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Gender Perspectives on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Expert Consultation

Brenda V. Smith

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GENDER PERSPECTIVES ON TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

EXPERT CONSULTATION
NOVEMBER 5 – 6, 2015

WORKING PAPER¹

INTRODUCTION

The aim of this consultation with experts is to ensure that the Special Rapporteur receives the necessary exposure to the different practices, international standards and jurisprudence, and expert opinions that will help him draft his forthcoming thematic report for the United Nations Human Rights Council. The report will focus on assessing the unique experiences of women, girl children and LGBTI persons from the perspective of torture and other cruel, inhuman or degrading treatment and punishment (“CIDTP”) in international law. The consultation will focus on specific practices where the mistreatment rises to the level of torture or CIDTP to identify gaps in protection, state obligations, and best practices.

The thematic report will specifically consider practices such as, *inter alia*, violence and discrimination against women, girls, and LGBTI persons; conflict-related sexual violence; domestic violence; custody and detention practices; honour-based violence, human trafficking, reproductive rights and healthcare, and other cultural practices that uniquely or disproportionately affect women and LGBTI individuals. The purpose of examining these practices will be to determine whether higher or modified standards are required to ensure adequate protection of women, girls, and LGBTI persons. The discussions will cover practices that are already classified as torture, identify new practices requiring specific attention or modified standards to combat and prevent torture and other ill-treatment, and examine best practices.

This consultation is intended to help the Special Rapporteur determine priorities for the forthcoming report, and to facilitate a focused discussion of key issues pertaining to gender perspectives on torture. **The preliminary research and questions identified below, whilst not comprehensive, are intended to provide a basis for and a guide to the discussion between the experts and the Special Rapporteur.** It is hoped that the consultation will help shed light on a broad range of topics and perspectives, with a view to identifying existing gaps in law and practice and fleshing out necessary protective and preventive mechanisms to ensure that women, girls, and LGBTI persons are adequately protected from torture and other ill-treatment in a variety of contexts.

¹ The Special Rapporteur on Torture and the Anti-Torture Initiative would like to thank UC Berkeley School of Law International Human Rights Law Clinic students *Sabira Khan* ’16, *Maria Ochoa Vargas* ’16, and *Kelsey Quigley* ’17, under the supervision of *Laurel E. Fletcher*, Clinical Professor of Law, for their assistance in preparing this Working Paper.

THURSDAY, 5 NOVEMBER

PANEL I

Gender Perspectives on Torture Other Ill-Treatment: An Overview of Major Challenges in Law and Practice

OVERVIEW

The international community has acknowledged that certain manifestations of violence against women, girls and persons identifying as lesbian, gay, bisexual, transgender, and intersex (LGBTI) are forms of/can amount to torture. The Vienna Declaration and Programme of Action, the Declaration on the Elimination of Violence against Women and the Beijing Declaration and Platform for Action, all have been influential in developing norms around gender-based violence. There has also been mention of violence against women in three key regional human rights treaties, including the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 1994, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003, and the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

Both the European Court of Human Rights and the Inter-American Commission on Human Rights have, in their case law, found instances of rape of detainees to amount to torture.² In dealing with domestic violence and rape by non-state actors, the European Court of Human Rights has given indications that it may be willing to make a finding of “torture”, but up until now has only referred to the acts as “ill-treatment,” when the acts are committed by non-state actors.³ The Inter-American Commission on Human Rights has found that a rape can constitute torture even when it only consists of one act or when it occurs outside of state installations, if there is intentionality, severe suffering, and an end on the part of the perpetrators.⁴ In 1986, the first UN Special Rapporteur on torture classified rape as a form of torture.⁵ In 2013, the UN Committee Against Torture (UNCAT) expressed concern over rape used as torture in its review of periodic country reports.⁶ The UN Human Rights Committee has recognized other manifestations of violence against women as constituting torture or CIDT, including forced sterilization,⁷ forced abortion⁸ and female genital mutilation.⁹

The Statute of the International Criminal Court states that “committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, or any other form of sexual violence” constitutes a war crime in international and non-international armed conflicts.¹⁰ Furthermore, “rape,

² See, e.g., European Court of Human Rights (“ECtHR”), *Aydin v Turkey* (1997) 25 September 1997; Inter-American Commission on Human Rights (“IACHR”), *Raquel Martí de Mejía v Perú* (1996) Case 10.970, Decision of 1 March 1996, Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7.

³ See, e.g., ECtHR, *Opuz v Turkey* (2009) App. No. 33401/02, Judgment of 9 June 2009.

⁴ IACHR, *Application to the Inter-American Court of Human Rights in the case of Inés Fernández Ortega* (Case 12,580) against the United Mexican States, May 7, 2009, paras. 178-179.

⁵ Commission on Human Rights (1986), 'Report by the Special Rapporteur, Mr P Kooijmans', UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.

⁶ See UN Committee Against Torture, Concluding Observations for Japan, Kenya, Mauritania and Estonia, respectively, CAT/C/JPN/CO/2, para. 20, CAT/C/KEN/CO/2, para. 7, CAT/C/MRT/CO/1, para. 23, and CAT/C/EST/CO/5, para. 12.

⁷ See, e.g., UN Human Rights Committee, Concluding Observations on Slovakia, CCPR/C/SVK/CO/3, para.13.

⁸ See, e.g., UN Human Rights Committee, General Comment No. 28, article 3, HRI/GEN/1/Rev.9 (Vol.I), Sect. II.

⁹ See, e.g., UN Human Rights Committee, Concluding Observations on Chad, CCPR/C/TCD/CO/1, para. 15.

¹⁰ International Criminal Court Statute, Article 8(2)(b)(xxii) and (e)(vi) (*ibid.*, § 1565).

sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” constitutes a crime against humanity under the Statute of the International Criminal Court and rape constitutes a crime against humanity under the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.¹¹ In the international humanitarian law context, rape and human trafficking are war crimes under both the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.¹²

In this context, and in view of the fact that women and girl children, as well as LGBTI persons uniquely experience torture and CIDTP, it is important to analyze how the genders experience pain and suffering (physiologically and psychologically) in different ways, and by doing that, analyze the special remedies that are necessary to be developed. In his work, the Special Rapporteur on Torture has observed that people frequently suffer torture or CIDT not only because of their gender but also because of incarceration and treatment policies that do not bear in mind particular gender-sensitive needs for rehabilitation and treatment. Moreover, gender-based discrimination and impunity are closely linked, while reports indicate that criminal justice systems are not responding to violence against and ill-treatment of women and LGBTI persons. In addition, over time, women, girl children and LGBTI persons have been disproportionately subjected to different forms of harm often by private actors, that do not fit within the traditional constructs of torture.

The torture protection framework in international law must be applied in a gender-inclusive and gender-sensitive manner, with a view to strengthening the protection of women, girl children, and LGBTI persons from practices amounting to torture and other ill-treatment.¹³ As explained by former Special Rapporteur on Torture Manfred Nowak, this endeavor is important because while a variety of international instruments explicitly or implicitly provide for an extensive set of obligations with respect to violence and discrimination against women, “classifying an act as ‘torture’ carries a considerable additional stigma for the State and reinforces legal implications” (for instance, the fundamental obligations to criminalize acts of torture, to bring perpetrators to justice, and to provide reparation to victims).¹⁴ Over the last decades, human rights advocates and practitioners have fought to ensure that the international and regional legal frameworks implementing the prohibition of torture take account of the unique experiences and situations of women and girls. Recognizing that certain forms of harm that uniquely or disproportionately affect women, girl-children, and LGBTI persons fall within the legal definition of torture and other ill-treatment can help ensure greater protection and prevention of serious human rights violations, and assist the delivery of justice and remedies for female victims of gender-based violence and discrimination.

From a legal perspective, the Special Rapporteur also seeks to explore how major legal instruments addressing discrimination and violence against women and girls, like the UN Convention on the Elimination of all forms of Discrimination Against Women, intersect with the UN Convention Against Torture and indeed with customary international law, and how protections of multiple human rights instruments can be effectively applied to protect women, girl children, and LGBTI persons. It is hoped that this inquiry will shed light on how existing standards preventing torture and CIDTP are

¹¹ International Criminal Court Statute, Article 7(1)(g) (*ibid.*, § 1564); ICTY Statute, Article 5(g) (*ibid.*, § 1576); ICTR Statute, Article 3(g) (*ibid.*, § 1577).

¹² International Criminal Tribunal of Rwanda, Statute, Article 4(e) (*ibid.*, § 1577); Statute of the Special Court for Sierra Leone, Article 3(e) (*ibid.*, § 1569).

¹³ See, e.g., Report of the Former Special Rapporteur on Torture Mr. Manfred Nowak, from para 25: <http://www.refworld.org/pdfid/47c2c5452.pdf>. See also REDRESS & Amnesty International, Gender and Torture Conference Report (2011), available at <http://www.redress.org/downloads/GenderandTortureConferenceReport-191011.pdf>.

¹⁴ *Id.*

currently applied and how must they be changed, modified or reinterpreted to apply appropriately to women and girl children, as well as LGBTI persons, in a variety of contexts. While there has been limited review of the international standards which currently govern issues related to gender from the perspective of the prevention of torture and CIDTP, a range of issues including but going beyond traditional understandings of gender-based violence, including, *inter alia*, women in custody, rape and other forms of sexual violence, domestic violence, denial of rights regarding childbearing and childrearing, human trafficking, mass incarceration, forced marriage, and other harmful practices, like female genital mutilation, merit analysis from the perspective and torture and other ill-treatment. This is particularly important because despite the persuasive normative frameworks outlined above, State practice often ignores these existing norms.

When considering torture from the perspective of gender, a few preliminary observations are in order. Torture has four elements: an action 1) intentionally perpetrated 2) by or with the acquiescence of the state or a state official 3) for a specific purpose 4) that causes severe physical or mental pain or suffering. Women or persons who do not conform to traditional gender roles may be targeted on this basis for practices that arise to the level of torture. Thus, the concept of discrimination is particularly powerful in addressing these harms as torture. International law defines discrimination as any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on a prohibited ground of discrimination and that has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of rights guaranteed under international law. Under CEDAW Article 1, gender-based discrimination includes violence that is directed against women or violence that affects women disproportionately. The mandate of the Special Rapporteur has long held that “[i]n regard to violence against women, the purpose element is always fulfilled if the acts can be shown to be gender-specific, since discrimination is one of the elements mentioned in the CAT definition. Moreover, if it can be shown that an act had a specific purpose, the intent can be implied.”¹⁵ Thus, throughout the memo, purpose is said to be satisfied if an action is solely perpetrated against a person because of their gender.

Preliminary Questions for Panel I

- **Question:** What, if any, changes, modifications, or additions should be made to the existing international legal framework to guarantee the rights of women, girls, and LGBTI persons to be free from torture and CIDTP?
- **Question:** How do the specific standards applicable to women, girls, and LGBTI persons interact with the principal international norms regarding the prohibition of torture and ill-treatment (and other customary international law norms)?
- **Question:** How does the CEDAW intersect with the CAT and how can protections of both treaties be most effectively and uniformly applied?

¹⁵ Id.

THURSDAY, 5 NOVEMBER

PANEL II

Women, Girls, and LGBTI Persons in Detention

Women and Girls Children in the Criminal Justice System

Prisons are typically designed for – and commonly thought to be inhabited by – men. Statistically, women comprise only between 2 to 10% of the global prison population:¹⁶ although these numbers are increasingly rapidly, the needs of women in detention continue to go unnoticed. Women generally get involved in criminal activities for different reasons than men do and experience prison in different ways. According to one commentator “prison is much more harmful and stigmatizing to women than men because of the role society has assigned to women for a long time. Having been offenders and having experienced prison is doubly stigmatizing for women. Women who have been in prison are portrayed as ‘bad’ and stigmatized by the community.”¹⁷

Female prisoners are a distinct group for whom different services and even infrastructures should be developed, in accordance with their specific needs. It is also imperative to disaggregate the underlying causes behind women’s criminal behavior, in order to help them avoid coming into contact with the criminal justice system. According to some sources the majority of women involved in criminal activities are *low-income, minority, single mothers with histories of abuse and trauma*.¹⁸ Additionally, women are frequently imprisoned for “*economic, non-violent offences often linked to their financial situation or experience of violence. Poverty, persisting discriminatory laws, lack of enjoyment of economic, social and cultural rights and related obstacles in accessing justice, increase the likelihood of women being detained*.”¹⁹ Generally speaking, vulnerable women who are unable to pay for a lawyer to keep them out of the prison system are routinely being incarcerated. Women routinely suffer from intersectional discrimination – referring to the reality that “people live multiple, layered identities derived from social relations, history and the operation of structures of power. [and that] something unique is produced at the intersection point of different types of discrimination.”²⁰ Female prisoners around the world are for instance often indigent,, illiterate, and indigenous: all these identities add layers of vulnerability.

1. Normative Framework: The Bangkok Rules

One of the first times the specific needs of women prisoners were recognized was 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.”²¹ The declaration goes on to explain that this lack of attention affects women’s access

¹⁶ UN-OHCHR, Women and Detention, September 2014, available at:

http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Women_and_Detention.pdf.

¹⁷ 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, México, April 28 – 29, 2003.

¹⁸ The Program That’s Keeping Women Out of Prison – And Saving Money, The Guardian, September 18, 2015: <http://www.theguardian.com/us-news/2015/sep/17/justice-home-program-keeping-women-out-of-prison-saving-money>

¹⁹ Id.

²⁰ Association of Women’s Rights in Development (AWID):

https://lgbtq.unc.edu/sites/lgbtq.unc.edu/files/documents/intersectionality_en.pdf

²¹ Caracas Declaration, adopted in December 1980 in Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF87/14/Rev. 1, pg. 12

to programs and services such as half-way houses, programs that help them take care of their children, or place them near their places of residency, and makes other relevant recommendations.

During the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Vienna, Austria in 2000, the Vienna Declaration was adopted.²² Member States declare in provision no. 11 that “[w]e commit ourselves to taking into account and addressing, within the United Nations Crime Prevention and Criminal Justice Programme, as well as within national crime prevention and criminal justice strategies, any disparate impact of programmes and policies on women and men.” Member States also undertake to create “action-oriented policy recommendations based on the special needs of women as criminal justice practitioners, victims, prisoners and offenders.” In 2009, during the 18th Session of the Commission on Crime Prevention and Criminal Justice, Resolution 18/1 entitled ‘Supplementary rules specific to the treatment of women in detention and in custodial and non-custodial settings’ was approved. The Resolution notes that women prisoners are a vulnerable group with specific needs, and also addresses the status of children of incarcerated women as a vulnerable group. Moreover, the Resolution requested the UN Office on Drugs and Crime (UNODC) to provide technical services to Member States to help them develop and implement legislation, procedures, policies and practices for women in prison, and to provide to alternatives to imprisonment. Finally, it was requested the Executive Director of the UNODC to convene in 2009 “an open-ended intergovernmental expert group meeting to develop, consistent with the Standard Minimum Rules for the Treatment of Prisoners (now the revised Mandela Rules) and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), supplementary rules specific to the treatment of women in detention and in custodial and non-custodial settings.”

The results of this intergovernmental expert group meeting were presented during the Twelfth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Salvador, Brazil in 2010. The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) were subsequently adopted by the General Assembly in Resolution A/RES/65//229 of December 2010. The seventy rules contained in the document function as a guide for policy makers, legislators, criminal justice and prison authorities, to establish a minimum standard of living for women prisoners and their children while in custody, and to reduce or avoid their encounters with the criminal justice system. These rules complement but do not replace the Mandela or Tokyo Rules.

2. Over-Incarceration and Overcrowding as a Form of Torture/CIDTP

Many factors cause overcrowding, ranging from inadequate infrastructure; lack of access to legal aid; lack of alternatives measures; the overuse of pretrial detention and (over)criminalization of certain practices or persons, failure to use measures like early and compassionate release, pardons, or diversion. The overcrowding characterizing many, if not most, prisons around the world negatively impact almost all other aspects of the daily life of inmates, whether in terms of conditions of accommodation, health-care services, food, educational and work opportunities. Overcrowding elevates tension among prisoners and “exacerbates existing mental and physical health problems, increases the risk of transmission of communicable diseases and poses immense management challenges,”²³ and is associated with an increase in suicides. Overcrowded prison facilities also suffer from a lack of sufficient staff, which impacts the security and safety of prisoners and leads to violations of basic principles found in the Mandela Rules and other international standards, for instance by contributing to an increase in “the risk of abuse of vulnerable prisoners by those who are stronger, as well as of corrupt practices” or by creating conditions for the operation of gangs inside prisons. Overcrowding also creates conditions for the commission of

²² A/CONF.187/4/Rev.3

²³ UNODC, Handbook on strategies to reduce the overcrowding in prisons

routine and systematic corruption, whereby prisoners may for instance be required to pay for receiving basic and necessary goods or for access to educational and work programs or other resources that should be provided by the State.²⁴

3. Women Prisoners and Parental Responsibility

While there is no data that reveals the number of women in prison who are mothers, some studies that suggest that it is as high as 80% of the female prison population. As many women are the primary care givers for their children (and frequently single mothers), when mothers are imprisoned their children are often placed with family members, neighbors, friends, or in foster care or public institutions, and can even end up living alone without adult supervision and in extremely poor conditions.²⁵ According to United Nations Human Rights, “the impact of imprisonment can be extremely severe if the prisoner is the primary care-giver of [] children – a role that is still overwhelmingly held by mothers. Even a short period in prison may have damaging, long-term consequences for the children concerned.”²⁶ Moreover, “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.”²⁷ In most parts of the world maintaining contact between imprisoned mothers and their children due to expenses associated with telephone calls or visits to places of detention, which are often far from home. In addition, “worrying about their children is one of the factors that leads to the high incidence of mental health problems and self-harm amongst female detainees.”²⁸ Nevertheless, judges are typically not required to and do not consider parental responsibility when determining sentencing and no leniency or consideration of the children’s well-being is shown. While some countries have local laws that allow judges to use house arrest for pregnant women and women with minor children,²⁹ they are rarely used. Most women do not know of these laws and often lack adequate legal representation to facilitate their ability to benefit from such provisions.

Bangkok Rules 57–60 express the need to apply non-custodial measures to female suspects/offender, due to the fact that many do not represent a risk to society and imprisonment can impose vast emotional and economic burdens on them and their children. It is additionally instructive that the Convention on the Rights of the Child notes the need to respect the best interest of the child “by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies” (Article 3). Moreover, Article 9.3 expresses the need to maintain direct contact with their parents; Article 18.2 highlights the assistance the parents need to receive from the States, including tools to perform their child-rearing responsibilities, as well as the need for States to develop institutions, facilities and services for the care of children. Additionally, Article 20.1 indicates that “[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” Article 16

²⁴ United Nations, CAT/OP/MEX/1, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico, May 27, 2009, para. 169.

²⁵ A report entitled “Lineamientos para la Implementación de las Reglas de Bangkok en el Sistema Penitenciario Peruano,” published in 2013 by the Ombudsman Office of Peru (Defensoría del Pueblo) surveyed 350 women from different prisons around the country and showed that 7% of their minor children were living by themselves. More information is available at: <http://www.defensoria.gob.pe/informes-publicaciones.php>.

²⁶ UNOHCHR, September 2014.

²⁷ UNODC, Handbook of Women and Imprisonment, 2014.

²⁸ Pretrial detention of women and its impact on children, QUNO, 2007. <http://www.quno.org/resource/2007/2/pre-trial-detention-women-and-its-impact-their-children>.

²⁹ In Argentina law 26.472 of the Penal Code established to impose the house arrest for mothers with children under five years or with caring responsibilities for persons with disabilities. This has allowed reducing the number of mothers with children in prison.

of the Universal Declaration of Human Rights points out that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

4. The Overuse of Pretrial Detention

Overcrowded facilities affect the classification of people within the prison. In most States, there are no separate facilities to separate prisoners awaiting trial from sentenced prisoners. According to the *Handbook on Strategies to Reduce Overcrowding in Prisons*, “the level of overcrowding is often much worse in pre-trial detention facilities in most countries worldwide, and the prison conditions are correspondingly much poorer, despite the fact that pre-trial prisoners should be presumed innocent until proven guilty by a court of law and special privileges should be provided to them, reflecting their non-convicted status, according to international law.”³⁰ According to *The Global Campaign for Pretrial Justice*, “the excessive use of pretrial detention leads to overcrowded, unhygienic, chaotic, and violent environments where pretrial detainees—who have not been convicted—are at risk of contracting disease.”³¹ As a result, infectious diseases such as tuberculosis are extremely common in prisons throughout the world, and prisoners with preexisting conditions are not likely to receive timely or adequate medical care. According to the *International Covenant on Civil and Political Rights* “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release (Article 9(3)), while “[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons” (Article 10). Moreover, the Tokyo Rules state that pretrial detention must be used as last resort and that alternatives to pretrial detention should be put in place, especially “for minor cases the prosecutor may impose suitable noncustodial measures, as appropriate” (Rules 5 and 6).

The Committee Against Torture has stated that prolonged periods of privation of liberty after the arrest in pre-trial detention may violate the Convention Against Torture, stating that “the undue prolongation of this pre-trial stage represent a form of cruel treatment of the individual concern, even if he is not detained.”³² Female pretrial detainees are in a particularly vulnerable position.³³ A majority of women in detention worldwide are first-time offenders, detained for minor non-violent crimes (often for drug related offences), and are typically automatically sent to pretrial detention. In many countries women spend prolonged periods of time in pretrial detention for prolonged periods which impacts the number of people in detention and their emotional state. The time women spend in pretrial detention affects them emotionally but is also especially hard on their children. One report explains that “in England and Wales 66% of reception of women into prison in a year are pretrial detainees. In Bolivia 77% of women in prison are pretrial. In India more than 70% of female prison population is pretrial: many remain in jail for four to five years charged with offences which would carry sentences shorter than that.”³⁴ In addition, female detainees in pretrial facilities – not built for the use of women – usually do not have access to specialized health services, and are at a much greater risk of sexual assault and violence when held in

³⁰ UNODC, *Handbook on Strategies to Reduce Overcrowding in Prisons*, available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.

³¹ The Global Campaign for Pretrial Justice Factsheet, available at: <https://www.opensocietyfoundations.org/factsheets/fact-sheet-global-campaign-pretrial-justice>

³² Committee Against Torture, 1998, Report of the UN Committee against Torture (A/53/44) paragraph 68.

³³ Open Society Foundations, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, 2011.

³⁴ Report by the Quaker United Nations Office, 2008, available at: <http://www.quno.org/resource/2007/2/pre-trial-detention-women-and-its-impact-their-children>.

facilities with convicted offenders and/or men,³⁵ which can exacerbate mental illnesses and lead to increases risks of HIV and other sexually transmitted diseases.”³⁶

5. The Criminalization of Drug Offences

Many, if not most incarcerated women worldwide are accused of drug offences. In Peru 60%³⁷ of women in prison are accused of drug related crimes (unless they have committed a drug related crime for the first time, they do not have access to benefits like early conditional release). Lately there has been an increase of women involved in drug related crimes in Latin America due to increased migration from rural areas to cities; the need to contribute to the family income; the rise in single mother households; and the lack of economic opportunities, among other factors.³⁸ They are labeled as “violent and dangerous criminals” when in fact they represent some of the most marginalized and voiceless groups in society. Furthermore, in some regions “a high percentage of imprisoned drug offenders are in prisons for possession, purchase, or cultivation of drugs for personal consumption.”³⁹ In the vast majority of cases, serious punitive measures are being imposed on persons who should instead be diverted from the criminal justice system to addiction treatment and rehabilitation programs. This trend is particularly problematic in view of the reality of overcrowded detention facilities lacking adequate health-care facilities, medical services, and treatment options.

Aside from considering the decriminalization of certain drug offenses to ameliorate these problems, States could also contemplate strategies for reducing sentences for women engaged in drug trafficking and measures for ensuring their transfer to their countries of residency, when they are apprehended and detained abroad. It is also essential to consider the fact that drug traffickers often target women who are in dire financial straits, women with low education, and/or single mothers. Observers have pointed out that handing down long sentences for such offenses often overlook the situations of vulnerable women “whose fates are totally disregarded by those at the top of the drug supply chain.”⁴⁰ Moreover, once they are detained, the victims typically receive discriminatory and harsh physical treatment and are exposed to brutal procedures that attempt to push the drugs out of their bodies.⁴¹ In some states, including Peru, once they are released on parole they are not allowed to leave the respective State where they were imprisoned and return to their home countries, until they complete their full sentences and/or pay their fine – a situation that victims have described as “torture” or like being in “another prison.”⁴² Even though some foreign consulates provide a stipend to victims while they are in prison, this practice ends upon release from prison.

³⁵ Open Society Justice Initiative. Pretrial Detention and Health Factsheet, 2011, available at: <https://www.opensocietyfoundations.org/fact-sheets/fact-sheet-pretrial-detention-and-health>.

³⁶ Id. at 20.

³⁷ Instituto Nacional Penitenciario, July 2014, available at: <http://www.inpe.gob.pe/>.

³⁸ 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.

³⁹ Handbook to Reduce Overcrowding in Prisons, UNODC, 2013.

⁴⁰ Heaven, Olga. Long Sentences for Drug Mules Were Never Going to Act as a Deterrent. May, 14, 2009, available at: <http://www.theguardian.com/commentisfree/2009/may/14/crime-drugs-smuggling-mules>.

⁴¹ Antony, Carmen, Mujeres invisibles: las cárceles femeninas en América Latina, Rev. Nueva Sociedad 208, March-April 2007.

⁴² “Foreign Drug Mules Trapped In Peru On Parole”, Huffington Post, February 13, 2014, available at: http://www.huffingtonpost.com/2014/02/13/drug-mules-peru_n_4782764.html.

6. The Criminalization of Victims of Domestic Violence *(see also infra, page 55)*

According to the former Special Rapporteur on Violence Against Women, “[t]here is a strong link between violence against women and women’s incarceration, whether prior to, during or after incarceration. Incarcerated women have been victims of violence at much higher rate prior to entering prison than is acknowledged by the legal system generally.”⁴³ Rule 61 of the Bangkok Rules states the urgency of considering a woman’s background as a way of tempering sentencing – something that is of particular importance for women accused of the killing of their domestic partners. Furthermore, Rule 6 requires an exhaustive medical screening from the part of prison authorities to detect any abuse. A survey conducted by Penal Reform International in Uganda⁴⁴ revealed that 20% (39) of the women imprisoned were accused of murder or manslaughter of their husband/partner/male family member. Of these 39 women, 74% reported they had experienced domestic abuse. In the UK, the percentage of women incarcerated who experienced domestic violence is as high as 50%,⁴⁵ while in the US it has been reported at 43% or higher, according to different studies.⁴⁶ According to the *Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice* (Provision 15(k))⁴⁷ “Member States are urged to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order to ensure that claims on self-defense by women who have been victims of violence, particularly in cases of battered women syndrome,⁴⁸ are taken into account in investigation, prosecution and sentencing against them.” For many female prisoners, the abuse and violence continues while in detention, with women frequently facing mistreatment such as insults, humiliation, invasive body searches, inappropriate touching, being forced to strip naked, and sexual assault, including rape.⁴⁹

7. The Criminalization of Abortion *(see also infra, page 26)*

Abortion is a sensitive topic around the world. According to one survey, the European continent has the highest number of States that allow abortion upon request (in 32 countries), consequently has the lowest rates of maternal mortality in the world.⁵⁰ By contrast, El Salvador⁵¹ prohibits abortion in all cases and criminalizes woman who have had abortions or miscarriages, charging them with homicide. The majority of victims of this discriminatory policy are poor and uneducated women.. According to the Center for Reproductive Rights “between 2000 and 2011, 129 Salvadoran women were prosecuted for crimes related to abortion, and myriad others were accused of having an abortion. Today, there are 17

⁴³ A/68/340, Pathways to Conditions and Consequences of Incarceration for Women, available at: <http://www.ohchr.org/Documents/Issues/Women/A-68-340.pdf>.

⁴⁴ Penal Reform International, Who are Women Prisoners? Survey Results from Uganda, July 2015.

⁴⁵ UNODC, Handbook for Prison Managers and Policymakers on women and imprisonment, 2007, p. 9.

⁴⁶ Id. at 8.

⁴⁷ A/RES/65/228.

⁴⁸ Syndrome suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and be unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or offers of support.

⁴⁹ Penal Reform International, Working Session 9 on Violence Against Women Belonging to Vulnerable Groups, Warsaw, 22 September 2014 – 2013 October 2014.

⁵⁰ Abortion Laws Around the World, available at: <http://www.theguardian.com/global-development/ng-interactive/2014/oct/01/-sp-abortion-rights-around-world-interactive>.

⁵¹ Some statistics on El Salvador indicate that maternal mortality rates are high: in 2008 there were 110 maternal deaths per 100,000 live births (as compared to the Latin American average of 66 deaths per 100,000 births) 11% of which were girls between the ages of 15 – 19; of the 2,079 sexual crimes reported in 2010, 67% were committed against girls under 17 years old; of the 1,300 complaints of sexual violence, only 47 people were convicted; in addition, 41% of households are reported to be living below the poverty line (50% in rural areas); and national illiteracy rate is 13% (8% for women) and 21% (12% for women) in rural areas.

women in prison serving sentences for homicide, after having been accused of procuring an abortion. In almost half of these cases, the crime was first identified as abortion-related, but later changed to homicide. This has serious repercussions for women, as a homicide charge may carry a prison sentence of up to 50 years.”⁵² Moreover, because of the high percentage of medical staff who report women seeking help in situations of miscarriage or a post-abortion complications, women refrain from seeking help in hospitals, thereby being exposed to higher risks of death. It is reported that 50% of the relevant cases in El Salvador’s criminal justice system stem from complaints by medical professionals. The criminalization of abortion in all cases violates women’s and girls’ human rights, puts them at risk of death and mistreatment – possibly even torture – and disproportionately affects young women from low income households. One victim in El Salvador has reported being sentenced to 30 years in prison for murder following a miscarriage, and feeling that her life was at risk since at certain times due to harassment by other prisoners, who accused of her of having killed her baby.⁵³

8. The Criminalization of “Moral Crimes” (see also *infra*, page 62)

Running away from an abusive husband or partner and *zina* (sexual intercourse outside of marriage) are punishable offences that women are accused of in some States. In a report entitled “‘[I Had to Run Away](#):’ The Imprisonment of Women and Girls for ‘Moral Crimes’ in Afghanistan,” Human Rights Watch describes that some 95 percent of girls and 50 percent of female prisoners in Afghanistan were accused of the “moral crimes” of running away from home or *zina*.⁵⁴ While running away from home is not technically a crime under Afghan law, judges have been instructed by the Supreme Court to treat the act as an offense. Abuses faced by women accused of having committed *moral crimes* include burning, rape, underage marriage, stabbing, threat of honor killing, forced prostitution, kidnapping, and beatings, among others. While the victims are frequently accused of crimes, these abuses are rarely investigated or prosecuted.

When a woman is accused of *zina*, police officers have the authority to order a virginity tests and subject women to “multiple vaginal exams without consent for no justifiable reason. Use of such examinations is not limited to rape cases, and examinations do not focus on documenting medical injuries or collecting physical evidence to support an allegation of sexual assault. Although medical examinations can be a legitimate form of investigation in cases of alleged sexual assault, gynecological exams that purport to determine ‘virginity’ have no medical accuracy. Use of such tests constitutes cruel, inhuman, and degrading treatment under international law.”⁵⁵ Additionally, in some countries *zina* can carry the death penalty such – often by stoning, as is the case for adultery in Yemen, Saudi Arabia and Iran.⁵⁶ Additionally, even though *zina* in principle applies to both men and women, the practice disproportionately impacts poor women. According to one study “thousands of women [in Pakistan] have been charged and jailed under the *Zina* Ordinance and that the interpretations and repercussions of the laws are class based. Although they are meant to apply to all Pakistani citizens, *zina* laws are unevenly exercised, and the most vulnerable members of society – impoverished and illiterate women – are the most affected. That is, women who cannot afford lawyers are most likely to be charged and jailed.”⁵⁷

⁵² Center for Reproductive Rights, available at:

http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_FS_ElSalvador-Final.pdf.

⁵³ Inter-American Commission of Human Rights. 156 Period of Sessions. Situación de derechos humanos de mujeres privadas de libertad por emergencias obstétricas durante sus embarazos en El Salvador, October 19, 2015.

⁵⁴ Human Rights Watch, <https://www.hrw.org/news/2013/05/21/afghanistan-surge-women-jailed-moral-crimes> March 2012

⁵⁵ Id. at 24.

⁵⁶ Penal Reform International, Crime and Justice: Application of the Death Penalty Under Sharia Law, 2015.

⁵⁷ Id. at 26.

In some States under Sharia Law (including Bangladesh, India, Nigeria, and Pakistan) “witchcraft and sorcery” are punishable offenses, while in Saudi Arabia those found guilty may be punished by death. Persons most commonly accused of witchcraft and sorcery are “the poor, children, those with mental health issues or those who hold religious beliefs and traditions not in tune with the dominant traditions of their communities (e.g. Sufism, African traditional religion).”⁵⁸

Homosexuality is also subject to capital punishment in some countries including Nigeria, Mauritania, Somalia, Sudan, Saudi Arabia, Iran, Afghanistan, Pakistan, Iraq, and Yemen. In many others homosexuality is considered illegal and carries lengthy prison sentences.⁵⁹ For instance, Nigeria’s criminal and penal codes punish consensual homosexual conduct with up to 14 years in prison, while Sharia penal codes in many northern regions of the State criminalize consensual homosexual conduct with caning, imprisonment, or death by stoning”.⁶⁰

9. The Criminalization of Victims of Human Trafficking (see also *infra*, page 67)

Almost 21 million people around the are victims of human trafficking for purposes of forced labor, estimated roughly at 11.4 million women and girls and 9.5 million men and boys, while 4.5 million people are victims of forced sexual exploitation.⁶¹ As sex work is penalized in many countries, trafficking victims working as sex workers can be criminalized for prostitution. Trafficking victims are also routinely accused of other crimes including vagrancy, trespass, disorderly conduct, crimes against nature, larceny, and drug and immigration offenses.⁶² As traffickers often use drugs to control, victims are frequently also exposed to drug offenses.⁶³

According to the United Nations Office of the High Commissioner for Human Rights Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking

*“The criminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act. Such criminalization is often tied to a related failure to identify the victim correctly. In other words, trafficked persons are detained and subsequently charged, not as victims of trafficking, but as smuggled or irregular migrants, or undocumented migrant workers”.*⁶⁴

Frequently, policing strategies emphasizing arrests for misdemeanors like prostitution are employed by law enforcement, and prove “detrimental to efforts to prevent and prosecute traffickers.”⁶⁵ It has been suggested that police raids intended to free trafficking victims are not an effective method of identifying and assisting victims, who may not desire to cooperate with police force due to fear of retaliation by the trafficker, feelings of shame of humiliation, and trauma associated with their experiences. Victims may further be traumatized by raids and arrests and may not trust that law enforcement officials are “on their

⁵⁸ Id. at 26

⁵⁹ THE WASHINGTON POST, HERE ARE THE 10 COUNTRIES WHERE HOMOSEXUALITY MAY BE PUNISHED BY DEATH, FEBRUARY 24, 2014.

⁶⁰ Human Rights Watch World Report 2014: Nigeria. Available at: <https://www.hrw.org/world-report/2014/country-chapters/nigeria>.

⁶¹ International Labor Organization, available at: <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>.

⁶² Melissa Broudo & Sienna Baskin, Sex Workers Project, *Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators* 3 (2012).

⁶³ CUNY School of Law. Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims, 2013.

⁶⁴ OHCHR, Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 7.

⁶⁵ Id., Principle 33.

side.”⁶⁶ Additionally, victims may have difficulties in communicating as foreigners. Women arrested for a prostitution offenses often have to endure inappropriate comments or more serious abuses by police forces, while transgender persons tend not to be recognized by the gender with which they identify. It is essential to recognize that trafficking victims who entered a State illegally will likely be subject to deportation proceedings, often being sent to detention centers ill-equipped to provide health services or support services, particularly for victims of sex trafficking. “Deportation may place victims of trafficking in great danger from their traffickers, especially if they had escaped from a trafficker’s control.”⁶⁷

10. The Criminalization of Persons with Mental and Intellectual Disabilities

The criminalization of persons with mental disabilities is an important consideration. Although reliable data on how many persons in detention suffer from mental disabilities – whether previously diagnosed or as a consequence of imprisonment – is not readily available in many cases, it is widely accepted that prisons frequently amount to “dumping grounds” for persons with mental disabilities.⁶⁸ Although law enforcement officials encounter persons with mental disabilities on a daily basis, many, if not most around the world, lack the proper training to deal with persons with mental disabilities, who disproportionately end up being subjected to harmful restraint mechanisms and disciplinary sanctions like solitary confinement. Jails and prisons around the world are often “dangerous, damaging, and even deadly places for men and women with mental health problems.”⁶⁹ Some training programs, such as the Crisis Intervention Team (CTI) of the Memphis, Tennessee Police Department, which was implemented more than two decades ago, have proven successful, resulting for instance in “a decrease in arrests rates for the mentally ill, an impressive rate of diversion into the health care system, and a resulting low rate of mental illness in [] jails.”⁷⁰ Another example of good practice in this area is that of the Eleventh Judicial Court of Miami, which has established the Criminal Mental Health Project that directs individuals with mental disabilities to institutions that are more adequately equipped to deal with their needs, diverting them to the criminal justice system. This program has helped lower significantly the number of persons with mental disabilities in prisons.⁷¹ Special attention should continue to be paid to the specific needs of women, girls, and LGBTI persons with mental and intellectual disabilities in the criminal justice system.

11. Alternatives to Detention

According to the Handbook on Women and Imprisonment, “[d]ue to the non-violent nature of most crimes committed by women and the minimal risk most female offenders pose to the public, they are ideal candidates for non-custodial sanctions and measures.”⁷² As some statistics indicate that women suffer from higher rates of mental illnesses than men and are more frequently victims of domestic abuse and addiction, diverting them from the criminal justice system is key to address their needs avoiding the harmful effects of imprisonment and ensuring that they receive adequate attention by means of other services and programmes. Alternatives to detention can include, among others: 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; or other restorative

⁶⁶ Ibid 33

⁶⁷ Id. at 33.

⁶⁸ World Health Organization and the International Committee for the Red Cross, available at: http://www.who.int/mental_health/policy/mh_in_prison.pdf.

⁶⁹ Human Rights Watch, May 5, 2015, available at: <https://www.hrw.org/news/2015/05/12/united-states-force-against-prisoners-mental-illness>.

⁷⁰ Memphis Police Department website at: <http://www.memphispolice.org/initiatives.asp>.

⁷¹ For more information go to the Eleventh Judicial Circuit of Florida website at: <http://www.jud11.flcourts.org/scsingle.aspx?pid=285>.

⁷² UNODC. Handbook on Women and Imprisonment, 2014.

process, such as sentencing circles;⁷³ In the state of Florida, Judge David Gooding and children's advocate groups launched a "Girls Court" that aims to divert girls from criminal justice system.⁷⁴ A 2013 study⁷⁵ found that 31% of girls in Florida's Juvenile Justice System have experienced sexual abuse (4 times the rate of boys) and 41% of girls were physically abused. The Court operates with a multidisciplinary team composed of probation officers and counselors and attempts to discover the underlying factors driving criminal behavior and to provide appropriate services to the girls and their families, rather than impose a sentence of privation of liberty.

Bangkok Rule 64 additionally states that "[n]on-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children."

Practices and Conditions of Detention

12. Health Services

Prison health services are typically not designed to respond to the specific health needs of women.⁷⁶ For instance, the presence of gynecologists and obstetric nurses on prison medical staff is essential but typically lacking in women's prisons. In many, if not most prisons around the world, lack of medication is also problematic. Female prisoners often complain of poor treatment and discrimination by medical staff, and often choose not to seek medical treatment in prisons to avoid such treatment. As explained by one commentator:

*"Female inmates compose a much smaller portion of the correctional population than men and, thereby, warrant less attention and investment by the state. Given the considerable growth of the female inmate population, this explanation seems increasingly problematic. The historical neglect of women prisoners, coupled with the massive increase in women's incarceration, make the health care problem increasingly salient as we begin the twenty-first century. However, two other matters promise to exacerbate it. First, the disproportionate prevalence of chemical dependencies among female offenders likely elevates physical and mental health problems, since drug offenders commonly report far more health problems than those without them. Second, and unlike their male counterparts, females' complicated reproductive systems introduce other types of health problems that current correctional systems are ill prepared to handle. For instance, female prisoners suffer considerable gynecological disease (e.g., cervical cancer), and terminal or chronic health problems such as HIV and hepatitis."*⁷⁷

Women in prison around the world often also do not have access to sanitary napkins, which have to be provided by family members or paid for by the women prisoners themselves. This is in contravention of Bangkok Rule 5, which requires prisons "to meet women's specific hygienic needs, including sanitary towels provided free of charge."

Amnesty International has long reported on the medical neglect of women in US prisons, explaining that women are often denied essential medical resources and treatments, especially during times of pregnancy and/or chronic and degenerative diseases. In particular, a failure to refer seriously ill

⁷³ Id. at 53.

⁷⁴ PBS, September 12, 2015, available at: <http://www.pbs.org/newshour/updates/beautiful-incarcerated-girls-turned-lives-around/>.

⁷⁵ OJJDP Journal of Juvenile, Spring 2014.

⁷⁶ ICRC, Health in Prison: Looking After Women in a Man's World, 2009, available at: <https://www.icrc.org/eng/resources/documents/interview/women-health-prison-interview-020309.htm>.

⁷⁷ Tammy L. Anderson, Ph.D., Issues in the Availability of Health Care for Women Prisoners, University of Delaware, 2000, available at: <http://www.udel.edu/soc/tammya/pdfs/Issues%20in%20the%20Availability%20of%20Healthcare%20for%20Women%20in%20Prison.pdf>

inmates for treatment and delays in treatment are common, creating a situation whereby “women inmates suffering from treatable diseases such as asthma, diabetes, sickle cell anemia, cancer, late-term miscarriages, and seizures have little or no access to medical attention, sometimes resulting in death or permanent injury. Instances of failure to deliver life-saving drugs for inmates with HIV/AIDS has also been noted.”⁷⁸ Other widespread problems include lack of qualified personnel and resources and use of non-medical staff; charges for medical attention; inadequate reproductive healthcare; shackling during pregnancy; lack of treatment for substance abuse; and lack of adequate or appropriate mental health services. In many parts of the world, women’s prisons that are housed in the same complexes as men’s prisons only receive visits from doctors assigned to the men’s prisons sporadically. Lack of adequate private spaces for medical examinations is also a problem in many prisons that presents an impediment to women receiving adequate care. Other major problems include lack of referrals to medical specialists and inability to access specialists, for instance due to the inadequate or absent transportation mechanisms.

Another common problem in prisons around the world that negatively impacts women’s health is the unavailability of clean safe water (for sanitation and drinking purposes), which can lead to diseases such as dengue, malaria or chikungunya, as is the case in Peru. Insufficient and insufficiently nutritious food is also a problem in many prisons around the world (whether due to overcrowding or deliberate withholding of food as punishment).. Many female prisoners – including pregnant women, breastfeeding mothers, women with diabetes or other chronic illnesses, and older women , among others – have special dietary needs that are not met, which can lead to disastrous consequences for their (or their children’s) health. In this context, it is instructive that after health services, food in prison constitutes the most common source of complaints amongst prisoners among prisoners.

Lack of access to adequate mental health care in prisons is also a common problem affecting female inmates worldwide. Many female prisoners who are mothers identify being separated from their children as “the worst punishment of all,” which contributes to high rates of depression amongst female prisoners. Nevertheless, psychiatrists are rarely available in most prisons worldwide, and in some cases psychotropic medications is often used without necessary complementary treatment, like counseling. In cases where children live with female prisoners in prison, there is a need for adequate pediatric services. Nevertheless, such services, including access to medicines for children, are typically lacking. Another serious concern is the risk of illness and infectious diseases (as well as violence) that children face in overcrowded and unsanitary conditions.

Geriatric care is a commonly overlooked aspect of prison health-care. As women age, certain health problems such as osteoporosis, diabetes, dementia, high blood pressure, and heart problems, which require attention by specialists, often developed. Unfortunately, such specialized care – including hospice care – is very uncommon in prisons throughout the world. States should consider alternative measures like early release, house arrest, or amnesties, among others, for older prisoners or prisoners suffering from terminal illnesses.

13. Sexual and Reproductive Health (*see also infra*, page 25)

In some countries conjugal visits⁷⁹ are granted to prisoners. Although the requirements for men and women are alike, in practice men are more likely to be granted permission for conjugal visits: in Peru, for instance, while requirements for male prisoners are lax, female prisoners can only request a conjugal visit after 6 months, with a demonstration of good behavior, and only upon presenting a marriage certificate or a proof of domestic partnership (a requirement that is not imposed on male prisoners), after

⁷⁸ Amnesty International Factsheet, available at: http://www.prisonpolicy.org/scans/women_prison.pdf.

⁷⁹ The Marshall Project, Conjugal Visits, 2015, available at: <https://www.themarshallproject.org/2015/02/11/conjugal-visits>.

undergoing a gynecological examination, and following an assessment by a social worker (which includes a visit with the woman's partner) In addition, female prisoners who are allowed conjugal visits are (in practice but not in law) required to submit to a contraceptive shot. The approval process can take up to 4 months, and visits are only permitted every 15 days for two hour With all requirements met the women can start with the conjugal visit every 15 days for two hours each visit. In addition, because the Penal Code classifies conjugal visits as a benefit and not a right, they make be arbitrarily revoked. Female prisoners are often not granted the right to conjugal visits due to authorities' fear of pregnancies amongst female prisoners. This practice is discriminatory and a clear violation of the sexual and reproductive rights of women. According to the UN document *Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development* "[g]overnments, in accordance with the Programme of Action, should take effective action to ensure the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information, education and means to do so."⁸⁰

The use of shackles and handcuffs on pregnant women, sometimes even during labor and after childbirth, is another practice that is widespread. "Shackling involves restricting women's movements by securing shackles or handcuffs around their ankles or wrists-and sometimes heavy chains around her stomach."⁸¹ Even though in some places laws who prohibit the practice on pregnant women it a common practice. As per Bangkok Rule 24, "instruments of restraint shall never be used on women during labor, during birth and immediately after birth." These practices can amount to torture. As explained by the ACLU, international organizations such as the United Nations' Human Rights Committee and the Committee Against Torture, as well as Amnesty International and the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, have called for an end to shackling women during pregnancy and postpartum recovery.⁸²

Some women are pregnant when they enter prison, while cases of sexual violence by prison staff can also lead to pregnancies. Pregnant inmates require near constant special care, which often may require contacts with medical services outside prisons to ensure a safe pregnancy and the health of the mother and baby. Pregnant inmates also have a need for special food regimes consisting of 3 – 4 high protein meals per day. In addition, special requirements like calcium supplementation should be accommodate by prison services (according to the World Health Organization, "[c]alcium supplementation has the potential to reduce adverse gestational outcomes, in particular by decreasing the risk of developing hypertensive disorders during pregnancy, which are associated with a significant number of maternal deaths and considerable risk of preterm birth, the leading cause of early neonatal and infant mortality."⁸³ Like pregnant women, breastfeeding mothers also need a higher intake of protein, a requirement that is typically not met in prisons and that can have a serious impact on the health and development of the child. In addition, breastfeeding women must to be allowed to feed her babies at all times even when working or doing other activities. Furthermore, breastfeeding is important for the emotional wellbeing of the mother and the baby and must never be prohibited or used as punishment. "Breastfeeding creates an emotional bond between mother and child, and is linked to positive psychomotor and social development of the

⁸⁰ A/RES/S-21/2. Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development, July 1999.

⁸¹ Executive Summary of Shadow Report submissions compiled by the US Human Rights Network to the United Nations Committee against Torture, October, 2014.

⁸² ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails, and Youth Detention Centers, available at: https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf.

⁸³ Guideline: Calcium supplementation in pregnant women. WHO 2013.
http://apps.who.int/iris/bitstream/10665/85120/1/9789241505376_eng.pdf?ua=1

child. Breastfed babies are also less likely to develop type-2 diabetes, or be overweight or obese as adults. Breastfeeding has a positive lifelong impact on health”.⁸⁴

14. Persons Living with HIV/AIDS and Tuberculosis

Tuberculosis (TB) and HIV/AIDS are common diseases affecting prisoners. Although international law requires that preventive measures, care, and treatment must be equivalent to that in the community,,⁸⁵ adequate treatment is for HIV/AIDS and TB is not readily available in many, if not most, prisons around the world. According to a report by UN Office of Drugs and Crime “[w]orldwide, the levels of HIV infection among prison populations tend to be much higher than in the population outside prisons. This situation is often accompanied and exacerbated by high rates of hepatitis C, tuberculosis (TB) (multi-drug resistant forms of which are becoming more prevalent), sexually transmitted infections (STIs), drug dependence, and mental health problems in prison populations” globally.

The World Health Organization advises “[s]pecial attention should be given to the needs of women prisoners [and] staff dealing with detained women should be trained to deal with the psychosocial and medical problems associated with HIV infection in women.”⁸⁶ Furthermore, it recommends the availability of gynecological care with a focus on diagnosis and treatment of STIs, family planning counseling, pregnancy care, and care for children, including those born to HIV-positive mothers.⁸⁷ As regards TB, the World Health Organization suggests that “[e]pidemiological surveillance of [TB] among prison inmates and prison personnel is needed. Special attention should be paid to the early detection of outbreaks of drug-resistant tuberculosis and their control by public health measures.” It is also very important to ensure that prisoners with TB complete their treatment,⁸⁸ which constitutes a common challenge in overcrowded prisons.

15. Victims of Abuse

A great number of female inmates are victims of abuse (such domestic violence or sexual abuse). Although there is a lack of clear statistical information on the numbers, this reality is typically not taken into account in terms of sentencing or treatment and care of female prisoners. In particular, research reveals that “girls who are sent into the juvenile justice system have typically experience overwhelmingly high rates of sexual violence.”⁸⁹ According to this study, 31% of girls in juvenile justice have been sexually abused, compared to 7% of boys. Forty-five percent of girls have experienced 5 or more adverse childhood experiences (ACE), as compared to 24% of boys. In addition, sexual abuse is cited as one of the strongest predictors of whether a girl will become caught-up in the criminal justice system after release. Experiences within the criminal justice system tend to exacerbate the trauma suffered by female victims of abuse.

16. People Who Use Drugs

Treatment for drug addiction is typically limited or non-existent in female prisons around the world, leaving women in vulnerable position and sometimes resulting in death. For instance, there have

⁸⁴ WORLD BREASTFEEDING WEEK. ASSISTANT DIRECTOR-GENERAL DR FLAVIA BUSTREO.,WHO, AVAILABLE AT: [HTTP://WWW.WHO.INT/LIFE-COURSE/NEWS/COMMENTARIES/WORLD-BREASTFEEDING-WEEK-COMMENT/EN/](http://www.who.int/life-course/news/commentaries/world-breastfeeding-week-comment/en/).

⁸⁵ UNODC, HIV-AIDS Prevention, Care, Treatment and Support in Prison Settings, 2006.

⁸⁶ WHO “Guidelines on HIV Infection and AIDS in Prisons” 1996

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Human Rights Project for Girls, Georgetown Law Center on Poverty and Inequality, Ms. Foundation for Women. The Sexual Abuse to Prison Pipeline, The Girls’ Story.

been several recent cases of prisoner's deaths in the United States due to inaction and negligence by prison authorities in providing treatment to persons who use drugs. It is reported that "[o]ver the past five years alone, families in at least six states have been awarded nearly \$11 million in compensation for loved ones who died while being denied routine detoxification care in local jails...According to some estimates, two-thirds of inmates entering jail have a diagnosable substance abuse disorder, yet few jails provide the medical standard of care recommended by doctors for patients at risk of withdrawal."⁹⁰

17. Other Practices

Regarding the use of force by law enforcement officials, including prison guards, Principle XXIII (2) of the IACHR's Principles and Best Practices expresses that:

The personnel of places of deprivation of liberty shall not use force and other coercive means, save exceptionally and proportionally, in serious, urgent and necessary cases as a last resort after having previously exhausted all other options, and for the time and to the extent strictly necessary in order to ensure security, internal order, the protection of the fundamental rights of persons deprived of liberty, the personnel, or the visitors . . . The personnel shall be forbidden to use firearms or other lethal weapons inside places of deprivation of liberty, except when strictly unavoidable in order to protect the lives of persons . . . In all circumstances, the use of force and of firearms, or any other means used to counteract violence or emergencies, shall be subject to the supervision of the competent authority.

Nevertheless, it is common to find that security measures and use of force by guards in female prisons are often disproportionately high as compared to the risks posed by prisoners' behavior. It is important to recall that in cases of juvenile facilities, penitentiary staff should be prohibited from carrying and using firearms.⁹¹

Body searches are often employed by prison staff prohibited objects or substances that can affect the safety and health of the other prisoners, visitors, or staff. "However, when conducted in a disproportionate, humiliating or discriminatory way, searches infringe upon the dignity of detainees and can amount to inhuman or degrading treatment."⁹² In some States, including Greece, female inmates are subject to vaginal examinations upon arrival to prison and, if they object, are placed in isolation cells for several days and obliged to ingest laxatives. Although Bangkok Rule 20 stresses the need for alternative screening methods to replace strip searches and invasive body searches "to avoid the harmful psychological and possible physical impact of invasive body searches,"⁹³ in practice this is typically not heeded by prison authorities around the world. One prisoner has described the humiliation caused by strip search as follows:

"You remove all your clothes, including underwear. Each item of clothing is examined. Standing naked in front of an examiner, you open your mouth and run your fingers around your gums before sticking out your tongue. You lift your arms over your head, and extend your fingers for inspections. One foot and then the other must be lifted up for examination. Men must lift their genitals with one hand and rake the fingers of their other hand through their pubic hair before turning around, bending at the waist, spreading their butt cheeks, and coughing. Women squat over a mirror placed on the ground between their feet to expose their genitals to examination."⁹⁴

⁹⁰ Moraff, Christopher, Death by Détox. Aljazeera America. October 26, 2015.

⁹¹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rules 63-65.

⁹² Balancing security and dignity in prisons: a framework for preventive monitoring, Penal Reform International. 2013

⁹³ UN Rules on the Treatment of Women Prisoners and Non-Custodial measures for Women Offenders (The Bangkok Rules) number 20.

⁹⁴ Hartman, Kenneth E., Los Angeles Times, "Op-Ed: Strip-searches will keep helpful visitors, not illegal drugs, out of prison," April 6, 2015

She condemns this practice as a “profound intrusions of privacy,” noting that women from many cultures find it unacceptable to expose their body to strangers. The Peruvian Ombudsman’s Office⁹⁵ has further explained that female prisoners are sometimes body searched by male staff. Although Bangkok Rules 19 prohibits the employment of male guards to carry out body searches, this remains a common practice worldwide. Similarly, “[i]nternational bodies have repeatedly warned of the sexual humiliation [that is] inherent when male guards watch female prisoners in their most intimate moments—such as dressing, showering, or using the toilet.”⁹⁶ In an Amnesty International report called, “[n]ot part of my sentence” is how one woman describes the discomfort, embarrassment and feelings of being gynecologically examined and even raped when being searched by male guards.⁹⁷

There are also concerns regarding sanitation, with one prisoner describing the use of the same latex glove to check on the genitals of 15 to 20 women prisoners as common practice. Intrusive body searches of visitors of all ages are also a common practice. It has been documented that many female prisoners opt not to have their children visit in order to avoid their having to undergo intrusive body searches upon entry, which may entail removal of underwear and diapers (visitors may in certain jurisdiction refuse being strip-searched but are accordingly restricted to non-contact visits).

Instruments of restraint refer to tools used to maintain security and order in prisons, and can include shackles, handcuffs, electro-shock belts, and strait jackets. Some have been prohibited by international law because they inherently inflict physical or mental harm amounting to cruel, inhuman or degrading treatment (i.e. chains, wearable electric-shock jackets, and restrain chairs). According to the Peruvian Ombudsman’s Office, of 350 female prisoners surveyed, 71% of those who gave birth during in prison were handcuffed to their beds before, during and after giving birth. Amnesty International provides the following account of a female prisoner’s experience:

“The doctor came and said that yes, this baby is coming right now, and started to prepare the bed for delivery. Because I was shackled to the bed, they couldn't remove the lower part of the bed for the delivery, and they couldn't put my feet in the stirrups. My feet were still shackled together, and I couldn't get my legs apart. The doctor called for the officer, but the officer had gone down the hall. No one else could unlock the shackles, and my baby was coming but I couldn't open my legs...Finally the officer came and unlocked the shackles from my ankles. My baby was born then. I stayed in the delivery room with my baby for a little while, but then the officer put the leg shackles and handcuffs back on me and I was taken out of the delivery room.”⁹⁸

Solitary confinement refers to the physical isolation of the prisoner in her cell for twenty-two to twenty-four hour a day.⁹⁹ In some countries, the prisoner may be allowed to leave her cell for an hour. Sometimes access to reading materials, radios, or televisions is permitted, but meaningful social contact is kept to a minimum. Solitary confinement may be applied as disciplinary measure or as way of “protecting” vulnerable prisoners from the rest of the population. While some jurisdiction impose limits on the duration of isolation (i.e. prohibit prolonged or indefinite solitary confinement), many – or most – do not. Bangkok Rule 22 – and more recently the revised Standard Minimum Rules for the Treatment of Prisoners, now known as the Mandela Rules – state that solitary confinement shall never be applied to

⁹⁵ Defensoria del Pueblo de Peru “Lineamientos para la Implementacion de las Reglas de Bangkok en el Sistema Penitenciario Peruano,” 2013, available at: <http://www.defensoria.gob.pe/informes-publicaciones.php>.

⁹⁶ American Civil Liberties Union, *Worse Than Second-class: Solitary Confinement of Women in the United States*, April 2014.

⁹⁷ AMNESTY INTERNATIONAL USA, “NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY”, FEBRUARY 28, 1999, AVAILABLE AT: [HTTPS://WWW.AMNESTYUSA.ORG/NODE/57783?PAGE=SHOW](https://www.amnestyusa.org/node/57783?page=show).

⁹⁸ Id. at 72.

⁹⁹ See report of the Special Rapporteur on Torture Juan E. Mendez, 2011 (A/66/268), available at: <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

pregnant, breastfeeding women and women with small children. According to the Special Rapporteur, “[c]onsidering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment.”¹⁰⁰

Female prisoners confined to isolation for prolonged periods of time suffer particularly grave consequences. First, women have higher rates of mental problems compared to men. Solitary confinement tends to re-traumatize female victims of abuse “and can render incarcerated women more vulnerable to abuse by correctional officers.”¹⁰¹ It is also used “as retaliation against women who have reported sexual abuse or other harmful treatment while in prison.”¹⁰² Another harmful consequence of isolation is the fact that family visits are extremely restricted, which can have devastating effects on mother-child relationships. In the US it is a common practice to permit some non-contact visits (i.e. through a glass partition) or video-conferencing between women in isolation and family members. Nevertheless, “[h]olding mothers in solitary confinement can make an already challenging situation even more painful for children, as well as mothers. Solitary punishes children.”¹⁰³

Concerns Relating to Vulnerable/Marginalized Groups

18. Migrant Women and Children

The plight of refugee and migrant women, children, and men has recently gained increased attention in most parts of the world. In many jurisdictions around the world, migrants and refugees are criminalized and detained in highly inadequate and degrading conditions.¹⁰⁴ In the United States detention centers holding “illegal immigrants” are often no different from prisons, and detainees are kept under constant surveillance, shackled, and generally kept in conditions similar to convicted prisoners. Wave of violence in Central America and Mexico have compelled entire families to flee their countries for safety. During the perilous trip to the US border, most women and children risk their lives and suffer from “high rates of exposure to trauma in the form of threat of death, physical and sexual abuse, and exploitation that leave serious physical and psychological scars.”¹⁰⁵ Once detained, “[m]any asylum seekers who cross [the US] southern border are quickly returned to the places they fled with no chance to tell their story and request protection [] put[ting] their lives at serious risk.”¹⁰⁶ For instance, “[o]f the nearly 15,000 Hondurans placed in fast-track procedures at the border in 2011 and 2012, Border Patrol quickly deported 98 percent and referred only 2 percent for a second-step credible fear assessment by asylum officers. Honduras has the [highest murder rate](#) in the world, with many people are escaping violent threats from gangs and epidemic levels of [violence against women](#) and children. Asylum officers have found that [over 90 percent](#) of Honduran families who are interviewed in that second step are found to have

¹⁰⁰ Id.

¹⁰¹ Amnesty International USA, “Not part of my sentence: Violations of the human rights of women in custody”. February 28, 1999, available at: <https://www.amnestyusa.org/node/57783?page=show>.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ The Criminalization of Migrant Women, available at:

http://www.crim.cam.ac.uk/people/academic_research/loraine_gelsthorpe/criminalreport29july12.pdf.

¹⁰⁵ American Academy of Pediatrics, July 24, 2015, available at: <https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf>.

¹⁰⁶ HUMAN RIGHTS WATCH, “THE OTHER REFUGEE CRISIS, FROM CENTRAL AMERICA TO THE U.S.,” AVAILABLE AT: <HTTP://WWW.HRW.ORG/NEWS/2015/09/21/OTHER-REFUGEE-CRISIS-CENTRAL-AMERICA-US>.

‘credible fear.’”¹⁰⁷ In addition, women in immigration detention centers are sometimes shackled and do not receive medical attention while pregnant due to “the lack of enforcement of federal standards for medical care in immigration detention facilities.”¹⁰⁸ Human Rights Watch¹⁰⁹ along with a plethora of other sources have revealed that women in immigration detention in the United States routinely do not receive adequate medical care, as authorities ignore sick call requests, fail to deliver medication, lose medical services, do not provide translation services, impede access to specialist care and outright deny treatment.

19. Girls In Detention

The Convention on the Rights of the Child (CRC) (Article 37b), the Beijing Rules (Rule 13.1) and the Bangkok Rules (Rule 65) mandate that the institutionalization of children in conflict with the law must be used only as a measure of last resort and for the shortest possible time. The Human Rights Council in its Resolution 24/12 expresses the importance of the development comprehensive juvenile justice policies aiming to “prevent and address juvenile delinquency . . . with a view to promoting, inter alia, the use of alternative measures, such as diversion and restorative justice, and ensuring compliance with the principle that deprivation of liberty of children should only be used as a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pretrial detention for children.”¹¹⁰

As noted during the recent launch of the new report of the Special Representative of the Secretary General on Violence Against Children on "Safeguarding the Rights of Girls in the Criminal Justice System - Preventing Violence, Stigmatization and Deprivation of Liberty," girls “run the risk of being criminalized and exposed to harassment, unlawful deprivation of liberty and inhuman punishment, rather than benefitting from protection, rehabilitation and reintegration.”¹¹¹ Because girls in detention represent a low percentage of the prison population in some countries, there are often no separate facilities to accommodate and separate them from adults and boys.¹¹² It has been reported that when male guards are present in girl’s facilities, there are more cases of sexual abuses.¹¹³ According to a study by the Human Rights Project for Girls “[s]exual abuse is one of the primary predictors of girls’ entry into the juvenile justice system. Once inside, girls encounter a system that is often ill-equipped to identify and treat the

¹⁰⁷ Id. at 27.

¹⁰⁸ Executive Summary of Shadow Report submissions compiled by the US Human Rights Network to the United Nations Committee against Torture, October, 2014.

¹⁰⁹ Human Rights Watch, *Detained and Dismissed, Women’s Struggles to Obtain Health Care in United States Immigration Detention*, March, 2009.

¹¹⁰ A/HRC/RES/24/12, Resolution 24/12 adopted by the Human Rights Council, Human Rights in the Administration of Justice, Including Juvenile Justice.

¹¹¹ SRSG launches new report on "Safeguarding the rights of girls in the criminal justice system - Preventing violence, stigmatization and deprivation of liberty," 2015, available at: http://srsg.violenceagainstchildren.org/story/2015-10-17_1398.

¹¹² Article 37 (c) of the CRC, article 10 (2) (b) of the ICCPR, Rules 13.4 and 26.3 of the Beijing Rules, Rule 29 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) and Rule 8 (d) of the SMR. General Comment No. 10 of the CRC Committee on the Rights of the Child explicitly sets out the reason for the separation of children from adults, as follows: “There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate,” adding that “[t]he permitted exception to the separation of children from adults stated in article 37 (c) of CRC, “unless it is considered in the child’s best interests not to do so”, should be interpreted narrowly; the child’s best interests does not mean for the convenience of the States parties.” UNODC, *Handbook on Women and Imprisonment*, 2014, p. 99.

¹¹³ UNODC, *Handbook on Women and Imprisonment*, 2014.

violence and trauma that lie at the root of victimized girls' arrests."¹¹⁴ Many incarcerated girls are victims of sex trafficking, or enter the criminal justice system directly from the welfare system and suffer from prior histories of abuse and drug dependence.¹¹⁵ According to commentators this situation evidences the fact that "[g]irls' behavioral reaction to sexual abuse and trauma is criminalized, reinforcing the sexual abuse to prison pipeline."¹¹⁶

Another way in which children enter the juvenile justice system is through what is called "school-to-prison-pipeline." The school-to-prison pipeline refers to the "policies and practices that push schoolchildren in the United States, and especially the most at-risk children "out of classrooms and into the juvenile and criminal justice systems."¹¹⁷ In this context, the American Academy of Pediatrics has warned school and health authorities that "[s]uspension and expulsion may exacerbate academic deterioration, and when students are provided with no immediate educational alternative, student alienation, delinquency, crime, and substance abuse may ensue...[and] jeopardize children's health and safety." School based arrests are rising, mainly because school authorities are handing over school discipline problems – such as disruptive behavior – to police officers.¹¹⁸ In addition, "youth who become involved in the juvenile justice system are often denied procedural protections in the courts; in one state, up to 80% of court-involved children do not have lawyers. Students who commit minor offenses may end up in secured detention if they violate boilerplate probation conditions prohibiting them from activities like missing school or disobeying teachers."¹¹⁹

20. LGBTI Persons (*see also infra*, page 45)

Lesbian, gay, bisexual, transgender and intersex (LGBTI) people are exposed to violations of their rights at all levels of the criminal justice system – upon arrest as well as after release. The risks of stigmatisation and abuse are even more pronounced in countries where sexual orientation and/or non-traditional expressions of gender identity are criminalised.¹²⁰ LGBTI persons around the world are widely discriminated against, harassed by law enforcement authorities, and can end up being arrested for minor contraventions. The fact that LGBTI persons represent a minority of the prison population contributes to a situation where their protection and specific needs are often neglected or overlooked.¹²¹ Transgender people face specific problems, especially regarding the location of their placement in prison or in a special wing of the institution. In most cases, they are automatically placed solely on the basis of their biological gender, without any particular consideration for their perception of gender or the gender reassignment procedures they may have undergone prior to their imprisonment.¹²² The Subcommittee on

¹¹⁴ Human Rights Project for Girls, Georgetown Law Center on Poverty and Inequality, Ms. Foundation for Women. *The Sexual Abuse to Prison Pipeline: The Girls' Story*.

¹¹⁵ *Id.* at 90.

¹¹⁶ "Studies suggests that if trauma is not resolved, ...result[s may] include (a) alcohol and drug use, (b) involvement in violent activity, and (c) development of mental health problems such as PTSD. For many of these adolescent females, there appears to be a link between the experience of abuse and neglect, the lack of appropriate treatment, and the behaviors that led to arrest. (*The Sexual Abuse to prison Pipeline: The Girls 'story*).

¹¹⁷ ACLU, *School to Prison Pipeline Factsheet*, March 11, 2008, available at: <https://www.aclu.org/fact-sheet/what-school-prison-pipeline>.

¹¹⁸ *Id.* at 94.

¹¹⁹ *Id.*

¹²⁰ Association for the Prevention of Torture, *LGBTI Persons in Detention*, available at: <http://www.ap.t.ch/en/lgbti-persons-in-detention/>.

¹²¹ *Id.*

¹²² *Id.*

the prevention of torture suggests that before placing a transgender person in prison, his/her will needs to be considered.¹²³

According to one report, “[y]outh who identify as lesbian, gay, bisexual, transgender, or gender non-conforming (LGBT/GNC) are overrepresented in the juvenile justice system. Although LGBT/GNC youth comprise only 5–7 % of the general population, they represent 13–15% of youth who come into contact with the juvenile justice system. Recent research by the National Council on Crime and Delinquency (NCCD) indicates that LGBT/GNC girls, in particular, are involved in the system at an even higher rate: a survey of 1,400 girls across seven jurisdictions found that 40 percent of girls in the juvenile justice system are LGBT/GNC (compared to 14 percent of boys).”¹²⁴ The use of solitary confinement as a “protective measure” is also frequent. As noted by the Special Rapporteur on Torture and many other “[g]iven the harmful long-term consequences of isolation, in particular where it is imposed prolonged or indefinite, the use of solitary confinement is only justified in exceptional circumstances, for the shortest possible time and with adequate procedural safeguards.”¹²⁵

The Committee Against Torture has also expressed particular concern about sexual and physical abuse against individuals in detention “on the grounds of their sexual orientation and/or transsexual identity.”¹²⁶ The SRT has noted with concern, that prison guards too often fail to take reasonable measures to reduce the risk of physical or sexual violence against LGBTI detainees.¹²⁷ In an especially brutal case out of El Salvador, a transgender woman was detained in a cell with gang members where she was “raped more than 100 times, sometimes with the complicity of prison officials.”¹²⁸ Transgender women in detention across the globe are targeted for beatings – often on the face and cheek, to release toxins.¹²⁹ In the United States, LGBTI individuals face similar vulnerabilities in institutionalized settings – partly as a result of the lack of implementation of laws that are aimed at protecting them.¹³⁰ U.S. President Barack Obama issued a Presidential Memorandum requiring federal confinement agencies to promulgate regulations in line with the Prison Rape Elimination Act (PREA).¹³¹ Nevertheless, the federal regulations have not worked to protect LGBTI detainees.¹³² Indeed, The Committee against Torture has received reports of LGBTI detainees being placed in administrative segregation for their own “safety,” even when studies show that even non-punitive segregation can have inflict lasting emotional and psychological harm on a detainee.¹³³ This presents “an impossible choice for many transgender detainees: speak out about fear to one’s safety and risk being segregated in isolation; both result in lasting psychical and psychological harm.”¹³⁴

Torture against LGBTI persons in custodial settings may also arise under more official auspices. In States where homosexuality is illegal, men suspected of homosexual conduct are subject to non-

¹²³ Subcommittee on the Prevention of Torture During a Presentation Before the Inter-American Commission on Human Rights October 23rd, 2015 (157 Period of Sessions, Situación de derechos humanos de las personas LGBT privadas de libertad en América Latina)

¹²⁴ Human Rights Project for Girls, Georgetown Law Center on Poverty and Inequality, Ms. Foundation for Women. The Sexual Abuse to Prison Pipeline, The Girls’ Story.

¹²⁵ Prison Reform International, available at: <http://www.penalreform.org/resource/lgbti-persons-deprived-liberty-framework-preventive-monitoring/>

¹²⁶ Concluding Observations of the Committee against Torture on Costa Rica, paras. 11 & 18.

¹²⁷ OHCHR Free and Equal Gender Report, p. 24

¹²⁸ OHCHR Free and Equal Gender Report, p. 23

¹²⁹ Id.

¹³⁰ Executive Summary of CAT Shadow Reports p. 42

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Id.

consensual anal examinations that are intended to obtain physical evidence of anal sex.¹³⁵ Both the Committee Against Torture and the Special Rapporteur on Torture have condemned such practices, rejecting the notion that they are valid methods to “prove” homosexuality.¹³⁶ The Special Rapporteur has specifically described these “invasive forensic examinations” as being “intrusive and degrading” and as potentially amounting to torture or other ill-treatment.¹³⁷

LGBTI people in detention are also denied access to conjugal visits, on a discriminatory basis in most of States around the world. Additionally, prison medical staff are typically not trained to deal with sexual diversity, and transgender persons often do not necessary hormone therapy in prisons and can be subject to degrading strip searches.¹³⁸

21. Women in Prison with Their Children

Children with incarcerated mothers are often forgotten victims of the criminal justice system. A mother’s imprisonment “can affect [her child’s] behavior, health, relationships, emotions, education, housing and finances, often for the worse.”¹³⁹ Research has found that children of the incarcerated are at greater risk of having behavioral problems and facing incarceration. “In the United Kingdom, for example, it has been estimated that of the 150,000 children who have a parent in prison, 75% will go on to commit a crime. In many cases this is sadly a part of the continued cycle of institutionalization, since it is likely that the mothers themselves will have spent at least part of their childhood in state care.”¹⁴⁰ In addition, “even a brief period of imprisonment can severely strain family systems and the problems caused by parental imprisonment do not end with release . . . 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.”¹⁴¹ According to the Committee on the Rights of the Child, “[c]hildren’s rights to development are at serious risk when they are orphaned, abandoned or deprived of family care or when they suffer long-term disruptions to relationships or separations (e.g. due to natural disasters or other emergencies, epidemics such as HIV/AIDS, *parental imprisonment*, armed conflicts, wars and forced migration). These adversities will impact on children differently depending on their personal resilience, their age and their circumstances, as well as the availability of wider sources of support and alternative care.”¹⁴²

While in some States children are allowed to live in prison with their mothers, in most state jurisdiction in the US, for instance, new mothers are required to return to the prison complex 48 hours after giving birth, leaving their child behind. Under the 1997 Adoption and Safe Families Act, “if a child is in foster care for 15 of 22 month, the state must begin proceedings to terminate parental rights,”¹⁴³ and if a woman does not have a place to live upon release, she is unable to reclaim their parental rights. On the other hand, prisons are not designed to accommodate children and are typically not suitable for a child

¹³⁵ OHCHR Free and Equal Gender Report, p. 24

¹³⁶ SRT Healthcare Report, para. 79.

¹³⁷ OHCHR Free and Equal Gender Report, p. 24

¹³⁸ Procuración Penitenciaria de la Nación (Argentina) before the Inter-American Commission of Human Rights October 23rd, 2015 (157 Period of Sessions. Situación de derechos humanos de las personas LGBT privadas de libertad en América Latina).

¹³⁹ QUNO, The Impact of Parental Imprisonment on Children, April 2007.

¹⁴⁰ UNODC, Handbook for Prison Managers and Policymakers on Women and Imprisonmen., 2008.

¹⁴¹ Id. at 57.

¹⁴² Committee on the Rights of the Child, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, CRC/C/CG/7/Rev.1 of 20 September 2006, para. 36(b)

¹⁴³ US Prisons and Jails are Threatening the Lives of Pregnant Women and Babies, 28 September, 2015, available at: <http://inthesetimes.com/article/18410>.

healthy development. According to one study, “having young (pre-school-aged) children in prison with mothers can enhance bonding and avoid some of the negative impacts of separation for both mothers and children. However, the children will have to live in the same conditions as their imprisoned parents, which are often unsuitable.”¹⁴⁴ While some prisons offer daycare centers offering the same educational services as are available in the community, many or not do not. In addition, major problems affecting female prisoners, such as lack of adequate health-care services or inadequate diets, will also affect children living in prisons with their mothers.

While the continuity of family visits is considered to be key for a successful re-entry, visits are often costly and oftentimes scarce. As noted in Bangkok Rule 26, it is essential to encourage family visits and to take measures to counterbalance disadvantages faced by women who are imprisoned far from home. Skype conversations are sometimes organized to replace the visits in some prisons, while some NGOs help mothers record their voices to send their children a message or even read a story to them, so the children can have it for bedtime.¹⁴⁵

22. Indigenous Persons and Foreigners in Detention

According to the *Handbook on Prisoners with Special Needs*, “[e]thnic and racial minorities and indigenous peoples comprise a vulnerable group in the criminal justice system and have special needs based on culture, traditions, religion, language and ethnicity, which prison systems often fail to address.”¹⁴⁶ Some problems foreign and indigenous people face in custody pertain to language and communication barriers, discrimination, and difficulties in obtaining legal aid and proper health-care. They can also be at “particular risk of developing mental health care needs in prison, due to isolation, discrimination and the anguish caused by their legal status, something which may also apply to ethnic minorities.”¹⁴⁷ In addition, more subtle discriminatory attitudes towards indigenous or foreign prisoners may be “reflected in the security level to which foreign nationals are allocated, the accommodation they are given, the number of disciplinary punishments they receive in comparison to others, the searching procedures and methods they are subjected to and the type of work they are given, if at all.”¹⁴⁸ It is instructive that the Correctional Services of Canada has developed a series of programs and services for “ethno-cultural offenders” which includes “supporting ethno-cultural inmates with training and mentoring, providing advice and expertise to help ethno-cultural communities reintegrate offenders, providing language training and interpretation services for offenders unable to communicate in English or French effectively,”¹⁴⁹ among other services.

23. Older Prisoners

Prisons have traditionally been designed for designed for young males. As sentences become longer and life expectancy increases, prisoners over the age of 60 present new challenges for penitentiary systems. A Human Rights Watch report estimates that the number of prisoners over 65 years of age have grown 94 times faster than the total sentenced prisoner population between 2007 and 2010 in the United States.¹⁵⁰ A recent report notes that Japanese prisons have been adapting to serve the needs of a growing number of aged prisoners by modifying certain aspects of the prison regime and providing for older

¹⁴⁴ Ibid 57

¹⁴⁵ See the trailer for the documentary “Turn the page”: <http://vimeo.com/89919860>

¹⁴⁶ UNODC. *Handbook on Prisoners with Special Needs*. 2009

¹⁴⁷ UNODC. *Handbook on prisoners with special needs*. 2009

¹⁴⁸ Id. 110.

¹⁴⁹ Correction Service Canada website, available at: <http://www.csc-scc.gc.ca/ethnocultural/index-eng.shtml>.

¹⁵⁰ Human Rights Watch, “Old behind bars, the aging prison population in the United States,” 2012

persons' physical and medical needs.¹⁵¹ Attention should be paid to the special needs of older female prisoners in particular.

Preliminary Questions for Panel II

- **Question:** How can legal protections and procedural safeguards for women and girls contained in non-binding instruments such as the Bangkok Rules and other guidelines be best implemented and enforced by States? What are effective mechanisms for enforcement? Examples of best practices for implementation and enforcement?
- **Question:** What are the ways in which prison overcrowding and associated problems unique affect women, girls, and LGBTI persons in detention?
- **Question:** What are examples of best practices involving the use of alternative/non-custodial measures for women prisoners, including as regards women with children and parental responsibilities?
- **Question:** To what extent, and under what circumstances can overcrowding itself be said to rise to the level of CIDPT? What are the particular gendered aspects of this experience? How have courts in different jurisdiction addressed this issue and what best practices can be highlighted?
- **Question:** What are best practices associated with dealing with persons with mental and intellectual disabilities in the criminal justice system?
- **Questions:** Which conditions and aspects of the prison experience discussed above have been considered by courts and other mechanisms to rise to the level of torture/CIDTP? What new and emerging areas of consensus are there, particularly with respect to how gender affects the experience of these conditions?
- **Question:** What other key groups and/or areas of vulnerability and concern may be highlighted when examining the situation of women, girls, and LGBTI persons within the criminal justice system? What additional practices and experiences have been found by courts and other mechanisms to rise to the level of torture or CIDPT? What new areas of consensus or advocacy are emerging? What particular examples are there of good practice in protecting vulnerable groups from experience torture or CIDPT whilst in detention?

¹⁵¹ The New York Times, "As Japan ages, prisons adapt to going gray," November 3, 2007, available at: http://www.nytimes.com/2007/11/03/world/asia/03japan.html?pagewanted=all&_r=0.

THURSDAY, 5 NOVEMBER
PANEL III
Reproductive Rights and Health-Care Practices

OVERVIEW

The Committee against Torture (“CAT”) has stated that women are vulnerable to torture and cruel, inhuman, or degrading treatment or punishment (“CIDTP”) in the context of “medical treatment, particularly involving reproductive decisions” on the basis of “actual or perceived non-conformity with socially determined gender roles.”¹⁵²

This section examines torture in the context of women’s exercise of their reproductive rights – particularly in situations of banned and limited abortion, inadequate post-abortion and labor care, and forced and coerced sterilization.

A. Outlawed Abortion and Limited Access to Abortion – General International Standards

International human rights bodies have increasingly recognized that restrictive abortion laws violate women’s human rights – including the right to life, the right to bodily integrity, and the right to be free from torture and CIDTP.¹⁵³ For example, the Human Rights Council has stated that restricting access to safe abortion in the case of rape constitutes a violation of the prohibition on torture in Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”).¹⁵⁴ In addition, human rights bodies have expressed concern about restricted access to post-abortion care – often for the impermissible purposes of punishment or to elicit confession.¹⁵⁵ More broadly, the CAT has “repeatedly expressed concerns about restrictions on access to abortion and about absolute bans on abortion as violating the prohibition of torture and ill-treatment.”¹⁵⁶ This is especially true when legal and policy restrictions on abortion serve a “discriminatory purpose,” based on stereotypes about woman’s maternal role in society and assumptions that women lack the moral agency to make decisions about their sexuality and reproduction.¹⁵⁷

¹⁵² Comm. against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 21, U.N. Doc. CAT/C/GC/2 (January 24, 2008) [hereinafter CAT General Comment No. 2].

¹⁵³ See, e.g. Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 24: Women and Health*, ¶ 11, U.N. Doc. A/54/38/Rev.1, chap. I (February 5, 1999) [hereinafter CEDAW General Recommendation No. 24] (characterizing the right to reproductive services as an extension of women’s right to life and stating that it is “is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women”); Special Rapporteur on Torture, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, ¶ 37, U.N. Doc. A/HRC/7/3 (January 15, 2008) (noting that the CAT has “expressed concern regarding domestic legislation that severely restricts access to voluntary abortion in cases of rape”); Special Rapporteur on Torture, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, ¶ 50, U.N. Doc. A/HRC/22/53 (February 1, 2013) [hereinafter SRT Healthcare Report] (noting that the CAT has “repeatedly expressed concerns about restrictions on access to abortion and about absolute bans on abortion as violating the prohibition of torture and ill-treatment”).

¹⁵⁴ SRT Healthcare Report, ¶ 50.

¹⁵⁵ *Id.* ¶ 46.

¹⁵⁶ *Id.* ¶ 50.

¹⁵⁷ CENTER FOR REPRODUCTIVE RIGHTS, *Briefing Paper – Reproductive Rights Violations as Torture and Cruel, Inhuman, or Degrading Treatment and Punishment: A Critical Human Rights Analysis* (December 2010), 14 [hereinafter Center for Repro Rights Briefing Paper].

These same human rights bodies have affirmed that, in circumstances where abortion is neither outlawed nor restricted by formal law, it needs to be accessible.¹⁵⁸

B. Restricted Abortion in Cases of Rape and Medically Necessity

The Human Rights Council has stated that restricting safe access to abortion for women who have become pregnant as a result of rape is a violation of Article 7 of the ICCPR.¹⁵⁹ Even more broadly, the Special Rapporteur on Torture Juan Méndez has affirmed that the denial of pain relief in the healthcare context constitutes CIDTP if it causes severe pain and suffering.¹⁶⁰ Therefore, restricting access to abortion that would provide physical or psychological pain relief – whether in cases of rape, medical necessity, or voluntary choice – arguably constitutes torture and/or CIDTP.

Despite these international standards, regional and domestic authorities vary in their protection of access to safe abortions. For example, the American Convention on Human Rights (“ACHR”) declares that the right to life “shall be protected by law, and in general, from the moment of conception.”¹⁶¹ However, such restrictions are not isolated to a single region of the globe. For example, domestic legislation in Chile, Guatemala, Ireland, Poland, and the Philippines, among other countries, recognizes the right to life before birth as equally important as the life of the mother.¹⁶² Even more strictly, in Malta, abortion and the provision of abortion are prohibited in all circumstances, including rape and medical necessity, and carry a prison sentence ranging from eighteen months to four years.¹⁶³ Over the past decade, both the Committee on Economic, Cultural and Social Rights and the Committee on the Elimination of Discrimination against Women (“CEDAW”) have expressed serious concern about Malta’s abortion prohibition, urging the country to provide legal exceptions that permit abortion for therapeutic purposes and in cases of rape or incest.¹⁶⁴

Even where abortion is legal, access to safe abortion is too often made virtually impossible because governments implement a maze of administrative hurdles or official incompetence and disinterest blocks safe access to care.¹⁶⁵ For example, the CAT condemned the “grave consequences” of Peru’s severely restrictive access to voluntary abortion, which applies even in cases of rape, noting that the policy resulted in “unnecessary deaths of women.”¹⁶⁶ The CAT had similar remarks on El Salvador and

¹⁵⁸ *Id.* at 21. *See, e.g.*, SRT Healthcare, ¶ 50 (noting that the “Human Rights Committee explicitly stated that breaches of article 7 of the International Covenant on Civil and Political Rights include forced abortion, as well as denial of access to safe abortions to women who have become pregnant as a result of rape and raised concerns about obstacles to abortion where it is legal”); *Tysiąc v. Poland*, 5410/03, Eur. Ct. H.R., ¶ 116 (2007) (“Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.”).

¹⁵⁹ SRT Healthcare Report, ¶ 50.

¹⁶⁰ *Id.* ¶ 54.

¹⁶¹ ACHR art. 4(1); *But see* CENTER FOR REPRODUCTIVE RIGHTS, *Whose Right to Life: Women’s Rights and Prenatal Protections under Human Rights and Comparative Law* (2014), 7 [hereinafter *Whose Right to Life*] (noting that analysis from the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights has clarified that this protection is not absolute).

¹⁶² *Whose Right to Life*, 3.

¹⁶³ BBC NEWS: EUROPE’S ABORTION RULES, <http://news.bbc.co.uk/2/hi/6235557.stm> (last visited October 18, 2015) [hereinafter *BBC Abortion Fact Sheet*]; Human Rights Council, *International Commission of Jurists Submission on the Universal Periodic Review of Malta*, ¶ 15 (March 2012) [hereinafter *ICJ Malta Submission*].

¹⁶⁴ *Id.*

¹⁶⁵ SRT Healthcare Report, ¶ 49.

¹⁶⁶ Center for Reproductive Rights Briefing Paper, 22 (citing the CAT’s statement that Peru’s abortion laws “severely restrict[] access to voluntary abortion, even in cases of rape, leading to grave consequences, including the unnecessary deaths of women,” while calling upon the government to “take whatever legal and other measures are necessary to effectively prevent acts that put women’s health at grave risk, by providing the required medical

Nicaragua – calling on those States to take steps towards providing required reproductive medical treatment for women and girls – particularly in cases of rape.¹⁶⁷ The CAT also noted that although Kenya amended its Constitution in 2010 to decriminalize abortion for cases in which the health of the mother is at risk, cases of rape and incest were not included in this amendment.¹⁶⁸ These omissions lead to confusion among healthcare providers and healthcare seekers throughout the country – resulting in providers refusing to provide even domestically legal abortions.¹⁶⁹

In the United States abortion is legal – subject to certain gestational, funding, and reporting requirements.¹⁷⁰ However, certain religious-affiliated hospitals refuse to perform abortions, even for women whose unborn babies have suffered preterm, premature membrane rupture – which almost always results in fetal death.¹⁷¹ Women denied of these abortions are at increased risk of infection.¹⁷² In these cases, the universal, non-derogable prohibition against torture and CIDTP may be useful in combatting practices that take place under the social right of religious freedom.

In Poland, abortion is permitted, with parental consent, during the first twelve weeks of gestation in only three situations: to save a woman's life, to preserve her mental or physical health, or in cases of rape or incest or fetal impairment.¹⁷³ After twelve weeks of gestation, abortions are allowed only if continued pregnancy would endanger the life or health of the pregnant woman.¹⁷⁴ In the context of this domestic regime, the European Court of Human Rights has held that administrative and bureaucratic hurdles restricting a fourteen-year-old rape victim's access to safe abortion violated Article 3 of the European Convention on Human Rights.¹⁷⁵ In this case, the victim, "P.," wished to have an abortion, with the explicit permission of her mother.¹⁷⁶ However, while at the hospital P. was temporarily taken from her mother's custody and healthcare personnel tried convince her not to terminate the pregnancy.¹⁷⁷ The same healthcare personnel then leaked the girl's personal information to anti-choice advocates, subjecting her to weeks of harassment.¹⁷⁸ P. did eventually receive an abortion, in the final days of her twelfth week of pregnancy, clandestinely, in a hospital more than 400 kilometers from her home.¹⁷⁹

treatment"); *Peru lawmakers reject bill to allow abortions for pregnant rape victims*, THE GUARDIAN, May 27, 2015, <http://www.theguardian.com/world/2015/may/27/peru-bill-to-abortions-pregnant-rape>.

¹⁶⁷ *Id.* at 23.

¹⁶⁸ CENTER FOR REPRODUCTIVE RIGHTS, *Piercing Review of Kenya's Reproductive Health Services* (July 2, 2013), available at <http://www.reproductiverights.org/feature/piercing-review-of-kenya-reproductive-health-services>; Center for Reproductive Rights, *Kenyan Women Denied Safe, Legal Abortion Services* (June 29, 2015), available at <http://www.reproductiverights.org/press-room/kenyan-women-denied-safe-legal-abortion-services>.

¹⁶⁹ *Id.*

¹⁷⁰ GUTTMACHER INSTITUTE, *State Policies in Brief: An Overview of Abortion Laws* (October 1, 2015), available at https://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

¹⁷¹ Sarah Zagorski, *ACLU Files Lawsuit to Force Catholic Hospitals to Do Abortions*, LIFE NEWS, October 2, 2015, <http://www.lifenews.com/2015/04/09/aclu-sues-to-force-catholic-bishops-to-push-abortion-on-children-of-illegal-immigrants/>.

¹⁷² *Id.*

¹⁷³ BBC Abortion Fact Sheet

¹⁷⁴ *Id.*

¹⁷⁵ Amnesty International, *Poland must implement landmark European Court ruling on abortion* (October 31, 2012), available at <https://www.amnesty.org/en/latest/news/2012/10/poland-must-implement-landmark-european-court-ruling-abortion/>.

¹⁷⁶ Center for Repro Rights Briefing Paper, 21-22.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

C. Restricted and Inadequate Abortion-Related Care

Whether medically necessary or voluntary, “clandestine” is a word that describes too many of the world’s abortions because legal and administrative roadblocks prevent effective abortion and post-abortion care.

Across the globe, anti-abortion stigma has inflicted severe pain and suffering upon women – through humiliating treatment, substandard care, and discrimination in the delivery of abortion-related care – even in countries where the procedure is legal.¹⁸⁰ Indeed, international and regional human rights bodies have expressed concern that restrictive abortion regimes, whether *de juris* or *de facto*, have devastating impacts on maternal mortality rates.¹⁸¹ Each year, an estimated 22 million unsafe abortions take place worldwide; in developing countries, more than 3 million women who suffer complications following unsafe abortions do not receive proper care.¹⁸² In 2008, there were an estimated 47,000 deaths resulting from unsafe clandestine abortion procedures and the denial of life-saving post-abortion care.¹⁸³ Such risks disproportionately affect women in developing countries: 99 percent of maternal deaths occur in the developing world and a woman in a developing region is fifteen times more likely to die during pregnancy than a woman in a developed region.¹⁸⁴ Empirically, the pain and suffering associated with inadequate abortion-related care solely affects women, and disparately affects women in marginalized communities.

Given the severity and prevalence of such violations, various United Nations bodies have expressed concern about limited and conditional access to abortion-related care – especially where this care is withheld for the impermissible purpose to punish or to elicit a confession.¹⁸⁵ The CAT has called upon governments to “eliminate the practice of extracting confessions for prosecution purposes from women seeking emergency medical care as a result of illegal abortion.”¹⁸⁶ The CAT has also called upon governments to operate in line with World Health Organization guidelines and to “guarantee immediate and unconditional treatment of persons seeking emergency medical care” – particularly in the context of “women seeking emergency medical care as a result of illegal abortion.”¹⁸⁷

In other contexts, where abortion-related care is not withheld to elicit a confession, the “purpose” element of torture may nonetheless be fulfilled. For example, in the provision of abortion-related care, governments may subject women to physical and mental pain and suffering – essentially punishing women for non-compliance with traditional childbearing roles and reflecting discriminatory intent and purpose.¹⁸⁸ The Human Rights Council, in its examination of the ICCPR’s Article 6 (right to life), has spoken out against such practices – expressing interest in strengthening mechanisms “to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.”¹⁸⁹

¹⁸⁰ *Id.* at 23.

¹⁸¹ CENTER FOR REPRODUCTIVE RIGHTS, *Bringing Rights to Bear: Abortion and Human Rights – Government Duties to Ease Restrictions and Ensure Access to Safe Services* (October 2008), 3 [hereinafter *Bringing Rights to Bear*].

¹⁸² WORLD HEALTH ORGANIZATION, *Preventing unsafe abortion* (July 2015), available at <http://www.who.int/mediacentre/factsheets/fs388/en/>.

¹⁸³ *Id.*

¹⁸⁴ WORLD HEALTH ORGANIZATION, UNITED NATIONS POPULATION FUND, WORLD BANK, *Trends in Maternal Mortality: 1990 to 2008* (2012), 1.

¹⁸⁵ SRT Healthcare Report, ¶ 46.

¹⁸⁶ Center for Repro Rights Briefing Paper, 24.

¹⁸⁷ Comm. against Torture, *Conclusions and recommendations on Chile*, ¶ 7, U.N. Doc. CAT/C/CR/32/5 (June 14, 2004).

¹⁸⁸ Center for Repro Rights Briefing Paper, 14-16.

¹⁸⁹ *Bringing Rights to Bear*, 8.

Therefore, while not all instances of State restrictions on abortion may constitute torture, or even CIDTP, examining restrictive abortion practices provides an international framework to shape women's reproductive rights – particularly in those instances where women exercise their rights to *not* reproduce.

D. Forced and Coerced Sterilization – General International Standards

Another ubiquitous form of mistreatment that implicates women's reproductive rights is sterilization, particularly forced or coerced sterilization. Forced and/or coerced sterilization may violate the right to be free from torture and CIDTP: government-sanctioned sterilization procedures cause severe pain and suffering and are inflicted with discriminatory purpose, because they disproportionately affect women.¹⁹⁰ Moreover, sterilization decisions may reflect even more pervasive discriminatory purpose where States target racial and ethnic minorities, women from marginalized socio-economic groups, and women with disabilities, citing that these women “are ‘unfit’ to bear children” or lack the capacity to make decisions about their reproductive health.¹⁹¹ Special Rapporteur Méndez has called upon States “to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.”¹⁹²

International standards reveal that a woman's informed consent prior to sterilization is vital to preventing violations against “rights to informed consent and dignity” – even in cases of medical emergency.¹⁹³ Voluntary informed consent requires that healthcare providers communicate the risks, benefits, and alternatives of sterilization in a language and a form that is understandable to the patient – without threats or inducements, even in cases where obtaining this consent may be difficult or time consuming.¹⁹⁴ The International Federation of Gynecology and Obstetrics has promulgated sterilization guidelines stating that, “only women themselves can give ethically valid consent to their own sterilization” – not husbands, not family members, not legal guardians, and not [S]tates.¹⁹⁵ Moreover, sterilization decisions cannot be a condition of access to medical care or to other social benefits and sterilization decisions should not be extracted when “women may be vulnerable, such as when requesting termination of pregnancy, going into labor or in the aftermath of delivery.”¹⁹⁶

This “increasingly global” problem of forced and coerced sterilization is evidenced by the experiences of specific marginalized groups – including ethnic minorities, criminal offenders, HIV-positive individuals, and persons with disabilities.¹⁹⁷

¹⁹⁰ WORLD HEALTH ORGANIZATION, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement – OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO* (2014), 1 [hereinafter WHO Interagency Statement].

¹⁹¹ SRT Healthcare Report, ¶ 48; U.S. HUMAN RIGHTS NETWORK, *Executive Summary of CAT Shadow Report Submissions* (October 21, 2014), 66 [hereinafter CAT Shadow Reports Executive Summary].

¹⁹² SRT Healthcare Report, ¶ 3.

¹⁹³ Center for Repro Rights Briefing Paper, 20; SRT Healthcare Report ¶ 33 (quoting the International Federation of Gynecology and Obstetrics: “[E]ven if a future pregnancy may endanger a woman's life or health,” she must be given time and support to consider her reproductive choices – and these informed choices “must be respected, even if it is considered liable to be harmful to her health”).

¹⁹⁴ CENTER FOR REPRODUCTIVE RIGHTS, *Reproductive Rights: A Tool for Monitoring State Obligations* (2012) [hereinafter Center for Repro Rights – Tool for Monitoring State Obligations].

¹⁹⁵ OPEN SOCIETY FOUNDATIONS, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide* (2011), 9 [hereinafter OSF Sterilization Report].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

E. Sterilization of Ethnic Minorities

The CAT has expressed particular concern about the systematic sterilization of ethnic minority women, because of the inherently discriminatory intent – indicating that the practice amounts to torture and/or CIDTP when States do not exercise due diligence to prevent it.¹⁹⁸

For example, human rights bodies have condemned the rampant, often State-sponsored, sterilization of Roma women throughout Europe – most prominently in the Czech Republic. In 2011, the European Court of Human Rights ruled that the sterilization of a Roma woman, who was sterilized during a caesarean section and only consented to the procedure in the height of labor, violated Article 3 and Article 8 of the European Convention on Human Rights.¹⁹⁹ The Court described the hospital’s coercion as a “paternalistic” interference with the victim’s “physical integrity,” “with gross disregard to her right to autonomy and choice as a patient.”²⁰⁰ Notably, the Court did not address whether the practice amounted to a violation of the prohibition against discrimination contained in European Convention on Human Rights.²⁰¹

However, empirical evidence reveals that such practices do disproportionately affect Roma minority women across Europe. Reports from as recent as 2014 reveal that healthcare providers systematically sterilized Roma women while under great pain or stress during labor, during delivery, or even while unconscious and undergoing caesarean sections.²⁰² The reports also reveal that even if these healthcare providers did counsel the patients prior to sterilization, the women were not informed of the permanency of the procedure or of alternative contraception methods.²⁰³ In other cases, this information was presented in a foreign language, in complex unfamiliar medical terminology, or with misinformation – for example, that the procedure was necessary on life-saving grounds.²⁰⁴ Similar practices have been documented in Hungary, where Roma women are sterilized without proper informed consent – sometimes given procedure information in a foreign language or asked to provide consent while under anesthesia.²⁰⁵

F. Sterilization Based on Socio-Economic Status

States also target poor women for sterilization across the globe. For example, in the United States, women receiving social assistance experience coercive family planning through a combination of incentives and disincentives surrounding their fertility.²⁰⁶ Particularly troubling are complaints from women on social assistance that point to coercive sterilization practices similar to those experienced by Roma women in Europe.²⁰⁷ In at least one such case, a woman who was receiving social assistance filed a complaint against the hospital for performing an unauthorized sterilization while she was under

¹⁹⁸ Comm. against Torture, *Concluding observations of the Committee against Torture: Czech Republic*, ¶¶ 12-13, CAT/C/CZE/CO/4-5 (July 13, 2012).

¹⁹⁹ Christina Zampas, *VC v Slovakia: A Step Toward Justice for Roma Women*, OPEN SOCIETY FOUNDATIONS, November 18, 2011, available at <https://www.opensocietyfoundations.org/voices/vc-v-slovakia-step-toward-justice-roma-women>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² WHO Interagency Statement, 5.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: OFFICE OF POPULATION AFFAIRS, <http://www.hhs.gov/opa/program-guidelines/program-requirements/> (last visited October 25, 2015).

²⁰⁷ OSF Sterilization Report, 4.

anesthesia.²⁰⁸ In response, members of the local community rallied in favor of the doctors, calling the victim a “state-check-collecting waste of space” who deserved to be sterilized.²⁰⁹

Similarly discriminatory practices that target impoverished women have been documented in Asia. In Uttar Pradesh, India government-sponsored family planning takes the form of “sterilization camps.”²¹⁰ In these camps, poor, illiterate women are rushed through the consent process – using a thumbprint to indicate consent without having the procedure fully explained and without being informed of other long-term family planning methods.²¹¹ In Uzbekistan, government family planning programs reportedly encourage physicians to sterilize poor women without their informed consent – either coercively or forcibly – and some employers require women to produce a “sterilization certificate” prior to employment.²¹²

G. Sterilization Based on HIV Status

HIV-positive women also face stigma, discrimination, and mistreatment in the context of sterilization. With proper interventions, the vertical transmission of HIV from mothers to children can be reduced to less than 5 percent.²¹³ Yet HIV-positive women seeking reproductive healthcare services are often misinformed about the potential transmission of HIV to their children and/or about their ability to care for their offspring.²¹⁴ Reports from Chile, the Dominican Republic, Mexico, Namibia, South Africa, and Venezuela document widespread coerced sterilization of HIV-positive women.²¹⁵ In a 2008 study from Namibia, documenting 230 women living with HIV, forty of them (17 percent) stated that they had been coerced or forced into sterilization.²¹⁶ Notably, in November 2014, the Namibian Supreme Court upheld a 2012 lower court decision ruling that the government, in these instances of coerced sterilization, had violated the women’s rights.²¹⁷

Judicial challenges to similar violations have occurred in Latin America. For example, the Inter-American Commission recently heard a complaint from a young rural Chilean woman who was sterilized without her informed consent because of her HIV-positive status.²¹⁸ The victim, F.S., was HIV positive, and due to an unrelated complication, she underwent an emergency cesarean section.²¹⁹ Because of her HIV status, while F.S. was under anesthesia, and without her knowledge, the surgical team performed a permanent sterilization procedure.²²⁰

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* At the time of the study, the World Bank and the U.S. government supported to program, and the Indian government reportedly had begun to pay physicians per successful sterilization procedure.

²¹² Mansur Mirovalev, *Uzbek Women Accuse State of Mass Sterilizations*, THE INDEPENDENT, July 17, 2010; OSF Sterilization Report, 4.

²¹³ WORLD HEALTH ORGANIZATION: MOTHER-TO-CHILD TRANSMISSION OF HIV, <http://www.who.int/hiv/topics/mtct/en/> (last visited October 18, 2015).

²¹⁴ WHO Interagency Statement, 3.

²¹⁵ OSF Sterilization Report, 5.

²¹⁶ *Id.*

²¹⁷ Lucile Scott, *Forced Sterilization and Abortion: A Global Human Rights Problem*, AMFAR, available at <http://www.amfar.org/forced-sterilization-and-abortion-a-global-human-rights-problem/>.

²¹⁸ Center for Repro Rights Briefing Paper, 20.

²¹⁹ *Id.*

²²⁰ *Id.*

H. Sterilization Based on Criminalized Behavior

Similarly, women engaged in criminalized behaviors are heavily incentivized, if not coerced, to undergo sterilization – which may implicate the prohibition against torture and CIDTP. For example, Project Prevention is a U.S.-based nonprofit organization that pays women who use illicit drugs to be sterilized or to accept long-term contraception.²²¹ To date, more than 1,300 women

I. Sterilization Based on Disability

The Convention on the Rights of Persons with Disabilities recognizes the rights of individuals with disabilities to “decide freely and responsibly on the number and spacing of their children, and to have access to age-appropriate information, reproductive and family planning education.”²²² It also requires that States provide persons with disabilities access to sexual and reproductive health services equivalent to those provided to others without disabilities.²²³

In jurisdictions that assign “guardianship,” courts may declare a disabled person “incompetent” and transfer decision-making rights, including those related to sterilization, to a court appointed guardian.²²⁴ Guardianship is globally “overused and abused,” but persons with disabilities are especially vulnerable.²²⁵

Examples of such abuse against persons with disabilities occur across the globe. For example, a survey conducted in India among women with disabilities revealed that 6 percent had been forcibly sterilized.²²⁶ As of reporting released in October 2014, eleven states in the United States permit a court to order that a disabled person be involuntary sterilized or be forced to use some form of contraceptive.²²⁷ Indeed, in the United States, women with disabilities are statistically more likely to have hysterectomies at a younger age for non-medical reasons, including at the request of a parent or guardian.²²⁸ Spain explicitly permits sterilization of minors with severe intellectual disabilities.²²⁹ The Egyptian Parliament has failed to include a provision banning the use of sterilization as a “treatment” for mental illness in its patient protection law.²³⁰

J. Abuses in Reproductive Healthcare Settings

Women confront severe pain and suffering, even when seeking reproductive healthcare in professional settings. Special Rapporteur Méndez has emphasized that access to reproductive health information and services is “imperative” to reproductive autonomy to the rights to health and to physical integrity.²³¹ Therefore, he has noted that mistreatment of women seeking reproductive health services can cause “tremendous and lasting physical and emotional suffering.”²³²

²²¹ OSF Sterilization Report, 4.

²²² Center for Repro Rights – Tool for Monitoring State Obligations.

²²³ *Id.*

²²⁴ OSF Sterilization Report, 4.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ CAT Shadow Reports Executive Summary, 66.

²²⁸ *Id.*

²²⁹ OSF Sterilization Report, 4.

²³⁰ *Id.*

²³¹ SRT Healthcare Report, ¶ 47.

²³² *Id.*

For example, undocumented migrants may avoid interacting with formal health systems – fearing deportation and family separation if their immigration status is disclosed; they therefore face greater risk of inadequate or poor quality reproductive care.²³³ Ethnic minorities and people of indigenous descent also face discrimination in formal healthcare settings – whether based on discrimination and marginalization or language and cultural barriers.²³⁴

HIV-positive women also face stigma in formal healthcare settings, which blocks access to effective care; Gita Bai, a young woman from Madhya Pradesh, India, serves as an example. In 2007, thirty-year-old Bai visited a local hospital for treatment for her fifth pregnancy.²³⁵ After a preliminary examination, the medical staff learned that Bai was HIV positive, and they discharged her without treatment.²³⁶ When Bai returned to the hospital a few days later, in labor, doctors forcibly prevented her from entering the hospital because of her HIV status.²³⁷ As a result, Bai was forced to deliver her child on the street outside the hospital, and she died a few days thereafter from preventable delivery complications.²³⁸ Notably, the hospital performed no autopsy and disposed of Bai’s body rapidly, while the police filed no formal complaint against the hospital for Bai’s death.²³⁹

Conversely, women may also be pressured into unwanted medical examinations – particularly if they are engaged in the sex industry. For example, the CAT has noted that Austrian sex workers are required to undergo weekly medical gynecological examines and blood test check-ups at community health centers, demonstrating a “lack of privacy and humiliating circumstances amounting to degrading treatment.”²⁴⁰ As such, the CAT has called on Austria to ensure that “medical examinations are carried out in an environment where privacy is safeguarded and in taking the greatest care to preserve the dignity of women being examined.”²⁴¹

Even women that do not fall within these vulnerable groups are too often denied proper care. For example, a report on Kenya healthcare facilities detailed physical and verbal abuse against pregnant women seeking maternity services – especially immediately before and after childbirth.²⁴² The report described that women in labor were subject to extended delays in receiving medical care, waited hours for stitching after delivery, or were stitched without anesthesia.²⁴³ Such mistreatment inflicts physical and psychological suffering – arguably constituting CIDTP.

Preliminary Questions for Panel III

- **Question:** What are the best practices for reparations for women who have been subjected to torture/CIDTP as part of reproductive rights violations including limited access to abortion, forced sterilization, and mistreatment in the provision of reproductive care?
- **Question:** Research reveals that current State policies for preventing reproductive rights violations primarily emphasize unconditional access to emergency care, informed consent, reproductive autonomy, and the medical obligation to “do no harm.” What other theoretical

²³³ Center for Repro Rights – Tool for Monitoring State Obligations.

²³⁴ *Id.*

²³⁵ Center for Repro Rights Briefing Paper, 24.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Center for Repro Rights Briefing Paper, 19.

²⁴¹ *Id.*

²⁴² *Id.* at 18-19.

²⁴³ *Id.*

frameworks or tangible measures should States take to implement to prevent reproductive rights violations that rise to the level of torture/CIDTP?

- **Question:** Are there good models to recommend to States operating in resource-constrained environments to ensure reproductive healthcare services are delivered without violation of the prohibition against torture and CIDTP?

FRIDAY, 6 NOVEMBER

PANEL IV

Violence Against Women, Girls, and LGBTI Persons and Sexual Violence

PANEL V

Domestic Violence, Harmful Practices, and Human Trafficking

CONFLICT-RELATED SEXUAL VIOLENCE

The 2015 Report of the Security General on Conflict Related Sexual Violence defines conflict-related sexual violence as:

*rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is linked, directly or indirectly (temporally, geographically or causally) to a conflict. This link may be evident in the profile of the perpetrator; the profile of the victim; in a climate of impunity or State collapse; in the cross-border dimensions; and/or in violations of the terms of a ceasefire agreement.*²⁴⁴

Today, State actors frequently use sexual violence as a weapon deployed in armed conflict, as seen in Sudan (Darfur), South Sudan, the Syrian Arab Republic, and the Democratic Republic of the Congo.²⁴⁵ However, non-state armed groups, many of which are pursuing extremist ideologies, perpetrate the vast majority of these crimes.²⁴⁶ This is true in the ongoing conflicts in Iraq, Syria, Somalia, Nigeria, Mali, Libya, and Yemen.²⁴⁷ Thus, any effort to end conflict-related sexual violence requires targeting groups like, Islamic State in Iraq and the Levant (ISIL), Al-Shabaab, Boko Haram, Ansar Dine, and al-Qaida affiliates.²⁴⁸

There is widespread consensus among the UN treaty-bodies and international criminal courts and tribunals that conflict-related sexual violence constitutes torture. The 2008 Report of the former Special Rapporteur on Torture, Manfred Nowak intended to strengthen the protection of women by moving towards a “gender-sensitive interpretation of torture.”²⁴⁹ In the report Special Rapporteur Nowak discussed certain practices that disproportionately impacted women, but which had been excluded from

²⁴⁴ U.N. Secretary-General, *Conflict Related Sexual Violence: Rep. of the Secretary-General*, ¶ 2, U.N. Doc. S/2015/203 (March 23, 2015) [hereinafter UNSG 2015 Report].

²⁴⁵ *Id.* ¶ 8.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ 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*, Human Rights Council (HRC), ¶ 25, U.N. Doc. A/HRC/7/3 (January 15, 2008) (by Manfred Nowak) [hereinafter SRT Manfred Nowak 2008 Report].

the classical understanding of torture. Nowak focused on acts of rape and sexual violence and classified them as torture based on the four elements of the act defined by United Nations Convention Against Torture (“UNCAT”): (1) Purpose, (2) Intent, (3) Severe Pain or Suffering, and (4) State involvement.²⁵⁰ Thus, his report articulated how States’ legal obligations under the UNCAT and customary international law apply to acts of sexual violence.²⁵¹

In 2008, when Special Rapporteur Nowak issued his report, there was already widespread recognition among the Special Rapporteurs and regional adjudicative bodies that rape constitutes torture “when it is carried out by or with the instigation of or with the consent or acquiescence of public officials.”²⁵² Nowak’s goal was to extend protections to cover forms of sexual violence beyond rape. One goal of his report was to displace the notion that rape and sexual violence can be reduced to “penetration with the male sexual organ.”²⁵³ The Special Rapporteur pointed out that “other forms of sexual violence, whether defined as rape or not, may constitute torture or ill-treatment and must not be dealt with as minor offences.”²⁵⁴ According to international criminal jurisprudence, these acts of sexual violence may include oral sex, and vaginal or anal penetration through the use of an object or any part of the aggressor’s body.²⁵⁵ Other examples of sexual violence include “threats of rape, touching, ‘virginity testing,’ being stripped naked, invasive body searches, insults and humiliations of a sexual nature, etc.”²⁵⁶ In 2015, the Prosecutor for the International Criminal Court (ICC) explained that the elements for the crimes of sexual violence require that:

the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact — for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.²⁵⁷

²⁵⁰ *Id.* ¶ 34.

²⁵¹ “The aim is to ensure that the torture protection framework is applied in a gender-inclusive manner with a view to strengthening the protection of women from torture. While a variety of international instruments explicitly or implicitly provide for an extensive set of obligations with respect to violence against women or rape, classifying an act as ‘torture’ carries a considerable additional stigma for the State and reinforces legal implications, which include the strong obligation to criminalize acts of torture, to bring perpetrators to justice and to provide reparation to victims.” *Id.* ¶ 26.

²⁵² *Id.* ¶ 34.

²⁵³ *Id.* ¶ 35.

²⁵⁴ *Id.* ¶ 35.

²⁵⁵ *Id.* ¶ 35; Special Rapporteur Nowak’s views were in accordance with the jurisprudence emerging from the international tribunals at the time. The *Akayesu* decision is the first time rape and sexual violence was defined in international law. The Chamber defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.” The Chamber distinguished this from sexual violence, which it defined as, “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” While the Chamber did not prosecute these acts as torture, they did explain that rape and sexual violence could constitute torture. In 1998, the ICTY recognized rape as torture in the *Celebici* decision. Alex Obote-Odera, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 New Eng. J. Int’l & Comp. L. 135, 147 (2005); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (September 2, 1998).

²⁵⁶ SRT Manfred Nowak 2008 Report, ¶ 34.

²⁵⁷ The Office of the Prosecutor of the ICC, Policy Paper on Sexual and Gender-based Crimes 3 (2014) [hereinafter ICC Policy Paper], <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

Because these acts constitute torture, or CIDTP, states have a positive obligation under CAT to prevent these violations.

A. Purpose Element

In its General Comment No. 2, the United Nations Committee Against Torture (“CAT”) points out that Article 1 of the UNCAT specifies “discrimination of any kind” as an important factor for determining whether an act constitutes torture.²⁵⁸ General Comment No. 2 states that gender is “a key factor,” because “being female intersects with other identifying characteristics or status of the person.”²⁵⁹ The CAT recognized that certain groups may be “especially at risk of being tortured,” based on their gender and obligates states to take positive measures to prevent and protect members of these groups.²⁶⁰ In his 2008 report, the Special Rapporteur articulated: “In regard to violence against women, the purpose element is always fulfilled if the acts can be shown to be gender-specific, since discrimination is one of the elements mentioned in the CAT definitions.”²⁶¹ Thus, because the CAT recognizes rape and sexual violence as “gendered violations,” these acts of sexual violence against women satisfy the purpose element of torture.²⁶²

Several international criminal courts have also recognized that rape and sexual violence satisfy the purposes that are more closely associated with classic forms of torture. In the *Akayesu* decision in 1998, the ICTR recognized that, “like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, and control or destruction of a person. Like torture, rape is a violation of personal dignity.”²⁶³

The 1998 *Celebici* decision from the ICTY was the first time rape was recognized as torture.²⁶⁴ Hazim Delic was the deputy camp commander at a prison camp in Celebici. He was on trial for raping two Bosnian Serb civilian women during their interrogations while they were held there. The judges held that “rape may constitute torture under customary international law.”²⁶⁵ However, they explained that the purpose of the rapes was to “obtain information, punish the women for their inability to provide information and to intimidate and coerce them. The Trial Chamber also found that the violence suffered by the two women had a discriminatory purpose—it was inflicted on them because they were women.”²⁶⁶ In the 2000 ICTY decision, *Prosecutor v. Kunarac*, the trial chamber found that the rape and sexual

²⁵⁸ Comm. Against Torture, General Comment No. 3, ¶ 20, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012) [hereinafter CAT General Comment No. 3].

²⁵⁹ Comm. Against Torture, General Comment No. 2: Implementation of article 2 by States parties, ¶ 22, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT General Comment No. 2].

²⁶⁰ *Id.* ¶ 21.

²⁶¹ SRT Manfred Nowak 2008 Report, ¶ 30.

²⁶² The CAT recognizes that sexual violence is also perpetrated against male victims [CAT General Comment No. 2, ¶ 22] and the ICC Prosecutor notes that “[g]ender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.” [ICC Policy Paper at 3.] However, the Secretary General states that women and girls are targeted in higher numbers than men and boys. U.N. Secretary General, Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence, 3, (June 2014), <http://www.unwomen.org/~media/headquarters/attachments/sections/news/stories/final%20guidance%20note%20reparations%20for%20crsv%203-june-2014%20pdf.ashx> [hereinafter SG Guidance Document].

²⁶³ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 687 (September 2, 1998).

²⁶⁴ U.N.-ICTY, *The Landmark Cases: Mucic et al.: Rape as Torture*, ICTY, <http://www.icty.org/sid/10314> (last visited Oct. 25, 2015).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

violence perpetrated against twenty women constituted torture. The defendants belonged to the Bosnian-Serb military forces and were participating a campaign to cleanse the region of Muslims.²⁶⁷ The Trial Chamber found that “rape was used by members of the Bosnian Serb armed forces as an instrument of terror. An instrument they were given free rein to apply whenever and against whomever they wished.”²⁶⁸

In 2008, the UN Security Council adopted Resolution 1820, which condemned the use of sexual violence as a weapon of armed conflict, noting “that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.”²⁶⁹ A 2015 Security Council Report, reaffirmed that conflict-related sexual violence is linked with strategic objectives, like torture.²⁷⁰

B. Intent Element

In his 2008 report, Special Rapporteur Nowak explained, “if it can be shown that an act had a specific purpose, the intent can be implied.”²⁷¹ Because sexual violence has been classified as a gender-based crime, it follows that sexual violence is committed with the intention to discriminate. The UN Voluntary Fund for Victims of Torture (UNVFVT) issued a report entitled, “Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies” in 2011. This report explained, “pain and suffering must intentionally be inflicted to the victim in order to qualify as torture.”²⁷² As noted above, sexual violence is used in armed conflict “as strategic weapons and policies of war, designed to invoke terror, prove absolute power over a population and tear apart the fabric of communities that fall prey to such acts of violence.”²⁷³ The Secretary General’s 2015 Report also notes, “the confluence of crisis wrought by violent extremism has revealed a shocking trend of sexual violence employed as a tactic of terror by radical groups.”²⁷⁴ Based on current patterns, the Secretary General concludes, “sexual violence is not incidental, but integrally linked with the strategic objectives, ideology and funding of extremist groups.”²⁷⁵

UN bodies recognize that conflict-related sexual violence is discriminatory. For example, the United Nations Entity for Gender Equality and the Empowerment of Women explained that conflict-related sexual violence is discriminatory because, “[a]lthough entire communities suffer the consequences of armed conflict, women and girls are particularly affected because of their status in society and their sex. Parties in conflict situations often rape women, sometimes using systematic rape as a tactic of

²⁶⁷ *Case Information Sheet: “FOCA” (IT-96-23 and 23/1) Kunarac, Kovac ¶ Vukovic*, U.N.-ICTY, http://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf.

²⁶⁸ *Id.*

²⁶⁹ S.C. Res. 1820, Preamble, U.N. Doc. S/RES/1820 (June 19, 2008) [hereinafter SC Resolution 1820]; U.N. Women Fact Sheet No. 5, U.N. Doc. DPI/2035 (May 2000) [hereinafter U.N. Women Fact Sheet No. 5].

²⁷⁰ “It is used to advance such tactical imperatives as recruitment; terrorizing populations into compliance; displacing communities from strategic areas; generating revenue through sex trafficking, the slave trade, ransoms, looting and the control of natural resources; torture to elicit intelligence; conversion and indoctrination through forced marriage; and to establish, alter or dissolve kinship ties that bind communities.” UNSG 2015 Report, ¶ 83.

²⁷¹ SRT Manfred Nowak 2008 Report, ¶ 30.

²⁷² UNVFVT, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, 4 (2011), http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf [hereinafter UNVFVT Interpretation 2011].

²⁷³ Anna Griffin & Yvette Zegenhagen, *The Development of Prohibitions Against Sexual Violence in Armed Conflict*, International Humanitarian Law Magazine, 2014, at 3.

²⁷⁴ U.N. Secretary-General, *Conflict Related Sexual Violence: Rep. of the Secretary-General*, ¶ 82, U.N. Doc. S/2015/203 (March 23, 2015).

²⁷⁵ *Id.* ¶ 83.

war.”²⁷⁶ In his report, Special Rapporteur Nowak similarly observed that “[b]ecause of the social stigma attached to sexual violence, official torturers deliberately use rape to humiliate and punish victims, but also to destroy entire families and communities.”²⁷⁷ Conflict-related sexual violence satisfies the purpose and intent elements of torture because it is intentionally inflicted against women because of their social roles as women. Because it is a gender-based crime, it constitutes discrimination, satisfying the purpose element of torture.

C. Severe Pain and Suffering Element

In his report, Special Rapporteur Nowak acknowledged the severe pain and suffering victims of sexual violence experience.²⁷⁸ However, Nowak also explained, “[w]hen Government officials use rape, the suffering inflicted might go beyond the suffering caused by classic torture, partly because of the intended and often resulting isolation of the survivor.”²⁷⁹ This is especially true in cultures where the sexual violence victim is rejected or formally banished from the family or community.²⁸⁰ In these situations, the women are relegated to lives of extreme poverty. The Special Rapporteur noted that such alienation “hinders the psychological recovery of the victim.”²⁸¹ However, even when the victim is not rejected by her community, she will still face difficulties in establishing intimate relationships.²⁸² Beyond the psychological trauma, sexual violence victims are “often infected with sexually transmitted diseases or may experience unwanted pregnancies, miscarriages, forced abortions or denial of abortion.”²⁸³ Indeed, Jan Ruff-O’Herne’s experience as a “Comfort woman” for the Japanese Army in World War II confirms the Special Rapporteur’s findings.²⁸⁴ She was 19 in 1942 when she was separated from her family by the Japanese army and taken to a house where she was “enslaved into enforced prostitution.”²⁸⁵ She explains, “even after more than fifty years I still experience this feeling of total fear going through my body and through all my limbs, burning me up ... I have never been able to enjoy intercourse as a consequence of what the Japanese did to me.”²⁸⁶ Patricia Sellers, former Legal Advisor for Gender-Related Crimes at the Office of the Prosecutor for the International Criminal Tribunal for the former Yugoslavia also explains how sexual violence is perpetrated and experienced in this context.²⁸⁷

²⁷⁶ U.N. Women Fact Sheet No. 5.

²⁷⁷ SRT Manfred Nowak 2008 Report, ¶ 36.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Anna Griffin & Yvette Zegenhagen, *The Development of Prohibitions Against Sexual Violence in Armed Conflict*, International Humanitarian Law Magazine, 2014, at 7.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ “Sexual penetrations or rapes, in a detention center are usually forced upon women who have not bathed in days, who have not brushed their teeth in weeks, who are starving, who are recovering from or are still in shock from seeing loved ones killed or mutilated, or who have witnessed their houses burned down. The actual rape is usually perpetrated upon a person who is utterly and physically exhausted and terrorized. Her body is stiff. Her mind sends no hormonal signals to release lubricating fluids to the body. The person is forced to witness and participate in her own torture--the forceful penetration. The victim is also forced to engage in unwanted touching, fondling, and kissing. Usually the victim is forced to be nude during the rape and to listen to the perpetrator insult her, her race, or her ethnic group. The rape is often committed in public, even if only one other person is present, maybe another guard at the side of the perpetrator who waits for his turn. Such facts certainly amount to the infliction of severe pain and severe mental suffering even before a victim-survivor is stricken with Post Traumatic Stress Disorder. Rape as torture is an act of sexual penetration that is separate and differentiated from, and unrelated and adverse to the sexual relations one experiences in their everyday life.” Patricia V. Sellers, *Sexual Torture as a Crime Under International Criminal and Humanitarian law*, 11 N.Y. City L. Rev. 339, 344 (2008).

The UNVFVT emphasizes that based on the UNCAT definition, “the pain and suffering may be either physical or mental.”²⁸⁸ Based on this, the ICTR was able to categorize non-physical acts of sexual violence, such as forced nudity, as crimes against humanity in *Akayesu*.²⁸⁹ This was expanded, in *Prosecutor v. Furundzija*, where the ICTY held that a witness who was forced to watch rape was tortured.²⁹⁰ Criminal tribunals have also recognized acts of sexual violence as acts of torture constituent elements of other types of international crimes. The ICTR in its *Akayesu* decision held that sexual violence may constitute the crime of genocide. The court found that:

*The acts of rape and sexual violence ... were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated and raped several times, often in public, in the worst Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and the destruction of the Tutsi group as a whole.*²⁹¹

In the *Akayesu* case and another case, *Semanza*, the ICTR also recognized rape as a crime against humanity.²⁹² In order for sexual violence to be considered a crime against humanity, “it must be committed: (a) as part of a widespread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.”²⁹³ Finally, in international armed conflict, sexual violence constitutes a war crime. Thus, international human rights law, international humanitarian law, and international criminal law all recognize the severity and the destructive capacity of conflict-related sexual violence.

D. Public Official Element

In General Comment No. 2, the UNCAT recognized that states have positive obligations under the CAT and customary international law:²⁹⁴

Where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they 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. 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

²⁸⁸ UNVFVT Interpretation 2011 at 4.

²⁸⁹ Alex Obote-Odera, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 New Eng. J. Int'l & Comp. L. 135, 152 (2005).

²⁹⁰ Patricia V. Sellers, *Sexual Torture as a Crime Under International Criminal and Humanitarian law*, 11 N.Y. City L. Rev. 339, 344 (2008).

²⁹¹ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 706-707 (September 2, 1998).

²⁹² Alex Obote-Odera, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 New Eng. J. Int'l & Comp. L. 135, 152 (2005).

²⁹³ UNVFVT Interpretation 2011 at 19.

²⁹⁴ CAT General Comment No. 2, ¶ 18.

*States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.*²⁹⁵

More simply, as Special Rapporteur Nowak explained: “rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.”²⁹⁶ Furthermore, as Sellers notes, the jurisprudence from the Tribunals shows that “emphasis is to be placed on the torture act alleged to have been committed, not the official or unofficial status of the torturer. To obtain a conviction of torture, the status of the perpetrator became irrelevant as long as other elements and the jurisdictional prerequisites were established.”²⁹⁷ This is especially relevant given that many conflicts today do not involve state actors. In the *Celebici* case, the Trial Chamber of the ICTY held that, given the dissolution of the former Yugoslavia, both state and non-State actors could commit torture.²⁹⁸ In situations of ongoing conflict involving non-State actors, the Committee on the Elimination of Discrimination Against Women (CEDAW) holds that States have an obligation to “reject all forms of rollbacks in women’s rights protections in order to appease non-State actors.”²⁹⁹

In conclusion, conflict-related sexual violence constitutes torture because they are intentionally inflicted for the purpose of discrimination, gaining military advantage, as well as many of the same objectives as the “classic” understanding of torture. The CAT, various Special Rapporteurs, international criminal law, and international humanitarian law all recognize the severity of the mental and physical pain that sexual violence victims experience. Thus, states have a positive obligation to prevent and punish conflict-related sexual violence with due diligence.

E. Access to Justice and Reparations for Victims

In 2014, the Secretary General issued a Guidance Note regarding reparations for conflict-related sexual violence. The report acknowledges that while women and girls are affected by conflict related sexual violence in greater numbers, men and boys are also victims of conflict-related sexual violence.³⁰⁰ The severe mental and physical pain or suffering experienced by the victims has an impact on their families.³⁰¹ The Secretary General’s Guidance Note recognizes that when considering reparations “victims of conflict-related sexual violence” include family members and dependents, such as partners, children, and children born as a result of pregnancy from rape as well as individuals who suffered harm from intervening to prevent the violations or assist the victims.³⁰²

Sexual violence victims face significant hurdles in accessing justice and reparations.³⁰³ The physical and mental pain that these victims have experienced is only intensified by the stigma and shame associated with these crimes.³⁰⁴ When seeking redress these victims also fear being rejected by their

²⁹⁵ *Id.*

²⁹⁶ SRT Manfred Nowak 2008 Report, ¶ 34.

²⁹⁷ Patricia V. Sellers, *Sexual Torture as a Crime Under International Criminal and Humanitarian law*, 11 N.Y. City L. Rev. 339, 344 (2008).

²⁹⁸ Patricia V. Sellers, *Sexual Torture as a Crime Under International Criminal and Humanitarian law*, 11 N.Y. City L. Rev. 339, 344 (2008).

²⁹⁹ U.N. Comm. On the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict, and Post-Conflict Situations, ¶ 17(d), U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013).

³⁰⁰ SG Guidance Document, at 3.

³⁰¹ *Id.* at 3.

³⁰² *Id.* at 3.

³⁰³ *Id.* at 5.

³⁰⁴ *Id.* at 5.

families and communities.³⁰⁵ For women in societies with structural discrimination against women, this loss of family support can be devastating.³⁰⁶ Beyond the difficulties of disclosing their trauma, those who do report their torture may be interviewed and/or examined by personnel who are not trained in gender-sensitive methods of doing so.³⁰⁷ The CAT recognized the importance of such training in General Comment No. 3.³⁰⁸ Thus, for reparations to be just and adequate, they should be based on “a full understanding of the gendered-nature and consequences of the harm suffered.”³⁰⁹ This also requires considering existing gender inequalities to ensure that the reparations provisions themselves are not discriminatory.³¹⁰

The Guidance Note also recognizes that gender-based discrimination can be compounded by discrimination on other grounds, such as ethnicity, age, religion, class, or nationality. Given the sensitivity required to provide reparation to sexual violence victims, any initiative should include ongoing protection for victims, respectful engagement with the victims, effective confidentiality measures, and ensure that the reparations initiatives do no harm.³¹¹ In order to provide adequate redress for these victims, a combination of reparations is necessary, including, restitution, compensation, rehabilitation, and guarantees of non-repetition.³¹² Reparations program should offer priority of access to these victims and should include a combination of individual, collective, symbolic, and material reparations.³¹³

When such atrocities have occurred, States should use administrative and judicial procedures to complement each other to provide reparations to the victims.³¹⁴ States should implement administrative procedures when they are trying to provide reparations to large numbers of victims of gross violations.³¹⁵ Under such programs, the States identify the violations and the victims and provide reparations through an established procedure.³¹⁶ States may be ordered to implement such procedures by the national courts or international courts as required.³¹⁷ However, even in cases where administrative procedures may be more efficient, “all victims should have access to effective judicial remedies which include adequate,

³⁰⁵ *Id.* at 5.

³⁰⁶ *Id.* at 5.

³⁰⁷ SRT Manfred Nowak 2008 Report, ¶ 61.

³⁰⁸ “Furthermore, officials and personnel involved in efforts to obtain redress should receive methodological training in order to prevent re-traumatization of victims of torture or ill-treatment. This training should include, for health and medical personnel, the need to inform victims of gender-based and sexual violence and all other forms of discrimination of the availability of emergency medical procedures, both physical and psychological. The Committee also urges States parties to establish human rights offices within police forces, and units of officers specifically trained to handle cases of gender-based and sexual violence, including sexual violence perpetrated against men and boys, and violence against children and ethnic, religious, national or other minorities and other marginalized or vulnerable groups.” CAT General Comment No. 3, ¶ 35.

³⁰⁹ SG Guidance Document at 5.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 5-6.

³¹³ *Id.* at 6.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ “When gross violations of human rights and/or serious violations of international humanitarian law, including conflict-related sexual violence, take place on a large scale, administrative reparations programmes have the potential of being more inclusive and accessible than courts. These programmes are in fact capable of reaching a larger number of victims and are more victim-friendly as their procedures are more flexible, and evidentiary standards and costs are considerably lower. They imply recognition of the harm suffered, without subordinating it to the judicial establishment of the responsibility of the perpetrator.” *Id.*

³¹⁷ *Id.*

prompt, and full reparation for the harm suffered.”³¹⁸ Effective access entails “assistance and support to complainants as well as the removal of barriers to access to justice, including discriminatory barriers particularly affecting women.”³¹⁹ In order to be effective, the judicial decisions have to be executed without unreasonable delay.”³²⁰ This distinction between administrative and judicial reparations is part of the larger objective that collective and individual reparations should complement and reinforce each other.³²¹ However, the Secretary General emphasizes that “collective reparations are not a substitute for individual reparations,” because they serve different purposes.³²² The CAT also holds this same view.³²³

Providing individual access to justice requires States to implement judicial procedures and rules of evidence that are specific to sexual violence, so that the interests of both the victim and the perpetrator are protected.³²⁴ Special Rapporteur Nowak also discussed the significance of responsive judicial rules. He explained that when victims testify, they face an impossible dilemma: they have to simultaneously establish the trauma they established by the sexual violence and that their testimony is still credible, despite this trauma.³²⁵

³¹⁸ “Domestic or international courts should take into account and complement reparations awarded by administrative reparations programmes when deciding on redress for victims of conflict-related sexual violence.” *Id.*

³¹⁹ *Id.* at 7.

³²⁰ *Id.*

³²¹ *Id.*

³²² “Collective reparations could help to prevent stigma given that they do not require naming individual victims and the violations suffered. Individual victims should, however, directly benefit from collective reparations and not feel excluded or marginalized, or even further stigmatized by these measures. Measures such as building infrastructure for entire communities and naming them after victims may for example expose survivors. Equally, collective reparations may end-up benefitting more men than women, if they for example result into greater access to economic resources for the family or the community, where women traditionally do not control or have little access to such resources. However, there may be instances when collective measures that honour survivors of sexual violence may both diminish stigmatization within a community as well as encourage victims to speak openly about their experiences.” *Id.*

³²³ “The Committee is therefore of the view that a State party may not implement development measures or provide humanitarian assistance as a substitute for redress for victims of torture or ill-treatment. The failure of a State party to provide the individual victim of torture with redress may not be justified by invoking a State’s level of development. The Committee recalls that subsequent governments as well as successor States still have the obligation to guarantee access to the right of redress.” CAT General Comment No. 3, ¶ 37.

³²⁴ “Courts hearing reparations claims for sexual violence should be encouraged to consider the adoption of a lower standard of proof than the standard which is required for a criminal conviction. For instance, according to the ICC decision in the Lubanga case, “a balance of probabilities” is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person. Several factors, such as the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence, are of significance in determining the appropriate standards of proof in reparations awards. Claims commissions and administrative reparations programmes have gone further, recognizing a wide array of standards of proof, have shifted certain aspects of the burden of proof and/or have adopted presumptions in the consideration of the evidential basis for certain acts, taking into account the difficulty for the victim to access evidence.” SG Guidance Document at 13; “Judicial and non-judicial proceedings shall apply gender-sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment. With respect to sexual or gender-based violence and access to due process and an impartial judiciary, the Committee emphasizes that in any proceedings, civil or criminal, to determine the victim’s right to redress, including compensation, rules of evidence and procedure in relation to gender-based violence must afford equal weight to the testimony of women and girls, as should be the case for all other victims, and prevent the introduction of discriminatory evidence and harassment of victims and witnesses. The Committee considers that complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress. CAT General Comment No. 3, ¶ 33.

³²⁵ SRT Manfred Nowak 2008 Report, ¶ 62.

According to Special Rapporteur Nowak providing access to justice might require that acts of conflict related sexual violence be categorized as torture. It is often the only way that individual victims can adequately explain their experiences.³²⁶ Given the stigma surrounding sexual violence, women, especially minors who have survived sexual violence rarely use the word rape and instead refer to their experiences as “making love,” which has vastly different implications.³²⁷ It is easier for these victims to refer to their experiences as “torture,” rather than by terms that have shameful associations for these victims.

Special Rapporteur Nowak pointed to the standards established by international courts as an example for domestic courts to follow.³²⁸ In the *Furundzija* decision, the ICTY clearly stated that post-traumatic stress disorder does not affect the witness’s credibility.³²⁹ This was also the first international court to explicitly prohibit the admission of evidence regarding the victim’s prior sexual activity.³³⁰ Furthermore, the rules of the ICC provide that “silence or lack of resistance cannot be used to imply consent, and that consent cannot be inferred from the words or conduct of the victim if the victim was subjected to force, threats of force, or a coercive environment.”³³¹ Relatedly, “the special rapporteur further stresses that in situations where the perpetrator has complete control over the victim the issue of consent becomes irrelevant.”³³² The ICC also established a Victims and Witnesses Unit to protect victims and witnesses from physical violence and additional stigmatization. The ICC also provides counseling and other appropriate assistance.³³³

Sexual violence both results from and aggravates “patterns of pre-existing structural subordination and discrimination.”³³⁴ Reparations should aim to ameliorate these inequalities or at least trigger the necessary social changes.³³⁵ Reparations programs should be evaluated based on their potential to be transformative.³³⁶ The Special Representative of the Secretary General explains that in live conflict situations, states should “include protection and empowerment of women and girls in their strategies to counter terrorism.”³³⁷ Victim participation and consultation is necessary to develop an adequate system of reparations that meets all of these objectives.³³⁸

Non-state actors, such as terrorist organizations, often perpetrate conflict-related Sexual Violence.³³⁹ Although the State may be weak in these situations, it still has a due diligence obligation to

³²⁶ *Id.*

³²⁷ “Victims of sexual violence in Guatemala have reported feeling more protected from social stigmatization when the crime is defined as torture rather than rape, forced impregnation or sexual slavery.” SRT Manfred Nowak 2008 Report, ¶ 66.

³²⁸ *Id.* ¶ 63.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* ¶ 64

³³³ *Id.*

³³⁴ “For women, it is often rooted in beliefs about women’s subordination and male sexual entitlement, combined with the disregard for the equal enjoyment of human rights by women. Sexual violence against men is also rooted in stereotypes about masculinity and constructions of gender and sexual identity around power and domination. These inequalities can also aggravate the consequences of the crime.” SG Guidance Document at 8.

³³⁵ *Id.* at 8.

³³⁶ *Id.* at 9.

³³⁷ Press Release, Office of the Special Representative of the Secretary General for Sexual Violence in Armed Conflict, Statement by the United Nations Special Representative on the First Anniversary of the Sinjar Tragedy, U.N. Press Release (Aug. 3, 2015).

³³⁸ *Id.* at 10.

³³⁹ U.N. Comm. On the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict, and Post-Conflict Situations, ¶ 13, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013).

ensure redress for the acts of private individuals or entities.³⁴⁰ Under CEDAW, States also have the obligation to use gender-sensitive practices when investigating violations during and after the armed conflict to ensure that violations by non-State actors are addressed.³⁴¹

Such comprehensive programs often require years to be fully implemented. The Secretary General points out that in most cases, reparations were only provided years after the resolution of the conflict during which these acts occurred.³⁴² For these reasons, States have a responsibility to provide urgent interim reparations to respond to the immediate needs of victims of sexual violence.³⁴³ In most situations, this will require States to provide immediate access to mental and physical healthcare.³⁴⁴

Preliminary Questions for Panel IV

- **Question:** Given the prevalence of sexual violence committed by non-state actors in armed conflict, are there effective strategies or best practices that States should adopt to prevent such acts? What role, if any, should humanitarian agencies or NGOs play in this regard?
- **Question:** Given that men and women are targeted for sexual violence in armed conflict based on conventional understandings of their gender roles, what implications does this have for the articulation of the discriminatory purpose element to recognize these acts as torture/CIDTP?
- **Question:** Are there any shortcomings or adverse consequences to prosecuting all acts of sexual violence in armed conflict as torture?

LESBIAN, GAY, TRANSGENDER, INTERSEX (“LGBTI”) RIGHTS

The Special Rapporteur on Torture’s mandate notes that “members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations.”³⁴⁵ Indeed, according to the Special Rapporteur on Torture Juan Méndez, discrimination based on non-traditional gender roles contributes “to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment.”³⁴⁶ Nonetheless, States are obligated to protect all persons against torture and ill treatment – regardless of sexual orientation or transgender identity, and are required to prohibit, prevent and provide redress for torture and ill treatment in all contexts of State custody or control.³⁴⁷ Therefore, given the LGBTI

³⁴⁰ *Id.* ¶¶ 13, 17(a).

³⁴¹ *Id.* ¶ 17(d).

³⁴² *Id.* at 12.

³⁴³ *Id.* at 12.

³⁴⁴ “Victims of conflict-related sexual violence often face serious mental and physical health problems as a consequence of the crimes committed against them, and often do not have access to health services. For example, women and girls as well as men and boys, as applicable, could suffer serious genital, vaginal and/or anal or other bodily injury, serious sexual mutilations, fistulas or uterine prolapse, among other harms, that would seriously affect not only their reproductive systems but also their urinary and digestive systems. Furthermore they may have also contracted serious diseases like HIV/AIDS. They require access to immediate medical treatment and medication and other services.” *Id.* at 12.

³⁴⁵ Special Rapporteur on Torture, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, ¶ 79, U.N. Doc. A/HRC/22/53 (February 1, 2013) [hereinafter SRT Healthcare Report].

³⁴⁶ *Id.*

³⁴⁷ Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, 24 (2011) [hereinafter OHCHR Free and Equal Gender Report]; see also Comm. against Torture, *General Comment No. 2: Implementation of article 2 by States parties* ¶ 21, U.N. Doc. CAT/C/GC/2 (January 24, 2008) [hereinafter CAT General Comment No. 2].

community's vulnerability to mistreatment, the United Nations High Commissioner on Human Rights ("the High Commissioner") and the Committee Against Torture ("CAT") have asserted that States have an obligation to enact legislation that prohibits discrimination by public actors and private parties – including through hate crime laws that address homophobic and transphobic violence.³⁴⁸ These bodies have interpreted this obligation to require that States ensure their existing laws apply to all persons equally, regardless of "sexual orientation" and "transgender identity."³⁴⁹ Moreover, States must "ensure that LGBT[I] persons have access to justice, and that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated."³⁵⁰

Despite this clear standard, over the past two decades, the Human Rights Council and other international bodies have documented widespread mistreatment of LGBTI individuals across the globe.³⁵¹ In the wake of this violence, in 2011, the Human Rights Council adopted resolution 17/19 – expressing "grave concern" at global acts of violence and discrimination "committed against individuals because of their sexual orientation and gender identity."³⁵² Similarly, the CAT has repeatedly expressed concern about allegations of torture perpetrated against members of the global LGBTI community, characterizing the treatment as "gender-based violence" that is driven by a discriminatory desire to punish those seen as defying gender norms.³⁵³ Building on this gender-based perspective, the Human Rights Council has acknowledged that lesbians and transgender women are at particular risk for mistreatment because of gender inequality and power relations within families and wider society.³⁵⁴

The problem of mistreatment of the LGBTI community is exacerbated by the lack of States' due diligence to prevent, protect against, and punish torture – particularly because of the lack of effective complaint or enforcement procedures in many jurisdictions. Few States have systems in place for quantifying homophobic or transphobic acts; moreover, even where such mechanisms do exist, violations nonetheless go unreported because victims distrust the police, fear retaliation, wish to maintain their privacy and are reluctant to identify themselves as LGBTI, or because those responsible for registering the incidents fail to recognize motives of perpetrators.³⁵⁵

The mistreatment of the LGBTI community, due to its inherently discriminatory nature, constitutes torture or cruel inhuman or degrading treatment or punishment ("CIDTP") when it causes severe pain and suffering. In this context, the practices ripe for examination include physical violence perpetrated by State and private actors, the criminalization of LGBTI status – particularly in those countries where homosexuality remains a capital offense, and inadequate access to appropriate medical care.

A. State Violence Against LGBTI Persons

The CAT has warned that "rules on public morals can grant the police and judges discretionary power which, combined with prejudices and discriminatory attitudes, can lead to abuse against this

³⁴⁸ OHCHR Free and Equal Gender Report, 19; see CAT General Comment No. 2, ¶ 18.

³⁴⁹ CAT General Comment No. 2, ¶ 21.

³⁵⁰ OHCHR Free and Equal Gender Report, 20.

³⁵¹ *Id.* at 7.

³⁵² *Id.* at 7.

³⁵³ *Id.* at 15, 23.

³⁵⁴ Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Rep. of the United Nations High Commissioner for Human Rights*, ¶ 21, U.N. Doc. A/HRC/19/41 (November 17, 2011) [hereinafter Human Rights Council Sex and Gender Report].

³⁵⁵ *Id.* ¶ 22.

group.”³⁵⁶ Indeed, State forces across the globe disproportionately target members of the LGBTI community, particularly LGBTI individuals of color.³⁵⁷ In the following cases, and others where the severity element is met, State practices constitute torture because State actors inflict the mistreatment for an inherently discriminatory purpose.

Sexual minorities, especially transgender individuals, are disproportionately subject to victimization by police when reporting crimes and are generally more vulnerable to police brutality.³⁵⁸ For example, as of 2014 in the United States, transgender men and women are nearly five times more likely to experience police violence than non-trans people,³⁵⁹ and transgender women are nearly six times more likely to experience police violence than non-trans people.³⁶⁰ This violence against transgender women includes sexual and physical assault, verbal degradation, and public humiliation – including forced nudity.³⁶¹ Police also unlawfully arrest transgender women, particularly transgender women of color, at a disproportionate rate – a statistic that is especially alarming because these women are also at increased risk for police violence.³⁶² Typically, these unlawful stops are based on the discriminatory assumption that the transgender victims are sex workers – supposedly violating prostitution laws that are vague and infrequently enforced against non-transgender people.³⁶³ Despite these widespread human rights violations, under existing U.S. law, transgender victims have very few legal protections or avenues for seeking reparations.³⁶⁴ Similarly, the Special Rapporteur on violence against women has detailed allegations of police brutality against transgender individuals in Nepal, referred to locally as metis.³⁶⁵ In these cases, police beat the metis victims, demanding money and sex.³⁶⁶ In El Salvador, there have been epidemic levels of violence committed by police against LGBT individuals, particularly against the transgender community, amidst a backdrop of official impunity.³⁶⁷ Most of these violations are not investigated, and as of 2012 none had resulted in a successful prosecution.³⁶⁸ Such failures of the El Salvador criminal justice system leave LGBT individuals without redress for these State sanctioned attacks.³⁶⁹

Similarly, a recent study conducted by three Peruvian human rights organizations reveals the depth of State involvement in the violence against LGBTI victims. In 2010, the study documented 18 murders and 19 violations of personal integrity among members of the Peru LGBT community – the majority of which were perpetrated by either the Peruvian National Police or by Serenazgo, the Peruvian

³⁵⁶ Comm. against Torture, *Concluding observations on Costa Rica*, ¶¶ 11, 18 U.N. Doc. CAT/C/CRI/CO/2 (July 7, 2008) [hereinafter CAT Concluding Observations on Costa Rica].

³⁵⁷ See NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014* (2015), 5 available at

http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf [hereinafter NCAVP Report].

³⁵⁸ See OHCHR Free and Equal Gender Report, 24; NCAVP Report, 9-12.

³⁵⁹ NCAVP Report, 9.

³⁶⁰ *Id.*

³⁶¹ U.S. HUMAN RIGHTS NETWORK, *Executive Summary of CAT Shadow Report Submissions* (October 21, 2014), 44 [hereinafter CAT Shadow Reports Executive Summary].

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ OHCHR Free and Equal Gender Report, 24.

³⁶⁶ *Id.*

³⁶⁷ INTERNATIONAL HUMAN RIGHTS CLINIC – UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW, *Sexual Diversity in El Salvador: A Report on the Human Rights Situation of the LGBT Community* (July 2012), I [hereinafter Berkeley Law El Salvador Report].

³⁶⁸ *Id.*

³⁶⁹ *Id.*

municipal security service.³⁷⁰ In 2011, this trend continued with 14 murders and 17 violations of personal integrity among members of the LGBT community – five of which were committed by the National Police, one by Serenazgo, and one by both services together.³⁷¹

In Peru, the most common forms of torture and CIDTP perpetrated against LGBTI individuals include physical harm, extortion, and sexual assault.³⁷² For example, Yefri Edgar Peña Tuanama, a transgender man, nearly died after police officers denied him medical assistance after being beaten by unknown assailants.³⁷³ In another case, during 2008, three members of the National Police robbed, stripped, and raped Luis Alberto Rojas Marín with a rubber baton simply for identifying as a gay man.³⁷⁴ After exhausting futile potential remedies within the Peruvian justice system, Rojas Marín brought the case before the Inter-American Commission on Human Rights, and in November 2014 the Commission ruled the case admissible.³⁷⁵ Despite international recognition of the severity of such mistreatment, and the physical evidence of injury, Peruvian physicians who conduct medical examinations of the victims often do not conclude that the actions amounted to torture because, as the study describes, there are “no signs of hanging, use of electrical discharges in the genitals, drowning or other similar techniques.”³⁷⁶ This underreporting is exacerbated by the fact that Peru’s legal system provides members of the LGBTI community with inadequate redress for torture and CIDTP.³⁷⁷

Lastly, State sanctioned torture and CIDTP against LGBTI individuals is especially rampant in conflict zones. For example, in Colombia, sexual violence is used to “cleanse” the population of LGBTI individuals and has forced members of these communities to flee their home, ravaged by conflict.³⁷⁸ Similarly, in Iraq, armed groups have violently targeted LGBTI individuals as a form of “moral cleansing.”³⁷⁹ In Syria, LGBTI individuals have been subjected to sexual assault and harassment at checkpoints controlled by armed groups and in detention.³⁸⁰

B. Private Actor Violence Against LGBT Individuals

In addition to preventing torture and CIDTP perpetrated by public officials, States have a positive obligation to prevent and punish torture and CIDTP perpetrated by private individuals – including the obligation to enact legislation that appropriately outlaws hate crimes and addresses homophobic and transphobic violence.³⁸¹ Despite this due diligence standard, across the world, private individuals inflict torture and CIDTP on LGBTI individuals in a climate of impunity.

LGBT individuals are subject to physical violence – and too often fatal violence – across the globe. For example, from 2008 to 2011 the Trans Murder Monitoring project documented 680 murders

³⁷⁰ REDRESS, PROMSEX, COORDINADORA NACIONAL DE DERECHOS HUMANOS, *Torture and the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Peru: Alternative Report submitted to the Committee Against Torture* (October 12, 2012), 2 [hereinafter Peru LGBTI Report].

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*; November 2014 Edition of *Reparation News*, REDRESS REPARATION NEWS (REDRESS), November 2014, available at <http://www.redress.org/case-docket/louis-alberto-rojas-marin-v-peru>.

³⁷⁵ *Id.*

³⁷⁶ Peru LGBTI Report, 4.

³⁷⁷ *Id.* at 2-3.

³⁷⁸ Security Council, *Conflict-related sexual violence: Report of the Secretary General*, ¶ 20, U.N. Doc. S/2015/203 (March 23, 2015).

³⁷⁹ *Id.* ¶ 30.

³⁸⁰ *Id.* ¶ 61.

³⁸¹ OHCHR Free and Equal Gender Report, 19.

of transgender individuals in fifty countries.³⁸² Notably, this figure does not include fatal violence against lesbian, gay, or bisexual people.³⁸³ During an eighteen-month period within this same timeframe, the Special Rapporteur on extrajudicial, summary or arbitrary executions highlighted the murders of at least thirty-one lesbian, gay, bisexual, or transgender persons in Honduras alone.³⁸⁴ One of these victims was a transgender woman found dead in a ditch, her body beaten and burned, showing evidence of rape and blows to her face from stoning that rendered her remains virtually unrecognizable.³⁸⁵ The Special Rapporteur on violence against women has reported gang rapes, family violence, and murder against lesbian, bisexual and transgender women in El Salvador, Kyrgyzstan and South Africa.³⁸⁶ In addition, the African Commission on Human and Peoples' Rights has noted "an upsurge of intolerance against sexual minorities" in Cameroon.³⁸⁷ In the United States, current data suggests that between 20 and 25 percent of lesbian women experience hate crimes during their lifetimes³⁸⁸ and the United States' National Coalition of Anti-Violence Programs reported twenty bias-motivated murders of LGBT persons in 2014, up from eighteen in 2013.³⁸⁹

Sexual violence, constituting torture and CIDTP, also disproportionately affects LGBT individuals across the globe. For example, the Special Rapporteur on violence against women has generally noted that lesbian women are at an increased risk of violence, "especially rape, because of widely held prejudices and myths," including "that lesbian women would change their sexual orientation if they are raped by a man."³⁹⁰ Specifically, the Committee on the Elimination of Discrimination against Women has expressed serious concern about the practice of so-called "corrective rape" of lesbians in South Africa.³⁹¹ Despite these global figures, statistics on rape in the United States point to a lower lifetime prevalence of rape of lesbians (13.1%) as compared to heterosexual women (17.4%).³⁹² Notably, however, this rate balloons to 46.1% for bisexual women.³⁹³

Most sources speculate that the figures of private violence against LGBTI individuals underrepresent reality.³⁹⁴ There are often no formal national registries for complaints of torture or CIDTP.³⁹⁵ Moreover, even if there were such a registry, many victims would be unwilling to lodge formal complaints because of fear of retaliation, lack of trust in the system, and fear of discrimination and stigma.³⁹⁶

C. Criminalization and the Death Penalty

Special Rapporteur Méndez has stated that the death penalty per se fails to respect the inherent dignity of the person, causes severe mental and physical pain or suffering, and likely amounts to torture or

³⁸² Human Rights Council Sex and Gender Report, ¶ 27.

³⁸³ *Id.*

³⁸⁴ *Id.* ¶ 24; Human Rights Council, *Report of the Special Rapporteur on extrajudicial summary or arbitrary executions: Addendum – Summary of information, including individual cases, transmitted to Governments and replies received*, 9, U.N. Doc. A/HRC/17/28/Add.1 (May 27, 2011).

³⁸⁵ Human Rights Council Sex and Gender Report, ¶ 24.

³⁸⁶ *Id.* ¶ 29.

³⁸⁷ *Id.* ¶ 26.

³⁸⁸ NCAVP Report, 17.

³⁸⁹ Human Rights Council Sex and Gender Report, ¶ 27.

³⁹⁰ *Id.* ¶ 29.

³⁹¹ *Id.*

³⁹² NCAVP Report, 18.

³⁹³ *Id.*

³⁹⁴ *See* Peru LGBTI Report; Human Rights Council Sex and Gender Report, ¶ 22.

³⁹⁵ Human Rights Council Sex and Gender Report, ¶ 22.

³⁹⁶ *Id.*

to CIDTP.³⁹⁷ Therefore, discriminatory death sentences – targeting the LGBTI community for the purpose of imposing traditional gender roles – satisfy the severity, public capacity, and purpose elements of torture.

As of 2011, at least seventy-six countries had laws criminalizing consensual relationships between adults of the same sex.³⁹⁸ In at least five of these seventy-six countries, along with some areas within at least two other countries, the death penalty may be applied for consensual same-sex intimacy.³⁹⁹ This violates Article 6 of the International Covenant on Civil and Political Rights (“ICCPR”), which only permits the death sentence “for the most serious crimes.”⁴⁰⁰ Previously, the Commission on Human Rights repeatedly resolved that this standard does not include non-violent “sexual relations between consenting adults.”⁴⁰¹ Even in countries with an indefinite moratorium on the death penalty, such as Nigeria, the Special Rapporteur on extrajudicial summary or arbitrary executions has stated that the “mere possibility” of a death sentence threatens the accused for years, and therefore constitutes at least CIDTP.⁴⁰²

D. Deprivation of Proper Healthcare – General International Standards

This criminalization of homosexuality legitimizes prejudice in public life – including mistreatment in healthcare settings.⁴⁰³ Special Rapporteur Méndez has cited the Pan American Health Organization’s conclusion that “homophobic ill-treatment on the part of health professionals is unacceptable and should be proscribed and denounced.”⁴⁰⁴ Special Rapporteur Méndez has also called upon healthcare providers to be “cognizant of, and adapt to, the specific needs of lesbian, gay, bisexual, transgender and intersex persons.”⁴⁰⁵ However, despite this clear standard, Special Rapporteur Méndez has noted “an abundance of accounts and testimonies” from LGBTI victims who have been “denied medical treatment, subjected to verbal abuse and public humiliation, psychiatric evaluation, a variety of forced procedures such as sterilization, State sponsored forcible anal examinations for the prosecution of suspected homosexual activities, [] invasive virginity examinations conducted by health-care providers, [and] hormone therapy and genital-normalizing surgeries under the guise of so called ‘reparative therapies.’”⁴⁰⁶ These procedures, which are rarely – if ever – medically necessary may “cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression.”⁴⁰⁷ To address these practices, Special Rapporteur Méndez has called upon States to “repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, ‘reparative therapies’ or ‘conversion therapies’” when they are enforced or administered without the free and informed consent of the person concerned.⁴⁰⁸

³⁹⁷ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Death penalty increasingly viewed as torture, UN Special Rapporteur finds* (October 23, 2012), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E#sthash.F7V7xakQ.dpuf> [hereinafter SRT Death Penalty Article].

³⁹⁸ OHCHR Free and Equal Gender Report, 30.

³⁹⁹ *Id.* at 34. The five countries are the Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan, and Yemen.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 35.

⁴⁰³ *Id.* at 33.

⁴⁰⁴ SRT 2013 Healthcare Report, ¶ 76.

⁴⁰⁵ *Id.* ¶ 38.

⁴⁰⁶ *Id.* ¶ 76.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* ¶ 3.

Many LGBTI experiences in the healthcare context – including conversion therapy, sex assignment, and gender reassignment – reveal such treatment may arise to torture or to CIDTP because it discriminatorily targets members of LGBTI community and is sanctioned by State healthcare policies or by government acquiescence.

E. LGBT Status as an Illness – Conversion Therapy

One of the most pernicious examples of mistreatment suffered by LGBTI in the healthcare context is “conversion therapy” – treatments that purportedly convert an individual from “gay to straight.”⁴⁰⁹ Although the World Health Organization removed homosexuality from its classification of diseases in 1992, many countries still classify homosexuality as an illness.⁴¹⁰ The UN Secretary General has noted that “sexual minorities” are “involuntarily confined to State medical institutions,” and are “allegedly subjected to forced treatment on grounds of their sexual orientation or gender identity, including electric shock therapy and other ‘aversion therapy;’” these practices often cause lasting psychological and physical harm.⁴¹¹ The techniques utilized for such “therapy” include violent role-play, reenactment of past abuses, and exercises involving nudity and intimate touching.⁴¹² Testimony from survivors of conversion therapy also reveals accounts of extreme humiliation, physical violence, aversive conditioning through electric shock or emetic substances, and even attempts of “reparative rape,” especially in the case of lesbian women.⁴¹³

The victims of such “therapeutic” techniques have reported long-term psychological effects – including anxiety, insomnia, feelings of guilt and shame, and even suicidal ideation and behaviors.⁴¹⁴ Given these severe consequences, and the lack of medical justification for conversion therapy, international medical, psychiatric, and psychological professional organizations practice have widely discredited the practice.⁴¹⁵ However, despite international condemnation, the practice has been documented throughout the Americas and Europe.⁴¹⁶ Indeed, conversion therapy remains largely condoned in United States law, which even allows licensed medical officials to perform the “treatments.”⁴¹⁷

F. Healthcare Violations Against Transgender Individuals

For transgender people, navigating the global healthcare system can prove especially harrowing. The most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) includes “gender dysphoria” as a mental health condition, in which someone is intensely uncomfortable with his or her biological gender and strongly identifies with, and wants to be, the opposite gender – in essence, a transgender individual.⁴¹⁸ Despite ample case law from the European Court of Human Rights in favor of

⁴⁰⁹ SOUTHERN POVERTY LAW CENTER: CONVERSION THERAPY, <https://www.splcenter.org/issues/lgbt-rights/conversion-therapy> (last visited October 19, 2015).

⁴¹⁰ OHCHR Free and Equal Gender Report, 48.

⁴¹¹ Note by the Secretary General, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 24, U.N. Doc. A/56/156 (July 3, 2001).

⁴¹² *Id.*

⁴¹³ PAN-AMERICAN HEALTH ORGANIZATION, “Cures” for an Illness that Does Not Exist: Purported therapies aimed at changing sexual orientation lack medical justification and are ethically unacceptable (2012), 1, available at http://www.paho.org/hq/?option=com_docman&task=doc_view&gid=17703.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ CAT Shadow Reports Executive Summary, 72.

⁴¹⁷ *Id.*

⁴¹⁸ Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity*, HUFFPOST HEALTHY LIVING, June 4, 2013, http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html

gender reassignment recognition, legal recognition remains a challenging process for many transgender persons across the globe.⁴¹⁹

Cumbersome legal and medical requirements characterize most gender recognition procedures – including lengthy psychological, psychiatric, and physical tests.⁴²⁰ Some of these procedures, like genital examinations by psychiatrists, amount to a violation of physical integrity; depending on the severity the procedures may also constitute torture or to CIDTP.⁴²¹ Often, transgender people elect not to complete these official procedures at all, due to discriminatory medical processes and inappropriate treatment or due to the fact that only one course of treatment is available.⁴²² Consequently, these individuals are often denied legal recognition of their preferred gender and name or of the gender reassignment treatment that fits their personal health needs.⁴²³ As a sign of positive developments, in 2011 in El Salvador, a family court ordered the country’s Family Registry to change a transgender individual’s birth certificate to correspond with her new female identity after she had undergone a sex reassignment surgery in the United States.⁴²⁴ Although this signaled a positive development for transgender people in El Salvador, individuals who choose not to undergo medical procedures or do not have the financial means to do so, remain outside the scope of this legal precedent.⁴²⁵

Moreover, gender reassignment therapy, where available, is often prohibitively expensive and is rarely covered by public funding or by private health insurance.⁴²⁶ Across Europe, many governments – at least twenty-nine as of 2013⁴²⁷ – require an individual seeking gender reassignment to document that “1) (s)he has followed a medically supervised process of gender reassignment – often restricted to certain [S]tate appointed doctors or institutions and 2) (s)he has been rendered surgically irreversibly infertile and/or (s)he has undergone other medical procedures, such as hormonal treatment.”⁴²⁸ In another eleven European States, where there is no such legislative requirement, enforced sterilization of individuals seeking gender reassignment is nonetheless a common practice.⁴²⁹ As of 2008, twenty states in the United States required a transgender person to undergo “gender-confirming surgery” or “gender reassignment surgery” before permitting a legal sex change; in Canada, every province except Ontario required “transsexual surgery” to change a recorded sex on a birth certificate.⁴³⁰ Despite the fact that the majority of transgender people do desire sterilization, there is no inherent need to enforce such sterilization requirements for gender reclassification.⁴³¹ Moreover, Special Rapporteur Méndez has noted that these policies violate the bodily integrity of the person seeking gender reassignment and, depending on the severity of the pain and suffering, may amount to torture and/or CIDTP – as medical agents of the State perform the procedure for the purpose of sterilizing an entire community.⁴³²

G. Intersex – Sex Assignment Surgery

⁴¹⁹ *Id.*; Berkeley Law El Salvador Report, 42.

⁴²⁰ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *Human Rights and Gender Identity* (July 29, 2009), ¶ 3.2, available at <https://wcd.coe.int/ViewDoc.jsp?id=1476365> [hereinafter Council of Europe Gender Identity Report].

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ Berkeley Law El Salvador Report, 42.

⁴²⁵ *Id.*

⁴²⁶ OHCHR Free and Equal Gender Report, 51.

⁴²⁷ SRT Healthcare, ¶ 78.

⁴²⁸ Council of Europe Gender Identity Report, ¶ 3.2.1.

⁴²⁹ *Id.*

⁴³⁰ SRT 2013 Healthcare Report, ¶ 78.

⁴³¹ Council of Europe Gender Identity Report, ¶ 3.2.

⁴³² SRT 2013 Healthcare Report, ¶ 78.

In September 2015, the High Commissioner convened an Expert meeting to specifically address the human rights situation of intersex individuals for the first time.⁴³³ In his opening remarks at this meeting, Zeid Ra'ad Al-Hussein, the United Nations High Commissioner for Human Rights, recognized “a general lack of awareness” regarding intersex people.⁴³⁴ He explained that people too frequently believe that everyone can be mutually exclusively categorized as either male or female.⁴³⁵ However, the High Commissioner called this a “myth,” explaining that human beings are more complex and diverse than this dichotomy allows.⁴³⁶ However, as the High Commissioner also noted, this myth is so societally engrained that instead of celebrating and protecting such diversity, intersexuality is stigmatized – resulting in “serious human rights violations” against intersex people.⁴³⁷ Like Special Rapporteur Méndez, the High Commissioner noted that such violations include medically unnecessary surgeries “and other invasive treatment of intersex babies and children,” infanticide of intersex babies, and “widespread and life-long discrimination, including in education, employment, health, sports, accessing public services, birth registration and obtaining identity documents.”⁴³⁸

According to the High Commissioner, there is impunity for the perpetrators of such violations, because these crimes are rarely addressed as human rights violations, and almost never investigated or prosecuted.⁴³⁹ This impunity, combined with the lack of remedy for victims, perpetuates the “cycle of ignorance and abuse.”⁴⁴⁰ In his remarks, the High Commissioner recognized that progress has been made, with States taking judicial and legislative action to end these violations.⁴⁴¹ However, he also explained that, even where States have taken positive steps, more work needs to be done “to bridge the gap between legislation and the lived realities of intersex people.”⁴⁴²

Two years before this Expert meeting convened, Special Rapporteur Méndez explained that mandatory sex assignment, and related practices, violate human rights and satisfy the elements of torture.⁴⁴³

First, according to Special Rapporteur Méndez, sex assignment surgeries and related procedures satisfy the purpose and intent elements of torture. He notes that these procedures are carried out in “an attempt to fix [the individual’s] gender.”⁴⁴⁴ Thus, intersex individuals are subjected to torture and/or CIDTP because they fail to conform to “socially constructed gender expectations.”⁴⁴⁵ This is especially

⁴³³ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Opening remarks by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights at the Expert meeting on ending human rights violations against intersex persons*, September 16, 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E> [hereinafter High Commissioner Opening Remarks].

⁴³⁴ *Id.* “Intersexuality” is a term used to describe a broad class of medical conditions that features “congenital anomalies of the reproductive and sexual system;” typically, an intersex person is born with sex chromosomes, external genitalia, or an internal reproductive system that is not considered “normal” for either a male or female. GENDER IDENTITY DISORDER INFORMATION, <http://www.hemingways.org/GIDinfo/intersex.htm> (last visited on October 19, 2015).

⁴³⁵ High Commissioner Opening Remarks.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ SRT 2013 Healthcare Report, ¶ 76.

⁴⁴⁴ *Id.* ¶ 79.

⁴⁴⁵ *Id.*

relevant, given that, as Special Rapporteur Méndez articulates, “discrimination on the basis of gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to occur.”⁴⁴⁶

Second, these actions cause severe mental and physical pain or suffering. In particular, intersex individuals suffer significant harm as a result of genital-normalizing surgery in childhood, hormone therapy, involuntary sterilization, excessive genital exams and medical display, human experimentation, and denial of needed medical care.⁴⁴⁷ Many of these “reparative therapies” are not medically necessary and have been criticized for being “unscientific, potentially harmful, and contributing to stigma.”⁴⁴⁸ Moreover, in many instances, such practices are performed without the informed consent of either the individual or their parents.⁴⁴⁹ A recent non-governmental organization report discussed that sex-reassignment surgery at birth may cause severe harm to intersex individuals who suffer life-long physical and emotional injury as a result of such treatment.⁴⁵⁰ For example, in some cases, sex-assignment surgery removes viable gonads or other reproductive organs, terminating or permanently reducing reproductive capacity.⁴⁵¹ Many of these procedures result in scarring, loss of sexual sensation, pain, and incontinence.⁴⁵² With respect to emotional injury, harms include depression, poor body image, dissociation, social anxiety, suicidal ideation, shame, self-loathing, difficulty with trust and intimacy, and post-traumatic stress disorder.⁴⁵³

Finally, this mistreatment occurs with the acquiescence of State officials, because States are obligated to enforce laws preventing, investigating, and prosecuting such acts of torture and CIDTP with due diligence.⁴⁵⁴ Special Rapporteur Méndez has called upon States “to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery,” “when enforced or administered without the free and informed consent of the person concerned.”⁴⁵⁵

H. Limited HIV Care

More subtly, the criminalization of same-sex consensual relationships, and resultant limited access to healthcare, may also subject HIV-positive LGBTI individuals to additional suffering – under a guise of official public morals. For example, in a joint letter to Uganda, four UN special mandate holders stated that the country’s pending anti-homosexuality bill “would impede access to HIV [] and health-related information and services for LGBT individuals” –preventing LGBT individuals from seeking and accessing life-saving and pain-relief services.⁴⁵⁶ This is especially relevant from a perspective of torture and CIDTP because Special Rapporteur Méndez has affirmed that denying access to pain relief may constitute torture or CIDTP.⁴⁵⁷

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* ¶ 76.

⁴⁴⁹ *Id.* ¶ 77.

⁴⁵⁰ CAT Shadow Reports Executive Summary, 68.

⁴⁵¹ *Id.*

⁴⁵² SRT 2013 Healthcare Report, ¶ 76.

⁴⁵³ *Id.*

⁴⁵⁴ SRT 2013 Healthcare Report, ¶ 76 (“In turn, the absolute and non-derogable nature of the right to protection from torture and ill-treatment establishes objective restrictions on certain therapies.”).

⁴⁵⁵ SRT Healthcare Report, ¶ 88.

⁴⁵⁶ OHCHR Free and Equal Gender Report, 50.

⁴⁵⁷ SRT Healthcare Report, ¶ 54.

Preliminary Questions for Panel IV

- **Question:** The mistreatment of LGBTI individuals widely occurs in various forms across the globe. This research identifies some of these practices but may not be sufficiently inclusive. What additional practices perpetrated worldwide may warrant examination within a torture and/or CIDTP framework?
- **Question:** Biases against those who do not adhere to traditional gender roles serve as the basis for much of the torture/CIDTP of LGBTI individuals. What actions should States take to combat violence that is engrained within societal as well as legal frameworks?
- **Question:** What actions should States take to provide adequate remedies to LGBTI individuals who are victims of torture/CIDTP? Are there promising models or best practices to recommend?
- **Question:** How can States reduce LGBTI individuals from intersectional vulnerabilities – including sex, race, socio-economic disadvantage, and HIV or criminal status – that contribute to torture/CIDTP violations?

DOMESTIC VIOLENCE

In her 1996 Report, the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, observed, “[violence within the family] is a universal phenomenon.”⁴⁵⁸ She defined domestic violence as “violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood, or law.”⁴⁵⁹ She emphasized that domestic violence is almost always a gender specific crime, perpetrated by male partners against women.⁴⁶⁰ She also specifically distinguished the term “domestic violence” from “family violence,” because the latter focuses on the structure of a family, thus failing to address violence that women experience outside the narrow scope of the traditional family unit.⁴⁶¹ To implement this paradigm shift, the Special Rapporteur defines family “broadly as the site of intimate personal relationship.”⁴⁶² She advocated for a subjective definition of family, because it “is more inclusive than an objective one and more relevant for the discussion of domestic violence.”⁴⁶³

In 1996, the Special Rapporteur observed that the public/private dichotomy in rights enforcement impacted the perception of women’s rights and as a result, international human rights law lacked a gender-specific dimension.⁴⁶⁴ By focusing only on private actors when addressing domestic violence, she argued that international law reinforced a false distinction between the public and private spheres that ignored “state-tolerated violence intended to control women in their so-called private lives.”⁴⁶⁵ The Special Rapporteur explained, “domestic violence exists as a powerful tool of oppression.”⁴⁶⁶ By challenging the dichotomy, the Special Rapporteur illustrated that violence against women generally and domestic violence specifically are means by which societies oppress women: “violence against women

⁴⁵⁸ Special Rapporteur on Violence Against Women, its Causes and Consequences, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Comm.: Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, Comm. on Human Rights, ¶ 22, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (by Radhika Coomaraswamy) [hereinafter SRVAW 1996 Report].

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* ¶ 23.

⁴⁶¹ *Id.* ¶ 24.

⁴⁶² *Id.* ¶ 25.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* ¶ 26.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* ¶ 27.

not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.”⁴⁶⁷

Recognizing the state involvement in sustaining violence against women in the domestic sphere, the Special Rapporteur stated that domestic violence “may be carried out by both private and public actors or agents.”⁴⁶⁸ And like the definition of domestic violence articulated in the United Nations Declaration on the Elimination of Violence Against Women in Article 2 of the Declaration, the Special Rapporteur recognizes domestic violence take many forms including: “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.”⁴⁶⁹ In 1992, CEDAW issued General Recommendation No. 19, which linked domestic violence to gender-based violence and torture, thus establishing the obligation that states act with due diligence to prevent and respond to such acts.⁴⁷⁰

A 2014 fact sheet issued by U.N. Women stated that “35 percent of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence.”⁴⁷¹ In some States, up to 70 percent of women have experienced physical and/ or sexual intimate partner violence.⁴⁷² Studies show that of all the women killed in 2012, at least half were killed by intimate partners or family members.⁴⁷³ Women who were victims of child marriage are particularly vulnerable to intimate partner violence.⁴⁷⁴ Because child brides are often unable to negotiate safe sex, they are frequently left vulnerable to sexually transmitted infections and early pregnancy, which can be fatal because these women are not physically mature enough to give birth.⁴⁷⁵ Women in urban areas are twice as likely as men to experience violence, particularly in developing countries. The former Special Rapporteur on Violence Against Women, Yakin Erturk, noted that in many countries women are also victims of acid attacks.⁴⁷⁶ In Bangladesh, there were 3000 cases of acid attacks between 1999 and 2011.⁴⁷⁷ In India there were more than 153 incidents between 2002 and 2001.⁴⁷⁸ In South and Southeast Asia these attacks are often perpetrated by a husband or his family against his wife because the wife’s family refuses to pay more dowry to the husband’s family. Acid throwing causes injuries resulting in permanent loss of vision and hearing, organ damage and death. Although the practice of giving dowry is outlawed in Bangladesh, refusal to pay more dowry was cited as a cause of fifteen percent of acid attacks in the country.⁴⁷⁹ Dowry-related violence can also takes other forms. In India, a husband’s family may also

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* ¶ 28.

⁴⁶⁹ *Id.*; G.A. Res. 48/104, Art. 2, U.N. Doc. A/RES/48/104 (Feb. 23, 2014).

⁴⁷⁰ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38, 11th Sess. (1992).

⁴⁷¹ U.N. Women, Facts and Figures: Ending Violence Against Women (Oct. 2014), <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ “Worldwide, more than 700 million women alive today were married as children (below 18 years of age),” of these more than 250 million were married before age 15. *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ THE AVON GLOBAL CENTER FOR WOMEN AND JUSTICE AT CORNELL LAW SCHOOL, THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS OF THE NEW YORK BAR ASSOCIATION, THE CORNELL LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC & THE VIRTUE FOUNDATION, COMBATING ACID VIOLENCE IN BANGLADESH, INDIA, AND CAMBODIA (forward) (2011), *available at* <http://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/AvonGlobalCenterforWomenandJustice.pdf>

⁴⁷⁷ *Id.* at 10.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* at 20.

douse a wife in kerosene and burn her alive when a wife's family cannot pay more dowry. So-called "bride- burnings" account for the death of more than 8000 women in India per year.⁴⁸⁰ In some parts of the world, domestic violence against women continues even after a husband's death. In Ghana's Ashanti group, women must be secluded in the dark and bathe in cold water for the entire period of mourning. Other "cleansing rituals" for widows in some African countries include drinking the water in which the husband's corpse was bathed and having sex with a male relative.⁴⁸¹ In some communities in Kenya with high incidences of HIV/AIDS, widows are also forced to marry and have unprotected sex with their late husband's kin since wives are deemed inheritable property.⁴⁸² Thus, the perpetrators in domestic violence are not necessarily only husbands, but may also be relatives, in-laws, and extended family.

The Special Rapporteur also asserted that "depending on its severity and the circumstances giving rise to State responsibility, domestic violence can constitute torture" or CIDTP under the ICCPR and CAT.⁴⁸³ The objective of this argument was to challenge "the assumption that intimate violence is a less severe or terrible form of violence than that perpetrated directly by the State."⁴⁸⁴ The Special Rapporteur compared domestic violence to the classic understanding of torture and showed that it may satisfy the elements of torture or, in less severe cases, CID.⁴⁸⁵

A. Purpose Element

"Like officially inflicted torture, domestic violence is purposeful behavior which is perpetrated intentionally."⁴⁸⁶ She points out that men who beat their female partners are able to control their impulses in other settings and their violence is limited to their family members, thus showing that it is intentional action.⁴⁸⁷ Intimate partner violence has been recognized as an act of gender discrimination, satisfying the discrimination purpose in the CAT definition.⁴⁸⁸ As seen in classic torture scenarios, this violence is intentionally perpetrated against women to elicit information, punish, and/or intimidate their partners.⁴⁸⁹ Furthermore, it satisfies the purpose element articulated in the Inter-American Convention to Prevent and

⁴⁸⁰ Jason Koutsoukis, *India Burning Brides and Ancient Practices Is On The Rise*, SIDNEY MORNING HERALD, (January 31, 2015), <http://www.smh.com.au/world/india-burning-brides-and-ancient-practice-is-on-the-rise-20150115-12r4j1.html>. These deaths are often recorded as accidental or as suicides. The husband's family, the wife's family, and the police are interested in covering them up. Only 15 percent of the few bride-burning cases that make it up to court result in convictions. As in Bangladesh, dowries are outlawed in India. Justice C.K. Prasad of the Supreme Court of India has seen a great increase in dowry harassment cases in the past few years.

⁴⁸¹ Such "cleansing" rituals have been documented in Angola, Botswana, Republic and Democratic Republic of Congo, Cote d'Ivoire, Ghana, Kenya, Lesotho, Malawi, Nigeria, Rwanda, Senegal, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. VIJAY DUTT & RISTO F. HARMA, THE LOOMBA FOUNDATION, *Annexure I—Widow's Deprivation and Poverty*, in *INVISIBLE FORGOTTEN SUFFERERS: THE PLIGHT OF WIDOWS, AROUND THE WORLD*, (2010). In Nigeria and Kenya, the law does not protect women from this cruel, inhuman, and degrading treatment. Both of those countries' courts look at guidance from local customary laws in adjudicating cases, and since customary laws allow for burial rituals, then widows subject to cruel, inhuman, and degrading treatment have no legal recourse. *See generally*, Uche Ewelukwa, *Post-Colonialism, gender, and Customary Injustice: Widows in African Societies*, 24 HUMAN RIGHTS QUARTERLY 424 (2002); Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOBEL LEGAL STUD. 87 (2011).

⁴⁸² VIJAY DUTT & RISTO F. HARMA, THE LOOMBA FOUNDATION, *Chapter 1: The Deprived One-Sixth of Humanity*, in *INVISIBLE FORGOTTEN SUFFERERS: THE PLIGHT OF WIDOWS, AROUND THE WORLD*, (2010).

⁴⁸³ SRVAW 1996 Report, ¶42.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* ¶ 44.

⁴⁸⁶ *Id.* ¶ 47.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

Punish Torture, which includes “to obliterate the personality and diminish the capacities of women.”⁴⁹⁰ Battering frequently involves interrogations meant to establish the powerlessness of the victim and the supremacy and control of the perpetrator.⁴⁹¹ Like victims of torture, victims of domestic violence are intimidated by the continual threat of physical violence and verbal abuse and both maybe “effectively manipulated by intermittent kindness.”⁴⁹²

B. Severe Pain and Suffering Element

Domestic violence satisfies the severity element of torture. The Special Rapporteur notes that jurists and experts agree that the physical and psychological abuse that results from both classic torture perpetrated by a state agent and domestic abuse are similar “in both kind and severity.”⁴⁹³ Both victims live isolated under the constant threat of physical violence that results in serious psychological injury.⁴⁹⁴ Rape also occurs frequently in both situations. Furthermore, both types victims are unable to leave—victims of domestic violence are afraid of provoking further violence and the lack of alternatives reinforce the victim’s sense that she deserves this treatment.⁴⁹⁵

In 2008, the Special Rapporteur on Torture Manfred Nowak explained that the violence in both domestic violence and classic torture scenarios tends to escalate over time, resulting in the death, permanent mutilation, or permanent disfigurement.⁴⁹⁶ According to the Special Rapporteur, women who experience such violence “suffer depression, anxiety, loss of self-esteem, and a feeling of isolation. Indeed, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture as well as by victims of rape.”⁴⁹⁷ Like the Special Rapporteur on Violence Against Women, the Special Rapporteur on Torture explained that the intention of both official torture and domestic violence is to keep the victim in a “permanent state of fear based on unpredictable violence by seeking to reduce the person to submission.”⁴⁹⁸

C. Public Official Element

The CAT covers private action that occurs with the consent or acquiescence of a public official. Domestic violence occurs with the acquiescence of the State because, as the Special Rapporteur explained, “[t]he concept of State responsibility has developed to recognize that States also have an obligation to take preventive and punitive steps where human rights violations by private actors occur.”⁴⁹⁹ The Human Rights Committee has stated that a State has a duty to both protect its citizens and to investigate and prosecute violations when they occur.⁵⁰⁰ Thus, States have to meet the due diligence standard and take “the minimum steps necessary to protect their female citizen’s rights to physical integrity and, in extreme cases, to life.”⁵⁰¹ When States fail to take these steps, the State is complicit in the violence. Its inaction suggests acquiescence and justification for the violence.⁵⁰² Thus, like in torture

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.* ¶ 46.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ SRT Manfred Nowak 2008 Report ¶ 45.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ SRVAW 1996 Report ¶ 31.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* ¶ 33.

⁵⁰² *Id.*

carried out by State agents, where States fail to exercise due diligence and equal protection to prevent and punish domestic violence, such violence occurs with the tacit involvement of the State.⁵⁰³

In 2008, the Special Rapporteur on Torture went further to state, “State acquiescence in domestic violence can take many forms, some of which may be subtly disguised.”⁵⁰⁴ He pointed out that civil laws, such as restrictions on divorce or inheritance, denying women child custody, preventing women from receiving compensation or owning property all serve to subjugate women by making them dependent on men and limiting their ability to leave violent domestic situations.⁵⁰⁵

The 2013 Report of the Special Rapporteur on Violence Against Women points out that General Comment No. 2 of the CAT also interprets the convention to provide that a State has failed to satisfy its due diligence standard where:

State authorities or others acting in an official capacity or under color of law, know or have reasonable ground to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent investigate, prosecute, and punish such non-state officials or private actors consistently with the Convention.⁵⁰⁶

General Comment No. 2 explains that the State bears responsibility and its actors should be considered complicit or otherwise responsible for consenting or acquiescing to these acts prohibited by the Convention.⁵⁰⁷ According to the CAT, “the State’s indifference or inaction provides a form of encouragement and/or de facto permission.”⁵⁰⁸ The Committee applies this standard broadly to gender-based violence.⁵⁰⁹

D. Access to Justice and Reparations for Victims

Indeed, the international adjudicative bodies have accepted this view and have established a robust body of case law holding that when states fail to act with due diligence to prevent and punish domestic violence, they are violating their legal obligations under international law. In *Velasquez Rodriguez v. Honduras*, the Inter-American Court of Human Rights, established ground-breaking jurisprudence that an illegal act which is not directly imputable to the State can lead to international responsibility of the State, not because of the act itself, but because of the state’s lack of due diligence in preventing and responding to the violation.⁵¹⁰ The Court ordered Honduras to “adopt, without delay, such measures as are necessary to prevent further infringements on the basic rights” of these victims “in strict compliance with the obligation of respect for and observance of human rights” under Article 1(1) of the Convention.⁵¹¹ The Court also ordered Honduras to “employ all means within its power to investigate

⁵⁰³ *Id.* ¶ 48.

⁵⁰⁴ SRT Manfred Nowak 2008 Report ¶ 46.

⁵⁰⁵ *Id.*

⁵⁰⁶ http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A_HRC_23_49_English.pdf
Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report*, Human Rights Council, ¶ 27, U.N. Doc. A/HRC/23/49 (May 14, 2013) (by Rashida Manjoo) [hereinafter SRVAW Report 2013].

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) [hereinafter *Velasquez v. Honduras*].

⁵¹¹ *Id.* ¶ 41(1).

these reprehensible crimes, to identify the perpetrators and to impose the punishment provided for by the domestic law of Honduras.”⁵¹²

Later case law further delineated the actions that states were required to take to meet the due diligence standard. In the 2000 case before the Inter-American Commission, *Maria da Penha Maia Fernandes v. Brazil*, the Commission found that Brazil was violating its obligations under the Inter-American Convention by not investigating and punishing domestic violence that had occurred in 1983, prior to Brazil’s ratification of the Convention. The Commission found that the state had failed to act with due diligence because it had failed to provide justice even 15 years after the act of violence occurred.⁵¹³ The state’s “tolerant attitude” and failure to investigate and prosecute the action is an ongoing denial of justice to the victim and a continuous human rights violation by the state.⁵¹⁴ The Commission explained, “this violation forms a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action.”⁵¹⁵ According to the Commission, “the failure to prosecute and convict the perpetrator under these circumstances is an indication that the state condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband.”⁵¹⁶ Furthermore, the Commission stated, “the condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”⁵¹⁷ The Commission explained that because of the “general pattern of negligence and lack of effective action by the state in prosecuting and convicting aggressors,” the state violated both its obligations to prosecute these aggressors and its obligation to prevent these violations from occurring.⁵¹⁸ The Commission also stated that the “general and discriminatory judicial ineffectiveness” in Brazil “creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of society, to take effective action to sanction such acts.”⁵¹⁹

Case law emerging from the Committee on the Elimination of Discrimination Against Women (“CEDAW”) also expanded the scope of state action required to meet the due diligence standard. In 2005 in *A.T. v. Hungary*, the Committee held that private acts of violence are a symptom of broader societal beliefs, attitudes, and structures of discrimination. For the previous four years, A.T. said that she was subjected to regular severe domestic violence and threats by her husband.⁵²⁰ Although her husband had a firearm and threatened to rape her, she could not go to a shelter because one of her children is fully disabled and none of the shelters are equipped to house both A.T. and her children.⁵²¹ Even when she did leave the family house with her children, her husband would threaten her regularly and violently broke into the apartment she was living in with her children.⁵²²

⁵¹² *Id.* ¶ 41(2).

⁵¹³ *Maria da Penha Maia Fernandes v. Brazil*, *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. ¶ 27 (2000).

⁵¹⁴ *Id.* ¶ 26.

⁵¹⁵ *Id.* ¶ 3.

⁵¹⁶ *Id.* ¶ 55.

⁵¹⁷ *Id.* ¶ 55.

⁵¹⁸ *Id.* ¶ 55.

⁵¹⁹ *Id.* ¶ 56.

⁵²⁰ *A.T. v. Hungary*, Views of the Comm. on the Elimination of Discrimination against Women Under Art. 7, Para. 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Communication No.: 2/2003, ¶ 2.1, U.N. Doc. CEDAW/C/32/D/2/2003 (2005).

⁵²¹ *Id.* ¶ 2.1.

⁵²² *Id.* ¶ 2.2.

Over the years, A.T. had 10 medical certificates as a result of various incidents of abuse.⁵²³ There were also several civil proceedings regarding access to the apartment that was jointly owned by A.T. and her husband. The Hungarian courts authorized his access to the apartment on the basis that his property rights could not be limited.⁵²⁴ Although Hungary pointed to all of its efforts to prevent and prosecute domestic violence with due diligence, the Committee found that “the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.”⁵²⁵ The Committee found that domestic violence cases do not “enjoy high priority in court proceedings” in Hungary and stated, “women’s human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.”⁵²⁶ In order to meet the due diligence standard, the Committee found that Hungary should have provided the victim with alternative avenues to seek protection.⁵²⁷ The Committee directed Hungary to take immediate steps to guarantee the physical and mental integrity of A.T. and her family. The Committee also ordered the State to ensure that A.T. had a home to live in with her children, and that she receive adequate child support, legal assistance, and “reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.”⁵²⁸ The Committee also generally ordered Hungary to act with due diligence to prevent and respond to violence against women to ensure that they are protected by the law; to take effective measures to prevent and treat domestic violence on a national scale; to investigate and prosecute such violations when they occur; to provide lawyers and law enforcement officials with training regarding violence against women; and to ensure that victims have access to justice and rehabilitation.⁵²⁹

In 2007, in *Goekce (Deceased) v. Austria*, CEDAW extended State obligations under the due diligence standard further to say that when a State knows or should have known that a woman is in danger, it should take positive steps to ensure her safety, even when the victim hesitates in pursuing legal action.⁵³⁰ In this case, victim experienced a three-year period of frequent violent episodes during which she would contact law enforcement, but then refused to press charges.⁵³¹ Finally, she contacted law enforcement during a particularly violent episode, but officials did not arrive until after she had been murdered.⁵³² The Committee found that the state violated its due process obligations to protect the victim’s right to life and physical and mental integrity.⁵³³ In doing so, it was perpetuating traditional attitudes, which viewed women as being subordinate to men.⁵³⁴

In its General Comment No. 28, the Human Rights Committee took the stance that domestic violence could constitute a violation of Article 7 of the ICCPR, which guarantees the right to be free from torture or CIDTP, because domestic violence also violates the right to equality between men and women

⁵²³ *Id.* ¶ 2.3.

⁵²⁴ *Id.* ¶ 2.4.

⁵²⁵ *Id.* ¶ 9.2.

⁵²⁶ *Id.* ¶ 9.3.

⁵²⁷ *Id.* ¶ 9.3.

⁵²⁸ *Id.* ¶ 9.6(I)(a).

⁵²⁹ *Id.* ¶ 9.6(II)(a-h).

⁵³⁰ *Goekce (Deceased) v. Austria*, Views of the Comm. on the Elimination of Discrimination against Women Under Art. 7, Para. 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Communication No.: 5/2005, ¶ 12.1.4, U.N. Doc. CEDAW/C/39/D/5/2005 (2007).

⁵³¹ *Id.* ¶ 12.1.3.

⁵³² *Id.* ¶ 12.1.3.

⁵³³ *Id.* ¶ 12.3.

⁵³⁴ *Id.* ¶ 12.3.

protected by Article 3 of the ICCPR.⁵³⁵ Based on this General Comment, in his 2008 Report, the Special Rapporteur on Torture explained that States are obligated to adopt specific legislation to combat domestic violence, including legislation criminalizing marital rape. Furthermore, states are required to modify their judicial systems to provide restraining orders to protect women in these situations and to provide shelter and support to victims to encourage victims to report domestic violence to law enforcement. When prosecuting domestic violence cases, states are required to ensure that their judicial systems require fair standards of proof.⁵³⁶

In 2009, in the landmark case, *Opuz v. Turkey*, the ECHR found that in failing to prevent chronic domestic violence, Turkey had violated its Article 3 obligation to guarantee freedom from torture and CIDTP. The court pointed out that the State had failed to use due diligence to protect its citizens, “especially given the vulnerable situation of women in south-east Turkey.”⁵³⁷

Thus beginning in 1996 the Special Rapporteurs began challenging the public/ private distinction that excluded domestic violence from the conception of torture. Today this dichotomy has been eliminated and international law protections have advanced to recognize that states have positive obligations to prevent and prosecute domestic violence. There has been extensive case law emerging from the regional bodies detailing state obligations under the due diligence standard. In 2008, Domestic violence was recognized as torture, thus strengthening the protections for victims and reinforcing the positive obligations that states have to prevent and respond to such violations.

Preliminary Questions for Panel V

- **Question:** Given the international consensus regarding norms recognizing domestic violence as torture, what are the pressing legal or normative issues that require further attention?
- **Question:** Are there effective strategies and/or best practices that States should adopt to prevent domestic violence and/or provide victims an adequate remedy?
- **Question:** The classification of domestic violence as torture relies on gender discrimination to satisfy the purpose element. How should this standard be articulated to address domestic violence that occurs in same-sex partnerships? Given the lack of documentation of this practice, is this normative issue ripe to address?

HONOUR KILLINGS AND HONOUR-BASED VIOLENCE

Violence committed by family members against other members of the family to protect the family’s “honour” is a prevalent practice in several part of the world.⁵³⁸ Perpetrators of honour-based violence attempt to restore a family’s “honour” by publicly punishing the actor (generally a female

⁵³⁵ Comm. on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligation of States Parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women U.N. Doc. CEDAW/C/2010/47/GC.2.

⁵³⁶ *Id.*

⁵³⁷ Lee Hasselbacher, State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection, 8 Nw. J. Int’l Hum. Rts. 190 (2010).

⁵³⁸ Phyllis Chesler, *Worldwide Trends in Honor Killings*, 17 THE MIDDLE EASTERN QUARTERLY 3 (Spring 2010), available at <http://www.meforum.org/2646/worldwide-trends-in-honor-killings>. The tables in this study show prevalence in North America, “Muslim World”, worldwide, and Europe. The U.N. Population Fund estimates that between 5,000 and 12,000 women are killed in the name of honour each year, mainly in the Middle East and Asia. These killings also occur within immigrant communities in the United Kingdom. See Aisha K. Gill, *Introduction: ‘Honour’ and ‘Honour-Based Violence: Challenging Common Assumptions*, in 1 ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 8 (Aisha K. Gill, Carolyn Strange, and Karl Roberts eds., 2014).

relative) who brought about the family shame.⁵³⁹ The specific acts that erode honour, and thus give rise to this type of violence, vary throughout societies with honor-based value systems. Some of the behavior for which family members punish women include their having sex outside of marriage, choosing to marry someone other than the man who their family had chosen for them, or behaving in other ways that are seen as “immoral.”⁵⁴⁰ One scholar has explained that in honour-based societies, honour is generally equated with “the regulation of female sexuality and their conformity with social norms and traditions.”⁵⁴¹ A man’s ability to control his female relatives’ sexual and social behavior reflects the family’s honour, and when he fails at this task, the woman brings about “shame” to the family.⁵⁴²

Shame in honour-based societies not only decreases social reputation, but may also have serious economic consequences for families. If a man does not “cleanse the family honour,” he may lose business customers and find community members unwilling to make financially beneficial alliances with him.⁵⁴³ Thus, one scholar describes the decision of families to retaliate against family members who transgress social norms through the commission of honour-based violence as a cost-benefit analysis for families.⁵⁴⁴ Where the costs are low to perpetrate such crimes (low penalties for the commission of honour-based violence and low economic value of women’s lives), and the benefits are high (higher financial and social standing in the community), men are more likely to commit honour-based violence.⁵⁴⁵ Thus, discriminatory practices that relegate women to economic marginalization and disempowerment in honour-based societies may contribute to higher incidences of honour-based violence.

Honour killings are the form of honour-based violence that receives the most international attention.⁵⁴⁶ In 2009, the Human Rights Commission of Pakistan reported that 600 women were killed

⁵³⁹ Aisha K. Gill, *Introduction: ‘Honour’ and ‘Honour-Based Violence: Challenging Common Assumptions*, in 1 ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 2 (Aisha K. Gill, Carolyn Strange, and Karl Roberts eds., 2014).

⁵⁴⁰ INTEGRATED REGIONAL INFORMATION NETWORKS, *Pakistan: Hundreds of women die for honour each year*, (January 27, 2011), available at: <http://www.refworld.org/docid/4d4a526bc.html> (referring to behavior that gives rise to honour-based violence in Pakistan); *see also* Suruchi Thapar-Björkert, ‘If There Were No Khaps[. . .] everything will will go haywire[. . .] young boys and girls will start marrying into the same gotra’: Understanding Khap-Directed ‘Honour Killings in Northern India, in ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 156 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014) (describing practices in Northern India where constitutionally approved local judicial councils order the killing of young women and couples when they choose to marry somebody within their same village).

⁵⁴¹ Aisha K. Gill, *Introduction: ‘Honour’ and ‘Honour-Based Violence: Challenging Common Assumptions*, ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 1, 2 (Aisha K. Gill, Carolyn Strange, and Karl Roberts eds., 2014).

⁵⁴² Rupa Reddy, *Domestic Violence or Cultural Tradition? Approaches to ‘Honour Killing’ as Species and Subspecies in English Legal Practice*, ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 27, 29 (Aisha K. Gill, Carolyn Strange, and Karl Roberts eds., 2014).

⁵⁴³ Johanna Bond, *Honour as Familial Value*, ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 89, 92 (Aisha K. Gill, Carolyn Strange, and Karl Roberts eds., 2014).

⁵⁴⁴ *Id.* at 93.

⁵⁴⁵ *Id.*

⁵⁴⁶ Acid attacks can be another form of honour-based violence. In Bangladesh and parts of India where men have decision-making authority and women are expected to obey their wishes, women who reject men romantically or sexually may be seen as damaging those men’s honour. Throwing acid at a woman and permanently disfiguring her face serves to restore the man’s honour and social position. *See* THE AVON GLOBAL CENTER FOR WOMEN AND JUSTICE AT CORNELL LAW SCHOOL, THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS OF THE NEW YORK BAR ASSOCIATION, THE CORNELL LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC & THE VIRTUE FOUNDATION, *COMBATING ACID VIOLENCE IN BANGLADESH, INDIA, AND CAMBODIA* 19 (2011), available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/AvonGlobalCenterforWomenandJustice.pdf>.

using the justification of honour.⁵⁴⁷ Informal councils in rural areas in Pakistan sentence women to violent punishments or death.⁵⁴⁸ Similarly, in Northern India, local judiciary bodies order the murder or forced suicides of young couples who choose to marry other members of their village.⁵⁴⁹ Police in these parts of India have been complicit in these killings by apprehending couples and handing them over to their families when they are found eloping.⁵⁵⁰ Local councils, however, do not always mandate these killings—unprompted family members usually perpetrate them. According to the Honor-Based Violence Awareness Network, 5000 honour killings occur per year around the world.⁵⁵¹ Honour-based violence (mainly killings) has been documented in Southeast Asia (Pakistan, India, Nepal, Bangladesh), Europe, North America, and the Middle East.⁵⁵² This type of violence has been documented in Southeast Asia (Pakistan, India, Nepal, Bangladesh), Europe, North America, and the Middle East.⁵⁵³

A. Purpose Element

Honor-based violence and killings satisfy the purpose element of torture since they are committed with a discriminatory purpose—only female sexuality and autonomy and same-sex behavior give rise to the commission of the crime. The most frequent victims are women and LGBTI persons.⁵⁵⁴ When it is perpetrated against heterosexual men, it is because the men are seen to be complicit with the woman's violation of the family's honour.⁵⁵⁵ The perpetrators of an honour-based killing are usually the male

⁵⁴⁷ INTEGRATED REGIONAL INFORMATION NETWORKS, *Pakistan: Hundreds of women die for honour each year*, (January 27, 2011), available at: <http://www.refworld.org/docid/4d4a526bc.html> (referring to behavior that gives rise to honour-based violence in Pakistan).

⁵⁴⁸ United States Department of State, *2014 Country Reports on Human Rights Practices—Pakistan* (June 25, 2015), available at <http://www.refworld.org/docid/559bd54a28.html>.

⁵⁴⁹ Suruchi Thapar-Björkert, 'If There Were No Khaps[. . .] everything will will go haywire[. . .] young boys and girls will start marrying into the same gotra': Understanding Khap-Directed 'Honour Killings in Northern India, in 'HONOUR' KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 156 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014).

⁵⁵⁰ *Id.* at 167-68.

⁵⁵¹ HONOUR-BASED VIOLENCE AWARENESS NETWORK: STATISTICS AND DATA, <http://hbv-awareness.com/statistics-data/> (last visited October 19, 2015).

⁵⁵² Phyllis Chesler, *Worldwide Trends in Honor Killings*, 17 THE MIDDLE EASTERN QUARTERLY 3 (Spring 2010), available at <http://www.meforum.org/2646/worldwide-trends-in-honor-killings>. The tables in this study show prevalence in North America, "Muslim World", worldwide, and Europe.

⁵⁵³ Phyllis Chesler, *Worldwide Trends in Honor Killings*, 17 THE MIDDLE EASTERN QUARTERLY 3 (Spring 2010), available at <http://www.meforum.org/2646/worldwide-trends-in-honor-killings>. The tables in this study show prevalence in North America, "Muslim World", worldwide, and Europe.

⁵⁵⁴ See Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat, *Report of the Secretary-General's In-Depth Study on Violence Against Women Mandated by the U.N. General Assembly Resolution 58/185*, ¶ 124 U.N. Doc. A/61/122/Add.1 (July 6, 2006) ("Secretary-General Study on VAW 2006"), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>; see also Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Cultural Practices in the Family that are Violent towards Women*, Radhika Coomaraswamy, ¶¶ 27-28 U.N. Doc. E/CN.4/2002/83 (January 31, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/104/28/PDF/G0210428.pdf?OpenElement>; see also Special Rapporteur on Violence Against Women, its Causes and Consequences, *Mission to Turkey*, Yakin Ertük, ¶ 19 U.N. Doc. A/HRC/4/34/Add.2, para. 19 (January 5, 2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/100/90/PDF/G0710090.pdf?OpenElement>; see also Special Rapporteur on Violence Against Women, its Causes and Consequences, *Mission to Sweden*, Yakin Ertük, ¶ 34 U.N. Doc. A/HRC/4/34/Add.3 (February 6, 2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/53/PDF/G0710653.pdf?OpenElement>.

⁵⁵⁵ See e.g., *D.N.M. v. Sweden*, Application no. 28379/11, Council of Europe: European Court of Human Rights (June 27, 2013, available at <http://www.refworld.org/docid/51d2e29e4.html>).

relatives of an offending female, not the relatives of a male.⁵⁵⁶ Although the estimates of male victims of honour-based violence vary, they hover around 7 percent of victims worldwide.⁵⁵⁷ A study found that out of that 7 percent of male victims, 81 percent of them were killed in addition to a woman.⁵⁵⁸ Further, in contrast to men, women only lose honour, and may only regain it by having their male relatives inflict violence upon them, while men can lose honour and regain it through non-violent means.⁵⁵⁹ For instance, in Iraq Kurdistan, men can restore their honour after having an extra-marital affair by marrying their mistress, while women do not have the same option.⁵⁶⁰ When sons are found to be homosexual, families regain honour by publicly showing that the son is now in an appropriate relationship with a woman, not by automatically killing them.⁵⁶¹ Only if sons resist these relationships, do their families inflict violence upon them.⁵⁶² Thus, women are at a higher risk of victimization.

B. Due Diligence and Honour-Based Violence

The European Court of Human Rights has recognized honour-based violence as torture or ill-treatment. It has addressed honor-based violence in the context of the right of non-refoulement. In the case of *D.N.M. v. Sweden*, the Court declared that failing to give asylum to a male applicant facing the risk of an honor killing in his country of origin constituted a violation of Article 3 of the European Convention on Human Rights, the right to be free of torture and cruel, inhuman, and degrading treatment and punishment (CIDTP).⁵⁶³ The Inter-American System has also stated that honour is not a justification for any act of violence.⁵⁶⁴ Failure to prevent honor killings and violence violates the State's due diligence requirements under CAT.

Several international instruments recognize the importance of eliminating this practice. CEDAW General Recommendation 19 provides that States should enact legislation to “remove the defence of honour in regard to the assault or murder of a family member.”⁵⁶⁵ The United Nations General Assembly has also passed several resolutions that call upon Member States to prevent and prosecute honour-based

⁵⁵⁶ Karl Roberts, *Towards a Psychologically Oriented Motivational Model of Honour-Based Violence*, ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 69, 79 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014).

⁵⁵⁷ Phyllis Chesler, *Worldwide Trends in Honor Killings*, 17 THE MIDDLE EASTERN QUARTERLY 3 (Spring 2010), available at <http://www.meforum.org/2646/worldwide-trends-in-honor-killings>. In contrast, however, a study of honour killings in Germany found that 43 percent of victims were male. See Karl Roberts, *Towards a Psychologically Oriented Motivational Model of Honour-Based Violence*, ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 69, 75 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014).

⁵⁵⁸ Phyllis Chesler, *Worldwide Trends in Honor Killings*, 17 THE MIDDLE EASTERN QUARTERLY 3 (Spring 2010), available at <http://www.meforum.org/2646/worldwide-trends-in-honor-killings>.

⁵⁵⁹ Karl Roberts, *Towards a Psychologically Oriented Motivational Model of Honour-Based Violence*, ‘HONOUR’ KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 69, 79 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014).

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 80.

⁵⁶² *Id.*

⁵⁶³ See *D.N.M. v. Sweden*, Application no. 28379/11, Council of Europe: European Court of Human Rights, (June 27, 2013), available at <http://www.refworld.org/docid/51d2e29e4.html>.

⁵⁶⁴ Special Rapporteur on Violence Against Women, its Causes and Consequences, *Mission to Turkey, Yakin Ertük*, ¶ 19 U.N. Doc. A/HRC/4/34/Add.2 (January 5, 2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/100/90/PDF/G0710090.pdf?OpenElement>; see also Special Rapporteur on Violence Against Women, its Causes and Consequences, *Mission to Sweden, Yakin Ertük*, ¶ 34 U.N. Doc. A/HRC/4/34/Add.3 (February 6, 2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/53/PDF/G0710653.pdf?OpenElement>

⁵⁶⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19* § 24(r)(ii) U.N. Doc. (1992) (“CEDAW General Recommendation No. 19”), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

crimes, improve support services for victims, and raise awareness on their commission.⁵⁶⁶ Further, General Assembly resolutions acknowledge that failure to punish honour-based crimes is a violation of the ICCPR Articles 6, 14, and 26.⁵⁶⁷

Nevertheless impunity for honor-based violence is prevalent. For example, in Turkey, where honor-killings are generally punished by life imprisonment, sentences for this crime are generally reduced because of mitigating factors.⁵⁶⁸ Judges are allowed to take into consideration the anger or passion that the victim's behavior provoked in the perpetrator of the killing.⁵⁶⁹ Similarly, in Australia, judges assigning sentences in certain jurisdictions consider whether the men who perpetrate honour crimes felt provoked based on their cultural background.⁵⁷⁰ Because of the social acceptance of such crimes, they generally also go unprosecuted in Iraq.⁵⁷¹ Further, in Pakistan, the federal law that bans honour killings allows the victim or the victim's heirs to negotiate physical or monetary restitution with the perpetrator to drop the charges.⁵⁷²

Increasing criminal penalties and decreasing mitigating factors may only be one aspect of eliminating honour-based violence. Since communities where honour-based violence occurs likely strongly believe that honour can be maintained through violence, community education and outreach may be necessary to eradicate this practice.⁵⁷³ For instance, the Metropolitan Police in Great Britain has developed a Strategic Homicide Prevention Working Group on Honour Killing that has successfully raised awareness of honour-based violence within communities where it occurs.⁵⁷⁴ They have seen a reduction in domestic-related murders and reports on honour-based crimes since starting this initiative.⁵⁷⁵ Thus, States' due diligence obligations to eradicate honour-based violence may need to include community education programs on the harms of this practice.

Preliminary Questions for Panel V

- **Question:** Research revealed extensive statistics, accounts, and literature regarding honour-based killings. What other honour-based practices could arise to torture/CIDTP even when they do not

⁵⁶⁶ See The United Nations General Assembly Resolution 55/66, *Working Towards The Elimination of Crimes Against Women Committed in The Name of Honour* (2001); United Nations General Assembly Resolution 57/179, *Working Towards The Elimination of Crimes Against Women Committed in The Name of Honour*, p. 3 U.N. Doc. A/Res/57/179 (January 30, 2003), available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2FRES%2F57%2F179+&Submit=Search&Lang=E.

⁵⁶⁷ See Human Rights Committee General Comment No. 28: Equality of Rights Between Men and Women (article 3) ¶ 31 U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>.

⁵⁶⁸ United States Department of State, *2014 Country Reports on Human Rights Practices—Turkey* (June 25, 2015), available at <http://www.refworld.org/docid/559bd5301e.html>.

⁵⁶⁹ *Id.*

⁵⁷⁰ See Jocelyn A. Scott, *(Dis)honour, Death, and Duress in the Courtroom*, 'HONOUR' KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 108, 115 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014).

⁵⁷¹ See UN High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq* (May 31, 2012), p. 12, U.N. Doc. HCR/EG/IRQ/12/03, available at <http://www.refworld.org/docid/4fc77d522.html>.

⁵⁷² See United States Department of State, *2014 Country Reports on Human Rights Practices – Pakistan*, (June 25, 2015), available at <http://www.refworld.org/docid/559bd54a28.html>

⁵⁷³ See Karl Roberts, *Towards a Psychologically Oriented Motivational Model of Honour-Based Violence*, 'HONOUR' KILLING & VIOLENCE: THEORY, POLICY AND PRACTICE 69, 81 (Aisha K. Gill, Carolyn Strange, and Karl Roberts ed., 2014).

⁵⁷⁴ *Id.* at 83.

⁵⁷⁵ *Id.*

culminate in a killing? How should States satisfy their due diligence obligations with regard to such practices?

- **Question:** Research revealed that honour-based societies often place a higher value on regaining honour than on preserving women's lives. Since perpetrators of honour-based violence generally act publicly to redeem the family's honour, is criminal deterrence the best remedy for ending honour-based violence? What measures in addition to prosecution of perpetrator are effective in deterring honour-based violence? Should increasing women's value in society (for instance, by increasing their economic power) be part of states' due diligence obligations?

TRAFFICKING, SEXUAL SLAVERY, AND LABOR SERVITUDE

According to a 2012 International Labour Organization study, each year at least 20.9 million adults and children are bought and sold worldwide into commercial sexual servitude, forced labor, and bonded labor.⁵⁷⁶

Most instances of human trafficking follow a similar trajectory: a victim is abducted or recruited in his or her country of origin and then transferred to and exploited in a specific destination country.⁵⁷⁷ Once in the destination country, most victims are forced into sexual or labor servitude.⁵⁷⁸ Some victims are kept in forced confinement, under constant surveillance, or incapacitated with various drug cocktails; many others are simply controlled by intimidation.⁵⁷⁹

Given these exploitative conditions, the Committee against Torture ("CAT") has recognized that human trafficking and torture are closely intertwined and has called for the implementation of measures to prevent its perpetuation.⁵⁸⁰ Similarly, the Special Rapporteur on Torture Manfred Nowak has stated that "particularly severe conditions" of trafficking – including confinement, long periods of forced work, and severe physical and mental violence – may amount to cruel, inhuman, or degrading treatment or punishment ("CIDTP"),⁵⁸¹ or to torture if the additional criteria are met.⁵⁸²

A. The Severity of Mistreatment in Human Trafficking, Sexual Slavery, and Labor Severity

The graphic descriptions of human trafficking conditions and its long lasting effects reveal the severity of pain and suffering endured by victims.

Exploited victims are often forced to work eighteen to twenty-four hours per day and are subjected to severe forms of physical and mental violence including beatings, sexual abuse, humiliations,

⁵⁷⁶ EQUALITY NOW, *Global Sex Trafficking Fact Sheet* (2013), available at http://www.equalitynow.org/sites/default/files/Global_Sex%20Trafficking_EN_v3.pdf [hereinafter Equality Now Trafficking Fact Sheet].

⁵⁷⁷ Special Rapporteur on Torture, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, ¶ 56, U.N. Doc. A/HRC/7/3 (January 15, 2008) [hereinafter SRT Manfred Nowak 2008 Report].

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at ¶ 33.

⁵⁸¹ Special Rapporteur on Torture, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, ¶ 60, U.N. Doc. A/HRC/13/39 (February 9, 2010) [hereinafter SRT 2010 Trafficking Report].

⁵⁸² *Id.* at n.14.

and threats.⁵⁸³ Decades of investigation reveals that trafficking victims are subject to physical violence; perpetrators burn victims with cigarettes, choke them, kick them in the head and the back, slam them against floors or walls, and assault them with guns, knives and other objects.⁵⁸⁴ Psychologically, perpetrators threaten victims with beatings, murder, an increase in debt, re-trafficking, food or sleep deprivation, insults and humiliation, and harm to their families.⁵⁸⁵ “Impossible choice” threats, particularly those that threaten harm to a family member, prove especially effective against women.⁵⁸⁶ The effectiveness of these forms of psychological torture is evidenced by the fact that, during the exploitation phase of trafficking, perpetrators rarely need to employ physical blockades to egress; most victims never even attempt to escape.⁵⁸⁷

Human Rights Watch has documented severe mistreatment in domestic workers in Gulf States – including trafficking victims.⁵⁸⁸ In Saudi Arabia, for example, domestic worker victims, who are primarily women, are subject to gruesome physical abuse.⁵⁸⁹ For example, an Indian woman’s right hand was cut off while she tried to escape her household from a third floor window by rappelling down a sari; a Sri Lankan woman had nails hammered into her body as punishment; an Indonesian woman received cut and burn wounds to the face with scissors and a hot iron; and a Filipina woman had boiling water thrown at her face.⁵⁹⁰ In other cases, the workers do not survive because they are tortured to death, die trying to escape their working conditions, or commit suicide.⁵⁹¹ In the United Arab Emirates, for example, after an Ethiopian domestic worker was beaten to death, her employer attempted to use “a chemical substance” to burn away the victim’s identifying features.⁵⁹² Other non-physical abuse documented in the Gulf region includes passport confiscation, forced confinement to the home, salary withholding, forced work up to twenty-one hours a day without rest and no day off, food deprivation, inadequate sleeping conditions, and psychological, physical, and sexual abuse.⁵⁹³

Such mistreatment has lasting effects; trafficking victims exhibit a range of psychological problems including post-traumatic stress disorder, depression, overwhelming shame, loss of self-esteem, loss of sense of safety, dissociation, anxiety, and phobias.⁵⁹⁴ For example, a European study on sexually trafficked women and girls revealed that 56 percent of those interviewed displayed symptoms of post-traumatic stress disorder comparable to those identified in victims of more conventional forms of torture.⁵⁹⁵

⁵⁸³ OFFICE OF THE SPECIAL REPRESENTATIVE AND CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (2013), 23 [hereinafter OSCE Commentary].

⁵⁸⁴ *Id.* at 22.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 23.

⁵⁸⁷ *Id.* at 24.

⁵⁸⁸ Rothna Begum, *Gulf States Fail to Protect Domestic Workers From Serious Violence*, October 16, 2015, available at <https://www.hrw.org/news/2015/10/16/gulf-states-fail-protect-domestic-workers-serious-violence> [hereinafter Gulf States Report].

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*

⁵⁹² *Id.*

⁵⁹³ *Id.*

⁵⁹⁴ SRT 2008 Trafficking Report, ¶ 56.

⁵⁹⁵ *Id.*

B. The Purpose of Human Trafficking

On average, approximately 98 percent of trafficking victims are women and six in ten are trafficked for sexual exploitation.⁵⁹⁶ Trafficking in women and girls is one of the most widespread and lucrative activities of organized crime and doing so for sexual exploitation is the fastest growing criminal enterprise in the world – despite its wide criminalization.⁵⁹⁷

The Vienna Declaration and the Beijing Platform for Action identify human trafficking as gender based violence because it is “incompatible with the dignity and worth of the human person”⁵⁹⁸ and it especially places “girls and women at high risk of physical and mental trauma, disease and unwanted pregnancy.”⁵⁹⁹ In these instances, where victims are disproportionately female because women are targeted for exploitation, Special Rapporteur Nowak has noted that the “discriminatory purpose” element of torture is satisfied.⁶⁰⁰ This assertion is only strengthened by the fact that institutional violence against women and girls – including a lack of access to education, resources, and employment – makes them especially vulnerable to trafficking.⁶⁰¹

Although trafficking generally targets women and girls, human traffickers also target similarly vulnerable and marginalized male victims. Both men and women from marginalized groups, including those from migrant or disadvantaged socio-economic backgrounds, may suffer intersectional discriminations – based on sexism, homophobia, xenophobia, and racism; and these intersectional vulnerabilities only intensify the discriminatory purpose and effects of human trafficking.⁶⁰² Therefore, regardless of gender, the “discriminatory purpose” element of torture is met in the trafficking context – implicating torture and CIDTP protections.

C. Public Capacity – Due Diligence in the Trafficking Context

Human trafficking, particularly in women and girls, is a lucrative and burgeoning enterprise.⁶⁰³ Special Rapporteur Nowak has criticized the insufficient response to trafficking victims’ needs because too often States return victims to their countries of origin rather than providing protection and reparation.⁶⁰⁴ In many cases, State officials cooperate with traffickers, directly implicating the State in trafficking-related human rights violations – including torture. However, even where public officials are not involved, State complacency, disinterest, or incompetence in strengthening and enforcing anti-human trafficking policies constitutes a State failure to prevent, investigate, and punish torture – thereby satisfying the public capacity requirement of torture within the Special Rapporteur’s general framework.⁶⁰⁵

First, although private individuals typically run human trafficking operations, studies on the business model of human trafficking reveal that public officials often play an important role in the

⁵⁹⁶ Equality Now Trafficking Fact Sheet.

⁵⁹⁷ *Id.*; SRT 2010 Trafficking Report, ¶ 62.

⁵⁹⁸ Vienna Declaration and Programme of Action art. 18, June 25, 1993.

⁵⁹⁹ Beijing Declaration and Platform for Action, ¶ 83(l), September 15, 1995.

⁶⁰⁰ OSCE Commentary, 24.

⁶⁰¹ *Id.*

⁶⁰² OSCE Commentary, 109; General Assembly, *Contributions to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Note by the Secretary General*, ¶ 18, U.N. Doc. A/CONF.189/PC.2/14, (March 13, 2001).

⁶⁰³ SRT 2010 Trafficking Report, ¶ 62; Equality Now Trafficking Fact Sheet.

⁶⁰⁴ SRT 2010 Trafficking Report, ¶ 62.

⁶⁰⁵ *Id.*

success of the enterprise.⁶⁰⁶ The Office of the High Commissioner for Human Rights (“High Commissioner”) has documented the involvement of public officials across a wide range of human trafficking operations.⁶⁰⁷ For example, public officials accept bribes or inducements to permit the passage of trafficked persons at the border by forging documents or enabling irregular immigration into the country.⁶⁰⁸ Within the workplace, labor inspectors or health and safety officials may accept bribes to certify dangerous or illegal working conditions.⁶⁰⁹ In other contexts, law enforcement officials, including international peacekeeping or international military personnel, may accept bribes or favors from traffickers in exchange for protection from investigation or prosecution.⁶¹⁰ Moreover, action (or inaction) of courts, legislatures, criminal justice actors, and executive bodies constitute conduct that can be directly attributable to the State – and thereby satisfy the public capacity element of torture.⁶¹¹

More nuanced cases of State involvement require closer examination for determining whether this public capacity requirement is met. For example, a public official may employ a trafficked domestic servant or may maintain a private commercial interest in a brothel that exploits trafficked women.⁶¹² In these instances, Special Rapporteur Nowak has stated, citing to *Siliadin v. France*, that “by not acting with due diligence to protect” victims of trafficking “States may commit torture or cruel, inhuman or degrading treatment or punishment by acquiescence.”⁶¹³ The Human Rights Council and the General Assembly have echoed this notion by recognizing, with increasing specificity, that the due diligence standard is applicable in the trafficking context.⁶¹⁴ Determining this requires an examination of whether the trafficking 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” as opposed to “isolated instances of outrageous conduct on the part of persons who are officials.”⁶¹⁵ The Special Rapporteur on violence against women has offered another articulation for determining whether a state is fulfilling this due diligence obligation through domestic policy: “The test is whether the State undertakes its duties seriously [...] If statistics illustrate that existing laws are ineffective in protecting women from violence, States must find other complementary mechanisms to prevent.”⁶¹⁶

Another approach to examining State due diligence calls for a two-pronged set of obligations: punishing the perpetrators and providing protection for the victims. States must first ensure that there is an appropriate framework for the identification, investigation, and prosecution of trafficking-related human rights violations and must especially punish public officials for their role in trafficking operations.⁶¹⁷ States also have an obligation to protect individuals from further victimization through

⁶⁰⁶ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010), 117 [hereinafter OHCHR Recommended Principles and Guidelines].

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ *Id.* at 76.

⁶¹² *Id.* at 121.

⁶¹³ SRT 2008 Trafficking Report, ¶ 57.

⁶¹⁴ OHCHR Recommended Principles and Guidelines, 80; *See, e.g.*, General Assembly resolution 61/180, preamble (“Member States have an obligation to exercise due diligence to prevent trafficking in persons, to investigate this crime and to ensure that perpetrators do not enjoy impunity”); General Assembly resolution 63/156, preamble, and Human Rights Council resolution 11/3 on trafficking in persons, especially women and children, preamble (“States have an obligation to exercise due diligence to prevent, investigate and punish perpetrators of trafficking in persons”).

⁶¹⁵ OHCHR Recommended Principles and Guidelines, 37, 121.

⁶¹⁶ *Id.* at 81.

⁶¹⁷ *Id.* at 121-122.

criminal justice systems.⁶¹⁸ For example, in *Siliadin v. France*, the European Court of Human Rights determined that France had failed to satisfy its obligation to institute a criminal law system to prosecute and punish non-State actors involved in the domestic enslavement of women.⁶¹⁹ Similarly, currently in Saudi Arabia, when domestic workers report abuse, employers rarely face criminal charges and courts even more rarely convict employers.⁶²⁰ At police stations and during legal proceedings, Saudi authorities often fail to provide domestic workers with interpreters and lawyers.⁶²¹ Those domestic workers who do manage to register formal complaints may also have to deal with spurious counter-claims by former employers, often coercing the workers to drop their own charges.⁶²² Saudi Arabia also offers no shelters for abused domestic workers and those who do escape from their employers end up in overcrowded embassy shelters or deportation centers.⁶²³ Many drop their complaints and return home without justice.⁶²⁴

However, simply instituting a criminal system to punish trafficking-related human rights violations is insufficient. For example, the European Court of Human Rights in *Rantsev v. Cyprus* held that states must implement “a combination of measures” to combat trafficking – only one of which may include “the duty to penalise and prosecute trafficking.”⁶²⁵ In establishing this combination of measures – to protect and to provide for victims – the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children requires that States consider “the age, gender and special needs” of trafficking victims and protect “especially women and children, from re-victimization.”⁶²⁶

D. Criminalization of Trafficking Victims

Despite these international standards that require States to protect and support trafficking victims, many governments instead prosecute and punish the victims – potentially subjecting them to further torture and CIDTP.

For example, many of the victims enter their destination countries illegally, continue to work illegally, or are forced to engage in illegal activity.⁶²⁷ Many are forced into criminalized or marginalized roles: they may not have the correct migration or work papers; their traffickers may have confiscated their identity documents or have provided them with forged ones; and the exploitative activities demanded of a trafficked person, such as prostitution, soliciting, or begging, may be illegal.⁶²⁸ Women and girls, especially, are trafficked into gender-specific exploitative, and often illegal, situations – including prostitution and sex tourism.⁶²⁹ Therefore, they are at an increased risk for criminal targeting in the destination country.⁶³⁰ Notably, when victims in the sex industry do present themselves to law enforcement, their criminal status often results in immediate deportation – thereby depriving these victims of any opportunity for reparations.⁶³¹

⁶¹⁸ *Id.* at 122.

⁶¹⁹ SRT 2008 Trafficking Report, ¶ 57.

⁶²⁰ Gulf States Report.

⁶²¹ *Id.*

⁶²² *Id.*

⁶²³ *Id.*

⁶²⁴ *Id.*

⁶²⁵ OHCHR Recommended Principles and Guidelines, 195.

⁶²⁶ PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS ESPECIALLY WOMEN AND CHILDREN, Art. 6(4) (November 15, 2000).

⁶²⁷ OHCHR Recommended Principles and Guidelines, 129.

⁶²⁸ *Id.*

⁶²⁹ *Id.* at 61.

⁶³⁰ *Id.*

⁶³¹ *Id.*

Such deportation policies not only place unwarranted blame on the trafficking victims, but also raise concerns about the failure of the State to prevent these abuses in the first place.

E. Non-Refoulment of Trafficking Victims

Deportation policies that affect trafficking victims may also implicate the prohibition on refoulment of individuals who will be subject to torture or CIDTP when returned to their country of origin. For example Special Rapporteur Nowak has held that returning a victim to a State where he or she will be subject to slavery or forced labor may violate the absolute prohibition on torture.⁶³²

Despite this legal standard, for trafficked persons who are not lawfully within the country, substantive and procedural guarantees against expulsion are much less clear and States retain a considerable degree of discretion in deciding whether and when to remove unlawful immigrants – thereby potentially implicating violations of the prohibition against torture/CIDTP and refoulment.⁶³³

Preliminary Questions for Panel V

- **Question:** Research reveals that women are especially vulnerable to torture and CIDTP when trafficked into sexual slavery and domestic servitude. Are there other situations into which women are trafficked that should be included in this context, and/or should all contexts in which individuals are trafficked into forced labor be recognized as torture/CIDTP?
- **Question:** The Special Rapporteur on Violence Against Women has articulated the due diligence standard as follows: “The test is whether the State undertakes its duties seriously [...] If statistics illustrate that existing laws are ineffective in protecting women from violence, States must find other complementary mechanisms to prevent.”⁶³⁴ How should this standard be articulated in the context of human trafficking? Are there particular mechanisms that States should employ to prevent trafficking and are these different for sending States and receiving States?
- **Question:** What are some best practices for access to justice for victims of trafficking – especially in countries of origin that often have limited economic resources and weak rule of law?
- **Question:** Although trafficking operations – especially in sexual slavery – target women, men are also trafficked into sex work as well as other forms of forced labor. How should the “purpose” element of torture and CIDTP be articulated to cover male victims?

OTHER HARMFUL PRACTICES

International law protects the right to participate in cultural life and freedom of religion. However, it also stipulates that manifestations of religion and culture should be limited to protect the health, fundamental rights and freedoms of others.⁶³⁵ This section discusses female genital mutilation (FGM) and forced marriage, two deeply harmful practices that are perpetrated against girls and women under the guise of culture.

The term “culture”, however, may misguide the reader into believing that these practices are confined to certain regions in the world. In fact, these practices are widespread globally. More than cultural pluralism, the commonalities of these practices across different regions showcase the severe

⁶³² *Id.* at 37.

⁶³³ *Id.* at 179.

⁶³⁴ *Id.* at 81.

⁶³⁵ International Covenant on Civil and Political Rights art. 18.3, Dec.19, 1966, 999 U.N.T.S. 171.

suffering that women and girls endure because of global gender discrimination. This section examines how FGM and forced marriage may arise to torture.

A. Female Genital Mutilation

Female genital mutilation (FGM) is the ritual cutting, removal, infibulation, alteration or cauterization of parts or whole of the female genitalia for non-medical purposes. It is generally performed on girls between zero and fifteen years old without anesthetics.⁶³⁶ It takes different forms. Type I involves the partial or total removal of the clitoris and/or the prepuce (also called a clitoridectomy); type II includes the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora; type III involves the narrowing of the vaginal orifice, and the creation of a covering seal by re-positioning of the labia minora and the labia majora, with or without excision of the clitoris; finally, type IV includes all other harmful procedures to the female genitalia for non-medical purposes, including cauterization, pricking, piercing, and incising the genitalia.⁶³⁷

FGM has severe health consequences and no known document health benefits.⁶³⁸ The practice is generally performed without anesthetics, using rudimentary non-sterile tools.⁶³⁹ As a result, women may die from hemorrhagic shock, neurogenic shock as a result of pain and trauma, and infections and septicaemia.⁶⁴⁰ Even if not fatal, subjects experience stress and shock stemming from extreme pain as well as exhaustion from screaming.⁶⁴¹ Although research on psychological consequences of FGM is limited, studies have found that women and girls suffer from PTSD, anxiety, depression and memory loss after the procedure.⁶⁴² Longer-term effects of the practice include “a higher incidence of post-partum hemorrhage and other obstetric complications, chronic infections, tumors, abscesses, cysts, infertility, excessive growth of scar tissue, increased risk of HIV/AIDS, hepatitis, and urinary incontinence as a

⁶³⁶ The procedure can also be performed on adult women.

http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1149&context=djglp>

⁶³⁷ *Id.*

⁶³⁸ See AMERICAN ACADEMY OF PEDIATRICS, COMM. ON BIOETHICS, *Female Genital Mutilation*, 102 AM. ACAD. PEDIATRICS 153–56 (1998); see also, Special Rapporteur on Torture, *Report of the 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*, (7th Sess.), Manfred Nowak ¶ 50-U.N. Doc. A/HRC/7/3 (January 15, 2008) available at <http://www.refworld.org/pdfid/47c2c5452.pdf> [hereinafter SRT Manfred Nowak 2008 Report].

⁶³⁹ SRT Manfred Nowak 2008 Report ¶ 50.

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

⁶⁴² See SRT Manfred Nowak 2008 Report ¶ 50, citing J. Whitehorn, O. Ayonrinde and S. Maingay, *Female genital mutilation: cultural and psychological implications*, 17 SEXUAL & RELATIONSHIP THERAPY, 161 (May 2002); Alice Behrendt and Steffen Moritz, *Post-traumatic stress disorder and memory problems after female genital mutilation*, 162 THE AMERICAN JOURNAL OF PSYCHIATRY 1000, (May 2005); HASEENA LOCKHAT, FEMALE GENITAL MUTILATION: TREATING THE TEARS, (United Kingdom, Middlesex University Press, 2006); A. Elnashar and R. Abdelhady, *The impact of female genital cutting on health of newly married women*, 97 INTERNATIONAL JOURNAL OF GYNECOLOGY & OBSTETRICS 169, (June 2007).

result of damage to the urethra, painful menstruation, and painful sexual intercourse.⁶⁴³ Despite these consequences, around 133 million girls and women have been subjected to this practice worldwide.⁶⁴⁴

There is often a misconception that FGM exclusively occurs in African countries. However, although practiced in many countries in Africa, FGM also has been documented in Europe and Middle East.⁶⁴⁵ As noted in a recent report from the European Union, FGM is the expression of “deeply entrenched” gender inequalities in patriarchal communities.⁶⁴⁶ It is committed with the purpose of discriminating against women, and the practice perpetuates the view that women exist solely for the purpose of belonging to men.⁶⁴⁷ That is, FGM itself creates the patriarchal power structures that allow for its continuing existence.⁶⁴⁸ This is reflected entirely in the cultural justifications for its commission. For instance, in Kenya, the Masai community believes that the practice reduces risk of transmission of HIV/AIDS since a woman then will remain “pure” until after she marries, and “faithful” during marriage.⁶⁴⁹ Infibulation, or closing the vaginal orifice, is said to ensure that a woman will not engage in sexual acts outside of marriage for fear of the pain of opening the orifice.⁶⁵⁰ The common feature of these practices is that they are designed to control women’s sexual behavior.⁶⁵¹

There is a strong consensus that FGM constitutes torture and cruel, inhuman and degrading treatment and punishment (“CIDTP”). The SRT mandate previously issued a report finding that the State duty of prevention is violated by national laws allowing the practice.⁶⁵² Further, the Committee Against Torture General Comment 2 specifically mentions that a State’s failure to exercise “due diligence to

⁶⁴³ WORLD HEALTH ORGANIZATION, *Female Genital Mutilation: Fact Sheet No. 241*, (February 2014), available at <http://www.who.int/mediacentre/factsheets/fs241/en/>; Special Rapporteur on Violence Against Women, its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Cultural Practices in the Family that are Violent towards Women*, Radhika Coomaraswamy, ¶ 15 U.N. Doc. E/CN.4/2002/83 (January 31, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/104/28/PDF/G0210428.pdf?OpenElement>.

⁶⁴⁴ See UNICEF, *Female Genital Mutilation/Cutting: What Might the Future Hold?*, p. 3, available at http://www.unicef.org/media/files/FGM-C_Report_7_15_Final_LR.pdf.

⁶⁴⁵ Some of these countries include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d’Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Indonesia, India, Kenya, Liberia, Malaysia, Mali, Mauritania, Nepal, Niger, Northern Iraq, Nigeria, Senegal, Sierra Leone, Somalia, Sri Lanka, Northern Sudan, Tanzania, Togo, Uganda, and Yemen. Immigrants from these countries perform FGM in Australia, Canada, Denmark, France, Italy, the Netherlands, Sweden, the United Kingdom, and the United States of America. See *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Cultural Practices in the Family that are Violent towards Women*, Radhika Coomaraswamy, ¶ 15 U.N. Doc. E/CN.4/2002/83 (January 31, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/104/28/PDF/G0210428.pdf?OpenElement>. Immigrants; The European Union also recently issued a report of the prevalence of FGM victims in Europe. EUROPEAN INSTITUTE FOR GENDER EQUALITY, *Female Genital Mutilation in the European Union and Croatia*, (2013) available at <http://eige.europa.eu/sites/default/files/documents/eige-report-fgm-in-the-eu-and-croatia.pdf>.

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 23.

⁶⁴⁸ *Id.*

⁶⁴⁹ See Patricia A. Broussard, *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention Against Torture*, 15 DUKE J. GENDER L. & POL’Y 19, 28 (2008), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1149&context=djglp>, citing IRIN WEB SPECIAL, *Razor’s Edge: The Controversy of Female Genital Mutilation*, available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62462>.

⁶⁵⁰ WORLD HEALTH ORGANIZATION (2012), *Female Genital Mutilation. Fact Sheet N°241* (2014) available at <http://www.who.int/mediacentre/factsheets/fs241/en/>.

⁶⁵¹ *Id.*

⁶⁵² SRT Manfred Nowak 2008 Report ¶ 54. The SRT also determined that existence of national laws that allows for FGM amounts to state acquiescence in committing torture.

prevent, investigate, prosecute and punish...non-State officials or private actors” for committing FGM constitutes de facto State permission for committing acts of torture or CIDTP.⁶⁵³ The Human Rights Committee has also stated that FGM is in violation of Article 7 of the ICCPR.⁶⁵⁴ In 2008, eight U.N. agencies made a statement to call for the elimination of FGM.⁶⁵⁵ Further, both the UNCHR and the European Court of Human Rights have stated that victims or potential victims of FGM can be considered “members of a particular social group” for the purpose of seeking asylum or refugee status.⁶⁵⁶ Finally, Article 5 of the Protocol to the African Charter on Human and People’s Rights affirms States Parties’ obligations to eradicate the practice.⁶⁵⁷

According to the Special Rapporteur on Torture States’ obligations to exercise due diligence in addressing FGM extend further than passing legislation criminalizing the practice.⁶⁵⁸ In light of the high social acceptance of the practice, States must raise awareness to “mobilize public opinion” against it.⁶⁵⁹ Further, States must award FGM victims fair and adequate compensation, and must provide them appropriate “social, psychological, medical and other relevant specialized rehabilitation.”⁶⁶⁰

⁶⁵³ Comm. against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 18, U.N. Doc. CAT/C/GC/2 (January 24, 2008) [hereinafter CAT General Comment No. 2]

⁶⁵⁴ HRC GC No. 28 (2000) and Concluding Observations on Uganda (para. 10): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004); Mali (para. 11): Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003); Sweden (para. 8); Yemen (para. 6): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002)

⁶⁵⁵ OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, and WHO issued the statement. WHO, *Eliminating Female Genital Mutilation: An Interagency Statement*, (2008), available at http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf.

⁶⁵⁶ Although girls and women that are at risk of being subjected to FGM are part of the socially protected group, domestic judicial bodies may not extend that protection to the parents of an at-risk girl that were seeking the asylum to protect her. This includes mothers who were victims of FGM. The *Conseil d’État* in France recently ruled that while a girl facing a risk of FGM in her home country was eligible for refugee protection in France, her parents were not. See Lucile Abassade, *Female Genital Mutilation and the Asylum Claim in France: What Rights, What Legal Protection?*, 29 IMMIGRATION, ASYLUM AND NATIONALITY LAW 308, 316 (citing Conseil d’Etat, 20 November 2013, No. 368676). However, one scholar speculates that this is not consistent with French law, which may give ascendants a right to family reunification. See *Id.* at 317. Courts in other countries, such as Canada, the United Kingdom, Austria, Belgium, and Germany, have also granted women refugee status finding a well-founded fear of FGM. See *Female Genital Mutilation: Progress-Realities-Challenges*, Statement by SRT Juan E. Méndez, (June 1, 2011), ¶ 10, available at <http://www.endfgm.eu/en/news-and-events/news/press-releases/legislation-against-fgm-not-sufficient-says-un-special-rapporteur-on-torture-0053/>.

⁶⁵⁷ See Article 5 of Protocol to the African Charter on Human and People’s Rights. At least one state, however, has not been upholding its obligation. Kenya ratified the Protocol in 2010. However, a case was recently brought on behalf of a woman mutilated without her knowledge or consent at a private hospital after delivering a baby. The case has been pending for 10 years. See CENTER FOR REPRODUCTIVE RIGHTS AND JUSTICE, *Litigation series: M.N.N. v Attorney General of Kenya*, available at <http://www.reproductiverights.org/node/2435>, see also SRT Manfred Nowak 2008 Report ¶ 53 (stating that medicalization of the practice does not constitute its eradication as called upon by the Article 5 Protocol).

⁶⁵⁸ *Female Genital Mutilation: Progress-Realities-Challenges*, Statement by SRT Juan E. Méndez, (June 1, 2011), ¶ 10, available at <http://www.endfgm.eu/en/news-and-events/news/press-releases/legislation-against-fgm-not-sufficient-says-un-special-rapporteur-on-torture-0053/>.

⁶⁵⁹ *Id.*

⁶⁶⁰ *Id.*

B. Forced Marriage

The Universal Declaration of Human Rights states that “no marriage shall be entered into without the free and full consent of the intending spouses.”⁶⁶¹ International human rights treaties guarantee the right of all individuals to enter into marriage with free and full consent of both parties.⁶⁶² Nevertheless, forced marriage occurs in many contexts and has gained increasing attention as an important human rights issue. The jurisprudential relationship of forced marriage to torture is evolving. In general, forced marriage has been defined as a marriage entered into (1) without the valid free will and consent of one or both of the parties⁶⁶³ and (2) through physical and mental duress.⁶⁶⁴ The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages established that children under eighteen years old are not capable of giving their full and free consent to enter into marriage.⁶⁶⁵ Forced marriage has a disproportionately negative impact on women and girls.⁶⁶⁶ The three most prevalent forms of forced marriage are forced marriage in conflict, forced marriage following abduction of the victim in non-conflict situations, and child marriages. The lack of control and autonomy over the decision to marry -- a decision regarding a fundamental life circumstance -- has been recognized as causing severe pain and suffering, physical or psychological, of the victim⁶⁶⁷ and thus may be considered torture or CID. However, research did not reveal widespread and definitive international recognition of forced marriage as torture.

1. *Forced marriage in conflict*

The U.N. Secretary General recently stated that forced marriage is often used in conflict as a terror and war strategy,⁶⁶⁸ which serves to control the reproduction and indoctrination of the population is a method to subdue a region.⁶⁶⁹ The jurisprudence on forced marriage in conflict has been addressed through criminal courts and tribunals and thus, the concept has been developed in the context of international criminal law rather than through human rights bodies. The Special Court for Sierra Leone is the only court that has issued a judgment on the matter.⁶⁷⁰ In 2008, the Appeals Chamber held that forced

⁶⁶¹ Universal Declaration on Human Rights, 1948.

⁶⁶² ICCPR, Art. 23 ¶ 3; ICESCR, Art. 10, ¶ 1.

⁶⁶³ Since minors cannot legally consent, early and child marriage is considered to be forced marriage, even if the parents of the child consent to the marriage. See <http://www.unhchr.ch/html/menu3/b/63.htm>

⁶⁶⁴ *Prosecutor v. Brima, Kamara, and Kanu*, Judgment, SCSL-04-16-A, Appeals Chamber, 22 February 2008 ¶ 196

⁶⁶⁵ See Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages; see also Convention on the Rights of the Child, Art. 1 (defining a child as being below the age of 18).

⁶⁶⁶ See UN General Assembly, *Child, early and forced marriage : resolution / adopted by the General Assembly*, (January 22, 2015) U.N. Doc. A/RES/69/156, available at <http://www.refworld.org/docid/54c7a1254.html> (finding that approximately 15 million girls are married before the age of eighteen worldwide, and that 700 million women and girls alive today were married before their eighteenth birthday).

⁶⁶⁷ See Valerie Oosterveld, *Forced Marriage and The Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties*, INTL. HUMANITARIAN LEGAL STUDIES 127 (2011), citing Judgment, *Prosecutor v. Brima, Kamara and Kanu*, SCLS, Appeals Chamber, 22 February 2008. [AFRC Appeals Judgment].

⁶⁶⁸ U.N. Secretary-General, United Nations Security Council: Conflict-Related Sexual Violence 23 March 2015: Report of the Secretary-General (March 23, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf, ¶1.

⁶⁶⁹ *Id.* See also Filings Before the Trial Chamber Extraordinary Chambers in the Courts of Cambodia, File No. 002/19-09-2007-ECCC/TC, Filed by the Civil Party Lead Co-Lawyers (characterizing the Khmer Rouge’s forced marriage policy in Cambodia as aimed towards increasing the population and creating a rapid socialist revolution through the erasure of cultural and religious diversity).

⁶⁷⁰ The Extraordinary Chambers in the Courts of Cambodia have taken up the issue of “regulation of marriage,” and are now receiving briefing and hearing arguments on how to adjudicate the issue. See Press Release, Extraordinary Chambers in the Courts of Cambodia, Case 002/02 Trial to Start with Charges Related to Tram Kok Cooperatives (September 12, 2014), available at [http://www.eccc.gov.kh/en/articles/case-00202-trial-start-charges-related-tram-](http://www.eccc.gov.kh/en/articles/case-00202-trial-start-charges-related-tram)

marriage was a crime against humanity.⁶⁷¹ It determined that in the context of the Sierra Leone conflict, “forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.”⁶⁷²

State actors and rebel factions in many conflicts have committed forced marriage. The 1991-2002 Sierra Leone conflict is perhaps the most widely publicized conflict in which forced marriage occurred. Rebel factions violently abducted women, held them in camps, and assigned them to a rebel fighter for marriage. “Wives” were forced to submit sexually to their assigned husband, bear children for them, and attend to domestic duties such as cooking and cleaning.⁶⁷³ Similar atrocities arose during the Mozambique Civil War from 1976 to 1992, the Rwanda genocide in 1994, and the Uganda civil war.⁶⁷⁴

The U.N. Secretary General found similar violations as recently as 2014 in several countries currently marred by conflict. In Iraq and Syria, ISIL gifts women to its fighters for marriage in Somalia and 46 cases have been confirmed where government and clan militias forced women into marriage; in Yemen, the Secretary General found a link between the presence of armed groups and an increase in forced and early marriage; in Nigeria, Boko Haram rebels abduct women, and force them to into marriages that involve repeated rape through death threats and violence.⁶⁷⁵

Rape may occur in the context of a forced marriage but women are also subjected to forced marriage as a consequence of having first been raped. In Somalia, Sudan, Syria, and South Sudan, survivors of rape are often forced to marry their rapists as a form of restitution or reparation for the crime committed against them.⁶⁷⁶ For example, a court in Sudan ordered a fourteen-year-old victim who became pregnant as a result of rape to marry the perpetrator as a form of traditional settlement.⁶⁷⁷

Although the most common cases of forced marriage in conflict involve situations where women are abducted against their will, during the Khmer Rouge regime the State systematically forced both parties to enter into marriage against their will. Authorities forced approximately 400,000 Cambodians were forced into marriage during the years of Khmer Rouge control (1975-79).⁶⁷⁸ The Khmer Rouge held formal mass weddings in which both parties were forced into marriage through threats, sexual violence,

[kok-cooperatives](#); see also *Prosecutor v. Nuon Chea and Others*, Closing Order, 002/19-09-2007-ECCC-OCIJ, 5 September 2010, ¶¶ 841-61 (stating the “Regulation of Marriage” facts to be examined during trial); see also THERESA DE LANGIS, ET. AL., LIKE GHOST CHANGES BODY: A STUDY ON THE IMPACT OF FORCED MARRIAGE UNDER THE KHMER ROUGE 34-35 (October 2014), (discussing the “regulation of marriage” indictment at the ECCC). available at https://kh.boell.org/sites/default/files/forced_marriage_study_report_tpo_october_2014.pdf

⁶⁷¹ Bridgette A. Toy Cronin, *What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime Against Humanity*, 19 Colum. J. Gender L. 539 (2010).

⁶⁷² AFRC Appeals Chamber Decision, at ¶ 196a.

⁶⁷³ Frances Nguyen, *Untangling Sex, Marriage, and Other Criminalities in Forced Marriage*, 6 GOETTINGEN J. OF INTL. L. 13, 27 (2014).

⁶⁷⁴ But no prosecution of LRA criminals for forced marriage as a crime against humanity.

⁶⁷⁵ U.N. Secretary-General, United Nations Security Council: Conflict-Related Sexual Violence 23 March 2015: Report of the Secretary-General (March 23, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf, ¶ 80. The report also noted that the State of Nigeria has not responded adequately to women victims of Boko Haram.

⁶⁷⁶ See *Id.* ¶ 11

⁶⁷⁷ See *Id.*

⁶⁷⁸ *Prosecutor v. Nuon Chea and Others*, Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC-OCIJ, 15 July 2009, ¶ 9.

and physical punishment.⁶⁷⁹ The policy behind this marriage was to increase the population as well as to advance the Khmer Rouge political project of refashioning the nation into a classless society.⁶⁸⁰ The mass forced marriages also could be characterized as controlling women's reproductive capacity to propagate a new generation that supported Khmer Rouge ideology. Thus, although this practice differs from current examples of forced marriage in armed conflict, the reasoning behind it is similar to current rebel groups' (such as Boko Haram and ISIL) desire to control women's reproduction as these groups aspire to statehood.⁶⁸¹

Research has not revealed any definitive jurisprudence either in international criminal law or in international human rights law discussing forced marriage in conflict as torture. Forced marriage in conflict has been recognized by the Special Court for Sierra Leone as a crime against humanity.⁶⁸² However, forced marriage could be analogized to other crimes that do arise to torture, such as rape in conflict. First, forced marriage satisfies the purpose element of torture in conflict similarly to rape. Like rape, it is used as a tactic of war both with strategic objectives of domination and to intimidate, degrade, and to control women.⁶⁸³ Second, like rape in conflict, it satisfies the intent element because intent can be implied if there is a purpose.⁶⁸⁴ Third, like rape, it satisfies the severe pain and suffering element. Not only are women abducted and forced to marry against their will, but they are also often repeatedly raped and subjected to violence over long periods of time under the auspices of marriage.⁶⁸⁵ Finally, under humanitarian law, rape constitutes torture even when perpetrated by non-state actors.⁶⁸⁶

2. *Forced marriage arising from abductions in non-conflict settings*

⁶⁷⁹ See Bridgette A. Toy Cronin, "What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime Against Humanity", 19 Colum. J. Gender L. 539, 548 (2010), *citing* interviews with April 17 Women, in Cambodia (July 6, 11, 18, and 19, 2006), interviews with Base Women, in Cambodia (July 6, 11, 12, 24, and 27, 2006), interview with Base Men, in Cambodia (July 24, 25, and 26, 2006), interview with male soldier, in Cambodia (July 7, 2006), interview with April 17 Man, in Cambodia (July 18, 2006).

⁶⁸⁰ See Filings Before the Trial Chamber Extraordinary Chambers in the Courts of Cambodia, File No. 002/19-09-2007-ECCC/TC, Filed by the Civil Party Lead Co-Lawyers (characterizing the Khmer Rouge's forced marriage policy in Cambodia as aimed towards increasing the population and creating a rapid socialist revolution through the erasure of cultural and religious diversity).

⁶⁸¹ See U.N. Secretary-General, United Nations Security Council: Conflict-Related Sexual Violence 23 March 2015: Report of the Secretary-General (March 23, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf ¶ 84.

⁶⁸² Only the SCLC established that forced marriage is a crime against humanity, recognized as a practice that falls within the category of "other inhuman acts." The Court did not discuss whether forced marriage also constituted torture. See AFRC Appeals Chamber Decision ¶ 183. Scholars have criticized the ICC's decision not to charge Ugandan LRA leader Joseph Kony with the crimes of forced marriage. They see it as a failure of the ICC and Uganda to evolve its understanding of the crime, and properly recognize it as a crime against humanity. See e.g., Frances Nguyen, *Untangling Sex, Marriage, and Other Criminalities in Forced Marriage*, 6 GOETTINGEN J. OF INT'L L. 13, 29 (2014).

⁶⁸³ See U.N. Secretary-General, United Nations Security Council: Conflict-Related Sexual Violence 23 March 2015: Report of the Secretary-General (March 23, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf, ¶1; See also *infra* p. 2, "Rape in Conflict."

⁶⁸⁴ See generally *infra*, "Rape in Conflict." (citing SRT Manfred Nowak 2008 Report).

⁶⁸⁵ This would constitute both physical and mental suffering. As explained in "Rape in Conflict", both severe mental and physical suffering cross the threshold of suffering required for torture. See Alex Obote-Odera, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 New Eng. J. Int'l & Comp. L. 135, 152 (2005).

⁶⁸⁶ See *infra*, "Rape Constitutes Torture Even When Perpetrated by a Non-State Actor", *citing* CAT General Comment 2, ¶18.

Forced marriage is also prevalent in countries that are not in conflict. The practice of “bride-kidnapping” is common in countries in Eastern Europe and Central Asia.⁶⁸⁷ A “bride” is abducted by a group of men who take her to the home of a potential groom.⁶⁸⁸ There, the groom’s family exerts either physical or psychological force to coerce the victim to marry the groom.⁶⁸⁹ Women are often raped at the abductor’s home so that they will be ashamed to return to their parents’ home, and thus, agree to marry the groom.⁶⁹⁰ In Kyrgyzstan, this has been documented with girl victims as young as twelve-years-old.⁶⁹¹

CEDAW and Convention on Consent to Marriage require (1) consent of both parties to enter into a marriage, (2) both parties to be over eighteen-years-old to be able to consent, and (3) all marriages to be legally registered in the country.⁶⁹² Albania, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, the Ukraine, and Uzbekistan have all ratified the Convention on the Consent of Marriage.⁶⁹³ Nevertheless, bride abductions are documented in each of these countries. States facilitate these violations by not enforcing their minimum age to marry, allowing younger people to marry, allowing couples to enter into religious marriages that do not have the same legal age and registration requirements, and not punishing individuals who violate these laws.⁶⁹⁴

Part of the difficulty in ending bride kidnapping is that the countries that practice it view it as a long-standing tradition.⁶⁹⁵ Thus, they may not enforce the laws in place to prevent and punish the practice. For instance, Kyrgyzstan’s criminal code penalizes marriage with anyone younger than sixteen and adds a multi-year prison sentence in case of a violation.⁶⁹⁶ Despite this, Human Rights Watch reports that in prosecuting these crimes, “impunity remains the norm.”⁶⁹⁷ Officials view bride kidnapping as a

⁶⁸⁷ See U.N. Division for the Advancement of Women: Expert Group Meeting on good practices legislation to address harmful practices against women: Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws From Other Countries: Expert Paper Prepared by Cheryl Thomas (25 to 28 May 2009), http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Cheryl%20Thomas%20revised_.pdf, p. 7 [hereinafter *Forced and Early Marriage in Central and Eastern Europe and Former Soviet Union Countries*].

⁶⁸⁸ *Id.* at 7-8.

⁶⁸⁹ While some bride-kidnappings are consensual, where the man and woman agree to marry and to have the potential groom “kidnap” the bride, this is generally not the case. See *Forced and Early Marriage in Central and Eastern Europe and Former Soviet Union Countries*, at 8, http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Cheryl%20Thomas%20revised_.pdf.

⁶⁹⁰ *Id.* at 7-8.

⁶⁹¹ *Id.* at 7.

⁶⁹² The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, November 7, 1962, 32 U.N.T.S. 231, available at <http://www.unhcr.ch/html/menu3/b/63.htm>; Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 1, 1981, available at <http://www1.umn.edu/humanrts/instree/elcedaw.htm>

⁶⁹³ All of the countries mentioned except for Azerbaijan and Kyrgyzstan have also ratified CEDAW. See *Forced and Early Marriage in Central and Eastern Europe and Former Soviet Union Countries*, at 8, http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Cheryl%20Thomas%20revised_.pdf.

⁶⁹⁴ *Id.* at 10.

⁶⁹⁵ *Id.* at 7.

⁶⁹⁶ See OFFICE OF THE SECRETARY-GENERAL’S ENVOY ON YOUTH, *New Law in Kyrgyzstan Toughens Penalties for Bride Kidnapping*, (September 1, 2013), <http://www.un.org/youthenvoy/2013/09/new-law-in-kyrgyzstan-toughens-penalties-for-bride-kidnapping/>; Art. 155 of Kyrgyzstan Criminal Code.

⁶⁹⁷ HUMAN RIGHTS WATCH, *Kyrgyzstan*: UPR Submission 2014 (December 2014), <https://www.hrw.org/news/2014/12/18/kyrgyzstan-upr-submission-2014>

consensual tradition.⁶⁹⁸ In 2006, Human Rights Watch reported that in Kyrgyzstan approximately 40 percent of women living in cities and 60 to 80 percent of women living in villages had been victims of the crime.⁶⁹⁹ Bride kidnapping is also a crime in Uzbekistan and Georgia, yet the practice remains pervasive.⁷⁰⁰

The level of suffering for abducted women forced to marry a man against their will is severe. A report on Tajikistan documented cases of 14- and 15 year-old girls who were forced to marry men attempted suicide.⁷⁰¹ In one of the rare cases where a man was convicted and sentenced to six years of prison for abducting, raping, and forcing a woman to marry him, the nineteen-year-old university student who he had subjected to all of those crimes hung herself.⁷⁰² Even if women are not raped when abducted, the cultural assumptions in the areas in which bride abductions are practiced are that the victims are no longer virgins after being abducted.⁷⁰³ In conservative societies, this causes great social stigma that forces women to marry their abductors.⁷⁰⁴ Even if victims escape their captors, their families often ostracize them.⁷⁰⁵ In addition to the mental trauma caused by the coercion to marry, domestic violence is especially prevalent in marriages that result from kidnapping.⁷⁰⁶

Research has not revealed any international jurisprudence that recognized forced marriage resulting from abductions as a form of torture. CAT has identified child marriage as a form of cruel, inhuman, and degrading treatment, but kidnappings may occur with women who are no longer children. The level of suffering that women encounter in these situations, along with the pervasive impunity that States exercise in prosecuting it, suggest that bride kidnapping constitutes torture. First, it satisfies the purpose element through discrimination—women are the only victims of bride-kidnappings. Second, it satisfies the severe pain and suffering element—as explained above, women and girl’s suffering is so severe in these circumstances that they often commit suicide rather than live in that forced marriage. Third, even though the state does not directly commit the crime, it fails to exercise due diligence in preventing and prosecuting it.

⁶⁹⁸ <http://hrw.org/reports/2006/kyrgyzstan0906/>.

⁶⁹⁹ HUMAN RIGHTS WATCH, *Reconciled to Violence*, (September 2006) <http://hrw.org/reports/2006/kyrgyzstan0906/>, at p. 90.

⁷⁰⁰ Seventeen percent of Georgian women marry before the age of 18. *See* Forced and Early Marriage in Central and Eastern Europe and Former Soviet Union Countries.

http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Cheryl%20Thomas%20revised_.pdf. In June 2015, Human Rights Watch wrote a letter to U.N. Secretary General Ban Ki Moon in anticipation of his trip to Central Asia. In it, HRW reminded the U.N. Secretary that the problem of bride-kidnapping remained rampant in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan despite legislative reforms. *See* HUMAN RIGHTS WATCH, *HRW Briefing Memorandum Submitted to Ban Ki-moon* (June 8, 2015), <https://www.hrw.org/news/2015/06/08/hrw-briefing-memorandum-submitted-ban-ki-moon>

⁷⁰¹ THE ADVOCATES FOR HUMAN RIGHTS, *Don’t let them stay in school: “Domestic Violence in Tajikistan,”* (October 2008) at 23.

⁷⁰² HUMAN RIGHTS WATCH, *Kyrgyzstan: UPR Submission 2014* (December 2014), <https://www.hrw.org/news/2014/12/18/kyrgyzstan-upr-submission-2014>

⁷⁰³ *See* Forced and Early Marriage in Central and Eastern Europe and Former Soviet Union Countries, at 8, http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Cheryl%20Thomas%20revised_.pdf.

⁷⁰⁴ *Id.*

⁷⁰⁵ *See* Forced and Early Marriage in Central and Eastern Europe and Former Soviet Union Countries, at 8, http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Cheryl%20Thomas%20revised_.pdf

⁷⁰⁶ HUMAN RIGHTS WATCH, *Reconciled to Violence*, (September 2006) <http://hrw.org/reports/2006/kyrgyzstan0906/>, at p. 117; *see also* .

THE ADVOCATES FOR HUMAN RIGHTS, *“Don’t let them stay in school:” Domestic Violence in Tajikistan*, (October 2008) at 23.

3. Child or early marriage

The Committee against Torture has recognized that child marriage may constitute cruel, inhuman or degrading treatment, particularly where governments have failed to establish a minimum age of marriage that complies with international standards.⁷⁰⁷ CAT and CEDAW have also identified child marriage as a harmful practice that leads to the infliction of physical, mental or sexual harm or suffering, with both short- and long-term consequences, and negatively impacts on the capacity of victims to realize the full range of their rights.⁷⁰⁸ Not only is there lack of consent,⁷⁰⁹ but girls who enter child marriage often become pregnant soon thereafter. These pregnancies constitute severe suffering not only from a psychological perspective, but also from a health perspective—girls giving birth between the ages of 10 and 14 are five times more likely die during childbirth than women giving birth between the ages of 20 and 24.⁷¹⁰ Child marriage also places girls at greater risk of domestic violence and marital rape.⁷¹¹

The Committee on the Elimination of Discrimination against Women and other treaty bodies require States to register births and marriages as a means to facilitate monitoring of the age of marriage and to support the effective implementation and enforcement of laws on the minimum age of marriage.⁷¹² CAT has urged states where early and child marriage is practiced to raise the minimum legal age of marriage for girls to eighteen-years-old, to properly monitor the registration of all marriages to monitor their legality, to not legally recognize marriages child marriages, and to prosecute the perpetrators of these marriages.⁷¹³

⁷⁰⁷ See the Comm. Against Torture, *Concluding Observations on Bulgaria*, ¶ 26, U.N. Doc. CAT/C/BGR/CO/4-5 (14 December 2011); see also Comm. Against Torture, *Concluding Observations on Yemen*, ¶31 U.N. Doc. CAT/C/YEM/CO/2/Rev.1 (25 May 2010).

⁷⁰⁸ See e.g., Comm. on the Elimination of Discrimination Against Women, *Concluding Observations on Montenegro*, ¶ 39 U.N. Doc CEDAW/C/MNE/CO/1 (October 21, 2011); Comm. on the Rights of the Child, *Concluding Observations on Mauritania*, ¶ 69 U.N. Doc. CRC/C/MRT/CO/2 (17 June 2009); Comm. on the Rights of the Child, *Concluding Observations on Togo*, ¶ 55 U.N. Doc. CRC/C/TGO/CO/3-4, (8 March 2012); Comm. on the Elimination of Discrimination Against Women, *Concluding Observations on Zambia*, ¶¶29-30 U.N. Doc. CEDAW/C/ZMB/CO/5-6 (27 July 2011); Comm. Against Torture, *Concluding Observations on Bulgaria*, ¶ 26, U.N. Doc. CAT/C/BGR/CO/4-5 (14 December 2011)

⁷⁰⁹ Certain kinds of treatment became cruel, inhuman or degrading only because they were administered without the subject's free consent. E/CN. 4/56 (Working Party); Third Committee, 13th Session in 1958; M. J. BOSSUYT, GUIDE TO THE 'TRAVAUX PREPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS' (1987), 147 and 158 respectively cited in Alice Edwards, *The 'Feminizing' of Torture under International Human Rights Law*.

19 LEIDEN JOURNAL OF INTERNATIONAL LAW 349, 363 (2006). (arguing that the lack of consent argument applied to FGM because the victims are generally below the age of consent, that is, children).

⁷¹⁰ HUMAN RIGHTS WATCH, *Marry Before Your House is Swept Away: Child Marriage in Bangladesh*, HUMAN RIGHTS WATCH, (June 9, 2015), <https://www.hrw.org/report/2015/06/09/marry-your-house-swept-away/child-marriage-bangladesh>.

⁷¹¹ Special Rapporteur on Violence Against Women, its Causes and Consequences, *Mission to Azerbaijan*, Rashida Manjoo, ¶ 16 U.N. Doc. A/HRC/26/38/Add.3 (18 June 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/056/73/PDF/G1405673.pdf?OpenElement>.

⁷¹² The Committee Against Torture, the Committee on the Rights of the Child, and the Committee on the Elimination Against Women have all stated this principle. See U.N. Human Rights Council, *Preventing and eliminating child, early and forced marriage : Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/26/22 (2 April 2014), available at <http://www.refworld.org/docid/53999c1b4.html>.

⁷¹³ See Comm. against Torture, *Concluding Observations on Bulgaria*, ¶ 26, U.N. Doc. CAT/C/BGR/CO/4-5 (14 December 2011); see also Comm. against Torture, *Concluding Observations on Yemen*, ¶31 U.N. Doc. CAT/C/YEM/CO/2/Rev.1 (25 May 2010), citing CEDAW recommendations (CEDAW/C/YEM/CO/6, para. 31. .

Despite CAT's and CEDAW's ongoing statements regarding child marriage, it continues to be a prevalent practice around the world. In its country recommendations for Bulgaria in 2011, CAT expressed concern that Roma girls as young as 11 were entering into marriages.⁷¹⁴ Human Rights Watch has also issued reports on child marriage in Malawi, Yemen,⁷¹⁵ Tanzania, and South Sudan.⁷¹⁶ The organization also reported on the practice in Nepal, Bangladesh, Niger, Central African Republic, and Chad.⁷¹⁷ The cases of child marriage are not limited to these countries. Worldwide, 700 million women alive today were married before the age of 18, and 250 million of them were married before the age of 15.⁷¹⁸

The context in which child marriage occurs in Bangladesh illustrates the difficulty of eradicating this practice. Parents riddled in poverty cannot afford to put their daughters through school, and, instead they choose to marry them to relieve themselves of that economic burden.⁷¹⁹ Although primary education formally is free in Bangladesh, families cannot afford the transportation to school, school supplies, and associated expenses for their children.⁷²⁰ Further, girls are at a disadvantage in obtaining stipends that require regular school attendance to cover additional education costs. Schools often lack private and hygienic bathrooms that girls could use during menstruation, so they miss school an average of three days during their menstrual cycle.⁷²¹ Thus, since parents view sons as "future economic providers," and daughters as economic burdens destined for marriage, they are more likely to pull their girls out of school and marry them off when money is short.⁷²² Between 2005 and 2013, 29 percent of girls were married before the age of 15, and 65 percent of girls before the age of 18.⁷²³ And while the government recently expanded birth registration to have an accurate reflection of a child's age with the goal of reducing underage marriages, HRW reports that public officials often take bribes to falsify birth certificates and

⁷¹⁴ See the Comm. against Torture, *Concluding Observations on Bulgaria*, ¶ 26, U.N. Doc. CAT/C/BGR/CO/4-5 (14 December 2011).

⁷¹⁵ Yemen's record on child marriage is especially poor. "The United States Department of State "2010 Human Rights Report: Yemen", of 8 April 2011 found that there was no minimum age of marriage, and girls were married as young as age eight. A February 2009 law setting the minimum age for marriage at age 17 was repealed. According to a 2009 MSAL study, a quarter of all girls were married before they were 15 years old. The law has a provision that forbids sex with underage brides until they are "suitable for sexual intercourse," an age that is undefined. An Oxfam International study calculated that among 1,495 couples, 52 percent of women and 7 percent of men were married at an early age. The report also highlighted that 15-16 years was generally considered the appropriate age of marriage for girls, depending on region and socioeconomic status. See also, Amnesty International report "Yemen's Dark Side - Discrimination against Women and Girls", of November 2009, and the Human Rights Watch report "How Come You Allow Little Girls to Get Married? Child Marriage in Yemen", of December 2011, support the above-mentioned findings concerning women and children by the U.S. Department of State. "

⁷¹⁶ HUMAN RIGHTS WATCH, *Child*

⁷¹⁷ HUMAN RIGHTS WATCH, *Marry Before Your House is Swept Away: Child Marriage in Bangladesh*, HUMAN RIGHTS WATCH, (June 9, 2015), <https://www.hrw.org/report/2015/06/09/marry-your-house-swept-away/child-marriage-bangladesh>.

⁷¹⁸ UNICEF, *Ending Child Marriage: Progress and Prospects*, p. 2, available at http://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR.pdf.

⁷¹⁹ HUMAN RIGHTS WATCH, *Marry Before Your House is Swept Away: Child Marriage in Bangladesh*, HUMAN RIGHTS WATCH, (June 9, 2015), <https://www.hrw.org/report/2015/06/09/marry-your-house-swept-away/child-marriage-bangladesh>.

⁷²⁰ *Id.*

⁷²¹ *Id.*

⁷²² *Id.*

⁷²³ *Id.* at Summary.

indirectly facilitate child marriage.⁷²⁴ Currently, the government is advocating law reform to reduce the legal age of marriage for girls from 18 to 16-years-old, which will only exacerbate the problem.⁷²⁵

Child marriage, however, cannot be solely blamed on poverty. In Azerbaijan, where UNICEF documented more than 5,000 girls were victims of early marriages in 2013,⁷²⁶ only 7 percent of parents cited economic reasons for marrying off their child and adolescent daughters.⁷²⁷ Forty-five percent of parents cited concern for their daughters' future, 29 percent customs and traditions, and 19 percent the girls own will.⁷²⁸ Thus, countries cannot evade responsibility for addressing this issue based on economic reasons. States must act to end this discriminatory practice.

Some of the existing legal remedies for forced marriage in Western countries are protective orders (for either current victims of potential future victims) and nullity proceedings.⁷²⁹ The marriage can be nullified on the grounds that it was entered into under duress or that it failed to observe the minimum age regulations.⁷³⁰ In countries where the practice itself is not criminalized, perpetrators can be prosecuted for threatening behavior, assault, kidnapping, rape, or other crime. Although human rights jurisprudence has not directly addressed the issue of forced marriage, at least one scholar has built strong arguments that forced marriage could trigger protections under Article 3 and Article 8 of the European Convention of Human Rights.⁷³¹

Preliminary Questions for Panel V

- **Question:** Discriminatory practices such as forced marriage and FGM are often discussed under the umbrella of “cultural practices.” These practices, however, are widespread among many cultures around the globe. Given that these cultures are distinct from each other aside from the widely accepted dominance of men and the harmful practices that assert their dominance, what, if anything, could be gained from calling these practices “patriarchal” instead? Should State due diligence encompass eradicating other seemingly less harmful patriarchal practices that perpetuate practices such as FGM and forced marriage?
- **Question:** Research revealed that perpetrators of child marriage include parents who marry daughters off rather than support their education. Given that girls and women may be hesitant to report their illegal marriage to authorities when it may imply sending family members to prison, are high criminal penalties the best remedy to eliminate child marriage? What are other strategies that states could use to end this practice? How would they best be able to fulfill their due diligence obligations to eliminate the practice?
- **Question:** Countries that require mutual consent for marriage often prescribe nullity proceedings as a judicial remedy. Because of the extent of a victim’s suffering, however, this remedy may not be fully adequate—a woman may have lost years of education and lack the skills to be economically independent from an unwanted husband, be suffering of health consequences

⁷²⁴ *Id.*

⁷²⁵ *Id.*

⁷²⁶ Special Rapporteur on Violence Against Women, its Causes and Consequences, *Mission to Azerbaijan, Rashida Manjoo*, ¶ 16 U.N. Doc. A/HRC/26/38/Add.3 (18 June 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/056/73/PDF/G1405673.pdf?OpenElement>.

⁷²⁷ *Id.*

⁷²⁸ *Id.*

⁷²⁹ Shazia Choudhry, *Forced Marriage: the European Convention on Human Rights and the Human Rights Act 1998*, in 67, 68 FORCED MARRIAGE: INTRODUCING A HUMAN RIGHTS AND SOCIAL JUSTICE PERSPECTIVE (Aisha K. Gill and Sundari Anitha, eds. 2011) (discussing current legal redress for forced marriage in the United Kingdom).

⁷³⁰ *Id.*

⁷³¹ *Id.* at 72-83.

stemming from early pregnancies, and have mental distress of domestic violence. What are adequate remedies States should provide to victims of forced marriage?

- **Question:** Research reveals that the most common actors who perform FGM on girls have themselves been victims of FGM. Given that those women may likely have deeply-held beliefs about the appropriateness of FGM, what are successful strategies or best practices to change cultural attitudes in communities where this practice is prevalent?