of each Justice Institute is broken into four modules: (1) Practical Exercises, (2) Evaluating/Investigating the Case, (3) Prosecuting the Case, (4) Holding Offenders Accountable.[35] These modules address various stages of interaction with victims of gender-based violence to improve the interaction a victim has with legal systems so victims become more likely to report and seek the support they need.

Although activities within each of these modules vary, the goal of each module remains consistent throughout each Justice Institute. The "Practical Exercise" module introduces participants to detailed case studies of gender-based violence to address possible attitudinal biases participants may have toward victims. These case studies are developed with the help of regional partners using scenarios that participants are likely to have seen in their own work, which keeps participants engaged with the Justice Institute, but also helps to build empathy between them and the victims—confronting the attitudinal biases that they may hold. Case studies are hypothetical scenarios centering around a survivors of gender-based violence in the specific community. This exercise provides a detailed explanation of the violence endured by the survivor and the steps they have taken within the criminal justice system. The hypothetical includes the introduction of family members who may support or serve as an additional obstacle to the survivor.

The second module, "Evaluating/Investigating the Case," includes activities that focus on helping law enforcement and other stakeholders who help in the evaluation and investigation of a case. Important skills that this module seeks to develop include: interviewing victims, assessing risk and lethality, and understanding relevant laws. Victims of gender-based violence often require a specialized approach to interviewing, therefore, this module helps participants learn the best ways to approach victims without re-traumatizing them.[36] Again, though activities may vary in this module, they often include role play, multi-media, lecture, large and small group discussion to develop the aforementioned skills. Using the case study outlined in the "Practical Exercise" module, the trainers provide further information about the hypothetical survivor and give participants the opportunity to discuss questions they would ask this survivor if they were to be called to the

[34] *See generally* Vital Voices, *Describing the Vital Voices Justice Institute: One-pager* (unpublished material) (on file with organization) (2012).
[35] *See generally* Vital Voices, *Justice Institute on Gender-Based Violence Curriculum: South Africa* (unpublished material)(on file with organization) (Aug. 2016).
[36] *See generally*, UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, available at: http://www.refworld.org/docid/4638aca62.html.

scene as law enforcement. Though not all participants are law enforcement, this role play allows for individuals throughout the system to better understand the obstacles that law enforcement faces when initially encountering survivors. Often included in this module are activities that discuss the process of obtaining the various remedies survivors may have access to within this specific system, including civil protective orders.

The third module, "Prosecuting the Case," focuses on aiding prosecutors in the presentation of the case. This includes activities focused on overcoming common defenses or educating the court about victim behavior. Like the second module, which is focused primarily on the work of law enforcement (this may depend on context), this module focuses primarily on the work of the prosecutor, although all participants are present. The presence of all stakeholders allows for open dialogue, and highlights opportunities for prosecutors, law enforcement, and other stakeholders to address gaps or create more efficient solutions to meet the needs of victims. This module may include small and large group discussions that center around how to question survivors on the stand in a manner that allows the judge (and jury, if applicable) to best understand the trauma affecting the survivor and how this may affect the attitude or demeanor of the survivor. These discussions are prompted by questions posed by the trainers and further development of the hypothetical introduced in the previous modules.

The fourth module, "Holding Offenders Accountable," focuses on the role of judges. The content of activities in this module surrounds verdicts and sentencing. When addressing gender-based violence in the legal system, all stakeholders are faced with a difficult task, and judges are no different. Judges have the unique position within the system of wanting to protect victims while also protecting the rights of the accused, one that activities in this module may address through discussion. This module provides a unique opportunity to discuss different types of evidence that may be presented in a gender-based violence case and how this may differ from other cases that judges may commonly hear. Furthermore, it allows for other stakeholders to hear directly from judges regarding the difficulties in making findings or sentencing, giving other stakeholders a more complete picture of what and how evidence should be presented for a judge to hold an offender accountable in the particular system. This module continues to draw upon the hypothetical survivor's story, sometimes introducing a new scenario where the survivor is nervous while testifying and may give atypical answers while being questioned. This allows for judges to better understand the trauma response of survivors, which may aid in the judge's decision-making.

Finally, each Justice Institute generally ends with a forward-looking activity, allowing each participant to outline goals and plan for the future. This activity focuses on the development of an individual and the professional action plan for each participant's respective efforts in addressing gender-based violence. The action plan gives participants' the opportunity to 'map out' a goal or challenge they want to work on when they go back to their organization, helping them identify the necessary time and resources. This allows each participant to leave the Justice Institute with a plan, ensuring that the momentum of the program is not lost and that participants seek to take what they have learned and continue to apply it in their work.

c. The Five Pillars of the Justice Institute Model

The Justice Institute focuses on building a coordinated community response to gender-based violence, by bringing together stakeholders and building knowledge and relationships to improve State investigation and prosecution and building greater understanding of the victim's experience.

To achieve this goal, the Justice Institute is built on five pillars: (1) deep consultation with local partners to ensure cultural sensitivity and relevance, (2) diversity of perspectives and teaching methods to reach a variety of learners, (3) flexibility in design and implementation to respond to new issues as they arise, (4) utilizing and building networks of individuals and institutions working to address gender-based violence, and (5) experienced and credible trainers. These pillars ensure that responses to gender-based violence are thorough, effective, empowering, sensitive to each specific context, creating an environment that engages and welcomes different stakeholders and learners, ensuring that the methods of addressing gender-based violence fit the community and will be credible.

Deep consultation with partners. Gender-based violence is best addressed at a community level, where the necessary contextual analysis can be undertaken. To best design Justice Institutes that suit their target communities, Vital Voices first listens to partners in those communities. Social service organizations, prosecutors, judges, law enforcement officers and other stakeholders who are working to combat gender-based violence locally have the best knowledge of what gaps exist. These partners shape the Justice Institute curriculum to address these gaps so that the training is pertinent to their particular context. Vital Voices follows the lead of these local partners, understanding that those on the ground are the experts on their communities.

Diversity of perspectives and teaching methods. No single group can conquer gender-based violence alone. Social service providers, law enforcement, prosecutors, and judges all must work together to effectively protect victims and prosecute perpetrators. Most criminal justice systems; however, do not create dialogue amongst these different groups. These groups often work with victims of gender-based violence at different stages[37] of the legal process and may be focused on different goals, leading them to operating in silos. With each group often working to support victims from separate and narrow perspectives, they often fail to understand the overall needs of victims, or the ways in which groups can help support each other's efforts. For example, a social worker may be focused on avoiding re-traumatization by shielding a victim from the need to talk about the abuse, while a prosecutor may need a victim to talk about the violence endured in order to successfully punish the perpetrator. Though each of these people are seeking justice for the victim, their immediate goals may not be completely aligned.

This creates a need for a multi-disciplinary approach to gender-based violence, a goal that can only be achieved when individuals from different parts of the criminal justice system are in consistent and open dialogue. The Justice Institute Model provides a forum for this communication by bringing different stakeholders into the same room, often for the first time. The Justice Institute Model utilizes group discussions to ensure that participants can express their own goals in supporting survivors of gender-based violence while also putting them in role play activities where they are able to experience and empathize with the goals of other institute participants.

Along with a deep respect for diversity of opinion, the Justice Institute employs diverse teaching methods to reach a wider audience of adult learners. By integrating lectures, role plays, slide shows, media, and other teaching methods, Justice Institute trainers reach participants regardless of their preferred learning styles. The diversity of teaching methods makes for a highly engaging and interactive curricula based on Kolb's theory of experiential learning.[38] This means that trainers

[37] Victims interact with legal systems in various ways, coming across law enforcement, social workers, prosecutors, judges, and other stakeholders who may be Justice Institute Model participants at different times and in different parts of the legal system.

[38] *See* Kolb, *supra* note 33.

do not simply lecture participants, but they also engage with participants through visual aids, such as videos, interactive activities, such as role plays and both small and large discussions to give different participants the ability to engage comfortably. Kolb's theory focuses on learning as a process and not an outcome. The theory centers on the learners ability to perceive information through feeling or thinking through "concrete experience" or "abstract conceptualization."[39] The second dimension of the theory surrounds the way learners process or transform information through watching or doing. By understanding the variety of ways in which participants learn, the Justice Institute caters to the variety of learning styles and preferences.

Flexibility in design and implementation. The Justice Institute Model provides a methodology for trainings, and is not a rigid structure. In other words, the Justice Institute Model does not apply the same overall structure to multiple communities, as every community is different and the same approach is unlikely to produce positive results in every environment. As a result, no two Justice Institutes are the same, though the approach to all Justice Institutes is similar. For example, role plays are written with stakeholders from the specific country where the Institute takes place, using stories of gender-based violence that mirror those that are typical to the community. This means that role plays will differ depending on the country, region and community. This flexibility allows trainers to address the specific needs of a community both in the types of gender-based violence the community experiences and the types of laws and remedies available, as well as the types of teaching methods that are most effective for the specific Justice Institute's participants.

Utilizing and building networks. A convening of any sort typically creates energy and growth limited to its duration. To avoid this, Vital Voices selects participants for each Justice Institute who work in the same community or region, enabling them to build networks of professionals during the training that will ensure and, in many cases, result in collaborations. These relationships can lead to further trainings and developments, allowing for sustainable, community-owned change well past the ending of the Justice Institute.

Experienced and credible trainers. Vital Voices invests time in forming a dynamic and experienced training team for each Justice Institute, an essential element to ensuring its success. Ideally, the team will have a representative of each discipline participating in the course as faculty. Trainers who make up this team are respected issue-area experts, and are chosen for their experience in their chosen discipline, with most trainers having worked a minimum five years in her/his respective field. There are not strict qualification guidelines for trainers as experience and knowledge may vary depending on context, but it is essential that trainers have had a significant amount of exposure to the criminal justice system and gender-based violence in the specific environment. This experience gives trainers credibility in the eyes of the participants, and allows them to have a realistic picture of the challenges that participants face. Training teams combine community and global expertise, ensuring that participants can learn about both local and international tools.

[39] *See id.* (defining "concrete experience" as: immediate human situations, perceived through feeling/sensing with reliance on intuition and "abstract conceptualization" as: logic, ideas, concepts, analyzing or systematically planning).

IV. Effectiveness of the Justice Institute Model

Effective trainings take a multi-disciplinary approach.[40] They also feature high quality content delivered by skilled trainers, are supported by high-level officials, and are followed with changes to policy and procedure.[41] As described above, Vital Voices ensures that Justice Institutes include people from various professions (e.g. law enforcement, prosecutors, and social workers), and employ different teaching techniques (e.g. role play, multimedia, discussion) to ensure that the Institute Model is multi-disciplinary. It also ensures that trainers are highly-skilled, there is support from local government, and that each Justice Institute encourages sustained participation that will lead to future policy and procedural change.

When evaluating the effectiveness of the Justice Institute Model, a recent study shows that participants increased their knowledge and understanding of the underlying dynamics of gender-based violence along with increasing their preparedness to take action to combat various types of gender-based violence.[42] By increasing participants' knowledge and understanding of underlying dynamics of gender-based violence, the Justice Institute helps address social and cultural stereotyping[43] that surround these issues. These biases, when carried by State actors such as law enforcement or prosecutors, can discourage victims from reporting, thereby blocking their access to legal remedy and justice.[44] Furthermore, the perpetuation of these biases within government institutions prevents States from providing adequate reparations to victims because these biases often affect judicial decision-making.[45]

Increasing participants' preparedness to take action to combat various types of gender-based violence includes building knowledge about what techniques can be used to acquire better evidence for investigation, as well as knowledge of what laws are available to prosecute. This facilitates a faster response to gender-based violence, by providing first responders, like law enforcement, with the knowledge to quickly identify the signs of gender-based violence—allowing to interview victims at the earliest time possible. These techniques also give law enforcement and prosecutors the specific questions and emotional skills to interview survivors in a sensitive manner, which allows for more reliable evidence to be collected. Faster response times com-

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[40] *See* Sarah Bott, M. Ellsberg, & Andrew Morrision, *Preventing and responding to gender-based violence in middle and low-income countries: A global review and analysis* (World Bank Policy Research Working Paper 3618, 2005), http://documents.worldbank.org/curated/en/852691468140377416/pdf/wps3618.pdf.

[41] *See id.*

[42] *See* Jennifer M. Guzman, *Evaluation of Vital Voices' Institute Model*, (2015) (unpublished Masters' Thesis, Univ. of Arkansas Clinton School of Public Service) (on file with author) (though this study is not a full impact-analysis, it demonstrates the development experienced by participants of the Justice Institute.)

[43] Rep. of the Office of the High Commissioner for Human Rights, Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases, June 9, 2014 (discussing the wide-ranging consequences that gender-based stereotyping can have in distorting perception of the facts, affecting vision of who is a 'victim' or 'perpetrator,' and influencing views about witness credibility); *see also Karen Tayag Vertido v. The Philippines*, ¶ 10, UN Doc. CEDAW/C/46/D/18/2008 (22 Sept. 2010) (finding that the reasoning of the trial judge relied on implicit assumptions about men/masculinities, concluding that the acquittal of the accused—a man in his sixties—had also been influenced by the stereotype that older men lack sexual prowess, the assumption being that they are not capable of rape); *see generally* Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) (detailing various categories of gender-based stereotyping that has impacted transnational legal systems and the way that victims are understood and how their cases are adjudicated).

[44] *See generally* Rep. of the Office of the High Commissioner for Human Rights, Gender Stereotyping as a Human Rights Violation, Oct. 2013.

[45] *See generally* Rep. of the Office of the High Commissioner for Human Rights, Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases, June 9, 2014.

bined with a gender-sensitive approach can lead to higher reporting rates, allowing for greater accountability.[46]

V. How the Justice Institute Could Help States Move Toward Fulfilling Their Due Diligence Obligations

Developing a holistic and systemic process that ensures the protection, prosecution, punishment, provision of reparations for victims, and prevention of gender-based violence requires a State to take a thorough and intentional approach. States must develop laws and systems to address gender-based violence, and these laws and systems must be utilized fully and properly. To utilize the systems that States put in place, State actors must understand the nature of gender-based violence and the resources available to combat it. The Justice Institute provides a State with the ability to develop these capacities, helping law enforcement, prosecutors, judges, social workers, advocates, and other important stakeholders with the ability to train with highly-skilled and experienced instructors and peers who have the common goal of combatting gender-based violence in their communities.

Protection. A means of secondary prevention, protection aims to stop the re-occurrence of gender-based violence. Perpetrators must be stopped from violating victims repeatedly, a cycle that not only re-victimizes the individual victim, but also creates a culture of impunity for perpetrators of gender-based violence. Access to medical and counseling services is one way of providing protection to victims, as these measures sometimes offer victims options to change their circumstances and avoid re-victimization.[47] This protection, however, is ineffective if individuals providing resources are untrained. Trainings that allow government social service providers to effectively support victims are essential to fulfilling the protection prong of due diligence.

All trainings, however, are not sufficient to create effective support for victims. Without highly-skilled and experienced trainers, for example, some trainings fail to establish credibility amongst participants, and therefore to establish long term or substantial changes. The methodology of the Justice Institute Model addresses the gaps that many trainings fail to address. By teaching participants about the specific laws that victims of gender-based violence can utilize while also addressing attitudinal and cultural biases, the Justice Institute allows for all levels of State actors to provide sustained and effective support and protection to victims.

Training government actors also ensures that the protection provided by a State is accessible to victims. It is not enough that States pass laws or create services. In order to fulfill the due diligence standard to protect, these laws and services must be accessible—impossible if law enforcement, prosecutors, judges and other actors lack knowledge or carry misunderstandings or biases.[48]

Prosecution. The investigation and prosecution of gender-based violence is required for States to meet its due diligence obligation. This helps increase victim's trust in systems with the hopes that they will report the violence they have experienced. Investigations must be prompt and impar-

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[46] *See generally, Lenahan (Gonzales) et. al v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.98, doc. 7 rev. (2011).

[47] Other modes of providing protection to victims of gender-based violence is through the provision of shelters, hotlines, programs leading to housing and financial independence

[48] *Lenahan (Gonzales) et. al v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.98, doc. 7 rev. ¶ 122-6 (2011).

tial and must be followed by prosecutions where there is a legitimate finding to do so.[49] To ensure that investigations of gender-based violence are prompt and impartial, training of the actors conducting the investigations is integral. Again, law enforcement must not only have knowledge of the laws that may protect victims, but they must also approach each case without bias—something that may be difficult where cultural biases and stereotyping exist.[50]

The Justice Institute provides participants with concrete examples of how to investigate and prosecute cases involving gender-based violence through various exercises designed for specific communities. Role plays, multi-media, lectures, discussions and other types of activities that bring together law enforcement, prosecutors, judges, social workers, and other State actors facilitate the exploration and deconstruction of biases surrounding gender-based violence, while providing specific instructions on how individuals within the justice system can improve their investigation methods and gather the best evidence for prosecution.

Punishment. Where a fair investigation and prosecution finds that an individual has perpetrated gender-based violence, States are required to hold perpetrators accountable for their actions. Without punishment, prosecution lacks an enforcement mechanism and fails to create a State that protects victims of gender-based violence. If a victim reports abuse and an investigation and prosecution find that gender-based violence occurred but perpetrators fail to be held accountable, then the victim fails to be made whole, effectively blocking them from accessing justice. Therefore, the development and application of adequate punishment must be part of fulfilling due diligence.

The Justice Institute provides guidance for judges to sentence perpetrators to proportionate punishment. Trainers facilitate activities that give context to the offense and allow judges to think more broadly about what remedies would be in the best interests of all parties involved. Fact-finders are encouraged to consider power differentials and social influences that provide the backdrop to the offenses committed. This can result in a more tailored and appropriate sentence in each individual case. More appropriate and effective sentencing leads to fair punishment allowing the State to move toward meeting this prong of its due diligence obligation.

Reparations. States can provide reparations in five ways: (1) restitution or measures to restore victims to their original situations, (2) compensation for economic assessable damage, (3) rehabilitation, (4) satisfaction, (5) guarantees of non-repetition. Reparations are necessary for victims of gender-based violence to be made whole, to heal and move forward with their lives. Providing victims of torture and other serious international crimes is a well-established principle in international law.[51]

The benefits of the Justice Institute to the provision of reparation is not as obvious as the other prongs of due diligence, however, there are several concrete ways that the Justice Institute contributes to a State's ability to provide each of these types of reparations. First, in order to provide proportionate restitution or compensation to victims, judges and other State actors must be knowledgeable about the harm suffered by victims. Deciding the amount and type of restitution necessary to restore a victim to their previous situation or to compensate for assessable damage, means understanding the underlying power dynamics of gender-based violence. More specifically, a judge that holds gender-based stereotypes or does not grasp the harm caused by gender-based

[49] *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 5 and 7, Dec. 10, 1984, 1465 U.N.T.S. 85.
[50] *See* Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* 26 (University of Pennsylvania Press, 2010).
[51] *See* Abdul Aziz and Moussa, *supra* note 6 at 13.

violence may order inadequate restitution because s/he fails to understand the scope of the harm. The Justice Institute Model ensures that judges and other training participants will have the requisite knowledge to provide adequate restitution.

By bringing together individuals from social service sectors with government actors, the Justice Institute helps rehabilitate survivors of gender-based violence by improving legal and social services. When these actors work together, access to resources increases for victims. Any increase in empathy of service providers increases comfort levels for victims to utilize the services. Creating this comfort creates real opportunities for victims to pursue rehabilitation services, thus giving States the ability to provide reparations through rehabilitation.[52]

The Justice Institute particularly affects reparations by improving a State's ability to provide satisfaction and guarantees of non-repetition. Satisfaction may not always be something that victims of gender-based violence want because of the shame and self-blame associated, however, where victims want a public venue for the disclosure of truth, it is integral that courts provide access to justice for victims. As discussed above, this access is often impeded by bias and misunderstanding of gender-based violence, something that the Justice Institute directly addresses.

Perhaps the most significant category of reparation that the Justice Institute impacts is the guarantee of non-repetition. Here, a State guarantees that it will take measures to prevent the act of gender-based violence the victim suffered through. By training government actors in a holistic and thorough manner, the Justice Institute helps the State develop protocols and other measures that improve its practical response to gender-based violence along with challenging attitudes amongst participants that may help prevent this violence from happening in the future.

Prevention. The most difficult element of due diligence is prevention. The impact of a prevention method is difficult to assess because a community may experience less gender-based violence after the implementation of a prevention method, however, the cause of a decrease cannot always be linked to the specific method. Despite the difficulty of drawing a causal link, good prevention methods often combine awareness of gender-based violence, knowledge of services, and legal protection after an incident.[53] Some successful prevention programs include family violence initiatives, gender-sensitive education, and legal literacy programs.[54] These programs aim to create networks and active partnerships between various stakeholders empowering those stakeholders to create awareness of the issues facing victims of gender-based violence. This is something the Justice Institute successfully does by linking people together who often create long term relationships and help each other create awareness campaigns and other programs that help bring attention to gender-based violence. These partnerships last long after the duration of the Institute, facilitating opportunities for States to fulfill the prong of their due diligence obligation to prevent gender-based violence.

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[52] *See generally*, Katie L. Pummell, *Empathetic Cops: The Impact on Victims of Domestic Violence* 164 (2017) (Senior Honors Thesis, The College at Brokport), available at: http://digitalcommons.brockport.edu/honors/164; *see also* Rebecca Campbell, *The community response to rape: Victims' experiences with the legal, medical, and mental health systems*, 26(3) American Journal of Community Psychology 355-379 (1998); *see also* W. David Allen, *The reporting and underreporting of rape*, 73(3) Southern Economic Journal 623-641 (2007).

[53] *See* Abdul Aziz and Moussa, *supra* note 6 at 13.

[54] *See id*. at 11-12.

VI. Conclusion

The Vital Voices Justice Institute is a multi-disciplinary Model designed to train participants to better utilize local laws and systems while concurrently helping them understand underlying dynamics of gender-based violence. Its unique design prioritizes deep consultation with local partners to ensure cultural sensitivity and relevance, diversity of perspectives and teaching methods to reach a variety of different learners, flexibility in design and implementation to respond to new issues as they arise, utilizing and building networks, and experienced and credible trainers.

As international due diligence obligations around gender-based violence develop, States have been required to not only implement laws to address the growing threat of gender-based violence, but to also take responsibility to prevent, protect victims, and punish perpetrators of gender-based violence. As States continue to grapple with these growing responsibilities, programs like the Justice Institute can provide States with a strong solution to meet their due diligence obligations to end gender-based violence.

Reparations for Sexual and Other Gender-Based Violence

Carla Ferstman*

Abstract

This chapter considers the legal framework related to reparations for sexual and other gender-based violence. It describes the way in which the legal framework has evolved over time and the challenges for victims of sexual and other gender-based violence to access reparation in practice.

I. Introduction

The Special Rapporteur's report on gender perspectives of torture assesses the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender, and intersex persons.[1] He determines that "The torture protection framework must be interpreted against the background of the human rights norms that have developed to combat discrimination and violence against women."[2] A part of that protection framework is the obligation to afford reparations for torture. Taking that as a starting point, this article analyses the normative content of the right to reparation for torture from a gendered perspective. It considers acts of gender-based violence that may amount to torture under applicable international law standards, and assesses the challenges for victims of such crimes to access meaningful and appropriate reparations for the harm suffered.

Not all acts of gender-based violence will amount to torture, though this does not make those that do not fit within the definition less problematic or important to address. Moreover, fitting within the definition of torture is not the only entry-point for victims of gender-based violence to obtain reparation. The right to reparation is increasingly recognised as applicable to all human rights violations.

Nonetheless, torture is one of the lenses through which gender-based violence can be understood. It is an important lens because of the status and weight given to torture under international law. Nevertheless, considering gender-based violence through this torture lens is not a perfect fit. This is because of the way in which torture has been historically understood —as an offence that is carried out by or at the instigation of, or with the consent or acquiescence of, public officials, usually in the context of detention, to exert force, subvert the will of the victim, or to obtain a confession. Gender-based violence is broader in scope than this definition. Also, until relatively recently,

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1 Juan Mendez, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

2 *Id.* at ¶ 9.

gender-based violence was largely overlooked by human rights instruments altogether because of the general marginalisation of such acts and their victims. Acts and victims of gender-based violence were not seen as sufficiently 'serious' or important and, because of the traditional focus of human rights instruments on public acts, gender-based violence was largely understood as something which took place in the private sphere, carried out by private actors.

There are at least three ways in which these classical understandings about torture and gender-based violence are changing:

1. It has increasingly been recognised that acts of torture must be analysed through a gendered lens. Persons who are tortured are often subjected to particular forms of violence linked to their gender or sexual orientation, including rape, mutilation of sexual organs, forced nudity, and the use of interrogation techniques which focus on sexual humiliation. The gendered element of the crime can be crucial to understanding the purposive element of torture, which can be linked, for example, to discrimination or humiliation on the basis of gender, sexual orientation, and transgender identity, meant to instil fear in communities, and/or undermine the heterosexual 'masculinity' of the victim. Identifying gendered elements of the crime is also essential in understanding the impact of the crime on the victim and how the harms might best be remedied. In the *Čelebići* case, the International Criminal Tribunal for the former Yugoslavia recognised that it was 'difficult to envisage circumstances in which rape, … could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.'[3]
2. The public-private distinction in human rights law is progressively being blurred. There is increased recognition that States are responsible when they fail to exercise due diligence to prevent or respond to violence occurring in the private sphere. States have been found to be in breach of the prohibition of torture and ill-treatment when they exposed persons to acts of violence perpetrated by private actors. Furthermore, International jurisprudence on States' due diligence obligations has placed particular emphasis on various forms of gender-based violence, including killings and mutilations of women,[4] domestic violence,[5] and in some cases, the denial of reproductive rights.[6]
3. International criminal law standards do not limit acts of torture to conduct perpetrated by, at the instigation of, or with the consent or acquiescence of public officials. A range of non-State actors have been found liable for torture as an underlying offence within the context of the perpetration of war crimes, crimes against humanity, and genocide. When torture operates as one of those underlying offences, the definition diverges from the one applicable to torture as a discrete crime under human rights law, in that there is no need for the involvement of a public official.[7] This phenomenon is not limited to the jurispru-

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[3] Prosecutor v. Mucić et al., Case No. IT-96-21, Trial Judgment, ¶ 495 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

[4] *Gonzalez et al. ("Cotton Field") vs. Mexico,* Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Nov. 16, 2009) [hereinafter *Cotton Field*].

[5] Opuz v Turkey, 2009-III Eur. Ct. H.R. 107.

[6] Human Rights Committee, *KL v Peru*, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005).

[7] Prosecutor v Kunarac et al., Case No. IT-96-23-T & IT-96-23/I-T, Trial Judgment, ¶¶ 495-596 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Prosecutor v. Kunarac et al., IT-96-23&23/1-A, Appeals Judgment,¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia June 20, 2002); Prosecutor v. Semanza, Case No. ICTR-97-20, Trial Judgment, ¶¶ 342-343 (May 15, 2003); Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

> dence of international courts or tribunals; increasingly, domestic anti-torture statutes are grappling with definitions of torture, which include acts by non-State actors.[8] While this practice has its critics, it affords additional avenues to pursue acts of sexual and other gender-based violence under the frame of torture.

The right of victims of torture to reparations is well-established, though often un-implemented. As Professor Van Boven, the former Special Rapporteur on torture and principal author of the United Nations (U.N.) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[9] has indicated, "In spite of the existence of relevant international standards . . . the perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon."[10] The reasons for the lack of implementation are multiple and are discussed below. These reasons are compounded for victims of gender-based violence that may amount to torture.

II. Context

Reparations for victims of gender-based violence is a subject which is getting increasing attention by academics, policy-makers and activists. However, there is a tendency for this focus to be narrowly construed—most of the attention has focused on the rape of women and girls during conflict. Sometimes these rapes occur in public, in front of family members or villagers. They may be carried out as an official policy of the warring factions to destabilise communities, but are often also carried out by civilians acting opportunistically against vulnerable persons caught up in difficult situations.

While this phenomena of conflict rape deserves our attention, the overly narrow focus on conflict gives the impression that it is the conflict which is the cause for this aberrant behaviour, as opposed to structural discrimination and impunity, which are present in both conflict and peace times. Also, the focus on rape leaves out a range of other behaviours which may amount to gender-based violence during conflict such as: mutilation or burning of sexual organs, forced sterilisations and pregnancies, knowingly infecting another with HIV/AIDS, sexual exploitation, sexual slavery, and forced marriage. Rashida Manjoo, the former Special Rapporteur on violence against women, has raised concerns about this exclusive focus on sexual violence, which she says runs the risk of "sexualizing women":

> The current explicit inclusion of sexual violence in many reparations programmes is a victory against a tradition that minimizes its importance as collateral, private or non-political damage. Nevertheless, the forms of sexual violence that are included are often limited in range and other forms of victimization with a disparate gender impact are also not included. Often excluded have been forms of reproductive violence (including forced abortions, sterilization or impregnations), domestic enslavement, forced "marital" unions, forced displacement, abduction and forced recruitment. Gross violations of social, economic and cultural rights have also been excluded, even when they result in the loss of health, life and death of culture, or when such violations are specifically related to sys-

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[8] *E.g.*, the Ugandan *Prevention and Prohibition of Torture Act* (2012) defines torture in Art 2(1) as applying to "… any person whether a public official or other person acting in an official or private capacity."

[9] G.A. Res. 60/147 (Dec. 16, 2005) [hereinafter *Basic Principles and Guidelines*].

[10] Theo van Boven (Special Rapporteur), *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross violations of Human Rights and Fundamental Freedoms*, ¶¶ 132-33 U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993).

> tematic forms of discrimination, including based on sex, ethnicity or sexual orientation. Forced domestic labour, often taking the form of forced conscription or forced marriages, has also traditionally been left out. This tendency to include a narrow range of forms of sexual violence in such programmes runs the risk of sexualizing women, if it is not accompanied by a serious effort to encompass a broader notion of harm.[11]

The notoriety of rape of women and girls during conflict can also play into gendered stereotypes about the ownership of women. The crime is often perceived locally as one which impacts spouses, communities and families, even more so than the impact it clearly has on the direct victims. Likewise, the focus on rape as a weapon of war can de-link that conduct from the more tolerated forms of violence that persist in peacetime. Conflict-related violence can be fostered by discriminatory and stereotypical attitudes towards women and girls in society (which operate in both peacetime and during conflict), and often towards race and class. Gender-based violence during peacetime can be a method to enforce social expectations about how individuals should behave. For instance, domestic violence may be used as a tool to exert control over women's behaviour in the home, and rape and other forms of sexual violence may be used to 'punish' individuals for their sexual orientation and/or transgender identity.

While reparations for gender-based violence is increasingly talked about and recognised as important, it is rarely implemented, even for those categories of violence that have received most attention.

III. The Legal Framework for Reparations

It is a basic principle of international law that when an international obligation is breached, a State must provide reparation.[12] The obligation to afford reparations is set out in human rights treaties[13] and their interpretive bodies,[14] in declarative texts,[15] by independent experts[16] and in judi-

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[11] Rashida Manjoo (Special Rapporteur), *Report of the Special Rapporteur on Violence Against Women (Reparations for Women Subjected to Violence)*, ¶ 44, U.N. Doc. A/HRC/14/22, (Apr. 23, 2010)[hereinafter A/HRC/14/22].

[12] *Chorzów Factory (Germany v Poland)*, Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9 at 21.

[13] International treaties include: *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976), art 2(3); *Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010), arts 18, 20(2), 24(4); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) art 14(1); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (adopted 25 May 2000, entered into force 18 January 2002) art 8; *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (adopted 18 December 1990, entered into force 1 July 2003) art 16(9).

[14] *E.g.*, Human Rights Committee, General Comment 31, Nature of the General Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004)[hereinafter HRC, General Comment 31]; Committee Against Torture, General Comment 3, Implementation of Article 14 by States Parties, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012)[hereinafter CAT, General Comment 3]; CEDAW Committee, General Recommendation 28, On the Core Obligation of States Parties Under Article 2 of the Convention, ¶ **32,** U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

[15] *E.g.*, G.A. Res. 217 (III) A, art.8, Universal Declaration of Human Rights (Dec. 10, 1948); *Basic Principles and Guidelines, supra* note 9; G.A. Res. 40/34, at 4, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, 31, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, 20, U.N. Doc. E/1989/89 (May 24, 1989); G.A. Res. 61/295, art. 8(2), Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, (Mar. 19-21, 2007), www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf.

[16] *See also*, A/HRC/14/22, *supra* note 11; Joy Ezeilo (Special Rapporteur), *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, U.N. Doc. A/66/283 (Aug. 9, 2011)[hereinafter A/66/283];

cial decisions. This obligation is also reflected in international humanitarian law treaties, notably, in Article 3 of the *Hague Convention IV*,[17] largely reproduced in Article 91 of *Protocol I of the Geneva Conventions*.[18] Declarative texts, such as the U.N.'s *Basic Principles and Guidelines*[19] and the International Law Association's *Declaration of International Law Principles on Reparation for Victims of Armed Conflict*,[20] also consider reparation for international humanitarian law violations and emphasise victims' "right" to reparation.

In human rights law, reparations entails two aspects: the right to a domestic remedy and the right to adequate and effective forms of reparation. The connection between the procedure by which reparation is sought and the ultimate award is understood as indivisible. The U.N. *Basic Principles and Guidelines* explain the obligation to respect, ensure respect for, and implement international human rights law and international humanitarian law as giving rise to a duty, *inter alia*, to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation."[21]

The procedural remedy has been understood to require States to afford effective access to fair processes in which arguable claims for reparations can be determined. Jurisprudence and standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice processes. They specify the need to ensure that victims receive adequate information[22] and are assisted to access justice. Victims, including those with particular vulnerabilities, must be treated with humanity and dignity,[23] and their privacy and safety, both physical and psychological, must be safeguarded.[24]

The types of reparation that have been understood as required include: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[25] This has been underscored by the Committee against Torture in its General Comment no. 3 on Article 14 of the Convention.[26]

Ben Emmerson (Special Rapporteur), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 49-62, U.N. Doc. A/HRC/20/14 (June 4, 2012); Pablo de Greiff (Special Rapporteur), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, U.N. Doc. A/HRC/21/46 (Aug. 9, 2012); Sir Nigel Rodley (Special Rapporteur), *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 24-30, U.N. Doc. A/55/290 (Aug. 11, 2000); Theo van Boven (Special Rapporteur), *Report of the Special Rapporteur on Torture*, ¶¶ 29-35 U.N. Doc. A/58/120 (July 3, 2003); Manfred Nowak (Special Rapporteur), *Implementation of General Assembly Resolution 60/251 of 15 March 2006*, ¶¶ 61-68, U.N. Doc. A/HRC/4/33 (Jan. 15, 2007).

[17] *Convention Respecting the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910).

[18] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978).

[19] *Basic Principles and Guidelines, supra* note 9, at 11.

[20] Int'l Law Ass'n, *Declaration of International Law Principles on Reparation for Victims of Armed Conflict*, Res. 2/2010, Arts. 6, 30 (74th Conference, The Hague (Aug. 15-19, 2010).

[21] *Basic Principles and Guidelines, supra* note 9, at 3(c). *See also* World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 27, U.N. Doc. A/CONF.157/53 (June 25, 1993).

[22] *Anguelova v Bulgaria*, 2002-IV Eur. Ct. H.R. 355; *Zontul v Greece* App. No. 12294/07 Eur. Ct. H.R. (Jan. 17, 2012) [115]; High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Trafficking*, § 9.2, U.N. Doc. E/2002/68/Add.1 (May 20, 2002).

[23] *AT v. Hungary*, ¶ 9.6(II)(vi), U.N. Doc. CEDAW/C/32/D/2/2003 (Jan. 26, 2005); HRC, General Comment 31, *supra* note 14, at ¶ 15; U.N. Committee on the Rights of the Child, General Comment 5, General Measures of Implementation of the Convention on the Rights of the Child, ¶ 24, U.N. Doc. CRC/GC/2003/5 (Oct. 3, 2003); *Basic Principles and Guidelines, supra* note 9, at 12(c); *Aksoy v Turkey,* 1996-VI Eur. Ct. H.R. 98.

[24] *Basic Principles and Guidelines*, *supra* note 9, at 10, 12(b).

[25] *Id*.

[26] CAT, General Comment 3, *supra* note 14, at ¶ 6.

The standards which relate to reparations for gender-based violence can be determined in several ways.

Firstly, because of States' due diligence obligations, just about all forms of gender-based violence will engender States' general obligations to prevent, prohibit and remedy harms arising from acts of gender-based violence. For instance, the International Covenant on Civil and Political Rights recognises that a breach of the Covenant entails an obligation to afford reparation to victims.[27] However, many forms of gender-based violence, particularly those that have traditionally been associated with the private sphere, have not been translated into a human rights framework at the domestic level.

Secondly, they can be extrapolated from other recognized norms of human rights and international humanitarian law, to the extent to which gender-based violence forms part of those other recognized norms. As indicated, this is an imprecise exercise given that not all acts of gender-based violence will fall within the definitions of other crimes or human rights violations such as torture. The same is true for the U.N. *Basic Principles and Guidelines* whose provisions are tailored to "gross violations of international human rights law and serious violations of international humanitarian law." Are all forms of gender-based violence sufficiently "gross" or "serious" to fall within these parameters? The answer is not clear or obvious, particularly for domestic legislatures. Additionally, while shoe-horning gender-based violence in this way will gain these forms of violence entry into a privileged club where specific rights and obligations flow from a breach, the articulation of those rights and obligations does not account for the gendered nature of the violence, or the gendered impact of the harm. A "neutral" framing of rights and obligations tends to ignore or take insufficient account of the specific experiences of women and other marginalized groups. The resultant "neutral" reparations may not adequately reflect the specificities of the harm.

Thirdly, standards for gender-based violence reparations can be extrapolated from the growing number of standards and related texts that deal with gender-based violence specifically. A number of mechanisms have sought to develop a more precise understanding of what reparations should entail to adequately incorporate a gendered lens.

The U.N. Committee on the Elimination of All Forms of Discrimination against Women has by far taken the broadest view of States' obligations to afford reparations for gender-based violence. Its General Recommendation no. 33 on access to justice requires that States: "Ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement); compensation (whether provided in the form of money, goods or services); and rehabilitation (medical and psychological care and other social services). Remedies for civil damages and criminal sanctions should not be mutually exclusive."[28] Similarly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women requires States Parties to "establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies."[29]

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[27] HRC, General Comment 31, *supra* note 14, at ¶¶ 16-17.

[28] CEDAW, General Recommendation No. 33, Women's Access to Justice, U.N. Doc. CEDAW/C/GC/33 (July 23, 2015)[hereinafter CEDAW, General Rec. 33].

[29] *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women*, (Adopted 6 September 1994, entered into force 3 May 1995, art 7(g)).

IV. The Standards of Reparation Reinterpreted from a Gendered Lens

1. Restitution Reinterpreted: The need for transformative reparations

Restitution comprises measures aimed, as far as possible, at restoring the situation that existed prior to the violation. In the context of gender-based violence, this might include the release of victims from detention and dropping criminal charges against such persons. This might be applicable to persons who claim that they were raped. In some societies, if a claim of rape cannot be substantiated, the woman or a man filing the complaint may be prosecuted either for adultery or for wrongful accusation of adultery.[30] This dis-incentivises rape victims from lodging complaints and fosters impunity for sexual offences. For trafficking victims in particular, restitution measures might include, in addition to releasing trafficking victims from State detention or confinement by non-State actor traffickers, the return of travel and identity documents, recognition of citizenship, safe and voluntary repatriation to the individual's country of origin, and help to facilitate the individual's integration.[31]

But, it has increasingly been recognised that where a situation of discrimination contributed to the violations in the first place, reparations should not seek to put the victim back to that situation of disadvantage; reparations should be designed to eliminate the pre-existing disadvantage. The notion of transformative reparations was articulated in the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*,[32] by the Special Rapporteur on Violence Against Women,[33] and has since been taken up in the U.N. Secretary-General's 2014 guidance note on reparations for conflict-related sexual violence,[34] in jurisprudence,[35] and in the Committee against Torture's General Comment no 3.[36] The Inter-American Court of Human Rights has recognised that a situation of discrimination which contributed to the violations could only be repaired by reparations "designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable."[37] The UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ezeilo, has also recognised that trafficking victims should be provided with "temporary or permanent residence status as a form of remedy where a safe return to the country of origin cannot be guaranteed, may place them at risk of persecution or further human rights violations, or is otherwise not in their best interests," as a form of transformative reparation.[38] Similarly, restoring the safety and security of domestic violence victims has been recognised as crucial. Victims of domestic violence will require restraining orders for those who perpetrated violence against them, and access to shelters for abused women.[39]

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[30] *See* Redress & Kchred, Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence 32-36 (2008).
[31] A/66/283, *supra* note 16, at ¶ 14.
[32] *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*.
[33] A/HRC/14/22, *supra* note 11.
[34] United Nations Secretary-General, Guidance Note on Reparations for Conflict-Related Violence (2014), http://www.ohchr.org/Documents/Issues/Women/WRGS/PeaceAndSecurity/ReparationsForCRSV.pdf
[35] *Cotton Field supra* note 4, at ¶ 450.
[36] *Id.* at ¶ 8.
[37] *Id.*
[38] A/66/283, *supra* note 16, at Annex (outlining, in principle 6(b), draft basic principles on right to an effective remedy for trafficked persons) & ¶ 16.
[39] Committee against Torture, Concluding Observations on the Third Periodic Report of Kuwait, U.N. Doc. CAT/C/KWT/3, at ¶ 28(g) (Aug. 8-9, 2016).

What is transformative will depend on the situation of vulnerability and discrimination requiring transformation. In practice, the measures awarded draw upon the types of reparation measures that have traditionally been associated with satisfaction and guarantees of non-repetition—described more fully later in this chapter, such as strengthening laws, providing services, improving structures for accountability, and memorialisation of the victims. What is important is that the measures identified align with victims' needs and choices, and do not inadvertently undermine victims' safety, privacy and dignity. Consulting with and involving victims in devising appropriate forms of reparations and in determining the modalities for their implementation is therefore crucial.

2. Compensation: The need to take full account of the harms that result from gender-based violence

Compensation is an important form of reparation for gender-based violence, and must be prompt, fair, adequate, as well as sufficient to compensate for any economically assessable damage resulting from the crime, whether pecuniary or non-pecuniary.[40] It is important for courts to appreciate the severity of the harms caused by gender-based violence, which, particularly for psychological harm, can be under-valued and may result in low awards. In most cases, financial compensation will not alone be sufficient.

At the domestic level, claims for reparations against both private and State actors can in theory be pursued through civil claims for damages, although the high costs of such proceedings tend to make them inaccessible to the majority of victims. In predominantly civil law jurisdictions, claims for damages tend to be joined to criminal complaints. This can present certain advantages because the prosecution will be responsible for taking the case to court and the victim will only have to demonstrate the harm suffered in connection to the crime. However, a negative aspect is that usually the sole form of reparation on offer is financial compensation. Furthermore, compensation is only available if the accused person is convicted. Also, the enforcement of compensation awards can be complex and the barriers to enforcement may be so great that the victim does not obtain the actual judgment.

In the case of *Gerasimov v Kazakhstan,* the U.N. Committee gainst Torture determined that, "notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. [The Committee] considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available that is independent of the criminal proceeding, and necessary legislation and institutions for such civil procedures should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence or undue delay of those criminal proceedings constitute a failure on behalf of the State party to fulfil its obligations under the Convention."[41]

Because of the challenges involved in pursuing domestic civil claims, and the broader limitations of the criminal justice system, victims may not pursue cases due to a fear of being re-traumatised by the process of serving as a witness, because they do not wish to be identified as a victim, or because they have no faith in such processes. After all, many criminal prosecutions of sexual and other gender-based violence do not result in convictions. This can result in victims or their families

[40] CAT, General Comment 3, *supra* note 14, at ¶ 10.
[41] *Gerasimov v. Kazakhstan*, U.N. Doc. CAT/C/48/D/433/2010, at ¶ 12.8 (July 10, 2012).

resorting to customary dispute resolution approaches, which tend to reinforce gender stereotypes and emphasize the restoration of the family's honour, as opposed to the individual victims' honour within the family. For instance, a perpetrator may be required to give an animal to the victim's family, or the victim may be forced to marry the perpetrator.

Thus, it is important for States to afford other routes to compensation. Some States have put in place criminal injury compensation schemes, which are administrative mechanisms to which victims can apply and require very low thresholds of proof for a victim to become eligible for compensation payments. The U.N. *Basic Principles and Guidelines* stipulate that "the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged."[42] Similarly, the Committee for the Convention on the Elimination of all Forms of Discrimination against Women has recommended that "states should create specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation."[43]

3. The Centrality of Rehabilitation: The need to afford access to rehabilitation regardless of whether a judicial process was initiated

Measures of rehabilitation are typically critical for victims of gender-based violence. Numerous human rights bodies have underscored the importance of providing victims of sexual violence with access to free psychological care.[44] However, it is important for facilities to be available to victims, irrespective of whether their claim goes to court or whether the alleged perpetrator is prosecuted and convicted. It is well known that victims who have faced sexual violence are unlikely to report the abuse, sometimes even to their families, because of the fears of being ostracized and that no one will believe them. This hiding away can compound the victim's suffering, which could be alleviated through appropriate treatment and support. Moreover, delayed medical interventions, like specialised reproductive care or fistula repair, can be both traumatic and dangerous for victims.

It is important that rehabilitation be available to all victims who need it, not only to a certain category or subset of victims with a particular immigration status,[45] or who cooperated with law enforcement,[46] or filed claims, or whose cases were brought to court and/or resulted in convictions. The victim's status as a victim (and entitlements as a victim) does not depend on the juridical recognition of a perpetrator: "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim."[47] This is particularly important for cases of gender-based violence, which rarely result in convictions. The Committee against Torture has recognized that "access to rehabilitation programmes should not depend on the victim pursuing judicial remedies."[48]

Forcing victims of sexual and other forms of gender-based violence to reveal themselves individually in order to access services may act as a deterrence for some. As the Office of the High

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[42] *Basic Principles and Guidelines, supra* note 9, at Preamble.
[43] CEDAW, General Rec. 33, *supra* note 28, at ¶ 19(d).
[44] *See, e.g.*, *RPB v the Philippines,* Communication No. 34/2011, CEDAW/C/57/D/34/2011, at ¶ 9 (Mar. 12, 2014).
[45] A/66/283, *supra* note 16, at 9(b)(i).
[46] *Id.* at ¶ 17.
[47] *Basic Principles and Guidelines*, *supra* note 9, at ¶ 9.
[48] CAT, General Comment 3, *supra* note 14, at ¶ 15.

Commissioner for Human Rights has noted in relation to Timor-Leste, "rather than singling out victims of sexual violence, the Commission for Reception, Truth and Reconciliation (CAVR) recommended that the reparations be available to categories including single mothers, widows, and children affected by conflict, as well as survivors of gender-based and sexual violence, adding a layer of protection and confidentiality to female victims coming forward."[49]

4. Satisfaction: Must be tailored to the particular needs of victims of gender-based violence

Measures of satisfaction are designed to help restore victims' dignity. These may involve actions aimed at cessation of violations, criminal prosecutions, acknowledgment of the wrong done to the victim and that it is not her fault, truth seeking, public apologies, and commemoration or memorialisation projects. For gender-based violence, it is crucial that measures are tailored to take into account the victims' particular needs for dignification, which may be different than for other human rights violations or crimes, given cultural stigmas, the possible relationship between a victim and a perpetrator, and the likelihood of re-victimisation if measures are ill-conceived. Judicial proceedings regardless of their nature should take due account of victims' particular needs for privacy and safety. Rashida Manjoo has underscored that:

> Judicial arenas for obtaining reparations are, however, riddled with difficulties. Procedural obstacles that victims of sexual violence have traditionally encountered in the judicial arena can amount to an experience of re-victimization, exposing women not only to psychological harm but also to reprisal, stigma and communal and family ostracism. Crucial here are both the evidentiary standards relied upon and the degree of confidentiality upheld during the reparations process.[50]

5. Guarantees of non-repetition: Requirement for structural changes

Guarantees of non-repetition comprise the range of broad structural measures aimed to bring about a lasting change in the situation so that violations do not repeat themselves. These may involve changes in policies, legal or institutional reforms, and the promotion of human rights standards. With respect to gender-based violence, there is a need to ensure that all forms of gender-based violence are criminalised, including marital rape and domestic violence. Procedures for lodging complaints should be simplified and accessible to victims, and barriers, such as the production of medical certificates in rape cases, should be removed as a requirement for pursuing investigations. Gender-sensitive training and capacity building for security sector and law enforcement institutions to respond to gender-based violence cases are essential, as are measures designed to change attitudes in society, in addition to providing practical measures, such as putting in place gender advisors in police stations to receive complaints from victims.

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[49] OHCHR, *Analytical Study Focusing on Gender-based and Sexual Violence in Relation to Transitional Justice*, ¶ 48, U.N. Doc. A/HRC/27/21 (June, 30, 2014)[hereinafter OHCHR, *Analytical Study*].
[50] A/HRC/14/22, *supra* note 11, at ¶ 35.

V. Victims' Active Participation in Justice Processes: Applicable Procedural Standards for Victims of Gender-Based Violence

With respect to violence against women occurring during conflict, the U.N. Security Council's resolution 1325, and subsequent resolutions on women, peace, and security all underscore that States must ensure women's active participation in post-conflict peace-making, peace-building, and reconstruction processes. The active participation of women in defining and implementing solutions is crucial to their empowerment, and a necessary precondition to eradicate marginalisation.

Victims' active participation has also been recognised as a crucial component to justice processes, which include, but are not limited to, reparations processes. In his 2015 report, Pablo de Greiff noted that "the participation of victims, in particular women and girls, in the early stages of debates on the design of reparation programmes contributes to ensuring that serious gender-related violations are not excluded from the range of rights that, if violated, will trigger reparation benefits."[51]

Indeed, when done well, justice can be empowering and reparative for victims. It can give them a voice and enable them to be heard by an official decision-making body. The converse is also true. Processes which ignore victims' concerns and treat them as passive observers tend to have a deleterious impact on victims' well-being and their sense that justice has been achieved. Where victims are not treated with respect, and are subjected to re-traumatising examinations, this can impact their overall experience with the justice process, and can deter others from coming forward.[52] As the Inter-American Court of Human Rights has held, "it is essential to provide support to a rape victim from the beginning of the investigation in order to ensure her safety and provide an appropriate context to refer to the abuse suffered and to facilitate her participation, as simply and as carefully as possible, in the investigation procedures."[53] This obligation extends not only to the investigation, but throughout any judicial procedure that follows, including reparations.

The stigma that surrounds sexual violence can lead to female victims being abandoned by their families and ostracized from their communities, causing victims to hide or isolate themselves. But for some victims of sexual violence, testifying can sometimes be an act of defiance, an act to reclaim power over the events, though an extremely painful process nonetheless. Khadidja Zidane, who testified in the *Hissène Habré* case about her experiences of rape by *Habré* himself, explained that after she came back from giving her testimony, she was was threatened with death, physically attacked by strangers in the street, and abused in her own home. "The whole thing is because I went and told the truth. Why shouldn't I tell the truth? I have every right. An injustice has been done to me. I was not alone. Hissène Habré destroyed all of us. I don't have anything to lose. I have to speak. I don't care."[54] After having heard evidence from Khadidja Zidane and other victims of sexual violence, the trial judges added sexual violence to Habré's charge sheet, and sexual violence was drawn specific attention to in the verdict and in the award for reparations.[55] Moreover, the judges determined that the sexual violence perpetrated against the women amounted to torture, crimes against humanity, and sexual slavery. While the conviction and sentence were upheld on

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[51] Pablo de Greiff (Special Rapporteur), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, **¶ 70,** U.N. Doc. A/HRC/30/42 (Sept. 7, 2015).

[52] Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR 272-275 (2005).

[53] *Rosendo Cantú et al. v. Mexico,* Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H. R., at ¶ 189 (Aug. 31, 2010).

[54] Ruth Maclean, 'I told my story face to face with Habré': Courageous Rape Survivors Make History, Guardian (Sept. 18, 2016).

[55] Judgment of 30 May 2016, http://www.chambresafricaines.org/pdf/Jugement_complet.pdf

appeal, one count of rape committed against Khadidja Zidane by Habré himself was thrown out on procedural grounds, as it was added to the charge sheet once the trial was already underway.

In the *Bemba* case before the International Criminal Court, Pulchérie Makiandakama, the first victim appearing before the Chamber, who was raped by two soldiers, testified without the usual protection measures, such as face and voice distortion, because, as she said, "I cannot ask for my voice or image to be distorted. I want it to be natural, be myself and say before the Judges and before the whole world what I suffered." When her counsel asked her what she was expecting from the ICC, she replied: "I am a human being. Judges need to pay attention to my situation. Judges have to rule on this case and give me justice. This is all I want from the ICC."[56]

The *Basic Principles and Guidelines* make it clear that access to remedies must be fair and non-discriminatory, and procedures must be accessible and suitable to take account of victims' particular needs. In practise, discrimination and marginalisation can inhibit access to justice or associated reparations processes. Often, key documents are not translated into local languages, and information dissemination does not reach remote areas or those who cannot read. Outreach and awareness-raising activities are necessary preconditions for victim participation in justice processes, whether before courts or administrative programmes.[57] Structures to ensure safety, privacy, and dignity are needed but are not usually in place, which can discourage women and others who experience stigma from coming forward.[58] The *Basic Principles and Guidelines* underscore that measures should be taken to "minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims."[59]

In a post-conflict context, the regular justice institutions may not be functioning or will be under extreme strain. Even in the best of circumstances they would be ill-equipped to deal with a flood of conflict victims that have experienced multiple harms. Practically, this has meant that in such circumstances specialist judicial or administrative structures are needed to give effect to victims' rights to lodge claims for reparations. The *Basic Principles and Guidelines* recommends courts to refer to such possibilities, indicating that "[i]n addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate."[60]

VI. Implementation: How far have we come?

The rights framework has become much clearer with respect to victims of gender-based violence, their right to reparations, and what reparations should entail, particularly for sexual violence perpetrated during conflict. This has led to this phenomena being considered by claims commissions and other transitional justice processes as well as a small number of courts. Nonetheless, the implementation of this framework remains piece-meal and largely inadequate. As noted, the challenges for victims to achieve reparations are multiple and include a variety of practical access

[56] As reported in Victims' Rights Working Group, *Victim testifies publicly in the Bemba trial: "I lost my dignity"*, Issue 20 (Spring 2012).
[57] OHCHR, *Analytical Study*, *supra* note 49, at ¶ 47.
[58] Catherine O'Rourke et al. *Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice,* 28 Harvard Hum . R. J. 97, 137-139 (2015).
[59] *Basic Principles and Guidelines*, *supra* note 9, at art. 12(b).
[60] *Id.* at art. 13.

hurdles, procedural barriers, and gaps in the law. Furthermore, victims who submit their cases to justice processes are still sometimes forced to confront prosecutors and judges who judge the victims on the basis of discriminatory stereotypes and narratives about gender, which impede victims from realising fair and equitable justice.[61]

When reparations follow criminal law proceedings, problems to secure convictions translate to problems to secure reparation. The low number of investigations, prosecutions, and convictions in cases of alleged rape and other forms of gender-based violence, coupled by insensitive cross-examination procedures and poor witness protection, also undermine victims' confidence in the justice system and lead to them rejecting judicial approaches altogether.

[61] *Vertido v. The Philippines*, U.N. Doc. CEDAW/C/46/D/18/2008 (Sept.1, 2010).

How Non-State Torture is Gendered and Invisibilized: Canada's Non-Compliance with the Committee Against Torture's Recommendations

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Abstract

Non-State torture was recognized by the Committee on Torture in 2008 (CAT/C/GC/2). This chapter examines non-State torture perpetrated within families disproportionately victimizing girls and women including for sale in the commercialised trafficking and sexualized exploitation markets and to the pornification industry. Despite these wide-spread practices, non-State torture violations have not gained much social and legal recognition by States. It is important, therefore, to closely examine why.

In this chapter we focus on one country: Canada. Despite the 2012 Concluding Observations of the Committee against Torture presented to Canada recommending Canada incorporate into domestic law torture perpetrated by non-State actors (CAT/C/CAN/CO/6), this has been rejected.

By refusing to identify, name, and criminalize non-State inflicted torture, we argue that Canada's response provides the 'perfect' patriarchal form of governmental and legal structural resistance and oppression. Multi-level resistance ranging from the 'highest' level to the grass-root reality is examined. Including Canada's rejection of the genderization of international obligations related to the

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United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to the failure to provide a 'victim's lens' for a victim-related Criminal Code amendment, to the denial of women's ability to take into court their truth-telling of suffering torture committed by non-State actor(s). This adds, at the individual level, secondary re-victimization harms. Referencing international and human rights case law, human rights treaties, and the need for a new legally binding treaty addressing violence against women and girls, will ensure non-State torture violations are gendered and recognised.

Twenty-Eight Words is all it Took

At 10 a.m. in Geneva, Switzerland, on May 23, 2012, at the forty-eighth session of the United Nations Committee against Torture and Canada's State party report, the following conversation occurred:

> Mr. Kessel, (Canada) [informed the Committee], it should refrain from asking questions that fell more squarely within other treaty bodies' mandates, such as general issues relating to violence against women or trafficking in persons (Committee against Torture, 2012a, para. 12).
>
> [Responding], Claudio Grossman (Committee Chair) noted Canada's invitation for the Committee not to consider acts of domestic violence, but said . . . that was an invitation the Committee could not affect due to its obligations to the Convention; discriminatory treatment for women or men that could constitute torture was clearly listed in article 16 . . . . if the Committee was to do that it would end up only considering acts of torture that were committed against white males (*News & Media*, 2012, p. 4).

Twenty-eight words is all it took for the Canadian delegation to reveal structural, legal and gendered discriminatory-based resistance and oppression when generalizing and rejecting that violence against Canadian women—against all women—can involve torture, which falls to the Committee to address. Torture is one of the worst human rights violations a human being can inflict on another, and States "bear the primary responsibility for implementing international human rights standards . . . by protecting human rights against interference by private actors" (Nowak, 2010, para. 2).

This chapter focuses on Canadian women born into families that perpetrate non-State torture, women who constitute a specifically unacknowledged, multi-victimized population. Such family-based operators also trafficked—sold or rented—them as children to like-minded others who create the commercialised demand for the global prostitution and pornography industries (Sarson, 2011; Sarson, 2016; Sarson & MacDonald, 2009; Sarson & MacDonald, 2014a; Sarson & MacDonald, 2016; Sarson & MacDonald, 2018). When exploited and trafficked into prostitution and pornography, women and girls can suffer torture at the hands of non-State actors (Bamber & Korzinski, 2007; Mendez, 2016; Native Women's Association of Canada, 2014; Office of Drugs and Crime, 2013). Although the family is recognized for its capacity to have positive influences on its members and its community (Human Rights Council, 2014), it remains a dangerous site for its potential to inflict many forms of gendered discrimination and gender-based violence on women and girls (Human Rights Council, 2016). These forms of violence are endorsed by sexism, misogyny, misopedia, and inequality. Torture committed by non-State actors within the context of family is recognized in the Declaration on the Elimination of Violence against Women

(DEVAW) (General Assembly, 1993) and in the Committee against Torture's General Comment No. 3 (2012b).

The Canadian Government's position that the Committee against Torture should not address cases where women are subjected to non-State torture raises, from a grass-roots feminist human rights perspective, and attached to an evolving international human rights legal framework, the following basic questions:

1. Should women who suffer acts of gender-based violence that amounts to torture perpetrated by non-State actors have that violence named or be recognized as a human rights crime under international and national law?
2. Should women be equal before the law and entitled, without discrimination, to equal protection under the law to not be subjected to torture, irrespective of whether the torturer is a non-State or State actor?
3. Should women have the equal human right to bring complaints of torture inflicted by non-State actors before the Committee against Torture, as do those who have suffered acts of torture inflicted by the State?

Canada's Non-Compliance with Torture Committee Recommendations

The response by the Canadian Government delegation was shocking to the two Canadian authors in attendance at this session. They knew, just as Committee expert Ms. Belmir noted, that Canada's past was as "a leading defender of human rights" (Committee against Torture, 2012a, para. 30). In 1994, a Canada-led resolution resulted in the appointment of a United Nations Special Rapporteur on violence against women; in 2008, another Canada-led resolution renewed this position and helped Canada eliminate ongoing violence against women and children (D. L. Emerson, letter dated September 24, 2008). Additionally, during the Vienna World Conference in the early 90s, Canada was involved in formulating the following sentence, which was eventually adopted on the fourth draft proposal: "The human rights of women are an inalienable, integral, and indivisible part of universal human rights" (Bauer as cited in Gaer, 1998, p. 32).

The Committee experts countered Canada's dismissive position. Committee expert, Ms. Gaer, expressed her disappointment in Canada's statement that "violence against women would be better addressed elsewhere." She explained that "during the first 12 years of the Committee's existence, women had . . . been invisible . . . . [and] the first step towards preventing further human rights violations must be to put an end to such invisibility" (Committee against Torture, 2012a, para. 35). Ms. Belmir commented that, "the Committee was duty-bound to address any issue involving . . . a risk of torture" (para. 30); Mr. Menéndez noted that "trafficking could involve the use of torture" (para. 40).

Indeed, the above 2012 Canada-Committee discussion ensued because of the non-governmental organization (NGO) shadow report of the Canadian Federation of University Women (CFUW, 2012). The report called on the Government of Canada to immediately amend the *Criminal Code* by specifically naming and criminalizing non-State torture.

The Committee against Torture's Concluding Observations (2012c) included the Committee's regrets about the Canadian delegation's position on violence against women, reminding Canada that it "bears responsibility and its officials should be considered authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in acts of torture . . . by non-

State actors (arts. 2, 12, 13 and 16)" (para. 20). It recommended that Canada incorporate torture perpetrated by non-State actors into its domestic law.

The Canadian Government was aware of non-State torture crimes prior to its appearance before the Committee against Torture in 2012. In 2008, a Canadian NGO shadow report submitted to the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recommended naming and criminalizing non-State torture (Canadian Voice of Women for Peace). The shadow report included women's testimonies of non-State torture, detailing the severity of the pain and suffering they endured. Efforts to recover from this torture were described as feeling like being tortured all over again: it is "double torture . . . which is a most agonizing, exhausting, and debilitating struggle for survival, post-torture" (p. 23). Double torture for women means re-constructing a relationship with oneself, and requires undoing survival dissociative responses that automatically developed as a reaction to the severe physical, sexualized, and mental pain. It means coping with the remembered terror and horror that flashbacks ignite, and re-experiencing feelings of deep humiliation, consequences of dehumanization, degradation, and sexualized torture that accompany involuntary re-enactments. A major tactic of torturers is to intentionally humiliate, thereby destroying an individual's personal integrity and dignity (Vorbrüggen & Baer, 2007), ordeals that are exactly what human rights treaties are designed to prevent.

The NGO shadow reports of 2008 and 2012 sought human rights entitlement, and non-discriminatory equal protection of the law, for women tortured by non-State actors. Canada's *Criminal Code* only permits individuals tortured by Canadian State officials—for example, a peace or public officer or member of the Canadian Forces—to invoke the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (General Assembly, 1984) in a Canadian court of law under section 269.1 (Government of Canada, 2016). This is a failure of State protection obligations.

Fulfilling Gender-Sensitive International-National Due Diligence Obligations

There are several national and international reasons for Canada to adopt the gender-sensitive recommendation made by the Committee in relation to criminalizing non-State torture. Most provisions of the United Nations Universal Declaration of Human Rights (UDHR) have customary international law status, including the absolute prohibition on torture (Article 5). Therefore, for Canada to become a human rights standard bearer once again, it should fulfil its most basic human rights obligations. The preamble of the UNCAT acknowledges States' obligations under the Charter of the United Nations, particularly Article 55, which promotes universal respect for non-discriminatory human rights and fundamental freedoms for all members of the human family, which should, and must, include women. Women's equal protection of and before the law is mandated by Articles 2 and 7 of the Declaration. Equal protection should translate into non-State-centric structural and legal due diligence obligations to promote, protect, and fulfill, equitably and reasonably, the human rights of women not to be subjected to torture, irrespective of whether the torturers are non-State or State actors.

The UDHR does not assign human rights to a specific duty-holder, such as protection only to individuals tortured by State actors; the right not to be tortured belongs to all individuals (Clapham, 2006; Cook, 1994; Romany, 1994; Schlütter, 2012). Copelon (2000) wrote that achieving "gender justice . . . [is] revolutionary and one of the ultimate tests of universal justice" (p. 219). This struggle remains

in the private sphere for Canadian women. It is impossible for Canadian women to seek justice for non-State torture crimes because such a criminal offence does not exist in Canada's *Criminal Code*, and Canada does not currently fulfil its international law obligations. These obligations include recognising the prevention of torture as a *jus cogens* norm of international law and part of customary international law. Additionally, since the Vienna Declaration of 1993, there is an increasing movement towards treating gender inequality as a violation of customary international law.

Furthermore, from a non-State-centric due diligence obligation, Ertürk (2006) has concluded, based on State practices and *opinio juris*, that "there is a rule of customary international law that obligates States to prevent and respond to acts of violence with due diligence" (para. 29). Ertürk made reference to the *Velásquez Rodriguez v. Honduras* decision, which stated that "the act of a private person . . . can lead to international responsibility of the State . . . because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights]" (1988, para. 172; see also Edwards, 2011, pp. 237-252). Likewise, the Inter-American Court on Human Rights made a similar ruling in the case of *Maria Da Penha v. Brazil* (2001). Moreover, the Court in *Velásquez* held that a State will be liable when "a violation of . . . rights . . . has occurred with the support or the acquiescence of the Government, [or when] the State has allowed the act to take place without taking measures to prevent it or to punish those responsible" (para 173; see also *Godinez Cruz v. Honduras*). The State's due diligence failure was also identified in the case of *Opuz v. Turkey*, under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which states that "no one shall be subjected to torture." The case also explained that States parties are required "to take measures . . . to ensure that individuals within their jurisdiction are not subjected to torture . . . by private individuals (2009, para. 159). Interights (International Centre for the Legal Protection of Human Rights) submitted to this case that "the *jus cogens* nature of the right to freedom from torture . . . required exemplary diligence on the part of the State with respect to investigation and prosecution of these acts" (para. 125; see Askin, 1997, pp. 239-242; Romany, 1994, pp. 99-102). Furthermore, in *Jessica Gonzales v. United States,* the United States appearing before the Inter-American Commission on Human Rights was asked about its affirmative obligations to protect individuals from private acts of violence (Bettinger-López, 2008). In all of these cases, the violence was perpetrated by men—by non-State actors—against women within the family context.

The Committee against Torture is entrusted with supervising how States enact and implement the UNCAT to promote protection from torture and other inhuman acts globally (Centre for Human Rights, 2009). Looking through a feminist lens, the non-derogable human right of women not to be subjected to torture was negated by discriminatory language employed during the drafting of the UNCAT. Operationalized historically through the patriarchal dominant perspective (Mendez, 2016), *he*, *him*, and *his* are mentioned 21 times—*she* is absent. Men needed protection from torturing each other during war—*she* didn't matter. That *she* was tortured during war and at home did not matter (Askin, 1997; Brownmiller, 1990; Copelon, 2009; Edwards, 2011; Fortin, 2008; Randall, 2006). But *she* would not be silenced. Gaer (1998) wrote that building on centuries of efforts, the 1995 United Nations Fourth World Conference on Women in Beijing advanced women's rights as human rights, and part of international human rights.

It took the Committee against Torture (2008) over twenty years before it released its General Comment No. 2, stating that the UNCAT applied to violence perpetrated against women by non-State actors that met the defining elements of torture as described in Article 1 of the Convention.

During the 2012 Committee against Torture-Canada session, Committee expert Ms. Sveaass drew Canada's "attention to general comment No. 2 . . . [and] asked whether it would consider amending its legislation to include acts of torture committed by non-State actors" (Committee against Torture, 2012a, para. 38). The Committee's recommendation to Canada was to fully incorporate the UNCAT into domestic law by prohibiting torture by non-State actors under national law. This recommendation was rejected by Canada and explained as:

> Canada's longstanding view is that the general comments and concluding observations of the UN treaty bodies are not legally binding. General comments and concluding observations of the treaty bodies, and this includes the Committee against Torture, are given serious consideration by governments in Canada, but Canada's view is that States Parties are not legally bound to implement them (E. Brady, personal communication, July 11, 2013).

This explanation utilizes the concept of 'soft law' which

> Refer[s] to rules that are neither strictly binding . . . nor completely lacking legal significance. In the context of international law, soft law refers to guidelines, policy declarations or codes of conduct which set standards of conduct. However, they are not directly enforceable (USLegal, 2001-2016; see generally Boyle, 2014).

Women's gendered inequality gives rise to multiple forms of violence that States have a due diligence duty to prevent, including those perpetrated by non-State actors. This requires that national laws be in compliance with international standards (General Assembly, 2006; Human Rights Council, 2009; Office on Drugs and Crime, 2008). Being gender-sensitive and cognizant of the evolving international legal decisions previously discussed, Canada's soft law and existing explanations are without merit for not practicing due diligence and upholding women's entitlement to the human and legal right not to be subjected to torture committed by non-State actors. Refusing to create a victim-related *Criminal Code* amendment also negates Canada's federal victims' strategy of empowering and assisting crime victims to reconstruct their lives (Department of Justice, 2015). Such structural, legal discrimination reinforces patriarchal oppression and women's inequality as human beings, negating their human right to seek legal justice by naming non-State torture as the violation suffered. How will women ever earn *legal credibility* if they are forever denied legal justice to speak of the non-State torture crimes they have endured?

A Gender-Sensitive Interpretation of Torture—and of Non-State Torture

United Nations resolutions have contributed to the genderization of the UNCAT. These have mandated Special Rapporteurs against Torture to integrate a gender-sensitive perspective into their work, noting that at any time, in any place, and under all circumstances, the prohibition of torture is a peremptory norm that reaffirms that no one should be subjected to torture (Human Rights Council, 2008; General Assembly 2011).

Article 1 of the UNCAT lists the four elements of torture:

1. Severe pain or suffering, mental or physical;
2. Intent;
3. Purpose including for punishment, coercion, to threaten, or for any reason based on discrimination of any kind;
4. State involvement or acquiescence of the State.

Special Rapporteur Manfred Nowak (2008) stated that intent is implied with acts of gender-specific torture, and that the purpose element is always fulfilled when acts of gender-based discrimination are involved. He also confirmed that it is a State's duty to prevent torture in the private sphere. When some manifestations of women's victimization at the hands of non-State actors are compared to torture inflicted by State actors, the two are remarkably similar. With regard to State involvement, Special Rapporteur Juan Mendez (2016) refers to international criminal law developments which have determined that torture can occur when the State had no role in its perpetration and where the State did not fail to exercise due diligence obligations, with the "characteristic trait of the offence [being] found in the nature of the act committed rather than in the status of the person who committed it" (para. 52) (*Prosecutor v. Kunarac et al*. and *Prosecutor v. Semanza* footnote cited in Mendez, 2016).

The following chart illustrates the points made by Nowak, Mendez, and others (Marshall, 2005). Acts of State and non-State torturers are similar, and it is not the status of the person that determines whether they are a torturer, but rather, it is the acts they commit. The chart below describes and compares three groups of women and the torture inflicted against them:

1. 100 Mexican women arrested, jailed, and tortured by security forces, police, army and navy members (Amnesty International, 2016);
2. 100 Asian and African women who immigrated to the United Kingdom (UK) tortured mainly by State actors, but also by non-State actors (Smith, & Boyles, 2009), and
3. Women known by the Canadian authors, beginning in 1993, who detail being born into non-State torturing families who trafficked and exploited them to like-minded others. These women are from Canada, the United States, the UK, Western Europe, Australia, and New Zealand.

Mexican women	**African and Asian women UK immigrants**	**Women known by Canadian authors**
Psychological abuse, humiliation, harassment, insults, misogynistic put-downs, called derogatory names, threats, stripped naked	Humiliation, forced nakedness	Psychological torture, humiliation, harassment, insults, misogynistic put-downs, called derogatory names, threats, stripped naked, stalked

Mexican women	African and Asian women UK immigrants	Women known by Canadian authors
Beatings to the head, stomach, thorax, legs, and ears; dragged by the hair; biting of face and neck; blindfolded	Beatings, burnt, cut, and stabbed; tools used included weapons, razor blades, machetes, broken glass, belt buckle, metal rods, heated knives, boiling water, caustic liquid, sharpened wood sticks, and cigarettes	Beatings to the head, ears, feet, whole body; burnt, cut, stabbed, pinched, needle pricks under fingernails; tools used included belts, weapons, broken glass, burning wooden sticks, heated metal rod, heated spoon, hot light bulb, hot and ice cold water, pepper into eyes, cigarettes, whips, knives, pins, pliers; hair pulled; blindfolded; joints dislocated; tied down, hung, confined, caged; denied bathroom facilities; forced to eat vomit and feces
Sexualized torture: vaginal, oral, anal rapes with penis, fingers, with objects, firearms; group raped; breasts, buttocks, genitals groped; nipples pinched; forced kissing; masturbated on; forced to ingest torturers' body fluids	Raped numerous times; raped with implements, gun barrels, sticks, bottles, truncheons; anal bottle raped, forced to balance on the bottle; group raped; urinated and ejaculated on and forced to ingest torturers' body fluids; breasts bitten, burnt, cut, damage to reproductive organs, fistula; sexually transmitted infections, HIV+; sexual slavery	Raped repeatedly, orally, vaginally, anally, with penis, fingers, objects, firearms; pseudo-necrophilic rapes when unconscious; urinated, ejaculated, defecated on; smeared with and forced to ingest torturers' body fluids; group raped; damage to reproductive organs, hysterectomies and repairs; infections; breasts bitten, burnt, cut, punctured
		Bestiality with dogs, horses; forced to eat out of animal trough; forced to eat on all fours like a dog
Electroshocks to genitals, legs	Electroshocks, breast bound with wire and electroshocked	Repetitive electroshocks to head, in vagina, and mouth
Suffocated with a plastic bag placed over the head		Suffocated with a plastic bag placed over the head
Water tortured, head plunged into a bucket of water		Water tortured, head held in a bucket of water, in sink, in bath tub, in stream, or lake

Mexican women	African and Asian women UK immigrants	Women known by Canadian authors
Watched others or heard cries of others being tortured, including family members	Rapes photographed; tortured and raped in front of others, family members, including children, or in public	Rapes photographed; watched others being tortured, forced to participate in sexualized torture victimization of others including children; repetitively trafficked to like-minded group for sexualized torture "parties"; pornographic images made as 'teaching tool', forced to harm or kill animals
Impregnations, abortions, miscarriages from violent beatings and rapes	Impregnations, abortions, lost pregnancies due to violent rapes	Impregnations, violent abortions perpetrated; forced to consume aborted tissue
Locations where tortured: in their house, during arrest and detention, in a warehouse, a Navy base, and police installations	Location where tortured: at home, in detention, in police custody, in the bush, in a graveyard	Location where tortured: at home, homes of like-minded, warehouse, farm, woods, cabins, basements, boats, plane, military base, church, motel, fire station, professional's office, modelling agency

Although all of the women in the above chart may not have suffered every act of torture described, they did suffer acts of torture that caused severe pain and suffering—physical, sexualized, and mental. Besides intent and purpose being gendered, other forms of multi-intersecting discriminatory vulnerabilities were noted. The Mexican women were mostly young and of low income; many were single parents, and others were considered to be gender non-conforming. Vulnerabilities existed for the Asian and African women who reported being raped when as young as six years old, through to the age of sixty-two. Moreover, the women were tortured on a mass scale, over a broad geographical area. The Asia and African women were mainly single, and some were traumatised by their loss of children who died from violence, starvation, and disease. For the majority of the women known to the Canadian authors, they suffered non-State torture victimization from birth or shortly thereafter that lasted for years. Many were in their early adult years before finding ways to escape, surviving over 23,000 rapes, for instance, in addition to being trafficked, prostituted, and exploited by the pornography industry (Sarson & MacDonald, 2016a). These kinds of repetitive rapes are considered torture (Fortin, 2008).

Amnesty's research on the Mexican women lasted eight months. The women from Asia and Africa sought services from the Medical Foundation for the Care of Victims of Torture for six months. For the women known to the Canadian authors, contacts ranged from single disclosing testimonies to decades, which explains why the accounts of torture victimization are more detailed, due to the period of time some women had to disclose. Disclosures can arise spontaneously, years

after escaping. This occurred when Sara (not her real name) who, several decades after first disclosing non-State torture victimization, explained the tactic her parents used to traffic her as a youth. Sara's parents gave her a code name before leaving home for school and told her to walk home rather than take the school bus. When a car drove up, stopped, and said the code name, she 'simply' got into the car. This was her relational norm. For the specific population of women born to family-based, non-State torturers, traffickers, and exploiters, their victimization is relationally complicated in that surviving meant bonding with a family that was supposed to nurture them rather than destroy them. This kind of torturer intends to cause destruction. When torture victimization begins in infancy, the destruction to a woman's relationship with herself as a human being is swift. Women frequently describe their Self-perception as being an "it", a "thing", or a "nobody". (Sarson, & MacDonald, 2014a).

Women in all three groups lack access to State supportive justice. For the Canadian women identified in this chapter, justice for non-State torture crimes is directly denied by the refusal of the Canadian Government to amend the *Criminal Code*. Patriarchal discrimination that legally invisibilizes non-State torture continues in countries other than Canada. For example, Garcia and Santos (2009) wrote that when the Philippines created their anti-torture law, Republic Act No. 9745 (The LAWPHiL Project, 2009), non-State torture was not addressed. Other countries, such as Belgium, have not restricted their laws on torture to require State involvement. The Belgian law has reportedly been used only twice for non-State torture—once in a case involving acid burning, the second time in a case where an exorcism resulted in a woman's death (REDRESS, & European Centre for Constitutional and Human Rights, 2012). In Queensland, Australia, in the case of *R v. HAC,* a husband was found guilty of torturing his wife over a period of six months (2006).

Acquiescence of the State: Canada knew of Non-State Torture

The Government of Canada knows non-State torture, including the sexualized exploitative torture of Canadian women, children, and infants, occurs and that, for some, it has occurred for decades (Sarson, & MacDonald, 2016b; Sarson, & MacDonald, 2015). A herstorical awareness began before Canada ratified the UNCAT in 1987. For example, in the 1985 report, *Pornography and Prostitution in Canada*, "Women are represented in scenarios of degradation, injury, abasement, torture, shown as filthy and inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual" (Special Committee on Pornography and Prostitution, p. 55). Prior to this, Robertson (1979) referred to a quote in a testimony given before the House of Commons Justice Committee that said, "johns want 'to burn, torture and beat . . . .' the women prostituted" (p. 13). Reference to the torture of women continued to be delivered to the Canadian Government, including in the 1993 Canadian Panel on Violence Against Women report given to the Minister Responsible for the Status of Women. It said, "Every day in this country women are maligned, humiliated, shunned, screamed at, pushed, kicked, punched, assaulted, beaten, raped, physically disfigured, tortured, threatened with weapons and murdered" (p. 3). In 2010, LePard reported sadistic and sexualized torture of several women in prostitution; in 2013 the Human Trafficking National Coordination Centre gave examples of acts of non-State torture perpetrated against domestically trafficked young women; and in the 2014 report by the Native Women's Association of Canada, a sexually exploited and trafficked woman said, "Torture is torture. I survived it. I'm an expert of it." Additionally, when the Canadian Government was studying Bill C-36 to shape Canada's position on the prostitution

of women and girls, evidence was given that women and girls suffered non-State torture in sexualized human trafficking and exploitation (CPAC, 2014).

Sarson and MacDonald (2014b) submitted a brief to the Senate of Canada detailing patterns of victimization whereby parents 'trained' their very young girls to withstand non-State torture by 'preparing' them for sexualized exploitation and oral rape. For example, Hope (not her real name) described her ordeals as:

> The family would stuff and stuff mashed potatoes into my mouth and throat, massage my throat while speaking ever so softly in voice tones that were trance and hypnotic-inducing. This exercise trained me to let the mashed potatoes slide down my throat without gagging, which taught and conditioned me not to gag during oral rapes; something my father and others did very frequently to me . . . . when I was prostituted as a child (p. 5).

Women who have survived non-State torture need to be heard. Social inclusion is about being welcomed to participate in the development of effective preventive interventions (General Assembly, 2010a), including in the development of client centered non-State torture victimization-traumatization informed care (Sarson & MacDonald, 2012). International legal frameworks can guide States to adopt laws that will remove legal discrimination and work to eliminate all forms of violence against women and girls (General Assembly, 2012). To address non-State torture, criminal legal recognition must be achieved to prevent the trivialization and impunity that is promoted when no legal framework exists for addressing it. Such a legal framework nurtures the development of knowledge about non-State torture crimes, and advances investigative skills regarding the cruelty of non-State torturers' tactics. Victimization impacts are identified and these criteria assist in producing a non-State torture victimization-traumatization-informed legal framework that provides insights into the *reliability* and accuracy of women's testimonies, allowing the women to truth-tell and have their *credibility* respected. This was attempted in 2016 in Canada.

Bill C-242, Testimonies, A Victim Impact Statement, and the Legal Status Quo

On February 26, 2016, the Private Members Bill C-242, was an Act to amend the *Criminal Code* to include inflicting torture. It was introduced to Members of the Canadian House of Commons (Parliament of Canada, 2016a) with the aim of criminalizing non-State torture. Bill C-242 sought to align Canadian law with international law by amending Canada's *Criminal Code*. At the second reading, the Bill passed, following discussions that amendments were required. The Bill was then referred to the Standing Committee on Justice and Human Rights to be studied (Parliament of Canada, 2016b). Briefs and other evidence were provided by advocates (Sarson & MacDonald, 2016c) and by a woman (Lane) and her husband (Holodak) (2016). Lane discussed her family-based non-State torture ordeals in hopes that the Standing Committee would understand what non-State torture victimization meant. She wrote:

> I survived decades of brutal and unimaginable torture at the hands of my father and his associates (non-State actors) . . . . Their psychological programming, demented acts of brutality and sexualized exploitation, humiliation and degradation began when I was approximately two years old. It lasted into my mid-twenties at which time I fled.

> At night he would take me to our country church or an old barn and torture me. He put a cattle prod inside my vagina and shocked me. He tied me up and stuck a gun inside of me . . . .
>
> When I was six, my dad took me to a farm that had baby rabbits. I picked up the cutest one and hugged it. My dad took the rabbit from me and broke its neck . . . . the look he gave me was clear—this could happen to me.
>
> My dad made me watch as he cut the heads off chickens–I sat there in horror as the headless chickens jumped around splattering blood everywhere. My father told me that if I told of the things he did to me, the same thing would happen to me . . . . I was forced . . . to drink the blood and eat pieces of the dead animals and their feces as the other men watched and laughed.
>
> I was twelve when my dad and his associates got me pregnant and told me that I had evil inside me . . . . I thought I was dying . . . . They were giving me an abortion and then took the underdeveloped baby, cut it into pieces and made me eat some of it.
>
> My dad told me if I ever said anything about what he was doing, someone I loved would be hurt or killed and it would be my fault.
>
> He said that the only way I could make him really proud of me was to kill myself.
>
> [A]ssault; assault with a weapon causing bodily harm; aggravated assault; sexual assault; sexual assault with a weapon and aggravated sexual assault. It is an inadequate comparison . . . . I can assure you with the deepest conviction I feel there is nothing symbolic about using the word "torture" when naming this bill. To truly grasp and identify the full scope of non-State torture in Canada, there needs to be a law in place that empowers the victims of such torture to come forward knowing they are "**finally"** protected by the law. They need to be given their human rights to enter a courtroom, face their perpetrators and speak the truth using the appropriate and necessary term to describe the crime committed against them–torture.

The Government's Department of Justice appeared before the Standing Committee on Justice and Human Rights studying Bill C-242 to answer questions (2016a). They stated that the UNCAT is focused on stopping State-inflicted torture and that international law defines the meaning of torture to be State related, thus no legal gap exists in the *Criminal Code* because existing provisions such as aggravated sexual assault, aggravated assault, and kidnapping would legally address non-State torture crimes. According to Gaer (2012), these are inadequate definitions that dismiss the specific gravity of torture crimes. No mention was made of international rulings such as *Opuz v. Turkey*, in which the Court referred to Article 3 of the ECHR ("no one shall be subjected to torture") and held States responsible for such acts of violence perpetrated by private persons.

Naming non-State torture, the Department of Justice said, serves more as a denunciatory purpose, and that using existing provisions is easier for police and prosecutors because they do not have to prove that the intentionality of the perpetrators is to cause harm and its consequential severe pain and suffering. This Department of Justice legal position was generally supported by Michael Spratt of the Criminal Lawyers' Association, who appeared before this Standing Committee (2016b). No value was given to denunciation. Knowledge that denunciation can strengthen women's legal empowerment was dismissed. Women born into non-State torture families lost their childhoods forever; legal restoration can only alter the present and their future. Nowak (2010) learned that people telling their torture stories and being heard matters most, and that public acknowledge-

ment of their torture pain, suffering, and humiliation is important in ending powerlessness and social isolation. Healing benefits happen with the right to legally denounce non-State torturers. Smith and Boyles (2009) and Bettinger-López (2008) identify denunciation as providing therapeutic rehabilitation for women. Denunciation helps prevent socio-legal secondary re-victimization when non-State torture suffered is truthfully acknowledged, preventing an erosion of dignity, promoting social inclusion, and alleviating social exclusion, which mires women in their suffering (Phillips, 2011).

No regard was given to Special Rapporteur Mendez's 2016 report on Gender Perspectives on Torture, which states that it is the act committed rather than who committed the act that helps advance legal non-discriminatory human rights equality. Also ignored were United Nations resolutions aimed at eliminating the discriminatory operationalization of the UNCAT and Committee against Torture (2008), as well as General Comments that Canada was failing to exercise due diligence to prevent, investigate, prosecute, and punish non-State torturers consistently with the UNCAT. Thus, Canada or its officials were considered to be consenting or acquiescing to impermissible, ongoing acts. Back in 2005, a Government of Canada report said that discriminatory attitudes underlie gendered violence, referring to equality promoted in the UDHR and specifically quoting the *Canadian Charter of Rights and Freedom* principles of fundamental justice, which guarantees equality before and under the law in addition to equal protection and benefit of the law for all. This was not acted upon by the Standing Committee for the women identified seeking social and legal access to justice, specifically for the human right crime of non-State torture.

We repeat: How will women ever earn *legal credibility* if they are forever denied legal justice to name and speak of the non-State torture crimes they have suffered? Naming a specific crime—non-State torture—would create factual evidence identifying specific data about such a crime. Naming non-State torture would also eliminate impunity afforded to non-State torturers, and expand understanding that non-State torture victimization exists in the private sphere. This understanding would help to improve the skills of law enforcement officers, legal practitioners, child protection workers, and health professionals. It would therefore improve women's safety and the development of non-State torture victimization-traumatization informed interventions, which are of ultimate importance in ensuring women's legal credibility and reliability.

In the end, the Members of the Standing Committee unanimously voted to defeat Bill C-242 (2016c). Reporting to the Parliament of Canada (n.d.), the Chair of the Standing Committee reinforced the use of euphemisms by stating that existing provisions of aggravated assault and aggravated sexual assault can deal with non-State torture violations. The Standing Committee (2016c) sent a letter to the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, asking that the issue be considered when addressing her mandate of updating the *Criminal Code of Canada.* In her capacity, Minister Wilson-Raybould is responsible for the administration of justice, including human rights law and private international law, addressing gaps, and keeping survivors and children safe (Trudeau, n.d.). However, Minister Wilson-Raybould's perspective is State-centric; she writes:

> [T]he existing specific offence of torture is meant to deter the infliction of pain and suffering by persons acting on behalf of a state for state purposes such as obtaining information or a confession. . . . This policy was set by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . . (J. Wilson-Raybould, personal communication, January 09, 2016).

Canada's Fall as a Human Rights Global Leader

Canada's actions to legally misname non-State torture as another crime, such as aggravated assault, to reject United Nations resolutions that encourage the Committee against Torture to practice human rights non-discrimination by becoming inclusive of gender-sensitive manifestations of violence that amount to torture, to ignore that soft law sets standards of conduct not completely lacking legal significance, and to refuse to consider evolving international law standards that address due diligence in a gender-sensitive manner mean that Canada is no longer a human rights global leader working to eliminate all forms of violence against women and girls. Canada can be considered as contributing to societal and legal human rights regression, both nationally and internationally. Gender-based violence is pandemic, and over the past three decades has become increasingly acknowledged as fundamental discrimination (Manjoo, 2011; for an overview of early attempts by other UN bodies see Chinkin, 2012). For a society to progress, it must confront violence against women (Arendt, 1970; Hudson, Ballif-Spanvill, & Caprioli, 2012; Study of the Secretary-General, 2006), including non-State torture victimization in the domestic or private sphere.

Feminist movements are key to such policy transformation (Htun & Weldon, 2012). To develop, Canada must acknowledge that women, who as infants and developing children, were persons who incurred substantial impairment of their human rights when subjected to torture by non-State actors. Canada must adhere to the fundamental and legal human rights principle of non-discrimination that specifically names non-State torture as a crime. This ensures that women are equal before the law. If access to such justice is denied, they must be able to bring before the Committee against Torture acts of torture that have been inflicted by non-State actors, as women who have suffered acts of State inflicted torture do.

To the Future: International Law and A New International Legally Binding Treaty

As Cook wrote in 1994, "International human rights law has not yet been applied effectively to redress the disadvantages and injustices experienced by women by reason only of their being women" (p. 3). This chapter has presented direct and lengthy evidence that Cook's statement is still true today. It has also presented compelling evidence in support of the legal obligation of States to fulfill their international law obligations for violence against women and girls subject to non-State torture. Equally, States are responsible for their omissions and failures to take positive measures to protect and promote rights (Ashworth & Zedner, 2014, chapter 1; see generally Crawford & Olleson, 2014, chapter 15; Study of the Secretary-General, 2006; Walby, 1990, p. 150). International obligations must be transposed into the national legal system. This includes passing and properly implementing normative instruments that outlaw violence and prosecute perpetrators.

Interpreting normative instruments in a 'gender-inclusive manner' would be a step in the right direction. However, laws that purport to be gender-neutral, but are in fact gender-blind, do not fulfil international law obligations (Romany, 1994). Once States are aware of a pattern of violence against women by non-State actors, their due diligence obligations are engaged. General Recommendation No. 2 of the UN Committee against Torture clearly states that if a State is indifferent or inactive it provides "a form of encouragement and/or de facto permission" (para. 18). That is gender-blindness in action, and is not acceptable (see *Dzemajil v. Yugoslavia* 2002). To date, Canada has failed in its obligations to protect women and girls from non-State torture violence. Additionally, because

Canada knows that it exists, persists, and is acquiescing in it, Canada is thereby perpetuating legal discrimination that marginalizes, stigmatizes, devalues, minimizes, dismisses, and invisibilizes the worth, dignity, and equality of women so tortured. Canada, therefore, can no longer consider itself to be a human rights leader.

Sadly, Canada is not unique in this regard. There are countries all over the world that are failing in their international-national legal obligations towards women and girls to take responsibility to prevent, investigate, and prosecute all forms of torture, to protect women from perpetrators of torture, and hold perpetrators to account. That includes non-State actors. As Chinkin wrote in 1996, the Torture Convention was intended for "protecting men from the harms men commit against each other, not to those that are committed against women" (p. 562). The prohibition against torture is a *jus cogens* norm of international law, applicable to all States. Canada's resistance tells the story of an unwillingness to read gender into international-national laws (Charlesworth, & Chinkin, 2000; Edwards, 2011; Randall, 2006), which is no longer sustainable. If States are unwilling to respect, protect and fulfil their obligations at a national level, it is time to pass an international legal instrument that is gender specific and includes a provision against non-State torture.

There is a normative gap in international law that requires filling. A new Convention to Eliminate all forms of Violence against Women and Girls (CEVAWG) that names and addresses non-State torture, as well as other forms of violence, would fill this gap—a role that CEDAW is not fulfilling. CEDAW's main goal, as interpreted by the CEDAW Committee, is to eradicate discrimination (Reddy, chapter 11), not violence. Its strength, therefore, is not only legal, but also social, and is best served if it concentrates its efforts on the elimination of all forms of discrimination against women. However, its original intent is yet to be realized.

CEDAW (1979) is the most wide-ranging gender-specific international treaty to date. It focuses on the myriad forms of discrimination women suffer in society, including in the family. As the Preamble clearly enunciates, despite numerous resolutions, declarations and recommendations that have been adopted by the United Nations, there is concern that "extensive discrimination against women continues to exist." It has a cultural and educative role (Merry, 2006, pp. 89-98) and incorporates rights in the private sphere (Charlesworth & Chinkin, 2000, p. 217), for instance in the family, as a site of discrimination (Article 16). It mentions violence only once explicitly: Article 6 requires States to take all appropriate measures (including passing legislation) to suppress trafficking and the prostitution of women. So potentially, Article 6 of the CEDAW might address certain types of violence, which are the subject of this chapter. However, the CEDAW is not comprehensive or wide enough in scope to address the serious human rights violations perpetuated against women across the globe. Indeed, in terms of torture, the CEDAW Committee failed to gender torture when it had the opportunity to do so in its (otherwise) very strong *Ciudad Juarez Report*. At paragraph 67 it interpreted Article 1 of the UNCAT:

> As far as [the Committee] know[s], the method of these sexual crimes begins with the victims' abduction through deception or by force. [The women] are held captive and subjected to sexual abuse, including rape, and in some cases, torture, until they are murdered. Their bodies are then abandoned in some deserted spot. (CEDAW, 2005, cited in Edwards, 2011, p. 256).

One function of the CEDAW Committee is to issue judgments, which it has done on several occasions. In the CEDAW Committee decision *A.T. v Hungary*, the Committee used the legal requirement of non-discrimination in the Convention to hold the State liable for the violence perpetrated by a

private actor (a former common law husband) against his former wife. The Committee highlighted the State's failure to provide adequate redress for the woman, as there were no women's shelters that had adequate facilities for her and her disabled child to flee from her husband's continued violence (four years). The Committee also pointed to the State's failure to take the husband, who had beaten his wife so badly she had to be hospitalized, into custody, although he repeatedly attacked her at her home and was, at the time, subject to criminal proceedings. As Rudolf and Eriksson rightly point out, the Committee "based its understanding of the situation . . . on the prohibition of gender discrimination seen as the state's obligation to ensure effective equality," (2007, p. 522; see also Reddy, 2016, pp. 505-508) but not the State's international *jus cogens* obligation to prevent violence against women. In other words, the Committee's main emphasis is on the elimination of discrimination, not ending violence against women. Nevertheless, there is room, as demonstrated in the case, for violence against women to be read into the equality standard. For instance, at the time, Hungary admitted that its domestic laws were inadequate and in the process of being re-written, most likely as a consequence of accession to the European Union (EU). However, it is not necessarily that 'easy' in other situations, such as the Canadian example which this paper describes, and therefore certainly needs to be treated with caution for other more challenging situations. It is also the case that the individual petition procedure is onerous on the person suffering the discrimination and violence. It is not a systemic, transformative solution (see generally Fredman, 2008). Rather, it permits the State to 'wait and see' if someone will make a complaint, instead of fulfilling its positive obligations under international law where it knows the violence is occurring. In other words, the jurisprudence of the Committee to date is growing, but not yet developed enough to fill the normative gap.

Alongside its judgments, the CEDAW Committee has issued several recommendations that are relevant to addressing violence against women. This includes General Recommendations 12 (1989) and 19 (1992). Both recognize the family as a site for violence against women. Indeed, these General Recommendations constitute a blueprint (in part) for any new global instrument. General Recommendation 19 provides an interpretation that is vital as an underpinning of any possible treaty, as it interprets violence against women and girls as a form of discrimination against them, meaning "violence that is directed against a woman because she is a woman or that affects women disproportionately" (para. 6). It expounds on the types of violations that constitute discrimination, including the right not to be subjected to torture, that would impair or nullify the enjoyment by women of their human rights under general international law and conventions (para. 7). Paragraphs 8 and 9 clarify that the Recommendation is not only applicable to State actors, but also to non-State actors.

Additionally, the DEVAW, ratified in 1993, provides a comprehensive framework in terms of definition, scope, and State obligations to act with due diligence, and highlights the role of the United Nations in the effort to eliminate violence against women. The DEVAW has formed the basis for numerous subsequent resolutions and, as such, has served the purpose of drawing the international community's attention to gender-based violence. Other organs of the United Nations aside from the CEDAW Committee and the Commission on the Status of Women (CSW, outcome documents, agreed conclusions, etc.) have for many years recognized violence against women, whether perpetrated in private or public, as a violation of human rights. Despite numerous documents and instruments, including the United Nations General Assembly Resolutions; the work of the United Nations Commission on Crime Prevention and Criminal Justice; General Comments of both the Human Rights Council and the Committee on Economic, Social and Cultural Rights;

an in-depth study by the Secretary-General on Violence against Women in 2003; the reports of the United Nations Special Rapporteurs on violence against women (since 1994); the Millennium Development Goals; and the new Sustainable Development Goals, violence against women persists. These instruments and their provisions are simply not strong enough. The only problem with the vast majority of these examples (apart from CEDAW itself, although Merry has said the "CEDAW operates as quasi-law" and influences rather than coerces, 2007, p. 162) is that they are 'soft' law, not 'hard' law instruments. They are non-obligatory, meaning that they only impose a moral obligation on member States (on 'soft' law see generally, Boyle, 2014, chapter 5). This is not enough; women and girls need and deserve more.

There are examples of regional legally binding violence against women treaties ('hard' law); however, their coverage is not universal. Examples include the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará); the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and the 2014 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). Several States within these regions either do not fulfill their obligations under their respective regional instrument or have not ratified the treaties. The UK, for example, has signed the Istanbul Convention but has not ratified it, and in the current climate, it is not beyond imagination that the UK will never ratify it. It is clear that the normative instruments cover some of the globe, but not the entire globe. The absence of specific regional instruments in other parts of the world (e.g. Asia, the Pacific and the Middle East, among others) strengthens the need for a global instrument. Equally, no instrument at present covers all modern manifestations of violence that have become prevalent in the 21st century. Cyber crimes are at the frontier of acts of private violence that the international community must come to terms with in order to protect, not only, but mainly, the younger generation of women who are in real danger of serious long-lasting mental and bodily harm.

The fact remains that there is no single global normative instrument to outlaw the most prevalent form of human rights violations in the world today (UN CSW57 Agreed Conclusions, 2013). A new Treaty, or possibly an Optional Protocol to the CEDAW, would focus exclusively on violence against women and girls and would include non-State actors explicitly. Unequivocally incorporating non-State actors into the international legal instrument would address naming and eradicating the pervasive forms of violence that take place in the 'private' sphere, including the family (Chinkin, 2012). It could also hold contractors accountable for facilitating violence committed through their social media platforms.

Another reason it is vitally important to explicitly include non-State actors in any new legally binding international instrument is the changing nature of the relationship of the State to its people. For instance, since 9/11 there has been an exponential expansion in the work traditionally viewed as governmental being contracted out to private companies, including security firms (Afghanistan, Iraq; Crawford & Olleson, 2014; Porter, 2009; Strawson, 2002; True, 2012). This privatization of the State governance function has adversely impacted the social contract between citizen and State, and "global structural conditions" that are "responsible for exacerbating endemic violence against women" (True, 2012, p. 54). The social contract between citizen and State requires that State provide the means for individuals to flourish and for the State not to rescind its obligations vis-à-vis its people (Boerefjin & Naezer, 2008; Reilly, 2009; Rousseau, Book 3; True, 2012, p. 60).

For the State to fulfill its duties under this social contract, it must take responsibility for actions by private companies acting on its behalf, and for individuals when they perpetrate or facilitate

violence against anyone, including women. Equally, the family unit exists in different forms in every society across the globe. The family is known as a site of love, affection AND of violence. Where the State has knowledge that the family is a site of violence, the State is obligated to provide the means for real, transformative redress, including holding perpetrators to account. However, when it comes to violence against women, I would agree with Merry, "CEDAW is law without sanctions" (p.165, 2006) and therefore an international convention specifically addressing violence against women is needed. An international instrument could address the form any meaningful redress should take (for example, reparation, truth telling (for latter see de Londras, 2007), etc. (Study of the Secretary-General, 2006)). Filling this normative gap in one document is a key indicator of the **commitment** of the international community to women and girls. If the international community and States within it take no effective action, Derrida might argue that these crimes are taking place under the auspices of legal organization (2001). Or maybe it is as Arendt wrote in 1970, that "there is a general reluctance to deal with violence as a phenomenon in its own right" (p. 35). We would qualify this statement by adding 'this is especially evident when dealing with violence against women and girls'.

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The Importance of Investigating Torture Against Women and Girls by Non-State Actors: Applicable Legal Standards from International Human Rights Law

Teresa Fernández-Paredes*

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Abstract

Feminist scholarship fought to get forms of violence against women, including rape and domestic violence, which were considered "private matters" at the time, recognized under international law as serious violations of human rights. The language of the Convention against Torture: "with the consent or acquiescence of"[1] was initially construed very narrowly to mean that the person committing the torture must be a State official. The definition of torture and degrading and inhuman

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[1] Article 1: For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official..." Convention against Torture. http://www.ohchr.org/SP/ProfessionalInterest/Pages/CAT.aspx.

treatment was later broadened to include sexual violence committed by private persons and acts committed in private spaces. For example, rape was first recognized as a form of torture when committed by State agents in State facilities such as prisons. Nonetheless, it has proven difficult to establish that acts committed in private spaces constitute torture, and they have tended to be considered degrading and inhuman treatment.

The article analyzes, through different judgments and jurisprudence from the universal human rights system and the African, European and Inter-American regional systems, a clear progress toward the inclusion of a gender perspective in the definition of torture, the current need to continue challenging this definition in order to include the harm done to women specifically by private actors beyond rape and sexual violence, and the content of the obligation to investigate when applying the due diligence standard for violence against women.

I. Regulation of Sexual Violence and Gender-Based Violence as Torture Under International Law

Back in the 1980s, Rhonda Copelon fought to get forms of violence against women, including rape and domestic violence, which were considered "private matters" at the time, recognized under international law for what they truly were: clear examples of discrimination against women and serious violations of women's human rights.[2]

International Criminal Law (ICL) and International Human Rights Law (IHRL) include provisions to punish these crimes. While ICL addresses individual responsibility and IHRL addresses State responsibility, a review of both bodies of law may be helpful in achieving a fuller understanding of the elements of these types of crimes and violations of rights. Torture is a salient example. This crime is punished under jurisprudence issued by courts charged with enforcing both bodies of law, so these courts may influence each other as they work toward a more thorough interpretation and understanding of this form of violence.

The prohibition of torture under international law has achieved peremptory norm (*jus cogens*) status. Torture must therefore be prosecuted as an international crime and a serious human rights violation. International law further requires all States to punish those responsible for acts of torture within their jurisdictions under domestic law or extradite them for trial in another jurisdiction, under the principle of *aut dedere aut judicare.* However, these advances have not succeeded in protecting the numerous women and girls who continue to suffer violence at the hands of State or non-State agents in both the public and private spheres.

It is true that the States' responsibility under IHRL for acts of violence or torture committed by non-State agents is a type of responsibility difficult to adjudicate, and is based on the principle of due diligence[3]. This principle marks a minimum in the performance of the State to comply with the obligation of respect for human rights. It also establishes the responsibility of States for the viola-

[2] Gaer, Felice (2012): *Rape as a Form of Torture: The Experience of the Committee against Torture*, CUNY Law Review, Vol. 15, p. 293.

[3] "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: (…) (c) Exercise due diligence" UN. *Declaration on the Elimination of Violence against Women*, A/RES/48/104, 85th plenary meeting, 20 December 1993, 48/104. http://www.un.org/documents/ga/res/48/a48r104.htm.

tion of human rights by third parties[4]. Both the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECHR) have already developed a "due diligence test" to determine whether or not the State is responsible for the acts of private agents[5]. As the Special Rapporteur on Violence against Women has said, "the application of [the] due diligence standard, to date, has tended to be State-centric and limited to responding to violence when it occurs, largely neglecting the obligation to prevent and compensate and the responsibility of non-State actors."[6]

Regarding torture[7], it has traditionally been interpreted from a male perspective in which the male prisoner, deprived of freedom and tortured by State agents in the context of a political struggle, is the dominant image.[8] Scholars such as Catharine MacKinnon have criticized this image, arguing that it ignores forms of systematic violence that women suffer more frequently (such as rape) or exclusively (such as *machista* violence within the couple).[9] To counter this tendency where only the suffering of men is considered torture and to establish that the abuses committed against women also meet the definition of torture, MacKinnon argues that it must be recognized that these abuses cause serious harm, that they are systematic and based on women's status as women, that they are defined by the distribution of power in society that places women in a subordinate position to men, and that States are complicit in their commission when they condone these acts and fail to prosecute them vigorously.[10]

The women's movement has played a key role in transforming international law, which was deeply rooted in a hierarchical, patriarchal, and heteronormative visions of law that disregarded the specific violence suffered by women and girls.[11] Indeed, feminist theory has sought to deconstruct the dichotomy between the public and private sphere[12] on which traditional law was built,

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[4] Waisman, Viviana (2010), Human Trafficking: States Obligations to protect victim´s rights, the current framework and a new due diligence standard, Hastings *International and Comparative Law Review*, vol. 33/2, pp. 385-430, 2010.

[5] IAHR Commission, Velásquez Rodriguez v. Honduras, 29 July 1988, Series C: Decisions and Judgments, No. 04; ECHR Commission, Osman v. United Kingdom (Application no. 23452/94); Z and Others v. the United Kingdom 29392/95, [2001] European Commission on Human Rights 333, 10 May 2001; E and Others v. the United Kingdom, 33218/96, [2002] ECHR 590, 26 November 2002.

[6] UN. *Integration of The Human Rights of Women and the Gender Perspective: Violence Against Women the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk http://repository.un.org/bitstream/handle/11176/257909/E_CN.4_2006_61-EN.pdf?sequence=3&isAllowed=y.

[7] For purposes of this article, and following the feminist's critics to IHRL, I will be using a broad approach to torture and not the traditional one pointed out in Article 1 of the Convention Against Torture.

[8] McGlynn, Clare (2008): Rape as "Torture"? Catharine MacKinnon and questions of feminist strategy, p. 75-76.

[9] Ibid.

[10] Ibid.

[11] Copelon, Rondha (2007). *Gender Violence as Torture: The Contribution of CAT General Comment no. 2*, 11 N.Y. City L. rev. 229.

[12] "Since the dawn of Western thought, our thinking has been structured around complete sets of dualisms or opposing pairs that divide things into contrasting spheres or opposite poles. The public/private dichotomy is one of these dualisms (...) According to liberal theorists, the public/private dichotomy acts on individuals in a neutral and general fashion. Women are relegated to the private sphere of home and family, while the public sphere of work, law, economics, and politics is seen as men's territory. This phenomenon is explained as something natural and convenient and a matter of personal choice (...) However, this dichotomy is a "genderized" and ethnocentric dichotomy that serves to legitimize men's domination of women: by assigning women to the private sphere, their inequality with men is perpetuated, because women are seen as depending upon men for survival. Women's interests are thus disregarded and the status quo is preserved." Miguel, Carmen (2014) *Pandataria: Una Mirada Feminista al Derecho Internacional de los Derechos Humanos y al Derecho Internacional de las Personas Refugiadas.* Doctorate program: Human Rights, Democracy, and International Justice. Pp. 42-43. Valencia.

and which "disregards the harm that women often suffer."[13] However, *jus cogens* norms were developed "by privileging the experiences of men over those of women, providing protections to men that are not available to women."[14] In the framework of torture, this has proven to be an obstacle to including the harm done to women within the definition of torture, because although women are also "victims of torture in the public sphere, most of the violence (...) takes place in the private, nongovernmental sphere."[15]

An important symbolic step forward was made in January 2008, when General Comment No. 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") specifically mentioned rape and others forms of gender-based violence as torture, as well as the positive[16] and negative obligations of States regarding these forms of torture:

> "Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking".[17]

The office of the UN Special Rapporteur on Torture has also played an important role in achieving recognition of women's rights as human rights.[18] But, official recognition would not come until the 1990s, with the Vienna and Beijing Declarations.[19] In what was considered a major step forward in the struggle for women's rights, Peter Kooijmans, the first Special Rapporteur on Torture, argued in 1986 that prison rape should be viewed as a form of torture under the Convention against Torture (hereinafter "CAT").[20] This marked the first time rape was considered torture, albeit only when committed by State agents in public facilities such as prisons.

Later, in 2008, Special Rapporteur on Torture Manfred Nowak issued an extensive report on torture with a gender perspective.[21] Regarding a definition of torture that takes gender into account, the Special Rapporteur cited the elements of the definition of torture provided by the Convention

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[13] Miguel, Carmen (2016). *Refugiadas. Una mirada feminista al derecho internacional.* Pp. 218 *et seq.* Ed. Catarata. Madrid.

[14] Ibid. Miguel, Carmen, p. 221.

[15] Ibid. Miguel, Carmen. p. 222.

[16] The theory of positive obligations is a vital tool for raising awareness of violence against women not as a private matter, but as a human rights violation, and one which allows State responsibility to extend not only to acts committed by the State but also to those committed by non-State parties. Preventive measures are an example of a positive obligation.

[17] CAT General Comment 2, para. 18.

[18] Gaer, Felice. Op. cit., p. 294.

[19] Ibid.

[20] *Cf.* UN Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment*, pp. 119, 138, UN Doc. E/CN.4/1986/15 (1986) (prepared by Peter Kooijmans), UN ECOSOC, Comm'n on Human Rights, *Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment,* pp. 18, 19, UN Doc. E/CN.4/1995/34 (Jan. 12, 1995) (prepared by Nigel S. Rodley); UN Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/7/3 (Jan. 15, 2008) (prepared by Manfred Nowak).

[21] HRC. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.* Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. A/HRC/7/3 15 January 2008.

against Torture,[22] noting that the element of "purpose" is met when specific violence is committed against women, since such violence is inherently discriminatory and one of the possible purposes listed in the Convention is discrimination.[23]

This report was important in that it represented a step toward greater protection for women against torture and because the Rapporteur recognized the existence of other forms of violence in the private sphere that particularly affect women and may constitute torture and ill-treatment. He specifically focused on three forms of violence: domestic violence, female genital mutilation, and human trafficking[24]:

> "While there is no exhaustive list of forms of violence that may constitute torture or cruel, inhuman and degrading treatment (…) the Special Rapporteur would like to focus on three of them: domestic violence (in the form of intimate partner violence), female genital mutilation and human trafficking. The Special Rapporteur wishes to highlight these forms of violence for three reasons. First, they are widespread and touch millions of women around the world every year. Second, in many parts of the world they are still trivialized and the comparison between them and 'classic' torture will raise awareness with regard to the level of atrocity that they can reach. Third, stating that these forms of violence can amount to torture if States fail to act with due diligence, illustrates the parallels between torture and other forms of violence against women."[25]

Succeeding Special Rapporteurs on Torture have continued to apply a gender perspective to issues relating to torture. In 2016, Special Rapporteur Juan Méndez issued a report analyzing "the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons."[26] The Rapporteur indicated that "States are responsible for the acts of private actors when States fail to exercise due diligence to prevent, stop or sanction them, or to provide reparations to victims."[27]

International jurisprudence of the universal human rights system, the Inter-American and European regional systems, and ICL and International Humanitarian Law (IHL), have all recognized rape *per se* as a form of torture. ICL was influenced by advances in IHL, or the law of war, which regulates the conduct of internal and international armed conflicts. As Patricia Sellers has pointed out, rape has been considered a war crime since the 1st century B.C., although this fact has not served as a deterrence to its widespread commission.[28]

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[22] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx.

[23] Citing domestic and international jurisprudence, the Rapporteur also noted that rape and other serious acts of sexual violence committed by officials in contexts of detention and control not only constitute torture and ill-treatment, but they are an especially grave form of these conducts, because of the stigma attached to them. He also pointed to the heightened risk of torture and ill-treatment if women are guarded by men or not strictly separated from male detainees.

[24] Nowak. Op. cit., paras. 44-58.

[25] Ibid., para. 44.

[26] HRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016.

[27] Ibid. Juan Méndez, para. 51.

[28] Viseur Sellers, Patricia: *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of interpretation* [online] http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf, Women Under Siege. When rape became a war crime (hint: It's not when you think). Blog. By Kerry K. Paterson/Guest Blogger. July 13, 2016.

The *ad hoc* Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively) have referred to the definition of torture under the Convention against Torture for use in their jurisdictions. These courts have been clear in finding acts of State agents to be torture.[29] Human rights courts, on the other hand, initially required a clear nexus between rape and a State agent in order for the crime to rise to the level of torture.[30] In subsequent rulings, the tribunals found that acts committed by private persons may constitute torture.[31] These findings have made it easier to define violence against women as torture.[32]

The *ad hoc* tribunals were the first to recognize sexual violence and rape as forms of torture in the context of war crimes.[33] In the 1998 *Akayesu* case, the ICTR found that rape constituted torture in a judgment that would serve as a basis for subsequent rulings by the same court as well as by the ICTY. The ICTR wrote that "like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[34]

The ICTY, too, has made many contributions to the extensive jurisprudence recognizing rape as torture. In the *Delalic* case, commanders of a prison camp were convicted of rape as torture for rapes they committed as well as for having failed to prevent soldiers under their command from committing rapes.[35] In the *Furundzija* case, the ICTY found the defendant guilty of rape as torture as a co-perpetrator for having allowed the rape of a female detainee who was being interrogated in his presence.[36] In addition to establishing jurisprudence that makes it clear that rape may constitute torture, the ICTY also established that other acts of sexual violence and gender-based violence may also rise to the threshold of serious physical or mental harm required in order to find torture, as in the following cases:

- *Kvocka et al*. The Tribunal found that fondling of sex organs and the threat of rape constituted torture.
- *Furundzija.* The Tribunal ruled that being required to witness serious sexual assaults on family members or acquaintances constituted torture.
- *Martic*. The Tribunal found that forced mutual masturbation constituted a form of torture.

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[29] *Prosecutor v. Jean Paul Akayesu: case number ICTR-96-4-T*. International Criminal Tribunal for Rwanda, September 2, 1998.

[30] *Aydın v. Turkey*, Application No. 57/1996/676/866, Judgment of September 25, 1997. Vid: LSE Centre for Women, Peace and Security. Tackling Violence against Women http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/aydin-v-turkey/ Inter-American Commission on Human Rights. *Raquel Martín de Mejía v. Peru. Report No. 5/96*. Judgment of March 1, 1996. Chapter III. Section III-Analysis. Part a). (online) http://www.cidh.org/annualrep/95span/cap.III.peru10.970b.htm. Vid: LSE Centre for Women, Peace and Security. Tackling Violence against Women, http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/meija-v-peru/.

[31] *Opuz v. Turkey*, Application No. 33401/02, Judgment of June 9, 2009. Vid: LSE Centre for Women, Peace and Security. Tackling Violence against Women. http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/opuz-v-turkey/.

[32] McGlynn, C. *Rape as "Torture"? Catharine MacKinnon and Questions of Feminist Strategy*. Feminist Legal Studies 16(1): 71-85. p. 76 (2008).

[33] Gaer Felice, op. cit., p. 294-295.

[34] *Akayesu*, op. cit., paras. 597-598.

[35] *Prosecutor v. Zejnil Delalic, et al.: case number IT-96-21*. International Criminal Tribunal for the former Yugoslavia, November 16, 1998, paras. 944 and 965.

[36] *Prosecutor v. Anto Furundzija: case number IT-95-17/1-T*. International Criminal Tribunal for the former Yugoslavia, December 10, 1998, paras. 269, 273, and 275.

- *Brdanin.* The Tribunal convicted prison guards for torture for their role in beatings, including blows to a prisoner's genitals and death threats.[37]

The Inter-American Commission on Human Rights (IACHR) referred to rape as a form of torture for the first time on March 1, 1996.[38] The Commission heard the case of *Fernando and Raquel Mejía v. Peru,* in which Fernando Mejía was kidnapped from his home by Peruvian military authorities, accused of being a member of the Túpac Amaru Revolutionary Movement, tortured, and killed, and his wife, Raquel Mejía was raped twice by a soldier who accused her of also being an opposition member. In its decision, the IACHR stated that "Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity". The court cites the international humanitarian normative that considered rape and other types of sexual abuse as serious offences or torture or other inhuman treatments.[39] In the *Mejía* case, the IACHR analyzed how the elements of tortured applied to the acts suffered by Raquel Mejía and established that:

> "rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture. Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community. (...) Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant."[40]

On this basis, the Commission found that "having established that the three elements of the definition of torture are present in the case under consideration, the Peruvian State is responsible for violation of Article 5 of the American Convention [right to personal integrity]."[41]

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[37] Brammertz Serge, Jarvis Michelle (ed.), Prosecuting Conflict-Related Sexual Violence at the ICTY. P. 189. Oxford. 2016.

[38] "The IACHR had previously considered rape inhuman treatment or a violation of integrity, but not torture. This decision was a landmark that was cited in subsequent litigation all over the world. For instance, it was cited in the Aydin case before the ECtHR to show that violation of a girl in custody constituted torture under the European Convention." LSE. *Raquel Martín de Mejía v. Peru*. http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/meija-v-peru/.

[39] "In the context of international humanitarian law, Article 27 of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly prohibits sexual abuse. Article 147 of that Convention which lists acts considered as "serious offenses" or "war crimes" includes rape in that it constitutes "torture or inhuman treatment". The International Committee of the Red Cross (ICRC) has declared that the "serious offense" of "deliberately causing great suffering or seriously harming physical integrity or health" includes sexual abuse. Moreover, Article 76 of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse. Article 85(4),for its part, states that when these practices are based on racial discrimination they constitute "serious offenses". As established in the Fourth Convention and Protocol I, any act of rape committed individually constitutes a war crime. In the case of non-international conflicts, both Article 3 common to the four Geneva Conventions and Article 4(2) of Protocol II additional to the Conventions, include the prohibition against rape and other sexual abuse insofar as they are the outcome of harm deliberately influenced on a person. The ICRC has stated that the prohibition laid down in Protocol II reaffirms and complements the common Article 3 since it was necessary to strengthen the protection of women, who can be victims of rape, forced prostitution or other types of abuse. Article 5 of the Statute of the International Tribunal established for investigating the serious violations of international humanitarian law committed in the territory of the former Yugoslavia, considers rape practiced on a systematic and large scale a crime against humanity. *Raquel Mejía*, op. cit.

[40] Op. cit. Raquel Mejía v Perú.

[41] Ibid.

The Inter-American Court of Human Rights (IACHR Court) reached similar conclusions in the case of the *Miguel Castro Castro Prison v. Peru*[42]. The Court recognized for the first time that men and women experience torture and suffering in different ways, given that there may be different objectives or forms of torture depending on the sex of the person. The Court considered a document by a third party which stated that:

> *"q) "[t]here is no torture that does not take the victim's gender into account. There is no […] 'neutral' torture […]. Even when a form of torture is not 'specific' for women […] its effects will have specific results on women." Due to the aforementioned, "even though not all forms of violence in this case were specific for women, […] it constitute[d] a gender violence since it was directed […] to attacking female identity;"*[43]

The IACHR Court also considered that the forced nudity to which the detained women were subjected was a violation of the personal dignity of the victims and constituted sexual violence in and of itself. Following international jurisprudence and the Belem do Para Convention, the Court affirmed that sexual violence includes acts of a sexual nature which may or may not include penetration or physical contact of any kind. The Court found, "that the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal "examination" (supra para. 309) constituted sexual rape that due to its effects constituted torture. Therefore, the State is responsible for the violation of the right to humane treatment enshrined in Article 5(2) of the American Convention."[44]

In the more recent cases of *Rosendo Cantú et al. v. Mexico* and *Fernández Ortega et al. v. Mexico*, both the Court and the Commission applied a differentiated perspective to crimes of inhuman treatment (art. 5) depending on the victims' gender, age, and ethnicity, which allowed the Court to determine the degree of seriousness of the sexual violence used as a means of torture.[45] In addition to the Court's consideration of the intersectional nature of discrimination, its analysis of the crime of rape as torture is of particular interest because of the analysis the Court does of the elements of the crime. In the *Rosendo Cantú* case, the Court considered that "rape, like torture, pursues the objective of intimidating, degrading, humiliating, punishing or controlling the victim." It went on to say that "an act of torture may be perpetrated both through acts of physical violence and acts that cause acute mental or moral suffering to the victim. (...) Indeed, the after-effects of rape do not always involve physical injuries or disease. Women victims of rape also experience severe trauma and psychological and social consequences."[46] Regarding the element of intention required to prove the

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[42] IACHR Court. *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs.* Judgment of November 26, 2006, para. 224. In the *Miguel Castro Castro Prison* case, the Court analyzed events that occurred in the prison as a result of an operation in which over 300 prisoners were subjected to cruel, inhuman, and degrading treatment. The Court noted that men and women received different treatment, and that women were subjected to sexual violence. Paragraph 224 reads that "It has been acknowledged that during domestic and international armed conflicts the confronting parties used sexual violence against women as a means of punishment and repression. The use of State power to breach the rights of women in a domestic conflict, besides affecting them directly, may have the purpose of causing an effect in society through those breaches and send a message or give a lesson."

[43] IACHR Court. *Case of the Miguel Castro Castro Prison v. Peru* [online]. *Merits, Reparations and Costs.* Judgment of November 25, 2006, para. 260. http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_esp.pdf

[44] Ibid, para. 312.

[45] In the Fernandez Ortega case, the Court cited the Commission, which established that "In cases involving the rape of indigenous women, the pain and humiliation is exacerbated because they are indigenous, since they do not know the language of their attackers and of the authorities that intervene [, and] also owing to the repudiation of their community as a result of the facts." IACHR Court. *Case of Fernández Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 30, 2010. Series C. No. 215, para. 90.

[46] IACHR Court. *Case of Rosendo Cantú et al. v. Mexico Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2010. Series C. No. 216.

crime of torture, the Court noted that "rape may constitute torture even when it consists of a single act or takes place outside State facilities (...). Based on the foregoing, the Court concluded that the rape in this case entailed a violation of Mrs. Rosendo Cantú's personal integrity, constituting an act of torture."[47] The Court reached similar conclusions in the *Fernández Ortega* case[48].

The Inter-American System clearly sanctions sexual violence carried out by public officials as acts of torture or ill treatment. The same strength has not been demonstrated against acts conducted by non-State actors. Under the standard of due diligence articulated by the Court, States may incur responsibility under international human rights law where there is a failure to prevent or respond to certain acts or omissions of non-State actors. However, the tendency of the Court has been that of a reluctance to extend the coverage of the prohibition of torture to acts not directly carried out by the State. For example, it must be noted that Judge Medina Quiroga, in a separate opinion in the case Cotton Field, criticized the failure of the Court to label the acts as torture rather than ill treatment[49].

The European Court of Human Rights (ECtHR) found that the rape of a woman by State agents constituted torture for the first time in *Aydin v. Turkey* (1997).[50] The applicant was subjected to a series of traumatic and humiliating experiences while detained by Turkish security forces. For three days, she was blindfolded, beaten, forced to strip, and raped.[51] For the first time, the court found the rape of a detainee by a State official to be a particularly "abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim." [52] The Court further noted that, "rape leaves deep psychological scars on the victim."[53] It ruled that the level of suffering occasioned by the rape and the others acts rises to the level of torture under Article 3 of the Convention. In the latter case of *Maslova et al. v. Russia* (2008), a woman was taken to a police station to be interrogated regarding a murder case. She was beaten by a policeman, electrocuted, suffocated, raped, and forced to perform oral sex on him. The Court, citing *Aydin v. Turkey*, held that the accumulation of acts of physical violence committed against the applicants and the particularly grave nature of the rape were equivalent to torture and therefore violated Article 3 of the European Convention on Human Rights (ECHR).[54]

However, regarding other acts of sexual violence committed by non-State agents, the ECtHR has not clearly found that these acts constitute torture. It is interesting that the Court asks States to carry out "a context-sensitive assessment (… that) provides effective protection, in particular, of children and other vulnerable persons"[55]. However, when it comes to recognizing gendered violence suffered by women and girls as torture, the Court just refers to ill-treatment in a broader sense[56]. For

[47] Ibid., para 118.
[48] Op. cit. *Fernández Ortega*, para. 117-128
[49] Concurring Opinion of Judge Cecilia Medina Quiroga in relation to the Judgment of the Inter-American Court of Human Rights in the case of *González et al. ("Cotton Field") v. Mexico* of November of 16, 2009
[50] *Aydın v. Turkey*, op. cit., para. 83.
[51] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 31-33. 2014
[52] Ibid. and *Maslova et al. v. Russia*, Application No. 839/02, Judgment of January 24, 2008, para. 105. The ECtHR has furthermore held that rape causes severe psychological after-effects that do not improve over time in the same way the after-effects of other forms of physical or psychological violence can.
[53] ECtHR, *Maslova and Nalbandov v. Russia*. Application No. 839/02, Judgment of January 24, 2008, *Final. 07/07/2008.*
[54] Ibíd.
[55] ECtHR, I.C. v. Romania, para. 51-52.
[56] See, for example, *I.C. v. Romania,* P.M. v. Bulgaria, I.C. *v. Moldova*, *D.J. v. Croatia*, *Y. v. Slovenia*, *MGC v. Romania*, *M. and M. v. Croatia.*

instance, in the case of *M.C. v. Bulgaria,*[57] the case of a young woman raped by three men, the ECtHR found that the facts constituted violations of Article 3 of the European Convention, but "without specifying whether they were torture or inhuman or degrading punishment or treatment."[58]

The Court was similarly vague regarding female genital mutilation as it rises to the level of torture in the case of *Coolins, et al. v. Sweden* and domestic violence in *Opuz v. Turkey.* In *Coolins,* the two complainants asked for asylum in Sweden, alleging that if returned to Nigeria, they would be forced to undergo Feminine Genital Mutilation (FGM). The ECtHR while rejecting the complaint, stated that FGM falls under the scope of Article 3 of the Convention, but without specifying if it amounts to torture or other ill treatment. In *Opuz,* the complainant and her mother were subjected to repeated and escalating episodes of threats and domestic violence from her husband. They complained several times to the police, unsuccessfully. After a number of years, the violence culminated in the killing of the mother. The court found that the domestic violence suffered by the applicant in the form of physical and psychological harm were sufficiently serious to amount to ill-treatment within the meaning of Article 3. The Court stated that States have positive obligations under the Convention "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhumane or degrading treatment or punishment, including such ill-treatment administered by private individuals."[59]

In the case *O'Keeffe v. Ireland*, regarding sexual abuse by a teacher to a girl when she was attending primary school, the Court found that this "ill-treatment" violated her rights under Article 3.[60] A couple of years later, in the case *M. and M. v. Croatia* [61], the Court determined that the physical and psychological abuse of a father against her 9 year-old girl child, should be understood as a "degrading treatment" in breach of Article 3 of the Convention.

The ECtHR made it clear that different forms of gender-based violence—rape, domestic violence, FGM etc.—conducted by a public official amount to torture or other inhuman or degrading

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[57] ECtHR *M.C. v. Bulgaria*, Application No. 39272/98, Judgment of December 4, 2003.
[58] Miguel, Carmen, op. cit., p. 219.
[59] ECtHR, *Opuz v. Turkey*, Application no. 33401/02) Judgment of June 9, 2009.
[60] ECtHR *O'Keeffe v. Ireland*, application no. 35810/09), Judgment, Strasbourg, 28 January 2014.
[61] ECtHR, *M. and M. v. Croatia* (Application no. 10161/13) Judgment, September 2015 "133. In the present case the applicants alleged that in the period between February 2008 and April 2011 the first applicant had been exposed to physical and psychological abuse by her father (see paragraph 52 above). In particular, they claimed that the first applicant's father had sworn at her, uttered vulgar expressions against her, and called her names such as "stupid" or "cow", and that he had threatened that he would cut off her long hair and ensure that she never saw or heard from her mother. They also claimed that he had frequently forced her to eat food she did not like and, when she refused, grabbed her chin and shoved the food in her mouth. He had sometimes even smeared the food all over her face. The applicants further claimed that the first applicant's father had often threatened her with physical violence, had hit her on the leg with a hairbrush on one occasion, and had sometimes grabbed her arm and squeezed it so hard that she had bruises afterwards. This had culminated in the incident of 1 February 2011, when he had allegedly hit her in the face and squeezed her throat while verbally abusing her. 134. In this connection the Court itself notes that in her statements to the police, those given before various clinical experts and those before the forensic experts who examined her in the custody proceedings, the first applicant stated on a number of occasions that she was afraid of her father (see paragraphs 15, 19-20, 23, 28-29 and 32 above). She also stated, inter alia, that when her father had smeared the food over her face she had felt embarrassed because she had been made to look ugly (see paragraph 29 above). It follows that, if the applicants' allegations are true, the abuse complained of instilled in the first applicant feelings of fear and shame, and on one occasion even caused her physical injury. 135. Therefore, the Court, having regard in particular to the first applicant's young age (she was nine years old at the time of the incident of 1 February 2011), considers that the cumulative effect of all the above-described acts of domestic violence (see, mutatis mutandis, Sultan Öner and Others v. Turkey, no. 73792/01, § 134, 17 October 2006) would, if they were indeed perpetrated, render the treatment she was allegedly exposed to sufficiently serious to reach the threshold of severity required for Article 3 of the Convention to apply. Having regard to its case-law (see paragraph 132 above), the Court finds that such treatment could be regarded as "degrading".

treatment or punishment. However, when such acts are conducted by private actors, the ECtHR has not ruled out the possibility that they fall under Article 3 but has not said that it could either, leaving the door open for further interpretation.

As noted above, the United Nations system has clearly recognized that rape is a form of torture that merits the most serious treatment, and that the ways in which States have dealt with it have reflected patriarchal patterns of domination.[62]

The Committee against Torture (CAT), too, has already recognized in its jurisprudence that rape may constitute torture, and that when it is committed by State agents, it need not occur in a detention center or prison to be considered torture.[63] These findings took some time and zealous advocacy from feminist jurists. See, as an example, the case of *Kisoki v. Sweden* (1996), regarding a Zairian citizen residing in Sweden seeking refugee status who, while in Zaire [DRC], was arrested by security forces, imprisoned in inhuman and degrading conditions, and raped more than ten times[64]. She went before the Committee and claimed that her forced return to Zaire would constitute a violation by Sweden of Article 3 of the CAT. The Committee found that Sweden had an obligation to refrain from forcibly returning the complainant to Zaire, whom would be in danger of being subjected to torture but did not—surprisingly—examine nor mentioned the issue of sexual violence in its reasoning. This reluctance of the CAT to address the violence against women, spread strong deconstructionist feminist´s critiques against the male bias in the Convention and their fear that this will result in a narrow interpretation of Article 1.[65]

However, some significant advances have been made. For instance, in Communication No. 262/2005, the case of *V. L. v. Switzerland*, a Belarusian woman was raped by State agents who went to her home to interrogate her regarding the whereabouts of her husband, the Committee found that "the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities." The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. The Committee determined that the sexual violence committed against the complainant by the police constituted torture. It can be noticed that, in this case, the CAT Committee did not analyze the elements of torture of "severe pain and suffering" and "purpose" when confirming that rape constitutes torture[66]. In other words, the decision is also important since the wording of the Committee suggests that the element of severe pain or suffering is satisfied *per se* by rapes carried out by police officers or agents, even when this is outside of detention facilities. This can also be found in General Comment No. 2 of the Convention. Furthermore, the Committee recognizes that asylum seekers may be unwilling to speak of sexual violence from the outset but that this is not fatal to claiming the right to not be returned (*non-refoulement*).[67]

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[62] Hilary Charlesworth and Christine Chinkin, *Boundaries of International Law: A Feminist Analysis*. 38-61 (2000).
[63] CAT, *V.L. v. Switzerland*, Communication No. 262/2005, 20 November 2006, UN Doc. CAT/C/37/D/262/2005 (2007).
[64] CAT, *Pauline Muzonzo Paku Kisoki v. Sweden*, Communication No. 41/1996, U.N. Doc. CAT/C/16/D/41/1996 (1996).
[65] Edwards, Alice (2006): The 'Feminizing' of Torture under International Human Rights Law. Leiden Journal of International Law, 19, pp 351.
[66] Fortin, Katharine (2008): Rape as Torture: an Evaluation of the Committee against Torture's Attitude to Sexual Violence. *Utrecht Law Review*, 4.
[67] Women´s Link Worldwide, Gender-Justice Observatory. Analysis of V.L. v. Switzerland, Communication No. 262/2005. Available at: http://www.womenslinkworldwide.org/en/gender-justice-observatory/

The Committee also analyzed Communication No. 279/2005 in the case of *C. T. and K. M. v. Sweden,* presented by a Rwandan citizen and her minor child. In this case, the complainant was detained in Rwanda for belonging to a particular political party. While she was in detention, the authorities raped her repeatedly and threatened to kill her, and she became pregnant as a result of the rapes. Upon arrival in Sweden, she applied for asylum. When her application was denied, she faced deportation back to Rwanda. In its decision, the Committee determined that she "was repeatedly raped in detention and as such was subjected to torture in the past"[68] and her deportation was improper and a breach of Article 3.

In 2010, in two similar cases, the Committee considered that being deported to a country where sexual violence occurs, would amount to a breach of Article 3 of the Convention. In *Njamba and Balikosa v. Sweden*, the complainants, two Congolese women, fled to Sweden from DRC after the murder of their family, where they were denied asylum. They claimed that if they were returned to DRC, they would be subject to torture, rape and sexual exploitation by security forces. In its decision, the Committee put a special emphasis on the scale of violence against women in the region—especially sexual violence, which "makes it impossible for the Committee to identify particular areas of the country which could be considered safe for the complainants in their current and evolving situation[69]". The Committee found that there was substantial ground to believe that the complainants were in danger of being subjected to sexual violence amounting to torture if returned to DRC.[70] Also, in *Bakatu-Bia v. Sweden,* a Congolese woman was arrested because of her religious and political activities. While in detention, she was subjected to torture, beatings and multiple rapes by security forces. She claimed that she would be imprisoned and tortured if returned to the Democratic Republic of Congo by Sweden, in violation of Article 3 of the Convention. The Committee found that she was indeed at risk of being subjected to torture if returned to her country and that Sweden would be in breach of Article 3 if it did so. [71]

The above judgments and jurisprudence represent clear progress toward the inclusion of a gender perspective in the definition of torture. Rape was first recognized as a form of torture when committed by State agents in State facilities such as prisons. The language of the Convention against Torture, "with the consent or acquiescence of"[72], was initially construed very narrowly to mean that the person committing the torture must be a State official. The definition of torture and degrading and inhuman treatment was later broadened to include sexual violence committed by private persons and acts committed in private spaces. Nonetheless, it has proven difficult to establish that acts committed in private spaces constitute torture, and they have tended to be considered degrading and inhuman treatment.

In any case, it has been clearly established that sexual violence and gender-based violence are particularly egregious forms of torture that have been used by State agents in order to inflict harm or severe physical or mental suffering on victims.[73]

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court-rulings-database/v-l-v-switzerland-communication-no-262-2005.

[68] *Case C.T. and K.M. v. Sweden*, Communication No. 279/2005. Committee against Torture, November 17, 2006, para. 7.5.

[69] *Case Eveline Njamba and Kathy Balikosa v. Sweden*, Communication No. 322/2007, Committee against Torture, June 3, 2010, para. 9.5

[70] Ibid.

[71] CAT, *Sylvie Bakatu-Bia v. Sweden*, Communication No. 379/2009, June 3, 2011.

[72] Convention against Torture, at art. 1.

[73] *Aydin v Turkey,* op. cit., para. 251; *Akayesu,* op. cit.; *C.T. and K.M. v. Sweden,* 279/2005, 17 November 2006; *V.L. v. Switzerland,* 262/2005, 27 January 2007; *Prosecutor v. Kvocka* Case No. IT-98-30/1; *Case of the Miguel Castro Castro Prison*, op. cit.

Therefore, despite these clear advances at the regional and international level, it is important to continue emphasizing and working toward the inclusion of a gender perspective in the investigation and prosecution of torture, particularly in domestic courts and in cases of violence committed by non-State actors. Despite the fact that torture is prohibited under *jus cogens* norms, as noted above, widespread acts of torture continue to occur, often specifically affecting women and girls and occurring outside of State facilities and committed by private individuals.

This calls for a response by States in two key areas: implementation of existing jurisprudence and international and regional human rights standards, and the inclusion of gender perspective in investigations in order to bring to light the specific inhuman and degrading treatment women and girls suffer because of their gender. Only with a keen focus on these two areas will the principle of due diligence be effectively fulfilled.

Furthermore, international standards for protection against violence against women must be broadened. Specifically, the different "human rights violations committed against women (...) when the actor is not a State official and the violation does not occur in a public space"[74] must be explicitly recognized as torture.

II. The Obligation to Investigate Different forms of Torture with a Gender Perspective

Under international law and customary law or *jus cogens*, States have an obligation to investigate, prosecute, and punish international crimes committed in contexts of armed conflict, widespread or systematic attacks on civilian populations, and serious human rights violations. This includes acts of gender-based violence constituting international crimes. Therefore, in order to achieve an accurate assessment of the nature, use, and impact of these kinds of crimes, an appropriate gender approach must be applied to any analysis of violence, including violence that constitutes torture.

The first part of this section will focus on general aspects of including a gender perspective when dealing with acts of torture. The second part will review legal standards regarding the obligation of including this perspective in accordance with international law, with particular attention to the jurisprudence of the Inter-American and European regional human rights systems, and to a lesser degree, the African regional system.

A. Overview

In order to ensure that laws against torture comply with the principle of non-discrimination, the investigation of acts of torture must include a gender perspective and comply with the elements of due diligence when dealing with forms of violence against women committed by private actors.[75]

In the words of the former Special Rapporteur on Violence Against Women, Yakin Ertürk, "the concept of due diligence provides a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women. However, there remains a lack of clarity concerning its scope and content."[76]

[74] Miguel, Carmen, op. cit., p. 219.
[75] Gaer, Felice, op. cit., 298.
[76] Op. cit. The Due Diligence Standard, para. 14.

It is clear that women are often tortured in different ways than men, and that women are targeted for discriminatory treatment because of their sex or gender.[77] Rape and other forms of sexual violence are widely used by men as ways of humiliating, intimidating, and subjugating women in society.[78] Rape and other forms of sexual violence are gender-based violence, because they are based on a conception of women as inferior and as the property of men. These forms of violence also constitute a particularly vicious attack on women's identity and sexuality.[79] Even today, rape is one of the least-prosecuted crimes both in domestic and international contexts, as it is often trivialized, justified, or denied.[80]

It may be helpful to begin with a review of some key concepts of the dynamics of gender-based violence. First, the terms "sex" and "gender" are not entirely interchangeable. Both terms, but particularly gender, have been interpreted in many different ways by different feminist theories. Initially, the feminist movement, inspired by works such as *The Second Sex* by Simone de Beauvoir, held that "sex" refers to biological differences between men and women, while "gender" is a social and cultural construct, unrelated to biology, that determines what is meant by male and female in each society, culture, and era.[81] However, this definition was criticized by later feminist theorists who argued that this sex/gender system failed to explain the hierarchical power relationships that subjugate female to male. Any definition of gender must therefore take this aspect into account. One possible definition of gender is "a constitutive element of social relationships based on perceived differences between the sexes, and (…) a primary way of signifying relationships of power."[82]

Gender constructs determine what the values, behaviors, and expectations are for men and women in a specific social and cultural context.[83] Gender is therefore not immutable, but may change depending on the social context and dominating culture at a given place and time. It is a relational concept that highlights relationships of inequality between men and women—or "male" and "female"—as it regards the distribution of power, a key element for understanding the differential use of violence in contexts of conflict, widespread or systematic attacks, or serious human rights violations.

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[77] Askin, Kelly (2003): *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,* 21 Berkeley Journal of Int'l Law 288, 347.

[78] *Akayesu,* op. cit., paras. 382-384.

[79] UN. Declaration on the Elimination of Violence against Women. Resolution of the General Assembly 48/104 of December 20, 1993. A/RES/48/104, February 23, 1994. http://www.ohchr.org/SP/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx

[80] Maja Kirilova Eriksson, Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law 478 (1999) (stating that "rape and other grave violations of women's reproductive rights under international humanitarian law committed all over the world have for centuries remained... the least prosecuted crimes"); ECOSOC, Comm'n on Human Rights, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, P 263, UN Doc. E/CN.4/1995/42 (Nov. 22, 1994) (prepared by Radhika Coomaraswamy) (describing rape as the "least condemned war crime").

[81] Ávila, Ramiro, Salgado, Judith, Valladares, Lola (editors). *El género en el derecho. Ensayos críticos. Ecuador:* Ministry of Justice and Human Rights, *UNIFEM,* United Nations High Commissioner for Human Rights, 2009, pp. 103-133.

[82] Scott, Joan. "El género: una categoría útil para el análisis histórico" in Lamas, Marta (ed.) "El Género, la construcción cultural de la diferencia sexual." Mexico: UNAM Grupo Editorial Miguel Angel Porrua, 1997, p. 289. It is important to note that this theory of gender has also been challenged by feminist theories, such as queer theory, that argue that sex is not strictly biological but also cultural.

[83] Bergara, Ander, Riviere, Bacete Josetxu, Bacete Ritxar. *Los hombres, la igualdad y las nuevas masculinidades*. [online] Emakunde-Basque Institute for Women, July 2008. P. 21. http://www.berdingune.euskadi.net/u89-congizon/es/contenidos/enlace/enlaces_mochila_gizonduz1/es_gizonduz/adjuntos/guia_masculinidad_cas.pdf.

The process of attributing specific characteristics or roles to men and women based solely on their membership in one group or the other is referred to as gender stereotyping. The values, behaviors, and expectations attributed to the male or female sex are gender stereotypes. Gender stereotypes, in turn, are social and cultural constructs of what men and women should be, centering on physical, biological, sexual, and social differences, which draw on preconceived notions about the different attributes or characteristics they possess or the roles they fulfill or should fulfill ("the natural role of women is motherhood," or "men are always physically strong").[84] Gender stereotypes become discriminatory when they work to deny the rights and freedoms of persons or deprive them of access to justice.[85] They have also been considered a form of violence against women.[86] Furthermore, gender stereotypes often intersect[87] with other stereotypes to produce compounded forms of discrimination.

The processes of gender stereotyping are related to concepts of masculinity and femininity. Masculinity refers to the set of behaviors and qualities associated with men within a culture, such as the role of protectors of family and community, virility, and bravery, while femininity refers to the set of behaviors and qualities associated with women, such as sensitivity, need for protection, and the role of caregiver. This creates a set of "shoulds" for both men and women, who must act in accordance with the behaviors and qualities attributed to them, such as when men seek to prove their manhood throughout their lives by performing acts that are not perceived as feminine.

In addition, each culture defines masculinity and femininity differently. There is a hegemonic, predominant model of masculinity and femininity in any given society and era, which leads to the rejection of those who do not fit into the model. This rejection is supported by a conception of male and female sexuality defined by heterosexuality and which limits and punishes affection, intimacy, and closeness between men or between women. In this hegemonic model, homosexual men are rejected and labeled as less "manly," or masculine, and homosexual women are rejected as less "womanly," or feminine.[88] Any form of behavior considered outside of or contrary to the model may be punished with violence.

In light of the above, gender-based violence refers to violence directed against certain individuals or groups because of their gender, or violence directed against certain individuals or groups

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[84] Cook, Rebecca and Cusack, Simone. *Estereotipos de género: Perspectivas legales transnacionales.* (A. Parra, Trans.). Bogotá, Colombia: Profamilia, 2010, pp. 23–25.

[85] Ibid. See also: Gender Stereotyping: A Priority Issue in the Campaign to Eliminate Gender-based Violence against Women Panel: Gender Stereotypes—Gender Violence, 57th session of the Commission on the Status of Women, UN Church Centre, New York, 8 March 2013, Simone Cusack and Rebecca J. Cook.

[86] Ibid.

[87] General Recommendation No. 28 of the CEDAW Committee *on the Core Obligations of States Parties under Article 2*, contains a definition of "intersectionality" that, although in this case it is defined in relation to women, can be extrapolated to any vulnerable group: "18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25. UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28

[88] Bergara, Ander, Riviere, Bacete Josetxu, Bacete Ritxar, op. cit., pp. 21-24.

who do not fulfill socially acceptable gender roles.[89] So, when we refer to gender violence, we mean not only violence committed against women and girls, but violence directed against any person when it is used on the basis of gender roles assigned to that person within a given society and historical period. This kind of violence constitutes a form of discrimination.[90]

Applying a gender perspective includes considering the relevance of the victim's sex or gender identity in a particular case. We must consider its relevance within the socio-legal context in which a violation of rights occurs, meaning the legal framework of equality between men and women in different spheres of society, as well as its relevance to the specific form the violation of rights takes in light of applicable laws for prevention of all forms of violence committed against women because they are women.

A gender perspective allows for analysis and understanding of the specific defining characteristics of men and women, as well as their similarities and differences.[91] By applying a gender perspective to contexts of violations of rights, it becomes clear that both men and women may be targeted for acts of sexual violence, but there are important differences in their meaning and impact that may only be understood by taking into account gender differences and the meanings of femininity and masculinity within the specific context in which violations occur. In addition, this approach underscores the fact that certain crimes, such as rape, affect women disproportionately, while others, such as forced pregnancy or abortion, affect them exclusively because they are women. Similarly, certain crimes exclusively affect men, such as castration, and others disproportionately affect men, such as blows to the genital area.

What, then, does this obligation to investigate cases of rape and sexual violence as torture with a gender perspective mean? It requires taking into account the specific forms of harm inflicted on women and the gravity and seriousness of this harm in order to consider the acts torture. It further means that States should ensure that all complaints of torture presented by women are immediately investigated, complainants are granted effective protection, investigation and evidentiary processes are sensitive to the sex of the victim, and women's specific needs are addressed. In addition, it must be recognized that rape and sexual violence are forms of discrimination, and legal frameworks of protection against torture must be interpreted in light of the extensive body of human rights law, particularly the set of laws against violence against women.

B. International Standards for Investigating Gender-Based Torture

Advances that have been made in women's rights in the different systems of international law (IHRL, ICL, and IHL) have created a positive obligation for States to investigate cases of sexual violence and other forms of gender-based violence as torture, both committed by public or private actors. This obligation is derived from States' duty to guarantee the human rights of all persons within their jurisdictions without discrimination.

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[89] Poder Judicial de la Federación de México and Women's Link Worldwide. *El Principio de Igualdad de Género en la jurisprudencia comparada. Muestra analística de criterios nacionales e internacionales.* July 2014.

[90] Vid. UN. Declaration on the Elimination of Violence against Women, op. cit. The Declaration establishes that although the CEDAW does not specifically mention gender violence, it should be considered to be included as a form of discrimination. Cf. http://www.cidh.org/women/Colombi06sp/parte2.htm, https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/Hacer%20los%20derechos%20realidad:%20La%20violencia%20contra%20las%20mujeres%20en%20los%20conflictos%20armados?CMD=VEROBJ&MLKOB=26208835050.

[91] Lagarde, Marcela. *Género y feminismo: Desarrollo humano y democracia*. Madrid: Horas y horas (2nd edition), 1997. P. 15.

1. The obligation to investigate cases of sexualized torture and gender-based torture by non-State actors under the universal human rights system

The obligation of States to investigate cases of sexual violence and gender-based violence as torture when committed by non-State actors implies a set of measures including training for officials who receive complaints; establishment of protocols for addressing complaints; objective, diligent, and speedy investigation; and bringing those responsible for violations to trial without re-victimizing survivors.

The Declaration on the Elimination of Violence against Women of the General Assembly of the United Nations establishes that States should "Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.[92]

The Special Rapporteur on Violence Against Women has indicated that "The State is required to send an unequivocal message that violence against women is a serious criminal act that will be investigated, prosecuted and punished.... The re-victimization of women who have reported that violence must be avoided and procedural rules regarding the giving of evidence as well as protection for victims and witnesses must ensure that women are not subjected to further harm as a result of reporting violence."[93] In 2006, she was already pointing that "the major potential (…) for expanding the due diligence framework lies (a) in the full implementation of generalized obligations of prevention and compensation, and in the effective realisation of existing obligations to protect and punish, and (b) **in the inclusion of relevant non-State actors as the bearers of duties in relation to responding to violence against women**."[94]

Minimum standards for effective investigation and documentation of cases of torture have been established by the Istanbul Protocol.[95] These standards have been clarified by the work of United Nations human rights monitoring and protection mechanisms, which have addressed the need to apply a gender perspective to the investigation of cases of torture in order to properly identify the differential use of violence and its different meanings according to the victim's gender. Both elements are indispensable in order to achieve proper prosecution and punishment of these crimes and appropriate reparations for the damages suffered by victims.[96] The Istanbul Protocol establishes the following obligations for States when investigating these crimes:

> "(a) Clarification of the facts and establishment and acknowledgment of individual and State responsibility for victims and their families;
>
> (b) Identification of measures needed to prevent recurrence;
>
> (c) Facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full

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[92] UN, Declaration on the Elimination of Violence against Women. Resolution of the General Assembly 48/104 of December 20, 1993. A/RES/48/104, February 23, 1994, Article 4.c.

[93] Yakin Erturk, Report of the Special Rapporteur on violence against women, its causes and consequences, Commission on Human Rights, 62nd session. E/CN.4/2006/6. January 20, 2006, para. 92. http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm.

[94] Ibid., para. 74

[95] Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2004. http://www.ohchr.org/Documents/Publications/training8Rev1sp.pdf

[96] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 13. 2014

reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation."[97]

The effective investigation of acts of sexual violence must also take into account other international standards, such as the standards developed by the World Health Organization (WHO) regarding the preparation of medico-legal reports on these violations. Relevant WHO publications on these issues include "Guidelines for medico-legal care for victims of sexual violence"[98] and the recent guide on "Health care for women subjected to intimate partner violence or sexual violence."[99]

Similarly, the previously cited report by Special Rapporteur on torture Manfred Novak emphasized that it is crucial to interpret the torture protection framework in the light of a wide range of human rights guarantees, in particular the set of rules that has developed to combat violence against women, which can provide valuable insights into the particular challenges posed by violence against women.[100]

With regard to justice for women victims of torture, Special Rapporteur Novak observed that "in many contexts, the criminal law system, the court rules of procedure and evidence, as well as reparation and rehabilitation programs and policies are not sufficiently gender-sensitive," leading to a situation of powerlessness and discrimination. He therefore called upon States to "ensure that women victims of torture and ill-treatment by officials enjoy full protection under the law and that special measures are taken to prevent sexual violence in the contexts of detention and control."

Special measures must be adopted in order to encourage women to report torture and ill-treatment and ensure that the officials receiving these complaints gather the necessary evidence with appropriate gender sensitivity. Laws and court rules must therefore be adapted to the specific needs of victims of sexual violence and ensure that an objective assessment of the victim's de facto situation is made in each case.

With regard to gender-sensitive monitoring and investigation, the Special Rapporteur noted that "anti-torture monitoring mechanisms at the national and international levels should extend their scrutiny of the legal framework to a broad range of laws that might be of particular concern to women. The network of partners should include women's rights groups and relevant academic and research institutions."[101] He also recommended that "monitoring/fact-finding teams be composed in a gender-inclusive manner (including female doctors) and that all its members be trained to deal with sexual violence and other sensitive gender-specific issues. Fact-finders and monitors

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[97] Ibid., p. 78. http://www.ohchr.org/Documents/Publications/training8Rev1sp.pdf.

[98] "The aim of these guidelines is to improve professional health services for all victims of sexual violence by providing: health care workers with the knowledge and skills that are necessary for the management of victims of sexual violence; standards for the provision of both health care and forensic services to victims of sexual violence; guidance on the establishment of health and forensic services for victims of sexual violence." WHO. *Guidelines for medico-legal care for victims of sexual violence*. 2003. http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/#

[99] WHO. *Health care for women subjected to intimate partner violence or sexual violence—A clinical handbook—Field testing version.* 2013. http://www.who.int/reproductivehealth/publications/violence/vaw-clinical-handbook/en/#.

[100] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/7/3, January 15, 2008.

[101] HRC. *Promotion and Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Manfred Nowak, para. 76

need to be able to ask the right questions using gender-sensitive language and to assess the psychological trauma that comes with violence, in particular sexual violence."[102]

The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation rightly affirms that the core elements of these rights include truth-telling, criminal justice, and guarantees of non-repetition. Victims of all forms of gender-based torture and ill-treatment should also be entitled to reparations. And, they should have access to medical services and support programs to treat the psychological trauma caused by sexual violence.[103]

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has established in its jurisprudence that States have the obligation to investigate reports of acts of torture or inhuman or degrading treatment. See, for example, the case of *Inga Abramova v. Belarus*.[104]

The CAT, too, in addition to finding sexual violence committed by State officials against women detainees to be torture, has confirmed States' obligation to launch a speedy and impartial investigation of cases of rape or sexual violence as torture, and that failing to do so violates Article 1 read in conjunction with Articles 12, 13, 14, and 16 of the Convention.[105] See, for example, the case of *Saadia Ali v. Tunisia*.[106]

2. The obligation of investigation in the Inter-American Human Rights System

States' obligation to conduct investigations of torture with a gender perspective, particularly in cases of rape and other forms of sexual violence committed against women, derives from Articles 1.1 and 5 of the American Convention on Human Rights as well as provisions of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against

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[102] Ibid.

[103] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 22. 2014

[104] The complainant, an activist who was detained during the "European March" campaign, complained that the conditions of her detention constituted inhuman or degrading treatment and that Belarusian authorities failed to investigate several complaints she filed with domestic courts. The CEDAW Committee found that her detention for five days in deplorable conditions, in facilities staffed exclusively by men, constituted gender-based inhuman and degrading treatment under Article 1 of the Convention and a violation by Belarus of its obligations under Articles 2 (a), (b), (d), (e), and (f), 3, and 5 (a), read in conjunction with Article 1 of the Convention. The CEDAW Committee went on to express its "grave concern about inhuman and degrading treatment of women activists during detention, and urge[d] the State party to ensure that the complaints submitted by those women are promptly and effectively investigated." CEDAW Committee. *Inga Abramova v. Belarus*, Communication No. 238/2009. CEDAW/C /49/D/20/2008, September 27, 2011.

[105] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 27. 2014

[106] The complainant was detained while attempting to obtain an official document from Tunisian authorities. She was forced to strip and brutally beaten in front of some fifty male detainees. Criminal proceedings were initiated against her for attacking an official and she was sentenced to three months in prison. The complainant appealed the conviction, but her appeal was dismissed without explanation, so she filed a complaint with the CAT arguing that her right to reparations under Article 14 of the Convention against Torture had been violated. The Committee found that the State denied the complainant any form of reparation by failing to launch an investigation immediately. It recalled that Article 14 of the Convention not only recognizes the right to fair and adequate compensation but also requires States parties to ensure that the victim of an act of torture obtains redress, which should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations. However, it noted that "Given the length of time that has elapsed since the complainant attempted to initiate proceedings at the domestic level, and given the lack of information from the State party concerning the completion of the investigation still under way, the Committee concludes that the State party has also breached its obligations under Article 14 of the Convention." CAT. *Saadia Ali v. Tunisia,* Communication No. *291/2006,* CAT/C/41/D/291/2006, November 26, 2008.

Women (Convention of Belém do Pará) and the Inter-American Convention to Prevent and Punish Torture (IACPPT).

The IACPPT[107] holds that the commission of torture is a grave violation that must be investigated and punished, providing under Article 6 paragraph 2 that States "shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties." Additionally, the Convention Belém do Para states in article 7b that States parties have the duty to 2b apply due diligence to prevent, investigate and impose penalties for violence against women. In light of these requirements, the Inter-American system has established standards in its jurisprudence for the interpretation of the principle of due diligence in cases of sexual violence and gender-based violence.

The IACHR Court has written that "the duty to investigate is a compulsory obligation of the State embodied in international law, which cannot be mitigated by any domestic legislation or act whatsoever."[108] Similarly, in the case of the *"Las Dos Erres" Massacre v. Guatemala*, the Court found that "the lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws (*jus cogens*) and generate obligations for the States such as investigating and punishing those practices, in conformity with the American Convention and in this case in light of the [IACPPT] and the Convention of Belém do Pará."[109]

The case of *González et al. ("Cotton Field") v. Mexico,* in which the IACHR Court analyzed violations of rights in the case of three young women who were killed in Ciudad Juárez, is particularly relevant to the investigation of cases of violence against women because of the Court's interpretation of the concept of gender discrimination. In its judgment, the Court wrote that "the obligation to investigate effectively has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women."[110] It further indicated that the State's actions were characterized by a pattern of indifference to the chronic violence against women and children in Ciudad Juárez, perpetuating the situation of discrimination and sending a message of tolerance and tacit acceptance.[111] Notwithstanding these encouraging findings, the IACHR Court did not find the violence committed against women by non-State agents in this case to be torture.

In this judgment, the Court was clear in indicating that States must take comprehensive measures to prevent violence against women and girls in accordance with the American Convention on Human Rights and the Convention of Belém do Pará.[112] This means having an appropriate legal

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[107] Convención Interamericana Para Prevenir Y Sancionar La Tortura, Article 6. http://www.oas.org/juridico/spanish/tratados/a-51.html.

[108] IACHR Court. *Case of Vargas Areco v. Paraguay: Merits, Reparations and Costs.* Judgment of September 26, 2006, Series C No. 155, para. 81; *Case of Gutiérrez Soler v. Colombia,* Judgment of September 12, 2005, Series C. No. 132, para. 54.

[109] IACHR Court. *Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 24, 2009, para. 140.

[110] IACHR Court. *Case of González et al. ("Cotton Field") v. Mexico.* Judgment of November 16, 2009. *Preliminary Objections, Merits, Reparations, and Costs*, para. 293.

[111] *Cotton Field,* op. cit., para. 400.

[112] The obligation to carry out investigations with gender perspective is strengthened by Article 7 of the Convention of Belém do Pará, which establishes that States must "apply due diligence to prevent, investigate and impose penalties for violence against women." OAS Department of International Law. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará." Article 7, c. Brazil: 1994.

framework and enforcing it, preventing risk factors, ensuring that victims of violence can obtain an effective response from public agencies and authorities, and ensuring that public officials and persons responsible for receiving reports have the capacity and the sensitivity to understand the seriousness of the phenomenon of violence against women.[113]

In the abovementioned judgments in the cases of *Fernández Ortega* and *Rosendo Cantú v. Mexico,* the IACHR Court laid out the minimum guiding principles that must be included in any investigation of sexual violence, based on standards of international law provided under instruments such as the Istanbul Protocol and the medico-legal guidelines.[114]

In its more recent judgment in the case of *Velásquez Paiz et al. v. Guatemala*, the Court reiterated that "the obligation to investigate has a wider scope when dealing with the case of a woman who is killed or ill-treated or whose personal liberty is affected within the framework of a general context of violence against women. In this scenario, State authorities have the obligation to officially investigate any possibility of gender-based discrimination in an act of violence committed against a woman, particularly when there are specific indications of sexual violence of any kind or evidence of brutality (such as mutilation), or when the act occurs in a context of a pattern of violence against women in a particular country or region. The investigation of such crimes must also include a gender perspective and be performed by officials trained in similar cases and in assistance for victims of discrimination and gender-based violence."[115]

Similarly, in the case of *Espinoza Gonzáles v. Peru*, the Court indicated that "when there are indications or specific suspicions of gender-based violence, the failure by authorities to investigate the possible discriminatory motives for an act of violence against women may itself constitute a form of gender-based discrimination."[116]

In the case of *J. v. Peru,* the Court found that "Regarding the inexistence of the international obligation to investigate sexual 'touching' at the time of the events, the Court reiterates its consistent case law concerning the obligation to investigate possible acts of torture or cruel, inhuman or degrading treatment."[117]

In the same case, the Court wrote that "with regard to the impediment to opening an investigation *ex officio* because the offense of rape was subject to private right of action, the Court repeats that, when there is a well-founded reason to believe that an act of torture or ill-treatment has been

[113] *Cotton Field,* op. cit., para. 258.
[114] The standards are as follows: "i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence; ii) the victim's statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary; iii) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape; iv) a complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes; v) the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim's clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided." *Fernández Ortega,* para. 194; *Rosendo Cantú,* para. 178.
[115] IACHR Court. *Case of Velásquez Paiz et al. v. Guatemala: Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 19, 2015. Ibid.
[116] IACHR Court. *Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 20, 2014, para. 221.
[117] IACHR Court. *Case of J. v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 27, 2013, para. 348.

committed in the sphere of the State's jurisdiction, the decision to open and conduct an investigation is not a discretionary power, but rather the duty to investigate constitutes a peremptory State obligation that arises from international law and cannot be disregarded or conditioned by domestic legal decisions or provisions of any kind. Thus, when an act of violence is committed against a woman, it is particularly important that the authorities in charge of the investigation conduct it with determination and effectiveness, taking into account society's duty to reject violence against women and the obligation of the State to eliminate it and give the victims confidence in the State institutions created to protect them. Consequently, States must ensure that their domestic laws do not impose differentiated conditions for the investigation of attacks on personal integrity of a sexual nature."[118]

3. The obligation of investigation in the European Human Rights System

It is important to note that the jurisprudence of the ECtHR regarding States' obligation to investigate cases of torture has evolved over time. While the failure to perform a diligent investigation was previously considered a violation of Article 13 of the ECHR (right to an effective remedy), it is now considered a direct violation of procedural requirements under Article 3 (prohibition of torture).[119] The ECtHR has divided the obligations under Article 3 into substantive and procedural requirements, and this evolution has been applied to cases of rape as torture.[120]

In recent jurisprudence, the ECtHR has ruled that a lack of investigation constitutes a violation of the prohibition of torture under procedural requirements of Article 3, which is not subject to derogation. In light of this conclusion, the Court no longer finds it necessary to apply Article 13 of the ECHR to such cases.

The minimum standards of effectiveness set out by the ECtHR require investigations to be independent, impartial, and subject to public review, and for competent authorities to act in diligent and speedy fashion.[121] When a person alleges that he or she has been tortured by State agents, the notion of an "effective remedy" implies, "in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, (...) and effective access for the complainant to the investigation procedure."[122]

Regarding the obligation to investigate and punish forms of sexual violence and gender-based violence as torture, while this obligation is not expressly mentioned in the language of the ECHR, sexual violence is implicitly prohibited under Article 3. In the jurisprudence of the ECtHR, the rape of women detainees by State officials has been considered torture, and the Court has established a set of positive obligations for States to protect women against this form of violence, including the obligation to perform a thorough, speedy, and effective investigation.

In *Aydin v. Turkey*, for instance, the ECtHR found that in cases of serious crimes such as rape, the obligation to investigate requires such investigations to be carried out in a speedy, careful, and effective manner capable of establishing the truth of the complainant's allegations. In this case, the

[118] Ibid., para. 350.
[119] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 43. 2014
[120] Ibid. at para. 44
[121] ECtHR, *Doran v. Ireland*, Application No. 50389/99, Judgment of July 31, 2003, para. 57.
[122] ECtHR, *Aydın v. Turkey*, op. cit., para. 103, and *Selmouni v. France*, Application No. 25803/94, Judgment of July 28, 1999, para. 79.

competent authorities did not perform an investigation that was sensitive to the victim's needs and capable of identifying and punishing those responsible.[123]

The Court further found that the deficiencies present in the medical examination of the victim were inconsistent with the requirements of a fair and effective investigation in cases of rape of a person in custody. The ECtHR determined that a person who reports having been raped should "be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination."[124]

In *Maslova et al. v. Russia* (2008), the ECtHR found that the investigation carried out was inadequate, because errors were committed that rendered much of the evidence inadmissible, in violation of procedural requirements under Article 3.[125] The Court wrote that "where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention,' requires by implication that there should be an effective official investigation."[126]

In the abovementioned case of *Opuz v. Turkey*, the ECtHR found that the authorities' failure to exercise due diligence to prevent and investigate a domestic violence complaint violated Article 3, but without specifying if it constituted torture or inhuman or degrading treatment.[127]

> "It cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention."[128]

In this example, the ECtHR reached its conclusion based on deficiencies including the failure to carry out an official investigation of the victim's serious allegations, notwithstanding the fact that she later withdrew her complaints and her abusive former partner was merely ordered to pay a fine.[129]

In more recent cases, the Court has found that rape is a degrading offense for the victim and has emphasized States' procedural obligations in such cases. Of particular interest in this regard is the case of *M.C. v. Bulgaria*, in which the ECtHR addressed States' positive obligation to investigate and prosecute cases of rape by non-State agents as prohibited acts under Article 3. In this case, the Court found that domestic authorities had failed to explore the available possibilities for establishing all the circumstances surrounding the rape of the complainant, and therefore determined that the State did not adequately investigate her allegations.[130] It went on to find that the investigation in this case did not comply with the State's positive obligation to enact criminal law provisions effectively punishing all forms of rape and sexual violence and to apply them in practice.[131] The Court cited the jurisprudence of ICL and emphasized the importance of placing the focus on the

[123] ECtHR *Aydin v. Turkey*, op. cit., paras. 105-109.
[124] Ibid., paras. 103-109.
[125] ECtHR, *Maslova et al. v. Russia*, Application No. 839/02, Judgment of January 24, 2008, para. 108. Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 46. 2014
[126] Ibid., para. 91.
[127] ECtHR, *Opuz v. Turkey*, op. cit., paras. 166 *et seq*.
[128] Ibid., para. 169.
[129] Ibid., para. 170.
[130] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 47. 2014
[131] Ibid.

protection of persons' sexual autonomy, noting that an overly rigid approach to the investigation of sexual violence may leave certain forms of rape unpunished and compromise this protection of sexual autonomy.[132] The Court therefore found that the State had violated its positive obligations under Article 3 of the Convention.[133]

In one of its most recent cases, *I.C. v. Romania*, in which a twelve-year-old girl with an intellectual disability was raped by a group of six adult men, the Court considered that investigations of cases involving women and girls in a heightened state of vulnerability require increased diligence.[134] The Court wrote that "the authorities put undue emphasis on the absence of proof of resistance from the applicant and they failed to take a context-sensitive approach in the current case"[135] and that "the investigation of the applicant's case fell short of the requirements inherent in the States' positive obligations to apply effectively a criminal-law system punishing all forms of rape and sexual abuse."[136]

Similar conclusions were reached in the cases of *P.M. v. Bulgaria*,[137] *I.G. v. Moldova*,[138] *M. et al. v. Italy and Bulgaria* and *D.J. v. Croatia*,[139], where private-actors committed rape, and the ECtHR found violations of procedural requirements under Article 3 of the ECHR.[140] As an example, the Court in the last case, affirmed that:

> "Even though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence has been inflicted by private individuals, the requirements as to an official investigation are similar. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an

[132] ECtHR *M.C. v. Bulgaria,* op. cit.: "165. Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy. 166. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."

[133] Ibid., paras. 182, 183, and 185.

[134] ECtHR, *I.C. v. Romania*, Application No. 36934/08, paras. 55-56.

[135] Ibid., para. 58.

[136] Ibid., para. 60.

[137] In this case, the complainant was raped when she was thirteen years old. Bulgarian authorities took over fifteen years to complete their investigation of the rape, and the complainant did not have access to a remedy to address the State's failure to prosecute her attackers. Criminal proceedings were launched by the authorities but with many delays, which in the end prevented any liability because of the expired limitation period. The Court, taking into account the age of the victim at the time of the facts, found that the State had violated Article 3 of the Convention as the authorities failed to investigate and punish the rape committed by a private actor on one of its citizens. ECtHR, *P.M. v. Bulgaria*, Application No. 49669/07, Judgment of January 24, 2012.

[138] The complainant was raped by her grandmother's neighbor when she was fourteen years old. She complained that the authorities had not effectively investigated her case. The ECtHR found that the State had not fulfilled its positive obligations to effectively investigate and punish all forms of rape and sexual violence. The court found that there had been a violation of the procedure requirements of Article 3, as the obligation to investigate had not been fulfilled. It notably stressed that "the allegation that a rape victim was under the influence of alcohol or other circumstances concerning the victim's behaviour or personality cannot dispense the authorities from the obligation to effectively investigate". ECtHR, *I.G. v. Moldova*, Application No. 53519/07, Judgment of May 15, 2012. See also *M. et al. v. Italy and Bulgaria,* Application No. 40020/03, Judgment of July 31, 2012.

[139] ECtHR *D.J. v. Croatia*, Application No. 42418/10, 9 October 2012, paras. 83-104.

[140] Women´s Link Worldwide y Clínica Jurídica por la Justicia Social de la Universidad de Valencia. Amicus Curiae ante la Corte Interamericana de Derechos Humanos. Caso 11.157. *Espinoza v. Perú*, para. 45. 2014

> obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia,* eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Article 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements, and to the length of time taken for the initial investigation[141]"

Therefore, there is a clear, positive obligation of States to investigate and apply effectively a criminal-law system punishing all forms of rape and sexual abuse committed by private individuals. However, the Court has hesitated in qualifying these acts as torture and just refers to ill-treatment.

4. The obligation of investigation in the African Human Rights System

While this article has focused, in the interest of brevity, on regional human rights standards in the two regional systems that are currently most developed, the Inter-American Human Rights System and the European Human Rights System, this subsection will provide a brief review of the jurisprudence of the African Human Rights System as regards torture.

In the African Human Rights system, the right not to be subjected to torture or other forms of ill-treatment as stated in Article 5 of the African Charter on Human and Peoples' Rights, is part of the right to human dignity:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.[142]"

Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Maputo Protocol, also includes a protection against "all forms of exploitation, cruel, inhuman or degrading punishment and treatment[143]" against women and girls. The Maputo Protocol, therefore, broadens Article 5´s protection "to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence."[144] Following these provisions, it can be argued that the prohibition against inhuman treatment includes acts committed both by public and private individuals[145].

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[141] Ibid., para. 85

[142] African (Banjul) Charter on Human and Peoples' rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, http://www.achpr.org/instruments/achpr/

[143]Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 01, 2003, http://www.achpr.org/files/instruments/womenprotocol/achpr_instr_proto_women_eng.pdf

[144] "j) all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".

[145] OMCT Handbook series.–*The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (volume 3), p.55, 71-72 "The Mauritania cases, for example, comprised five consolidated communications arising from developments in Mauritania between 1986 and 1992 (…) These communications alleged the existence in that State of slavery and analogous practices, and of institutionalized racial discrimination perpetrated by the ruling Beydane (Moor) community against the more populous black community. The cases alleged that black Mauritanians were enslaved, routinely evicted or displaced from

Although the African Commission on Human and Peoples' Rights (ACPHR) has issued several judgments finding States in violation of their obligations to carry out effective investigations of allegations of torture[146], a limited analysis has been done with regard to gendered forms of torture. For example, in the case of the Commission, *Malawi Africa Association and Others v. Mauritania*[147], different acts committed by state officials, as well as rape of female prisoners, were considered a violation of Article 5 of the African Charter[148].

Furthermore, on one hand, the case of *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* is emblematic as the first case to address women's rights. The case was brought before the ACPHR on May 18, 2006.[149] The complainants submitted that four women journalists were subjected to insults and violence, including sexual violence, at the hands of supporters of the NDP political party, and harassment and attacks by police while they were covering protests held on May 25, 2005.[150]

The Commission considered that clear acts of gender-based violence were committed against the four victims,[151] and that these acts constituted discrimination, torture, and inhuman and degrading acts. Furthermore, Egyptian authorities, despite witnessing these acts of violence, not only failed to act to protect the women, but actually encouraged the attacks as part of a pattern of "systematic sexual violence targeted at the women," failing to fulfill their duty to investigate the acts of torture with due diligence:

> "Article 4(c) of the Declaration on the Elimination of Violence against Women, adopted by the General Assembly provides that States should, 'Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons' (…) It is the African Commission's opinion that the Respondent State failed to investigate and prosecute the perpetrators who committed gender-specific violations against the Victims. Failure to investigate effectively, with an outcome that will bring the perpetrators to justice, shows lack of commitment to take appropriate action by the State (…) failure to investigate compromises an international responsibility on the part of the Respondent State, both in the case of crimes committed by agents of the State and those committed by private individuals. (…) The Respondent State therefore owed an obli-

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their lands, which were then confiscated by the Government. The communication also alleged that some detainees had, among other things, been starved to death, left to die in severe weather without blankets or clothing and were deprived of medical attention."

[146] African Commission on Human and People´s rights, Communication 368/09, *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*. November (2013) http://www.achpr.org/communications/decision/368.09/; Communication 245/02 Zimbabwe Human Rights NGO Forum / Zimbabwe (2006). http://caselaw.ihrda.org/doc/245.02/view/en/#facts; Communication 204/97, Mouvement burkinabé des droits de l'Homme et des peuples / Burkina Faso (2011). http://caselaw.ihrda.org/doc/204.97/.

[147] ACHPR, Malawi Africa Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98, 27th Ordinary Session (11 May 2000).

[148] OMCT Handbook series.–*The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (volume 3), p.53.

[149] African Commission on Human and Peoples´ Rights Communication 323/06: *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, 12-16 December 2011. http://www.achpr.org/files/sessions/10th-eo/comunications/323.06/achpreos10_232_06_eng.pdf.

[150] ACHPR, Communication 323/06: *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, paras. 3-22.

[151] "The physical assaults described above are gender-specific in the sense that the Victims were subjected to acts of sexual harassment and physical violence that can only be directed to women. For instance, breasts fondling and touching or attempting to touch 'private and sensitive parts'. There is no doubt that the Victims were targeted in this manner due to their gender," para. 144.

> gation to the Victims to effectively investigate the acts of ill-treatment that impacted on their dignity and punish the perpetrators accordingly. Failing to do so only amounted to an infringement of the rights of the Victims under Article 5 of the Africa Charter and other international instruments that the Respondent State is a party to."[152]

Other cases speak in more detail and specifically to certain aspects of States' due diligence obligations in 'communications' which contained allegations of sexual violations done by private actors[153]. As an example, in a recent case from 2015, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia*, the ACPHR condemned the State of Ethiopia for failing to prevent and protect a 13 year-old girl from "forced marriage by abduction coupled with rape"[154]. The case concerns a 13-year-old girl who was abducted and raped by various men on several occasions and was forced to sign a marriage contract with one of her abductors. The main aggressor was sentenced to 10 years imprisonment and his four accomplices were each convicted of abduction and sentenced to 8 years' imprisonment. However, on appeal, different Courts, from the High Court of her district to the Supreme Court, overturned the conviction on the basis that the evidence suggested that the girl has given her consent for the acts[155].

The Commission clearly established that rape is a violation of Article 5 of the African Charter, but only in regard to the right to dignity and without linking it directly to torture[156]. However, its reasoning is worth mentioning:

> "In the Commission's view, by rape, the victim is treated as a mere object of sexual gratification against his or her will and conscience. The victim is treated without regard for the personal autonomy and control over what happens to his or her body. By rape, the personal volition of the victim is gravely subverted and disregarded, and the victim is reduced from being a human being who has innate worth, value, significance and personal volition, to a mere object by which the perpetrator can meet his or her sadistic sexual urges. Inevitably, rape may, and often does, inflict physical pain and invokes in the victim a sense of helplessness, worthlessness, and gross debasement, which cause unimaginable mental anguish beyond the physical suffering. Clearly, rape degrades and humiliates the victim. Thus, even though not expressly listed under Article 5 of the Charter rape is one of the most repugnant affronts to human dignity and the range of

[152] ACHPR, Communication 323/06: *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, paras. 163, 204-208.

[153] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, AfCommHPR, Comm. 245/02, Décision of 15 May 2006, available at http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf; and *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, AfCommHPR, Comm. 279/03-296/05, Decision of 27 May 2009, available at http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf.

[154] ACHPR Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia, Communication 341/2007.

[155] To read more about the case, please visit: https://www.escr-net.org/caselaw/2016/equality-now-and-ethiopian-women-lawyers-association-ewla-v-federal-republic-ethiopia

[156] "Article 5 of the Charter guarantees that every individual shall have the right to respect of the dignity inherent in a human being. (…) It also entails that a human being is a moral agent possessed with the conscience and personal volition to decide what happens to his or her body. The right to respect of dignity is a guarantee that a human being should not be subjected to acts or omissions that degrade or humiliate him or her. (…) Article 5 of the Charter also enunciates the clear principle that all forms of degradation and exploitation of human beings shall be prohibited. It further provides for a sample of acts and omissions which in and of themselves amount to exploitation and degradation of a human being. These listed acts outright constitute violations of the dignity of a human being and are prohibited without reserve. Specifically: slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment are absolutely prohibited."

> dignity-related rights, such as security of the person and integrity of the person, respectively guaranteed under Articles 6 and 4 of the Charter. [157]"

Regarding State responsibility, the Commission offers applied the due diligence standard to the case in order to affirm Ethiopia´s responsibility in the present case:

> "it is to be recalled that a State incurs international responsibility for violation of rights and freedoms when it breaches its international law obligations with respect to the rights and freedoms in question (…) not because the act itself, but because of the lack of due diligence to prevent the violation or to respond to it (…) [Ethiopia] was aware or must be deemed to have been aware of the prevalence of marriage by abduction and rape and should have adopted and implemented protection measures.[158]"

It finally declared that the State violated Article 5 of the Charter. This case sets, then, a very interesting legal precedent that confirms the responsibility of states to investigate and punished non-State actors violations of women and girls rights, specifically rape and abduction.

Thus, it can be said that the due diligence principle of State responsibility for the acts and omissions of non-state actors, specifically for failure to prevent, respond, investigate, prosecute, punish and provide effective/comprehensive reparations, in the case of sexual violations, is recognized by the ACHPR. Its scope needs, as in the other regional systems, still need to be clarified and broaden.

Conclusion

The prohibition of torture under international law has achieved peremptory norms (*jus cogens*) status. It has been set up as a rule under customary international law that States have to prevent and respond to acts of violence against women with due diligence.

International jurisprudence of the universal human rights system, the Inter-American and European regional systems, and ICL and International Humanitarian Law (IHL) have all recognized rape *per se* as a form of torture. A non-exhaustive overview of international and regional jurisprudence from the African, European and Inter-American systems shows an evolution in introducing a gender perspective in relation to cases of torture. However, in the case of private individuals, the jurisprudence hesitates: rape and other forms of sexual and gender-based violence have not been expressly recognized as torture yet. Most human rights systems qualify these acts as violations of the right to integrity and are starting to analyze, little by little, whether they can constitute torture. The lack of definition occurs, then, in cases of rape by non-state agents and when dealing with other forms of gender violence other than sexual violence.

While the CAT considers that sexual violence perpetrated by public officials falls under Article 3 of the Convention prohibiting torture and other cruel, inhuman or degrading treatment or punishment, the Committee has never answered the question as to whether the same acts perpetrated by a private party could amount to torture too. Meanwhile, the IACHR sanctions sexual violence carried by public officials as acts of torture or ill treatment. Under the standard of due diligence articulated by the Court, States may incur responsibility under international human rights law where there is a failure to prevent or respond to certain acts or omissions of non-State actors. However, not even in the *Cotton Field* case, an emblematic case for women´s rights because it sets a strict due diligence principle in relation to violence against women, the Court decided to label the acts suf-

[157] Equality Now and EWLA v. Ethiopia, Op. Cit., para 120.
[158] Ibid. at para 122.

fered by the women as torture rather than ill-treatment and linked it to a reluctance to extend the coverage of the prohibition of torture to acts not directly carried out by the State.

The ECtHR made it clear that different forms of gender-based violence conducted by a public official amount to torture or other inhuman or degrading treatment or punishment. However, when such acts are conducted by private actors, the ECtHR has not ruled out the possibility that they fall under Article 3 but has not said that it could either, leaving the door open for further interpretation. Finally, it has used the obligation of States to take measures to ensure that individuals are not subject to torture, inhumane or degrading treatment and to sanction States for the failure of public officials to investigate crimes perpetrated by private parties.

In any event, this jurisprudence gives important clues to national Courts when examining torture cases where acts of sexual and gender-based violence were committed. International human rights law provides a clear road-map to apply the due diligence principle for acts of violence against women committed by private actors. Non-discrimination is a fundamental norm to guarantee this task. States must use the same commitment to investigate and punish violence against women.

However, we have also seen through this article that there is room for improvement. The case of torture is an emblematic one. Its definition under international human rights has been harshly criticized by feminist theorists because it mainly focuses on (male) violence that occurs in a public sphere. The use of the principle of due diligence has great potential in broadening the narrow interpretation of torture but is yet to be extended. Rape and other forms of sexual and gender-based violence, when committed by private individuals, have been qualified as degrading offenses or ill-treatments, but not as torture. Thus, there is still work to be done to guarantee that the due diligence principle is correctly applied in cases of torture against women and girls, in order to "prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."[159]

As the Special Rapporteur on Violence against Women once concluded there is a need

> "to continue punishing "the boundaries of due diligence in demanding the full compliance of States with international law, including the obligation to address the root causes of violence against women and to hold non-State actors accountable for their acts, then we will move towards a conception of human rights compatible with our aspirations for a just world free of violence." [160]

The women's movement has played a key role in transforming international law, but that work is far from finished. We, women right´s jurists, have a role in creating innovative legal strategies in order to challenge patriarchal legal foundations and gender hierarchies for which violence and other forms of discrimination against women are still justified or trivialized.

[159] Art. 4. UN Declaration on the Elimination of Violence against Women.
[160] Op. Cit. Special Rapporteur Violence Against Women.

II.
Gender and Sexuality as the Basis for Specific Harms

Murdered in the Name of "Honor"

Aisha K. Gill*

Abstract

On August 3, 2012, Shafilea Ahmed's parents were convicted of her murder, nine years after her brutal 'honor' killing. The case offers important insights into how 'honor'-based violence might be tackled without constructing non-Western cultures as inherently uncivilized. Critiquing the framing devices that structure British debates about 'honor'-based violence demonstrates the prevalence of Orientalist tropes, and so reveals the need for new ways of thinking about culture that do not reify it or treat it as a singular entity that can be tackled only in its entirety. Instead, it is important to recognize that cultures consist of multiple, intersecting signifying practices that are continually 'creolizing'. Thus, rather than talking purely about culture, debates on 'honor'-based violence should explore the intersection of culture with gender and other axes of differentiation and inequality in the wider sphere of violence against women and girls (VAWG).

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Introduction

For decades, anthropologists and sociologists have developed a rich body of research on the complex, multifaceted concept of honor. In his influential article, Pitt-Rivers (1966) describes honor as an individual's claim to pride, as well as his or her right to be granted it by others (Pitt-Rivers 1966) realized through a system of symbols, values, and rules of conduct. Although this socially constructed system, known as the "honor code," varies between cultures (Gill 2014), it nonetheless shares a number of common elements across cultures. While not usually considered cultures of honor, contemporary Western cultures do value honor in relation to a person's integrity, pride, and self-worth. Individuals view themselves as honorable to the extent that they feel pride as a result of their own actions and beliefs. Western societies tend to consider cultures of honor as those that place honor above all else, including the lives of female family members who are perceived to have committed actions of shame and dishonor, typically through sexual or other forms of disobedience. Drawing on the specific case of Shafilea Ahmed, a UK-born woman of Pakistani origin who was murdered by her parents following myriad cultural transgressions in their eyes, including her refusal to enter into an arranged marriage in Pakistan, this paper presents a critical analysis of how the prosecution in this case, as well as the media, identified a culture of honor as the primary explanation for her murder without adequately exploring other contributing factors, and, consequently, perpetuating harmful generalizations about ethnic minority groups in Britain.

The Face of "Honor"-Based Violence

The United Nations (UN) Population Fund estimates that between 5,000 and 12,000 women are murdered in the name of honor each year, primarily in the Middle East and Asia (Manjoo 2011, Gill 2014)[1]. It is impossible to determine the true number of honor killings or the true incidence of "honor"-based violence (HBV) more generally. Reports to the police are rare and sporadic, not least because both male and female family members often try to conceal honor-related crimes and many victims of HBV are abducted and never reported missing (Manjoo 2011).

Western countries with large multi-ethnic immigrant communities, such as Britain, began recognizing HBV as a significant and growing domestic issue in the late twentieth century. Understandings and awareness of HBV shifted accordingly, prompting the initiation of concerted national and international efforts to counter it. In Europe, most reported honor killings occur in South Asian, Turkish, or Kurdish migrant communities; however, there have also been cases in Brazil, Italy, and the United States involving Roman Catholic perpetrators with varied ethnic backgrounds (Chesler 2010).

Perpetrators are often part of minority groups, even in countries where HBV is prevalent, a fact that underlines the significance of economic and social marginalization as aggravating factors (Kulczycki and Windle 2011). For example, Sheeley (2007) surveyed a stratified convenience sample from Jordan—a nation with a strong tradition of honor. A third of respondents knew someone who had been threatened with HBV, and 28 percent knew someone who had died as a result of it. While incidence data do not explain the mechanisms through which cultural concerns with honor

[1] The UN has estimated that at least 5,000 women are murdered by family members each year in 'honor' killings. According to women's advocacy groups the figure could be around 20,000. In general, given the difficulty surrounding the reporting of these crimes, official statistics are understood to be grossly underestimates (see A/HRC/20/16).

or male dominance come to motivate HBV, media reporting of HBV cases all too often treats such data as explanatory, attributing responsibility for HBV to specific cultures and minority groups.

What Is Honor?

Honor is characterized in various ways. In a broad sense, it is perceived as a social process that determines and designates the social value to an individual or subgroup. When viewed as a whole, it contains distinct primary and secondary concepts that are referred to both within the literature and in common use (Stewart 1994). Honoring is an action involving two or more parties, occurring between individuals, and within subgroups and groups. Any examination of this concept thus requires a broad analysis extending from individual to state levels. This internally integrative process of socialization defines the formation and dynamics of relationships among individuals within subgroups and groups. It establishes norms for behavior as well as disciplinary action to be taken against transgressors, such as expulsion from the group. Prestige, shame, saving face, esteem, and affiliated honor are the primary characteristics of honor. *Prestige* is the process whereby a group bestows honor on an individual or subgroup for attributes, characteristics, and actions the group values as "good," elevating the hierarchal standing of an individual in relation to others in the group as a reward for demonstrating a standard of excellence through his or her deeds and attributes (Stewart 1994).

Conversely, *shame* lowers the standing of an individual or subgroup within the group, because of attributes, characteristics, and actions that are deemed "bad," or antithetical to excellence. Shame and prestige are not mutually exclusive. One may be shamed without a loss of prestige or gain prestige without a loss of shame. Stewart (1994), however, identifies an inverse relationship between shame and prestige, which together form the process of vertical honoring. Whereas prestige increases the social value of an individual, shame decreases it. Shame has an absolute characteristic; it can be lost, but will never be less than zero. The more shame a person has, the lower his or her social value to the group. When an individual is shamed, the group lowers his or her value without necessitating separation from the group. A shamed individual maintains utility within the group as an exemplar of how not to act, serving as a warning to other members to avoid departing from group values.

To maximize prestige and minimize shame, individuals or subgroups strive to maintain a position of honor in the group through *face* in order to preserve social identity and determine who is "first among equals" in the group hierarchy. "Saving face" refers to maintaining one's claim to membership in a particular group by resisting either the loss of a particular identity or a less-valued position within the group. An individual or group gains *esteem* by excelling in an honor system, even when the system is not necessarily agreed upon by both parties. The group bestowing esteem does not need to accept the values by which the individual is judged. The person judged, however, recognizes that the group judging him/her follows a comprehensible honor system. Esteem acknowledges the social value an individual contributes as a member of the group (Stewart 1994).

When a group member assumes an honorable status, based upon the reputation of the group with which he or she is associated, it is known as *affiliated honor*. The individual needs to do nothing more than maintain his or her status as a member by appearing to uphold the values of the group. Deriving social value from groups is a double-edged sword. Association with desirable parties can raise one's status, while membership of disreputable or unacceptable groups can result in dishonor and shame. Essentially, honor acts as the glue that keeps the social contract intact. Honor is

a more effective means of social control than violence because violence is never fully monopolized and honor-systems provide a substantial incentive in the form of internal social valuation. Stewart (1994) articulates the division of honor into vertical and horizontal forms, as described below.

Although respect gained through possessing horizontal honor can be lost, it cannot be increased. "Negative honor" is not considered to be respect that is due to an equal, as one person has a right to more respect than others. Horizontal honor may be contrasted with *vertical* (or positive) *honor*, that is, the right to special respect enjoyed by those who are superior, whether by virtue of their abilities, their rank, their services to the community, their sex, their kin relationship, their office, or some other factor. According to Stewart (1994), horizontal honor is akin to shame, forming a base from which one can only lose honor. Here, female chastity as a source of potential negative value to families has been used as a point of comparison (Oner-Ozkan and Gencoz 2006). Adhering to the social norm represents inclusion in a group with a particular standard of conduct that affords a distinction both within the group and with outsiders. In contrast to horizontal honor, vertical or positive honor is the right to special respect enjoyed by those with superior status in the group. Class, rank, caste, or other overt distinctions of position are the most evident forms of vertical honor along a continuum, with corresponding rights and obligations both up and down the group's hierarchical structure (Stewart 1994).

Consequences of Losing Honor

In honor cultures, aggression is an acceptable reaction to insults and threats to honor. Ethnographic and sociological research on diverse honor cultures, such as Iraqi Kurdistan (Begikhani, Gill and Hague, 2015), Spain (Gilmore 1987), rural Greece (Safilios-Rothschild 1969) and Turkey (Oner-Ozkan and Gencoz 2006), suggests that members of honor cultures consider retaliation to be a duty when a particular individual or family is insulted. Failure to retaliate connotes acceptance of the insult and an admission of being unworthy of honor. The most effective way to restore tarnished honor is to repudiate the insult by demonstrating a willingness to engage in physical aggression when necessary. Under certain circumstances, when the dishonouring insult is perceived by others as justified, such as when a female member of the family engages in a premarital or extramarital sexual affair, aggression is directed toward the "wrongdoer," (in this example the woman), rather than the party who has by his/her action "insulted" the honor of the community (in this example, the man with whom she had the extramarital affair situation).

Intra-familial honor killings embody the most extreme form of such aggression (Faqir 2005; Gill 2014). The willingness of people in honor cultures to take such radical measures, however painful and self-destructive, provides insights into the gravity of the consequences perceived by members of the group if action is not taken because these retaliatory measures can include actions such as shame, ridicule, loss of respect and social resources, and even complete ostracism (Gill 2014). In traditional societies where social mobility is limited, and where individuals' social, psychological, and material prospects are closely interwoven with those of their family, tribe, or clan members, ostracism would mean the loss of not only social support, but also of the material resources necessary for survival. A group's projection of aggression against the offender or wrongdoer highlights the necessity of addressing problems of honor directly rather than peripherally.

According to Pitt-Rivers (1966), losing honor by accepting humiliation cannot be repaired by demonstrating excellence. When someone has neither the ability nor the opportunity to take appropriate action, he or she will be subjected by the group to shame, which is acknowledged as

the strongest emotional reaction to the loss of honor in honor cultures. A susceptibility to shame is considered to be a positive quality, as illustrated by phrases, such as "having a sense of shame," popular among cultures of honor (Abu-Lughod 2011). In this respect, shame is not only an emotional consequence of losing honor, but also an important regulator of behavior.

In such societies, words corresponding to shame are used in a way that makes them synonymous with dishonor (Abu-Lughod 2011). Dishonor differs from shame, because it is antithetical to the values of the group, affecting the individual who commits the deed and threatening the foundation of the values upon which the entire system rests. Dealing with dishonored members differs from one honor group to another. Some honor cultures allow an individual to atone for "bad" deeds, while others allow for grace depending upon the severity of the dishonorable action (Casimir and Jung 2009). More extreme honor cultures actively rid the group of dishonored individuals by means of ostracism, exile, and capital punishment.

"Honor" Killing

Gendered violence encompasses HBV, "crimes of honor," "crimes related to honor conflict," "crimes of tradition," and "culture-based violence." The terms "honor killing" and "honor murder" are typically used interchangeably to refer to situations where violence results in a woman's death. Some scholars and activists reject the use of these designations altogether, categorizing such crimes as "domestic violence" (Terman 2010), while others place the various types of "honor violence" under the umbrella of "violence against women" (VAW).

Although most victims of HBV are female, there is also evidence of victimization of young men. According to Chesler (2010), 7 percent of victims in a sample of 230 honor killings examined worldwide between 1989 and 2009 were male. A German study on the prevalence of honor killings between 1996 and 2005 found that, of the 20 cases unequivocally classified as honor killings, 43 percent of victims were male (Oberwittler and Kasselt 2011). Like women, young men must respect and heed the wishes of more senior, usually older, male relatives (Abu-Lughod 2011). Subordinate men are most likely to cause dishonor as a result of (1) their choice of dating or sexual partners, (2) refusing an arranged marriage, (3) coming out as gay, bisexual or transgender (Ozturk 2011), and/or (4) refusing to commit an act of HBV (Roberts, Campbell, and Lloyd 2014).

Nevertheless, the majority of victims are female and the majority of perpetrators male. Eisner and Ghuneim (2013) examined the attitudes of fifteen-year-olds in Amman, Jordan, demonstrating that the practice of brutal vigilante justice, predominantly against young women perceived to have committed slights against family "honor," finds favor with a significant proportion of adolescents. The study revealed that almost half of boys and one in five girls believed that killing a daughter, sister, or wife who has "dishonored" or shamed her family is justified. A third of all teenagers involved in the research supported honor killings. These disturbing attitudes were connected more closely to patriarchal and traditional worldviews, including "moral" justification of violence, and the importance of female "virtue," rather than stemming from religious beliefs. Women's victimization is thus an outgrowth of broad cultural norms that legitimize gendered violence (Ertürk 2012).

An honor killing is a murder committed against a woman for actual or perceived immoral behavior deemed to be in breach of a household or community's honor (Gill 2014), most commonly for intimate relations with a man, whether that (allegedly) involves adultery, sex outside marriage, or simply close companionship. Even women who have been victims of rape and sexual assault become targets for honor killing. Honor killings also take place because a woman or girl is in the

presence of a male who is not a relative, refuses to agree to an arranged marriage, falls in love with someone who is unacceptable to the family, seeks a divorce, tries to escape marital violence, or appears Western. In some cases, the mere perception that a woman has behaved disobediently, thus shaming her father, brother/s, uncle/s, or male cousin/s, has been reason enough to motivate an attack on her life. The norms of honor societies exist to maintain the sexual "purity" of women and to ensure that only certain bloodlines are allowed to blend, preventing wealth from becoming diluted by the marriage or consorting of a woman from the landed class with an individual of lower status in the social hierarchy. Rumors and gossip serve as community's greatest weapons for instilling shame in male members of society who cannot preserve the purity and chastity of female family members (Shalhoub-Kevorkian and Daher-Nashef, 2013).

Honor killings form part of a larger category of violence against women, though violence against women generally takes many different forms and names. Bride burning in India (Ahmad 2008), crimes of passion in Latin America (Brinks 2007), and honor killings in Islamic nations (Hellgren and Hobson 2008), for example, all share the same dynamic: women are killed by male family members in an act which is deemed as socially acceptable, "understandable," or "excusable." Although crimes of passion, bride burning, and honor killings share this dynamic, there are key distinctions. In a crime of passion, it is the woman's husband or lover who commits the murder in a heated reaction to a sense of personal betrayal or anger (Sen 2005), whereas an honor killing is carried out by a male family member on a premeditated basis as a symbol of rejecting a perceived dishonorable action to prevent the family from being shamed by the group (Sen 2005).

This paper applies these concepts to the murder of Shafilea Ahmed, a young British woman of Pakistani origin, and examines how the prosecution and the mainstream British media presented culture as the overriding explanation for this crime. A critical analysis of racialized interpretations of such murder cases is presented to advance an appeal for greater vigilance against the acceptance of "honor" as a justification for brutally murdering young women perceived to have shamed family members (Gill 2014).

The Murder of Shafilea Ahmed

The eldest of five children, Shafilea Ahmed was born in Bradford on July 14, 1986, shortly after her parents emigrated from Pakistan. Shafilea attended Great Sankey High School in Warrington until her father removed her from school in February 2003 for a trip to Pakistan. She was murdered later that year. In the year prior to Shafilea's death, tension over clashing "traditional" and "Western" values intensified between Shafilea and her parents, Farzana and Iftikhar. For instance, one of her parents' complaints was that Shafilea's wide circle of friends consisted of mostly Caucasian peers from school, with only a small percentage from minority ethnic backgrounds.

Shafilea's case was first referred to Warrington social services on October 3, 2002, after another pupil told teachers that Shafilea's parents had physically assaulted her and prevented her from attending school. Shafilea's social services file notes a mark on her face and the fact that she believed she was going to be sent to Pakistan for an arranged marriage. When Shafilea returned to school five days later, she revealed to her best friend that her mother, Farzana, had threatened a forced marriage. According to the friend, Shafilea's mother said, "I can't wait till you go to Pakistan to teach you a lesson" (Gill 2014), prompting school staff to refer Shafilea to social services again several weeks later. This time, Shafilea's social services file noted that her father, Iftikhar, had forced

Shafilea to withdraw savings from her bank account, evidencing an attempt to exert control over his daughter.

Late in November 2002, one of Shafilea's friends saw her in a park, carrying her belongings wearing only a "thin sari." Shafilea indicated she was running away from home "because her parents would not let her be." Although the school reported the incident to social services, there is no record on file. In a meeting subsequently arranged by her teacher, Joanna Code, between Shafilea and her parents, Shafilea spoke "quite openly" about wanting "to be able to work and have money and go out." By the end of the meeting, Mr Ahmed had agreed that Shafilea would be allowed more freedom. However, things did not improve and teachers continued to refer Shafilea to social services and suggested that she should contact Childline (author's personal notes related to court attendance of this case, 2012). From the age of 15, Shafilea frequently reported suffering from domestic violence.

On February 18, 2003, Shafilea's parents drugged her and took her to Pakistan. The trip was cut short in May of that year, when she swallowed bleach, or a similar caustic liquid, and required treatment at a local hospital. Farzana later told the police that Shafilea had accidentally ingested the bleach, mistaking it for mouthwash. Medical practitioners reported that the mouth injury was inconsistent with the action of gargling mouthwash, but was consistent with a deliberate act of swallowing. The most likely explanation is that this was a deliberate act of self-harm by Shafilea to frustrate her parents' plans of forced marriage in Pakistan. As a result of this injury, she was no longer considered "marriageable," thus shaming her family.

Despite her illness, Shafilea was determined to continue her education and become a lawyer. In September 2003, Shafilea commenced a series of courses at Warrington's Priestly College. On the evening of September 11, 2003, she worked at her part-time job until 9.00 p.m. when another employee observed her leaving at the end of her shift. She spent the evening at her family home in Warrington with her parents and four siblings. Her father claims that she was alive though asleep when he and the rest of the family went to bed at 11.00 p.m. Although Shafilea was due for treatment at the hospital the following day, she was not seen alive again after that night.

Shafilea's former teacher reported her missing on September 18, 2003, prompting an extensive police investigation into her disappearance. At the time, the primary sources of information were Shafilea's family, friends, and teachers. Significant inconsistencies soon emerged, casting suspicion over her disappearance. The investigation also revealed the history of school, social services, and law enforcement involvement with Shafilea and her family as early as her entry into secondary school and continuing until her disappearance. In December 2003, Shafilea's parents were arrested on suspicion of abduction. They denied any involvement in their daughter's disappearance and were released on police bail.

Shafilea's parents gave a number of press interviews in March 2004, including one broadcasted on *Newsnight* on March 2, 2004. Whereas Farzana Ahmed remained silent throughout the interview, Iftikhar Ahmed appeared attentive and focused, distancing himself from Shafilea by referring to her as "the daughter" or "the girl." When asked about Shafilea's suicide attempt, he contradicted the medical evidence, stating that his daughter "took a sip" of poisonous liquid. Mr Ahmed claimed "I'm not a strict parent in any way . . . I'm as English as anybody can picture me, right. But obviously the police portrayal of me is different . . . we have not been treated fairly" (Gill 2014). He complained that his family was misunderstood by the police and the public and feigned being hurt by suspicion that he and his family were responsible for the death of "the girl."

His response focused less on the loss of his daughter and more on what he perceived as unfair treatment directed at him and his family. Rather than making a plea to those responsible for his daughter's death, he defended his "Englishness," illustrating the importance he placed on saving face and maintaining honor in the eyes of others. Mr Ahmed used the word "normal" many times in the *Newsnight* interview when describing Shafilea, his family, the "holiday" to Pakistan during which Shafilea swallowed bleach, and the night of her disappearance (Gill 2014). He continuously sought to present his family in a positive light.

R v Iftikhar Ahmed and Farzana Ahmed 2012

In September 2004, the police submitted a file of evidence to the Crown Prosecution Service to determine whether to pursue a case against Shafilea's parents. Six months later, Mr Robin Spencer QC advised the police that there was insufficient evidence to demonstrate guilt beyond a reasonable doubt and secure a conviction. On January 11, 2008, a coroner's inquest into the circumstances of Shafilea's death found that she had been "unlawfully killed" (*Warrington Guardian* 2009). The situation changed in August 2010 when "Alesha" (a pseudonym) Ahmed, Shafilea's sister, was taken into custody on suspicion of having arranged a robbery at her parents' home. Having requested to speak to officers about another matter, she was interviewed in the presence of her solicitor. During the interview, Alesha claimed that, as a 15-year-old, she and her three surviving siblings had witnessed their parents killing Shafilea on the night of September 11, 2003. "Both of my parents were very controlling and tried to bring us up in the Pakistani Muslim way," she said, before going on to explain that Shafilea was the one who was "picked on" most by their parents (Gill 2014: 185).

One of Alesha's earliest childhood memories was of seeing her mother hitting Shafilea. She stated that her parents attacked her and her sisters countless times, both verbally and physically. According to Alesha, her parents' abuse of Shafilea escalated over time. Between the ages of 14 and 17, her sister was attacked virtually every day for the most trifling reasons. If Shafilea received a text message or phone call from a boy, wore "inappropriate" clothes, or associated with white friends at school, her mother would claim that Shafilea had shamed the family. Alesha described one incident in which her mother hit Shafilea and then shut her in a room without food for two days, only allowing her out to use the toilet. "They knew that they could control us completely through fear" (Gill 2014: 186). Alesha's testimony presented the "missing piece" of evidence, allowing the Crown Prosecution Service to advance a convincing case against Shafilea's parents. In September 2011, both parents were charged with murder. Their trial commenced on May 21, 2012 at Chester Crown Court.

The Trial of "Normal" Parents

As a witness for the prosecution, Alesha was called on to describe the night of Shafilea's disappearance. She recalled going with her mother and brother to collect Shafilea from work just after 9.00 p.m. on September 11, 2003. When Shafilea reached the car, they saw that she was wearing a lilac t-shirt and white trousers made from stretchy material, with ties at each side on her hips. As soon as her mother saw Shafilea, she complained that her clothes were too revealing.

Alesha stated that when they arrived home, the whole family assembled together in the kitchen, her mother demanding that the family collectively search Shafilea's bags. This practice was not unusual. Finding some money in Shafilea's handbag increased her mother's anger and she accused

her of hiding the money. She pushed Shafilea with both hands on her chest and shoulders onto the settee. Alesha stated that Shafilea, still weak from her illness, had a small frame of not much more than five or six stone (31–38 kg). Alesha then heard her mother say "*Etay khatam kar saro*," Punjabi for "just finish it here." Iftikhar went to Shafilea and pulled her into a lying position on the settee. Shafilea began to struggle as both parents hit her and held her down. One of them said, "Get the bag." Alesha saw her mother grab a thin white carrier bag from the stool next to the settee. Then they both forced the entire bag into Shafilea's mouth. Each placed a hand over her mouth and nose. Her legs kicked, but Iftikhar put his knee up on the settee to pin her down until she stopped struggling (Gill 2014: 186–187).

Alesha went on to explain that, despite having seen her sister die the night before, the following morning she asked her mother where Shafilea was. The children were sternly instructed that if anyone asked, they were to say that Shafilea came home from work, went to bed, then ran away in the night. The day after Shafilea's murder all the children were sent to school. Alesha recalled breaking down and telling some friends what had occurred. She described being very upset and confused at the time and, as a result, spontaneously blurted out that her father had killed her sister. When her teachers asked her about this, she recanted from fear of reprisal from her parents and the matter was not pursued until later. Questions remain as to why those who had witnessed Alesha's breakdown at school did not take further action to investigate the disappearance of her sister. Why did the teachers only contact the police on September 18, 2003?

During the trial, both of Shafilea's parents insisted that they had not been involved in their daughter's disappearance. They also denied claims that they had repeatedly beaten her over a prolonged period. Eight weeks into the trial, Shafilea's mother, Farzana Ahmed, changed her defense in what the judge described as a "significant" development (Gill 2014: 187). On July 8, 2012, she admitted that an incident of "violence" involving Shafilea took place on September 11, 2003 (Gill 2014: 187). Shafilea had confided in her friends that her mother was particularly abusive toward her while she was growing up. Perhaps the most damning evidence for Farzana's complicity in her daughter's murder came from the installation of a covert listening device in the Ahmed home in November 2003. In conversations with her other children, Shafilea's mother can be heard warning them not to say anything at school. She was also recorded saying to her son: "If the slightest thing comes out of your mouth, we will be stuck in real trouble. Remember that." These covert recorded conversations further suggest that Farzana may have had knowledge of what happened to Shafilea. She exclaims to Iftikhar: "You're a pimp. You're shameless. I'm going to say it to you clearly, I swear to Allah, everything happened because of you" (Bhagdin 2012).

In other recorded conversations she remarks on the mileage of their family car: "… Yeah, so this means they will look at the mileage of our car as well to see how much it is" (Bhagdin 2012).

In the year of Shafilea's "disappearance," Farzana scolded her children:

> *That's what I'm saying. That slut is acting as if she is relieved. The face is getting puffed up. And you behave* bandeh di ti ban *["become the daughter of a human"] yourself, as well. Today is not a day to be beaten up, okay. Are you listening to me? I'm talking to you . . .*

Farzana's treatment of her daughter could be explained using Kandiyoti's seminal 1988 study, which describes the phenomenon of abuse by mothers against daughters as a culturally specific form of "patriarchal bargain" between the mother and the extended household. Kandiyoti's discussion of "classic patriarchy" sets out how family dynamics between younger and older women in the South Asian familial systems are structured by a model of patriarchy that stresses "corporate

male-headed entities rather than more autonomous mother and child units" (Kandiyoti 1988: 275). Kandiyoti further explains:

> *Different forms of patriarchy present women with distinct "rules of the game" and call for different strategies to maximize security and optimize life options with varying potential for active or passive resistance in the face of oppression*. (1988: 275)

Ultimately, the men make the rules, but if women are able to play by those rules, they gain for themselves a form of symbolic capital. Specifically, they can present themselves as conforming women, enabling their survival in the field of patriarchy (Kandiyoti 1988). With the honor schema, misbehavior by one woman dishonors the entire patriarchal familial unit, male and female; to ensure their survival and security, women, as much as men, monitor the behavior of their kinswomen.

Up until the trial in May 2012, Shafilea's mother denied that she had any knowledge of what happened to her daughter. The defense counsel stated that, on the night in question, Iftikhar was very angry "… hitting [Shafilea], slapping her with his hands towards the facial area and punching her two to three times to the upper part of her body. [Shafilea's mother] tried to intervene but she was told to go away" (author's personal notes, 2012).

When she tried again to help her daughter, she was "pushed away by both hands and also punched with a clenched fist" (Gill 2014: 187). Contrary to Alesha's account, Shafilea's mother claimed that only her third eldest daughter, "M" (then aged 12), was present. "Extremely scared" and fearing for M's safety, Shafilea's mother took her upstairs. Some 20 minutes later, she heard a car leave and came downstairs to find Shafilea and her husband gone, along with her car. At 6:30 a.m. the next day, her husband returned without Shafilea (author's personal notes, Gill, 2012). In response to these allegations, Shafilea's brother, who was 13 at the time of her disappearance, told the jury: "I think it's a lie what she's saying but that's her account to give." He also said: "It's a whole pack of lies that [Alesha's] told and I don't believe a word of what she's saying" (see Gill 2014: 187). He described the Ahmed household as a "happy family" before Shafilea disappeared and told the jury that "nothing out of the ordinary" happened on September 11, 2003. He claimed that he only knew his sister was missing the next morning (author's personal notes, Gill, 2012).

Ultimately, the jury accepted Alesha's version of events and on August 3, 2012, Shafilea's parents were convicted of her murder. Both received life sentences. While the true facts of the case may never be known, all the accounts of what happened on September 11, 2003, circle back to the key role of "honor." They also simultaneously demonstrate how cultural explanations for Shafilea's death are insufficient; it was a product of many factors, including the relationship between "honor," gender, and power inequalities within the Ahmed household.

Cultural Predicaments

The Ahmed family lived in a context that was simultaneously British and Pakistani, in what Homi Bhabha (1994) refers to as a "third space." This applies to both generations, albeit in different ways. Shafilea's social location was determined partly by her being born in the 1980s in postcolonial Britain and partly by the fact that her parents had migrated from a rural area of Pakistan. The patriarchal gender system that Shafilea was ensnared in did not derive simply from the Ahmeds' "backward" rural roots standing in opposition to the enlightened culture of British society outside the Ahmed home. Instead, Shafilea lived her life life under the constraints imposed by both the British patriarchal values to which all women in Britain are subject and the patriarchal values of her parents' rural Pakistani upbringing.

Mr Ahmed's defense of his "Englishness" is particularly interesting in this context. It reveals how his own implicit claims that he was sufficiently influenced by local cultural practices to consider himself English indicate that his actions were not simply the result of cultural conflict (Brah 1996). Indeed, Mr Ahmed had been married before to a Danish woman with whom he had a child (Keaveny 2012) and with whom he had led a "creolized-Western" lifestyle (Grillo 2003). It is not only immigrant parents, but also their children, who must negotiate their intersectionally configured "third space." Thus, while families may share a common ethos, individual members often express and experience this ethos differently. The fact that the different members of the Ahmed family did not occupy a single, shared intersectionally configured space helps to explain why the Ahmed children reacted in different ways to Shafilea's murder. Jacqueline Rose (2012), writing in *The Guardian* about the Ahmed trial, argued that:

> *Missing in the court room, in pretty much any court room, is the idea of fantasy, of how we make our lives bearable by elaborating stories about ourselves. For both Alesha and [her sister] lying was a way to survive. If, in the judges* [sic] *own words, this case has been "extraordinary," it is not least by bringing these contortions of the inner world, the agonies of attachment and belonging, so painful* [sic] *to life.*

As a victim of domestic violence herself, Shafilea's sister, Alesha, had nowhere to go when, in August 2010, she disclosed to the police that her parents were responsible for her sister's murder. Her situation was complicated by the fact that giving evidence against her parents had serious repercussions for her within Warrington's tight-knit Pakistani community. Alesha told the police that for many years she had been too afraid to discuss Shafilea's disappearance. Although her testimony proved crucial in securing her parents' conviction, Alesha was too afraid to attend court again afterwards and was not present to hear the verdict on August 3, 2012.

In comparison to their white counterparts, for whom shame tends to take on a more personal character, black and minority ethnic victims often see themselves as responsible for their families' as well as their own "honor," causing them to experience heightened feelings of shame (Feldman 2010). South Asian women are socialized to believe that they are primarily to blame for any violence they experience, especially when it is triggered by dishonor perceived to stem from their own actions. In struggling to make their own life choices, both Alesha and Shafilea were continuously confronted with the internalized need to conform to their family's values and, in doing so, to avoid bringing "shame" upon them. Shame creates feelings of humiliation, indignity, and exposure to debasement in the eyes of others, which, in turn, increases victims' sense of vulnerability (Gill 2009); the wish to conceal this vulnerability lies at the heart of many women's silence about the violence they have experienced.

South Asian women are socialized not to discuss private matters with outsiders. Such discussion is in itself seen as shameful, and this disinclination to speak to others often creates difficulty when it comes to talking about their experiences of violence, even with trained professionals. Further complicating the situation is the emphasis Pakistani society places on behavior that encourages harmony in the home, rendering many women reluctant to complain for fear of being perceived as "trouble-makers." Just as negative family and community responses encourage women to remain silent about abuse, positive responses can, however, often play a crucial role in enabling women from ethnic minorities to discuss their experiences of violence (Gill 2014).

The Wider Implications of Shafilea Ahmed's Case

The ways in which the violence that Shafilea suffered within the confines of her own home, and which ultimately ended beside the River Kent in Sedgwick, Cumbria, offer a striking representation of how Western nations point to domestic cases of crimes related to "honor" as being illustrative of a growing threat to dominant cultural norms and, by extension, maintaining security within society. Consequently, the discourse surrounding Shafilea's murder supports Hellgren and Hobson's (2008) contention that:

> *honour killings are boundary-making arenas . . . intended to be public statements, to restore honour to a family . . . [but] are also public dramas re-enacted in the courts and media . . . arenas for boundary marking beyond the family and local community.* (Hellgren and Hobson 2008: 386)

Media coverage of Shafilea's "honor killing," and those involved in it, provides a convenient opportunity not only to make sweeping generalizations, drawn from the experience of a single Muslim Pakistani family, about the Muslim and South Asian migrant population, but also to underline the implications of their presence for the British nation. Shafilea's death embodies a complicated, symbolic battlefield for an entire discourse about national inclusion and exclusion. She becomes what Reimers identifies as the "other but with us." (Gill, 2017: 161) Shafilea is "othered" as a victim to be saved by Western culture, while the act of claiming Shafilea as "Western" makes her a "worthy" victim. On a secondary level, Shafilea is also sacrificed for her family's "honor," thus her "Westernization" also makes her a martyr for the British nation, and the ideal migrant citizen. We must not overlook, however, the extreme costs that such a positioning has upon the lives of Shafilea and women like her, as they vacillate between cultures within the discursive no-man's land described in Anzaldúa's (2007) concept of borderlands.

Representations of honor killings that construct South Asian culture as the key causal factor are permeated with discursive strategies associated with moral panic. The perpetrators of these crimes are labeled "deviant," with the problem of HBV seen as pervasive among such deviants—in this case, among all Muslims. Specific forms of domestic violence common in minority communities tend to be depicted as the norm in these "deviant" communities. Whereas "mainstream" forms of domestic violence are generally represented through rhetoric focused on the individuals involved, the majority of news stories about HBV employ framing devices centered on the cultural differences of perpetrators of this form of violence. As such, the media's framing of honor killings contributes to the perception that culturally specific forms of violence are more abhorrent than "normal" domestic violence and that they are rightfully subject to media-driven moral crusades (Anitha and Gill 2011).

Conclusion

The police refused to call Shafilea's murder an "honor killing" precisely because they wanted to stress that no license should be granted to those who claim that their cultural rights excuse acts of brutality, and in so doing marked a step in the right direction. At the same time, those charged with protecting the public must be able to identify and understand the risk factors associated with all forms of VAW in order to respond effectively. Such an understanding is only possible if, instead of talking purely about culture, debates about HBV and VAW explore the intersection of culture with gender and other axes of differentiation; the tackling of violence against females in society is not just a question of culture, but also one of equity. In sentencing Shafilea Ahmed's parents to

life imprisonment on August 3, 2012, the judge, Mr Justice Roderick Evans, described Shafilea as a determined, able, and ambitious girl "squeezed between two cultures, the culture and way of life that she saw around her and wanted to embrace and the culture and way of life her parents wanted to impose upon her" (Gill 2014: 195). However, the causal factors behind Shafilea's murder were far more complex than was suggested by the judge and also by the British media's tale of backward parents acting against the backdrop of modern Britain's progressive society. Understanding the forms of violence experienced by minority ethnic women in Britain requires an approach that takes account not only of the links between all forms of gender-based violence, but also addresses the specificity of particular forms of VAW, such as HBV. A distinction must be drawn between the wholesale condemnation of the culture of a specific social group and condemnation of a particular cultural practice.

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Female Genital Mutilation as a Form of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Intersections with the Migration Context

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Abstract

This paper seeks to explore how female genital mutilation (FGM) amounts to torture or other cruel, inhuman, and degrading treatment (CIDT) or punishment, with a specific focus on how the intersection with migration compounds torture and CIDT. The paper argues that the application of the torture framework is needed to prevent, protect, and provide access to justice for those affected by FGM. Some lessons learned from Europe regarding the implementation of the SRT's recommendations will be shared, and additional recommendations will be provided.

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1. Introduction

Two hundred million women and girls worldwide have been subjected to female genital mutilation (FGM), while each year three million girls are at risk of being cut[1]. The practice is predominantly prevalent on the African continent, but is equally occurring in other parts of the world, including Europe. This paper seeks to explore how the migration context can increase the likelihood of torture and other ill-treatment for women and girls living with FGM, or at risk of it, by focusing on Europe.

2. FGM and the Torture Framework

By complying with the predominant social norm in certain communities, in particular by performing FGM, families avoid being ostracized by their communities and adhere to the perceived benefits of the practice. However, by doing so, the ability of women and girls to fully exercise their human rights is clearly denied.

UN General Assembly resolution 67/146[2] defined FGM as a practice that is "an irreparable, irreversible abuse that impacts negatively on the human rights of women and girls". The human rights at stake include the right to be free from discrimination[3] on the basis of sex, the right to be free from violence and inequality, the right to life, the right to the highest attainable standard of health, the rights of the child, and the right to freedom of torture and other ill-treatment.

The Special Rapporteur's 2016 report on Gender Perspectives on torture and other cruel, inhuman and degrading treatment (CIDT) or punishment[4] reiterates that FGM constitutes torture or ill-treatment[5] and that it must be prohibited in accordance with, inter alia, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (article 5).

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) lists four required elements to meet the threshold of torture: severe pain and suffering (physical or mental), intent, purpose, and State involvement[6]. Moreover, the element of

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1 UNICEF, 2016. Female genital mutilation/cutting, a global concern, available at: https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf.

2 A/RES/67/146. General Assembly. Sixty-seventh session. Resolution adopted by the General Assembly on 20 December 2012. 67/146. Intensifying global efforts for the elimination of female genital mutilations.

3 This refers to any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Joint General Recommendation/General Comment N° 31 of the Committee on the Elimination of Discrimination against Women and N° 18 of the Committee on the Rights of the Child on harmful practices. New York: United Nations, 2014, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGC%2f31%2fCRC%2fC%2fGC%2f18&Lang=en.

4 FGM has been recognised as a form of torture at other occasions as well, such as the Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, para. 18, available at http://www.unhcr.org/refworld/docid/47ac78ce2.html; Human Rights Committee (HRC), General Comment No. 28: Article 3 (The equality of rights between men and women), 29 March 2000, para. 11.17, available at: http://www.unhcr.org/refworld/docid/ 45139c9b4.html; European Court of Human Rights, Application no. 23944/05, Emily Collns and Ashley Akaziebie v. Sweden 8 March 2007, available at: http://www.unhcr.org/refworld/docid/46a8763e2.html.

5 UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, para. 58, U.N.Doc. A/HRC/31/57 (2016) (by Juan Méndez), § 62.

6 A/HRC/7/3. Manfred Nowak, 2008. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on

powerlessness has been taken into consideration, as it allows including the specific status of the victim (age, sex, and physical and mental health)[7].

Severe pain and suffering

In the case of FGM, severe pain and suffering have been well documented. In 2016, the World Health Organisation provided a summary of the available evidence of FGM's negative impacts on health and wellbeing (table 1)[8]. The effects of FGM can occur in the short or long term and include health consequences, sexual and reproductive health risks, and psychological risks.

Table 1: Health risks of FGM

Immediate health risks
Haemorrhage
Pain
Shock
Genital tissue swelling
Infections
Urination problems
Wound healing problems
Death
Obstetric risks
Caesarean section
Postpartum haemorrhage
Episiotomy
Prolonged labour
Obstetric tears/lacerations
Instrumental delivery
Difficult labour/dystocia
Extended maternal hospital stay
Stillbirth and early neonatal death
Infant resuscitation at delivery
Sexual functioning risks
Dyspareunia
Decreased sexual satisfaction
Reduced sexual desire and arousal
Decreased lubrication during sexual intercourse
Reduced frequency of orgasm or anorgasmia

torture and other cruel, inhuman or degrading treatment or punishment. A/HRC/7/3, 15 January 2008, §27.

[7] A/HRC/7/3, § 28 & §29.

[8] World Health Organisation, 2016. WHO Guidelines on the management of health complications from female genital mutilation.

Psychological risks
Post-traumatic stress disorder
Anxiety disorders
Depression
Long-term health risks
Genital tissue damage
Vaginal discharge
Vaginal itching
Menstrual problems
Reproductive tract infections
Chronic genital infections
Urinary tract infections
Painful urination

Intent

FGM is usually performed on non-consenting minors, by traditional excisors, traditional midwives, or medical personnel. The act is done for non-medical reasons, and the decision to cut a girl is made by (one of) the girl's parents, the broader family and/or the community at large. Parents decide to have their daughters cut in order to comply with the prevailing social norms in their communities. Even though they might be aware of the negative consequences on their daughter's health and wellbeing, the perceived benefits outweigh these negative effects, hence the decision to cut their daughters. The intent to cut is therefore present. A more extensive interpretation of the criteria of 'intent' was elaborated by the creation of the concept of general intent, which is "a less demanding standard, requiring merely that the actor intended to perform the conduct as opposed to intending to create a particular result in violation of the law."[9]

In the case of health care providers who perform the practice (so-called medicalization of the practice[10]), the element of intent is even more apparent. Health professionals, who are skilled and trained to prevent and cure health threats or diseases, adhere to the principle of 'do no harm' (the Hippocratic Oath). As health professionals, they should be aware of the negative impact of cutting healthy female genital tissue for non-medical reasons, and as such, when performing FGM, the purpose of intent is fulfilled. Indeed, Special Rapporteur on Torture Manfred Nowak stated in his 2008 report that the medicalization of FGM does not render the practice acceptable, and recalled that article 5 of the Protocol to the African Charter on Human and People's Rights on the Rights of

[9] Miller, G.H (2005) Defining Torture. Floersheimer Center for Constitutional Democracy.
[10] Medicalisation refers to the situations in which the procedure (including re-infibulation) is practised by any category of health care provider, whether in a public or a private clinic, at home or elsewhere, at any point in time in a woman's life (WHO, 2016, p. 8).

Women in Africa, the Maputo Protocol[11], calls on States to adopt legislative measures to prohibit all forms of FGM, including its medicalization and paramedicalization[12].

Purpose

FGM is performed for a number of reasons: to make a girl ready for marriage, to mark her as becoming of age and asserting that she is a full member of society, to preserve her virginity prior to marriage or control her sexuality, to purify her, or because of tradition. Although male circumcision is equally widespread, the extent of cutting (removal of foreskin) in male circumcision is far less invasive than most cases of FGM. Moreover, some health benefits of male circumcision have been assessed, while this is not the case for FGM. On the contrary, removing (major) parts of the female sexual organ interferes with its normal functioning, which is irreversible and has a lifelong effect. Reasons for male circumcision also do not intend to control sexuality or preserve virginity[13]. As such, FGM is a gender-specific act, and an expression of the deeply entrenched subordinated status of women. As discrimination is one of the elements in the CAT's definition of torture, the purpose element is therefore always fulfilled if the acts can be shown to be gender-specific[14].

State involvement

Article 5 of the Maputo Protocol declares that, "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures[15] to eliminate such practices"[16]. If States fail to act with due diligence to protect, prevent, investigate, and punish FGM, this too can amount to torture under the CAT. As Special Rapporteur Manfred Nowak stated in his 2008 report, article 1 of the CAT includes the State's failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals, and reinforces the Declaration on the Elimination of Violence against Women, adopted by the General Assembly in resolution 48/104[17]. The obligations of the State regarding FGM will be further elaborated in Section 3.

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[11] African Commission on Human and Peoples' Rights. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted by the 2nd Ordinary Session of the Assembly of the Union. Maputo, 11 July 2003.

[12] UN. General Assembly. Human rights Council, Seventy session. A/HRC/7/3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. 15 January 2008, § 53.

[13] World Health Organisation and UNAIDS. Male circumcision: global trends and determinants of prevalence, safety and acceptability. 2008.

[14] A/HRC/7/3/, § 30.

[15] These measures are: (a) awareness-raising through information campaigns, formal and informal education, and outreach; (b) prohibition, through legislative measures backed by sanctions, of all forms of FGM, including the medicalised procedure; (c) support for victims of FGM in the form of health care, legal counsel, psychological care and support, and education and training; (d) protection of women who are potential victims of FGM or other forms of violence, abuse or intolerance. *See* Leye E and Middelburg M. *Female genital mutilation in Europe from a child right's perspective, in* Routledge International Handbook of Children's Rights Studies (Vandenhole W, et. al. eds., Routledge International Handbooks, London and New York, 2015) pp. 295-315.

[16] Article 5, Elimination of Harmful Practices. African Commission on Human and Peoples' Rights. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

[17] A/HRC/7/3, § 31.

Powerlessness

According to Special Rapporteur Nowak, powerlessness arises when one person exercises total control over another. If it is found that a victim is unable to flee, or is otherwise coerced into staying, the powerlessness criterion can be considered fulfilled. It also allows taking a victim's specific status into consideration[18]. With regard to non-consenting minors who are dependent on their parents, and where loyalty issues prevent them from opposing FGM, the state of powerlessness is satisfied. Furthermore, girls and women have very little decision-making power, if any, with regard to the cutting of their genitals, which underlines the element of powerlessness.

3. FGM in a Migration Context Might Add to Torture or CIDT

FGM is also prevalent in countries with migrant populations that come from regions where FGM is practiced. In this section, we will explore how the migration context contributes to the torture and ill-treatment women and girls suffer because of FGM, and those who are at risk of being subjected to it. We will do this by providing a brief overview of European States' obligations to diligently protect and support women and girls affected by FGM, or who at risk of it, the obligation to prosecute, as required by the Istanbul Convention (Table 2), and by discussing some gaps related to these obligations[19].

Istanbul Convention

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention, was adopted in 2011, and as of March 2018, has been ratified by and entered into force in 28 European countries that are members of the Council of Europe (47 countries in total)[20]. It is the first legally binding instrument in Europe on preventing violence against women and domestic violence. It requires States to act with due diligence, to prevent FGM, to protect victims, and to prosecute perpetrators[21]. These obligations, with their related articles from the Istanbul Convention, are detailed in the table below.

[18] A/HRC/7/3, § 28.

[19] According to the Istanbul Convention, States have the obligation to prevent (Art. 12-17), protect (Art. 18-24, 27-28, and 60-61) and prosecute FGM (Art. 31, 38, 42, 44-46, 49, 50-51, 53, and 56). For an overview of all articles in relation to FGM: *see* Council of Europe and Amnesty International, 2014).

[20] As of March 3, 2018, these countries are: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Italy, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Switzerland, Turkey. Full list can be consulted at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures.

[21] The application of the due diligence standard to violence against women is recognised in the UN General Assembly Declaration on the Elimination of Violence against Women (1993) in Article 4c, where states are urged to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons. The Committee on the Elimination of Discrimination against Women (CEDAW) noted in its General Recommendation N° 19 (1992) that states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence (Council of Europe and Amnesty International, 2014).

Table 2: The Istanbul Convention's States Obligations related to FGM[22]

Diligence subject	Article of the Convention	State Obligations
To prevent FGM	Article 12: General Obligations	§ 1: Address gender stereotypes and take measures that are necessary to promote changes in mentality and attitudes § 3: Address the specific needs of women and girls in positions of vulnerability § 4: Involve all members of society, especially men and boys § 5: Ensure that culture, custom, religion, tradition or so-called 'honour' shall not be invoked to justify any act of violence § 6: Seek empowerment of girls and women
	Article 13: Awareness-raising	Undertake awareness-raising and information campaigns on a regular basis
	Article 14: Education	Use formal and informal education to teach children about gender equality, stereotyped gender roles, mutual respect, gender-based violence and the right to personal integrity
	Article 15: Training of Professionals	Provide training for professionals
	Article 17: Participation of the Private Sector and the Media	Address the role of the media and the information and communication technology sector

[22] Adapted from Council of Europe, Amnesty International, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *A tool to end female genital mutilation*, 2014.

Diligence subject	Article of the Convention	State Obligations
To Protect and Support women and girls affected by or at risk of FGM	Article 18: General Obligations	§ 1: Take necessary legislative or other measures to protect victims from any further violence § 2: Take necessary legislative or other measures to ensure the provision of effective cooperation between all State agencies § 3: Ensure that measures: are based on gendered understanding of violence, focus on human rights of victim, are based on an integrated approach, aim at avoiding secondary victimisation, aim at empowering victims, allow for support services at same location, and address specific needs of vulnerable persons § 4: Ensure that provision of services does not depend on victim's willingness to press charges or testify against perpetrator § 5: Take appropriate measures to provide consular and other protection and support
	Article 20: General Support Services	Provide for appropriate and accessible general support services (legal, psychological counseling, financial assistance, housing, education, training and assistance in finding employment)
	Article 22: Specialist Support Services Article 4, § 3: Availability of services	Specialist services should complement general support services, run by specialized and experienced staff services Services should be available to all women, irrespective of legal status
	Article 19: Information Article 21: Assistance in Individual/ Collective Complaints	Ensure that victims receive, in a language they understand, adequate and timely information Ensure that victims have information on and access to individual/collective complaints mechanisms and promote provision of assistance in presenting such complaints
	Article 23: Shelters	Establish shelters in sufficient numbers to provide safe accommodation and to proactively reach out to victims
	Article 24:Telephone helplines	Provide round-the-clock free telephone helplines to give advice

Diligence subject	Article of the Convention	State Obligations
	Article 27: Reporting	Encourage reporting to a competent authority or organisation
	Article 28: Reporting by Professionals	Allow professionals normally bound by rules of professional secrecy to report suspected cases
	Article 60: Gender-Based Asylum Claims	§ 1: Ensure that gender-based violence against women may be recognized as a form of persecution § 2: Ensure a gender-sensitive interpretation of each of the 1951 Geneva Convention grounds § 3: Develop gender-sensitive asylum procedures, reception conditions, and support services for asylum seekers
	Article 61: Non-Refoulement	Respect the principle of non-refoulement
To investigate and protect	Article 49: General Obligations	Ensure that investigations and judicial proceedings in relation to cases are carried out without undue delay
	Article 50: Immediate Response, Prevention and Protection	Ensure law enforcement agencies engage promptly and appropriately
	Article 51: Risk Assessment and Risk Management	Ensure that an assessment of the lethality risk, the seriousness of the situation, and the risk of repeated violence is carried out by all relevant authorities
	Article 53: Restraining or Protection Orders Article 31: Custody, Visitation Rights and Safety	Offer restraining or protection orders for women and girls at immediate risk of violence or further violence Ensure that when a girl is at risk from her parents or guardians, the exercise of custody rights does not jeopardise rights and safety of the child
To prosecute and punish	Article 38: FGM	Introduce the necessary measures to ensure criminalisation of performing FGM and inciting, coercing or procuring a girl to undergo FGM
	Article 45, §1: Effective, proportionate and dissuasive sanctions	Ensure that FGM is punishable by effective, proportionate, and dissuasive sanctions

Diligence subject	Article of the Convention	State Obligations
	Article 42: Unacceptable Justifications for Crimes	Justifications on the basis of culture, custom, religion, tradition, or so-called "honour" cannot be used in order to reduce sanctions
	Article 46: Aggravating Circumstances	Include situations where a perpetrator has previously been convicted of FGM, where the offence resulted in severe physical or psychological harm for the affect woman, or if the offence was committed against a child or adolescent under 18
	Article 44: Extraterritoriality	Apply the principle of extraterritorial jurisdiction in FGM related cases
	Article 56: Measures of Protection	Protect the rights and interests of victims, including their special needs as victims

Migrants in Europe can be exposed to particular vulnerabilities, including their legal status, ill health, racism, discrimination, or a history of violence, exploitation and/or trafficking during migration routes. Research shows that the legal status of refugees, asylum seekers, and undocumented migrants is a risk factor for sexual ill health and sexual violence[23]. Being an ethnic minority or a woman with a precarious legal status further exacerbates the vulnerability of these women.

International protection

In a recent report by the European Parliament, one of the reasons[24] identified for the vulnerability of female refugee and asylum seekers is the difficulty they encounter in proving their asylum claims. They generally can provide less evidence for their applications compared with men, or deliberately choose to do so because female victims of torture or gender persecution are reluctant to report their stories, even if their stories might constitute the legal basis for an asylum application[25].

According to the United Nations High Commissioner for Refugees (UNHCR), during the first three quarters of 2014, 71% of the female asylum seekers in the EU were survivors of FGM[26], thus reinforcing the importance of guaranteeing a gender-specific focus. The Istanbul Convention requires States Parties to criminalise FGM (article 38); to recognise gender-based violence against women, including FGM, as a form of persecution (refugee status) and serious harm (subsidiary

[23] Keygnaert Ines, *Sexual violence and sexual health in refugees, asylum seekers and undocumented migrants in Europe and the European Neighbourhood: determinants and desirable prevention*. Doctoral thesis. ICRH Monographs, 2014.
[24] Bonewit, A. and Shreeves, R., Reception of female refugees and asylum seekers in the EU. Case study Germany, European Parliament, February 2016, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536497/IPOL_STU(2016)5 36497_EN.pdf.
[25] Sansonetti Silvia. Female refugees and asylum seekers: the issue of integration. Study. European Parliament DG for Internal Policies Citizen's Rights and Constitutional Affairs, Women's Rights and Gender Equality, 2016.
[26] Novak-Irons F., *Female genital mutilation: a case for asylum in Europe*, Forced Migration Review, May 2015. http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/climatechange-disasters/FGM.pdf.

protection status); to ensure a gender-sensitive interpretation of the 1951 Convention Relating to the Status of Refugees grounds; and to develop gender-sensitive reception conditions (article 60). However, gender-sensitive approaches are very diverse throughout Europe, as EU countries that already dealt with gender-based asylum claims grounded in the fear of prosecution adopted different solutions[27,28]. These different systems have led to a non-homogenous asylum-seeker system. This is exacerbated by the fact that when national gender guidelines do exist, due to their non-legally binding nature, almost no monitoring systems are put in place regarding their implementation. One effect of the non-binding nature of such measures is that in some countries international protection is given to women by granting refugee status, while in other countries only subsidiary protection is given in cases of gender-related asylum requests[29].

The European Commission's proposals to reform the Common European Asylum System (CEAS) create a number of obligations for EU Member States with regard to gender-specific acts of persecution, including FGM[30]. Member States should already have transposed these Directives into national law[31].

With regard to FGM, accepting persecution as grounds for attaining asylum status depends on the gender sensitivity of the interpretation of persecution, which is adopted individually by each EU country. While the UNHCR and the ECtHR recognize that victims or potential victims of FGM could apply for international protection on the prosecution ground "membership of a particular social group", across the European Member States this international standards has been implemented in different ways[32], as there is no minimum common standard throughout the EU concerning the criteria that should be used to evaluate the asylum claim of a victim or possible victim of

[27] Reikh Ali H, Querton C, Soulad E., *Gender related asylum claims in Europe: a comparative analysis of law, policies and practice focusing on women in nine EU Member States. France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom*. European Parliament, DG for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs, 2012 (Gender Equality.).

[28] "Malta, Romania, Sweden and the UK have adopted non-legally binding, gender specific guidelines on international protection, while Belgium and Italy do not have such gender specific guidelines but have developed alternative guidance material. France, Hungary and Spain have neither national gender guidelines nor alternative gender-specific guidance. However, in Spain, the national representation of the UNHCR has developed a specific brochure" (Reikh Ali H et al, op cit).

[29] Querton C. Gender-related asylum claims in Europe: a comparative analysis of law, policies and practice in nine EU Member States. Asylum Aid, 2012.

[30] CEAS includes the following directives: Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast); Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing of international protection (recast). Recognize that acts of persecution can take the form of acts of a gender-specific or child-specific nature (Article 9); The recast Directives created obligations for EU member states to, among others: consider gender-related aspects when determining membership of a particular social group or identifying a characteristic of such a group (Article 10); ensure that authorities and organisations working on "qualification" aspects receive adequate training (Article 37); take into account the specific situation of vulnerable persons such as, inter alia, pregnant women, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation (Article 21).

[31] End FGM European Network. FGM in the Asylum Directives on Qualification, Procedures and Reception Conditions. END FGM Network Guidelines for Civil Society, March 2016.

[32] The approach of the member states toward the future risk of being subjected to FGM vary: not in all asylum claims it was considered as a form of persecution. The national Courts adopted different criteria to evaluate the seriousness of the harm of past FGM and the future risk to be subjected to FGM such as the age of the applicant or if the applicant has been already submitted to the practice. (Rheik Ali et. al., 2016, op cit.).

FGM.[33] Each country adopts a different interpretation of the Refugee Convention and a different gender-sensitive approach toward the meaning of persecution.

The lack of common legally binding provisions recognizing FGM as a specific ground for granting refugee status also limits the non-refoulement of women with FGM or those whose daughters risk being subjected to the practice, despite the existence of guidelines by UNHCR on gender-related persecutions[34] and refugee claims involving FGM[35]. National courts need to evaluate asylum claims on a case-by-case basis, by assessing whether FGM can be defined as persecution, the seriousness of the persecution, if the persecution is related to one of the grounds in the Geneva Convention, and the reliability of the asylum-seeker's individual claim. Hence, the implementation of national and international law provisions and guidelines on non-refoulement for receiving States that recognize FGM as grounds for seeking asylum is recommended and in line with the European Parliament resolution adopted on 8 March 2016[36], as well as article 61 of the Istanbul Convention.

A milestone for the international protection of women against FGM was the recognition of FGM as a form of torture and other ill-treatment by different national and international bodies[37]. As a result, the European Court of Human Rights began applying article 3 of the 1950 European Convention of Human rights,[38] meaning that every State has the obligation to not return or expel a woman to a country where she could be subjected to FGM [39].

It is important to emphasize that even if a woman has already been subjected to FGM, due to the permanent and irreversible nature of FGM, she may still need international protection to not be returned to her country of nationality, particularly to a State where reinfibulation is common practice[40]. In some cases, asylum claims were denied for various reasons, including failing to establish grounds as provided under the Geneva Convention and presuming that a woman who has already subjected to FGM lacks the fear of persecution because "FGM is generally performed only once"[41]. As Special Rapporteur on Torture Juan E. Méndez stated, the prohibition of refoulement is

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[33] The Asylum Qualification Directive adopted in late 2011 highlighted already the necessity to introduce a « common concept of the persecution ground "membership of a particular social group". For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilization or forced abortion, should be given due consideration insofar as they are related to the applicant's well-founded fear of persecution.» Directive 2011/95/EU,13 December 2011.

[34] UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002.

[35] UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009.

[36] European Parliament resolution of 8 March 2016 on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)). This resolution recognizes FGM as a form of violence and discrimination and declared it a form of persecution; states are urged to foresee FGM as valid ground for seeking asylum in the EU.

[37] For example: Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para. 18, available at: http://www.unhcr.org/refworld/docid/47ac78ce2.html; Human Rights Committee (HRC), General Comment No. 28: Article 3 (The equality of rights between men and women), 29 March 2000, CCPR/C/21/Rev.1/Add.10, para. 11, available at: http://www.unhcr.org/refworld/docid/ 45139c9b4.html.

[38] Emily Collins and Ashley Akaziebie v. Sweden, European Court of Human Rights, Application no. 23944/05, 8 March 2007.

[39] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3 states that:" No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

[40] In some countries, women risk to be reinfibulated several times after each childbirth or upon marriage in order to maintain the "purity" of the woman.

[41] In Re A-T 2007.

absolute and an important additional source of protection[42]. States should ensure that refugees and asylum-seekers' claims are assessed in accordance with international guidance on FGM, including the prohibition of non-refoulement.

A good example of a national provision is the case of Spain. In 2007, Spain adopted a law that complemented its national asylum law (5/1984)[43]. Pursuant to article 3 of the 2007 law, provisions concerning refugee status, enumerated in article 1, extend to women who escape their country of nationality for a well-founded fear of persecution for gender-related purposes.[44] The provision makes it easier for judges to extend international protections to women and girls fearing prosecution for FGM or other gender-related practices. Additionally, women and girls do not have to depend solely on a judge's interpretation, but can appeal to an explicit law provision that provides for refugee status in cases of FGM.

Given that FGM is not only a violation of human rights but also amounts to torture or CIDT, States have the obligation to protect asylum-seekers from such violation of their rights as well as torture. Therefore, a minimum standard for gender related asylum claims should be implemented through national legislation within the European common immigration and asylum framework that should provide legally binding guidance to States in adopting a gender sensitive approach to the interpretation of persecution.

Supporting women and girls with—or at risk of—FGM

Women and girls who have been subjected to FGM require, among others, health services with different treatment options related to their health and wellbeing. These options might be FGM-related (see table 1), or not. Substantial evidence exists on how health services in countries where FGM is not common practice are inadequately addressing the needs of women and girls. These inefficiencies include lack of knowledge on FGM, lack of skills and trainings to manage the care of these clients, low competencies in handling discussions about FGM with women, racist reactions, and exposing women and girls to humiliating or judgmental reactions[45]. These inefficiencies ultimately result in not providing victims of FGM the care that they need.

Difficulties accessing appropriate health care for FGM-related issues, including discrimination on the part of healthcare workers and a lack of knowledge about or sensitivity to the needs of women with FGM, violate the right to health and can amount to torture or other ill-treatment. Taking into account the intersecting vulnerabilities related to migration/ethnicity/race/gender, and in particular the legal status of women and girls with FGM, the provision of adequate health care for women and girl victims of FGM becomes further jeopardized by these intersections. Indeed,

[42] A/HRC/31/57, §33.

[43] Law 5/1984, 26 March 1984, regulating the right to asylum and the refugee status, as amended by Law 9/1994, 16 May 1994–Asylum Law (Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado, modificada por Ley 9/1994, de 16 de mayo).

[44] Law 3/2007, 22 March 2007. (Ley Orgánica 3/2007 de 22 March).

[45] *See* for example, BMC International Health Human Rights, *Female genital mutilation and cutting: a systematic literature review of health professionals' knowledge, attitudes and clinical practice*, 2015 (Published online 2015 December 10), available at: 10.1186/s12914-015-0070-y; Cappon S, L'Ecluse C, Clays E, Tency I, Leye E., *Female genital mutilation : knowledge, attitude and practices of Flemish midwives*. 31(3) Midwifery, 2015,pp. 29-35; Zaidi N, Khalil A, Roberts C, Browne M J Obstet Gynaecol, *Knowledge of female genital mutilation among health care professionals*, February 2007, 27(2):161-4; Leye E, Ysebaert I, Deblonde J, Claeys P, Vermeulen G, Jacquemyn Y, Temmerman M, *Female genital mutilation: knowledge, attitudes and practices of Flemish gynaecologists*, 13(2) Eur J. Contracept Reprod. Health Care, June 2008, pp.182-90; Ali AA, *Knowledge and attitudes of female genital mutilation among midwives in* Eastern *Sudan*. 9 Reprod Health, 28 September 2012, p. 23.

as the Special Rapporteur affirmed[46], States' failures to properly screen migrants and refugees, identify victims of torture, including victims of FGM, and provide appropriate care and support can re-traumatize victims and inflict additional mistreatment. Given that women with FGM are considered vulnerable, and that States have a heightened obligation to protect vulnerable and marginalized individuals from torture[47], subjecting women and girls to humiliating, discriminating, or judgmental attitudes in the health setting prohibits them from enjoying the right to the highest attainable standard of health, and can amount to torture or ill-treatment. The Istanbul Convention requires States Parties to ensure that public welfare services have the professional expertise and capacity to identify and address women's and girls' uniquely difficult situations and traumas (article 20), and to provide such services to all women and girls, irrespective of their legal status in the country (article 4, §3). With regard to FGM, the Special Rapporteur's report on Gender Perspectives could include a recommendation that urges States to undertake appropriate training and introduce community-level gender and diversity sensitisation campaigns that address underlying discriminatory attitudes in the provision of health care services to women and girls with FGM.

A growing concern regarding FGM is the expanding trend of medicalising the practice[48]. This is particularly relevant in countries such as Egypt, Nigeria, Malaysia, Mali, Kenya, Yemen[49], Northern Sudan[50], and Indonesia[51]. In Indonesia, where over 50% of women are excised, health professionals perform one-third of the excisions. In Egypt, where over 90% are subjected to FGM, this amounts to 77%. Various organisations and scholars have argued that medicalising FGM negates the long-term gynecological and obstetric effects of cutting the genitalia, as well as the impact on the emotional, psychological, and sexual wellbeing of the woman, and that it remains a violation of the right to bodily integrity, even if performed by medical professionals[52].

However, a number of other effects of medicalization can be noted, including the perception that medicalising FGM is a safer procedure, which raises concerns about the institutionalizing and legitimizing effects of medicalization. Moreover, the medicalising trend might equally have a negative impact on women and girls seeking asylum. Given the current issues related to obtaining asylum on the grounds of fear of persecution related to FGM (see discussion above), the fact that FGM is performed in a medical setting could allow it to be considered a minor procedure, and hence undermine the request for asylum–not only because of a lack of explicit grounds but also because of a lack of well-founded fear of persecution[53].

In his 2013 report on torture in health care settings, the Special Rapporteur expressed concern about the failure to detect abusive and mistreating practices in health care settings that amount to torture or ill-treatment due to the fact that the practices exceed the scope of violating the right to health but are justified because they are described as medical necessities, or "healthcare treat-

[46] A/HRC/31/57 §31.
[47] Inter-American Court of Human Rights, Ximenes-Lopez v. Brazil, judgment of 4 July 2006, in A/HRC/31/57.
[48] The medicalisation of FGM refers to situations in which the procedure (including re-infibulation) is practiced by any category of health care provider, whether in a public or a private clinic, at home or elsewhere, at any point in time in a woman's life (WHO, 2016, op cit).
[49] Robertson L, Szaraz M. 2016. The medicalization of FGM. 28 Too Many.
[50] UNICEF, 2013. Female Genital Mutilation/Cutting : A statistical overview and exploration of the dynamics of change.
[51] G.I. Serour. Medicalisation of female genital mutilation/cutting. African Journal of Urology, Vol. 19, September 2013.
[52] *See* for example: Global Strategy to stop health care providers from performing female genital mutilation, 2010, available at: http://www.who.int/reproductivehealth/publications/fgm/rhr_10_9/en/.
[53] Foldès P, Martz F. The medicalisation of female genital mutilation FGM and asylum in Europe, Forced Migration Review, May 2015.

ments"[54]. The Special Rapporteur affirmed that non-therapeutic, intrusive, and irreversible treatment might constitute torture or ill-treatment when enforced without the free and informed consent of the person concerned[55]. Indeed, informed consent is, as the Special Rapporteur states, "a fundamental feature to guarantee the respect of individual's autonomy, self-determination and human dignity"[56]. In particular, informed consent has to be guaranteed to avoid torture or ill-treatment where the situation presupposes powerlessness of the victim, which is the case when a person is controlled by another. This situation can occur in health care settings, were patients rely on the judgment and skills of health care professionals, and in the case of FGM performed on minors, consent is given by parents. However, in countries where FGM is common practice, health professionals might adhere to the same social norms that perpetuate FGM, and as such, might not question its performance.

Furthermore, in line with a 2011 report by the United Nations High Commissioner for Human Rights[57], in which concerns were raised about health care practices and violence based on sexual orientation and gender identity, the Special Rapporteur on Torture, stated that informed consent has to be prioritized in order to guarantee the right to health of vulnerable groups such as lesbians, gay, transsexuals, and intersex persons. The Special Rapporteur recommends repealing any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, and "reparative therapies" or "conversion therapies", when enforced or administered without the free and informed consent of the person concerned. Moreover, to ensure a gender-sensitive approach toward the torture protection framework, he identified some reproductive-rights practices in health care settings that amount to torture or ill-treatment, including FGM. In the report, the Special Rapporteur recalled that States have the obligation to regulate, control, and supervise health care practices with a view to preventing mistreatment under any pretext. The Committee against Torture and the Inter-American Court of Human Rights have confirmed that States have the particular obligation to ensure special protection of minorities as well as marginalized groups and individuals from torture, as such persons are generally more at risk of experiencing torture and ill-treatment.

An example of how a State could act with regard to such obligations is Italy's law against FGM. Law no. 7/2006[58]introduced article 583 bis and 583 ter into Italy's criminal code,[59] and serve to prevent and prohibit FGM. Article 583 bis establishes FGM as a specific crime. The first paragraph of this article provides for imprisonment from four to twelve years for perpetrators who cause the mutilation of a female genital organ for no therapeutic reason. The second paragraph provides for imprisonment from three to six years for those who, without therapeutic reason, cause injuries to female genital organs, other than those referred to in the first paragraph, with the purpose to impair females' sexual functions. In both cases, the sanction increases by one-third if the victim is

[54] A/HRC/22/53, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2013.
[55] A/HRC/22/53, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2013.
[56] A/HRC/22/53, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2013.
[57] A/HRC/19/41.
[58] Law 7/ 2006, 9 January 2006, Provisions concerning the prevention and prohibition of female genital mutilation (Legge 9 Gennaio 2006, n.7, Disposizioni concernenti la prevenzione e il divieto delle pratiche di mutilazioni).
[59] Italian Criminal Code (approved by Royal Decree No. 1398 19 October, 1930).

a minor. Article 583 ter provides accessory sanctions for health care providers that perform FGM, and calls for suspension from professional activity for three to ten years.

States' indifference or inaction provides a form of encouragement and de facto permission for the practice to take place and go punished[60]. When States, even in the presence of specific criminal laws prohibiting FGM, do not take action to punish perpetrators, including medical professionals, this suggests consent, acquiescence and, at times, justification of violence. One could even argue that, given that States have enacted laws prohibiting FGM, those States are aware of a pattern of continuous violence in a particular region or community, targeted at a specific group and performed by non-State actors (i.e., minor girls excised by excisors, medical doctors with the agreement of parents), and are thus obliged to respond appropriately[61]. As the Special Rapporteur asserts, States fail in their duty to prevent torture and ill-treatment whenever their laws, policies, or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, a prohibited act to be performed with impunity.

Investigating and prosecuting FGM

The Special Rapporteur's report on gender states that "domestic laws permitting the practice contravene States' obligation to prohibit and prevent torture and ill-treatment, as does States' failure to take measures to prevent and prosecute instances of female genital mutilation by private persons[62]". It further cautions that perpetrators include the victim's parents, and in this context, prosecution and the imposition of sanctions, including imprisonment, must result from a nuanced determination that takes the best interests of the child into account.

In the European context, implementing laws regarding FGM has proven challenging. When not carefully accompanied by adequate measures, the implementation of laws can have a number of effects that may amount to torture.

In Europe, FGM is prohibited either by general criminal laws or specific criminal laws. By July 2014, 13 EU Member States had established specific laws criminalising FGM[63] (Austria, Belgium, Croatia, Cyprus, Denmark, Germany, Ireland, Italy, Malta, the Netherlands, Spain, Sweden and the UK). However, the number of court cases remains limited, which has raised concern in some countries, such as the UK, as to the usefulness of having a criminal law that is not implemented.

Research on the implementation of laws indicates that there are a number of issues related to reporting FGM cases and finding sufficient evidence to bring a case to court[64],[65]. Several measures have been suggested to increase the number of reports sent by professionals to judicial authorities, or to acquire evidence of FGM. One of these measures is the compulsory examination of girls' genitals to detect whether or not a girl is still intact. However, introducing such a measure to enforce the law on FGM is highly controversial and poses several critical challenges to put the law into practice. In the Netherlands, for example, such annual gynaecological screenings of all minor girls

[60] A/HRC/31/57.
[61] A/HRC/31/57, §11.
[62] A/HRC/31/57, § 62
[63] EIGE, 2015. Estimation of girls at risk of female genital mutilation in the European Union. Report.
[64] Leye E, Deblonde J, Garcia-Anon J, Johnsdotter S, Kwateng-Kluvitse A, Weil-Curiel L, Temmerman M. An analysis of the implementation of laws with regard to female genital mutilation in Europe. Crime Law Social Change, February 2007, Vol. 47, Issue 1.
[65] Johnsdotter S, Mestre I, Mestre R.M., Female genital mutilation in Euorpe: an analysis of court cases. European Commission, 2015; Johnsdotter S., Discrimination of certain ethnic groups: Ethical aspects of implementing FGM legislation in Sweden. Malmö University, Sweden, 2009.

from population groups where FGM is practiced was suggested in 2005. After an in-depth inquiry by a special Commission, the Dutch government concluded that it did not have the legal authority to oblige minors from specific population groups to cooperate with gynaecological examination[66]. The Commission argued that the measure was unconstitutional (i.e., against the principle of discrimination, as it singles out population groups to impose a measure), against the individual's right to freedom, and that only perpetrators, not victims, could be obliged to endure such a measure on the basis that it endangered public health. We have argued elsewhere that imposing such a measure regarding FGM is discriminatory and repressive, and that—if deemed relevant and feasible—genital screenings should be framed within the detection of sexual abuse of all minors[67]. Furthermore, such a measure would require substantial resources to put it into practice, in particular obtaining informed consent by parents and training professionals[68].

In his Gender Perspectives and torture report, the Special Rapporteur cautions that prosecution and the imposition of sanctions must result from a nuanced determination that takes the best interest of the child into account. Article 3 of the CRC stipulates that "the best interests of the child" must be a primary consideration. However, such "best interests" should not be interpreted in an overly culturally relativist way, whereby other rights guaranteed by the CRC are denied[69], nor should such measures contribute to the revictimization of girls and women, or contribute to the suffering and pain already inflicted upon them. Inclusive, non-paternalistic and more convincing cross-cultural best interest arguments must be made when seeking to investigate and prosecute FGM. Finally, overemphasizing the need to criminalize FGM can cause further harm to the girl and her whole family, if the suspicion proves to be unfounded. This was the case in Sweden, where vague suspicions reported to police resulted in extensive measures taken in the form of compulsory genital examinations, custodians being detained, and children taken into custody by force. The criminal inquiries in none of those cases ended in prosecutions, and local authorities were charged with ethnic discrimination due to the disproportionate response and harm caused to the Swedish Somalis under suspicion[70].

One effective method to overcome the issues associated with reporting by professionals and implementation is the development of guidelines to assist professionals in assessing the level of risk of FGM[71]. This would contribute to a more nuanced response to the implementation of laws, as requested by the Special Rapporteur.

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[66] Commissie Bestrijding Vrouwelijke Genitale Verminking, 2005. Bestrijding vrouwelijke genitale verminking. Beleidsadvies. Advies uitgebracht door de Commissie Bestrijding Vrouwelijke Genitale Verminking aan de minister van Volksgezondheid, Welzijn en Sport, Zoetermeer.

[67] Leye et. al., (2007, op cit.).

[68] Given that in a European context, the caseload of women and girls with FGM is lower than in countries where FGM is highly prevalent, only a very limited number of health professionals can built sufficient expertise to detect the 'minor' types of FGM, such as incisions, prickings.

[69] Leye E and Middelburg AM, op cit.

[70] Johnsdotter S, Mestre i Mestre R.M. Female genital mutilation in Europe: an analysis of court cases. European Commission, 2015; Johnsdotter S. Discrimination of certain ethnic groups? Ethical aspects of implementing FGM legislation in Sweden. Malmö University, Sweden, 2009.

[71] *See* for example Decision Tree in Belgium: the Decision Tree assists professionals to detect FGM and support girls affected by or at risk of FGM. It is a protocol describing the protection measures that professionals need to adopt when confronted with a risk or an act of FGM. The tree is supplemented by risk assessment indicators and a risk scale which professionals are advised to consider before reporting. Risk indicators aim to help professionals in making an objective assessment of the situation and have been designed to be culturally sensitive and child sensitive. Once the risk indicators have been identified, professionals can refer to a five level risk scale. Protection measures as described in the decision tree are then determined according to the level of risk identified by the professionals. Available at: www.strategiesconcertees-mgf.be/wp-content/uploads/MGF-tryptique_final_RTP.pdf.

4. Conclusion

The need to use a gender lens when implementing the international human rights framework, in particular the torture framework, is clearly illustrated when examining FGM in a migration context. The intersecting realities of gender, race, legal status, and access to services provide a complex myriad of issues that need to be addressed to preserve the human rights of women and girls affected by FGM. This paper identified a number of critical issues that need to be taken into account when putting the framework into practice. The many issues we highlighted underline the need for a gender-sensitive approach when applying the torture framework. The need for such a framework cannot be overemphasized: It sets out clear guidance to preserve women and girls from torture and ill-treatment, which includes FGM.

Pregnancy and Virginity Testing in Educational Settings and the Torture and Other Ill-Treatment Framework

Esther Major*

Abstract

It is still the case that in some countries girls are subjected to humiliating and degrading "tests" if they are suspected of being pregnant. Often adults in positions of authority will touch girls' breasts and stomachs, or make them take urine tests to ascertain their pregnancy status. The subsequent punishments for girls who are found to be pregnant include public humiliation, exclusion from school or exams and sometimes physical violence. So-called "virginity" testing of young women and girls also persists in a number of countries in order for them to be admitted to schools and colleges, to sit exams, or to qualify for bursaries.

The evidence shows that negative gender stereotypes motivate such invasive tests and punishments and that their continued existence reaffirms negative societal structures that harm women and girls. Mandatory pregnancy and "virginity" tests were raised by the United Nations Special Rapporteur on Torture in former mandate holder Juan E. Méndez's ground-breaking report on gender and torture or other ill-treatment.

This article applies the torture and ill-treatment framework to the experiences of girls subjected to such tests and punishments in schools and colleges. It draws on the stated intentions of proponents of these policies and laws, transnational jurisprudence and international norms. The analysis indicates that, following the lead shown by the Special Rapporteur, a more robust application of the torture and other ill-treatment framework to these violations is necessary, appropriate and helpful towards protecting girls from acts of torture and other ill treatment as well as affirming them as full rights holders.

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Introduction

"They touched our breasts and stomachs to see if we were pregnant. Some girls were made to take urine tests."[1]

In some countries girls routinely face mandatory or coerced pregnancy tests in order to gain access to school or to sit exams.[2] Some of these "tests" involve teachers feeling girls' breasts and stomachs or compelling them to take urine tests. Girls are then frequently subjected to public shaming and punishment. Pregnancy status is still a disciplinary offence in some countries, and girls in such discriminatory contexts are excluded from school if suspected of being, or found to be, pregnant.[3] In other contexts, humiliating, degrading and discriminatory "virginity" tests are a prerequisite for girls seeking to enrol in school or college, sit exams, or apply for bursaries for study.[4]

The issue of mandatory pregnancy and "virginity" tests in educational settings was raised by the mandate of the United Nations (UN) Special Rapporteur on Torture in former mandate holder Juan E. Méndez's ground-breaking report on gender and torture or other ill-treatment.[5] This article explores these two very specific violations of the right of girls[6] to be free from torture and other ill-treatment in educational settings.

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1 Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone* (Index: AFR 51/2695/2015), interview with 18-year old-girl, Sierra Leone, 2015, p. 26, available at https://www.amnesty.org/en/documents/afr51/2695/2015/en/.

2 Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone.* Further, a follow up research trip findings also provide further testimony and evidence for the continued violation of girls' human rights: Amnesty International, *Sierra Leone: Continued pregnancy ban in schools and failure to protect rights is threatening teenage girls' futures, 2016,* available at https://www.amnesty.org/en/latest/news/2016/11/sierra-leone-continued-pregnancy-ban-in-schools-and-failure-to-protect-rights-is-threatening-teenage-girls-futures/; Further, Center for Reproductive Rights, *Forced Out: Mandatory Pregnancy Testing and the Expulsion of Pregnant Students in Tanzanian Schools*, 2013, available at https://www.reproductiverights.org/document/tanzania-report-forced-out-mandatory-pregnancy-testing-expulsion.

3 Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone;* Amnesty International, *Sierra Leone: Continued pregnancy ban in schools and failure to protect rights is threatening teenage girls' futures, 2016;* and Center for Reproductive Rights, *Forced Out: Mandatory Pregnancy Testing and the Expulsion of Pregnant Students in Tanzanian Schools*, 2013.

4 News24, *Girls be warned: Lose your virginity, you lose your bursary*, 22 January 2016, available at http://www.news24.com/SouthAfrica/News/municipality-warns-maidens-lose-your-virginity-lose-your-bursary-20160122; The Guardian, *South Africa's 'virgin bursaries' ruled unconstitutional,* 17 June 2016, available at: https://www.theguardian.com/world/2016/jun/17/south-africa-virgin-bursaries-ruled-unconstitutional-university-scholarships-women-gender-equality-education; Human Rights Watch, Indonesia: Military Imposing 'Virginity Tests', 13 May 2015, available at: https://www.hrw.org/news/2014/11/17/indonesia-virginity-tests-female-police; Human Rights Watch, *Abusive, Inaccurate 'Virginity Tests' Won't Help, Educating Children Will,* 14 September 2014, available at https://www.hrw.org/news/2013/09/14/abusive-inaccurate-virginity-tests-wont-help-educating-children-will.

5 In the report by the Special Rapporteur to the Human Rights Council titled *Gender perspectives on torture and other cruel, inhuman and degrading treatme*nt or punishment (A/HRC/31/57) the issues of virginity testing, forced or coerced pregnancy testing and the expulsion of pregnant girls from school are specifically raised in paragraph 46 of the report, as follows: "In some States, such practices include requiring sex workers to undergo weekly gynaecological examinations and blood tests, and forced or coerced pregnancy testing by means of physical examination or urine testing as a precondition for attending schools and public examinations. Virginity testing and the expulsion of pregnant girls from schools, which often result in long-term harmful consequences, constitute forms of discrimination and ill-treatment" and, further, in paragraph 71(f) of the report, which recommends that states "Effectively monitor and regulate practices by public and private actors in health-care and educational settings to ensure the eradication of prohibited practices including, inter alia, the denial of maternal health care and compulsory medical examinations such as forced pregnancy and virginity testing, and investigate, prosecute and punish perpetrators;"

6 Although the article largely focuses on girls under the age of 18, women who have also been subjected to virginity testing in higher educational settings such as academies and colleges are also referred to.

The first section looks at how girls who are enrolled in schools and are pregnant or suspected of being pregnant are tested and punished by school authorities. The second section analyses the practice of subjecting women and girls to "virginity" testing for the purposes of admission to schools and colleges, in order to sit exams, or to qualify for bursaries. The analysis concludes by setting out the actions that states must take to fulfil their obligation to prevent, eradicate, punish and redress acts of torture and other ill-treatment in relation to girl students and prospective/aspiring students. It also looks at measures that other stakeholders can take in order to contribute to a positive change and ensure accountability for violations of girls' fundamental human rights in educational settings.

While this article will focus on gender-based human rights violations, it is crucial to recognise that other factors also determine whether and how a person experiences such violations in educational settings, and that each violation must be assessed using an intersectional lens. A childs race, class, disability and their real or perceived gender non-conformity and sexual orientation can have a very real impact on their experience of school. In particular, such factors affect the risk of physical punishment or sexual abuse that they may face at the hands of adults in positions of authority. Couple any of these aspects of their identity with belonging to a marginalized group, such as Roma, and a child's chances of having an education on an equal basis with others are even more remote. Indeed, research shows that Roma children are even more likely to face humiliating treatment and punishments from teachers and bullying from classmates and their parents, with little chance of redress.[7]

Tests motivated by discrimination and negative stereotypes

The arguments put forward by proponents of pregnancy and "virginity" testing are invariably ridden with negative stereotypes and steeped in archaic ideas of what the role of women and girls in society should be. They frequently infer that pregnant girls are a negative influence on others, and often imply that pregnant girls are of low moral character, physically weak, sick, and less able to manage studies. Policies that are developed and implemented on the basis of such arguments reflect these harmful notions.[8]

By employing policies of exclusion and other punishments on the basis of pregnancy, a state confers all responsibility on girls for their early pregnancy. It denies the states' potential role in failing to ensure girls' right to be protected from sexual violence, or to guarantee their rights to information about and access to sexual and reproductive health information, services and goods, including the option of safe and legal abortion services.[9] This means that the state effectively

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[7] Amnesty International, *Segregation, bullying and fear: The stunted education of Romani children in Europe, 2015*, available at https://www.amnesty.org/en/latest/news/2015/04/the-stunted-education-of-romani-children-in-europe/.

[8] Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone* (Index: AFR 51/2695/2015), interview with 18-year old-girl, Sierra Leone, 2015, see section titled *The governments flawed justifications for the ban* at page 17, and the section titled *Stigma and negative stereotypes about pregnant girls being unable to study or pass exams* at page 38 respectively, available at https://www.amnesty.org/en/documents/afr51/2695/2015/en/; also, the argument that the pregnant girl at the centre of the case T-348/07 in Colombia was too weak and delicate to take the same classes as her peers was one consistently put forward by the school staff. *See* Sentencia T-348/07, Corte Constitucional de la Republica de Colombia, available at http://www.corteconstitucional.gov.co/relatoria/2007/T-348-07.htm.

[9] Guidance as to state obligations in relation to sexual and reproductive health can be found in the Committee on Economic, Social and Cultural Right's General Comment No. 22, E/C.12/GC/22, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en.

washes its hands of any role it may have had in creating the circumstances that lead to their situations. It also denies that girls have a right to engage in consensual sexual conduct and to choose to become pregnant.

The issue of mandatory or coerced pregnancy testing and punishment on the basis of pregnancy status is not a new one. In Sierra Leone, for example, the practice of excluding girls for pregnancy is a longstanding human rights concern. In 2002, the Truth and Reconciliation Commission deemed the practice *"discriminatory and archaic."*[10] Over a decade later, in March 2015, as children returned to school after the Ebola outbreak, the Minister for Education, Science and Technology, Mr. Bah, proclaimed an official ban on *"visibly pregnant"* girls from schools and exams. Further, Mr. Kaikai, the Minister of Social Welfare, Gender and Children's Affairs, was quoted as saying that it would be unacceptable to have pregnant girls sitting alongside *"normal"* girls at school and that pregnant girls must face *"consequences for their actions,"* in this case being excluded from mainstream schools and prohibited from sitting exams.[11]

In Colombia, when a pregnant student was instructed to attend separate classes on her own, isolated from her classmates, the school staff claimed that this was because her health was weak and her delicate condition precluded her from following the same programme as her friends. They chose to ignore a doctor's testimony that pregnancy is not an illness and that there was no medical reason why the student should not follow the same schedule as her peers, and study alongside them, if she wished to do so.[12]

In South Africa, according to a UThukela District Municipality spokesman, girls applying for a bursary ought to have their virginity tested regularly because *"[t]hey must keep pure and protect themselves from diseases like AIDS."*[13] When virginity testing was proposed at a police academy in Indonesia, the reason given was to *"maintain the honour of the service"* and *"combat prostitution."*[14]

These practices humiliate girls for their real or perceived sexual conduct, have a lasting impact on their wellbeing, and can drastically affect their life chances.[15] Girls face fraught and coercive circumstances. Refusing to take a pregnancy or virginity test can leave them vulnerable to accusations, rumours and disapproval. It may out her as a victim of sexual violence. Further, a girl's refusal also may close the door on her chances to gain entry to college or obtain a bursary. It is an obvious fact, but worth emphasizing nonetheless, that since these discriminatory policies are based on gender, boys do not have to endure, or live in fear of being subjected to, these specific tests, accusations, or subsequent punishments and other social consequences. Tests and punishment for pregnancy, or "virginity tests" are neither legitimate nor effective means to reduce early pregnancies, if that is the purported intent.

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[10] Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, 2004 (Report of the Sierra Leone TRC), at para 360, available at: http://www.sierraleonetrc.org/index.php/view-report-text-vol-2/item/volume-two-chapter-three.

[11] Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone*, at page 17.

[12] Sentencia T-348/07, Corte Constitucional de la Republica de Colombia, available at http://www.corteconstitucional.gov.co/relatoria/2007/T-348-07.htm.

[13] News24, *Girls be warned: Lose your virginity, you lose your bursary*, 22 January 2016, available at http://www.news24.com/SouthAfrica/News/municipality-warns-maidens-lose-your-virginity-lose-your-bursary-20160122.

[14] Human Rights Watch, *Indonesia: Military Imposing 'Virginity Tests'*, 13 May 2015 and https://www.hrw.org/news/2014/11/17/indonesia-virginity-tests-female-police.

[15] Special Rapporteur to the Human Rights Council, Gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment, (A/HRC/31/57) at para. 46.

Deliberately degrading, shaming and humiliating

"In the view of the Committee [on the Rights of the Child], corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."[16]

Where there is an official policy of excluding pregnant girls from schools or colleges, teaching staff and other adults in positions of authority feel empowered, and indeed instructed, to take measures to ascertain girls' pregnancy status in order to enforce the ban. This is the case whether the policy of exclusion on the basis of pregnancy status is imposed at the individual school or college level or is a national government-backed policy. In countries where such policies persist, the practices of touching of girls' stomachs and breasts, or compelling them to take urine tests, are common.[17] As one 18-year-old girl in Sierra Leone told Amnesty International in 2015:

"We had to register and queue to get an attendance slip for the exams. The female teachers told all the girls we would be searched as pregnant girls are not allowed to sit exams. We were made to line up and we were checked. They touched our breasts and stomach to see if we were pregnant. Some girls were made to take urine tests. The teacher was wearing gloves when she was checking us, but only used one pair of gloves throughout the process, which is dangerous during Ebola times. I felt really embarrassed when this happened to me. Many girls left, as they were scared the teachers would find out they are pregnant. About 12 pregnant girls did not sit their exams. This policy is bad as many girls may not sit exams."[18]

Adults in schools, such as teachers, heads of the school, nurses or assistants, occupy positions of authority over the children in their care, In addition to the age difference between a child and an adult, the particular power imbalances between students and school staff closely mirror those that underlie the dynamics of power between prison officials and detainees in detention settings, where abuses, including torture and other ill-treatment, tend to occur because one party has a position of power.

Public shaming, disclosure of private information

"One teacher announced…that the girl was pregnant in front of the whole school, took her bag away (she was protecting her stomach) and beat her with a cane."[19]

Public shaming, verbal abuse, and violence against girls often accompany policies that punish girls for being pregnant. Such policies provide a social licence to teachers, fellow pupils and other members of the community to denigrate and judge girls.

Indeed, a specific component of these tests is to publicly shame the girl and to use her as an example to provoke fear in others. Girls who witness such acts against others are also intimidated and shamed. Public shaming and humiliation have been found to be key elements in acts of torture

[16] Committee on the Rights of the Child, General Comment No.8 (CRC/C/GC/8 (2006)) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, at para. 11.
[17] *See*, for example, Center for Reproductive Rights, *Forced Out: Mandatory Pregnancy Testing and the Expulsion of Pregnant Students in Tanzanian Schools.*
[18] Amnesty International, *Shamed and blamed: Pregnant girls' rights at risk in Sierra Leone*, p. 26.
[19] Results of a second research and campaign visit by Amnesty International, available at: https://www.amnesty.org/en/latest/news/2016/11/sierra-leone-continued-pregnancy-ban-in-schools-and-failure-to-protect-rights-is-threatening-teenage-girls-futures/.

and other ill-treatment.[20] Girls—whether they are pregnant or not—live in fear of these tests or of witnessing others having their physical and mental integrity and dignity violated in this way.[21] Thus, humiliation and shunning of the girl are a key part of the punishment meted out to them. In some cases witnessing or being threatened with such tests leads girls to drop out, skip exams, or not apply for bursaries.[22]

Subjecting girls to pregnancy tests and excluding girls from school if they are pregnant frequently involves adults in positions of power publicly disclosing private information about and shaming them in front of others. Such a public revelation of a girl's pregnancy status not only causes distress in that moment, but also provides a social licence to adults in positions of authority, as well as others in society, such as classmates and their parents, to stigmatize, verbally abuse, shun, and punish the girl. In cases of sexual abuse, exposing a girl for her pregnancy status may also mean simultaneously outing her as a victim of rape.

International and domestic responses to mandatory pregnancy testing and exclusion

It is particularly worrying that policies banning pregnant girls from school settings persist in contexts where sexual violence by teachers and people in positions of authority are reported to be high. Creating a situation in which teachers feel they can touch girls' breasts and stomachs or make them take humiliating tests flies in the face of concerns expressed by treaty monitoring bodies about sexual violence in schools. For example, in 2014 the UN Committee against Torture urged specific action on the issue of sexual violence against children in schools in Sierra Leone, stating that it *"remains concerned at the high prevalence of gender-based violence in the country, including rape of girls by close relatives and teachers."*[23] The issue of sexual violence against children in schools has been raised by the UN Committee on the Rights of the Child under Article 37(a) of the Convention on the Rights of the Child (prohibition of torture or other cruel, inhuman or degrading treatment or punishment).[24]

In Tanzania, which also has mandatory pregnancy testing in schools, the Committee on the Rights of the Child expressed its *"serious concern regarding the physical and sexual violence against children in the State party, including in schools or on the way to and from school."* The Committee also noted with concern "*[r]eports of sexual violence and abuse carried out by teachers, and the lack of disciplinary or*

[20] In the *Greek Case* 12 (1969) ECHR, the European Commission of Human Rights found degrading to be a treatment or punishment that "grossly humiliates the victim before others." Even where humiliation was not the intention, but did result from the act, this can still constitute a breach of Article 3 of the European Convention on Human Rights, as found in *Grori v. Albania*, Application No. 25336/04 (2009), para. 125.

[21] Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone*; also, results of a second research and campaign visit by Amnesty International, available at: https://www.amnesty.org/en/latest/news/2016/11/sierra-leone-continued-pregnancy-ban-in-schools-and-failure-to-protect-rights-is-threatening-teenage-girls-futures/; *see also* the Center for Reproductive Rights, *Forced Out: Mandatory Pregnancy Testing and the Expulsion of Pregnant Students in Tanzanian Schools*.

[22] Amnesty International, *Shamed and Blamed: Pregnant girls' rights at risk in Sierra Leone.* Results of a second research and campaign visit by Amnesty International, available at: https://www.amnesty.org/en/latest/news/2016/11/sierra-leone-continued-pregnancy-ban-in-schools-and-failure-to-protect-rights-is-threatening-teenage-girls-futures/; and The Center for Reproductive Rights, *Forced Out: Mandatory Pregnancy Testing and the Expulsion of Pregnant Students in Tanzanian Schools*.

[23] Concluding observations on the initial report of Sierra Leone, (CAT/C/SLE/CO/1) June 2014, at para. 14.

[24] Concluding observations on the combined third and fourth periodic reports of Germany (CRC/C/DEU/CO/3-4) 25 February 2014, at para 34 and 35.

criminal investigation of teachers for professional misconduct."[25] In such contexts, it is not beyond the realm of possibility that a girl may be publically humiliated for pregnancy, excluded from school or prevented from taking exams on the grounds of pregnancy by the same man who raped her.

Girls seeking justice for expulsion or temporary exclusion from school on the basis of pregnancy have come before the courts in several countries.[26] National courts have, rightly, recognized that the range of rights at stake to go beyond girls' rights to education, non-discrimination, and equality before the law, to also include the rights to human dignity, privacy, and physical and mental integrity.[27]

For example, in 2014 the Constitutional Court of South Africa found that two pregnant girls who had been expelled due to pregnancy had their rights to human dignity, physical and psychological integrity, privacy violated, non-discrimination and to equal protection and benefit of the law violated.[28] In particular, when speaking about the issue of disclosure of private information about their pregnancy status, the Court observed specifically that it was this right that was jeopardized by obliging the girls to disclose their pregnancy to the school authorities and obliging fellow learners to report any suspicions of pregnancy. The Court stated that *"[t]he policies thus have the effect of stigmatising pregnant learners for being pregnant and creating an atmosphere in which pregnant learners feel the need to hide their pregnancies rather than seek help from school authorities for medical, emotional and other support."*[29]

In 2007, the Colombian Constitutional Court handed down its judgment in the case of a 17-year-old girl who was compelled to take classes separately from her classmates and not permitted to take certain religious education classes.[30] The Court found that *"the fact that a student is pregnant is not something that can limit or restrict [her] right to education. Neither can it be acceptable that manuals and regulations of the school categorize pregnancy as misconduct, either explicitly or implicitly."*[31] The Court went on to say that exclusion or other measures against the pregnant girl, "*instead of helping the*

[25] Committee on the Rights of the Child Concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania (CRC/C/TZA/CO/3-5), at para. 40. It is also worth noting that CEDAW expressed concern at the persistently high levels of sexual violence perpetrated by teachers and the impunity surrounding such acts. *See* paras 30 and 31 of the Concluding observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania, 9 March, 2016, (CEDAW/C/TZA/CO/7-8).

[26] It is worth noting some of the other cases at the national level where courts have concluded that exclusion on the basis of pregnancy status constitutes discrimination and a violation of women's and girls' human right to equality include *Student Representative Council of Molepolole College of Education v. Attorney General* [1995] (3) LRC 447) and *Lloyd Chaduka and Morgenster College v. Enita Mandizvidza* (Zimbabwe, Supreme Court), Judgment No. SC 114/2001; Civil Appeal No. 298/2000.

[27] At the international and regional level the United Nations Committee on the Elimination of Discrimination against Women also specifically recognises the right to dignity as being at stake in the context of mandatory pregnancy tests. At para. 22 of General Recommendation No. 24 it states that "States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity.", available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm. Also, in a case brought before the Inter-American Commission on Human Rights, namely *Mónica Carabantes Galleguillos v Chile*, Report No 33/02, Friendly Settlement Petition 12.046, 12 March, 2002 the rights in focus were, the right to have one's honor respected and one's dignity recognized (Article 11) and the right to equal protection of the law (Article 24). In this case the school which had excluded Mónica Carabantes Galleguillos for pregnancy was a private school.

[28] South African Constitutional Court decision CCT 103/12 [2013] ZACC 25, available at http://www.saflii.org/za/cases/ZACC/2013/25.pdf.

[29] South African Constitutional Court decision CCT 103/12 [2013] ZACC 25, available at http://www.saflii.org/za/cases/ZACC/2013/25.pdf.

[30] Unofficial translation of Sentencia T-348/07, Corte Constitucional de la Republica de Colombia. Original available at http://www.corteconstitucional.gov.co/relatoria/2007/T-348-07.htm.

[31] Unofficial translation of Sentencia T-348/07, Corte Constitucional de la Republica de Colombia at Section 4 of the judgment. Original available at http://www.corteconstitucional.gov.co/relatoria/2007/T-348-07.htm.

student, stigmatize her personal situation."[32] The Court also stated that the rights violated in her case included the rights to education, equality, privacy and free development of personality, as well as human dignity.[33]

Treaty bodies have also urged reforms of policies that require pregnancy testing of girls in schools. Their concerns have largely focussed so far on the rights to education, privacy, and non-discrimination and harmful practices. In relation to Tanzania, the Committee on the Rights of the Child expressed concern *"that the State party has not revised provisions of the Education Act of Tanzania Mainland to explicitly prohibit the expulsion of pregnant girls from school."* The Committee was also concerned that "*the practice of mandatory pregnancy testing of girls as a prerequisite for admission to school on the Mainland remains prevalent, as does the expulsion of pregnant girls from school."*[34] Similarly, the UN Committee on the Elimination of All Forms of Discrimination against Women has expressed concern at the "*lack of explicit provisions in the education legislation covering the Mainland to prohibit the expulsion of pregnant girls from school, and the continued prevalence of the practice of mandatory pregnancy testing of girls as a precondition for admission to school and their expulsion if found to be pregnant*."[35] The Committee on the Elimination of Discrimination against Women has also urged states to: "*Strengthen efforts to retain girls in school, including pregnant girls, facilitate the return to school of young mothers after giving birth by adopting the policy on second-chance education currently under consideration and by providing adequate childcare facilities, and ensure that girls are not expelled from school because they are pregnant..*" significantly, the Committee also called for states to act by " *by imposing appropriate sanctions on those responsible for such dismissals."*[36]

It is inherently discriminatory for states to use the denial of the right to education as a punishment for girls' pregnancies, or to permit private education providers to use the same approach.[37] Indeed, as courts in South Africa and Colombia and various treaty bodies have maintained, pregnancy must not be a disciplinary offence, and continuance at mainstream schools must be an option for pregnant girls. A girl's pregnancy status must not form the basis for expulsion or exclusion from

[32] Unofficial translation of Sentencia T-348/07, Corte Constitucional de la Republica de Colombia at Section 4 of the judgment. Original available at http://www.corteconstitucional.gov.co/relatoria/2007/T-348-07.htm.
[33] In judgment T-348-07, the Constitutional Court specifically notes that it has also been called upon to respond to several cases where pregnant girls have claimed their rights have been violated as a result of exclusion or other measures, such as being compelled to take classes at a separate time to other students, and it has consistently found that such measures constitute a breach of their rights.
[34] Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania (CRC/C/TZA/CO/3-5), at paras 62 and 63; *see also* the Concluding Observations: Colombia, CRC/C/COL/CO/3 8 June 2006, para 76 and 77 and Committee on the Rights of the Child and the Committee on the Rights of the Child, Concluding observations on the second periodic report of Zimbabwe, CRC/C/ZWE/CO/2, March 2016, at para 68 (b) and (e) and 69 (b) respectively. Also, the Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Colombia, CEDAW/C/COL/CO/7-8, 29 October 2013, para 25 and 26, Committee on the Elimination of Discrimination against Women, Concluding observations on Guinea, CEDAW/C/GIN/CO/7-8, 14 November 2014, at para 42, Concluding observations on the combined third and fourth periodic reports of Tuvalu CEDAW/C/TUV/CO/3-4, 11 March 2015, at para 25 (g) and the Concluding observations on the combined seventh to ninth periodic reports of Rwanda, CEDAW/C/RWA/CO/7-9, 9 March 2017, at para 33 (c).
[35] Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania, 9 March 2016, (CEDAW/C/TZA/CO/7-8), at paras 30 and 31.
[36] Committee on the Elimination of Discrimination against Women, Concluding observations on the combined initial to third periodic reports of Solomon Islands, CEDAW/C/SLB/CO/1-3, 14 November 2014, at para 33 (g).
[37] The Committee on the Elimination of Discrimination against Women has expressed specific concerns about the expulsion of pregnant girls from private schools in its Concluding observations on the combined initial to third periodic reports of the Federated States of Micronesia, CEDAW/C/FSM/CO/1-3, at para 32 (a) and 33 (b), (c) and (d).

school settings. Girls do not cease to be girls or forfeit their human rights due to pregnancy or motherhood. Nor do states cease or forfeit their obligations to guarantee girls' human rights if they become pregnant.

States should protect, not punish, pregnant girls. Legitimate actions that would bring a state into compliance with its treaty obligations would be to investigate and punish any act of sexual violence and to guarantee a girl's right to information about and access to sexual and reproductive health services. Such services should include the option of emergency contraception, safe and legal abortion services, as well as health and social support should she wish to go ahead with the pregnancy. Further, states should provide the support and services necessary to guarantee her continuance in mainstream school and education, in accordance with her wishes. A girl's pregnancy status must not be used as a reason for violating her right to education or as a reason to threaten, or subject her to, degrading and humiliating treatment or punishment.

Virginity testing

Treaty bodies have repeatedly criticized states for virginity testing[38] and related vaginal examinations carried out with the purported aim of proving that sexual activity has occurred.[39] Both the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have listed virginity testing as a harmful practice that is "*strongly connected to and reinforce[s] socially constructed gender roles and systems of patriarchal power relations and sometimes reflect[s] negative perceptions of or discriminatory beliefs.*"[40]

The World Health Organisation (WHO) has also condemned virginity tests and urged healthcare professionals never to conduct such procedures, stating that *"[t]here is no place for virginity (or 'two-finger') testing; it has no scientific validity."*[41]

Doctors, nurses or other adults in positions of authority purporting to have expertise often carry out these "tests." They do so by inspecting the girl's vagina, sometimes using their fingers to see if

[38] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, (CEDAW/C/GC/31-CRC/C/GC/18), at para. 9. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement, United Nations Human Rights Committee, Concluding observations on the initial report of South Africa, CCPR/C/ZAF/CO/1, April 2016, at para 18 and 19; Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa, CRC/C/ZAF/CO/2, October 2016, at para 39 and 40; Committee on the Rights of the Child, Concluding observations on the second periodic report of Zimbabwe, March 2016, CRC/C/ZWE/CO/2, at para 40, 41 (right to privacy) and 46 (eradication of harmful practices).

[39] Committee against Torture, Concluding observations on the third periodic report of Tunisia (CAT/C/TUN/CO/3), at paras 41 and 42.

[40] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, (CEDAW/C/GC/31-CRC/C/GC/18), at para. 9, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement.

[41] World Health Organisation, *Healthcare for women subjected to intimate partner violence or sexual violence*, WHO/RHR/14.26, 2014, at p. 46, available at: http://apps.who.int/iris/bitstream/10665/136101/1/WHO_RHR_14.26_eng.pdf?ua=1 at p. 46. Also, Human Rights Watch, *Abusive, Inaccurate 'Virginity Tests' Won't Help, Educating Children Will,* 14 September 2014 also contains some analysis of 'virginity tests' in the context of violations of girls' fundamental human rights, as well as information about how flawed, unreliable as well as violative these tests are, available at*:* https://www.hrw.org/news/2013/09/14/abusive-inaccurate-virginity-tests-wont-help-educating-children-will.

her hymen is intact. The purported expert conducting the test then "confirms" virginity (or not), or makes a formal declaration to confirm her status.[42]

In the case of Indonesia, Human Rights Watch interviewed women military recruits and the fiancées of military officers who had been subjected to virginity testing at military hospitals in Bandung, Jakarta and Surabaya. All of the women interviewed described the test as *"painful, embarrassing, and traumatic."*[43] One woman described the experience in the following way: *"Entering the virginity test examination room was really upsetting. I feared that after they performed the test I would not be a virgin anymore. It really hurt. My friend even fainted because...it really hurt, really hurt."*[44] As is so often the case with such practices, the only women who were able to avoid such tests were those with power, economic resources and influence.[45]

Human Rights Watch has repeatedly expressed concern at persistent proposals to virginity test schoolgirls and at the currently implemented policy of virginity testing female recruits to the army and police in Indonesia. In August 2014, the organization reported that "*an education office in Prabumulih, southern Sumatra, cancelled plans to have high school girls undergo mandatory 'virginity tests.'*" These tests had been proposed in order "*to tackle "premarital sex and prostitution."*[46]

In South Africa, the Children's Act (2003) prohibits virginity testing only in regard to girls under the age 16. After the age of 16, virginity testing of girls is permitted, so long as the girls have provided their consent.[47] Although the Children's Act employs the plural term "children" in the text on virginity testing, girls are the ones subjected to the procedure.[48] In the South African example, far from taking the action necessary to prevent, eradicate and punish virginity testing, the state actually enshrines the practice as acceptable in law, further entrenching pervasive stereotypes in which virginity determines the value and social status of girls.

The UN Human Rights Committee raised concerns about the situation of virginity testing under Article 7 of the International Covenant on Civil and Political Rights (the right to be free from torture or to cruel, inhuman or degrading treatment or punishment), amongst other rights. The Committee urged the South African government to *"amend the Children's Act with the aim of prohibiting virginity tests for children, irrespective of their age"*.[49] Further, the Committee on the Rights of the Child in its concluding observations on South Africa expressed concern *"about the traditional practice of virginity testing which threatens the health, affects the self-esteem, and violates the privacy of girls."*[50]

The South African Human Rights Commission, in a 2005 submission to the South African Select Committee on Social Services, expressed multiple concerns about virginity testing and the lack of

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[42] *Girls be warned: Lose your virginity, you lose your bursary*, News24, 22 January 2016, available at http://www.news24.com/SouthAfrica/News/municipality-warns-maidens-lose-your-virginity-lose-your-bursary-20160122; and Human Rights Watch, *Indonesia: Military Imposing 'Virginity Tests'*, 13 May 2015, available at https://www.hrw.org/news/2014/11/17/indonesia-virginity-tests-female-police.

[43] Human Rights Watch, *Indonesia: Military Imposing 'Virginity Tests'*.

[44] Human Rights Watch, *Indonesia: Military Imposing 'Virginity Tests'*.

[45] Human Rights Watch, *Indonesia: Military Imposing 'Virginity Tests'*.

[46] Human Rights Watch, World Report, Indonesia, 2014. Available at: https://www.hrw.org/world-report/2014/country-chapters/indonesia.

[47] Children's Act of 2005, South Africa, Article 12 (4) (5) and (6), available at http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf.

[48] South African Human Rights Commission, Submission to the South African Select Committee on Social Services, 2005, available at: http://www.sahrc.org.za/home/21/files/30%20SAHRC%20Submission%20on%20Childrens%20Bill%20-%20Virginity%20Testing%20(Parl.)%20Oct%202005.pdf.

[49] United Nations Human Rights Committee, Concluding observations on South Africa, CRC/C/15/Add.122, February 2000, at para 33.

[50] Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa, CRC/C/ZAF/CO/2, October 2016, at para 39 and 40.

protection offered to girls by the state to prevent and eradicate this practice. It observed that virginity testing places a value and status on virginity that victims of sexual violence can never achieve, and that this was perhaps additionally cruel in contexts where rates of sexual violence are high:

> *"Girls who are tested and then declared to be virgins are provided with certificates in a public ceremony. It is not clear how girls who have been the victims of rape, incest and sexual abuse are dealt with in this procedure. Given the unfortunate alarmingly high levels of sexual violence in our country, at any virginity testing ceremony there must be young girls who are survivors of such horrendous deeds. Declaring these young women not to be virgins potentially exposes publicly what has happened to these young girls. This raises serious concerns about secondary traumatisation and stigmatisation of these young girls. This gives further rise to serious concerns regarding these especially vulnerable young girls' dignity."*[51]

The same report went on to note that *"[t]he practise furthermore could also constitute a psychological punishment for girl-children who engage in pre-marital sex (either voluntarily or involuntarily). Boy-children are not subjected to testing and thus do not receive the same treatment."*[52]

It is worth noting that the requirement for consent in the Children's Act completely fails to take into consideration the coercive context in which virginity testing takes place. Given the negative stereotypes and harmful gender norms on which such testing is based, could girls refuse without the risk of reputational harm and rumours? Further, there is a significant power imbalance between the girls subjected to the tests and the adults conducting them. The state, in endorsing virginity tests, not only violates girls' fundamental human rights; it also affords credibility to tests that the World Health Organisation has deemed to have no scientific validity.[53]

International law and standards

Article 1 of the UN Convention on the Elimination of All Forms of Discrimination against Women defines discrimination as:

> *"[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*[54]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) defines discrimination against women as: *"any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy*

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[51] South African Human Rights Commission, Submission to the South African Select Committee on Social Services, 2005, at p. 7, available at: http://www.sahrc.org.za/home/21/files/30%20SAHRC%20Submission%20on%20Childrens%20Bill%20-%20Virginity%20Testing%20(Parl.)%20Oct%202005.pdf.

[52] South African Human Rights Commission, Submission to the South African Select Committee on Social Services, 2005, at page 9, available at: http://www.sahrc.org.za/home/21/files/30%20SAHRC%20Submission%20on%20Childrens%20Bill%20-%20Virginity%20Testing%20(Parl.)%20Oct%202005.pdf.

[53] World Health Organisation, *Healthcare for women subjected to intimate partner violence or sexual violence*, WHO/RHR/14.26, 2014, at page 46, available at: http://apps.who.int/iris/bitstream/10665/136101/1/WHO_RHR_14.26_eng.pdf?ua=1 at page 46, also, Human Rights Watch, *Abusive, Inaccurate 'Virginity Tests' Won't Help, Educating Children Will,* 14 September 2014 also contains some analysis of 'virginity tests' in the context of violations of girls' fundamental human rights, as well as information about how flawed, unreliable as well as violative these tests are, available at: https://www.hrw.org/news/2013/09/14/abusive-inaccurate-virginity-tests-wont-help-educating-children-will.

[54] The United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979), at Article 1, available at: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1.

the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life."[55]

The prohibition of torture and other ill-treatment of children in educational settings is set out both in treaties and in the authoritative guidance issued by treaty monitoring bodies and special procedures, such as the UN Special Rapporteur on torture. The Committee against Torture in its General Comment No. 2 specifically recognizes that: "*girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.*"[56] The Committee also specifically outlines states' obligations to

> "*prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.*"[57]

The Convention on the Rights of the Child prohibits torture and other cruel, inhuman or degrading treatment or punishment of children (Article 37). It also obliges state parties "*to ensure that school discipline is administered in a manner consistent with the child's human dignity.*"[58]

Both the Committee against Torture and the Human Rights Committee have expressed particular concern at states' failure to eradicate corporal punishment, sexual violence and other abuses in schools. For example, the Human Rights Committee has stated explicitly that:

> "*The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.*"[59]

Conclusions

The mandatory testing of girls for pregnancy or "virginity," and their subsequent exclusion from educational settings, including from applying for bursaries, breach state obligations under the torture and other ill-treatment framework to prevent, eradicate and punish degrading treatment and punishment. This is the case whether such tests are implemented by the state as nationwide policy, or by individual schools, colleges, or private education or bursary providers.

The testimonies taken from women and girls subjected to mandatory or coerced pregnancy or "virginity" tests in educational settings describe these practices as degrading and at times as physically painful and psychological harmful. The tests frequently lead to public humiliation, disclosure of private information, a heightened risk of sexual abuse in the ascertaining of pregnancy status, including touching of breasts and stomachs, and being subjected to urine tests. In the context of

[55] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), at Article 1. Definitions, available at: http://www.achpr.org/instruments/women-protocol/.
[56] Committee Against Torture, General Comment No. 2, Implementation of article 2 by States Parties, (CAT/C/GC/2/CRP. 1/Rev.4 (2007)), at para. 22.
[57] Committee Against Torture, (CAT/C/GC/2/CRP. 1/Rev.4 (2007)), at para. 15.
[58] The UN Convention on the Rights of the Child (1989) at Article 28 (2).
[59] UN Human Rights Committee (HRC), ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 5.

virginity testing, girls may have to undress and have an adult in a position of authority inspect their vaginas, sometimes inserting their fingers to do so.

Such tests are humiliating and degrading in a gendered way. They do not only harm the women and girls on whom they are directly inflicted, but also their peers who witness such acts or fear the same happening to them. Their very existence in rules and regulations are an expression of, and cement, the pre-existing inequality and discrimination against girls that exists in society. Their application enforces a negative gender stereotype. At the wider level, mandatory or coerced pregnancy and virginity tests, and punishments relegate girls to a lower status in society. They afford a social licence to adults in a position of authority, as well as peers and others in society, to subsequently stigmatize, degrade, humiliate, and punish girls for their real or perceived sexual activity. Both such tests may have particular implications for those who have previously suffered sexual violence.

States must act urgently to abolish these harmful, degrading, and abusive practices. Policies that require or coerce girls to submit to virginity or pregnancy testing in order to sit exams, gain bursaries, or attend schools or colleges must be repealed immediately. States must monitor state officials as well as private actors, sanctioning those who introduce or maintain discriminatory requirements that both constitute and facilitate violations of girls' human rights. Directives must be issued to all educational facilities, teaching staff, and healthcare professionals prohibiting mandatory and coercive virginity or pregnancy tests, detailing the specific human rights at risk. The directive issued could explicitly include the prohibition of any touching of girls' breasts and stomachs, or urine tests. They must also proscribe punishments such as exclusion or other similar measures for girls on the basis of their pregnancy status. Effective and regular monitoring systems should be put in place to verify that educational facilities are respecting and protecting girls' human rights.

Rather than being shamed and shunned, girls who become pregnant should be supported to continue in mainstream education, in accordance with their wishes. Information about and the option of, and access to safe and legal abortion services, support if she decides to continue with the pregnancy, as well as other sexual and reproductive health services should also be guaranteed. If the girl is pregnant as the result of sexual violence, her right to access to justice should be upheld.

International human rights monitoring bodies, as well as states, must heed the call of the UN Special Rapporteur on torture in his ground-breaking report to recognize the full spectrum of violations suffered by girls when they are subjected to discriminatory and degrading mandatory pregnancy or "virginity" tests in educational settings. To acknowledge the full spectrum of violations of girls' human rights in this context will contribute to recognising and affirming girls' status as rights holders. By applying the torture and other ill-treatment framework to the particularly stigmatised experiences of girls could marshal a powerful mechanism of protection for girls. The torture and other ill-treatment framework also provides states with additional clear guidance as to their specific obligations to prevent, eradicate, punish and redress such acts.

Treaty bodies who are already expressing concerns and providing recommendations could consider recognising the range of rights at stake and harm endured by girls beyond the right to education and harmful practices. Other treaty bodies and Special Procedures who have so far not taken up the issues of mandatory or coerced pregnancy testing and virginity testing could raise these violations of girls' rights under their mandates. As recognised by domestic courts, there are mul-

tiple rights at stake. Girls' right to be free from torture or other ill treatment, right to physical and mental integrity, right to non-discrimination, privacy, equality and education, amongst other rights are violated when policies, laws and practices require, facilitate or permit girl students be tested and disciplined for pregnancy or subjected to 'virginity' tests.

National human rights institutions and civil society could monitor violations of girls' rights in educational settings, investigate reports of violations, and raise concerns about mandatory or coercive pregnancy testing and "virginity" testing locally, regionally and internationally. State officials should establish mechanisms for girls and the advocates representing them to engage on these issues, listen to their needs, and respond to their concerns. Action should be taken to eradicate the gender stereotypes in society that fuel discriminatory testing and punishment of girls in educational settings. Laws and policies that cement and enforce these stereotypes by permitting or requiring "virginity tests", or making pregnancy a disciplinary offence, must be urgently reformed.

Teaching staff and healthcare professionals must be informed about girls' human rights, including their right to be free from discrimination, torture, and other ill-treatment. Healthcare professionals and teachers must refuse to take part in practices that violate these rights and educate their peers to do the same. Disciplinary processes and sanctions should be imposed on teachers, healthcare professionals, or others in positions of authority over children found to have committed sexual violence, harassment or harm to students in their care.[60] Healthcare professionals should also be educated about the human rights of girls and be made aware of the fact that the World Health Organization is against "virginity" testing and additionally confirms that such tests are scientifically worthless.

The Special Rapporteur's report offers an opportunity to take concrete steps to eradicate the inhuman and degrading testing of girls for pregnancy or "virginity" in educational settings. Such a move could significantly help bring about the day when the only things girls are tested on at school or to qualify for bursaries are their skills and knowledge, the same as other young learners.

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[60] It is interesting to note that in the South African Constitutional Court decision CCT 103/12 [2013] ZACC 25, the judge specifically observed at para. 251 that: "In terms of the policy the school governing body required the principal to act unlawfully and unconstitutionally. The principal was entitled, if not obliged, to say to the school governing body: I refuse to carry out this policy or instruction or requirement because it is an unlawful instruction!" Full decision available at: http://www.saflii.org/za/cases/ZACC/2013/25.pdf.

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Forced Contraception as a Means of Torture

Christie J. Edwards, JD, LLM*

Abstract

Since 2014, the Islamic State of Iraq and the Levant's (ISIL) campaign and conquest of territory has been demarcated by genocide, war crimes, and crimes against humanity, with a particular focus and target on the minority Yazidi people. The United Nations estimates that 7,000 Yazidi women have been kidnapped and forced into sexual slavery by ISIL fighters, with over 3,200 women believed to remain in captivity. However, of over 700 Yazidi rape survivors who have escaped and sought treatment, physicians found that a mere five percent became pregnant during their enslavement, compared to expected figures of between 20-25 percent based on normal fertility rates for young women. The women reported that ISIL fighters forced them to use oral and injectable contraception, as well as undergo forced abortions to comply with a highly contentious reference to a ruling in shari'a *law that sex with enslaved women is allowed and even encouraged, provided that men ensure that the woman is not pregnant prior to engaging in intercourse. This also ensures that the women can be resold, traded, or given to other fighters. Rape and sexual slavery are frequent methods of warfare, but the use of forced contraception in order to prevent pregnancy and thereby ensure continued sexual violence is a new manifestation of sexual violence. While a clear violation of international humanitarian, human rights, and criminal law, this paper examines whether forced contraception meets the elements of torture and what accountability mechanisms may exist for ISIL perpetrators.*

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Introduction

In June 2014, the self-declared Islamic State of Iraq and the Levant (ISIL) established the "State of the Islamic Caliphate," which is regarded by supporters as the reestablishment of the *khilafa ʿala minhaj al-nubuwwa (*the "caliphate in the prophetic method") set forth by the Prophet Mohammed.[1] ISIL's campaign and conquest of territory has since been demarcated by mass executions, public beheadings,[2] kidnappings, sexual slavery, and rape, among other crimes.[3] No group has been more affected by ISIL's heinous military tradition than the Yazidi people.[4] The systematic rape of Yazidi women and girls has become a core practice and key theological tenet of ISIL since the group announced it was reinstituting the practice of slavery in 2014.[5] The United Nations estimates that 7,000 Yazidi women have been kidnapped and forced into sexual slavery by ISIL fighters, with over 3,200 women believed to remain in captivity.[6]

Physicians found that only five percent of the over 700 Yazidi rape survivors who escaped and sought treatment at a United Nations-backed clinic in northern Iraq became pregnant during their enslavement—constituting an extremely low figure as compared to the standard fertility rate of 20 to 25 percent in young women.[7] The women reported that ISIL fighters forced them to use oral and injectable contraception[8] and to undergo forced abortions.[9] ISIL justified this practice by a highly contentious reference to a ruling in *shari'a* law that sex with enslaved women is allowed and even encouraged, provided that men ensure that the woman is not pregnant prior to engaging in intercourse.[10]

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[1] Andrew F. March & Mara Revkin, *Caliphate of Law*, Foreign Affairs (Apr. 15, 2015), https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law [hereinafter *Caliphate of Law*]. This declaration has been rejected by the majority of Muslims worldwide, http://www.pewresearch.org/fact-tank/2015/11/17/in-nations-with-significant-muslim-populations-much-disdain-for-isis/.

[2] *Id*.

[3] U.N. Independent International Commission of Inquiry on the Syrian Arab Republic [UN COI], *They came to destroy: ISIS Crimes Against the Yazidis*, *delivered to the Human Rights Council*, 1, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf [hereinafter *ISIS Crimes*].

[4] Amnesty Int'l, Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq 4 (2014), https://www.amnesty.org/en/documents/mde14/021/2014/en/; *The Revival of Slavery Before the Hour*, Dabiq (2014) at 14-16, https://clarionproject.org/docs/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf [hereinafter *Slavery Before the Hour*].

[5] Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. Times (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0 [hereinafter *Theology of Rape*].

[6] *ISIS Crimes*, *supra* note 3, at ¶ 205; Richard Spencer, *Isil carried out massacres and mass sexual enslavement of Yazidis, UN confirms*, Telegraph (Oct. 14, 2014), http://www.telegraph.co.uk/news/worldnews/islamic-state/11160906/Isil-carried-out-massacres-and-mass-sexual-enslavement-of-Yazidis-UN-confirms.html; U.N. Assistance Mission for Iraq [UNAMI] and Office of the United Nations High Commissioner for Human Rights [UNHCR], Report on the Protection of Civilians in the Armed Conflict in Iraq 18 (2015), http://www.ohchr.org/Documents/Countries/IQ/UNAMIReport1May31October2015.pdf; Radhika Sanghani, *Meet the British Yazidi teen fighting to save her girlfriends from Isil's sexual slavery*, Telegraph (July 23, 2015), http://www.telegraph.co.uk/women/womens-life/11757780/ISIS-sexual-slavery-British-Yazidi-teen-fighting-to-save-her-friends.html.

[7] Rukmini Callimachi, *To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control*, N.Y. Times (Mar. 12, 2016), http://www.nytimes.com/2016/03/13/world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html?_r=1 [hereinafter *ISIS Pushes Birth Control*].

[8] *ISIS Crimes*, *supra* note 3, at ¶ 69.

[9] *ISIS Pushes Birth Control*, *supra* note 7; Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, ¶ 41, U.N. Doc. A/HRC/28/18 (Mar. 2015), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_AUV.doc.

[10] Research & Fatwa Department, ISIL, Su'alwa-Jawab fi al-Sabiwa-Riqab ("Questions and Answers on Taking Captives and Slaves") (Al-Himma Library, Muharram 1436 or October/November 2014), http://www.

While rape and sexual slavery are often-used methods of warfare, the use of forced contraception in order to prevent pregnancy and thereby ensure continued sexual violence is a new manifestation of sexual violence.[11] While nascent, forced contraceptive use is a clear violation of international humanitarian law.[12] Part I of this paper will provide an overview of ISIL's treatment of the Yazidis. Part II will examine whether forced contraception meets the elements of torture, and of torture as a war crime and a crime against humanity. Part III will explore the mechanisms of accountability that may exist for ISIL perpetrators.

I. Factual and Legal Overview

A. ISIL's Legal Justification of Treatment of Yazidis

ISIL's attack and siege of Sinjar, Iraq, in August 2014 led to the murder of thousands of Yazidi men and boys and the kidnapping and enslavement of thousands of Yazidi women and girls.[13] In the months before the attack and siege of Sinjar, ISIL's *shari'a* students were asked to research the status of the Yazidi people to determine whether they should legally be considered an unbelieving group in origin, or one that was originally Muslim and later rejected Islam (apostates). The scholars ultimately concluded that the Yazidis were an unbelieving polytheist group by origin and that, unlike Jews and Christians, they were not eligible to make a *jizyah* payment (a tax imposed on non-Muslims). Instead, the Yazidis were given an ultimatum: to repent or be killed.[14] The scholars claimed that as unbelievers, Yazidi women could be enslaved and divided amongst the ISIL fighters who participated in the Sinjar operations.[15]

In its attempt to justify slavery more generally, ISIL set forth its Quranic interpretation that slavery signifies the coming of the Day of Judgment and a final war between Muslims and non-Muslims (*al-malhama al-kubra*, or the "Great Slaughter"). Specifically, "the slave girl gives birth to her master" since any male child born to a slave receives the free status of his father and becomes the master of his slave mother.[16] ISIL further noted that "enslaving the families of the [unbelievers] and taking their women as concubines is a firmly established aspect of the Sharī'ah that if one were to deny or mock, he would be denying or mocking the verses of the Qur'ān and the narrations of the Prophet … and thereby apostatizing from Islam."[17]

In the fall of 2014, ISIL's Research and Fatwa Department released a pamphlet on the topic of female slaves, which clarifies its position and interpretation of *shari'a* law, presumably in response to the international public outcry over reports that ISIL had captured thousands of Yazidi women for use as sex slaves.[18] The pamphlet affirms, among other things, that it is permissible to engage in sexual intercourse with non-Muslim women and pre-pubescent girl slaves, and that it is permitted to beat, buy, sell, or give slaves away.[19] Additionally, the pamphlet states that it is permissible to

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memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html–_ednref1 (last accessed June 16, 2016) [hereinafter Treatment of Slaves].

[11] *Slavery Before the Hour, supra* note 4, at 14-16.

[12] Geneva Convention IV, Article 27; Common Article 3.

[13] *ISIS Crimes*, *supra* note 3, at ¶ 33.

[14] *Slavery Before the Hour, supra* note 4, at 14-16.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Treatment of Slaves, *supra* note 10.

[19] *Id.*

engage in sexual intercourse with a female captive immediately after taking possession of her, as long as her master ensures that she is not pregnant, or that "her uterus [is] purified…"[20]

According to a manual issued in the summer of 2015 by ISIL's Research and Fatwa Department, the owner of a female slave must not engage in sexual intercourse with her until after she has undergone *istibra*–menstruation or "the process of ensuring that the womb is empty."[21] The owner must "make sure there is nothing in her womb," prior to engaging in sexual intercourse, so as to ensure that there is no confusion over a child's paternity.[22] The manual's authors also suggest not only that rape of young girls is permissible, but that in the absence of actual penetration or intercourse, sexual abuse of girls who have not yet reached puberty is also acceptable.[23]

B. ISIL's System of Sexual Slavery

Survivors have noted that the August 2014 Sinjar offensive marked the introduction of systematized sexual slavery by ISIL as part of its territorial expansion.[24] Almost immediately upon capture by ISIL fighters, male and female captives were separated.[25] Adolescent boys and men were taken to nearby fields, where they were forced to lie down and then shot with automatic weapons, while women and girls were taken to a nearby town in large flatbed trucks.[26] There, young and unmarried women were separated from older women and mothers and forced onto overcrowded buses.[27] Many survivors described how the bus windows were covered with black curtains, which were allegedly added because ISIL fighters planned to transport large numbers of women not wearing head coverings upon captivity.[28]

These groups of young women were driven to towns and cities under ISIL control, usually in the Sinjar province, where they were confined for days or even months in schools, prisons, hotels, factories, military bases, municipal buildings, and public halls.[29] Although these buildings had been supplied with mattresses, plates and utensils, and food and water for hundreds of people in advance, the supplies were not adequate.[30] Upon arrival, ISIL fighters conducted a census, during which each woman was forced to stand and instructed to state her full name, age, hometown, marital status, and whether she had children.[31] From then on, the ISIL captors would refer to a woman as *sabaya* (slave), followed by her name.[32]

Eventually, the women were forced back onto the buses and driven to other cities and towns, where they were held in large groups.[33] Although these holding facilities for Yazidi women and

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[20] *Id.*
[21] *ISIS Pushes Birth Control*, *supra* note 7; *Caliphate of Law*, *supra* note 1.
[22] Author correspondence with Professor Andrew March (Aug. 14, 2016), https://azelin.files.wordpress.com/2016/04/the-islamic-state-22slavery-provisions-and-issues-second-edition22.pdf; *Theology of Rape, supra* note 5.
[23] Treatment of Slaves, *supra* note 10.
[24] *Theology of Rape, supra* note 5.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *ISIS Pushes Birth Control*, *supra* note 7; *ISIS Crimes*, *supra* note 3, at ¶ 49.
[30] *Theology of Rape, supra* note 5; Human Rights Watch (HRW), *Iraq: ISIS Escapees Describe Systematic Rape*, Apr. 14, 2015, https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape [hereinafter *Systematic Rape*].
[31] *Theology of Rape, supra* note 5.
[32] *Id.*
[33] *ISIS Crimes*, *supra* note 3, at ¶ 51.

girls were heavily guarded by ISIL fighters, very few reports of rape by the guards exist, pointing to highly structured ideological control of the fighters by ISIL authorities, as well as strict regulations about the ownership and treatment of Yazidi women.[34] The women deemed the youngest and prettiest were bought by ISIL members immediately, while others were purchased by wholesalers who photographed and gave them numbers to advertise them to potential buyers.[35]

ISIL fighters kept the women in buildings called "Sabaya Markets," which often included a viewing room where they took scarves and coverings from the women and forced them to sit in a chair facing the buyers.[36] The women were asked to catwalk through the buyers, stand and turn around several times. They were also forced to answer intimate questions, such as the exact date of their last menstrual cycle in order to determine whether they were pregnant.[37] The June 2016 report of the United Nations Commission of Inquiry on Syria (UN COI Report) noted, "[i]n the last year, [ISIL] fighters have started to hold online slave auctions, using the encrypted Telegraph application to circulate photos of captured Yazidi women and girls, with details of their age, marital status, current location and price."[38] An ISIL document released online instructed fighters to pre-register if they wished to attend a Sabaya Market in Homs, and explained that a "bid [to purchase a slave] is to be submitted in the sealed envelope at the time of purchase, and the one who wins the bid is obliged to purchase."[39]

Once purchased, the woman's status as a slave was registered in a contract.[40] Many of the Yazidi women reported being given or traded away, forced into "marriage," or sold for up to $2,000 multiple times.[41] The funds from the sale and resale of Yazidi women and girls have been lucrative for ISIL authorities,[42] giving an added benefit to ensuring that women are not pregnant. When an "owner" sells a woman to another buyer, a new contract is drafted, similar to the transfer of a property deed.[43] Women who unsuccessfully attempt to escape ISIL control face severe consequences, such as starvation, brutal beatings, gang rapes, and the murder of their children.[44] Many of the women and girls attempt to commit suicide in order to avoid rape, forced marriage, or forced religious conversion, and many know others who have committed suicide by cutting their wrists or throats or hanging themselves using their headscarves.[45]

II. Elements of Crimes

A. Torture

Since the enslavement and rape of Yazidi women by ISIL fighters takes place in the context of a non-international armed conflict between ISIL and the governments of Syria, Iraq, and other States, international humanitarian law (IHL), or the laws of war, is applicable to the legal analysis below.

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[34] Notwithstanding the reality that sexual and gender based violence is often underreported, the paucity of reporting speaks to the extent of indoctrination by ISIL fighters. *ISIS Crimes*, *supra* note 3, at ¶ 54.
[35] *Theology of Rape, supra* note 5.
[36] *Id.*
[37] *Id.*
[38] *ISIS Crimes*, *supra* note 3, at ¶ 57.
[39] *Id.* at ¶ 57 n.17.
[40] *Theology of Rape, supra* note 5.
[41] *Systematic Rape*, *supra* note 30.
[42] *ISIS Crimes*, *supra* note 3, at ¶ 55.
[43] *Theology of Rape, supra* note 5.
[44] *Systematic Rape*, *supra* note 30; *ISIS Crimes*, *supra* note 3, at ¶ 67-68, 73.
[45] *Systematic Rape*, *supra* note 30; *ISIS Crimes*, *supra* note 3, at ¶ 53.

Common Article 3 of the Geneva Conventions posits that persons in the hands of a party to a conflict must "in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria," and that "to this end, the following acts are and shall remain prohibited at any time and in any place whatsoever[:] violence to life and person, in particular . . . mutilation, cruel treatment and torture[; and] outrages upon personal dignity, in particular humiliating and degrading treatment."[46] Violating the prohibition against torture is a grave breach of IHL.[47] In essence, Common Article 3 sets forth an absolute and minimum requirement of humane treatment of civilians/persons taking no part in hostilities during armed conflict.[48] Specific provisions in each of the four Geneva Conventions further prohibit torture and cruel treatment.[49] The prohibition of torture and other cruel, inhuman, or degrading treatment or punishment is furthermore a peremptory norm of international human rights law.[50] The International Covenant on Civil and Political Rights (ICCPR) accordingly establishes the right to be free from torture and other ill-treatment as an absolute and non-derogable norm.[51]

Torture, cruel and inhuman treatment, and degrading and humiliating treatment are all prohibited by the Geneva Conventions. Each of the three categories of treatment are characterized by similar yet distinct criteria and legal thresholds. The legal threshold required for an act or form of treatment to qualify as torture is the highest; cruel and inhuman treatment and degrading and humiliating treatment have a lower threshold than torture, whilst being equally prohibited under international law. The nuances among these definitions are discussed below.

The definition of torture has developed over time. In the 1958 Commentary on the Fourth Geneva Convention, torture was defined as "the infliction of suffering on a person to obtain from that person, or from another person, confessions or information."[52] The definition of torture has since broadened to capture a wider range of purposes than merely seeking a confession or information, as evidenced in treaty law and in practice.[53]

Interpreting the IHL definition of torture requires looking to international human rights law (IHRL) on torture.[54] "[W]hile there are a number of differences between IHRL and IHL, the notions

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[46] Geneva Conventions I, II, III, IV, Art. 3, Geneva, 12 August 1949, https://ihl-databases.icrc.org/ihl/WebART/375-590006.

[47] *See* grave breach provisions: Article 50 of Geneva Convention 1, Article 51 of Geneva Convention II, Article 130 of Geneva Convention III, and Article 147 of the Geneva Conventions IV, and Articles 11 and 85 of AP I.

[48] Convention (III) relative to the Treatment of Prisoners of War, Art. 3, Geneva, 12 August 1949, *available at* https://ihl-databases.icrc.org/ihl/WebART/375-590006.

[49] First Geneva Convention, Article 12, second paragraph ("torture") *(Id. at* § 985); Second Geneva Convention, Article 12, second paragraph ("torture") (*Id. at* § 986); Third Geneva Convention, Article 17, fourth paragraph ("physical or mental torture") *(Id. at* § 987), Article 87, third paragraph ("torture or cruelty") (*Id. at* § 988) and Article 89 ("inhuman, brutal or dangerous" disciplinary punishment) (*Id. at* § 989); Fourth Geneva Convention, Article 32 ("torture" and "other measures of brutality") (*Id. at* § 990). GC IV, Article 27.

[50] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, *I.C.J. Reports 2012*, at ¶ 99.

[51] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 176 arts. 4(2), 10 (Dec. 16, 1966).

[52] Cordula Droege, *"In Truth the Leitmotiv": The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law*, 89 Int'l. Rev. red cross 867, 524 (2007) [hereinafter *Prohibition of Torture*] (quoting Commentary, Vol. IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958, at 204).

[53] *Id.* at 524-525.

[54] *Id.* at 525 (stating the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment "Constitutes the starting point for the interpretation of torture in IHL as well, and in particular Common Art. 3").

of ill-treatment are so similar in both bodies of law that the interpretation of one body of law influences the other, and *vice versa*."[55]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides the internationally authoritative definition of torture as:

> *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[56]

i. Intentional infliction of severe mental or physical pain or suffering

In order for an act to constitute torture, the perpetrator must intentionally inflict severe mental or physical pain or suffering on a person.[57] This element must be assessed according to both objective and subjective (i.e. relating the unique circumstances of a particular case) criteria.[58]

The International Criminal Tribunal for the former Yugoslavia (ICTY) has defined the threshold of pain required for torture to be considered "severe."[59] According to the ICTY, all factual circumstances of the case have to be taken into account in order to assess the severity of the pain inflicted.[60] The nature and context of the infliction of pain includes the environment, duration of time, repetition or isolation of the act or treatment, the mental health or strength of individual, as well as his or her cultural, social, and religious beliefs and sensitivity, gender, age, social or political background, or past experiences.[61] In addition, "the manner and method used" (i.e. type of act inflicted) and the "position of inferiority of the victim" are also relevant.[62] Some acts, such as rape, *per se* meet the severity threshold required to prove torture, because they necessarily imply severe physical pain and suffering.[63]

The severe mental suffering experienced by Yazidi women as a result of their abuse is clear. While several researchers have documented cases of women and girls committing suicide after their capture, but before their sale as sexual slaves, there are also instances of women committing suicide during their captivity, so as to escape constant rape and other abuses by their captors.[64] The UN COI Report noted that while the Yazidi survivors bore physical wounds and scars from

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[55] *Id.* at 517 (*See, e.g.*,, Prosecutor v. Furundzija, Case No. IT-95-17/1, Trial Judgment, ¶ 159 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[56] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, Art. 1(1) (Dec. 10, 1984), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx [hereinafter CAT].

[57] CAT, *supra* note 56, at Art. 1(1).

[58] *Prohibition of Torture*, *supra* note 52, at 526.

[59] *Id.* at 527.

[60] *Id.* at 529 (citing Prosecutor v. Brdjanin, Case No. IT-99-36-T, Trial Judgment, ¶ 483 (Int'l Crim. Trib. for the Former Yugoslavia (Sept. 1, 2004).

[61] *Id.* at 529.

[62] Prosecutor v. Krnojelac, Case No. IT-97-25, Trial Judgement, ¶ 182 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

[63] *Prohibition of Torture*, *supra* note 52, at 529 (citing Prosecutor v. Brdjanin, Case No. IT-99-36-T, Trial Judgment, ¶ 485 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) ; Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ¶ 682 (Sept. 2, 1998); *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. ¶¶ 82-86 (Sept. 25, 1997); Committee against Torture, *T.A. v. Sweden*,¶¶ 2.4, 7.3, U.N. Doc. CAT/C/34/D/226/2003 (May 27, 2005); *Raquel Martı´n de Mejı´a v. Peru*, Case 10.970, Report No. 5/96, Inter-Am. Ct. H.R., at 185 (1996).

[64] *Systematic Rape*, *supra* note 30.

the abuse they suffered, their mental trauma was even more visible, and most of the women interviewed described thoughts of suicide.[65] The report also stated that "[f]emale survivors of sexual slavery have been shattered, with many experiencing suicidal thoughts, and intense feelings of rage interspersed with periods of deep depression and listlessness."[66] Though the mental trauma experienced by the Yazidis is not solely a result of forced contraceptive use, this act facilitated the ongoing and perpetual rape and sexual abuse of some of these women while in captivity. In order to determine whether the precise act of forcible use of oral or injectable contraception had a direct causal link to their severe mental and emotional suffering, further psychological studies must be undertaken to determine whether the specific act of forced contraceptive use immediately prior or following rape caused particular mental or emotional harm.[67]

Yazidi women forced to undergo abortions by ISIL fighters clearly suffered severe physical pain and suffering as a result of this invasive surgical procedure.[68] Similarly, the forced use of oral and injectable contraception caused severe physical pain and suffering to Yazidi women. These tactics allowed ISIL fighters to continuously rape their victims by preventing or eliminating pregnancies, as well as by enabling them to sell, trade, or gift their victims to other fighters with assurances that the women and girls were not pregnant.[69]

Interviews by a New York Times reporter with over three dozen Yazidi women who recently escaped ISIL described several methods the ISIL fighters used to avoid pregnancy.[70] Women were forced to take daily birth control pills in front of their captors, and one young woman was forced to take the morning after pill when her owner feared the delay of her menstrual cycle.[71] In some cases, multiple forms of birth control were administered to individual women, in order to ensure that they did not become pregnant.[72]

In one case, an older Yazidi woman was forced to escort about 30 young women over a period of months to receive regular shots of 150 milligrams of Depo-Provera (an injectable contraceptive) at the hospital in Tel Afar–including her own teenage daughter.[73] Many of the women said they knew they were about to be sold when they were taken to the hospital to give a urine sample and tested for the hCG hormone, which indicates pregnancy.[74] In at least one reported case, a woman was forced to have an abortion in order to make her available for sex, and others were pressured to do so.[75]

The women were not asked whether they were willing to take birth control or if they had a preference for a specific kind. Additionally, no consideration was taken of the hormonal or physical

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[65] *ISIS Crimes*, *supra* note 3, at ¶ 77.
[66] *Id.* at ¶ 177.
[67] Such as the study by the Human Rights in Trauma Mental Health Lab at Stanford University, which submitted testimony on severe mental trauma for survivors of sexual and gender based violence in the *Prosecutor v. Bemba case* before the International Criminal Court, https://www.icc-cpi.int/RelatedRecords/CR2016_06768.PDF.
[68] Atika Shubert & Bharati Naik, *ISIS 'forced pregnant Yazidi women to have abortions,* CNN (Oct. 6, 2015), http://www.cnn.com/2015/10/06/middleeast/pregnant-yazidis-forced-abortions-isis/ [hereinafter *Forced Abortions*].
[69] *ISIS Pushes Birth Control*, *supra* note 7.
[70] *Id.*
[71] *Id.*
[72] *Id.*; *ISIS Crimes*, *supra* note 3, at ¶¶ 69-70.
[73] *ISIS Pushes Birth Control*, *supra* note 7.
[74] *Id.*
[75] *Id.*; *Forced Abortions, supra* note 68.

effects that many women experience when taking hormone-based forms of birth control.[76] Finally, the use of oral and injectable contraceptives only prevented pregnancies, but did not prevent sexually transmitted diseases, for which they were at significant added risk when sold and traded among multiple owners who raped them without the use of condoms or other forms of protection.[77]

Forced abortion and forced sterilization as methods of torture, and particularly as discriminatory practices towards women from a minority group, are addressed by many international human rights bodies and treaties.[78] In a 2013 report, U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Juan E. Mendez noted that "[f]orced sterilization is an act of violence,[79] a form of social control, and a violation of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment."[80] The Special Rapporteur cited examples of "female detainees forced to undergo abortions, so that they could be sent to labour camps" as forms of torture.[81] He also noted that reproductive discrimination that "target[s] ethnic and racial minorities, women from marginalized communities… [is] an increasingly global problem."[82]

The Human Rights Committee explicitly stated that breaches of Article 7 of the ICCPR (which prohibits torture, cruel, inhuman or degrading treatment or punishment) include forced abortion and forced sterilization, among other crimes.[83] The European Court of Human Rights also found that the forced sterilization of Roma women was in contravention of Article 3 (prohibiting of torture, inhuman or degrading treatment) of the European Convention on Human Rights.[84] Finally, the Inter-American Court of Human Rights recently determined that forced sterilization generally violates a core set of human rights, including the right to dignity, and may also constitute cruel, inhuman or degrading treatment.[85] Because the use of forced contraceptives to prohibit women from becoming pregnant is similar in purpose, methods, and physical and mental harms to the practices of forced sterilizations and forced abortions, an analogous comparison can be made to determine that the use of forced contraceptives amounts to torture.

The use of forced oral or injected contraception is furthermore analogous to forced feeding, due to its impermanent nature (unlike forced sterilization which may have permanent effects), even in the absence of long-term consequences or particular physical pain, and as a non-consensual and unnecessary medical intervention. The international community, including the U.N. Special Rapporteur on Torture, the U.N. Commission on Human Rights, and the International Committee

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[76] *ISIS Crimes*, *supra* note 3, at ¶¶ 69-71.
[77] *Id.* at ¶ 71.
[78] *See inter alia* International Covenant on Civil and Political Rights, General Comment No. 28, Equality of Rights Between Men and Women, ¶¶ 11, 20, CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_21_Rev-1_Add-10_6619_E.pdf; Committee Against Torture, *Concluding Observations*: *Slovakia*, ¶ 14, U.N. Doc. CAT/C/SVK/CO/2(2009); *Czech Republic*, ¶ 6(n), U.N. Doc.CAT/C/CR/32/2; Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24, Article 12 of the Convention*, ¶ 22, A/54/38/Rev.1, chap. I.
[79] *See* Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Violence against Women, ¶ 22; Human Rights Committee, General Comment No. 28, ¶¶ 11, 20; Juan Mendez (Special Rapporteur, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 48, A/HRC/22/53 (Feb. 1, 2013)[hereinafter A/HRC/22/53]
[80] A/HRC/22/53, *supra* note 79, at ¶ 48.
[81] Manfred Nowak (Special Rapporteur), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶ 286, A/HRC/7/3 (Jan. 15, 2008)[hereinafter A/HRC/7/3].
[82] *Id.* at ¶ 48.
[83] *Id.* at ¶ 50.
[84] N.B. v. Slovakia, 2012-II Eur. Ct. H.R. 29518; V.C. v. Slovakia, 2011-II Eur. Ct. H.R. 18968.
[85] *I.V. v. Bolivia, IACtHR (Dec. 22, 2016).*

of the Red Cross (ICRC), have condemned forced feeding as torture or inhumane treatment.[86] The Committee against Torture, which monitors State implementation of CAT, has also found that force-feeding constitutes torture and violates CAT.[87]

Various other international bodies have also considered the legality of forced feeding. Article 11 of Additional Protocol I to the Geneva Conventions[88] prohibits subjecting detainees "to any medical procedure…which is not consistent with generally accepted medical standards" and is considered customary international law by actors such as the ICRC and the United States.[89] Organizations such as the World Medical Association, and national medical associations such as the American Medical Association and the Israeli Medical Association have vocally opposed forced feeding for decades.[90] Two European Court of Human Rights cases have affirmed that forced feeding constitutes torture.[91]

In sum, it is well-established that practices such as forced abortions, forced sterilization, and other non-consensual and medically unnecessary medical interventions like forced feeding constitute torture, causing severe mental and physical pain and suffering. Similarly, the use of forced oral and injectable contraceptives in the case addressed here, which is by nature non-consensual and medically unnecessary, causes severe physical and mental pain and suffering, and *per se* amounts to torture under international law. Furthermore, the use of forced contraceptives cannot be disassociated from the broader context in which it is used, namely as a means of allowing and perpetuating consistent and repeated sexual abuse, which in itself is also a well-established form of torture.

Ultimately, when assessing whether an act amounts to torture or to other cruel, inhuman, or degrading treatment, the severity of harms will need to be determined by a trier of fact during judicial proceedings, or by members of international or regional human rights mechanisms. While torture has been assessed in this section, the alternative legal categories of cruel and inhuman treatment, and degrading and humiliating treatment, will be examined below. While the difference between torture, cruel and inhuman treatment, and degrading and humiliating treatment is often one of severity of harm and intent, the classification of specific acts as torture, cruel and inhuman

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[86] *See, e.g.*, Press Release, U.N. Office of the High Comm'r for Human Rights, U.N. Experts Urge Israel to Halt Legalization of Force-Feeding Hunger-Strikers in Detention (July 28, 2015) (quoting the Special Rapporteur on Torture as saying that force-feeding is "tantamount to cruel, inhuman, and degrading treatment"); *Hunger Strikes in Prisons: The ICRC's Position*, ICRC (Jan. 31, 2013), https://www.icrc.org/eng/resources/documents/faq/hunger-strike-icrc-position.htm; Leila Zerrougui (Chairperson-Rapporteur), *Situation of Detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006).

[87] Committee Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, ¶ 14, U.N. Doc. CAT/C/USA/CO-3-5 (Dec. 19, 2014).

[88] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol 1), June 8, 1977, art. 11. The official commentary on Article 11 identifies the World Medical Association (WMA) as one source of these standards, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=67D8F6A27DB1CEA4C12563CD004306A3.

[89] Int'l Comm. of the Red Cross, Customary IHL r. 92 (2005); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. Pol'y 415, 423 (1987).

[90] 57th World Medical Assembly, Pilanesberg, South Africa, Oct. 2006, *Revised Declaration of Malta on Hunger Strikers*, ¶ 2 (Oct. 2006) ("Forced feeding contrary to an informed and voluntary refusal is unjustifiable."); *see also* 29th World Medical Assembly, Tokyo, Japan, Oct. 1975, *Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, ¶ 6 (Oct. 1975); *see also* Israeli Medical Association, The Physician's Guide to Treating the Detainee/Prisoner on a Hunger Strike 3 (June 2014) ("[F]orced feeding is equivalent to torture."); Letter from Jeremy A. Lazarus, President, American Medical Ass'n, to Chuck Hagel, Sec'y of Defense (April 25, 2013).

[91] Nevmerzhitsky v. Ukraine, 2005-II Eur. Ct. H.R. 307; Press Release, European Court of Human Rights, Chamber Judgment Ciorap v. Republic of Moldova (June 19, 2007).

treatment, or degrading and humiliating treatment, is typically determined on a case-by-case basis, and remains fluid. This is important for the reasons that it (1) permits such determinations to remain flexible in order to cover a wide range of evolving situations and practices; (2) recognizes that many victims endure a number of acts and conditions that cumulatively amount to torture or other ill-treatment, rather than suffering one isolated act; and (3) accounts for the evolution of legal interpretations of acts and practices over time.[92]

ii. Prohibited purpose: discrimination against Yazidi women and girls

ISIL's treatment of the Yazidi women reveals clear patterns of discrimination and differential treatment from other groups in the same communities. In practice, only Yazidi women and girls are held at the holding centers throughout Iraq and Syria, and advertised and sold at slave markets.[93] "Those bought in groups by their fighter-owners or held on ISI[L] military bases as sex slaves for its fighters stated they were only ever held with other Yazidi females, including girls aged nine and above."[94] Community leaders, government officials, and other human rights workers also confirmed this claim.[95] The UN COI Report notes that Christians living in ISIL-controlled territories "live difficult and often precarious existences, are viewed with suspicion, and are vulnerable to attack if ISIS perceive they are seeking protection from non-aligned forces." However, Christian women have not faced similar treatment to Yazidi women and, as long as they pay the *jizyah* tax, they are allowed to live as Christians in their communities.[96]

The Center for Reproductive Rights also recently noted "the CAT Committee has also consistently found that forms of forced contraception such as forced sterilization may constitute torture or ill-treatment, particularly when targeted at marginalized groups, such as …women from other minority groups."[97] Additionally, the ICTY in the Čelebići judgment noted that it considered rape to be a form of discrimination against women, fulfilling the purpose requirement under the definition of torture.[98] The explicit and targeted discrimination of the minority population of Yazidis as "apostates" and unbelieving "devil-worshippers" who were eligible for sexual slavery, and forced to take contraceptives to ensure their sexual availability, demonstrate clear discrimination against Yazidi women.

iii. Consent or acquiescence of a public official or other person acting in an official capacity

Despite the strong evidence of an institutionalized policy of sexual slavery by ISIL authorities, the forced use of contraception has been more *ad hoc* and perpetrated by individual fighters, rather than pursuant to an ISIL-instituted policy.[99] Captives held by senior commanders were more likely

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[92] *Prohibition of Torture*, *supra* note 52, at 518.
[93] UN COI, *ISIS Crimes*, *supra* note 3, at ¶ 73, 161.
[94] *Id.*
[95] *Theology of Rape, supra* note 5.
[96] UN COI, *ISIS Crimes*, *supra* note 3, at ¶ 162.
[97] Center for Reproductive Rights, *Reproductive Rights Violations as Torture or Ill-Treatment*, http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Reproductive_Rights_Violations_As_Torture.pdf. Specific references to Convention against Torture Committee comments to Slovakia, Peru, and Kenya were cited. Committee Against Torture, Concluding Observations on: Slovakia, ¶ 14, U.N. Doc. CAT/C/SVK/CO/2 (2009); Peru, ¶¶ 15, 19, U.N. Doc. CAT/C/PER/CO/5-6 (2013); Kenya, ¶¶ 23, 27, U.N. Doc. CAT/C/KEN/CO/2 (2013).
[98] Prosecutor v. Mucić et al., Case No. IT-96-21-I, Trial Judgement, ¶ 493 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).
[99] *ISIS Crimes*, *supra* note 3, at ¶ 69-70.

to be given contraception, while junior fighters enforced the prohibition less frequently, possibly because they were less familiar with the specific rules of slave ownership, or had less access to contraception.[100]

However, developments in customary international law and jurisprudence indicate that the "official capacity" requirement for a finding of torture is not necessary in cases of armed conflict. The ICTY in *Prosecutor v. Kunarac, et al.* concluded:

> *"the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law."*[101]

Jurisprudence has since reaffirmed that in such cases, the "characteristic trait of the offence is found in the nature of the act committed rather than in the status of the person who committed it."[102]

This holding has been adopted and accepted by the international community, as reflected in the definition of crimes against humanity and war crimes in Articles 7 and 8 of the Rome Statute, which recognizes that torture can be committed by State as well as private actors.[103] Therefore, since forced contraceptive use intentionally inflicts severe mental and physical pain and suffering on Yazidi women, and was done for a discriminatory purpose, the act rises to the level of torture.

B. Cruel and Inhuman Treatment

If the use of forced contraception by ISIL fighters on Yazidi women does not rise to the level of severity to constitute torture, the act meets the threshold of harm for cruel and inhuman treatment. Common Article 3 of the Geneva Conventions prohibits "cruel treatment" by parties to non-international armed conflicts.[104] Although Common Article 3 does not explicitly mention the term "inhuman," international jurisprudence and State practice show similarities between the terms "cruel" and "inhuman" treatment.[105] The terms are used interchangeably and have no difference

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[100] *ISIS Pushes Birth Control*, *supra* note 7.
[101] *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & 23/1-A-T, Trial Judgement, ¶ 496 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
[102] *See Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Judgement, ¶ 495 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement (May 15, 2003).
[103] The act of torture must take place while the "in the custody or under the control of the accused," Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), art. 7(2)(e); "and where the State did not fail to exercise due diligence obligations, with the "characteristic trait of the offence [being] found in the nature of the act committed rather than in the status of the person who committed it." *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 489 (Sept. 1, 2004).
[104] Geneva Conventions, Common Article 3.
[105] *Prohibition of Torture*, *supra* note 52, at 520 (citing *Prosecutor v. Delalic and Others*, Case No. IT-96-21, Trial Judgement, ¶ 552 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *see also Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Trial Judgement, ¶ 265 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26 2001); *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgement, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

in their meaning.[106] The term "inhuman treatment" appears in the grave breaches provisions of the four Geneva Conventions, as well as in the Additional Protocols.[107]

The ICTY defines "inhuman treatment" as "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[108] The Inter-American Court of Human Rights has followed the ICTY's definition.[109] The European Court of Human Rights has not always used the same wording as the ICTY but has found a requirement for ''a minimum level of severity'' for treatment to attain the threshold of ill-treatment.[110]

To qualify as cruel or inhuman treatment, an act must cause suffering of a "serious" nature and "must go beyond mere degradation or humiliation."[111] Like torture, the seriousness of physical or mental suffering is a question of fact to be determined on a case-by-case basis.[112] Examples of "cruel treatment" include lack of medical attention;[113] holding a detained person or imprisoned person in conditions which deprive her temporarily or permanently of the use of any of her natural senses, such as sight, hearing, or her awareness of place and the passing of time;[114] placing a person in the trunk of a vehicle in the absence of other ill-treatment;[115] involuntary sterilization;[116] gender-based humiliation such as shackling women detainees during childbirth;[117] and the use of electroshock devices to restrain a person in custody.[118] Courts have found violations of the prohibition

[106] *Id.* at 520 (citing *Prosecutor v. Delalic and Others*, Case No. IT-96-21, Trial Judgement, ¶ 552 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *see also Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Trial Judgement, ¶ 265 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgement, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3 2000).
[107] *Id.* at 520; Articles 50, 51, 130, and 147 of the four Geneva Conventions, as well as in Article 75 of Additional Protocol I and Article 4 of Additional Protocol II.
[108] *Id.* at 521 (citing *Prosecutor v. Delalic and Others*, Case No. IT-96-21, Trial Judgement, ¶ 543 (Int'l Crim. Trib. for the Former Yugoslvaia Nov. 16, 1998); *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Trial Judgement, ¶ 246 (Int'l Crim. Tirb. For the Former Yugoslavia Mar. 31, 2003; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Trial Judgement, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26 Feb., 2001); *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgement, ¶¶ 154-55 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3 Mar. 2000). *See Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgement, ¶¶ 154-55 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3 2000); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Trial Chamber, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Trial Judgement, ¶ 246 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003). Keeping the notion of ''serious attack'' in the definition of inhuman treatment would mean that it would constitute a grave breach according to Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions. With regard to Common Article 3, however, the discussion has no practical consequence, since ''serious attacks'' would in any case be covered by the notion of ''outrages upon personal dignity'' and therefore be absolutely prohibited.
[109] *Id.* at 521 (citing IACtHR, *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005, Series C, No. 13, ¶ 68).
[110] ECtHR, *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, ¶ 162.
[111] *Prohibition of Torture*, *supra* note 52, at 520.
[112] *Id.* at 521 (citing *Prosecutor v. Limaj and Others*, Case No. IT-03-66-T, Trial Judgement, ¶ 232 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).
[113] *Id.* at 523 (citing IACtHR, *Tibi v. Ecuador*, Judgment of 7 September 2004, Series C No. 114, ¶ 157; ECtHR, *Koval v. Ukraine*, Judgment of 19 October 2006, ¶ 82).
[114] Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, (Body of Principles), http://www.unhchr.ch/html/menu3/b/h_comp36.htm.
[115] IACtHR, *Castillo-Pa´ez v. Peru*, Judgment of 3 November 1997, Series C, No. 34, ¶ 66; *Villagra´n Morales v. Guatemala*, Judgment of 19 November 1999, Series C, No. 63, ¶ 164; *Go´mez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004, Series C, No. 110, ¶ 109.
[116] Comm. Against Torture, Concluding Observations for Peru, ¶ 23, U.N. Doc. CAT/C/PER/CO/4 (July 25, 2006).
[117] *Id.* at ¶ 23.
[118] *Id.* at ¶ 35.

of "inhuman treatment" in cases of active mistreatment and very poor conditions of detention,[119] solitary confinement,[120] and a lack of adequate food, water or medical treatment for detainees.[121] Additionally:

> *"[w]hile the wording in the Geneva Conventions as well as jurisprudence suggest that cruel and inhuman treatment is of a nature to cause more serious harm than degrading treatment, and that torture is of a nature to cause more severe harm than cruel and inhuman treatment, it is extremely difficult in practice to draw a clear line between the thresholds of suffering."*[122]

Finally, as with torture, mental suffering alone can be serious enough to fulfill the requirement of cruel and inhuman treatment.[123] Threats of torture, witnessing others being ill-treated, raped or executed can all amount to cruel and inhuman treatment.[124]

Overall, in differentiating between torture and cruel and inhuman treatment, the ICTY has held that the purposive element and the level of severity of the pain or suffering are the two elements that distinguish torture from the IHL violation of inhuman treatment found in Common Article 3.[125]

In this case, the physical pain from a forcible injection of Depo-Provera and its possible side effects[126] or a forced abortion, as well as the mental suffering of women and girls required to take the morning after pill or daily contraceptives in order to facilitate their frequent rape and transfer the Yazidis as sex slaves between owners, are serious harms that constitute cruel and inhuman treatment at a minimum.

C. Humiliating and Degrading Treatment

The third form of ill-treatment prohibited by Common Article 3 is "outrages upon personal dignity, in particular humiliating and degrading treatment," which is also prohibited by Article 75

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[119] *See*, e.g., U.N. Human Rights Committee, *Améndola Massiotti and Baritussio v. Uruguay* (cited in Vol. II, Ch. 32, § 1334) and *Deidrick v. Jamaica (Id. at* § 1335); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria (151/96)* (*Id. at* § 1338); European Commission of Human Rights, *Greek case* (*Id. at* § 1339).

[120] *See*, e.g., U.N. Human Rights Committee, General Comment No. 20, Article 7 of the International Covenant on Civil and Political Rights (*Id. at* § 1333), *Gómez de Voituret v. Uruguay* (*Id.* at§ 1333) and *Espinoza de Polay v. Peru* (*Id. at* § 1333); European Committee for the Prevention of Torture, Second General Report (*Id. at* § 1346); Inter-American Court of Human Rights, *Velásquez Rodríguez case* (*Id at* § 1347); Inter-American Court of Human Rights, *Castillo Petruzzi and Others case* (*Id at* § 1351).

[121] U.N. Human Rights Committee, *Essono Mika Miha v. Equatorial Guinea,* Communication No. 414/1990, 8 July 1994, § 6.4; U.N. Human Rights Committee, *Williams v. Jamaica,* Communication No. 609/1995, § 6.5; European Court of Human Rights, *Keenan v. United Kingdom*, Judgment, 3 April 2001, § 115; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria*, Communication No. 151/96, 15 November 1999, § 27.

[122] *Prohibition of Torture*, *supra* note 52, at 519.

[123] *Id.* at 524 (citing ACtHR, Loayza Tamayo v. Peru, ¶ 57; ECtHR, Ireland v. United Kingdom, ¶ 167; Committee Against Torture, 'Concluding Observations for the United States of America, ¶ 13).

[124] *Id.* (citing ACtHR, Villagran Morales v. Guatemala, ¶ 165; Case of the 'Juvenile Reeducation Institute'' v. Paraguay, Judgment of 2 September 2004, Series C, No. 112, ¶ 167; Inter-American Commission on Human Rights (IACmHR), Prada Gonzalez and Bolano Castro v. Colombia, Case 11.710, Report No. 63/01, Annual Report OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), ¶ 34).

[125] *Id.* at 526 (citing *Prosecutor v. Kunarac*, Cases No. IT-96-23/IT-96-31/, Trial Judgement, ¶ 142 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Judgement, ¶¶ 179-80 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Trial Judgement, ¶ 486 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004). This is in conformity with international human rights law: as is clearly stated in Article 1(2) of the Torture Declaration and recognized in the title of the Convention against Torture, torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment).

[126] *Depo-Provera (contraceptive injection)*, Mayo Clinic, https://www.mayoclinic.org/tests-procedures/depo-provera/basics/risks/prc-20013801 (last visited Jan. 12, 2018).

of Additional Protocol I and Article 4 of Additional Protocol II of the Geneva Conventions.[127] The ICTY requires "that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity."[128] Just as the terms "cruel" and "inhuman" are synonymous, "humiliating" and "degrading" are interchangeable.[129]

Like the other two forms of ill-treatment, humiliating and degrading treatment also have both objective and subject criteria. According to the ICTY, "the form, severity and duration of the violence, [and] the intensity and duration of the physical and mental suffering, shall serve as a basis for assessing whether crimes were committed."[130] The harm must be "real and serious" but does not need to be permanent.[131] Examples of acts found to be degrading and humiliating include:

> *"[t]reatment or punishment of an individual if it grossly humiliates the individual before others or drives him or her to act against his or her will or conscience,*[132] *serious forms of racial discrimination,*[133] *not allowing a prisoner to change his soiled clothes,*[134] *cutting off the hair and beard for punishment,*[135] *the use of human shields,*[136] *inappropriate conditions of confinement, performing subservient acts, being forced to relieve bodily functions in one's clothing, or enduring the constant fear of being subjected to physical, mental or sexual violence."*[137]

However, unlike the crime of torture, no purposive element is required to establish degrading and humiliating treatment.[138] In addition, proving a violation does not require severe mental or physical pain; rather, the harm must be significant to be distinguished from a mere insult.[139]

The European Court of Human Rights has found that in order to determine whether a particular form of treatment is ''degrading'' it must consider ''whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 [of the European Convention of Human Rights]."[140] The Court also held that the absence of an intention to debase or humiliate does not exclude a finding of degrading treatment.[141] The Inter-American Court of Human Rights has found

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[127] Article 75 of Additional Protocol I and Article 4 of Additional Protocol II of the Geneva Conventions.
[128] *Prohibition of Torture*, *supra* note 52, at 530 (citing Prosecutor v. Kunarac, Cases No. IT-96-23/IT-96-23/1, Trial Judgement, ¶ 161 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
[129] *Id.* at 532.
[130] *Id.* at 531 (quoting Prosecutor v. Aleksovski, Case No. IT-95-14/1, Trial Judgement, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999).
[131] *Id.* (quoting Prosecutor v. Kunarac, Cases No. IT-96-23/IT-96-23/1, Trial Judgement, ¶ 501 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
[132] *Id.* (citing ECmHR, The Greek Case, Report of 5 November 1969, (1969) 12 Yearbook 186–510, at 186).
[133] *Id.* (citing ECmHR, *East African Asians v. United Kingdom*, European Commission of Human Rights Report, 14 December 1973, Decision and Reports (DR) 78, at 76).
[134] *Id.* (citing ECtHR, *Hurtado v. Switzerland*, Judgment of 28 January 1994, Series A, No. 280-A, ¶ 12).
[135] *Id.* (citing ECtHR, *Yankov. v. Bulgaria*, Judgment of 11 December 2003, ECHR 2203-XII, ¶¶ 114, 121).
[136] *Id.* (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1, Trial Judgement, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999).
[137] *Id.* (citing Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Appeals Judgement, ¶ 173 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).
[138] *Id.* (citing Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Appeals Judgement, ¶226 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).
[139] *Id.*
[140] *Id.* (citing ECtHR, *Raninen v. Finland*, Judgment of 16 December 1997, Reports 1997-VIII, ¶ 55).
[141] *Id.* (citing ECtHR, *Peers v. Greece*, Judgment of 19 April 2001, Reports 2001-III, ¶ 74; Kalashnikov. v. Russia, Judgment of 15 February 2002, Report 2002-VI, ¶ 95).

"[t]he degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance."[142]

The reality that the grave breaches provisions criminalize cruel and inhuman treatment, but not outrages upon personal dignity, suggests that degrading and humiliating treatment has a lower threshold of physical and mental suffering than what is necessary to constitute inhuman treatment.[143] However,

> *"[d]epending on the particular circumstances of the case, treatment which is merely considered degrading or humiliating can easily turn into cruel and inhuman treatment if repeated over a certain period of time or committed against a person in a particularly vulnerable situation, or into torture if committed intentionally for an illegitimate purpose."*[144]

In the current instance, the use of forced contraception by ISIL fighters on Yazidi women as a means to continuously subject them to rape, sexual slavery, and other forms of abuse, constitutes humiliating and degrading treatment. As noted above, these acts are analogous to instances of forced abortion, forced sterilization, and forced feeding, performed particularly on young minority women who are at their most vulnerable. Since these acts frequently take place on a frequent basis over a period of months or years, it is likely that they rise to the level of cruel and inhuman treatment or torture.

D. War Crimes[145]

In order for torture to qualify as a war crime, four elements specific to IHL on non-international armed conflict must be met, in addition to the requirements codified in the CAT definition. These are: the status of victim as either *hors de combat*, civilian, medical personnel, or religious personnel taking no part in the hostilities; the perpetrator's knowledge of the victim's status; the act happening during or being associated with a non-international armed conflict; and the perpetrator's knowledge of the factual circumstances establishing the existence of the armed conflict.[146]

The war crime of "inhuman treatment" is defined by the Elements of Crimes for the International Criminal Court (ICC) as the infliction of "severe physical or mental pain or suffering."[147] Case law from various human rights bodies has applied similar definitions to the one used by the Elements of Crimes, stressing the severity of the physical or mental pain or suffering, as noted above.[148]

Finally, the war crime of "outrages upon personal dignity" is defined in the ICC Elements of Crimes as acts which humiliate, degrade or otherwise violate the dignity of a person to such a

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[142] *Id.* 531 (citing IACtHR, *Loayza Tamayo v. Peru*, Judgment of 17 September 1997, Series C, No. 33, ¶ 57; IACmHR, Report No. 35/96, Case No. 10.832, *Luis Lizardo Cabrera v. Dominican Republic*, 19 February 1998, ¶ 77).
[143] *Id.* at 532.
[144] *Id.*
[145] This is not an exhaustive discussion of all war crimes that may apply to ISIL fighters because of their treatment of the Yazidis, of which there could be many, merely limited to the use of forced contraceptives as a method of torture.
[146] Elements of Crimes for the ICC, Definition of inhuman treatment as a war crime (ICC Statute, Article 8).
[147] Elements of Crimes for the ICC, Definition of Inhuman Treatment as a War Crime (ICC Statute, Article 8(2)(a)(ii)-2).
[148] *E.g.* Prosecutor v. Delalic, Case No. IT-96-21, Trial Judgement, ¶ 543 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Trial Judgement, ¶246 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2, Trial Judgement, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Blaskic, Case No. IT-95-14, Trial Judgement, ¶¶ 154-55 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

degree "as to be generally recognized as an outrage upon personal dignity."[149] The Elements of Crimes noted that the cultural background of the person must be considered, to account for treatment that may be humiliating to someone of a particular nationality or religion.[150]

There is no doubt that ISIL fighters are well aware of the Yazidis' status as civilians taking no part in hostilities, and that the acts in question occurred during the non-international armed conflict. ISIL fighters are also aware that they are actively taking part in the conflict[151] and therefore the use of forced contraceptives on Yazidi women and girls can be charged as a war crime under one (or more) of the thresholds listed above.

E. Crimes Against Humanity

The ICC Elements of Crimes defines the crime against humanity of torture as follows:

> *"The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. Such person or persons were in the custody or under the control of the perpetrator. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."*[152]

The Elements of Crimes specifically states that "no specific purpose need be proved for this crime."[153] Similar to the discussion of torture as a war crime above, the perpetrator of the crime against humanity of torture must cause "severe physical or mental pain or suffering" on a person under his or her control,[154] or in the alternative, may be charged with the crime against humanity of other inhumane acts if the "perpetrator inflicted great suffering, or serious injury to body or to mental or physical health…"[155]

A determination of the severity of harm will need to be made, but since the acts under discussion took place as part of a widespread and systematic attack on Yazidi civilians and the ISIL fighters were well aware of this fact, the ISIL perpetrators could be charged with the crime against humanity of torture or other inhumane acts.

III. Accountability Mechanisms

International law typically places rights and obligations on States Parties to international treaties. As a general principle, non-State armed groups and non-State actors do not fall within the jurisdiction of such treaties, even if they have effective control over the territory in which the violations take place and/or perpetrate the violence (unless they become the official ruling government or new State).[156] This section examines accountability mechanisms in international humanitarian

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[149] Elements of Crimes for the ICC, Definition of Outrages Upon Personal Dignity, in particular Humiliating and Degrading Treatment, as a War Crime (ICC Statute, Article 8(2)(b)(xxi) and (c)(ii)) https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.
[150] *Customary IHL*, ICRChttps://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90#refFn_42_28
[151] *Slavery Before the Hour, supra* note 4, at 7.
[152] Elements of Crimes–Crime Against Humanity of Torture 7(1)(f).
[153] Elements of Crimes–Crime Against Humanity of Torture 7(1)(f) footnote 14.
[154] Elements of Crimes–Crime Against Humanity of Torture 7(1)(f).
[155] Elements of Crimes–Crime Against Humanity of Other Inhumane Acts 7(1)(k).
[156] William Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 Fordham Int'l L. J. 907 (2003) [hereinafter *NSAs in NIACs*].

law, international human rights law, international criminal law, and national domestic law, in relation to where jurisdiction for the crimes analyzed above can be found.

A. International Humanitarian Law

Although the prohibition of torture and the requirement of humane treatment are the minimum legal standards applicable to parties to a conflict, IHL does not provide for supervisory systems to mandate compliance with these standards, or for permanent mechanisms to allow survivors of torture to bring complaints against State or non-State actors for violations of IHL.[157] Although there is currently a movement towards creating a compliance mechanism for IHL violations,[158] no such mechanism currently exists to provide relief to Yazidi victims.

B. International Human Rights Law

Unlike in IHL, various international human rights law treaties establish treaty bodies, or committees of independent experts tasked with monitoring States' compliance with and implementation of obligations. The Committee against Torture (Committee), is the treaty body that monitors compliance with and implementation of obligations contained in the CAT, and a mechanism that has the potential to address the torture and mistreatment suffered by the Yazidis.

However, because the Committee only has the authority to consider claims directed at States Parties to the CAT—which recognize the competence of the Committee to hear such claims—the Yazidis who have suffered from acts that would amount to torture or other ill-treatment under the CAT are in fact not eligible to bring claims against individual, or non-State perpetrators. Although the Committee has limited authority to consider individual complaints or communications based on "reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party [to CAT],"[159] an individual complaint may only be directed at a State Party that has made a formal declaration recognizing the competence of the Committee to receive and consider individual complaints or communications.[160] As such, claims brought by Yazidi victims against individual perpetrators, such as ISIL fighters, or against non-State entities such as ISIL itself, do not meet the eligibility criteria for consideration by the Committee, which only has the authority to address complaints against State Parties that have agreed to recognize the Committee's competence to hear individual complaints.[161]

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[157] ICRC, Compliance with International Humanitarian Law (2003); Kleffner, Improving compliance with International Humanitarian Law through the establishment of an individual complaints procedure p. 237 et seq.

[158] *Strengthening Compliance with International Humanitarian Law: The World of the ICRC and the Swiss Government*, ICRC (Jul. 22, 2016), https://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government.

[159] Article 20(1) of the Convention, http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx.

[160] Article 22(1) of the Convention ("A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.").

[161] Article 22(4)(b) of the Convention contains an additional requirement that "all domestic remedies must be invoked and exhausted" before the Committee will consider a claim, except if the remedy is "unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention." Article 22(4)(a) enshrines an additional requirement that the "matter has not been, and is not being, examined under another procedure of international investigation or settlement."

Since claims by Yazidis against individual perpetrators or non-State entities do not meet the eligibility criteria, they cannot not be considered by the Committee. Although ISIL embodies State-like characteristics, ISIL is not a party to the CAT, and Yazidi complainants thus cannot lodge complaints against ISIL before the Committee. Individual complainants who might consider directing claims at Iraq and/or Syria—on the grounds that violations by ISIL are occurring in their territories—will also find themselves unable to do so. This is because although both Syria and Iraq are State Parties to the CAT,[162] neither has made the necessary declaration recognizing the competence of the Committee to consider individual claims.[163] In fact, Syria has lodged a declaration stating that it does not recognize the competence of the Committee.[164]

Additionally, while Syria and Iraq are both parties to the ICCPR, the ICCPR's individual complaint mechanism only exists in its Optional Protocol, to which neither States are party. If an individual communication was made alleging violations of the ICCPR by one of the many ISIL fighters from countries around the globe that is a State Party to the Optional Protocol and the State Party was unable or unwilling to prosecute the ISIL fighter, then the Human Rights Committee (HRC) would have jurisdiction to consider the complaint.[165]

If an ICCPR complaint establishes the *prima faci*e elements of a violation, then it is referred to the HRC's Special Rapporteur on New Communications and Interim Measures, who decides whether the case should be registered and transmitted to the State Party.[166] Once the case is registered, then the HRC considers the admissibility and merits of the case simultaneously.[167] The State Party against whom the complaint is directed has six months to present its submissions on the admissibility and merits of the case.[168] When or if it does so, the petitioner has two months to comment.[169] If the State Party fails to respond, the HRC considers the complaint on the basis of the information initially supplied.[170] Though this process can be lengthy, it is possibly the only current avenue of redress for Yazidi women aggrieved by individual ISIL fighters.

C. International Criminal Law

Torture is an international crime, which obligates States Parties to the CAT to prosecute or extradite those accused of the crime, irrespective of the nationality of the perpetrator or the victim, or even the location of the crime.[171] Torture is recognized in the Rome Statute as an element of international crimes under the jurisdiction of the International Criminal Court—genocide, war crimes, and crimes against humanity[172]—and customary international law requires States Parties to prosecute

[162] Iraq ratified and acceded to the Convention in 2011. The Syrian Arab Republic ratified and acceded to the Convention in 2004. *See Status of Ratification,* OHCHR, http://indicators.ohchr.org/.
[163] *See Status of Ratification,* OHCHR, http://indicators.ohchr.org/.
[164] *Id.*
[165] U.N. Human Rights Office of the High Commissioner, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, at 13 (2013).
[166] *Id.*
[167] High Commissioner for Human Rights Office, *Fact Sheet No. 15* (Rev. 1), at 12 (2013).
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *NSAs in NIACs*, *supra* note 156, at 918.
[172] Rome Statute, Arts. 5-8; "Torture, cruel treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, constitute war crimes in non-international armed conflicts under the Statutes of the International Criminal Court, of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone." ICRC Customary International Law Study, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90.

those crimes that take place on the territory of the State as well as outside the State, even when committed by non-State actors.[173] Non-State actors can incur individual responsibility for any international crime, whether committed individually or jointly, either as actual perpetrators or on grounds of command responsibility.[174] The mandate of international and internationalized tribunals, as well as relevant international and national State practice, is demonstrative of this reality.[175]

Currently, the International Criminal Court (ICC) is the only international criminal tribunal that could have jurisdiction over the crimes committed by ISIL against the Yazidis. However, neither Iraq nor Syria are parties to the Rome Statute.[176] Furthermore, although the U.N. Security Council can refer situations in Syria and Iraq to the ICC, on May 22, 2016, a draft Resolution that sought to refer the situation in Syria to the ICC failed after China and Russia exercised their veto power.[177] In December 2016, the U.N. General Assembly passed a resolution establishing the International, Impartial and Independent Mechanism (IIIM) to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes in Syria, and on July 3, 2017, U.N. Secretary-General Antonio Guterres appointed renown international jurist Catherine Marchi-Uhel as Head of IIIM.[178] The mandate of the IIIM is to collect, consolidate, preserve, and analyze widespread evidence of violations, focusing particularly on linkage evidence and evidence pertaining to intent and to specific modes of criminal liability. It will store and analyze this information and, in the future, share it with domestic or international jurisdictions carrying out prosecutions for international crimes committed in Syria.[179]

Finally, the ICC Prosecutor may initiate investigations *proprio motu* on the basis of information of crimes committed within the ICC's jurisdiction, based on "information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate..."[180] ICC Prosecutor Fatou Bensouda has not yet submitted a request for authorization of an investigation of ISIL's crimes to the Pre-Trial Chamber.[181] Since the most high-ranking members of ISIL are from Iraq and Syria, this lack of an investigation prohibits personal jurisdiction over these perpetrators.[182] However, as ISIL fighters have come from around

[173] *NSAs in NIACs*, *supra* note 156, at 910.
[174] Rome Statute, Arts. 27-28.
[175] *NSAs in NIACs*, *supra* note 156, at 918—921.
[176] *ISIS Crimes*, *supra* note 3, at ¶ 196.
[177] *Id.* at ¶ 197.
[178] Stephanie Nebehay, *New U.N. Team Aims to Bring Syria War Crime to Court,* Reuters (Feb. 16, 2017), https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes/new-u-n-team-aims-to-bring-syria-war-crimes-to-court-idUSKBN15V1QU; Syria Justice & Accountability Centre et al., *Responding to Misconceptions Regarding the IIIM* (Aug. 2, 2017), https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim/; *UN Chief Appoints Head of Panel Laying Groundwork for Possible War Crimes Probe in Syria*, UN News (July 3, 2017), https://www.un.org/apps/news/story.asp?NewsID=57112#.WjqgvEtG3BL
[179] Stephanie Nebehay, *New U.N. Team Aims to Bring Syria War Crime to Court,* Reuters (Feb. 16, 2017), https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes/new-u-n-team-aims-to-bring-syria-war-crimes-to-court-idUSKBN15V1QU; Syria Justice & Accountability Centre et al., *Responding to Misconceptions Regarding the IIIM* (Aug. 2, 2017), https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim/; *UN Chief Appoints Head of Panel Laying Groundwork for Possible War Crimes Probe in Syria*, UN News (July 3, 2017),https://www.un.org/apps/news/story.asp?NewsID=57112#.WjqgvEtG3BL
[180] Rome Statute, Art. 15(1)(2)(3)(4).
[181] International Criminal Court, Situations Under Investigation, https://www.icc-cpi.int/Pages/Situations.aspx (last accessed Sept. 8, 2016).
[182] Fatou Bensouda, *Statement of the Prosecutor of the International Criminal Court on the Alleged Crimes Committed by ISIS,* ICC (Apr. 8, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1 [hereinafter Bensouda Statement].

the globe,[183] the Prosecutor's office can work with States Parties whose members are part of ISIL to get personal jurisdiction over these individuals.[184] Ongoing efforts to get a referral from the Security Council remain active[185] and the current ICC investigation in Libya where ISIL fighters have been active could be a window into a more expanded jurisdiction for ISIL.

D. National Courts

Since no *ad hoc* international or internationalized tribunals to try members of ISIL for international crimes have been established, national prosecutions remain the only legal accountability options for victims and survivors in States that have enacted universal jurisdiction statutes, ratified CAT and/or the Rome Statute, or enacted domestic legislation.[186] In these cases, if the facts surrounding ISIL's forced contraception practice do not meet the torture threshold, then applying IHL standards for cruel and inhuman treatment, and/or degrading and humiliating treatment as alternative theories of liability could be argued.

Additionally, the grave breaches provisions of the Geneva Conventions include torture and inhuman treatment. Jurisdiction over them is universal. In other words, national courts can try and punish those suspected of committing grave breaches no matter the location of the crime or nationality of the victim.[187]

Conclusion

The use of forced contraception in order to prevent pregnancy and ensure the continued sexual slavery of Yazidi women and girls is a clear violation of the prohibition against torture, cruel and inhuman treatment, and humiliating and degrading treatment under international humanitarian law, international human rights law, and international criminal law. Since this crime was knowingly perpetrated by members of ISIL on Yazidi civilians in the context of a non-international armed conflict, it also meets the elements necessary to establish war crimes and crimes against humanity. While current mechanisms of accountability for ISIL perpetrators are limited, the overwhelming evidence against the perpetrators will hopefully aid in any future domestic prosecution or in the event of a referral to the ICC or other international justice mechanism.

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[183] *Id.*; *ISIS Crimes*, *supra* note 3, at ¶ 61.
[184] Bensouda Statement, *supra* note 182.
[185] Marlise Simons, *International Criminal Court Says ISIS Is Out of Its Jurisdiction*, N.Y. Tim es (Apr. 8, 2015), https://www.nytimes.com/2015/04/09/world/middleeast/international-criminal-court-says-isis-is-out-of-its-jurisdiction.html.
[186] *ISIS Crimes*, *supra* note 3, at ¶ 200.
[187] *Universal Jurisdiction over War Crimes*, ICRC—Advisory Service on International Humanitarian Law, 1 (Mar., 2014), https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf.

The Humanisation of Women: A Work in Progress

Purna Sen*

Abstract

Human rights are claimed to be inalienable and universally applicable. This would mean their application and realisation should be known to all people everywhere; that should include women. Yet, recognition of various expressions of violence, especially against women, has been at best patchy despite the progress made on torture and other rights frameworks to address abuse. Catherine MacKinnon named this failure to address women's lives as a failure to recognise women as human. This piece gives a short overview of the development of the human rights framework in relation to women, with particular regard to violence. It then offers a frame through which to understand why some violence has found recognition and not others. It ends with a review of positive developments in this regard; yet the recognition of women as humans to whom the rights promise must be kept, remains a work in progress.

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The Neglect of Women Humans

Torture has specific legal meaning and application. It is globally recognized as unacceptable, such that universal and absolute prohibitions prevail.[1] The word itself and the actual experiences it suggests, denote a specific stigma in the panoply of human rights violations, affirming its persistent unacceptability. Although few voices have offered public dissent to the prohibition on torture, there have in recent years been challenges to its global abhorrence and rejection and to the human rights framework more generally. In these contested times, it may be difficult to hold the line that exists—and advocate that its application and relevance extend to women.

Half the world's population, 3.5 billion women, are at risk of violence of a variety of forms; an established measure of the prevalence of violence is 1 in 3 women. This would lead us to surmise that over a billion women experience violence in their lives. Many name their experience as torture,[2] but international rights experts have not fully extended the provision of legal codes on torture to these experiences. Here lies the contestation over whether, how well and to what extent the human rights discourse, torture in particular, have spoken to women. Debates on violence against women, rights, and torture have a history, but gain a new pertinence at a time when there are efforts, some successful, to roll back on existing rights[3] and legal provisions[4].

As part of a continuum of violence against women, actions that amount to torture under the definition provided by the United Nations Convention against Torture have failed generally to be applied to the situation of many women. The argument put by Catherine Mackinnon and others (more below) that this is an expression of the construction and treatment of women as incomplete human beings helps to understand why this is so. Human rights are applicable to humans, not others; they are inherent in our humanity and are inalienable. What then of those who do not know the realisation of these rights, let alone whose humanity is undermined by the failure even to recognise that they have rights? Are they, thus, not human? How this has come about is discussed briefly below. Further, the definitional parameters that address torture/ill-treatment, and the characterization of certain acts of violence against women, have been challenged and remain contested, though authoritative sources have moved the interpretation and application of existing provisions[5].

This paper offers a framework to understand why it is that certain dimensions of violence against women have more easily been absorbed into human rights work while others have been

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[1] Winston P. Nagan & Lucie Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement," 14 *Harv. Hum. Rts. J.* 87 (2001). Retrieved from: http://scholarship.law.ufl.edu/facultypub/615/; Jamie Mayerfeld, "In Defense of the Absolute Prohibition of Torture," 22 *Pub. Aff. Q.* 2 (2008). Retrieved from: http://faculty.washington.edu/jasonm/4—Mayerfeld.indd.pdf.; Jamie Mayerfeld, "In Defense of the Absolute Prohibition of Torture," *Pub. Aff. Q.* 22, no. 2 (2008). Retrieved from: http://faculty.washington.edu/jasonm/4—Mayerfeld.indd.pdf.

[2] Purna Sen, *A Basket of Resources: Women's Resistance of Domestic Violence in Calcutta* (Bristol: University of Bristol , 1997*); see* Refugee Women's Resource Project Asylum Aid, *Refugee Women and Domestic Violence: Country Studies, edition 5* (May 2003). Retrieved from: http://www.asylumaid.org.uk/wp-content/uploads/2013/02/Refugee_Women_and_Domestic_Violence_Edition_5.pdf.

[3] The Mexico City Policy has been reinstated in 2017, resulting in the frustration of women's safe access to reproductive health and rights. *See* Marie Stopes International, *The Mexico City Policy: A world without choice*. Retrieved from: https://www.mariestopes.org/what-we-do/our-approach/policy-and-advocacy/the-mexico-city-policy-a-world-without-choice/; The White House Office of the Press Secretary, *Presidential Memorandum Regarding the Mexico City Policy* (Jan. 23, 2017). Retrieved from: https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-mexico-city-policy.

[4] Shaun Walker, "Putin approves legal change that decriminalises some domestic violence," *The Guardian* (Feb. 7, 2017). Retrieved from: https://www.theguardian.com/world/2017/feb/07/putin-approves-change-to-law-decriminalising-domestic-violence.

[5] *See* section on Recent Developments, *infra* at 19.

much more contested. Some argue that there has been a gradual 'feminisation' of the rights discourse, through incremental and hard-won recognition of the ways in which violations are experienced by women specifically. The recognition of the denial of reproductive rights, including access to abortion, as sometimes amounting to torture or other ill-treatment are recent examples[6], though the work is not yet complete. This feminisation is a necessary and overdue means through which the human rights framework is rendered pertinent to the people it claims to serve. It strengthens and gives greater veracity to the conceptualisation, and therefore its application, of the term to humanity as a whole.

This piece begins with a brief overview of the journey through which the promise of human rights for women has been recognized as lacking and has been contested. It does so by means of a focus on violence. I pay attention to and warmly welcome recent developments in work against torture that pay heed to women's specific experiences, as well as those of women in spaces of intersection, such as sexual orientation or trafficking. The piece is also informed by the somewhat overdue recognition of the complexity of marginalization and inequality.

The framing of human rights standards, treaties, and definitions has been conducted predominantly by and through the minds of male lawyers. They have set indispensable foundations for human rights principles and norms that have gained purchase in the international political and policy lexicon, although their application remains a work in progress. Nevertheless, inroads have been made in the fields of development and human security; human rights remains one of the core pillars of the work of the United Nations (UN). The UN's new 2030 Agenda for Sustainable Development (Agenda 2030)[7] declares human rights to be a core value and foundational principle.

Implicit in the rights-based vision is a belief that a better world is not only possible, but must be actively crafted. Such hope and optimism have informed various promises that have been made to all people, including standards of health, sustainable livelihoods, education, peaceful assembly, housing, decent work, leisure time, the safety to organize with others, participation in political life, freedom from cruelty, degradation and hunger,[8] and so much more. This vision drives collective and individual struggle and has found resonance with the poor, the hungry, the disenfranchised, and the abused, for it communicates potential emancipation and constitutes a promissory note to everyone, including women, of a better world where their dignity and rights are made real.

A significant promise in the human rights framework has particular appeal to those with personal or historical experiences of degradation, marginalization, and inequality. The human rights framework encompasses equality between individuals, as mandated in the Universal Declaration of Human Rights (UDHR): "all human beings are born free and equal in dignity and rights."[9] The UDHR also addresses inequality between groups of people, including men and women. Relevant to the discussion here is Article 5, which commits that nobody shall be subject to "torture or to cruel, inhuman or degrading treatment or punishment."[10]

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[6] Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment*, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

[7] General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* U.N. Doc. A/RES/70/1 (Oct. 21, 2015). Retrieved from: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

[8] *See* Universal Declaration of Human Rights *adopted* Dec. 10, 1948, G.A. Res. A/RES/217 (III) A; International Covenant on Economic, Social and Cultural Rights *adopted* Dec. 16, 1966 G.A. Res. 2200A (XXI) (entered into force Jan 3, 1976); International Covenant on Civil and Political Rights *adopted* Dec. 16, 1966 G.A. Res. 2200A (XXI) (entered into force Mar. 23, 1976).

[9] Universal Declaration of Human Rights art. 1, *adopted* Dec. 10, 1948, G.A. Res. A/RES/217 (III) A.

[10] *Id.* at article 5.

Inequality between groups of people is recognised not simply as a matter of amalgamated accidents or coincidence, but as structural and systemic. The hope offered by the human rights framework, therefore, speaks to collectives, communities, and groups that have historically known patterned and geographically widespread inequality. Affected groups include indigenous peoples, persons with disabilities, racialised peoples, castes historically deemed 'untouchable,' and women—both as a class and as members of other collectivities. The potential of the framework is clear, and therein lies its strong appeal. However, the delivery of that promise is less than whole and has spurred contestation, at times of its intent, but more often in regards to the question of whose lives and experiences it encompasses. Such contestation has included a re-imagining and revised understanding of what constitutes torture, cruelty, and degradation. Thus, more comprehensive interpretations of foundational texts reflect inadequately seen, heard, and respected experiences.

In a discussion of gender and torture, this article considers the trajectory of human rights engagement with violence against women, and offers a means by which to understand their troubled but improving relationship. The intersection of gender and torture is bound up within pervasive cultural norms, that shape our notions of excusable aggressors, expected victims, and the use of violence as expected or, in some cases, accepted.[11]

Adoption of Agenda 2030 saw a promise by States to 'leave no one behind', which grew during 2016 into a policy interest in intersectionality[12]. The human rights framework is now explicitly obliged to give greater attention to how multiple forms of inequality impact the enjoyment of human rights[13]. A future development template requires immediate attentiveness to women's experiences of multi-dimensioned inequality.

The critique of re-structuring and re-interpretation of existing standards, through feminist activism, marks a slow and bumpy journey. Feminising torture provisions has been a significant dimension of that journey. The early part of the 21st century has seen widespread and profound challenges to gains won by women over many decades and represent worrying assaults on human rights norms and work.[14] It will require resolute and determined collective work to maintain existing standards and develop stronger, more relevant protections specific to women. The promise of human rights cannot be actualized primarily for the most privileged, or for the most heinously abused. Human rights must have meaning for the daily lives of the many of those in between, who know neither dignity nor justice.

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[11] *See generally* Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment*, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016); Ana Maria Munoz Boudet et. al., "On Norms and Agency: Conversations about Gender Equality with Women and Men in 20 Countries," *The World Bank* (2012). Retrieved from: http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1164107274725/On-Norms-Agency-Book.pdf.

[12] U.N. Women, *Women's Empowerment and the Link to Sustainable Development: 2015 Commission on the Status of Women, Agreed Conclusions* at para. 16 (2016) (noting "multiple and intersecting forms of discrimination" affect women and girls and states must take measures to address them). Retrieved from: http://www.unwomen.org/-/media/headquarters/attachments/sections/csw/60/csw60%20agreed%20conclusions%20conclusions%20en.pdf?vs=4409.

[13] General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* U.N. Doc. A/RES/70/1 at para. 4 (Oct. 21, 2015) (pledging to "leave nobody behind"). Retrieved from: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

[14] *See generally* Charlotte Bunch & Niamh Reilly, "Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights" *Ctr. for Women's Global Leadership, Rutgers U.* (1994). Retrieved from: http://www.cwgl.rutgers.edu/docman/coalition-building-publications/283-demand-accountability/file.

Considering the necessity of incorporating women's collective experiences into human rights, the title of this piece draws on a question posed by Catherine MacKinnon: are women human?[15] Her question emerges from the failure of the human rights framework to understand women's experiences of abuse, and its consequent failure to recognise them as human. MacKinnon argues that human rights have developed as responses to the denial of atrocities, such that "[b]efore atrocities are recognized as such, they are authoritatively regarded as either too extraordinary to be believable or too ordinary to be atrocious."[16] She goes on to say that "[l]egally one is less than human when one's violations do not violate the human rights that are recognised."[17] Therefore, her question emerges from the failure of the human rights framework to understand women's experiences of abuse, and the human rights framework's consequent failure to recognise women as human. Much of women's activism and engagement with the human rights discourse has been to further the recognition of everyday ("too ordinary" in MacKinnon's text) human rights violations, which deny the recognition of women as fully human, or as 'deserving' of rights protections.

MacKinnon's question remains relevant. A (belated) process of recognizing women as human is underway and must now find energy and resoluteness. Most importantly, it remains a work in progress.

Human Rights, Torture and Violence against Women

The international human rights framework is built upon the recognition of two groups of actors: those who have rights and freedoms (rights holders) and those who have the obligation to realise those rights and freedoms (duty bearers). States are duty bearers and every human being is a rights holder. States are obligated to respect, promote, and fulfil individuals' human rights. Every human, as individuals and members of social groups, should have their rights protected and realised. Conditions need to be created whereby rights can be exercised ('enjoyed'), no matter who or where the individual is, or what he or she does.[18] The traditional human rights mind-set is premised, therefore, on the centrality of the relationship between the individual and State, played out primarily within the public sphere.

Feminist critiques have strongly objected to the limiting nature of this formulation, arguing that it fails to recognise that women's experiences of rights violations are often rooted in the private sphere and occur at the hands of private, rather than State, actors.[19] Pithily put, MacKinnon noted:

> If we measure the reality of women's situation in all its variety against the guarantees of the Universal Declaration [of Human Rights], not only do women not have the rights it guarantees—most of the world's men don't either—but it is hard to see, in its vision of humanity, a woman's face. [20]

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[15] Catherine A. MacKinnon, "Are Women Human? And other International Dialogues" *Cambridge: The Belknap Press of Harv. U. Press*, (2006).
[16] *Id.* at 3.
[17] *Id.*
[18] Few exceptions exist, where the denial of rights is sanctioned in law, such as freedom of movement for those incarcerated in prison and freedom of expression where national security is at risk. *See e.g.* Christopher Michaelson, "Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric," *29 U. New South Wales L. J.* 2 (2006).
[19] Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law," 85 *A.J.I.L.* 613 (1991); Christine Chinkin, "Feminist Interventions into International Law," *Adelaide L.R.* 19, no. 1 (1997); Julie S. Peters & Andrea Wolper, "Women's Rights, Human Rights: International Feminist Perspectives," (1995).
[20] MacKinnon, *supra* note 15 at 43.

Critiques go beyond the male terminology utilized in (almost) all rights treaties, although these have inevitably given substance to the problematic maleness of the human rights canon. They have focused particularly on the application of existing provisions that claim to be pertinent to all individuals, but have failed to deliver for women. Violence against women has been the litmus test and a powerful rallying concern for women across the world.[21] These arguments have also been central to the debate on gender and torture.

On torture

"It is telling that rape of men is torture and rape of women is rape."[22] The overarching prohibition of torture is captured in article 7 of the International Covenant on Civil and Political Rights (ICCPR) and spelled out more fully in the CAT. These instruments state, respectively, that, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment**,"**[23]

and

> [t]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[24]

While much feminist attention has been focused on the CAT, article 7 of the ICCPR has received relatively little scrutiny in its application, or advocacy on its application, by women.[25] The components of article 1 of the CAT have been much examined. The four key elements of the CAT definition of torture are typically identified as: (1) severity of harm (i.e. intensity of pain or suffering inflicted); (2) prohibited purpose (i.e. to secure a confession; intimidation; coercion; punishment; or discrimination of any kind); (3) intent of the perpetrator; and (4) status of the perpetrator as a State agent (i.e. the involvement, instigation, consent or acquiescence of a public official).[26]

The definitional elements of public official (as perpetrator) and of the intent (as carried by the perpetrator) have been problematised in feminist critiques.[27] Core arguments have focused on the issue that acts otherwise constituting torture, which reside in the private sphere, are excluded from the CAT's definition. Thus, women are afforded little protection by the CAT against the abuses they experience, many of which occur in the private realm. Secondly, men are more likely than women

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[21] Purna Sen, "Successes and challenges: understanding the global movement to end violence against women," *in Global Civil Society* 2003 at 119-147 (Mary Kaldor et. al. eds. 2003).

[22] Amnesty International & REDRESS, *Gender and Torture Conference Report* (2011) at 18. Retrieved from: http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf.

[23] International Covenant on Civil and Political Rights art. 7 *adopted* Dec. 16, 1966 G.A. Res. 2200A (XXI) (entered into force Mar. 23, 1976).

[24] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *adopted* Dec. 10, 1984 G.A. Res. 39/46 (entered into force June 26, 1987).

[25] Alice Edwards, "The 'Feminizing' of Torture under International Human Rights Law," 19 *Leiden J. Int'l L.* 2 (2006): 354.

[26] *See e.g.* Nigel S. Rodley, "The Definition(s) of Torture in International Law," *Current Legal Problems* 55 (2002): 467-493; United Nations Voluntary Fund for Victims of Torture (UNVFVT), "Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies (2011).

[27] Alice Edwards, "The 'Feminizing' of Torture under International Human Rights Law," *Leiden J. Int'l L.* 19, no. 2 (2006).

to be subjected to prohibited forms of treatment for the purpose of extracting a confession.[28] Alice Edwards concludes that the United Nations Committee against torture (UNCAT) has interpreted the definition of torture conservatively, by limiting the remit of persons acting in an official capacity to "quasi-governmental structures that exercise effective control over a territory and where there is no central government."[29]

In this context, women organised to influence the creation of a key new treaty, the Rome Statute of the International Criminal Court (ICC), which entered into force in July 2002.[30] The Statute defines torture as:

> "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[31]

This definition of torture rests on two features that parallel the CAT approach: the degree of harm (severity) and the context (custody or control). That rape is specifically included in the scope of war crimes and crimes against humanity in this treaty[32] constitutes, without doubt, a great leap forward. Yet, the notion that torture is exceptional and extreme lies at the heart of the understanding of rape as a form of torture.

Another treaty, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[33] has been the instrument delineating the principle human rights claims and protections that flow from the obligation to end discrimination against women. It contains no article on torture, nor one on violence, although it does name trafficking and the exploitation of prostitution within its remit; it also addresses child and forced marriage without using the word violence.[34] The *Committee* on the Elimination of Discrimination against Women, in its interpretive general recommendation number 19 (adopted in 1993)[35] established that violence against women constitutes a form of discrimination, thereby bringing its writ to bear on such abuse. Further, the CEDAW and general recommendation 19 did not limit the population of perpetrators to State actors, but rather cast a wider net:

> "discrimination under the Convention is not restricted to action by or on behalf of Governments . . . For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women **by any person, organization or enterprise**. Under general international law and specific human rights covenants, **States may also be responsible for private acts if they fail to act with**

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[28] *Id.*

[29] Alice Edwards, "The 'Feminizing' of Torture under International Human Rights Law," *Leiden J. Int'l L.* 19, no. 2 (2006): 374.

[30] Rome Statute of the International Criminal Court art. 7(2)(e) *adopted* July 17, 1998 A/CONF/183/9 (entered into force July 1, 2002). https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

[31] Rome Statute of the International Criminal Court art. 7(2)(e) *adopted* July 17, 1998 A/CONF/183/9 (entered into force July 1, 2002). (Id.)

[32] *Id.* at 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

[33] Convention on the Elimination of All Forms of Discrimination against Women *adopted* Nov. 7, 1967 G.A. Res. 1921 (XVIII) (entered into force Dec. 18, 1979). Retrieved from: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx.

[34] *Id.* at art. 6.

[35] Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, adopted in the Committee's eleventh session (1992). Retrieved from: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

> **due diligence to prevent violations of rights or to investigate and punish acts of violence**, and for providing compensation."[36] (emphasis added)

CEDAW's updated GR on violence (CEDAW 2017[37]) affirms this approach:

"The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women.[38] Such failures or omissions constitute human rights violations."

Two further strands of development have been critical in broadening the conceptualisation of State responsibility and range of actors whose behaviour is determined as amounting to violations of human rights standards. The delineation of 'non-State actors' and of 'due diligence,' has been key in this regard.

Non-State actors and due diligence

There has been a gradual widening of the categories of persons identified as perpetrators of torture. From an initial focus on State actors, formulations have moved to encompass non-State actors, such as members of guerrilla or combatant groups, and private individuals. The category 'non-State actors' has enhanced the range of perpetrators of torture whose actions are pertinent to its recognition. For decades, women have argued that the failure to extend international human rights law protections to women's experiences of abuses in their personal or intimate lives has been detrimental.

In 2008, the UNCAT stated that:

> 'where state authorities or others acting in an official capacity . . . have reasonable grounds to believe that acts of torture . . . are being committed by . . . private actors, and . . . fail to exercise due diligence to prevent, investigate, prosecute and punish such non-state officials or private actors consistently with the convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.'[39]

The principle of due diligence has been expounded over several decades. In 1988, the landmark case of *Velasquez Rodriguez v. Honduras* led to one of the first in-depth analyses of the concept. This key judgement of the Inter-American Court of Human Rights determined that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State,

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[36] *Id.* at art. 9.
[37] CEDAW GR 35, Part B.
[38] CEDAW General recommendation No. 19, para. 9.
[39] Committee Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). Retrieved from: http://www.unhcr.org/refworld/docid/47ac78ce2.html.

> not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights].[40]

The judgment goes on to state that:

> The violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.[41]

Furthermore, the UN Human Rights Committee has stated that it is "the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against [torture] whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity."[42]

How is the State to carry out this duty? The due diligence principle mandates that States have a duty to prevent, investigate, prosecute and punish those suspected of torture.[43] It has reformulated the third element of the definition of torture by broadening the responsibility of States to encompass an obligation to anticipate, prohibit, and punish treatment that amounts to torture, whoever the perpetrator might be.

Feminist engagement with the international human rights system has found resonance in these provisions. Actors within the system, including male lawyers, have pushed the boundaries and interpretations of existing provisions, such that women have started to become recognized as humans. Yet this process is characterised by approaches and understandings that reflect either feminist or patriarchal understandings.

Regional Approaches to Violence against Women

Regional systems have taken a different approach to addressing violence against women and the rights dimensions thereof, than have the global human rights mechanisms. Both the African and Inter-American systems have been clear on their stance on violence against women. As early as 1994, the Organization of American States adopted the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* (*Belém do Pará),* which offered a broad definition of violence against women, without caveats as to the status of perpetrator or spheres of application:

> For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere[44].

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[40] Velásquez Rodríguez v. Honduras, Sentence, Inter. Am. Ct. H.R. (ser. C) No. 04 (July 29, 1988). Retrieved from: http://hrlibrary.umn.edu/iachr/b_11_12d.htm.

[41] *Id.* at para. 173.

[42] Human Rights Committee, *General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7)* at 30, U.N. Doc. HRI/GEN/1/Rev.1. Retrieved from: http://hrlibrary.umn.edu/gencomm/hrcom20.htm.

[43] Amnesty International & REDRESS, *Gender and Torture Conference Report* (2011) at 13. Retrieved from: http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf.

[44] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Para" *adopted* June 9, 1994 Organization of American States (entered into force Mar. 5, 1995). Retrieved from: http://www.oas.org/juridico/english/treaties/a-61.html.

The Convention identifies torture in article 2, as physical, sexual, or psychological violence that is carried out in the community and is perpetrated by any individual.[45]

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted in 2003, similarly defines violence against women expansively:

> "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.[46]

Although the 2003 Maputo Protocol does not mention torture, the 1981 African Charter on Human and People's Rights defines torture in terms of both 'all individuals' and 'man':

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.[47]

In 2011, the Council of Europe took a similar approach in its Convention on Preventing and Combating Violence against Women and Domestic Violence **(Istanbul Convention)**. The Istanbul Convention references the CEDAW's formulation of violence as discrimination and to a broad vision of rights in the following definition:

> "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[48]

Torture is only specifically mentioned in Article 61 of the Istanbul Convention on non-refoulement.[49]

The various regional instruments' definitions of violence against women do not seek to distinguish between different forms of violence. Gradations or inferred seriousness are not at issue. This is testimony to the feminist analysis of violence against women as existing on a continuum.[50] However, at high levels of discourse, violence is said to be abusive, violating of rights and unacceptable, yet in practice, a set of parameters (often implicitly) shape the visibility of such violence to policy and legal audiences. Instead, responses to violence are often contingent upon the specifics of relationships or contexts (discussed further below).

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[45] *Id.*

[46] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa *adopted* July 11, 2003 African Union (entered into force Nov. 25, 2005). Retrieved from: http://www.achpr.org/instruments/women-protocol/.

[47] African Charter on Human and Peoples' Rights art. 5, *adopted* June 27, 1981 Organization of African Unity (entered into force Oct. 21, 1986). Retrieved from: http://www.achpr.org/instruments/achpr/.

[48] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence "Istanbul Convention" *adopted* May 11, 2011 (entered into force Aug. 1, 2014). Retrieved from: https://rm.coe.int/168046031c.

[49] The obligation not to return victims of violence to a place of danger. *See* United Nations High Commissioner on Refugees, *Note on Non-Refoulement* U.N. Doc. EC/SCP/2 (Aug. 23, 1977). Retrieved from: http://www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html.

[50] Liz Kelly, *Surviving Sexual Violence* (Cambridge: Polity Press, 1988).

Crafted more recently than the international instruments, regional conventions appear to take cognisance of women's voices in fashioning their definitions. Where regional conventions exist, they have not defined violence as distinct from torture: and most of the definitions cited above are fashioned around the notion of harm. Arguably, experiences of colonial abuse or violence under authoritarian rule among former colonies that have drafted the regional provisions, may have given rise to a more holistic and respectful understandings of violence. Or it may be that women's movements are better organised on smaller stages. It may also be that time has brought fuller understandings of the issues at stake. The UDHR and the CAT are, after all, decades older than these regional instruments. It would seem that women have become more human in the interim, and particularly so at regional levels.

Exceptionality

The special stigma that attaches to torture reflects and maintains its exceptional nature. It does so in a formal sense, at least, though there continues to be contestation of this status through feminist work.

In seeking to increase prosecutions under existing provisions, lawyers have used arguments premised on the exceptionality of rape and sexual violence, which as Kiran Kaur Grewal[51] argues, undermines the notion of a continuum of violence. This is seen in approaches to violence during conflict. Exceptionality builds upon, Grewal suggests, the differentiation of sexual violence in war or armed conflict from that experienced in times of peace, and is the basis on which violence against women has been sought and given recognition in international human rights law and international criminal law.

Citing an article by Judge Wolfgang Schomberg and Ines Peterson[52] Grewal highlights their analysis that through the application of the principle of consent, they characterize rape as 'merely' undesired sex during peacetime as against rape as a weapon of war during armed conflict. This characterization creates a qualitative difference in the nature of the criminal act, denying and obfuscating a rightful focus on the harm that the violence produces. Equally problematic is the distinction between private acts of violence and abuse, which are seen to be individual and atomized, as opposed to organized, and purposeful assaults on an identifiable group. Refusing to recognize that violence against women is structured and continues, in part, through State acquiescence—means that not only is rape against men characterized as torture, while rape against women is merely rape, but that rape against women during conflict can be rape, yet rape against women during times of "peace" may be neither torture nor rape.[53] Even so, it has taken considerable advocacy to begin to have systematic or directed rape[54] in conflict be understood as amounting to torture.

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[51] Kiran Kaur Grewal, "International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies," 23 *Feminist Legal Studies* 2 (2015) at 149-165.

[52] Wolfgang Schomburg & Ines Peterson, "Genuine Consent to Sexual Violence under International Criminal Law," 101 *A.J.I.L.*, 1 (2007): 121-140.

[53] *See e.g.* Jelke Boesten, "Women and Conflict: Why We Should Not Separate Rape in War from the Everyday Reality of Violence" *Africa at LSE* (Jun. 13, 2014). Retrieved from: http://blogs.lse.ac.uk/africaatlse/2014/06/13/women-and-conflict-why-we-should-not-separate-rape-in-war-from-the-everyday-reality-of-violence/.

[54] Rape instigated or conducted or in any way carried out under a command structure.

Giving "Meaning" to Violence against Women: Partial Cognition

Why is it that some forms of violence, some types or certain contexts of rape, have gained more recognition than others? Rape as a weapon of war or during situations of conflict has captured the popular imagination in a way that rape in marriage, or rape by teachers, has not. Is rape in marriage more easily excusable than campus rape? Are some rapes treated less seriously in law than others? Does the context in which the behaviours take place—or the relationships in which they occur—take precedence over the acts inflicted on women?

It is my assertion that the abuse of women is so normalised that only certain manifestations of such violence capture our attention and prompt our abhorrence: routinised violence becomes "hidden in plain sight."[55] The determination of what is seen and allowed to be known, that is understood to be legitimate and true 'knowledge' is an exercise of power by elites[56] such that the ability to name, the power to recognise and legitimise remains a site of contestation; when women, minorities, women with disabilities and others gain (some) power they are able to name violence after their own understandings rather than have others tell them that their experiences are or are not real violence, or torture or rape. Naming violence against women as torture is one of these arenas of struggle where the abused have started to be heard by the powerful. Agenda 2030 commits to leave nobody behind yet this absolutely depends upon re-examining what constitutes knowledge, how this is built and what that means for our legal and practical standards.

The "meaning" that we ascribe to violence shapes it recognition. Here, "meaning" refers to the social, legal, and political treatment of the violence, and is intrinsically bound up with its recognition, tolerance, or rejection by different actors. These actors include the legal system, the media, States and others. It is in the interaction between the *form* and *context* of violence that meaning is constructed, as well as the relationship between the *abused* and the *perpetrator*. Further, the particular characteristics of each of these determinative factors—form, perpetrator, target, context—are significant. In the next section I explore these characteristics and the relationship between them to argue a rationale explaining why violence against women is troubling to public discourse in certain cases and less so in others. This partial cognition reflects the incomplete humanisation of women as beings rightfully entitled to the full protection and enjoyment of the human rights promise.

[55] Collins, Patricia Hill, 2017, On violence, intersectionality and transversal politics http://www.tandfonline.com/doi/full/10.1080/01419870.2017.1317827

[56] Collins, Patricia Hill, 1998, Fighting Words: Black Women and the Search for Justice, University of Minnesota Press. Collins argues that ideas can be either thoughts or theory, shaped by the power of elites to legitimise 'the knowledge that they define as theory as being universal, normative, and ideal."

Table 1: Giving Meaning to Violence against Women

Form	Perpetrator	Target	Context
Rape	Stranger	Virgin	Place of worship
Shooting	Mother	Girl	Street
Genital cutting	Religious leader	Adolescent	Armed conflict
Stabbing	Doctor	Mother	Place of employment (outside the home)
Choking	Teacher	Older woman/widow	School
Kicking, punching	Father	Woman with disability	University
Hair pulling	Husband	Wife	Public transport
Stalking	Celebrity	Political activist	Parliament
Genital groping	Prison officer	Politician	
Humiliation, degradation	Gang/group	Prisoner	Prison
Withholding of food/ starvation	Sports coach	Refugee	Home
Verbal abuse	Under-cover Police officer	Racialised /minority woman	Marriage

The column to the far left lists examples of forms of violence against women. The next column names some of those who perpetrate violence. The third column identifies the targets of abuse, and the column on the far right lists some of the physical and institutional contexts in which violence against women occurs[57]. Different combinations of elements in the columns provide a basis for social acceptance or rejection. The calculation, this metric, is often unspoken but it is known. It implicitly harnesses myths about women who "deserve" to be abused or who are considered to have 'contributed' to violence.

The rows in the table indicate the proximity of the category to greater or lesser opprobrium. Rows at the top have lower levels of acceptance compared to those further down. The ranking is not absolute, rather it is suggestive of how meaning, and therefore importance, is ascribed to violence: it is contingent upon the other three parameters.

[57] The lists in this table are not exhaustive but indicative.

Taking rape as an example, it is possible to illustrate the variety of meanings that can be ascribed to one overarching category of violence against women. By and large, both in law and in culture, rapes perpetrated on a street or on a bus, are deemed more worthy of public condemnation than rapes that occur in marriage or in the martial home (husband-wife). Indeed, different combinations of rape with different perpetrators, targets and contexts lend themselves to quite different meanings. For instance (see Table 2 below), holding rape a constant we can observe how varying combinations of other characteristics lend themselves to different interpretations:

Form: Rape

- Stranger + Virgin + Place of worship (top row)
- Husband + Wife + Home (middle row)
- Prison officer + Racialised/minority woman + Prison (bottom row)

Table 2: Giving Meaning to Rape

Perpetrator	Target	Context
Stranger	Virgin	Place of worship
Husband	Wife	Home
Prison officer	Racialised /minority woman	Prison

The first configuration (top row) is more likely to gain recognition as unacceptable violence, than the other two rows. While each of these factors impinges upon recognition in legal, policy and social domains, there are other key considerations that mitigate or enhance the possibilities of such recognition. Black women scholars, activists who draw our attention to the inter-relationships of gender and race, gender and disability, age, sexual orientation and other socially structured inequalities, have deepened our understanding of when and which violence gains public visibility. Systems, and exercise, of power, as well as its absence, make some women's experiences unseen and unheard and allow some the authority to name or deny what constitutes violence.

There are further contextual considerations that may also be relevant in ascribing meaning and shaping policy responses. There may be a greater readiness to condemn and hold accountable women or mothers who abuse compared to than men. FGM or other child abuse by women, leaving children unattended or neglected at home—such expressions of 'poor parenting' do not result the sort of moral panic around fathering as it does of mothering. There has been lesser willingness to condemn celebrities or men who have carried out humanitarian or charitable works though this may have been punctured by the #MeToo wave of women naming their abusers. Yet, even here, the ability of some women (mostly white, famous and western) to move this excellent movement forward has not been matched by poorer or immigrant women abused in their workplaces in hotels, farms and elsewhere[58]. Again, this confirms my argument that it is not that any/all abuse or vio-

[58] *See* Sandra E. Garcia, "The Woman Who Created #MeToo Long Before Hashtags," *New York Times* (Oct. 20, 2017) https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html; Bethonie Butler, "Gabrielle Union on #MeToo: 'The floodgates have opened for white women,'" *The Washington Post* (Dec. 8, 2017) https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/12/08/gabrielle-union-on-metoo-the-floodgates-have-opened-for-white-women/?utm_term=.aed9595febfd; "700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault," *Time* (Nov. 10, 2017). http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/.

lence (i.e. *form*, in Table 1) is unacceptable; it reinforces the importance of the other characteristics identified in the table in shaping what is seen and known as violence. [59]

Notions of innocence and shame are pertinent, with youth, sexual inexperience, male chaperoning in public space and heterosexual wifehood being indicators of good character, and therefore of unwarranted victimhood. Such parameters are remarkably consistent across cultural contexts.[60] Distance from these ideal-type characteristics and behaviours can cast women as somehow 'deserving' of violence, such that, for example, unmarried women found socialising with unknown men or men from outside their family or marriage are often considered deserving of any violence they may experience. An inherent transgression is inferred from women's entry into public space, almost to the point that it can "legitimately," or at least understandably, be met by (sexual) abuse.[61]

Race and the racialisation of certain groups can characterise them as hyper-sexualised, rendering them legitimate or excusable targets of sexual violence. Their rape is somehow to be expected, whether black women in white-majority contexts, or tribal, aboriginal or indigenous women.[62] In table 1, these groups are placed in the lower rows.

Women's appearance, and clothing in particular, can deem them to be contributors to their own abuse. Short skirts, makeup, heels or, especially infamously, jeans[63] have been considered—both in popular culture and in courts[64]—as legitimate considerations in the determination of accountability for sexual assault. Victim blaming is a core element of rape culture,[65] where victimized women are held at fault and men are excused of their violence. Such value judgements have infected legal and rights-based approaches to violence against women and mitigate the treatment of women as fully human. This results in a failure to recognise that all violence against women constitutes abuse, not just the most culturally loaded 'worst' examples.

Arguably, amongst the category of women who are most vulnerable to rape, and have the most difficulty in gaining recognition of when they are raped, are women in the sex trade.[66] In particular, those who are racialised or otherwise subject to specific intersections of marginalization face profound difficulties in having the abuse they suffer be recognised as violence, an abuse of rights, or torture. They are among the least humanized women.

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[59] This paragraph is at a high level of abstraction due to space constraints.

[60] *Cf.* Craig Palmer, "Is Rape a Cultural Universal? A Re-examination of the Ethnographic Data," 28 *Ethnology*, 1 (1989) at 2 (citing Shields & Shields, "Forcible Rape: An Evolutionary Perspective," *Ethnology & Sociobiology* 4, no. 3 (1983): 115-136)).

[61] *See* World Health Organization, *World Report on Violence and Health: Chapter 6, Sexual Violence* (2002). Retrieved from: http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf.

[62] *See* William H. George & Lorraine J. Martínez, "Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism," 26 *Psychol. of Women Q.* 2 (2002).

[63] Alessandra Stanley, "Ruling on Tight Jeans and Rape Sets Off Anger in Italy," *New York Times* (Feb. 16, 1999). Retrieved from: http://www.nytimes.com/1999/02/16/world/ruling-on-tight-jeans-and-rape-sets-off-anger-in-italy.html.

[64] Rachel Lubitz, "Here Are 9 Times Clothing Was Blamed for Sexual Assault—Rather than the Obvious," *Mic Network* (Apr. 27, 2016). Retrieved from: https://mic.com/articles/141781/here-are-9-times-clothing-was-blamed-for-sexual-assault-rather-than-the-obvious#.l0E7rBNsz.

[65] "Rape Culture, Victim Blaming, and the Facts," (2017). Retrieved from: http://www.southernct.edu/sexual-misconduct/facts.html.

[66] *See* KN Deering et. al., "A systematic review of the correlates of violence against sex workers," 104 *Am. J. Pub. Health* 5 (2014).

While criminalisation of rape exists in all jurisdictions, the struggle to have marital rape recognised in criminal law is ongoing in 77 states.[67] Moreover, 35 countries have clauses in their rape legislation exempting the prosecution of rapists who are married to, or who subsequently marry their victims. Rape by non-intimates is evidently better recognised by laws as a crime, guaranteeing that a range of identical actions that ought to be condemned are in fact excused, because they occur within the State sanctioned institution of heterosexual marriage. It is not the case that there is a consistent approach where a set of behaviours or actions with a range of impacts is deemed to be inherently unacceptable, or recognised consistently as violations of women's rights and dignity. Factors such as importance and heinousness, often highly subjective, shape interpretation of actions as rape or otherwise. Debates on degrees of rape and the relative seriousness of rape indicate that the context of the act and relationship of the individuals determine responses to rape.

Rape Is Rape Is Rape—Or Is It?

Box 1: Rape: Gradations of Seriousness

Police officer in New York: " . . . out of 13 [rapes and attempted rapes reported], only two were true stranger rapes . . . If there's a true stranger rape, a random guy picks up a stranger off the street, those are the troubling ones. "[68]

UK Justice Minister on different rapes: "if an 18-year-old has sex with a 15-year-old and she's perfectly willing, that is rape. Because she is under age, she can't consent. What you and I are talking about is . . . about a man forcibly having sex with a woman and she doesn't want to—a serious crime."[69]

These quotes in Box 1 are illustrative of perceptions of rape and of equivocation on the seriousness of this form of sexual violence. The quotes are from individuals whose roles require them to uphold and improve the functioning of the criminal justice system, and illustrate that myths and misperceptions about the crime of rape reach into official discourse, and are not just limited to popular or non-specialist discussions. Women are thus told, not always in so many words but in effect, you were raped by the 'wrong person'[70], or at the 'wrong time', or in the 'wrong place'. Husbands, night time and the street or public places are often the 'wrong' components of actions which prohibit their naming as rape or assault.

Alice Edwards argues that defining the specificities of various and overlapping marginalisations can deepen stereotypes by mapping out what it means to be a black woman, a woman without privilege, or a poor woman.[71] She argues that when these specificities are mapped out, the risk of

[67] The World Bank, *Women, Business and the Law 2016* (2015). Retrieved from: http://wbl.worldbank.org/~/media/WBG/WBL/Documents/Reports/2016/Women-Business-and-the-Law-2016.pdf.
[68] Amy B. Wang, "NYPD captain apologizes after saying 'true stranger rapes' are more troubling than others," *Washington Post* (Jan. 10, 2017). Retrieved from: https://www.washingtonpost.com/news/post-nation/wp/2017/01/08/nypd-captain-draws-outrage-after-saying-true-stranger-rapes-are-more-troubling-than-others/?utm_term=.0cad48b70a19.
[69] *See e.g.* Alan Travis & Nicholas Watt, "Clarke forced to apologise for rape comments," *The Guardian* (May 11, 2011). Retrieved from: https://www.theguardian.com/politics/2011/may/18/kenneth-clarke-apologises-rape-comments.
[70] Amnesty International & REDRESS, *Gender and Torture Conference Report* (2011) at 22. Retrieved from: http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf.
[71] Alice Edwards, "The 'Feminizing' of Torture under International Human Rights Law," *Leiden J. Int'l L.* 19, no. 2 (2006): 354.

essentialising all women as having the same experiences is replaced by a range of other groupings that are similarly uniformly defined. Instead, understanding individual lives and situations should be the starting point for assessment.[72]

It is clear that the monolithic category of 'human' has served women poorly. Women's lives have been understood and recognised primarily when they mirror those of men: that is, when they experience abuses occurring in the public sphere, or by State actors.[73] Likewise, should the experiences of women be homogenised around the lives of those whose lives are known in international debates and policy, particularly in the law, then a parallel injustice exists to those whose lives remain eclipsed. Those whose lives are little known to policy makers can include women in prison or trafficked into the sex industry, indigenous women, women who are arbitrarily deprived of their liberty in institutions due to family shame over their mental ill-health, women prosecuted for seeking abortions, or women who are undocumented migrants. Unlike women who enjoy the comparative privilege of speaking English and having international networks, the aforementioned women struggle to enjoy and exercise their rights, and are collectively identified in Agenda 2030 as those who have been 'left behind'. Lives and bodies are rendered unequal if some are simply neither seen nor heard nor their abuse recognised.

Inequality cannot be reduced to a myriad of unpredictable micro-injustices—it is neither random nor accidental. Patterns and structures of inequality enable and constrain lives, and these patterns, whether in politics, economics, or society, also shape the treatment of certain groups by others. The recognition of patterns of inequality is intimately connected with the extent to which abuse has been recognised in international law. In that vein, appreciation of the value of intersectionality in informing the work of feminising the human rights system is crucial.

The UN's definitions of violence against women, and of torture, combine different elements beyond those in the first column in Table 1, and consider the impacts of violence.

Box 2: Defining Violence against Women

Violence against women shall be understood to encompass, but not be limited to, the following[74]:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

[72] *Id.* at 391.
[73] *Id.* at 349.
[74] General Assembly, *Declaration on the Elimination of Violence Against Women,* art. 2 U.N. Doc. A/RES/48/104 (Dec. 20, 1993). Retrieved from: http://www.un.org/documents/ga/res/48/a48r104.htm . *See* Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, adopted in the Committee's eleventh session (1992). Retrieved from: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

As explained above, the CAT was adopted in 1984 and sets out specific conditions regarding the threshold of severity an act must meet in order to qualify as torture (in terms of the pain and suffering inflicted); the relationships involved (between perpetrator and abused); and the status of the perpetrator (as a State agent[75]).[76] The definition of violence against women in the 1993 Declaration on the Elimination of Violence against Women (DEVAW), reproduced in Box 2, considers both the impact of violence and its context while very broadly identifying the different forms that violence can take (physical, sexual, and psychological).[77] Although a deep analysis of the DEVAW and the developments that influenced it is beyond the scope of this article, it is important to recognize that the DEVAW is strongly linked to the influence of the women's movement. Developed almost ten years after the CAT, it is the broader and more encompassing of the two.[78]

Both definitions of violence against women and torture set out the inter-relationship of different elements in Table 1 as thresholds for the recognition of violence; and thereby leave greater room for interpretation than would a definition that rested on form alone. If, for instance, the definition of rape were to be 'physical invasion of a sexual nature committed on a person under circumstances that are coercive,"[79] then it could hold in marriage, conflict, on campus, and in prison. The physical or institutional context, relationship between victims and perpetrators and intent, can serve as caveats to the act/s, mitigating their resonance and the application of law to the lives of women.

Recent Developments

Much ink has been spilled and many words spoken in the effort to make existing human rights norms and provisions relevant to women. Torture is amongst the most egregious and severe forms of human rights violations, and its primary rendering in the male domain has prompted significant critique from women.[80] Such engagements have brought forth results and significant developments in recent years.

Rape and sexual violence are now recognised as constituting torture.[81] Female Genital Mutilation (FGM), domestic violence, and forced abortions have been recognised under Article 7 of the ICCPR, and by the UNCAT.[82] It is also recognised that torture is not only committed by State agents per se, but extends to the behaviour of individuals in cases where the State has failed to exercise its obligations to prevent, investigate, prosecute, and punish acts of torture.

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[75] The principle of due diligence and accountability for abuse by non-state actors is discussed further below.

[76] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1 *adopted* Dec. 10, 1984 G.A. Res. 39/46 (entered into force June 26, 1987).

[77] *See* General Assembly, *Declaration on the Elimination of Violence Against Women,* art. 2 U.N. Doc. A/RES/48/104 (Dec. 20, 1993). Retrieved from: http://www.un.org/documents/ga/res/48/a48r104.htm.

[78] *See id.* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1 *adopted* Dec. 10, 1984 G.A. Res. 39/46 (entered into force June 26, 1987).

[79] This is not to say that this is the only or the most appropriate definition of rape but it is posited here in order to illustrate the general point. It draws on the International Criminal Tribunal for Rwanda's *Akayesu* judgment. *See The Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda No. ICTR-96-4-T (Sept. 2, 1998). Retrieved from: http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf .

[80] *See* Amnesty International & REDRESS, *Gender and Torture Conference Report* (2011). Retrieved from: http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf.

[81] *Id.* at 12 (finding "rape necessarily give[s] rise to pain and suffering, physical or mental, and . . . this justifies characterization as an act of torture."). Retrieved from: http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf.

[82] International Covenant on Civil and Political Rights *adopted* Dec. 16, 1966 G.A. Res. 2200A (XXI) (entered into force Mar. 23, 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1 *adopted* Dec. 10, 1984 G.A. Res. 39/46 (entered into force June 26, 1987).

UN Special Rapporteur on Torture Juan Mendez discussed the range of violence that the CAT and other international norms prohibiting torture and other ill-treatment cover in his 2016 report on gender.[83] The report addresses violence perpetrated on the basis of discrimination, on grounds of sexual orientation, and pertaining to issues of reproductive rights and sexual violence. It provides an excellent overview of the relationship between violence against women and torture and other ill-treatment, as exemplified in *Table 2*.

Table 3: Examples of the Relationship Between Violence against Women and Torture and Other Ill-Treatment[84]

Torture in armed conflict:	Torture can occur when the State had no role in its perpetration and where the State did not fail to exercise due diligence obligations, with the "characteristic trait of the offence [being] found in the nature of the act committed rather than in the status of the person who committed it."[85]
Domestic violence:	Domestic violence amounts to ill-treatment or torture whenever States acquiesce to the prohibited conduct by failing to protect victims and prohibited acts, of which they knew or should have known, in the private sphere.[86]
Honour crimes:	States' failure to prevent honour-based violence contravenes their obligations to combat and prevent torture and ill-treatment. This includes failure to grant asylum to persons facing the risk of honour violence in their countries of origin.[87]
Female genital mutilation:	The practice constitutes torture or ill-treatment and must be prohibited in accordance with, inter alia, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (art. 5).[88]
Child marriage:	Child marriage constitutes torture or ill-treatment particularly where Governments fail to establish a minimum age for marriage that complies with international standards or allow child marriage despite the existence of laws setting the age of majority at 18.[89]

Furthermore, the provisions on torture found in the ICCPR (Article 7) have been determined to apply in cases involving the denial of access to abortion services that cause suffering or humiliation.[90]

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[83] Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment*, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).
[84] *Id.*
[85] *Id.* at para. 52.
[86] *Id.* at para. 55.
[87] *Id.* at para. 60.
[88] *Id.* at para. 61.
[89] *Id.* at para. 63.
[90] Human Rights Committee, *Communication No. 1153/2003* U.N. Doc. CCPR/C/D/1153/2003/Rev.1 (Aug. 14, 2006). Retrieved from: http://www.bayefsky.com/pdf/peru_t5_iccpr_1153_2003_rev.pdf.

These recognitions indicate that the everyday violence faced by women is beginning to be understood as torture. This is a considerable advance and should not be minimised in any way. The recognition that certain acts of violence against women constitute torture[91] opens the door to a fuller application of fundamental human rights protections, and they reflect considerable efforts by feminist activists and scholars, as well as the receptiveness of human rights mechanisms and mandate holders. They illustrate a growing recognition of the humanity of women.

Nevertheless, social norms persist that slip and slide to find ways to hold women accountable for their abuse. These social norms influence public policy and initiatives that focus on the relationship between perpetrator and victim when determining culpability. Prevailing social norms also encourage mitigations and limitations in understanding violence against women as torture.[92] The pervasive nature of gender stereotypes work against effective application of the principles so clearly articulated by the Special Rapporteur on Torture, who noted that:

> "States are internationally responsible for torture when they fail—by indifference, inaction or prosecutorial or judicial passivity—to exercise due diligence to protect against such violence or when they legitimize domestic violence by, for instance, allowing husbands to "chastise" their wives or failing to criminalize marital rape, acts that could constitute torture."[93]

A Work in Progress

There has been gradual acceptance of violence against women into the vision of human rights, and its incorporation in key normative standards and legal provisions.[94] How we imagine human rights to be made real, or to be relevant, expresses the importance and (in)tolerance of violence against women. This imagination has expanded to make space for the connection between women and human rights (remembering that women had to organise and advocate that "women's rights are human rights") and for violence against women to be considered a form of discrimination against women under the CEDAW.

It is indeed significant that the special stigma that attaches to torture has now made space for women's experiences of a variety of forms of violence. Work remains to be done so that this acknowledgement of women's experiences extends into policy making and the provision of services.

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[91] CEDAW General recommendation 35 of 2017 article 16 makes reference to relevant developments in this area.

[92] *See* Table 1, *supra* at 13.

[93] Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment* ¶ 55, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

[94] *See e.g.* Eva E. Sandis, "United Nations Measures to Stop Violence against Women," *Annals of the New York Acad. of Sci.* 1087 (2006): 370-383.

In the 1970s, women across the world started to name and share their experiences of violence, shelters were established to protect victims, and agitation was underway. Throughout the 1980s and 1990s, violence against women broke into public discourse and public policy arenas. It became gradually accepted that such violence had to be addressed and reduced.[95] The Millennium Development Goals[96], a global inter-governmental compact adopted in 2000, made no mention of violence against women. However, in 2015, the 2030 Agenda for Sustainable Development and the Sustainable Development Goals offered the world a new vision, accompanied by a set of commitments. The Agenda and Sustainable Development Goals recognize that violence against women is not to be tolerated.[97] Like women, Member States of the UN have imagined a world without violence. The UN has committed to "[e]liminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation"[98] by 2030.

The normative landscape has indeed progressed—within the human rights system the definition of torture has been expanded in reach to capture many forms of violence, including the everyday. Women's lives are becoming recognized as human. Regional mechanisms have set the standard in defining violence around the notion of harm, without inserting caveats as to relationships or contexts. These are truly meaningful advances. And governments have committed to eliminating violence against women by 2030. This is far from a small objective.

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[95] *See* U.N. Women, *Focusing on prevention to stop the violence*. Retrieved from: http://www.unwomen.org/en/what-we-do/ending-violence-against-women/prevention.

[96] *See* World Health Organization, *Addressing violence against women and achieving the Millennium Development Goals* (2005). Retrieved from: http://apps.who.int/iris/bitstream/10665/43361/1/WHO_FCH_GWH_05.1.pdf; United Nations, *The Millennium Development Goals*. Retrieved from: http://www.un.org/en/mdg/summit2010/pdf/List%20of%20MDGs%20English.pdf.

[97] General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* U.N. Doc. A/RES/70/1 (Oct. 21, 2015); The Sustainable Development Goals were adopted as part of Agenda 2030. *See* United Nations Development Program, *Sustainable Development Goals*. Retrieved from: http://www.undp.org/content/undp/en/home/sustainable-development-goals.html.

[98] General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* at Goal 5.2, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

Table 4: Violence Against Women—A Daily Reality

FGM	200 million girls and women alive today have undergone female genital mutilation[99]
Child marriage	Over 700 million women alive today were married as children[100]
Intimate partner abuse	35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence[101]
Sexual violence in public spaces	92 per cent of women reported having experienced some form of sexual violence in public spaces in their lifetime 88 per cent of women reported having experienced some form of verbal sexual harassment (New Delhi[102])

Yet, as Table 4 indicates, these changes and commitments are yet to be actualized in the lives of millions of women. If the promise of human rights is to touch women's lives and enable then to know dignity and peace, then these great advances in the normative legal frameworks must be given practical and everyday meaning. Norms that sustain hierarchies of rape or other violence still infiltrate criminal justice systems, both at the national and international levels. These norms inform policy approaches and the minds of policy makers, such that not all rapes are treated the same by law, and not all rapes are deemed worthy of condemnation or criminalisation.[103] All women are not equal where our responses to violence are concerned.

For women to become fully human, each and every woman must feel the promise of the human rights framework through the fabric of her daily life, no matter who she is, where she lives, what passport she carries, or other discrimination she faces. The human rights discourse has come a long way—will it now lead the policy worlds into a better understanding of, and fuller commitment to, women? In this regard, the humanisation of women remains a work in progress.

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[99] United Nations International Children's Emergency Fund, *Child Protection: Female Genital Mutilation and Cutting Data (2016). Retrieved from:* https://data.unicef.org/topic/child-protection/female-genital-mutilation-and-cutting/#.

[100] *See* Girls Not Brides, *Child Marriage Around the World. Retrieved from:* http://www.girlsnotbrides.org/where-does-it-happen/.

[101] *See* World Health Organization, *Global Violence and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* at 2 (2013). Retrieved from: http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf; See also U.N. *Women, Facts and Figures: Ending Violence Against Women (2016). Retrieved from:* http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures.

[102] U.N. Women, *In Brief: Safe Cities Global Initiative (2013). Retrieved from:* http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2013/12/un%20women-evaw-safecities-brief_us-web%20pdf.ashx. S*ee also* U.N. W*omen, Facts and Figures: Ending Violence Against Women* (2016).

[103] *See e.g.* Patricia Mahoney & Linda M. Williams, "Sexual Assault in Marriage: Prevalence, Consequences and Treatment of Wife Rape," *Partner Violence: A Comparative Review of 20 Years of Research* (J.L. Jasinski & Linda M. Williams eds., Thousand Oaks: Sage (1998)).

Gendering the Lens: Critical Reflections on Gender, Hospitality and Torture

Mauro Cabral Grinspan and Morgan Carpenter*

Abstract

Historically, situations of torture and ill-treatment affecting men have received greater attention than those affecting women and sexual and gender minorities. Gendered and intersectional lenses highlight distinctions between men and women, but they also create a distinction between men and women who are regarded as legitimately gendered subjects, and intersex and transgender people who are subject to contestation, inspection, verification and modification in order to become legitimate. This gendered system thus constructs a compelling organizing logic that produces and reproduces difference. Intersex people and transgender people are subjected to both symbolic and material "rules of hospitality" that govern how they may enter a gendered world, in the case of intersex people, or re-enter it, in the case of transgender people.

Hospitality rules concerning intersex people literalize gender stereotypes, determining infants' sex assignments and reinforcing those assignments surgically and hormonally before the subjects of such interventions can consent to them, with profound and deleterious physical and psychological consequences. Sex assignment at birth is usually considered a fundamental and irreversible act. Transgender people are perceived to transgress rules of hospitality in attempting to re-enter a gendered world in a different gender role.

Human rights violations against intersex and trans people are frequently committed and justified in the name of gender, but the experiences of trans and intersex people are normatively excluded from the gender framework itself. It is necessary to critically expand mainstream notions of gender to make them sensitive to historically excluded groups in order to dismantle and prevent gendered violence.

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1. Introduction

The 2016 *Report* of the Special Rapporteur on Torture focused on "the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls and lesbians, gay, bisexual, transgender and intersex persons."[1] It did so because, historically, situations of torture and ill-treatment affecting men have received greater attention. The *Report* acknowledges that

> "The analysis has thus largely failed to have a gendered and intersectional lens, or to account adequately for the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes (…) the torture and ill-treatment framework can be more effectively applied to qualify human rights violations committed against persons who transgress sexual and gender norms…."[2]

It is necessary to critically explore gender itself in that same context, both as a concept and as a systemic framework intrinsically related to the human rights violations addressed by the Special Rapporteur's *Report*.

The default association between gender and empirically defined populations (i.e., men and women) produces a pervasive distinction and hierarchical relationship between these gendered subjects and *others*. This association also produces and reproduces stigma, discrimination, and violence. For example, intersex and trans people are subjected to gender-based human rights violations that are too frequently ignored, denied, tolerated or even justified in the name of gender. It is appropriate and necessary to address these dynamics of *othering* within the gender framework by expanding the scope of its critical lens, in order to dismantle false universalisms and to adopt a reflexive, multi-focal, and truly intersectional approach to gendered forms of torture and ill treatment.[3]

Addressing current forms of gender universalism requires a critical approach similar to that used in introducing the gender framework itself. The gender framework illuminated, challenged and broke a naturalized and universalized association between the categories of man and human, it also created an ontological binary that confines humanity to two normative and distinct gendered subjects: men and women. To address gender-based human rights violations against intersex and trans people it is therefore necessary to examine their construction as *others* within the gender framework.

One means of expanding the naturalized and universalized categories of woman and man within the current gender framework would be to democratize specifiers, that is, to acknowledge and name significant variations among women and men, without imposing an arbitrary hierarchy upon those variations. For example, this democratization could be achieved by making reference, when appropriate, to cisgender (or non-transgender) women and men, and to transgender women and men, or by referring both to intersex women and men and to endosex (or non-intersex) women and men. Another means of expanding the gender framework would be to open it up to multiple *genders*; for example, gender non-binary people, agender people, and those with particular identities, such as hijra, travesti, and trans. Accounting for the human rights situations of intersex and

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[1] Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment*, para. 5, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).
[2] *Ibid*.
[3] Sara Ahmed, *Strange Encounters. Embodied Others in Post-Coloniality* (London: Routledge, 2000).

transgender people through a critical gendered lens requires a combination of both strategies: *specification* and *diversification*. However, the adoption of a revised gender framework does not solve one of the key issues posed by *any* gender framework: the existence of implicit and explicit "hospitality rules," and the connection between those rules and gender-based human rights violations.

In the context of this paper, "hospitality rules" refer to those social, cultural, or legal norms that regulate whether people are: allowed to enter, welcome to inhabit, able to move, or permitted to cross, gendered borders. The rules normatively distinguish between those people who receive full hospitality, those who may be admitted under specific and conditional rules of hospitality, and those who are rejected, persecuted, or even eliminated.[4] *Any* gender framework, whether narrow or broad, has to answer the same questions: who *belongs* to a recognized and recognizable gender, and who qualifies as the unintelligible, foreign, unwelcome *other*? Who is allowed to *move* in and out of a given gender, across genders, even beyond gender, and under what conditions? What kinds of rules govern the relationships between natives, outsiders, and newcomers in the spaces demarcated by gender?

Gender is an imaginary, yet highly normative space. It is presumed to be inhabited by men and women who are defined by standard combinations of features, including physical sex characteristics, gender identity, gender expression, sexual orientation, and a personal narrative that makes these features comprehensible. The hegemonic gender framework, and the gendered world it constructs only recognizes *some* men and women as legitimate gendered subjects. At the same time, it imposes severe, painful symbolic and material conditions on *others* in order to allow them to enter or re-enter the territory demarcated by gender.[5] Those others are subjected to reduction, contestation, inspection and verification, revocation, deportation, and cancellation.

This gendered system provides a pervasive, compelling, and organizing logic that produces and reproduces epistemological, ethical and political differences. They work through stigma, discrimination, and violence against those who contradict gender expectations, including those whose sex characteristics vary from standard female or male characteristics, and those whose gender identity and/or gender expression vary from standard feminine or masculine identities and expressions. Many human rights violations, including torture, cruel, degrading and inhuman treatment, are performed, explained, and justified as generally accepted hospitality rules imposed on *others*. For example, around the world, gendered hospitality rules are enforced from the moment of birth, and even prior to that moment, through processes of genetic de-selection, selective abortion and infanticide. Addressing and understanding human rights violations on the basis of gender against people who are not considered gendered subjects requires more than adding them to the extant gender framework. It requires a critical examination of the politics of hospitality that they face in a world dominated by those simply and unambiguously identified as men and women.

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[4] Jacques Derrida and Anne Dufourmantelle, *Of Hospitality* (Stanford: Stanford University Press, 2000). Dan Bulley, *Migration, Ethics and Power: Spaces of Hospitality In International Politics* (London: SAGE Publications, 2017).

[5] Both "entry" and "re-entry" into gender demarcated territory must be taken as metaphorical and stylized expressions of much more complex processes. We decided to use them in spite of their limitations because they provide an adequate articulation of imaginary but normative spaces (such as gender, but also nation States) and borders distinguishing between territories inside and outside and the rules governing movements between the two.

2. Entering a Gendered World

Being born with a female or male body is usually perceived as being intrinsic to the human experience, despite evidence to the contrary. According to the Office of the High Commissioner for Human Rights, intersex people are "are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies."[6]

Intersex people are heterogeneous. An intersex individual may have different numbers of sex chromosomes, different physical responses to hormones, a different hormonal balance or combination during prenatal development, and a range of anatomical sex characteristics. Intersex traits also include developmental differences caused by environmental factors. Some common intersex variations are diagnosed prenatally, or may be apparent at birth. Other intersex traits become apparent at puberty, when trying to conceive, or by random chance. At least 40 different variations have been recognized, present in at least as many disparate codes in the current International Classification of Diseases (ICD-10). Within the ICD-10, variations of intersex are described using terms such as "malformations", "defects" and "pseudohermaphroditism," and they have recently been grouped together under the contentious additional clinical term "disorders of sex development."[7] Most traits are not pathological, but are simply healthy variations of the human body. When apparent, intersex traits are recognized and treated as a challenge to gendered hospitality. For many intersex individuals, being born into this world means to be subjected to human rights violations as a condition of hospitality.

Infants and children with intersex traits may be subjected to early, so-called "normalizing," and irreversible surgical and hormonal interventions. Even entering the world as an intersex human being is becoming increasingly difficult, as more and more intersex births are avoided through genetic de-selection and selective abortion. Other children may be born following prenatal intervention *in utero* to avoid introducing intersex features into the world—including prenatal dexamethasone, a drug that potentially has detrimental cognitive consequences.[8]

In some cases, intersex characteristics make it difficult to assign a child's sex at the moment of birth. The existence of intersex babies highlights the erasure of a key decisional moment in *all* sex assignments. Intersex infants interrupt a naturalized association between external genitalia and "true" sex, gender identity, gender expression, and sexual orientation.[9]

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[6] Office of the High Commissioner for Human Rights, "Intersex Awareness Day—Wednesday 26 October: End violence and harmful medical practices on intersex children and adults, UN and regional experts urge," [News Release] Oct. 24, 2016. Retrieved from: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E

[7] Morgan Carpenter and Mauro Cabral, Submission by GATE to the World Health Organization: Intersex codes in the International Classification of Diseases (ICD) 11 Beta Draft. 2017]. Retrieved from: https://transactivists.org/wp-content/uploads/2017/06/GATE-ICD-intersex-submission.pdf; Emilie Johnson, Ilina Rosoklija, Courtney Finlayson, Diane Chen, Elizabeth Yerkes, Mary Beth Madonna, et al. Attitudes towards "disorders of sex development" nomenclature among affected individuals. Journal of Pediatric Urology. 2017; In press.

[8] For example, in a Swedish study, Hirvikoski and others found examples of a failure to thrive, developmental delays, mood fluctuations and impaired verbal working memory. See Tatja Hirvikoski et al. "Prenatal Dexamethasone Treatment of Children at Risk for Congenital Adrenal Hyperplasia: The Swedish Experience and Standpoint" *The Journal of Clinical Endocrinology & Metabolism* 97, no. 6 (2012) 1881–3.Alice Dreger et al., "Prenatal Dexamethasone for Congenital Adrenal Hyperplasia: An Ethics Canary in the Modern Medical Mine," *J. of Bioethical Inquiry* 9, no. 3 (2012): 277-94.

[9] Katrina Karkazis, *Fixing Sex. Intersex, Medical Authority and Lived Experience*. (Durham: Duke University Press, 2008).

In 2013, the Special Rapporteur on Torture found that children born with sex characteristics that are not typically female or male are often subjected to irreversible genital and sterilization surgeries, to assign or reinforce sex, without their fully informed consent.[10] "Fixing" sex can result in permanent, lifelong harm, producing sterility, genital insensitivity, impaired sexual function, chronic pain, bleeding, and infections, post-surgical depression, trauma, massive internal and external scarring, and metabolic imbalances.[11]

The means to implement these rules of hospitality are set out in a 2006 clinical "consensus" document by two pediatric endocrine societies. The document described rationales for early cosmetic surgeries as including, "minimizing family concern and distress, and mitigating the risks of stigmatization and gender-identity confusion of atypical genital appearance."[12]

Such "psychosocial" rationales for medical intervention typically rely on gender stereotypes and, in particular, a child's perceived gender role in a family and in society. A derivative clinical decision-making framework considers relevant to sex assignment, surgical and hormonal management:

> "Risk that child will not be accepted by parents in the chosen sex of rearing … Risk of social or cultural disadvantage to child, for example, reduced opportunities for marriage or intimate relationships or reduced opportunity for meaningful employment and capacity to earn an income [and] social stigma associated with having genitalia which do not match the gender in which the person lives."[13]

Zillén and others, for the Committee on Bioethics of the Council of Europe, have stated that parental consent for early "normalizing" medical interventions is inherently flawed because of a lack of clinical necessity for intervention on these grounds, with "no credible evidence that children benefit from improved attachment with parents" as a consequence.[14] Indeed, such interventions may complicate future relationships between parents and their adult or adolescent children. Systematic evidence that surgeries have psychosocial benefits is lacking, and no control trials exist.[15] Surgeries performed during an intersex child's infancy are, in fact, predicated on the unsubstantiated belief that parents can *direct* gender development. In contrast, Zillén and others point to a lack of scientific evidence that would explain how surgeries "will be certain to coincide with the child's actual identity, sexual interests, and desires for bodily appearance."[16]

Morgan Holmes suggests that the presence of an intersex trait precludes a "child's species membership as a human, and subsequent status as a person,"[17] where personhood begins "with the performative pronouncement of a sex upon which to hang a subject/identity… it is impossible

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[10] Human Rights Council, *supra* note 1, para. 46.
[11] *Ibid.*
[12] Christopher P. Houk et al., "Summary of Consensus Statement on Intersex Disorders and Their Management," *Pediatrics* 118, no. 2 (2006): 753-7; *See also* Georgiann Davis, *Contesting Intersex: The Dubious Diagnosis* (New York: New York University Press, 2015).
[13] L.H. Gilam et al., "Ethical Principles for the Management of Infants with Disorders of Sex Development," *Hormone Research in Paediatrics* 74, no. 6 (2010): 412-8.
[14] Kavot Zillén, Jameson Garland & Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties* (2017).
[15] I.A. Hughes et al., "Consensus statement on management of intersex disorders," *Archives of Disease in Childhood* 91, no. 7 (2005): 554-63; P.A. Lee, et al., and the Global DSD Update Consortium. Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care. *Hormone Research in Paediatrics* 85, no. 3 (2016): 158–180.
[16] *Ibid.*
[17] M. Morgan Holmes, "Mind the Gaps: Intersex and (Re-productive) Spaces in Disability Studies and Bioethics," *J. of Bioethical Inquiry* 5, no. 2-3 (2008): 169-81. 2008.

even to conceive of admitting them to the category of personhood without performing extensive and immediate medical and surgical intervention." In a very literal way, such interventions can be considered *gendering* procedures, inscribing rules of hospitality on intersex bodies. They are routinely performed to force intersex people into normative ideals of female or male embodiments.

Indeed, an inability to pronounce a child's sex can result, in some parts of east and southern Africa and Asia, in infanticide, abandonment, and in stigmatizing accusations that the child's mother practices witchcraft.[18] The withholding of a required pronouncement of sex has, in Kenya, prevented access to identification documents for a child, with a consequential exclusion from school, and limited access to health care.[19] There have also been instances in Argentina where children are refused identification documents unless their parents committed to subjecting them to unwanted medical interventions.[20]

Hospitality rules concerning intersex people literalize gender stereotypes. Over much of the last century, in most places with accessible healthcare, medical practitioners decided intersex persons' sex assignments depending upon the size or "adequacy" of an infant's phallus, determining whether it would be a penis or a clitoris. This rule is based on surgical and technological capacities favoring feminizing procedures[21] described in the aphorism that "you can make a hole, but you can't build a pole,"[22] as well as a belief that it may be less traumatic to be a woman than a "non-functioning" or "inadequate" male.[23] These rules remain part of the proposed next version of the International Classification of Diseases.[24] This rule is now supplemented by additional rules focusing on a child's androgen sensitivity and sex chromosomes,[25] although in some countries, these approaches are sometimes outweighed by societal preferences for male children.[26] The consequence of each normative framework is the same: children are perceived to need genitals that match their sex assignment. Moreover, each framework assesses what is "appropriate" for the individuals affected before they are able to determine for themselves what they feel is appropriate.

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[18] Helen Grady & Anne Soy, "The midwife who saved intersex babies," *BBC News* (May 4, 2017). Retrieved from: http://www.bbc.com/news/world-africa-39780214; Carl Collison, "Intersex babies killed at birth because 'they're bad omens'". *Mail & Guardian* (January 24, 2018). Retrieved from https://mg.co.za/article/2018-01-24-00-intersex-babies-killed-at-birth-because-theyre-bad-omens; Beyond the Boundary–Knowing and Concerns Intersex, *Intersex report from Hong Kong China, and for the UN Committee Against Torture* (Oct. 1, 2015). Retrieved from: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fHKG%2f22156&Lang=en

[19] *Baby 'A' (suing through her mother, E.A.) & another v. Attorney General & 6 others*, No. 266/2013, High Court of Kenya at Nairobi, Constitutional and Human Rights Division, (Dec. 5, 2014).

[20] Justicia Intersex & Stop IGM.org/ Zwischengeschlecht.org, *NGO Report to the 6th and 7th Periodic Report of Argentina on the Convention against Torture*, Buenos Aires (Mar. 2017). Retrieved from: http://intersex.shadowreport.org/public/2017-CAT-Justicia-Intersex-Zwischengeschlecht-IGM.pdf.

[21] M. Diamond & H.K. Sigmundson, "Sex Reassignment at Birth: A Long Term Review and Clinical Implications," *Archives of Pediatrics and Adolescent Medicine* 151, No. 3 (1997): 151.

[22] Melissa Hendricks, "Is it a Boy or a Girl?" *Johns Hopkins Mag*. 45, no. 6 (1993): 10-16.

[23] K. Rossiter & S. Diehl, "Gender reassignment in children: Ethical conflicts in surrogate decision making," *Pediatric Nursing* 24, no. 1 (1998): 59.

[24] For example: World Health Organization. 46,XY disorder of sex development due to 17-beta-hydroxysteroid dehydrogenase 3 deficiency. In *ICD-11 Beta Draft (Foundation)*. (2018). Retrieved from https://icd.who.int/dev11/f/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f887793448

[25] M. Morgan Holmes, *supra* note 16

[26] U. Kuhnle & W. Krahl, "The Impact of Culture on Sex Assignment and Gender Development in Intersex Patients," *Perspectives in Biology and Medicine* 45, no. 1 (2002): 85-103; Beyond the Boundary–Knowing and Concerns Intersex *supra* note 17, *Intersex report from Hong Kong China, and for the UN Committee Against Torture* (Oct. 1, 2015). Retrieved from: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fHKG%2f22156&Lang=en.

In 19th-century western medicine, the performing of clitoridectomies on girls was seen as a "harmless" "cure" for masturbation, hysteria, and an "enlarged clitoris."[27] Today, clitoridectomies are recognized as Female Genital Mutilation (FGM) when performed on non-intersex girls. While clitoris amputations motivated by the desire to prevent masturbation and "hysteria" attracted mounting criticism within the medical community, and the practice was mostly abandoned between 1900 and 1945,[28] similar reductions of "enlarged" clitorises persist. In the 1960s, clitoridectomies became the dominant medical standard for female-assigned intersex newborns.[29]

For decades, doctors claimed that the "removal of [the] clitoris does not interfere with the ability to achieve [an] orgasm," and that surgery would facilitate "normal sexual function in these females."[30] It was only in the 1980s and 1990s that clitoris amputations were replaced by partial amputations described as "clitoris reduction surgeries," amid claims that these reduction surgeries provided improved outcomes.[31] As late as 1993, clinical reports claimed that, among surgical subjects, "Not one has complained of a loss of sensation, *even when the entire clitoris* had been removed."[32]

Feminizing interventions also occur in the treatment of adult women with intersex variations. A currently suspended International Association of Athletics Federations policy mandates that national sports authorities "actively investigate any perceived deviation in [their women athletes'] sex characteristics."[33] Women with high innate levels of testosterone have been subject to exclusion, despite inadequate evidence of a performance advantage.[34] The suspended policy is currently under review by the Court of Arbitration in Sport. However, the impact of this and prior policies based on physical examinations or chromosomal analysis, has already been felt. In 2016, the UN Special Rapporteur on health noted that "a number of athletes have undergone gonadectom[ies] (removal of reproductive organs) and partial clitoridectom[ies] (a form of female genital mutilation) in the absence of symptoms or health issues warranting those procedures."[35]

Some intersex girls may undergo cosmetic labial "enhancement" surgery. A 2016 Australian Family Court case explicitly referred to a child's labioplasty and clitorectomy at three years of age as surgeries that "enhanced the appearance of her female genitalia." The judge gave the child's

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[27] Examples of individuals who espoused this belief include: Carl Ferdinand von Graefe (Germany, 1787-1840), James Marion Sims, "The Father of Gynecology" (U.S.A., 1813-1883), Isaac Baker Brown (UK, 1811–1873), Alfred Hegar (Germany, 1830-1914) and Gustav Braun (Austria, 1829-1911); *see* Zwischengeschlecht.org., *Intersex Genital Mutilations: Human Rights Violations Of Children With Variations Of Sex Anatomy* (Mar. 2014). Retrieved from: http://intersex.shadowreport.org/public/2014-CRC-Swiss-NGO-Zwischengeschlecht-Intersex-IGM_v2.pdf.

[28] Karkazis, *supra* note 9 at 148-149; Sandra Eder, "The Volatility of Sex: Intersexuality, Gender and Clinical Practice in the 1950s," *Gender & History* 22, no. 3 (2010): 700-701.

[29] Cheryl Chase, ""Cultural Practice" or "Reconstructive Surgery"? U.S. Genital Cutting, the Intersex Movement, and Medical Double Standards," *in Genital Cutting & Transnational Sisterhood* (Stanlie M. James & Claire C. Robertson eds., University of Illinois Press, 2002) 126-51.

[30] Jürgen R. Bierich, (1962), "The Adrenogenital Syndrome," *in Intersexuality* (Claus Overzier ed., 1962) 345–386; Robert E. Gross, Judson Randolph, & John F. Crigler, "Clitorectomy for Sexual Abnormalities: Indications and Technique," *Surgery* 59, no. 2 (1966): 300-308; N. Sagehashi, "Clitoroplasty for clitoromegaly due to Adrenogenital Syndrome without loss of sensitivity," *Plastic and Reconstructive Surgery* 91, no. 5 (1993): 956.

[31] Cheryl Chase, "Surgical Progress Is Not the Answer to Intersexuality," *in Intersex in the Age of Ethics* (Alice Dreger ed., Frederick: University Publishing Group,1999*)* 148–159.

[32] Milton Edgerton. Discussion: Clitoroplasty for Clitoromegaly Due to Adrenogenital Syndrome Without Loss of Sensitivity. *Plastic & Reconstructive Surgery*, *91* no. 5, (1993): 956.

[33] Rebecca M. Jordan-Young Peter H. Sönksen & Katrina Karkazis, "Sex, health, and athletes," *BMJ* 348 (2014). Retrieved from: http://www.bmj.com/content/348/bmj.g2926.

[34] P. H. Sőnksen, et al. Hyperandrogenism controversy in elite women's sport: an examination and critique of recent evidence. *Br J Sports Med*, (2018).

[35] Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 56, U.N. Doc. A/HRC/32/33 (Apr. 4, 2016). Retrieved from: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/33.

parents the right to authorize their child's sterilization, without clear evidence that the sterilization was clinically necessary. The judge's decision was predicated on gender stereotypes: including the child's "Barbie bedspread," "Minnie Mouse underwear," and long, braided hair. The sterilization was deliberately ordered before the child was of an age where she could understand the procedure, while the Court also noted that she might require further surgery to make her body suitable for heterosexual intercourse.[36]

In contrast to labioplasties, vaginoplasties typically require regular follow-up treatment through dilation.[37] Intersex persons forced to undergo the procedure without informed personal consent to either vaginoplasty or dilation, have described the dilation procedure as an experience comparable to being raped. Katrina Karkazis notes that "dense scarring and the closing of the vagina opening are common complications [of the procedure, in addition to] chronic pain during intercourse, excessive vaginal secretion and total closure of the vagina."[38]

Masculinizing procedures are often performed to meet rules of hospitality that are naturalized as "functional" rather than "cultural," such as to ensure that men are able to stand to urinate.[39] The term hypospadias is used to describe a situation in men where urethra opens anywhere from the glans of the penis to the perineum, rather than at the tip of the penis. This may impact the ability to stand to urinate. Alice Dreger argues, citing a 1995 German study,[40] that clinical standards impose unrealistic expectations of "normality," and that few men with hypospadias may be aware of any physical anomaly.[41] Furthermore, multiple studies suggest that physical and psychological issues associated with hypospadias are overstated,[42] and that surgical interventions are challenging, and frequently result in complications.

Rafal Chrzan and others report complications in 31% of hypospadias surgeries.[43] Guido Barbagli and others report that complications can arise "many years after achieving successful functional and cosmetic results." In a study of 1,176 hypospadias surgeries reported in 2012, 11.9% were considered "failures," and the majority of these were said to "require surgical reconstruction … fully

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[36] Family Court of Australia. *Re: Carla (Medical procedure)* [2016] FamCA 7 (Jan. 20, 2016). Retrieved from: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2016/7.html; Morgan Carpenter, "The 'normalisation' of intersex bodies and 'othering' of intersex identities, the experience in Australia" *in The Legal Status of Intersex Persons* (Jens Scherpe, Anatol Dutta & Tobias Helms eds., Intersentia; 2018).

[37] Ismail-Pratt et al, "Normalization of the Vagina by Dilator Treatment Alone in Complete Androgen Insensivity Syndrome and Mayer-Rokitansky-Kuster-Hauser Syndrome," *Human Reproduction* 22, no. 7 (2007): 2020-2024; L-M. Liao et al, "Dilations as Treatment for Vaginal Agenesis and Hypoplasia: A Pilot Exploration of Benefits and Barriers as Perceived by Patients," *J. of Obstetrics & Gynaecology* 26, no. 2 (2006): 144-148; Carla P. Roberts, Michael J. Haber & John A. Rock, "Vaginal Creation for Müllerian Agenesis," *Am. J. of Obstetrics & Gynecology* 185, no. 66(2001): 1349-1353.

[38] Karkazis, *supra* note 9 at 166.

[39] Australasian Paediatric Endocrine Group, *Submission to the Senate Inquiry into the Involuntary or Coerced Sterilization of People with Disabilities in Australia: Regarding the Management of Children with Disorders of Sex Development* (June 27, 2013). Retrieved from: http://www.aph.gov.au/DocumentStore.ashx?id=aafe43f3-c6a2-4525-ad16-15e4210ee0ac&subId=16191

[40] Jan Fichtner et al, "Analysis of Meatal Location in 500 Men: Wide Variation Questions Need for Meatal Advancement in All Pediatric Anterior Hypospadias Cases," *J. of Urology*. 154, no. 2 (1995): 833-4.

[41] Alice Dreger, "Do You Have to Pee Standing Up to Be a Real Man?" *Pacific Standard* Feb. 13, 2014. Retrieved from: http://www.psmag.com/navigation/health-and-behavior/pee-standing-real-man-73133/. Adrienne Carmack, Lauren Notini & Brian D. Earp, "Should Surgery for Hypospadias Be Performed Before an Age of Consent? ," *J. of Sex Research* 53, no. 8 (2015).

[42] Jan Fichtner et al, *supra* note 39. Alice Dreger, *supra* note 40

[43] R. Chrzan et al, "Quality Assessment of Hypospadias Repair with Emphasis on Techniques Used and Experience of Pediatric Urologic Surgeons," *Urology* 70, no. 1 (2007): 148-52.

resurfacing the glans and penile shaft."[44] Ulrike Klöppel's 2016 report on intersex-related surgeries in Germany found that 10-16% of children diagnosed with hypospadias underwent "plastic reconstructions of the penis."[45] The consequential loss of sexual sensation is a catastrophic cost, and there is no guarantee that the persons concerned will be able to stand to urinate.

Masculinizing interventions can also include hormone treatment. These include cases where individuals were coercively prescribed testosterone as adults, to meet expectations demanded of "real" men.[46] Children have also been prescribed testosterone if they required hormonal assistance to go through puberty, without any prior consultation about their gender identity.[47]

Third sex

While intersex variations can pose challenges to rigidly binary gender frameworks, socio-medical technologies seek to tackle that challenge by eliminating, as far as practicable, evidence of intersex traits from people's bodies instead of by challenging the narrowness of gendered medical norms themselves.

Multiple countries, including Australia, India, and New Zealand, have constructed a third sex category, in addition to female and male categories. In some cases, this responds to the identification of human rights violations faced by intersex people. This measure should be carefully evaluated from multiple standpoints.

First, three sex categories, just like two categories, define borders where hospitality rules may be imposed. Secondly, intersex people are diverse, comprising people with many different understandings of their own bodies and identities. Some intersex people have gender identities that are aligned with the sex they were assigned at birth, while others have gender identities that are not so aligned. Compressing a heterogeneous population, their different bodies and manifestations of sex characteristics, identities, and assignments into a single category is a homogenization and simplification that denies their diversity. This process inappropriately reduces intersex issues to matters of legal sex recognition.

The key argument for assigning intersex people to a third sex category appears to be protective in nature: to prevent harmful practices aimed at "normalizing" intersex people's bodies. For example, a German law passed in 2013 created a new rule where infants who could not be assigned to a female or male category were not assigned a sex at all, in order to protect their

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[44] Guido Barbagli et al, "Surgical Repair of Late Complications in Patients Having Undergone Primary Hypospadias Repair during Childhood: A New Perspective," *Advances in Urology* 2012 (2012): 1–5.

[45] Ulrike Klöppel, "Zur Aktualität kosmetischer Operationen „uneindeutiger" Genitalien im Kindesalter" *Zentrum für transdisziplinäre Geschlechterstudien* (Dec. 2016). Retrieved from: https://www.gender.hu-berlin.de/de/publikationen/gender-bulletins/texte-42/kloeppel-2016_zur-aktualitaet-kosmetischer-genitaloperationen. Organization Intersex International Germany, *CEDAW Shadow Report. With reference to the combined Seventh and Eighth Periodic Report from the Federal Republic of Germany on the Convention on the Elimination of All Forms of Discrimination against Women* (Jan. 20, 2017). Retrieved from: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/DEU/INT_CEDAW_NGO_DEU_26315_E.pdf.

[46] Michael Noble, "I am me and I am OK," *Organisation Intersex International Australia Limited* (July 19, 2010). Retrieved from: https://oii.org.au/18138/opinion-michael-noble/; Morgan Carpenter, " Submission to the Senate Inquiry on the Human Rights Anti-Discrimination Bill," *Organisation Intersex International Australia Limited* (Dec. 10, 2012). Retrieved from: http://oii.org.au/21433/submission-human-rights-anti-discrimination/.

[47] Family Court of Australia. *Re: Kaitlin* [2017] FamCA 83 (Feb. 22, 2017). Retrieved from: http://www.austlii.edu.au/au/cases/cth/FamCA/2017/83.html; Amnesty International, *First, Do No Harm: Ensuring the Rights of Children Born Intersex* [campaign] 2017. Retrieved from: https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/.

bodily integrity.[48] However, assigning intersex people to a third sex category purifies the standard gender framework of non-standard embodiments, rendering them as an abject 'other', distinguished from endosex men and women. The law enacted an incredibly literal hospitality rule offering two differentiated entrances into the world: such infants are either assigned a specific legal marker evident on identification documents and so disclosed to caregivers and service providers, *or* are subjected to the very real possibility of being mutilated. Grounded in an unsubstantiated but pious wish, there is no evidence that third sex classifications produce protections from forced and coercive medical practices.[49]

Medical 'normalization' on the one hand, and legal *othering* on the other offer two radically different and incommensurate epistemological frameworks providing hospitality, neither of which is grounded in a principle of self-determination.[50]

3. Re-Entering a Gendered World

Sex assignment at birth is usually considered a fundamental, irreversible act. It encapsulates specific sex characteristics, a legal gender marker, a legal name, and long-term, gendered expectations for preferred colors and toys, personality and behavior, interactions and relationships with others, and sexual preferences. Around the world, newborns designated as females are expected to grow up to be girls and women, and those designated as males are expected to grow up to be boys and men. Despite this belief in the incontestability of sex assignment, many people follow a life-path that challenges the sex assigned to them at birth, along with the entire array of social, cultural, and normative expectations associated with that sex, by identifying with a different gender. These individuals are referred to as transgender, or, more concisely, "trans" people.

Transgender people identify with a gender different than the one that corresponds to the sex assigned to them at birth. These forms of identification are diverse and include terms specific to particular geographical and temporal contexts and cultural and political frameworks, such as hijras, genderqueers, travestis, fa'afafines, and transsexuals. Many transgender individuals also identify with gendered terms that hold universal currency, such as man and woman. Some transgender people instead identify as non-binary or agender. While many trans people express themselves in ways that contravene gender norms, many others adhere to those norms. Therefore, gender non-conformity should not be assumed when referring to trans people. Furthermore, bodily, sexual, and reproductive diversity are key components of trans experiences and should not be ignored when addressing trans issues from an intersectional perspective.

The international dominance of the LGBTI acronym, and the fusion of the conceptual pair "sexual orientation" and "gender identity" into "SOGI" issues, have placed trans people in the category of "sexual minorities." This placement is incorrect and the logic behind it is flawed. Trans people should be considered a gender minority, and the issues affecting them must be addressed as gender issues. Categorizing trans people as sexual minorities can have serious negative consequences. On the one hand, including trans people into "sexual minorities" category renders the specific forms of gendered stigma that they experience invisible. Trans people face discrimination and violence in most countries around the world, even in places where the human rights of "sexual minorities",

[48] Hida Viloria, "Op-ed: Germany's Third-Gender Law Fails on Equality," *Advocate* (Nov. 6, 2013). Retrieved from: http://www.advocate.com/commentary/2013/11/06/op-ed-germany%E2%80%99s-third-gender-law-fails-equality.
[49] Morgan Carpenter, *supra* note 35.
[50] *Ibid.*

such as cis lesbians and gay people, are rapidly advancing. On the other hand, excluding trans people from the realm of gender contributes to the formulation of gender itself as an extremely narrow, binary category that only refers to cis men and women. Narrowing the scope of gender and, therefore, of the gender perspective itself, has been consistently identified and denounced as *cissexist*: integral to the power structure that, explicitly or implicitly, defines the relationship between cisgender people and transgender people as an ideologized power structure that privileges cis people and excludes, oppresses, persecutes, punishes, and eliminates (i.e. kills) trans people.[51]

At the beginning of this paper hospitality was identified as a key epistemological, ethical, and political framework to address torture through a gendered lens. Using this lens to approach trans issues, it is possible to identify some clear and distinct ways in which torture appears legitimized as the very hostile condition of hospitality, put to work every time a trans person attempts to re-enter our shared gendered world. "Re-entry" should be read here, again, as a metaphorical movement acknowledging that both inside and outside gender are not only relational, but also mutually constitutive. In our opinion, the social and legal transition from the sex one is assigned at birth to a different gender can be read as a movement that puts trans people in the situation of being given or denied recognition of their gender for the second time in their lives (sex assignment at birth being the first occasion). This "recognition" is just another name for what we refer to in this article as "hospitality". Of course, trans people—and, actually, *all* people—face many different situations where gender recognition is at stake.[52]

Stigma, discrimination, and violence against trans people are too common a reality. In 2016, the Trans Murdering Monitoring Project reported "a total of 2,190 murdered trans and gender diverse people in 66 countries worldwide [across all major world regions] between 1 January 2008 and 30 June 2016."[53] This violence often affects trans women and other people in the trans feminine spectrum; trans people who are black, brown and/or from ethnic or racial minorities; trans people who are poor or homeless; trans people who are incarcerated;[54] trans migrants; trans sex workers; trans drug users; and trans people living with HIV.[55]

Trans people are not only perceived to be different from cis people because of their gender biography, but, that biography is itself labeled as an intrinsically different pathology. According to both the DSM V (Diagnostic and Statistical Manual for Mental Disorders) and the ICD-10, being a trans person means, in and of itself, that one is labelled as having a mental disorder.[56] Undoubtedly, trans pathologization reinforces cissexism, establishing an unacceptable hierarchy between healthy ways that cis men and women live their gender, and pathological ways that trans people live their

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[51] Viviane Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: The University of Chicago Press, 1997).

[52] Derrida and Dufourmantelle,op cit.

[53] Carsten Balzer, Carla LaGata & Lukas Barredo, "2,190 murders are only the tip of the iceberg—An introduction to the Trans Murder Monitoring project: TMM annual report 2016," *Transrespect versus Transphobia Wordwide* (Oct. 2016). Retrieved from:—http://transrespect.org/wp-content/uploads/2016/11/TvT-PS-Vol14-2016.pdf.

[54] Eric. A Stanley & Nat Smith (eds.), C*aptive Gender: Trans Embodiment and the Prison Industrial Complex* (Oakland: AK Press, 2011).

[55] S.D. Baral et al, "Worldwide burden of HIV in transgender women: a systematic review and meta-analysis," *Lancet Infectious Diseases* 13, no. 2 (2013).

[56] Amets Suess, Karine Espineira & Pau Crego Walters, "Depathologization," *Transgender Studies Quarterly* 1, no. 1-2 (2014): 73-77; World Health Organization. *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines* (2012); Kelley Winters, *Gender Madness in American Psychiatry.: Essays from the Struggle for Dignity* (Dillon: GID Reform Advocates, 2008); Svend Brinkmann, *Diagnostic Cultures: A Cultural Approach to the Pathologization of Modern Life* (New York: Routledge, 2016).

gender.[57] The pathologization of trans people also has a direct impact on hospitality in gender: in most countries around the world, a diagnosis is required for trans people to be legally recognized as the persons that they are.[58] Pathologization also contributes to the control that cis people have over trans peoples' ability to make decisions about their own bodies, including their sexual and reproductive rights and health. For example, pathologization of trans individuals has justified the requirement that, in some places, trans people seeking legal recognition must be sterilized. These kinds of practices are strongly associated with eugenic practices and assumptions about people with mental disabilities and other groups whose reproduction has been deemed undesirable.[59] In 2017, the European Court of Human Rights "found that the sterilisation requirement in legal gender recognition violates human rights. Setting the legal precedent for Europe, this decision will force the remaining 22 countries using the infertility requirement to change their laws."[60]

Pathologization also impairs transgender people's access to general healthcare.[61] Trans people looking to access medical services are usually welcomed by a very hostile hospitality, where stigma and discrimination intersect with pathologization. As stated by the Special Rapporteur on Torture's *Report*, trans people are "frequently denied medical treatment and subjected to verbal abuse and public humiliation, [as well as] psychiatric evaluations."[62] Essentially, trans people's gender is treated as a pathology to be examined, treated, and cured, and, too frequently, as *the* pathology at stake.[63]

The intersection between (trans) gender and pathologization has repeatedly justified so-called conversion or reparative therapies, that aim to force trans people to change their gender identity and to identify with both the sex assigned to them at birth and the gender aligned with that sex.[64]

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[57] Gavriel Ansara & Peter Hegarty, "Cisgenderism in Psychology: Pathologizing and misgendering children from 1999 to 2008," *Psychology & Sexuality* 3 no. 2 (2012).

[58] Eszter Kismodi & Mauro Cabral, "Transgender Health and Human Rights," *in Principles of Transgender Medicine and Surgery* 2nd edition, (Randi Ettner, Stan Monstrey & Eli Coleman, ed. New York: Routledge, 2016).

[59] Micah Grzywnowics, "Consent Signed with Invisible Ink: Sterilization of Trans* People and legal gender recognition," *in Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (American University Washington College of Law Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, Washington D.C. 2014); Office of the High Commissioner on Human Rights (OHCHR), et al., *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Inter-Agency Statement*, 1 (2014) (agencies involved include: UN Women, UNAIDS, UNDP, UNFPA, UNICEF, and WHO). Retrieved from: http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1. World Health Organization. Sexual health, human rights and the law (2015). Retrieved from: http://apps.who.int/iris/bitstream/10665/175556/1/9789241564984_eng.pdf?ua=1.

[60] Transgender Europe, *Human Rights Victory! European Court of Human Rights ends Forced Sterilization* (Apr. 6, 2017). Retrieved from: http://tgeu.org/echr_end-sterilisation/; *A.P., Garcon et Nicot v. France*, App. Nos. 79885/12, 52471/13, 52596/13, Eur. Ct. H.R. (April 6, 2017).

[61] Sam Winter et al, "Transpeople, Transprejudice and Pathologization: A Seven-Country Factor Analytic Study," *Int'l J. Sexual Health* 21, no. 2 (2009).

[62] R. Mazin, "When Healing and Comforting Hands Turn Hostile and Harmful: Homophobia and Transphobia in Health Care centers," *in Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (American University Washington College of Law Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, Washington D.C. 2014).

[63] Axel Repka & Adrian Repka, "The (Im)patients: An analysis of how Stigma Leaks Through the Layers of Trans Specific Health Care," *Lambda Nordica*, 18, no.3-4 (2013).

[64] Diane Ehrensaft, "Why conversion therapy for transgender youth is unethical," *Los Angeles Times: Readers React* (May 26, 2015). Retrieved from: http://www.latimes.com/opinion/readersreact/la-le-0526-transgender-children-20150526-story.html; Kristina R. Olson et al, "Mental Health of Transgender Children Who Are Supported in Their Identities," *Pediatrics* 137, no. 3 (2016).

In many cases, trans people are required to undergo hormonal and surgical treatment so that their bodies appear like those of cis men or women.[65] Yet the right to access wanted body modification surgery is still unavailable in numerous countries; in most countries where these modification surgeries are permitted, strict pathologizing laws and regulations require that trans people request permission from a mental health provider before making decisions regarding their own bodies.[66] To date, Argentina is the only country in the world to provide access to hormonal treatments and surgical procedures on the basis of informed consent, which is the only way of making those procedures fully compatible with human rights standards.[67]

The gender-based inhospitality that trans people experience is not limited to laws regulating access to gender recognition. Trans people are subjected to torture and ill-treatment on grounds that go beyond their gender identity and gender expression, directly affecting their bodies and bodily functions. Exhaustive physical and psychological exams performed to assess a trans person's gender have also been denounced as a torturing methodology to provide or deny hospitality—as legal recognition—of a particular gender.

Trans people's bodies are also routinely used *against* them, as restrictions on trans individuals' freedom of movement make their bodies into weapons that inflict psychological pain and physical harm. "Travelling while trans" recently became a popular hash-tag that trans people use to share stories about gender-based scrutiny, physical examination, and detention at different airports around the world.[68] Laws and other legal provisions regulating trans people's access to public bathrooms, including school bathrooms, not only violate their human right to access to water and sanitation, but also their right to education and to work, their right to health, their right to have a public life and, of course, their right to be free from torture and ill-treatment.[69] A survey from the US National Center for Transgender Equality (NCTE) shows that in 2015, almost 59% of transgender people in the US avoided using public restrooms for fear of confrontation, asserting that they had previously been harassed and assaulted because of their public bathroom use. According to NCTE findings, 31% of respondents "have avoided drinking or eating so that they did not need to use the restroom," and 8% "report having a kidney or urinary tract infection, or another kidney-related medical issue from avoiding restrooms."[70] Imposing such regulations on bodily functions makes torture and ill-treatment an embodied principle of cis hospitality of trans people in gendered spaces—the kind of principle that presents hospitality as impossible to achieve.

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[65] Amnesty International, *The State Decides Who I Am: Lack of Recognition for Transgender People* (2014). Retrieved from: https://www.es.amnesty.org/uploads/media/The_state_decide_who_I_am._Febrero_2014.pdf.

[66] Open Society Foundations, *License to Be Yourself: laws and advocacy for legal recognition of trans people* (May, 2014). Retrieved from: http://www.opensocietyfoundations.org/reports/license-be-yourself.

[67] , Z. Chiam, S. Duffy & Matilda González Gil, "Trans Legal Mapping Report: Recognition before the law," *International Lesbian, Gay, Bisexual, Trans and Intersex Association* (Nov. 1, 2016). Retrieved from: http://ilga.org/downloads/TLMR_ENG.pdf.

[68] *See e.g.*, Danielle Corcione & Ana Valens, "The Trials and Trauma of Flying While Transgender," *Truth-Out* (Aug. 2, 2016). Retrieved from: http://www.truth-out.org/news/item/37068-the-trials-and-trauma-of-traveling-while-transgender. *See also* Paisley Currah & Tara Mulqueen, "Securitizing Gender: Identity, Biometrics and Transgender Bodies at the Airport," *Social Research*, 78, no. 2 (2011).

[69] Human Rights Council, *Report of the Special Rapporteur on the human rights to safe drinking water and Sanitation, Catarina de Albuquerque*, ¶ 40, U.N. Doc. A/HRC/21/42 (July 2, 2012). Retrieved from: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42_en.pdf.

[70] National Center for Transgender Equality, *U.S. Transgender Survey: Harassment of Transgender People in Bathrooms and the Effects of Avoiding Bathrooms, Preliminary Findings from the 2015 U.S. Transgender Survey*, 2016. Retrieved from: https://static1.squarespace.com/static/54f76238e4b03766696d8f4c/t/5782a8d9197aeaa57b589608/1468180715744/USTS-Preliminary-Findings-July-2016-2.pdf.

Third gender

In a similar vein to the third sex "solution" posed for intersex people, multiple different jurisdictions have offered trans people the possibility of identifying as a third gender to prevent violence grounded in their gender. This proposal needs to be considered from at least two perspectives.

On one hand, everyone should have the right to identify as the gender of their choice, or to avoid identifying themselves as any gender. Ultimately, we hope for a future where legal gender markers are irrelevant, or no longer legally required at all.

On the other hand, when a third gender is offered as a means of preventing human rights violations perpetrated against trans people *because* they identify as men or women, an implicit assumption is created that gendered violence is unavoidable.[71] Consequently, human rights violations, including torture and ill-treatment, are invoked and accepted as mainstream hospitality rules in gender, and trans people are offered a different identification to be protected, which distinguishes them from cis men and women. Rather than a move to expand human rights, this kind of recognition offers a warning, identifying the relationship between gender hospitality rules and their historically naturalized hostility to others.

4. Conclusions

Addressing torture and ill-treatment from an intersectional gender perspective requires taking a long-overdue step: reviewing the gender framework itself, its epistemological, ethical, and political assumptions, and the ways in which it includes and gives hospitality to the gendered subjects whose human rights are to be respected.

Both intersex and trans people occupy precarious positions within the traditional gender framework; they are recurrently framed as *others* and routinely classified as "sexual minorities" within a broader LGBTI spectrum. At the same time, gendered hospitality rules impose stigma, discrimination, and violence on intersex and trans people. Human rights violations against intersex and trans people are frequently committed and justified in the name of gender, but the experiences of trans and intersex people, including experiences of torture and ill-treatment, are normatively excluded from the gender framework itself.

Critically expanding mainstream notions of gender to make them sensitive to historically excluded groups is a necessary step in order to dismantle and prevent gendered violence, to provide adequate reparations to its victims, and to start a dialogue about the hospitality we grant to each other in our shared world.

[71] This seems to be the case, for example, of the sentence from the Supreme Court of India granting hijras their right to be recognized in a third gender. *See* Vishnu Varma & Nida Najar, "India's Supreme Court Recognizes 3rd Gender," *The New York Times: India Ink* (Apr. 15, 2014). Retrieved from: https://india.blogs.nytimes.com/2014/04/15/indias-supreme-court-recognizes-3rd-gender/.

III.
Gender, Sexuality, and Deprivation of Liberty

Crime and Multiple Punishments: The Vulnerability of LGBTI Persons in the Criminal Justice System

Jean-Sébastien Blanc*

Abstract

This article reflects and expands on some aspects of the report of the Special Rapporteur on Torture, Mr. Juan E. Méndez, concerning his assessment of the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons (A/HRC/31/57). The article focuses on the specific situation of LGBTI persons in the criminal justice system and looks into their unique exposure to torture and other forms of ill-treatment. It aims at further elaborating on what a full integration of a gender perspective into any analysis of torture and ill-treatment can mean in concrete terms for LGBTI persons. The article outlines the specific risks they face during arrest and detention by the police, including extortion, abuse during interrogation, police profiling, and discriminatory attitudes. The author then looks into experiences of LGBTI detainees in the prison system, by analyzing their unique exposure to violence from fellow prisoners and prison staff, the risk of resorting to solitary confinement for alleged protective purposes, the allocation of trans inmates to either female or male facilities, and other important issues, such as abuse during body searches, discriminatory sanctions, and access to health services. The article concludes by emphasizing that there are still many instances where State authorities are either complicit to, or perpetrators of, acts of torture, and that if the repeal of legislation that criminalizes same-sex sexual activities and non-conforming gender identities and expressions is a first step towards the eradication of such practices, more is needed to ensure that the problem of homophobia and transphobia in the criminal justice system is tackled at its roots.

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Introduction

When deprived of their liberty in the criminal justice system, lesbian, gay, bisexual, trans, and intersex (LGBTI) persons are extremely vulnerable to abuse and face heightened risks of violations of their rights because of their sexual orientation, gender identity and expression and/or sex characteristics. In this article, I intend to expand on the Special Rapporteur on Torture's assessment of the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of LGBTI persons, focusing on the criminal justice system. I will therefore elaborate on the specific risk situations faced by LGBTI persons while in the hands of the police and in the prison system. Their unique vulnerability in detention—deriving from their sexual orientation and/or gender identity—needs to be intersected with other factors and characteristics, such as age, ethnic origin, or the existence of a disability, in order to fully comprehend their exposure to, and their experience of, torture and other ill-treatment. Although LGBTI persons are not a homogeneous group, they are exposed to the same array of risks when detained and "are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations[1]". In this article, I will neither address the situation of LGBTI persons in immigration detention, nor the plight of LGBTI persons in health-care settings. However, it is important to note that both contexts present significant risks for LGBTI persons, and the streamlining of a gender perspective in addressing these risks is required to ensure protection from torture and other ill-treatment.

With reference to treatment by police, I will look into the practices of discriminatory profiling and arbitrary arrests, heightened risks during interrogations, and the practice of forced anal examinations. With regard to the prison system, I will concentrate on the issues of violence (from both staff and fellow detainees), segregation and solitary confinement, body searches, and access to health care and allocation for trans detainees in particular. For some issues, I will outline potential solutions—based on best practices—as to how to reduce the risks and how to better protect LGBTI persons, while better meeting their needs. By doing so, I aim to illustrate what, in the words of the Special Rapporteur on Torture, a "full integration of a gender perspective into any analysis of torture and ill-treatment[2]" can mean in concrete terms.

Risks of Torture and Other Ill-treatment During Arrest by the Police and in Custody

The link between criminalization of LGBTI persons and heightened violence against them, including by the police, is well established[3]. To date, 72 countries retain laws that criminalize same-sex sexual activity[4]. Because of the discriminatory nature of such laws and the fact that, in the words of the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), they "exacerbate the risk of other violations and

[1] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, A/56/156, 3 July 2001, para.19.
[2] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 6.
[3] Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, 17 November 2011.
[4] International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State-Sponsored Homophobia: a world survey of sexual orientation laws: criminalisation, protection and recognition*, 12th edition, May 2017, p. 193.

impede the elimination of impunity in relation to torture and ill-treatment[5]", both the SPT and the Special Rapporteur have called for the repeal of such laws[6]. While decriminalization is a necessary pre-condition to ensure the protection of LGBTI persons from torture and other ill-treatment, discrimination and abuse towards this population in detention have also been reported in many countries that do not criminalize homosexuality or trans expressions and identities. The questions discussed below therefore apply to most contexts (with the exception of forced anal examinations, which are limited to a few specific countries).

LGBTI persons are more likely to be apprehended by police and to experience hostile attitudes from police officers. Trans women in particular report high levels of police brutality. In a report on impunity and violence against trans women in Latin America, 95 per cent reported that they had suffered police brutality either on the street, in police patrols, or in police stations[7]. Trans women engaging in sex work are "questioned and searched more often than other people because of profiling applied by police officers.[8]" In some US cities, carrying several condoms at a time can be used by police and prosecutors as evidence in court to prosecute under anti-prostitution laws[9]. As a result, trans sex workers, trying to avoid being arrested with condoms, are at higher risk of contracting HIV[10]. LGBTI persons also incur the risk of being arbitrarily detained[11]. The Special Rapporteur on Torture highlights that "ill-treatment against sexual minorities is believed to have been used, inter alia, to make sex workers leave certain areas, in so-called 'social cleansing' campaigns, or to discourage sexual minorities from meeting in certain places, including clubs and bars.[12]"

Risks of Extortion and Abuse During Interrogations

When LGBTI persons are brought to police stations for interrogation, specific threats may be used by police officers to extort a confession—for instance, threats to reveal the detainee's sexual orientation to family members or employers to obtain a confession. In countries where homosexuality is criminalized, the risk of confessions being extorted is even higher, whilst means of redress are almost inexistent. In Cameroon, for example, where most trials for homosexuality are based on confessions, police officers tend to resort to torture and other ill-treatment in order to obtain the "evidence" they are seeking[13]. In Sri Lanka, a vaguely worded "vagrancy law" and a law against "cheating by personation" are used to target gender non-conforming persons and other LGBTI

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5 Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 73, p. 15.

6 Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 69; *see also*, Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, para. 70.

7 *See* Redlactrans and International HIV/AIDS Alliance, *The night is another country. Impunity and violence against transgender women human rights defenders in Latin America*, 2012, p. 15.

8 Penal Reform International & Association for the Prevention of Torture, *LGBTI persons deprived of their liberty: a framework for preventive monitoring*, 2015 [2013], p. 7.

9 In New York City, for example, prosecutors have attempted to use condoms as evidence in some cases that proceeded to trial. In the reported cases, judges eventually refused to admit them as evidence. *See* Human Rights Watch, *Sex workers at risk: condoms as evidence of prostitution in four US cities*, 19 July 2012, pp. 15-16.

10 Human Rights Watch, *Sex workers at risk: condoms as evidence of prostitution in four US cities*, 19 July 2012.

11 *See* Coordinadora de Derechos Humanos Parguay, *Aca no hay homophobia*, 2014 (for instance the case of two gay adolescents who were detained for several hours in Paraguay without any charge, only for being openly gay).

12 Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, A/56/156, 3 July 2001, para. 18.

13 Human Rights Watch, *Coupables par association. Violations des droits humains commises dans l'application de la loi contre l'homosexualité au Cameroun*, 2013.

persons for arrest. LGBTI persons in Sri Lanka report recurring harassment by police, including arbitrary detention and mistreatment, and a lack of trust in authorities, which makes it unlikely for them to report a crime[14]. Bribes and extortion by the police may also be used as a way of securing the detainee's release. However, physical violence can be used against LGBTI persons not only to extract confessions, but also as a "form of punishment and behavioral correction[15]".

The practice of subjecting men suspected of same-sex conduct to non-consensual anal examinations is denounced by both the Special Rapporteur on Torture and the SPT as being "medically worthless" and amounting to torture or other ill-treatment[16]. However, a recent report from Human Rights Watch compiles evidence of the use of forced anal exams in eight countries (Cameroon, Egypt, Kenya, Lebanon, Tunisia, Turkmenistan, Uganda, and Zambia) and accounts for the lasting psychological trauma of some people subjected to these examinations[17].

Police Profiling and Discriminatory Attitudes

Police violence against LGBTI persons usually is deeply rooted in institutional culture and is often the reflection of socially entrenched stereotypes. In many countries, the police deliberately target LGBTI persons. Intersectional factors may increase the risk of individuals' exposure to discriminatory police profiling, such as in Kyrgyzstan, where men were targeted not only on the basis of their sexual orientation but also on ethnicity grounds. In the reported case, several gay men (of both Kyrgyz and Uzbek ethnicity) had been arrested and extorted by police officers, but only ethnic Uzbeks remained in detention, being consequently further victimized for belonging to the country's first ethnic minority[18]. Similarly, in a survey conducted in the United States, more LGBTI persons of colour reported sexual and physical assault by police than the rest of the respondents[19]. In a petition submitted to the Inter-American Commission on Human Rights on behalf of a young Peruvian who was arrested, insulted, beaten, humiliated, and raped with a stick, the petitioners underlined intersectional factors which made the victim more vulnerable to police abuse by "highlighting that impunity in Peru is even more serious when it comes to poor and rural persons, and that (…) such vulnerability is heightened when the person is homosexual, given the repudiation of such orientation in Peru, particularly in the rural areas of the country[20]". "Gendered and intersectional lenses" are therefore particularly important in order to comprehend the specific risks faced by LGBTI individuals when in contact with law enforcement officials.

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[14] Human Rights Watch, "*All Five Fingers Are Not the Same": Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka*, August 2016.

[15] *See e.g.* Human Rights Watch, *"It's part of the jobb": Ill-treatment and torture of vulnerable groups in Lebanese police stations*, 2013.

[16] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 36 and Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 14.

[17] Human Rights Watch, *Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions*, July 2016.

[18] Human Rights Watch, *"They said we deserved this", Police violence against gay and bisexual men in Kyrgyzstan*, January 2014.

[19] Williams Institute, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, UCLA, March 2015.

[20] Coordinadora de Derechos Humanos (CNDDHH), el Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX) y Redress Trust: Seeking Reparations for Torture Survivors (REDRESS), *Petición Presentada a La Honorable Comisión Interamericana de Derechos Humanos, En El Caso de Luis Alberto Rojas Marín*, 2014 (The translation is ours.).

The police not only must abstain from any discriminatory attitudes towards LGBTI persons, but also have a positive obligation to protect them. However, there are numerous reports of police failing to provide protection to organizers and participants of protests, notably pride parades and marches[21]. In Georgia, participants in a gay pride march reported that the police remained passive in the face of violence from counter-demonstrators, who outnumbered the marchers. In particular, several police officers, "when asked for help by the marchers, replied that they were not part of the police patrol and it was not their duty to intervene." The case was brought to the European Court of Human Rights (ECtHR),[22] which held that the State violated article 3 (prohibition of inhuman or degrading treatment) taken in conjunction with article 14 (prohibition of discrimination) and with article 11 (freedom of assembly and association). The Court considered that the authorities knew or ought to have known of the risks surrounding the march and that they therefore had an obligation to provide adequate protection, which they failed to do.

Tackling discriminatory attitudes by law enforcement requires holistic and multifaceted interventions that are not limited to the police itself. However, some actions can produce significant and swift changes. For example, in Nepal, a Supreme Court verdict ruled that the country had been negligent in protecting the rights of '*nemis*' (trans) and those of LGBTI persons in general, and ordered the government to take measures to protect this group, including specific anti-discrimination legislation. Consequently, reports of violence by law enforcement officials against trans persons decreased by 98 per cent[23]. Although legislation in itself is not sufficient to tackle deeply-rooted forms of discrimination, it often proves a necessary step to advance societal changes.

LGBTI Persons in Prison: Finding One's Way Between a Rock and a Hard Place

Prisons—as "total institutions"—are environments where manifestations of "otherness" are mostly faced with hostility, from both staff and fellow inmates. Prisons tend to magnify discriminatory attitudes that prevail on the outside and further stigmatize minority groups. This is particularly true for LGBTI persons, as prisons are characterized by strong heteronormative values, hence exacerbating their vulnerability. In Irish prisons, for example, "there is substantial evidence that homophobia is amplified in men's prisons as a result of a 'corrections culture' of hyper-masculinity and a strict hierarchy, often maintained through violence[24]". As noted by the Special Rapporteur on Torture, "within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as children, the elderly, persons with disabilities and diseases, gay, lesbian, bisexual and trans-gender persons, suffer double or triple discrimination[25]". In some countries, the stigma attached to LGBTI prisoners is so strong that they are treated as outcasts; they are confined to the worst parts of the prisons and are reduced to a slave-like condition by other detainees[26].

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[21] *See inter alia* Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/26/29, 14 April 2014, para. 46.
[22] European Court of Human Rights, *Identoba and Others v. Georgia (application no. 73235/12)*, 2015.
[23] *See An activist's guide to the Yogyakarta Principles*, August 2010, pp. 89-91.
[24] Irish Penal Reform Trust, *Out on the Inside. The Rights, Experiences and Needs of LGBT People in Prison*, February 2016, p. 14.
[25] Report of the Special Rapporteur on Torture to the UN Human Rights Council, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, 5 February 2010, A/HRC/13/39/Add.5, para. 231.
[26] Association for the Prevention of Torture, *Addressing situations of vulnerability of LGBT persons in detention–Jean-Jacques Gautier NPM Symposium Outcome Report*, 2015, p. 13.

Furthermore, LGBTI prisoners are particularly affected by structural shortcomings, such as corruption, overcrowding, and so-called "self-government" (whereby some detainees exert control over entire areas of the prison)[27].

In many contexts, LGBTI persons are disproportionately overrepresented[28] in the prison system, because of both discriminatory laws criminalizing their "deviant behaviours" or trans identity and police harassment. This reinforces the thesis[29] that the ever-growing prison population is the direct result of policies that tend to control and isolate people who are undesirable in our societies: the "poor", the "marginalized", and the "strange".

Exposure to Violence From Prison Staff and Fellow Inmates

LGBTI detainees are particularly vulnerable to violence from both fellow inmates and prison staff. Violence can take many forms, including verbal, psychological, physical, as well as sexual. Verbal violence (such as homophobic or transphobic name-calling and abuse) are often not challenged by the staff, hence contributing to a feeling of impunity where insults go unpunished. In the UK, discrimination against LGBTI detainees is reported to be excused sometimes by reference to religious teaching or "cultural" norms that are not questioned[30]. LGBTI prisoners are victims of sexual violence precisely because of their sexual orientation or gender identity. Examples of gender-specific violence specifically targeting LGBTI detainees include the "corrective rape" of lesbian women and "intentional beatings of the breasts and cheekbones of transgender women to burst implants and release toxins" (both documented by the SPT[31]). Lesbians have also reportedly been placed in cells with men if they refused the sexual advances of prison staff and are viewed as "masculine" in appearance by guards. They are subjected to harassment, physical abuse, and "forced feminization"[32].

Failing to adequately account for the gender dimension of this violence not only contributes to further consolidating an entrenched form of discrimination, but also incurs the risk of lessening the gravity of such acts. Therefore, it is essential that a gender-sensitive analysis grid be applied to guard against viewing such violations "as ill-treatment even where they would more appropriately be identified as torture[33]".

When data is available, LGBTI detainees will often appear among the first groups exposed to sexual violence, including rape. According to the United States' Bureau of Justice Statistics[34], inmates who identified their sexual orientation as gay, lesbian, or bisexual have the highest rate of

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[27] *See e.g.* Red Nacional de la Diversidad Sexual y VIH (REDNADS), *Primer Diagnóstico. Necesidades de la población LGBTI privada de libertad*, Guatemala, 2015.

[28] *See inter alia* Redlactrans and International HIV/AIDS Alliance, *The night is another country*, 2012 (Notably in Central America), *see also* Amnesty International, *The State decides who I am: Lack of recognition for transgender people*, 2014.

[29] *See* in particular Wacquant Loïc, *Les prisons de la misère*, Editions Raisons d'Agir, Paris, février 2015.

[30] See Dunn Peter, *Slipping off the equalities agenda? Work with LGBT prisoners, in* Prison Service Journal, March 2013, No.206, p. 7.

[31] Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 March 2015, para. 67.

[32] Report of the Special Rapporteur on violence against women, its causes and consequences, *Pathways to, conditions and consequences of incarceration for women*, A/68/340, 21 August 2013, para. 58-59, 63.

[33] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 8, p. 4.

[34] *See* US Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, May 2013.

sexual victimization[35] in both prisons and jails (12.2% and 8.5%, respectively), as opposed to 0.7% for other detainees (both prison and jails). Furthermore, the fact that LGBTI detainees tend not to denounce acts of violence—either because they fear reprisals or do not trust existing complaints' mechanisms—suggests that the rate of underreporting is high. In a study conducted in Guatemala with fifty-four LGBTI detainees, all of the respondents stated that they would not denounce acts of discrimination against them because they feared and mistrusted the system[36]. Furthermore, as sexual activity in prison has to be clandestine, it is often difficult to differentiate consensual from non-consensual activity, thereby allowing the sexual victimisation of detainees to remain concealed[37]. The taboo prevailing in most prisons regarding sexuality heavily contributes to this lack of differentiation between consensual and non-consensual sex, but also contributes to the spread of sexually transmitted infections (STIs), including HIV. Some countries have adopted a public health perspective and ensure that condoms are made available in prisons[38]. However, access is not always provided in a way that avoids exposing or "outing" detainees, and similar policies do not necessarily exist in female prisons[39].

A case[40] brought before the ECtHR illustrates the type of violence gay detainees are exposed to when they are detained in prisons. The applicant, a French national, was reportedly forced to wear a pink star, beaten, burned, deprived of food, prevented from leaving his cell, and raped. The Court considered that some allegations were not supported by sufficient evidence but found that he had been subjected to acts of violence that were serious enough for the facts in question to be classified as inhuman and degrading treatment. However, the Court considered that the authorities had taken all measures that could reasonably be expected of them to protect the applicant from physical harm. More importantly, the Court found that domestic law provided the applicant with effective and sufficient protection against physical harm, as there was the possibility for him to file a criminal complaint (but had not done so). The judgement can be viewed as an illustration of how a regional Court failed to apply "gendered and intersectional lenses" to its reasoning and assessment of the situation, as the judges did not consider that the applicant might not have wanted to file a formal complaint precisely because he had feared reprisals and did not trust the system. The Special Rapporteur on Torture noted that "fear of reprisals and a lack of trust in the complaints mechanisms frequently prevent [LBGTI] persons in custody from reporting abuses".[41] The dissenting opinion of two judges is nonetheless very conscious of this reality, stating that the positive obligation of the State to protect also includes what authorities "should have known", particu-

[35] This is confirmed by a report from Human Rights Watch, which found that LGTBI detainees in US prisons were the first target of sexual violence, before young adults, sexual offenders and first offenders and detainees with higher degree of education. It also shows the importance of intersecting sexual orientation and gender identity with other factors. *See* Human Rights Watch, *No escape: Male Rapes in US prisons*, July 2008.

[36] *See* Red Nacional de la Diversidad Sexual y VIH (REDNADS), *Primer Diagnóstico. Necesidades de la población LGBTI privada de libertad*, Guatemala, 2015; Colombia Diversa, *Del amor y otras condenas: Personas LGBT en las cárceles de Colombia*, 2013-2014 (Similarly, in Colombia, only 0.4% of LGBTI detainees would denounce acts of violence or discrimination)

[37] Robinson Russell K, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309 (2011), p. 1136.

[38] In Switzerland for instance, a law on epidemics which entered into force in 2016 includes an article on prevention measures in penal institutions which specifically state that condoms must be made available to detainees (art. 30.c): http://www.bag.admin.ch/themen/medizin/00682/15904/index.html?lang=fr.

[39] *See* Irish Penal Reform Trust, *Out on the Inside. The Rights, Experiences and Needs of LGBT People in Prison*, February 2016 (in particular the experience of LGBTI detainees in the Irish prison system).

[40] European Court of Human Rights, *Stasi v. France (application no. 25001/07)*, 2011, p. 24. (The translation is ours.)

[41] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 35, p. 10.

larly, as the "vulnerability" of the applicant was well known by the authorities. More importantly, they considered that in the prison environment, "where a code of silence prevails", one could not reproach the plaintiff for not having lodged complaints[42].

Isolation and Segregation: An Illusory Protection

In order to protect[43] LGBTI individuals from the violence of fellow inmates, prison authorities sometimes resort to isolating them. However, "their placement in solitary confinement or administrative segregation for their own 'protection' can constitute an infringement on the prohibition of torture and ill-treatment.[44]" Although placing a vulnerable detainee in isolation can be understood as an emergency and short-term measure while an appropriate solution is identified or while awaiting the detainee's transfer to another facility, it should never be justified in the long-term. The Special Rapporteur on Torture defines solitary confinement as the "physical isolation of individuals who are confined to their cells for 22 to 24 hours a day[45]". Prisoners held in solitary confinement are usually allowed out of their cells for one hour of solitary exercise a day and "meaningful contact with other people is typically reduced to a minimum[46]". When solitary confinement is prolonged (in excess of 15 days and beyond), "some of the harmful psychological effects of isolation can become irreversible[47]". The "protective" solitary confinement of LGBTI detainees has been reported to last weeks or even months and years.

The ECtHR set a significant precedent in a ruling against Turkey concerning one of its citizens, who had spent almost 10 months in solitary confinement after he complained about intimidation and harassment by fellow detainees with whom he shared a collective cell, because he was gay[48]. In addition to living in a small and filthy cell, he was denied access to fresh air and his social contacts were limited to meetings with his lawyer. For the first time, the Court found that a complaint related to discrimination based on sexual orientation yielded a violation of article 3 (prohibition of torture) of the European Convention of Human Rights, in conjunction with article 14 (prohibition of discrimination), and therefore sanctioned the principle that solitary confinement based on sexual orientation is discriminatory, even if the measure is intended to be protective.

To protect LGBTI detainees from violence, while at the same time avoiding their complete isolation, some States have resorted to grouping these detainees in special "LGBTI wings" or even special prisons[49]. One example is the "K6G" wing in the Los Angeles county jail—one of the largest

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[42] European Court of Human Rights, *Stasi v. France* (application no. 25001/07), p. 24. (The translation is ours.)

[43] It should be noted that solitary confinement is not only resorted to as a "protective" measure, as its use as a specific punishment for LGBTI detainees engaging in consensual sexual activity has also been reported. In a report on the situation of LGBTQ detainees across the USA, over a third of respondents have been "disciplined for engaging in consensual sex, and of those, nearly two thirds have been placed in solitary confinement as punishment". *See* Black and Pink, *Coming out of concrete closets: a report on black & pink's national LGBTQ prisoner survey*, October 2015.

[44] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 35, p. 10.

[45] In line with the Special Rapporteur's report, the revised Standard Minimum Rules for the Treatment of Prisoners (the "Nelson Mandela Rules") define solitary confinement as 'confinement of prisoners for 22 hours or more a day without meaningful human contact' and prohibit its indefinite or prolonged use (in excess of 15 days), Rules 43 and 44.

[46] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/66/268, 5 August 2011, para. 25.

[47] *Id*. at para. 26.

[48] European Court of Human Rights, *X. v. Turkey*, (Application Number: 24626/09), 2012.

[49] Turkey announced in 2015 the construction of an LGBTI prison in Izmir, sparking strong reactions from LGBTI activists in the country. *See e.g.* http://www.al-monitor.com/pulse/originals/2015/01/turkey-gay-

prisons in the world. The wing was created in 1982 following a class action lawsuit lodged by the American Civil Liberty Union (ACLU) on the conditions of confinement of homosexual detainees[50]. The wing can hold about 300 inmates, who stay an average of 40 days, before being released or transferred to a prison. Although the wing was hailed almost unanimously at its opening, less enthusiastic opinions have grown over time. The main criticism[51] revolves around the admission process, which reportedly relies heavily on appearance and stereotypes, lacks privacy, and tends to exclude black and Hispanic inmates. Therefore, although many inmates find a protective space during their time at the LA county jail, others are excluded on the basis of a discriminatory and biased admission "test". As the wing does not deal with the problem at its roots, the creation of the unit merely "shifts" vulnerabilities and risk areas within the prison[52].

Other prisons that have created similar units (in smaller facilities) have established confined areas, where inmates' rights are severely restricted. That is the case in the "alternative lifestyle tanks" in the West Valley Detention Center in San Bernardino County, California, where LGBTI detainees spend an average of 22.5 hours in their cells and are isolated from the general inmate population. As a result, they are denied access to services, programmes and facilities offered to other inmates, and are excluded from drug rehabilitation programmes (even when their attendance is part of their sentence)[53]. Other prisons have special wings that house trans detainees only—as they are considered even more vulnerable to abuse than gay, lesbian, or bisexual detainees—but their living conditions are far worse than in the rest of the prison. This is notably the case at the prison of Tacumbú in Paraguay, where trans women are detained in a special unit. The Rapporteur on the Rights of Persons Deprived of Liberty of the Inter-American Commission of Human Rights visited the prison and found that trans women occupy "a closed space, with no ventilation or electricity, in conditions of overcrowding, and are subject to different forms of violence and discrimination ranging from physical and verbal assaults to multiple instances of rape[54]". The segregation of trans women within this special unit not only did not guarantee dignified living conditions, but had no protective effect, therefore creating situations amounting to torture and other ill-treatment.

The question of whether it is appropriate to segregate LGBTI detainees from the rest of the prison population cannot be answered by a "one-size-fits-all" solution. Certainly, building "LGBTI" prisons would lead to further stigmatization of the population and might negatively impact these prisoners' relationships with their relatives, including by forcibly disclosing their sexual orientation or gender identity. Furthermore, placing all detainees identified as LGBTI in the same prison would not "take into consideration the place of residence of their respective families or the city

lesbian-lgbt-special-prison.html. More recently, the Thai government announced its projects to open a LGBTI prison. *See* http://internacional.elpais.com/internacional/2016/08/21/actualidad/1471806080_898690.html).

[50] According to the author, the jail responded to the lawsuit by moving the homosexual unit from the central jail to an isolated section of the old Hall of justice jail. In time, however, jail officials transferred the homosexual unit back to the central jail, where it remains today. *See* Robinson Russell K, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309 (2011), pp.1319-20.

[51] *See notably* Robinson Russell K, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309 (2011).

[52] *Id*.

[53] Class action lawsuit lodged by ACLU. *See* http://www.latimes.com/local/california/la-me-1023-lgbt-jail-20141023-story.html.

[54] IACHR's press release, Rapporteurship on the Rights of Persons Deprived of Liberty Wraps up Visit to Paraguay, September 15, 2014. A similar situation at Tacumbú prison was described in the SPT's report on Paraguay. *See* Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, CAT/OP/PRY/1, 7 June 2010, para. 214.

in which the judicial hearings are to be held"[55]. Special units for LGBTI—or only trans—detainees are also questionable, as they carry the risk of stigmatization and restrictions of the detention regime, while they do not necessarily contribute to protecting them from violence. In the USA, the Commission overseeing the Prison Rape Elimination Act (2003) "discourages the creation of specialized units for vulnerable groups, and the standard specifically prohibits housing assignments based solely on a person's sexual orientation, gender identity, or genital status because this practice can lead to labeling that is both demoralizing and dangerous.[56]" However, in contexts where prison violence is endemic, and homophobia and transphobia are rampant, such options cannot be discarded without realistic alternatives. Importantly, the opinion of the detainees should be sought. The Yogyakarta Principles call on the States to "ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity.[57]" The decision of placement in such units should be done on a case-by-case basis, as it cannot be assumed that all LGBTI detainees would prefer to be segregated from their fellow inmates[58]. In Argentina, the hasty decision by the Federal Penitentiary System in April 2016 to move trans women and cross-dressers from the special unit for "sexual minorities" to a female prison drove the Prison Ombudsman to issue a recommendation highlighting that LGBTI persons should be consulted prior to their placement[59]. When the protection of LGBTI detainees cannot be guaranteed by the authorities, alternatives which do not amount to placing the person in solitary confinement, ought to be sought, notably by judges, either when issuing their sentence[60] or when overseeing the conditions of detention[61].

Allocation of Trans Inmates: A Non-Binary Issue

Prisons are conceived as entirely binary environments, and trans persons consequently have to be allocated into either a male or a female facility. In most contexts, placement is done on the basis of their gender assigned at birth and does not take into consideration the person's self-perceived gender, nor the fact that trans identities can be fluctuating. Even in countries with liberal gender identity legislation, such as Argentina where the law since 2012 allows people to alter their gender on official documents without first having to receive a psychiatric diagnosis or surgery, there is

[55] Association for the Prevention of Torture, *Addressing situations of vulnerability of LGBT persons in detention–Jean-Jacques Gautier NPM Symposium Outcome Report*, 2015, p.15.
[56] National Prison Rape Elimination Commission, *Report*, June 2009, p. 8.
[57] Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 9 (c).
[58] In an assessment conducted in Guatemala on the needs of LGBTI detainees, half of the respondents (52%) stated that there should be a specific unit for them, while the other half thought that they should be detained with the rest of the prison population or had no opinion. *See* Red Nacional de la Diversidad Sexual y VIH (REDNADS), *Primer Diagnóstico. Necesidades de la población LGBTI privada de libertad*, Guatemala, 2015.
[59] Recomendación del Procurador Penitenciario de la Nación acerca de la continuidad de la Unidad Residencial VI como espacio para el alojamiento de personas con identidades de género, orientaciones sexuales y expresiones de género diversas, Buenos Aires, 29 de agosto 2016: http://www.ppn.gov.ar/?q=PPN_recomendo_al_%20Director_SPF_las_persona_que_haga_explicita_orientacion_sexual_deba_ser_consultada_respecto_de_su_alojamiento.
[60] For example, in light of the fact that an Israeli trans man sentenced to 15 months for robbery would have to be held in solitary confinement to protect him from fellow prisoners, the Supreme Court reduced the sentence to 10 months, stating that the unusually harsh prison conditions constituted a mitigating factor. The verdict established a precedent for leniency due to particularly harsh prison conditions. *See* http://www.timesofisrael.com/supreme-court-rules-leniency-for-transgender-prisoner/).
[61] In Argentina, a trans woman obtained to be under house arrest, because she he had been victim of ill-treatment and torture during her detention. *See* Inter-American Commission on Human Rights, *Hearing on the situation of LGBT persons deprived of their liberty in Latin America*, 23 October 2015.

often a significant gap to bridge for the effect of the law to reach the prisons. According to a hearing before the IACHR on the situation of LGBTI persons deprived of liberty in Latin America, "the advances in the [Argentinean] domestic law did not go along with guidelines or instructions as to how to implement the new legislative framework in the prisons[62]." As a result, in many prisons, trans detainees are detained in male or female facilities on the basis of their gender assigned at birth, where they (particularly trans women) are extremely vulnerable to abuse. As noted by the SPT, "the absence of appropriate means of identification, registration and detention leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel.[63]" To obtain the protection of staff, trans women are sometimes asked to perform sexual favors in return[64].

The recently revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Nelson Mandela Rules") specifies that the system of prison file management should "enable the determination of the prisoners' unique identity, respecting his or her self-perceived gender" (rule 7.a). This provision should be understood "as a way to facilitate the placement of transgender detainees in facilities—male or female—of their choice[65]". The Special Rapporteur on Torture not only recommends " [taking] individual's gender identity and choice into account prior to placement", but also "[providing] opportunities to appeal placement decisions.[66]" Even where allocation is dependent upon self-perceived gender, it is essential that the views of trans detainees always be duly considered, as some transgender detainees still feel safer being housed in a facility for their birth-assigned gender[67]. In Malta, a recently adopted policy on trans inmates includes important provisions and safeguards, including allocation that matches the gender on their legal documents regardless of their sex characteristics, the possibility for an inmate to start the transition process in prison (upon a declaration under oath), and admission to the appropriate division. Interestingly, the policy provides safeguards to avoid prolonged solitary confinement, as an initial assessment in separate facilities (i.e. segregated from fellow inmates) can be ordered, but for no longer than seven days[68].

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[62] Inter-American Commission on Human Rights, *Hearing on the situation of LGBT persons deprived of their liberty in Latin America*, 23 October 2015.

[63] In 2011, the Special Rapporteur on Violence against Women reported a particularly horrendous case in El Salvador, where a trans woman was placed in a male-only prison and detained in a cell with gang members, where she was reportedly raped more than 100 times, sometimes with the complicity of prison officials. *See* Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 March 2015, para. 68; *see also* Report of the Special Rapporteur on violence against women, its causes and consequences, *Follow-up mission to El Salvador*, A/HRC/17/26/Add.2, 14 February 2011, paras. 28-29.

[64] *See inter alia* the situation of trans women detained in Malaysia: Human Rights Watch, "*I'm Scared to Be a Woman"*, Sept. 2014.

[65] Penal Reform International & Association for the Prevention of Torture, *LGBTI persons deprived of their liberty: a framework for preventive monitoring*, 2015 [2013], p. 9.

[66] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 70.

[67] *See inter alia* National Center for Transgender Equality, *Standing with LGBT prisoners: An advocate's guide to ending abuse and combating imprisonment*, USA, 2013.

[68] See http://www.timesofmalta.com/articles/view/20160818/local/trangender-policy-for-prisons-launched.622376

Risks of Humiliation and Abuse During Body Searches

Body searches represent a sensitive moment where abuses are likely to take place, in particular for LGBTI detainees. As noted by the Special Rapporteur on Torture, "humiliating and invasive body searches may constitute torture or other ill-treatment, particularly for transgender detainees[69]". There are numerous reports of trans and intersex[70] inmates being maliciously searched in front of other prison officers or inmates for the sole purpose of viewing their body[71]. To prevent abuse and mitigate the risk of searches amounting to other ill-treatment, trans and intersex detainees should be given the possibility to choose the gender of the officer conducting the search. The Canadian correctional service adopted a policy on searching inmates, which specifically states that "searching, especially strip searching, will take into consideration mixed gender physiology, in consultation with inmates[72]". Similarly, in Argentina, procedural guidelines on searches on trans detainees were approved by the Federal Penitentiary Services, following a habeas corpus presented by the Public Defender's Office (*Defensoría General de la Nación*), in which degrading searches on trans women were denounced. The guidelines prescribe how both medical and non-medical searches should be conducted. For the latter, they establish that alternative means should first be sought (such as metal detectors) and, when strip searches cannot be avoided, they should be conducted by a medical doctor while the prison staff checks clothing and belongings. It also stipulates that prison staff cannot have physical, verbal, or visual contact with the person being searched by the health care staff[73]. It should also be noted that trans *visitors* can be discriminated against when searched by the prison staff at the entrance. Cases of trans women deciding not to visit relatives and friends in prison because they were asked to wear men's clothing and were searched by male officers have been documented[74].

Discrimination in Everyday Life: From Family Visits to Open Displays of Affection

Applying "gendered and intersectional lenses" to any analysis of the prison environment enables an understanding of the discrimination LGBTI prisoners face in their everyday life because of their sexual orientation or gender identity. For example, some prison systems allow "conjugal" or "intimate" visits, whereby a detainee can spend a certain amount of hours in a specially designed cell with his or her partner privately. Although some decisions and regulations specifically provide for the right to conjugal visits for LGBTI detainees[75], there are many instances where they are denied such rights or, in the absence of regulations, the decision is left to the discretion of the prison direc-

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[69] Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 36.

[70] In Kenya, for instance, the High Court found that an intersex prisoner had been subjected to inhuman and degrading treatment during body searches and awarded the plaintiff with financial reparation. *See Richard Musaya v. the Hon. Attorney General*, 2010.

[71] *See inter alia* National Institute of Corrections, US Department of Justice, *Policy review and development guide. LGBTI persons in custodial settings, 2013*, p.24, *and* Colombia Diversa, *Del amor y otras condenas: Personas LGBT en las cárceles de Colombia*, 2013-2014, p. 24.

[72] Correctional Service of Canada, *Commissioner's Directive on Searching of Inmates, Annex F*, Canada, June 2015.

[73] Servicio Penitenciario Federal, *Guía de procedimiento de "visu médico" y de "control y registro" de personas trans en el ámbito del servicio central de alcaidías*, March 2016.

[74] REDNADS, *Primer Diagnóstico "Necesidades de la población LGBTI privada de libertad*, Guatemala, 2015, p. 58.

[75] *See inter alia* the Costa Rican Supreme Court's ruling that found unconstitutional the penitentiary rules that limited conjugal visits to persons of different genders (*Corte Suprema de Justicia, Exp: 08-992849-0007-CO; Res. 2011013800*, 2011); *see also* the Resolution on the protection of LGBTI persons in the Brasilian penitentiary system, *Resoluçao conjunta N°1, Presidencia da Republica Conselho Nacional de combate a discriminaçao*, April 2014.

tor. The case of the Colombian (now former) detainee Marta Lucía Álvarez Giraldo[76] is an illustration of a State's policy with direct discriminatory consequences for LGBTI detainees. In this case, the State of Colombia claimed that "allowing intimate visits to homosexuals would affect the penal establishments' regime of internal discipline, given that, in its opinion, Latin-American culture has little tolerance for homosexual practices in general.[77]" During its visit to Argentina, the SPT clearly stated that such visits should not depend on the marital status between the inmate and his/her visitor, but rather, the State "should ensure that all persons deprived of their liberty are able to receive regular visits, including conjugal visits, regardless of whether the partnership is formally recognized by the State; such visits should not be restricted on grounds of sex, nationality, sexual orientation or for any other discriminatory reason[78]". In Guatemala, where intimate visits are denied to LGBTI detainees on a discriminatory basis, a survey shows that it is the most commonly expressed need among this group[79].

Equally discriminatory are disciplinary measures targeting LGBTI detainees, in particular lesbians, for open displays of affection. Such behaviors—sometimes viewed by authorities as "exhibitionism"—can be punished by transferring one of the detainees to another facility[80] or by placing both detainees in solitary confinement, even for a prolonged period[81]. Such measures not only constitute a form of discrimination, but can also lead to situations amounting to torture or other ill-treatment.

Discrimination in Accessing Health Services

The Special Rapporteur on Torture emphasized the importance of adopting special measures to address the particular health needs of persons deprived of liberty belonging to vulnerable and high-risk groups, including trans people[82]. However, trans detainees often face discrimination in accessing health care services. The situation is particularly traumatic for persons having started sex-reassignment therapy and/or needing hormone therapy, as well as other specific health care. Though not binding, the Yogyakarta Principles stipulate that authorities should "provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognizing any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired.[83]" According to the principle of equivalence of care, authorities should at least ensure

[76] An agreement has been reached with the State of Colombia in July 2017 to implement the recommendation of the IACHR. The report is not yet public.
[77] Inter-American Commission on Human Rights, *Informe nº 71/99, Caso 11.656 Marta Lucía Alvarez Giraldo Colombia*, 4 May 1999, para. 2 (the translation is ours).
[78] *See* Report of the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina, CAT/OP/ARG/1, 27 November 2013.
[79] 34% of the respondants identified intimate visits as their priority need, before access to specialized health care (23%),and right to use their own clothes and ancillary (16%). *See* REDNADS, *Primer Diagnóstico "Necesidades de la población LGBTI privada de libertad*, Guatemala, 2015.
[80] *Id*.
[81] This has been documented in Colombia, where lesbians openly displaying affection have been punished to prolonged solitary confinement (in so-call "*calabozos*"). *See* Colombia Diversa, *Del amor y otras condenas: Personas LGBT en las cárceles de Colombia*, 2013-2014.
[82] Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, para. 23, and Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, 9 August 2013, para. 55.
[83] Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 9 (B).

that treatment is not discontinued in prison, provided that an equivalent treatment is available in the community.

In France, the General Controller of places of deprivation of liberty—the National Preventive Mechanism established under the Optional Protocol to the Convention against Torture (OPCAT)—made clear that the article of the national penitentiary law, according to which "the quality and continuity of care shall be guaranteed to prisoners under equivalent conditions to those enjoyed by the population as a whole" also applied to trans prisoners. The Controller also stated that they "should be able to obtain assistance and be referred to the prison medical services", and that "the prison administration must guarantee the continuity and regularity of medical consultations that have to be conducted outside prison.[84]" In many contexts, however, trans persons, because of their precarious situation, take street-based hormones that are not prescribed by a doctor prior to their incarceration[85] and therefore face additional challenges in accessing such therapies while in prison. A review of policies of correctional facilities relating to trans prisoners in Europe, Australia, Canada and the United States[86] found that "the majority adopted the concept of 'freeze framing' which refers to when the individual is 'freeze framed' at the stage he or she was at when they arrived in custody". Detainees who are denied such treatment can resort to self-mutilation or suicide and not granting them the required treatment can be considered as undermining both their physical and mental integrity.[87]

Conclusion

The protection of all persons, including LGBTI persons, from torture and other forms of ill-treatment is a responsibility of the State. However, as we have seen above, there are many instances where State authorities are either complicit to, or perpetrators of, acts of torture. LGBTI persons are particularly vulnerable because of entrenched forms of discrimination based on their sexual orientation and/or gender identity. Changing this situation does not happen overnight. As stated by both the United Nations Special Rapporteur on Torture and the United Nations Subcommittee for the Prevention of Torture, a first step towards this achievement is the repeal of legislation that criminalizes same-sex sexual activities and non-conforming gender identities and expressions. However, we have seen that even in countries with progressive legislations, LGBTI persons deprived of their liberty remain extremely vulnerable to abuse. Isolating them from the rest of the detained population can easily lead to situations amounting to torture or other forms of ill-treatment, while further reinforcing their stigmatization. Nevertheless, there are countries where the exposure of LGBTI detainees to violence is so high that segregating units can be considered a "least worst" temporary solution. In order to prevent abuses stemming from discrimination based on sexual orientation

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[84] *See* Contrôleur Général des Lieux de Privation de Liberté (GLPLG), *Opinion of 30th June 2010 concerning the care and management of transsexual prisoners, in* Opinions and Recommendations of the French Contrôleur general des lieux de privation de liberté, published jointly by the CGLPL and the Association for the Prevention of Torture, 2014, pp. 47-52.

[85] *See e.g.* Black and Pink, *Coming out of concrete closets a report on black & pink's national LGBTQ prisoner survey*, 2015; the majority of respondents reported taking street-based hormones before going to prison.

[86] Petersen, M., Stephens, J., Dickey, R. and Lewis, W., *Transsexuals within the prison system: An international survey of correctional services policies*, Behavioral Sciences and the Law (1996), pp. 14, 219-229.

[87] As acknowledged by a Turkish high court in the case of a prisoner who considered that gender-reassignment surgery was imperative to preserve the prisoner's integrity. However, the prison administration refused to bear the expenses for surgery and hair-removal. The application in now pending before the European Court of Human Rights (*D.Ç. v. Turkey (no. 10684/13*), Application communicated to the Turkish Government on 15 November 2013).

and/or gender identity, State authorities should tackle the problem of homophobia and transphobia at its roots. Otherwise, LGBTI persons deprived of their liberty will continue to suffer discriminatory and multiple punishments only because of who they are.

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Women in the Criminal Justice System and the Bangkok Rules

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Abstract

Female detainees face many of the same risks of torture and ill-treatment as male detainees when in contact with the criminal justice system, but—as outlined in this article—there are also specific risks due to their sex and gender roles. Multiple layers of discrimination faced by women in all spheres of life are mirrored and often exacerbated in justice systems across the globe.

The characteristics of women offenders and prisoners are key to understanding why criminal justice systems overall and prison systems in particular need to be adapted to women. They have different and greater health-care needs than men when detained, including sexual, reproductive, preventative and mental health-care needs. There is a high risk that the exposure to violence in these women's lives continues after arrest, and that they face abuse by prison staff and/ or fellow prisoners. Humiliating measures, such as body searches or shackles during late-term pregnancy, re-traumatise these women. At the same time, support systems are scarce for detained women.

These are some of the many gender-specific obstacles that women worldwide face in detention, while also enduring widespread negligence of their particular biological and gendered needs. As a result, women's life in prison often entails a denial of fundamental rights, which may amount to torture or other inhuman or degrading treatment or punishment.

This article introduces the topic of women in the criminal justice system, lays out the gender-related dynamics in detention and introduces relevant international standards, in particular the UN Bangkok Rules.

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Contents

1. Introduction

While all human beings may be vulnerable when deprived of their liberty, because they are shielded from the outside world and placed in a situation of inferiority, certain groups in society are particularly at risk of torture and ill-treatment. Women in detention or prison constitute one such group, and their increased vulnerability is intrinsically linked to their biological sex and their gender roles.

With a global prison population that is male-dominated, prisons are largely designed and managed for men, by men. The male-dominated architecture and governance persists, despite an alarming trend towards increased incarceration of women.[1] The female prison population has risen much faster than that of men, by approximately 50%, while the total world prison population has grown by 'only' 20% since 2000.[2]

Notwithstanding the disproportionate increase of female prisoners in recent years, women continue to constitute a small minority, 2-9% on average of the total prison population.[3] As a result, they find themselves held under conditions that, at best, have been poorly adapted for them from the male model or, worse, are the same as those for men or, worst, are poorer and more repressive

[1] Janni Gainsborough, *Women in prison: international problems and human rights based approaches to reform*, William & Mary Journal of Women and the Law, Volume 14, Issue 2 (2008).
[2] Roy Walmsley, *World Prison Brief: World Female Imprisonment List*, Institute for Prison Policy Research, 2015, p. 2.
[3] Roy Walmsley, World Female Imprisonment List, International Centre for Prison Studies, Kings College London, 2015, p. 2.

than those provided to men. In other words, many prison systems and the conditions they offer lack a gender focus, and prison policies and daily practices around the world range from being gender-neutral to being gender-biased.

Prison systems often fail to recognize that women in prison have different trajectories than their male counterparts. Incarcerated women have been victims of physical and sexual abuse at higher rates than men, and they are over-represented in statistics on mental health issues, substance dependency and self-harm. As a result, women entering prison often require psychological and somatic health care, at times long overdue. In addition, female prisoners have biological health needs, such as gynecological, obstetric and other reproductive health care, as well as gender-specific needs related to their role as the primary caretaker for children before their incarceration, prompting needs to ensure alternative placement and proper care.[4] Globally, prisons often fail to identify, let alone respond adequately to, the particular needs of women.

In his January 2016 report to the UN Human Rights Council, the Special Rapporteur on Torture illustrates these shortcomings and states that different incarceration and treatment policies, services and infrastructure are required to address women's distinct needs and ensure their protection.[5] This article will reflect and elaborate on the Special Rapporteur's report and, in doing so, will draw upon first-hand experience from female prisons, scientific and other evidence-based research as well as the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, the Bangkok Rules.[6]

2. Gender-Specific Challenges Within the Criminal Justice System

The status of women and society's gender-related dynamics reach deep into the criminal justice system and permeate prisons. While both men and women may face obstacles in accessing justice, women often experience additional barriers, which are directly related to their sex and their gender roles. Lack of financial resources in addition to high rates of illiteracy, inequality and exclusion[7] are among the key factors that challenge women's access to justice and influence/determine their pathways to offending. These factors also impact their journey through the justice system and, ultimately, their life in prison.

Criminal justice institutions are basically designed to uphold the norms of a given society. Consequently, discriminatory social norms and constructions of gender in society influence the development of justice systems, which, in turn, perpetuate such norms and constructions.[8] From a wider justice sector perspective, entrenched gender norms,[9] and the multiple layers of discrimination that women face in all spheres of life, make women particularly vulnerable on their journey

[4] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *Pathways to, conditions and consequences of incarceration for women*, Report to the UN General Assembly, A/68/340, 21 August 2013.
[5] U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report to the Human Rights Council, A/HRC/31/57, 2016, para. 16.
[6] U.N. General Assembly resolution 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010.
[7] International Bar Association, *International Access to Justice: Barriers and Solutions*, *Bingham Centre for the Rule of Law Report*, October 2014, p. 16-17.
[8] U.N. Office of the High Commissioner for Human Rights, U.N. Women, U.N. Development Programme, Committee for Latin America and the Caribbean for the Defense of Women's Rights and International Women's Rights Action Watch Asia Pacific, *Access to Justice Concept Note*, endorsed by the U.N. Committee on the Elimination of Discrimination against Women at its 53rd session, October 2012.
[9] World Bank, *Gender norms' are understood as 'socially construed norms and ideologies, which determine the behaviour and actions of men and women*, World Development Report, 2012.

through the criminal justice system and during their stay in prison.[10] Such obstacles may be legal, institutional, social, economic or practical.

When navigating through the criminal justice system—ranging from the police, prosecution and judiciary to the prison system—gender-specific barriers arise regardless of whether women are victims, witnesses or defendants. Such barriers are often rooted in an absence of gender-sensitive policies and practices, which address women's particular needs and vulnerabilities.

Women in the criminal justice system also tend to be disadvantaged in accessing legal representation. Typically, they depend on the willingness of male heads of households to agree to spending the family budget on their legal representation. Where legal aid is available, eligibility criteria can discriminate against women if the criteria are based on family/household income, to which women offenders often do not have access.[11]

National laws may violate the principle of equality before the law if they are based on gender-stereotypes and norms, which impair women's access to justice. This is the case where corroboration rules require women to discharge a higher burden of proof than men in order to establish an offence or seek a remedy.[12] This is particularly pronounced in cases concerning 'moral crimes', such as adultery.

Criminal justice institutions often have an under-representation of female justice administrators, and in some jurisdictions, patriarchal norms prompt police, prosecutors and judges to adopt gender-biased approaches. Police may dismiss claims of gender-based violence as unsubstantiated without initiating any preliminary investigation; prosecutors may allow stereotypes to influence investigations and trials, undermining the claims of female victims; and judges may adopt rigid standards about what is appropriate behaviour for women, penalising those who do not conform[13] and issuing lenient sentences to male perpetrators.[14] It is against this background that many women end up in prison, where past patterns of injustice and discrimination persist alongside new forms of suffering.

3. Profile of Women Prisoners

Overlooked by many actors in the criminal justice system, the profile of women in contact or conflict with the law is very different from that of male suspects and offenders.

Wherever research has been conducted, the majority of women were found to be charged with or convicted of non-violent economic offences.[15] Moreover, the rate of detention for drug-related offences amongst women is much higher than for their male counterparts, up to 70% compared to

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[10] U.N. Office on Drugs and Crime, *Handbook on Women and Imprisonment, 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)*, 2014, p. 7.

[11] Huber A, *Women in Criminal Justice Systems and the Added Value of the UN Bangkok Rues, in* Women and Children as Victims and Offenders: Background, Prevention, Reintegration (Kury et. al. eds., Springer Publishing House volume 2), June 2016, p. 39.

[12] U.N. Committee on the Elimination of Discrimination against Women, *General Recommendation on women's access to justice*, CEDAW/C/GC/33, 23 July 2015, para. 21 and 25(a)(iii); Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/SER.L/V/II.Doc.68, 20 January 2007, paras. 71-73.

[13] *Ibid*, paras. 26-29.

[14] OHCHR, UN Women, UNDP et al, *supra* note 8, section 4.

[15] The overall figure for economic offences globally is 18%, surveys of women prisoners identified rates between 22% and almost 50%. *See* U.N. Office for Drugs and Crime, *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice*, 12 February 214, E/CN.15/2014/5, para. 16.

21% in the overall sentenced prison population.[16] Research indicates that in the 'enthusiasm' for waging the 'war on drugs' women are easier targets for law enforcement, even though they do not play significant roles in the drug trade.[17] Other types of crimes that disproportionately affect women are 'moral crimes', such as adultery and prostitution, in particular where prostitution is only penalised for 'providers' but not for 'clients'.[18]

The offences women are charged with or convicted of are not detached from their backgrounds. They reflect, to a large extent, the social and economic backgrounds they come from, and the economic and social discrimination women and girls face in society. The "feminisation of poverty"[19] has a bearing on women in the criminal justice system. The number of women who are heads of households is increasing, but at the same time they still face discrimination in the labour market, inequalities of salaries, lack of protection by labour laws and a high percentage of precarious employment.[20] The high level of economic pressure women experience, such as having to raise children with little or no support from husbands, may explain the high proportion of economic offences women are charged with or convicted of.

A low educational profile is another key characteristic of women offenders, reminiscent of the discrimination girls face in accessing education in many countries across the world. Research has revealed the impact of young motherhood on education and subsequent pathways to offending. A striking number of women entering prison have been victims of violence prior to arrest, and a strong link has been established between violence against women and women's incarceration.[21] Given the high level of psychological distress over the lifetimes of these women, it may not be surprising that higher rates of mental health issues[22] have been found amongst women prisoners compared to men, and that alcohol and substance dependency were also overrepresented.[23]

The overwhelming majority of women prisoners are mothers, and many leave more than one child behind.[24] The children may be taken into the care of the woman's family, but many end up

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[16] UNODC, World crime trends and emerging issues and responses in the field of crime prevention and criminal justice, 2014, para. 29. *See also* OHCHR, *Study on the impact of the world drug problem on the enjoyment of human rights*, 4 September 2015, A/HRC/30/65, para. 52, *and* Penal Reform International, *Global Prison Trends, Special Feature Drugs and Imprisonment*, 2016, p. 2.

[17] Huber A, *supra* note 11, p. 51.

[18] *See* U.N. Working Group on the issue of discrimination against women in law and practice, *Report to the Human Rights Council,* 8 April 2016, A/HRC/32/44, paras. 79 et sqq.

[19] The term has been used, for example, by the Sierra Leone Truth and Reconciliation Commission, *see* AdvocAid, *Women, Debt & Detention: An Exploratory Report on Fraudulent Conversion and the Criminalisation of Debt in Sierra Leone*, July 2012, p. 15.

[20] Surt Association, *Women integration and prison*, Aurea Editores S.L, June 2005, p. 23. *See also* Papavangjeli E, *Women offenders and their re-integration into the society—gender perspective in the criminal justice system*, 2013, p. 9. The phenomenon has been described as the "feminisation of poverty".

[21] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *supra* note 4, p. 4.

[22] U.N. Working Group on the issue of discrimination against women in law and practice, *supra* note 18, para. 60.

[23] World Health Organization Europe, *Health in Prisons: a WHO Guide to the Essentials in Prison Health*, EUR/07/5063925, 2007; Moloney KP, Van den Bergh BJ and Moller LF, *Women in Prison: The Central Issues of Gender Characteristics and Trauma History*, *Public Health*, 123(6), 2009, pp. 426-430.

[24] For example, Penal Reform International, *Who are women prisoners? Survey results from Armenia and Georgia*, 2013, pp. 13-14; Penal Reform International, *Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan*, 2014, p.11; Penal Reform International, *Who are women prisoners? Survey results from Jordan and Tunisia*, 2014, p.11; Papavangjeli, *supra* note 20; Artz L, Hoffman-Wanderer Y, and Moult K, *Hard Time(s): Women's Pathways to Crime and Incarceration*, 2012, p. vi, 11, 35; Foundation for Human Rights Initiative/ Penal Reform International, *Who are women prisoners? Survey results from Uganda*, 2015, pp. 11, 17.

in orphanages or on the street, and often mothers simply do not know what has become of their children following their arrest,[25] adding to their anxiety and depression.

4. Risk of Abuse in Detention

In many regards, women have a heightened vulnerability to mental and physical abuse during arrest, questioning and while in prison. [26] Women and girls are at particular risk of rape, threats of rape,[27] sexual assault, insults and humiliation of a sexual nature by fellow male prisoners and by prison staff. This correlates with the strikingly high exposure to physical and sexual violence before arrest and detention, resulting in a high risk of re-victimisation.[28] The Special Rapporteur on violence against women has described this phenomenon as the "continuum of violence during and after incarceration"[29].

Protection From Abuse by Prison Staff

Exposure to the risk of torture and ill-treatment in police custody and during detention, including to coerce confessions or information about other suspects, is not unique to women. However, women are typically less aware of their rights and easier to intimidate than men. They have a lower social status and are well aware of it. They are also aware of the particular stigma they face in society in cases of sexual abuse—despite being the victim. In addition, they fear potential pregnancy, sexual abuse leading to the inability to have children, and in some cultures, loss of their virginity. It is not only their sex, but also their perception within and by society, i.e., their gender, that makes them particularly prone to sexual abuse, humiliation and sexual exploitation.

Such abuse is not an 'unfortunate' exception of some rogue prisons, nor is it unique to low income countries. This is illustrated by an investigation conducted in a state prison in the United States that concluded that the women prisoners lived "in a toxic environment with repeated and open sexual behaviour". The officers had forced the women to engage in sexual acts in exchange for basic sanitary supplies. The staff had watched the women while showering and using the toilet and had organised a 'strip show'. Furthermore, there was "a constant barrage of sexually offensive language; punishment of prisoners who report[ed] improper conduct; and encourage[ment of] improper sexual contact between prisoners". Insufficient staffing and supervision, inadequate policies and procedures, a heightened fear of retaliation and an inadequate investigative process

[25] Papavangjeli, *supra* note 20, p. 10.
[26] U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 5, paras. 19, 20; U.N. Working Group on the issue of discrimination against women in law and practice, *supra* note 18, para. 17.
[27] "It is widely recognised, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials." (Special Rapporteur on Torture, A/HRC/7/3, 2008).
[28] A high percentage of women in prison have been victims of violence before their arrest. According to the WHO, 35% of women worldwide have experienced either intimate partner violence or non-partner sexual violence in their lifetime. World Health Organization, *Factsheet N°239, Violence against women*, last updated October 2013. For the women prison population, studies have shown an even higher rate. U. N. Special Rapporteur on Violence Against Women: "There is a strong link between violence against women and women's incarceration, whether prior to, during or after incarceration."
[29] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *supra* note 4, p. 4.

were found to result in "serious systemic operational deficiencies [that[exposed women prisoners to harm and serious risk of harm from staff-on-prisoner sexual abuse and sexual harassment".[30]

In many countries, dependency of detainees upon staff has been found to increase vulnerability. Where resources are scarce and where rules for their dissemination are lacking, staff may be tempted to provide supplies to their 'favourites', usually those willing to pay with cash or with sex. This 'system' equally applies to trading of 'protection', access to visits or medical care.[31]

Being watched naked in the shower or toilet,[32] routine strip and invasive body searches and humiliating medical examinations, including but not limited to so-called 'virginity testing', add to the forms of gender-specific abuse women are often exposed to when detained.[33]

Even according to the initial, 1955 version of the Standard Minimum Rules for the Treatment of Prisoners,[34] female detainees must be supervised and attended only by female staff and "no male staff member shall enter the part of the prison set aside for women unless accompanied by a woman staff member".[35] United Nations (UN) treaty bodies, such as the Committee against Torture, often reiterate this principle in the context of gender-based violence.[36] Provision for basic needs, including personal hygiene items, with clear rules and documentation regarding their distribution, are also important measures to prevent sexual exploitation.

Protection From Inter-Prisoner Violence

When women are allocated together with male detainees, not only does the risk of violence arise from detention staff but also from fellow prisoners, and authorities' failure to act with due diligence to prevent such inter-prisoner violence may amount to torture or other-ill-treatment.[37] The separation of male and female detainees constitutes a key safeguard against such abuse,[38] but risk factors are too subtle to 'tick the box' just by separating the living quarters.

In a prison in Benin, for example, the UN Subcommittee for the Prevention of Torture found that the women had to go to the men's quarters to fill their water containers with fresh water. Being con-

[30] United States Department of Justice, *Justice Department Releases Findings Showing That the Alabama Department of Corrections Fails to Protect Prisoners from Sexual Abuse and Sexual Harassment at the Julia Tutwiler Prison for Women*, 22 January 2014.

[31] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *24th General Report of the CPT,* January 2015, CPT/Inf (2015) 1, para. 56; Penal Reform International (et. al.), *Women in detention: a guide to gender-sensitive monitoring*, 2013, p. 7; U. N. Special Rapporteur on violence against women, its causes and consequences, *Report on visit to the United States of America*, A/HRC/17/26/Add.5 and Corr.1. (2011), para. 36.

[32] Such practice was documented, for example, in women's prisons in Armenia, Azerbaijan and Georgia, where male guards had an unobstructed view into the women's showers and regularly watched female prisoners bathing. (Council of Europe, Parliamentary Assembly, (2007), para. 53; U.N. Special Rapporteur on violence against women, *supra* note 31.

[33] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *supra* note 4, para. 42.

[34] The U. N. Standard Minimum Rules for the Treatment of Prisoners were first adopted in 1955. They were updated following a four-year process that revised eight areas of the rules considered most urgently in need of revision. The revised Standard Minimum Rules were adopted by the UN General Assembly in December 2015 as the Nelson Mandela Rules (UN-Doc A/Res/70/175).

[35] Rule 81 of the Nelson Mandela Rules, U.N. General Assembly resolution 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175, 8 January 2016.

[36] U.N. Committee against Torture, *Concluding observations for Yemen*, CAT/C/YEM/CO/2, 2009; U. N. Committee against Torture, *Concluding observations for the Philippines*, CAT/C/PHL/CO/2, 2009.

[37] U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, *Mission to Kazakhstan*, 16 December 2009, A/HRC/13/39/Add.3, para. 28.

[38] However, many countries still fail to do so, despite the unambiguous wording to this end in the Standard Minimum Rules since 1955.

cerned about their safety, however, they continued to use the dirty water provided in their own quarters.[39] Another striking example was documented in Honduras by the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty, reporting on two 'mixed' prisons in the country, i.e., where women were housed alongside male prisoners. The Commission found that women had to "find themselves a 'husband', usually a male prisoner with a certain amount of power, to seek protection and find a place in the social structure of the prison". This was exacerbated by the fact that control inside the prison walls was exercised by the prisoners entirely.[40]

The separation of male and female detainees,[41] including during transport, therefore constitutes a key, but not sufficient, measure to protect women in custody from abuse.

5. Contact With the Outside World

The ability to maintain ties with the outside world, particularly with family, is one of the main factors that determine prisoners' prospects of re-integration into society upon release.[42] Close contact with the family during the period of imprisonment is vital to the morale and rehabilitation of prisoners. For women, it is even more important, due to their gendered identities and responsibilities as primary care-givers for children and sick and elderly relatives—which is much more challenging to fulfil while in prison.[43]

Adequate contact with the family is also a crucial element in the reduction of the harmful effects of imprisonment. The possibility of receiving regular visits significantly impacts women prisoners' health and well-being, and it may also serve as an important safeguard against abuse.

Allocation Close to Home and Family

To enable family contact, international standards call for contact to be facilitated and prisoners to be allocated, to the extent possible, to prisons close to their homes or other usual place of residence. For women prisoners, this is reiterated in Bangkok Rule 4, with the additional provisions that authorities take each woman's caretaking responsibilities into account when considering her location, along with the availability of appropriate programmes and services.[44] Accordingly, the UN Subcommittee on Prevention of Torture has recommended States parties to arrange for the transfer of prisoners to a prison located closer to their families.[45]

However, as women only represent 2-9% of the global prison population,[46] the number of women's prisons is relatively low, which inevitably challenges the aim of allocating women close to their family. This is particularly pronounced in large countries where great distances make regular

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[39] U.N. Subcommittee on Prevention of Torture, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin*, 15 March 2011, CAT/ CAT/OP/BEN/1.en, paras. 207-208.

[40] Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras, 18 March 2013, OEA/Ser.L/V/II.147 Doc. 6, paras. 91-93.

[41] Rule 11 (a) of the Nelson Mandela Rules.

[42] Re-integration into society upon release is a basic principle, embodied in Rule 4 of the Nelson Mandela Rules.

[43] Baker J. and Rytter T., *Conditions for Women in Detention–Needs, Vulnerabilities and Good Practices*, DIGNITY Publications Series on Torture and Organized Violence, no. 7, 2nd edition, 2014, p. 99.

[44] Similar rules are embodied in Rule 59 of the Nelson Mandela Rules, and Principle 20 of the U.N. General Assembly resolution 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988.

[45] U.N. Subcommittee on Prevention of Torture, *Country visit report on Honduras*, CAT/OP/HND/1, 2010.

[46] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *supra* note 4, para. 1.

family visits difficult, logistically and financially. Contact may also be compromised where public transport facilities are poor or non-existent. In conflict or post-conflict zones these challenges may be further exacerbated by concerns of security and safety.[47]

In order to counter these circumstances, States need to establish a larger number of smaller facilities to accommodate women prisoners to allow all women to be placed close to their families. In this vein, the UN Committee against Torture urged a State party to "pursue regionalisation of women's prisons so as to avoid the uprooting of women prisoners".[48] Where States choose to establish women's wings within male prisons to increase the number of prison facilities for women, special attention needs to be paid to adapting the women's wings to gender-specific needs—to ensure the separation between male and female detainees and to have female staff attend to the female prisoners.

Whilst most women prefer being located as near as possible to their families, some may wish the contrary if a husband or another person subjected them to violence or sexual abuse prior to imprisonment and they need to be protected from the perpetrator.[49] Gender-sensitive policies imply that a woman prisoner's preferences are taken into account.

Family Visits

Rule 58 of the Nelson Mandela Rules establishes that all prisoners shall be allowed to communicate with their family and friends at regular intervals by receiving visits, amongst others.[50]

The poor mental health status of women in detention, described below, is associated with several factors, notably the (in)ability to maintain contact with the family, particularly the children. Most women prisoners are mothers, some single mothers and sole care-takers, and they have a particular emotional and psychological need to stay closely involved with their children.[51]

At the same time, being financially less independent than men, women prisoners rely more heavily on outside support from their family to meet basic needs, such as extra food, medicine and other necessities that are scarce in prison. Family visits thereby take on a financial dimension, which is important for the women's dignity and well-being. However, this practice clearly reflects the failure of the prison system to fulfil its duty to make adequate provision for the prisoners.

In recognition of the afflictive nature of imprisonment that cuts off prisoners from the outside world, prison authorities should not aggravate the suffering that is inherent in such a situation.[52] In order to counterbalance the disadvantages faced by women located far from home, the Bangkok Rules require prison staff to encourage and facilitate visits, by allowing home leave and longer visits, especially when visitors have travelled long distances. International standards also emphasise the importance of open contact between mother and child in a positive visiting environment and permission of conjugal visits on an equal footing with men.[53]

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[47] Ashdown and James, *Women in Detention*, International Review of the Red Cross, Vol.92, number 877 (2010), p. 132.
[48] U.N. Committee against Torture, *Concluding Observations on Costa Rica*, CAT/C/CRI/CO/2, 2008, para. 18.
[49] UNODC, *supra* note 10, page 30.
[50] UN General Assembly, *UN Standard Minimum Rules on the Treatment of Prisoners (the Nelson Mandela Rules)*, A/RES/70/175, 8 January 2016.
[51] Baker and Rytter, supra note 43, p. 99.
[52] Basic principle 3 of the Nelson Mandela Rules.
[53] Rules 26-28 of the Bangkok Rules and Rule 58(2) of the Nelson Mandela Rules.

Notwithstanding women's psychological, social and financial needs, many women prisoners receive fewer visits than men, especially in societies where female incarceration is perceived/seen as particularly shameful and stigmatizing. Some women even struggle with gender-related abandonment,[54] where they lose custody and parental rights over their children and their husbands re-marry. This is most common in societies where patriarchal honour codes prevail. Abandoned by the family, ostracised by the community and removed from the care-taking role, such women struggle with acute isolation and low levels of self-worth.[55]

6. Safety and Security

The State's duty of care regarding women prisoners includes the obligation to protect them from others who may wish to cause them harm.

To maintain security and order within the prison setting, penitentiary authorities may use restrictive measures vis-à-vis the prison population and individual prisoners who pose a danger to themselves or others. Similarly, sanctions can be imposed as a disciplinary measure towards prisoners who violate national legislation or prison rules, as long as they are provided by the law and are necessary and proportionate. Restrictive measures[56] may not be used as a punishment, and should be limited to what is absolutely necessary to ensure safe custody of prisoners and the secure operation of the prison.[57]

The absolute prohibition of torture or other inhuman or degrading treatment or punishment also applies to restrictions and sanctions, and certain measures are prohibited at all times, notably indefinite and prolonged solitary confinement, confinement in dark—or permanently lit–cells and corporal punishment.[58]

As a safeguard to secure the mother-infant relation, and the best interest of the child, disciplinary sanctions for women should never include a prohibition of family contact, especially with children.[59] Despite the absolute nature of this rule and the potentially damaging effects of disregarding it, some countries continue to deny women prisoners family visits as a means of punishment.[60] Further, women's poor state of mental health is at times misinterpreted as a security risk or an act of disobedience. For instance, in some societies, mentally ill women are held in solitary confinement, as (unlawful) punishment for making complaints.[61]

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[54] The term refers to abandonment of women due to the stigma attached to having female family members in prison.

[55] Baker and Rytter, *supra* note 43, p. 103-104.

[56] The Nelson Mandela Rules use the term 'restrictive measures' to describe restrictions imposed on prisoners based on safety and security considerations rather than due to breaches of prison rules (see section on 'Restrictions, discipline and sanctions', including Rule 43). Such measures may include, separation from other prisoners (e. g. gang-related or due to conflicts between groups of prisoners) or restrictions in communication (e.g. surveillance of phone calls during criminal investigations).

[57] Rules 27-39 of the Nelson Mandela Rules.

[58] Rule 43 (2) of the Nelson Mandela Rules provides that instruments of restraint shall never be applied as a sanction for disciplinary offences and Rule 47 prohibits the use of instruments which are inherently degrading or painful. Rule 42 implies further prohibitions, providing that general living conditions shall "apply to all prisoners without exception", including light, ventilation, sanitation, personal hygiene and health care.

[59] Rule 23 of the Bangkok Rules.

[60] Baker and Rytter, *supra* note 43, p. 63.

[61] For example, a report by the American Civil Liberties Union revealed that a number of women perceived to be mentally ill were held in solitary confinement, some of them as a punishment for raising complaints. American Civil Liberties Union, *Worse than Second Class: Solitary Confinement of Women in the United States*, 2014; *see also* press release: *New ACLU Report Examines Devastating Impact of Solitary Confinement on Women*, 24 April 2014.

Body Searches

Body searches,[62] in particular strip and invasive body searches, are prone to humiliation and abuse for both male as well as female prisoners. Yet, the anatomy, socialisation and background, and especially the high rate of previous abuse, makes body searches a particularly degrading experience for women. [63] This is exacerbated when conducted by male staff or in the presence of men, which is the case in many countries.[64]

Searches of this kind involve undressing, lifting their breasts, bending over at the waist and spreading their cheeks. Prisoners describe having to remove tampons in front of prison staff during menstruation or having to urinate in a bottle, facing loss of entitlements to family visits if they refuse to cooperate.[65]

The Special Rapporteur on violence against women has described this practice as "sanctioned sexual harassment".[66] Moreover, it discourages women from receiving visitors, who are already few and far between. Women prisoners express this, stating that they should not have to choose between a visit and avoiding a body search—a choice which runs contrary to the principle of respect for their dignity.[67]

Bangkok Rules 19 and 20 and Rules 50-52 of the Nelson Mandela Rules have therefore introduced strict regulations on when and how searches can be conducted in a prison context, encouraging their replacement by alternative screening methods wherever possible. Searches must be limited to an absolute minimum, be necessary and proportionate, and be carried out by staff of the same sex,[68] safely and respecting the individual's privacy and dignity.[69]

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[62] Searches include all personal searches, including pat down and frisk searches, as well as strip and invasive searches. A strip search refers to the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas. Invasive body searches involve a physical inspection of the detainee's genital or anal regions. Other types of searches include searches of the property and rooms of prisoners. Visitors to prison are also frequently searched.

[63] *See* U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 5, para. 19.

[64] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *supra* note 4, para. 43; Human Rights Watch, *Unjust and Unhealthy*, 2010; South African Human Rights Commission, *Report of the National Prisons Project*, 1998, p. 67.

[65] Australian Human Rights Committee, *Australian Study Tour Report, Visit of the UN Special Rapporteur on Violence against Women*, 10-20 April 2012; and Amanda George, *Strip Searches: Sexual Assault by the State, in*: Without consent: confronting adult sexual violence, Australian institute of Criminology, 1993, p. 211.

[66] U.N. Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report to the Commission on Human Rights: Integration of the Human Rights of Women and the Gender Perspective,* on the issue of violence against women in state and federal prisons, E/CN.4/1999/68/Add.2, paras. 55, 58; *see also* U. N. Committee on the Elimination of Discrimination Against Women (CEDAW), Communication No. 23/2009, Inga Abramova v. Belarus, 27 September 2011, CEDAW/C/49/D/23/2009 (The search by a male guard of a female arrestee led to this widely noted complaint to the UN Committee on the Elimination of Discrimination against Women. During the search, one of the guards had poked her buttock with his finger, made humiliating comments and threatened to strip search her.).

[67] American Civil Liberties Union, *Prison Strip Search is Sexually Abusive*, aclu videos, available at: https://www.youtube.com/watch?v=HLSGLLa_TPI

[68] The principle that women prisoners should only be supervised and attended to by female officers is already enshrined in Rule 53 of the Standard Minimum Rules, and has been emphasised by various international and regional bodies in order to prevent sexual abuse and humiliation of prisoners. Yet, increasing use of mixed staff also means that male staff is carrying out searches of women prisoners in some countries, and the Standard Minimum Rules do not include any explicit guidance on body searches.

[69] This principle derives from the general prohibition of torture and other forms of ill-treatment and is also stipulated in the World Medical Association Statement on Body Searches (1993). *See also* World Medical Association, *Statement on Body Searches of Prisoners*

Solitary Confinement

Solitary confinement is a very intrusive measure, which is known to carry the potential of severely damaging effects on mental, somatic and social health when applied for prolonged periods.[70] Studies have shown a particular impact on women because of their generally poor state of mental health upon arriving at prison, resulting in higher rates of self-harm and suicide.

In light of the negative impact of isolation on human beings, international standards have introduced strict limitations of the use of solitary confinement, defined as confinement of prisoners 22 hours or more a day without meaningful human contact.[71] An absolute prohibition has been introduced for indefinite solitary confinement and prolonged isolation, defined as separation from the general prison population in excess of 15 days.[72] Beyond these absolute prohibitions, solitary confinement may only be used in exceptional cases as a last resort, for as short a time as possible and subject to independent review.[73]

Importantly, solitary confinement may never be used as punishment for self-harm or attempted suicide. As women are known to have significantly higher levels of deliberate self-harm in prison than men, and as self-harm is known to be associated with increased risk of attempted suicide, this rule is particularly important as a shield against harmful forms of disciplinary punishment of female prisoners.[74] However, recent research has shown that this practice persists in several countries, including Guatemala, Jordan, and the Philippines.[75] In these countries, women not only face unlawful punishment, but during their solitary confinement several minimum standards are disregarded, such as contact with the outside world, sanitation and exercise.[76]

The Bangkok Rules raise the level of protection by prohibiting solitary confinement as punishment for pregnant women, women with infants and breastfeeding mothers in prison.[77] This safeguard is important in order to avoid health complications or penalising children in prison by separating them from their mothers.[78]

As a milder variation of solitary confinement, some countries use so-called 'communal confinement' as punishment, whereby a group of women is confined together for prolonged periods. This phenomenon, which can be found in the Philippines and Zambia, is sometimes labelled as

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[70] The scientific evidence for this is well summarised by Sharon Shalev, *A Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, London, 2008, available electronically at www.solitaryconfinement.org.

[71] Rule 44 of the Nelson Mandela Rules. At a meeting of international experts at the University of Essex in April 2016, the participants sought to clarify the term 'meaningful human contact', based on the provision's rationale and relevant documents of international human rights bodies. *See*, Penal Reform International/ University of Essex, Essex Paper 3: *Initial Guidance on the Interpretation and Implementation of the UN Nelson Mandela Rules*, p. 89, (2017) available at: https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf), stating that: "The experts stressed that the provision needs to be interpreted in good faith and conscious of its intent and purpose. They emphasised that, therefore, it does not constitute 'meaningful human contact' if prison staff deliver a food tray, mail or medication to the cell door or if prisoners are able to shout at each other through cell walls or vents. In order for the rationale of the Rule to be met, the contact needs to provide the stimuli necessary for human well-being, which implies an empathetic exchange and sustained, social interaction. Meaningful human contact is direct rather than mediated, continuous rather than abrupt, and must involve genuine dialogue. It could be provided by prison or external staff, individual prisoners, family, friends or others – or by a combination of these."

[72] Rule 44 of the Nelson Mandela Rules.

[73] Rule 45 of the Nelson Mandela Rules.

[74] Hawton K, Linsell L et al, *Self-harm in prisons in England and Wales: an epidemiological study of prevalence, risk factors, clustering, and subsequent suicide*. The Lancet 2011; 377: 956-65.

[75] Baker and Rytter, *supra* note 43, p. 63.

[76] Ibid.

[77] Rule 22 of the Bangkok Rules.

[78] UNODC, *supra* note 10, p. 48.

'Buryong' or' Boiling Pot', which reflects the agitation, anxiety, stress and disharmony that this sanction causes among the confined women.[79]

Instruments of Restraint

Certain types of instruments of restraint—such as chains, irons and other instruments that are inherently degrading or painful—are prohibited at all times, both in relation to men and women.[80] Furthermore, instruments of restraint may never be applied as a sanction for a disciplinary offence.[81]

As a measure of additional protection of women, the Bangkok Rules prescribe that instruments of restraint may never be used on women during labour, birth or immediately after birth.[82] In such situations, prison authorities should instead apply alternative means, such as close supervision by a female staff member. Regrettably, although the risk that women may escape during labour, during birth or immediately thereafter cannot be reasonably justified, and despite pronouncements by medical specialists against the use of shackling during labour and childbirth, the practice continues in some jurisdictions.[83]

7. Gender-Specific Hygiene and Health-Care

Given the particularly well-documented poor health status of women prisoners as well as greater and gender-specific health-care needs the "mere replication of health services provided for male prisoners is (...) not adequate",[84] as stated by the UN Special Rapporteur on violence against women.

Yet, typically, health-care in prisons is male-oriented and overlooks women-specific health-care needs including hygiene, sexual, reproductive and preventative health-care. Women prisoners also require specific medical attention due to prior abuse and the higher prevalence of mental health issues, alcohol or drug use and risks related to unsafe sexual practices, including high rates of HIV infection and other sexually transmitted and blood-borne diseases.

Hygiene

Since 1955, the Standard Minimum Rules,[85] as a matter of course, provide for men to be able to shave regularly, but corresponding provisions relating to women's hygiene were only introduced in 2010 with the adoption of the Bangkok Rules.[86] The provision of basic hygiene products has become a symbol of the disregard of women's needs in the context of detention.

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[79] Baker and Rytter, *supra* note 43, p. 63.
[80] Rule 47 of the Nelson Mandela Rules. *See also* U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 5, para.21.
[81] Rule 43 of the Nelson Mandela Rules.
[82] Rule 24 of the Bangkok Rules.
[83] Penal Reform International et al, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, 2013, p. 68.
[84] Quoted in Lines R, *The right to health of prisoners in international human rights law*, International Journal of Prisoner Health, 2008, Vol. 4 Iss: 1, pp.3–53, 13.
[85] Rules 15 and 16. Rule 16 reads: "In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly."
[86] Rule 5 of the Bangkok Rules.

The availability of sanitary pads is not only a matter of "convenience" for women but a requirement for their dignity and health.[87] Yet, in places of detention all over the world, women prisoners have described the humiliation they face due to the lack of sanitary pads and the possibility to wash during their menstruation, as well as the lack of painkillers for menstruation cramps.[88] Too often, women have access to sanitary pads only if they can afford to buy them, if charitable organisations donate them or if they trade (sexual) favours in order to receive them. Research shows that sanitary pads become an instrument of power, of coercion and exploitation, leaving women in detention even more vulnerable to abuse than they already are.[89]

Gender-Sensitive Health-Care

The provision of adequate medical care has been described as a minimum and indispensable material requirement for ensuring the humane treatment of persons in custody.[90] However, States regularly fail to tailor medical care to women detainees' health-care needs. Typically, the box is considered ticked if pre- and post-natal care are available.

Yet, the differences between men's and women's health care needs go beyond women's attribute of giving birth, and their differences are not only biological. Women have sexual and reproductive health needs, as well as somatic and psychological needs, that stem from their background and history.[91] Other health-care needs arise while they are in prison, or are exacerbated due to detention.

Specific medical needs may arise as a consequence of violence, including sexual violence, women have suffered prior to being detained. Such needs may be related to their sexual and reproductive health, including miscarriages or (illegal) abortion obtained prior to detention. Not least because of the frequent exposure to violence throughout their lives, women prisoners are more likely to have mental health issues[92] and considerably higher levels of deliberate self-harm[93] and suicide.

Family breakdown, separation from children and feelings of failure in their parental responsibilities have been found to cause women particular distress. HIV and other sexually transmitted and blood-borne diseases are also more prevalent among female prisoners, and substance dependency problems have been consistently found to be over-represented among women, compared to the general prison population.[94] Furthermore, health-care needs resulting from a history of poverty

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[87] The lack of access to hygiene products jeopardises the dignity and the health of women detainees, and the European Committee for the Prevention of Torture has held that the failure to provide basic necessities such as sanitary pads can amount to degrading treatment in violation of international law. (CPT Standards, 2006 Edition, *Extract from the 10th General Report*, CPT/Inf (2000) 13, para. 31).

[88] Artz, Hoffman-Wanderer and Moult, *supra* note 24, p. 47.

[89] Huber, *supra* note 11, p. 57; *see also* United States Department of Justice, Justice Department Releases Findings Showing That the Alabama Department of Corrections Fails to Protect Prisoners from Sexual Abuse and Sexual Harassment at the Julia Tutwiler Prison for Women, 22 January 2014, p. 14.

[90] U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim report to the General Assembly*, 9 August 2013, UN-Doc. A/68/295, para. 50.

[91] *See also* U.N. Working Group on the issue of discrimination against women in law and practice, *supra* note 18, para. 59.

[92] For example, according to a study conducted by the Bureau of Justice Statistics in 2002 and 2004. *See* UNODC, *supra* note 10, p. 9.

[93] Fazel S. Baillargeon, *The health of prisoners*, The Lancet 2011, 377: 956-65, 2010. *See also* U. N. Working Group on the issue of discrimination against women in law and practice, *supra* note 18, para. 60.

[94] Penal Reform International, *Women in criminal justice systems: the added value of the UN Bangkok Rules*, 2015, pp. 4 et sqq.

and inadequate medical care before admission to detention are features that are more prevalent among female than male prisoners.[95]

All these differences have to be taken into account—from medical examinations upon admission to release.[96] They also mean that health-care provided to women prisoners cannot be identical to what is provided to male detainees. Rather, health care must be gender-sensitive and take into account prior victimisation as well as social and cultural sensitivities. In particular, in most countries women feel exposed in a medical examination where they have to undress, and may be terrified of doing so in front of male doctors. At this particular stage, gender-sensitivity is crucial so as to respect women's physical and mental integrity.

Moreover, it is rather typical that in a woman's life—prior to detention—medical issues may have gone unattended, and it may be her first time undergoing a medical examination of this kind. Physicians attending to women prisoners therefore need to be particularly sensitive and thorough in their examination and care, while making sure that any treatment is based on informed consent and does not re-victimise the patient.[97]

Health-care for women in detention needs to include sexual and reproductive care and incorporate preventative services, such as pap smears and screening for breast and gynaecological cancer.[98] Adequate psychological care, counselling and support relating to the causes of mental health problems also need to be provided and include measures to prevent suicide and self-harm.[99]

At the same time, health-related services in detention must not discriminate against women, directly or indirectly. This is the case, for example, regarding substance dependency and harm reduction programmes, which in some countries are provided in men's prisons only, even for HIV-positive pregnant women where treatment could prevent mother-to-child transmission.[100]

The conduct of so-called 'virginity tests' is a particularly stark example of the violation of women's rights—a breach of the right to dignity and the right not to be subjected to ill-treatment.[101] Bangkok Rule 8 emphasises the right to "medical confidentiality, including specifically the right

[95] For example, a study on inequalities in accessing healthcare in EU countries undertaken by the European Fundamental Rights Agency found that financial barriers affect women's access to health-care. *See* European Union Fundamental Rights Agency, *Inequalities and multiple discrimination in access to and quality of healthcare,* 2013, p. 41.

[96] The carrying out of a prompt, independent and consensual medical examination upon a person's admission to a place of detention and after every transfer between facilities, and thereafter on a routine basis, constitutes one of the basic safeguards against ill-treatment. *See* Human Rights Council resolution 10/24, paras. 4 and 9, and A/52/40 (vol. I), para. 109).

[97] Rule 25(1) of the Nelson Mandela Rules clarifies unequivocally that the physician's duty is the evaluation, protection and improvement of the physical and mental health of prisoners, i.e. the treatment and care of prisoners as their patients only.

[98] Such measures can include the provision of contraceptive pills, as necessary, for instance in cases of problematic menstruation, and also access to condoms and dental dams to prevent the transmission of sexually transmitted diseases. Preventive measures in health-care also include access to sports activities and other meaningful activities, which have a positive impact on physical and mental well-being of prisoners, but in the provision of which women detainees are frequently disadvantaged.

[99] Symptoms must not be addressed through medication alone and it has proven ineffective to rely exclusively on the removal of items with which women can harm themselves. *See* Huber, *supra* note 11, p. 63; *see also* Report by Baroness Jean Corston, *A review of women with particular vulnerabilities in the Criminal Justice system (The Corston Report)*, March 2007, p. 76.

[100] Huber, *supra* note 11, p. 62; *Health-based policies in prisons and other closed settings, in* International Drug Policy Guide, 3rd edition, IDPC, London, March 2016, p. 104.

[101] U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Report to the Human Rights Council, A/HRC/7/3, 15 January 2008, para. 34.

not to share information and not to undergo screening in relation to their reproductive health history," thereby prohibiting 'virginity tests'.

"The mere replication of health services provided for male prisoners is (…) not adequate" for women—as the Special Rapporteur on violence against women has noted.[102] The failure to address the need of women in detention represents a failure to meet their basic requirements of health-care and humane treatment.

8. Information and Complaints

All prisoners feel vulnerable upon admission to prison, but women prisoners are particularly vulnerable at this stage. As discussed above, their imprisonment may entail the trauma of separation from their families and possibly the placement of their children in alternative care, often at very short notice.[103] Meanwhile, it is also upon admission that prisoners need to be informed about–and understand–the prison rules and regime, their rights and obligations, as well as the avenues to make requests and file complaints.[104]

Information

Information provided upon entry is often cursory and rarely transmitted in a manner that takes into account the individual situations of women. Moreover, information brochures and procedures are usually not adapted for women prisoners and seldom include gender-specific information. This lacuna can, in itself, block women's enjoyment of the full spectrum of rights. As women prisoners' levels of stress and anxiety are often peaking upon admission, it is crucial that prison staff are trained to provide information in a professional and sensitive manner.[105]

Dominant gender norms require women to be less assertive than men in many countries; this is particularly pronounced among women from conservative, low income or minority backgrounds, among those with lower levels of educations and those who have experienced violent abuse. This intersects with other gendered barriers to information in prison. As a result, many women prisoners refrain from seeking information from staff and instead rely on each other for information on the prison regime and their rights. However, given the smaller numbers of women prisoners in facilities for women or in wings of male prisons, the knowledge pool is smaller, leaving many women ill-informed. This affects women's access to health-care, legal aid and communication with family, and may lead to ill-advised decisions.

The most harmful information gaps are often found among foreign prisoners who do not understand the language, women in 'protective' or 'precautionary' custody, and among mothers of 'illegitimate' children who lose all rights over their children and receive no information about their placement or well-being.[106]

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[102] Quoted in Rick Lines, *The right to health of prisoners in international human rights law, in* International Journal of Prisoner Health, Vol. 4 Iss: 1 (2008), pp.3—53, p13.
[103] UNODC, *supra* note 10, p. 31-32.
[104] Rule 54 of the Nelson Mandela Rules.
[105] Baker and Rytter, *supra* note 43, p. 90.
[106] Baker and Rytter, *supra* note 43, p. 92-97.

Complaints

The Nelson Mandela Rules require that each prisoner have the daily opportunity to make requests or complaints to the prison director, prison staff and external bodies, such as prison inspectors, National Preventive Mechanisms and judicial authorities.[107] If a prisoner wishes to lodge a complaint to an inspection body, he/she should have the possibility to speak with this body freely and in full confidentiality, without the prison director or other staff being present. In turn, every request or complaint shall be replied to without delay and claims need to be investigated by competent and independent authorities.[108]

The Bangkok Rules increase the scope of rights by establishing that women prisoners who report abuse shall be provided immediate protection, support and counselling. Isolation, as a measure of protection, is not recommended as it may have an unintended punitive effect, increases the risk of self-harm and suicide and can compound the original abuse.[109]

As a result of the aforementioned gendered roles and status of women, female prisoners are less likely to complain than men and have greater difficulty mobilising the necessary courage to lodge a complaint about ill-treatment. This applies particularly to women who have a history of domestic abuse or sexual violence, belong to a minority group, or are keen to protect accompanying children. Research has shown that the gross under-reporting of gender-based violence, which is prevalent in broader society because of gendered biases and barriers, is mirrored—and sometimes even exacerbated–in places of detention.[110]

9. Conclusion

When promoting a gender-sensitive approach to women in the criminal justice system, one is often faced with two types of reactions: One group of interlocutors maintains that women are dealt with more leniently by justice systems and that women prisons have 'nicer conditions' than men; others argue that treating women differently would constitute discrimination. Neither of these views stands up to scrutiny, least of all when looking at gender perspectives of torture and other forms of ill-treatment in the context of detention.

Research on women and girls in the criminal justice system increasingly reveals that while facing many of the same risks of torture and ill-treatment as male detainees, there are additional risks. These stem not only from biological and anatomical differences, but also reflect the different gender roles based on social norms, perceptions and expectations towards women, and their different economic and social status.

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[107] Rule 56 of the Nelson Mandela Rules.
[108] *See* Rules 56-57 of the Nelson Mandela Rules on requests and complaints, and Rule 71 on investigation of cases of custodial death, serious injury and torture or other cruel, inhuman or degrading treatment or punishment.
[109] UNODC, *supra* note 10, p. 41.
[110] Baker and Rytter, *supra* note 38, p. 89. Furthermore, in a study by the Institute of Comparative Studies in Penal Sciences of Guatemala (*Instituto de Estudios Comparadas en Ciencias Penales de Guatemala*) entitled *Figures of impunity for police crime against women (Cifras de impunidad del crimen policial contra mujeres)*, research revealed that 99% of the 154 women prisoners at the Sta. Teresa pre-trial detention centre, who participated in the study, stated that they had been abused by agents or officers of the National Civil Police, of which 75% were sexual violations. However, only 43% of the women had reported the abuse, only one complaint was investigated by the Public Prosecutor's office, and not a single complaint was found to constitute torture. The research is referenced in *Caracterización de la tortura contra las mujeres privadas de libertad en Guatemala*, Lucía Morán, El Observador Judicial, 2005, p. 5-6.

Criminal justice systems are set up and run by men for a majority male population and gender stereotypes do not stop at the prison gates. As the Special Rapporteur on Torture stated in his report, such stereotypes even mean that the pain and suffering inflicted on women and girls by certain practices is often downplayed, and that there is a tendency to regard violations as ill-treatment even when they would more appropriately be identified as torture.[111]

When considering the situation of women in prison, three main areas of concern have been identified:

Firstly, women and girls are more vulnerable to ill-treatment, including sexual violence and exploitation from those who detain them as well as fellow prisoners, and face additional forms of abuse such as so-called 'virginity testing', humiliating medical examinations or the use of shackles during pregnancy and delivery.

Secondly, certain forms of ill-treatment have a particular impact on women and girls because of their backgrounds and life histories, such as being watched naked, humiliating body searches or the practice of solitary confinement, in particular during and after pregnancy.

A third set of concerns results from the discrimination of women and girls compared to male prisoners. For instance, health-care is usually set up to fit the needs of male patients, but neglects women's sexual, reproductive, preventative and mental health-care needs. Substance dependency and harm reduction programmes may only be available in male prisons. Similarly, there is often a disadvantage with regard to visits from family or friends—even though regular contact with relatives is a vital component of emotional and practical support, well-being and reintegration following release. Not only is the stigma against women prisoners even greater than for male offenders, the low number of prison facilities for women means that they are far away from family and friends, yet prison systems hardly ever seek to compensate this disadvantage.

It is only in the recent decade that the particular risks and needs of women and girls in the criminal justice system, and particularly in detention, have been recognised. The adoption of the UN Bangkok Rules has played a vital role in catalysing a mainstreaming of gender-sensitive laws and policies in the criminal justice context, and providing comprehensive guidance on measures to address gender bias.

Yet, many of the concerns raised in this article are a symptom of the continued practice of gender stereotyping and discrimination of women, which is entrenched in society as a whole. It is these multiple layers of discrimination faced by women and girls in all spheres of life that make them particularly vulnerable on their journey through the criminal justice system and during their stay in prison. As the Special Rapporteur on Torture noted in his report, a "variety of obstacles to accessing justice, including poverty and discrimination, increase the likelihood of women being detained" in the first place.[112]

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[111] U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 5, paras. 8, 9.
[112] U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 5, para. 18.

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Mothers Behind Bars: Reflecting on the Impact of Incarceration on Mothers and their Children

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Abstract

This article seeks to elaborate on the Special Rapporteur on Torture's March 2016 Report *by considering how incarcerating women who are mothers most often results in deep and lasting negative impacts on both these women and their children. These negative sequelae appear in inmates and their children—both during imprisonment and after release. The article considers the urgent need to develop and implement innovative policies and programs based on the latest research and understanding of gender and of maternity. These policies can only be as effective as their ability to directly take into account the unique needs of mothers who have been involved in crime and of their children. Meanwhile, it is critical to improve legal mechanisms to prevent the incarceration of mothers and to expedite the release of those currently incarcerated.*

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Introduction

This article takes a multidisciplinary approach by incorporating sociological, psychological, legal, and gender perspectives to understand the reality of mothers in detention. Factors such as the context in which a woman commits a crime, and whether the crime is a consequence of domestic abuse or gender based violence, must be considered in developing appropriate sentencing guidelines for female criminal defendants. In most countries, the criminal justice system does not consider parental responsibility at the time of sentencing. I argue that this is critical when considering the lasting damage that a mother's or caretaker's imprisonment can cause in her child. Aside from the considerable emotional toll of imprisonment on mothers and their children, there are other enduring negative effects on the entire social ecosystem of incarcerated women, resulting in a wholesale fragmentation of the family's social fabric.

Rather than focusing exclusively on the United States or on a particular geographic region such as Latin America, as many other reports have done, I have chosen to complement the large body of research from the United States with examples from Latin America as well as other countries and contexts.

The content is organized as follows: Section I profiles the harmful consequences of the incarceration of mothers on themselves and on their children, both during and after imprisonment. Section II draws upon the concepts of parental responsibility, the right to maternal bonding, the right to a family, the rights of children (including best interest of the child and the right to voice his or her opinion), and the importance of incorporating the Bangkok Rules in all stages of the criminal justice system process. Finally, Section III discusses the legal and administrative measures and strategies that can be applied as alternatives to imprisonment. It also considers the importance of parental responsibility as a factor to be weighed in sentencing, and the prospect of early release for female inmates who are mothers.

SECTION I: WOMEN AND MOTHERS IN THE CRIMINAL JUSTICE SYSTEM

The number of women sent to prison has progressively increased over recent decades, positioning women as the most rapidly growing prison population demographic. In the United States alone, a 2016 Vera Institute of Justice study reported that the number of women prisoners (in jails)[1] has grown from under 8,000 to nearly 110,000 between 1970 and 2014.[2] Looking at data from the United Kingdom, a similar pattern emerges. In 1995, the mid-year female prison population was 1,979. By August 2012, the number of women in prison in England and Wales stood at 4,132. Between 2000 and 2010, the women's prison population increased by 27%."[3]

With regard to the motives for incarceration in the United States, women are overwhelmingly arrested for drug-related crimes. This is also the case in Latin America. According to a Washington Office for Latin America (WOLA) report, "most [women] are arrested for low-level yet high-risk tasks (small-scale drug dealing or transporting drugs)…Their incarceration contributes little if

[1] Jails are county or municipal correctional facilities. Jails held prisoners with short prison sentences.
[2] Swavola, Elizabeth; Riley, Kristine; and Subramanian, Ram. *Overlooked: Women and Jails in an Era of Reform.* Vera Institute of Justice 2016. Print.
[3] Prison Reform Trust. *Women in Prison Briefing.* August 2012. Print.

anything to dismantling illegal drug markets or improving public security."[4] Although the "war on drugs" is a global phenomenon, it evidently adopts different forms and involves particular law enforcement and judicial structures in different regions and countries. Unique laws in each country have been passed as part of measures to combat the drug trade, which has contributed to the increasing number of prisoners in general, and female prisoners in particular. Examples of such laws include mandatory minimum laws in the US and *Law 23,737* in Argentina.[5] In the latter, the legislation had a direct effect on the female prison population. As documented in Argentina's *Procuración Penitenciaria de la Nación* Annual Report 2013[6], since the 1960s, Argentinean legislation has been increasingly focused on punitive methods to solve drug-related crimes. *Law 23,737* has increased sentences for drug-related crimes from 4 to 15 years, which has in turn increased the number of women in Argentine prisons. The 2013 Annual Report documents that 63 percent of female inmates were charged with crimes established under *Law 23,737*.[7]

In the case of Peru, 60 percent of women in prison are accused of drug-related crimes[8]. Unless they have committed a drug-related crime for the first time, female offenders do not have access to benefits like early conditional release. More recently, the number of women involved in drug-related crimes has increased in Latin America. As Carmen Antony explains, this is the result of the migration from rural areas to cities, the need to increase the family income, the rise of single-mother households, and the lack of economic opportunities, among other factors. Antony's research further chronicles that, at least in the case of Peru and elsewhere in Latin America, women are overwhelmingly prosecuted for nonviolent, minor offense, drug crimes. Rarely, if ever, does one find a female drug kingpin or cartel leader amongst the incarcerated mothers. They are in the catch-all category of illicit drug offenses, but within this category there are no subcategories or nuances. In general, they are neither violent, nor dangerous. Qualitative prison research undertaken in Peru in 2013 revealed that the female drug offenders were essentially very poor women who had become involved in the drug trade in order to survive.

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[4] Washington Office for Latin America (WOLA). *Women Drug Policies, and Incarceration. A guide for policy reform in Latin America and the Caribbean*. February 2, 2016 Print.

[5] Ministerio de Justicia y Derechos Humanos. Presidencia de la Nacion. Información Legislativa. October 1989. http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/138/texact.htm.

[6] Procuración Penitenciaria de la Nación. *La situación de los Derechos Humanos en las cárceles federales Argentinas. Annual Report 2013*. Print.

[7] Ibid.

[8] Antony, Carmen. *Panorama de la situación de las mujeres privadas de libertad en América Latina desde la perspectiva de género. Violaciones de los derechos humanos de las mujeres privadas de libertad.* Mexico, April 28 and 29, 2003.

World Prison Brief 2014[9]
World Women Imprisonment List Select Statistics

- Globally 700,000 women and girls are in prisons
- 200,000 women and girls are held in US correctional facilities, and over 100,000 in China
- The lowest numbers of women in prison correspond to Africa (2.8%)
- Female prisoners comprise between 2% and 10% of the prison population, especially in the Americas, Oceania, and Asia
- The number of women and girls in prison has increased by about 50% since the year 2000

In Latin America and elsewhere, most female inmates are incarcerated for nonviolent crimes and have a particular demographic profile. In general, incarcerated women have low levels of education, have lived in poverty in low-income neighborhoods, have a history of domestic violence, and are the primary caregivers of children, teenagers, and elderly or disabled family members.[10] Some women commit crimes to finance a drug addiction. Others enter the criminal justice system by association after being in an intimate relationship with a gang member. Laws that punish drug crimes are particularly harsh all over the world. In the US, mandatory minimums are imposed in cases of drug-related crimes and property offenses, which comprise 61 percent of crimes committed by women.[11]

Studies have estimated that a high percentage of incarcerated women are mothers; in some countries, incarcerated mothers comprise 87 percent of women prisoners.[12] Many are single mothers. The rights guaranteed to children by numerous international law standards, including the right to a family, are rarely considered by judges when sentencing a female defendant who is also a mother. Many female inmates report suffering from headaches and depression, which they attribute to being away from their children.[13] Female inmates who are mothers are forced to abruptly shift from taking care of their children every day to only seeing them sporadically, and to losing total control over their upbringing.

The period during which mothers who are criminal defendants spend in pretrial detention undoubtedly has emotional effects on both the women and their children. This is particularly acute in the case of single mothers. During this period of limbo, children often stop attending school and are spread among family members, friends, foster care, or public institutions during their mother's initial absence and until permanent arrangements are made. An unknown number of children end up living alone during their mother's detention.[14] The aforementioned WOLA report outlines the

[9] World Prison Brief. World Women Imprisonment List. 2014. For the complete list of countries see http://www.prisonstudies.org/news/more-700000-women-and-girls-are-prison-around-world-new-report-shows.
[10] Antony, Carmen. *Panorama de la situación de las mujeres privadas de libertad en America Latina desde la perspectiva de género. Violaciones de los derechos humanos de las mujeres privadas de libertad.* Mexico, April 28 and 29, 2003. Print.
[11] Swavola, Elizabeth; Riley, Kristine; and Subramanian, Ram. *Overlooked: Women and Jails in an era of reform.* Vera Institute of Justice. 2016. Print.
[12] United Nations Office on Drugs and Crime (UNODC). *Women and imprisonment.* 2nd Edition. Vienna. 2014. Print.
[13] Information gathered on field work for author's MA thesis. Female Correctional Facility "Chorrillos I," Lima, Peru. January-April 2012.
[14] See box on next page.

findings of a 2010 international prison census. One of the study's conclusions was that when a father is in prison, most children continue to be cared for by their mothers; however, when it is the mother who is incarcerated, only 10 percent of children remain in the care of their fathers. A prison census performed in São Paulo, Brazil validated this, showing that in cases where the incarcerated parent is a father, 86.9 percent of the children were assumed by the father's partner, while only 19.5 percent of the children of an incarcerated woman are under the care of their male spouses or partners. "This disparity shows how equally strict penalties for women and men end up punishing children disproportionately."[15] It is also very common for children to be left in the care of grandparents. Research undertaken in female Peruvian correctional facilities found that 43 percent of children were being cared for by their maternal grandparents.[16] Author Nell Bernstein's book, "All Alone in the World: Children of the Incarcerated" supports this notion, contending that "nearly two-thirds of children being raised by single grandmothers live in poverty."[17]

A report titled *"Lineamientos para la Implementación de las Reglas de Bangkok en el Sistema Penitenciario Peruano"* was published in 2013 by the Ombudsman Office of Peru (Defensoria del Pueblo). It surveyed 360 women from different prisons around the country, revealing that 7% of the women's minor children were living by themselves and 19% were not attending school while their mothers were serving their sentences. The complete report is available at: http://www.defensoria.gob.pe/informes-publicaciones.php

In many cases, detainees are sent to pretrial detention, where judges show little or no regard for the personal circumstances of those accused of a crime, such as the particular circumstances of women with parental responsibilities. Research has found that worrying about the well-being of children is one of the contributing factors to the high incidence of mental health problems and self-harm observed in female detainees.[18] The suffering that women experience as a result of separation from their children is extremely painful, as reflected in the recorded testimony of female inmate Ida McCray. Ms. McCray had not seen her children for a year-and-a-half, since her mother did not have sufficient financial resources to take them to the prison. Ida, in her own words, said:

> I experienced so much pain in not being able to see my children, it almost killed me. It feels like a piece of you has been torn off and you don´t know where it is. I needed to see how my children looked. Were they OK? Were they cold? Not being able to see that made me feel less human. I felt less caring, because I couldn't care for who I really wanted to care for.[19]

The following testimony is given by a former female inmate from Ecuador, who was sentenced for possession of 335 grams of a drug she could not even identify. This excerpt from a video posted by Washington Office on Latin America captures the suffering many women held in prison and their children face from the time of arrest to release.

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[15] Washington Office for Latin America (WOLA). *Women, Drug Policies, and Incarceration. A guideline for policy reform in Latin America and the Caribbean*. February 2, 2016. Print.
[16] Defensoria del Pueblo del Peru. *Lineamientos para la Implementacion de las Reglas de Bangkok en el Sistema Penitenciario Peruano.* March 2013. Print.
[17] Bernstein, Nell. *All Alone in the World. Children of the Incarcerated.* The New Press. New York. 2005. Print.
[18] Townhead, Laurel. *Pretrial detention of women and its impact on children,* Quaker United Nations Office (QUNO) February 2007. Print.
[19] Berstein, Nell. All Alone in the world. Children of the incarcerated. The New Press. New York. 2005. Print.

"My name is Analia Silva. Because of my economic situation I once dealt small packets of drugs. I was going to sell drugs because at that time I did not have work. I had to provide school supplies for my daughter, I had to pay rent, I had to eat, I had to buy her clothes, and I couldn't make ends meet. One day the police arrived, although I didn't know if they were police because they were acting with a lot of violence, so I wasn't sure if they were arresting me or they were robbing me. …They raided my house with my landlord´s permission, and the few belongings I had, were turned upside down. They let me grab a few blankets and let me take my daughter with me to the narcotics jail. And I was imprisoned with my daughter. And this friend came and took her. I was desperate because I couldn't see my friend. I couldn't have a phone call, I couldn't send notes, I couldn't see them, they couldn't see me.

It was a desperate situation because they don´t torture you physically but there is psychological torture. And that is a very powerful form of torture because you don´t know about your children, what you are going to do, where to put your things. You don´t know if you will get out. You don´t know how long the sentence will be. You don´t know anything.

I had no clue about the judicial process because the reality is that when you are poor and you are someone who hasn't had the chance to study, you are ignorant about those things. My court case was long. I wanted to know immediately how long I was going to get. If I´d be free. The hearing took place. The lawyer didn't defend me. There was no debate as I would have liked. If there had been a debate, a good defense, they wouldn't have given me such a long sentence.

He came to me 3 weeks later and said "here is your sentence, they gave you 8 years." Eight years without your children! Not being able to live with them, see them grow up, guide them, 8 years without them and 8 years them without me! Because when they sentence me, and when they sentence every woman, they do not only sentence the person who committed the crime. They sentence also their family, their children…and they do not realize that they want to get rid of crime, but they are the ones promoting it. Because if they are left alone. What can they do? Go and steal, my daughter become a prostitute, to become a drug addict, or a drug dealer. They didn't have anywhere to live because the landlord saw what happened they ask them to leave the house immediately.

And you are left tormenting yourself. Eight years' sentence, and thanks that I received a pardon I was freed. I still had 3 years 2 months of sentence left. But the pardon actually didn't change my life. I am still poor. Because in prison you are a prisoner, they don´t give you work, there is no rehabilitation. What was I given? They open the doors is what I got. They kicked me out of a small prison into a big prison like the city. What is there when you leave? Again the same system and the same society that pushes you to go back to do the same. You start asking for a place to stay. "Look I am broke, I have nothing, I have nothing to eat, my children are under the care of a government institution. I want to get them back, but I can´t afford a place... I left prison. I have a soiled CV. I am not 15 anymore, neither 24 nor 30. At my age I am finishing school. It´s never too late, they say. But I would have preferred it to have it sooner rather than so late. Perhaps, I would have had another way of life. I don´t know, no-one knows."[20]

[20] Washington Office on Latin America (WOLA). *Drugs and Prisons in Ecuador—The Human Face of Misguided Drug Laws*. July 20, 2011. YouTube 2011. Web September 2016.

Children have become the collateral damage of parental incarceration. Having a parent in prison is a highly stressful and traumatic experience for children, which is now placed on the same level as abuse, domestic violence, and divorce.[21] Children of incarcerated parents suffer from discrimination and stigmatization and are more likely to live in low-income neighborhoods where no social services are offered. "Their lives are destabilized when they are passed from household to household and when their material needs go unmet as financial resources are absorbed by the costs associated with a family member's incarceration."[22] Children experience shame, guilt, anger, and resentment and have no special counseling to avoid long-term emotional consequences. "Children of incarcerated women are among society's most vulnerable citizens and are the hidden victims of the expansion of the penal state."[23]

Europe and the United States are increasingly directing more research toward the consequences of parental incarceration. A prison charity in Scotland called "Families Outside" estimates that every year 27,000 children in the country experience the imprisonment of a parent[24]. A study by the Annie E. Casey Foundation in the US estimates that 5.1 million children have had a parent in prison at some point during their childhood. The research also found that the demographic profile of children with incarcerated parents generally includes being younger than 10 years old, living in a low-income family of color, and living with a young single mother with limited education. The study concludes that "Children with incarcerated mothers are more likely than those with incarcerated fathers to end up living with grandparents or family friends or in foster care[25]—and as a result, tend to experience greater disruption and instability."[26]

Research has found that children with incarcerated parents are at greater risk of having behavioral problems and being incarcerated themselves. In the United Kingdom, for example, it is estimated that of the 150,000 children who have a parent in prison, 75 percent will go on to commit a crime.[27] This sets the stage for a continued cycle of institutionalization, since it is likely that the mothers themselves will have spent at least part of their childhood in State care. One study shows that in the United Kingdom, over 25 percent of female inmates had been in foster care as children.[28]

According to a UNOHCHR fact sheet "Women and Detention", when primary caregivers are taken to prison, the enduring effects on their children are particularly severe in cases where maintaining contact with the prisoner is costly and difficult. Prisons are typically located in remote areas far from prisoners' homes, and children need to be accompanied by an adult to visit their mother or father, which is not always possible. Phone calls are expensive, so communication is not frequent. Even when the prison stay is short, the emotional consequences of separation can be severe

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[21] Ibid.
[22] Mauer, Marc and Chesney-Lind, Meda, Editors. *Invisible Punishment. The Collateral consequences of mass imprisonment.* 2002. Print.
[23] Ibid.
[24] Queiro, Alicia. *Innocent Victims: Life for children with mothers behind bars.* BBC. UK News, Scotland Section. October, 15, 2014. Web Septiembre 2016.
[25] According to Children and Families of the Incarcerated Fact Sheet 2014 National Resource Center on Children & Families of the Incarcerated, 2% of incarcerated fathers and 8-10% of mothers have children in foster care (these data do not include at least some persons in prison with children in kinship foster care placements).
[26] The Annie E. Casey Foundation. *A Shared Sentence. The devastating toll of parental incarceration on kids, families and communities.* April 2016. Print.
[27] United Nations Office on Drugs and Crime (UNODC). Handbook for Prison Managers and Policymakers on Women and Imprisonment. 2008. Print.
[28] Ibid.

and long-term. [29] The UNOHCHR fact sheet further explains that, "a woman living in insecure or rented accommodation is likely to lose it when she goes to prison. She is also likely to lose her job if she was employed. It is often difficult or impossible for such women to regain custody of their children."[30] Another study found that 75 percent of women in prison are mothers and two-thirds have children under the age of 18.[31] When a single mother is imprisoned, her child or children not only lose their mother but also their economic support and primary caregiver. Incarcerating the family breadwinner most often pushes families into financial disaster.[32]

Children not only suffer forced separation from their mothers during imprisonment but are also negatively impacted both at the time of arrest and at the time of release. Witnessing a mother's arrest can be an exceptionally traumatic experience for children. Most police forces around the United States have little to no training or special procedures in place for how to conduct an arrest when minors are at home. According to the 2014 Fact Sheet from the National Resource Center on Children & Families of the Incarcerated, children who witnessed a family member's arrest were 57 percent more likely to present post-traumatic stress symptoms compared with children who were not present at the moment of arrest.[33] The organization contends that even short periods in prison can seriously stress families, and the problems that arise as a consequence of incarceration do not end with release.[34]

Reentry is also a complex matter. During the years in which a mother has been incarcerated, her children have grown and may be at a different developmental age than they were when she was detained. Adding to this stress, children may not be accustomed to their mother´s presence and discipline, making her return home even more difficult. "The failure to consider or consult children of imprisoned parents at all stages of the criminal justice process—from arrest to trial to imprisonment to release to rehabilitation into the community—can result in their rights, needs, and best interests being overlooked or actively damaged."[35]

Children Living With Their Mothers In Prison

In some countries, female inmates are allowed to live with their children until they reach 3 or 4 years of age (ex. Peru and Argentina). In several countries, older children are able to live with their mothers in prison beyond that age (ex. Bolivia). In the US, most states require that a woman return to the prison complex 48 hours after giving birth, leaving her child behind. This has a tremendous emotional impact on both mother and child. Under the 1997 Adoption and Safe Families Act, "if a child is in foster care for 15 of 22 months, the state must begin proceedings to terminate parental rights."[36] More complex still, if a woman does not have a place to live after her release, she is unable to reclaim her parental rights.

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[29] Office of the United Nations High Commissioner for Human Rights (UNOHCHR). *Fact sheet: Women and detention*. September 2014. Print.
[30] United Nations Office on Drugs and Crime (UNODC). *Handbook of Women and Imprisonment*. 2014. Print.
[31] Mauer, Marc and Chesney-Lind, Meda, Editors. *Invisible Punishment. The Collateral consequences of mass imprisonment. New York: New,* 2002. Print.
[32] Ibid.
[33] National Resource Center on Children & Families of the Incarcerated. *Children and Families of the Incarcerated Fact Sheet 2014.* Print.
[34] United Nations Human Rights Office of the High Commissioner (UNHROHC). *Fact sheet: Women and Detention*. September 2014. Print.
[35] Child Rights International Network. *Children of Prisoners: The Impact of Parental Imprisonment on Children* March 2008. Print.
[36] 1997 Adoptions and Safe Families Act (H.R. 867). Public Law 105-89.United States. December 1997.

Although prisons are not designed to accommodate children, and are unsuitable for a child's healthy development, allowing children to live with their mothers in prison can benefit both mother and child. According to a Quakers United Nations Office (QUNO) report, research points to the positive benefits of very young children (preschool age) being able to stay with their mothers in prison.[37] The experience can actually enhance bonding and prevent some of the negative impacts of separation. That said, the young child ends up living in the same conditions as their incarcerated mother, conditions which are generally not suitable.[38] In a later document, QUNO encourages States to "Ensure living conditions for children residing in prison with a parent are safe, adequate for the child's physical, mental, moral and social development, including access to health and education services. This should include enabling the caregiver to spend the maximum amount of time possible with their child. To facilitate this the environment, facilities and services for children in prison should be as close as possible to that outside prison. Children should be screened by a child health specialist on entry to the prison."[39] Unfortunately, there is no evidence of such practices being performed by any State that allows children residing in prisons with their mothers.

Some prisons in Latin America and Spain have daycare centers, which offer the same educational services encountered by a facility on the outside. Most prisons, however, do not offer such services. As female inmates often lack adequate medical care or proper nutrition, their children will also be affected by these limitations, which can have serious physical and developmental consequences.

While it is true that children living with their mothers in prison are permitted to leave the facility and take a walk or stay with a family member, thus allowing them to experience the outside world, many mothers do not have a family member who can take the child and bring him/her back.[40] This means that these children will never experience the outside world while they accompany their mothers. In countries where children can only live with their mothers in prison for a few years, as in most Latin American countries, the separation process when children are required to leave can be the most heartbreaking and disturbing situation for a female inmate and her child, and the days before the child is scheduled to exit are full of distress. It is important to highlight that most women who decide to keep their children in prison with them do so because they do not have a family member who can care for the child during the period of incarceration. "During the separation, mothers may not see their children again or may lose track of them, sometimes due to the cost involved in arranging visits to the prison, other times due to the rejection of the mother by the relatives taking care of the children, or because the mother may have lost custody of her child."[41]

Maintaining Family Ties

Family visits are considered a key factor in supporting a prisoner's successful reentry. Unfortunately, there are many reasons why the visitation process poses significant challenges for both family members and prisoners. One reason is that many prisons are far from the prisoner's place of residence. Also, transportation and hotels can be expensive for most families; family mem-

[37] Robertson, Oliver. *The Impact on parental imprisonment on children*. Quakers United Nations Office (QUNO). April 2007. Print.
[38] Ibid.
[39] Laurel Townhead. Quaker United Nations Office. Briefing Paper: Children of Incarcerated Parents. International Standards and Guidance. April 2015.
[40] Defensoria del Pueblo del Peru. Lineamientos para la Implementacion de las Reglas de Bangkok en el Sistema Penitenciario Peruano. March 2013. Print.
[41] United Nations Office on Drugs and Crime (UNODC). *Women and imprisonment*. 2nd Edition. Vienna. 2014. Print.

bers sometimes need to travel by bus and spend the night at a hotel near the prison to be on time for visitation hours that are available for only a short period of time.

Women, in particular, suffer from being away from their children, from not seeing them often, or having the opportunity to talk and hug them as a way of bonding. Children in foster care or institutional care visit less often because of the difficulty in finding someone to take the child to see his or her mother on a regular basis.[42] Some families sever contact with the female inmate and do not take the children to see their mother, thinking that she could be a bad influence on them.[43] According to a Prison Policy Initiative report,[44] different states in the US tend to have different visitation policies, but overall, these policies represent unnecessary stressful situations that family members have to face every time they visit a prisoner. "With all of these unnecessary barriers, state visitation policies and practices actively discourage family members from making the trip."[45] Some mothers are hesitant to allow their children to visit to avoid the abuses committed by guards while performing corporal inspections of children.

Visitation

"A prison visiting room is, despite everything, a repository of miracles. Inside these crowded, barren spaces, parents and children build a tent of intimacy that shelters and unites them. In the hours allotted, they struggle mightily to hold on their connection and draw what they need from each other. When they succeed, they not only make a prison term more bearable for those on both sides of the wall; they allow families to sustain themselves, and pave the way for reunification."[46]

Phone calls are costly, and sometimes the number of public phones available is far fewer than the number of prisoners in each hall. In some countries, women have to work for days to earn enough money to buy a calling card. In other countries, collect calls are an immense burden on the finances of family members on the outside, even for short-duration calls.

In some prisons, video calls within the prison are organized to replace visits to avoid contraband. However, many see requiring family members to travel to the correctional facility only to prevent them from seeing their incarcerated family member in person as counterintuitive. There are also some organizations that help mothers record their voices to send their children a message or even read them a story, so the children can play it for bedtime.[47]

In some countries, visitations are held in special rooms where inmates and visitors can sit next to each other, even though displays of affection are under surveillance. In certain cases, physical contact is limited to two hugs and two kisses at the beginning and end of the visit. In other prisons, physical contact is completely prohibited and visitation rooms have windows and phones separating prisoners from the visitors. Many see this as a highly unnatural dynamic for a child who wants to hug her mother and feel secure in her arms. One example of this is a Maryland corrections department rule, which prohibits physical contact. Even young mothers are not permitted to cuddle their infants or toddlers. If prisoners or visitors do not comply with the rule they may receive a

[42] Information gathered on fieldwork for author's consultancy for International Committee for the Red Cross. Female Correctional Facility Iquitos, Peru. October 2014.
[43] Information gathered on fieldwork for author's MA thesis. Female Correctional Facility "Chorrillos I," Lima, Peru. January-April 2012.
[44] Rabuy, Bernadette and Kopf, Daniel. *Separation by bars and miles: visitation in State prisons.* Prison Policy Initiative. October 20, 2015. Print.
[45] Ibid.
[46] Bernstein, Nell. *All Alone in the World. Children of the Incarcerated*. The New Press. New York. 2005. Print.
[47] For more information go to the trailer for the documentary "Turn the page": http://vimeo.com/89919860.

ticket and corresponding sanction, such as cell restriction, phone restrictions, among other punishments.[48] As a prisoner explains in her own words:

> I understand that most people have little sympathy for prisoners. We committed crimes. We have been convicted and are receiving the punishment we deserve. But we are still women. We are still mothers. Let us hold our children and grandchildren. They have committed no crime.[49]

SECTION II: INTERNATIONAL LAW STANDARDS /THE BANGKOK RULES

This section reflects upon the international law standards that support the rights of women involved in the criminal justice system. It also considers the international standards related to the rights of their children to be cared for by their parents and to have a family. It is fundamental to reflect on all relevant international legal standards in the development of modifications to local judicial and corrections-related legislation. There is also a pressing need for carefully crafting special social programs that involve female inmates' children and their families in the rehabilitation and social reintegration process without infringing on their rights. In the case of defendants who are mothers, parental responsibility must also be considered by judges as a mitigating factor at the time of sentencing.

The specific needs of female prisoners were first recognized during the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Caracas, Venezuela in 1980. According to the Caracas Declaration, "because of the small number of women offenders throughout the world, they often do not receive the same attention and consideration as do male offenders."[50] While the Declaration calls for several recommendations, including the deinstitutionalization of women offenders that would allow them to carry out their parental responsibilities, it does not consider holding women in detention centers near their places of residence, which would facilitate visits from their children and families, to be crucial.

Following this first document, others called attention to the system's problems with the treatment of female defendants and inmates. These documents also questioned the impact of programs and policies on women involved in the criminal justice system, as well as the specific needs of women prisoners, the existence of gender bias in the administration of justice, and the need to eliminate these disparities. Contributions to international standards include:

- The Vienna Declaration[51] (Provision 11 and 12)
- The Vienna Declaration and Programme of Action[52] (point 38)
- The *Plans of Action for the Implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of twenty-first century.*[53]

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[48] The Washington Post. *I am the inmate. Why is my granddaughter being punished, too?* August 5, 2016. Web September 2016.
[49] Ibid.
[50] Adopted during the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Caracas, Venezuela August 25-September 5, 1980.
[51] Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
[52] Ibid.
[53] A/RES/56/261. 15 April 2002.

- Resolution 18/1. Supplementary rules specific to the treatment of women in detention and in custodial and non-custodial settings[54]
- The Report of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice.[55] Finally, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, commonly known as the Bangkok Rules), were approved by the General Assembly in December 2010 through Resolution A/RES/65/229.[56] The seventy rules detailed in the document function as a guide for policy makers, legislators, and criminal justice and prison authorities to establish a minimum standard of living for women prisoners and their children while in custody. The Rules also aim to reduce or avoid future encounters with the criminal justice system to the greatest degree possible. These rules complement, but do not replace, the United Nations Minimum Rules for the Treatment of Prisoners or the Minimum Rules for Non-Custodial Measures, or Tokyo Rules.

Regarding specific rules to avoid or reduce imprisonment of women who are mothers with minor children, rule 61 of the Bangkok Rules states that at the time of sentencing, it is essential that the judicial system consider "mitigating factors, such as lack of criminal history and relative non-severity and nature of the criminal conduct, in light of women's caretaking responsibilities and typical backgrounds." Discretion on the part of judicial authorities is also mentioned in rule 3.3 of the Tokyo Rules. Tokyo rule 7.1 states that during the trial and sentencing stage, judicial authorities should receive and consult a *social inquiry report* that contains objective and unbiased information and recommendations relevant to the sentencing procedure.[57] Finally, Bangkok rule 64 proposes the application of non-custodial sentences for pregnant and women with dependent children…taking into account the best interests of the child or children…"

The following law standards refer to the protection of the State of the right of having a family:

- Article 16 of the *Universal Declaration of Human Rights,*[58]
- Article 23 of the *International Covenant on Civil and Political Rights*,[59]
- Article 10 of the *International Covenant on Economic, Social and Cultural Rights*,[60]and
- Article 17 of the *American Convention on Human Rights "Pact of San Jose, Costa Rica,"*[61]

Children's rights and opinions are not considered during any criminal justice process. However, the Convention on the Rights of the Child (CRC) serves as the most relevant document for incorporating children into these processes. Article 3.1 of the CRC highlights the best interest of the child as a primary consideration by States in any circumstance. Article 9.3 talks about the right of the child to maintain personal relations and direct contact with parents in case of separation. As explained in rule 26 of the Bangkok Rules, it is essential to encourage family visits and take measures to counterbalance disadvantages faced by women who are imprisoned far from home.

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[54] Adopted during the 18th session of the Commission on Crime Prevention and Criminal Justice. 2009.
[55] A/CONF.213/18. Salvador, Brazil, 12-19 April 2010.
[56] A/RES/65/229. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). Resolution adopted by the General Assembly on 21 December 2010.
[57] United Nations Minimum Rules for the Treatment of Prisoners or the Minimum Rules for Non-Custodial Measures, adopted by General Assembly resolution 45/110 of 14 December 1990.
[58] Adopted by the United Nations General Assembly in Paris on 10 December 1948.
[59] Adopted by United Nations General Assembly on 16 December 1966.
[60] Adopted by the United Nations General Assembly on 16 December 1966.
[61] Adopted by Organization of American States in San José, Costa Rica on November 7-22, 1969.

Finally, the following document is a good example of a regional law standard that applies to women involved in the criminal justice system and their children. Article 30 of the *African Charter on the Rights and Welfare of the Child*[62] expresses that States will provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law, and shall in particular:

> A. Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
>
> B. Establish and promote measures alternative to institutional confinement for the treatment of such mothers;
>
> C. Establish ***special alternative institutions*** for holding such mothers;
>
> D. Ensure that a mother shall not be imprisoned with her child.[63]

SECTION III: JUDICIAL DISCRETION AND BEST PRACTICES[64]

In many cases, judges are impeded from applying judicial discretion because they are required by mandatory minimums to impart a prescribed sentence. Mandatory minimums establish that criminal defendants convicted of certain crimes must be punished with at least a minimum number of years in prison. According to Families Against Mandatory Minimums, "[T]hese inflexible and 'one-size-fits-all' sentencing laws may seem like a quick-fix solution for crime, but they undermine justice by preventing judges from fitting the punishment to the individual and the circumstances of their offenses."[65]

In the United States, mandatory minimums were initially applied to drug crimes, but have since been extended to apply to all felonies. These requirements affect women directly, as they translate into disproportionately long sentences for female criminal defendants with no regard for mitigating or personal circumstances, and result in the abrupt separation of families for very long periods of time. Finally, mandatory minimums have led to overcrowded female jails and prisons. To challenge this practice, US Justice Action Network worked collectively with Republican and Democratic senators to introduce a bill entitled, the Sentencing Reform and Corrections Act.[66] Once approved, this legislation (which can be applied retrospectively) will allow judges to exercise discretion. It will also expand programs to help reduce recidivism.[67]

Generally, judges do not exercise leniency towards defendants who are mothers, and children's well-being is not taken into account as a factor that could decrease sentences. Dr. McLellan, parish priest of the Scottish church and correctional commissioner of Scotland, supports the idea that judges and social workers must consider the lasting emotional damage that family separation frequently causes before sentencing a female defendant who is a mother with an extensive prison

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[62] *African Charter on the Rights and Welfare of the Child*, adopted by the African Union on November 29, 1999.
[63] Ibid.
[64] For an extended list of best practices see the document called "Experiencias de Referencia: Ejemplos de políticas de drogas innovadoras" Washington Office for Latin America (WOLA). https://www.wola.org/analysis/women-drug-policies-and-incarceration/.
[65] Families for Mandatory Minimum. What are Mandatory Minimums? http://famm.org/mandatory-minimums/ Web September 2016.
[66] US Justice Action Network. Accomplishments. Web September 2016.
[67] Palmer, Clarice. *America's Female Prison Population Up By 800% But Nobody Is Talking About It*. The Liberty Beacon. July 13, 2016. Web September 2016.

term. Instead, he argues, judges should be required to consider alternatives to incarceration such as house arrest and restorative justice, among other options. While certain countries have local laws that allow judges to impose a sentence of house arrest for pregnant women and women with minor children, the law is not automatically applied. In Argentina, Law 26,472 of the Criminal Code[68] established that house arrest should be utilized to sentence mothers with children under five years of age, or for women responsible for caring for persons with disabilities. This legislation, if applied, would reduce the number of mothers with children in prison. However, it is rarely used. Most female defendants are unaware of this law and often lack adequate legal representation, in particular legal counsel that is cognizant of this protection. This law presents a better alternative for women than Law 24,660,[69] which allows female inmates to live with minor children in prison. In all aspects of child development it is preferable for the pair to be at home rather than in a high stress environment such as a prison. Law 26,472 is also the only practical alternative for female defendants who are mothers of many children. Although this law seems to make sense in practice, it also presents disadvantages. Women need to have a house in which to live and a guardian (a family member), two requirements with which not all women can comply.[70] Furthermore, being under house arrest means that they are not allowed to go out to earn a living, which is an invitation for recidivism. Judges often display resistance to imposing these kinds of measures because they are afraid of being considered "soft" by their peers or by the public.

For women engaged in drug trafficking (most frequently referred to as human couriers or mules) it is also important to consider sentence reductions, as well as immediate transfers to their countries of residency. This reduces the number of people in local prisons, and allows them to be close to home and to their families. Women who swallow and transport small amounts of drugs from country to country risk not only their liberty, but also their health and lives. Drug traffickers search for poor women who are financially unstable. According to an article published by The Guardian, the ideal profile for drug mules are, "poor women, with low education... single mothers that turned into mules in desperation…vulnerable men and women from third world countries whose fates are totally disregarded by those at the top of the drug supply chain."[71] Once they are detained, drug mules receive discriminatory and harsh physical treatment and are exposed to brutal procedures to extract the drugs from their bodies.[72] A 2012 guideline for UK courts recommends a less punitive approach for "drug mule" sentences, recognizing that most of those used to transport drugs between countries are "women who have been coerced or exploited by organized criminals."[73]

Some countries, such as Peru, Spain, and Argentina, regulate the expulsion of alleged human couriers. Article 89 of the Spanish Criminal Code[74] establishes the expulsion or deportation to a person's country of origin instead of deprivation of liberty. In Argentina, article 64 of the Migration Law[75] establishes that a prisoner is eligible for deportation after having served half of his or her

[68] Law 26,472. Article 1. Ejecucion de la pena privativa de la libertad. Ministerio de Justicia y Derechos Humanos. January 12, 2009.
[69] Law 24,660. Article 195. Ejecucion de la pena privativa de la libertad. Ministerio de Justicia y Derechos Humanos. July 8, 1996.
[70] Most women are discriminated by their own family members after an arrest and during the detention.
[71] Heaven, Olga. *Long sentences for drug mules were never going to act as a deterrent.* The Guardian. May, 14, 2009. Web September 2016.
[72] Antony, Carmen, *Mujeres invisibles: las cárceles femeninas en América Latina.* Rev. Nueva Sociedad 208, March-April 2007. Print.
[73] Travis, Alan. *Drug guidelines suggest lighter sentences for social dealers*. The Guardian. 23 January 2012. Web September 2016.
[74] Codigo Penal y Legislacion Complementaria. Ministerio de Justicia. Spain, November 3, 2016.
[75] Law 25,871. Migration Law. Ministerio de Justicia y Derechos Humanos. January 20, 2004.

sentence.[76] To ease overcrowding, Peru has engaged in twenty-one bilateral agreements with several countries to transfer foreigners who end up in Peruvian prisons for crimes committed in Peru, most frequently for drug-related offenses, back to their countries of residence. Under the Criminal Procedure Code,[77] inmates can request to serve the remainder of their sentences in their home countries.

Another good example of a program targeting women in prison is a New York-based program created by the Women's Prison Association (WPA) entitled JusticeHome. WPA is a community-based program for women sentenced to a minimum of six months imprisonment.

According to WPA's description on alternatives to incarceration:

> WPA staff assesses a woman's specific risks and strengths, promotes healthy coping strategies to address histories of trauma, and employs evidence-based cognitive behavioral group interventions. The program features additional opportunities to benefit families and communities including intensive home-based interventions, ongoing assessments of child and family well-being, and the promotion of positive parenting skills. All of these efforts lead to increased family stability and cost much less than sending a woman to prison.[78]

Alternatives To Incarceration and the Path to the Reduction of Women Involved in the Criminal Justice System

According to the Handbook on Women and Imprisonment, because women are primarily involved in criminal activities that are non-violent, and pose minimal or no risk of harm to society, they are the optimal candidates for non-custodial sanctions and measures.[79] Women are more frequently afflicted with mental illness and addictions than their male counterparts, and are more often victims of domestic abuse.[80] Thus, diverting them to suitable services is key to addressing their needs and to avoiding the significantly damaging consequences of spending extensive periods of time in prison. Options of this type may include the following:

- Absolute or conditional discharge
- Verbal sanctions
- Community service order
- Compensation orders or restitution to victims
- Arbitrated settlements
- Victim offender mediation
- Family group conference
- Another restorative process, such as sentencing circles[81]

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[76] Washington Office for Latin America (WOLA). *Experiencias de Referencia: Ejemplos de políticas de drogas innovadoras* 2016.Web September 2016.
[77] Decreto Legislativo 654, Titulo Preliminar articulo VII. Peru. August 2nd, 1991.
[78] Women´s Prison Association. *Alternative to Incarceration.* http://www.wpaonline.org/services/alternative-to-incarceration. Web September 2016.
[79] United Nations Office on Drugs and Crime (UNODC). *Handbook on Women and Imprisonment.* 2014. Print.
[80] Ibid.
[81] Ibid.

Likewise, rule 8 of the Tokyo Rules sets forth a number of sentencing measures on which judicial authorities can rely, including: conditional discharge, status penalties, economic sanctions and monetary penalties, confiscation or expropriation orders, suspended or deferred sentences, probation and judicial supervision, referral to an attendance center, house arrest, and any other mode of non-institutional treatment. Rule 9 provides post-sentencing recommendations, including furlough and halfway houses, work or education release, various forms of parole, remission, and pardon.

Alternatives to imprisonment have been applied to juveniles over the past decades with great success. Restorative justice is one example of this. Whereas retributive justice measures how much punishment is inflicted, restorative justice concentrates on how to repair the harm done and how much violence can be prevented by imposing effective reintegration processes for teen infractors.[82]

An example of a restorative approach is described in a report by the Special Representative of the Secretary General on Violence against Children[83]. It details an example from the implementation of the Family and Community Group Conferencing in Bangkok. A 14-year-old boy caught with an electrical wire, which he had stolen from a house in which he worked as a construction worker, was sentenced to an innovative alternative to incarceration: A community service regimen of his choice in the Bangkok suburb where he lives.[84] Prior to this government program directed at rehabilitating first time offenders, the boy would have been charged, sentenced for theft, and sent to a juvenile detention center. Instead, he avoided the criminal justice system.

Another example of imprisonment alternatives is the use of diversion programs. In the state of Florida, Judge David Gooding and child advocate groups helped launch a Girls Court, which tries to divert girls from the criminal justice system.[85] A 2013 study found that 31percent of girls in Florida's Juvenile Justice System have experienced sexual abuse (4 times the rate for boys) and 41 percent of girls were physically abused.[86] The Girls Court, through its multidisciplinary team (probation officers and counselors), looks to identify the root causes of the adolescent girls' behavior and provide services for them and their families, rather than requiring them to serve a sentence in a prison or a detention center.

Regarding the various approaches to reduce the female prison population, particularly for inmates sentenced for drug-related crimes, the WOLA Report[87] describes the importance of *decriminalization* (removing a conduct or certain activity from the domain of criminal law), and *depenalization* (eliminating privation of liberty as a punishment). The report recommends using diversion, which is an essential approach for those who suffer mental health problems, drug addiction, and violence in any form, to pursue the proper treatment. It is also fundamental to use any and all legal mechanisms available to avoid long-term sentences (i.e., pardons, amnesties, or reduced sentences).

As detailed in the Vera Institute of Justice report discussed above, reducing the number of women in prison is not an easy task. It is also a task that does not depend on a single solution, particularly because the problem is the result of decisions made by "autonomous decision-makers at each phase of the justice system whose actions can be difficult to align in pursuit of reduced

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[82] Special Representative of the Secretary General on violence against children. *Promoting Restorative Justice for Children.* 2013. Print.
[83] Ibid.
[84] Ibid.
[85] Thompson, Megan. *'I am beautiful': Meet once incarcerated girls who turned their lives around. Public Broadcast Service. September 12, 2015.* Web September 2016.
[86] Office of Juvenile Justice and Delinquency Prevention. *Journal of Juvenile.* Spring 2014. Print.
[87] Washington Office for Latin America (WOLA). *Women, Drug Policies and Incarceration. A Guide for Policy Reform in Latin America and the Caribbean*. February 2, 2016. Print.

jail incarceration."[88] That said, what can be changed, at all points in the process and for all decision makers, is including a gender-sensitive approach during all points of contact between women and criminal justice authorities, including police, judges, prosecutors, and correctional authorities. While it may seem unattainable or even utopian, this also means that all future public policies involving female criminal defendants must be developed using a gender-sensitive perspective.

CONCLUSION

It is urgent to start considering women involved in the criminal justice system and their children as vulnerable groups in need of social protection. High incarceration rates mean that children of incarcerated parents are left carrying a two-fold burden of both crime and punishment. When strategically examining the overwhelming evidence of the negative impact that incarceration has on both mothers and children, it is crucial to effectuate all possible mechanisms to respect the parental responsibilities of female criminal defendants. It is also critical to respect the rights of children to remain in their mother's care. Social innovation strategies must be developed for more humane and effective ways of dealing with women within the criminal justice system. It is only with the development and implementation of innovative and gender-sensitive alternatives to traditional criminal justice approaches that the children of imprisoned mothers will avoid marginalization and have a chance at a brighter future. As researcher Nell Bernstein concludes in her book on children of the incarcerated, "The parent-child bond, beyond its private importance to the individuals who share it, is a social asset that must be valued and preserved."[89]

[88] Swavola, Elizabeth; Riley, Kristine; and Subramanian, Ram. *Overlooked: Women and Jails in an Era of Reform*. Vera Institute of Justice. August 2016. Print.
[89] Berstein, Nell. All Alone in the world. Children of the incarcerated. The New Press. New York. 2005. Print.

Making the Global Local, and the Local Global: Lessons Learned

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Abstract

The articles in this section illustrate the ways in which criminal justice systems across local, national and international fora impose disproportionately harsh punishments on historically marginalized populations—particularly on women, girls and LGBTI people. These articles emphasize that a comprehensive definition of torture must recognize crimes disproportionately affecting women, girls and LGBTI populations, as gendered punishment philosophies and that racial identities have a multiplier effect on the torture these populations experience. Gendered forms of punishment—including acts of sexual assault, physical and sexual abuse, the denial of medical care and the maltreatment of pregnant women in detention—seek to enforce morality constructs that treat women as objects rather than actors. Those morality constructs existed first in the home but were later enforced by communities and the State.[1] International fora must recognize gendered forms of punishment as crimes that rise to the level of torture.

Historically, States viewed acts of torture committed in the private sphere as outside the realm of state prevention and legal action, further perpetuating harmful gender stereotypes and a culture of state impunity.[2] Only within the past fifteen years, and with the groundbreaking work of feminist-activists like Rhonda Copelon, has international law begun to recognize rape as a form of torture.[3] Today, the Nelson Mandela Rules and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders recognize rape and other gendered acts of violence as crimes and provide guidance for the treatment of women in vulnerable and hostile spaces.[4] The articles in this section theorize and describe the ways that the definition of torture should include gendered forms of punishment, and how civil society and institutions can

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1 Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 1091 Cardozo L. R. 35 (2014).

2 *Lenahan (Gonzales) v. United States,* Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11 (2011).

3 Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum . Hum . Rts. L. R. 291 (1994); Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No.* 2, 11 N.Y. City L. R. 229 (2008); *see also* Catherine A. MacKinnon, Are Wom en Hum an? And other International Dialogues (2006).

4 General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution adopted by the General Assembly*, U.N. Doc. A/RES/70/175 (Jan. 8, 2016), http://www.refworld.org/docid/5698a3a44.html; General Assembly, *United Nations Rules for the Treatment of Women Prisoners and*

glean lessons from both global and local legal and regulatory frameworks to implement solutions that fully realize the human rights of all people.

Sexual Assault and Rape in Custody in the United States: Making the Local Global

In 2003, the United States Congress enacted the Prison Rape Elimination ACT (PREA) which established the Prison Rape Elimination Act Commission (PREA Commission).[5] Congress charged the PREA Commission with developing a set of standards to prevent and eliminate all forms of sexual abuse in custodial settings.[6] In addition to establishing the PREA Commission, PREA required the Bureau of Justice Statistics (BJS) to collect data on the incidence and prevalence of sexual abuse in custody.[7] PREA also required the establishment of a Review Panel on Prison Rape.[8] Finally, PREA required the U.S. Department of Justice to audit one-third of all correctional facilities each year and to publish the results of those audits.[9] An agency's failure to pass the audit or submit an assurance with concrete steps for coming into compliance with the PREA standards results in loss of federal funds.[10] After submitting assurances, agencies must commit the at-risk funds to coming into compliance with PREA's minimum standards.[11] For example, agencies who do not have confidential reporting mechanisms must use the funds they would otherwise lose to create those mechanisms. If agencies have not provided training for staff, volunteers, contractors or prisoners, they must use the funds they would otherwise lose to develop and provide training. Additionally, agencies must provide proof that they have remedied their deficiencies.

PREA's accountability measures and states' efforts to comply with the standards—particularly those related to investigation of complaints, protection of complainants, treatment of survivors and employment and criminal sanctions for abusers—have the greatest chance of changing the culture of abuse of women that exists in U.S. prisons, jails and juvenile facilities. Consistent with the conclusions of the articles in this section, international human rights law must recognize gendered forms of punishments as crimes amounting to torture. Consequently, human rights law must require States' due diligence, including private reporting mechanisms that respect the inherent dignity of those involved.[12] Additionally, States' mechanisms must employ a gender and race analysis to account for the full spectrum of abuse that take place, including: male-on-male and female-on-

Non-Custodial Measures for Women Offenders (the Bangkok Rules): note by the Secretariat, U.N. Doc. A/C.3/65/L.5 (Oct. 6, 2010), http://www.refworld.org/docid/4dcbb0ae2.html.

5 Brenda V. Smith, The Prison Rape Elimination Act: Implementation and Unresolved Issues (Crim. L Brief, Washington College of Law Res. Paper No. 2008-49 (2008)).

6 National Prison Rape Elimination Commission, Report v (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.

7 *See* Bureau of Justice Statistics, Prison Rape Elimination Act (Sexual Victimization In Correctional Facilities), https://www.bjs.gov/index.cfm?ty=tp&tid=20.

8 *See e.g.* Allen Beck & Timothy Hughes, Bureau of Justice Statistics, Sexual Violence Reported by Correctional Authorities, 2004 (2005), www.bjs.gov/content/pub/pdf/svrca04.pdf.

9 *See* National PREA Resource Center, https://www.prearesourcecenter.org/audit.

10 *See e.g.* Ryan Howes, *Arizona misses deadline on curbing prison rapes, federal funds at risk*, Tucson Local Media (June 10, 2014), http://www.tucsonlocalmedia.com/news/article_4b40c9e4-f0d1-11e3-8641-0019bb2963f4.html; U.S. Dep't of Justice, *Department of Justice Announces 48 States and Territories Have Committed to Ending Prison Rape: 2003 Law Requires States to Take Certain Steps to Reduce Sexual Assaults of Prisoners or Else Forfeit Portion of Federal Grant Funding* (May 28, 2014), https://www.justice.gov/opa/pr/department-justice-announces-48-states-and-territories-have-committed-ending-prison-rape.

11 *See* National PREA Resource Center, https://www.prearesourcecenter.org/audit.

12 *See* Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 11, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016)[hereinafter A/HRC/31/57].

female abuse; abuses of LGBTI people in custody; and their disproportionate impact of communities of color.[13]

While at the same time, States are attentive to the gender dimension of torture in custodial settings, they must also account for abuses committed by female staff.[14] PREA data collections demonstrate that female staff play a significant role in abuse of men and boys in custody.[15] In his report to the Human Rights Council, the Special Rapporteur on Torture identified that "lesbian, gay, bisexual and transgender detainees report higher rates of violence than the general population".[16] The Special Rapporteur also noted that "while women, girls, lesbian, gay, bisexual and transgender persons, sexual minorities and gender-non-conforming individuals are the predominant targets, men and boys can also be victims of gender-based violence, including sexual violence stemming from socially determined roles and expectations".[17]

For meaningful change to occur, the domestic context must inform global, normative standards. At the same time, local and national actors must heed the global standard and guidance from the Special Rapporteur. International jurisprudence has largely evolved to account for crimes that affect men, resulting in failures to sufficiently examine structures that undermine women's human rights.[18] The articles in this section advance two propositions: (1) that instances of sexual assault and rape that occur in detention can only be identified as torture if a gender-based analysis which accounts for the disproportionate effect on women, girls and children is present and (2) that women can be both subjects and perpetrators of violence in detention. The formal definition of torture must include these crimes, as the Special Rapporteur advocates. A 2007 report from the American Correctional Association, for instance, indicated that women now account for thirty-seven percent of the United States correctional workforce, or approximately 144,274 employees. Yet, BJS reported that female staff committed sixty-one percent of the sexual misconduct and twenty-one percent of the instances of sexual harassment reported.[19] State surveys in the U.S. produced similar results, finding that female staff members perpetrated eighty percent of all incidents of staff sexual misconduct.[20]

To fully account for gender-based crimes in detention, a new analytical paradigm centering on a gendered analysis would account for disproportionate rates both in terms of survivors and perpe-

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[13] Fed. Register 79, No. 45 at 13146 (Mar. 7, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-03-07/html/2014-04675.htm.

[14] Anupama Selvam, Bonnie Doesn't Need a Clyde: Understanding Narratives about Women Who Commit Violence and their Effect on the Perception of Women War Criminals (May 15, 2017) (unpublished paper, Washington College of Law) (on file with author).

[15] Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers' Sexual Interactions with Men and Boys in Custody*, 59 UCLA L. Rev. 1690 (2012).

[16] A/HRC/31/57, *supra* note 12, at ¶ 5.

[17] *Id.; See e.g.* Laura Burke, *A Woman's Touch*, Tex. Observer (Sept. 1, 2010), http://www.texasobserver.org/a-womans-touch/ (cataloging multiple cases of female correctional workers sexually abusing and having forced sex with male youth inmates); Elizabeth Harrington, *Ex-Employee at State Juvenile Detention Center Charged with Sexual Battery of a Minor Housed There*, W. Palm Beach TV (Aug. 29, 2014), http://www.wptv.com/news/region-okeechobee-county/employee-at-state-juvenile-detentioncenter-charged-with-sexual-battery-of-a-minor-housed-there (describing the sexual battery of a seventeen-year-old male inmate by a thirty-one-year-old female Youth Care Worker); Nate Rau, *Sex Abuse Allegations Plague TN Juvenile Detention Center*, Tennessean (Feb. 8, 2010), http://archive.tennessean.com/article/20100207/NEWS0205/2070362/Sexabuse-allegations-plague-TN-juvenile-detention-center (detailing a case in which a female security guard at Woodland Hills Youth Development Center solicited oral sex from a fifteen-year-old male inmate).

[18] A/HRC/31/57, *supra* note 12, at ¶ 5.

[19] J.B. Morton, *ACA & Women Working in Corrections*, The Free Library (Oct. 1, 2005).

[20] *See* Bureau of Justice Statistics, Data Collection: National Crime Victimization Survey (NCVS), https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245.

trators. That is, a gendered analysis would account for the roles of all actors in order to ensure states do not discount crimes perpetrated by women as failing to amount to torture, and that the international normative definition of torture includes crimes perpetrated both by and against women. This paradigm would ensure that women are neither above or beneath the reach of the law. This would ensure that crimes committed against and by women are not unreported, underreported or unseen for what they are: torture and ill-treatment.

Pregnancy in Detention: Making Global Local

As the articles in this section describe, many women and girls conceive while in custody[21], enter custodial settings during their pregnancies[22] or are imprisoned because they are pregnant.[23] Whatever path brings these pregnant and parenting women and girls into custody, the potential for abuse is great and encompasses conduct that constitutes torture including denial of medical treatment,[24] forced abortion,[25] sterilization,[26] shackling during pregnancy and delivery[27] and the arbitrary detention of women following childbirth because they are unable to pay medical fees[28] worldwide. Additionally, pregnancies that occur while a woman is in detention also suggest that woman are at higher risk for human immunodeficiency (HIV) and other sexually transmitted diseases.[29] In the United States, the Supreme Court established the right to be free from "cruel and unusual punishment" over 20 years ago in a case that challenged the sexual abuse of Dee Farmer, a transgender woman in federal custody.[30] Since then, lower courts have applied this reasoning to the denial of medical care to pregnant women, sexual abuse in custody, forced sterilization and the shackling of pregnant women during labor and delivery.[31] As the articles in this section illustrate, in order to realize women's full reproductive autonomy States must recognize that the specific abuses that pregnant women endure while in custody are violations of constitutional law and human rights.[32]

The number of pregnant inmates in Federal and state prisons in the U.S. alone is substantial. A 2015 BJS Special Report estimated that among female prisoners, four percent of the State and

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[21] *See e.g.* Meghan Lane, *Woman gets pregnant while in jail*, WWLP-22 News (Jan. 31, 2015), http://wwlp.com/2015/01/31/woman-gets-pregnant-in-jail/.

[22] *See* National Women's Law Center, Mothers Behind Bars: a state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children (2010), https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf.

[23] *See* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 10 Cal. L. R. 4 (2014), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4249&context=californialawreview.

[24] A/HRC/31/57 *supra* note 12, at ¶ 42.

[25] *Id.* at ¶¶ 43-45.

[26] *Id.* at ¶ 45.

[27] *See* American Civil Liberties Union National Prison Project, The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers, https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf.

[28] *See* Evelyne Opondo, *When Does a Hospital Become a Jail? When You Can't Afford the Bill*, Open Soc'y Found. (Oct. 29, 2015), https://www.opensocietyfoundations.org/voices/when-does-hospital-become-jail-when-you-can-t-afford-bill.

[29] *See e.g.* Stanford U., *Machismo Sexual Identity*, https://web.stanford.edu/group/womenscourage/Repro_Latin/ekobash_HIVmachismo_Latin.html; Robert E. Fullilove, *Mass Incarceration in the United States and HIV/AIDS: Cause and Effect?*, 9 Ohio State J. of Crim . L. 1 (2011); United Nations Office on Drugs and Crime, Women and HIV in prison settings (2008), https://www.unodc.org/documents/hiv-aids/Women_in_prisons.pdf.

[30] U.S. Const., amend VIII; *Farmer v. Brennan*, 511 U.S. 825 (1994).

[31] *See e.g. Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563 (6th Cir. 2013), http://www.opn.ca6.uscourts.gov/opinions.pdf/13a0059p-06.pdf.

[32] *See* Amnesty Int'l, Women in Custody, http://www.amnestyusa.org/pdf/custodyissues.pdf.

three percent of the Federal inmates reported being pregnant at the time of admission—of those prisoners, only half reported receiving any kind of pregnancy care.[33] Because the United States does not track or report pregnancies resulting from relationships or assault by prison personnel or volunteers, the estimated percentage of pregnant inmates in the United States federal and states prison system is likely higher than the numbers reported. These data also do not include conception of female correctional workers who engage in sexual abuse or relationships with men and boys in custody.[34]

In addition to sexual abuse being underreported, the standard of liability under the Eighth Amendment to the U.S. Constitution is relatively low. For example, the 8th Amendment of the U.S. Constitution requires that state actors " know or should have known" that conduct is likely to result in serious harm to a person in custody.[35] The U.S. standards lag behind international human rights law in its guarantee of the right to health and safety in that the U.S. Constitution requires correctional officials provide medical care only for "serious" medical needs. With the number of women in State and Federal prisons expected to keep rising, the national standard must mirror the global standard that dictates that the denial of medical treatment, without reference to the intentionality of the perpetrator, is a violation of human rights law, disproportionately harming pregnant women in custody.

As the articles in this section show, international law is increasingly recognizing factors that affect women's experiences of ill-treatment in custody during pregnancy, including denial of access to timely prenatal testing and treatment in custody and the right to be free from the practice of shackling or otherwise restraining female prisoners during pregnancy and childbirth. The articles in this section skillfully illustrate that activists, scholars, academics and government actors seeking to instill normative change and structural change must look to the local, national and global to glean lessons in change and because each one reinforces the other.

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[33] Laura M. Maruschak & Marcus Berzofsky, Bureau of Justice Statistics, Special Report: Medical Problems of State and Federal Prisoners and Jail Inmates 2011-12, (2015), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf.

[34] *See Four female prison guards impregnated by same inmate*, CBS News (Apr. 24, 2013), http://www.cbsnews.com/news/four-female-prison-guards-impregnated-by-same-inmate/; Mosi Secret, *Year in Prison for Ex-Guard Who Had Child With Inmate*, N.Y. Times (Feb. 19, 2014), https://www.nytimes.com/2014/02/20/nyregion/year-in-jail-for-ex-guard-who-had-child-with-an-inmate.html.

[35] Officials may be held liable under state or federal tort claims in certain instances. *See e.g. Millbrook v. United States*, 569 U.S. 50 (2013).

IV.
Healthcare and Reproductive Rights

Reproductive Rights Violations as Torture or Ill-Treatment

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Abstract

International and regional human rights mechanisms have established a robust body of law recognizing that infringements on women's personal integrity, autonomy, and health related to their reproductive capacities can amount to torture or cruel, inhuman or degrading treatment. This article explores a number of key developments in the interpretation of ill-treatment and its application to States' human rights obligations concerning women's reproductive rights—advancements that are critical for maximizing women and girls' ability to seek accountability and redress for such human rights violations. This article further provides an in-depth look at two specific areas in which the jurisprudence on ill-treatment has evolved considerably: the mistreatment and abuse of women in maternal health settings, and the denial of safe and legal abortion services. Finally, the article concludes by identifying areas that have the potential to improve how reproductive rights violations amounting to ill-treatment are addressed and remediated.

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I. Introduction

In seeking accountability and redress for violations of women's reproductive rights, human rights advocates have turned to international and regional human rights mechanisms. These mechanisms have established a robust body of law recognizing that infringements on women's personal integrity, autonomy, and health related to their reproductive capacities can amount to torture or cruel, inhuman or degrading treatment (hereinafter ill-treatment).

As a result, human rights bodies and experts have recognized forced and coerced sterilization as a violation of the right to be free from ill-treatment.[1] Similarly, human rights courts and quasi-judicial bodies have found that denying women and girls abortion services in a number of circumstances, including where their life or health is at risk, where pregnancy results from rape, and in cases of fatal fetal impairments, amounts to ill-treatment.[2] More recently, human rights bodies have recognized physical, verbal, and mental abuse of women in the context of maternal health care as a form of ill-treatment—a widespread human rights violation that has been documented globally, and can include the shackling of pregnant women during delivery, detention of women unable to pay their medical bills, the denial of anesthesia, and prolonged delays in administering care.[3]

This article describes a number of key developments in the interpretation of ill-treatment and its application to States' human rights obligations concerning women's reproductive rights. Furthermore, it provides an in-depth look at two specific areas in which the jurisprudence on ill-treatment has evolved considerably: the mistreatment and abuse of women receiving maternal health care, and the denial of safe and legal abortion services. Finally, the article concludes by identifying areas that have the potential to improve how reproductive rights violations amounting to ill-treatment are addressed and remediated.

II. Gender, Reproductive Rights, and the Ill-Treatment Framework

As the Special Rapporteur on Torture's report on gender perspectives recognizes, an interpretation of the prohibition on ill-treatment has "evolved largely in response to practices and situations that disproportionately affected men," resulting in jurisprudence that has been slow to account for entrenched gender discrimination, harmful gender stereotypes, and discriminatory power structures that undermine respect for women's human rights.[4] In the last two decades there

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[1] *See, e.g.,* V.C. v. Slovakia, No. 18968/07 Eur. Ct. H.R. (2012); *See also* Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 45, U.N. Doc. A/HRC/31/57 (Jan. 2, 2016) (Juan E. Mendez).

[2] *See* K.L. v. Peru, Human Rights Committee, Communication No. 1153/2003, para. 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., paras. 158-159 (2008); Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, para. 7.6, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

[3] Committee against Torture (CAT Committee), *Concluding observations on the third to fifth periodic reports of United States*, para. 21, U.N. Doc. CAT/C/USA/CO/3-5 (2014); *see also* CAT Committee, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture: United States of America,* para. 33, U.N. Doc CAT/C/USA/CO/2 (2006). *See also* Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 46, U.N. Doc. A/HRC/31/57 (Jan. 2, 2016) (Juan E. Mendez).

[4] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 5, U.N. Doc. A/HRC/31/57 (Jan. 2, 2016) (Juan E. Mendez).

has been significant progress in applying the framework to women's experiences of ill-treatment, especially in the area of violence against women and, more recently, in the reproductive rights sphere. However, the distinct differences in the human rights violations women more frequently endure, particularly in relation to their reproductive rights, have posed challenges in establishing them as forms of ill-treatment. This section examines some of these challenges and demonstrates how the interpretation of the ill-treatment framework has evolved to increasingly recognize these violations, including by undertaking a more robust gender analysis.

A. State Responsibility to Prevent and Redress Ill-Treatment

Where women face ill-treatment in the reproductive rights sphere, the State's responsibility is often engaged by the application of restrictive and discriminatory laws or policies, actions by medical professionals who fail to meet ethical standards, by the failure to appropriately regulate private healthcare settings, or the failure to sanction violence by private individuals, such as a spouse or intimate partner.

Restrictive laws and policies that either deny women reproductive autonomy or fail to protect their physical integrity are often the root cause of reproductive rights violations. For example, human rights bodies have repeatedly expressed concerns that restrictive abortion laws expose women to violations of the right to be free from ill-treatment, and have called for the decriminalization of abortion and reform of restrictive laws.[5] Recent jurisprudence builds on this body of soft law, recognizing that prohibiting and criminalizing abortion can cause women harm amounting to ill-treatment.[6] Furthermore, human rights bodies have, in multiple rulings, held that sterilizing a woman without her informed consent is grossly disrespectful of human dignity and freedom, including the right to freely make decisions about one's reproductive health.[7]

Human rights jurisprudence has also started to recognize medical professionals' role in violations of women's reproductive rights. For example, in the case of *V.C. v. Slovakia*, which addressed forced sterilization of a Roma woman, the European Court of Human Rights (European Court) recognized that the medical staff "displayed gross disregard for [the petitioner's] right to autonomy and choice as a patient" when doctors sterilized V.C. without her full and informed consent.[8] This behavior lies in contrast to the historical view of health care providers as benevolent actors, a view based on their ethical duty to "do no harm" to patients, or to their standing in society. Recognition that in certain situations health care providers can perpetuate human rights violations is critical in establishing State accountability for a range of reproductive rights violations.

Human right bodies have also established State responsibility where the State knew or should have known about acts of ill-treatment by non-State actors and failed to exercise due diligence in addressing and remedying these violations.[9] Indeed, the Committee against Torture has noted that State "indifference or inaction provides a form of encouragement and/or de facto permission," for individuals committing acts of ill-treatment, which may include acts of gender-based

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[5] *See, e.g.*, Committee Against Torture, *Concluding Observations: Ireland*, para. 26, U.N. Doc. CAT/C/IRL/CO/1 (2011); Committee Against Torture, *Concluding Observations: Peru*, para. 15, U.N. Doc. CAT/C/PER/CO/5-6 (2013).

[6] Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, para. 7.4, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

[7] V.C. v. Slovakia, No. 18968/07 Eur. Ct. H.R., para. 78 (2012).

[8] V.C. v. Slovakia, No. 18968/07 Eur. Ct. H.R., para. 119 (2012).

[9] CAT Committee, *General Comment No. 2: Implementation of article 2 by States parties*, para. 18, U.N. Doc. CAT/C/GC/2 (2008).

violence.[10] Recognition of States' due diligence obligation under the ill-treatment framework is particularly important in the context of reproductive rights violations, where perpetrators may be private actors, requiring the State to exercise vigilance in both regulating and sanctioning private actors' conduct.

B. Forms of Pain and Suffering

Although the Convention against Torture explicitly recognizes that ill-treatment can be caused by both severe physical and mental pain and suffering, human rights bodies have been slow to fully recognize and appreciate mental pain or suffering as constituting ill-treatment. The tendency to undervalue these harms and consider them secondary to physical injuries is evident in human rights jurisprudence, although there have been significant steps towards fuller recognition and appreciation of mental harms.

In seeking accountability for violations that predominately result in severe mental suffering, petitioners may face significant challenges in demonstrating their pain and suffering to the court. In contrast to physical injuries, mental harm may go untreated by health care professionals, seem more subjective, and may be less visible. Misunderstandings about, or lack of sensitization to, mental health and trauma may further lead courts to undervalue such injuries. Reproductive rights advocates have largely been able to overcome this obstacle using expert opinions and testimony from mental health professionals in support of petitioners' claims.

In effectively adjudicating reproductive rights violations, it is necessary for courts to understand and assess pain and suffering in both the short and long term, in order to fully appreciate the impacts that certain acts can have on women's physical and mental well-being. Courts have already taken some significant steps in this regard. For example, the European Court has recognized the life-long effects of forced sterilization on a woman's physical and mental well-being and how, years later, forced sterilization can impact a woman's marriage and family and cause her lasting suffering.[11]

Further, acts of humiliation in the reproductive rights sphere, such as where women's confidentiality is intentionally violated when seeking post-abortion care or where women are shamed and mistreated during delivery, are sometimes employed as a form of punishment and may amount to ill-treatment.[12] As discussed *infra*, the Kenyan High Court, in a recent decision, recognized that humiliating treatment of women in maternal health settings amounted to ill-treatment.

C. Recognizing Individual Circumstances, Inequalities, and Marginalization

Assessing whether the threshold for ill-treatment has been reached requires a context-specific approach that takes into account individual characteristics and circumstances. In this regard, the assessment considers a range of factors such as duration and nature of the treatment and physical and mental impacts, as well as individualized factors, such as the person's sex/gender, age, and

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[10] CAT Committee, *General Comment No. 2: Implementation of article 2 by States parties*, para. 18, U.N. Doc. CAT/C/GC/2 (2008).

[11] V.C. v. Slovakia, No. 18968/07 Eur. Ct. H.R., para. 118 (2012).

[12] *See* Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 35, U.N. Doc. E/CN.4/2006/6 (Dec. 23 2005) (Manfred Nowak).

health status.[13] This approach is critical for understanding the different types and impacts of pain and suffering women are subjected to in the reproductive rights sphere.

Human rights bodies recognize that certain marginalized groups may be at a heightened risk of ill-treatment and that States have particular obligations to protect such groups.[14] They have repeatedly affirmed that women who are pregnant or have recently given birth are often in situations of heightened vulnerability and therefore require greater protection.[15] Similarly, these bodies have begun to acknowledge how socialized gender roles and harmful gender stereotypes can affect women's experiences of pain and suffering. For example, the Inter-American Court of Human Rights recognized that the gender norms associating women's fertility with their social value resulted in women being disproportionately harmed by a ban on in vitro fertilization.[16]

These advancements in the application of the ill-treatment framework have influenced the development of jurisprudence on a range of reproductive rights issues, including in relation to mistreatment and abuse in maternal heath settings, and access to safe and legal abortion services, as discussed below.

III. Mistreatment and Abuse in Maternal Health Settings

Mistreatment and abuse of women in maternal health settings encompass a broad range of acts, including outright denial of prenatal care due to women's economic, immigration, or health status; delayed and neglectful care during labor, which leads to preventable injuries; verbal, physical and mental abuse, and humiliation; denial of pain medication during and after childbirth; food deprivation; forced sterilization; forced genital mutilation or cutting; and arbitrary detention of women following delivery because they are unable to pay their medical fees.[17]

Mistreatment and abuse of women seeking maternal health care is systemic in many countries and primarily experienced by marginalized women. Though mostly prevalent in resource-poor

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[13] *See* Directorate General of Human Rights of the Council of Europe, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights* 12, Human rights handbooks, No. 6 (2002) (Aisling Reidy), *available at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4c.

[14] The CAT Committee has explicitly indicated that "the protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment" and "States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by…ensuring implementation of other positive measures of prevention and protection." *See* CAT Committee, *General Comment No. 2: Implementation of article 2 by States parties*, para. 21, U.N. Doc. CAT/C/GC/2 (2008); Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, (44th Sess., 1992), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 200, para. 11, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).

[15] For example, the European Court of Human Rights has routinely recognized pregnancy and childbirth as situations of vulnerability in assessing alleged human rights violations. Similarly, the Committee Against Torture has called on states to take specific, targeted measures to protect the rights of women during pregnancy. *See* P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., para. 162 (2008); R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., para. 209 (2011); Tysiac v. Poland, No. 5410/03 Eur. Ct. H.R., para. 125 (2007); CAT Committee, *Concluding observations on the third to fifth periodic reports of United States*, paras. 20-21, U.N. Doc. CAT/C/USA/CO/3-5 (2014) (calling for pregnant women not to be subjected to solitary confinement) (calling for an end to the practice of shackling or otherwise restraining female prisoners during pregnancy and childbirth).

[16] Artavia Murillo et al. v. Costa Rica, paras. 294-302, Inter-Am. Ct. H.R., (Nov. 28, 2012).

[17] *See* Center for Reproductive Rights, *Broken Promises: Human Rights, Accountability, and Maternal Death in Nigeria* (2008); Center for Reproductive Rights, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities* (2007) ; Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Att'y Gen. of Kenya and others, Petition No. 562 of 2012 (Kenya), *available at* http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Judgment%20Petition%20No562%20of%202012%20Kenya%20detention%20case.pdf.

settings in the Global South,[18] particularly throughout Africa, where significant numbers of women in vulnerable conditions reside, mistreatment and abuse also occurs in the Global North, where women belonging to minority populations are particularly vulnerable.[19]

Experiences of mistreatment and abuse during childbirth can have long-lasting implications for women. In addition to long-lasting physical and mental pain, such abuse often discourages women from seeking adequate maternal or reproductive health care services in the future.[20] Further, inadequate skilled care increases women's risk of maternal mortality and morbidity, particularly affecting women in the Global South, where 99% of the world's maternal deaths occur.[21]

Regional and international human rights bodies have begun to address these forms of mistreatment and abuse as human rights violations of, for example, the rights to life, health, non-discrimination, and freedom from ill-treatment. Notably, human rights bodies have recognized the existence of links between human rights violations and discriminatory and harmful stereotypes about women's child-bearing role,[22] including ideas that women should be able to go through child birth without pain medication, individualized care, or experiencing complications, and that they should be complacent actors in the delivery process.

In 2015, a groundbreaking decision from the High Court of Kenya specifically addressed mistreatment and abuse in maternal health settings as a form of ill-treatment.[23] Beyond being the first case to establish this precedent, it is significant to note that very few standard-setting mechanisms had recognized such mistreatment and abuse as potentially amounting to ill-treatment. For instance, the Committee against Torture had only raised the issue once, in its concluding observations following Kenya's periodic review in 2013; the Committee expressed concern about post-delivery detentions and urged the government to end the practice.[24] Therefore, the judgment from the High Court of Kenya not only has significant value for similar pending cases before national and regional courts, but also holds great potential to strengthen the interpretation of the ill-treatment framework and improve the quality of maternal health care for women across the globe.

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[18] Mistreatment and abuse of pregnant women in health care facilities have been documented in numerous African, Asian and Latin American countries including Kenya, Uganda, Nigeria, Ghana, Burundi, Zimbabwe, Egypt, India, Cambodia, Brazil, Argentina, Puerto Rico and Venezuela.

[19] Mistreatment of women seeking maternal healthcare services have been documented in North American and European countries such as the United States of America, Canada and Greece, where victims are typically minorities, immigrants, and refugees.

[20] In *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, W.P.(C) No. 8853/2008, the court in Delhi noted that one of the principal reasons why the maternal death in question in this case occurred was because of the woman's decision not to give birth in a hospital due to previous neglect and denial of maternal health care services.

[21] World Health Organization (WHO), Trends in Maternal Mortality 1990-2015 xi (2015).

[22] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 47, U.N. Doc. A/HRC/22/53 (Feb. 1 2013) (Juan E Mendez).

[23] Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Att'y Gen. of Kenya and others, Petition No. 562 of 2012 (Kenya).

[24] CAT Committee, *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013). Notably, the Special Rapporteur on Torture's 2016 report briefly addressed the detention and mistreatment of women under these circumstances, reinforcing that they can amount to ill-treatment and further demonstrating that the recognition of such mistreatment and abuse as TCIDT is continuing to gain strong support from human rights mechanisms. *See* Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 47, U.N. Doc. A/HRC/31/57 (Jan. 2, 2016) (Juan E. Mendez).

A. Millicent Awuor and Margaret Oliele v. A.G Kenya and Others

In September 2015, the High Court of Kenya delivered an unprecedented decision in *Millicent Awuor and Margaret Oliele v. A.G Kenya and Others*,[25] involving the detention and mistreatment of two low-income women at the Pumwani Maternity Hospital immediately after they had given birth. The women were detained for 20 days and 6 days, respectively, and during this time they were secluded in a separate ward to prevent escape; subjected to physical, verbal and mental abuse; deprived of food; forced to share beds or sleep on a cold concrete floor next to a flooding toilet, without adequate clothing; and denied post-natal care, including medical attention for one of the woman's post-Caesarian section stitches.

This was the first decision at any level—national, regional, or international—to determine that detaining women in health care facilities after giving birth due to an inability to pay their hospital bill can amount to ill-treatment. With minimal jurisprudence on point for the Court to rely on, the facts of this case, particularly the extent of the mistreatment and abuse the women endured, unequivocally spoke for themselves in demonstrating ill-treatment.

In its ruling, the Court took into account the myriad of different forms of abuse the women were subjected to—physical, verbal, and mental—and did not privilege one type of abuse or suffering over another, giving equal value to them all.[26] The Court also drew a clear connection between detentions in health care facilities and in prisons, enumerating the prison-like measures that Pumwani Maternity Hospital established to prevent the petitioners from leaving, including barring them from stepping outside their wards for some sunlight, and posting guards to monitor them at all times.[27] The High Court concluded that in itself, the act of detaining the petitioners, despite their increased level of vulnerability from having just given birth, showed utter disregard for their physical and mental well-being. In doing so, the Court demonstrated how non-traditional custodial settings can give rise to ill-treatment, and can be similar to more traditional custodial settings.

Until this decision, international human rights bodies had not provided a clear interpretation of how the elements of ill-treatment are met, and State accountability imposed, as a result of these types of mistreatment. The High Court provided an authoritative interpretation as to why these experiences amounted to ill-treatment, determining that the appalling treatment the petitioners were subjected to during their detention was for the sole purpose of humiliating them, and thus constituted ill-treatment. It confirmed that the individual acts of detention, mistreatment, and the unsanitary and harsh conditions in which the women were detained each amounted to ill-treatment. Further, the High Court found that the Kenyan government violated the petitioners' right to be free from discrimination based on sex, recognizing how detention in maternal health facilities disproportionately affects women based on their need for maternal health services. One health care provider justified the detention and mistreatment by indicating that the women are typically "stubborn" and "rogue mothers."[28] These comments illustrate how the forms of punishment or humiliation women face that may expose them to ill treatment can commonly stem from their perceived failure to conform to predominant gender roles. The High Court further recognized

[25] Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Att'y Gen. of Kenya and others, Petition No. 562 of 2012 (Kenya).
[26] *See id*., paras. 106-109.
[27] *Id*., paras. 114-177.
[28] Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Att'y Gen. of Kenya and others, para. 130, Petition No. 562 of 2012 (Kenya). *See also* Majani v. Att'y Gen. of Kenya, Petition No. 5 of 2014 (Kenya). Submissions are on file with the Center for Reproductive Rights.

that the women, both from low-income households, were discriminated against based on their socio-economic status.

Importantly, the Kenya High Court decision further built upon two historic decisions at the international and regional levels that had previously established preventable maternal deaths as human rights violations for which States could be held accountable. In *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights addressed the maternal death of an indigenous woman whose community had long experienced denial of access to medical care,[29] while in *Alyne da Silva Pimentel v. Brazil,* the CEDAW Committee addressed the avoidable death of a pregnant Afro-Brazilian woman, whose ethnicity and low socio-economic status contributed to the severely delayed care she received.[30] Both of these cases substantively address the role that intersectional discrimination played in the inadequate maternal health services the women received and their resulting deaths, including discrimination on the basis of their sex, minority status, and socio-economic status. Although these women's experiences had similarities to those of the women in the Kenya High Court decision, these cases did not allege violations of the right to be free from ill-treatment.[31] Accordingly, the Kenya High Court decision has filled this gap by establishing mistreatment and abuse in maternal health settings as a form of ill-treatment.

B. The implications of the Kenya High Court decision for pending cases in national and regional courts

The Kenya High Court decision provides persuasive precedent for pending cases on women who have been detained after receiving maternal health care services, and can serve as an important tool for advocates seeking to end this practice in other countries.[32]

The case *Women Advocates Research and Documentation Centre (WARDC) v. Attorney General of the Federation and others,*[33] currently pending before the Federal High Court in Lagos, Nigeria, raises issues that are substantially similar to those in the Kenya High Court decision. This case seeks accountability for the death of a woman that resulted from the mistreatment she experienced at the Lagos University Teaching Hospital, a public hospital, while she was detained in a locked and guarded ward for six weeks due to her inability to pay her maternity care bill in full. During this time, she was denied access to a toilet; refused life-saving post-natal care, even as her health deteriorated; denied access to her newborn, despite numerous pleas to be allowed to breastfeed; and forced to sleep on the bare floor—all of which served to humiliate and punish her. Eventually, she died from puerperal sepsis and pneumonia, while she was still detained within the hospital.[34] As the first decision establishing detention and abuse of women in maternal health care settings as a form of ill-treatment, the Kenya decision may be particularly influential in establishing ill-treatment in the Nigerian case.

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[29] *Xákmok Kásek Indigenous Community v. Paraguay*, Inter-American Commission of Human Rights—Application with the Inter-American Court of Human Rights, para 10.

[30] Alyne da Silva Pimentel Teixeira v. Brazil, CEDAW Committee, Commc'n No. 17/2008, para. 7.7, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).

[31] In *Xakmok*, the IACHR found violations of the rights to non-discrimination, life, personal integrity, and judicial protection, among others. In *Alyne*, the CEDAW Committee found violations of the rights to health, nondiscrimination and an effective remedy.

[32] In addition to Kenya, such detentions are also occurring in Nigeria, Ghana, Burundi and Zimbabwe.

[33] Submissions for the litigation are on file with the Center for Reproductive Rights.

[34] The threshold for establishing the essential elements of torture or ill-treatment are intentionality, severe pain and suffering, a proscribed purpose, and state involvement.

The Kenya High Court decision could also be relied on with regard to mistreatment and abuse in maternal health settings that do not involve detention of women. This could be particularly relevant in two pending cases: one before the Kenya High Court, *Josephine Majani v. Attorney General of Kenya and Others*,[35] regarding a low-income woman, and the other before the Inter-American Court of Human Rights, *Eulogia y su Hijo v. Peru*,[36] concerning an indigenous woman. Both of the petitioners in these cases suffered severe neglect by health care workers and delayed access to essential maternal health care. As a result, in the first case, the petitioner was forced to give birth alone on the hospital floor. Afterwards, nurses repeatedly slapped and verbally abused her for making the floor dirty. During the ordeal, she was only partially conscious and was physically incapacitated. Similarly, the delay in providing adequate care to the petitioner in *Eulogia y su Hijo v. Peru* resulted in the petitioner's newborn falling on the floor during delivery, causing brain damage and permanent impairment of his eyesight and his ability to walk and talk.

Mirroring the Kenya High Court decision's strong consideration of the direct role that multiple forms of discrimination played in the mistreatment, abuse, and neglect of women in maternal health settings could strengthen the analyses of the abuses that the women in these pending cases experienced. The Kenya High Court decision could further motivate the [specific] Kenyan court and the Inter-American Court of Human Rights to equally account for and value the physical, verbal, and mental abuse that these women experienced, and recognize the long-term consequences of these violations.

IV. Legal Restrictions on and Denial of Access to Abortion Services

Over the past decade, international and regional human rights courts and quasi-judicial bodies have issued a series of decisions elaborating on how the right to be free from ill-treatment protects women's access to abortion services in law and in practice.[37] In pioneering jurisprudence, these courts have held that States must both guarantee that abortion is legal, at least in certain circumstances, and that women can actually access legal abortion services. The rulings are relevant to the everyday experiences of countless women who are denied access to safe and legal abortion. Indeed, nearly 40% of the world's women live in countries where access to abortion is severely restricted by law and unsafe abortion claims the lives of nearly 47,000 women each year.[38]

This section analyzes the development of the international and regional jurisprudence on abortion and ill-treatment. It highlights how the recognition that women may suffer ill-treatment when they are prevented from accessing abortion services as a result of criminal laws, legal restrictions, or arbitrary practices by authorities, relies on a growing recognition of the particular circumstances of women seeking abortion services and the seriousness of mental pain and suffering as causes of ill-treatment.

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[35] Majani v. Att'y Gen. of Kenya, Petition No. 5 of 2014 (Kenya). Submissions are on file with the Center for Reproductive Rights.

[36] Eulogia y su Hijo Sergio v. Peru, Petition 1334-09, Inter-American Commission of Human Rights OEA/Ser.L/V/II.150 Doc. 39 (2009).

[37] *See, e.g.*, KL v. Peru, Human Rights Committee, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., (2013); L.M.R. v. Argentina, Human Rights Committee, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

[38] World Health Organization, Safe Abortion: technical and policy guidance for health systems (2nd ed. 2012), *See also*, The Center for Reproductive Rights, The World's Abortion Laws (2015), *available at* http://worldabortionlaws.com.

A. Denial of access to abortion services in law or practice can cause women severe suffering amounting to ill-treatment

International and regional human rights bodies have held States responsible for ill-treatment as a result of a wide range of actions and omissions effectively denying women access to abortion services. Initially, the jurisprudence on abortion and ill-treatment focused on the denial of legal abortion services—through a series of cases, women challenged instances where States obstructed or failed to guarantee access to abortion services to which women had a legal entitlement.[39]

A recent, groundbreaking decision has significantly advanced the jurisprudence by recognizing that women's right to be free from ill-treatment can also be violated by restrictive abortion laws. In *Mellet v. Ireland,* the Human Rights Committee established for the first time, in relation to an individual complaint, that restrictive and punitive abortion laws—and not just denial of legal abortion services—can cause women severe pain and suffering amounting to ill-treatment.[40] In a very similar case, *Whelan v. Ireland*, the Human Rights Committee reaffirmed its findings in the Mellet case.[41] The domestic prohibition on abortion forced the petitioners in both cases to choose between continuing a non-viable pregnancy and traveling to another country to end the pregnancy. The Human Rights Committee ruled that only having these options available exacerbated both women's suffering and mental distress, thus recognizing that these options failed to respect the women's personal integrity and dignity.

The *Mellet* and *Whelan* decisions also recognized the multiple harmful impacts of restrictive and punitive abortion laws on women's health and well-being. Importantly, the rulings explicitly recognized the shame and stigma associated with the criminalization of abortion, which served as a source of additional suffering for the petitioners. It also advanced the understanding of the harms done to pregnant women by disruptions in the provision of essential reproductive health care services—even if they ultimately access the services they need. To this end, the decisions recognized that the petitioners' distress and suffering were exacerbated by the fact that domestic law prevented them from receiving essential reproductive health care from known and trusted medical providers, and that they each had to bear health-related and financial burdens and hardship in traveling to a foreign country to receive such care.[42]

As the jurisprudence has evolved, it has increasingly recognized the extreme impacts that not respecting women's decisions to have an abortion can have on their mental health. Notably, in many of the cases the petitioners encountered multiple obstacles undermining their decision to have an abortion, causing them anguish and distress. International and regional human rights bodies have ruled that when State agents, such as doctors in State hospitals, obstruct, delay, or otherwise hinder women's access to legal abortion services and necessary reproductive health infor-

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[39] *See* P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., (2013); R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., para. 209 (2011); L.M.R. v. Argentina, Human Rights Committee, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); K.L. v. Peru, Human Rights Committee, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

[40] Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

[41] Whelan v. Ireland, Human Rights Committee, Communication No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).

[42] Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); Whelan v. Ireland, Human Rights Committee, Communication No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).

mation, they violate women's right to be free from ill-treatment.[43] The petitioners in these cases faced multiple obstacles, including: arbitrary acts by doctors who refused them abortion services, even though the women met the relevant requirements; procrastination by doctors who delayed care until applicable gestational limits expired; pressure and harassment by hospital staff, representatives of the Catholic Church, and the police; and even court injunctions seeking to bar them from receiving legal reproductive health services. These repeated and compounded affronts to their personal integrity caused the petitioners serious suffering.

Furthermore, the jurisprudence has increasingly recognized the critical importance of access to reproductive health information for women to make meaningful and informed decisions about their pregnancies. In several of the cases, the multiple harms that women suffered were exacerbated by denial of proper medical information or relevant prenatal screening. For example, the Human Rights Committee and the European Court have both acknowledged women's mental distress resulting from the denial of the reproductive health information necessary to decide whether to have an abortion, or where and how to access abortion services. The European Court has specifically recognized that obstructing a woman's timely access to such information can cause women distress that amounts to ill-treatment.[44] Similarly, the Human Rights Committee has held that when a woman faces obstacles in receiving needed information about relevant medical options from known and trusted medical providers, the suffering she experiences as a result of punitive abortion laws is aggravated.[45]

B. Recognition of subjective factors affecting women's experiences of ill-treatment

As mentioned above, human rights courts and quasi-judicial bodies recognize that the assessment of the severity of suffering in the context of ill-treatment claims is relative, depends on a number of subjective factors, and requires an examination of the specific circumstances and their cumulative effects. The jurisprudence illustrates the application of this principle to the particular experiences of pregnant women seeking access to abortion services. These decisions have explicitly recognized pregnant women's particular circumstances and their specific needs for timely information and quality medical care, the denial or obstruction of which can cause them great anguish and distress.

For example, the European Court has held that the specific circumstances of a pregnant woman must be taken into account in assessing whether she has been subject to ill-treatment. In *R.R. v. Poland*, which addressed the denial of access to timely prenatal testing, the Court considered that the applicant was deeply distressed at the prospect of the fetus being affected by an impairment and, as a pregnant woman, required especially timely access to information about the fetus' condition and the options available to her so that she could make a decision about her pregnancy.[46] Instead, because of the procrastination of health professionals, she had to endure weeks of painful uncertainty about the health of the fetus and her own future. The Court held that her concerns

[43] *See* P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., (2013); R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., para. 209 (2011); L.M.R. v. Argentina, Human Rights Committee, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); K.L. v. Peru, Human Rights Committee, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

[44] K.L. v. Peru, Human Rights Committee, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

[45] Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, para. 7.5, U.N. Doc CCPR/C/116/D/2324/2013 (2016).

[46] R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., para. 209 (2011).

were not properly addressed and that no regard had been given to the time-sensitive nature of her situation. Similarly, the Human Rights Committee has acknowledged that a pregnant woman who learns that her fetus has a fatal impairment is in a situation of heightened vulnerability.[47]

The Human Rights Committee and the European Court have also both recognized young age and the circumstances surrounding a pregnancy as important factors to consider when assessing claims of ill-treatment related to the denial of abortion. To this end, they have emphasized the vulnerabilities of pregnant adolescent girls, recognizing that protection from ill-treatment is particularly critical for minors.[48] Indeed, in finding a violation of the right to be free from ill-treatment in *P and S v. Poland*, the European Court noted that it was "of cardinal importance" that the petitioner, who became pregnant as a result of rape, was only fourteen years old.[49] Human rights bodies are increasingly recognizing adolescents' decision-making in this regard: in *P and S*, the European Court also held that the failure to consider the girl's views and feelings in seeking access to abortion services contributed to her distress.[50] Finally, human rights bodies have recognized that where pregnancy results from sexual violence, women and girls are often in situations of particular vulnerability, exacerbating the impact of the denial of abortion services.[51]

C. Conclusions

When considered as a whole, the jurisprudence on abortion and ill-treatment establishes that States must make abortion legal, at least in certain circumstances, to protect women from violations of their right to be free from ill-treatment. They must also adopt effective legal and policy frameworks to enable women in practice to obtain information necessary to make decisions about their pregnancies and timely access to abortion services. From the jurisprudence emerges the contours of how State failures to ensure respect for women's exercise of reproductive autonomy can undermine their personal integrity and cause them serious suffering in ways that implicate State responsibility for protecting women from ill-treatment. States should enable women to exercise reproductive autonomy in a manner that is respectful of their dignity, in order to protect them from ill-treatment.

V. Areas for Further Strengthening Responses to Ill-Treatment in the Reproductive Rights Sphere

As seen in the above-described jurisprudential developments, the interpretation of the normative framework on ill-treatment has adopted an increasingly gendered perspective that recognizes reproductive rights violations and the pain and suffering women endure when these rights are

[47] Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, U.N. Doc CCPR/C/116/D/2324/2013 (2016).
[48] K.L. v. Peru, Communication No. 1153/2003, para. 6.4., U.N. Doc. CCPR/C/85/D/1153/2003 (2005); P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., para 166 (2013).
[49] P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., para. 161 (2013).
[50] P. and S. v. Poland No. 57375/08 Eur. Ct. H.R., (2013).
[51] For example, in LC v. Peru, the CEDAW Committee recognized that the State's failure to provide an effective procedure for the petitioner to establish her right to medical services, including abortion care, was "even more serious considering that she was a minor and a victim of sexual abuse…" (L.C. v. Peru, Communication No. 22/2009, Committee on the Elimination of Discrimination against Women, paras. 2.1–2.11, U.N. Doc. CEDAW/ C/50/D/22/2009 (Nov. 25, 2011)). Further, in P. and S. v. Poland, the European Court noted that it was "particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who…should have been considered to be a victim of sexual abuse." (P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R., (2013).).

denied. In closing, this section will briefly highlight some areas that hold the potential to more fully address reproductive rights violations.

Role of Discrimination in Reproductive Rights Violations: Accountability bodies have demonstrated different levels of willingness to fully recognize the discriminatory aspects of reproductive rights violations, including in their analysis of ill-treatment. For example, in a number of cases on abortion, human rights bodies have failed to explicitly acknowledge the role of discrimination and harmful gender stereotypes in the denial of abortion care.[52] Groundwork for further acknowledgement of the role that discrimination plays in perpetuating reproductive rights violations has been laid in decisions such as *LC v. Peru*, which recognizes the denial of abortion services as being based on harmful gender stereotypes; *Alyne v. Brazil*, which found that the neglect, and ultimate death, of a woman seeking maternal health services was discriminatory; and in *Millicent Awuor and Margaret Oliele v. A.G Kenya and Others*.[53] As accountability bodies continue to adjudicate cases of ill-treatment, they should look to and draw upon the rich body of law on gender discrimination developed by other human rights bodies.

Effective Remedies: In adjudicating individual cases, accountability bodies are increasingly demanding effective remedies that address the underlying causes of specific reproductive rights violations, such as restrictive laws and policies and inadequate reproductive health services. For example, in *Mellet*, the Human Rights Committee specifically called on Ireland to amend its restrictive abortion law, including the Constitution, if necessary.[54] Further, the Kenyan High Court in *Awuor and Oliele* not only called for an end to the practice of detaining women in maternity health care facilities, but also called on the State to fully implement its fee-waiver system, acknowledging inadequate funding of maternal health services for poor women as a root cause of this practice.[55] Where human rights bodies call for transformative measures of non-repetition, it also sends a strong message to other States about the measures necessary to prevent ill-treatment against women in the reproductive rights sphere.

Cross-Fertilization of Norms and Precedents on Ill-Treatment: As advocates continue to seek redress for reproductive rights violations before human rights bodies at the international, regional, and national levels, there is a critical need for strong precedent from across these fora to inform these efforts, as well as future judicial and quasi-judicial decisions. For example, international and regional human rights mechanisms now have the opportunity to build upon the Kenya High Court's decision in *Awuor and Oliele* by recognizing that the detention and mistreatment of women in maternal health settings can amount to ill-treatment. Furthermore, the strong precedent set in *Mellet* may be significant for advocates in dozens of countries where women in comparable situations are denied access to safe abortion services.

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[52] *See, e.g.*, L.M.R. v. Argentina, Human Rights Committee, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); K.L. v. Peru, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

[53] *See, e.g.*, L.C. v. Peru, CEDAW Committee, Commc'n No. 22/2009 (2011); Alyne da Silva Pimentel Teixeira v. Brazil, CEDAW Committee, Commc'n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011); Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Att'y Gen. of Kenya and others, Petition No. 562 of 2012 (Kenya).

[54] Mellet v. Ireland, Human Rights Committee, Communication No. 2324/2013, para. 9, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

[55] Millicent Awuor Maimuna & Margaret Anyoso Oliele v. Att'y Gen. of Kenya and others, para. 202, Petition No. 562 of 2012 (Kenya).

Torture and Ill-Treatment: Forced Sterilization and Criminalization of Self-Induced Abortion

Cynthia Soohoo & Farah Diaz-Tello*

Abstract

The Special Rapporteur on torture's recent report applying the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the experiences of people marginalized on the basis of gender catalyzes and reinforces key developments in international law recognizing the impact that gender, and its intersections with other identities, has on torture and ill-treatment. Building upon these important recognitions, this article examines two issues that raise concerns of gender-based torture and ill-treatment: forced sterilization and criminalization of self-induced abortion. The capacity for pregnancy makes women and some transgender and gender non-conforming individuals vulnerable to human rights violations based on paternalistic notions about their ability to make medical decisions. This article explores the role that "entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and social gender stereotypes" play in perpetuating forced sterilization and criminalization of self-induced abortion, the serious harms that flow from these practices, and their disproportionate impact on ethnic or racial minorities, immigrants, people with disabilities, and people living in poverty. It encourages the Rapporteurship and other U.N. bodies to continue to use an intersectional analysis informed by an understanding of the dynamics of gender, marginalization, and power, and to take a firm stand against these pernicious forms of reproductive oppression.

Introduction

The Special Rapporteur on torture's recent report on gender considers application of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the experiences of women, girls, lesbian, gay, bisexual, transgender, and intersex persons. Because "the torture and ill-treatment framework evolved largely in response to practices and situations that disproportionately affect men," the report emphasizes the need to utilize a gendered and intersectional lens—an analysis informed by an understanding of the dynamics of gender, marginalization, and power—

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to human rights standards and protections. The report also recognizes the role that "entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and social gender stereotypes" play in promoting torture and ill-treatment.[1] By explicitly considering how gender impacts torture and ill-treatment, the report represents an important step in continuing efforts to ensure that human rights standards reflect the experiences of all people. Building upon these important recognitions, this article will examine two issues that raise concerns of gender-based torture and ill-treatment: forced sterilization and criminalization of self-induced abortion.

Bringing Torture and Ill-Treatment of Women into Focus

The Special Rapporteur's report summarizes important developments in international law and considers situations that merit closer analysis given the way that gender interacts with the torture and ill-treatment framework. One important way to address gendered rights violations is to pay increased attention to sites in which women, girls, and gender non-conforming individuals are at greater risk for rights violations. Recognition that torture and ill-treatment are not limited to acts by government officials, and can take place in private settings,[2] has had a ground-breaking impact on addressing gendered rights violations. In recent years, there has been increased awareness that torture and ill-treatment can occur outside of formal interrogation and criminal detention settings.[3] In particular, the Special Rapporteur and other human rights bodies have drawn attention to torture and ill-treatment in health-care facilities. In a report devoted to health-care settings, the Special Rapporteur noted that "[i]nternational and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender." [4]

A gender lens requires attention to both biological and socially-constructed differences. For instance, women, trans men, and other gender-nonconforming individuals with the capacity to become pregnant are subject to a host of State and private actions that impact, regulate, and sometimes criminalize their reproductive choices. At the same time, socially-constructed differences and stereotypes about women's proper roles and choices can lead to discrimination, coercion, and ill-treatment. In particular, views that women must and should be mothers, as well as judgments about which women should be mothers, threaten a woman's ability to make free, informed, autonomous decisions about contraception, sterilization, and abortion without coercion or punishment. In particular, as the report notes, abortion "may contravene socialized gender roles and expectations,"[5] which creates unique risks of torture and ill-treatment.

Women also face stereotypes about their ability to make autonomous health-care decisions. Human rights law makes it clear that States cannot require women to obtain authorization from their husbands, partners or parents before receiving health services, including sterilization, abor-

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[1] Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment*, ¶ 5, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016) [hereinafter *SRT Gender Report*].

[2] Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2*, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *CAT General Comment No. 2*].

[3] *I.V. v. Bolivia*, Inter-Am. Ct. H.R. (ser. C) No. 329 at ¶ 263 (Nov. 30, 2016) (noting torture and ill-treatment can occur outside criminal interrogation and detention settings and does occur in other contexts of custody, domination and control in which the victim is defenseless, such as in health-care settings).

[4] Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez*, ¶ 46, U.N. Doc. A/HRC/ 22/53 (Feb. 1, 2013) [hereinafter *SRT Report on Health-Care Settings*].

[5] SRT Gender Report, *supra* note 1 at ¶ 42.

tion, or contraception.[6] Assumptions that doctors and health-care providers always "know best," and that women cannot, or need not, be trusted to make decisions about their health, bodies, and reproductive lives for themselves, are equally pernicious. The asymmetry of power and information in health-care settings creates unique risks, permitting providers to "exercise considerable authority over clients [which can place] women in a position of powerlessness."[7] Further, State over-regulation and criminalization of women's reproductive health choices, either in the name of "protecting" women's health or protecting fetal life, devalue women as autonomous decision makers and place them at risk for torture or ill-treatment.

Finally, it is important to note that gender does not impact all persons in the same way. As the Special Rapporteur's report emphasizes, "gender intersects with other factors and identities . . . that may render a person more vulnerable to being subjected to torture and ill-treatment," and "intersectional identities can result in experiencing torture and ill-treatment in distinct ways."[8] Women with less economic power, women who are racial and ethnic minorities, immigrant women, disabled women, and LGBTI individuals are more likely to face force and coercion when making reproductive health decisions, in addition to criminalization, punishment, and stigmatization for their reproductive outcomes and choices.

Emerging Issues in Torture and Ill-Treatment in Reproductive Decision-Making

The Committee against Torture has noted that women are particularly at risk of torture and ill-treatment in the context of medical treatment involving reproductive decisions.[9] Forced sterilization and the criminalization of self-induced abortion are two practices that, when viewed through a gender lens, constitute torture and ill-treatment. Both practices bring the coercive and punitive powers of the State to bear on women's reproductive decisions, resulting in harsh consequences on the basis of gender—the very type admonished by the report. These practices rely on stereotypes that women are unable to make medical decisions, and the presumption that the State is better positioned to dictate whether and how a woman will become pregnant or end a pregnancy. While forced sterilization deprives women of decisional autonomy, criminalization of self-induced abortion punishes them for exercising autonomous decisions, often in the name of their own safety. Women are thus stripped of agency in their own reproductive lives and subjected to degrading and humiliating treatment.

Forced sterilization and criminalization of self-induced abortion are intertwined with societal conventions about women's roles as mothers: Which women are "fit" or "unfit" to mother, and whose pregnancy loss constitutes "innocent" miscarriage versus "guilty" self-induced abortion. Underlying these ideas is the notion that there is only one ideal way for women to behave, and failure to conform to the ideal warrants force or punishment by the State.

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[6] Committee on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, ¶ 14, U.N. Doc. A/54/38/Rev. 1 (Aug. 20, 1999) [hereinafter *CEDAW General Recommendation No. 24*]; Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter *HRC General Comment No. 28*].

[7] SRT Gender Report, *supra* note 1 at ¶ 42.

[8] SRT Gender Report, *supra* note 1 at ¶ 9.

[9] CAT General Comment No. 2, *supra* note 3 at ¶ 22.

Both forced sterilization and criminalization of self-induced abortions are more likely to disproportionately affect women with identities—or intersecting identities—that are marginalized by society. The justifications for forced sterilization are often explicitly eugenic in nature: The State dictates that certain types of women should be prevented from reproducing. Criminalization of self-induced abortion, on the other hand, is likely to target marginalized women for reasons that are less explicitly drawn. Marginalized women are members of communities that are already subject to over-surveillance, by both law enforcement and social service agencies, and are more likely to lack access to facility-based abortions due to poverty, distance, and other factors. These women are also more likely to experience adverse pregnancy outcomes that authorities may find suspicious. Whether subjected to forced sterilization or arrested for ending a pregnancy, women with intersectional marginalities are punished for being born into identities or experiencing circumstances that are devalued by society.

In essence, both practices permit the State—and private actors using the power of the State—to second-guess women, undermining their ability to make autonomous decisions. In so doing, they turn decisions about pregnancy into a site of coercion and punishment, subjecting women to a gendered form of torture and ill-treatment that causes permanent harm and devastating stigma to individual women. In the long-term, women's reproductive health becomes undermined due to mistrust in the health-care system.

Forced Sterilization

Forced sterilization occurs when people are sterilized without their knowledge or in the absence of their informed consent.[10] Many people voluntarily use sterilization as a form of birth control.[11] However, when forced, sterilization imposes severe physical and mental harm and violates the right to personal integrity, liberty, privacy and family life, and to be free from violence.

Historically, coercive government family planning policies have led to forced sterilization.[12] Today, official government policies continue to impose forced sterilizations on women,[13] although now these sterilizations often reflect the discriminatory views of health-care providers who believe that certain individuals should not have children.[14] These beliefs may be motivated by animus toward

[10] The Special Rapporteur on Health has defined informed consent as "a voluntary and sufficiently informed decision." Informed consent is only valid "when documented prior to a medical procedure and provided voluntarily, meaning without coercion, undue influence or misrepresentation." Coercion includes conditions of duress such as fatigue or stress. Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 9, 13-14, U.N. Doc. A/64/272 (Aug. 10, 2009).

[11] Office of the High Commissioner on Human Rights (OHCHR), et al., *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Inter-Agency Statement*, 1 (2014) (agencies involved include: UN Women, UNAIDS, UNDP, UNFPA, UNICEF, and WHO) [hereinafter *OHCHR Interagency Statement*].

[12] SRT Gender Report at ¶ 45 (stating "Government-sponsored family planning initiatives targeting economically disadvantaged and uneducated women that shortcut the process of obtaining consent" may constitute torture or ill-treatment); SRT Report on Health-Care Settings at ¶ 48 (noting that "forced abortion or sterilizations carried out by State officials in accordance with coercive family planning laws or policies may amount to torture.").

[13] SRT Gender Report at ¶ 49 (finding that some States impose gender reassignment, sterilization or other medical procedures on individuals who seek to modify gender markers on identity documents); *see* Human Rights Watch, *India: Target-Driven Sterilization Harming Women*, (June 12, 2012),. Retrieved from https://www.hrw.org/news/2012/07/12/india-target-driven-sterilization-harming-women.

[14] *See, e.g.*, OHCHR Interagency Statement at 3-8; Center for Reproductive Rights, *Reproductive Rights Violations as Torture and Cruel, Inhuman, or Degrading Treatment or Punishment: A Critical Human Rights Analysis*, 19 (2010) [hereinafter *Reproductive Rights Violations as Torture*]; International Community of Women Living with HIV/AIDS, *The Forced and Coerced Sterilization of HIV Positive Women in Namibia*, 8-9 (Mar. 2009) [hereinafter *HIV*

particular groups, stereotypes that the individuals are unfit parents, or providers may think that for certain women, having a child would not be a "good" decision.[15] Forced sterilization is disproportionately practiced on those from stigmatized groups, such as women living with HIV, poor women, ethnic or national minorities, women with disabilities, and gender non-conforming individuals. Additionally, transgender persons have been forced to undergo unwanted sterilization surgeries in many countries as a prerequisite to the State's legal recognition of their gender identity.[16]

The Special Rapporteur's report on gender unequivocally recognizes that "[f]orced sterilization is an act of violence and a form of social control" that violates the "right to be free from torture and ill-treatment."[17] Cases from regional human rights courts illustrate how gender and other identities must inform our understanding of forced sterilization as torture and ill-treatment. Looking at these policies through a gender lens reveals the degrees and types of harms suffered by women who are forcibly sterilized, and uncovers how both biological and socially constructed gender roles and stereotypes impact the informed consent process.

Regional courts and U.N. treaty bodies have recognized forced sterilization as a form of torture and ill-treatment. In a series of cases concerning the forced sterilization of Roma women in Slovakia, the European Court of Human Rights (ECHR) recognized that forced sterilization violates the prohibition of torture and inhuman or degrading treatment or punishment, as well as other rights protected by the European Convention on Human Rights.[18] Recently, the ECHR affirmed that the right to physical integrity under Article 3 of the European Convention, which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,"[19] is implicated when a State conditions recognition of a transgender person's gender identity on the performance of a sterilizing operation that the person does not wish to undergo.[20] The Inter-American Court of Human Rights (IACtHR) also found a violation of the right to be free from torture and ill-treatment, as protected by the American Convention on Human Rights, in the recent case *I.V. v. Bolivia*. *I.V.*, which involved the non-consensual sterilization of a Peruvian refugee who underwent a caesarian section in a public hospital.[21] U.N. treaty bodies, including the Committee against Torture and the Committee on the Elimination of Discrimination against Women, also have recognized forced sterilization as a form of torture and ill-treatment and a violation of human rights.[22]

Positive Women in Namibia]; Open Society Foundations, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide*, 3-6 (2011) [hereinafter *Against Her Will*].

[15] *See, e.g.*, *Reproductive Rights Violations as Torture*, *supra* note 14 at 19; HIV Positive Women in Namibia, *supra* note 14 at 8-9; Against Her Will, *supra* note 14 at 3-6.

[16] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 78; Office of the High Commissioner for Human Rights, *Disrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, ¶ 70, U.N. Doc. A/HRC/29/23 (May 4, 2015).

[17] SRT Gender Report, *supra* note 1 at ¶ 45; *see also* SRT Report on Health-Care Settings, *supra* note 4 at ¶¶ 32, 45-48.

[18] *See e.g., V.C. v. Slovakia*, App. No. 18968/07, Eur. Ct. H.R. (Feb. 8, 2012); *I.G. and Others v. Slovakia*, App. No. 15966/04, Eur. Ct. H.R. (Nov. 13, 2012); *N.B. v. Slovakia*, App. No. 29518/10, Eur. Ct. H.R. (June 12, 2012).

[19] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, June 1, 2010.

[20] *A.P., Garcon et Nicot c. France*, App. Nos. 79885/12, 52471/13, 52596/13, Eur. Ct. H.R., ¶¶131, 135 (April 6, 2017) (finding that the rejection of applicants' petitions to alter the gender on their birth certificates based on their failure to undergo a sterilization operation or medical treatments with a high probability of causing infertility violated the right to private life under Article 8 of the European Convention on Human Rights).

[21] *I.V. v. Bolivia* at ¶ 1.

[22] HRC General Comment No. 28 at ¶ 11; Committee Against Torture, *Concluding Observations: Peru*, CAT/C/PER/CO/4, ¶ 23 (July 25, 2006); Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, ¶ 22, U.N. Doc. HRI/GEN/1/Rev.9 (1992) (noting that forced sterilization violates women's physical and mental health and reproductive autonomy).

Severity of Harm

Under international law, ill-treatment must meet a minimum level of severity. In order to determine if a threshold level of harm has been met, all circumstances of the case must be taken into consideration, including the duration of the harm, resulting physical and mental effects, and the victim's sex, age, and state of health.[23] In recent decisions, the ECHR and the IACtHR have recognized that forced sterilization imposes both physical and mental harms constituting ill-treatment.

Physically, forced sterilization causes serious and lasting change to a woman's body and terminates her reproductive capacity without her consent.[24] In *V.C. v. Slovakia,* the ECHR found that sterilization constitutes a major interference with a woman's reproductive health status. As it concerns one of the essential bodily functions of human beings, a woman's reproductive health status affects numerous aspects of her personal integrity, including her physical and mental well-being, as well as her emotional, spiritual, and family life.[25]

Courts have also recognized the severe mental harm that women may experience, including feelings of anger, frustration, guilt, shame, and devaluation as a woman.[26] In *V.C.,* the ECHR found that the "sterilization procedure, including the manner in which the applicant was requested to agree to it, was liable to arouse in her feelings of fear, anguish and inferiority and to entail lasting suffering."[27] In *I.G. and Others v. Slovakia*, the ECHR held that the mental harm caused by forced sterilization *alone* may be enough to constitute ill-treatment. In *I.G.,* one of the applicants had to undergo a life-saving hysterectomy several days after sterilization and delivery.[28] The applicant did not learn that she had been sterilized prior to the hysterectomy until three years later.[29] Although the Slovakian court found that applicant did not suffer damages requiring compensation in the "short period between the sterilisation and the hysterectomy," the ECHR found that Article 3 of the Convention had been violated because upon learning that she was sterilized as a minor, without her (or her guardian's) prior informed consent, the applicant "was susceptible to feeling debased and humiliated."[30]

While human rights bodies have emphasized that women's role in society should not be valued based on their reproductive capacities, they have recognized that gendered societal expectations can contribute to the mental and psychological harm that result from the inability to become pregnant and have children.[31] In *I.V. v. Bolivia,* the IACtHR noted that I.V. felt shame and devaluation as a woman following her forced sterilization, which were considered part of the mental harm of sterilization.[32] The ECHR also took into account that applicants who were forcibly sterilized felt ostracized or had diminished positions within their communities because of their inability to have more children.[33]

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[23] *V.C. v. Slovakia* at ¶ 101; *I.V. v. Bolivia* at ¶ 267.
[24] *I.V. v. Bolivia* at ¶. 266.
[25] *V.C. v. Slovakia* at ¶ 106.
[26] *I.V. v. Bolivia* at ¶ 268.
[27] *V.C. v. Slovakia* at ¶ 118.
[28] *I.G. and others v. Slovakia* at ¶ 120.
[29] *Id.*
[30] *Id.* at ¶ ¶ 120, 123.
[31] For instance, in in *Murillo v. Costa Rica* the IACtHR recognized that some women define their femininity through their ability to bear children, and the mental and psychological suffering of an infertile woman who wants to become pregnant is exacerbated when she is denied access to a medical procedure that would enable her to do so. *Murillo y Otros ("Fecundación In Vitro") v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 296 (Nov. 28, 2012).
[32] *I.V. v. Bolivia* at ¶ 268
[33] *V.C. v. Slovakia* at ¶¶ 118-119; *N.B. v. Slovakia* at ¶ 80.

Informed Consent

The Special Rapporteur's report emphasizes that "[f]ull, free and informed consent of the patient herself" is the essential inquiry in determining whether sterilization is permitted or constitutes torture or ill-treatment, and gender affects the informed consent inquiry in several ways.

The nature of female sterilization, and its relation to pregnancy and pregnancy-related health risks, has important implications for informed consent. Sterilization, like other medical procedures, requires the prior, voluntary, and informed consent of the patient. Further, consent must be obtained under circumstances free of coercion and conditions of duress, including situations of fatigue or stress. The IACtHR and ECHR have recognized that informed consent can never be given during or immediately after labor and delivery because the conditions and inherent stress of, and vulnerability caused by, the situation prevent a woman from making a free and fully informed decision.[34] The courts recognized that during labor and delivery, when a woman is likely to be experiencing pain and may be under medication,[35] she is unlikely to be given all of the information relevant to making an informed decision about sterilization, and may be unable to meaningfully process the information she is provided.[36] Further, given the power that health providers have over patients, there is a strong danger that the woman will feel threatened or coerced into making a decision.[37]

The ECHR and the IACtHR have also held that sterilization without informed consent can never be justified as an emergency procedure based upon the danger posed by a future pregnancy.[38] The ECHR noted that under generally recognized standards, sterilization is not a life-saving medical intervention.[39] Any health threats posed by a future pregnancy can be prevented by "alternative, less intrusive methods"[40] such as family planning or abortion. Respect for patient dignity and autonomy require that a woman be able to make her own health-care choices, even if health-care providers disagree with the choice. In his report on health-care settings, the Special Rapporteur cited the International Federation of Gynecology and Obstetrics, which notes that:

> sterilization for prevention of future pregnancy cannot be ethically justified on grounds of medical emergency. Even if a future pregnancy may endanger a woman's life or health, she . . . must be given the time and support she needs to consider her choice. Her informed decision must be respected, even if it is considered liable to be harmful to her health.[41]

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[34] *I.V. v. Bolivia* at ¶ 183; *V.C. v. Slovakia* at ¶ 112.

[35] *V.C. v. Slovakia* at ¶ 118 (patient was "asked to sign typed words 'Patient requests sterilization' while she was in a supine position and in pain resulting from several hours' labour"); *N.B. v. Slovakia,* at ¶ 77 (patient was asked to consent "while in labor, when her cognitive faculties were affected by medication"); *I.G. and Others v. Slovakia*, ¶ 25 (after receiving medication, patient was asked to sign a paper, which she was unable to read because her "head was spinning").

[36] *V.C. v. Slovakia* at ¶ 112; *N.B. v. Slovakia*, ¶ 10 (patient did not have the strength or will to ask what papers said).

[37] *N.B. v. Slovakia* at ¶ 10 (patient was told she would die if she did not sign consent form); *V.C. v. Slovakia* at ¶ 118 (medical staff told patient "she or her baby would die in the event of future pregnancy.").

[38] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 33; *I.V. v. Bolivia* at ¶ 177; *V.C. v. Slovakia* at ¶ 113 (finding that threat posed by future pregnancy does not pose an imminent risk to health).

[39] *I.G. and others v. Slovakia* at ¶ 118.

[40] *V.C. v. Slovakia* at ¶ 113.

[41] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 33.

Impact of Intersectional Identities and Stereotypes on Informed Consent

The report on gender perspectives on torture recognizes that "[g]ender often intersects with other characteristics such as race, sexual orientation, socioeconomic status, age and HIV status to render women and girls at risk of torture and other ill-treatment in the context of sterilization."[42] The aforementioned IACtHR case, *I.V. v. Bolivia*, illustrates how gender and other identities intersect in the sterilization context. I.V., a Peruvian refugee, went to a Bolivian public hospital that predominantly serves poor women, many of whom are migrant or indigenous women, to deliver her third child. During her cesarean section, doctors decided that a future pregnancy would endanger I.V. and performed a tubal ligation. Bolivia claimed that I.V. was informed about the procedure and orally consented to it. I.V., however, maintained that she was never informed and did not consent to being sterilized.

In *I.V.*, the IACtHR noted that unequal power relationships between health-care professionals and patients may be exacerbated by the gender stereotype that women are unable to make autonomous health-care decisions and by health-care providers' paternalistic attitudes.[43] Gender stereotypes frequently applied in health-care settings include the view that women are impulsive and unable to make reliable or consistent decisions. These stereotypes are aggravated within the sterilization context by societal attitudes that women, rather than men, must be responsible for pregnancy prevention.[44] Importantly, the Special Rapporteur has emphasized that medical treatments of an intrusive and irreversible nature may constitute torture or cruel, inhuman, or degrading treatment when administered without informed consent, "notwithstanding claims of good intentions by medical professionals."[45] Further, the ECHR has repeatedly emphasized that the fact that medical staff believe they are acting in a patient's best interest does not excuse or justify sterilizing a patient without obtaining her informed consent.

In *V.C. v. Slovakia,* the ECHR asserted that"[t]he way in which the hospital staff behaved was paternalistic, since, in practice, the applicant was not offered any option but to agree to the procedure which the doctors considered appropriate for her situation." [46] Similarly, in its merits report to the IACtHR, the Inter-American Commission on Human Rights (IACHR) found that I.V.'s medical team was influenced by "gender stereotypes on the inability of women to make autonomous" reproductive health decisions and that the decision to sterilize I.V. without her consent reflected the notion that the medical staff was "empowered to take better medical decisions than the woman concerned regarding control over reproduction." [47]

Not all women are at the same risk of forced sterilization. The Special Rapporteur's report on health-care settings affirms that:

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[42] SRT Gender Report, *supra* note 1 at ¶ 45 (citing Committee Against Torture, *Consideration of Report Submitted by States Parties under Article 19 of the Convention*, U.N. Doc. CAT/C/CZE/CO-4-5 (July 13, 2012); Human Rights Council, *Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice*, U.N. Doc. A/HRC/29/40/Add.2 (April 2, 2015)).
[43] *I.V. v. Bolivia* at ¶¶ 186-87.
[44] *Id*. at ¶ 187.
[45] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 32.
[46] *V.C. v. Slovakia* at ¶ 114.
[47] *I.V. v. Bolivia*, Case 12.655, Inter-Am. Ct. H.R., Report No. 72/14, Merits, ¶ 161 (Aug. 15, 2014) [hereinafter "*I.V. v. Bolivia Inter-Am. Ct. H.R. Report*"].

> Targeting ethnic and racial minorities, women from marginalized communities and women with disabilities for involuntary sterilization because of discriminatory notions that they are 'unfit' to bear children is an increasingly global problem.[48]

In its merits report to the IACtHR, the IACHR took note of the special vulnerability of migrant women seeking health-care in Bolivia, given their reliance on public services and the lack of care options.[49] The IACtHR recognized that acting without a woman's full informed consent is more common in situations when women have few economic resources and low levels of education.[50]

Criminalization of Self-Induced Abortion

The Special Rapporteur's gender report identifies the criminalization of abortion, which is aimed at and predominantly affects women, as a human rights violation.[51] This is consistent with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee's repeated emphasis that women should never be criminalized for undergoing abortions.[52] However, the primary focus of the torture and ill-treatment analysis thus far has been the ways that criminalizing the provision of abortion, which generally targets health-care providers, makes facility-based abortion inaccessible. Less attention has been paid to the criminalization of women themselves who, whether by necessity or by choice, end their own pregnancies outside of a clinical setting and the ways in which such criminalization subjects these women to torture and ill-treatment.

Self-induced abortion can include the use of pharmaceutical pills, traditional herbs, or physical means (including massages or introduction of sharp objects into the cervix) to end a pregnancy. In spite of new advances in reproductive health technologies that promise safer, more self-directed abortion experiences,[53] women suspected of ending their own pregnancies have been arrested and jailed in settings where abortion is legally protected as well as in those where it is prohibited.[54]

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[48] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 48 (citations omitted).
[49] *I.V. v. Bolivia* Inter-Am. Ct. H.R. Report at ¶ 160.
[50] *I.V. v. Bolivia* Inter-Am. Ct. H.R. Report at ¶ 188.
[51] SRT Gender Report, *supra* note 1 at ¶ 14 (noting that criminalization of offences that solely or disproportionately affect women and girls are "human rights violations in and of themselves" in addition to contributing to prison overcrowding).
[52] *See* CEDAW General Recommendation No. 24 at ¶ 31(c) (recommending that "When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion"); CEDAW, *Concluding Observations: Burkina Faso,* U.N. Doc. CEDAW/C/BFA/CO/6, ¶ 40 (Nov. 5, 2010); CEDAW, *Concluding Observations*: *Liechtenstein,* U.N. Doc. CEDAW/LIE/CO/3, ¶ 26 (Aug. 10, 2007); CEDAW, *Concluding Observations: Nicaragua,* U.N. Doc. CEDAW/C/NIC/CO/6, ¶ 18 (Feb. 2, 2007); CEDAW, *Concluding Observations: Mauritius,* U.N. Doc. CEDAW/C/MAR/CO/5, ¶ 31 (Aug. 25, 2006); CEDAW, *Concluding Observations: Chile,* U.N. Doc. CEDAW/C/CHI/CO/4, ¶ 20 (Aug. 25, 2006).
[53] Thoai D. Ngo et al., "Comparative Effectiveness, Safety, and Acceptability of Medical Abortion at Home and in a Clinic: A Systematic Review," Bull. World Health Org. 89 (2011): 317, 360; M.I. Rodriguez et al., "Acceptability of Misoprostol-Only Medical Termination of Pregnancy Compared with Vacuum Aspiration: An International Multicentre Trial," *BJOG* 119 (2012): 817.
[54] In the United States, the Constitution protects the right to seek an abortion. *See, e.g., Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). However, women have been charged with crimes and even spent time in jail after being accused of ending their own pregnancies. *See, e.g., Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016) (overturning a feticide conviction of a U.S. woman alleged to have ended her pregnancy using pills obtained from the Internet). Abortion is totally criminalized in El Salvador, leading to arrests of women accused of prompting miscarriages or stillbirths. *See* Ctr. for Reprod. Rights & La Agrupación Ciudadana, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalization of Abortion*, 16 (2014). Despite protections for abortion rights and availability of publicly funded abortion in the U.K., abortion is illegal and virtually impossible to access in Northern Ireland, and self-induced abortion can lead to arrest. *See* Siobhan Fenton, "Second Northern Irish

Criminalization of self-induced abortion violates many rights, including the right to health, the right to nondiscrimination, and the right autonomy and security of the person, and promotes practices that amount to cruel, inhuman, and degrading treatment or even torture.

The private nature of self-induced abortion makes it impossible to know how many women end their own pregnancies each year. Women who successfully self-induce abortions without medical complications are unlikely to come to the attention of health-care providers or law enforcement officials. High rates of maternal deaths due to unsafe abortions suggest that the practice of self-inducing abortions is widespread, especially where facility-based abortion is highly restricted by local law.[55] As the gender perspectives on torture report notes, "[w]here access to abortion is restricted by law, maternal mortality increases as women are forced to undergo clandestine abortion[s] in unsafe and unhygienic conditions."[56] While it is true that women are forced to undergo clandestine abortions—many of which are unsafe—when access to abortion is restricted, not all abortions performed outside of the clinical setting are dangerous.

To fully understand the human rights dimensions of self-induced abortion, it is necessary to disentangle the concepts of secrecy, safety, legality, and self-directedness. There is no agreed-upon definition of "clandestine abortion"; it may include the use of hazardous methods, but could also include seeking services from well-trained medical professionals who practice in secret.[57] In such cases, it is the necessity of secrecy for fear of legal consequences that may render an otherwise safe clandestine abortion dangerous.[58] The World Health Organization (WHO) defines "unsafe abortion" as a procedure for terminating an unintended pregnancy either by individuals without the necessary skills, or in an environment that does not conform to minimum medical standards.[59] However, ongoing research reveals that the necessary skills and minimum medical standards may be much lower than previously believed: Recent advances in reproductive health technologies may permit women to have safe, self-induced abortions with little to no interaction with medical personnel if the women are provided with proven the means, information about when to seek help, and medical care in the event of an emergency.[60] In fact, public health researchers have been exploring ways to improve abortion access in restrictive settings and supplant ineffective or dangerous means by disseminating information about how women can safely end pregnancies on their own.[61]

The drugs misoprostol and mifepristone, both of which are included on the WHO Model List of Essential Medicines,[62] can be used to safely induce a miscarriage within the first and second tri-

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woman faces Jail Under Abortion Laws After Helping Daughter Have Termination", *The Independent* April 7, 2016. Retrieved from http://ind.pn/2r10E5G; Amnesty International, *Northern Ireland: Barriers to Accessing Abortion Services* (Feb. 26, 2015).

[55] *See* Susheela Singh, "The Incidence of Unsafe Abortion: A Global Review," *in* "Preventing Unsafe Abortion and its Consequences: Priorities for Research and Action," *Guttmacher Institute* (Ina K. Warriner & Iqbal H. Shah, eds.) 35, 37, (2006).

[56] SRT Gender Report, *supra* note 1 at ¶ 43.

[57] Ina K. Warriner, "Unsafe Abortion: An Overview of Priorities and Needs," *in*, "Preventing Unsafe Abortion and its Consequences: Priorities for Research and Action," *Guttmacher Institute* (Ina K. Warriner & Iqbal H. Shah, eds.) 1, 3 (2006).

[58] *See* Singh, *supra* note 55 at 38-40.

[59] Bela Ganatra et al., "From Concept to Measurement: Operationalizing WHO's Definition of Unsafe Abortion", *Bull. World.Health Org.* 92, no. 3 (2014): 155.

[60] Abigail Aiken et al., "Self Reported Outcomes and Adverse Events After Medical Abortion Through Online Telemedicine: Population Based Study in the Republic of Ireland and Northern Ireland", *BMJ* 357 (2017) (finding that "Self-sourced medical abortion using online telemedicine can be highly effective and outcomes compare favourably with in clinic protocols.").

[61] *E.g.*, Francine Coeytaux et al., "Facilitating Women's Access to Misoprostol Through Community-Based Advocacy in Kenya and Tanzania", *Int'l J. Gynecology & Obstetrics* 125, no. 1 (2014): 53.

[62] World Health Org., "WHO Model List of Essential Medicines: 19th List," 38-39 (April 2015).

mesters of pregnancy.[63] These medications (especially misoprostol, which is more readily available in low-resource settings), have the potential to significantly curb unnecessary maternal deaths by supplanting more dangerous methods women often undertake to end pregnancies, such as ingesting poisonous substances or the use of physical means.[64] In fact, it was women's practice of self-induced abortion that led to the discovery of using misoprostol to safely end pregnancies. Abortion is highly restricted in Brazil; however, misoprostol was available in pharmacies as an ulcer-preventing medication. Women discovered that misoprostol contained abortifacient properties by reading the contraindication labeling on the drug packaging and began using the medication in secret. The practice only came to light when rates of abortion-related mortality fell.[65] This example highlights that when women have access to accurate information about contraindications, correct doses, and unfettered access to medical support, complications from self-managed abortions with pills are similar in nature and prevalence to those caused by spontaneous miscarriage, and can be treated similarly by health-care personnel.[66] There are certainly risks of complications associated with self-induced abortion, but the Brazilian example is revealing: When the medications were removed from pharmacies, the rates of sepsis resulting from surgically-induced clandestine abortions increased.[67]

Although laws prohibiting or highly restricting access to facility-based abortion increase the number of women who will self-induce abortion, not all self-induced abortion is due to the unavailability of facility-based abortion. While it is true that where abortion is restricted or inaccessible women will resort to whatever means possible to end untimely pregnancies,[68] self-induced abortions occur even in high-resource settings[69] and where facility-based abortion is available free of charge.[70] There are many factors that push people away from facility-based care or pull them toward self-directed forms of care, including cost, distance, fear of being exposed, harassment by anti-abortion protestors, and mistrust of the health-care system due to past negative experiences. Individuals may also favor self-care when members of their community have been forcibly sterilized, subjected to unconsented medical testing, or otherwise abused in facility-based health institutions. An individual's reason for self-inducing an abortion may also include positive factors such as a desire to incorporate spiritual or traditional practices, to be surrounded by companions of her choosing, or to remain with family or children instead of traveling to a medical facility. Thus, while it is important to dismantle barriers to obtaining facility-based abortion for those who desire it, there will likely always be some people for whom facility-based abortions are not accessible or acceptable.

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[63] World Health Org., "Safe Abortion: Technical and Policy Guidance of Health Systems, Second Edition," 114-16 (2012).

[64] C.C. Harper et al., "Reducing Maternal Morality Due to Elective Abortion: Potential Impact of Misoprostol in Low-Resource Settings," *Int'l J. Gynecology & Obstetrics* 98, no. 1 (2007): 66.

[65] *Id.* at 68; Francine Coeytaux, Leila Hessini & Amy Allina, "Bold Action to Meet Women's Needs: Putting Abortion Pills in U.S. Women's Hands," *Women's Health Issues* 25(6) (2015): 608-09.

[66] See, e.g., Megan Wainwright et al., "Self-management of medical abortion: a qualitative evidence synthesis," *Reproductive Health Matters* 24, no. 47 (2016): 155 (concluding providers were generally approving of the concept of self-management, including self-administration if initiation of medical abortion was supported by trained providers, and they believed that it could be done feasibly, effectively and safely. However, providers were not generally supportive of over-the-counter access to medical abortion drugs.)

[67] Warriner, *supra* note 57, at 5.

[68] Singh, *supra* note 55, at 36.

[69] Daniel Grossman et al., "Self-induction of Abortion Among Women in the United States," *Reproductive Health Matters*, 18, no. 36 (2010): 140, 146.

[70] Warriner, *supra* note 57, at 3.

The Role of Gender Stereotypes and Discrimination

The Committee against Torture has emphasized that "[t]he principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention."[71] The criminalization of self-induced abortion is discriminatory in both purpose and effect, as it targets and exclusively affects women and transgender or gender nonconforming individuals based on their capacity for pregnancy. Capacity for pregnancy has historically been cited as justification for excluding women from access to education, certain professions, and participation in civic life. Criminalization of self-induced abortion is more likely to affect individuals who are unable to surmount financial barriers and overcome structural disparities in order to access abortion care, confirming the report on gender's recognition that restrictive abortion policies "disproportionately impact marginalized and disadvantaged women and girls."[72]

In many cases, the State asserts a protective interest in criminalizing self-induced abortion to deter women from seeking unsafe care. In one U.S. case challenging the constitutionality of a law criminalizing self-induced abortion, the prosecuting attorney argued that the state's "legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient" justified felony charges for women who self-induced abortions.[73] This reasoning is based on a paternalistic view of women and their inability to self-direct care or seek medical attention when appropriate. Alternatively, the purpose for such laws may be to police women's sexuality and reproductive autonomy so that they reflect societal attitudes about women's proper roles within the community. None of these justify threatening women who end their own pregnancies with criminal investigations, arrest, or punishment. Indeed, the report on gender notes that gender-specific acts of mistreatment or acts perpetrated on the basis of non-adherence to social norms around gender and sexuality fulfill the purpose and intent elements in the definition of torture.[74]

Criminalization Acts as a Ban on Abortion

As noted above, an individual's reasons for self-inducing an abortion may be based on a combination of personal and external factors. While human rights law appropriately requires that external barriers to obtaining legal and accessible facility-based care be removed, it is also critical to ensure that individuals are able to engage in self-care without fear of arrest. For the people for whom facility-based care is either inaccessible or unacceptable, criminalization of self-induced abortion acts as a total ban on abortion, which has repeatedly been recognized as a form of torture and ill-treatment.[75] As the report on gender affirmed, forcing women to carry pregnancies to term against their will has "short- and long-term physical and psychological consequences" that violate

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[71] CAT General Comment No. 2, *supra* note 2 at ¶ 20.
[72] SRT Gender Report, *supra* note 1 at ¶ 43.
[73] *McCormack v. Hiedeman,* 694 F.3d 1004, 1012 (9th Cir. 2012) (citing *Roe v. Wade,* 410 U.S. 113, 150 (1973)).
[74] SRT Gender Report, *supra* note 1 at ¶ 8 (citing Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *Manfred Nowak*, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008)).
[75] SRT Gender Report, *supra* note 1 at ¶ 44 (referencing the SRT Report on Health-Care Settings). *See* Committee Against Torture, *Concluding Observations: Nicaragua*, U.N. Doc. CAT/C/NIC/CO/1, ¶ 16 (June 10, 2009) (expressing concern over general prohibition of abortion); Committee Against Torture, *Concluding Observations: Paraguay*, U.N. Doc. CAT/C/PRY/CO/4-6, ¶ 22 (Dec. 14, 2011) (expressing concern over general prohibition of abortion).

women's right to be free from torture and ill-treatment.[76] The Special Rapporteur has also recognized that restrictive abortion legislation "perpetuates torture and ill-treatment by denying women safe access and care"[77] and calls upon States to decriminalize abortion, at a minimum, in cases of rape, incest, severe or fatal fetal impairment, and where the life or physical or mental health of the mother is at risk.[78]

The criminalization of self-induced abortion requires that people imperil themselves—legally, physically, and psychologically—to seek facility-based abortion care. In the U.S., for example, people without protected immigration status may be unable to reach abortion clinics due to checkpoints that prevent them from moving freely, and for fear that they will be deported and separated from their families. Survivors of sexual assault may be unable to tolerate vaginal examinations or ultrasounds (which in some places are legally-mandated) in clinical settings. Moreover, women experiencing domestic abuse may be exposed or face violence for seeking medical care from a facility. Forcing women to undertake these dangers and humiliations as a condition of avoiding criminal prosecution subjects them to cruel, inhuman, or degrading treatment.

Additionally, criminalization makes self-induced abortion unnecessarily dangerous by reducing women's access to information about safe and effective means to end a pregnancy. As the Special Rapporteur has acknowledged, restriction of abortion does not stop the practice, it merely pushes women further away from medical care.[79] The same is true for self-induced abortion: Women who fear arrest are reluctant to openly seek information prior to self-induction, or to seek help if they experience complications after self-inducing. These women may delay seeking care until complications are unmanageable, or forego care altogether, leading to acute consequences that could have been prevented with timely medical support.

Criminalization Promotes Ill-Treatment in Health-Care Settings

The State's duty to prevent torture and ill-treatment also includes a duty to exercise due diligence to "prohibit, prevent, and redress" torture and ill-treatment committed by private actors.[80] There is an evolving understanding, embraced by the Special Rapporteur, that this includes abuse and mistreatment in health-care settings.[81]

Women seeking reproductive health-care services are vulnerable to abuse and ill-treatment, particularly "when seeking treatments such as abortion that may contravene socialized gender roles and expectations."[82] Patients seeking post-abortion care may face humiliating treatment, breaches of medical confidentiality if evidence of an unlawful abortion is discovered, and may be denied

[76] SRT Gender Report, *supra* note 1 at ¶ 43.
[77] SRT Gender Report, *supra* note 1 at ¶ 44.
[78] SRT Gender Report, *supra* note 1 at ¶ 72(b). *See P. and S. v. Poland*, App. No. 57375/08 Eur. Ct. H.R., ¶ 168 (Jan. 30, 2013) (holding that denial of access to an abortion to a 14 year-old rape victim constituted inhuman or degrading treatment); *K.L. v. Peru*, Human Rights Committee, *Communication No. 1153/2003*, U.N. Doc. CCPR/C/85/D/1153/2003, ¶ 6.3 (Nov. 22, 2005) (denial of access to an abortion constitutes cruel inhuman and degrading treatment where fetus suffered from a fatal fetal abnormality); Human Rights Committee, *Communication No. 2324/2013*, U.N. Doc. CCPR/C/116/D/2324/2013, ¶ 7.6 (Nov. 17, 2016) (criminal law prohibiting abortion in case of a fatal fetal abnormality constitutes cruel, inhuman or degrading treatment) [hereinafter *Mellet v. Ireland*].
[79] SRT Gender Report, *supra* note 1 at ¶ 43. *See also* World Health Org. *supra* note 61, at 90.
[80] SRT Gender Report, *supra* note 1 at ¶ 11.
[81] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 15.
[82] SRT Gender Report, *supra* note 1 at ¶ 42.

life-saving care in order to obtain confessions.[83] Abuse and mistreatment during this time can "cause tremendous and lasting physical and emotional suffering, which is inflicted on the basis of gender."[84] States should therefore make every effort to ensure that women are able to seek medical care for pregnancy, pregnancy loss, abortion, and post-abortion care without fear of mistreatment. Criminalization of self-induced abortion directly undermines this and perpetuates stigma, which can adversely affect the quality of care women receive.

Confidentiality of medical information is considered a component of the right to health[85] and is an ethical and legal imperative. However, the criminalization of self-induced abortion creates confusion and doubt among health-care providers as to their obligations to disclose abortion-related information to the State and keep their patients' information confidential.[86] Some States may require that physicians or other care providers report criminal activity, invoking the "supremacy of the right to life of the unborn" to supersede legal and ethical standards requiring health-care providers to keep patients' information confidential.[87] In other States, the atmosphere of hostility created by criminalization may lead health-care providers to erroneously believe that they are required to report patients suspected of self-inducing an abortion, even though it is not mandated by law. In practice, this has led to women suspected of taking steps to end their pregnancies being reported to law enforcement officials by the very people they turn to for help, including physicians, nurses, and social workers.[88] The result of such breaches of confidentiality is that patients are treated as suspects during a time of vulnerability.

Being designated a criminal imposes direct harm on individuals[89] and makes them more susceptible to mistreatment by non-State actors. The Special Rapporteur's report describes a "clear link" between the criminalization of LGBTI persons and hate crimes, community and family violence, and stigmatization, due to a climate of impunity for such acts.[90] Women who have abortions, whether self-induced or in a health-care setting, can face significant stigma. Stigma and misconceptions about self-induced abortion, which are reinforced by criminalization, can lead to mistreatment in the health care setting when women seek care for complications and are forced to disclose that they have induced or undergone an abortion. Health-care providers and institutions "exercise considerable authority over clients, placing women in a position of powerlessness," and making them vulnerable to torture and ill-treatment.[91]

Furthermore, because the symptoms of induced and spontaneous miscarriages are clinically identical, the criminalization of self-induced abortion exposes a broad range of women to criminal investigation and mistreatment. For instance, in El Salvador, women have been arrested and

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[83] SRT Report on Health-Care Settings, *supra* note 4 at ¶ 46.
[84] SRT Gender Report, *supra* note 1 at ¶ 42 (referencing SRT Report on Health-Care Settings).
[85] Committee on Economic, Social, and Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4, ¶ 12(c) (Aug. 11, 2000).
[86] *See* Committee Against Torture, *Concluding Observations: Peru*, U.N. Doc. CAT/C/PER/CO/5-6, ¶ 15 (Jan. 21, 2013) (expressing concern that the law requires physicians to bring information about post-abortion care to the attention of authorities for investigation and possible criminal prosecution).
[87] Bernard M. Dickens & Rebecca Cook, "Law and Ethics in Conflict Over Confidentiality?," *Int'l. J. Obstetrics & Gynecology*, 70 (2000): 385, 388.
[88] *See, e.g.,* Lynn M. Paltrow & Jeanne Flavin, "Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health," J. of Health Pol. Pol'y & L., 38, No. 2 (2013): 326-327.
[89] *Mellet v. Ireland supra* note 78, ¶ 7.4 (considering the shame and stigma from criminalization in determining whether criminalization of abortion resulted in cruel, inhuman or degrading treatment).
[90] SRT Gender Report, *supra* note 1 at ¶ 15.
[91] SRT Gender Report, *supra* note 1 at ¶ 42.

sentenced to lengthy prison sentences for seeking medical attention after having a miscarriage or stillbirth.[92] Additionally, the distinction between miscarriages that arouse suspicion and those that do not often falls along predictable, troubling lines: Young women, women who are unmarried, women belonging to racial or ethnic groups associated with negative stereotypes, and others who are marginalized are often deemed suspect.

Criminalization Invites Law Enforcement into the Health-Care Setting

In addition to the mistreatment women face at the hands of health-care providers, criminalization makes women vulnerable to torture and ill-treatment by law enforcement. Most self-induced abortions do not come to light unless complications arise requiring a woman to present herself to a medical facility. This urgent need for medical care may make the woman more vulnerable to humiliation or abuses by law enforcement officials before, during, or after receiving medical treatment.

Torture or ill-treatment can arise as law enforcement attempts to investigate suspected abortions. The Special Rapporteur has repeatedly expressed concern about the withholding of medical care to serve law enforcement purposes and has identified extracting confessions in order to prosecute illegal abortions as a form of torture.[93] Similar violations may occur after medical care has been administered, including lengthy and hostile bedside interrogations conducted while women recover from emergency treatment for complications, or women being remanded to law enforcement custody and detention while in a medically vulnerable state shortly after delivery. Additionally, because it can be difficult to ascertain the cause of a pregnancy loss, there is a significant likelihood that women who suffer spontaneous losses could be turned over to law enforcement, leading police to intrusively question women grieving losses of wanted pregnancies under the auspices of conducting a criminal investigation.

The Committee against Torture has admonished States for failing to "take steps to prevent acts that put women's physical and mental health at grave risk."[94] As the medical risks of self-induced abortion decline, the risks women face at the hands of the State—including imprisonment, deportation, or loss of child custody—become more significant. The potential for law enforcement entanglement in medical care places women's physical and mental health at risk by preventing them from seeking care to avoid legal consequences. These are harms that the State could easily prevent by decriminalizing self-induced abortion and ensuring that women can seek help without fear.

Conclusion

With his report, the Special Rapporteur continues to catalyze and reinforce key developments in international law recognizing the impact that gender, and its intersections with other identities, has on torture and ill-treatment. As the report acknowledges, women, girls, and gender non-conforming individuals are particularly vulnerable to torture and ill-treatment when making reproductive health decisions or seeking reproductive healthcare. Ensuring care that is appropriate and honors

[92] Ctr. for Reprod. Rights & La Agrupación Ciudadana, *supra* note 54, at 25-38.
[93] SRT Gender Report, *supra* note 1 at ¶ 44. *See* Committee Against Torture, *Concluding Observations: Chile,* CAT/C/CR/32/5, ¶ 6 (2004) (expressing concern that life-saving medical care for women suffering complications from illegal abortions is only administered on condition that they provide information to be used in legal proceedings); Committee Against Torture, *Concluding Observations: Peru*, CAT/C/PER/CO/5-6, ¶ 15(d) (2013) (recommending that Peru eliminate "the practice of extracting confessions for prosecution persons from women seeking emergency medical care as a result of illegal abortion").
[94] Committee Against Torture, *Concluding Observations: Peru*, *supra* note 86 at ¶ 23.

fundamental rights requires that States and health-care providers respect women as autonomous decision-makers and reject measures that have the intent or effect of coercing or punishing individuals who transgress sexual and gender norms.

The report reflects and builds upon significant strides that have been made in understanding forced sterilization as torture or ill-treatment. The Special Rapporteur, the ECHR, and the IACtHR have recognized the serious mental and physical harm imposed by unwanted sterilization. They have emphasized that informed consent for sterilization cannot be given during or immediately after labor or caesarian delivery, and that sterilization without consent cannot be justified as an emergency treatment based upon the danger posed by a future pregnancy. They have also revealed how gender stereotypes often result in paternalistic attitudes about health-care decision-making, and that women who are ethnic or racial minorities, women with disabilities, women with fewer economic resources, women who are immigrants, and gender non-conforming individuals are especially vulnerable to forced sterilization.

There has also been significant progress in recognizing access to abortion as a human rights issue. Human rights bodies have held that criminal bans on abortion can violate women's rights to life and health because they may force women to carry dangerous pregnancies to term, seek out illegal and often unsafe abortions, and forgo medical care if complications arise. Prohibiting abortion in situations where a pregnancy endangers a woman's life or health, where a pregnancy is the result of a rape, or where the fetus suffers a fatal impairment has been recognized as torture or ill-treatment. However, when considering abortion access, human rights bodies have generally focused on women's ability to legally obtain abortions from health-care professionals but have not directly addressed the human rights violations that occur when women are criminalized for self-inducing abortions.

The current political environment in many States may lead to increased prosecutions of women for self-inducing abortion. Although human rights bodies have not focused on this issue, the gender lens adopted by this report helps elucidate why criminally prosecuting women for self-inducing abortion violates their human rights. As in other reproductive health contexts, two stereotypes lie at the heart of such persecutions. First, is the view that women who choose to end their pregnancies should be punished because they reject motherhood or place their own aspirations (or aspirations for their families) before the potential life of a fetus, contrary to social norms about gender roles. Second, is the view that women cannot be trusted to make their own health-care decisions and must have medical experts involved in making and effectuating the decision to terminate a pregnancy. The report also recognizes that restrictive abortion laws have a disproportionate impact on women who belong to marginalized groups. In addition to the mental and physical harm imposed by arrest, prosecution and detention, criminalization increases stigma and puts women at risk of abuse in health-care and other settings. With this firm understanding of how gender impacts torture and ill-treatment in reproductive health-settings, we encourage the Rapporteurship and other U.N. and regional human rights bodies to explicitly recognize that prosecuting women who self-induce abortions violates their right to be free from torture and ill-treatment, as well as other fundamental human rights, and to call for an end to all such prosecutions.

V.
Annex

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, prepared pursuant to Council resolution 25/13. In the report, the Special Rapporteur assesses the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons.

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A/HRC/31/57

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Contents

I. Introduction

1. The present report has been prepared pursuant to Human Rights Council resolution 25/13. In an addendum (A/HRC/31/57/Add.1), the Special Rapporteur makes observations on cases sent to Governments between 1 December 2014 and 30 November 2015, as reflected in the communications reports of special procedures mandate holders (A/HRC/29/50, A/HRC/30/27 and A/HRC/31/79). During the period under review, the Special Rapporteur visited Georgia (A/HRC/31/57/Add.3) and Brazil (A/HRC/31/57/Add.4) and conducted a follow-up visit to Ghana (A/HRC/31/57/Add.2) with the support of the Anti-Torture Initiative.

II. Activities relating to the mandate

2. On 2 October 2015, the Special Rapporteur delivered a keynote address at a conference in London on the case against backsliding on the torture ban.

3. On 5 and 6 November 2015, the Special Rapporteur held expert consultations in Washington, D.C. on gender and torture, the focus of the present report.

4. From 29 to 30 October and 13 to 15 December 2015, the Special Rapporteur attended regional meetings of the Convention against Torture Initiative held in San José and Marrakech, Morocco.

III. Gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment

5. In the present report, the Special Rapporteur assesses the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual and transgender and intersex persons. Historically, the torture and ill-treatment framework evolved largely in response to practices and situations that disproportionately affected men. The analysis has thus largely failed to have a gendered and intersectional lens, or to account adequately for the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes. He highlights in the report how the torture and ill-treatment framework can be more effectively applied to qualify human rights violations committed against persons who transgress sexual and gender norms; identify gaps in prevention, protection, access to justice and remedies; and provide guidance to States on their obligations to respect, protect and fulfil the rights of all persons to be free from torture and ill-treatment.

A. Legal framework

6. The Special Rapporteur recalls the need to apply the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in a gender-inclusive manner (A/55/290). Full integration of a gender perspective into any analysis of torture and ill-treatment is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognized, addressed and remedied.

7. Gender-based violence, endemic even in peacetime and often amplified during conflict, can be committed against any persons because of their sex and socially constructed

gender roles. While women, girls, lesbian, gay, bisexual and transgender persons, sexual minorities and gender-non-conforming individuals are the predominant targets,[1] men and boys can also be victims of gender-based violence, including sexual violence stemming from socially determined roles and expectations. As noted by the Committee against Torture in its general comment No. 2 (2007) on the implementation of article 2 of the Convention, gender-based crimes can take the form of sexual violence, other forms of physical violence or mental torment.

8. The purpose and intent elements of the definition of torture (A/HRC/13/39/Add.5) are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality (A/HRC/7/3). The definitional threshold between ill-treatment and torture is often not clear. A gender-sensitive lens guards against a tendency to regard violations against women, girls, and lesbian, gay, bisexual and transgender persons as ill-treatment even where they would more appropriately be identified as torture.

9. Gender-based discrimination includes violence directed against or disproportionately affecting women (A/47/38). Prohibited conduct is often accepted by communities due to entrenched discriminatory perceptions while victims' marginalized status tends to render them less able to seek accountability from perpetrators, thereby fostering impunity. Gender stereotypes play a role in downplaying the pain and suffering that certain practices inflict on women, girls, and lesbian, gay, bisexual and transgender persons. Furthermore, gender intersects with other factors and identities, including sexual orientation, disability and age, that may render a person more vulnerable to being subjected to torture and ill-treatment (general comment No. 2). Intersectional identities can result in experiencing torture and ill-treatment in distinct ways. The torture protection framework must be interpreted against the background of the human rights norms that have developed to combat discrimination and violence against women.

10. States' obligations to prevent torture are indivisible, interrelated, and interdependent with the obligation to prevent other forms of ill-treatment. States have an obligation to prevent torture and ill-treatment whenever they exercise custody or control over individuals and where failure to intervene encourages and enhances the danger of privately inflicted harm (general comment No. 2). States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity. States are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever they create and implement discriminatory laws that trap them in abusive circumstances (A/HRC/7/3).

11. States must exercise due diligence to prohibit, prevent and redress torture and ill-treatment whenever there are reasonable grounds to believe that such acts are being committed by private actors. This includes an obligation to prevent, investigate and punish acts of violence against women (A/47/38).[2] Indifference or inaction by the State provides a form of encouragement and/or de facto permission (general comment No. 2). This principle applies to States' failure to prevent and eradicate gender-based violence.[3] States' failure to protect against prohibited conduct and effectively investigate and prosecute violations

[1] Secretary-General's guidance note on reparations for conflict-related sexual violence (2014).

[2] See also Committee on the Elimination of Discrimination against Women, general comment No. 28 (2010) on the core obligations of States parties under article 2 of the Convention.

[3] Committee against Torture, communication No. 161/2000, *Dzemajl et al. v. Yugoslavia*, decision of 21 November 2002.

suggests consent, acquiescence and, at times, even justification of violence.[4] When States are aware of a pattern of violence or the targeting of specific groups by non-State actors, their due diligence obligations are likewise engaged and they are required actively to monitor and review data, apprise themselves of trends and respond appropriately.[5]

12. In *Opuz v. Turkey*, the European Court of Human Rights found that discriminatory judicial passivity and unresponsiveness to domestic violence gave rise to impunity and a climate that was conducive to such gender-based violence, leading to a violation of the prohibition of torture and ill-treatment. Furthermore, when a State knows or should have known that a woman is in danger, it must take positive steps to ensure her safety, even when she hesitates in pursuing legal action (A/47/38). Women's rights to life and physical and mental integrity cannot be superseded by other rights, such as those to property and privacy.[6] States have a heightened obligation to protect vulnerable and marginalized individuals from torture.[7]

B. Torture and ill-treatment of women, girls, and lesbian, gay, bisexual and transgender persons in detention

13. Women, girls, and lesbian, gay, bisexual and transgender persons are at particular risk of torture and ill-treatment when deprived of liberty, both within criminal justice systems and other, non-penal settings. Structural and systemic shortcomings within criminal justice systems have a particularly negative impact on marginalized groups. Measures to protect and promote the rights and address the specific needs of female and lesbian, gay, bisexual and, transgender prisoners are required and cannot not be regarded as discriminatory.

14. In many jurisdictions, the criminalization of abortion, "moral crimes" like adultery and extramarital relationships, and witchcraft and sorcery, among others — offences that are aimed at or that solely and disproportionately affect women, girls and persons on the basis of their perceived or actual sexual orientation or gender identity — besides constituting violations of international human rights law in and of themselves are also a significant factor in prison overcrowding, which has a negative impact on all aspects of detainees' lives and gives rise to ill-treatment or torture.

15. A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization (A/HRC/19/41). At least 76 States have laws that criminalize consensual relationships between same-sex adults, in breach of the rights to non-discrimination and privacy; in some cases, the death penalty may be imposed. Such laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity. Transgender persons are criminalized in many States through laws that penalize cross-dressing, "imitating the opposite sex" and sex work. Lesbian, gay, bisexual and transgender persons are frequently detained on the basis of laws containing vague and undefined concepts such as "crimes against the order of nature", "morality", "debauchery", "indecent acts" or "grave scandal" (A/HRC/29/23).

[4] Inter-American Court of Human Rights, *Velásquez v. Honduras,* judgement of 29 July 1988.
[5] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (art. 11).
[6] Committee on the Elimination of Discrimination against Women, communication No. 2/2003, *A.T. v. Hungary,* Views adopted on 26 January 2005.
[7] Inter-American Court of Human Rights, *Ximenes-Lopes v. Brazil,* judgement of 4 July 2006.

1. Women in detention

16. Women comprise between 2 and 9 per cent of the prison population in 80 per cent of the world's prison systems.[8] Although their numbers are increasing, their needs in detention often go unnoticed and unmet, as prisons and prison regimes are typically designed for men. However, women's unique experiences of prison, as well as the motivations for women's criminal behaviour and their pathways into criminal justice systems are often distinct from those of men (A/68/340). Different incarceration and treatment policies, services and even infrastructure are required to address women's distinct needs and ensure their protection.

17. Many women in the criminal justice system are low-income, minority single mothers; many are victims of domestic violence and abuse and suffer from mental health problems, substance dependencies and overall poor states of health (ibid.). A large number were victims of intimate partner or non-partner violence before their detention, and are at risk of revictimization during arrest and incarceration.

18. A variety of obstacles to accessing justice, including poverty and discrimination, increase the likelihood of women being detained, while systematic or institutionalized societal discrimination contributes to legitimizing and replicating discrimination and violence against women and girls deprived of liberty. Women in prison face multiple forms of discrimination in accessing gender-sensitive and appropriate services across different aspects of the prison regime, such as health care, educational opportunities, rehabilitation services and visiting rights. The adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) filled a gap in international standards by recognizing and addressing the gender-specific needs and circumstances of female offenders and prisoners. The Bangkok Rules supplement but do not replace relevant provisions in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules). Their swift and full implementation by States would contribute significantly to reducing torture and ill-treatment against women in custody, as would gender-sensitive non-custodial measures and the consideration of gender-specific circumstances in sentencing female offenders, including in cases of women convicted of killing abusive domestic partners.[9]

Protection from violence by prison staff and inter-prisoner violence

19. Women and girls are at particular risk of sexual assault by male prisoners and prison staff, including rape, insults, humiliation and unnecessary invasive body searches. Added to the trauma of sexual abuse is the particular stigmatization women in these situations face, for instance for having engaged in extramarital sexual relations or due to the risk of pregnancy or of sexual abuse leading to the inability to have children. Sexual humiliation may occur when male guards watch female prisoners in intimate moments such as dressing or showering. The risk of sexual and other forms of violence can arise during transfers to police stations, courts or prisons, and particularly where male and female prisoners are not separated or when male staff transport female prisoners. Separating male and female detainees and ensuring that female detainees are supervised by female guards and prison officials are key safeguards against abuse. Rule 81 of the Nelson Mandela Rules mandates that male staff must not enter a women's institution unless they are accompanied by a

[8] Office of the United Nations High Commissioner for Human Rights (OHCHR), Women and Detention (2014); Roy Walmsley, World Prison Brief, World Female Imprisonment List, 3rd ed. (2015).

[9] General Assembly resolution 65/228.

female officer. Many States nevertheless fail to adhere to this and other unambiguous requirements. Abuses can occur even when female and male living quarters within an institution are separate, for instance when women's access to such basic necessities as fresh water is circumscribed by their exclusive availability in male quarters (CAT/OP/BEN/1). Furthermore, authorities' failure to prevent inter-prisoner violence amounts to torture or ill-treatment (A/HRC/13/39/Add.3).

20. Women are at particular risk of torture and ill-treatment during pretrial detention because sexual abuse and violence may be used as a means of coercion and to extract confessions. A majority of female detainees worldwide are first-time offenders suspected of or charged with non-violent (drug- or property-related) crimes, yet are automatically sent to pretrial detention. In many States the number of women held in pretrial detention is equivalent to or higher than that of convicted female prisoners, and women are held in pretrial detention for extremely long periods (A/68/340). Women in pretrial detention facilities — which are typically not built or managed in a gender-sensitive manner — tend not to have access to specialized health care and educational or vocational training. They face higher risks of sexual assault and violence when they are held in facilities with convicted offenders and men or are supervised by male guards. According to the Committee against Torture, the undue prolongation of the pretrial stage of detention represents a form of cruel treatment, even if the victim is not detained (A/53/44).

Security and disciplinary measures

21. The use of shackles and handcuffs on pregnant women during labour and immediately after childbirth is absolutely prohibited and representative of the failure of the prison system to adapt protocols to unique situations faced by women (A/HRC/17/26/Add.5 and Corr.1). When used for punishment or coercion, for any reason based on discrimination or to cause severe pain, including by posing serious threats to health, such treatment can amount to torture or ill-treatment.

22. Solitary confinement can amount to torture or ill-treatment when used as a punishment, during pretrial detention, for prolonged periods or indefinitely and on juveniles. Solitary confinement of any duration must never be imposed on juveniles, or persons with mental or physical disabilities, or on pregnant and breastfeeding women, or mothers with young children. (A/66/268). Its use as a measure of retaliation against women who have complained of sexual abuse or other harmful treatment must also be prohibited. Female prisoners subjected to solitary confinement suffer particularly grave consequences as it tends to retraumatize victims of abuse and women suffering from mental health problems. It places women at greater risk of physical and sexual abuse by prison staff and severely limits family visits.

23. Body searches, in particular strip and invasive body searches, are common practices and can constitute ill-treatment when conducted in a disproportionate, humiliating or discriminatory manner. Inappropriate touching and handling amounting to sexual harassment during searches is common, as are routine vaginal examinations of women charged with drug offences. These practices have a disproportionate impact on women, particularly when conducted by male guards. The punishment of women who refuse to undergo strip and invasive searches, for instance by placing them in isolation or revoking visitation privileges, is also common. When conducted for a prohibited purpose or for any reason based on discrimination and leading to severe pain or suffering, strip and invasive body searches amount to torture.

24. Detention, often for prolonged periods, is sometimes used on the grounds of "protecting" female victims of rape, honour-based violence and other abuses or to ensure that they will testify against the perpetrator in court. This practice further victimizes

women, deters them from reporting rape and sexual abuse and can amount to torture or ill-treatment per se.

Health care and sanitation

25. Most prison health policies and services are not designed to respond to women's specific health needs and fail to account for the prevalence of mental health and substance abuse problems among female prisoners, the high incidence of exposure to different forms of violence, and gender-specific sexual and reproductive health concerns.[10] The provision of appropriate health-care services, including comprehensive, interdisciplinary and rehabilitation-oriented mental health-care programmes, as well as the provision of training and capacity-building to prison staff and health-care personnel to identify specific physical and mental-health needs of female detainees, are key to preventing mistreatment.

26. Of particular concern are a lack of specialist care, including access to gynaecologists and obstetric health-care professionals; discriminatory access to services like harm-reduction programmes; lack of private spaces for medical examinations and confidentiality; poor treatment by prison health staff; failures in diagnosis, medical neglect and denial of medicines, including for chronic and degenerative illnesses; and reportedly higher rates of transmission of diseases such as HIV among female detainees. The absence of gender-specific health care in detention can amount to ill-treatment or, when imposed intentionally and for a prohibited purpose, to torture. States' failure to ensure adequate hygiene and sanitation and to provide appropriate facilities and materials can also amount to ill-treatment or even torture. It is essential to engage in capacity-building and adequate training for detention centre staff and health-care personnel with a view to identifying and addressing women's specific health-care and hygiene needs.

Pregnant women and women with small children

27. Studies suggest that up to 80 per cent of women in prison are mothers.[11] Many female prisoners are single mothers or primary caregivers, and imprisonment can result in considerable hardship for their children. Contact between detained mothers and their children is often difficult due to the remote location of female prisons. Concern about their children is a primary factor leading to the high incidence of mental health problems and self-harm among female detainees.[12] The Bangkok Rules require that parental and child-caring responsibilities be taken into account in the allocation and sentence-planning processes. The best interests of the child, including the need to maintain direct contact with the mother, must be carefully and independently considered by competent professionals and taken into account in all decisions pertaining to detention, including pretrial detention, sentencing and the placement of the child (CRC/C/THA/CO/2).

28. The Special Rapporteur on Prisons and Conditions of Detention in Africa of the African Commission on Human and Peoples' Rights noted in a 2001 report on prisons in Malawi that prisons were not safe place for pregnant women, babies and young children and that it was not advisable to separate babies and young children from their mothers. Even very short periods in detention settings can undermine a child's psychological and physical well-being, compromise cognitive development and result in higher rates of

[10] International Committee of the Red Cross (ICRC) Resource Centre, "Health in prison: looking after women in a man's world", 27 February 2009.

[11] Andrea Huber, "Women in criminal justice systems and the added value of the UN Bangkok Rules", Briefing Paper, Penal Reform International, 2015.

[12] Laurel Townhead, *Pretrial Detention of Women and Its Impact on Their Children* (Geneva, Quaker United Nations Office, 2007).

suicide, self-harm, mental disorders and developmental problems (A/HRC/28/68). Children living in prison with their mothers may be at heightened risk of suffering violence, abuse and conditions of confinement that amount to torture or ill-treatment. In this context, the imprisonment of pregnant women and women with young children must be reduced to a minimum.

Girls in detention

29. Girls in the criminal justice system are at particular risk of experiencing torture and ill-treatment. The majority have prior histories of abuse and violence that serve as primary predictors of their entry into the juvenile justice system. Girls' particular physical and mental health needs often go unrecognized and incarceration itself tends to exacerbate trauma, with girls suffering disproportionately from depression and anxiety and exhibiting a higher risk of self-harm or suicide than boys or adults. Many States lack facilities for separating girls from adults or boys, which significantly increases the risks of violence, including sexual violence.[13] The employment of male guards in girls' facilities significantly increases the risk of abuse, while girls held in remote, segregated facilities are isolated and have limited contact with their families.

30. Many States use the criminal justice system as a substitute for weak or non-existent child protection systems, leading to the criminalization and incarceration of disadvantaged girls who pose no risk to society and are instead in need of care and protection by the State.[14] The Special Rapporteur recalls that the deprivation of liberty of children is inextricably linked with ill-treatment and must be a measure of last resort, used for the shortest possible time, only when it is in the best interest of the child and limited to exceptional cases (A/HRC/28/68). Accordingly, the lack of gender-centred juvenile justice policies directly contributes to the perpetration of torture and ill-treatment of girls. There is an urgent need for policies that promote the use of such alternative measures as diversion and restorative justice, incorporate broad prevention programmes, build a protective environment and address the root causes of violence against girls. Failure to support girls in detention with adequate and complete information about their rights in a comprehensible manner and to provide assistance with reporting complaints in a safe, supportive and confidential manner further aggravates mistreatment.

Migrants and refugees

31. Migrants, asylum seekers and refugees worldwide face grave human rights violations during the migration process. Physical violence, threats and abductions by smugglers, traffickers and organized criminal groups are common. Women and girls are particularly vulnerable to sexual violence, exploitation and slavery along migration routes. Such abuses can amount to torture and ill-treatment and States' failure to properly screen migrants and refugees, identify victims of torture and provide appropriate care and support can retraumatize victims and inflict additional mistreatment.

32. Upon interception or rescue, migrants and refugees tend to be criminalized and detained in substandard and overcrowded conditions amounting to torture or ill-treatment. Unsanitary conditions and inadequate medical care, including lack of access to reproductive care, affect women in particular. Many facilities fail to separate female and male prisoners, leading to heightened risks of sexual violence from other detainees or guards

[13] Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice.

[14] *Safeguarding the Rights of Girls in the Criminal Justice System: Preventing Violence, Stigmatization and Deprivation of Liberty* (United Nations publication, Sales No. E.15.I.10).

(A/HRC/20/24). Lesbian, gay, bisexual and transgender migrants are also vulnerable to abuse on the basis of their sexual orientation and gender identity.[15]

33. The Special Rapporteur recalls that States are prohibited from returning anyone to a situation where there are substantial grounds to believe that the person may be subject to torture or ill-treatment. The prohibition of refoulement is absolute and an important additional source of protection for women, girls, and lesbian, gay, bisexual and transgender persons who fear such treatment in their countries of origin.

2. Lesbian, gay, bisexual and transgender persons in detention

34. Lesbian, gay, bisexual and transgender persons who are deprived of their liberty are at particular risk of torture and ill-treatment, both within the criminal justice system and in other contexts such as immigration detention, medical establishments and drug rehabilitation centres. Criminal justice systems tend to overlook and neglect their specific needs at all levels. Transgender persons tend to be placed automatically in male or female prisons or wards without regard to their gender identity or expression.

35. Lesbian, gay, bisexual and transgender detainees report higher rates of sexual, physical and psychological violence in detention than on the basis of sexual orientation and/or gender identity than the general prison population (CAT/C/CRI/CO/2). Violence against these persons in custodial settings, whether by police, other law enforcement authorities, prison staff or other prisoners, is prevalent (A/HRC/29/23). Fear of reprisals and a lack of trust in the complaints mechanisms frequently prevent lesbian, gay, bisexual and transgender persons in custody from reporting abuses. Their placement in solitary confinement or administrative segregation for their own "protection" can constitute an infringement on the prohibition of torture and ill-treatment. Authorities have a responsibility to take reasonable measures to prevent and combat violence against lesbian, gay, bisexual and transgender detainees by other detainees.

36. Humiliating and invasive body searches may constitute torture or ill-treatment, particularly for transgender detainees. In States where homosexuality is criminalized, men suspected of same-sex conduct are subject to non-consensual anal examinations intended to obtain physical evidence of homosexuality, a practice that is medically worthless and amounts to torture or ill-treatment (CAT/C/CR/29/4).

3. Alternatives to imprisonment and complaint and oversight mechanisms

37. The overuse of imprisonment and disproportionately long sentences in relation to the seriousness of the offence are major causes of overcrowding, resulting in conditions that amount to ill-treatment or even torture. In particular, the non-violent nature of crimes committed by the majority of women and girls and the minimal public risks posed by most female offenders make them ideal candidates for non-custodial sanctions.

38. Adequate and effective complaint and oversight mechanisms are critical sources of protection for at-risk groups that experience abuses in detention. All too often proper safeguards are absent or lacking in independence and impartiality, while fear of reprisals and the stigma associated with reporting sexual violence and other humiliating practices discourage women, girls, and lesbian, gay, bisexual and transgender persons from reporting. In many cases, the vulnerability and isolation of women and girls is compounded by limited access to legal representation, inability to pay fees or bail as a result of poverty, dependence on male relatives for financial support and fewer family visits.

[15] European Court of Human Rights, application No. 12294/07, *Zontul v. Greece*, judgement of 17 January 2012.

39. All places of detention must be subject to unannounced visits by independent bodies established in conformity with the Optional Protocol to the Convention against Torture. The inclusion of women, lesbian, gay, bisexual and transgender persons and other minority representation on inspection bodies at all levels would help facilitate the reporting of gender-based violence and discrimination and identify cases of torture and ill-treatment.

C. Trafficking in women and girls

40. Human trafficking affects approximately 21 million adults and children worldwide, including 11.4 million women and girls.[16] Human trafficking is a particularly egregious human rights violation and a form of gender-based violence specifically targeting girls and women for exploitation and placing them at high risk of physical and psychological abuse, trauma and disease. Systemic discrimination against women and girls, including lack of access to education, resources and employment, renders them especially vulnerable to trafficking. Trafficked women and girls are routinely subjected to confinement, severe physical and sexual abuse, humiliation and threats for the purposes of commercial sexual exploitation, domestic servitude, forced and bonded labour and organ removal.[17] These practices unequivocally amount to torture and ill-treatment (A/HRC/13/39).

41. While trafficking is perpetrated primarily by private persons, public officials actively acquiesce in or facilitate trafficking operations, for instance by accepting bribes or inducements and certifying or ignoring unlawful working conditions.[18] Furthermore, whenever States fail to exercise due diligence to protect trafficking victims from the actions of private actors, punish perpetrators or provide remedies, they are acquiescent or complicit in torture or ill-treatment (A/HRC/26/18).[19] This is particularly the case whenever the conduct is systematic or recurrent such that the State knew or ought to have known of it and should have taken steps to prevent it, including criminal prosecution and punishment.[20] States must implement a combination of measures to combat trafficking, of which the duty to penalize and prosecute is just one.[21] In designing measures to protect, support and rehabilitate victims of trafficking, States must consider the age, gender and special needs of victims with a view to protecting women and children from revictimization.[22] The criminalization and detention of trafficking victims for status-related offences and "protective" purposes can also amount to ill-treatment.

D. Torture and ill-treatment of women, girls, and lesbian, gay, bisexual, transgender and intersex persons in health-care settings

42. Women are vulnerable to torture and ill-treatment when seeking medical treatment on the basis of actual or perceived non-conformity with socially determined gender roles

[16] International Labour Organization, "Forced labour, human trafficking and slavery".
[17] Organization for Security and Cooperation in Europe, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-Treatment* (Vienna, 2013).
[18] OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2010).
[19] See also General Assembly resolution 61/180.
[20] European Court of Human Rights, application No. 73316/01, *Siliadin v. France*, judgement of 26 July 2005.
[21] European Court of Human Rights, application No. 25965/04, *Rantsev v. Cyprus and Russia*, judgement of 7 January 2010.
[22] See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 9.

(general comment No. 2). Discrimination against women, girls, and persons on the basis of sex, gender, real or perceived sexual orientation or gender identity and sex characteristics often underpins their torture and ill-treatment in health-care settings. This is particularly true when seeking treatments such as abortion that may contravene socialized gender roles and expectations. International human rights law increasingly recognizes that abuse and mistreatment of women seeking reproductive health services cause tremendous and lasting physical and emotional suffering, which is inflicted on the basis of gender (A/HRC/22/53). Health-care providers tend to exercise considerable authority over clients, placing women in a position of powerlessness, while the lack of legal and policy frameworks that effectively enable women to assert their right to access reproductive health services enhances their vulnerability to torture and ill-treatment.

Access to abortion and related care

43. Unsafe abortion is the third leading cause of maternal death globally.[23] Where access to abortion is restricted by law, maternal mortality increases as women are forced to undergo clandestine abortions in unsafe and unhygienic conditions. Short- and long-term physical and psychological consequences also arise due to unsafe abortions and when women are forced to carry pregnancies to term against their will (A/66/254). Such restrictive policies disproportionately impact marginalized and disadvantaged women and girls. Highly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women's right to be free from torture and ill-treatment (A/HRC/22/53, CEDAW/C/OP.8/PHL/1). Nevertheless, some States continue to restrict women's right to safe and legal abortion services with absolute bans on abortions. Restrictive access to voluntary abortion results in the unnecessary deaths of women (CAT/C/PER/CO/4).

44. In other cases, women and girls face significant difficulties in accessing legal abortion services due to administrative and bureaucratic hurdles, refusal on the part of health-care workers to adhere to medical protocols that guarantee legal rights, negative attitudes, official incompetence or disinterest (A/HRC/22/53). The denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment.[24] States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care. Limited and conditional access to abortion-related care, especially where this care is withheld for the impermissible purpose of punishing or eliciting a confession, remains of concern (A/HRC/22/53). The practice of extracting, for prosecution purposes, confessions from women seeking emergency medical care as a result of illegal abortion in particular amounts to torture or ill-treatment.

Forced and coerced sterilization

45. Forced sterilization is an act of violence and a form of social control, and violates a person's right to be free from torture and ill-treatment. Full, free and informed consent of the patient herself is critical and can never be excused on the basis of medical necessity or emergency when obtaining consent is still possible (A/HRC/22/53). Gender often intersects with other characteristics such as race, nationality, sexual orientation, socioeconomic status, age and HIV status to render women and girls at risk of torture and other ill-treatment in the context of sterilization (CAT/C/CZE/CO/4-5, A/HRC/29/40/Add.2) The European Court of

[23] Guttmacher Institute and World Health Organization, *Facts on Induced Abortion Worldwide* (2012).

[24] European Court of Human Rights, application No. 57375/08, *P and S v. Poland*, judgement of 30 October 2012.

Human Rights found that the sterilization of a Roma woman who consented to the procedure only during delivery by caesarean section violated the prohibition of torture and ill-treatment.[25] Documented practices that may violate the prohibition of torture and ill-treatment include Government-sponsored family planning initiatives targeting economically disadvantaged and uneducated women that shortcut the process of obtaining consent, sterilization certificates required by employers and coerced sterilization of HIV-positive women in some States. Despite the fundamental rights enshrined in the Convention on the Rights of Persons with Disabilities, women and girls with disabilities are also particularly vulnerable to forced sterilization and other procedures such as imposed forms of contraception and abortion, especially when they are labelled "incompetent" and placed under guardianship (A/67/227).

Other abusive practices in health-care and educational settings

46. Women and girls seeking reproductive health care in professional settings are often exposed to severe pain and suffering and coerced into or subjected to unwanted, degrading and humiliating procedures and examinations. In some States, such practices include requiring sex workers to undergo weekly gynaecological examinations and blood tests, and forced or coerced pregnancy testing by means of physical examination or urine testing as a precondition for attending schools and public examinations. Virginity testing and the expulsion of pregnant girls from schools, which often result in long-term harmful consequences, constitute forms of discrimination and ill-treatment.

47. In many States women seeking maternal health care face a high risk of ill-treatment, particularly immediately before and after childbirth. Abuses range from extended delays in the provision of medical care, such as stitching after delivery to the absence of anaesthesia. Such mistreatment is often motivated by stereotypes regarding women's childbearing roles and inflicts physical and psychological suffering that can amount to ill-treatment. The detention of post-partum women in health-care facilities for failure to pay medical bills amounts to ill-treatment by separating new mothers from their children and exposing them to significant health risks.[26]

Lesbian, gay, bisexual, transgender and intersex persons in health-care settings

48. Lesbian, gay, bisexual, transgender and intersex persons are frequently denied medical treatment and subjected to verbal abuse and public humiliation, psychiatric evaluations, forced procedures such as sterilization, "conversion" therapy, hormone therapy and genital-normalizing surgeries under the guise of "reparative therapies". These procedures are rarely, if ever, medically necessary, lead to severe and life-long physical and mental pain and suffering and can amount to torture and ill-treatment (A/HRC/22/53). The criminalization of same-sex relationships and pervasive discrimination against lesbian, gay, bisexual, transgender and intersex persons lead to the denial of health care, information and related services, including the denial of HIV care, in clear violation of international human rights standards such as the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

49. Transgender persons often face difficulties in accessing appropriate health care, including discrimination on the part of health-care workers and a lack of knowledge about or sensitivity to their needs. In most States they are refused legal recognition of their preferred gender, which leads to grave consequences for the enjoyment of their human

[25] Application No. 18968/07, *V.C. v. Slovakia*, judgement of 8 November 2011.

[26] High Court of Kenya, *Awuor and Oliele v. Attorney General of Kenya et al.*, judgement of 17 September 2015.

rights, including obstacles to accessing education, employment, health care and other essential services. In States that permit the modification of gender markers on identity documents abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures (A/HRC/29/23). Even in places with no legislative requirement, enforced sterilization of individuals seeking gender reassignment is common. These practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture.

50. In many States, children born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization and genital normalizing surgery, which are performed without their informed consent or that of their parents, leaving them with permanent, irreversible infertility, causing severe mental suffering and contributing to stigmatization. In some cases, taboo and stigma lead to the killing of intersex infants.

E. Rape and sexual violence

51. It is well established that rape and other forms of sexual violence can amount to torture and ill-treatment.[27] Rape constitutes torture when it is carried out by, at the instigation of, or with the consent or acquiescence of public officials (A/HRC/7/3). States are responsible for the acts of private actors when States fail to exercise due diligence to prevent, stop or sanction them, or to provide reparations to victims. In addition to physical trauma, the mental pain and suffering inflicted on victims of rape and other forms of sexual violence is often long-lasting due, inter alia, to subsequent stigmatization and isolation. This is particularly true in cases where the victim is shunned or formally banished from the family or community. Victims can also face difficulties in establishing or maintaining intimate relationships and a variety of other consequences, including sexually transmitted diseases, inability to bear children, unwanted pregnancy, miscarriage and forced or denial of abortion (A/HRC/7/3). Torture and ill-treatment of persons on the basis of actual or perceived sexual orientation or gender identity is rampant in armed conflict and perpetrated by State and non-State actors alike, with rape and other forms of sexual violence sometimes being used as a form of "moral cleansing" of lesbian, gay, bisexual and transgender persons (S/2015/203, A/HRC/25/65).

52. State and non-State actors alike commonly commit acts of sexual violence during international and non-international armed conflicts (S/2015/203). Sexual violence during conflict is often a product of gender stereotypes that are prevalent in societies during peacetime. Rape and other forms of sexual violence constitute violations of international humanitarian law[28] and unequivocally amount to torture under international criminal law jurisprudence.[29] Under international humanitarian law, torture constitutes a breach of the laws and customs of war and may be committed by both States and non-State armed groups. More recent developments in international criminal law have determined that torture can occur when the State had no role in its perpetration and where the State did not

[27] European Court of Human Rights, application No. 39272/98, *M.C. v. Bulgaria,* judgement of 4 December 2003; Inter-American Court of Human Rights, *Ortega et al. vs. Mexico,* judgement of 30 August 2010.

[28] ICRC, "Prevention and criminal repression of rape and other forms of sexual violence during armed conflicts", 11 March 2015.

[29] See, for example, International Criminal Tribunal for Rwanda, case No. ICTR-96-4-T, *Prosecutor v. Akayesu*, judgement of 2 September 1998 and International Criminal Tribunal for the Former Yugoslavia, case No. IT-96-21-Abis, *Prosecutor v. Mucić et al.,* judgement of 8 April 2003.

fail to exercise due diligence obligations, with the "characteristic trait of the offence [being] found in the nature of the act committed rather than in the status of the person who committed it".[30] The Special Rapporteur welcomes these developments and finds that the international humanitarian and criminal law frameworks complement the application of international human rights law, particularly with regard to conflict situations, wherein the control typically exercised by States in peacetime is either lacking or has been replaced by other elements of control, such as insurgent groups or militias.

53. States' due diligence obligations to ensure redress remain intact when non-State actors perpetrate conflict-related sexual violence. Gender-sensitive practices must be employed when investigating violations during and after the armed conflict. Silence or lack of resistance cannot be used to imply consent, which furthermore cannot be inferred from the words or conduct of a victim who was subjected to force, threats, or a coercive environment (A/HRC/7/3). Comprehensive assistance and reparations programmes in these contexts often require years to be fully implemented.

F. Domestic violence

54. It is estimated that 35 per cent of women worldwide have experienced physical or sexual intimate-partner or non-partner violence,[31] with significantly higher figures reported in some States. Women and girls can be victims of specific forms of violence at the hands of their families, for instance in the form of widowhood rites or dowry-related violence, such as bride burnings or acid attacks (A/HRC/20/16). Victims of domestic violence tend to be intimidated by continual threats of physical, sexual or other violence and verbal abuse and may be "effectively manipulated by intermittent kindness" (see E/CN.4/1996/53, para. 47). Fear of further assaults can be sufficiently severe as to cause suffering and anxiety amounting to inhuman treatment.[32]

55. Domestic violence can cause severe physical or mental pain and suffering, constitutes gender discrimination, and is sometimes perpetrated with the purpose of eliciting information, punishment or intimidation (E/CN.4/1996/53). Domestic violence amounts to ill-treatment or torture whenever States acquiesce in the prohibited conduct by failing to protect victims and prohibited acts, of which they knew or should have known, in the private sphere (A/HRC/13/39/Add.5). States are internationally responsible for torture when they fail — by indifference, inaction or prosecutorial or judicial passivity — to exercise due diligence to protect against such violence or when they legitimize domestic violence by, for instance, allowing husbands to "chastize" their wives or failing to criminalize marital rape, acts that could constitute torture.

56. Societal indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws and patterns of State failure to punish perpetrators and protect victims, create conditions under which women may be subjected to systematic physical and mental suffering, despite their apparent freedom to resist. In this context, State acquiescence in domestic violence can take many forms, some of which may be subtly disguised (A/HRC/7/3). States' condoning of and tolerant attitude towards

[30] See International Criminal Court for the Former Yugoslavia, case No. IT-96-23-T and IT-96-23/1-T, *Prosecutor v. Kunarac et al.,* judgement of 22 February 2001, para. 495; International Criminal Tribunal for Rwanda, case No. ICTR-97-20-T, *Prosecutor v. Semanza*, judgement of 15 May 2003.

[31] United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), "Facts and figures: ending violence against women".

[32] European Court of Human Rights, application No. 3564/11, *Eremia v. the Republic of Moldova,* judgement of 28 May.

domestic violence, as evidenced by discriminatory judicial ineffectiveness, notably a failure to investigate, prosecute and punish perpetrators, can create a climate that is conducive to domestic violence and constitutes an ongoing denial of justice to victims amounting to a continuous human rights violation by the State.[33] In cases where States are or ought to be aware of patterns of continuous and serious abuse in a particular region or community, due diligence obligations require taking reasonable measures to alter outcomes and mitigate harms, ranging from the strengthening of domestic laws and their implementation to effective criminal proceedings and other protective and deterrent measures in individual cases.[34] Domestic violence legislation and community support systems must in turn be matched by adequate enforcement.[35] Special attention must be paid to religious or customary law courts that may tend to downplay and inadequately address domestic violence (A/HRC/29/40).

57. Lesbian, gay, bisexual, transgender and intersex persons are disproportionately subjected to practices that amount to torture and ill-treatment for not conforming to socially constructed gender expectations (A/HRC/22/53). Violence motivated by homophobia and transphobia tends to be characterized by particularly brutal acts, often resulting in murder (A/HRC/19/41). Private actors typically inflict torture and ill-treatment on such persons in a climate of impunity as many States fail in their due diligence obligations to combat, prevent and remedy abuses. Lesbians and transgender women are at particular risk of mistreatment because of gender inequality and power relations within families and communities (ibid.). Sexual violence, including the practice of "corrective rape", uniquely affects lesbian, gay, bisexual, transgender and intersex individuals (CEDAW/C/ZAF/CO/4). Discrimination and violence against lesbian, gay, bisexual, transgender and intersex persons extends into the family sphere and can include placement in psychiatric institutions, forced marriage and honour-based violence (A/HRC/29/23).

G. Harmful practices

58. Harmful practices are persistent practices and forms of behaviour grounded in discrimination on the basis of, inter alia, sex, gender and age, in addition to multiple and intersecting forms of discrimination that often involve violence and cause physical or psychological harm or suffering, including immediate or long-term consequences for the victim's dignity, physical and psychosocial integrity and development, health, education and socioeconomic status.[36] Women and girls are disproportionately impacted by harmful practices. Typically justified on the basis of social norms and cultural beliefs, tradition or religion, harmful practices are motivated in part by stereotypes about sex and gender-based roles and rooted in attempts to control individuals' bodies and sexuality. Female genital mutilation, child and forced marriage and honour-based violence are acknowledged as forms of gender-based violence that constitute ill-treatment and torture. Victims seeking justice for violations of their rights as a result of harmful practices often face stigmatization and risk revictimization, harassment and retribution. States must ensure that the rights of

[33] Inter-American Commission on Human Rights, case 12.051, *Da Penha Maia Fernandes v. Brazil,* judgement of 16 April 2001.

[34] European Court of Human Rights, application No. 33401/02, *Opuz v. Turkey,* judgement of 9 June 2009.

[35] Committee on the Elimination of Discrimination against Women, communication No. 5/2005, *Goekce v. Austria*, Views adopted on 6 August 2007.

[36] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014)

women and girls are guaranteed and protected at all stages of the legal processes, inter alia through legal aid, support programmes and witness protection.

1. Honour-based violence

59. Violence committed by family members against relatives in order to protect the family's "honour" is a common practice around the world. In some communities honour is equated with the regulation of female sexuality and with women's conformity with social norms and traditions. Women, girls, and lesbian, gay, bisexual, transgender and intersex persons are the most common victims of honour-based violence, which targets female sexuality and autonomy and individuals' actual or perceived sexual orientation and gender identity and expression (A/61/122/Add.1 and Corr.1).

60. Women and girls tend to be at risk of honour violence or killing for engaging in sexual relations outside of marriage, choosing partners without their family's approval or behaving in other ways that are considered immoral; Lesbian, gay, bisexual, transgender and intersex persons are also targeted (A/HRC/29/23). Honour killings have been documented in South-East Asia, Europe, North America and the Middle East and affect 5,000-12,000 women each year.[37] States' failure to prevent honour-based violence contravenes their obligations to combat and prevent torture and ill-treatment. This includes failure to grant asylum to persons facing the risk of honour violence in their countries of origin.[38]

2. Female genital mutilation

61. Female genital mutilation has severely negative health consequences, including risk of death; has no documented health benefits; causes severe stress and shock, anxiety and depression; and has long-lasting, negative health consequences including higher risks of post-partum haemorrhage and other obstetric complications.

62. The practice constitutes torture or ill-treatment (A/HRC/7/3) and must be prohibited in accordance with, inter alia, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (art. 5). Domestic laws permitting the practice contravene States' obligation to prohibit and prevent torture and ill-treatment, as does States' failure to take measures to prevent and prosecute instances of female genital mutilation by private persons. The tendency towards "medicalization" of female genital mutilation does not in any way make the practice more acceptable. States' indifference or inaction provides a form of encouragement and de facto permission for the practice to take place and go unpunished. The Special Rapporteur notes that in many cases, the perpetrators of female genital mutilation include the victim's parents. In this context, prosecution and the imposition of sanctions, including imprisonment, must result from a nuanced determination that takes into account the best interest of the child.

3. Child and forced marriage

63. A forced marriage occurs without the full and free consent of at least one of the parties or where at least one party is unable to end or leave the marriage, including as a result of duress or intense social or family pressure. Child marriages involve at least one party under 18 years of age. Seven hundred million women alive today were married before the age of 18, and 250 million before the age of 15.[39] These harmful practices occur in

[37] Honour Based Violence Awareness Network, statistics and data.

[38] European Court of Human Rights, application No. 28379/11, *D.N.M. v. Sweden*, judgement of 27 June 2013.

[39] United Nations Children's Fund, *Ending Child Marriage: Progress and Prospects* (2014).

every region in the world, are strongly linked to violence against women and inflict long-term physical and psychological harm on victims. They can legitimize sexual abuse and exploitation; trap women in situations characterized by domestic violence and servitude, marital rape and life-threatening early pregnancies; and affect the victim's capacity to realize the full range of her human rights. (CEDAW/C/MNE/CO/1, CRC/C/MRT/CO/2, A/HRC/26/38/Add.3). Child marriage constitutes torture or ill-treatment (CAT/C/ETH/CO/1), particularly where Governments fail to establish a minimum age for marriage that complies with international standards or allow child marriage despite the existence of laws setting the age of majority at 18 (CAT/C/YEM/CO/2/Rev.1, CCPR/C/BGR/CO/3), to criminalize forced marriage and to investigate, prosecute and punish perpetrators.

64. Child and other forms of forced marriage increase during conflict and among displaced populations living in refugee or internally displaced persons camps. In 2015 the practice has been documented as being enforced by both State actors and non-State or rebel factions in Iraq, Nigeria, Somalia, the Syrian Arab Republic and elsewhere, with victims being repeatedly raped, compelled to carry multiple pregnancies and subjected to other forms of physical and psychological violence over prolonged periods. While rape commonly occurs in the context of forced marriage, girls and women can also be forced into marriage as a consequence of rape or fear of sexual violence, as a form of "restitution" or "reparation". Like rape, forced marriage is used as a tactic of war and to fulfil strategic objectives such as domination, intimidation and degradation. It has been recognized as a crime against humanity by the Special Court for Sierra Leone.[40]

H. Access to justice and reparations

65. Victims of gender-based violence face significant hurdles in accessing justice and reparations, including absence of or shortcomings in domestic legal frameworks to hold perpetrators accountable, and practical obstacles such as the significant expense involved in accessing courts. Stigma can be a factor associated with gender-based crimes, and victims may fear rejection by families and communities and encounter personnel who are not properly trained to respond to their needs. All victims must be granted access to effective judicial and administrative remedies. This entails the dismantling of discriminatory barriers and the provision of support to victims at all stages of the legal process.

66. Reparations must be premised on a full understanding of the gendered nature and consequences of the harm suffered and take existing gender inequalities into account to ensure that they are not themselves discriminatory (see A/HRC/14/22, para. 32). They must address the context of structural discrimination in which violations occurred and aim to provide both restitution and rectification.[41] Reparations must have a transformative impact, addressing the underlying causes and consequences of violations, and offer continued protection for and respectful engagement with victims (A/HRC/14/22). As stipulated in the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, victims must be empowered to help determine what forms of reparation are best suited to their situation.

67. Adequate redress requires States to investigate, prosecute and punish perpetrators and inform the public of results. States must ensure that judicial procedures and rules of evidence are gender responsive; that equal weight is afforded to the testimony of women,

[40] Case No. SCSL-2004-16-A, *Prosecutor v. Brima et al.*, judgement of 22 February 2008.
[41] Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico,* judgement of 16 November 2009.

girls, and lesbian, gay, bisexual, transgender and intersex persons; and that the introduction of discriminatory evidence and the harassment of victims and witnesses are strictly prohibited.[42] The standards established by international courts should serve as an example for domestic courts to follow, for instance by implementing institutional gender-balance requirements and prohibiting the admission of evidence regarding the victims' prior sexual conduct in cases of sexual, domestic and other gender-based violence.

IV. Conclusions and recommendations

68. **States have a heightened obligation to prevent and combat gender-based violence and discrimination against women, girls, and lesbian, gay, bisexual, transgender and intersex persons that amount to torture and ill-treatment, committed in a variety of contexts by both State and actors. In assessing the level of pain and suffering experienced by victims of gender-based violence, States must examine the totality of the circumstances, including the victim's social status; extant discriminatory legal, normative and institutional frameworks that reinforce gender stereotypes and exacerbate harm; and the long-term impact on victims' physical and psychological well-being, enjoyment of other human rights and their ability to pursue life goals. The provision of comprehensive reparations, including monetary compensation, rehabilitation, satisfaction and guarantees of non-repetition, is essential and must be accompanied by diverse measures and reforms designed to combat inequality and legal, structural and socioeconomic conditions that perpetuate gender-based discrimination. Urgent interim reparations designed to respond to the immediate needs of victims of gender-based violence, including rehabilitation and access to physical and mental health care, should also be provided where necessary.**

69. **States must repeal all laws that support the discriminatory and patriarchal oppression of women, inter alia laws that exclude marital rape from the crime of rape or grant pardon to rapists who marry their victims and laws that criminalize adultery. In addition, States must decriminalize same-sex relationships between consenting adults and repeal all laws that criminalize persons on the basis of their actual or perceived sexual orientation or gender identity or expression. Comprehensive, coordinated policies and programmes to combat gender-based discrimination and violence, inclusive of gender-sensitive trainings of public officials and the implementation of public education and awareness campaigns, must be developed and implemented at all levels.**

70. **With regard to women, girls, and lesbian, gay, bisexual and transgender persons in detention, the Special Rapporteur calls on all States to:**

(a) Fully and expeditiously implement the Bangkok Rules and establish appropriate gender-specific conditions of detention;

(b) Use pretrial detention as a means of last resort in accordance with the Tokyo Rules and prioritize the use of alternative measures, such as release on bail or personal recognizance;

(c) Guarantee the right to effective assistance of counsel, including by means of a legal aid system, and the right to appeal decisions to a judicial or other competent independent authority, without discrimination;

[42] Committee against Torture, general comment No. 3 (2012) on implementation of article 14 by States parties.

(d) Review laws, criminal procedures and judicial practices to ensure that they take full account of women's backgrounds, including histories of prior abuse, mental health problems and substance abuse, and parental and other caretaker responsibilities in the allocation of sentences and sentence planning;

(e) Divert women and girls away from the criminal justice system and towards appropriate services and programmes, whenever appropriate, and implement alternatives to detention such as absolute or conditional discharge, verbal sanctions, arbitrated settlements, restitution to the victim or a compensation order, community service orders, victim-offender mediation, family group conferences, sentencing circles, drug rehabilitation programmes and other restorative processes, services and programmes;

(f) Provide for non-custodial means of protection, such as shelters and other community-based alternatives, and guarantee that the placement of women in detention centres for protection — only where necessary and expressly requested by the woman in question — will be temporary, subject to supervision and competent authorities and never continued against their will;

(g) Ensure that male and female detainees are separated, including during transport; that female detainees are supervised and attended to only by female staff; and that escorts of female prisoners at least include female officers;

(h) Immediately cease the practice of shackling and handcuffing of pregnant women and women in labour and of women immediately after childbirth;

(i) Absolutely prohibit the use of solitary confinement on pregnant and breastfeeding women, mothers with young children, women suffering from mental or physical disabilities and girls under 18 years of age and as a measure of "protection";

(j) Ensure that strip and invasive body searches are conducted only when necessary and appropriate, by staff of the same gender with sufficient medical knowledge and skill to perform the search safely and respect the individual's privacy and dignity and in two steps (to ensure that the detainee is never fully unclothed), and to prohibit body searches of females by male staff;

(k) Account for women's gender-specific health-care needs and provide individualized primary and specialist care, including comprehensive and detailed screenings and prerelease preparations, in a holistic and humane manner, in line with the Bangkok Rules; provide preventive and gender-sensitive care designed to safeguard women's privacy and dignity, including as regards mental health, sexual and reproductive health, HIV prevention and treatment and substance abuse treatment and rehabilitation programmes; and ensure that female detainees are examined and treated by female health-care professionals if they so request, except in emergency situations, when female staff should be present;

(l) Ensure adequate sanitation standards and provide for facilities and materials that meet women's specific hygiene needs, such as sanitary towels at no cost, and clean water, including during transport;

(m) Prohibit forced and coerced pregnancy tests and obtain full, free and informed consent for such tests, and prohibit virginity testing under all circumstances;

(n) Consider the imprisonment of pregnant women and women with young children only when other alternatives are unavoidable or unsuitable; ensure that sentencing policies and practices respect the best interests of the child, including the need to maintain direct contact with mothers; assist female offenders with tools to

carry out child-rearing responsibilities and make special provisions for mothers prior to admission to allow for alternative childcare arrangements; and allow children to maintain personal relations and direct contact with mothers in detention;

(o) When the detention of children with their mothers in prison is unavoidable,implement effective safeguards, including regular monitoring and review of every case to ensure that the children are never treated like prisoners; ensure that the full range of the children's needs, whether medical, physical, psychological or educational, including living conditions that are adequate for a child's development, are guaranteed in practice;

(p) When the detention of girls is unavoidable, design and implement distinct, child-centred policies and practices, inclusive of properly trained and sensitized personnel; and ensure the provision of comprehensive assistance, protection and services, including by the development of specialized child and gender units designed to address the special needs of girls in detention;

(q) Ensure that migrants, refugees and asylum seekers are individually assessed, including with respect to their need for protection, and that adequate screening and assessment procedures are in place to identify victims of torture and ill-treatment; provide opportunities for safe, voluntary and dignified disclosure of lesbian, gay, bisexual, transgender and intersex status; and ensure that measures taken by migration authorities do not retraumatize victims;

(r) In the context of administrative enforcement of immigration policies, ensure that detention is used only as a last resort and in exceptional circumstances; and comply with the absolute prohibition of refoulement at all times, with special attention to prospective situations of gender-based discrimination and violence that women, girls, and lesbian, gay, bisexual, transgender and intersex persons may face;

(s) Take individuals' gender identity and choice into account prior to placement and provide opportunities to appeal placement decisions;

(t) Ensure that protective measures do not involve the imposition of more restrictive conditions on lesbian, gay, bisexual, transgender and intersex persons than on other detainees;

(u) Guarantee all transgender detainees the choice of being searched by male or female officers;

(v) Ensure the physical and mental integrity of detainees at all times and prevent, investigate, prosecute and punish all acts of violence, harassment and abuse by staff members or other prisoners, at all times;

(w) Set up operational protocols, codes of conduct, regulations and training modules for the ongoing monitoring and analysis of discrimination against women, girls, and lesbian, gay, bisexual and transgender persons with regard to access to all services and rehabilitation programmes in detention; and document, investigate, sanction and redress complaints of imbalance and direct or indirect discrimination in accessing services and complaint mechanisms;

(x) Monitor and supervise all places of detention in a gender-sensitive manner and ensure that allegations of abuse are effectively investigated and perpetrators brought to justice; and ensure the availability of adequate, speedy and confidential complaint mechanisms in all places of detention;

(y) Ensure that all places of detention are subjected to effective oversight and inspection and unannounced visits by independent bodies established in conformity with the Optional Protocol to the Convention against Torture, as well as

by civil society monitors; and ensure the inclusion of women and lesbian, gay, bisexual and transgender persons and other minority representation on monitoring bodies;

(z) Undertake specific training and capacity-building programmes designed to sensitize law enforcement authorities and detention facility staff to the specific circumstances and unique needs of female and lesbian, gay, bisexual and transgender prisoners and standards such as the Bangkok Rules.

71. **With regard to trafficking, the Special Rapporteur calls upon States to ensure that appropriate frameworks are in place for the identification, investigation and prosecution of trafficking-related human rights violations; duly investigate, prosecute and punish public officials for their role in trafficking operations; establish a combination of comprehensive gender- and age-sensitive measures to protect, support and rehabilitate victims; and avoid detention of victims for status-related offences and for "protective" purposes.**

72. **With regard to abuses in health-care settings, the Special Rapporteur calls upon States to:**

(a) Take concrete measures to establish legal and policy frameworks that effectively enable women and girls to assert their right to access reproductive health services;

(b) Decriminalize abortion and ensure access to legal and safe abortions, at a minimum in cases of rape, incest and severe or fatal fetal impairment and where the life or physical or mental health of the mother is at risk;

(c) Set forth clear guidance on implementing domestic abortion legislation and ensure that it is interpreted broadly; and monitor the practical implementation of legislation to ensure that persons are provided the right to legal services in practice;

(d) Guarantee immediate and unconditional treatment of persons seeking emergency medical care, including as a result of illegal abortion;

(e) Outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups; and ensure that health-care providers obtain free, full and informed consent for such procedures and fully explain the risks, benefits and alternatives in a comprehensible format, without resorting to threats or inducements, in every case;

(f) Effectively monitor and regulate practices by public and private actors in health-care and educational settings to ensure the eradication of prohibited practices including, inter alia, the denial of maternal health care and compulsory medical examinations such as forced pregnancy and virginity testing, and investigate, prosecute and punish perpetrators;

(g) Undertake appropriate training sessions and community-level gender-sensitization campaigns to combat discriminatory gender stereotypes underlying discrimination and abuses in the provision of health-care services to women, girls, and lesbian, gay, bisexual, transgender and intersex persons;

(h) Adopt transparent and accessible legal gender recognition procedures and abolish requirements for sterilization and other harmful procedures as preconditions;

(i) Repeal laws that allow intrusive and irreversible treatments of lesbian, gay, bisexual, transgender and intersex persons, including, *inter alia*, genital-normalizing surgeries and "reparative" or "conversion" therapies, whenever they are

enforced or administered without the free and informed consent of the person concerned;

(j) Prohibit and prevent the discriminatory denial of medical care and of pain relief, including HIV treatment, to lesbian, gay, bisexual, transgender and intersex persons.

73. **With regard to domestic and private-actor violence against women, girls, and lesbian, gay, bisexual, transgender and intersex persons, the Special Rapporteur calls upon States to:**

(a) Repeal or reform civil laws that restrict women's access to divorce, property and inheritance rights and that subjugate women and limit their ability to escape situations of domestic and other gender-based violence;

(b) Dismantle legal and practical barriers to initiating legal proceedings and reform judicial systems and procedures to permit women to obtain protective measures, including, *inter alia*, restraining and protective orders, witness protection programmes and other measures designed to combat harassment and retaliation;

(c) Provide community support programmes and services, including shelters, to victims and their dependents;

(d) Enact legislation that prohibits discrimination by public actors and private parties, including hate crime laws that sanction homophobic and transphobic violence; ensure that appropriate laws apply to all persons equally, regardless of real or perceived sexual orientation and gender identity; and implement effective complaint and enforcement procedures and systems for quantifying prohibited acts.

74. **With regard to harmful practices, the Special Rapporteur calls upon States to:**

(a) Remove the defence of "honour" and other mitigating factors in prosecuting victims' relatives; and engage in community outreach and public education campaigns to raise public awareness about honour-based crimes;

(b) Implement legislation that prohibits all forms of female genital mutilation at all levels, including in State-run and private medical facilities; prosecute and hold accountable health-care professionals, community leaders and other public officials who perpetrate or condone the practice or refuse to implement relevant laws; and concomitantly raise awareness and mobilize public opinion against female genital mutilation through community-based programmes and educational campaigns;

(c) Implement and enforce uniform laws that prohibit child marriage before the age of 18, with no exceptions on the basis of parental consent or personal status laws; extend the prohibition to cover traditional and religious marriages; provide appropriate assistance to women and girls living in forced marriages, including by helping women leave the marriage with a share of matrimonial assets, custody of children and the right to remarry; and provide support to victims' dependents and members of immediate families;

(d) Ensure that victims of honour-based violence have equal access to justice and remedies, including appropriate long-term social, psychological, medical and other appropriate specialized rehabilitation measures.

Gender Perspectives on Torture: Law and Practice brings together contributions by more that twenty-five experts in response to former United Nations Special Rapporteur on Torture Juan E. Mendez's cutting edge thematic report on gender perspectives on torture.

Each piece in this volume provides novel insights into critical topics at the intersection between gender and the international human rights law prohibition of torture and other ill-treatment, while addressing the unique experiences of women, girls, and lesbian, gay, bisexual, and transgender and intersex persons in a variety of key contexts, ranging from gender-based violence, female genital mutilation, deprivation of liberty, and forced sterilization. The questions raised by the former Special Rapporteur's report and the array of innovative per spectives offered in response by the contributing authors illustrate a profound commitment to tackling the ongo ing challenge of promoting the fundamental human rights of those at the margins of legal protection.