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Ending Torture. Seeking Justice for Survivors

Redress for Rape

Using international jurisprudence on rape as a form of torture or other ill-treatment

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This report was researched and written by Sarah Fulton, International Legal Officer at REDRESS. It was edited by Mariana Goetz and Carla Ferstman, also of REDRESS. Significant input into research and drafting was provided by Arianna Rafiq, with additional support from Inga Matthes. The report draws heavily on and is informed by discussions and previous work done with REDRESS by Vahida Nainar, who has consulted with the organisation on gender aspects of its work, and the Manual on Litigation Strategies for Sexual Violence in Africa authored by her and published by REDRESS in 2012. The report also draws on discussions held with numerous activists, academics and lawyers working on these issues, including the very fruitful conference co-hosted with Amnesty International on Gender and Torture in London in May 2011, a roundtable held with INTERIGHTS on domestic violence and torture in Geneva in June 2012 and regional meetings in Uganda and Nepal in April and June 2012. It also draws heavily on the writings of numerous academics in the field – a number of them participants in those meetings. The author would like to thank all of the participants at those meetings for their thoughtful insights and sharing of practical experiences, and hopes that this report will help to continue the conversation.

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INTRODUCTION

Rape is an egregious crime with devastating consequences for victims. However, until relatively recently it has not been the subject of serious attention within the international human rights law framework. Rape – at both the domestic and international level – was traditionally largely invisible, or trivialised as a "private matter", an unfortunate incident, the result of a woman's careless conduct, or the inevitable result of war.[1] As such, it was not cast as the responsibility of states, was rarely addressed in international human rights discourse, and was not to be found explicitly within the human rights violations prohibited by the core international conventions adopted during the course of the twentieth century.[2]

The past two decades have seen a significant normative change in this area. It is now clearly established at the international level that rape is a crime of the highest order, that states *do* have the responsibility to prevent and respond to it, whoever commits it, and that survivors of rape are entitled to the same level of protection and response as any other victim of violence. This normative change has started to have an impact in achieving accountability in some high profile individual cases, has increased scrutiny by international human rights bodies on the practices of states, and may have helped to improve responses of authorities in some jurisdictions. However the reality is that rape continues on a massive scale, and the majority of victims of rape around the world – both women and men – face almost insurmountable barriers to justice.

This report hopes to provide a useful resource for those seeking to build upon these developments, helping to translate them into change for individuals and communities. It does so by focusing on one strategy which has been fruitfully used both to bring rape within the international legal framework, and to seek justice in individual cases: making the link between rape and torture and other prohibited ill-treatment.

Rape as a form or torture or other prohibited ill-treatment

Torture and cruel, inhuman or degrading treatment[3] are high profile international crimes and human rights violations, which states all over the world have committed to preventing and punishing. Lawyers and women's advocates have drawn on the torture framework in both international humanitarian law and international human rights law to pursue individual cases and to push for policy change in responses to rape at the domestic level.

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[1] See Jennifer Temkin, *Rape and the Legal Process* (Oxford: Oxford University Press, 2002). See also Drew Humphries (2009), *Women, Violence, and the Media: Readings in Feminist Criminology,* University Press of New England; Colleen A. Ward (1995), '*Attitudes Toward Rape: Feminist and Social Psychological Perspectives'*, SAGE, p. 44; Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law', *European Journal of International Law,* 5 (1994), 326-41 at p.334; Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', *McGill Law Journal,* 46 (2000), 217-40 at pp.220-21; Catharine MacKinnon, *Are Women Human?: And Other International Dialogues* (Belknap Press, 2006) at pp. 23 and 25.

[2] Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law', *Leiden Journal of International Law,* 19 (2006), 349-91 at 349; citing Anne Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly,* 19 (1997), 283-333 at pp.290-91.

[3] For simplicity this report will refer to cruel, inhuman and degrading treatment as "other ill-treatment", and torture and other ill-treatment together as "prohibited ill-treatment".

The dialogue on rape as torture has arguably underscored the seriousness of rape as a crime, drawn out the "public" aspects of what is often considered a "private crime", has demonstrated why and how states are responsible when rape is committed by private individuals, opened up new avenues for justice, brought attention to rape against men, as well as bringing to light the sexual violence that had been a largely unspoken part of what was recognised as 'traditional torture' by state officials in places of detention.

On the other hand, questions have been raised about making the link. Is the prohibition of torture and other ill-treatment, with its entrenched meanings, the best vehicle to address rapes? Do all rapes qualify as torture? And is there a risk that using the torture framework casts women in the inevitable role of victim?

The report

The primary aim of this report is to bring together the developing international human rights law jurisprudence and significant other writing linking rape and torture and other ill-treatment in a comprehensive and useable way, so that it can be drawn on by lawyers and activists working on issues or individual cases of rape. In doing so, it also seeks to show how using international human rights law can help to challenge entrenched and often discriminatory barriers to justice faced when seeking accountability or other forms of justice for rape.

It is hoped that his will be useful both for lawyers, in putting together their cases at the domestic and international level, and for lawyers and others working on legal and policy reform, providing supporting arguments for why a state is required by its international obligations to make such changes.

Although, for simplicity, the report focuses on rape, many of the issues covered – particularly as they relate to states' obligations to prevent and respond to private harm – may also be helpful in litigation and advocacy on other forms of violence committed outside places of state detention, including domestic violence, "honour" killings and reproductive rights violations.

The report is divided into three main parts. **Part I** provides the foundation for the rest of the report by setting out the understandings of torture and other prohibited ill-treatment under international law, and how these have been influenced by debates on the nature of privately-inflicted ill-treatment. It then goes on to explore why, and how, it has been argued that it is important to recognise that rape amounts to torture or other ill-treatment. Finally, it examines criticisms that have been made of these linkages, and areas for further clarification in the jurisprudence. This part concludes that, although it has limitations – the framework of torture and other ill-treatment provides a useful lens through which to view rape, and a mechanism to address systemic issues and individual cases through advocacy and litigation.

Part II sets out a number of practical examples of how – in different settings –international human rights law, and particularly the prohibition of torture and other ill-treatment, has been useful to seeking justice in individual cases. The cases chosen reflect a number of different ways in which this has been done – through providing a venue to challenge the imposition of only a minor punishment for rape by an immigration official, to challenging barriers to justice in domestic laws such as statutes of limitation, bringing a constitutional claim to force police to investigate and prosecute rape by private actors, or holding consular officials accountable for failing to provide appropriate services to a victim of rape who sought their help.

Part III is the main section of the report, which sets out the key international jurisprudence under the elements that are usually required to prove torture or other ill-treatment within the international human rights framework. This part explores in detail both how rape has been seen to fit within the elements of torture and other ill-treatment (as examined in Part I), and where states may be held accountable for it: whether because it was committed by their own officials, because they failed to prevent it, or because they failed to respond appropriately by gender-sensitive investigations, prosecutions and reparation.

It is hoped that this Part will help litigants to draw upon the most progressive jurisprudence in international human rights and humanitarian law specifically related to rape to argue their cases. Although it is designed with litigants in mind, this part should also be helpful to inform broader policy debates on the issues raised – including standards of investigation and prosecution, the criminalisation of rape, the treatment of victims of rape through judicial proceedings, and the requirement to provide reparation to victims.

In all, it is hoped that this report will provide both the context, and the content, to draw upon progressive developments in international human rights law both in domestic and international litigation and advocacy. Although the traditional human rights law framework is only one way to challenge the continuing perpetration of sexual violence and states' failure to respond to it, and to seek the justice that is owed to victims, it is an important and useful one.

PART I: CONTEXT & CONTROVERSIES

This Part sets the context and foundation for the rest of the report by examining the reasons why rape has been increasingly, and deliberately, recognised as a form of torture or other prohibited ill-treatment under international law. In addition, it considers some of the criticisms that have been made of linking the two, areas for further development, and the continuing relevance of using the torture and other ill-treatment framework in this way.

As a necessary precursor to that discussion, however, Section A gives a detailed summary of understandings of torture and other prohibited ill-treatment under international human rights law, and the nuances in approach between different bodies and under different treaties. Although there is international consensus that both torture and cruel, inhuman and degrading treatment are prohibited, that such conduct must reach a minimum level of severity, and that torture must be committed for a specific purpose, there is still debate about the extent to which a state actor must be involved to make an act "torture". These are issues which are important for the resulting discussion on how rape is viewed in the context of the overall prohibition.

A. UNDERSTANDINGS OF TORTURE AND OTHER ILL-TREATMENT

1. The prohibition of torture and other ill-treatment in international law

Whether in war or peacetime, there is a clear and absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment ("other ill-treatment") in international law. The prohibition of torture is of the highest order, known as a peremptory norm, or *jus cogens*, so that derogation both in treaties and custom is precluded.[4]

The prohibition of torture and other ill-treatment is directed both at individuals and at states. In relation to individuals, torture and other ill-treatment are crimes in both peacetime and war. For States, international humanitarian law and international human rights law impose obligations to prevent and respond to torture and other ill-treatment.[5]

Torture and other ill-treatment by combatants are specifically outlawed as war crimes under the four Geneva Conventions of 1949, and are considered crimes of such seriousness as to amount to grave breaches of those Conventions, giving rise to universal jurisdiction.[6] Torture and inhuman

[4] See International Court of Justice ("ICJ"), *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal*), Judgment on the Merits of 20 July 2012 at para. 99; ICTY, *Prosecutor v Furundžija* (1998) Case No. IT-95-17/1-T, Trial Chamber judgment of 16 November 1998, at paras. 153-4.

[5] Stephen Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* (Intersentia, 2011) at pp.40ff.

[6] First Geneva Convention, Article 50; Second Geneva Convention, Article 51; Third Geneva Convention, Article 130; Fourth Geneva Convention, Article 147. Common Article 3 of the Geneva Conventions prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons *hors de combat*. See also specific provisions outlawing torture: First Geneva Convention, Article 12, second paragraph ("torture"); Second Geneva Convention, Article 12, second paragraph ("torture"); Third Geneva Convention, Article 17, fourth paragraph ("physical or mental torture"), Article 87, third paragraph ("torture or cruelty") and Article 89 ("inhuman, brutal or dangerous" disciplinary punishment); Fourth Geneva Convention, Article 32 ("torture" and "other measures of brutality"). The prohibition of torture and outrages upon personal dignity, in particular humiliating and degrading treatment, is recognized as a fundamental guarantee for civilians and persons hors de combat by

treatment as war crimes and torture and other inhumane acts as crimes against humanity were explicitly within the jurisdiction of international criminal tribunals for the former Yugoslavia and Rwanda, and are similarly included in the Statute of the International Criminal Court.[7]

Torture and cruel, inhuman and degrading treatment or punishment are also prohibited under general international human rights instruments, including the Universal Declaration of Human Rights,[8] the International Covenant on Civil and Political Rights ("ICCPR"),[9] and each of the major regional human rights treaties.[10] The prohibition of torture is also expressed in more specific human rights treaties including the Convention of the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of Migrant Workers.[11]

Finally, torture and other ill-treatment are also specifically addressed by the widely-ratified Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("Convention against Torture"), adopted in 1984, and the Inter-American Convention to Prevent and Punish Torture, adopted in 1985.[12] These two treaties were ground breaking in that – as well as further defining the states' responsibilities to prevent and respond to torture – they require states to investigate and either prosecute or extradite suspected perpetrators found on their territory, wherever the torture occurred.[13] Monitoring mechanisms designed to prevent torture in places of detention have also been established through the European Convention and the Optional Protocol to the Convention against Torture.[14]

Additional Protocols I and II: Additional Protocol I, Article 75(2) (adopted by consensus); Additional Protocol II, Article 4(2) (adopted by consensus).

[7] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), Art. 2 and Art. 5; Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), Art. 3 and Art. 4; Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002, Art. 7 and Art. 8.

[8] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 5.

[9] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Art. 7.

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, ("European Convention on Human Rights" or "ECHR") Art. 3; American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) ("American Convention on Human Rights"), Art. 5; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 ("African Charter on Human Rights" or "African Charter"), Art. 14; Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 Hum. Rts. L.J. 151 (1997) (not yet in force), Art. 13.

[11] Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, Art. 37(a); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003, Art. 10; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, Art. 15.

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987; Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992) ("Inter-American Torture Convention").

[13] CAT, Art. 2(1), Arts. 5-7; Inter-American Torture Convention, Arts. 2-3, 8, 11-14.

[14] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, entered into force Feb. 1, 1989; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002, 42 I.L.M. 26 (2003), *entered into force* June 22, 2006.

2. Understandings of torture and other ill-treatment

Despite the strong prohibition against torture and other ill-treatment in international law, these terms have not usually been defined in treaties outlawing their use. This has led to differing jurisprudence across international and regional bodies about what the exact elements of "torture" and "other ill-treatment" are, and the distinction between the two.[15]

Furthermore, torture is in an unusual position in international law, with the term used to refer both to the human right to be free from such treatment guaranteed by states, and to the crime under international law, which may be committed during armed conflict or in peacetime.[16] There are important structural differences between the different bodies of law, with human rights directed primarily at states, criminal law directed essentially at individuals, and humanitarian law directed at parties to the conflict.[17] This has impacted on the understanding of what amounts to "torture" in each context.

Nevertheless, there are certain elements that are generally accepted as being central to the notions of torture and other ill-treatment, and there appears to be growing convergence between international courts' and bodies' understanding of the terms. This section will examine those understandings, and how they impact on conceptualising rape as torture.

2.1. Distinguishing torture and other ill-treatment

International human rights law prohibits *both* torture and other ill-treatment, and imposes obligations on states to prevent and respond to both. Therefore, in many situations there is little practical difference whether rape is recognised as a form of prohibited ill-treatment, or "torture".[18] Nevertheless, there are rhetorical differences in the degree of stigma attached to torture, and there may be practical differences relevant in a particular case – the international crime of torture imposes on states the obligation to prosecute or extradite any suspect on their territory, for example. It is therefore important to understand how different bodies have distinguished the two before looking to the types of distinctions made when it comes to rape in particular.

Each international human rights body is guided by the wording of its governing treaty in its understanding of what amounts to prohibited ill-treatment, and what is required for such ill-treatment to amount to torture. Until relatively recently in the human rights sphere courts and bodies (with the exception of the Committee Against Torture and the Inter-American Commission and Court on Human Rights), had tended not to make the distinction between the two categories of conduct, although most are now more willing to do so.[19]

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[15] In Alice Edwards' view, "[a]rticulating the meaning of 'torture' and other forms on inhuman treatment under international law continues to be one of the greatest juridical challenges for the UN treaty bodies, and other international courts and tribunals": Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) at p.205. For an in-depth study of the definition of torture under international law see Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law*.

[16] For a further discussion on the implications of this see Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* at p. 39ff.

[17] Ibid., at p. 39.

[18] See, eg. IACtHR, *González et al. v Mexico ("Cottonfields Case")* (2009) Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 215 at Separate Opinion of Judge Medina Quiroga at para. 2.

[19] For the Human Rights Committee see, eg. HRCtee, *Giri v Nepal* (2011) Comm. No. 1761/2008, Views dated 28 April 2011, CCPR/C/101/D/1761/2008 at para. 7.5 ("Nevertheless, the Committee considers it appropriate to identify

Each of the major treaties referred to above prohibits "torture or cruel, inhuman or degrading treatment or punishment", apart from the European Convention, which does not include the word "cruel".[20] The different types of prohibited ill-treatment are not, however, defined in the treaties prohibiting the conduct.

2.2. Other ill-treatment under international human rights law

It is generally accepted that there is a minimum threshold to be met for conduct to amount to one of the forms of prohibited ill-treatment. The European Court has held, for example, that for conduct to fall within Article 3 of the Convention, it must reach a "minimum level of severity".[21] The assessment of this minimum is relative, depending on "all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".[22] It is therefore both an objective and subjective test – what effect the treatment was likely to have had on a victim *in the position of the victim*. A similar approach has been taken by the Human Rights Committee.[23] The European Court's approach has also been explicitly followed by the African Commission,[24] which has also stressed that the prohibition is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.[25]

Different approaches have been adopted to the requisite threshold for "cruel" or "inhuman" treatment. Some courts and tribunals have required demonstration of the infliction of "severe" pain or suffering, whether physical or psychological.[26] Others have maintained the "severe pain and suffering" threshold for torture, and have adopted a lower threshold for cruel or inhuman treatment.[27] The European Court has held treatment to be "inhuman" because, among other things, it was premeditated, was applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering.[28]

For degrading treatment, a lower threshold of pain or suffering is required, if the act or combination of acts is carried out in a particularly degrading manner. For example, the European Court has held that treatment will be degrading if it "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[29]

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treatment as torture if the facts so warrant"). For the European Court of Human Rights see, eg. ECtHR, *Aydin v Turkey* (1997) App. No. 57/1996, Judgment of 25 September 1997, at para. 86.

[20] See references cited in n. 9, and CAT, Art. 16.

[21] ECtHR, *Ireland v United Kingdom* (1978) Judgment of 18 January 1978, Series A no. 25 at para. 162.

[22] ECtHR [GC], *El Masri v Former Yugoslav Republic of Macedonia* (2012) App. No. 39630/09, Judgment of 13 December 2012, at para. 196.

[23] See, eg. HRCtee, *Vuolanne v Finland* (1989) Comm. No. 265/1987, Views adopted 2 May 1989, U.N. Doc. Supp. No. 40 (A/44/40) at 311 at para. 9.2.

[24] AfrComHPR, *Huri-Laws v Nigeria* (2000) Comm. No. 225/98, at para. 41.

[25] Ibid., at para. 40; AfrCmHPR, *Curtis Francis Doebbler v Sudan* (2003) Comm. No. 236/2000, at para. 37.

[26] Manfred Nowak, 'Torture and Enforced Disappearance', in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Turku: Institute for Human Rights, Abu Akademi University, 2009) at p. 153. See also International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) ("ICC Elements of Crimes"), elements of the war crime of inhuman treatment (Art. 8(2)(a)(ii)-2): "The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons…". See Rodley's discussion of the three different approaches taken to the severity requirement IN Nigel S. Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn.; Oxford: Oxford University Press, 2011) at pp. 98-99.

[27] Rodley and Pollard, *The Treatment of Prisoners under International Law* at p. 99.

[28] ECtHR, *P & S v Poland* (2012) App. No. 57375/08, Judgment of 30 October 2012 at para. 158.

[29] ECtHR, *Pretty v UK* (2002) App. No. 2346/02, Judgment of 29 April 20112 at para. 52.

The early cases considered by the international human rights mechanisms under their respective articles focussed on the infliction of inhuman and degrading treatment on those in state custody by public officials in situations connected to arrest, detention and interrogation.[30] However, it is now established beyond doubt that the prohibition of inhuman and degrading treatment under those treaties applies to any conduct meeting this threshold, whether committed by a public official or a private actor in any context, and states therefore have a positive obligation to prevent and respond to it.[31] The application of the Convention against Torture, on the other hand, is expressly limited to such conduct when it is "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[32]

2.3. Torture under international human rights law

Torture is recognised as an aggravated, and most serious, form of prohibited ill-treatment, with a particular stigma attached.[33] It also gives rise to certain specific obligations, including – under the Convention against Torture – to exercise universal jurisdiction in relation to perpetrators.[34] However, different bodies have taken different approaches to the distinguishing features between torture and other ill-treatment.

Torture is not defined in the core general human rights treaties which prohibit it including the earliest of those instruments – the European Convention on Human Rights (ECHR) and the ICCPR. In their early jurisprudence these bodies tended not to make findings as to whether conduct amounted to torture specifically, although the European Commission on Human Rights held that torture constitutes an aggravated and deliberate form of inhuman treatment which is directed at obtaining information or confessions, or at inflicting a punishment.[35]

An express definition of torture was included in the 1975 Declaration Against Torture, and introduced into treaties in the 1980s when, concerned at the widespread use of torture as an instrument of state policy during the 1970s, two key torture-specific treaties were adopted. These treaties – the Convention against Torture, adopted in 1984, and the Inter-American Torture Convention, adopted in 1985 – can be seen as hybrid international human rights and international criminal law treaties, as they both codified a system of universal jurisdiction over crimes of torture and elaborated on states' duties to prevent and respond to them.

The criminal law and preventive aspect of these treaties was consciously limited in application to situations where there was state involvement in the crime – whether through commission of the

[30] See, eg. ECmHR, *The "Greek Case"* (1969) Apps. Nos. 3321/67, 3322/67, 3323/67, 3344/67, YB Eur Conv on H R 12 at p. 186. See further Edwards, 'The 'Feminizing' of Torture under International Human Rights Law', (2006) at p. 358; Edwards, *Violence against Women under International Human Rights Law* at p. 206. As Edwards points out, a number of women were among the first applicants to these bodies and "many of the cases involved so-called traditionally 'male' claims of physical abuse, poor prison conditions or disappearances".

[31] For the Human Rights Committee see: HRCtee (1992), 'General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7) ', Forty-Fourth Session, at para. 2; HRCtee (2004), 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ', UN Doc. CCPR/C/21/Rev.1/Add. 13, at para. 8. For the European Court of Human Rights see ECtHR, *A v United Kingdom* (1998) App. No. 25599/94, Judgment of 23 September 1998, at para. 22. This issue is discussed further in Section B, below.

[32] CAT, Article 16.

[33] Nowak, 'Torture and Enforced Disappearance', at p. 154.

[34] CAT, Article 5-7.

[35] ECmHR, *The "Greek Case"* (1969) at p 186.

act by a state official or acquiescence.[36] The Convention against Torture states that, for the purposes of the Convention, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[37]

The Inter-American Torture Convention defined torture, for the purposes of that convention, as:

> any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[38]

It went on to specify that individuals must be held responsible for the crime of torture where it is committed, ordered or acquiesced in by a public official.[39]

However, it was far from clear that these (different) definitions were considered directly applicable to the prohibitions contained in the ICCPR, the European Convention on Human Rights and the American Convention on Human Rights. Courts expressed some opinions on the distinctions between torture and other ill-treatment (examined below),[40] but often skirted the issue by finding a violation of the right generally, without specifying whether or not the conduct amounted to torture. This attitude was summed up in the Human Rights Committee's 1992 general comment on Article 7, where it noted that "the Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied".[41]

2.4. Torture in international criminal law

The meaning and elements of the term 'torture' did, however, receive detailed attention in the context of international criminal law in prosecutions for war crimes and crimes against humanity before the ICTY and ICTR. Although it is explicitly prohibited in the core international humanitarian law conventions, torture was not defined in them.[42] Faced squarely with the issue, the ICTY initially held that the elements of torture under customary international law were the

[36] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988) at pp. 45, 119. For further discussion of this see Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law*.
[37] CAT, Article 1(1).
[38] Inter-American Torture Convention, Art. 2.
[39] *Ibid*., Art. 3.
[40] See, for example, ECtHR, *Ireland v United Kingdom* (1978) 18 January 1978, at para. 167.
[41] HRCtee (1992), 'General Comment No. 20', at para.4.
[42] Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* at p. 48, fn. 140.

same as those enunciated in the Convention against Torture.[43] Later, however, the tribunal moved away from that position – recognising the importance of the structural differences between international criminal law and international humanitarian law, concerned as they are with individuals, and international human rights law, concerned primarily with the responsibilities of states.

In the *Kunarac* judgment, the Trial Chamber undertook an extensive review of the jurisprudence on the meaning of the term "torture" in customary international humanitarian law. Drawing from international human rights law, but recognising the difference between the two branches of law, it concluded that, for its purposes, the elements of torture under customary international law are:

> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
>
> (ii) The act or omission must be intentional.
>
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[44]

According to the tribunal, "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".[45] This finding was not disturbed on appeal,[46] and was later followed by the ICTR in the *Semanza* case.[47]

Since that time there have been further developments through the adoption of the Statute of the ICC and elaboration of elements of crimes. The ICC Statute establishes that "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused" will amount to the crime against humanity of torture when it is committed as part of a widespread or systematic attack against a civilian population.[48] The war crime of torture is defined as the infliction of severe physical or mental pain or suffering for such purposes as "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind".[49]

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[43] ICTY, *Prosecutor v Delalić et al. ("Celebici Case")* (1998) Case No. IT-96-21-T, Trial Chamber judgment of 16 November 1998, at para. 459; ICTY, *Furundžija (Trial Chamber Judgment)* (1998) 16 November 1998, at paras. 160-61.

[44] ICTY, *Prosecutor v Kunarac, Kovac and Vukovic* (2001) Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber judgment of 22 February 2001, at para. 497. This was upheld in the Appeal Chamber Judgment of 12 June 2002.

[45] Ibid., at para. 496.

[46] ICTY, *Prosecutor v Kunarac, Kovac and Vukovic* (2002) Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber judgment of 12 June 2002, at paras. 142-48. Note however that the Appeals Chamber said: "*The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. However, the Appeals Chamber notes that the Appellants in the present case did not raise the issue as to whether a person acting in a private capacity could be found guilty of the crime of torture; nor did the Trial Chamber have the benefit of argument on the issue of whether that question was the subject of previous consideration by the Appeals Chamber*" (at para. 148).

[47] ICTR, *Prosecutor v Semanza* (2003) Cas No. ICTR-97-20-T, Trial Chamber judgment of 15 May 2003, at para. 342 ("outside the framework of the Convention Against Torture, the "public official" requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity"). See also ICTY, *Prosecutor v Krnojelac* (2002) Case No. IT-97-25-T, Trial Chamber judgment of 15 March 2002, at paras. 179 and 87.

[48] Art. 7(2)(e).

[49] ICC Elements of Crimes, Article 8 (2) (a) (ii)-1 and Article 8 (2) (c) (i)-4.

2.5. Current jurisprudence on the distinction between torture and other ill-treatment in international human rights law

The developments referred to above have had an impact on the jurisprudence of the different international and regional human rights bodies that consider claims of violations of the prohibition of torture and other ill-treatment under their respective treaties. There is a large degree of convergence, with some remaining differences in approach, which need to be borne in mind by parties litigating before them. The various bodies have shown themselves to be willing, however, to take into account and draw on each other's jurisprudence in developing their own. There is therefore room for further convergence – particularly if litigants think strategically about the way cases are argued and the jurisprudence of other bodies that are cited.

Below is a brief summary of the current approach expressed by each of the key international and regional human rights mechanisms on the distinction between torture and other ill-treatment.

2.5.1. Human Rights Committee

Despite its previous reluctance to do so, the Human Rights Committee has recently expressed a willingness to "identify treatment as torture if the facts so warrant". In doing so, the Committee has clarified that it draws the distinction between torture and other ill-treatment on "the presence or otherwise of a relevant purposive element".[50]

In reaching this conclusion the Committee stated that it is guided by the definition of torture found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Notably, however, when quoting from Article 1 of the Convention it did not include the words "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", suggesting that it does not consider that the public official requirement is a defining characteristic of torture under the ICCPR. This has also been suggested by some commentators,[51] and is a conclusion supported by its General Comment No. 31, which stresses that "States Parties have to take positive measures to ensure that private persons or entities do not inflict *torture* or cruel, inhuman or degrading treatment or punishment on others within their power".[52]

It should be noted however that the current Chair of the Committee, and former Special Rapporteur on Torture, Sir Nigel Rodley, has expressed the contrary view that the public aspect of the prohibition *is* inherent to the definition of torture in international law. [53] In his view, the effect of the language in the Convention against Torture "is to suggest that the prohibition is not concerned with private acts of cruelty; international concern arises only where cruelty has official sanction".[54]

[50] HRCtee, *Giri v Nepal* (2011) 28 April 2011, at para. 7.5.
[51] See, eg. Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2004) at p. 198 ("…article 7 of the ICCPR may not contain any requirement of public official involvement").
[52] HRCtee (2004), 'General Comment No. 31', at para. 8 (emphasis added).
[53] Rodley and Pollard, *The Treatment of Prisoners under International Law* at pp. 88-89.
[54] Ibid., at p. 88.

2.5.2. European Court of Human Rights

By contrast, the European Court of Human Rights had traditionally focussed on the intensity of pain or suffering inflicted on the victim as the decisive criterion distinguishing torture from other ill-treatment. According to the Court, "the special stigma of "torture" [will] attach only to deliberate inhuman treatment causing very serious and cruel suffering".[55] Sir Nigel Rodley has described this as the "severe-plus" approach to torture.[56] However, subsequent caselaw has been moving away from the understanding of "aggravated" pain and suffering,[57] and the Court has stressed that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future".[58] According to the Court, the "severity" threshold for torture must be judged, like that for other ill-treatment, "on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc".[59] In addition, the Court has increasingly recognised that in addition to the severity of the treatment, a separate distinguishing factor is the purposive element, as recognised in the Convention against Torture, "which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating".[60]

The Court has also given indications that it may be willing to find that acts committed by non-state actors amount to torture,[61] and has in fact made such a finding in a case where official involvement could not be proved.[62] It has not, however, made a finding of "torture" in key high-profile cases of violence by non-state actors, including domestic violence and rape, instead referring to "ill-treatment".[63]

2.5.3. Inter-American Court of Human Rights

The Inter-American Court of Human Rights has traditionally expressed its understanding of the elements of torture as intentional conduct that causes severe physical or mental suffering that is committed with a specific goal or purpose, by a state official or person acting at their instigation.[64]

However, members of the Court have recently adopted different approaches in two cases raising sexual violence determined since that time. In the *Cottonfields* case, the majority did not refer to the treatment inflicted on the victims as "torture", apparently on the basis that it was not committed by a public official or at their instigation.[65] In a strong dissent, Judge Cecilia Medina

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[55] ECtHR, *Ireland v United Kingdom* (1978) 18 January 1978, at para. 167.
[56] Rodley and Pollard, *The Treatment of Prisoners under International Law* at pp. 99-107.
[57] See ibid., at pp.106-11.
[58] ECtHR, *Selmouni v France* (1998) App. No. 22107/03, Judgment of 14 April 1998, ECHR 1999-V at para. 101.
[59] Ibid., at para. 100.
[60] See ECtHR, *Ilhan v Turkey* (2000) App. No. 22277/93, Judgment of 26 June 2000, ECHR 2000-VII at para. 85; ECtHR [GC], *El Masri* (2012) 13 December 2012, at para. 197.
[61] See further Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* at pp. 387-88, citing ECtHR, *Mahmut Kaya v Turkey* (2000), App. No. 22535/93, 28 March 2000, ECHR 2000-III, para. 115. Although cf. ECtHR, *Selmouni v France* (1998) 14 April 1998, at para. 98, where the Court referred to the public official requirement in passing.
[62] ECtHR, *Antropov v Russia* (2009) App. No. 22107/03, Judgment of 29 January 2009, at paras. 38-46. See further Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* at p. 388.
[63] See, eg. ECtHR, *Opuz v Turkey* (2009) App. No. 33401/02, Judgment of 9 June 2009, at para. 161.
[64] IACmHR, *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 at 157. See also IACtHR, *Bueno Alves v Argentina* (2007) Merits, Reparations and Costs, Judgment of 11 May 2007, Series C No. 164 at para. 79, which does not refer to the public official requirement.
[65] Concurring opinion of Judge Cecilia Media Quiroga, IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 9.

Quiroga criticised the majority for importing a public official requirement in the context of the American Convention on Human Rights (as opposed to the Inter-American Torture Convention), and held that the real distinguishing feature between torture and other ill-treatment is the severity of the suffering inflicted.[66]

2.5.4. African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights tends not to make a distinction between torture and other "cruel, inhuman or degrading" treatment.[67]

2.5.5. Committee against Torture

The Committee against Torture, on the other hand, is guided by the definition of torture contained in Article 1 of the Convention against Torture as set out above. In making the distinction between torture and other ill-treatment it has referred specifically to both the purpose element, and the "severity" as relevant distinguishing factors.[68] In relation to its own competence under the Convention, it has clearly maintained the understanding of the "state official" requirement in relation to torture (and other ill-treatment). However, it has recognised that acts of "torture" may also be committed by non-State officials or private actors, and that States may have responsibilities under the Convention against Torture to prevent and respond to such acts.[69] In its General Comment No. 2, adopted in 2008, the Committee explained that:

> 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.[70]

2.5.6. Other understandings

Others have proposed additional elements for the understanding of torture. One of the most high-profile conceptualisations was that of former Special Rapporteur on Torture, Manfred Nowak, who suggested that torture also requires an element of "powerlessness" of the victim,

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[66] Ibid., at para. 3.
[67] Rodley and Pollard, *The Treatment of Prisoners under International Law* at p. 115.
[68] See, CAT (2008), 'General Comment No. 2: Implementation of Article 2 by States Parties', CAT/C/GC/2, 24 January 2008 at para. 10. Note however Rodley's view that, in referring to the severity, "it may be that this comment refers primarily to the lower threshold applicable to degrading treatment, rather than suggesting a distinction on this ground that 'may' be applicable between cruel and inhuman treatment on the one hand, and torture on the other": Rodley and Pollard, *The Treatment of Prisoners under International Law* at pp. 87-8. On this point see also the individual opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete under rule 113 of the Rules of Procedure, CAT, *Hajrizi Dzemajl et al. v Yugoslavia* (2000) Comm. No. 161/1999, Views dated 2 December 2002, CAT/C/29/D/161/2000.
[69] CAT, *Hajrizi Dzemajl et al. v Yugoslavia* (2000) 2 December 2002.
[70] CAT (2008), 'General Comment No. 2', at para. 18.

which is often, but not exclusively, found in detention settings.[71] Nowak explained his conception of this element as follows:

> A situation of powerlessness arises when one person exercises total power over another, classically in detention situations, where the detainee cannot escape or defend him/herself. However, it can also arise during demonstrations, when a person is not able to resist the use of force any more, e.g. handcuffed, in a police van etc. Rape is an extreme expression of this power relation, of one person treating another person as merely an object. Applied to situations of "private violence", this means that the degree of powerlessness of the victim in a given situation must be tested. If it is found that a victim is unable to flee or otherwise coerced into staying by certain circumstances, the powerlessness criterion can be considered fulfilled.[72]

This additional element has proven controversial, and has not yet been considered or applied by other bodies. It is, however, similar to the additional element found in the definition of torture as a crime against humanity in the Rome Statute of the ICC, which requires that the torture is committed "upon a person in the custody or under the control of the accused".[73] According to Vahida Nainar, the "custody or control" requirement gets to the crux of the prohibition, which is the:

> use, or rather the misuse, of what the 'public official' embodies, i.e. *inherent power*, and what 'state sanction' includes, i.e. the *authority*. Since officials' power and authority are portable, similar power and authority may be invested in any person at any point in time. When a person is under the custody or control of another individual the latter is, by default, in a position of power and has some over the former that is being abused by acts of torture.[74]

The idea of custody or control has also been seen to be relevant by the Committee against Torture which, in its General Comment No. 2, stated that:

> each State Party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.[75]

2.5.7. Summary

An overview of this jurisprudence shows that three key aspects of torture reflected in the Convention against Torture definition are now widely accepted as part of the "essence" of torture as both an international crime and a human rights violation: the infliction of severe pain and

[71] UN General Assembly (2008), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak', A/HRC/7/3, 15 January 2008 at para. 28.
[72] Ibid., at para. 28.
[73] Rome Statute, Art. 7(2)(e).
[74] Vahida Nainar, 'Torture by Private Actors: Introducing a Legal Discourse in India', in Vahida Nainar and Saumya Uma (eds.), *Pursuing Elusive Justice: Mass Crimes in India and the Relevance of International Standards* (Oxford, 2013).
[75] CAT (2008), 'General Comment No. 2', at para. 15.

suffering, whether physical and mental; that such act be intentional; and that such suffering be inflicted for a prohibited purpose.[76]

Some divergence still arises in relation to the final aspect – the understanding of the prohibition of torture as limited to acts by public officials, or with their direct acquiescence.[77] While the exact parameters of the definition across all contexts is still a matter of debate, it is clear that the prohibition of torture and other ill-treatment may engage *state responsibility* under international human rights law no matter who commits the act, or in what location it is committed.[78] On the other hand, whether rape committed by a private actor should be called "torture", and whether it amounts to the "international crime" of torture over which states are required to exercise jurisdiction is still an open question in the jurisprudence. These are issues that will be examined further in Section B.

KEY POINTS

- *There is a strong prohibition of both torture and other ill-treatment in international human rights law, international humanitarian and international criminal law.*
- *For an act to amount to prohibited ill-treatment it must generally reach a minimum level of severity. States have obligations under international human rights law to prevent and respond to such ill-treatment.*
- *Torture is one form of prohibited ill-treatment, and states have specific obligations to respond to it. However, different bodies have taken different approaches to what distinguishes torture from other ill-treatment. At the very least it is accepted that torture involves the infliction of severe pain and suffering for a prohibited purpose. For many, and as set out in the definition of the Convention against Torture, there must also be the involvement of a public official. However the state official requirement is increasingly being challenged as an element intrinsic to the concept of torture under international law more generally.*

[76] See Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* .
[77] For a contrary view see Rodley and Pollard, *The Treatment of Prisoners under International Law* at pp. 88-89.
[78] This was made clear by the UN Human Rights Committee as early as 1992 in its first general comment addressing Article 7: HRCtee (1992), 'General Comment No. 20', at para. 2.

B. ADDRESSING THE BLIND SPOT: RECOGNISING RAPE AS TORTURE OR OTHER ILL-TREATMENT

1. Rape in the international legal sphere

Rape, although outlawed under international humanitarian law and implicitly covered by international human rights law, was rarely the subject of international legal attention for much of the twentieth century.

In international humanitarian law, rape has long been considered a war crime.[79] However, it was prohibited as a form of "humiliating treatment", an "outrage upon personal dignity", or an "attack on honour", but was not seen as a crime of violence and was not named in the list of "grave breaches" giving rise to the universal obligation to prosecute.[80] The international criminal tribunals established after World War Two had jurisdiction over rape, but failed, on the whole, to prosecute it. The Nuremburg Tribunal admitted and heard evidence of rape, but rape was never actually charged.[81] In relation to the Tokyo Tribunal, some rape cases were prosecuted, but despite widespread knowledge of the systematic sexual violence committed against 200,000 euphemistically named "comfort women" by Japanese forces, these crimes were not prosecuted at all.[82]

During the 1970s and 1980s there was increasing recognition at the UN level that violence against women was a human rights issue, however the Convention on the Elimination of Discrimination Against Women, adopted in 1979, did not include an explicit provision outlawing such violence.[83]

When international criminal tribunals were set up in the 1990s following conflicts in the Former Yugoslavia and Rwanda, there was again significant evidence of the systematic use of sexual violence against women (and later acknowledged against men), and rape was included in the jurisdiction of the tribunals as both a war crime and crime against humanity. However, such crimes were initially given limited importance by prosecutors, and were noticeably absent from the first papers filed in relation to both tribunals.[84] A report published in 1996 on sexual violence

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[79] See ICTY, *Celebici Case (Trial Judgment)* (1998) 16 November 1998, at para 475-76; Chinkin, 'Rape and Sexual Abuse of Women in International Law', (1994) at p. 331-32; Patricia Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', (2007), http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf, at pp. 5-10.

[80] See Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000) at pp. 220-21. As Copelon remarked, "[i]n this scenario, women were the object of a shaming attack, the property or objects of others, needing protection perhaps, but not the subjects of rights" (at p. 221). See further K. Alexa Koenig, Ryan Lincoln, and Lauren Groth, 'The Jurisprudence of Sexual Violence', (2011), http://www.law.berkeley.edu/HRCweb/pdfs/SVA_Jurisprudence.pdf, at pp. 3-4.

[81] Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000) at p. 221; Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', (2007) at p. 7.

[82] Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000) at pp. 221-23; Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', (2007) at pp. 7-8.

[83] Alice Edwards, 'Everyday Rape: International Human Rights Law and Violence against Women in Peacetime', in Clare McGlynn and Vanessa Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish, 2010), 92-108 at pp. 94-95.

[84] Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000) at p. 224 (re. the ICTR) and p. 29 (re. the ICTY).

during the Rwandan Genocide criticised the "widespread perception among the Tribunal investigators that rape is somehow a 'lesser' or 'incidental' crime not worth investigating".[85]

In international human rights law, women's, and men's, experience of rape were also largely missing from the jurisprudence of treaty bodies and regional human rights courts for much of the twentieth century, including under the prohibition of torture and other ill-treatment.[86] Rape was recognised by the European Commission of Human Rights as a form of "inhuman treatment" in 1976, however very few cases of rape were brought before regional and international mechanisms, and where cases did raise gendered aspects these tended to be ignored or were simply seen as background to other violations, rather than violations in themselves.[87]

Feminist legal scholars argued that this was for two reasons: first, because rape and other violence predominantly committed against women was consistently trivialised compared to types of violence also committed against men (to the point of not even recognising it as violence).[88] As such, violence experienced by women was not regarded as sufficiently serious to warrant international attention. Second, because of international human rights law's traditional focus on "public" acts, and initial understanding that the state needed to be the direct perpetrator of the harm for an act to amount to a human rights violation.[89] As women often experience violence, including rape, at the hands of non-state actors, much of their experience of violence was removed from the scrutiny of traditional international human rights law.[90]

In 1993 the UN General Assembly adopted the Declaration on the Elimination of Violence Against Women, and the first Special Rapporteur on the subject was appointed in 1994.[91] At the same time, academics, and lawyers and activists working with victims of gender based violence in both peacetime and war engaged directly with both international humanitarian law and international human rights law. An important part of the strategy in both spheres during the 1990s and 2000s was ensuring recognition of rape and other forms of violence predominantly committed against women within the framework of the prohibition of torture and other ill-treatment. At the same time, rape of men in conflict and the use of sexual violence against men in detention began to receive further attention.[92]

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[85] Human Rights Watch and FIDH, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath', (1996), http://www.hrw.org/reports/1996/09/24/shattered-lives.

[86] Although it was considered by the European Commission of Human Rights in ECmHR, *Cyprus v Turkey* (1976) Apps. Nos. 6780/74 and 6950/75, Report of 10 July 1976, at paras. 373-4. See also ECmHR, *X and Y v Netherlands* (1985) App. No. 8978/80, 26 March 1985. Note in that case rape was only considered under Article 8 (right to private and family life).

[87] See Edwards, *Violence against Women under International Human Rights Law* at pp. 221-23.

[88] See Rhonda Copelon, 'Recognising the Egregious in the Everday: Domestic Violence as Torture', *Col. Hum. Rts. L. Rev,* 25 (1994), 291-367 at pp. 295-96; Catharine MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', *Reprinted in Are Women Human? And Other International Dialogues* (Cambridge, Massachusetts: Harvard University Press, 1992) at p. 21. For a very helpful summary of the literature see Edwards, 'Everyday Rape: International Human Rights Law and Violence against Women in Peacetime'.

[89] See Edwards, *Violence against Women under International Human Rights Law* at p. 211.

[90] See ibid.

[91] UN General Assembly (1993), 'Declaration on the Elimination of Violence against Women', A/RES/48/104, adopted 20 December 1993.

[92] See, eg. Dustin A. Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law', *Wisconsin International Law Journal,* 71/1 (2009), 1-49; Pauline Oosterhoff, Prisca Zwanikken, and Evert Ketting, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret', *Reproductive Health Matters,* 12/33 (2004), 68-77.

2. Making the link to torture and other ill-treatment

Awareness of the invisibility of rape and other forms of violence predominantly affecting women within the international sphere led to renewed thinking on addressing such crimes. One strategy, pursued predominantly in the human rights sphere, was to frame violence against women as a matter of sex discrimination.[93] Another was to show how such violations fell within the existing, and powerful, prohibition of torture and other ill-treatment.[94]

This was done for a number of interlocking reasons – both theoretical and practical. In the 1990s feminists such as Catharine MacKinnon showed powerfully how certain instances of violence against women, including rape, fit the "recognised profile of torture".[95] It is clear that the level of suffering inflicted by rape can be no less severe than in cases of "traditional" torture and other ill-treatment. Clinical examinations have demonstrated that both rape and torture victims suffer from post-traumatic stress disorder (PTSD) as well as other personality disorders and ongoing trauma.[96] According to various medical studies "the trauma experienced in terms of both the physical symptoms and emotional distress is akin to that of other torture victims".[97]

But in addition to considering the severity, MacKinnon argued that recognising that rape and other forms of violence committed against women are torture uncovers the public aspects of what had previously been primarily thought of as a "private" crime.[98] Rape as torture is an intentional act of humiliation, discrimination and intimidation, rather than (as may have traditionally been argued or assumed) a natural result of the perpetrators' sexual urges.[99] The abuse is "systemic and group based" and "defined by the distribution of power in society".[100] It is often committed by state officials and armed groups as a matter of policy. And even where rape is committed by private actors there is very often good reason to hold states responsible. In the words of Catharine MacKinnon, states are "typically deeply and actively complicit in the abuses under discussion, collaborating in and condoning them". Violence "is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of law and policy".[101]

Seeing rape in this way has the additional benefit – particularly when it comes to prosecutions – of shifting the focus from the actions of the victim to those of the perpetrator. In many jurisdictions prosecutors must prove that a victim strenuously resisted in order to show lack of consent, leading to the victim being the person effectively on trial.[102] The attention given to her

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[93] See Edwards, *Violence against Women under International Human Rights Law* at pp. 140-97.
[94] See in particular Deborah Blatt, 'Recognising Rape as a Method of Torture', *New York University Review of Law and Social Change,* 19 (1992), 821; MacKinnon, 'On Torture: A Feminist Perspective on Human Rights'.
[95] MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', at p.17. See further Clare McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', *Feminist Legal Studies,* 16 (2008), 71-85 at p. 74.
[96] Temkin, *Rape and the Legal Process* at chapter 1: "Kilpatrick et al. found that victims of rape were considerably more likely than victims of other crimes to develop PTSD and that rape had a more negative impact than other crimes".
[97] Hannah Pearce, 'An Examination of the International Understanding of Political Rape and the Significance of Labeling It Torture', *International Refugee Law,* 14 (2002), 534-60 at p. 540 citing Burgess and Holmström (1974) 'Rape Trauma Syndrome' 131 (9) American Journal of Psychiatry 981.
[98] MacKinnon, *Are Women Human?: And Other International Dialogues* at p. 22.
[99] See Amnesty International, 'Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court', (2011), http://www.amnesty.org/en/library/asset/IOR53/001/2011/en/7f5eae8f-c008-4caf-ab59-0f84605b61e0/ior530012011en.pdf, at p. 39. See also Blatt, 'Recognising Rape as a Method of Torture', (1992); Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly,* 12 (1990), 486; Copelon, 'Recognising the Egregious in the Everday: Domestic Violence as Torture', (1994).
[100] MacKinnon, *Are Women Human?: And Other International Dialogues* at p. 22.
[101] MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', at pp. 23 and 25. See further McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', (2008) at p. 75.
[102] As to the elements of the crime of rape under international law see Part III, Section B.0.

behaviour, past history and version of events is riddled with prejudices and distorted expectations of what a rape victim looks like. The aggressiveness of the prosecution and the attempts at undermining the complainant's credibility often leaves rape victims feeling debased, reinforcing existing trauma.[103] Where rape is delinked from issues of honour and dignity, and when the element of consent is removed (as it is when considered as torture), rape can be seen for what it is – a violation of sexual autonomy.

In addition, where rape is seen as a form of torture or other ill-treatment, the strict legal implications attached to the prohibition will be engaged.[104] In the international sphere at least, torture is considered a crime and violation of the highest order.[105] It was argued that recognising that rape could amount to torture would help to ensure that it is considered on a par with the most egregious crimes, and prosecuted at the highest level of seriousness – both at the domestic level, and the international level.[106] In the words of Rhonda Copelon, an advocate for prosecution of gender crimes by the international criminal tribunals and the ICC:

> despite all the public hand-wringing about rape, history teaches that there is an almost inevitable tendency for crimes that are seen simply or primarily as crimes against women to be treated as of secondary importance. It makes a difference, to the elements that must be proved, to the penalty imposed, and to the larger cultural understanding of violence against women, to treat rape as torture rather than humiliation. So we needed to insist, as a matter of the principle of non-discrimination, that sexual violence be treated as constituting any of the recognized crimes so long as it met their elements, at the same time as it was necessary to name the sexual violence crimes specifically.[107]

This idea was echoed by the Special Rapporteur on torture, who stated that "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".[108] Because the prohibition of torture is a peremptory norm

[103] Temkin, *Rape and the Legal Process* at p. 3: "In addition to the trauma of the rape itself, victims have had to suffer further mistreatment at the hands of the legal system. Be it in England, Scotland, Australia, Canada, Scandinavia, Russia, or elsewhere, the rough handling of complainants has been much the same". Temkin has also pointed to the "belief shared by many … that complaints of rape are frequently false". See Jennifer Temkin, 'Reporting Rape in London: A Qualitative Study', *Howard Journal of Criminal Justice,* 38/1 (1999), 17-41.

[104] MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', at p. 17. See further McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', (2008) at p. 77.

[105] Note that this is not always the case at the domestic level however – a point made by Alice Edwards, and echoed by partners in countries where torture is endemic and seen as a normal part of the criminal justice system. Some have asserted that the rhetoric of rape is as strong and effective, if not more, than the rhetoric of torture: McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', (2008). Yet as Alice Edwards pointed out, "[t]he symbolism of labeling an act as "rape" is socially and culturally contingent. Precisely because it is a crime generally considered to be perpetrated against women, it has not attained the same status under domestic or international laws": Edwards, *Violence against Women under International Human Rights Law* at p.214.

[106] See Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', *Michigan Journal of International Law,* 30/1 (2008), 1-124.

[107] Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000) at p. 234.

[108] UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para 26. See also Hannah Pearce, 'An Examination of the International Understanding of Political Rape and the Significance of Labeling It Torture', *International Journal of Refugee Law,* 14 (2003), 534-60 at p. 540.

of customary international law, it allows for no derogation and has very strict legal obligations associated with it.[109]

Recognising rape as torture or other ill-treatment also has the added practical benefit of opening up new avenues for justice for victims of rape – through domestic mechanisms including constitutional courts and, where available, regional and international human rights and international criminal justice mechanisms. As victims and their lawyers brought their cases to these mechanisms, these arguments reached a wider audience.

3. Key developments in international criminal law jurisprudence on rape and torture and other ill-treatment

On one hand, the argument that rape amounts to torture was deployed alongside prosecutions by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, aimed in part at pushing for the prosecution of rape at the highest level.[110] This led to significant developments in the jurisprudence on both rape and torture.

In 1998 the ICTR issued the *Akayesu* judgment.[111] It was a landmark decision, not only because it held that rape was a constitutive act of the crime of genocide, but also because the Court recognised that rape could amount to torture. According to the Court:

> [l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[112]

This jurisprudence was consolidated and developed further by the ICTY in a line of cases over the following years. In the *Čelebići* case, the Court identified the elements of torture for the purposes of articles 2 and 3 of the ICTY statute by reference to the Convention against Torture. The tribunal recognised that rape inflicts severe pain and suffering, both physical and psychological, and that it was "difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation".[113] Accordingly, where rape was inflicted by a public official against a person in detention in a situation of armed conflict it would meet the elements of torture.[114] It found that rapes alleged were proved and held the accused guilty of torture amounting to a grave breach of the Geneva Conventions and a war crime.[115]

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[109] CAT (2008), 'General Comment No. 2', at para. 1. The Committee also considers that the prohibition of other ill-treatment is non-derogable: ibid., at para. 3. See also Article 53, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

[110] See Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000); Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', (2008).

[111] ICTY, *Prosecutor v Jean-Paul Akayesu* (1998) ICTR-96-4-T, Trial Chamber Judgment of 2 September 1998.

[112] Ibid., at para. 597. Note however that no charges of war crimes for rape as torture had been brought, and it did not result in a conviction on that ground.

[113] ICTY, *Celebici Case (Trial Judgment)* (1998) 16 November 1998, at para. 495.

[114] Ibid., at para. 496.

[115] Ibid., at paras. 943 and 65.

The same line of reasoning was followed in the *Furundzija* case where a Serbian commander was convicted for aiding and abetting the rape of a detainee and where rape was said to include forced oral sex.[116] Once again the rape was held to amount to the war crime of torture and the war crime of rape.[117]

In *Kunarac*,[118] the first case where sex crimes only were prosecuted,[119] the ICTY considered the case of Serbian soldiers who had allegedly committed, among other crimes, numerous rapes of women during the conflict. In relation to some of these rapes, the accused were charged with both rape and torture as war crimes and crimes against humanity. As highlighted above, examining the definition of torture under international humanitarian law the Trial Chamber found that the 'public official' requirement of the Convention against Torture was not applicable in the international humanitarian law context.[120] It held that a number of the rapes committed by the defendants Kunarac and Vukovic amounted to both rape a war crime and crime against humanity, and torture as a war crime and crime against humanity.[121] This position was later followed by the ICTR in the *Semanza* judgment.[122]

Prosecutorial efforts before the *ad hoc* Tribunals were deployed more or less alongside the negotiations of the Rome Statute for the International Criminal Court. Building on the developing jurisprudence, victims' groups and others were able to entrench significant achievements to ensure better protection of women's rights. A range of serious sexual violence crimes were codified separately under the jurisdiction of the ICC, to ensure that they will be "always on the checklist and always understood as crimes in themselves".[123] In addition, the developments in customary international law recognising that rape was part of, and encompassed by, other egregious crimes including torture, are reflected in the Statute and elements of crimes, with the aim that they will always be treated with the highest degree of seriousness.[124]

The jurisprudence of the ICTY establishes clearly that under international criminal law and international humanitarian law rape by a combatant may amount to the war crime of torture, which is a grave breach of the Geneva Conventions. Similarly, rape committed as part of a widespread and systematic attack directed against a civilian population may amount to the crime against humanity of torture if the elements of the crime can be proved. In fact, on the basis of the jurisprudence of the *ad hoc* tribunals it is difficult to see how rape in such circumstances could ever *not* fulfil the elements of those crimes. This issue will be discussed further in Part III, Section A.

[116] ICTY, *Furundžija (Trial Chamber Judgment)* (1998) 16 November 1998, at para. 183.
[117] Ibid., at paras. 268 and 74.
[118] ICTY, *Kunarac (Trial Chamber Judgment)* (2001) 22 February 2001.
[119] This was also the case in *Funrundzija*, but only because other charges had failed.
[120] ICTY, *Kunarac (Trial Chamber Judgment)* (2001) 22 February 2001, at para. 496. This was upheld by the Appeals Chamber: see ICTY, *Kunarac (Appeals Chamber Judgment)* (2002) 12 June 2002, at paras. 145-48.
[121] ICTY, *Kunarac (Trial Chamber Judgment)* (2001) 22 February 2001.
[122] ICTR, *Semanza (Trial Chamber Judgment)* (2003) 15 May 2003, at paras. 342-43. See also ICTY, *Krnojelac (Trial Chamber Judgment)* (2002) 15 March 2002, at para. 187.
[123] See Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Law', (2000) at p. 234.
[124] Ibid.

4. Key developments in international human rights law jurisprudence on rape and torture and other ill-treatment

In addition, developments linking rape and torture in international human rights law occurred almost in parallel to those in international humanitarian law.

As flagged above, rape had in fact been recognised as a form of "inhuman treatment" by the European Commission on Human Rights in the context of the Turkey-Cyprus conflict in 1976;[125] generally rape was seen as a violation of the private life of an individual.[126] In some cases, involving rape or attempted rape of men in custody as one of a series of violent acts, the UN Human Rights Committee found that the victim had been subjected to "torture and inhuman treatment", but it did not provide any further analysis.[127]

From the 1990s there were two key further developments: a recognition that rape by state officials (and potentially non-state actors) in itself could amount to "torture", and elaboration of the idea that States could be held responsible under the prohibition of torture and other ill-treatment for failures to prevent and respond to rape by non-state actors.

4.1. Rapes by state officials amounting to "torture"

The first recognition of rape of a woman by public officials as amounting to "torture" in an individual case was by the Inter-American Commission on Human Rights in 1996, when it held that the rape of a schoolteacher by members of the Peruvian Army violated the prohibition of torture under article 5 of the American Convention on Human Rights.[128] In that case the Commission said that a rape would constitute torture if it was "1) an intentional act through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former".[129] It found all the elements fulfilled in that case.

The European Court of Human Rights followed suit in 1997, finding that the rape of a 17 year old girl by a state official was "an especially grave and abhorrent form of ill-treatment" and amounted to torture,[130] as did the African Commission on Human and Peoples' Rights in 2000.[131] The Committee against Torture had previously shied away from finding that rape amounted to torture,[132] but, in 2006, held that "sexual abuse by the police … constitutes torture even though it

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[125] ECmHR, *Cyprus v Turkey* (1976) 10 July 1976. In 1994, the Inter-American Commission also held rape to amount to inhumane treatment in IACmHR, *Flor De María Hernández Rivas v El Salvador* (1994) Case No.10.911, Decision of 1 February 1994, Report No. 7/94.

[126] See, eg. ECmHR, *X and Y v Netherlands* (1985) 26 March 1985., concerning the rape of a 16 year old mentally handicapped girl in a privately-run home.

[127] See, eg. HRCtee *Motta Et Al v Uruguay* (1980) Comm. No. 11/1977, 29 July 1980 at para. 16. See also HRCtee, *Casafranca De Gómez v Peru* (2003) Comm. No. 981/2001, Views adopted 22 July 2003, UN Doc. CCPR/C/78/D/981/2001 at para. 7.1.

[128] IACmHR, *Mejía v Perú* (1996) 1 March 1996.

[129] Ibid.

[130] ECtHR, *Aydin v Turkey* (1997) 25 September 1997, at paras. 83-85.

[131] African CmHPR, *Malawi African Association and Others v. Mauritania* (2000) Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, at paras. 117 and 18.

[132] See, eg. CAT, *Kioski v Sweden* (1996) Comm. No. 41/1996, Views adopted 8 May 1996, UN Doc. CAT/C/16/D/41/1996 at where despite allegations of multiple rapes in state custody, the Committee did not examine the issues of sexual violence; CAT, *SC v Denmark* (2000) Comm. No. 143/1999, Views adopted 20 May 2000, UN Doc.

was perpetrated outside formal detention facilities".[133] A line of Special Rapporteurs on Torture have also identified rape and sexual violence as a form of torture,[134] as has the Committee on the Elimination of Discrimination Against Women.[135]

There is some divergence in the jurisprudence as to whether rape by a state official will *automatically* amount to torture. This issue will be examined further in Part III, Section A.1.2.

Despite this progress, international bodies have still displayed significant limitations when it comes to considering cases of rape within the framework of torture and other ill-treatment, particularly in earlier cases.[136] A key criticism is that they have in a number of cases imposed a higher threshold of proof on allegations of rape and sexual assault than other acts alleged to constitute torture or other ill-treatment, displaying the traditional mistrust relating to such allegations.[137] For example, in the case of *Loayza Tamayo v. Peru*, decided in 1997, the Inter-American Court of Human Rights considered the case of a female professor who had allegedly been beaten, threatened with drowning, subjected to solitary confinement and raped by police officers while in detention for alleged communist sympathies. The Court, with very sparse explanation, dismissed the rape allegations, saying that "given the nature of this fact, the accusation could not be substantiated", while finding allegations of other forms of violence proved.[138] Similarly, in the case of *Ortiz v Guatemala*, the Inter-American Commission on Human Rights found that the complainant could not substantiate allegations of rape, while other forms of violence were held to have been substantiated through physical evidence.[139] A similar approach was taken in a case decided in 1999 by the European Court of Human Rights, when it found that all but two of the allegations of the complainant had been proved, with one of the unproven allegations being that he had been raped, because "the allegation was made too late for it to be proved or disproved by medical evidence".[140]

4.2. Rapes by non-state actors engaging State responsibility for torture and other ill-treatment

Alongside these developments, international and regional human rights bodies also developed their jurisprudence on states' obligations under human rights treaties in relation to acts committed by private entities. This has dramatically broadened the scope for considering rape by

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CAT/C/24/D/143/1999; CAT, *ETB v Denmark* (2002) Comm. No. 146/1999, Views adopted 30 April 2002, UN Doc. A/57/44 at 117. See further Katharine Fortin, 'Rape as Torture: An Evaluation of the Committee against Torture's Attitude to Sexual Violence', *Utrecht Law Review,* 4/3 (2008), 145-62 at p. 147.

[133] CAT, *VL v Switzerland* (2006) Comm. No. 262/2005 Views adopted 20 November 2006, UN Doc. CAT/C/37/D/262/2005 at para. 8.10.

[134] Commission on Human Rights (1986), 'Report by the Special Rapporteur, Mr P Kooijmans', UN Doc. E/CN.4/1986/15, 19 February 1986 at p. 26; Commission on Human Rights (1992), 'Forty-Eighth Session, Summary Record of the 21st Meeting (Oral Statement of Special Rapporteur Kooijmans)', UN Doc. E/CN.4/1992/SR.21, 11 February 1992 at para. 35; UN Commission on Human Rights (1995), 'Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32', UN Doc. E/CN.4/1995/34, 12 January 1995 at paras. 15-24; UN General Assembly (2008), 'Manfred Nowak 2008 Report', at paras. 26 and 34-36.

[135] CEDAW (1992), 'General Recommendation No. 19: Violence against Women', UN Doc. A/47/38, 11th session at para. 7.

[136] Edwards, *Violence against Women under International Human Rights Law* at p. 262.

[137] Ibid., at pp. 226-7.

[138] IACtHR, *Loayza Tamayo v Peru* (1997) Judgment (Merits) of 17 September 1997, Series C, No. 33 at para. 58. See further Edwards, *Violence against Women under International Human Rights Law* at pp. 226-27.

[139] IACmHR, *Dianne Ortiz v Guatemala* (1996) Case No. 10.562, Decision of 16 October 1996, Res. No. 31/96.

[140] ECtHR, *Selmouni v France* (1998) 14 April 1998, at para. 90.

private actors within the international human rights framework, and for holding states to account for their failures to prevent and respond to it.

In 1988 the Inter-American Court on Human Rights ruled in the landmark *Velasquez Rodriguez* judgment that:

> [a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[141]

The Court went on to find that the obligation of "due diligence" encompassed both the duty to prevent acts violating human rights, and the duty to investigate, identify, punish and compensate for acts of torture.[142] Where a state fails to do so, it is responsible for a violation of its obligations under the Convention.

States may therefore incur responsibility under international human rights law where there is a failure to prevent or respond to certain acts or omissions of non-State actors. As the Special Rapporteur on Violence Against Women has shown, this is a long-standing ground of responsibility in international law.[143] It arises because as well as the duty to *respect* human rights, states have positive obligations to *protect* and *ensure respect* for those rights.[144]

States' positive obligations include having the necessary legal and administrative framework in place to control, regulate, investigate and prosecute actions by non-state actors that violate the human rights of those within the territory of that state,[145] as well as taking specific action to protect specific individuals from known risks, and responding to such violations by providing an effective remedy when they occur.[146]

At the same time there has also been detailed attention on measures required to prevent and respond to violence against women specifically, as a matter of addressing discrimination. It is now generally accepted that to address violence against women States must both respond appropriately in individual cases, and "ensure a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence against women".[147] Again, in both respects, states are expected to use "due diligence" to respond to violence against women.

What steps will demonstrate that states have exercised due diligence has been the subject of a number of specific instruments and treaties on violence against women. These include the Beijing Declaration and Platform for Action, the UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice Convention, and regional treaties such as the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

[141] IACtHR, *Velasquez Rodriguez v Honduras* (1988) Judgment (Merits) of 29 July 1988, Series C. No. 4 at para. 172.
[142] Ibid., at paras. 174-75.
[143] Human Rights Council (2013), 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo', UN Doc. A/HRC/23/49, 14 May 2013 at para. 11.
[144] Ibid., at para. 35.
[145] Ibid., at para. 14, citing Robert McCorquodale and Penelope Simons, "Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law", 70 (4) Modern Law Review (2007) at p. 618.
[146] Ibid., at paras. 20 and 70.
[147] Ibid., at para. 71.

(the Maputo Protocol), which entered into force in 2005, and the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in 2011.[148] It has also been the subject of detailed study by successive UN Special Rapporteurs on Violence Against Women, culminating in a detailed report on the issue released in May 2013.[149]

These concepts have been used to hold states responsible for their failures to prevent and respond to private harms including domestic violence, trafficking, and rape, using the prohibition of torture and other ill-treatment, the right to life, and the right to private life.[150] Part III explores this jurisprudence in greater detail.

5. Legal consequences

The now well-established link between rape and the prohibition of torture and other ill-treatment can therefore be seen to have come about in two ways. In one respect, making the link was adopted as a deliberate strategy in order to raise the profile of a previously trivialised crime predominantly affecting women, to open access to remedies that were otherwise not available, and to make the "public" aspect of private actions, and states' potential complicity in them, clear. Once this link was made, however, the jurisprudence demonstrated how rape fell squarely within the definition of torture and other ill-treatment.

This has important legal consequences which may be useful for rape survivors at a broader policy level. At a minimum, it is clearly established that rape – whether by a state official or a private actor – will engage the state's obligations to exercise due diligence to prevent and respond to prohibited ill-treatment. This has meant that where domestic jurisdictions fail to respond to rape appropriately, and regional or international mechanisms are available, survivors have had the option to turn to those mechanisms for a remedy against the state in their case. Although survivors of rape continue to face significant obstacles to accessing those mechanisms, this has in some individual cases led to positive orders in their favour. These have included individual remedies such as the ordering of investigation and prosecutions in specific cases, and to more general measures such as orders for the amendment of the definition of rape in domestic legislation, reform of procedures for hearing rape trials so as to minimise additional trauma to victims, and the development of gender sensitive training for public officials and society at large.[151]

This jurisprudence can also be drawn on in public interest litigation at the domestic level, for example in administrative law or constitutional challenges to the practice of state officials in their response to rape, such as that brought in Kenya and discussed in Part II. It has also meant that state parties are subject to increasing scrutiny on their response to sexual violence before different treaty bodies, including the Committee Against Torture, the Human Rights Committee, and the Committee of the Convention on the Elimination of all forms of Discrimination against Women ("CEDAW Committee").

[148] See further ibid., at paras. 23-40.
[149] Ibid.
[150] See, eg. ECtHR, *MC v Bulgaria* (2003) App. No. 39272/98, Judgment of 4 December 2003, ECHR 2003-XII; ECtHR, *Opuz v Turkey* (2009) 9 June 2009; ECtHR, *Rantsev v Cyprus & Russia* (2010) App. No. 25965/04, Judgment of 7 January 2010.
[151] See, eg. ECtHR, *MC v Bulgaria* (2003) 4 December 2003; IACtHR, *Cottonfields Case* (2009) 16 November 2009; CEDAW, *Vertido v Philippines* (2010) Comm. No. 18/2008, Views adopted 16 July 2010, UN Doc. No. CEDAW/C/46/D/18/2008.

The recognition in a number of high profile cases that rape amounts to *torture* has had additional practical benefits. First, where the alleged perpetrator is a state official or combatant in an armed conflict it has engaged the strict requirements of the Convention against Torture and/or international humanitarian law in relation to prosecution by third states. As torture is a non-derogable prohibition, it has also meant that rape is considered within the crimes for which no amnesty or immunity from prosecution can be provided. These arguments can be brought both before regional and international mechanisms, and before domestic jurisdictions which have a constitutional prohibition against torture.

C. CRITIQUES AND POTENTIAL LIMITATIONS OF HARNESSING THE TORTURE FRAMEWORK

Despite what appear to be some potential practical gains from understanding rape as a form of torture or other ill-treatment, a number of reservations have been expressed about this approach to address rape and violence against women more generally.

Some have argued that rape as a crime is egregious enough in itself to be treated as a crime of the highest severity, without the need to draw on the prohibition of torture.[152] In fact, it has been argued, to term rape "torture", a gender neutral term, may obscure the reality that rape is a gendered crime.[153] Perhaps as evidence of this, in 2013 there has been a specific effort within the G8 to recognise rape as a grave violation of the Geneva Conventions in and of itself.[154]

A related concern is the difficulty inherent in using two terms – one of which, torture, may have different elements across different contexts – to apply to the same act. Alice Edwards, while recognising the practical benefits of such an approach, cautions that it can become confusing when trying to describe exactly what occurred: "[w]as it rape, was it torture, or was it rape as torture?" In her view, "conflating old and new interpretations of the same term, [equating rape with torture] is problematic in so far as it may obscure the reality and complexity of the issue".[155] Tied to this, in criminal prosecutions, recognising rape as torture may require an additional layer of evidence to prove the elements of both crimes.[156]

On the other hand, in the context of discussions about male rape, it has been argued that there is benefit in using the language of both rape and torture, in order to "recognise the general – rape as torture – as well as the particular – rape as rape".[157] In contrast to what often happens when women are raped, when men are raped or subjected to sexual assault it is often "buried under the rubric of 'abuse' or 'torture'".[158] According to the same author, "[a]n accurate classification of abuse is important not just to give victims a voice, not only to break down stereotypes and not

[152] McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', (2008) at pp. 77-78.
[153] Ibid., at p. 77.
[154] G8 (2013), 'Declaration on Sexual Violence in Conflict', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_-_FINAL.pdf, adopted by G8 foreign ministers in London on 11 April 2013 at para. 4.
[155] Edwards, *Violence against Women under International Human Rights Law* at p. 237.
[156] Redress and Amnesty International, 'Gender and Torture: Conference Report', (2011), http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf, at p. 47.
[157] Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict', *European Journal of International Law,* 18 (2007), 253-76 at p. 257.
[158] Ibid., at p. 256.

merely to accurately record the picture. Language in general and legal language in particular 'reinforces certain world views and understandings of events'".[159]

An alternative criticism is that seeing rape within the narrative of torture automatically positions women as sexualised victims, and that not all women want their experience to be automatically equated with torture.[160] As Clare McGlynn pointed out: "in characterizing rape as torture, we fail to accept the diversity of experience of rape survivors who may not characterize their harms as "severe" harms, sufficient to ground a torture claim".[161] She adds: "holding that not all rapes are of extreme severity may go some way towards reducing the stigma and stereotyping associated with the crime".[162]

Writing about wartime rape Karen Engle regretted that "[i]n finding that rape per se constituted the harm required for torture, the ICTY reinforced the understanding that women are not capable of not being victimized by rape".[163] For Rayburn (quoting a woman who had been raped):

> [T]o concur with the view that rape is the single worst thing that can happen to a woman is to do disservice to women **....** [I]t raises the status of the penis to an unproductive level. It is to say that all of women's powers, all that we can stand in the face of pain and hardship, are reduced to naught because we will fall to pieces should an unwelcome lump of male flesh be forced upon us.

He adds:

> None of this is to blame those who do not recover, but rhetoric that traps women and children into a corner of isolation and reliving agony should not be supported.[164]

Alice Edwards, in her detailed study of violence against women under international human rights law, summarised her own concerns about using the torture prohibition as a deliberate strategy to address violence against women. In her view, doing so:

> fails to acknowledge that violence against women is a serious violation worthy in its own right of separate international legal regulation and condemnation. Instead, in order to be heard, women have to fit their experiences into provisions with entrenched meanings, and these meanings generally describe and cover the harm that men fear rather than the fears of women. Instead, for women to be heard, they must establish either that what they have suffered is equivalent to these traditional understandings or that such treatment warrants the creation of an exception to the rule: the former approach

[159] Ibid., at p. 257.
[160] See Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics', *Harvard Human Rights Law Journal,* 15 (2002), 1-38. See also Christine Chinkin, Shelley Wright, and Hilary Charlesworth, 'Feminist Approaches to International Law: Reflections from Another Century', in Doris Buss and Ambreena Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005) at pp. 17-47.
[161] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights', *International and comparative law quarterly* 58/3 (2009), 565-95 at p. 579.
[162] Ibid.
[163] Karen Engle, 'Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', *American Journal of International Law,* 99 (2005), 778-815 at p. 813.
[164] Corey Rayburn, 'Better Dead Than R(Ap)Ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes', *St John's Law Review* 78/4 (2004), 1119-65 at p.1155. Sharon Marcus also warns against focusing exclusively on the horror of rape, writing that*:* "such a view often concurs with masculinist culture in its designation of rape as a fate worse than, or tantamount to, death; the apocalyptic tone which it adopts and the metaphysical status which it assigns to rape implies that rape can only be feared or legally repaired, not fought": Sharon Marcus, 'Fighting Bodies, "Fighting Words, a Theory and Politics of Rape Prevention', in Judith Butler and Joan Scott (eds.), *Feminists Theorize the Political* (New York and London: Routledge, 1992) at p. 387.

> reinforces sexual hierarchies manifest in the 'male' standard of international law, while the latter exceptionalises the experiences of women and in turn 'essentialises' her into the stereotyped role of a victim of 'sexual non-political violence' or of culturally depraved acts. This system places a double and, therefore, unequal burden on women who are disproportionately subjected to forms of harm that do not fit within the traditional construct of torture. Women are thus yet to be treated equally under international law.

In Edwards' view, there are pragmatic reasons to continue with such engagement, and it should be strengthened by "broader understandings of gender, gender relations and gender equality, the application of contextual reasoning, and by taking account of other identity as well as personal characteristics of individual women".[165] However, she argues that to really address violence against women, including rape, the international human rights system needs significant procedural and structural changes and specific protection for women.[166]

Should 'everyday' rape be called torture?

Perhaps the most controversial issue is the extent to which the term "torture" – with its grave stigma and particular legal implications – should be extended to what has been termed "everyday" rape, the type of rape routinely committed against women and girls by private actors in peacetime.

This raises two different, but inter-related questions. First, should international bodies call harms inflicted by private actors for private purposes "torture" where they fulfil the purpose and severity requirements, and *then* look to whether the state is responsible in some way for that "torture"?

Second, can and should national legislation criminalise such acts as "torture", and prosecute the private individuals who have inflicted them at the national level as torturers?

Should the stigma of torture be reserved for acts carried out or directly acquiesced in by state officials?

Some argue that the term "torture" should be reserved for crimes with the *direct* involvement of state officials, drawing on the definition of the term in the Convention against Torture. For some, the special stigma of torture should be used for the cases which are made additionally serious because of the involvement of state officials, to whom individuals expect they can turn to protect their rights, and who are in a position to impede, or completely stymie, investigation and prosecution.[167]

Clare McGlynn points out that societies hold certain types of rape to be more egregious, for example where it is against a minor, or where state officials carry out the crime. She recognises that the victim may not see a difference, but that the society attaches greater opprobrium where there are such aggravating features – for example because state officials are supposed to protect individuals and uphold the law, and may disrupt investigations and prosecutions. She suggests that there may be benefit to keeping rape and torture separate, thereby "retaining the label 'torture' for some acts which different societies hold as especially egregious, for example rape by

[165] Edwards, *Violence against Women under International Human Rights Law* at p. 339.
[166] Ibid., at Chapter 8.
[167] McGlynn, 'Rape, Torture and the European Convention on Human Rights', (2009) at p. 576.

state officials, as well as maintaining the label 'rape', with its own powerful associations and gendered meaning".[168]

For some, it is important to keep this distinction for practical reasons too – it is then easier to track the incidence of the specific crimes of violence by state actors, and such crimes require specific preventive approaches and responses.

An interesting counterpoint to this argument has been raised by colleagues in countries where torture is endemic and culturally accepted. It has been argued that in some countries rape already carries a higher stigma than torture. By equating 'everyday' rape with torture, it is argued that this will confuse already very heated national discussions about the illegality of violence by state officials against detainees, and make it difficult to achieve progress on those specific issues.

On the other hand, the alternative view outlined above questions *why* society (and international law) should see violence by state officials against individuals as more serious and deserving of specific attention. Is it, as suggested by Catharine MacKinnon, because state violence "is done to men as well as women" and is therefore the type of violence that men fear?[169] In the words of Rhonda Copelon, is it right that "when stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence".[170]

Where does state complicity start and end?

An alternative difficulty, if it is accepted that state involvement is a necessary element of torture, but that such involvement can extend to a failure of due diligence, is that it is difficult to justify why the same act should be called different things depending on the state's response.

As McGlynn argues, state complicity cannot extend to every rape. It is often difficult to link state action or inaction to individual cases, particularly in peacetime. In addition, states may pursue policies to combat rape which are entirely ineffective.[171] Should it make a difference to the term used to describe the act because a woman has been raped in a country with discriminatory rape laws, as opposed to one which does not? Difficulties such as these have led some to question whether it is in fact helpful to use "consent or acquiescence" of the state as the basis for determining whether treatment in fact amounts to torture.

These are powerful arguments, but are relevant only if public official involvement is seen as a matter going to the essence of torture. The alternative view, examined below, is that torture can be committed by any person, and the public official requirement instead defines the state's responsibility for those acts.

Public official requirement: international practice

It is clear that the Convention against Torture limits "torture" under that convention to acts "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". However, it is also clear that exactly the same limitation applies to "cruel, inhuman or degrading treatment or punishment" under the Convention.[172]

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[168] Ibid., at p. 580.
[169] MacKinnon, *Are Women Human?: And Other International Dialogues* at p. 21.
[170] Copelon, 'Recognising the Egregious in the Everday: Domestic Violence as Torture', (1994) at pp. 295-96.
[171] McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', (2008) at p. 84.
[172] CAT, Article 16.

Other human rights bodies have firmly established that "ill-treatment" by private actors imposes obligations on states under their respective more general conventions (including the ICCPR, the European, American and African Conventions). Just as the definition of prohibited ill-treatment under those more general human rights treaties goes beyond that set out in the Convention against Torture, it is possible that the definition of torture does too; that the treaties regulate different spheres of conduct.

A broader understanding of torture as not limited to acts with the involvement of a state official is also supported by the jurisprudence of the bodies referred to above which have not (with the exception of the Inter-American Court, albeit with a strong dissent) explicitly referred to the public official requirement as a distinguishing factor between torture and other ill-treatment.[173] It is other factors – either the severity of the pain and suffering,[174] and/or the purpose element, which make torture "torture". This is also consistent with the jurisprudence of the international criminal tribunals which have explicitly held that the public official requirement is not a part of the prohibition of torture under international criminal and international humanitarian law.

An understanding of torture which is not limited to actions of state officials is also supported by the drafting history of the Convention against Torture itself, and the drafting of the American Torture Convention. During the drafting of the Convention against Torture there were different opinions on whether the definition of torture in the Convention should be limited to acts of public officials. France took the view that the definition of the act of torture should be a definition of the intrinsic nature of the act itself, irrespective of the status of the perpetrator.[175] Other states responded that "the purpose of the convention was to provide protection against acts committed on behalf of, or at least tolerated by, public authorities, whereas the State could normally be expected to take action according to its criminal law against private persons having committed *acts of torture* committed by other persons" (emphasis added).[176] The Convention against Torture and its specific obligations, including the requirement to extradite or prosecute suspected torturers on your territory, was therefore consciously limited to acts of torture committed with the involvement of state officials.

This distinction can also be seen in the way the American Torture Convention is drafted. There, the definition of torture does not include state involvement as an element. Instead, the act of torture is defined, and the Convention then specifies that "the following shall be held guilty of the crime of torture". It then limits the responsibility under that Convention to specifically criminalise "torture" and the obligations of extraterritorial prosecution to state officials who have committed, instigated, ordered, induced or allowed torture to occur, when they were in a position to prevent it, and to others who have committed torture at the instigation of a public official.

So, although it is clearly that international law closely regulates torture committed by or acquiesced in by public officials – including by imposing universal jurisdiction – it is not as clear that public official involvement is necessarily inherent in the understanding of torture itself.

Public official requirement: National practice

A conception of torture that is not limited to acts committed by public officials is also reflected in the domestic law of a number of jurisdictions, which criminalise torture without reference to the status – official or otherwise – of the perpetrator.

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[173] See above, Section A.
[174] Although that might arguably be impacted by whether the perpetrator is a state official.
[175] See Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at pp. 43-45.
[176] Ibid., at p. 45.

The Criminal Code of the Australian state of Queensland, for example, defines torture as "the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion".[177] This provision is regularly used to prosecute cases of domestic violence, child abuse and violence inflicted on people deprived of their liberty in the context of organised crime.

Similar provisions exist in other countries, including Brazil, where torture is defined as to include (alternatively) actions which:

> I. Intimidate someone with violence or serious threat, causing physical or mental suffering:
>
> a) in order to obtain information, statement or confession from the victim or a third person;
>
> b) to induce action or inaction of a criminal nature;
>
> c) on grounds of racial or religious discrimination;
>
> II. Submit someone, under one´s custody, power or authority, with the use of violence or serious threat, to intense physical or mental suffering, as a way to enforce personal punishment or a preventive measure. [178]

REDRESS has been informed by a Brazilian prosecutor that charges under these provisions have been brought against employers, such as farm owners, accused of torturing their employees.

In Lebanon torture is criminalised without reference to the status of the perpetrator but is confined to situations where it is carried out for the purpose of obtaining a confession to a crime, *or* where it is carried out in connection with a kidnapping or other deprivation of liberty and is committed on someone who is deprived of their liberty.[179]

Other countries, such as Slovenia and Montenegro, criminalise torture without reference to the status of the perpetrator, but specify an aggravating circumstance where it is committed by or with the acquiescence of a state official.[180]

The question of whether private actors who commit harms against a private person should be prosecuted for "torture" has been an issue in recent debates on criminalisation of torture in India. Vahida Nainar has described how activists have pushed for a definition that includes, and criminalises, torture committed by private individuals, against a person in their "custody or control". According to the campaign, this is a key opportunity to extend protection to women,

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[177] Queensland Criminal Code, Section 320A.
[178] Law Nº9.455, 7 April 1997, Brazil, unofficial translation available at: www.apt.ch/content/countries/brazil.pdf.
[179] Lebanon, Criminal Code of 1 March 1943, Articles 401 and 569, available at: http://www.apt.ch/content/countries/lebanon.pdf.
[180] Slovenia, Criminal Code, Article 265: "Torture (1) Whoever intentionally causes severe pain or suffering to another person, either physically or mentally, in order to obtain information or a confession from him, or a third person, or punishes him for an act committed by him or a third person, or which is suspected of having been committed by him or a third person, with a view to intimidate him or putting him under pressure, or to intimidate a third person or to put such person under pressure, or for any reason which is based on any form of violating equal status, shall be punished by imprisonment of one up to ten years. (2) If the pain and suffering referred to in the preceding paragraph is caused or committed by an official person or any other person acting in official capacity, or on his initiative, or upon his expressed consent, or tacitly, he shall be punished by imprisonment of three up to twelve years." See Montenegro Criminal Code, Article 167 (Torture and Maltreatment).

dalits, sexual minorities and other marginalised groups, who are often subjected to hate crimes and torture.[181] However, this proposal has met resistance, including from human rights groups.

Conclusions

There are still different opinions about whether it is right, and helpful, for international bodies to use the word "torture" to describe treatment inflicted by private individuals for private purposes. However, the arguments described in Section B.2, that it is important to do so to recognise the very serious nature of the harm inflicted, and the purposes behind it, is a powerful one. As pointed out by Judge Medina Quiroga in the *Cottonfields* case,

> From a practical and juridical perspective, whether or not a conduct is classified as torture does not make much difference. Both torture and cruel, inhuman or degrading treatment are violations of a human right and all these acts are regulated in almost the same way. Despite this, in other cases, the Court has not hesitated to classify a conduct as torture, often without mentioning the reasons why…. An act is classified as torture because a greater stigma is assigned to torture than to other acts that are also incompatible with Article 5(2) of the Convention.

In that case the majority did not reach the conclusion that the victims had been tortured; Judge Medina Quiroga saw this as a missed opportunity to clarify that non-state actors can commit torture, and that states may be held responsible if they fail to prevent it.[182] It may be that the different element of "custody or control", which underscores the power relationship between perpetrator and victim, is in fact a better reflection of the essence of stigma attached to torture.

Then again, it must be recognised that because of particular problems inherent in prosecution of acts where the state is directly implicated, states have agreed to *very strict and specific responsibilities* under the Convention against Torture in relation to torture committed with the direct involvement of state officials – whether as perpetrator, or through consent or acquiescence in the acts of others. Important among those responsibilities are obligations to prosecute the individual, wherever they are. The extent to which those responsibilities cover acts committed by private individuals depends on the interpretation of "consent and acquiescence", which may be narrower than more general positive obligations to prevent and respond to torture and other ill-treatment generally.

Ultimately, whether harms by private actors should be criminalised at the domestic level as "torture" is likely to come down to domestic understandings of the word, the practical effect that such labeling is likely to have for both the victims and society's response to them and the interplay it has with other anti-torture strategies. Such debates should be informed by the actual experiences of victims and how they perceive the treatment inflicted on them. The Convention against Torture – which has a definition which is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application" should not be seen as a barrier to such criminalisation.[183] As is shown above, a number of states do have provisions of wider application, which are not limited by the status of the perpetrator.

[181] See Nainar, 'Torture by Private Actors: Introducing a Legal Discourse in India'.
[182] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at Separate opinion of Judge Medina Quiroga at paras. 17-20.
[183] Despite concerns expressed in the past by the Committee Against Torture where states have not included the "public official" requirement as an aspect of the definition.

KEY POINTS

- *There have been critiques of using the language of torture and other ill-treatment in relation to rape and other forms of violence against women. For some, such an analysis plays into the gendered system of international law, and imposes additional hurdles on women who must show that the violence fits the elements of "torture" as well as "rape". For others, there is a danger that using the language of torture in relation to rape paints women as necessarily being victimized by it.*
- *Further debates arise as to whether acts by private actors, without the consent or acquiescence of state officials, should be called "torture". Although some say that the stigma of torture should be reserved for acts committed by state officials, others argue that this is not inherent in the definition, and there are good reasons for it to cover non-state actor harms. Different approaches have been taken to this issue at the domestic level. Either way, it is clear that – whether it is termed torture or other ill-treatment – the state's international human rights obligations are engaged in relation to rape by non-state actors.*

D. CONCLUSIONS

This part has examined how rape has been brought squarely within the international human rights law framework – clearly recognised as amounting to torture when it is committed by state officials, and engaging the state's responsibilities to put in place administrative, judicial and operational measures to prevent and respond to it when it is committed by non-state actors. This has helped to unpack the political and discriminatory purposes behind rape, as well as the state's often deep complicity in them; brought issues of inadequate responses to rape within the scrutiny of international bodies, and has helped to push for change through domestic litigation and policy advocacy.

There are drawbacks and limitations to using the framework – including the fact that some of these interpretations are still developing and that they may not always adequately describe rape or how it has affected a victim. The traditional anti-torture framework is also not necessarily designed to address the discrimination underlying these issues, nor does it incorporate the specific responses required. Nevertheless, it is submitted that – bearing in mind these limitations – the framework of torture and other ill-treatment still provides a useful lens through which to view rape, and a mechanism to address systemic issues and individual cases through advocacy and litigation. The next part gives examples of some cases in which this has been done.

PART II. FROM THEORY TO PRACTICE: CASE EXAMPLES

This part gives brief summaries of a number of individual cases where it has been helpful to show how rape committed against individuals has engaged states' responsibilities under the prohibition of torture and other ill-treatment. These cases show different ways by which using the torture and other ill-treatment framework has assisted victims to access justice in their individual case, to hold officials responsible for systemic failures, to highlight underlying discrimination, and to challenge the barriers that exist to achieving justice at the domestic level.

The cases have been chosen to demonstrate a spectrum of issues raised in such cases – inadequate penalties, barriers to justice including statutes of limitation, inability to participate in proceedings against perpetrators, a failure to deal with cases with the appropriate level of seriousness, and systemic police failings to respond to complaints of rape leading to continuing victimisation. They have also been chosen to demonstrate how the prohibition has been used to hold states and individuals accountable for rapes committed by both state and non-state actors. The cases cross a number of forums – international and regional human rights bodies, to constitutional court and national ombudsman.

Of course, such cases are only part of the story. Individuals face tremendous obstacles to accessing advice, collecting evidence and pursuing their cases. Even if they have a judgment in their favour – whether from a national or international body – such judgments are often not implemented. However, these cases can and have led to substantive outcomes for victims, including compensation, and with determined advocacy and follow-up can have longer lasting effects on the way rape is responded to at the national level.

RAPE IN IMMIGRATION DETENTION

GREECE

European Court of Human Rights

Necati Zontul, a Turkish national, boarded a boat from Istanbul to Italy with 164 other migrants on 27 May 2001. The boat was intercepted by the Greek Coastguard and escorted to Crete. Passengers were placed in a disused school.

The conditions of detention were extremely poor, with restricted access to the lavatory, food, and basic amenities. Necati saw many of the migrant detainees being assaulted. On 5 June 2001 two coastguard officers forced Necati to undress while he was in the bathroom. One of them threatened him with a truncheon, and then raped him with it. He believes he was singled out for this treatment because he is homosexual.

An investigation was ordered the next day by the commanding officer and Necati was asked to identify the perpetrator. However, his request to be examined by a doctor was refused whereas other detainees, who had been beaten, were examined.

Criminal proceedings were started on 3 October 2001. On 13 December 2001, the Committals Division of the Naval Tribunal committed six officers for trial but did not include the allegation of rape. It later became apparent that a statement Necati had made had been falsified, recording the rape as a "slap" and "use of psychological violence". It was also changed to state that he did not want to see the responsible officers punished.

On 15 November 2003, Necati contacted the Greek Ombudsman, who obtained a reopening of the disciplinary inquiry. On 15 October 2004 a number of officers were sentenced, including the officer responsible for the rape, who was sentenced to 30 months' imprisonment for an offence against sexual dignity. The officer appealed and the sentence was commuted to a fine. Necati was not informed properly about the proceedings and was not allowed to be involved as a civil party.

Case before the European Court of Human Rights

In April 2008, REDRESS filed an application to the European Court of Human Rights on Necati Zontul's behalf (application no. 12294/07).[184] It was argued that Necati Zontul had been the victim of torture when he was raped, that the authorities had not conducted a thorough, fair and impartial investigation and that the Appeals Tribunal had imposed inadequate penalties.

In 2010 the Court communicated the case to Greece, and asked it to respond. Speaking about this development, Necati said, "The events of 2001 made me feel terrible, psychologically and emotionally. Now I feel much stronger because my case is progressing and because my true story is being told".

On 17 January 2012, the Court decided unanimously in favour of Necati.[185] The Chamber reiterated that the rape of a detainee by an official of the State is an especially grave and abhorrent form of ill-treatment. It found that the treatment to which Necati was subjected, "in view of its cruelty and its intentional nature, had unquestionably amounted to an act for torture from the standpoint of the Convention".

The Court found that the internal administrative inquiry and the criminal proceeding had been sufficiently prompt and diligent. Nevertheless the penalty imposed on the perpetrator had not been sufficient in respect to the fundamental right that had been breached; there had been a clear lack of proportion. It found that the penalty could not be seen to be sufficient to have a deterrent effect, nor to be perceived as fair by the victim.

The Court found further that, in spite of Necati's efforts to track the progress of and participate in the proceedings, he had not been kept informed of the proceedings by the Greek authorities in such a way as to enable him to exercise his rights a civil party and claim damages. The Court found that the Greek authorities had therefore failed in their duty to provide information to him. This, it was held, amounted to a further violation of Article 3 of the Convention.

[184] Available at: http://www.redress.org/Application_to_the_European_Court_of_Human_Rights_April_2008.pdf.
[185] ECtHR, *Zontul v Greece* (2012) App. No. 12294/07, Judgment of 17 January 2012.

The Court awarded Necati €50,000 in non-pecuniary damages and €3,500 in costs and expenses.

PROSECUTION OF RAPE BY SOLDIERS BARRED BY STATUTE OF LIMITATIONS

NEPAL

UN Human Rights Committee

For ten years from 1996 to 2006 Nepal was gripped by an armed conflict between the Royal Nepal Army (RNA) and the Communist Party of Nepal ("Maoists"). Numerous gross human rights violations were committed by both sides, including extrajudicial killings, enforced disappearance and torture, including rape.

Although many violations of humanitarian law and human rights committed during the conflict were documented by UN agencies and NGOs,[186] data regarding sexual violence during the conflict is scarce.[187] Human rights activists, journalists and international observers paid very little attention to gender-based violence directed at women and girls. Certain factors, such as impunity for perpetrators, cultural stigmatisation, insecurity and fear of retaliation from perpetrators, and the fact that most human rights defenders at the time were male, discouraged women and girls from reporting sexual violence during the conflict. This invisibility has continued since the end of conflict, due to "the strong culture of silence on sexual violence in the Nepalese society, not only by the women and girls who suffer the violence but in society at large".[188] The fact that it has remained an overlooked and under-researched phenomenon means that victims and survivors are still without much-needed psychosocial support, medical assistance and legal recourse.

Purna Maya (not her real name), is a Nepalese woman who tried to use the Nepal legal system to have the perpetrator of rapes against her prosecuted. During the conflict Purna Maya, who was estranged from her husband, supported herself by running a tea shop. Beginning in September 2004, Purna Maya had been harassed by a Lieutenant of the RNA, and soldiers under his command. Over a period of weeks they came to her house and asked for her husband, assuming that he was associated with Maoists. Among other things she was called a whore and told that if her estranged husband did not present himself to the authorities she would suffer the consequences.

When her estranged husband did not appear, in November 2004 Purna Maya was arrested by soldiers from the RNA and taken into custody. At a nearby army barracks she was blindfolded, interrogated about her estranged husband's activities, punched and kicked, told

[186] For a comprehensive overview see OHCHR (2012), 'Nepal Conflict Report 2012: An Analysis of Conflict-Related Violations of International Human Rights Law and International Humanitarian Law between February 1996 and 21 November 2006', available at: http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf, October 2012.
[187] Ibid., at p. 158.
[188] See Project Document, UNFPA and UNICEF, 'Ensuring recognition of sexual violence as a tool of conflict in the Nepal peace building process through documentation and provision of comprehensive services to women and girls victims/survivors' available at http://mhpss.net/.

to drink urine, bitten, and raped repeatedly by at least four different soldiers. She lost consciousness, and was later dumped on the street outside the barracks.

Purna Maya suffered severe internal injuries from the rape, requiring extensive medical treatment including a hysterectomy, and continues to suffer from physical and psychological consequences of her treatment. She lost any financial support from her estranged husband and suffered from flashbacks to the point that she had to leave her family village. She has also been shunned by people in her new community who are aware of the rape, and the rape and resulting hysterectomy have had other negative consequences for her in society: women such as her, for instance, are not permitted to attend certain festivals.

In March 2006, after the conflict had ended, Purna Maya informed the Chief District Officer of her district, who is the head of the police, that she had been raped by members of the RNA. However no action was taken. In 2011, with the help of a local human rights organisation, Advocacy Forum, she filed a complaint with police about the rape. However, the complaint was rejected as the relevant legislation imposes a 35-day limitation period on bringing charges of rape. There is no provision criminalising torture.

The refusal to register the complaint was appealed up to the Supreme Court. Lawyers argued that the limitation period was contrary to Nepal's constitution, which guarantees equality for women and freedom from torture, and with Nepal's international human rights obligations. However, the appeal failed. Purna Maya's position is symptomatic of the position of all victims of rape during the conflict – given the security situation at the time, and the link between army and police, it was almost impossible for victims to bring complaints within the 35 day limitation period.

Case before the UN Human Rights Committee

Advocacy Forum Nepal and REDRESS submitted the case to the UN Human Rights Committee using the individual complaints procedure, which has been accepted by Nepal.

The communication argues that the failure to investigate, prosecute and provide reparation for the treatment inflicted on Purna Maya reveals multiple violations of the ICCPR. These include violations of her rights under Article 7 (prohibition of torture and other ill-treatment), Article 9 (liberty and security) and Article 10(1) (humane treatment) for the threats, arbitrary detention, torture and inhuman treatment inflicted on her by the soldiers of the RNA.

In relation to recognising her treatment as torture, the communication argued that:

> [t]he acts Purna Maya was subjected to … including blindfolding, beating, kicking and punching, the threat of rape, and gang rape by at least four different soldiers, amounted to torture, in violation of Article 7. It may be inferred from the facts that this was inflicted for a number of purposes, including (initially) to extract information; to punish Purna Maya for something her estranged husband was alleged to have done, and that she was alleged to have done or not to have done; to intimidate others in the community; and to humiliate and degrade her. The form the torture took and the words used in the lead up to and during the torture also demonstrate that it was motivated by discrimination.

Psychological torture and beating

The course of conduct involved the intentional infliction of severe physical and mental pain and suffering on Purna Maya. It began with Purna Maya being walked to the barracks at gunpoint, and surrounded by fifty to sixty armed guards, after she had been subjected to threats that she would face "consequences" if her husband did not present himself to the authorities. When they arrived at the gate to the barracks, a soldier blindfolded Purna Maya, leaving her disoriented and vulnerable. For two and a half hours she sat alone in a room.

[The officer] intentionally inflicted severe pain and suffering on Purna Maya when he kicked her with his boots and then punched her 30-35 times in her stomach, back, legs, and thighs. This physical attack left Purna Maya with several cuts and bruises on her thighs, knees, calves and forehead. He also used insulting and degrading language towards her, and ordered her to drink her own urine.

[The officer] then told Purna Maya he was going to rape her, and tore off Purna Maya's saree. When she tried to protect herself, he forcefully banged her head into the wall, causing her to bleed.

It was submitted that these acts on their own would have been sufficient to amount to torture under the ICCPR.

Multiple rapes

The torture then continued with the multiple rapes of Purna Maya. This conduct on its own unequivocally amounted to torture. As outlined above, rape in itself is automatically held to fulfil the severity threshold for torture, and the severe consequences for Purna Maya's psychological and physical (including reproductive) health, and financial situation, bear this out.

Furthermore, underlying the rape and other inhuman acts were a number of prohibited purposes, including:

In order to obtain information: Purna Maya was initially beaten during questioning, ostensibly in an attempt to obtain information from her.

Punishment of herself and her estranged husband: The beating and rapes inflicted on Purna Maya were the "consequences" that she had previously been warned of if her estranged husband did not present himself to the authorities.

Discrimination on the grounds of gender: Purna Maya was targeted for arrest and torture because of her role as the wife of a suspected Maoist and as punishment for his failure to report to the authorities. The perpetrators committed the crimes in a way that expressed their discriminatory motivation: from the very beginning of the threats made against her, and during her interrogation and torture, she was addressed in sexually demeaning terms: "whore", "prostitute", "fatherfucker". The form the torture took, including gang rape, was a form of torture used overwhelmingly predominantly against women and girls during the conflict, and the perpetrators were fully aware in the Nepali context that it would have particularly serious consequences for Purna Maya because of her gender. The rapes of Purna Maya were driven by discrimination, and amounted to such discrimination.

To degrade and humiliate Purna Maya, and to intimidate others (particularly women) in the community: Rape in Nepali society draws tremendous stigma, and … is consciously

degrading and humiliating. Having been gang raped, and horrifically injured to the point where she would later need a hysterectomy, Purna Maya was then dumped on the street outside the army barracks, both making the fact of the rape public in a society where that can draw tremendous stigma, and serving as a warning to other women to cooperate.

The communication further alleges that Purna Maya was specifically targeted and subjected to those violations of her rights because of her gender, and that she is therefore a victim of discrimination and that Nepal is in violation of Article 2(1) in conjunction with Articles 7, 9 and 10(1). In addition, she alleges that she has been denied access to a remedy, as required by Article 2(3) of the ICCPR, and that the limitation period itself is contrary to Article 2(3) in conjunction with Articles 7 and 10 as its very existence fails to adequately prevent crimes amounting to violations of the ICCPR and does not allow the State Party to properly investigate and prosecute cases amounting to torture, for which no limitation period should apply.

Given that rape is recognised as a form of discrimination which overwhelmingly affects women and girls, and that women and girls were targeted on a large scale by rape and other forms of sexual violence during the conflict, Purna Maya has further alleged that the limitation provision also in itself violates the State Party's obligations under Article 3 and Article 26, and the Author is a victim of these violations.

The case was accepted by the Human Rights Committee in May 2013, and forwarded to Nepal for its response. In August 2013 Nepal challenged the admissibility of the communication, and proceedings are still ongoing.

This case is one of a number of cases that have been brought to challenge the limitation period for rape in Nepal. At least two other cases have been taken at the domestic level, and have resulted in orders from the Supreme Court that the limitation period is unconstitutional. A number of years later, however, the legislation has not been amended, and police still refuse to accept complaints past the 35 day limit. It is hoped that this case before the Human Rights Committee will both lead to justice in Purna Maya's case, and lead to wider changes, including removal of the limitation period, and improvements in the way police investigate rape.

COMPLAINT ABOUT RESPONSE OF CONSULAR OFFICIALS TO RAPE BY SOLDIER

EGYPT/UNITED KINGDOM

Parliamentary & Health Services Ombudsman (England)

N, a British citizen, was travelling in Egypt on 14 May 2011 when she was stopped at a military checkpoint and told she could not proceed further until morning. Her passport was confiscated, and she was taken to a room where she was told she could sleep for the night. She was trapped in the room and, after some time, was raped by a military officer in plain clothes. Other soldiers nearby saw her emerge from the room distressed and bleeding.

The next day N and her friends contacted the British Embassy to ask for assistance and advice what to do. After a telephone conversation, the embassy sent her a list of hospitals and suggested that she report the rape to the police. When she raised concerns about reporting the case to the police, given that the rape was committed by a military officer, she was told that the normal advice would be to report. Contrary to internal guidance, she was not accompanied or offered to be accompanied by a member of the consular team to report the rape to the police, nor was she given any assistance in arranging a medical examination. When she went to one of the hospitals on the list she was treated extremely badly by the examining doctor, who breached her privacy, questioned why she had been at the checkpoint, and told her not to be worried about HIV because there was no HIV in Egypt. When she later asked consular staff for advice about where to obtain drugs to minimise the risk of HIV, staff were not able to assist.

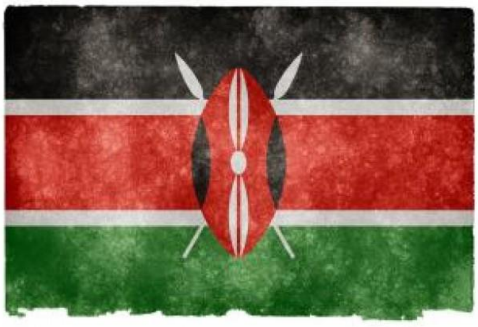
When N reported the rape to police as advised, she was taken to a military facility and held there for a number of hours against her will. She became very distressed and called the embassy for assistance, but was told over the phone, contrary to reality, that she was free to go at any time. When she was eventually released in the early hours of the morning she was told that a member of staff from the embassy would meet her and would go with her back to the military facility, but this did not happen. This caused further anxiety as she feared she could be arrested at any time. When she asked for assistance to rearrange the appointment she was told that she would have to do so herself. She later ended up giving her statement informally at a friend's house, in a language she did not understand, and was forced by the officer taking the statement to reenact parts of what had happened. She was later confronted by the perpetrator in an unannounced police line up. No forensic evidence was taken.

N left Egypt and for months tried to obtain information about whether a prosecution had gone ahead, without success. It was only many months later, with the help of lawyers in Egypt, that she was told that the perpetrator had been convicted by a military court of sexual assault (not rape) and sentenced to a term of imprisonment. This was appealed and a retrial ordered, where he was again convicted, but sentenced to a lesser term of imprisonment. After an application by her Egyptian lawyers they were allowed to make representations on her behalf in the latter proceedings (a first for a military trial), however she has still not been able to see a copy of the judgment.

N was very upset about the way she had been treated by the embassy staff after she sought assistance, and brought a formal complaint when she returned to the United Kingdom. One significant issue was that neither the internal rape guidance, nor the guidance on reporting incidents of torture and other ill-treatment had been followed. N felt that, had these been followed, she would not have been subjected to the additional trauma she suffered in reporting the rape and seeking medical assistance in the days after the rape. It was clear from the advice and lack of assistance given by embassy staff that they failed to comprehend that a different approach may be needed to reporting where the rape was committed by a state official. They had also failed to follow up with the authorities with sufficient vigour on the progress on the investigation, as required by the torture and ill-treatment guidance.

After months of dialogue the Foreign and Commonwealth Office (FCO) accepted that some of N's complaints had been substantiated and offered a partial apology. It also committed to revising the internal guidance on torture and other ill-treatment to make it clearer that cases such as N's fell within it, and improve training for staff.

Unhappy with this result, N took her complaint to the Parliamentary and Health Services Ombudsman for England and Wales. After a full investigation N's complaint was upheld, with the Ombudsman finding multiple examples of maladministration by the FCO. The FCO agreed to provide a full apology, to undertake an internal review, and to provide compensation to N.



PUBLIC LAW CHALLENGE FOR FAILURE TO PROTECT FROM RAPE

Kenya High Court

According to a government survey, one in five girls and women in Kenya are victims of sexual violence. Ninety percent of the victims are raped by people they know.

On 11 October 2012, a group of girls filed a petition in the High Court of Meru, Kenya on police failures to investigate and prosecute their rape cases. The initiators of the petition were the Canadian human rights organisation Equality Effect and Mercy Chidi, who runs the Tumaini Girls Rescue Centre in Meru. Eleven girls aged between five and 16 presented their cases before the Court. Three of them became mothers due to the rape.

The girls alleged that police asked for bribes before investigating cases of rape, refused to record rapes unless the victims produced witnesses and claimed that the victims had consented.

The petitioners alleged that the failure to investigate and prosecute rape breached numerous provisions of the Constitution, Articles 1, 2, 3, 5, 7, 8 and 10 of the Universal Declaration of Human Rights, Articles 1, 2, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child, Articles 2, 3, 4, 5, 6, 7 and 8 of the African Charter of Human and Peoples Rights, and numerous domestic laws. They sought declarations as to violations of their rights, and orders of mandamus directing the police to investigate cases, and to take measures at the policy level to implement a national framework on sexual violence, and to ensure training for police officers.

On 27 May 2013, the Meru High Court upheld the petition.[189] It found that:

Whereas the perpetrators are directly responsible for the harms, to the petitioners, the respondents herein cannot escape blame and responsibility. The respondent's ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a "climate of Impunity" for commission of sexual offences and in particular defilement. As a result of which the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted. This to me makes the respondents responsible for physical and psychological

[189] High Court of Kenya, *CK (a Child) et al. v Commissioner of Police et al.* (2013) Petition 8/2012, Judgment of 27 May 2013. A copy of the judgment is available at http://theequalityeffect.org/160girlshighcourt2013.html.

harms inflicted by perpetrators, because of their laxity and their failure to take prompt and positive action to deter defilement. The worse is that the petitioners' visited various police stations after defilements and gave names of the perpetrators being people they knew yet the respondents did not bother to take appropriate action. Instead the respondents showed disbelief, blamed the victims, humiliated them, yelled at and ignored them as they put them under vigorous cross-examination and failed to take action. The respondents are in my view directly responsible for psychological harm caused by their actions and inactions.

The Court found that the respondents had failed to implement the rights and fundamental freedoms as enshrined under the Constitution to observe, respect, protect, promote and fulfil the petitioners' fundamental rights and freedoms in particular the rights and freedoms relating to special protection as members of vulnerable group (Article 21(3)), equality and freedom from non-discrimination (Article 27) human dignity (Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (Article 53(1),(d) under the Constitution of Kenya, 2010.

It found further that:

In the instant petition the police have allowed the dangerous criminals to remain free and/or at large. The respondents are responsible for arrest and prosecution of the criminals who sexually assaulted the petitioners and the failure of State agents to take proper and effective measures to apprehend and prosecute the said perpetrators of defilement and protect the petitioners being children of tender years, they are in my opinion responsible for torture, defilement and conception of young girls and more particular the petitioners herein.

The Court also considered that “the police failure to conduct prompt, effective, proper, corruption free, and a professional investigation into petitioners complaints of defilement and other form of sexual violence” amounted to discrimination contrary to the Constitution.

The Court granted the following orders:

- A declaration that the neglect, omission, refusal and/or failure of police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ complaints of defilement violates their fundamental rights and freedoms:
    - To special protection as members of a vulnerable group
    - To equal protection and benefit of the law
    - Not to be discriminated against
    - To inherent dignity and the right to have dignity protected
    - To security of the person
    - Not to be subjected to any form of violence either from public or private sources or to torture or cruel or degrading treatment
    - To access to justice.
- A declaration that the neglect, omission, refusal and/or failure of police to conduct prompt, effective, proper and professional investigations into the first eleven

petitioners' complaints of defilement violates their fundamental rights and freedoms under:

- Articles 1 to 8(inclusive) and 10 of the Universal Declaration of Human Rights,
- Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;
- Articles 1, 3, 4,16 and 27 of the African Charter on the Rights and welfare of the child, and
- Articles 2 to 7(inclusive) and 18 of the African Charter on Human and people's rights.

- An order of mandamus directing the first respondent (the Commissioner of Police) and his agents to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints of defilment and other forms of sexual violence.

- An order of mandamus directing the first respondent and his agents to implement Article 244 of the Constitution, which relates to police upholding professionalism and human rights standards, insofar as it is relevant to the matters raised in the petition.

PART III. FRAMING AN INDIVIDUAL CASE USING HUMAN RIGHTS LAW

The developments linking rape and torture and other ill-treatment, outlined in Part I, can be drawn upon by lawyers and advocates to frame their cases and policy arguments in human rights terms – whether before domestic, regional or international bodies. This section aims to bring together in detail the jurisprudence linking rape and torture to assist in this task.

Cases using the framework of torture and other ill-treatment can be brought at a number of levels – domestic (criminal, civil, constitutional), regional, and international. They may be cases of individual victims seeking justice in their case, class actions on behalf of groups of victims subject to similar or related violations, or public interest litigation challenging particular laws or practices which lead to violations of victims' rights.

Framing any case before a judicial or quasi-judicial body requires careful consideration of the wishes and experiences of the survivor(s), the purposes of the litigation, and the legal framework within which the litigation is brought. As shown in Part I, different treaties and legal regimes may require proof of different legal elements to show the commission of torture and other ill-treatment, and the bodies interpreting those legal regimes have differed in their jurisprudence in a number of respects.

This section therefore aims to set out the key issues that are usually required to show torture or other ill-treatment within the international human rights framework to help litigants to draw upon the most progressive jurisprudence in international human rights and humanitarian law specifically related to rape to argue their cases. A flowchart providing a schematic representation of the way the information in this part is organised, as a suggestion as to the logical steps a litigant may want to follow in framing human rights aspects of their case, is set out in **Annex Two**.

It is hoped that as well as assisting with arguing cases before international human rights bodies, this analysis will prove useful for litigation through domestic fora, including through constitutional guarantees, and in educating judges, lawyers and policy makers about international standards. In addition, this section will show where the jurisprudence of particular bodies could be developed further to better reflect the experiences of rape survivors, and the growing consensus in international law, allowing for judgments to be made about the potential risks and additional benefits of strategic litigation in those areas.

This section does not go through the practicalities of collecting and compiling the evidence required for a case, weighing up the potential benefits of different domestic options, pursuing prosecutions, considering the available regional and international mechanisms, and the advantages and disadvantages of each. The REDRESS report *Litigation Strategies for Sexual Violence in Africa*, by Vahida Nainar, addresses these issues and provides detailed information about strategic considerations in litigation, and the mechanics of different mechanisms, both domestic and international.[190]

[190] Vahida Nainar, *Litigation Strategies for Sexual Violence in Africa* (September 2012: REDRESS, 2012).

A. ESTABLISHING THAT RAPE ENGAGES THE PROHIBITION

It is clear on the jurisprudence that rape – whether committed by a state or non-state actor, amounts to a form of prohibited ill-treatment. Any rape will therefore raise the question of whether states fulfilled their obligations under general human rights treaties such as the ICCPR, ECHR, IACHR and ACHPR, and under the Convention against Torture, to use due diligence to prevent and respond to it.[191]

1. Show that rape amounts to prohibited ill-treatment

As outlined above, for conduct to amount to cruel or inhuman treatment or punishment, it must show a minimum level of severity of pain and suffering. To be found degrading, the act or combination of acts need not reach the same severity threshold if it is carried out in a particularly degrading manner.

Courts and tribunals have been quick to find that rape committed by any actor reaches both of these thresholds and engages the general obligations of states. In many, although not all, cases, they have qualified the ill-treatment as torture (the jurisprudence on the severity issue in this context is discussed in the next section). However, even where courts have not made the distinction, there has been no question that the rape is "severe" and/or "degrading" enough to amount to inhuman or degrading treatment. This was the case, for example, in *MC v Bulgaria*, where the European Court considering the case of a "date rape" by two men held under Article 3 that states generally have "the responsibility to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution".[192] Since then the Court has clarified that any rape will meet the threshold, noting in a recent case simply that "rape amounts to treatment contrary to Article 3 of the Convention".[193] This is also consistent with the position adopted in General Comments and Recommendations by the Human Rights Committee, the Committee Against Torture and the CEDAW Committee.[194] For more detail on the relevant jurisprudence see the next section on the elements of torture.

Such an approach has been welcomed as correct "both in terms of the empirical evidence of the harm of rape and the seriousness of the wrong of rape in violating the sexual autonomy of individuals".[195] The obligations that flow from such a finding are examined further in sub-section B, below.

1.1. Consider whether the rape should be termed "torture"

A separate question is whether to argue that the ill-treatment in fact amounted to torture, and should be termed such. Where the rape is committed by a state official it is clear that

[191] Although the extent and nature of those obligations may be different – see Section B.
[192] ECtHR, *MC v Bulgaria* (2003) 4 December 2003, at para. 153.
[193] ECtHR, *DJ v Croatia* (2012) App. No. 42418/10, Judgment of 24 July 2012, at para. 83.
[194] CAT (2008), 'General Comment No. 2', at para. 18; CEDAW (1992), 'General Recommendation No. 19', at para. 7; HRCtee (2000), 'General Comment No. 28: Equality of Rights between Men and Women (Article 3)', UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000 at para. 11.
[195] McGlynn, 'Rape, Torture and the European Convention on Human Rights', (2009) at p. 7.

this should be argued. There is still debate, however, where the rape is committed by a non-state actor.

As discussed in detail above, there are compelling arguments for the term torture to be used regardless of the perpetrator, or any failing by the state. On the other hand, different opinions remain about whether using the term torture is strategically (and some would say legally) the correct approach in the human rights sphere. These are issues that need to be considered carefully in an individual case, and in considering advocacy at the domestic and international levels more generally. Set out below is jurisprudence that can be drawn on if such a case is to be made.

The elements of torture

As discussed in Part I, different bodies are guided by different treaty provisions and jurisprudence on what needs to be proven to show that an act amounts to torture. The same may apply to criminalisation of torture under domestic law, and constitutional guarantees against such conduct.

As such, it is necessary to be very clear from the outset about the elements of the crime or human rights violation of torture that must specifically be proven in order to win a case in the forum in which you are operating. It may also be necessary to draw on the jurisprudence of other bodies in further support or to argue that the interpretation of those elements needs to be changed to bring it into harmony with international human rights obligations and developing norms.

There are clear parallels across the different regimes, and a developing understanding of a customary international law definition of torture. It is generally accepted that torture requires (i) the intentional infliction of severe pain or suffering, (ii) for a prohibited purpose. There is still debate about the extent to which a public official must be involved in the act for it to amount to torture, but in human rights regimes at least some failing on the part of the state is required to raise its responsibility.

Jurisprudence from different bodies on each of these aspects is set out below to help litigants frame arguments on rape as torture in their own context. For a detailed picture of the requirements under different legal regimes, see Appendix One, which provides a summary of the current understandings of the elements of torture and other ill-treatment by key human rights bodies.

1.2. Intentional infliction of severe pain or suffering

The Committee against Torture has emphasised that the requirement of intent "does not involve a subjective inquiry into the motivations of the perpetrators, but rather must be [an] objective determination under the circumstances".[196] Rape as defined under international law, which is an intentional violation of sexual autonomy, will fulfil this requirement. In addition, intent can be implied where it can be shown, as discussed below, that an act was committed for a particular purpose.[197]

[196] CAT (2008), 'General Comment No. 2', at para. 9.
[197] See UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para. 30.

In relation to severity, human rights law now recognises that rape is a crime of such a serious and cruel nature with such devastating impact on victims that it can reach the necessary threshold to qualify as torture. However, different human rights bodies are still developing their jurisprudence as to whether rape will *automatically* reach that threshold.

In discussing this element it is necessary to recall that some courts and bodies – notably the European Court of Human Rights – count the severity of the pain and suffering as a key distinguishing feature between torture and other ill-treatment.[198] The Court tends to look at a number of factors to determine whether that threshold has been reached, including the duration of the treatment, the context of the treatment, and personal characteristics of the victim. There is therefore a higher severity threshold for torture.

Other bodies, including the Human Rights Committee, see the distinguishing features in other elements – so that it is necessary to prove a certain level of severe pain and suffering in order for conduct to amount to cruel or inhuman treatment, but once that threshold is reached it is other elements, such as the purposive element, that are decisive.

The usual approach to determining whether pain or suffering is "severe" uses both objective and subjective criteria: determining the objective effect of the physical and mental effect of the treatment on the particular victim, while taking into account factors including his or her age, gender, religion, sexual orientation, state of health or membership in a particular group.[199]

1.2.1. Jurisprudence seeing rape as automatically reaching the threshold

Some of the jurisprudence recognises that, objectively, rape automatically reaches the necessary severity threshold to be termed "torture". This was the view of the Appeals Chamber of the ICTY in the *Kunarac* case, which held that "some acts establish per se the suffering of those upon whom they are inflicted. Rape is obviously such an act".[200]

Similarly, in *Delalic*, the Trial Chamber of the ICTY stated that it considered "the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity".[201] According to the Trial Chamber:

> Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.[202]

Human rights courts and bodies have also taken such an approach. In *Mejia v Peru,* a case involving the rape of a schoolteacher by members of the Peruvian Army, the Inter-American Commission implied that the suffering requirement under the American Convention on

[198] This approach was also approved of by the ICTY in ICTY, *Krnojelac (Trial Chamber Judgment)* (2002) 15 March 2002, at para. 182.
[199] See Nowak, 'Torture and Enforced Disappearance', at p. 155; Rodley and Pollard, *The Treatment of Prisoners under International Law* at pp. 128-9.
[200] ICTY, *Kunarac (Appeals Chamber Judgment)* (2002) 12 June 2002, at paras. 150-1.
[201] ICTY, *Celebici Case (Trial Judgment)* (1998) 16 November 1998, at para. 495.
[202] Ibid.

Human Rights was automatically fulfilled - rape as an "act of violence" would necessarily cause the required level of suffering. The Commission explained that:

> [r]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.[203]

The understanding that rape will automatically fulfil the severity threshold has been confirmed by the recent jurisprudence of the Inter-American Court, in two cases concerning rape by members of the military. There, the Court held that:

> rape is an extremely traumatic experience that can have severe consequences and cause significant physical and psychological damage that leaves the victim 'physically and emotionally humiliated,' a situation that is difficult to overcome with the passage of time, contrary to other traumatic experiences. This reveals that the severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease. Indeed, the after effects of rape will not always be physical injuries or disease. Women victims of rape also experience complex consequences of a psychological and social nature.[204]

The Court has made it clear in cases of rape by state officials that a single act of rape, outside state detention facilities, "because the objective and subjective elements that classify an act as torture do not refer either to the accumulation of facts or to the place where the act is committed, but to the intention, the severity of the suffering, and the purpose of the act, requisites that, in the present case, have been fulfilled".[205]

The Committee Against Torture appears to have come to the same conclusion in the case of *V.L. v. Switzerland*, a *non-refoulement* case. It held that multiple rapes by state agents, (in that case outside of a detention facility), constituted torture.[206] In its view:

> The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture ... [207]

1.2.2. Jurisprudence examining specific factors in relation to severity

The European Court, which imposes a higher severity threshold for torture, has tended to draw attention to specific facts to support its findings that rape amounted to torture, rather

[203] IACmHR, *Mejía v Perú* (1996) 1 March 1996.
[204] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) Preliminary Objections, Merits, Reparations and Costs, Judgment of 30 August 2010, Series C No. 215 at para. 124 (emphasis added). See also IACtHR, *Rosendo Cantú Et Al v Mexico* (2010) Judgment (Preliminary Ojections, Merits, Reparations and Costs) of 31 August 2010, Series C, No. 216 at para. 112. See further UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para. 36.
[205] IACtHR, *Rosendo Cantú Et Al v Mexico* (2010) 31 August 2010, at para. 118.
[206] CAT, *VL v Switzerland* (2006) 20 November 2006, at para. 8.10.
[207] Ibid.

than making such finding automatic. These often read like aggravating circumstances, and have included the age of the victim, vulnerability, and conditions of detention.[208]

The Court's position, established in *Aydin v Turkey*, is that "the rape of a detainee by a State official is to be regarded as an especially grave and abhorrent form of ill-treatment, given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim".[209] The Court has also recognised that rape leaves deep psychological scars that do not respond to the passage of time as quickly as other forms of physical and mental violence,[210] and has stressed that a victim suffers "the acute physical pain of forced penetration, which [leaves] her feeling debased and violated both physically and emotionally".[211]

The European Court considers that under the Convention the term 'torture' attaches to "deliberate inhuman treatment causing very serious and cruel suffering".[212] In *Aydin* the complainant alleged that as a 17 year old she had been detained, sprayed with a high pressure hose, spun around in a car tyre, beaten and raped. The Court looked to factors including her sex and age, the fact that she was held in detention, and the accumulation of acts committed against her over a number of days. Against this background, it was satisfied that:

> the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.

In another more recent case, the Court found that the anal rape of a man with a baton in immigration detention amounted to torture and, importantly, referred with approval to jurisprudence of the ICTY, ICTR and Inter-American Court of Human Rights that penetration by an object automatically constituted an act of torture.[213] Nevertheless, the Court still considered the detention context of the rape and the physical pain experienced as factors in its consideration of whether the act amounted to torture. The Court noted that the complainant had suffered sharp physical pain as a result of the rape, and that "such an act, particularly against a person in custody, is likely to generate the feeling of being debased and violated both physically and emotionally". On this basis, it found that "there can be no

[208] See also ICTY, *Krnojelac (Trial Chamber Judgment)* (2002) 15 March 2002, at paras. 181-83.
[209] ECtHR, *Aydin v Turkey* (1997) 25 September 1997. See in particular para. 83 ("*Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence*"). In that case, The Court in that case held that even if the only grounds for the complaint had been the act of rape, without the other ill-treatment the victim had been subjected to, the Court would still have found that the treatment of the victim (rape) amounted to torture in violation of Article 3 of the European Convention (at para. 86).
[210] Ibid., at para. 83. The Court held that even if the only grounds for the complaint had been the act of rape, without the other ill-treatment the victim had been subjected to, the Court would still have found that the treatment of the victim (rape) amounted to torture in violation of Article 3 of the European Convention (at para. 86).
[211] Ibid., at para. [*].
[212] Ibid., at para. 82. The Court cited ECtHR, *Ireland v United Kingdom* (1978) 18 January 1978, at para. 167.
[213] ECtHR, *Zontul v Greece* (2012) 17 January 2012, at para. 91.

doubt that the treatment of the applicant was – by its cruelty and the intentional element that characterised it – an act of torture under the Convention".[214]

In other cases concerning rape – including by private actors – the Court has not considered whether the act amounts to torture, treating the complaint instead as simply raising a violation of Article 3 generally.[215] Whether it would find rape by private actors in future cases to amount to torture is an open question, although its jurisprudence on other types of ill-treatment suggests that it might.

1.2.3. Arguments for and against an automatic severity finding

Part I examined how some have criticised the jurisprudence linking rape and torture by finding that rape automatically gives rise to severe pain and suffering, because it positions women as sexualized victims, "reinforc[ing] the understanding that women are not capable of not being victimized by rape".[216] It has been argued that the severity of harm experienced by rape is necessarily subjective, and that avoiding an automatic classification of rape as meeting a severity threshold "can take into account a victim's perspective and ensure that they are included in the process of assessing and determining what happened to them".[217]

On the other hand, considering the severity of harm of different rapes differently has inherent dangers. It risks downplaying the gravity of some rapes, as well as reintroducing the idea, already pervasive in society, that "not all rapes are rape", and not all victims are "worthy" victims.[218] Focusing on an assessment of the harm puts the spotlight on the victim, and may lead to intrusive questioning of victims regarding their background, the impact of the rape and its adverse effects.[219]

In this discussion it is important to return to the traditional approach to assessing the severity of harm under the prohibition of torture and other ill-treatment. The test is an objective one, with subjective elements. The question is therefore not what the individual actually experienced, but whether in general it can be said that the treatment would have caused severe mental or physical suffering to a person in a situation comparable to that of the person, with their personal characteristics. With that approach in mind it is suggested that, on balance, it is right to adopt an approach whereby rape automatically reaches the threshold for severe pain and suffering.

However in arguing such cases it is also important to ensure that the survivor's story is heard – to avoid reducing them to the stereotype of a sexualised victim, to bring to light factors

[214] Ibid., at para. 92. See also ECtHR, *Maslova and Nalbandov v Russia* (2008) App. No. 839/02, Judgment of 24 January 2008, at paras. 107-08, where the court found that a series of acts of violence, including "especially cruel acts of repeated rape" amounted to torture.
[215] ECtHR, *MC v Bulgaria* (2003) 4 December 2003; ECtHR, *IG v Moldova* (2012) App. No. 53519/07, Judgment of 15 May 2012.
[216] Engle, 'Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', (2005) at p. 813.
[217] McGlynn, 'Rape, Torture and the European Convention on Human Rights', (2009) at p. 580.
[218] Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Portland: Hart, 2008) at pp. 31-50. The Guardian, 'Ex-Crimewatch presenter defends rape remarks' (26 May 2013), available at http://www.guardian.co.uk/society/2013/may/26/crimewatch-presenter-defends-rape-remarks and John Eligon and Michael Schwirtz, 'Senate Candidate Provokes Ire With "Legitimate Rape" Comment' New York Times (19 August 2012) available at http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?_r=0
[219] See McGlynn, 'Rape, Torture and the European Convention on Human Rights', (2009) at p. 573.

that lead to rape *objectively* leading to severe pain and suffering to a person in the position of the survivor, and to understand the harm actually suffered, and how it can therefore be responded to. While a litigant may therefore argue for an automatic finding of severity, there may nevertheless be good reasons to provide evidence of the why the harm suffered was severe for the individual.

KEY POINTS

- *International bodies take different approaches to the level of severity required for an act to amount to torture. For some bodies a higher threshold is required than that for other ill-treatment, while for others the threshold is the same.*
- *It is clear that – for all bodies – rape can reach the severity threshold for torture, but there is still debate about whether it will automatically reach that threshold. This is largely down to differences in approaches to the definition between the bodies.*

1.3. For a prohibited purpose

The idea that to amount to torture an act must be committed for a particular purpose is one that is consistent across the jurisprudence of each human rights body and in international criminal law.[220] The Convention against Torture definition of torture specifies that such purposes include "obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind". This is not a closed list, and the Committee Against Torture and other international courts and bodies have added to it in their jurisprudence.[221]

For conduct to amount to torture there is no requirement that the conduct must be solely perpetrated for one of the prohibited purposes; the prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose.[222] Like intent, the determination of the purpose behind an act of torture does not "involve a subjective inquiry into the motivation of the perpetrators, but rather must be objective determinations under the circumstances".[223]

[220] The definition of torture as a crime against humanity under the ICC statute does not include the purpose requirement, but this is generally seen as being inherent in the chapeau requirements to prove such a crime, ie. that it is part of a systematic attack directed at a civilian population.
[221] The Inter-American Torture Convention has an open-ended list, allowing any other purpose to be taken into account ("personal punishment" for example). One could also argue that the words "such as" in article 1 of the CAT mean that the purposes are not exhaustively listed. However, in relation to international humanitarian law, note ICTY, *Krnojelac (Trial Chamber Judgment)* (2002) 15 March 2002, at paras. 185-86.
[222] ICTY, *Kunarac (Trial Chamber Judgment)* (2001) 22 February 2001, at para. 816.
[223] CAT (2008), 'General Comment No. 2', at para. 9.

1.3.1. Examination of the purpose element where rape by a public official

International criminal tribunals and international human rights bodies and experts have explored the purpose elements underlying the use of rape in individual cases, and have found such purposes to be clearly identifiable where rape is used.

In the *Delalic* case, the victim was taken into a prison camp and interrogated about the whereabouts of her husband, and slapped. She was then taken to another room, where she was ordered to take her clothes off and was raped by the officer who had been interrogating her while two other officers were present. She was told that the reason she was there was because of her husband, and that she would not be there if he was. She was later subjected to a number of further rapes.[224] According to the Trial Chamber:

> The purposes of the rapes committed by Hazim Delic were, *inter alia*, to obtain information about the whereabouts of [the victim's] husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce and intimidate her into providing such information; and to punish her for the acts of her husband. The fact that these acts were committed in a prison-camp, by an armed official, and were known of by the commander of the prison-camp, the guards, other people who worked in the prison-camp and most importantly, the inmates, evidences Mr. Delic's purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness. In addition, the violence suffered by [the victim] in the form of rape, was inflicted upon her by Delic because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.

Similar cases have been examined by bodies including the Inter-American Commission on Human Rights, and the Committee against torture. In *VL v Switzerland*, a *non-refoulement* case, the same Committee against torture held that multiple rapes by State agents, (in that case outside of a detention facility), constituted torture.[225] In its view:

> The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture ... [226]

In another case, *CT and KM v Sweden*, the Committee appeared to take for granted that the purpose element was fulfilled, finding that torture was proved where there had been multiple rapes in state custody, without examining the element specifically.[227]

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[224] ICTY, *Celebici Case (Trial Judgment)* (1998) 16 November 1998, at para. 937.
[225] CAT, *VL v Switzerland* (2006) 20 November 2006, at para. 8.10.
[226] Ibid.
[227] CAT, *CT and KM v Sweden* (2006) Comm. No. 279/2005, Views adopted 17 November 2006, UN Doc.CAT/C/37/D/279/2005 at para.7.5. See further Fortin, 'Rape as Torture: An Evaluation of the Committee against Torture's Attitude to Sexual Violence', (2008) at pp. 147-8.

1.3.2. Prohibited purposes and rape by private actors

Much of the examination of the purpose element has taken place in the context of rape by a state official. However, the jurisprudence of these bodies suggests that prohibited purposes will be at play in rape by any perpetrator, whether an official or not. This is because, as recognised by the Inter-American Court (albeit in a case concerning rape by members of the military) "rape, as in the case of torture, has other objectives, including intimidating, degrading, humiliating, punishing, or controlling the person who undergoes it".[228]

1.3.2.1. Degradation and humiliation

In addition to purposes of obtaining information, punishment, and intimidation, which may be obvious on the facts in an individual case, it is recognised that rape will frequently have two further purposes. The first of these is the degradation and humiliation of the victim, his or her family, and community. This has been recognised as a prohibited purpose although it is not specifically enumerated in the definition contained in the Convention against Torture.[229] This was recognised, for example, by the Inter-American Commission in the leading case of *Mejia v Peru*.[230] According to the Commission "rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community".[231] This purpose has also been discussed and held to be present in a number of other leading judgments on rape and torture.[232]

1.3.2.2. Discrimination

Another recognised purpose underlying the use of rape as a method of torture is discrimination on the basis of sex or gender. Certain forms of violence, including rape, are recognised as being gender specific – that is, in their form or purpose aimed at "correcting" behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.[233]

Rape inherently has an underlying discriminatory purpose. Perpetrators' use of sexual crimes "embody gendered discrimination in that these crimes target the gender identity and sexual identity of the victims – whether the victims are men or women".[234]

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[228] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 127.
[229] See ICTY, *Furundžija (Trial Chamber Judgment)* (1998) 16 November 1998, at para. 162; CAT, *VL v Switzerland* (2006) 20 November 2006, at para. 8.10; UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para. 36.
[230] IACmHR, *Mejía v Perú* (1996) 1 March 1996.
[231] Ibid., at para. 3(a).
[232] See, eg. ICTY, *Furundžija (Trial Chamber Judgment)* (1998) 16 November 1998, at para. 162; ICTY, *Akayesu (Trial Chamber Judgment)* (1998) 2 September 1998, at para. 687; CAT, *VL v Switzerland* (2006) 20 November 2006, at para. 8.10; IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 127. Although note the opposition position was taken in ICTY, *Krnojelac (Trial Chamber Judgment)* (2002) 15 March 2002, at paras. 185-86.
[233] UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para. 30.
[234] Amnesty International, 'Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court', (2011) at p. 45.

This idea has been developed in most detail in relation to discrimination against women. The CEDAW Committee has recognised that where rape is targeted at a woman because she is a woman, or affects women disproportionately, it is a form of discrimination.[235] In his report on violence against women the Special Rapporteur on Torture affirmed 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 Convention against Torture definition".[236] In *Celebici* the ICTY Trial Chamber also relied on the notion that rape was a "discrimination against women" to find the purpose requirement was satisfied.

However, the same arguments are equally applicable in relation to rape of men. Rhonda Copelon argued that rape is "sexualized violence that seeks to destroy a woman based on her identity as a woman" and because raping a man is a way to "feminize" him, rape will always be "a crime of gender".[237]

There is a danger, however, in relying solely on gender discrimination as the prohibited purpose shown by rape. To do so may obscure the political motives and other forms of discrimination torture often carries. The use of rape to intimidate minority groups for example, is widely documented.[238] Seeing rape only as discrimination on the grounds of gender does not account for the complex, multi-layered nature of power relationships, whereby women and men are targeted not only because of their gender, but also because of their religion, ethnicity, class or sexual orientation. And discrimination can be plural; in *Aydin v. Turkey* for example the victim was raped both on account of her gender and of her ethnicity.[239]

It is therefore important to acknowledge that there may be a number of purposes at play in the use of rape. International criminal courts have stated that it is difficult to envisage circumstances in which rape by or with the consent of acquiescence of a public official would *not* involve prohibited purposes of punishment, coercion, discrimination or intimidation.[240] However, on the jurisprudence outlined above there is a strong argument that such purposes, along with the prohibited purposes of humiliation and degradation, will always be present in the commission of rape, regardless of who carries it out. It is for this reason that the recognition of rape as a form of torture serves an important function of acknowledging that rape is an intentional act of humiliation, discrimination and intimidation, rather than a natural result of the perpetrators' sexual urges.[241]

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[235] CEDAW (1992), 'General Recommendation No. 19', at para. 6. See also Committee on Economic Social and Cultural Rights (2005), 'General Comment No. 16 - Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights', UN Doc. E/C.12/2005/3, 13 May 2005 at para. 27.

[236] UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para 30 (emphasis added).

[237] Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law', *Hastings Women's Law Journal,* 5 (1994), 243-65.

[238] Examples from Turkey: "Violence by State agents targets women who are active in the Kurdish movement that claims their minority and human rights and who voice political beliefs unacceptable for the government and the military in order to hinder their fight and to punish the whole community." Roj Women Assembly (2010) *NGO shadow report to the CAT*, available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/RojWomen.pdf.

[239] Livio Zilli, 'The Crime of Rape in the Case Law of the Strasbourg Institutions', *Criminal Law Forum* 13 (2002), 245-65 at p. 261: "Notwithstanding the importance of the Court's judgment in confirming the Commission's ruling of rape as amounting to torture, Sükran Aydin's rape was not only an act of discrimination on the grounds of her "race or ethnic identity", but also, clearly, of gender discrimination – she had been raped because of her gender. This double layer of discrimination is lost in both the Commission's report and the Court's judgment".

[240] ICTY, *Celebici Case (Trial Judgment)* (1998) 16 November 1998, at para. 495.

[241] See Amnesty International, 'Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court', (2011) at p. 39.

KEY POINTS

- *International bodies have found that rape by public officials of those under their control will almost certainly involve prohibited purposes including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. The same reasoning applies whether the rape is committed against women or men.*
- *However, the jurisprudence of these bodies suggests that prohibited purposes – including discrimination and humiliation – will be part of rape by any perpetrator, whether an official or not.*
- *Although discriminatory aspects are important, when considering the purpose element it is important not to focus solely on discrimination, as this may obfuscate other power relationships and political purposes at play.*

1.4. Consider the public official aspect

Finally, it is important to consider how to approach the "public official" aspect which, as discussed above, some still see as integral to the definition of torture in international human rights law, although jurisprudence increasingly suggests otherwise.

It is clear that when dealing with cases and obligations under the Convention against Torture, at the very least "consent" or "acquiescence" by a state official is a requirement for the act to come within the scope of the Convention (whether it is termed torture or other ill-treatment). However, as discussed above, this is not as clear-cut under other more general human rights treaties, and there is still debate about whether rape by non-state actors should be termed "torture". For some scholars it is very important that it is so called, no matter whether the state is involved (directly or through omission).[242] For others, using the word "torture" to describe rape by non-state actors is seen as unhelpful and unnecessary.[243] For the bodies themselves, while none have yet found rape by a non-state actor to be "torture" most have left the question open.[244]

This issue therefore needs very careful consideration taking into account the views and wishes of the survivor, the jurisprudence of the body hearing the case, and wider strategic aims. Either way, it is clear that the state may be *responsible* for such conduct under international human rights law – whether it is termed torture or other ill-treatment. The ways in which the state may be held responsible are examined in sub-section B, below.

[242] See, eg. Nainar, 'Torture by Private Actors: Introducing a Legal Discourse in India'.
[243] See, eg. McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy', (2008).
[244] However cf. IACtHR, *Cottonfields Case* (2009) 16 November 2009.

1.4.1. Where the rape is committed by a public official

On the jurisprudence it is difficult to envisage circumstances when rape by a state official will not amount to torture. Indeed, that rape in state custody will always amount to torture is a position that appears to have been adopted by the Committee against torture. In the case of *CT and KM v Sweden* it held Committee held:

> on the basis of the medical evidence provided, and the State party's failure to dispute the claim, the Committee considers that the first named complainant was repeatedly raped in detention and **as such** was subjected to torture in the past (emphasis added).[245]

This is consistent with the views of previous Special Rapporteurs on Torture.[246] It is also consistent with the jurisprudence of international criminal law tribunals, which holds that rape automatically meets the severity threshold to amount to torture, and that the purpose requirement will almost certainly be fulfilled where there is rape in state custody.[247]

It is also clear on the jurisprudence of the ECtHR, the Committee against Torture, and the IACtHR that for conduct, including rape, by a state official to amount to torture, it need not take place within state detention facilities.[248] As such, rapes committed by police in a field, and by military personnel in the victim's house have both been held to amount to torture.

It has also been made clear that the category of "state officials" caught by the provision is wider than law enforcement and military personnel. The Committee against Torture explained in General Comment No. 2 that:

> States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law. Accordingly, each State Party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions…[249]

Precedents such as these are helpful for those who have been raped by a state official to show that conduct analogous to what they have experienced has been recognised as torture in the past. However, it is still important to consider wider strategic issues when arguing such cases: if it is thought desirable to strengthen jurisprudence that recognises non-state actor harm, including rape, as torture, it will be important to avoid arguments that suggest that there is a 'public official' *requirement*, even if it can be fulfilled in a particular case.

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[245] CAT, *CT and KM v Sweden* (2006) 17 November 2006, at para. 7.5.

[246] UN Commission on Human Rights (1995), 'Rodley Report', at paras. 16-19; UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para. 34. Rodley also referred to the statement by previous Special Rapporteur Koojimans in his oral introduction to his 1992 report to the Commission on Human Rights that "[s]ince it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture" (E/CN.4/1992/SR.21, para. 35).

[247] ICTY, *Celebici Case (Trial Judgment)* (1998) 16 November 1998, at para. 471.

[248] See, eg. CAT, *VL v Switzerland* (2006) 20 November 2006, at para. 8.10; IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 128; ECtHR [GC], *El Masri* (2012) 13 December 2012, at paras. 205-11 (where insertion with a suppository was part of the treatment held to amount to torture).

[249] CAT (2008), 'General Comment No. 2', at para. 15.

1.4.2. Cases of non-state actor rape under the Convention against Torture and American Torture Convention

Even for those Conventions which explicitly include a 'public official' requirement to fall within their scope, it is possible to show that this requirement is fulfilled where the direct perpetrator is not a public official. For the Convention against Torture, this is possible if it can be shown that it was committed "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[250] For the Inter-American Torture Convention, it is necessary to show that a public servant or employee acting in that capacity ordered, instigated or induced the use of torture, or "being able to prevent it, fail[ed] to do so". If so, that public servant is to be held guilty of the crime of torture.[251]

These broader understandings of the extent of public official involvement have been examined in most detail by the Committee against Torture. Through its caselaw the Committee has appeared to understand acquiescence as requiring "knowledge of the activities of the non-state actors, general agreement with those actions, or a purposive refusal to act".[252]

This has been demonstrated through a number of cases concerning the potential *refoulement* of individuals to states where they were at risk of violence by non-state armed groups. In nearly all of those cases the Committee has held that the state party is not responsible for the actions of the armed groups, that the risk is therefore not of "torture" as defined in the Convention, and that the person's removal is not prohibited under Article 3.[253] Such armed groups similarly have not generally been considered to fall within the 'acting within an official capacity' requirement unless they exercise effective control over a territory where there is no central government.[254] This leads to the result that a person may be returned to a state where there is a serious risk of being subjected to the same treatment at the hands of armed groups that they would have been protected from if it had been committed by state actors.

The Committee has examined the notion of acquiescence in only two cases which are not *refoulement* cases. In one relatively straightforward case, it was satisfied that prison guards had either instigated, consented to or acquiesced in violence committed by other prisoners against a person in detention, and that it therefore amounted to a violation of Article 7.[255] In another, it considered the attacks by private individuals against their Roma neighbours and their property. The complainants alleged that the burning of their houses and crops while some of the complainants were in those houses, and subsequent dispossession from their

[250] CAT, Article 1.
[251] American Convention to prevent and punish torture, article 3.
[252] Edwards, *Violence against Women under International Human Rights Law* at p. 246.
[253] See eg. *HMHI v Australia,* Communication No. 177/2000, 1 May 2002 (return to Somalia, where alleged faced risk by non-state actors), but cf. *Elmi v Australia*, Communication No. 120/1998, 14 May 1999 (where on similar facts found was within the scope of the Convention because there was an absence of central government and the non-state actors were in 'effective' control); SV *et al v Canada*, Communication No. 49/1996, 15 May 2001 (return to Sri Lanka where author faced risk of harm from Liberation Tigers of Tamil Eelam (LTTE); *GRB v Sweden*, Communication No. 83/1997, 15 May 1998 (return to Peru where alleged at risk of violence of violence from members of "Shining Path"). See further ibid., at pp. 245-47; Robert Mccorquodale and Rebecca La Forgia, 'Taking Off the Blindfolds: Torture by Non-State Actors', *Human Rights Law Review,* 1 (2001), 189-218 at pp. 209-10.
[254] See Edwards, *Violence against Women under International Human Rights Law* at p. 249.
[255] HRCtee, *Wilson v Philippines* (2003) Comm. No. 868/1999, Views adopted 11 November 2003, UN Doc. CCPR/C/79/D/868/1999 at para. 7.3.

land, amounted to inhuman treatment with the consent or acquiescence of the police. The Committee agreed, holding that "the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention".[256]

Two members of the Committee issued a separate opinion stating that in their opinion the severity of the pain and suffering inflicted on the complainants meant that the attack should be qualified as "torture".[257] The jurisprudence therefore suggests that in order to acquiesce to torture or other ill-treatment, officials must know of an immediate risk to an individual or group, and not take steps to protect them. If there is such "acquiescence", the failure to respond will fall within the Convention and the state will be held responsible.

The Committee considered further the issue of acquiescence in private actions in its General Comment No. 2, where it said:

> 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 States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking (emphasis added).[258]

Such an approach was endorsed by the Special Rapporteur on Torture, Manfred Nowak, who noted that "the language used in article 1 of the Convention concerning consent and acquiescence by a public official clearly extends State obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals".[259]

By the reference in the General Comment to the concept of "due diligence", drawn from the jurisprudence of other treaty bodies and discussed in further detail in the next section, the Committee has been seen by many as going much further than the its previous approach discussed above.[260] However, interpreted in line with that previous jurisprudence, and limited by the requirement that the state authorities must "know or have reasonable grounds to believe" that acts of torture are being committed, this may still be a narrower approach to due diligence than that of other bodies. The Committee against Torture's jurisprudence suggests that it does not create any pre-abuse preventive obligations on a state in relation to private actions and will require *actual* knowledge of a particular incident

[256] CAT, *Hajrizi Dzemajl et al. v Yugoslavia* (2000) 2 December 2002, at para. 9.2.
[257] Individual opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete under rule 113 of the Rules of Procedure.
[258] CAT (2008), 'General Comment No. 2', at para. 18.
[259] UN General Assembly (2008), 'Manfred Nowak 2008 Report', at para. 31.
[260] Edwards, *Violence against Women under International Human Rights Law* at p.250.

and *actual* refusal to act: a higher standard of proof than due diligence, which can be implicated by mere failures to act".[261]

Although this apparently narrower approach has been criticised, there is a good argument that it makes sense for the Committee against Torture to understand its mandate in this more limited way. This is because the Convention against Torture imposes strict requirements to prosecute the crime of torture, including through the use of universal jurisdiction. As the Committee made clear in General Comment No. 2, when there is complicity or acquiescence by a state official in torture, not only is the state responsible, but the relevant officials should be held criminally responsible, whether as authors, complicit parties, or otherwise, under the Convention.[262] Where wider policy measures have contributed to the perpetration of acts leading to severe pain and suffering by non-state actors, there are serious questions about whether it is possible, or appropriate, to identify individual officials as criminally responsible in this way.

As a separate but important point, the Committee's jurisprudence on the issue of acquiescence, and particularly the case of *Dzemajl* suggests (as is clear in the definition of other ill-treatment) that the distinguishing feature between torture and other ill-treatment is not a public official requirement (which may be severity, as is suggested by the Committee against Torture and ECtHR, and/or purpose). Rather, there must be some degree of public official involvement through instigation, consent or acquiescence for any act to come within the scope of the Convention at all. As has been pointed out by Dewulf, the "public official" requirement is therefore not a matter of the intrinsic definition of torture, but rather the attribution of state responsibility,[263] albeit one with specific consequences under the Convention against Torture in terms of criminalisation, prevention and response.

Therefore, if the Convention against Torture is seen as not defining the scope of the prohibition of torture as a whole, but rather its application to torture leading to direct individual criminal responsibility of state officials and others over which all states have jurisdiction, it may make sense for the Committee to take a narrower approach to which failures of "due diligence" lead to a finding of torture or ill-treatment in a specific case under the Convention. That does not mean, however, that the state avoids responsibility under general human rights law for more general failures to prevent and respond to such acts by private individuals.

1.4.3. Cases of non-state actor rape under other Conventions

For cases under other convention regimes there are two alternative approaches. The first is to accept that state involvement is required for an act to amount to torture and – drawing on the jurisprudence of the Committee against Torture outlined above, and ideas of due diligence discussed below – to argue that the state has "consented or acquiesced" to the treatment in such a way as to mean that the act should be characterised as torture.

The second, and it is suggested preferable, is to argue that the state official requirement is not inherent in the definition of torture generally, and that the act fulfils the other necessary

[261] Ibid., at p. 251.
[262] CAT (2008), 'General Comment No. 2', at para. 18. See also CAT (2003), 'Concluding Recommendations in Relation to Azerbaijan', CAT/C/CR/30/1; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (New York: Oxford University Press, 2008) at p. 237.
[263] Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* at pp. 398-99.

elements. It nevertheless then remains for the complainant to show that the state is in some way responsible under international human rights law for the act. The different ways in which such responsibility can be established are set out in the next section.

KEY POINTS

- *Some argue that the "state official" requirement found in the Convention against Torture is not inherent to the definition of torture in international law. This should be borne carefully in mind when arguing cases.*
- *There is an argument that the state official requirement, whether through direct perpetration or complicity, is an important limiting factor for the "international crime" of torture under the Convention against Torture. Even so, it is clear that some private actor harms will fall within this scope, and it is open to states and other treaty bodies to adopt broader definitions.*

B. DEMONSTRATING STATE RESPONSIBILITY

Where an act of rape has been committed, the state may be responsible in two ways under international human rights law.

The first is where is where a degree of responsibility for the act itself can be attributed to the state. This will clearly be the case where a state official commits rape or is complicit in it: the rules of state responsibility provide that the acts of an official are attributable to the State itself.[264] However, it may also be the case where the state is held responsible for the rape by a private actor because of its failure to prevent the rape – either because its officials were aware of immediate risk to an individual and failed to act, or because it had created a general environment which allowed such rapes to happen.

Second, a state may be responsible for separate (and/or what are termed by the ECtHR as "procedural") violations if it fails to adequately respond to the rape at issue, for example by not investigating and punishing the perpetrators and providing an effective remedy to the victim. Such violations may include additional prohibited ill-treatment occasioned by inappropriate responses of state officials to the complaint of rape which cause further, or secondary, victimisation of the survivor.

Both of these aspects should be considered in any litigation, and are examined in further detail below.

[264] International Law Commission (2001), 'Responsibility of States for Internationally Wrongful Acts', Yearbook of the International Law Commission, 2001, vol. II (Part Two), at Art. 7.

The standard of liability – strict liability and "due diligence"

States have strict obligations to *respect* human rights standards, so any rape carried out by a state official in their capacity as such will be a breach of the state's obligations: the state is held liable on a strict basis (see further below).

However, when it comes to preventing private actions and responding to actions by both private actors and state officials, states are generally judged on whether they have exercised "due diligence" to ensure the relevant rights are protected.[265] These are therefore not obligations of result, but of conduct.[266]

However, any such obligations must also be carried out in a non-discriminatory way; as the previous Special Rapporteur on Violence Against Women made clear, principles of non-discrimination require states "to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to other forms of violence".[267] States also have further positive obligations to address violence against women as a form of discrimination under the relevant human rights conventions.[268] Considerations of whether a state has taken the necessary measures should therefore be informed by the specific standards of due diligence expected of states on both an individual and systemic level to address violence against women.[269]

A failure to meet these obligations in relation to an individual case does not necessarily mean that the actions of the private actor will be attributed to the state (although in some cases it will). Rather, in many cases these failures will either lead to a finding that the state has violated one of the procedural rights of the complainant (eg. to an effective remedy), or that the state has not fulfilled its general obligations to exercise due diligence to protect all persons in its territory from torture and other ill-treatment.

There are a number of interlinking issues at play in any consideration of state responsibility in relation to rape when it is considered within the framework of the prohibition of torture and other ill-treatment.

First, are states' obligations to *respect* human rights: where state officials are criminally responsible for rape (whether as direct perpetrators or complicit), the state will be liable;

Second, are specific obligations that states have, on a legislative, administrative and judicial level, to protect individuals within their jurisdiction from rape under the prohibition of torture and other ill-treatment as identified by treaty bodies and regional courts;

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[265] See the distinction made in the Commentary to Articles on State Responsibility, Article 2, para. 3.
[266] Human Rights Council (2013), 'Manjoo 2013 Report', at para. 16.
[267] Commission on Human Rights (2006), 'Report of the Special Rapporteur on Violence against Women,Its Causes and Consequences, Yakin Ertürk ', UN Doc. E/CN.4/2006/61, 20 January 2006 at para. 33.
[268] CEDAW (1992), 'General Recommendation No. 19'; HRCtee (2000), 'General Comment No. 28', at para. 8. See also Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994; African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003; Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011.
[269] See further Human Rights Council (2013), 'Manjoo 2013 Report', at paras. 70-71.

Third, are specific obligations that states have, on an operational level, to respond to known threats against individuals or groups of individuals to prevent the rape (or other violence) from occurring;

Fourth, are the responsibilities the state has to respond to an individual rape when it occurs, which includes the obligation to provide an effective remedy. These obligations apply equally to rapes committed by state officials and private individuals.

1. State responsibility for the act itself

1.1. Rape by a public official

States will be held responsible for an act under international law where the conduct in question can be attributed to them, and where it constitutes a breach of an international obligation of the state.[270] States have obligations under international human rights law and customary law to respect the prohibition of torture and other ill-treatment, and any act of a state official acting in that capacity which amounts to torture or other ill-treatment will be attributable to it.

There is no question that a state has responsibility for the acts of its officials acting in that capacity, even if the act is not within the scope of their duties. This is recognised in the Articles on the Responsibility of States for Internationally Wrongful Acts, which provide that:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[271]

Therefore, where a military officer or group of officers go against orders to protect civilians, and instead rape an individual during military operations, the state will nevertheless be responsible for their acts, and liable to pay reparation to the victim. Similarly, if a staff member working within a state-run care home rapes a patient at the care home, the state itself will be directly responsible for a violation of the prohibition of torture and other ill-treatment.

1.2. Rape by private actors: obligations to prevent

In the recent *Cottonfields* case, concerning the abduction, rape, mutilation and murder of a number of girls in a context where such violence was widespread, the Inter-American Court summarised the obligation to prevent violations as follows:

> The Court has established that the obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate

[270] International Law Commission (2001), 'Articles on State Responsibility', at Art. 2.
[271] Ibid., at Art. 7.

> the victims for the harmful consequences. It is also clear that the obligation to prevent is one of means or conduct, and failure to comply with it is not proved merely because the right has been violated.[272]

After considering the specific obligations in the Convention of Belem do Para that the state had to use due diligence to prevent violence against women, the Court held that:

> States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence.[273]

The European Court has stressed that states have positive obligations under the Convention "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".[274] The Court has also recognised that children and other vulnerable individuals (among which it has included women subjected to domestic violence) are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity.[275]

In the context of protection from rape in particular, the Court has stated that under Articles 3 (torture) and 8 (private life) states have a primary duty to:

> [put] in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[276]

Those duties include "a positive obligation inherent in Articles 3 and 8 … to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution".[277]

The jurisprudence suggests that there are two distinct times at which the obligation to prevent violations might conceivably lead to a finding that the state is responsible for a violation of its obligations under the relevant anti-torture prohibition. First, on a general level, where a state is aware of a general pattern of violence, and second, on an individual

[272] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 252.
[273] Ibid., at para. 258.

[274] ECtHR, *Opuz v Turkey* (2009) 9 June 2009, at para. 159. In cases concerning the right to life, the Court has made it clear that the obligation to safeguard the rights of individuals within its jurisdiction will extend "in appropriate circumstances" to a positive obligation on the authorities to take "preventive operational measures" to protect an individual who is at risk from the criminal acts of another individual".

[275] Ibid.
[276] ECtHR, *DJ v Croatia* (2012) 24 July 2012, at para. 86.
[277] ECtHR, *MC v Bulgaria* (2003) 4 December 2003, at para. 153.

level, where the state becomes aware of a known risk to a named individual.[278] Courts have adopted different approaches to assessing the state's compliance with its obligations at theses times.

1.2.1. Failure to respond to an immediate, and known risk to the individual

The clearest, and narrowest, application of states' positive obligations to prevent torture and other ill-treatment arise where state officials know of a particular risk to an identified individual. States will incur responsibility for a violation of the prohibition of torture and other ill-treatment in cases of private harm where officials have been aware of an immediate risk to a person within their jurisdiction, and have not acted reasonably to prevent or respond to that risk. Such responsibility has been framed in two ways which appear to be closely linked.

1.2.1.1. Committee against Torture

As discussed above, under the Convention against Torture, such responsibility has been framed by reference to the words "consent and acquiescence" in the Convention against Torture. There, where public officials are aware of an immediate risk faced by individuals and do not take appropriate steps in order to protect them, they will be held to have acquiesced to the conduct. The state official is therefore seen as a participant to the conduct, and the state will be held responsible for the torture or other ill-treatment.[279]

1.2.1.2. Inter-American Court of Human Rights

The Inter-American Court of Human Rights has also examined states' obligations in these circumstances. It has suggested that states may be responsible for a failure to prevent which is broader than a finding of "acquiescence", stressing that "[t]he most important factor is to determine "whether a violation [...] has occurred with the support or the acquiescence of the government *or* whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible" (emphasis added).[280]

The Court has held that, when a state has actual knowledge of a risk to a named individual there is an obligation of strict due diligence not merely to investigate but to act promptly and expeditiously to prevent the commission of the act.[281] A higher standard of conduct is expected than the more general measures required to prevent violations at the systemic

[278] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 281, and separate opinion of Judge Medina Quiroga at paras. 18-19.
[279] CAT, *Hajrizi Dzemajl et al. v Yugoslavia* (2000) 2 December 2002; CAT (2008), 'General Comment No. 2', at para. 18.
[280] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 236. The Court cited *Velásquez Rodríguez v. Honduras*, (1988) Judgment (Merits) of 29 July 1988, Series C. No. 4 at para. 173; *Case of Godínez Cruz v. Honduras* (1989) Judgment (Merits) of 20 January 1989, Series C No. 5 at para. 182, and *Case of Gangaram Panday v. Suriname* (1994) Judgment (Merits, Reparations and Costs) of 21 January 1994. Series C No. 16 at para. 62.
[281] Ibid., at para. 283 and Separate opinion of Judge Medina Quiroga at para. 19.

level.[282] Furthermore, the assessment of the nature of the risk must be guided by the context.

The ***Cottonfields*** case, referred to above, concerned the abduction, rape, mutilation and murder of three girls in an area where such violence was common. The Court held that, because of the existing pattern of violence against women and girls, when the three women in question went missing the state was aware that there was a real and imminent risk that they would be sexually abused, subjected to ill-treatment and killed.[283] The Court held that, in that context, there was an obligation of "strict due diligence" to search for the missing women during the first hours and days. The Court stressed that:

> "[s]ince this obligation of means is more rigorous, it requires that exhaustive search activities be conducted. Above all, it is essential that police authorities, prosecutors and judicial officials take prompt immediate action by ordering, without delay, the necessary measures to determine the whereabouts of the victims or the place where they may have been retained. Adequate procedures should exist for reporting disappearances, which should result in an immediate effective investigation. The authorities should presume that the disappeared person has been deprived of liberty and is still alive until there is no longer any uncertainty about her fate.[284]

The Court found that state officials' attitude towards the victims' relatives at the time suggested that the missing person reports should not be dealt with urgently, and that instead, between the reports and the discovery of the victims' bodies, the state "merely carried out formalities and took statements that, although important, lost their value when they failed to lead to specific search actions". The Court concluded that there were unjustified delays following the filing of the reports, and the state had not acted with sufficient due diligence to prevent the violations. The Court also found that Mexico had not adopted norms or implemented the necessary measures that would have *allowed* the authorities to provide an immediate and effective response to the reports of disappearance and to adequately prevent the violence against women.

As such, it found the state responsible for the violations themselves to the detriment of the victims – essentially attributing responsibility for the acts of the private actors to the state.[285] The Court found that the state was responsible for violations of the right to life, liberty, personal integrity and freedom from torture and other ill-treatment of the victims, because it had not guaranteed them or adopted the necessary measures to ensure that they could be guaranteed.[286]

[282] Ibid.
[283] Ibid., at para. 283.
[284] Ibid.
[285] See ibid., at para. 280.
[286] Ibid., at para. 286.

1.2.1.3. European Court of Human Rights

The European Court of Human Rights has considered this narrower aspect of the obligation to prevent in relation to both the right to life, and the prohibition of torture and other ill-treatment.

In relation to the right to life, it has stated clearly that states have positive obligations to take "preventative operational measures" to protect a particular individual. Such an obligation arises when the authorities know or ought to know at the time "of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party".[287] The Court has been careful to state that:

> bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.288

Therefore, not every claimed risk to life will entail a Convention requirement of operational measures to prevent the risk from materialising. However, the state will be held responsible for a violation of its positive obligation to protect a person in a particular case where there is such a known real and immediate risk and the state has "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[289] To prove this, it is sufficient for the applicant to show "that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge".[290]

In relation to the prohibition of torture and other ill-treatment, the Court has stated that:

> The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge ….[291]

The Court examined in detail this obligation to take operational measures to prevent a violation of both the right to life and the right to physical integrity in the case of ***Opuz v Turkey***. In that case, the complainant and her mother were subjected to numerous death threats and escalating episodes of violence, including being run over by a car and stabbed seven times, from her husband, and they had made a number of complaints to the police. Although proceedings were undertaken in relation to some complaints, some were discontinued because complaints were withdrawn, and the most the proceedings resulted in

[287] ECtHR, *Opuz v Turkey* (2009) 9 June 2009, at para. 129.
[288] Ibid.
[289] Ibid., at para. 130.
[290] Ibid.
[291] ECtHR, *E and Ors v United Kingdom* (2002) App. No. 33218/96, Judgment of 26 November 2002, at para. 88.

was a fine and three months imprisonment. After a number of years, the violence culminated in the fatal shooting of the complainant's mother.

In relation to the mother's right to life, the Court found that the local authorities could have foreseen a lethal attack, and that in such circumstances "a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State".[292] The Court held that, once the situation has been brought to their attention, the national authorities could not rely on the victim's attitude for their failure to take adequate measures which could "prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim".[293] The Court held that, in the circumstances, by not initiating protective measures Turkey had not exercised due diligence to protect the mother's life, and was therefore responsible for a violation of Article 2.

In relation to the ill-treatment of the complainant, the Court considered whether the national authorities had taken "all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity".[294] In doing so, it took into account developing norms and practices in responding to violence against women, as developed through the CEDAW and conventions such as the Convention Belem do Para.[295] However, in doing so, it stressed that it is "not the Court's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under Article 3 of the Convention".[296]

The Court noted that the state authorities had not remained totally passive in face of the violence experienced by the complainant, but that nevertheless the local authorities had not "displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity".[297] The Court found that "the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question" and that "the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of [the husband]".[298] The Court found that Turkey had violated Article 3 of the Convention, "as result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband".[299]

[292] ECtHR, *Opuz v Turkey* (2009) 9 June 2009, at para. 136.
[293] ECtHR, *Osman v United Kingdom* (1998) App. No. 23453, Judgment of 28 October 1998, at para. 116.
[294] ECtHR, *Opuz v Turkey* (2009) 9 June 2009, at para. 162.
[295] Ibid., at para. 164.
[296] Ibid., at para. 165.
[297] Ibid., at para. 169.
[298] Ibid., at para. 170.
[299] Ibid., at para. 176.

The Court had previously examined the extent to which state authorities may be held responsible for a failure to intervene in the case of sexual abuse of children.

In the case of ***E and ors v United Kingdom***, the applicants alleged that as children they had been subjected to sustained sexual and other violence, including rape, by their step father during a period stretching from 1967 to 1989. In 1976 one of the children, E, was found semi-conscious having taken an overdose. The medical notes recorded that E complained that her stepfather hit her, shouted and upset her so much that she ran away intending to kill herself. In 1977 another of the children, L, ran away from home, following an incident in which she claimed that her stepfather had attempted to rape her. The stepfather was arrested by the police and charged with indecently assaulting E and L. He pleaded guilty to charges involving offences of indecent behaviour, but was not detained pending sentence, nor given a custodial sentence. Despite a probation order prohibiting him from contact with the children, he returned to live in their home.

In 1988, following counselling, E, L and a third child, T, reported to the police that they had been abused by their stepfather. Charges were then brought against him, and he was convicted of serious acts of indecency. He was sentenced to a two-year suspended prison sentence.

The applicants brought the case to the European Court of Human Rights, alleging violations of Article 3 (prohibition of torture and other ill-treatment) and Article 13 (right to a remedy).

In relation to Article 3, the Court considered the relevant questions to be whether "the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse".[300] On an examination of the facts it was satisfied that the social services should have been aware that the situation in the family disclosed a history of past sexual and physical abuse from the stepfather and that, notwithstanding the probation order, he was continuing to have close contact with the family, including the children. Even if the social services were not aware he was inflicting abuse at this time, they should have been aware that the children remained at potential risk. The fact that at the relevant time there was not the knowledge of the prevalence of, and persistence of, sexual offenders victimising children within a family that there exists now, was not significant in this case, as the social services knew that there had been incidences of sexual abuse resulting in criminal offences and were under an obligation to monitor the offender's conduct in the aftermath of the conviction.

However, in the Court's view, the social services failed to take steps which would have enabled them to discover the exact extent of the problem and, potentially, to prevent further abuse taking place. The Government had accepted that social services should have worked with both E and L who had shown significant distress at the situation at home which could have led to further understanding of family dynamics and should have referred L to the Reporter of the Children's Hearing, which could have led to a supervision requirement over one or more of

[300] ECtHR, *E and Ors v United Kingdom* (2002) 26 November 2002, at para. 92.

the children who had been living with a known and convicted offender. In addition, the Government had accepted that more should have been done to investigate the possible breach by the stepfather of the probation order, that there was a consistent failure to place the full and relevant details of the family situation before the Sheriff's Court or Children's Hearing when the applicant children were the subject of a specific examination in the context of offending and truancy, and that there was no effective co-operation or exchange of information between the school authorities which were attempting to deal with a persistent truancy problem and the social services who had access to the information about the wider family situation and history. It was also not apparent that E's disclosures at the hospital in December 1976 were passed to the social services or that, if they were, they led to any response.

In all, the Court was:

> [s]atisfied that the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.[301]

There had, accordingly, been a violation of Article 3.

The Court found further that the applicants did not have access to any mechanism which could have determined their allegations that the local authority failed to protect them from inhuman and degrading treatment. There had therefore also been a violation of Article 13.

The jurisprudence outlined above could be of particular importance where there is an indication in a case that the state authorities should have been aware of the risk of rape to an individual but failed to take reasonable measures to prevent it. This could occur if, for example, a child made allegations of rape or other sexual abuse to a social worker, but these were not sufficiently followed up by the state authorities and the child continued to be subjected to further abuse. It could also very easily be the case where state officials were aware of a pattern of rape and sexual assault in a particular prison, but failed to take reasonable steps to protect those detained there. In such cases, there would be a strong argument that the state was responsible under international human rights law for a violation of its obligations under the prohibition of torture and other ill-treatment. Whether this responsibility should be termed a failure to prevent, acquiescence, or complicity in the violation is still an open question, although the jurisprudence suggests it could be any of these.

1.2.1.4. Guidance on operational measures required to protect in individual cases

The Special Rapporteur on Violence Against Women has given some guidance as to the types of measures that states may put in place to protect women from violence. She stresses that individual cases require flexibility, as procedures taken in these instances must reflect the

[301] Ibid., at para. 100.

needs and preferences of the individuals harmed. States can fulfil the individual due diligence obligation of protection by providing a woman with services such as telephone hotlines, health care, counselling centres, legal assistance, shelters, restraining orders and financial aid. She adds that "education on protection measures and access to effective measures can also help fulfil protection and prevention obligations that an individual is owed by the State".[302]

KEY POINTS

- *The jurisprudence indicates at the very least that:*
- *Where a state is aware or should be aware of an immediate risk of torture or other ill-treatment being committed against an individual, that state should take reasonable measures within the scope of their powers to avoid that risk. If they do not, the State will be responsible for a failure to prevent the torture or other ill-treatment of the individual.*
- *In judging the level of risk to the individual, the context is important: where there is a pattern of violence against a certain group of which the individual is a part the risk should be deemed to be high.*
- *Where the risk is deemed to be high the measures taken in response should be carried out with great urgency, and legislation should provide for such measures to be taken.*
- *In assessing the types of steps required to respond to the risk it is relevant to take into account international standards and norms on, for example, preventing violence against women.*

1.2.2. Responsibility for torture or other ill-treatment because of a failure to exercise due diligence at the systemic level?

Courts and human rights bodies have also consistently recognised that states have more general duties to secure the right of everyone in their jurisdiction not to be subjected to torture and other ill-treatment.[303] Such jurisprudence is helpful to hold states to account for general failures to prevent and respond to rape: through treaty body reviews, public interest litigation, constitutional petitions and advocacy, using the prohibition of torture and other ill-treatment, and other relevant guaranteed rights such as the right to be free from discrimination.

[302] Human Rights Council (2013), 'Manjoo 2013 Report', at para. 70.
[303] See above, Part I, Section B.4.2.

The Special Rapporteur on Violence Against Women has summarised the types of measures that have been required of states at a systemic level to combat violence against women, including violations of the prohibition of torture and other ill-treatment. She explained that:

> Systemic due diligence refers to the obligations States must take to ensure a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence against women. At a systemic level, States can meet their responsibility to protect, prevent and punish by, among other things, adopting or modifying legislation; developing strategies, action plans and awareness-raising campaigns and providing services; reinforcing the capacities and power of police, prosecutors and judges; adequately resourcing transformative change initiatives; and holding accountable those who fail to protect and prevent, as well as those who perpetrate violations of human rights of women. Also, States have to be involved more concretely in overall societal transformation to address structural and systemic gender inequality and discrimination.
>
> A general comprehensive system of protection and prevention must be established, and that system must be implemented in practice in a reasonable manner, and be generally effective in individual cases. The obligation is one of means and not results, but it requires States to take reasonable measures that have a real prospect of altering the outcome or mitigating the harm. Ultimately, the general system and its application to specific cases should have an adequate deterrent effect to prevent violence against women. While due diligence does not require perfect deterrence in fact in each case, it requires the State to act in a way to reasonably deter violence. Due diligence will look to whether protective measures available in domestic law are appropriate to respond to the situation, and whether they were employed. Ultimately, "it is not the formal existence of judicial remedies that demonstrates due diligence, but rather that they are available and effective".[304]

However, when a failure to fulfil those duties will lead to state responsibility for a failure to prevent torture or other ill-treatment *in relation to an individual case* is still the subject of differing jurisprudence.

1.2.2.1. European Court of Human Rights

The European Court has been clear that a failure to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution, can lead to a violation of the state's positive obligations in relation to torture and other ill-treatment.[305] It has also noted the importance that such a framework has in deterring violations. However, when examining issues such as deficient criminalisation of rape and its effect on an individual case it has viewed this as relevant to the authorities' obligations to *respond* to the rape, rather than finding that such failings have led to a failure to *prevent* the rape.[306] Such failings have also been considered particularly relevant to separate claims of state responsibility for discrimination.[307]

[304] Human Rights Council (2013), 'Manjoo 2013 Report', at paras. 71-72.
[305] ECtHR, *MC v Bulgaria* (2003) 4 December 2003.
[306] Ibid., at para. 185.
[307] See, eg. ECtHR, *Opuz v Turkey* (2009) 9 June 2009, at paras. 183-202.

1.2.2.2. Inter-American Commission and Court on Human Rights

The Inter-American Commission and Court have, however, suggested that a failure to take measures at a systemic level could lead to a finding of responsibility for a failure to prevent violations by a private actor in an individual case.

In the case of ***Maria Da Penha v Brazil***,[308] the Inter-American Commission examined a case brought by a woman who had been the victim of violence at the hand of her husband, culminating in two attempts on her life. At the time the complaint was lodged criminal proceedings against her ex-husband had been continuing for more than 15 years, during which time the husband had been free. It was alleged that the judicial system had been ineffective, creating a great risk of impunity in light of a looming statutory limitation period.

The Commission held that the state was responsible for violations of its obligations under the American Convention, the American Declaration and the Convention of Belem do Para. Importantly, the Commission found that not only had there been a failure to respond to the violence suffered by the complainant but also a failure to prevent the violations in the first place. 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. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. 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.
>
> Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.[309]

The idea of systemic measures of prevention was also examined by the Inter-American Court in the ***Cottonfields*** case, referred to above. Both the majority and Judge Medina Quiroga in dissent agreed that a duty did arise to take measures to address the pattern of violence against women in the region, and that although Mexico had taken some measures, those measures were not

[308] IACmHR, *Maria Da Penha v Brazil* (2001) Case 12.051, Decision of 16 April 2001, Report No. 54/01, Annual Report 2000, OEA/Ser.L/V.II.111 Doc.20 rev. .
[309] Ibid., at paras. 55 and 56.

sufficient in the circumstances to prevent the pattern of violence.[310] However, the majority and the dissent disagreed on whether those failures were enough in themselves to make Mexico responsible for the torture or other ill-treatment carried out against the victims in the individual case.

The majority took quite a different approach to the earlier decision of the Inter-American Commission in the *Maria da Penha* case, looking at the question as one of whether the private actor's conduct could be *attributed* to the state, rather than examining whether the state's failure to comply with its separate positive obligations to prevent such conduct by private actors had contributed to the harm suffered by the victims. It found that:

> it is evident that a State cannot be held responsible for every human rights violation committed between private individuals within its jurisdiction. Indeed, a State's obligation of guarantee under the Convention does not imply its unlimited responsibility for any act or deed of private individuals, because its obligation to adopt measures of prevention and protection for private individuals in their relations with each other is conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger. In other words, even though the juridical consequence of an act or omission of a private individual is the violation of certain human rights of another private individual, this cannot be attributed automatically to the State, because the specific circumstances of the case and the discharge of such obligation to guarantee must be taken into account.[311]

As such, even though the state had not taken the general measures required by its obligation to prevent torture and other ill-treatment (and had therefore "fail[ed] to comply in general with its obligation of prevention") responsibility for a failure to prevent *in this case* arose only once the victims had been reported missing.[312]

Judge Medina Quiroga disagreed. In her view, there was no state obligation to prevent the specific persons from being abducted, as that would be a disproportionate obligation on the state. However, "as soon as the State was officially (not to mention unofficially) aware, in other words, at least as of the moment at which the National Human Rights Commission officially alerted it to the existence of a pattern of violence against women in Ciudad Juárez, there was an absence of policies designed to try and revert the situation".[313] In her view by this failure, the state failed to fully comply with its obligation to safeguard the personal integrity of the victims from the possibility of torture.

In that case, either way, the state was held responsible for violations of the victims' rights because of the state's further failures once the victims had been reported missing. However, the distinction could be important in a case where those immediate operational failures were not present. It is also important

[310] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at paras. [*], Separate opinion of Judge Medina Quiroga at paras. 18.
[311] Ibid., at para. 208.
[312] Ibid., at para. 282.
[313] Ibid., at Separate opinion of Judge Medina Quiroga, para. 18.

theoretically, in understanding the state's implication in the perpetuation of certain violence by private actors.

1.2.2.1. Other

The High Court in Kenya in the ***CK (a child) v Commissioner of Police*** case,[314] described in Part II, *did* attribute responsibility to state organs (the police) for the acts of private individuals because of its systemic failures to investigate and prosecute the rape of girls. In the Court's view:

> In the instant petition the police have allowed the dangerous criminals to remain free and/or at large. The respondents are responsible for arrest and prosecution of the criminals who sexually assaulted the petitioners and the failure of State agents to take proper and effective measures to apprehend and prosecute the said perpetrators of defilement and protect the petitioners being children of tender years, they are in my opinion responsible for torture, defilement and conception of young girls and more particular the petitioners herein.

However, even if failures to address systemic issues are not tied to responsibility in an individual case (and therefore to the obligation to provide reparation to the individual), it is clear that they do lead to state responsibility under the prohibition of torture and other ill-treatment more generally. In addition, it may be that these issues are also addressed under the heading of discrimination – an issue examined further below.

KEY POINTS

- *States have broad general obligations to implement a system of protection and prevention against rape and violence against women.*
- *Some Courts have found that responsibility for ill-treatment by a private actor should be attributed to the State where such measures have not been taken, because it failed to prevent it. For some, in such cases it is important to call the ill-treatment "torture".*
- *Other Courts have found that where such failures exist, responsibility for the act is not attributed to the State. However the State may be held responsible for a violation of its "positive" obligations, for a "procedural" violation in relation to the ill-treatment, or the failures may demonstrate a pattern of discrimination.*

[314] High Court of Kenya, *CK (a Child) et al. v Commissioner of Police et al.* (2013) 27 May 2013.

- *Even if such obligations do not lead to attribution of responsibility in individual cases, it is clear that such general obligations exist. An understanding of such obligations is therefore particularly helpful in public interest or constitutional litigation to obtain orders that specific steps be taken, and for participation in state party reviews before treaty bodies.*

2. Violations arising from failures in response

The right to an effective remedy for violations of human rights has been affirmed by a range of treaties,[315] United Nations treaty bodies,[316] regional courts,[317] and in a series of declarative instruments.[318] For example, Article 2(3) of the ICCPR provides that the state party is obliged:

> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

States have the positive obligation to provide a remedy for violations of human rights, whether the violation is carried out by a state official, or a private individual. The obligation to investigate and prosecute the crime is one of due diligence – it is an obligation of means, not of result. However, where the state is responsible for the violation it has a strict obligation to provide reparation.

The ICCPR establishes the right to a remedy determined by a "competent judicial, administrative or other authority". However, for serious human rights violations, including rape, a judicial remedy must always be provided.[319] As stated by the Human Rights Committee, "administrative remedies cannot be deemed to constitute adequate and effective remedies [...] in the event of particularly serious violations of human rights [...]".[320]

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[315] For example, ICCPR, Articles 2(3), 9(5) and 14(6); CAT, Article 14; and Statute of the International Criminal Court (1988) Article 75.
[316] See, for example CAT (2008), 'General Comment No. 2', at para. 15; HRCtee (2004), 'General Comment No. 31', at paras. 15-17.
[317] See for example IACtHR, *Velasquez Rodriguez v Honduras* (1988) 29 July 1988, at para. 174. See also ECtHR, *Papamichalopoulos v Greece* (1995) App. No. 14556/89, Judgment of 31 October 1995, at para. 36.
[318] UN General Assembly (2005), 'UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ', UN G.A. Res 60/147, adopted by the General Assembly 16 December 2005. See also the UN General Assembly (1985), 'UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', Adopted by General Assembly resolution 40/34 of 29 November 1985.
[319] UN General Assembly (2005), 'Basic Principles on Remedy and Reparation', at para. 12.
[320] HRCtee, *Bautista De Arellana v Colombia* (1995) Comm. No. 563/1993, Views adopted 27 October 1995, UN Doc. CCPR/C/55/D/563/1993 at para. 8.2.

The Convention against Torture imposes a specific obligation upon states to provide redress to victims of torture through Article 14, which provides that:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

The Committee against Torture has recently issued a detailed general comment to guide states on the implementation of Article 14. That comment makes it clear that obligations under Article 14 apply in respect of both torture and other ill-treatment.[321]

The General Comment stresses that the right to remedy and reparation has both procedural and substantive aspects, which are closely interlinked. The remedy must be appropriately adapted so as to take account of the special vulnerability of certain categories of persons.[322] A necessary prerequisite to any judicial remedy, including prosecution, is mechanisms for prompt, independent and effective investigations. Credible institutions must be in place to bring perpetrators to account, to provide substantive reparation to victims, and barriers to remedy must be removed.

Different bodies characterise failures to provide an effective remedy in different ways, dependent on the treaty under which they are operating. The Human Rights Committee tends to characterise such failures as a violation of the substantive obligation (eg. Article 7), in conjunction with Article 2(3). The European Court of Human rights, on the other hand, describes them as "procedural" violations of the relevant article (eg. Article 3). The Inter-American Court tends to describe them as violations of the right to a fair trial and to judicial protection, derived from the substantive article (eg. Article 5).[323] It is clear in each case, however, that the state bears responsibility under the international human rights framework for any such failure, and it leads to an obligation to provide reparation to the victim.

2.1. Obligation to investigate

2.1.1. General issues

The duty to investigate credible allegations of human rights violations is central to the fulfilment of states' obligations to provide a remedy for violations of human rights.[324] Without a thorough and effective investigation it is impossible prosecute and punish those responsible, and for victims to prove their entitlement to remedy and reparation. Human rights bodies have also stressed the importance of diligent investigations to avoid impunity and the repetition of this type of act.[325]

Multiple human rights bodies, including the Human Rights Committee, have stressed that complaints of violations must be investigated "promptly, thoroughly and effectively through

[321] CAT (2012), 'General Comment No. 3: Implementation of Article 14 by States Parties', CAT/C/GC/3, 13 December at para. 1.
[322] HRCtee (2004), 'General Comment No. 31', at para. 15.
[323] On this, see IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 292.
[324] See UN General Assembly (2005), 'Basic Principles on Remedy and Reparation', at paras. 3(b) and 4.
[325] See, eg. IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 289.

independent and impartial bodies" to make the right to a remedy effective.[326] The Committee has also made it clear on many occasions that "[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."[327] The Human Rights Committee has, in fact, found a violation of Article 7 of the ICCPR in a number of cases where allegations of rape by state officials have not been investigated.[328]

States should not require victims to undertake steps to initiate or progress complaints in relation to torture or other ill-treatment. Rather, once states are aware of an incident which might violate human rights they must undertake an investigation *ex officio* and without delay.[329]

In addition, the Inter-American Court of Human Rights has made it clear that military justice systems should have no role in the investigation or prosecution of rape.[330] Such intervention will amount to a violation of the victim's right to an effective remedy.[331] This is consistent with the jurisprudence of other bodies in relation to other serious violations of human rights.[332]

2.1.2. Requirements of an effective investigation

The requirements as to an official investigation into treatment contrary to the prohibition of torture and other ill-treatment are similar whether it has been inflicted by state agents or private individuals.[333]

In ***DJ v Croatia,*** concerning rape by a private actor, where the complainant alleged that state authorities had failed to carry out an effective investigation, the European Court explained that:

> For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken

[326] HRCtee (2004), 'General Comment No. 31', at para. 15. In relation to complaints of torture, see HRCtee (1992), 'General Comment No. 20', at para. 14.
[327] HRCtee (2004), 'General Comment No. 31', at para. 15.
[328] See, eg. HRCtee, *Chikunov v Uzbekistan* (2007) Comm. No. 1043/2002, Views adopted 16 March 2007, UN doc. CCPR/C/89/D/1043/2002; HRCtee, *Amirov v. Russia* (2009) Views adopted 2 April 2009, UN Doc. CCPR/C/95/D1447/2006; HRCtee, *Turaeva v Uzbekistan* (2009) Comm. No. 1284/2004, Views adopted 20 October 2009, UN Doc. CCPR/C/97/D/1284/2004.
[329] IACtHR, *Case of the Pueblo Bello Massacre v Colombia* (2006) Judgment (Merits, Reparations and Costs) of 31 January 2006, Series C, No. 140 at para. 143; IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 290; IACtHR, *Perozo et al. v Venezuela* (2009) Judgment (Preliminary Objections, Merits, Reparations and Costs) of 28 January 2009, Series C, No. 195 at para. 298.
[330] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 177.
[331] Ibid.
[332] Economic and Social Council (2006), 'Draft Principles Governing the Administration of Justice through Military Tribunals, Adopted by the United Nations Sub-Commission on Human Rights and Forwarded to the Human Rights Council', UN Doc. E/CN.4/2006/58, 13 January 2006 at Principle 7; UN General Assembly (1996), 'Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions', UN Doc. A/51/457, 7 October 1996 at para. 125.
[333] IACtHR, *Case of the Pueblo Bello Massacre v Colombia* (2006) 31 January 2006, at para. 145; IACtHR, *Kawas Fernández v Honduras* (2009) Judgment (Merits, Reparations and Costs) of 3 April 2009, Series C, No. 196 at para. 78; ECtHR, *DJ v Croatia* (2012) 24 July 2012, at para. 85.

> the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Article 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements, and to the length of time taken for the initial investigation.[334]

In that case, it had already been determined by the national authorities that the police officers on the scene had failed to take the necessary steps in the initial phase of the inquiry. They did not "order an in situ inspection; nor did he take a statement from the injured party or conduct a detailed informative interview with her ... nor did he take the clothes that the injured party and the suspect were wearing in order to give them for forensic examination".[335] The Court found that this gave the complainant a right to compensation from the state, for which there was an effective remedy at the domestic level (the possibility to apply for such compensation).[336] However, the fact remained that the obligation to investigate had not been fulfilled. Those flaws had an impact on the entire investigation, and there were further aspects of the investigation which had been lacking, including the appearance of lack of impartiality of the investigating judge, who had made an initial decision not to open an investigation, and that the authorities had not taken all reasonable steps to secure evidence including forensic evidence from the complainant's skirt, and a failure to secure eyewitness evidence.[337]

The Court expressed particular concern about the attitudes displayed by the investigating judge, which raised concerns of bias. In that respect, the Court stressed the crucial importance that justice is seen to be done, and that "such considerations equally concern the accused and the injured parties in proceedings". To that end, the Court stressed that "any allegation that a victim was under the influence of alcohol or other circumstances concerning the victim's behaviour or personality cannot dispense the authorities from the obligation to effectively investigate".[338]

The Court found that the objective flaws in the investigation showed a "passive attitude as to the efforts made to properly probe the applicant's allegations of rape". As such, the Court found that there had been a violation of the procedural aspect of both Article 3 and Article 8 (right to privacy and family life).

Where there is evidence that an attack has discriminatory aspects, this should be an important factor in the investigation. The European Court has found that where an "attack is

[334] ECtHR, *DJ v Croatia* (2012) 24 July 2012, at para. 85.
[335] Ibid., at para. 90.
[336] Ibid., at para. 95.
[337] Ibid., at para. 103.
[338] Ibid., at para. 101.

racially motivated, it is particularly important that the investigation is pursued with vigor and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence".[339] The Inter-American Court has applied this by analogy when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence. As such, it has held that the obligation to investigate effectively "has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women".[340] The Court has stressed that:

> when an act of violence against a woman occurs, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society's obligation to reject violence against women and the State's obligation to eliminate it and to ensure that victims have confidence in the State institutions for their protection.[341]

Other cases have shown numerous failings which have led to the state being held responsible for a failure to effectively investigate allegations. These include:

- refusals to receive a complaint;[342]
- the inability of a victim of rape to make a complaint in her own language;[343]
- stereotyping about the victim and his or her behaviour leading to a lack of prompt investigation;[344]
- requiring the complainant to give his or her complaint in a public place where privacy could not be respected;[345]
- repeatedly summoning the complainant to give statements;[346]
- failures to survey and secure evidence at crime scenes;[347]
- problems in chain of custody and failures to keep records of storage of evidence;[348]
- failures to conduct forensic testing, or irregularities in such tests;[349]
- failing to use an action protocol for the collection of medical and other evidence;[350]

[339] ECtHR, *Angelova and Iliev v Bulgaria* (2007) App. No. 55523/00, Judgment of 26 July 2007, at para. 98; ECtHR, *Virabyan v Armenia* (2012) App. No. 40094/05, Judgment of 2 October 2012, at para. 218.
[340] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 293.
[341] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 193.
[342] Ibid., at para. 195.
[343] Ibid., at para. 201.
[344] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 196.
[345] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 195.
[346] IACtHR, *Rosendo Cantú Et Al v Mexico* (2010) 31 August 2010, at para. 180.
[347] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 298; IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 195.
[348] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at paras. 298, 304.
[349] ibid., at para.331; ECtHR, *DJ v Croatia* (2012) 24 July 2012, at para. 94.

- losing forensic evidence;[351]
- torture of suspects leading to tainted confessions, and other lines of inquiry not being followed;[352]
- a failure to analyse systematic patterns in linked cases;[353]
- failures to investigate and discipline officials responsible for irregularities in the investigation.[354]

There are a number of international standards and protocols which assist states to comply with their enhanced obligations to investigate rape, which may be drawn on by litigants to highlight failings in individual cases.[355] The Inter-American Court has placed particular emphasis on these standards, and summarised key aspects as follows.

> i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence;
>
> ii) the victim's statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary;
>
> iii) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape;
>
> iv) a complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes;
>
> v) the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim's clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and
>
> vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.[356]

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[350] IACtHR, *Rosendo Cantú Et Al v Mexico* (2010) 31 August 2010, at para. 181.
[351] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 195.
[352] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 346.
[353] IACtHR, *Rochela Massacre v Colombia* (2007) Judgment of 11 May 2007, Series C, No. 163 at paras. 156, 58 and 64.
[354] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 346.
[355] See Annex Two. See further, eg. Crown Prosecution Service (England and Wales), 'A Protocol between the Police and Crown Prosecution Service in the Investigation and Prosecution of Allegations of Rape', (2008), http://www.cps.gov.uk/publications/agencies/rape_protocol.html; Us Department of Justice, 'A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents, Second Edition', (2013), https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf.
[356] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 194.

2.1.3. Providing equal access to justice, medical care and avoiding further traumatisation

There are an additional three key issues which should be considered carefully throughout the criminal justice process, reflected in part in the above. First, is the obligation to provide equal access to justice: the state may need to take special measures to ensure that a person can obtain that, for example through providing translation where the victim does not speak the language,[357] and avoiding discriminatory responses based on ethnic or gender stereotyping. The Inter-American Court has recognised, for example, that:

> in order to guarantee access to justice to members of indigenous communities, it is indispensable that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions.[358]

This has also been stressed by the Committee against Torture, which stated in General Comment No. 3 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.[359]

An additional key consideration recognised in cases of sexual violence in particular is the need to avoid causing further trauma to the survivor by an inappropriate state response by the criminal justice and health systems. Not only does this hamper the investigation, in some cases it has been held to amount to a separate and additional infliction of torture or other ill-treatment on the individual by the state. Finally, the victim should receive appropriate medical care: a failure to provide this may in some circumstances give rise to a separate violation.

The case of ***LNP v Argentina,*** decided by the Human Rights Committee, is a leading example of this aspect of the state's obligations. That case concerned a 15 year old girl of the Qom ethnic group who was raped by three acquaintances. Immediately after the assault, the author went alone, in her blood-stained clothes, to the village police station, where she was kept waiting for approximately three hours. The police did not take a complaint, but then sent her to the local medical centre. When she arrived there, she was again kept waiting for several hours, standing up, before she was attended to. At around 4 a.m., she was subjected to a medical examination by the head of the medical centre, who performed anal and vaginal palpations which caused her intense pain. She alleged that the tests she was subjected to were not necessary to determine the nature of the assault committed against her, but rather whether she was a virgin. The medical report states that anal injuries were found which tallied with a violent assault.

A formal complaint was filed, and judicial investigation ordered; the three alleged

[357] Ibid., at para. 203.
[358] Ibid., at para. 200.
[359] CAT (2012), 'General Comment No. 3', at para. 33.

perpetrators were arrested and the author was subjected to a forensic examination which was consistent with the earlier findings. As part of the investigation a social worker was sent to the author's village "in order to enquire into lifestyles, habits and any other facts of interest" for the investigation. The complainant alleged that the social worker investigated only the victim, her family and her community, enquiring about her morals, but leaving aside the three accused. There were further serious failings in the conduct of the prosecution of the accused – these are examined in further detail below. However, the Court held that the treatment she was subjected to at the police station and medical centre (and later treatment in court) was both discriminatory on the basis of her gender and ethnicity, in violation of Article 26 of the ICCPR, and amounted to torture or other ill-treatment, in violation of Article 7 of the ICCPR. In relation to the latter, the Committee considered that:

> the treatment she received in the police station and in the medical centre just after being assaulted, as well as during the court proceedings, when many discriminatory statements were made against her, contributed to her re-victimization, which was aggravated by the fact that she was a minor. The Committee recalls that, as pointed out in its general comment No. 20 and its jurisprudence, the right protected by article 7 covers not only physical pain but also mental suffering. The Committee concludes that the author was the victim of treatment of a nature that is in breach of article 7 of the Covenant.[360]

Similar issues of re-victimisation have been examined by the Inter-American Court of Human Rights in *Fernández Ortega v Mexico*,[361] and *Rosendo Cantú et al v Mexico*,[362] and the European Court of Human Rights in *P and S v Poland*.[363] In *P and S v Poland* the Court held that the response to a complaint of rape by a 14 year old girl by the criminal justice authorities (which separated the complainant from her parents and began an investigation into her behaviour for unlawful intercourse) and medical authorities (which obstructed her access to an abortion and made her case public leading to further harassment) had itself amounted to prohibited ill-treatment in violation of Article 3.[364]

2.1.4. Obligations flowing from failure to investigate

A failure to diligently investigate rape allegations will lead to an obligation to provide reparation to the victim. The failings or irregularities in the investigation should also be investigated, and the responsible officials subject to, at the very least, disciplinary proceedings.[365]

[360] HRCtee, *LNP v Argentina* (2011) Comm. No. 1610/2007, Views adopted 18 July 2011, UN Doc. CCPR/C/102/D/1610/2007 at para. 13.6.
[361] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010.
[362] IACtHR, *Rosendo Cantú Et Al v Mexico* (2010) 31 August 2010, at para. 128-31.
[363] ECtHR, *P and S v Poland* (2012) App. No. 57375/08, Judgment of 30 October 2012.
[364] Ibid., at paras. 157-69.
[365] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 374.

KEY POINTS

- *States have obligations to diligently investigate allegations of rape, whether alleged to have been committed by a state official or a private actor.*
- *Such investigations must be effective, and international standards help define what is required for an effective investigation into rape. Where a state fails to fulfil those obligations it will be responsible for a 'procedural' violation of the prohibition of torture and other ill-treatment.*
- *States must take positive measures to provide equal access to justice – addressing barriers caused by the multiple forms of discrimination that victims may face, including on the grounds of gender, ethnicity or poverty. Where the investigation has been hampered by discrimination, that may raise a separate violation, and if it has caused severe pain or suffering it may amount to a separate violation of the prohibition of torture or other ill-treatment by the state.*
- *A failure to diligently investigate rape allegations will lead to an obligation to provide reparation to the victim and should lead to (at least) disciplinary proceedings.*

2.2. Appropriate criminalisation of rape

2.2.1. Criminal law must effectively punish rape

As set out above, it is clear that states have a positive obligation inherent in the prohibition of torture and other ill-treatment to "enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution".[366] States have also been found in violation of their obligations under the prohibition when the way that rape is criminalised does not adequately reflect the understanding of rape in international practice, and therefore promotes impunity and denies victims access to justice.

Both the European Court of Human Rights and CEDAW Committee have found states in violation of their obligations to individual victims where the definition of rape in domestic law has blocked access to justice in their case. In *MC v Bulgaria*, the definition of rape in domestic law required that it be shown that force was used. The Court found that:

> any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.[367]

The Court found that the state was therefore responsible for a violation of its positive obligations under the prohibition of torture and other ill-treatment, and the right to respect for privacy and family life, and should provide reparation to the victim.[368] The CEDAW Committee reached a similar conclusion in the case of *Vertido v the Philippines*, although there the finding was based on discrimination, because of the nature of that Convention.[369] As set out above, such a finding is also consistent with the general jurisprudence of human rights bodies including the Human Rights Committee and the Committee against Torture.[370]

2.2.2. How should rape be criminalised?

Many national legal systems have definitions of rape which are tied to myths about rape and how rape victims *should* behave, and that perpetuate discrimination and impunity. In considering domestic definitions of rape, a useful starting point is the definition contained in the Elements of Crimes of the International Criminal Court.[371] There, rape is defined as:

> The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual

[366] ECtHR, *MC v Bulgaria* (2003) 4 December 2003, at para. 153.
[367] Ibid., at para. 166.
[368] Ibid., at para. 187.
[369] CEDAW, *Vertido v Philippines* (2010) 16 July 2010.
[370] See in particular CAT (2008), 'General Comment No. 2', at para. 18; HRCtee (2004), 'General Comment No. 31', at paras. 8 and 18.
[371] For more information about the development of jurisprudence leading to this definition see Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', (2007).

> organ or of the anal or genital opening of the victim with any object or any other part of the body.
>
> The invasion was committed by force, or by the threat of force or coercion, such as that was caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.[372]

A number of points can be noted. Rape can be committed against any person – man or woman. It does not just involve penile penetration of the vagina, but also includes other physical invasions of a sexual nature. The definition does not require proof that the alleged perpetrator used force, as it recognises that a number of different factors may demonstrate lack of consent.

Furthermore, building on the jurisprudence of international criminal tribunals, the definition moves away from prerequisites such as those found in many domestic jurisdictions that a victim physically or verbally communicate their non-consent to the perpetrator regarding the physical invasion of the sexual nature. An evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator. In a conflict situation it has been understood that a coercive environment often exists, and lack of consent therefore need not be proved.[373] In other circumstances the focus is on the actions of the alleged perpetrator (such as using force, threat, or coercion including psychological oppression, or taking advantage of a person incapable of giving consent), rather than the actions of the alleged victim in 'fighting off' the attacker.

The limited jurisprudence available from human rights bodies on the compatibility of domestic definitions of rape with human rights standards is generally consistent with the understanding of rape before the ICC. In *Miguel Castro Prison v Peru*, the Inter-American Court relied on jurisprudence of the ICTR to find that a woman who had been subjected to "a finger vaginal 'inspection'", carried out simultaneously by several hooded people had been subjected to "sexual rape".[374] The Court considered that:

> sexual rape does not necessarily imply a non-consensual sexual vaginal relationship, as traditionally considered. Sexual rape must also be understood as act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member.[375]

This understanding of rape as including penetration by an object was endorsed by the European Court of Human Rights in the case of *Zontul v Greece*, concerning rape of a man by a baton in immigration detention.[376]

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[372] ICC Elements of Crimes, Article 8(2) (b) (xxii)-1.

[373] See, eg. ICTY, *Akayesu (Trial Chamber Judgment)* (1998) 2 September 1998, at para. 188: "Coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahmwe among refugee Tutsi women at the bureau communal".

[374] IACtHR, *Miguel Castro-Castro Prison v Peru* (2006) Judgment of 25 November 2006, Series C, No. 160 at paras 309-12.

[375] Ibid., at para. 310.

[376] ECtHR, *Zontul v Greece* (2012) 17 January 2012, at paras. 91-93.

The elements of rape were also considered by the Grand Chamber of the European Court of Human Rights in ***MC v Bulgaria***, a case concerning the rape by two men of a 14 year old girl with mental disabilities while on a date. In relation to the issue of consent, the Grand Chamber held that there should be no requirement in domestic law to show evidence of the use of force, or of a victim fighting off the attackers in order to prove rape. Instead, the lack of consent should be judged by an assessment of the surrounding circumstances. It found that a contrary definition in domestic law failed to protect victims who were subject to coercive surroundings, would lead to impunity and contravened the State's responsibility to investigate and prosecute the crime under the prohibition of torture and other ill-treatment.[377]

This has also been the position consistently adopted by the CEDAW Committee, and explained in the case of ***Vertido v the Philippines***, where the Committee found that the Philippines' response to the alleged rape of a woman by her boss had been discriminatory.[378] The Committee recommended that the government remove any requirement in legislation criminalising sexual assault that it be committed by force or violence, and any requirement of proof of penetration. To minimise secondary victimisation of the complainant in proceedings by an undue focus on her own behaviour, it further recommended that the definition of sexual assault should either:

- require the existence of "unequivocal and voluntary agreement" and require proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
- require that the act take place in "coercive circumstances" and include a broad range of coercive circumstances.

The Human Rights Committee and Committee against torture have also considered the definition of rape in domestic legislation in light of international human rights obligations. They have repeatedly recommended during state party reviews that states amend their domestic legislation on rape to include rape of any person, man or woman,[379] to include marital rape within the definition of the crime,[380] and remove requirements of evidence showing resistance to the attack.[381]

2.2.3. Criminalisation and prosecution as torture?

A separate question is whether states have the obligation to investigate and prosecute rape which fits the definition of torture, *as the crime of torture*. This was an argument raised in the case of *Fernandez Ortega v Mexico*, where the victim had been raped by three military

[377] ECtHR, *MC v Bulgaria* (2003) 4 December 2003, at para. 166.
[378] CEDAW, *Vertido v Philippines* (2010) 16 July 2010.
[379] See eg. HRCtee, Concluding Observations: Japan (A/64/40), 19 August 2010 at para. 14.
[380] See eg. HRCtee, Concluding Observations: Mongolia (CCPR/C/79/Add.120), 25 April 2000 at para. 8
[381] See eg. HRCtee Concluding Observations: Japan (A/64/40), 19 August 2010 at para. 14; Mongolia (CCPR/C/79/Add.120), 25 April 2000 at para. 8; CAT, Concluding Observations : Norway (CAT/C/NOR/CO/6-7), 13 December 2012.

officials. In that case, the Inter-American Court held that there was no such obligation: it was sufficient for the act to be investigated as rape because rape is a crime under domestic law with sufficiently serious penalties (of between eight and sixteen years imprisonment).[382]

However, this is not necessarily in line with the jurisprudence of the Committee against Torture, which emphasises the importance under the Convention against Torture of applying the label "torture" to acts fitting the definition.[383] As discussed above in Part I, Section B.2, there are important theoretical reasons why it can be important for rape to be prosecuted as torture where it fits the definition. This may therefore be an issue that other parties take up in litigation.

KEY POINTS

- *States must enact criminal law provisions effectively punishing rape and apply them in practice through effective investigation and prosecution.*
- *International bodies have found states in violation of their obligations to individual victims where the definition of rape in domestic law has blocked access to justice in their case.*
- *Definitions of rape in domestic law should not require proof of use of force or the victim "fighting off" the attacker.*
- *Where the act of rape fits the definition of torture under the Convention against Torture, there is an argument that it should be criminalised and prosecuted as "torture".*

2.3. Prosecution and participation in legal proceedings

A key part of the "prevention, suppression and punishment" of rape is ensuring that those responsible are prosecuted through an effectively functioning criminal justice system. That means that the trial process in an individual case is a crucial part of the state's response, and the victim's right to a remedy. Where the trial process is flawed, allowing for impunity or inflicting further suffering on victims, the state will be responsible for a violation of the obligation to guarantee the right to be free from torture and other ill-treatment.

Three key aspects of rape trials raise important human rights considerations for the victim in this context.

[382] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 202.
[383] CAT (2008), 'General Comment No. 2', at paras. 10-11.

2.3.1. Avoiding discriminatory "rape myths"

The first is the tendency in many systems for discriminatory myths about rape and rape victims to taint the decision making process in a way that does not happen for other crimes. In this regard, the CEDAW Committee has stressed that:

> stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.[384]

This is tied closely to the definition of rape in the domestic legal system, however experience has shown that even where the definition of rape ostensibly reflects international standards, preconceived ideas of lawyers, judges and jury members can influence the way they argue cases and make decisions under that legislation.

The CEDAW Committee examined the way such myths were deployed in a rape trial in the case of ***Vertido v the Philippines***. In that case the judge relied on three "guiding principles" in rape cases derived from legal precedent, one of which – that rape claims are made with facility – reflected clear gender bias.

The Committee also considered that although the Judge had referred to principles in line with international standards – such as that physical resistance is not an element of rape – the Judge did not apply those principles in "evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape".[385] Instead, it was clear from the judgment that the assessment of the credibility of the author's version of events "was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation".[386] In that case, the way the proceedings were conducted amounted to a violation of the victim's right of equal access to a remedy for the violation of her rights.[387]

Similar discriminatory attitudes to the credibility of the complainant were at issue in the case of ***LNP v Argentina***, referred to above. The court that heard the case invoked what the Human Rights Committee termed "discriminatory and offensive criteria", such as "the presence of long-standing defloration" of the victim to conclude that a lack of consent to the sexual act had not been demonstrated, leading to the acquittal of the accused. All the witnesses in the trial were asked whether she was a prostitute, and the judgment based its analysis of the case on the sexual life of the author and whether or not she was a "prostitute". It took the author's loss of virginity as the main factor in determining whether she consented or not to the sexual act. The Human Rights

[384] CEDAW, *Vertido v Philippines* (2010) 16 July 2010, at para. 8.4.
[385] Ibid., at para. 8.5.
[386] Ibid.
[387] Ibid., at para. 8.9.

Committee found that this amounted to discriminatory treatment.[388]

A related issue is the extent to which evidence in corroboration of the complainant's testimony is required for rape to be proved. Many legal systems have historically required such corroboration for rape, but the Inter-American Court has stressed that the victim's testimony is the fundamental proof:

> the Court finds it evident that rape is a particular type of violence, which is generally characterized by taking place in the absence of persons other than the victim and the aggressor or aggressors. In view of the nature of this type of violence, one cannot await graphic or documentary evidence, thus the victim's testimony becomes the fundamental proof of that which occurred.[389]

In that case, concerning the rape of an indigenous child, the victim had not reported the rape at the first two medical examinations she had attended after it. However, the Court found that this was explicable, and did not undermine her credibility. According to the Court:

> the first time Mrs. Rosendo Cantú appeared at a health care clinic after the event occurred, on February 18, 2002, (supra para. 75), she told the doctor that she was hit with military weapons, and when asked if she had been raped, she said no. On the other hand on February 26 of the same year, she went to the Hospital of Ayutla were she also did not state that she had been raped, rather she told the doctor that "10 days [ago], a piece of wood had fallen on her abdomen, causing her extreme pain [there]." The Court considers that the fact that she did not indicate that she had been raped in the two initial medical consultations should be contextualized to the circumstances of the case and of the victim. First, sexual assault is a type of crime that the victim does not tend to report. This occurs specifically in indigenous communities, given the cultural as well as social particularities that the victim must face (supra para. 70), in some cases, as in the present, because of fear. Likewise, Mrs. Rosendo Cantú, at the time the facts occurred, was a girl child who was forced to live an experience in which, in addition to being physically and sexually assaulted, she received death threats against her community by the soldiers who attacked her. Based on this, it is the criteria of the Court, that not having told the first doctor that she was raped and not having indicated that she was raped by soldiers at the second doctor's visit, does not discredit her statements regarding the existence of said rape. Lastly, said omission may be due to the lack of sufficient safety or trust to relate what had happened.[390]

The Court considered that other evidence, including a medical psychiatric report carried out later, medical evidence collected a month after the incident, and witnesses who saw the victim shortly after the incident, did provide support for her testimony.[391]

[388] HRCtee, *LNP v Argentina* (2011) 18 July 2011, at para. 13.3.
[389] IACtHR, *Rosendo Cantú Et Al v Mexico* (2010) 31 August 2010, at para. 89.
[390] Ibid., at para. 95.
[391] Ibid., at paras. 99-101.

2.3.2. Victims must have information about the proceedings and possibility of being heard in them

A second key aspect is the importance of victims having information about the proceedings and the possibility of being heard in them.[392] According to the Inter-American Court, victims of human rights violations, or their next of kin, should have wide-ranging possibilities of being heard and taking part in the proceedings, both in order to clarify the facts and punish those responsible, and also to seek due reparation.[393] That means, for example, that where the victim does not speak the language in which the proceedings are being held, the state should provide translation in order for them to participate. If it does not it will have breached its obligation to provide equal access to an effective remedy.[394] It also means that victims should be aware of when proceedings are being held, and of any decisions of acquittal or appeal.[395]

2.3.3. Specific measures are likely to be required to avoid further traumatisation

The third aspect, tied to both of the above, is the need to take specific measures to avoid, as far as possible, the further traumatisation of the victim through the proceedings themselves. As is the case in traumatisation during investigations, where the proceedings lead to severe pain and suffering for the victim, this may go beyond a failure to fulfil the positive obligation to respond to the rape, and in addition amount to the infliction of further prohibited ill-treatment by the state. In *LNP v Argentina*, the Human Rights Committee found that the discriminatory treatment inflicted on the victim during the proceedings contributed to her re-victimisation, and was sufficient to amount to a violation of the prohibition of torture and other ill-treatment under the ICCPR.[396]

The Committee against Torture has recently summarised some of these issues, stating that:

> 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.[397]

[392] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 192. See also ECtHR, *Zontul v Greece* (2012) 17 January 2012.
[393] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 192.
[394] Ibid., at para. 201.
[395] HRCtee, *LNP v Argentina* (2011) 18 July 2011, at para. 13.5.
[396] Ibid., at para. 13.6.
[397] CAT (2012), 'General Comment No. 3', at para. 33.

3. Reparation

Finally, the right to an effective remedy for a violation of human rights requires that the responsible individual or entity provide reparation to the victim.[398] This has been stressed by all the key relevant human rights bodies, including the Human Rights Committee, the Committee against Torture, the CEDAW Commitee, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.[399]

As flagged above, Article 14 of the Convention against Torture imposes specific obligations on states to "ensure in their legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible". The Committee against Torture's General Comment No. 3 provides detailed guidance on what reparation should entail. The Committee explains that:

> Reparation must be adequate, effective and comprehensive. … [I]n the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them. The Committee emphasizes that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.[400]

3.1. Where a private individual is responsible

Where a private individual is responsible for the violation – in this case a rape – the state must provide avenues through which offenders or third parties responsible for their behaviour should make fair restitution to victims, their families or dependants, including payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.[401] Such avenues may be compensation orders which can be made as part of the criminal proceedings, or through separate civil claims.

When compensation is not fully available from the offender or other sources, the international community has agreed that the state should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health, which would normally include rape victims.[402] Such compensation is often paid through administrative state compensation schemes. In Europe, States that have ratified the European Convention on the Compensation of Victims of Violent Crimes are obliged to provide compensation for victims and their dependants when such

[398] See, eg. HRCtee (2004), 'General Comment No. 31', at para. 16; UN General Assembly (1985), 'Basic Principles for Victims of Crime', at paras. 8 and 11.
[399] See, eg. IACtHR, *Velasquez Rodriguez v Honduras* (1988) 29 July 1988, at paras. 80 and 178; ECtHR, *Ilhan v Turkey* (2000) 26 June 2000, at para. 97; Afrcmhpr (2007), 'Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence', Resolution No. 111, 28 November 2007; CAT (2012), 'General Comment No. 3'; CEDAW (2010), 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women ', CEDAW/C/2010/47/GC.2, 19 October 2010 at para. 32; HRCtee (2004), 'General Comment No. 31'.
[400] CAT (2012), 'General Comment No. 3', at para. 6.
[401] UN General Assembly (1985), 'Basic Principles for Victims of Crime', at para. 5.
[402] Ibid., at para. 12.

compensation cannot be fully obtained by other means, including when the offender cannot be prosecuted or punished.[403]

3.2. Where the state is responsible for a violation

Where the state is responsible for a violation (whether substantive or procedural or both), the state should provide the victim with reparation in the form of restitution, compensation, satisfaction, guarantees of non-repetition and rehabilitation.[404] If it does not do so it may be responsible for a separate violation of the right to an effective remedy.

3.3. Types of reparation

The Committee against Torture has explained the different forms of reparation which should be provided in cases of torture and other ill-treatment as follows:

> Restitution
>
> 8. Restitution is a form of redress designed to re-establish the victim's situation before the violation of the Convention was committed, taking into consideration the specificities of each case. The preventive obligations under the Convention require States parties to ensure that a victim receiving such restitution is not placed in a position where he or she is at risk of repetition of torture or ill-treatment. In certain cases, the victim may consider that restitution is not possible due to the nature of the violation; however the State shall ovide the victim with full access to redress. For restitution to be effective, efforts should be made to address any structural causes of the violation, including any kind of discrimination related to, for example, gender, sexual orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination.
>
> Compensation
>
> 9. The Committee emphasizes that monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment. The Committee affirms that the provision of monetary compensation only is inadequate for a State party to comply with its obligations under article 14.
>
> 10. The right to prompt, fair and adequate compensation for torture or ill-treatment under article 14 is multi-layered and compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary. This may include: reimbursement of medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as

[403] Council of Europe 'European Convention on the Compensation of Victims of Violent Crimes', CETS No. 116, adopted 24 November 1984, entered into force 1 February 1998.
[404] CAT (2012), 'General Comment No. 3', at para. 6.

employment and education. In addition, adequate compensation awarded by States parties to a victim of torture or ill-treatment should provide for legal or specialist assistance, and other costs associated with bringing a claim for redress.

Rehabilitation

11. The Committee affirms that the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services. Rehabilitation, for the purposes of this general comment, refers to the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.

12. The Committee emphasizes that the obligation of States parties to provide the means for "as full rehabilitation as possible" refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture. The obligation does not relate to the available resources of States parties and may not be postponed.

13. In order to fulfil its obligations to provide a victim of torture or ill-treatment with the means for as full rehabilitation as possible, each State party should adopt a long-term, integrated approach and ensure that specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible. These should include: a procedure for the assessment and evaluation of individuals' therapeutic and other needs, based on, inter alia, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol); and may include a wide range of inter-disciplinary measures, such as medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education etc. A holistic approach to rehabilitation which also takes into consideration the strength and resilience of the victim is of utmost importance. Furthermore, victims may be at risk of re-traumatization and have a valid fear of acts which remind them of the torture or ill-treatment they have endured. Consequently, a high priority should be placed on the need to create a context of confidence and trust in which assistance can be provided. Confidential services should be provided as required.

14. The requirement in the Convention to provide these forms of rehabilitative services does not extinguish the need to provide medical and psychosocial services for victims in the direct aftermath of torture, nor does such initial care represent the fulfilment of the obligation to provide the means for as full rehabilitation as possible.

15. States parties shall ensure that effective rehabilitation services and programmes are established in the State, taking into account a victim's culture, personality, history and background and are accessible to all victims without

discrimination and regardless of a victim's identity or status within a marginalized or vulnerable group, as illustrated in paragraph 32, including asylum seekers and refugees. States parties' legislation should establish concrete mechanisms and programmes for providing rehabilitation to victims of torture or ill-treatment. Torture victims should be provided access to rehabilitation programmes as soon as possible following an assessment by qualified independent medical professionals. Access to rehabilitation programmes should not depend on the victim pursuing judicial remedies. The obligation in article 14 to provide for the means for as full rehabilitation as possible can be fulfilled through the direct provision of rehabilitative services by the State, or through the funding of private medical, legal and other facilities, including those administered by non-governmental organizations (NGOs), in which case the State shall ensure that no reprisals or intimidation are directed at them. The victim's participation in the selection of the service provider is essential. Services should be available in relevant languages. States parties are encouraged to establish systems for assessing the effective implementation of rehabilitation programmes and services, including by using appropriate indicators and benchmarks.

Satisfaction and the right to truth

16. Satisfaction should include, by way of and in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of the Convention, any or all of the following remedies: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of victims' bodies in accordance with the expressed or presumed wish of the victims or affected families; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; judicial and administrative sanctions against persons liable for the violations; public apologies, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims.

17. A State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14.

Guarantees of non-repetition

18. Articles 1 to 16 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment. To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention. Such measures include issuing effective, clear instructions to public officials on the provisions of the Convention, especially the absolute prohibition of torture. Other measures should include any or all of the following: civilian oversight of military and security forces; ensuring that all judicial proceedings abide by international standards of due

process, fairness and impartiality; strengthening the independence of the judiciary; protecting human rights defenders and legal, health and other professionals who assist torture victims; establishing systems for regular and independent monitoring of all places of detention; providing, on a priority and continued basis, training for law enforcement officials as well as military and security forces on human rights law that includes the specific needs of marginalized and vulnerable populations and specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials; promoting the observance of international standards and codes of conduct by public servants, including law enforcement, correctional, medical, psychological, social service and military personnel; reviewing and reforming laws contributing to or allowing torture and ill-treatment; ensuring compliance with article 3 of the Convention prohibiting refoulement; ensuring the availability of temporary services for individuals or groups of individuals, such as shelters for victims of gender-related or other torture or ill-treatment. The Committee notes that by taking measures such as those listed herein, States parties may also be fulfilling their obligations to prevent acts of torture under article 2 of the Convention. Additionally, guarantees of non-repetition offer important potential for the transformation of social relations that may be the underlying causes of violence and may include, but are not limited to, amending relevant laws, fighting impunity, and taking effective preventative and deterrent measures.

Section D, below, expands on the types of reparation orders that may be provided by different international bodies in individual cases.

KEY POINTS

- *The provision of reparation is a key part of the remedy required for a human rights violation. Reparation must be adequate, effective and comprehensive, tailored to the particular needs of the individual, and proportionate to the gravity of the harm suffered.*
- *Where a private individual has committed harm causing serious injury the victim should have the opportunity to claim reparation. Where a state is responsible for a violation (either substantive or procedural) it must provide reparation.*

C. CONSIDER OTHER VIOLATIONS

1. Violations of other rights

This report focuses on litigating rape using the prohibition of torture and other ill-treatment, however in any case there will almost certainly be violations of other rights which are connected to, and support, these arguments. These should be considered carefully at the outset of framing any case, and the jurisprudence of the relevant bodies examined to understand how they fit together.

In relation to the rape itself, and the state's response to it, as outlined above there are often two further violations argued in conjunction with the violation of prohibition of torture and other ill-treatment. These are the right to privacy and family life, which is also traditionally seen within some treaty frameworks to be violated by rape,[405] and the right to be free from discrimination, which as demonstrated above is often central to a finding of torture or other ill-treatment in the first place, and to failings in response to such treatment. In a number of key cases arguments about states' general and broader failures to respond to violence against women are framed as a matter of discrimination, and states have been held to have violated their obligations to take positive measures to address gender based violence as a form of discrimination.[406] In any case raising human rights concerns about rape discrimination, often on multiple grounds, is likely to be a key issue.[407]

In addition, characteristics of the victim may mean that there are specific obligations owed to them – for example, as children, under guarantees of child rights.[408] Where the state owes additional obligations to combat violence against women under specific conventions such as the Convention of Belem do Para or the Maputo Protocol these should also be raised.

Other human rights violations are often also associated with rape, and should be considered carefully. These may include, for example, violations of the right to life, to liberty, to humane conditions of detention, to freedoms of expression, opinion, and association and to respect for one's home and family life (for example in relation to forced entry into a victim's home).

2. Violations affecting family members

A further consideration is whether rights of the victims' family members have been violated as a result of the rape or events after it. The Inter-American Court has held, for example, that a mother who witnessed the rape of her children,[409] and children who witnessed the rape of their mother by soldiers had, as a consequence, suffered a violation of their personal

[405] See, eg. ECmHR, *X and Y v Netherlands* (1985) 26 March 1985; IACmHR, *Mejía v Perú* (1996) 1 March 1996; ECtHR, *MC v Bulgaria* (2003) 4 December 2003.
[406] See, eg. ECtHR, *Opuz v Turkey* (2009) 9 June 2009. Contrast, however, ECtHR, *A v Croatia* (2010) App. No. 55164/08, Judgment of 14 October 2010.
[407] For further discussion see Interights, 'Non-Discrimination in International Law: A Handbook for Practitioners ', (2011), http://www.interights.org/handbook/index.html.
[408] See eg. Convention on the Rights of the Child; ICCPR, Art. 24; American Convention on Human Rights, Art. 19; African Convention on Human and Peoples Rights, Art. 18.
[409] IACmHR, *Ana, Beatriz Y Celia González Pérez v. Mexico* (2001) Case No. 11/565, Decision of 4 April 2001, Report No. 53/01 at para. 53.

integrity under Article 5(1) of the American Convention for which the state was responsible.[410] Such a violation may also arise, for example in relation to the victim's spouse and children, from the state's actions and omissions in relation to the investigation.[411]

On a number of occasions family members of victims have also been the target of threats and violence in retaliation for the fact a complaint has been made or prosecution pursued. In such cases courts have been willing to order provisional measures for their protection,[412] or find them the subject of violations themselves.[413]

D. REQUEST APPROPRIATE REPARATION

In determining reparation to be awarded for a violation of a state's obligations, courts will normally try to re-establish, to the extent possible, the situation that existed before the commission of the violation and compensate for the damage caused. The amount and nature of the reparation will depend on the characteristics of the violation and the pecuniary and non-pecuniary damage caused.

However, as the Inter-American Court has stressed, a special approach may need to be taken where structural discrimination is at the root of the violation in the first place. In such a case "the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re- establishment of the same structural context of violence and discrimination is not acceptable".[414]

In the ***Cottonfields*** case, the Court detailed criteria to be applied for the assessment of reparation, including the following: (i) reparations should have a direct connection with the violations found by the Court; (ii) they should repair in a proportional manner pecuniary and non-pecuniary damages; (iii) they cannot be a source of enrichment or impoverishment; (iv) restitution is an aim but without breaching the principle of non-discrimination; (v) reparations should be oriented to identify and eliminate the structural factors of discrimination; (vi) they should take into account a gender perspective, bearing in mind the different impact that violence has on men and on women; and (vii) take into account all the measures alleged by the state to have been taken to repair the harm.[415]

The Court also made a clear distinction between reparation, humanitarian assistance, and social services. Mexico had attempted to deduct from the reparations granted any monetary and housing assistance already provided to the family members, but this was rejected by the Court.[416]

The Special Rapporteur on Violence Against Women has also done detailed work in this area, with a report on the topic tabled in 2010.[417] Her report considered issues of reparation arising in both post-conflict and post-authoritarian contexts, and in relation to violations committed against women in peacetime. According to the Special Rapporteur:

[410] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para.145.
[411] Ibid., at paras. 144, 46-7.
[412] Ibid., at para. 214.
[413] IACtHR, *Kawas Fernández v Honduras* (2009) 3 April 2009, at para. 118.
[414] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 450.
[415] Ibid., at para. 451.
[416] Ibid., at para. 558.
[417] Human Rights Council (2010), 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo', UN Doc. A/HRC/14/22 19 April 2010.

> women are often the target of both sex-specific and other forms of violence, not only in times of conflict but also in ordinary times. Women often bear the brunt of the consequences of violence that targets them, their partners and dependants. Given the disparate and differentiated impact that violence has on women and on different groups of women, there is a need for specific measures of redress in order to meet their specific needs and priorities. Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation.[418]

In addition, the Special Rapporteur stressed the importance of women's participation in reparations discussions and processes. In her view, particularly when it comes to reparations programmes following widespread human rights violations:

> Without the participation of women and girls from different contexts, initiatives are more likely to reflect men's experience of violence and their concerns, priorities and needs regarding redress. Additionally, without such participation, an opportunity is missed for victims to gain a sense of agency that may in itself be an important form of rehabilitation, especially when victims come to perceive themselves as actors of social change. Finally, such participation is important for women and society in general to draw the links between past and present forms of violence and seize the opportunity provided by reparations discussions to press for more structural reforms.[419]

This was also stressed in a document adopted by civil society organisations known as the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*.[420]

In relation to sexual violence in particular, the Special Rapporteur has stressed the specific types of harm that need to be understood and addressed when it comes to reparation:

> Since women and girls who are subjected to gender violence, including sexual violence and forced unions, are often re-victimized in their families and communities, restitution of identity, family life and citizenship for them may require measures that target their wider communities – including attempts to subvert cultural understandings around the value of women's purity and sexuality. Although some of the intangible assets that are often taken from victims of sexual violence, such as virginity or social standing, cannot be returned, all the tangible assets of which victims of sexual violence are commonly stripped should be borne in mind. Communal and family ostracism, abandonment by spouses and partners and becoming unmarriageable or sick are all too commonly synonyms of material destitution, and the costs of ongoing medical treatment, pregnancy, abortions, and raising children resulting from rape, are all too real to deny. To date, no reparations programme has succeeded in fully reflecting the economic impact of raising children born of rape. [421]

When it comes to individual cases at the international level, some bodies are more open to awarding creative reparation orders that can achieve these ends. The European Court has

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[418] Ibid., at para. 24.
[419] Ibid., at para. 29.
[420] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, adopted March 2007, available at: http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf.
[421] Human Rights Council (2013), 'Manjoo 2013 Report', at para. 50.

traditionally taken a narrow approach – ordering the payment of monetary compensation, and leaving it to the state party to determine the other measures that it should take to comply with its obligations under the Convention as determined by the Court, although there have been a number of recent cases concerning systemic failings where it has been prepared to go further.[422] The Inter-American Court, on the other hand, will often make very detailed orders covering the full scope of reparation measures – from the payment of compensation, specific orders as to the provision of rehabilitation, to measures of satisfaction such as publication of the judgment, public acceptance of responsibility, and memorials, as well as guarantees of non-repetition such as the development of specific policies and implementation of particular training programmes.

Extracts from a number of recent examples in cases concerning violence against women are included in **Annex Three**.

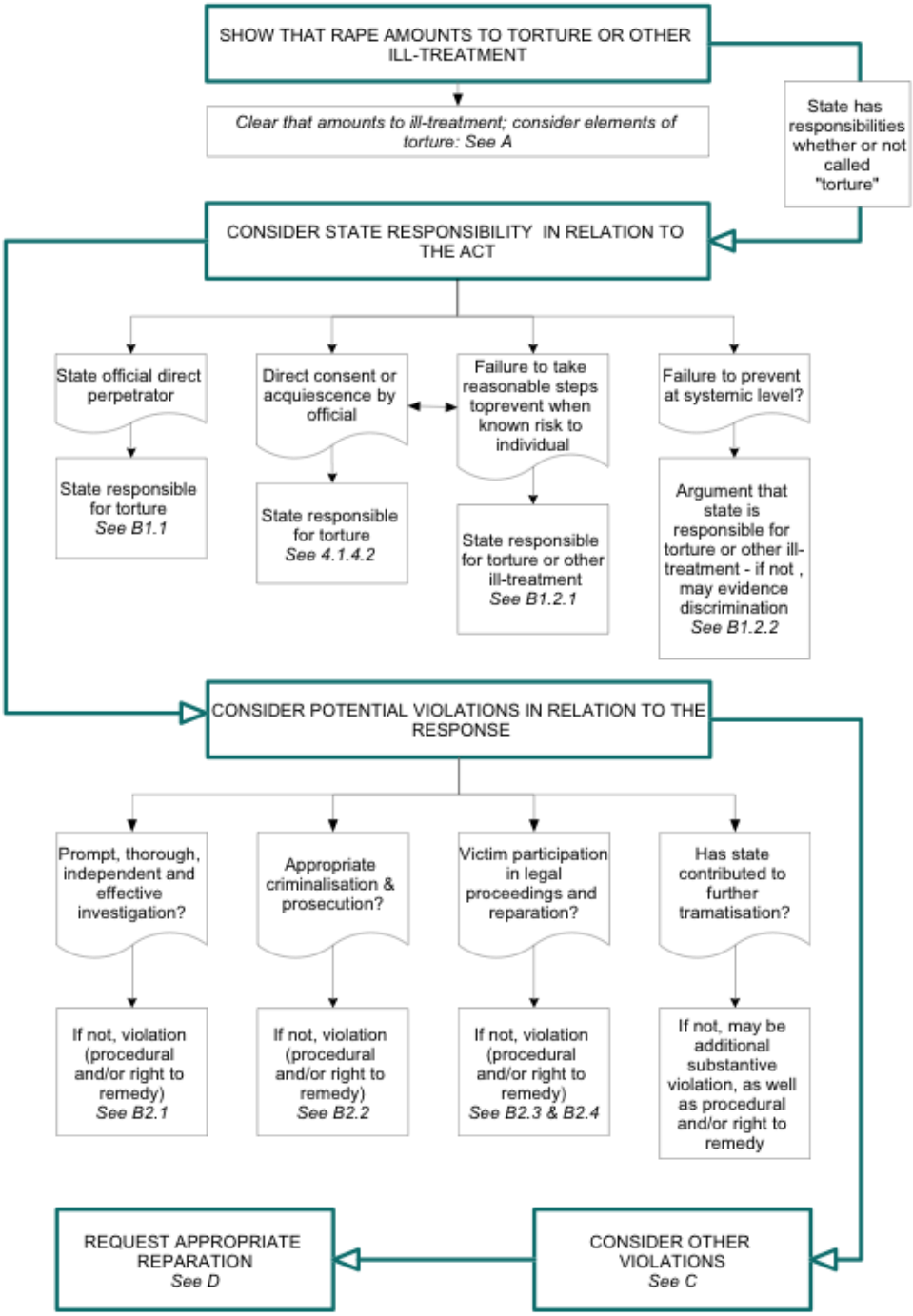
[422] See, eg. ECtHR, *Aslakhanova and Ors. v Russia* (2012) Apps. Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10), Judgment of 18 December 2012.

ANNEX ONE: PROHIBITIONS

ICCPR	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. (Art. 7)
CAT	Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (Art. 2) 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain orsuffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. (Art. 1) 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. (Art. 16)
ECHR	No one shall be subjected torture, inhuman or degrading treatment or punishment (Art. 3)
American Convention	1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. (Art. 5)
Inter-American Convention to Prevent and Punish Torture	The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention. (Art. 1) For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of

	the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article. (Art. 2) The following shall be held guilty of the crime of torture: a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so. b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto. (Art. 3)
African Charter on Human and Peoples' Rights	Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

ANNEX TWO: FRAMING A HUMAN RIGHTS CASE



ANNEX THREE: REPARATION ORDER EXTRACTS

IACtHR, González et al. v Mexico ("Cottonfields case") (2009) Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 215.

11. This judgment constitutes *per se* a form of reparation.

12. The State shall, in accordance with paragraphs 452 to 455 of this Judgment, conduct the criminal proceeding that is underway effectively and, if applicable, any that are opened in the future to identify, prosecute and, if appropriate, punish the perpetrators and masterminds of the disappearances, ill-treatments and deprivations of life of Mss. González, Herrera and Ramos, in accordance with the following directives:

i) All legal or factual obstacles to the due investigation of the facts and the execution of the respective judicial proceedings shall be removed, and all available means used, to ensure that the investigations and judicial proceedings are prompt so as to avoid a repetition of the same or similar facts as those of the present case;

ii) The investigation shall include a gender perspective*;* undertake specific lines of inquiry concerning sexual violence, which must involve lines of inquiry into the respective patterns in the zone; be conducted in accordance with protocols and manuals that comply with the guidelines set out in this Judgment; provide the victims' next of kin with information on progress in the investigation regularly and give them full access to the case files, and be conducted by officials who are highly trained in similar cases and in dealing with victims of discrimination and gender-based violence;

iii) The different entities that take part in the investigation procedures and in the judicial proceedings shall have the necessary human and material resources to perform their tasks adequately, independently and impartially, and those who take part in the investigation shall be given due guarantees for their safety, and

iv) The results of the proceedings shall be published so that the Mexican society learns of the facts that are the object of the present case.

13. The State shall, within a reasonable time, investigate, through the competent public institutions, the officials accused of irregularities and, after an appropriate proceeding, apply the corresponding administrative, disciplinary or criminal sanctions to those found responsible, in accordance with paragraphs 456 to 460 of this Judgment.

14. The State shall, within a reasonable time, conduct the corresponding investigation and, if appropriate, punish those responsible for the harassment of Adrián Herrera Monreal, Benita Monárrez Salgado, Claudia Ivonne Ramos Monárrez, Daniel Ramos Monárrez, Ramón Antonio Aragón Monárrez, Claudia Dayana Bermúdez Ramos, Itzel Arely Bermúdez Ramos,

Paola Alexandra Bermúdez Ramos and Atziri Geraldine Bermúdez Ramos, in accordance with paragraphs 461 and 462 of this Judgment.

15. The State shall, within six months of notification of this Judgment, publish once in the Official Gazette of the Federation, in a daily newspaper with widespread national circulation and in a daily newspaper with widespread circulation in the state of Chihuahua, paragraphs 113 to 136, 146 to 168, 171 to 181, 185 to 195, 198 to 209 and 212 to 221 of the present Judgment, and the operative paragraphs, without the corresponding footnotes. Additionally, the State shall, within the same time frame, publish this Judgment in its entirety on an official web page of the State. The foregoing in accordance with paragraph 468 hereof.

16. The State shall, within one year of notification of this Judgment, organize a public act to acknowledge its international responsibility in relation to the facts of this case so as to honor the memory of Laura Berenice Ramos Monárrez, Esmeralda Herrera Monreal and Claudia Ivette González, in the terms of paragraphs 469 and 470 of this Judgment.

17. The State shall, within one year of notification of this Judgment, erect a monument in memory of the women victims of gender-based murders in Ciudad Juárez, in the terms of paragraphs 471 and 472 of the present Judgment. The monument shall be unveiled at the ceremony during which the State publicly acknowledges its international responsibility, in compliance with the decision of the Court specified in the preceding operative paragraph.

18. The State shall, within a reasonable time, continue standardizing all its protocols, manuals, prosecutorial investigation criteria, expert services, and services to provide justice that are used to investigate all the crimes relating to the disappearance, sexual abuse and murders of women in accordance with the Istanbul Protocol, the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, and the international standards to search for disappeared persons, based on a gender perspective, in accordance with paragraphs 497 to 502 of this Judgment. In this regard, an annual report shall be presented for three years.

19. The State shall, within a reasonable time, and in accordance with paragraphs 503 to 506 of this Judgment, adapt the Alba Protocol or else implement a similar new mechanism, pursuant to the following directives, and shall present an annual report for three years:

(i) Implement searches *ex officio* and without any delay, in cases of disappearance, as a measure designed to protect the life, personal liberty and personal integrity of the disappeared person;

(ii) Establish coordination among the different security agencies in order to find the person;

(iii) Eliminate any factual or legal obstacles that reduce the effectiveness of the search or that prevent it from starting, such as requiring preliminary inquiries or procedures;

(iv) Allocate the human, financial, logistic, scientific or any other type of resource required for the success of the search;

(v) Verify the missing report against the database of disappeared persons referred to in paragraphs 509 to 512 s*upra*, and

(vi) Give priority to searching areas where reason dictates that it is most probable

to find the disappeared person, without disregarding arbitrarily other possibilities or areas. All of the above must be even more urgent and rigorous when it is a girl who has disappeared.

20. The State shall create, within six months of notification of this Judgment, a web page that it must update continually with the necessary personal information on all the women and girls who have disappeared in Chihuahua since 1993 and who remain missing. This web page must allow any individual to communicate with the authorities by any means, including anonymously, to provide relevant information on the whereabouts of the disappeared women or girls or, if applicable, of their remains, in accordance with paragraphs 507 and 508 of the present Judgment.

21. The State shall, within one year of notification of this Judgment and in accordance with paragraphs 509 to 512 hereof, create or update a database with:

(i) The personal information available on disappeared women and girls at the national level:

(ii) The necessary personal information, principally DNA and tissue samples, of the next of kin of the disappeared who consent to this – or that is ordered by a judge – so that the State can store this personal information solely in order to locate a disappeared person, and

(iii) The genetic information and tissue samples from the body of any unidentified woman or girl deprived of life in the state of Chihuahua.

22. The State shall continue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society, in the terms of paragraphs 531 to 542 of this Judgment. Every year, for three years, the State shall report on the implementation of the courses and training sessions.

23. The State shall, within a reasonable time, conduct an educational program for the general population of the state of Chihuahua so as to overcome said situation. In this regard, the State shall present an annual report for three years, indicating the measures it has taken to this end, in the terms of paragraph 543 of this Judgment.

24. The State shall provide appropriate and effective medical, psychological or psychiatric treatment, immediately and free of charge, through its specialized health institutions to Irma Monreal Jaime, Benigno Herrera Monreal, Adrián Herrera Monreal, Juan Antonio Herrera Monreal, Cecilia Herrera Monreal, Zulema Montijo Monreal, Erick Montijo Monreal, Juana Ballín Castro, Irma Josefina González Rodríguez, Mayela Banda González, Gema Iris González, Karla Arizbeth Hernández Banda, Jacqueline Hernández, Carlos Hernández Llamas, Benita Monárrez Salgado, Claudia Ivonne Ramos Monárrez, Daniel Ramos Monárrez, Ramón Antonio Aragón Monárrez, Claudia Dayana Bermúdez Ramos, Itzel Arely Bermúdez Ramos, Paola Alexandra Bermúdez Ramos and Atziri Geraldine Bermúdez Ramos, if they so wish, in the terms of paragraphs 544 to 549 of this Judgment.

25. The State shall, within one year of notification of the present Judgment, pay the amounts established in paragraphs 565, 566, 577, 586 and 596 hereof as compensation for

pecuniary and non-pecuniary damage and reimbursement of costs and expenses, as appropriate, under the conditions and in the terms of paragraphs 597 to 601 of this Judgment.

26. The Court will monitor full compliance with this Judgment in exercise of its powers and in compliance with its obligations under the American Convention, and will consider the case closed when the State has complied in full with all the provisions herein. Within one year of notification of the Judgment, the State shall provide the Court with a report on the measures adopted to comply with it.

CEDAW, Vertido v Philippines (2010) Comm. No. 18/2008, Views adopted 16 July 2010, UN Doc. No. CEDAW/C/46/D/18/2008.

8.9 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee, and makes the following recommendations to the State party:

(a) Concerning the author of the communication

- Provide appropriate compensation commensurate with the gravity of the violations of her rights

(b) General

- Take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay

- Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:

(i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;

(ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances."[423]

(iii) Appropriate and regular training on the Convention on the Elimination of All Forms of Discrimination against Women, its Optional Protocol and its general recommendations, in particular general recommendation No. 19, for judges, lawyers and law enforcement personnel;

(iv) Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a

[423] Handbook for legislation on violence against women, Department of Economic and Social Affairs, Division for the Advancement of Women, United Nations Publication, New York, 2009, p. 27

gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.

IACtHR, Fernandez Ortega et al. v Mexico (2010) Preliminary Objections, Merits, Reparations and Costs, Judgment of 30 August 2010, Series C No. 215.

10. This Judgment constitutes *per se* a form of reparation.

11. The State must effectively conduct in the common jurisdiction, with due diligence and within a reasonable period of time, the criminal investigation, and where needed, the criminal proceedings to determine those criminally responsible and to effectively apply the punishment and consequences that the law dictates, in the period of time established in paragraphs 228 to 230 of this Judgment.

12. The State must, in accordance with the relevant normative principles, examine the facts and conduct of the agent of the Public Prosecutor's Office that obstructed the reception of the complaint presented by Mrs. Fernandez Ortega, pursuant to paragraph 231 of this Judgment.

13. The State must adopt, in a reasonable period of time, the relevant legislative reforms to conform Article 57 of the Military Code of Justice with international standards on the matter and the American Convention on Human Rights, pursuant to that established in paragraph 239 of this Judgment.

14. The State must adopt the relevant reforms so as to permit that individuals affected by the intervention of the military justice system have an effective remedy to contest its jurisdiction, in conformity with that established in paragraph 240 of this Judgment.

15. The State must carry out a public act of acknowledgment of its international responsibility in regard to the facts of the present case, in the terms of paragraph 244 of the present Judgment.

16. The State must carry out the aforementioned publications, pursuant to that established in paragraph 247 of the present Judgment.

17. The State must provide the medical and psychological treatment as required by the victims, in the terms of paragraphs 251 and 252 of the present Judgment.

18. The State must continue with the process of standardization of an action protocol, for the federal forum and that of the state of Guerrero, regarding the attention provided and investigation of rape, taking into consideration, to the extent relevant, the parameters established in the Istanbul Protocol and the Orders of the World Health Organization, in accordance with paragraph 256 of this Judgment.

19. The State must continue to implement programs and permanent trainings regarding diligent investigation in cases of violence against women, that include an ethnic and gender based perspective, which should be administered to federal employees and those of the state of Guerrero, in conformity with that established in paragraphs 259 and 260 of this Judgment.94

20. The State must implement, in a reasonable period, a permanent and obligatory training and formation program or course in human rights, directed at the members of the Armed Forces, pursuant to that established in paragraph 262 of the present Judgment.

21. The State must grant scholarships for study at public Mexican institutions for the benefit of Noemí, Ana Luz, Colosio, Nelida, and Neftalí, all with the surname of Prisciliano Fernández, in conformity with that established in paragraph 264 of this Judgment.

22. The State must facilitative the necessary resources so that the indigenous Me'paa community may establish a community center, to be considered a Women's Center, where educational activities regarding human rights and the rights of women can be carried out, pursuant to paragraph 267 of the present Judgment.

23. The State must adopt measures so that the girls of the community of Barranca Tecoani that carry out their middle school studies in the city of Ayutla de los Libres, may provide facilities that offer adequate food and shelter, so as to allow the girls to continue their education at the institutions which they attend. Notwithstanding the aforementioned, this measure may be complied with by the State if it decides to install a middle school in the mentioned community, in the terms established in paragraphs 270 of this Judgment.

24. The State must assure that the attention services for women victims of sexual violence are offered by institutions indicated by Mexico, among others, the Public Prosecutor of Ayutla de los Libres, via the provision of medical resources and personnel, whose activities must be strengthened with trainings, in conformity with that established in paragraph 277 of the present Judgment.

25. The State must pay the quantities fixed in paragraphs 286, 293, and 299 of the present Judgment, for pecuniary and non-pecuniary damage, and the reimbursement of costs and expenses, as it so corresponds, within a period of one year, to begin as of the notification of the present Judgment, in the terms of paragraphs 300 to 307 of the same.

26. The Court will monitor the full compliance with this Judgment, in the exercise of its attributions and in compliance with its obligations pursuant to the American Convention on Human Rights, and will conclude the present case once the State has entirely satisfied said dispositions. In a period of six months as of the notification of this Judgment, the State must offer the Court a brief regarding the measures adopted to satisfy compliance.

ANNEX FOUR: LIST OF KEY CASES

European Court and Commission of Human Rights

ECmHR, The "Greek case" (1969) Apps. Nos. 3321/67, 3322/67, 3323/67, 3344/67, YB Eur Conv on H R 12.

ECmHR, Cyprus v Turkey (1976) Apps. Nos. 6780/74 and 6950/75, Report of 10 July 1976.

ECtHR, Ireland v United Kingdom (1978) Judgment of 18 January 1978, Series A no. 25.

ECmHR, X and Y v Netherlands (1985) App. No. 8978/80, 26 March 1985.

ECtHR, Aydin v Turkey (1997) App. No. 57/1996, Judgment of 25 September 1997.

ECtHR, Osman v United Kingdom (1998) App. No. 23453, Judgment of 28 October 1998.

ECtHR, Selmouni v France (1998) App. No. 22107/03, Judgment of 14 April 1998, ECHR 1999-V.

ECtHR, A v United Kingdom (1998) App. No. 25599/94, Judgment of 23 September 1998.

ECtHR, E and Ors v United Kingdom (2002) App. No. 33218/96, Judgment of 26 November 2002.

ECtHR, MC v Bulgaria (2003) App. No. 39272/98, Judgment of 4 December 2003, ECHR 2003-XII.

ECtHR, Angelova and Iliev v Bulgaria (2007) App. No. 55523/00, Judgment of 26 July 2007.

ECtHR, Maslova and Nalbandov v Russia (2008) App. No. 839/02, Judgment of 24 January 2008.

ECtHR, Opuz v Turkey (2009) App. No. 33401/02, Judgment of 9 June 2009.

ECtHR, Antropov v Russia (2009) App. No. 22107/03, Judgment of 29 January 2009.

ECtHR, A v Croatia (2010) App. No. 55164/08, Judgment of 14 October 2010.

ECtHR, Rantsev v Cyprus & Russia (2010) App. No. 25965/04, Judgment of 7 January 2010.

ECtHR, P and S v Poland (2012) App. No. 57375/08, Judgment of 30 October 2012.

ECtHR [GC], El Masri v Former Yugoslav Republic of Macedonia (2012) App. No. 39630/09, Judgment of 13 December 2012.

ECtHR, Virabyan v Armenia (2012) App. No. 40094/05, Judgment of 2 October 2012.

ECtHR, IG v Moldova (2012) App. No. 53519/07, Judgment of 15 May 2012.

ECtHR, Zontul v Greece (2012) App. No. 12294/07, Judgment of 17 January 2012.

ECtHR, DJ v Croatia (2012) App. No. 42418/10, Judgment of 24 July 2012.

Inter-American Court and Commission of Human Rights

IACtHR, Velasquez Rodriguez v Honduras (1988) Judgment (Merits) of 29 July 1988, Series C. No. 4.

IACmHR, Flor de María Hernández Rivas v El Salvador (1994) Case No.10.911, Decision of 1 February 1994, Report No. 7/94.

IACmHR, 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

IACmHR, Dianne Ortiz v Guatemala (1996) Case No. 10.562, Decision of 16 October 1996, Res. No. 31/96.

IACtHR, Loayza Tamayo v Peru (1997) Judgment (Merits) of 17 September 1997, Series C, No. 33.

IACmHR, Ana, Beatriz y Celia González Pérez v. Mexico (2001) Case No. 11/565, Decision of 4 April 2001, Report No. 53/01.

IACmHR, Maria da Penha v Brazil (2001) Case 12.051, Decision of 16 April 2001, Report No. 54/01, Annual Report 2000, OEA/Ser.L/V.II.111 Doc.20 rev. .

IACtHR, Case of the Pueblo Bello Massacre v Colombia (2006) Judgment (Merits, Reparations and Costs) of 31 January 2006, Series C, No. 140.

IACtHR, Miguel Castro-Castro Prison v Peru (2006) Judgment of 25 November 2006, Series C, No. 160.

IACtHR, Rochela Massacre v Colombia (2007) Judgment of 11 May 2007, Series C, No. 163.

IACtHR, Bueno Alves v Argentina (2007) Merits, Reparations and Costs, Judgment of 11 May 2007, Series C No. 164.

IACtHR, Kawas Fernández v Honduras (2009) Judgment (Merits, Reparations and Costs) of 3 April 2009, Series C, No. 196.

IACtHR, Perozo et al. v Venezuela (2009) Judgment (Preliminary Objections, Merits, Reparations and Costs) of 28 January 2009, Series C, No. 195.

IACtHR, González et al. v Mexico ("Cottonfields case") (2009) Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 215.

IACtHR, Fernandez Ortega et al. v Mexico (2010) Preliminary Objections, Merits, Reparations and Costs, Judgment of 30 August 2010, Series C No. 215.

IACtHR, Rosendo Cantú et al v Mexico (2010) Judgment (Preliminary Ojections, Merits, Reparations and Costs) of 31 August 2010, Series C, No. 216.

African Commission on Human and Peoples' Rights

AfrComHPR, Malawi African Association and Others v. Mauritania (2000) Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98.

AfrComHPR, Huri-Laws v Nigeria (2000) Comm. No. 225/98.

AfrComHPR, Curtis Francis Doebbler v Sudan (2003) Comm. No. 236/2000.

UN Human Rights Committee

HRCtee, Motta et al v Uruguay (1980) Comm. No. 11/1977, 29 July 1980.

HRCtee, Vuolanne v Finland (1989) Comm. No. 265/1987, Views adopted 2 May 1989, U.N. Doc. Supp. No. 40 (A/44/40) at 311.

HRCtee, Bautista de Arellana v Colombia (1995) Comm. No. 563/1993, Views adopted 27 October 1995, UN Doc. CCPR/C/55/D/563/1993.

HRCtee, Casafranca de Gómez v Peru (2003) Comm. No. 981/2001, Views adopted 22 July 2003, UN Doc. CCPR/C/78/D/981/2001.

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