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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,  
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,  
INCLUDING THE RIGHT TO DEVELOPMENT**

**Report of the Special Rapporteur on torture and other cruel, inhuman  
or degrading treatment or punishment, Manfred Nowak**

**Summary**

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment submits his second report to the Human Rights Council. Chapter I summarizes the activities of the Special Rapporteur undertaken between August and December 2007 (i.e. the period since the submission of his interim report to the General Assembly, A/62/221), including updates on country visits, future visits and pending requests for invitations, and highlights of key presentations and meetings. In chapter II, the Special Rapporteur focuses on the protection of women from torture and in chapter III he sets out his conclusions and recommendations thereon.

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## Introduction

1. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, hereby submits his second report to the Human Rights Council, in accordance with General Assembly resolution 60/251.
2. Chapter I summarizes the activities of the Special Rapporteur undertaken between August and December 2007 (i.e. the period since the submission of his interim report to the General Assembly, A/62/221). In chapter II, the Special Rapporteur discusses the protection of women from torture and in chapter III he sets out his conclusions and recommendations.
3. The summary of communications sent by the Special Rapporteur from 16 December 2006 to 14 December 2007 and the replies received thereto from Governments by 31 December 2007 are found in addendum 1 to the present report. Addendum 2 contains a summary of the information provided by Governments and non governmental organizations (NGOs) on implementation of the recommendations of the Special Rapporteur following country visits. Addenda 3 to 7 are reports of country visits to Paraguay, Nigeria, Togo, Sri Lanka and Indonesia, respectively.

### I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

4. The Special Rapporteur draws the attention of the Council to his third interim report to the General Assembly (A/62/221, paras. 6-41), which he presented in New York on 29 October 2007. In this report he described his activities for the period from January to July 2007 (i.e. the period since the submission of his report to the fourth session of the Human Rights Council<sup>1</sup>). The Special Rapporteur would like to inform the Council of the key activities he has undertaken since the submission of his report to the General Assembly.

#### Communications concerning human rights violations

5. During the period 16 December 2006-14 December 2007, the Special Rapporteur sent 79 letters of allegations of torture to 51 Governments and 187 urgent appeals to 59 Governments on behalf of persons who might be at risk of torture or other forms of ill-treatment.

#### Country visits

6. The Special Rapporteur reports that in the period since the submission of his report to the General Assembly, he has completed missions to Sri Lanka (1 to 8 October 2007) and Indonesia (10 to 23 November 2007) the reports of which are found in addenda 6 and 7 to this report, respectively.

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<sup>1</sup> A/HRC/4/33 and addenda.

*Upcoming missions*

7. The Special Rapporteur reports that his mission to Equatorial Guinea is expected to take place from 30 January to 8 February 2008 and to Iraq in the first quarter of the year.

*Pending requests*

8. The Special Rapporteur reports that dates are yet to be finalized for a mission to Côte d'Ivoire, following the Government's invitation, first requested in 2005, and received on 27 June 2005. No further information has been received following a statement by the delegation of Zimbabwe to the fortieth session of the African Commission on Human and Peoples' Rights, held in Banjul in November 2006 that an invitation to the Special Rapporteur could be expected shortly. No further information has been received following an invitation extended to the Special Rapporteur by the Minister for Foreign Affairs of the Gambia, H.E. Mr. B. Garba-Jahumpa, at a meeting on 17 November 2006.

9. In May 2007, the Special Rapporteur renewed requests for invitations from the following States: Algeria (request first made in 1997); Afghanistan (2005); Belarus (2005); Bolivia (2005); Côte d'Ivoire (2005); Egypt (1996); Eritrea (2005); Ethiopia (2005); Fiji (2006); the Gambia (2006); India (1993); Iran (Islamic Republic of) (2005); Israel (2002); Liberia (2006); Libyan Arab Jamahiriya (2005); Papua New Guinea (2006); Saudi Arabia (2005); Syrian Arab Republic (2005); Tunisia (1998); Turkmenistan (2003); Uzbekistan (2006); Yemen (2005); and Zimbabwe (2005). He regrets that some of these requests are long-standing.

**Highlights of key presentations and consultations**

10. From 1 to 2 September 2007, the Special Rapporteur participated in a panel discussion at the Salzburg Seminar on "Upholding human rights, civil liberties, and non-derogable rights: can they survive the present age of terrorism?"

11. From 3 to 5 September, he made several presentations at a regional seminar for the Middle East and North Africa, in Amman on monitoring human rights in places of detention, organized by the Association for the Prevention of Torture.

12. On 10 September, the Special Rapporteur delivered a speech entitled, "The protection of human rights of prisoners" at the Twelfth World Congress of the International Commission of Catholic Prison Pastoral Care held in Rome.

13. On 14 September, the Special Rapporteur participated in a panel discussion in Vienna, on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), "OPCAT - a national preventive mechanism for Austria".

14. On 27 September, he participated in a workshop organized by the London Metropolitan University on "International human rights and fact-finding: an analysis of fact-finding hearings and missions of the European Court (and Commission) of Human Rights".

15. From 17 to 19 September, the Special Rapporteur participated in meetings of the Darfur group of experts held in Geneva. The interim report of the group of experts<sup>2</sup> was presented to the sixth session of the Human Rights Council on 24 September.
16. On 28 September, the Special Rapporteur participated in a workshop in London organized by Amnesty International, and the Coalition of International NGOs against Torture, on “Torture and cruel, inhuman or degrading treatment or punishment: definitions and implications”.
17. On 7 November, at the University of Innsbruck the Special Rapporteur delivered the keynote lecture entitled, “The global fight against torture and enforced disappearances”.
18. From 27 to 28 November, the Special Rapporteur participated in an international symposium in Vienna entitled, “Harmony in society and human rights in China”.
19. From 7 to 8 December, he delivered a presentation entitled, “Solitary confinement and isolation practices as a human rights problem”, at the Fifth International Psychological Trauma Symposium held in Istanbul.
20. On 9 December, the Special Rapporteur delivered a presentation entitled, “Challenges to human rights protection in the 21st century”, for the Human Rights Day lecture, organized by Amnesty International in Ingolstadt, Germany.
21. On 11 December, the Special Rapporteur participated in the expert seminar on Freedom from torture, cruel, inhuman or degrading treatment or punishment and persons with disabilities, organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR). The aim of the seminar was to facilitate an understanding of torture and other forms of ill-treatment in light of the recently adopted Convention on the Rights of Persons with Disabilities; to identify the forms of torture and ill-treatment most affecting persons with disabilities; and to help mainstream the rights of persons with disabilities in the work of the Special Rapporteur and the Committee against Torture.
22. On 11 December, the Special Rapporteur participated in the presentation of the final report of the group of experts on Darfur<sup>3</sup> to the resumed sixth session of the Human Rights Council.

### **Press statements**

23. On 7 December 2007, on the occasion of International Human Rights Day, the Special Rapporteur, together with other special procedure mandate-holders, called upon States to address poverty with the utmost urgency.

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<sup>2</sup> A/HRC/6/7.

<sup>3</sup> A/HRC/6/19.

24. On 23 November 2007, on the occasion of the International Day for the Elimination of Violence against Women, he issued a joint statement with the Special Rapporteur on violence against women, its causes and consequences, calling on States to use the human rights framework in a gender-sensitive way to strengthen the protection of women from violence.

## **II. STRENGTHENING THE PROTECTION OF WOMEN FROM TORTURE**

### **A. Introduction: towards a gender-sensitive interpretation of torture**

25. The present chapter seeks to respond to and complement initiatives in the area of gender mainstreaming and combating violence against women, such as Human Rights Council resolution 6/30, the Secretary-General's in-depth study on all forms of violence against women, together with the United Nations follow-up campaign on violence against women to be launched in 2008, the focus of the High Commissioner for Human Rights on ending impunity, especially for sexual violence, and the call by the Special Rapporteur on violence against women to fully apply the human rights framework to the concerns of women.<sup>4</sup>

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

27. Torture is prohibited under a wide range of international instruments, such as article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Torture is also prohibited by many regional instruments as well as under international criminal law and international humanitarian law. CAT is the only legally binding instrument at the universal level concerned exclusively with the eradication of torture. Its article 1 lays down a definition, which sets out four elements required to meet the threshold of torture:

- Severe pain and suffering, physical or mental;
- Intent;
- Purpose;
- State involvement.

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<sup>4</sup> A/HRC/4/34, para. 56.

28. The Special Rapporteur has suggested adding to these elements the criterion of powerlessness.<sup>5</sup> A situation of powerlessness arises when one person exercises total power over another, classically in detention situations, where the detainee cannot escape or defend him/herself. However, it can also arise during demonstrations, when a person is not able to resist the use of force any more, e.g. handcuffed, in a police van etc. Rape is an extreme expression of this power relation, of one person treating another person as merely an object. Applied to situations of “private violence”, this means that the degree of powerlessness of the victim in a given situation must be tested. If it is found that a victim is unable to flee or otherwise coerced into staying by certain circumstances, the powerlessness criterion can be considered fulfilled.

29. The element of powerlessness also allows the specific status of the victim to be taken into consideration, such as sex, age and physical and mental health,<sup>6</sup> in some cases also religion, which might render a specific person powerless in a given context. A society’s indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws and a pattern of State failure to punish perpetrators and protect victims, create the conditions under which women may be subjected to systematic physical and mental suffering, despite their apparent freedom to resist.

30. In regard to violence against women, the purpose element is always fulfilled, if the acts can be shown to be gender-specific,<sup>7</sup> since discrimination is one of the elements mentioned in the CAT definition. Moreover, if it can be shown that an act had a specific purpose, the intent can be implied.

31. The central role of the State in article 1 of the Convention, which restricts the definition of torture to acts “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”, has frequently been used to exclude violence against women outside direct State control from the scope of protection of CAT. However, the Special Rapporteur wishes to recall that the language used in article 1 of the Convention concerning consent and acquiescence by a public official clearly extends State obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals. Also, article 1 of CAT should be seen as reinforcing - and reinforced by - the Declaration on the Elimination of Violence against Women adopted by the General Assembly in resolution 48/104.

32. Article 4 (c) of this Declaration proclaims that States should “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”. Recently, the

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<sup>5</sup> See E/CN.4/2006/6, paras. 39-40.

<sup>6</sup> See also European Court of Human Rights: *Soering v. UK*, 1989 and *Costello v. UK*, 1993.

<sup>7</sup> I.e. violence that is gender-specific in its form or purpose in that it is aimed at “correcting” behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.

Committee against Torture indicated that “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”.<sup>8</sup> Similarly, other universal<sup>9</sup> and regional<sup>10</sup> bodies have been applying the due diligence test.

33. Whereas the Committee against Torture often does not specify whether a violation amounts to torture or to other forms of ill-treatment, it has stressed that ill-treatment is often conducive to torture, and therefore torture and cruel, inhuman and degrading treatment are closely intertwined. In the view of the Special Rapporteur, the main elements distinguishing cruel, inhuman and degrading treatment are the powerlessness of the victim and the purpose of the act.

## **B. What constitutes torture?**

### **1. Torture and ill-treatment of women in the public sphere<sup>11</sup>**

#### **(a) Rape and sexual violence**

34. Custodial violence against women very often includes rape and other forms of sexual violence such as threats of rape, touching, “virginity testing”, being stripped naked, invasive body searches, insults and humiliations of a sexual nature, etc.<sup>12</sup> It is widely recognized, including by former Special Rapporteurs on torture<sup>13</sup> and by regional jurisprudence, that rape

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<sup>8</sup> Committee against Torture general comment No. 2 (2007) on the implementation of article 2 by States parties, para. 18.

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination against Women general comment No. 19 (1992) on violence against women, para. 9.

<sup>10</sup> See Inter-American Court of Human Rights (series C), *Velázquez Rodríguez v. Honduras*, 29 July 1988, No. 4. In *MC v. Bulgaria*, the European Court of Human Rights found that the failure to establish and apply a criminal law system punishing all forms of rape and sexual abuse constituted a violation of the prohibition of degrading treatment.

<sup>11</sup> The large majority of the communications sent by the Special Rapporteur on torture in relation to violence against women involve the active participation of State officials both in and outside of classic detention settings, which include prisons, police and military detention facilities, psychiatric clinics, social care centres etc. During the last four years the Special Rapporteur on torture has sent 122 joint communications together with the Special Rapporteur on violence against women (22 in 2007, 27 in 2006, 27 in 2005 and 46 in 2004).

<sup>12</sup> See for instance Committee against Torture concluding observations on Mexico, CAT/C/MEX/CO/4; on Guyana, CAT/C/GUY/CO/1; on Togo, CAT/C/TGO/CO/1; on Burundi, CAT/C/BDI/CO/1.

<sup>13</sup> See E/CN.4/1992/SR.21, para. 35 and E/CN.4/1995/34, para. 19.



constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.<sup>14</sup> In a 1997 decision on a case of custodial rape the European Court of Human Rights acknowledged that “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim” and “rape leaves deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence”.<sup>15</sup>

35. In the area of international criminal law, the International Criminal Tribunal for the former Yugoslavia decisions in the Celebici and Furundzija cases have contributed to the international recognition of rape as a form of torture.<sup>16</sup> Also, international criminal tribunals, in their jurisprudence, have broadened the scope of crimes of sexual violence that can be prosecuted as rape to include oral sex and vaginal or anal penetration through the use of objects or any part of the aggressor’s body.<sup>17</sup> This is crucial because in many countries rape is still defined as “carnal access”, reducing it to penetration with the male sexual organ. It is noteworthy that other forms of sexual violence, whether defined as rape or not, may constitute torture or ill-treatment<sup>18</sup> and must not be dealt with as minor offences.<sup>19</sup>

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<sup>14</sup> For instance, the Committee against Torture found in its decision *V.L. v. Switzerland* (CAT/C/37/D/262/2005) that “the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities”, para. 8.10; see also *Mejía v. Perú*, Inter-American Commission on Human Rights, annual report 1995, OEA/Ser.L/V/II.91. Doc. 7. rev., case 10, 970.

<sup>15</sup> European Court of Human Rights, *Aydin v. Turkey* (57/1996/676/866), 25 September 1997.

<sup>16</sup> See judgements on *Prosecutor v. Delalic, et al.*, case No. IT-96-21-T, 16 November 1998 and *Prosecutor v. Furundzija*, case No. IT-95-17/1-T, 10 December 1998.

<sup>17</sup> International Criminal Court, Elements of Crimes, article 8 (2) (b) (xxii)-1 of the ICC Elements of Crimes.

<sup>18</sup> For instance, the Inter-American Court of Human Rights resorted to the international jurisprudence on rape to conclude that “the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal ‘examination’ constituted sexual rape that due to its effects constituted torture.” See *Miguel Castro-Castro Prison v. Peru*, Inter-American Court of Human Rights judgement of 25 November 2006, para. 312.

<sup>19</sup> As for example in a case currently under consideration in Mexico (*Ana María Velasco contra Doroteo Blas Marcelo*, 79/2006, juzgado Primero Penal de Tenango de Valle, Estado de México), where a policeman forced his penis into her mouth and was charged with having committed a “libidinous act”. In relation to the same incident, the Special Rapporteur on the question of torture and the Special Rapporteur on violence against women sent a joint allegation letter to the Government of Mexico on 18 December 2006 concerning, inter alia, the sexual abuse of a group of women by police officers during incidents in San Salvador Atenco on 3 and 4 May 2006, to which the Government responded on 17 May 2007.

36. The case law presented here has, without exception, emphasized the severe pain and suffering endured by victims of rape. However, the Special Rapporteur wishes to highlight some of the unique dimensions of this form of torture. When Government officials use rape, the suffering inflicted might go beyond the suffering caused by classic torture, partly because of the intended and often resulting isolation of the survivor. In some cultures a rape victim may be rejected or formally banished from her community or family. This rejection greatly hinders the psychological recovery of the victim and often condemns her to destitution and extreme poverty. Even when rape survivors are not rejected they still face important difficulties in establishing intimate relationships.<sup>20</sup> Furthermore, raped women are often infected with sexually transmitted diseases or may experience unwanted pregnancies, miscarriages, forced abortions or denial of abortion.<sup>21</sup> Because of the stigma attached to sexual violence, official torturers deliberately use rape to humiliate and punish victims but also to destroy entire families and communities. This is particularly clear when State officials force family members to rape their female relatives or to witness their rape. The Akayesu decision, in which the International Criminal Tribunal for Rwanda (ICTR) recognized rape as a form of genocide in the same way as any other act committed with specific intent to destroy a particular group, is a striking acknowledgment of the destructive potential of rape. The ICTR made it explicit that these rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities.<sup>22</sup>

**(b) Violence against pregnant women and denial of reproductive rights<sup>23</sup>**

37. In its general comment No. 28 (2000) on article 3 (The equality of rights between men and women), the Human Rights Committee explicitly indicated that breaches of article 7 include forced abortion as well as denial of access to safe abortion to women who have become pregnant as a result of rape. The Committee against Torture has also identified reproductive decisions as a context in which women are particularly vulnerable<sup>24</sup> and expressed concern regarding domestic legislation that severely restricts access to voluntary abortion in cases of rape.<sup>25</sup> They have also condemned the practice of attempting to obtain confessions as a condition of

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<sup>20</sup> See for example, Evelyn Mary Aswad, "Torture by means of rape", *Georgetown Law Journal*, vol. 84, No. 5 (May 1996), p. 1913. Available at: <http://spr.org/pdf/Torture%20by%20Means%20of%20Rape.pdf>.

<sup>21</sup> See also A/54/426, A/55/290, A/59/324, E/CN.4/1995/34 and E/CN.4/1998/54.

<sup>22</sup> *Prosecutor v. Akayesu*, ICTR-96-4, 13 February 1996, amended 17 June 1997.

<sup>23</sup> The Special Rapporteur has sent nine communications in the last four years, linked to miscarriages as a result of torture or ill-treatment in detention. See for example A/HRC/4/33/Add.1, para. 11. He has also received information regarding female detainees forced to undergo abortions, so that they could be sent to labour camps. See for example E/CN.4/2005/62/Add.1, para. 286.

<sup>24</sup> CAT general comment No. 2 (2007) on implementation of article 2 by States parties, para. 22.

<sup>25</sup> See for example, concluding observations on Peru, CAT/C/PER/CO/4, para. 23.

potentially life-saving medical treatment after abortion.<sup>26</sup> Whereas, in a case where a woman's health was threatened if she gave birth, the European Court of Human Rights recently found a violation of the applicant's right to her private life, it regrettably did not establish that this amounted to inhuman treatment.<sup>27</sup>

38. The Human Rights Committee has referred to the sterilization of women without their consent as a breach of ICCPR article 7.<sup>28</sup> The Special Rapporteur also stresses that, given the particular vulnerability of women with disabilities,<sup>29</sup> forced abortions and sterilizations of these women if they are the result of a lawful process by which decisions are made by their "legal guardians" against their will, may constitute torture or ill-treatment.<sup>30</sup>

39. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), laws or policies prescribing the use of forced abortion or forced sterilization as methods of enforcement, or as punishment for non-compliance, would be considered inherently persecutory and will therefore give rise to justified claims for refugee status in view of the serious human rights violations each individual subject to these measures would suffer.<sup>31</sup> It is also worth noting that, in the asylum context, forced sterilization has been found to constitute

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<sup>26</sup> See concluding observations on Chile, CAT/C/CR/32/5, para. 6 (j), in which the Committee expressed concern over "Reports that life-saving medical care for women suffering complications after illegal abortions is administered only on condition that they provide information on those performing such abortions."

<sup>27</sup> See European Court of Human Rights, case No. 5410/03, *Tysiāc v. Poland*, 20 March 2007.

<sup>28</sup> See Human Rights Committee (HRC) general comment No. 28 (2000) on article 3 (The equality of rights between men and women). See also HRC concluding observations on Slovakia, CCPR/CO/78/SVK, para. 12; on Japan, CCPR/C/79/Add.102, para. 31; and on Peru, CCPR/CO/70/PER, para. 21. See also Committee against Torture concluding observations on Peru, CAT/C/PER/CO/4, para. 23.

<sup>29</sup> Surveys conducted in Europe, North America and Australia have shown that over half of women with disabilities have experienced physical abuse. See Human Rights Watch, *Women and Girls with Disabilities*, available at <http://www.hrw.org/women/disabled.html>.

<sup>30</sup> See also Convention on the Rights of Persons with Disabilities, articles 12, paragraphs 4 and 23, paragraph 1 (b) and (c) and report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2005/51, paras. 9 and 12.

<sup>31</sup> "UNHCR Note on Refugee Claims Based on Coercive Family Panning Laws and Policies", para. 13, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4301a9184>; see also: *Reproductive Health in Refugee Situations. An Inter-Agency Field Manual*, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=403b6ceb4>.

“a permanent and ongoing form of persecution”<sup>32</sup> and to “involve drastic and emotionally painful consequences that are unending”.<sup>33</sup> The Special Rapporteur recalls that enforced sterilization as well as forced pregnancy constitute crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population.<sup>34</sup>

**(c) Corporal punishment**

40. Between 2004 and 2007 the Special Rapporteur sent 13 joint communications concerning 21 women sentenced to death by stoning and 2 sentenced to flogging under sharia law. Stoning is a method of capital punishment primarily used for crimes of adultery and other related offences, of which women are disproportionately found guilty, which is inconsistent with the prohibition of discrimination on the basis of sex enshrined in all major human rights instruments, including the Convention on Elimination of All Forms of Discrimination against Women (CEDAW).<sup>35</sup> The Special Rapporteur on torture, the Human Rights Committee, the Committee against Torture and the Commission on Human Rights have reiterated that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>36</sup>

**(d) Women-specific aspects of detention**

41. Women in contexts of detention or control, such as psychiatric institutions or social care centres, have specific needs in terms of reproductive health care, family contact, hygiene, etc., which are often overlooked. They are often the sole or primary caregivers of young children and therefore frequently mention concern for their children as their biggest worry, especially at the initial stage of detention.<sup>37</sup> Breastfeeding mothers are exposed to particular suffering when they are separated from their babies. Pregnant women should not be deprived of their liberty unless there are absolutely compelling reasons to do so and their particular vulnerability should be borne in mind. If they need to be detained, the quality and quantity of food and the medical care provided to pregnant women should meet their specific requirements. Measures of physical

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<sup>32</sup> Matter of Y-T-L-, 23 I & N Dec. 601 (BIA 2003), US Board of Immigration Appeals, available at <http://www.usdoj.gov/eoir/vll/intdec/vol23/3492.pdf>.

<sup>33</sup> United States Court of Appeal for the Ninth Circuit, *Qu v. Gonzales*, No. 03-71141, March 2005.

<sup>34</sup> Rome Statute of the International Criminal Court, article 7, paragraph 1 (g).

<sup>35</sup> Statement by Yakin Ertürk, Special Rapporteur on violence against women, Istanbul, 26 November 2007, pp. 2-3.

<sup>36</sup> See A/60/316, paras. 18-28.

<sup>37</sup> Megan Bastick, *Women in Prison: A commentary on the Standard Minimum Rules for the Treatment of Prisoners*, Quaker United Nations Office, 2005.

restraint should be avoided during delivery.<sup>38</sup> Poor hygiene is also an issue that has a greater adverse impact upon women detainees. For example, menstruating women need access to appropriate sanitary protection.

42. In many countries male staff work in “contact positions” with women detainees and this situation increases their risk of being sexually assaulted since male officers may take advantage of routine pat-frisks to touch a woman’s breasts, thighs, vagina etc. They may also abuse their responsibilities regarding surveillance in order to watch women prisoners when naked. Physical violence can entail rapes of women detainees, but the abuse of women by male staff can also be more subtly disguised. For instance, they may offer women special privileges or goods otherwise hard to obtain. Equally, they may threaten to deny them access to their entitlements. It is crucial to bear in mind that under such circumstances it can never be argued that a woman has “consented” to a sexual relationship, even if this appears to be the case.

43. Finally, in some countries, prolonged detention as such can become ill-treatment, as is the case for instance when women are detained for their “protection” for up to 14 years because they are at risk of becoming victims of honour crimes.<sup>39</sup>

## **2. Torture and ill-treatment in the private sphere: violence within the family and the community**

44. While there is no exhaustive list of forms of violence that may constitute torture or cruel, inhuman and degrading treatment - rather it may encompass different types of so-called traditional practices (such as dowry-related violence, widow-burning, etc.), violence in the name of honour, sexual violence and harassment, as well as slavery-like practices often of a sexual nature - the Special Rapporteur would like to focus on three of them: domestic violence (in the form of intimate partner violence), female genital mutilation and human trafficking. The Special Rapporteur wishes to highlight these forms of violence for three reasons. First, they are widespread and touch millions of women around the world every year.<sup>40</sup> Second, in many parts

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<sup>38</sup> Tenth General Report on the activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment covering the period 1 January to 31 December 1999, para. 27, available at: [http://www.cpt.coe.int/en/annual/rep-10.htm#\\_Toc490017789](http://www.cpt.coe.int/en/annual/rep-10.htm#_Toc490017789). See also concluding observations of the Committee against Torture, CAT/C/USA/CO/2, para. 33.

<sup>39</sup> See the report of the Special Rapporteur on his mission to Jordan in June 2006, A/HRC/4/33/Add.3, paras. 39 and 72.

<sup>40</sup> The United Nations estimates that as many as 4 million women and children become victims of human trafficking every year, most of whom are exploited for sexual purposes. According to the World Health Organization, the number of girls and women who have undergone female genital mutilation (FGM) is estimated at between 100 and 140 million. Each year, a further 2 million girls and women undergo FGM. However, the most current form of violence against women around the world is that perpetrated by husbands or other intimate partners. See, for example, *WHO Multi-country Study on Women’s Health and Domestic Violence against Women: Initial results on prevalence, health outcomes and women’s responses* (Geneva, 2005).

of the world they are still trivialized and the comparison between them and “classic” torture will raise awareness with regard to the level of atrocity that they can reach. Third, stating that these forms of violence can amount to torture if States fail to act with due diligence, illustrates the parallels between torture and other forms of violence against women.

**(a) Intimate partner violence<sup>41</sup>**

45. As with female detainees who experience torture, battered wives may be beaten with hands and objects, kicked, strangled, stabbed or burned. Rape and other forms of sexual abuse are used by intimate partners as well as by prison guards or police officers. In both scenarios, physical violence is usually accompanied by insults, varied forms of humiliation, and threats to kill or harm the victim or her family members (often children). Domestic violence, as well as torture, tends to escalate over time, sometimes resulting in death or leaving women’s bodies mutilated or permanently disfigured. Women who experience such violence, whether in their homes or in a prison, suffer depression, anxiety, loss of self-esteem and a feeling of isolation. Indeed, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture as well as by victims of rape.<sup>42</sup> Another parallel between privately battering women and torture, which refers back to the element of powerlessness, is the intention to keep the victim in a permanent state of fear based on unpredictable violence by seeking to reduce the person to submission and destroy his/her capacity for resistance and autonomy with the ultimate aim of achieving total control.

46. State acquiescence in domestic violence can take many forms, some of which may be subtly disguised. For instance, “Civil laws that appear to have little to do with violence also have an impact on women’s ability to protect themselves and assert their rights. Laws that restrict women’s right to divorce or inheritance, or that prevent them from gaining custody of their children, receiving financial compensation or owning property, all serve to make women dependent upon men and limit their ability to leave a violent situation.”<sup>43</sup> The Special Rapporteur considers that States should be held accountable for complicity in violence against women, whenever they create and implement discriminatory laws that may trap women in abusive circumstances. State responsibility may also be engaged if domestic laws fail to provide adequate protection against any form of torture and ill-treatment in the home. For instance, in the case of *A. v. the United Kingdom*, the European Court of Human Rights considered a complaint concerning a minor whose stepfather had repeatedly beaten him. The stepfather had been acquitted by domestic courts under the defence of “reasonable chastisement” as provided under English law. The Court, referring to the beatings, found that “treatment of this kind reaches the

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<sup>41</sup> See E/CN.4/1996/53, para. 50.

<sup>42</sup> For a comparison between official torture and domestic violence see Rhonda Copelon, “Recognizing the egregious in the everyday: domestic violence as torture”, *Columbia Human Rights Law Review*, 1994.

<sup>43</sup> *Not a minute more: Ending violence against women*, UNIFEM, New York, 2003, p. 43.

level of severity prohibited by article 3<sup>44</sup> of the European Convention on Human Rights. The Court further stated that “the failure to provide adequate protection constitutes a violation of article 3 of the Convention”.<sup>45</sup>

47. But even if there are national laws against domestic violence in place, law enforcement agencies and the prosecution services may still not consider cases of domestic violence as serious violations and may be therefore reluctant to bring complaints, conduct investigations and prosecute perpetrators. In 2001 the Inter-American Commission on Human Rights considered the case of Maria da Penha, who had suffered physical and psychological violence at the hands of her husband since 1983. He twice tried to kill her and left her paralysed at the age of 38. Fifteen years later, the judicial investigation initiated by Maria da Penha had not been concluded. In this case, the Inter-American Commission held that the legislation was inadequate and that the State was responsible for not having acted with due diligence and added that “discriminatory judicial ineffectiveness creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts”.<sup>46</sup>

48. As can be seen from the above, international law has developed considerably over the years to become more gender-inclusive. In 1996, the Special Rapporteur on violence against women stated that: “the argument that domestic violence should be understood and treated as a form of torture and, when less severe, ill-treatment, is one that deserves consideration by the rapporteurs and treaty bodies that investigate these violations together perhaps with appropriate NGO experts and jurists”.<sup>47</sup> In 2000, the Human Rights Committee indicated that domestic violence can give rise to violations of the right not to be subjected to torture or ill-treatment under article 7 of the ICCPR.<sup>48</sup> In line with this statement the Committee has mentioned the need for States to adopt specific legislation combating domestic violence,<sup>49</sup> including legislation criminalizing marital rape.<sup>50</sup> More specifically, it has called upon States to ensure that their justice systems incorporate restraining orders to protect women from violent family members,

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<sup>44</sup> European Court of Human Rights, case No. 100/1997/884/1096, *A. v. the United Kingdom*, judgement 23 September 1998, para. 21.

<sup>45</sup> *Ibid.*, para. 24.

<sup>46</sup> Inter-American Commission on Human Rights, case No. 12.051, *Maria da Penha v. Brazil*, 16 April 2001.

<sup>47</sup> E/CN.4/1996/53, para. 50.

<sup>48</sup> Human Rights Committee general comment No. 28 (2000) on article 3 (The equality of rights between men and women), para. 11.

<sup>49</sup> See CCPR/CO/75/YEM, para. 6; CCPR/CO/79/LKA, para. 20; and CCPR/CO/80/DEU, para. 14.

<sup>50</sup> See CCPR/CO/79/LKA, para. 20.

provide shelters and other support to victims, establish measures to encourage women to report domestic violence to the authorities,<sup>51</sup> and offer “material and psychological relief to the victims”.<sup>52</sup> The Committee against Torture has also referred to the prevalence of domestic violence, and the urgent need to protect women by adopting specific legislative and other measures.<sup>53</sup> The Committee has stressed the need to take action in cases where a woman is reportedly being confined against her will by members of her family and the importance of ensuring that fair standards of proof are required.<sup>54</sup>

49. A side glimpse at refugee law shows that in cases of domestic violence where the State is unable or unwilling to intervene to provide protection, victims have increasingly been recognized as refugees. In one model case, the High Court of Australia granted refugee status to Mrs. Khawar, who claimed to be the victim of serious and prolonged domestic violence on the part of her husband and members of his family, and that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection. This refusal was considered not only to be a mere inability to provide protection, but also “alleged tolerance and condonation”.<sup>55</sup>

**(b) Female genital mutilation (FGM)<sup>56</sup>**

50. Like torture, female genital mutilation (FGM) involves the deliberate infliction of severe pain and suffering. The pain is usually exacerbated by the fact that the procedure is carried out with rudimentary tools and without anaesthetic. Many girls enter a state of shock induced by the extreme pain, psychological trauma and exhaustion from screaming. The procedure can result in death through severe bleeding leading to haemorrhagic shock, neurogenic shock as a result of

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<sup>51</sup> See CCPR/CO/74/HUN, para. 10 and CCPR/CO/80/LTU, para. 9.

<sup>52</sup> See CCPR/CO/81/LIE, para. 8.

<sup>53</sup> See, concluding observations on the Russian Federation, CAT/C/RUS/CO/4, para. 11; South Africa, CAT/C/ZAF/CO/1, para. 23; Qatar, CAT/C/QAT/CO/1, para. 22; Georgia, CAT/C/GEO/CO/3, para. 19; Republic of Korea, CAT/C/KOR/CO/2, para. 17; Greece, CAT/C/GR/33/2, paras. 5 (k) and 6 (l); and Zambia, A/57/44, para. 65 (Zambia).

<sup>54</sup> See CAT/C/QAT/CO/1, para. 22.

<sup>55</sup> See Alice Edwards, “Age and gender dimensions in international refugee law”, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Erika Feller, Volker Türk and Frances Nicholson eds., (United Kingdom, Cambridge University Press, 2003), p. 60.

<sup>56</sup> The World Health Organization defines female genital mutilation (FGM) as all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.



pain and trauma, and overwhelming infection and septicaemia. Other immediate medical complications include ulceration of the genital region, injury to adjacent tissues and urine retention. Although the scientific research addressing the psychological consequences of FGM is limited, some studies have found an increased likelihood of fear of sexual intercourse, post-traumatic stress disorder, anxiety, depression and memory loss, and that the cultural significance of the practice might not protect against psychological complications.<sup>57</sup>

51. The pain inflicted by FGM does not stop with the initial procedure, but often continues as ongoing torture throughout a woman's life. Depending on the type and severity of the procedure performed,<sup>58</sup> women may experience long-term consequences such as chronic infections, tumours, abscesses, cysts, infertility, excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis and other blood-borne diseases, damage to the urethra resulting in urinary incontinence, painful menstruation, painful sexual intercourse and other sexual dysfunctions.<sup>59</sup> FGM increases the risk for both mother and child during childbirth, including higher incidences of caesarean section and post-partum haemorrhage. In addition, women who have been infibulated have to be deinfibulated upon marriage, and later again during childbirth, hence causing further pain and psychological trauma.<sup>60</sup>

52. With regard to the element of powerlessness it must be noted that the cutting is usually carried out before a girl's tenth birthday.<sup>61</sup> In such circumstances, girls are clearly under

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<sup>57</sup> See for example, J. Whitehorn, O. Ayonrinde and S. Maingay, "Female genital mutilation: cultural and psychological implications", *Sexual & Relationship Therapy*, vol. 17, No. 2, (May 2002), pp. 161-170; Alice Behrendt and Steffen Moritz, "Post-traumatic stress disorder and memory problems after female genital mutilation", *The American Journal of Psychiatry*, vol. 162, No. 5 (May 2005), pp. 1000-1002; Haseena Lockhat, *Female Genital Mutilation: Treating the Tears*, (United Kingdom, Middlesex University Press, 2006); A. Elnashar and R. Abdelhady, "The impact of female genital cutting on health of newly married women", *International Journal of Gynecology & Obstetrics*, vol. 97, No. 3, (June 2007), p. 169.

<sup>58</sup> According to the World Health Organization, there are different types of female genital mutilation practised today. See <http://www.who.int/reproductive-health/fgm/terminology.htm>.

<sup>59</sup> See <http://www.who.int/mediacentre/factsheets/fs241/en/>. See also the report of Special Rapporteur on violence against women E/CN.4/2002/83, p. 15.

<sup>60</sup> UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, (Italy, Innocenti Digest, 2005), p. 18.

<sup>61</sup> The Demographic and Health Survey carried out in 1997 in Yemen found that as many as 76 per cent of girls underwent FGM in their first two weeks of life. UNICEF mentions that about 90 per cent of girls in Egypt are cut between the ages of 5 and 14 years, while in Ethiopia, Mali and Mauritania, 60 per cent or more of girls surveyed underwent the procedure before their fifth birthday. In Sudan, a 2004 study found that at least 75 per cent of girls had undergone FGM by the age of 9 to 10 in South Darfur. *Ibid.*, p. 6.

the complete control of their parents and communities and do not have the possibility of resisting. On the other hand, adolescent girls and women very often agree to undergo FGM because they fear the non-acceptance of their communities, families and peers.<sup>62</sup>

53. It is clear that even if a law authorizes the practice, any act of FGM would amount to torture and the existence of the law by itself would constitute consent or acquiescence by the State. The “medicalization” of FGM, whereby girls are cut by trained personnel rather than by traditional practitioners is on the rise in some African countries.<sup>63</sup> The Special Rapporteur stresses that from a human rights perspective, medicalization does not in any way make the practice more acceptable.<sup>64</sup> Even in contexts where FGM has been recognized as a criminal offence, but where public hospitals offer this “service”, it constitutes torture or ill-treatment. Also in cases where FGM is performed in private clinics and physicians carrying out the procedure are not being prosecuted, the State de facto consents to the practice and is therefore accountable.

54. Many special procedures have found that female genital mutilation may constitute torture and that States have the responsibility to take all the necessary measures to eradicate it.<sup>65</sup> The Special Rapporteur on torture considers FGM a violation falling within his mandate, and has welcomed the adoption of legislation prohibiting female genital mutilation after his visits to Nigeria and Togo in 2007, but regretted at the same time that the practice and social acceptance of female genital mutilation persist, and that effective mechanisms to enforce prohibition are absent.<sup>66</sup> The Committee against Torture has expressed concern regarding the lack of domestic legislation outlawing female genital mutilation in specific countries.<sup>67</sup> Furthermore, the Human Rights Committee has stated that female genital mutilation is in breach of article 7 of the ICCPR and has raised concerns regarding its persistence.<sup>68</sup>

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<sup>62</sup> Ibid., p. 11.

<sup>63</sup> Ibid., pp. 7 and 17.

<sup>64</sup> The Special Rapporteur also recalls that article 5 of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa stipulates that States shall prohibit, through legislative measures backed by sanctions, all forms of female genital mutilation, including its medicalization and paramedicalization.

<sup>65</sup> See E/CN.4/1986/15, para. 38. See also the report of the Special Rapporteur on violence against women (E/CN.4/2002/83, para. 6).

<sup>66</sup> See press releases of 12 March and 18 April 2007.

<sup>67</sup> See for example concluding observations on Cameroon, CAT/C/CR/31/6, para. 7.

<sup>68</sup> See Human Rights Committee general comment No. 28 (2000) on article 3 (The equality of rights between men and women), paragraph 11; see also concluding observations on Uganda, CCPR/CO/80/UGA, para. 10; Mali, CCPR/CO/77/MLI, para. 11; Sweden, CCPR/CO/74/SWE, para. 8; Yemen, CCPR/CO/84/YEM, para. 11.

55. UNHCR has stated that “FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be considered as a refugee if she or her daughters fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or to allow her daughters to undergo the practice.”<sup>69</sup> In the refugee context it has also been found that FGM amounts to “continuing and permanent persecution”.<sup>70</sup>

**(c) Human trafficking**

56. Although all human trafficking cases have their individual characteristics, most follow the same stages: victims are abducted or recruited in the country of origin, transferred and then exploited in the destination country, where they are forced into sexual or labour servitude or other forms of exploitation. Victims of human trafficking are very often kept in forced confinement.<sup>71</sup> Women working in brothels often undergo constant surveillance through the use of video cameras and may be forced to use drugs or stimulants by their traffickers as a means of control. A recent study on trafficking in women from Romania to Germany shows that the level of psychological control held by the traffickers over their victims is generally so high that most of the victims are not able to act on any opportunity to escape.<sup>72</sup> During the exploitation phase victims are often forced to work up to 18-24 hours per day and subjected to severe forms of physical and mental violence, including beatings, sexual abuse, humiliations and threats that may amount to torture or at least cruel, inhuman and degrading treatment.<sup>73</sup> Psychological problems observed in victims of trafficking include post-traumatic stress disorder, depression, overwhelming shame, loss of self-esteem, loss of sense of safety, dissociation, anxiety and

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<sup>69</sup> Office of the United Nations High Commissioner for Refugees (UNHCR), Memorandum on female genital mutilation, 10 May 1994, para. 7.

<sup>70</sup> United States Court of Appeals of the Ninth Circuit, *Mohamed v. Gonzales*, Nos. 03-70803 and 03-72265, March 2005; see also “Report and analysis of immigration and nationality law”, *Thomson West: Interpreter Releases*, vol. 83, No. 9, 27 February 2006, pp. 385-391. Ditto. Ed.

<sup>71</sup> With respect to the situation of domestic workers, see for example the report of the Special Rapporteur on trafficking in persons, especially women and children regarding her mission to Bahrain, Oman and Qatar, A/HRC/4/23/Add.2, paras. 69-75. For information regarding forced marriage in the context of trafficking, see A/HRC/4/23, paras. 13-60.

<sup>72</sup> United Nations Interregional Crime and Justice Research Institute (UNICRI), *Trafficking in Women from Romania into Germany*, March 2005, p. 46, available at: <http://www.gtz.de/de/dokumente/en-svbf-unicri-trafficking-romania.pdf>.

<sup>73</sup> See article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

phobias.<sup>74</sup> It has been reported that the model programmes developed to provide assistance to victims of classic torture are often used by organizations that assure psychological and medical assistance for trafficked women.<sup>75</sup>

57. Regarding State duties in this context, in the case of *Siliadin v. France*, the European Court of Human Rights found that the State failed to live up to the positive obligation to have in place a criminal law system to prevent, prosecute and punish non-State actors involved in domestic slavery.<sup>76</sup> States may also be held accountable for failing to provide appropriate protection to victims of human trafficking. In many instances trafficked women are not recognized as victims, often owing to the existence of “contracts” between them and their “employers”. The Special Rapporteur stresses that any initial consent becomes meaningless, once the element of powerlessness is fulfilled.<sup>77</sup> He also recalls that in the case of *Barar v. Sweden*, the European Court of Human Rights held that the expulsion of a person to a State where he/she would be subjected to slavery or forced labour might raise issues under the obligation to prohibit torture.<sup>78</sup>

58. The Committee against Torture has recognized that human trafficking and torture are closely intertwined and has repeatedly commented on the need for legislation and other measures.<sup>79</sup>

### 3. Women in the refoulement or refugee context

59. The refoulement context sheds light on several key issues, notably the question of re-affiliation.<sup>80</sup> There is no limit on where trauma stemming from past violation ends.

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<sup>74</sup> See for example, United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (New York, 2006), p. 156.

<sup>75</sup> *Ibid.*

<sup>76</sup> European Court of Human Rights, case No. 73316/01, *Siliadin v. France*, 26 July 2005.

<sup>77</sup> See article 3, paragraphs (b) and (c) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

<sup>78</sup> *Barar v. Sweden*, case No. 42367/98. Cases and Comment, European Human Rights Law Review, vol. 3 (1999), p. 330.

<sup>79</sup> See concluding observations on the Russian Federation, CAT/C/RUS/CO/4; Togo, CAT/C/TGO/CO/1; Qatar, CAT/C/QAT/CO/1; Republic of Korea, CAT/C/KOR/CO/2; Tajikistan, CAT/C/TJK/CO/1; South Africa, CAT/C/ZAF/CO/1; and Austria, CAT/C/AUT/CO/3.

<sup>80</sup> See also UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (HCR/GIP/02/01), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3d36f1c64>. See also UNHCR Guidelines on International Protection No. 7: The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of

Some forms of torture might constitute continuing and permanent violations and in some cases, re-exposure to the stimulus might constitute psychological torture (e.g. when medical expertise indicates that there might be a risk of suicide if a survivor is returned). In the refugee context, even if there is no risk of future persecution, past persecution may nonetheless warrant granting of international protection.<sup>81</sup>

60. Another gendered aspect of non-refoulement is the argument used with regard to the risk of women to be subjected to FGM, that there is a possibility of “internal flight”, meaning women can return and live safely in another part of the country. In particular in gender-based refugee claims, the lack of State protection in one part of the country is often an indication that the State is also not able or willing to protect the woman or girl in any other part of the country. Furthermore, if the woman or girl relocates, for example from a rural to an urban area to avoid FGM, the protection risks in the place of relocation would have to be carefully assessed.<sup>82</sup>

### **C. Justice for women-survivors of torture**

#### **1. Access to justice**

61. Whereas in many parts of the world women have to overcome a variety of hurdles, including financial and economic constraints, restricted movement, discriminatory laws etc. in order to access justice, victims of sexual violence face particular obstacles at all stages of the criminal justice system. While not widely used, international instruments lay the foundation for special temporary measures to be taken to ensure effective access to justice for women with respect to all forms of violence, including through the enjoyment of fundamental economic and social rights, without which women are less likely to seek justice. In addition, women often do not report sexual violence because of the stigma and sometimes rejection they fear from their family or community. In a recent decision the Committee against Torture held that “It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family

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Trafficking and Persons At Risk of Being Trafficked (HCR/GIP/06/07), available at <http://www.unhcr.org/cgi-bin/teXis/vtx/refworld/rwmain?docid=443679fa4>.

<sup>81</sup> See UNHCR’s Position on Categories of Persons from Bosnia and Herzegovina in Continued Need of International Protection, September 2001, para. 82. For a discussion of the obstacles to return arising from past persecution, see United Nations High Commissioner for Refugees and United Nations High Commissioner for Human Rights, *Daunting Prospects - Minority Women: Obstacles to their Return and Integration* (Sarajevo, April 2000), p. 16.

<sup>82</sup> For detailed guidance on internal flight, see UNHCR Guidelines on International Protection No. 4 “Internal Flight or Relocation Alternative” within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/03/04), available at <http://www.unhcr.org/publ/PUBL/3f28d5cd4.pdf>.

members.”<sup>83</sup> At the next stage, women victims of sexual violence may be interviewed and examined by personnel that have not been trained in gender-sensitive methods of recording evidence and interviewing. Moreover, collecting evidence of gender-based violence is a neglected area in many law enforcement contexts. In some countries, there might not be independent medical institutions to conduct such examinations; in others laws do not require police to send alleged rape victims for an immediate medical examination. One of the most egregious examples of re-victimization of rape victims, taken up on several occasions by the Committee against Torture, is when domestic laws and policies permit exemption from punishment of a rapist if he subsequently marries the victim.<sup>84</sup>

62. Also rules of procedure and evidence of national courts may overlook women-specific needs: they often require evidence of physical resistance by the victim in order to show lack of consent, which means that women who were too terrified to fight back and struggle with the perpetrator may be unable to prove that they were raped. Also courts frequently ignore “soft” evidence such as psychological assessments (“battered woman syndrome”). Furthermore, in some countries a rape victim must present eye witnesses in order to prove that the crime took place, which is obviously problematic in cases of sexual violence. Evidence of the prior sexual conduct of the victim is also frequently used during trials of crimes of sexual violence, in an attempt to prove that the victim is predisposed to promiscuity and therefore consented to sex on the occasion in question. The admission of this type of evidence increases the trauma of testifying, as women may be humiliated and forced to expose aspects of their private lives that are irrelevant for the crime being tried. Another particular dilemma is the double requirement for a victim to show that on the one hand the act of violence was traumatizing, but that on the other hand, this does not limit the credibility of the testimony.

63. In this regard, much can be learned from international criminal courts. The Furundzija decision of the International Criminal Tribunal for the former Yugoslavia clearly stated that post-traumatic stress disorder does not affect the credibility of the witness. It was the first international court to adopt a rule prohibiting the admission of evidence relating to the prior sexual conduct of the victim.<sup>85</sup> Also the rules of the International Criminal Court (ICC) explicitly provide that silence or lack of resistance cannot be used to imply consent, and that consent cannot be inferred from the words or conduct of the victim if the victim was subjected to force, threats of force or a coercive environment.<sup>86</sup> The Special Rapporteur further stresses that in situations where the perpetrator has complete control over the victim the issue of consent becomes irrelevant.

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<sup>83</sup> *V.L. v. Switzerland*, CAT/C/37/D/262/2005, para. 8.8.

<sup>84</sup> See concluding observations on Burundi, CAT/C/BDI/CO/1, para. 11; Guatemala, CAT/C/GTM/CO/4, para. 19; and Cameroon, CAT/C/CR/31/6, para. 7 (c).

<sup>85</sup> In this regard see also rules 70 and 71 of the ICC Rules of Procedures and Evidence, as well as article 69, paragraph 4, of the Rome Statute.

<sup>86</sup> See rule 70, paragraphs (a), (b) and (c) of the ICC Rules of Procedures and Evidence.

64. In addition, the ICC established a Victims and Witnesses Unit within the Registry, which applies protective measures and security arrangements, including counselling and other appropriate assistance.<sup>87</sup> During trial, victims and witnesses to crimes involving sexual violence can be protected from physical violence or further stigmatization.

## **2. Rehabilitation and reparation for women-survivors of torture**

65. In the past the needs of female victims of torture, in particular victims of sexual violence have often drawn little attention. The case of the survivors of Japan's military sexual slavery practices during the Second World War is a clear lesson of what happens when the needs of victims are completely ignored. As the Committee against Torture has stated: "The survivors of the wartime abuses, acknowledged by the State party representative as having suffered 'incurable wounds', experience continuing abuse and re-traumatization as a result of the State party's official denial of the facts, concealment or failure to disclose other facts, failure to prosecute those criminally responsible for acts of torture, and failure to provide adequate rehabilitation to the victims and survivors."<sup>88</sup>

66. As can be seen from this example, stigma is a central obstacle hindering justice for victims. It is the stigma that comes with sexual violence that means that sometimes victims, especially minors, do not use the word "rape" to describe what happened to them (they might rather use words like "make love", which does not necessarily imply that violence was used; it is therefore critical to make an assessment of the circumstances). In this regard, it is interesting to underline the power of naming an act as torture at the individual level: victims of sexual violence in Guatemala have reported feeling more protected from social stigmatization when the crime is defined as torture rather than rape, forced impregnation or sexual slavery. Women who became mothers as a result of rape, as well as their children and partners, need special psychological support.

67. The Nairobi process<sup>89</sup> and the ensuing "Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation"<sup>90</sup> give an overview of the issues that have arisen in connection with gender-blind reparation following armed conflict in the past and enumerate guiding principles for future reparation policies. The Special Rapporteur would like to stress that "truth-telling" is a crucial element of reparation and that criminal justice is at the core of any reparation process and must never be restricted.<sup>91</sup> Bringing perpetrators to justice is at

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<sup>87</sup> See article 43, paragraph 6, of the Rome Statute.

<sup>88</sup> CAT/C/JPN/CO/1, para. 24.

<sup>89</sup> Background paper on women's right to reparation, International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, March 2007.

<sup>90</sup> Available at [http://www.womensrightscoalition.org/site/reparation/signature\\_en.php](http://www.womensrightscoalition.org/site/reparation/signature_en.php).

<sup>91</sup> See also General Principles 3, para. C and 1, para. F of the Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation.

the same time the precondition for another key objective of reparations: ensuring the non-repetition of the violence, which might mean that legal and customary practices which sustain the persistence and tolerance of violence against women must be modified.

### III. CONCLUSIONS AND RECOMMENDATIONS

68. With regard to a gender-sensitive definition of torture, the Special Rapporteur referred to the elements contained in the definition of the Convention against Torture and stressed that the purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the Convention is discrimination. He also proposed to introduce an additional element, “powerlessness” to underline that, whereas detention contexts are classic situations of powerlessness, it can also arise outside of detention or direct State control. Situations constituting of de facto deprivation of liberty may occur in different “private” settings. There are also contexts, where fear can create a situation of total control: battered wives, victims of trafficking, as well as women prisoners who have been abused are likely to experience a permanent state of fear based on the unpredictable behaviour of the perpetrator. The Special Rapporteur considers that the concept of “acquiescence”, aside from the protection obligations, entails a duty for the State to prevent acts of torture in the private sphere and recalls that the concept of due diligence should be applied to examine whether States have lived up to their obligations.

69. Echoing international and national jurisprudence, the Special Rapporteur stressed that rape and other serious acts of sexual violence by officials in contexts of detention or control not only amount to torture or ill-treatment, but also constitute a particular egregious form of it, due to the stigmatization they carry. He also recalled that forced abortions or sterilizations carried out by State officials in accordance with coercive family planning laws or policies may amount to torture and that any form of corporal punishment is forbidden under international law. Regarding women-specific aspects of detention, he stressed that special attention should be paid to pregnant women and mothers of young babies and the hygienic needs of women. He also pointed to the heightened risk of torture and ill-treatment if women are guarded by men or not strictly separated from male co-detainees.

70. The Special Rapporteur concluded that torture and ill-treatment can occur in different private contexts. He pointed to the striking parallels between “official” and “private” torture in terms of strategies, process and resulting trauma, and showed that State acquiescence can occur at different levels. In order to ensure a gender-inclusive approach to torture, the Special Rapporteur underlined the need to perceive it as a process. Mental trauma does not happen at one point in time, but needs to be put in context. With regard to sexual violence, stigma is a crucial element at all stages, starting from its humiliating intention as well as its impact which, apart from the often devastating physical and mental consequences, often entails exclusion from the family and/or community and can lead to outright destitution.

71. The Special Rapporteur underlined that it is crucial to interpret the torture protection framework in the light of a wide range of human rights guarantees, in particular the set of rules that has developed to combat violence against women, which can provide



valuable insights into the particular challenges posed by violence against women. Furthermore, many lessons can be drawn from international criminal law, in particular when it comes to conceptualizing what acts can be encompassed by the term “rape” and gender-sensitive rules of evidence and procedure. Refugee law provides valuable insights not only into the long-term effects of some types of violence, but also in regard to a lack of action to protect by a given State. Furthermore, other disciplines, such as psychology and medicine, should be looked to more systematically when analysing whether a specific violation may constitute torture or not.

72. With regard to justice for women victims of torture, the Special Rapporteur found that in many contexts, the criminal law system, the court rules of procedure and evidence, as well as reparation and rehabilitation programmes and policies are not sufficiently gender-sensitive. He also stressed that the victim’s consent can never be implied in a de facto situation of powerlessness.

73. The Special Rapporteur therefore calls upon States to ensure that women victims of torture and ill-treatment by officials enjoy full protection under the law and that special measures are taken to prevent sexual violence in the contexts of detention and control. He also strongly recommends that torture and ill-treatment be understood in a gender-inclusive way and that States extend their prevention efforts to fully include torture and ill-treatment of women, even if it occurs in the “private” sphere.

74. The Special Rapporteur calls upon States to address stigma, as a central obstacle hindering women victims to search justice, in particular in cases of sexual violence, at all stages of the criminal process. Special measures need to be taken to ensure that women report torture and ill-treatment and that those who receive these complaints secure the necessary evidence in a gender-sensitive manner. Court rules need to be adapted to the special needs of victims of sexual violence and ensure that objective assessments of the de facto powerlessness of a victim are made on a case-by-case basis.

75. As proclaimed by the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, reparation and rehabilitation programmes should be inclusive and participatory at all stages. Truth-telling, criminal justice and ensuring non-repetition should be at their core. The categories of crimes that trigger reparation should explicitly mention gender-specific forms of torture and ill-treatment. Special attention needs to be paid to measures aimed at overcoming the stigmatization of victims of sexual violence and to address the socio-economic impact of violence against women. Victims should also have access to medical services and to support programmes that focus on the psychological trauma caused by sexual violence. The same is applicable to individual rehabilitation processes.

76. With regard to gender-sensitive monitoring/fact-finding, the Special Rapporteur stresses that anti-torture monitoring mechanisms at the national and international levels should extend their scrutiny of the legal framework to a broad range of laws that might be

of particular concern to women.<sup>92</sup> The network of partners should include women's rights groups and relevant academic and research institutions. Further, social care centres and psychiatric institutions should be included in the visits. He also recommended that monitoring/fact-finding teams be composed in a gender-inclusive manner (including female doctors) and that all its members be trained to deal with sexual violence and other sensitive gender-specific issues. Fact-finders and monitors need to be able to ask the right questions using gender-sensitive language and to assess the psychological trauma that comes with violence, in particular sexual violence. Also, to the extent possible, fact-finding should pay attention to the private sphere: whereas it would not be feasible to visit private homes to assess whether domestic violence occurs, an effort can be made at accessing sources that would know about domestic violence, trafficking, female genital mutilation and other forms of "private" torture and ill-treatment of women. In such a scenario, fact-finding should include interviews with victims at shelters to assess the prevention and protection gaps, and medical institutions should be consulted.

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<sup>92</sup> For instance, discrimination in law; legal grounds which create impunity for violence against women; the existence of domestic violence legislation; anti-trafficking legislation; legislation against traditional harmful practices; criminalization of rape/spousal rape; legal norms relating to abortion, prostitution, etc.; and the quality of these laws.