



# GENDER AND TORTURE CONFERENCE REPORT

**REDRESS**

*Ending Torture. Seeking Justice for Survivors*

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REDRESS is an international human rights organisation based in the United Kingdom that helps survivors of torture and related international crimes obtain justice and reparation. REDRESS works with survivors to help restore their dignity and to make torturers accountable. REDRESS prioritises the interests and perspectives of survivors in all aspects of its work.



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# EXECUTIVE SUMMARY

States acknowledge that torture is one of the most serious crimes that states or individuals can commit, and those accused of committing torture attract enormous stigma. This is because torture undermines the very core of human rights – the dignity and equality of every human being. It is about stripping away the dignity of one human being by another. It is about asserting power and control; about inflicting pain and despair and about destroying a person's identity and sense of self.

Traditional and popular understandings of torture have focussed in the past on the pain and suffering inflicted on a person – usually thought to be male – in the state's custody. But seeing torture only in this way denies protection from the many egregious forms of severe pain and suffering deliberately inflicted on others in different contexts – often women and those from marginalized groups – in an assertion of power and control by the state or with its acquiescence.

The international legal framework implementing the prohibition of torture – once criticized for ignoring the experiences of women and marginalized groups – has been harnessed in the past decade to recognise and validate these serious harms. It has also exposed the discrimination and power dynamics driving them. This has created an imperative to provide a remedy and reparation to victims of torture at the hands of both state and non-state actors. This is not about changing the definition of torture, but rather recognizing that some egregious harms which do fall within the definition have not always been seen as the responsibility of the state. By recognizing that a state is implicated in acts carried out by non-state actors by its failures to prevent and respond to such acts, the nature of the harms now addressed under the framework has been significantly enlarged. But how far have we come, and what more needs to be done?

This two-day conference brought together representatives of non-governmental organizations and academics from around the world to discuss and reflect on the role the legal framework on torture has and can play in achieving justice for women and those from marginalized groups who are the victims of deliberately inflicted harm, often at the hands of non-state actors. In doing so it looked at different gender dimensions to torture: considering how gender impacts not only the circumstances of the commission and its consequences, but also on its remedy.

The conference considered successes in advocacy and litigation under the legal framework on torture: the recognition of certain forms of harm inflicted by both state and non-state actors including rape, domestic violence, female genital mutilation and denial of reproductive rights as torture or other cruel, inhuman or degrading treatment or punishment, and the practical effect this recognition has had in actual cases to hold states to account for their failure to prevent such violations, and to provide a remedy to victims. It considered whether other forms of harm, including trafficking and so-called “corrective” rape and “honour” crimes, fall within the definition of torture and/or cruel, inhuman or degrading treatment or punishment. It also assessed developments in international criminal law and refugee law to determine whether there were lessons to be learned, or synergies to be drawn on.

The discussions were concerned also with the potential limitations of using the legal framework on torture to enforce rights and seek a remedy as well as the technical legal issues requiring further development for the prohibition to be fully understood and implemented in this context. Participants raised various legal areas requiring further thought in this context, including the benefits or otherwise of cumulative charging and convictions (and the equivalent in human rights terms) for crimes such as rape and torture; defining and naming violations associated with process crimes such as trafficking which may amount to an array of different violations over a period of time; the role of intention in non-state actor harms; obligations of due diligence; and the distinctions between torture and cruel, inhuman or degrading treatment or punishment.

We identified two core themes from the discussions: one legal and one practical. First, there is a complex array of issues of definition, responsibility and accountability for harms inflicted by non-state actors particular to the legal framework on torture, which needs further clarification and development. Second, just because something is widespread, it does not mean it is not egregious: it is vital to ensure that as the law evolves, victims and survivors benefit from this evolution and are able to seek an effective remedy.

## RESPONSIBILITY FOR HARMS BY NON-STATE ACTORS

For harms inflicted by non-state actors, there is still some uncertainty about when a state can be held responsible for torture under the different human rights frameworks. One question is whether “*consent and acquiescence*” by the state (as required by the Convention against Torture) is an additional and more restrictive element for recognizing something as torture, or is it simply equivalent to a failure of due diligence by the state – as is required to hold a state responsible for all types of violations under human rights treaties? This is not clear from the existing jurisprudence. However, in its General Comment No. 2 the Committee against Torture suggests that the two are equivalent:

*The Committee has made clear 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. 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.<sup>1</sup>*

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<sup>1</sup> UN Committee against Torture, General Comment No 2, UN Doc CAT/C/GC/2 (2008).



Another question is when does the state's positive duty to act arise: when can a state be held accountable for torture by a non-state actor in a particular case, and is it the same under all human rights treaties? It is recognised that states have general duties to have legislation in place to prevent serious harms, and specific duties to protect individuals where they are aware of particular risk to them. There are, however, indications that the general obligations go further when a state becomes aware of a pattern of violence, or the particular targeting of a particular group. There is a need to define the extent of those obligations: are they confined to addressing traditional security concerns or do they extend to addressing the underlying subordination and discrimination putting that group at risk?

A further question is how discrimination as a purpose of or context for torture fits within this framework, and how this element of the definition of torture should be applied. In the case of *Opuz v Turkey*<sup>2</sup> the European Court found that discriminatory judicial passivity and impunity leading to an atmosphere where violence against women is tolerated meant that the violations suffered were gender based and amounted to discrimination against women. Can this atmosphere of discrimination establish consent and acquiescence or a failure of due diligence?

A finding of responsibility for torture leads to specific obligations under the legal framework on torture, including the key obligation to prosecute the perpetrator. It is important to clarify which individuals are legally responsible and accountable for torture where there has been a failure of due diligence so that the finding of torture is matched to its binding legal obligations.

Which, if any, state officials should be prosecuted in relation to a state policy that allows or encourages violence against women generally, or a specific failure to act in a specific case? How should we deal with laws and policies which public servants apply, and which legislators enact, or permit to remain on the statute books, which impose severe pain and suffering intentionally on women and those from marginalised groups (for example, exemptions from the criminal law for marital rape and the denial of health services to women). Which state officials will be subject to universal jurisdiction for torture under the Convention against Torture where torture arises through a failure of due diligence? Are there some cases in which no individual can or should be held to account?

For non-state actor perpetrators of violence, the question is how they should be prosecuted, and what the state should prosecute them for. Should the laws that states have in place to criminalize and punish the intentional infliction of severe pain and suffering for a prohibited purpose define those acts at the domestic level as "torture"? And what do you tell the victim where the perpetrator has not committed a crime under the domestic law then in force, because of the state's failure to criminalize their acts at all (or positive legislation to compel those acts)?

Clarifying these issues is important to develop a solid understanding both of when egregious acts committed by non-state perpetrators can be attributed to the state as a violation of the

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<sup>2</sup> European Court of Human Rights, *Opuz v Turkey* (Application No. 33401/02), [2009] ECHR 870, 9 June 2009.

prohibition on torture, and what states should do to prevent and redress the wrong. A clear understanding will help both to underscore the legal basis of recognising such harms as torture in theory, and help states to implement their obligations in practice.

## **MATCHING ADVOCACY AND OBLIGATION**

Despite the legal developments in recognising state responsibility for the egregious harm inflicted in contexts outside custody, there has been scant progress in preventing and responding to torture of women and other marginalised groups. The ultimate aim of seeing other types of harm amounting to torture as such is not just because they are egregious and fit within the definition. It is also a way of engaging state responsibility to act to remedy the situation: on a comparable basis with 'traditional' torture, because of power dynamics in such cases, impunity is likely to prevail without the legal framework on torture requiring states to take specific steps.

Just as we must open our eyes to the different types of harm under the legal framework on torture, so too we must look again at how the state must address and seek to repair those harms. In framing legal obligations, we must keep in mind the barriers facing those from marginalised groups in accessing justice. In trying to repair the harm we must also consider the specific needs of survivors from such groups: traditional forms of reparation may not be enough when restoring the person to the position they were in puts them back in the position which allowed them to be tortured in the first place. Reparation in such circumstances must seek to transform that reality.

Matching the legal and advocacy positions is vital to support the claims for change. Clarity and consistency from human rights bodies in setting out first, the fact that these egregious harms are torture and/or cruel, inhuman or degrading treatment or punishment under the existing legal framework and second, the steps states need to take under the legal framework to prevent and remedy such violations, including by holding individuals accountable, is vital to validating the experiences of survivors and achieving real change on the ground. There are limits to what law can do, but it must be applied equally and robustly to stop all forms of torture, to uphold the dignity of all human beings.

# INTRODUCTION

Torture is an act based on abuse of power. Entrenched discrimination based on gender pervades virtually every society and is reflected in each society's laws. As a result, women, girls, and people who challenge a society's conventions regarding appropriate appearance, dress, actions, expression, emotions, work and relationships often are subject to discrimination, exclusion and abuse of power in both the private and public sphere. These stereotypes are further defined based on other elements of one's identity. For example what may be considered appropriate for a woman of one race may be considered inappropriate for a woman of another race.

To effectively understand and further refine our understanding of torture and other ill-treatment, we need to be aware of how power dynamics based on gender shape the existing legal framework on torture. In this conference, panellists and participants explored gender specific forms of torture, gender based torture and persecution, how laws entrench disparate treatment of individuals based on gender and how that structural discrimination impacts our understanding of torture and the enforcement – of lack thereof – of the prohibition against torture.

## WHY DO WE NEED TO THINK ABOUT THE GENDER DIMENSIONS OF TORTURE?

Law and the enforcement of law in society is the purview of the privileged. As we seek to ensure that all people are equal before the law and equally protected by the law, it is imperative that we examine how law reinforces power structures within a society. Only then can we begin to dismantle the obstacles individuals and groups face when they are denied equal protection of the law. This is not a simple exercise as the law itself becomes a lens through which one understands what is abhorrent and what is acceptable or normative in a society. For example, law both reflected and reinforced the idea that women are the property of men. Thus, the struggle to define sexual violence as a crime against an individual rather than the desecration of an object requires challenging how a society understands family, privacy, women, property, slavery and justice. In short, the law follows society and its values rather than defines it.

Thus, in this conference, panellists and participants sought to understand how to expose the failures of the legal framework on torture to address effectively the gender dimension of torture and how to change the framework to truly ensure equal protection of the law.

# PANEL ONE: TORTURE AND OTHER ILL-TREATMENT OF WOMEN AND GIRLS: AN OVERVIEW

*This Panel gave an overview of the significant developments over the past fifteen years in understanding of, and international norms concerning, gender dimensions to torture, and highlighted some key areas for further development.*

## WHY WAS THERE (AND STILL IS) DENIAL OF GENDER-BASED VIOLENCE AS AMOUNTING TO TORTURE?

As Catharine MacKinnon identified: either these forms of violence are so normal they become invisible and marginalised, or they are so extreme they become exceptional or a one-off or the woman is simply disbelieved. The public/private divide obscured issues like the deliberate infliction of pain and suffering upon women as constituting torture. Torture was perceived as having to be committed by state actor.

## COUNTER-TERRORISM AND GENDERED TORTURE BY STATE AGENTS

It was noted that counter-terrorism policies have widely used gendered forms of torture, including:

- the use of rape and other gender based violence against women suspected of terrorist activity or for their supposed association with others suspected of terrorist activity;
- the use of interrogation techniques on male Muslim detainees that were clearly gendered in a number of different ways, e.g. exploiting perceived notions of male Muslim homophobia, inducing feelings of emasculation in detainees, enforced nudity, enforced wearing of women's underwear, smearing fake menstrual blood onto detainees. In some instances the US department of defence has used female service members to administer techniques on male detainees in order to heighten the perceived degrading aspects of their treatment;
- the use by state agents of sexual violence to obtain information, but also to cause women to blame themselves for their role in the conflict (as identified by the Peruvian Truth and Reconciliation Commission).

There have been positive developments. It is now accepted that rape necessarily give rise to pain and suffering, physical or mental, and that this justifies characterization as an act of torture.<sup>3</sup> UN treaty bodies, regional human rights bodies and *ad hoc* criminal courts have

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<sup>3</sup> See the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), Appeal Chamber, *Prosecutor v Kunarac et. al*, 12 June 2002, paras. 151-152: severe pain or suffering as required by the

recognised that rape and sexual violence can constitute torture or cruel, inhuman or degrading treatment or punishment. However, there are other forms of deliberately inflicting pain or suffering which are also capable of being called torture. These are explored in later panels.

There is a danger, though, in assuming the gains in jurisprudence are secure: there is a great degree of pressure for a higher margin of appreciation, and governments are not always willing to take on board the advanced jurisprudence being put forward by regional human rights courts.

## RECOGNIZING THE EXERTION AND ABUSE OF POWER IN A DESIRE TO EXTINGUISH THE INDIVIDUALITY AND THE IDENTITY OF THE VICTIM

A cohesive and coherent aspect to gender torture is the exertion and abuse of power by the perpetrator over the victim and the desire to extinguish the individuality and the identity of the victim.<sup>4</sup> This is a very powerful idea and a strong response to frequently made comments, for example, in the context of domestic violence as a form of torture, that the victim could have fled. The passivity of the person is used against them, without realizing that the torture is aimed at the obliteration of that individual's identity and autonomy.

## STATE RESPONSIBILITY UNDER HUMAN RIGHTS LAW FOR ACTS OF TORTURE

### TORTURE BY A STATE AGENT

The classic situation of an internationally wrongful act being attributed to the state through its commission by organs of government or others who have acted under the direction, instigation or control of those organs is uncontroversial. The definition of torture in this situation is well established under international law in cases of gender violence.

### STATE RESPONSIBILITY FOR ACTS COMMITTED BY NON-STATE ACTORS

In the words of the UN Human Rights Committee, it is "*the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against [torture] whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity.*"<sup>5</sup> This is usually encapsulated in the assertion of the duty of due diligence – to prevent, investigate, prosecute and punish those suspected of torture. However, challenges of definition and implementation remain. The two key issues are: (i) When does the duty arise? (ii) What is the required standard of behaviour?

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definition of the crime of torture can thus be said to be established once rape is proved, since the act of rape necessarily implies pain or suffering.

<sup>4</sup> This idea is reflected in the Inter-American Convention to Prevent and Punish Torture, which has an additional definition of torture which refers to "*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*" (Article 2). Reference was made to the use of what has been termed "*corrective rape*" against lesbians in South Africa as a particularly clear example.

<sup>5</sup> Human Rights Committee, General Comment No. 20 (1992), para. 2.

There is a great deal of case law around the duty to investigate. The more difficult issues concern determining when there has been a failure of the duty to protect against or to prevent acts of torture. A particular complexity arises in the case of torture because of the concept of state “*consent and acquiescence*” in definitions of torture in some instruments. These issues are canvassed in the section on ‘Challenges and issues for further consideration’, below.

## CHALLENGES AND ISSUES FOR FURTHER CONSIDERATION

### THE DIFFERENT DEFINITIONS OF TORTURE IN DIFFERENT CONTEXTS

Although the prohibition of torture is widely recognised as a peremptory norm of international law, there is still a lack of clarity about many aspects of the precise requirements of the legal prohibition. There are different definitions under different human rights conventions and now under the international criminal law framework, and there is no clear agreement around state obligations under customary international human rights law with respect to torture. Bringing the gender dimension of torture into this adds complexities and makes the situation more difficult in legal terms.

### THE MINIMUM LEVEL OF SEVERITY TO REACH THE THRESHOLD OF TORTURE

The European Court of Human Rights (the “European Court”) has asserted that there is an increasingly high standard of required behaviour under international human rights law and that behaviour that once might have been regarded as inhuman and degrading treatment may now be viewed as torture. It is important that this increasingly high standard is also applied to a gendered understanding of torture.<sup>6</sup> The assessment of the minimum standard of severity is relative: it depends on the circumstances and the context, and can include factors including the duration of the act, physical impact, sex, age, mental state of the victim etc.

### IS THE REQUIREMENT OF STATE CONSENT OR ACQUIESCENCE IN THE TORTURE PART OF THE *JUS COGENS* PROHIBITION?

It was suggested that this question, and its link to attribution of responsibility to the state of torture by non-state actors, is at the heart of Judge Cecilia Medina Quiroga’s separate concurring opinion in the *Cotton Fields* case.<sup>7</sup> That case concerned the high incidence of murders and disappearances of women and girls in Ciudad Juarez, North Mexico. Judge Medina Quiroga criticised the majority for not explicitly finding that the victims had suffered torture, which – where there was evidence of severe pain and suffering – could only have been attributed to the majority’s belief that the state could not be found responsible if there was no evidence that it had been committed by a state agent or at least acquiesced in by

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<sup>6</sup> Compare, for example, the case *Cyprus v Turkey* (Applications 6780/74 and 6950/75), 10 July 1976, par. 373, 374, where the European Commission of Human Rights found that the rape of civilians in Turkey amounted to inhuman treatment under Article 3 of the Convention but not torture, to *Aydin v Turkey* (Application No. 57/1996/676/866), 25 September 1997, where the European Court of Human Rights found that rape by state agents could involve the infliction of pain and suffering at the requisite level of severity to place it at the level of torture.

<sup>7</sup> Inter-American Court of Human Rights, *Case of Gonzalez et al. (“Cotton Field”) vs. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations and Costs).

such a state agent.<sup>8</sup>

In Judge Medina Quiroga's view, the requirement of acquiescence or consent by a state agent is not part of the *jus cogens* of torture,<sup>9</sup> and the question of when torture by non-state actors can be attributed to a state is a separate question.<sup>10</sup> This distinction may be important to the consideration of when and how a state's responsibility to prevent torture arises.

## TORTURE BY PRIVATE ACTORS AND DUE DILIGENCE OBLIGATIONS

### IF CONSENT AND ACQUIESCENCE BY THE STATE IS REQUIRED IN ORDER TO FIND A STATE RESPONSIBLE FOR TORTURE BY PRIVATE ACTORS, WHEN IS IT PROVED?

Does it require a specific failure to act on the basis of knowledge of an immediate risk to a named individual, or does it arise from a state's general passivity in the face of systematic subordination, discrimination and violence against women?

In the European Court case *Opuz v Turkey*, discrimination, including discrimination through judicial passivity, led the Court to determine that domestic violence in Turkey was gender-based violence and a violation of Article 14 in conjunction with Articles 2 (right to life) and 3 (freedom from torture).<sup>11</sup> Is that general notion of discrimination to be viewed as the same as acquiescence or is there a distinction between overall discrimination and acquiescence on the part of the state with respect to acts of torture?

In Judge Medina Quiroga's view in the *Cotton Fields case*, state acquiescence is not required by international law but, even if it was, there was state acquiescence in that case on the basis that state officials knew or had reasonable grounds to believe that acts of torture or ill-treatment were being committed by non-state officials or private actors and they failed to exercise due diligence to prevent, investigate, prosecute, and punish those acts.<sup>12</sup> Is this the same as the general passivity to acts of domestic violence that the European Court saw in the *Opuz case*?

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<sup>8</sup> Inter-American Court of Human Rights, *Cotton Field case*, above, note 7, Separate Concurring Opinion of Judge Cecilia Medina Quiroga, paras.1, 8-9.

<sup>9</sup> Above, note 8, paras. 7 and 16.

<sup>10</sup> Above, note 8, para. 17.

<sup>11</sup> *Opuz v Turkey*, above note 2. In that case the Court made many references to the general incidence of discrimination, subordination and inequality in Turkey and the authorities' inadequate response to domestic violence, but at the same time emphasized (in the context of Article 2) that the positive obligation arises only when the "authorities knew, or ought to have known at the time, of the existence of a real and immediate risk of the identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, to judge reasonably, might have been expected to avoid that risk".

<sup>12</sup> *Cotton Field case*, above, n. 7, Separate Concurring Opinion of Judge Cecilia Medina Quiroga, para. 17, relying on the approach taken by the Committee Against Torture in its General Comment No. 2 (above note 1), para. 18.

If a general climate of passivity or support for discrimination amounts to acquiescence (or if it is not required), at what point does the state's positive duty to act arise?

In Judge Medina Quiroga's analysis, the duty arises at two points:

*Before the disappearance of the named victims: here, once a state becomes aware of a pattern of violence, it must have a policy to try to prevent it. At this point there is however no state obligation to prevent these specific persons from being abducted, as that would be a disproportionate obligation upon the state.*<sup>13</sup>

*When the state has actual knowledge of the risk to the named individual: at this point there is an obligation of strict due diligence not merely to investigate but to act promptly and expeditiously to prevent the commission of such torture.*<sup>14</sup>

Compare this to the approach of the European Court in the case of *Opuz v Turkey*. It recognised that (in the context of consideration of the right to life) a state has a general duty to put in place "effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches".<sup>15</sup> However, the positive obligation to take preventative operational measures to protect a particular individual arises only 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".<sup>16</sup> The state will only 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".<sup>17</sup>

#### WHAT LEVEL OF KNOWLEDGE MUST A STATE HAVE OF THE RISK TO WOMEN BEFORE THE POSITIVE DUTY IS ENGAGED?

Judge Medina Quiroga refers to the possibility of the state becoming unofficially aware of the risk to women in the area.<sup>18</sup> Would that include, for example, a requirement that the state take account of knowledge about particular situations when women become vulnerable – and so a duty to prevent arises not through any specific official knowledge but on an unofficial awareness of the vulnerability of women?

#### WHERE A STATE IS AWARE OF A PATTERN OF VIOLENCE, WHAT TYPE OF POLICY TO TRY TO PREVENT IT MUST BE PUT IN PLACE TO FULFIL ITS DUE DILIGENCE OBLIGATIONS?

Would the policy need to be directed at classic security issues or can it be seen as a broader

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<sup>13</sup> Above, note 19, at para. 18.

<sup>14</sup> Above, note 19, at para. 19.

<sup>15</sup> *Opuz v Turkey*, above note 2, para. 129.

<sup>16</sup> *Opuz v Turkey*, para 129.

<sup>17</sup> *Opuz v Turkey*, para. 130.

<sup>18</sup> *Cotton Field case*, above, note. 7, Separate Concurring Opinion of Judge Cecilia Medina Quiroga, para. 18.



human rights obligation relating to delivery and equality of the whole range of human rights?

#### HOW DO YOU ADDRESS THE 'FLOODGATES' ARGUMENT?

In discussion after the panel it was suggested that in some cases, for example refugee cases involving domestic violence, there is a fear by certain courts that recognition of the state's failure to address torture or persecution by non-state actors in the context of widespread and systematic discrimination and violence against women will "*open the floodgates*". This can harm the jurisprudence. Again this comes back to the normalization of harm experienced by women and girls. How do we deal with those arguments?

#### CUMULATIVE CHARGING: NAMING CRIMES

Where the same act or omission may amount to more than one crime it is possible in some jurisdictions, including in international criminal courts, to charge a person with some or all of the potential crimes: that is, they are charged "*cumulatively*". This may be either because it is not certain which of the different crimes will be proved, or because it is possible to *convict* a person of more than one crime for the same conduct, letting the record reflect fully each violation that occurred.<sup>19</sup> For example, in the international criminal law context, cumulative convictions are allowed where each crime has a materially distinct element not contained in the other.<sup>20</sup> In such cases potential issues of unfairness to the convicted person are addressed at the sentencing stage, where sentences for crimes based on the same act might be served concurrently, rather than consecutively: the overriding principle being that the overall sentence should reflect the totality of the culpable conduct.<sup>21</sup>

#### WHAT IS GAINED OR LOST BY USING THE SPECIFIC LABEL OF TORTURE? DOES THIS IMPACT ON THE UNDERSTANDING OF, FOR EXAMPLE, RAPE AND SEXUAL VIOLENCE WITHIN THE HIERARCHY OF INTERNATIONAL CRIMES?

The question of what to call crimes, and whether torture should be referred to and/or charged and convicted separately, or subsumed in other crimes, has arisen in both the human rights and international criminal law contexts.<sup>22</sup> It was suggested that an important aspect of human rights law in this context is to eradicate stereotypes.<sup>23</sup> The stereotypical assumptions of rape and rape trials continue. Failure to charge rape as torture can allow stereotyped assumptions of rape and rape trials to be brought into trials, where this would not be the case

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<sup>19</sup> *The Prosecutor v Delalić, et al.*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 406.

<sup>20</sup> *Delalić, et al*, above note 19, para. 412.

<sup>21</sup> *Delalić, et al*, above note 19, para. 429.

<sup>22</sup> See, for example, the European Court of Human Rights case of *Rantsev v Cyprus and Russia* (Application No. 25965/04) [2010] ECHR 22, 7 January 2010, concerning trafficking, where issues related to the infliction of pain and suffering were submerged under issues of slavery and servitude. In the international criminal law context this has arisen in the context of 'cumulative charging': see the further discussion in Panel 4, below.

<sup>23</sup> See the Convention on the Elimination of All Forms of Discrimination Against Women, Article 5.

in the context of a trial relating to torture. It is telling that rape of men is torture and rape of women is rape.

Tied to this, it was suggested in discussion after the panel that Courts, including in particular the European Court, often avoid discussing claims in relation to discrimination on the basis that a violation of other articles has already been found. Is this part of the same submerging of issues by failing to address them head on? Likewise, litigants and lawyers may also shy away from arguing torture: many cases have recently been argued under Article 8 before the European Court (right to a family life), when they could have been argued under Article 3.

## **PANEL 2: WHAT ROLE DOES GENDER-BASED DISCRIMINATION PLAY IN HOW TORTURE IS DEFINED? & PANEL 3: WHO COMMITS TORTURE: THE VEXED QUESTION OF STATE AND NON STATE ACTORS**

*This is a combined summary of two panels. The discussion of both themes developed along similar lines. The panellists explored the intersection of discriminatory state laws and policies with discriminatory attitudes of state agents and non-state actors alike, as factors which encourage acts of torture. Discriminatory laws and attitudes motivate perpetrators and facilitate acts of torture and ill-treatment. Similarly both laws and attitudes enable government officials to justify state inaction in dealing with these crimes. The question of who should be prosecuted for such acts as torture, as part of the general obligation to respect, protect and fulfil the right not to be subjected to torture and ill-treatment, proved to be the most challenging aspect of both panels.*

### **DEVELOPING UNDERSTANDINGS OF GENDER-BASED TORTURE**

The definitions of torture and ill-treatment in the Convention against Torture were constructed when the dominant understanding of torture was the harm caused to prisoners in state detention; such prisoners were and are predominantly men. Torture was tightly defined to account for their situation.

Feminist advocates identified that the intention, purpose and level of pain and suffering inflicted by non-state actors (particularly in cases of rape and domestic violence) on women is very similar to torture in detention. Rhonda Copelon said 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*”.<sup>24</sup> Catharine MacKinnon argued that the state is not absent from the rapes of women – such crimes are neither random nor individual but “*defined by the distribution of power in society*”.<sup>25</sup> She claims that “*the abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of law and policy*”.<sup>26</sup>

The identification of forms of violence against women as torture had enormous symbolic significance, and it was a huge achievement to ensure the acknowledgement that the pain and suffering caused by (for example) rape or domestic violence was as serious as that caused by torture. However, while there have been developments in identifying violence against women as torture, there has not been a corresponding transformation in our societies. There needs to be work across disciplines, social science, medical ethics, as well as law; but social transformation needs resourcing. Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women requires a transformation in the stereotypes which compound and sustain discrimination: the state has the obligation to do this, but the state both reflects society and is part of it, the state responds to the concerns and attitudes of society (particularly powerful interests in society) in order to maintain power.

## LEGAL COMPLEXITIES: HIERARCHIES OF HARM

However, there are challenges in identifying, for example, every act inflicting severe pain and suffering by a non-state actor as being within state responsibility. If we cannot apply the torture framework to every such act by a non-state actor, do we risk creating a hierarchy of ‘more important’ severe pain and suffering, depending on the identity of the perpetrator or the response of the state alone? Does this extra level of international legal responsibility affect possibilities for successful prosecution?

## THE “EGREGIOUSNESS IN THE EVERYDAY”

There is also the challenge of scope. Torture has been identified as being exceptional, as rare: yet we see “*the egregious in the everyday*”. Is it realistic to prosecute all acts inflicting severe pain and suffering against women or other groups which experience discrimination (especially gay men) as torture? A significant obligation in the Convention against Torture is the duty to prosecute or extradite: acts of torture (but not ill-treatment<sup>27</sup>) are subject to universal criminal jurisdiction. This could lead to obligations to seek out and prosecute those who commit torture, including torture by non-state actors, at a huge scale.

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<sup>24</sup> Copelon, Rhonda (1994), ‘*Recognizing the Egregious in the Everyday: Domestic Violence as Torture*’, 25 Columbia Human Rights Law Review 291-367.

<sup>25</sup> MacKinnon, Catharine (1993), ‘On torture: A feminist perspective on human rights’, in Mahoney & Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge*, Martinus Nijhoff, p. 22.

<sup>26</sup> *Ibid.*, p. 25.

<sup>27</sup> The boundary between torture and cruel, inhuman and degrading treatment or punishment has been identified by successive treaty bodies and regional human rights courts as not being clear.

## DISCRIMINATION AND IMPUNITY ARE CLOSELY LINKED

The inclusion of the prohibited purpose “for any reason based on discrimination of any kind” within the definition of torture in Article 1 of the Convention against Torture could be extremely useful in identifying when international criminal responsibility is attached to a particular act. However, this aspect of the Article 1 definition has not been developed very much in current jurisprudence. Under international criminal law definitions of torture, purpose (and therefore discrimination) is not identified as a part of the definition. Given the challenges of measuring and demonstrating indirect discrimination, and the difficulties of proving specific discriminatory criminal intent (*mens rea*) does using the torture framework create more obstacles to successful prosecutions?

Because of discrimination, both states and non-state actors consider themselves to be entitled and justified in targeting individuals because of their gender, sexual orientation, or race – and because of discrimination, they escape with impunity, because those working in the criminal justice system share those attitudes, and fail to investigate, prosecute and provide reparation.

It is worth noting that Article 2(2) and 2(3) of the Convention against Torture refer to positive permission for torture being no valid or legal justification for acts of torture or ill-treatment.<sup>28</sup> But in the case of discriminatory infliction of severe pain and suffering in marginalised and discriminated groups, there is permission by omission – a comprehensive state failure to investigate, prosecute, remedy, or prevent. There are also active justifications of infliction of pain and suffering against women, for example, cultural justifications in crimes perpetrated in the name of ‘honour’ and rape of lesbian women with the purported aim of ‘curing’ them.

This impunity is important to consider when planning strategy. Part of the need to identify a special crime of torture, distinguished from common assault or wounding, was to address the fact that the state would not be likely to prosecute its own agents, acting on its behalf; and also because it was assumed that private acts of violence and cruelty would be addressed by criminal justice systems.<sup>29</sup> However, particularly in the case of gender-based violence, successive global reports have indicated that criminal justice systems are not responding to violence against women, including rape, female genital mutilation, and domestic violence.

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<sup>28</sup> Article 2.2. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. Article 2.3. “An order from a superior officer or a public authority may not be invoked as a justification of torture”.

<sup>29</sup> Nigel Rodley’s account of the development of the first international standards on torture and the insertion of state agent requirement: “Another change inserted by the Working Group [of the Fifth UN Crime Congress] was the specification that the act must be committed ‘by or at the instigation of a public official.’ The motivation for introducing the status of the perpetrators of torture or other ill-treatment as an issue presumably reflects the Working Group’s wish to restrict international concern with torture to those acts which were not purely private acts of cruelty... This limitation has obvious validity to the extent that acts of torture or other ill-treatment committed by private citizens would in most circumstances incur criminal proceedings in domestic law. (Nigel Rodley and Matthew Pollard (2009) *The Treatment of Prisoners Under International Law*, 3<sup>rd</sup> ed. Oxford University Press, p. 31.)

## CONSENT AND ACQUIESCENCE, AND FAILURE OF DUE DILIGENCE

Where non-state actor violence contravenes human rights obligations and is considered to constitute torture, who should be held responsible for the act under criminal law: the non-state actor who perpetrates the act, or those in authority who fail to take action to address it?

As outlined above in Panel 1, failures of due diligence occur on two levels: at the state wide level, where there is a failure to put in place appropriate laws and policies to address violence; and at the individual level, where the authorities fail to take effective action to protect a person known to be at risk. At both levels, who, if anyone, should be held responsible for the crime of torture, the person who commits the act, or the state officials who fail to discharge their duties under international law?

In such situations where the criminal laws or state policies permit non state actor violence – such as the marital exemption to rape laws, domestic violence, FGM, and the criminalization of abortion in Nicaragua – these have been clearly identified as a breach of the principle of due diligence, and the state is accountable under international human rights law.

Paragraph 18 of the Committee Against Torture's General Comment on Article 2 appears to equate a failure of due diligence with “*consent and acquiescence*” for the purposes of Article 1 of the Convention against Torture:

*where state authorities or others acting in official capacity 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.<sup>30</sup>*

This statement implies that both state agents and non-state actors should be prosecuted: it would be useful for treaty bodies and special mechanisms to elaborate more detail what the charges should be (whether torture, complicity with torture, or crimes under domestic law).

The issue of laws that promote or facilitate gender-based harm also need to be addressed. Where legislators enact new laws, in the knowledge that these laws or attendant policies will cause specific gender-based pain and suffering to women (for example, in the case of the criminal ban on abortion in Nicaragua), how should the duty to criminalize acts of violence be understood? What about long-standing laws which promote, permit or facilitate gender-

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<sup>30</sup> Committee against Torture, General Comment No. 2, above note.1, para. 18.

based harm – for example, the marital rape exemption, or rape laws which allow a rapist to escape with impunity if he marries the victim. Should this give rise to criminal prosecution, for these laws and policies?

## SHOULD TORTURE BY PRIVATE ACTORS BE CRIMINALIZED IN DOMESTIC LAW AS TORTURE?

The state may be held accountable for torture, but the question remains: how does that help the victim/survivor, whose perpetrator still threatens them with no accountability? How do you tell the victim – you were raped by the wrong people?

The definition of torture in the Convention against Torture requires that it is carried out “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.<sup>31</sup> However the Committee Against Torture in its General Comment No. 2 acknowledges that torture is and can be committed by non-state actors and assigns the responsibility of such torture to state failure to “exercise due diligence to prevent, investigate, prosecute and punish such non-state officials or private actors”. It holds the state and its officials accountable “as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts”.<sup>32</sup> This has led to the development of due diligence standards under international law, a welcome development on accountability for torture by private actors.

It was suggested by a speaker that the state’s responsibility to carry out due diligence can be said to be applied at two levels, both of which would be strengthened by criminalizing acts of torture by private actors at the domestic level:

(1) In relation to the crime, what did the state do or not do to ensure accountability, to prevent, investigate and prosecute the crime? Was this reasonable given the circumstances of the particular case? If the state has done everything possible, what should the state charge the perpetrator with – assault? Intentionally causing severe pain or suffering? It was argued that the perpetrator should be charged with torture, as that is how you bring accountability for the crime.

(2) The state’s responsibility for a failure of due diligence also arises in relation to the state not having in place laws and policies to prevent the torture. Specific laws criminalizing torture by private actors again strengthens the state’s actions of due diligence.

However, because they address themselves primarily to state responsibility, the Committee against Torture and other human rights treaty bodies like the Inter-American Commission and Court on Human Rights, fall short of stating categorically that private actors are *directly* responsible for torture. This gap is addressed in jurisprudence of the international criminal tribunals. Both, the International Criminal Tribunal for former Yugoslavia (ICTY) and the

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<sup>31</sup> Convention against Torture, Article 1.

<sup>32</sup> Above note 1, para. 18.

International Criminal Tribunal for Rwanda (ICTR) have concluded that the ‘public’ official requirement of the Convention against Torture is *not* part of customary international law.<sup>33</sup>

The definition of torture in the Convention against Torture is expressly “*without prejudice to any international instrument or national legislation which does or may contain provisions of wider application*”.<sup>34</sup> It was argued that international criminal law provides a strong legal basis for criminalizing private acts as torture: in the jurisprudence of international criminal tribunals it is recognised that official involvement is not a requirement of torture as a crime against humanity under customary international law, and this is reflected in the Rome Statute of the International Criminal Court.<sup>35</sup> The essential element of the prohibition of torture is the misuse of what a public official embodies – power, and this power may be vested in any person. A private individual may embody the power of the official and the authority of state sanction. Similar power and authority may be vested in any person at any point in time. Thus the International Criminal Court (“ICC”) Article 7 definition continues to retain the core of the prohibition of torture. This definition includes torture by all individuals – public officials acting in public or private capacity and private actors acting in a public or private capacity.

The challenge is that there is a reluctance on behalf of many, including human rights groups, to see that state power is not the only absolute power: there is a difficulty in understanding that power may also be in other places.

It was suggested in discussion that domestic criminalization of private acts of torture may be a useful way of addressing impunity for violence against women in Shari’ah law countries.

## DISCUSSION OF SPECIFIC TYPES OF HARM

The challenges outlined above were elaborated in detailed discussions on how the following types of harm may be identified as torture or other cruel, inhuman or degrading treatment:

- (i) domestic violence
- (ii) so-called ‘honour-based’ violence
- (iii) trafficking
- (iv) violence against lesbian, gay, bisexual and transgender people
- (v) female genital mutilation
- (vi) rape
- (vii) denial of reproductive rights

## DOMESTIC VIOLENCE

In the past, states have identified domestic violence as a ‘private’ issue which is not subject to normal criminal law: normative legal frame works have – implicitly or explicitly – deemed

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<sup>33</sup> *Prosecutor v Kunarac and others*, ICTY, IT-96-23 & IT-96-23/1-T, 22 February 2001, paras. 478-481, 497

<sup>34</sup> Article 1(2).

<sup>35</sup> *Rome Statute of the International Criminal Court* (doc. 9 A/CONF.183/9 of 17 July 1998), Article 7.

domestic violence a private concern, and domestic law enforcement authorities have been unwilling to interfere.

There are particular legal problems around investigating crimes of domestic violence. Domestic violence is a distinct and complex kind of violence which evolves over time through a series of acts, and the site of the violence is hidden. The financial and emotional dependence of the victim on perpetrator, who commonly share a home, family and finances, means that victims are reluctant to report domestic violence. Women who do report domestic violence often face intimidation, reprisals and ostracism, which causes them to withdraw their complaint.

However, domestic violence by non-state actors has been clearly identified as a concern under international human rights law, as evidenced by the cases including *Bevacqua and S v Bulgaria*<sup>36</sup> in the European Court and repeated commentaries from the UN human rights bodies. The problem is calling states to account to deal with the issue in practical law enforcement terms.

The facts of *Opuz v Turkey*<sup>37</sup> are shocking and shockingly ordinary. The applicant in the case - Nahide Opuz - and her mother were subjected to years of domestic violence at the hands of her husband. They reported this to the police, on occasion the women withdrew the complaint due to threats of further violence, and on other occasions they maintained the complaints and no action was taken. Ms Opuz and her mother were hospitalized a number of times as a result of the violence. Despite a catalogue of protective measures being available in law, none were taken to protect the applicant or her mother. Eventually, her husband shot Ms Opuz's mother dead, immediately claiming he did so to protect his family's honour, and that her interference in his family life constituted provocation.

He was sentenced to life imprisonment but the Turkish criminal court took in to account the 'provocation' of the deceased and the perpetrator's good behaviour at trial, and this was reduced to 15 years and ten months. Given the time he had spent in pre-trial detention, he was immediately released at the time of sentence – he had been detained for less than six years. Ms Opuz's case, which was submitted to the European Court immediately upon the killing, had not yet been heard by the Court. After his release, Ms Opuz sought protective measures, which were not taken until the European Court intervened.

Ms Opuz's claim was for a breach of Article 2 (the right to life), because of the death of her mother, and threats to her own life, Article 3 (on torture and ill-treatment), and Article 14 (non-discrimination).

The Turkish government's case was that Mr and Ms Opuz beat each other; and furthermore, there was no obligation to pursue the case because Ms Opuz and her mother withdrew their complaints. Interights intervened on the extent of the obligation to exercise due diligence, and that gender-based violence should be identified as a form of discrimination, which was accepted by European Court.

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<sup>36</sup> European Court of Human Rights, *Bevacqua and S v Bulgaria* (Application no. 71127/01), 12 June 2008.

<sup>37</sup> Above, note.2.



In its comments on Article 3 and the minimum level of severity that torture or ill-treatment must reach, the European Court said that this depends on the circumstances of the case, and that that sex is a consideration. It also said that a victim's experience of violence is a factor in establishing vulnerability, and a history of violence will compound the particular vulnerabilities of a victim. In this respect, they noted that Ms Opuz had suffered in the past, threats that had been made to her, her fear and her social background, and – critically – the vulnerable situation of women in South East Turkey.

The European Court found that the violence suffered by the applicant in the form of physical injuries and psychological pressure were sufficiently serious to amount to ill-treatment within the meaning of Article 3. The Court also found that the authorities were not “*totally passive*” but that their efforts to deal with the case were not sufficient – the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against the husband despite with the withdrawal of complaints on the basis that the violence was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity.

In addressing whether the state had exercised due diligence in the judgment, the Court noted the absence of a general consensus among states parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints. However it noted that there appears to be an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's right to life and privacy rights in deciding on a course of action. In this connection, the Court held that there are certain factors that can be taken into account in deciding whether to pursue the prosecution, namely:

- the seriousness of the offence;
- whether the victim's injuries are physical or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats since the attack;
- if the defendant planned the attack;
- the effect (including psychological) on any children living in the household;
- the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
- the current state of the victim's relationship with the defendant; the effect on that relationship of continuing with the prosecution against the victim's wishes;
- the history of the relationship, particularly if there had been any other violence in the past; and
- the defendant's criminal history, particularly any previous violence.

The Court held that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

In response to the Government's argument that any attempt by the authorities to separate the

applicant and her husband would have amounted to a breach of their right to private and family life, the Court considered whether the local authorities had struck a proper balance between these rights and the duty to protect. In deciding on this balance, the Court noted that the husband had been violent from the very beginning of their relationship, with the applicant and her mother – on many occasions – suffering physical injuries, psychological pressure and fear. For some assaults, he used weapons such as knives and guns, and had constantly issued death threats. When her mother was killed, the attack was planned.

The Court held that in these circumstances, further violence was not only possible but foreseeable. The Court held that the authorities had not sufficiently considered these factors when repeatedly deciding to discontinue criminal prosecution of the husband. Instead, to quote the Court, they seemed to have given “*exclusive weight to the need to refrain from interfering in what they perceived to be a ‘family matter’*”.<sup>38</sup> Moreover, there was no indication that the authorities considered the motives behind the withdrawal of the complaints – despite the fact that the applicant’s mother had told the Public Prosecutor that she and her daughter had withdrawn their complaint because of death threats and pressure exerted on them. The Court, echoing *Bevacqua*,<sup>39</sup> found that characterising the violence as a ‘private matter’ was incompatible with obligations under the Convention. Indeed the Court noted that in some instances, the protection of private and family life necessitated interference by the authorities in order to prevent the commission of criminal acts. The seriousness of the risk to the applicant’s mother rendered such intervention necessary.

The Court held that the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims’ withdrawal of complaint.

In a first for the Court, it found that the state response to the violence amounted to discrimination. It highlighted what it called “*general and discriminatory judicial passivity in Turkey*”.<sup>40</sup> While recognising that this was unintentional, the Court noted that “*the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors... indicated that there was insufficient commitment to take appropriate action to address domestic violence*”.<sup>41</sup>

The ECHR Court cited its own jurisprudence in *DH and others v Czech Republic*,<sup>42</sup> considered international law (including the jurisprudence of the Committee on the Elimination of Violence Against Women) and looked at the prevalence of domestic violence, and found proof that domestic violence is directed mainly against women: therefore the overall lack of response by judicial system meant there was a violation of Article 14.

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<sup>38</sup> At para. 143.

<sup>39</sup> Above n.36.

<sup>40</sup> At para. 198.

<sup>41</sup> At para. 201.

<sup>42</sup> ECtHR, *DH and others v Czech Republic*, [GC], no. 57325/00, 13 November 2007, §§ 175-180).

## SO-CALLED 'HONOUR-BASED' VIOLENCE

This discussion was based on a report on Kurdish communities.

The use of the term “honour” is always difficult, but reflects the view of those committing the violence that this is an honourable act – even though it should be defined as a form of violence against women, as overwhelmingly women are targeted. The term “honour” emerges from a constellation of social and cultural and interpersonal exchanges, where different meanings are attributed to acts and this is not a static process. Therefore, it is important to look into specific factual situations.

Gender is significant as it shows political control. In the Kurdish community, the concept of “honour” indicates issues around respect, patriotism, prestige, and the self-worth of an individual within a peer-group. The UN General Assembly’s definition of “honour crime” emphasise the state’s responsibility to comply with efforts to ensure political commitment to women’s equality and human rights. States must take action as honour-based violence violates public health, and is a crime against women and society. The term “*harmful traditional practices*” is problematic – the term “traditional” implies that this is not an issue in Western societies, and that such practices are immutable because they are based in traditions.

## TRAFFICKING

The difficulty with addressing trafficking in the framework of torture and other cruel, inhuman or degrading treatment is capturing the complexity of the process.

A leading writer on the subject, Anne Gallagher, has identified trafficking as a process of moving people, within and between countries for exploitation, especially sexual or labour, in a way that involves coercion or deception. As Special Rapporteur on Torture, Manfred Nowak also considered the issues of forced confinement, being put under surveillance, use of drugs and control. Other definitions consider forced labour, bondage, and modern forms of slavery.

The European Court case of *Rantsev v Cyprus and Russia* identified trafficking as a violation of Article 4 of the European Convention on Human Rights (the prohibition of slavery or servitude). When he was Special Rapporteur on torture, Nowak identified trafficking as falling within definition of torture and other ill-treatment.<sup>43</sup> The views of the Committee against Torture vary: in the case of Honduras, it considered trafficking to be a violation of Articles 2, 10, 16; for Syria and Jordan – Articles 1, 2, 12, 16; for Yemen, Articles 1, 2, 12 and 16. There is no clear explanation of why different trafficking is raised as torture in some cases, and cruel, inhuman or degrading treatment in others.

How might human trafficking be considered as a form of torture and ill-treatment? First, specific acts within the trafficking process may fall under Article 3 of the European Convention of Human Rights (note in *Rantsev*, the European Court said there was no specific complaint of ill-treatment, but was open to this possibility).

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<sup>43</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 15 January 2008 (UN Doc. A/HRC/7/3), paras. 56-58, 68-76.

Can human trafficking *per se* be considered as a form of torture or ill-treatment? It is worth considering the cumulative nature of the act - particularly the psychological aspect: there is an analogy with enforced disappearances, which can *per se* be forms of torture or ill-treatment because of indefinite detention, and being held incommunicado. But if trafficking is dealt with under (for example) Article 4 in the European Convention, should it also be dealt with under Article 3?

In the case of *Rantsev*, the European Court said there was no need to deal with the allegation of torture (violation of Article 3), as the case concerned Article 4: but is this an adequate response, especially given the *refoulement* problem, that some victims of trafficking risk being returned to situations where they would face torture?

When considering the issue of whether non-state actors can commit acts of torture in the context of trafficking, there are some key questions. First is the issue of state responsibility. There is often state consent, acquiescence or active involvement by corrupt border-guards. However, in cases where for example, domestic servants have been brought to the UK by diplomats, the act of trafficking can be directly attributed to the state itself. In cases where a failure of due diligence might be assessed as consent or acquiescence, this situation was dealt with in cases like *Osman v United Kingdom*,<sup>44</sup> and *Opuz*<sup>45</sup> on the basis that the state had knowledge (or ought to have known) of a specific incident, or a specific person being under threat.

A further complexity with trafficking is that multiple states are involved – which state becomes responsible, and when?

Another key question in relation to trafficking is whether the purpose element of torture is fulfilled (this is not required for other forms of ill-treatment). Does the purpose have to be a state purpose or just intimidation of the victim? When he was Special Rapporteur on Torture, Manfred Nowak said that the purpose element is always fulfilled if acts can be shown to be gender-specific because this constitutes a form of discrimination for the purposes of Article 1 of the Convention against Torture.<sup>46</sup>

Where forms of torture, including rape, are perpetrated during the trafficking process, it is important to emphasise this for the purposes of protection of the victim from *refoulement*.

#### VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE

Many forms of discriminatory treatment of lesbian, gay, transgender and bisexual individuals by state and non-state actors can constitute torture or cruel, inhuman or degrading treatment or punishment, both where the state is directly involved in inflicting the harm, and where it creates an environment which encourages, supports or allows non-state actors to target individuals.

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<sup>44</sup> European Court of Human Rights, *Osman v United Kingdom* (23452/94), 1998-VIII, no. 95.

<sup>45</sup> Above note 2.

<sup>46</sup> Report of the Special Rapporteur on Torture, above note 43, para.30.

Homophobic and transphobic violence against women, men and transgender individuals is carried out with the intention of policing sexual orientation, gender identity and gender norms. In many countries, women whose appearance does not conform to traditional ideas of 'femininity' are targeted because of how they look rather than because of any perceived same sex behaviour. Gay men are targeted for being effeminate or for threatening with their sexuality and transgender women and men are punished for transgressing norms.

Many acts of violence against lesbian, gay, bisexual and transgender individuals occur with the explicit or implied consent of public officials. State agents including police and security forces are often themselves the perpetrators, and public officials often do not take seriously or investigate acts because of a culture of homophobia. However laws that criminalize homosexuality not only allow for torture and ill-treatment by state officials but are often used by non-state actors to justify abuse, or as a means of extortion. In addition, criminalization of homosexual acts will make it difficult or impossible for victims to seek help without putting themselves at risk of secondary victimization.

Some types of torture and cruel, inhuman or degrading treatment faced by lesbian, gay transgender and bisexual individuals and activists include:

- denial of health services based on an individual's actual or perceived sexual orientation or gender identity. For example, in some countries, medical service providers deny medical treatment and note "*known homosexual*" on the patient's medical records. This denial of health care services is a violation of the right to health, and, in some cases, may amount to torture;
- so-called "corrective" or "curative" rape of lesbians by non-state actors, with the purported intention of changing a lesbian's sexual orientation, which go unpunished by the state;
- the medicalisation of transgender people – gender identity disorder is included in both the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"),<sup>47</sup> and the World Health Organisation's International Classification of Diseases ("ICD-10");<sup>48</sup>
- conditions of imprisonment for transgender individuals convicted of crimes, including being housed with prisoners of their birth sex, the use of solitary confinement for "protection" and being denied hormones;
- policing in violation even of domestic laws criminalizing homosexual acts, leading to arbitrary arrest and long detention of individuals for being homosexual on the basis of denunciations by friends, neighbours, or colleagues;
- court-ordered anal examinations of gay men in custody to "prove" homosexuality, (which, like virginity tests, are scientifically spurious);

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<sup>47</sup> According to the American Psychiatric Association, gender identity disorder is a rare mental condition characterized by "*strong and persistent cross-gender identification . . . [accompanied by] persistent discomfort about one's assigned sex.*" Diagnostic and Statistical Manual of Mental Disorders (2000), pp. 576–82.

<sup>48</sup> International Statistical Classification of Diseases and Related Health Problems, 10th Revision.

- forced evictions of gay and lesbian individuals by their landlords under threat of being reported for violating laws criminalizing same sex sexual acts.

It is important to consider stated and underlying intentions and motivations in individual acts: for example, the real and stated intentions behind sexual violence through so-called 'corrective' rape, and cases where lesbian mothers have been denied custody because of their sexuality, but this is portrayed as being "*in the best interests of the child*".

The identification of crimes of violence against lesbian, gay, bisexual and transgender people as torture is important for advocacy to secure effective prevention. For example, there is a need for public awareness training on identity and discrimination – of gender identity, sexual orientation, as much as race or religion.

#### FEMALE GENITAL MUTILATION

Female genital mutilation (FGM) is defined as by World Health Organization as "*all procedures involving partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons*".<sup>49</sup> It tends to target girls, from a few days old to around 14 years. Therefore it is both age-based and gender-based discrimination.

The practice has a variety of underpinning beliefs promoting it for misconceived health and hygiene benefits, misunderstood religious requirements and traditionally-imposed roles, especially traditional roles linked to gender and chastity.<sup>50</sup> It is also sometimes seen as a rite of passage. This categorisation is somewhat artificial: in reality FGM might be performed for a number of reasons at the same time.

Different human rights authorities tend to qualify the practice differently:

- The fact that FGM falls within the mandate of Committee Against Torture has been clearly stated by the Committee. In its General Comment No. 2 the Committee specified that states' authorities should exercise due diligence to prevent, investigate, prosecute and punish non-states actors practicing FGM.<sup>51</sup> In its Conclusions and Recommendations the Committee usually examines whether states (not only in countries of origin where there is a high prevalence of FGM, but also in countries of residence – for example in Europe and Australia) are taking steps to end the practice. It has called on states to enact legislation,<sup>52</sup> to put in place

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<sup>49</sup> Female genital mutilation, Fact sheet N°241, February 2010  
<http://www.who.int/mediacentre/factsheets/fs241/en/index.html>.

<sup>50</sup> For a more detailed analysis of the reasons supporting the continuation of the practice please refer to pp 8 and 9 of ENDING FGM: A Strategy for the European Union Institutions  
[http://www.endfgm.eu/content/assets/END\\_FGM\\_Final\\_Strategy.pdf](http://www.endfgm.eu/content/assets/END_FGM_Final_Strategy.pdf).

<sup>51</sup> See above note 1, para. 18.

<sup>52</sup> CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE: CAMEROON PARAGRAPH(S) 11 CAT/C/CR/31/6 (CAT, 2004).

nationwide awareness-raising campaigns,<sup>53</sup> to punish the perpetrators of such acts<sup>54</sup> and to provide information on the number of cases reported and prosecuted. However, it is unclear whether this harm is classified as torture or other ill-treatment.

- Special Rapporteurs on violence against women<sup>55</sup> and on torture<sup>56</sup> have both recognised that FGM can amount to torture under the Convention against Torture and under customary international law.
- The Council of Europe 2001 Resolution on FGM<sup>57</sup> qualified the practice as “*inhuman and degrading treatment within the meaning of Article 3 ECHR*” and the European Court has confirmed that FGM violates article 3 of the European Convention on Human Rights.<sup>58</sup>

In the asylum field:

- UN Human Rights Council *Guidance Notes on Refugee Claims Related to FGM*<sup>59</sup> present an overview of national and international case law clarifying that FGM constitutes torture and cruel, inhuman or degrading treatment.
- Several US cases<sup>60</sup> recognised that FGM constitutes torture and other-ill treatment.

It was suggested that the main elements of the definition of torture according to Article 1 Convention against Torture are met in the case of FGM:

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<sup>53</sup> Conclusions and Recommendations of the Committee Against Torture : Togo para. 27 CAT/C/TGO/CO/1 (CAT, 2006); Conclusions and Recommendations of the Committee Against Torture : Indonesia Paragraph(s) 16 CAT/C/IDN/CO/2 (CAT, 2008).

<sup>54</sup> Conclusions and Recommendations of the Committee Against Torture: Togo Paragraph(s) 27 CAT/C/TGO/CO/1 (CAT, 2006), Conclusions and Recommendations of the Committee Against Torture: Australia (CAT, 2008) Paragraph(s) 33 CAT/C/AUS/CO/3 (CAT, 2008).

<sup>55</sup> The previous UN Special Rapporteur on Violence against Women has clearly stated that FGM amounts to torture. See '15 Years of the Special Rapporteur on Violence Against Women, Its Causes and Consequences' (2009): the Special Rapporteur “*views cultural practices that involve pain and suffering and violation of physical integrity as amounting to torture under customary international law, attaching to such practices strict penal sanctions and maximum international scrutiny regardless of ratification of CEDAW or reservations made thereto*”.

<sup>56</sup> Report of the Special Rapporteur on torture , above note 43. This has recently been reiterated by the current Special Rapporteur on Torture, Juan Méndez, see: <http://www.stop-stoning.org/node/1853>.

<sup>57</sup> Council of Europe PACE Resolution 1247 (2001) 'Female genital mutilation', available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/ERES1247.htm>.

<sup>58</sup> ECtHR, *Emily Collins and Ashley Akaziebie v Sweden* (Application No. 23944/05), 8 March 2007.

<sup>59</sup> UNHCR *Guidance Notes on Refugee Claims Related to FGM* (2009) [Http://www.unhcr.org/refworld/pdfid/4a0c28492.pdf](http://www.unhcr.org/refworld/pdfid/4a0c28492.pdf).

<sup>60</sup> *Nwaokolo v Ashcroft* (2003) the Seventh Circuit Court of Appeals held that FGM constitutes a form of torture, and that the risk that an asylum seeker's U.S. citizen daughter would be subjected to FGM must be considered by the immigration courts.

- The “*severity of the pain and suffering*”: FGM leads to physical and psychological short- and long-term health consequences.<sup>61</sup> The pain of FGM is “*an ongoing torture throughout a woman’s life*” according to Manfred Nowak.<sup>62</sup> FGM can also lead to death shortly after the act is performed, due to septicaemia or haemorrhage, or at the time of giving birth.
- “*Intentional infliction...for any reason based on discrimination of any kind*”: FGM is intentionally inflicted, but the stated intent of the parents is not to harm their girls, rather they seek to achieve the girls’ good on a social level, i.e. to ensure their marriageability and social acceptance. However, the parents, excisors or medical staff know that they are inflicting pain, and that the health consequences are extremely serious in the majority of cases.
- The arguments justifying the practice are based on perceptions of women as inferior, as property and/or as sexual objects: perceptions which are often reflected in discriminatory laws. The Committee Against Torture’s General Comment No. 2 states that “[t]he elements of intent and purpose in Article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances”.<sup>63</sup> Therefore, the discriminatory context of this practice affecting only girls must be taken into account when assessing the intent and purpose of the parents – not just their stated intention. FGM is a form of intersectional discrimination on the basis of gender and age. It is a (violent) expression of gender discrimination and of control over girls and women’s body and sexuality. In addition given the fact that the majority of girls are underage it constitutes age discrimination (expressed in the notion of powerlessness developed by Prof. Nowak).
- “*Consent or acquiescence of public official*”: This practice is performed by non-state actors in almost all circumstances. In some instances, states officials promote FGM. This is for instance the case in Sierra Leone where politicians pay for the “initiation” of girls in the Bondo society and support the construction of Bondo “Bushes” (places where FGM takes place) in their constituencies.

According to the 2008 Report of the UN Special Rapporteur on Torture, FGM can amount to torture if states fail to act with due diligence. It further stated that “*even if a law authorises the practice, any act of FGM would amount to torture and the existence of*

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<sup>61</sup> Report of the Special Rapporteur on torture, above note 43, details the short term and long term consequences of FGM. This has been confirmed by a statement on 1 June 2011 by Juan E. Méndez Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment Female Genital Mutilation: Progress-Realities-Challenges <http://www.stop-stoning.org/node/1853>

<sup>62</sup> Note 61, para. 51.

<sup>63</sup> Committee Against Torture General Comment No. 2, above note 1, para. 9.



*the law by itself would constitute consent or acquiescence by the state.”<sup>64</sup>*

This was already clarified in 1986, by the first UN Special Rapporteur on Torture, Professor Kooijmans. While discussing in his first report the notion of the “*qualified perpetrator*”, he argued that: “*the authorities’ passive attitude regarding customs broadly accepted in a number of countries (i.e. sexual mutilation and other tribal traditional practices) might be considered as “consent or acquiescence” particularly when these practices are not prosecuted as criminal offences under domestic law, probably because the state itself is abandoning its function of protecting its citizens from any kind of torture*”.<sup>65</sup>

Therefore the practice of FGM satisfies the definition of Article 1 of the Convention against Torture. The next question is whether it is useful to classify FGM as torture in efforts to eradicate the practice?

It was suggested that the two main interests in recognising FGM as torture are:

- For advocacy purposes: It is easier to advocate for legislation, for prevention measures and for access to adequate health care because of the status of the prohibition of torture as one of the most basic rules of international law.
- Asylum cases: It is easier to prove persecution when the practice is considered as torture. Although we need to be aware that even when FGM is recognised as persecution for the qualification for asylum, there are many hurdles linked to the asylum procedure (i.e. the way interviews take places). There is also an ignorance of the specific difficulties of claims based on FGM and other gender based/specific persecution (for instance difficulties in talking about a practice which is often so intimate and taboo).

However, there are significant complexities linked to the particular issue of FGM. When it comes to preventing FGM, measures taken by states often consist of legislation and campaigns of prevention which are not systematically evaluated for their impact. This is not sufficient and clearly falls below international standards. Whilst the criminalization of the practice can be important in setting standards, it will not by itself end the practice of FGM.<sup>66</sup> In tandem with and as part of addressing the underlying discrimination against women, it is vital to implement adequate prevention measures, including human rights education and awareness raising campaigns, protection mechanisms and collection of data on the practice in order to be able to adapt policies and access to adequate health services for women and girls living with the lifelong consequences of FGM.

There may be a question as to whether all forms of FGM constitute “*severe pain and*

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<sup>64</sup> Report of the Special Rapporteur on torture, above note 43 , para. 53.

<sup>65</sup> Report of Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15, para 38.

<sup>66</sup> This aspect has been stressed by the Special Rapporteur on Torture in a statement issued on 1 June 2011, above note 61.

*suffering, whether physical or mental*". When FGM is qualified as torture, it is usually referring to the most serious form of FGM (type three infibulation). The other types of FGM (like pricking or nicking) are considered as less harmful and are even proposed by some as an alternative to those harmful types. The American Academy of Pediatrics introduced a controversial policy on FGM last year, which encouraged its members to perform ritual "nicks" instead of most harmful types of FGM in an effort to reduce harm on the girls. The policy was latter withdrawn under the pressure of NGOs opposing FGM. They argued that international standards were not calling on harm reduction but on ending a practice based on gender discrimination and violating human rights.

However, it was pointed out that the distinction between different types of FGM is not clear (for example, certain type two can lead to type three). The rights violated in all types of FGM are similar and they remain severe human rights violations with no therapeutic benefit and unacceptable ways to control women's bodies and sexualities.

When considering *criminalization of FGM as torture*, the distinction between rights holders and perpetrators is blurred. In most cases, traditional excisors are women who have themselves been subjected to the practice of FGM as girls. Mothers who have endured the pain and suffering of FGM allow their girls to be mutilated under the pressure of their family and community.

In terms of complicity in criminal acts, are we looking at the excisors or the doctors (when medicalized)? Are we looking at the parents or the guardians? Are we also considering the people who knew that the practice was about to take place but did not act (teachers', doctors' right or duty to report)? Are we looking at the whole family or the community which puts a huge pressure on the parents to having their girls "cleaned" or "cut"? Are we considering the lack of action of the states under the due diligence principle in criminal law terms?

In this context the perpetrators and main duty bearer appear to be different entities. The main duty bearer (that is the state) has a duty to prevent and in particular prosecute perpetrators. If FGM is considered as a form of torture, states might adopt tougher sentences and take more radical measures (such as taking away parental rights if a girl has been mutilated). This might not benefit the interest of the victims and run against the "best interest of the child."

It was suggested in discussion that there may be a danger that identifying FGM as torture reinforces the sense of "otherness" and xenophobic stereotypes of brutality amongst the migrant communities. In the current context in Europe, FGM is sometimes used for political purposes to exacerbate anti-migrant feelings. The use of language by the media and politicians on this issue can lead to discrimination and racism, including towards the girls who have been mutilated.

It was also pointed out in discussion that FGM cannot be properly considered without assessing other practices altering women's body and their reproductive system: "*hymen repair*" or cosmetic genital surgery. They bear resemblances with the practice of FGM, and in particular the medicalised form which is widely condemned as constituting FGM and contravening the "*do not harm*" principle. Both practices are a result of social pressure to

conform to an ideal conception of womanhood (vs. free consent), practiced for no physical therapeutic reasons and they provide economic advantages to the person performing the act.

FGM is often inflicted to control women's sexuality and chastity. This is usually not the intention in cosmetic surgeries. However, both FGM and cosmetic surgeries are used to make women's sexual organs more sexually pleasing to men – to make vaginas tighter, and “more attractive, smoother”. Hymen construction has a similar role – to make a woman appear to be a “virgin” with an intact hymen, for reasons of social acceptability and also to make a man see himself as the woman's only sexual partner. Stereotypes about control of women's sexuality, appropriateness of women's sexuality, are prominent in both cases.

## RAPE

Rape by state actors unequivocally falls within the definition of torture.<sup>67</sup> The question of whether rape by non-state actors attracts state responsibility and amounts to torture is, however, more complex.

Non-state actor rape has been identified as a breach of state responsibility under the human right not to suffer torture (for example, in the case of *MC v Bulgaria*, and *Cottonfield*).<sup>68</sup> This leads to the following obligations on states:

- to take comprehensive steps to prevent crime, whether at the societal level (the *Velasquez Rodriguez*<sup>69</sup> case refers to “a state apparatus capable of enforcing rights”), or in individual cases (the test in *Osman*<sup>70</sup> and *Opuz*,<sup>71</sup> whether the state “knew or ought to have known” that a person was at risk);
- to investigate allegations promptly, effectively, independently, and impartially;
- to provide reparation.

Rape has been accepted to be a form of torture, subject to being prosecuted as an act of torture (and therefore subject to universal jurisdiction). It has been identified as a war crime (state and non-state actors); a crime against humanity (state and non-state actors) and as genocide (state and non-state actors). The only gap in the obligation to criminalize rape as an act of torture is that in peacetime, non-state actor rapists have not yet been identified as appropriate to prosecute as torturers.

It was suggested that there are significant benefits to prosecuting acts of rape as crimes of torture. In rape trials, defence lawyers and defendants allege that the victim consented, often

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<sup>67</sup> See, eg. International Criminal Tribunal for Rwanda, *Prosecutor v Jean-Paul Akayesu* (Case No. ICTR-96-4-T), Judgment of 2 September 1998, para. 597.

<sup>68</sup> Inter-American Court of Human Rights, *Cotton Field case*, above, n. 7.

<sup>69</sup> Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, (Ser. C) No. 4 (1988) 29 July 1988.

<sup>70</sup> European Court of Human Rights, *Osman v United Kingdom*, above n.44.

<sup>71</sup> European Court of Human Rights, *Opuz v Turkey*, above n.2.

by using methods which constitute secondary victimization, such as presentation of previous sexual history evidence and other forms of attacks on the victim's integrity. In a torture prosecution, there is no need to prove consent; rather the proof required is the infliction of severe pain and suffering for a prohibited purpose, with state involvement. Certainly some survivors may also find that they are subject to less stigma if they present themselves as survivors of torture, rather than rape.

The Rome Statute definition of rape constructs the crime in the international humanitarian law context to be more like torture than traditional rape: it identifies rape as an abuse of power, rather than a failure of consent or agreement.<sup>72</sup> The Rome Statute Elements of Crimes definition refers to “*force, threat of force, or coercion*” “*coercive circumstances*” which mirrors the state agent requirement in Article 1 of the Convention against Torture. Abuse of power is a common factor to both crimes. International criminal law acknowledges that where an individual abuses their power in these contexts, it is not possible to give free agreement to sexual contact.

This focus of the crime on abuse of power is significant, particularly when understood in conjunction with the identification of “*any reason based on discrimination of any kind*” (in Article 1 of Convention against Torture) as a prohibited purpose. Discrimination in human rights law has developed from interpretations based on difference in treatment to analyses of hierarchy, advantage and disadvantage and abuse of power. Jurisprudence in the European Court has identified indirect discrimination, where discrimination need not be intentional and is relevant to the assessment of a breach of Article 3, in the case of *Opuz v Turkey*.<sup>73</sup>

According to human rights standards, rape must be prosecuted, and paragraph 18 of the Committee Against Torture's General Comment No. 2 indicates that both the non-state actor who commits rape and the state agent who consents or acquiesces by failing to exercise due diligence, should be prosecuted.<sup>74</sup>

However, strategic issues must be considered. Does prosecuting rape as torture make it more or less likely to secure a conviction, and other forms of reparation, particularly given the challenge of proving a discriminatory intent? While the international standards are clear that an objective view can be taken about when a crime is gender-specific,<sup>75</sup> providing evidence

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<sup>72</sup> *Rome Statute of the International Criminal Court*, above note 35, Article 7(1)(g), Article 8(2)(b)(xxii), Article 8(2)(e)(vi) and *Rome Statute Elements of Crimes*.

<sup>73</sup> *Opuz v Turkey*, above n.2.

<sup>74</sup> UN Committee against Torture, General Comment No 2, above, note 1.

<sup>75</sup> “In regard to violence against women, the purpose element is always fulfilled, if the acts can be shown to be gender specific, since discrimination is one of the elements mentioned in the Convention against Torture definition. Moreover, if it can be shown that an act had a specific purpose, the intention can be implied.” Manfred Nowak's report as Special Rapporteur on torture, above note 43. Also, the Convention against Torture General Comment No. 2, para. 9, states that there is no need for a “*subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances*”.

to prove discriminatory intent that satisfies the criminal burden of proof in a domestic criminal court will be challenging.

However, if we do not prosecute non-state actor rapists for the crime of torture, there is a risk of lack of consistency, that all the obligations flowing from the violation of the prohibition of torture must be satisfied, otherwise the overall framework is undermined. It was suggested that failing to prosecute non-state actor rapists as torturers implies there is a greater or lesser prohibition of torture, rather than a consistent standard. Rape has been identified as torture in so many jurisdictions, to say that the duty to criminalize subject to universal jurisdiction does not apply, or that for the purposes of criminalization, rape will be considered as cruel, inhuman, or degrading treatment or punishment, would be completely undermining of the principles which already exist, and inconsistent with the reality of the severe pain and suffering which is caused by rape and sexual violence.

#### DENIAL OF REPRODUCTIVE RIGHTS

Historically, torture and cruel, inhuman or degrading treatment and punishment were understood to take place only in prisons and other traditional detention settings, during interrogations, and in conflict scenarios.

Over time, human rights bodies and experts have increasingly recognised that people may be at risk of torture or cruel, inhuman or degrading treatment and punishment in other contexts or custodial settings. The Committee Against Torture, for example, has reaffirmed that states' obligations to prevent, punish, and redress torture and ill-treatment apply not only to prisons, but other contexts of custody or control like hospitals, schools, and other institutions that engage in the care of children, where the failure of the state to intervene encourages and enhances the danger or privately inflicted harm. Human rights bodies and experts have also started to recognise that specific harms experienced by women and girls can constitute torture or cruel, inhuman or degrading treatment or punishment, and that these harms have particular gendered consequences for their lives.

For example:

- Abuse in healthcare settings;
- Coercive sterilization of persons in situations of vulnerability;
- Denial of medical care (such as safe legal abortion);
- Mistreatment and violence in custodial settings;
- FGM.

State obligations are negative, to refrain from committing torture and cruel, inhuman or degrading treatment or punishment, and positive, to take active steps to ensure and fulfil the right not to suffer torture or ill-treatment, and also to exercise due diligence to ensure that private actors do not violate rights. Private agents, such as commercial healthcare providers, engage state responsibility for violations of rights, as health is a public interest, the protection of which is a duty of the state. Thus, states "*must prevent third parties from unduly interfering with the enjoyment of the rights to life and personal integrity, which are*

*particularly vulnerable when a person is undergoing a health treatment*".<sup>76</sup>

El Salvador and Nicaragua are two countries where seeking or obtaining or providing access to abortion is criminalized. In Nicaragua, since 2006 there has been a total ban on abortion reinforced by criminal laws in 2008. It is now a criminal offence punishable with a lengthy criminal sentence for women and girls and anyone who assists them to seek or obtain an abortion even if her life or health is at risk or if she was raped. Even unintentional harm to a foetus is now criminalized. In 2006, during discussions on criminalizing all forms of abortion, 21 medical associations wrote a joint letter pleading with the government not to introduce this law to criminalize abortion. They explained how the law would tie their hands in relation to providing treatment to pregnant woman and girls. Regardless, Nicaragua criminalized abortion.

These laws weigh heavily on the minds of doctors and nurses as they attend to pregnant women and girls, for fear of being criminalized for causing unintentional harm during difficult births. Obstructed labour is very common in Nicaragua, and particularly affects young girls who are not sufficiently physically developed to give birth. In Peru, access to abortion is limited to cases where the life or health of the pregnant woman is at risk.

Three cases show the human rights concerns raised by the practical effects of these laws:

*KL v Peru*,<sup>77</sup> was a case decided by the Human Rights Committee in 2005. This case is considered a landmark case, the first case on abortion to reach any of the UN treaty bodies. KL, a young girl aged 17, discovered several weeks into her pregnancy that the foetus had a terminal medical condition, anencephaly, which affects the development of the foetus' brain. Babies only live for a few days after being born. On finding out the diagnosis, she tried to avail herself of her right to an abortion – the only exception to the abortion law in Peru is to protect the life or health of the woman, physical or mental. At the hospital, the director delayed the process, the case was brought to the Human Rights Committee: which found that there was no need to exhaust domestic remedies because there was no remedy that would provide redress. In 2005, the Human Rights Committee found several violations to KL's rights - violation of her right to special protection as a child, violation of her right to security, and a violation of her right to be free from cruel, inhuman or degrading treatment. This last finding was justified because of the pain she suffered by having to carry her pregnancy to term and being forced to breastfeed a baby that was deformed and had no brain: this pain and suffering could have been foreseen by the government.

Again, in Peru, LC, a 13 year old girl, became pregnant as a result of rape, and attempted suicide because of this by jumping from the roof of a house. LC did not die: her spine was injured. Normally to save her mobility, she should have been operated on immediately – but due to the pregnancy she was denied this operation,

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<sup>76</sup> *Ximenes López v Brazil*, Judgment of July 4, 2006. (Merits, Reparations and Costs), para. 89.

<sup>77</sup> *KL v Peru*, United Nations Human Rights Commission Communication no.1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

because the doctors feared that the operation could cause harm to the foetus. LC appealed before a hospital medical committee, which had a Catholic priest among its members. Eventually she miscarried at 20 weeks, and 20 days after this, received the decision from her final appeal that her operation could not go ahead because of the risk to the foetus. Her case is still on-going.

Maria Edis in El Salvador was taken to hospital in June 2008, after having fallen over and given birth prematurely. She told the doctors that her sister had said that the baby was stillborn. The doctor wrote in his note that he thought the pregnancy was probably due to infidelity: this was a subjective observation, not based on any further investigations or tests. Tests would have shown that Maria had a substantial tumour on her cervix. Maria was reported to police for investigation for suspected abortion. She was tried and incarcerated for abortion related homicide. In 2009 Maria was admitted to hospital again. Tests showed she had tumour and advanced cancer. The prison authorities did not ensure that she attended chemotherapy sessions; in January 2010 she admitted to hospital and died three months later. Manfred Nowak, when Special Rapporteur on torture, commented that discriminatory conduct includes being subject to torture and other ill-treatment for transgressing gender barriers or challenging predominant conceptions of gender roles. Maria was assumed to have transgressed gender roles by the medical practitioner who was given social license to judge what her sexual contacts might have been, and assuming that the pregnancy was unwanted. The medical practitioner was also given social license by criminalization of abortion to break medical confidentiality and report to police.

It was argued that no state can claim legitimate purpose for withholding essential medical services including those needed to prevent permanent physical or psychological damage. The decision to withhold this care can only serve an improper purpose such as punishment or coercion. Criminal law undermines medical science. Using criminal law to enforce the withholding of medical services with knowledge of the pain and suffering it causes is clearly punitive in effect and intent. It is worth noting when considering state declarations, that they are merely trying to protect foetal life - that the Committee Against Torture's General Comment 2, paragraph 9 states that "[t]he elements of intent and purpose in Article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances."

Criminalization of abortion forces women and girls to continue pregnancies which risk their life or health. The impact of criminalization is most acutely felt by marginalized women, such as adolescent girls and rural women.

Criminalization of abortion compounds physical pain, fear, stigma and depression that girls and women experience when they confront a pregnancy that is problematic for various reasons. In some cases, suffering may be so great it leads to their death or encourages them to commit suicide. Connections between the dilemmas created by law around pregnancy and suicide stand out most clearly with regards to girls pregnant as a result of rape. Some girls choose to continue with pregnancy and they take control of their situation in that way. For others the pregnancy itself is a daily reminder of the violence and its physical consequences and physical manifestation. Being deprived of the choice of how to proceed and denied a

remedy can be final humiliation and corroboration of their feelings of worthlessness. For some girls, a future so deprived of choice becomes too much and they commit suicide rather than continue. Suicide was one of the biggest causes of pregnancy-related mortality in Nicaragua in 2008, where some 24% of deaths of adolescent girls during pregnancy were due to consumption of poison.

Identifying the total prohibition of abortion in Nicaragua as a problem of torture and ill-treatment has been an effective advocacy strategy among treaty bodies, and the Inter-American Commission. Advocacy strategies are important: these cases show that social values about appropriate roles for women are being valued more than women's right not to suffer torture and ill-treatment.

## **PANEL 4: DEVELOPMENTS ACROSS INTERNATIONAL REFUGEE LAW & INTERNATIONAL CRIMINAL LAW ON ISSUES RELATING TO GENDER AND TORTURE**

*International humanitarian, criminal and refugee law have been the subject of significant policy and jurisprudential developments in recent decades in relation to gender-related crimes and persecution. This Panel outlined those developments, and considered lessons learned from them.*

### **INTERNATIONAL REFUGEE LAW: THE STARTING POINT**

The 1951 Convention relating to the Status of Refugees was drafted in a context where little consideration was given to refugee women, gender dimensions of displacement or gender equality. Article 3 of the 1951 Convention, the non-discrimination provision, does not include gender; it only proscribes discrimination in the enjoyment of the rights on the basis of race, religion, or country of origin. Similarly the definition of a refugee in the 1951 Refugee Convention is a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a political social group and political opinion. There was no explicit inclusion of sex or gender.

However, over the past 25 years, gender issues have become much more visible. The United Nations High Commission for Refugees (UNHCR) has consistently called for gender-sensitive refugee status determination procedures since the High Commissioner first pronounced on



gender and refugee status in 1985.<sup>78</sup> This includes recognizing that women may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted on account of any of the five Convention grounds, including due to their inferior status as women in their home countries. The UNHCR has issued a number of guidelines on the issue,<sup>79</sup> and the concept of gender-related persecution has now moved to encompass not just sex, but also sexuality.

#### RECOGNITION BY STATES OF GENDER-BASED PERSECUTION

Many states have recognised that women can be victims of gender-based persecution and therefore in need of international protection through landmark decisions, including:

- *Matter of Kasinga* in the US (1996) on Female Genital Mutilation;<sup>80</sup>
- *Shah and Islam* in the UK (1999) on domestic violence in Pakistan;<sup>81</sup>
- *Fornah* in the UK (2006) conjoined appeal: one in relation to forced marriage the other in relation to Female Genital Mutilation;<sup>82</sup>
- *Refugee Appeal 71427* in New Zealand (2000) on domestic violence and systemic discrimination;<sup>83</sup>
- *Khawar* in Australia (2002) on domestic violence;<sup>84</sup>
- *HJ Iran and HT Cameroon*, in the UK Supreme Court (2010), in relation to sexual orientation.<sup>85</sup>

## GENDER-BASED PERSECUTION AND THE TORTURE PROHIBITION

In the past, one of the ways gender-related persecution was recognised was via the torture prohibition, that is, a victim of a rape would say – rape is torture and torture is persecution. The effect is that outcomes are achieved indirectly, strategically. We need to rethink these approaches and travel directly.

<sup>78</sup> In ExCom Conclusion No. 39 on Refugee Women and International Protection, in which it was stated that women could be members of a particular social group for the purposes of the refugee definition both with regard to the substantive and procedural aspects.

<sup>79</sup> See e.g. 2002 Guidelines on Gender-related persecution; 2002 Guidelines on Membership of a particular social group; 2006 Guidelines on Victims of Trafficking and Persons at Risk of Being Trafficked; 2008 Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity; 2009 Guidance Note on Refugee Claims relating to Female Genital Mutilation.

<sup>80</sup> *In re Kasinga* United States Board of Immigration Appeals file no.A73 476 695, 13 June 1996.

<sup>81</sup> *Islam v Secretary of state for the Home Department and R. v Immigration Appeal Tribunal and Secretary of*

*state for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015.

<sup>82</sup> *Secretary of state for the Home Department v K; Fornah v Secretary of state for the Home Department* [2006] UKHL 46.

<sup>83</sup> Refugee Status Appeals Authority, 16 August 2000.

<sup>84</sup> *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14.

<sup>85</sup> *HJ (Iran) and HT (Cameroon) v Secretary of state for the Home Department* [2010] UKSC 31.

However, there is a need to be cautious about suggesting that landmark decisions are indicative of the whole picture: jurisprudence is inconsistent within and across states and can vary from one court or tribunal to another.

#### PERSECUTION BY NON-STATE ACTORS

Difficulties have arisen in the context of non-state actors, not least because the grounds of persecution must be linked to one of the Convention grounds. Here the idea of discrimination is already inherent in the refugee definition because the persecution must be tied to a Convention ground (eg. for reasons of race or religion).

In non-state actor persecution, adjudicators are sometimes reluctant to accept that the harm feared is for a Convention reason – that is, that it is on account of her race, religion, nationality, membership of particular social group or political opinion. The harm, often perpetrated by a husband, partner or other non-state actor, is considered a private act or common crime that is not related to a Convention ground. The state is not seen as involved in the harm or there is no proper examination of whether the state is actually unable or unwilling to provide protection to women in such circumstances. This is an issue, for example, in many claims made by lesbian women on the grounds of their sexual orientation.

The UNHCR's position is that harm by non-state actors can be considered persecution if the state is unable or unwilling to protect her, that is if there is no effective state protection. In non-state actor cases, it is necessary to examine the implementation and effectiveness of state protection against international human rights standards; it is not sufficient to merely have laws on the books.<sup>86</sup>

#### WOMEN AND SUBSETS OF WOMEN AS A PARTICULAR SOCIAL GROUP: THE DEPOLITICIZATION OF WOMEN?

Of the five Convention grounds, the "*membership of a particular social group*" ("PSG") Convention ground has become the default ground for women's claim to asylum in many

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<sup>86</sup> Recent case law addressing these issues includes: *No. 0907337*, Australia Refugee Review Tribunal, 15 March 2010, (concerning a woman from Vanuatu who had experienced years of **domestic violence** perpetrated by her husband. The Tribunal found that reconciliation measures (e.g. fines) by village chiefs and elders in domestic violence cases did not constitute sufficient state protection. Cultural norms did not afford adequate protection for women); *No. 0908130*, Australian Refugee Review Tribunal, 23 December 2009, (concerning a Kurdish woman from Turkey who had left her Australian husband (of an arranged marriage) due to domestic violence, the applicant was found to be at risk of **honour killing** for leaving her husband if forced to return to Turkey); Contrast *No. 0905560*, Australia Refugee Review Tribunal, 16 October 2009, (concerning a Chinese woman who had suffered abuse at the hands of her Australian husband and wanted separation, sufficient protection was found to be available in China, in particular in urban areas to where the applicant could relocate. There was improved legal system and infrastructure. Exposure to embarrassment, gossip, and pressure from relatives was not considered as sufficient harm); *No. 0903290*, Australian Refugee Review Tribunal, 4 August 2009, (concerning an Albanian woman in fear of **trafficking**, the Tribunal concluded that she was a refugee, finding that state protection against trafficking is not adequate in Albania when measured against international standards, even though the country was making significant efforts. The protection of women is markedly sub-optimal and mirrors closely the subordinate position of women in Albanian society in general).

jurisdictions. “Women” and various subsets of women have been recognised as PSGs by many jurisdictions and as having innate and immutable characteristics.

The reliance on the member of a PSG ground has emphasised the view of women as social and cultural actors but not as political actors. Women can of course bring claims to asylum also on political, religious, racial and ethnic grounds. To do so, it is necessary to reverse stereotyped roles which confine women to the private sphere or suggests that the political roles and activities of women are somehow at a lower level or confined to women’s issues only.

There has, however, been some recognition of the religious and political underpinnings of discrimination against women: see, for example:

- *Refugee Appeal 76044, New Zealand: Refugee Status Appeals Authority, 11 September 2008*, where the appeals body made important observations about gender in the context of the political opinion ground and the need for that ground to receive a gender-sensitive interpretation. This decision addressed honour killings in Turkey and concluded that crimes committed in the name of honour enforce the rigid control by men over women and their sexuality. Ultimately, it is about the distribution and exercise of power in Turkish society.
- In Belgium, *Decision n° 45 823, Conseil du Contentieux des Étrangers, 30 June 2010*, where the appeal body granted asylum to a father who opposed FGM and whose daughter was threatened with the practice, based on a link to the political opinion ground (note: the applicant was male).
- *Refugee Appeal No 76399, New Zealand, Refugee Status Appeals Authority, 13 September 2010*, which concerned an Iranian woman who believed that Islam was responsible for the gross inequality between the sexes in Iran. The authority found that cumulative discrimination due to a person’s gender can amount to persecution. The applicant had been denied entry to medical university as she was deemed “ideologically unsound”, combined with other factors such as lack of freedom of expression and restrictive dress code. However, despite the clear connection to religion and political opinion, she was granted asylum on the basis on her membership of the PSG “women in Iran”.

#### INTERSECTIONAL DISCRIMINATION

In addition to cumulative measures of discrimination on account of gender, discrimination can also be inflicted on multiple grounds, such as the applicant’s sex, gender, age, socio-economic status, sexual orientation and other factors. These multiple risk factors have been recognised in some asylum decisions.<sup>87</sup>

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<sup>87</sup> See, for example, *RRT Case No. 0907299, Australia Refugee Review Tribunal, 10 December 2009*, (concerning a Russian woman with a disability, where the Tribunal found that the applicant would be discriminated against for reasons of her membership in the social group of “people with disabilities” or “women with disabilities”). Women with disabilities were doubly disadvantaged, compared to men with disabilities); *Re M.R.D., C.R.D.D. No. 164 (QL), A98-00268, Canada, Immigration and Refugee Board, Refugee Division, 29 July 1998* (where the Board concluded that taking into account the claimant’s

## INTERNATIONAL CRIMINAL LAW

### SEXUAL VIOLENCE IN THE CONTEXT OF CONFLICTS: MULTI-FACETED ATROCITIES

There are widespread reports of sexual violence in the context of conflicts. In relation to the Democratic Republic of the Congo ("DRC"), the recent UN Mapping Exercise shows that the reality of sexual violence in the context of that conflict is one of multi-faceted atrocities.

These include:

- *Sexual violence used as an instrument of terror* (public rapes, gang rapes, forced incest, sexual mutilation, disembowelling (often of pregnant women), acts of cannibalism, deliberate spreading of HIV);
- *Bodies as objects of torture* (acts of extreme cruelty, insertion of objects, gun barrels, sticks, bottles, batons covered in chilli pepper);
- *Sexual violence as booty* (rape being 'offered' to troops after battle along with looting; subjugation of defeated population after victory);
- *Sexual slavery*: (mass abductions, women, and often girls, as spoils of war; mistreatment, ill-feeding, humiliation, repeated rape/abuse, horrific conditions);
- *Child soldiers, forced marriage*: "sexual acts against children were particularly appalling";
- Ethnically motivated sexual violence;
- Sexual violence against very young girls, boys, men, women and elderly people.<sup>88</sup>

### THE INVISIBILITY OF THE ATROCITIES: OBSERVATIONS ON ICC CASES IN THE DEMOCRATIC REPUBLIC OF CONGO AND THE CENTRAL AFRICAN REPUBLIC

The manner in which sexual violence is being prosecuted and portrayed at trial at the ICC is not, as yet, meeting the potential provided by the significant advances made in how these crimes are defined and constituted on paper. Such advances seem to be either absent from or disconnected to the context and level of atrocities reported. In the cases against Thomas Lubanga, head of the Union of Congolese Patriots ("UPC"), and Jean Bosco Ntaganda, charges of enlisting, conscripting and actively using children under the age of 15 in hostilities were brought, but not sexual violence charges.<sup>89</sup> This is despite the fact that, according to witness testimony in the case, after the battles for Lipri and Barrière in 2003, the UPC's commanding officers authorised troops to loot and rape women and girls in the civilian population. Similarly in the case against Jean Pierre Bemba, systematic rape was committed by his troops - sexual violence was inflicted in public spaces, before family members, to family members in turn: to terrorise, subjugate, and humiliate the population.

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sexual orientation, her ethnic identity and her identity as a woman, there was a reasonable chance of her being persecuted if she were returned to Russia).

<sup>88</sup> Source: RFDA, RFDP and International Alert, *Le corps des femmes comme champ de bataille*, 2004, UN Mapping Exercise DRC (1996-2003).

<sup>89</sup> *The Prosecutor v Thomas Lubanga Dyilo*, case no. ICC-01/04-01/06, *The Prosecutor v Bosco Ntaganda*, case no. ICC-01/04-02/06.

However, the testimony does not appear to date to portray the horror of what happened.<sup>90</sup>

## THE BEMBA TRIAL: EXTRACTS OF ORAL TESTIMONY

**Sexual violence was inflicted in public spaces, before family members, to family members in turn: to terrorize, subjugate, and humiliate the population. However the testimony available in the Bemba case does not portray the horror of what happened.**

Witness 68: "The soldiers who raped her also grabbed her bag, which contained clothes and food".

Witness 82: "My father wanted to intervene, and they put their weapons against him. Other people came and it was [at] that time that they seized me and raped me".

### CUMULATIVE CHARGING FOR RAPE AND TORTURE

Cumulative charging has been practiced in international criminal trials since Nuremberg. It allows multiple charges to be brought for the same underlying conduct – for instance, charges of murder and extermination may be brought over the same conduct. The Appeals Chamber at the ICTY clarified the rationale behind the practice in *Prosecutor v Delalić* indicating that before trial "it is not possible to determine to a certainty which of the charges brought against an accused will be proven."<sup>91</sup> Thus a range of permutations can be brought on the basis of the same underlying conduct, in view of the Trial Chamber then deciding at conviction, which charges it should retain on the basis of the evidence produced. It is at the conviction or sentencing stage that the Court will also ensure that the convicted person is not punished twice for the same criminal act.<sup>92</sup>

Cumulative charging and pronouncing cumulative convictions are means of fully reflecting culpability. Precise criminal labelling enables the full range of different social ills or evils represented by a course of conduct to be pronounced. In a sense a basic function of criminal law is to condemn prohibited and criminalized conduct in a context of shifting values and social constructions of crime.

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<sup>90</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, case no. ICC-01/05 -01/08.

<sup>91</sup> *The Prosecutor v Delalić, et al.*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 400.

<sup>92</sup> The Appeals Chamber in *Delalić* set out a test in relation to cumulative convictions (not charges): "[m]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision": *Prosecutor v Zejnil Delalić et al* (Appeal Judgment), Ibid at para 1190.

#### THE CUMULATIVE CHARGING DECISION IN THE BEMBA CASE

The Prosecutor sought to charge Bemba with rape, torture and other crimes, but the Pre-Trial Chamber did not confirm the torture charges, holding that the main element of crimes against humanity torture was “*severe pain and suffering and control of the perpetrator over the person*”, and these elements were “*also the inherent special material elements of the acts of rape*”.<sup>93</sup> As rape contained the additional element of penetration, it was the most appropriate charge: torture was subsumed into it.<sup>94</sup>

However the *actus reus* and *mens rea* elements of torture are different from rape. The infliction of severe pain and suffering is a consequence of rape, not an element to be proven for rape. Accordingly, the *mens rea*, intent to inflict severe pain and suffering, does not exist for rape, and thus it is difficult to see how the two distinct crimes could be seen as sharing these elements.

#### ISSUES FOR FURTHER CONSIDERATION

- Are there lessons to be learned from the role that the ‘membership of a particular social group’ ground has played in protection from gender based persecution in the refugee law context?
- Is there a danger that over-reliance on seeing discrimination as a purpose of torture will obscure its political nature and objectives?
- What is the role of criminal labelling?
- Does prosecuting sexual violence crimes cumulatively with torture help lend gravity to sexual violence crimes that they might otherwise lack in certain cultural contexts?
- In the aftermath of sexual violence in conflict contexts does charging rape, but not torture, obscure the atrocity and shift the crimes back to the private sphere? In one sense favouring a rape charge over a charge of torture might indicate that finally the two crimes are being prosecuted and treated on an equal footing, and that more currency is being given to sexual violence crimes when possible. Further, in the Bemba decision, by subsuming the torture charges, the Court has recognized that all of the rape proved to have been carried out was torture. On the other hand, the removal of torture may be a new incarnation of bias, reducing what are in this case systematic, public rapes, in front of family members in a manner designed to terrorise the population, to private acts of sexual conduct, which the oral testimony available reveals as somewhat banal. Because the torture charges were subsumed, it may be that the prosecutors have not felt the need to put in the aggravated evidence of how the rape was perpetrated.

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<sup>93</sup> International Criminal Court, *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, 15 June 2009, para. 204.

<sup>94</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, above note 93, paras. 204-205.

- Does cumulatively charging rape and torture make the crime more difficult to prove?
- Has there been an effect on the type of testimony elicited from survivors of rape in the Bemba trial because torture charges have been dropped in favour of rape charges alone? Is there value in proving the different elements of the different crimes?

## PANEL 5: STRATEGIES FOR OVERCOMING BARRIERS TO JUSTICE AND REPARATION FOR WOMEN AND GIRLS

*The right to a remedy and reparation for international crimes and human rights abuses has been affirmed by a range of treaties,<sup>95</sup> United Nations treaty bodies,<sup>96</sup> regional courts,<sup>97</sup> and in a series of declarative instruments.<sup>98</sup> International instruments also recognise specific obligations on states to provide women who are subjected to violence access to the mechanisms of justice, just and effective remedies and information on their rights to redress.<sup>99</sup>*

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<sup>95</sup> For example, the International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14); and Statute of the International Criminal Court (1988) (Art. 75).

<sup>96</sup> See, for example, Human Rights Committee, General Comment No. 31, (UN Doc. No. CCPR/C/21/Rev.1/Add.13), at paras. 15-17; UN Committee Against Torture, General Comment No. 2, above n. 1, at para. 15.

<sup>97</sup> See, eg. IACtHR, *Velasquez Rodriguez Case*, (Ser. C) No. 4 (1988) (Judgment of 29 July 1988) at para. 174. See also ECtHR, *Papamichalopoulos v Greece* (Application No. (14556/89), 31 October 1995 at para. 36.

<sup>98</sup> 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, Resolution 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)) and GA Resolution 60/147 (UN Doc. No. A/RES/60/147 (2006)). See also the 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; and the Universal Declaration of Human Rights (1948) (Art. 8).

<sup>99</sup> Declaration on the Elimination of Violence Against Women, adopted by General Assembly resolution 48/104 of 20 December 1993 (UN Doc. No. A/RES/48/104 (1993)) (Art. 4(d)). See also the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) (Art. 7(f) and (g)) and the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (Art. 4). See also Convention on Elimination of All Forms of Discrimination Against Women (1979) (Art.2(c)).

*However, women across the world still face significant structural and discriminatory barriers when they seek justice – whether through judicial or administrative mechanisms. Furthermore, women will often have specific needs that are often unmet when it comes to the forms of reparation. This panel examined those barriers and discussed strategies to overcome them, both in general, and in the aftermath of mass violations of human rights.*

## THE RIGHT TO REMEDY AND REPARATION

The aim of reparation is to eliminate as far as possible the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed. It is clear that the most serious violations of human rights are by their nature irreparable and any remedy will be disproportionate to the harm suffered. Nonetheless, it is an international legal obligation that an internationally wrongful act be remedied to the fullest possible extent.

## THE UN BASIC PRINCIPLES AND GUIDELINES

Many human rights violations are recognised as containing a right to remedy and reparation.<sup>100</sup> However, at a general level, the Basic Principles and Guidelines on the Right to a Remedy and Reparation (the “Basic Principles”)<sup>101</sup> – one of the key interpretive guidelines on this subject – do not cater for every human rights violation. They cater specifically for “*gross violations of international human rights law and serious violations in international humanitarian law*”.

The Basic Principles do not define these terms, but they were defined in the Special Rapporteur’s first report on the draft principles to include at least the following: genocide, slavery and slavery-like practices, summary or arbitrary execution, torture and cruel, inhuman and degrading treatment or punishment, enforced disappearances, arbitrary prolonged detention, deportation or forcible transfer of population, systematic discrimination especially based on race or gender.<sup>102</sup>

The Special Rapporteur on Torture has noted the benefits of recognising women-specific harms within the definition of torture in order to strengthen women’s claims to prevention, protection, and rehabilitation.<sup>103</sup> A similar argument could be made concerning reparation:

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<sup>100</sup> For example Article. 2 para. 3 of the ICCPR provides that state parties must ensure that those whose Covenant rights are violated have an effective and enforceable remedy.

<sup>101</sup> 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, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>102</sup> ‘Study Concerning the Right to Restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report submitted by the Special Rapporteur, Mr Theo Van Boven’, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993, para. 8.

<sup>103</sup> Report of the Special Rapporteur on torture, above note.43. Note that the Special Rapporteur on Violence Against Women has called for reparation measures not to concentrate on the “*fairly limited and traditionally conceived catalogue of violations of civil and political rights*”, but instead also to include the worst forms of crimes or violations targeting women and girls: Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc A/HRC/14/22 (2010), paras. 42-46 and 83.



framing women-specific violations which amount to torture as such may strengthen women's claims to reparation under international law.

## PARTICULAR BARRIERS FOR WOMEN AND GIRLS

It is clear that the number of claims lodged by and on behalf of women does not correspond at all to the number or scale of violations perpetrated against them. This was borne out by the experience of international NGOs discussed at the meeting: only a very small number of cases brought to them concern violence against women as a human rights violation. A variety of potential factors were canvassed:<sup>104</sup>

- The abuses may be downplayed by women and girls themselves and within their families; victims may be faced with the unenviable choice of maintaining harmony within their families or communities (and many are conditioned to do so) rather than pursuing justice for what happens to them specifically.

## THINKING OUTSIDE THE BOX...

### *A speaker shared an experience from when she first started working as a criminal defence lawyer*

*My first case was a woman with a minor shoplifting charge – there was clear evidence that she did it so we arranged a date and she was going to plead guilty. Before that date she returned with two more shoplifting charges. I asked: “Why are you doing this?” She said “I just want it to end. I thought it would be useful for me to be imprisoned.” She was trying, in her harmed way, to avoid domestic violence by being imprisoned. In my naive way I said “Now we have a defence.” It wasn't much of a defence but I brought the three cases of shoplifting into a single court and pleaded guilty but she was given an absolute discharge. I thought I'd done an amazing job, she was not going to be convicted. But actually thinking about it in the context of today's discussion I realise I failed this woman. The domestic violence I'm sure continued. I met her caseworker later with her, at the start of the criminal trial against her husband. The caseworker told me she was going to drop the charge.*

*Why am I raising this? When we think about reparation for victims the starting point is not natural or neutral. People want to get out of their situation. We may be going through a court process which ends in the victim's rights being vanquished. We need to take a step back and realise that obtaining a remedy and reparation is ideal but often we are starting from a different first point. The woman thought that her actions were the only way she could deal with the situation. My limited victory was avoiding her criminality but more broadly I lost miserably, as we didn't deal with the domestic violence. We need to remember how useless we can be when we see things in boxes.*

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<sup>104</sup> See also Report of the Special Rapporteur on violence against women, above, note 103, para. 35.

- Criminalization of the victims themselves may militate against them coming forward. A previous panel highlighted the case of abuse of lesbian women and gay men, who cannot come forward to complain in countries where homosexual acts are criminalized. Similarly, in certain countries with Shari'ah legal systems sexual violence can lead to charges of sex outside marriage.
- Women and girls' relative lack of political and public voice has meant they typically have less information on rights and remedies, and how to access them.
- Few countries have adequate victim and witness protection programs and this impedes claims. Even in countries with structures in place to support victims these typically do not cater to special needs of women and girls. In those countries where victim witness protection models exist, they are created in an organised crime model. The prosecutor will take a good witness and put them into a protection program. This is not appropriate in human rights violation situation as the prosecutor or state may not be the appropriate organ to be protecting the victim. Police rarely take the protection needs of women and girls seriously with gender-based violence – often the risk can emanate from the home. It was also pointed out that there is a need to carefully consider witness protection schemes in the context of honour crimes, as there is the risk that women find themselves in schemes that imprison them. Asking the women in these situations what they want is key.
- Particularly in small communities, it has proven very difficult to protect the privacy and dignity of survivors who do come forward, and has resulted in them being ostracised from their communities.
- Local human rights groups working on legal challenges for victims rarely adopt a gendered approach. Consequently women are typically less able to benefit from programs and services, which has knock on effect on the number of cases taken up. Particular NGOs come across this often: there is a distinction in some countries between women's groups working on women's issues and human rights groups working on law.
- In the relatively small number of cases that come to court there are further challenges to procure sufficient evidence to prove the harm. The forensic capacity to prove rape and sexual violence can be limited in many countries. Coupled with reluctance or other challenges faced by victims in obtaining a timely medical examination, this makes it hard to procure a conviction.

## LIMITATIONS IN TRADITIONAL UNDERSTANDINGS OF REPARATION

The Basic Principles list five main forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Of these, restitution is often understood to be the principle aim – to restore the person to his or her position prior to violation. However, violence against women is often a manifestation of historically unequal power relations between men and women. Restoring the victim to the position they were in before the violation when this is what gave rise to the violation in the first place is a feeble end goal. The whole process arriving at reparation – all the difficulties, the long legal process, being subject to protection concerns inside and outside the home - and at the end of the process they will get some kind of an award which puts them back in the situation of vulnerability. Reparation becomes a cyclical pattern leading to further violations.

Reparation programs that place emphasis on restitution and compensation for material losses to the detriment of other forms of reparation can impede benefits to women and girls given that they often have fewer material assets to start with.

These and other related gaps in the normative framework concerning women and girls' experiences of violence and needs in relation to reparation led to the Nairobi Declaration, which provides that reparation must go above and beyond the immediate reasons and consequences of the crimes and violations and aim to address political structures and inequalities that negatively shape women's and girls' lives.<sup>105</sup> If the law does not work for women, it is necessary to think creatively about how it can.

The Nairobi Declaration on Women's and Girls' Rights to Remedy and Reparation offers a victim and civil society perspective on reparation. It adopts a wide definition of harm, including harm to physical integrity, psycho-social and spiritual wellbeing, economic security, social status and the social fabric of the community. It references age and customary and religious law as factors that must be analysed in understanding diverse needs for reparation. Though the decision-making process should be participatory the declaration asserts that the state bears the primary responsibility for reparation. It also looks at what reparations should include from a gender perspective: truth-telling including the acknowledgement of women and girls' suffering; for physical and mental health services and other services for rehabilitation for women and girls; provision for compensation and restitution, justice initiative including ending impunity for sexual violence, crimes and violations; programs aimed at restoring victims' dignity using symbolic tools like public apologies; educational initiatives including raising awareness on women's rights and gender sensitivity, and the reform of discriminatory laws and customs against women.

The need to adopt a gender sensitive approach to reparations which harness their transformative potential, rather than just returning women and girls to the situation they were in before the individual instance of violence, has been recognised by the Inter-American Court of Human Rights,<sup>106</sup> and further developed by the Special Rapporteur on violence against women in her 2010 report on reparations for women subjected to violence.<sup>107</sup>

## REPARATIONS IN THE AFTERMATH OF MASS VIOLATIONS: LISTENING TO SURVIVORS

A speaker shared her experience of mapping reparations in Northern Uganda for the Office of the High Commissioner for Human Rights. The aim was to bring a gender lens to the agreement on accountability and reconciliation, to introduce the Nairobi declaration on

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<sup>105</sup> Nairobi Declaration on women's and girls' right to a remedy and reparation, issued at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007.

<sup>106</sup> Cotton Field Case, above note 7.

<sup>107</sup> Report of the Special Rapporteur on violence against women, above note 103.

Women's and Girls' Rights to Remedy and to do practical research on the principles needed to inform components of a gender just reparation system and the role of civil society and victims and their community in reparation processes. When victims were asked what they wanted, the issues they raised were:

- truth telling
- understanding the root cause of the conflict
- acknowledgement of the continuity of gender-based violence
- physical and mental health issues
- housing issues
- education
- land issues
- inheritance
- compensation
- recovery of livelihoods
- addressing harms to youth and children
- public apologies
- accounting for the missing
- proper burial and memorial for the dead
- rebuilding relationships and trust
- restoring trust
- ending impunity especially for crimes of sexual violence
- women's rights reforms
- political participation of women in the post-conflict government
- equality and non-discrimination – that the right to remedy and reparation must be applied without any discrimination of any kind this was very clear from the victim's viewpoint. Reparation as a tool to demonstrate equality - in part through distribution of tangible (could be monetary) or intangible (like full citizenship) compensation
- Agreement on accountability
- Striving to prevent and eliminate gender inequality that arises
- Special provisions required for victims of sexual violation and crimes

One of the key principles was ensuring that victims were full participants in the design, implementation, monitoring and evaluation of reparation programs.<sup>108</sup> The participation in decision-making signals their effort to position themselves as equal citizens – for them, this is the transformative part. Not only are we repairing but they are now part of a full sense of what our citizenship implies. It is a deep sense of being a citizen.

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<sup>108</sup> See also, Report of the Special Rapporteur on Violence Against Women, above note 103, paras. 29, 32.

## THE RIGHT TO RETURN

**A question that was raised is to what extent the right to return is part of reparation, and how does that impact on the position in international refugee law?**

It was reported that in situations of internal displacement in Uganda, women saw the return home, and the context of that return, as a key part of the process of reparation: they wanted their villages and livelihoods back. It was suggested that, to give more content to the idea of sustainable returns, should we explore linkages with reparations?

## OUTREACH AS KEY TO PARTICIPATION AND THE PROCESS OF REPARATION

Outreach to women who have been subject to sexual violence needs careful consideration. In its research in a particular region of Uganda, the Feinstein Center identified four issues:

Consultation should include state institutions, civil society, academia, community leaders, traditional and religious leaders and victims. Outreach is a two way process that involves engaging with victims, building trust and confidence among victims, ensuring inclusive and participatory space and support for victims empowerment.

Victim-led outreach should be considered as victims tend to distrust the system of being on lists or being assigned registration numbers. High levels of illiteracy, poverty, poor transportation, deep social fractures, gender, ethnic, religious, regional differences require well-crafted outreach processes.

Truth-telling is a key principle, involving a comprehensive, independent and impartial analysis of the history and manifestations of the conflict. Truth telling requires also the identification of grave and systematic crimes and gross human rights violations committed against women and girl – building a shared memory and history.

The gender understanding of reparation recognises the indivisibility of rights and moves beyond one built on civil and political rights only to consider economic, social and cultural conditions, structural violence and pre-existing inequality and discrimination. The nature of the Nairobi Declaration is transformative - existing discrimination is part and parcel of the key principles to do with reparation.

## REPARATION AS A PROCESS

Justice is one thing, but the administration of justice is of the utmost importance. The processes for reparation need to be owned by the victims and to empower them as survivors. First and above all, reparation is a process, before it becomes a judgment in a court. To achieve its aim of full participation and to empower survivors, the following should be considered:

- Language mindful of low literacy rates
- Simplified procedure
- Lower threshold of evidence
- Sparing victims cross-examinations

- Avoiding re-victimization, by investigators, perpetrators, family members and community
- Acknowledging and making provision for victims' difficult access to medical and legal documentation on returning from internally-displaced persons camps
- Support structures are needed to assist women in speaking out and claiming reparation, and reparation processes that enable highly stigmatised victims (for example, children born through wartime violations) to access reparation in a process sensitive to their concerns
- Not making publicly available the names of those seeking reparation
- Reparation processes must allow women and girls to come forward when they are ready. Measures should enable them to come forward after formal time period has expired.

## CHALLENGES AND ISSUES FOR FURTHER CONSIDERATION

### WHICH HUMAN RIGHTS VIOLATIONS AFFECTING WOMEN AND GIRLS FALL WITHIN THE BASIC PRINCIPLES DEFINITIONS IN THEIR OWN RIGHT?

Certain aspects of violence against women, including rape and other gender based violence carried out in the context of conflict, clearly fit within the Basic Principles definitions of gross violations of human rights law and serious violations of international humanitarian law in and of themselves, without the requirement that they amount to torture. However the boundaries of the definition are not clear and there is room for further exploration of whether other forms of violence against women would fall within the definition. Consider whether by seeking to raise the profile of violence against women by equating the seriousness of harm with male conceptions of torture (and therefore within the Basic Principles definition) rather than as grave human rights violations in their own right are we doing a disservice?

### WHAT MUST STATES DO TO PROVIDE A REMEDY FOR TORTURE ATTRIBUTABLE TO THEM BECAUSE OF A FAILURE OF DUE DILIGENCE? WHAT MUST THEY DO TO REPAIR THE DAMAGE CAUSED? HOW DO WE ACHIEVE JUSTICE AND TRANSFORMATIVE REPARATION FOR WOMEN AND GIRLS?

It is important that women-specific considerations are taken into account when framing solutions. It was suggested that this was the case when the UN Basic Principles and Guidelines on the Right to Remedy and Reparation were framed. The challenge is to look at the problem, and consider what makes sense, and how the law can work to fix the problem. If the law does not work, it should be changed. The task goes beyond the group of lawyers who have some knowledge of reparation in the law: we need to be more interdisciplinary in looking at what does reparation need to do? Central to that process are the survivors.

# APPENDIX: PANELLISTS

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## **GENDER AND TORTURE** **CONFERENCE REPORT**

Torture has been widely viewed in the past in terms of pain and suffering inflicted on a person – usually assumed to be male – in the custody of the state. However, this narrow understanding excludes many forms of severe pain and suffering deliberately inflicted on women and girls. It fails to recognize as torture crimes such as rape, domestic violence, targeted rape of lesbians, violence committed in the name of “honour” and also the infliction of severe pain and suffering through denial of reproductive rights. Such crimes are committed not only by agents of the state, but also by non-state actors with the acquiescence of the state.

This report summarizes a two-day conference on the gender dimensions of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Held in London in May 2011, the conference brought together representatives of NGOs and academics from around the world. They reflected on the role of the legal framework on torture in achieving justice and in holding states to account. Their findings are of interest to everyone concerned to clarify the law on torture and to ensure that as the law evolves, victims and survivors benefit and are able to seek an effective remedy.

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