

Compendium of legal cites regarding torture

First draft in November 2022

**Working Group of Gender-based violence as torture
inflicted by non-state actors (NST)**

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Introduction

The absolute prohibition of torture and ill-treatment has been codified in numerous universal, regional and national legal instruments¹ and has authoritatively been recognized as a core principle of customary international law which has attained peremptory status (*jus cogens*). This status makes it imperative for States to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of such violence against women and girls. In addition, States have also been instructed to address non-compliance regarding the prohibition of torture and other ill-treatment in order to secure everyone's right to be free from torture and ill-treatment without exception or discrimination of any kind and regardless of jurisdiction, territory or nationality as this is a non-negotiable, universal obligation to which all States must be held with no derogation permitted.² In addition, in all cases involving violence which are committed against women or girls, states have also been instructed to eliminate impunity, remove barriers to women's access to justice and to provide protection to the victims.³

¹ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022 Preamble citing : The Universal Declaration of Human Rights (1948) Article 5: Freedom from Torture Resolution [217 A \(III\)](#). There is one absolute prohibition in the Universal Declaration of Human Rights (UDHR) that is universally accepted as unequivocal: Article 5's ban on torture see also: The International Covenant on Civil and Political Rights, (1976) resolution [2200 A \(XXI\)](#), annex. Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; The International Covenant on Economic, Social and Cultural Rights See resolution [2200 A \(XXI\)](#), annex.; The International Convention on the Elimination of All Forms of Racial Discrimination United Nations, *Treaty Series*, vol. 660, No. 9464; The Declaration on the Elimination of Violence Against Women (1993) Article 3 The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment: Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto Ibid., vols. 1249 and 2131, No. 20378.;the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Ibid., vol. 1465, No. 24841; Convention on the Rights of the Child and the Optional Protocols thereto, Article 37 (a) State parties should ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Ibid., vol. 2220, No. 39481. Article 10. No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment: Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto Ibid., vols. 2515 and 2518, No. 44910. Article 15 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; and other relevant international human rights instruments, and the obligation of all States to promote, protect and respect all human rights and fundamental freedoms: The Vienna Declaration and Programme of Action; *The World Conference on Human Rights* also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment ... *discrimination against women* Para 30 and *The World Conference on Human Rights* reaffirms that under human rights law and international humanitarian law, freedom from torture is a right which *must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts*. Para 56 [A/CONF.157/24 \(Part I\)](#), chap. III.

² **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, Paragraphs 9-10 2021.

³ UN General Assembly Resolution **63/155**. Intensification of efforts to eliminate all forms of violence against women Preamble 2008 see also UN General Assembly Resolution **65/187** Intensification of efforts to eliminate all forms of violence against women Para 9 2011 UN General Assembly Resolution **67/144**. Intensification of efforts to eliminate all forms of violence against women Para 11 2013 UN General Assembly Resolution **69/147** Intensification of efforts to eliminate all forms of violence against women and girls Preamble 2015.

However, although the prohibition of torture and other cruel, inhuman or degrading treatment or punishment has been universally recognized as being absolute and non-derogable,⁴ today torture and ill-treatment continue to be practiced with almost complete impunity throughout the world⁵ and sexual and gender-based violence in all its different forms and manifestations has even increased worldwide.⁶ In 2021, even Special Rapporteur Nils Melzer observed that, after more than three decades of dedicated work on the mandate, torture and ill treatment continued “to be practiced with almost complete impunity throughout the world” especially as it related to women and girls. In addition, victims of such abuse or their relatives were also rarely able to obtain “the redress, reparation and rehabilitation to which they were entitled under international law.”⁷ Similar results have also continued to occur and even increase, despite repeated condemnation of all forms of sexual and gender-based violence, in vulnerable situations such as in conflict and post-conflict situations, humanitarian settings, as well as during and in the aftermath of disaster, pandemic and epidemic situations, with the increased use of technology-facilitated violence and crimes involving stalking, threats of violence or gender-based violence in all its different forms and manifestations worldwide.⁸

It is evident that all forms of violence against women seriously violate, impair or nullify the enjoyment by women of all human rights and fundamental freedoms and constitute a major impediment to the ability of women to make use of their capabilities.⁹ Yet it is also clear that victims, including women and girls of such abuse or their relatives, rarely obtain the redress, reparation and rehabilitation to which they are entitled under international law¹⁰ while, in the vast majority of cases, those responsible for perpetrating, instigating, consenting or acquiescing to torture or ill-treatment – whether States, their officials and agents, organizations, corporations or private individuals – are not being held to account.¹¹ Why is this occurring?

⁴ **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021, Preamble.

⁵ **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021 Para 2 UN General Assembly Resolution **69/147**. Intensification of efforts to eliminate all forms of violence against women and girls, Preamble.

⁶ UN General Assembly Resolution **76/304** Intensification of efforts to eliminate all forms of violence against women, Preamble.

⁷ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 1 citing [A/73/207](#), para. 58.

⁸ UN General Assembly Resolution **76/304** Intensification of efforts to eliminate all forms of violence against women, Preamble.

⁹ UN General Resolutions **63/155**. Intensification of efforts to eliminate all forms of violence against women , Preamble 2008. See also UN General Assembly Resolution **65/187** Intensification of efforts to eliminate all forms of violence against women, Preamble **75/161**. Intensification of efforts to prevent and eliminate all forms of violence against women and girls, Preamble.

¹⁰ **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021, Para 2.

Many national legal systems still do not adequately guarantee or effectively implement accountability for torture and ill-treatment and some even establish legal and practical obstacles to accountability.¹² State responses to credible allegations of torture and ill-treatment are generally characterized by one of three patterns of denial: denial of fact, denial of responsibility or denial of wrongfulness. State responses to allegations or suspicions of torture and ill-treatment are also often characterized by obfuscation rather than by the rigorous pursuit of accountability. By controlling the levers of investigation, States can effectively prevent any process of accountability from even beginning.¹³ In addition one of the most significant reasons for the accountability gap in respect of torture and ill-treatment is the profound power asymmetry between perpetrators and victims, particularly in terms of institutional control, political strength or support, and resources, as well as discrimination and the enduring legacies of colonialism. These power imbalances lead to double standards in the application of the law, benefiting not only States but also powerful and influential multinational corporations, as well as individuals that are implicated in grave exploitation and ill-treatment of individuals and communities.¹⁴

¹¹ **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021, Para 3.

¹² UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022, Preamble. See also [A/73/207](#), para. 24.

¹³ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16th, 2021 Para 50 citing [A/75/179](#).

¹⁴ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16th, 2021, Para 51.

1. Non-State Perpetrators of Torture

It is time to include non-State actors as being accountable when dealing with crimes involving non-State torture.

The steps which had been taken by the UNCAT mandate to combat torture had initially focused on States as being potential perpetrators of torture under the Convention Against Torture (CAT). However, exceptions were being created its mandate. To begin with the language used in article 1 of CAT concerning consent and acquiescence by a public official clearly extended to State obligations into the private sphere and were to be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals.¹⁵ In addition, experts were also arguing that Article 1 of CAT should be seen as reinforcing - and reinforced by – Article 4(c) of the Declaration on the Elimination of Violence against Women¹⁶ Article 4(c) proclaimed 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”.

1.1. UN Human Rights Experts observations

By 2017, the UN was facing another challenge regarding holding perpetrators of torture accountable for their actions. In July of 2017, U.N. Deputy Secretary-General Amina Mohammed observed that the rise of transnational criminal and terrorist organizations were “growing threats” to global stability.¹⁷ She explained that across the world “[v]igilante justice has replaced State authority” and that criminal and terrorist organizations were now “competing to buy ungoverned spaces that are growing in size as governments retreat.”¹⁸ Whereas in the past these organizations

¹⁵ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 2008, Para 31.

¹⁶ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 31 the Declaration on the Elimination of Violence against Women adopted by the General Assembly in resolution 48/104.¹⁶ 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 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”. Similarly, other universal and regional bodies have been applying the due diligence test.

¹⁷ Ibid citing Press Release, U.N. Deputy Secretary-General, *Good Governance Key to Addressing Causes of Instability in Sahel, Deputy Secretary-General Tells Joint Meeting of Major Organs*, U.N. Press Release DSG/SM/1067-ECOSOC/6850-PBC/123 (June 28, 2017).

¹⁸ Ibid citing *Id.*; see also Etienne Rosas, *Fulfilling Clandestinity: Reframing the “Crime-Terror Nexus” by Exploring Conditions of Insurgent and Criminal Organizations’ Origins, Incentives, and Strategic Pivots*, at 15 (Rand Corporation 2020), https://www.rand.org/pubs/rgs_dissertations/RGSDA506-1.html (explaining that [violent non-state actors] “tend to naturally converge, or indeed are born, in environments of weak or faulty governance and of high marginalization – slums, prisons, war zones – where influence is readily attainable through ideological

operated regionally, modern criminal and terrorist organizations were now operating transnationally, forming alliances and networks around the world as they exploited countries with weak or failing governance,¹⁹ or in many instances, forged relationships with corrupt government officials, further destabilizing fragile states.²⁰ These non-State actors would then form “power vacuums,” resulting in their authority rivaling or even taking the place of State authority.²¹ Many transnational criminal organizations would also take on a quasi-government role, assuming power and control traditionally held by State actors and providing, in many instances, State-like services including, *e.g.*, schools, medical clinics, utilities, and security.²² Once these non-State actors established a foothold, it became that much more difficult for States to regain legitimacy and control.²³ Unfortunately, to gain this foothold, a State did not necessarily need to be failing. Rather, it only took “the state to be dysfunctional in one area – or to underserve one vulnerable segment of the population.”²⁴

mobilization or criminal ventures, both of which capitalize on failures of governance.”); *Strategy to Combat Transnational Organized Crime*, NAT’L SEC. COUNCIL (July, 25, 2011) [hereinafter *NSC Strategies for TOCs*], <https://obamawhitehouse.archives.gov/administration/eop/ncs/transnational-crime/threat>; Ramon Bleuca & Douglas A. Ollivant, *A More Crowded Stage: America and the Emergence of Non-State Actors in the Middle East*, 17 HORIZONS: J. OF INT’L RELS. AND SUSTAINABLE DEV. (SPECIAL ELECTIONS ISSUE) 94, 100 (2020)

(“non-State actors are claiming the space left vacant in the political, security, and social arenas, creating parallel structures and organizations that can claim more effectiveness than the state.”).

¹⁹ Ibid citing The UNHCR first recognized the concept of a “failed states” in 1997. *See* U.N. High Comm’r for Refugees, *State of the World’s Refugees: A Humanitarian Agenda*, ch. 1, U.N. Doc ST/HCR(058)/S7/1997-98 (1997) (describing the “failed state syndrome” wherein “[o]n the one hand, they are symptomatic of a state’s inability (or unwillingness) to protect its citizens . . . [and] [o]n the other hand, by exploiting these conditions, armed groups, warlords and corrupt government officials deprive the state of revenue and legitimacy, thereby reinforcing its disintegration.”).

²⁰ Ibid citing *NSC Strategies for TOCs*, *supra* note 26. *See* Press Release, U.N. Deputy Secretary- General, *supra* note 25 (“Today, violent extremism and terrorism are global phenome that do not recognize borders.”).

²¹ Ibid Citing Etienne Rosas, *supra* note 26. *See NSC Strategies for TOCs*, *supra* note 26 (“[T]errorist and criminal groups use failed and fragile states as launching pads, since they can recruit more easily from suffering populations that lack supportive communities and reliable institutions.”) (internal citations omitted); Bleuca & Ollivant, *supra* note 26, at 26 (same).

²² Ibid citing Bleuca & Ollivant, *supra* note 26, at 109; *see also* Lindsey Kennedy & Nathan Paul Southern, *The Pandemic is Putting Gangsters in Power*, FOREIGN POLICY (Feb. 15, 2021), <https://foreignpolicy.com/2021/02/15/the-pandemic-is-putting-gangsters-in-power/#>; Ivan Brisco & David Keseberg, *Only Connect: The Survival and Spread of Organized Crime in Latin America*, 8 PRISM (No. 1) 114, 116 (2019) (noting that “[a]side from the insecurity and violence they generate, armed criminal groups exert demonstrable political, social, and even electoral influence over certain circumscribed territories, both rural and urban.”).

²³ Ibid citing José Miguel Cruz & Brian Fonseca, *How Transnational Crime is Mutating in the Age of COVID-19 in Latin America*, Ams. Q. (Jan. 26, 2021), <https://americasquarterly.org/article/the-other-mutating-virus-the-pandemic-and-organized-crime/>; *see also* Brisco & Keseberg, *supra* note 30, at 119 (“[A] pronounced shift towards criminal rackets operating within clearly defined territorial limits, and the failure or inability of state authorities to provide basic services, have provided criminal groups with opportunities to shore up a social support base, and fertile ground to undermine, contest, and to a certain degree, erode state authority and legitimacy.”).

²⁴ Ibid citing Kennedy & Southern, *supra* note 30.

In 2021, a group of independent United Nations human rights experts also observed that “a common practice of various organs of the United Nations, such as the Security Council, the General Assembly and the Human Rights Council”, had “contributed to a gradual closing of the above-mentioned gap in human rights protection.”²⁵ For example, the group of independent United Nations human rights experts added that: “Per the findings of Harvard Law School’s Program on International Law and Armed Conflict (PILAC), between 1948 and 2017, 125 resolutions of the Security Council, 65 resolutions of the General Assembly as well as more than 50 presidential statements of the Security Council dealt with the human rights responsibilities of armed non-State actors.”²⁶

“The Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) identified 33 relevant resolutions of the Human Rights Council adopted between 2008 and 2015.”²⁷ They also added that “such practice acknowledged that, at a minimum, armed non-State actors exercising either government-like functions or de facto control over territory and population must respect and protect the human rights of individuals and groups.”²⁸

Some special procedures and investigative mechanisms of the Human Rights Council have argued that armed groups have human rights obligations, for instance derived from their capacities²⁹, and they have detailed the conditions under which these obligations may apply and their extent.³⁰ Others have expressed concern at abuses of human rights by armed non-State

²⁵ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights>

²⁶ See PILAC, *Armed non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly*, Briefing Report with Annexes, June 2017, available at <http://blogs.harvard.edu/pilac/files/2017/06/HLS-PILAC%E2%80%94ANSAs-and-IHRL%E2%80%94June-2017.pdf>

²⁷ See Geneva Academy, *Human Rights Obligations of Armed non-State Actors: an Exploration of the Practice of the UN Human Rights Council*, December 2016, annex, available at https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf.

²⁸ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights>

²⁹ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights> citing The Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life, A/HRC/38/44, June 5th 2018, where she argues that armed non-State actors can be accommodated as subjects of international human rights law, without treating them akin to States, and that their human rights obligations are derived from the nature of their capacity.

³⁰ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights> citing Report of the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, A/HRC/34/54, 17 February 2017, para 44-48; Report of the Commission on Human Rights in South Sudan, A/HRC/40/69, 21 February 2019, para 96; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Sri Lanka, E/CN.4/2006/53/Add.5, 27 March 2006, para 25-27; See also Committee on the Right of the Child.

actors, and directly called on these actors to cease such conduct³¹ such as the recruitment of child soldiers³² and sexual violence.³³

The group of independent UN Experts also observed that business enterprises might also affect the implementation of the UN Convention on torture as they observed that: “others have noted that the presence of armed non-State actors present unique challenges for business enterprises, which are expected to exercise heightened human rights due diligence in conflict-affected contexts in order to meet the business responsibility to respect human rights in line with the UN Guiding Principles on Business and Human Rights.”³⁴

The group concluded by observing that much remained to be accomplished “in order to ensure that human rights of individuals and groups are respected, protected and fulfilled, irrespective of the character of the perpetrator(s)”. “We thus strongly call on States to support initiatives/processes/work on this crucial issue, including processes seeking to identify ways of engaging with armed non-State actors, to strengthen accountability and address impunity.”³⁵

In 2017, Special Rapporteur Nils Melzer also observed that the steps which had been taken by the UNCAT mandate to combat torture had focused almost entirely on States as potential perpetrators to the detriment of victims of torture by non-State actors. It was argued that UNCAT had to also offer practical protection against violations on the part of non-State actors because organized armed groups, private military and security contractors, mercenaries, foreign fighters and other non-State actors were increasingly engaged in conduct that adversely interfered with human rights, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Melzer believed that for the absolute and non-derogable prohibition of torture and other cruel,

³¹ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights> Citing for instance, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his visit to Ukraine, A/HRC/40/59/Add.3, 17 January 2019, para 122; Joint Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on human rights of internally displaced persons and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living on their mission to Lebanon and Israel, A/HRC/2/7, 2 October 2006, para 19; Report of the Independent Expert on the situation of human rights in Mali, A/HRC/40/77, 21 January 2019, para 34-38.

³² Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights> citing UNSC Resolution 1261 (1999). Furthermore, ILO Convention No 182, which designated children’s involvement in armed conflict as the ‘worst form of child labor.

³³ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights> citing NSC Resolution 1325 (2000).

³⁴ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights>

³⁵ Joint Statement by 42 independent United Nations human rights experts <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights>

inhuman or degrading treatment or punishment to retain its practical relevance, it had to also provide for practical protection against violations on the part of non-State actors.³⁶ Based on the above observations, one would have expected that, by 2021, States and the UN had eliminated all the constraints prohibiting the right of everyone to be free from torture and ill-treatment. However, in 2021 that was still not the case. Nils Melzer observed that unfortunately, in spite of the significance of accountability for the prohibition of torture and ill-treatment itself and for key values of the international legal order across the world, the vast majority of those responsible for perpetrating, instigating or consenting or acquiescing to torture or ill-treatment were still not being held to account. Many national legal systems still did not adequately guarantee or effectively implement accountability for torture and ill-treatment, and some even continued to establish legal and practical obstacles to accountability.³⁷ In addition, in reality few of those who were “held accountable” received sanctions commensurate with the gravity of their crimes.³⁸ Moreover, unduly narrow approaches to redressing torture and ill-treatment risked obscuring various facets of accountability and thereby restricting accountability’s reparative, preventive and transformative potential.³⁹

In 2021, it was argued that those who perpetrated or are otherwise involved (through consent, instigation or acquiescence) in the infliction of torture or ill-treatment were implicated in one of the most serious violations of human rights. Rather than continuing to permit a culture of impunity towards these criminals, States were to hold these individuals accountable as this was a fundamental component of State obligations derived from the absolute and non-derogable prohibition of torture and ill-treatment. Individual accountability for torture and ill-treatment also required States to ensure that individuals involved in violations of the prohibition, whether through acts or omissions, took or were assigned responsibility for their misconduct, faced appropriate consequences and repaired or contributed to repairing the harm caused for the benefit of victims, their next of kin and the wider community. While ensuring that individuals responsible for perpetrating or contributing to torture and ill-treatment were held to account, States were to impose sanctions and compel these perpetrators to provide redress for the violation as this was also an integral element of accountability for torture and ill-treatment. Special Rapporteur Nils Melzer also observed that individual accountability was always complementary to State accountability, rather than being a substitute for State accountability or exhaustive of accountability for torture or ill-treatment.⁴⁰

³⁶ **A/HRC/34/54** Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment Note by the Secretariat 2017 Para 44.

³⁷ [A/73/207](#), para. 24.

³⁸ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 26.

³⁹ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 12.

⁴⁰ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021, Para 24.

1.2. Other Actions Taken Regarding Non-State Actors

UN Resolutions also addressed strengthening measures to address all violence against women and girls⁴¹ by punishing all perpetrators whether these acts are perpetrated by the State, by private persons or by non-State actors.⁴² In addition, the UN was also calling for the elimination of all forms of gender-based violence in the family within the general community- which had been regarded as a private matter in the past – and holding States accountable for such crimes if they were perpetrated or condoned by the State.⁴³ The persistence of armed conflicts, other types of conflicts, terrorism and hostage-taking in various parts of the world also continued to be a major impediment to the elimination of all forms of violence against women or girls. In such cases, it was argued that all perpetrators of such violence were to also be duly investigated and, as appropriate, prosecuted and punished in order to end impunity.⁴⁴

⁴¹ UN General Assembly Resolution **76/303** United Nations action on sexual exploitation and abuse 2022 Preamble

⁴² UN General Assembly Resolution **76/303** United Nations action on sexual exploitation and abuse 2022 Preamble UN General Resolutions **63/155**. Intensification of efforts to eliminate all forms of violence against women 2008. Para 3 UN General Assembly Resolution 67/144. Intensification of efforts to eliminate all forms of violence against women Para 8, **69/147**. See also **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 citing [A/73/207](#), .

⁴³ UN General Resolutions **63/155**. Intensification of efforts to eliminate all forms of violence against women (2008) Para 3.

⁴⁴ UN General Resolutions **65/187**. Intensification of efforts to eliminate all forms of violence against women. Preamble 2011, Para 10 and 16(l) see also 67/144. Intensification of efforts to eliminate all forms of violence against women Para 12 **75/161**. Intensification of efforts to prevent and eliminate all forms of violence against women and girls : Preamble States have the obligation, at all levels, to promote, protect and respect all human rights and fundamental freedoms for all, including women and girls, and must exercise due diligence to prevent, investigate, prosecute and hold to account the perpetrators of all forms of violence against women and girls, eliminate impunity and provide for effective access to appropriate remedies for victims and survivors, and should ensure the protection of women and girls, including adequate enforcement of civil remedies, orders of protection and criminal sanctions, and the provision of shelters, psychosocial services, counselling, health-care and other types of support services, in order to avoid revictimization, to promote an empowering environment.

2. Crimes Described as Torture: Applicable to both Non-State Actors and State Actors

Discrimination: The purpose element of UNCAT 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.⁴⁵

2.1. Gender-based violence

Women and girls are disproportionately impacted by harmful practices. Typically justified on the basis of social norms and cultural beliefs, tradition or religion, harmful practices are motivated in part by stereotypes about sex and gender-based roles and rooted in attempts to control individuals' bodies and sexuality.

2.1.1. Rape

In the past, it was widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.⁴⁶ The definition of rape has also 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.⁴⁷ It

⁴⁵ **A/HRC/31/57** Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016, Para 8: The purpose and intent elements of the definition of torture (A/HRC/13/39/Add.5) are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality (A/HRC/7/3).

A/HRC/7/3 Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008, Para 30 and 68: Any form of discrimination, whether through stigmatization, demonization, marginalization, disregard or otherwise, almost invariably entails a significantly increased risk of torture or ill-treatment. Indeed, not only is the principle of non-discrimination a general principle in the protection of human rights, but the intentional infliction of severe pain and suffering "for any reason based on discrimination of any kind" also constitutes a distinct form of torture. Any dehumanizing ideologies that mark certain persons or groups as inferior or unworthy of human rights protections must be rejected as incompatible with the absolute and non-derogable prohibition of torture and ill-treatment and with human dignity as enshrined in the Universal Declaration of Human Rights as a whole. ⁴⁵

⁴⁶ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008, Para 34.

⁴⁷ *Ibid* citing International Criminal Court, Elements of Crimes, article 8 (2) (b) (xxii)-1 of the ICC Elements of Crimes.

was noteworthy that other forms of sexual violence, whether defined as rape or not, could constitute torture or ill-treatment⁴⁸ and must not be dealt with as minor offences.⁴⁹

The Committee against Torture developed jurisprudence according to which rape, when perpetrated by public officials, at their instigation or with their consent or acquiescence, constituted torture.⁵⁰

Over time, other entities have stressed that rape or other forms of sexual violence could also not be used or condoned in any circumstance by any individual, State or non-State actor.

In 2021, Dubravka Simonovic the Special Rapporteur on violence against women, its causes and consequences prepared a report (A/HRC/47/26) describing rape as a grave, systematic and widespread human rights violation including that of a torture, a crime and a manifestation of gender-based violence against women and girls. She observed that both the Committee against Torture and the Human Rights Committee had recognized rape as torture.⁵¹

In addition, further progress had been achieved through the development of jurisprudence on specific cases of rape, as regional and international human rights bodies determined the specific nature of States' obligation to criminalize and prosecute rape. At the regional level, the Inter-American Commission on Human Rights framed rape as torture under the Inter-American Convention to Prevent and Punish Torture, and later developed the concept of rape as torture and a violation of women's right to privacy under the American Convention on Human Rights.⁵² The Inter-American Court of Human Rights had established in its jurisprudence that sexual violence practiced by State actors and by non-State actors could be considered torture.⁵³

⁴⁸ Ibid: Para 35: citing 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.

⁴⁹ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 35 citing 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.

⁵⁰ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021 Para 32 citing *V.L. v. Switzerland* (CAT/C/37/D/262/2005) and *C.T. and K.M. v. Sweden* (CAT/C/37/D/279/2005).

⁵¹ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021 Para 29 citing Committee against Torture, general comment No. 2 (2007); Human Rights Committee, general comment No. 28 (2000).

⁵² See Inter-American Commission on Human Rights, *Martin de Meja v Peru* Report No. 5/1996, Case No. 10.970, Merits, 1 March 1996; and *Ana Beatriz and Celia Gonzalez Perez v Mexico*.

Similarly, the European Court of Human Rights first made determinations with respect to rape as a violation of articles 3 (prohibition of torture) and 8 (right to respect for privacy and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms and addressed the definition of rape in the landmark case *M.C. v. Bulgaria* in 2003. The Court established the positive obligation of States to enact criminal law provisions to effectively investigate and punish rape.⁵⁴ Those legal advancements were capitalized on and codified and further developed in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), adopted in 2011.⁵⁵

In 2016 the Special Rapporteur regarding Torture confirmed that it was well established that rape and other forms of sexual violence can amount to torture and ill-treatment. It was observed that rape also constituted torture when it is carried out by, at the instigation of, or with the consent or acquiescence of public officials (A/HRC/7/3) as States were responsible for the acts of private actors when States fail to exercise due diligence to prevent, stop or sanction them, or to provide reparations to victim.⁵⁶ In addition, the Special Rapporteur also observed that under international humanitarian law, torture constituted a breach of the laws and customs of war and could be committed by both States and non-State armed groups. In addition, more recent developments in international criminal law had also determined that torture can occur when the State had no role in its perpetration and where the State did not fail to exercise due diligence obligations, with the “characteristic trait of the offence [being] found in the nature of the act committed rather than in the status of the person who committed it.”⁵⁷

In 2017, the Committee on the Elimination of Discrimination against Women adopted its general recommendation No. 35 (2017) on gender-based violence against women, which had been prepared in collaboration with the Special Rapporteur. The Committee and the Special Rapporteur specifically recommended that States parties ensure that rape was characterized as a crime against the right to personal security and physical, sexual and psychological integrity, and that the definition of rape, including marital rape, was based on the lack of consent and took into account coercive circumstances. It also established that any time limitations, where they existed, should

⁵³ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021 Para 30 citing Inter-American Court of Human Rights, *Rosendo Cantu et al v Mexico, Judgment, 31 August 2010*; and *Lopez Soto et al. v. Venezuela, Judgment, 26 September 2018*.

⁵⁴ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021, Para 31.

⁵⁵ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021, Para 35.

⁵⁶ A/HRC/31/57 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2016, Para 51.

⁵⁷ A/HRC/31/57 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2016, Para 52.

give consideration to circumstances hindering the capacity of the victims to report the crime, and that rape could amount to torture.⁵⁸

Since international law at that time did not define rape, it was the jurisprudence of those tribunals that provided the definitional elements of rape as an international crime. The first case of rape that was found to constitute a crime against humanity was in the judgment of the International Criminal Tribunal for Rwanda in the case *Prosecutor v. Akayesu* in 1998.⁵⁹ The accused was convicted of rape as a crime against humanity, and the rapes, which had been condoned and encouraged by Akayesu, were further found to amount to the crime of genocide. The Tribunal also recognized that rape and sexual violence constituted were among the worst ways of inflicting harm on the victim, “as he or she suffers both bodily and mental harm”.⁶⁰

The next benchmark for the criminalization of rape and the definition of its constituent elements was the adoption in 1998 of the Rome Statute of the International Criminal Court. The Rome Statute established an important link with international human rights law in its article 21 (3), according to which the application and interpretation of law by the Court must be consistent with internationally recognized human rights. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence were enumerated under article 7 as crimes against humanity and under article 8 as war crimes in the context of both international and non-international armed conflict.⁶¹ In addition, the Chief Prosecutor’s pledged to strengthen efforts to combat impunity for sexual and gender-based violence.⁶²

⁵⁸ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021, Para 36.

⁵⁹ International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998.

⁶⁰ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021 Para 43 citing International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 at para 731.

⁶¹ **A/HRC/47/26** Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Simonovic 2021, Para 51.

⁶² UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022, Preamble.

2.2. Violence in the private sphere: families

2.2.1. Domestic violence

The Special Rapporteur has authoritatively categorized domestic violence as a form of torture.⁶³ It has been confirmed that the purpose element requirement was always fulfilled in gender-specific violence against women which is inherently discriminatory⁶⁴ and that the continuum of harm is a process.⁶⁵

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.⁶⁶ In line with this statement, the Committee has mentioned the need for States to adopt specific legislation combating domestic violence,⁶⁷ including legislation criminalizing marital rape.⁶⁸ More specifically, it has called upon States to ensure that their justice systems incorporate restraining orders to protect women from violent family members, provide shelters and other support to victims, establish measures to encourage women to report domestic violence to the authorities,⁶⁹ and offer “material and psychological relief to the victims”.⁷⁰ 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.⁷¹ The Committee has stressed the need to take action in cases importance of ensuring that fair standards of proof are required.⁷²

⁶³ UNHRC Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Manfred Novick: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the right to Development (15 January 2008) UNDOC A/HRC/7/3 Para 34-43 public sphere and Para 44-58 private sphere and Para 59-60 refugee or refoulement context; Para 61-67 women survivors of torture access to justice, Para 65-67 rehabilitation and reparation for women survivors of torture. Conclusion and Recommendations: 68-76.

⁶⁴ Ibid citing Special Rapporteur on Torture, 2008 Report, para 68.

⁶⁵ *REFRAMING DOMESTIC VIOLENCE AS TORTURE OR TERRORISM*; Isabel Marcus, PhD. Professor School of Law, The State University of New York at Buffalo, USA 2014 pp 18.

⁶⁶ Human Rights Committee general comment No. 28 (2000) on article 3 (The equality of rights between men and women), para. 11.

⁶⁷ See CCPR/CO/75/YEM, para. 6; CCPR/CO/79/LKA, para. 20; and CCPR/CO/80/DEU, para. 14.

⁶⁸ See CCPR/CO/79/LKA, para. 20.

⁶⁹ See CCPR/CO/74/HUN, para. 10 and CCPR/CO/80/LTU, para. 9.

⁷⁰ See CCPR/CO/81/LIE, para. 8.

⁷¹ See, concluding observations on the Russian Federation, CAT/C/RUS/CO/4, para. 11; South Africa, CAT/C//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/CR/33/2, paras. 5 (k) and 6 (l); and Zambia, A/57/44, para. 65 (Zambia).

⁷² *A/HRC/7/3* Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 48 citing CAT/C/QAT/CO/1, para. 22.

As early as 1996, the Special Rapporteur set out to illustrate why domestic violence - in all its forms - was such an insidious epidemic of violence. Throughout a woman's life cycle, there existed various forms of gender-based violence that manifested themselves at different stages. Most of this violence was domestic, occurring within the home, perpetrated by those to whom the woman was closest. Even before birth, females in cultures where son preference was prevalent, were targeted by the violent discriminatory practices of sex-selective abortion and female infanticide. Violence against the girl child continued to manifest itself as enforced malnutrition, unequal access to medical care, as well as physical and emotional abuse. Incest, female genital mutilation, early childhood marriage and other harmful traditional practices, and the sale of children by their parents for prostitution or bonded labor were all forms of violence inflicted on girl children.⁷³

In 2016, the Special Rapporteur observed that victims of domestic violence tend to be intimidated by continual threats of physical, sexual or other violence and verbal abuse and may be “effectively manipulated by intermittent kindness” (see E/CN.4/1996/53, para. 47). Fear of further assaults can be sufficiently severe as to cause suffering and anxiety amounting to inhuman treatment.⁷⁴ Domestic violence could cause severe physical or mental pain and suffering, constituting gender discrimination, and is sometimes perpetrated with the purpose of eliciting information, punishment or intimidation (E/CN.4/1996/53). Domestic violence amounts to ill-treatment or torture whenever States acquiesce in the prohibited conduct by failing to protect victims and prohibited acts, of which they knew or should have known, in the private sphere (A/HRC/13/39/Add.5). States are internationally responsible for torture when they fail — by indifference, inaction or prosecutorial or judicial passivity — to exercise due diligence to protect against such violence or when they legitimize domestic violence by, for instance, allowing husbands to “chastize” their wives or failing to criminalize marital rape, acts that could constitute torture.⁷⁵

Societal indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws and patterns of State failure to punish perpetrators and protect victims, create conditions under which women may be subjected to systematic physical and mental suffering, despite their apparent freedom to resist. In this context, State acquiescence in domestic violence can take many forms, some of which may be subtly disguised (A/HRC/7/3). States' condoning of and tolerant attitude towards domestic violence, as evidenced by discriminatory judicial ineffectiveness, notably a failure to investigate, prosecute and punish perpetrators, can create a climate that is conducive to domestic violence and constitutes an ongoing denial of justice to victims amounting to a continuous human rights violation by the State. In cases where States are or ought to be aware of patterns of continuous and serious abuse in a particular region or community, due diligence obligations require taking reasonable measures to alter outcomes and mitigate harms, ranging from the strengthening of domestic laws and their implementation to

⁷³ E/CN.4/1996/53 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/855 February 1996, Para. 54.

⁷⁴ A/HRC/31/57 Report of the Special Rapporteur on Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016, pp 54.

⁷⁵ A/HRC/31/57 Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016 pp 55.

effective criminal proceedings and other protective and deterrent measures in individual cases. Domestic violence legislation and community support systems must in turn be matched by adequate enforcement. Special attention must be paid to religious or customary law courts that may tend to downplay and inadequately address domestic violence (A/HRC/29/40).⁷⁶

2.2.2. Cases of domestic abuse: ECHR

In 2016, based on this generic understanding, domestic violence included a wide range of abusive conduct, from coercive or excessively controlling behavior aiming to isolate, humiliate, intimidate or subordinate a person, to various forms and degrees of physical violence, sexual abuse and even murder. In terms of severity, the pain or suffering caused by domestic violence often fall nothing short of that inflicted by torture and other cruel, inhuman or degrading treatment or punishment.

With its judgment of 14 December 2021 in [Tunikova and Others v Russia](#), the European Court of Human Rights has again added to its ever-expanding jurisprudence on the issue of domestic abuse. In *Tunikova*, the applicants had sustained bodily injuries, including one case of severe mutilation, at the hands of their former partners or husbands, as well as receiving death threats. The European Court of Human Rights held that there had been a violation of article 3, the right to be free from torture and inhuman or degrading treatment and found that the state had failed to establish a legal framework to combat domestic abuse effectively; had not assessed the risks of recurrent violence; and had not carried out an effective investigation into the domestic abuse. The Court also held that there had been a violation of the prohibition of discrimination contained in article 14 of the Convention, on the basis that women in the state were in a situation of de facto discrimination in relation to protection from the risk of domestic abuse.

This is not the first time that this question has been raised for the Court. In a 2019 case involving domestic abuse, [Volodina v Russia](#), in which a violation of article 3 had been found, a separate opinion was issued by Judge Pinto De Albuquerque. In this opinion, the Judge expressed his view that, although a violation of article 3 was found in the case, it should have been specifically held that the ill-treatment suffered by the applicant went beyond inhuman and degrading treatment and reached the threshold for torture.

In [Ireland v United Kingdom](#), the Court stated that torture consists of ‘deliberate inhuman treatment causing very serious and cruel suffering.’ In the Judge’s view, this threshold was met in *Volodina*. As the Judge stated, the applicant, ‘was subjected to multiple and persistent instances of extreme domestic violence, including a punch to her stomach, which in fact led to medical advice that she should induce the abortion of her unborn baby. She was further psychologically taunted through the publication of private photographs, the finding of what was believed to be a GPS tracker inside her purse, threats to kill her – which (the perpetrator) attempted to substantiate by damaging her car – and abduction from her city of residence.’ In support of his view, Judge Pinto De Albuquerque cited [General Comment 2 of the UN Committee against Torture](#), which asserts that a state’s systematic acquiescence to privately inflicted harm raises concerns under the [UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or](#)

⁷⁶ A/HRC/31/57 Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016 pp 56.

Punishment. It does seem that the argument of Judge Pinto De Albuquerque has much to commend it. As the Judge asserted, ‘When severe forms of pain and suffering are deliberately inflicted on a person, this must be identified as torture’, and ‘if the State faces condemnation for allowing its women to be submitted to torture, the positive obligation to protect is even more stringent.’

In Opuz v. Turkey, the European Court of Human Rights found that discriminatory judicial passivity and unresponsiveness to domestic violence gave rise to impunity and a climate that was conducive to such gender-based violence, leading to a violation of the prohibition of torture and ill-treatment. Furthermore, when a State knows or should have known that a woman is in danger, it must take positive steps to ensure her safety, even when she hesitates in pursuing legal action (A/47/38). Women’s rights to life and physical and mental integrity cannot be superseded by other rights, such as those to property and privacy. States have a heightened obligation to protect vulnerable and marginalized individuals from torture.

2.3. Violence in the private sphere: communities

In 2016, the Special Rapporteur observed that women and girls can be victims of specific forms of violence at the hands of their families. While there was 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, bride burnings or acid attacks (A/HRC/20/16), violence in the name of honor, slavery and female genital mutilation.⁷⁷ Women and girls are disproportionately impacted by these harmful practices. Harmful practices such as female genital mutilation (61-62), child and forced marriage (63-64) and honor-based violence (58-59) have all been acknowledged as forms of gender-based violence that constitute ill-treatment and torture.⁷⁸ Yet victims seeking justice for violations of their rights as a result of harmful practices often face stigmatization and risk revictimization, harassment and retribution.⁷⁹

2.3.1. Child marriage

Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age. The overwhelming majority of child marriages, both formal and informal, involve girls, although at times their spouses are also under 18 years of age. A child marriage is considered to be a form of forced marriage, given that one or both parties have not expressed full, free and informed consent.⁸⁰

⁷⁷ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008, Para 44.

⁷⁸ **A.HRC/31/57** Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016, Para 58; Honor based violence: Paragraphs 59-60; Female Genital Mutilation: Paragraphs 61-62; Child and Forced Marriage: Paragraphs 63-64.

⁷⁹ **A.HRC/31/57** Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016 ,Para 58.

In some contexts, children are betrothed or married very young, and, in many cases, young girls are forced to marry men who may be decades older. In 2012, the United Nations Children’s Fund reported that almost 400 million women between 20 and 49 years of age around the world had been married or had entered a union before reaching 18 years of age. The Committees have therefore been paying particular attention to cases in which girls have been married against their full, free and informed consent, such as when they have been married too young to be physically and psychologically ready for adult life or to make conscious and informed decisions and thus not ready to consent to marriage. Other examples include cases in which guardians have the legal authority to consent to marriage of girls in accordance with customary or statutory law and in which girls are thus married contrary to the right to freely enter into marriage.⁸¹

Child marriage is often accompanied by early and frequent pregnancy and childbirth, resulting in higher-than-average maternal morbidity and mortality rates. Pregnancy-related deaths are the leading cause of mortality for girls between 15 and 19 years of age, whether married or unmarried, around the world. Infant mortality among the children of very young mothers is higher (sometimes as much as two times higher) than among those of older mothers. In cases of child and/or forced marriage, in particular where the husband is significantly older than the wife, and where girls have limited education, the girls generally have limited decision-making power in relation to their own lives. Child marriage also contributes to higher rates of school dropout, especially among girls, forced exclusion from school and an increased risk of domestic violence, in addition to limiting the enjoyment of the right to freedom of movement.⁸²

Forced marriages are marriages in which one or both parties have not personally expressed their full and free consent to the union. They may be manifested in various forms, including child marriage, as indicated above, exchange or trade-off marriages (e.g. *baad* and *baadal*), servile marriages and levirate marriages (coercing a widow to marry a relative of her deceased husband). In some contexts, a forced marriage may occur when a rapist is permitted to escape criminal sanctions by marrying the victim, usually with the consent of her family. Forced marriages may occur in the context of migration in order to ensure that a girl marries within the family’s community of origin or to provide extended family members or others with documents to migrate to and/or live in a particular destination country. Forced marriages are also increasingly being used by armed groups during conflict or may be a means for a girl to escape post-conflict poverty. Forced marriage may also be defined as a marriage in which one of the parties is not permitted to end or leave it. Forced marriages often result in girls lacking personal and economic autonomy and attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.⁸³

⁸⁰ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 20.

⁸¹ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 21.

⁸² CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 22.

The payment of dowries and bride prices, which varies among practicing communities, may increase the vulnerability of women and girls to violence and to other harmful practices. The husband or his family members may engage in acts of physical or psychological violence, including murder, burning and acid attacks, for failure to fulfil expectations regarding the payment of a dowry or its size. In some cases, families will agree to the temporary “marriage” of their daughter in exchange for financial gains, also referred to as a contractual marriage, which is a form of trafficking in human beings. States parties to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography have explicit obligations with regard to child and/or forced marriages that include dowry payments or bride prices because they could constitute a sale of children as defined in article 2 (a) of the Protocol.¹¹ The Committee on the Elimination of Discrimination against Women has repeatedly stressed that allowing marriage to be arranged by such payment or preferment violates the right to freely choose a spouse and has in its general recommendation No. 29 (2013) outlined that such practice should not be required for a marriage to be valid and that such agreements should not be recognized by a State party as enforceable.⁸⁴

Pursuant to CSW 51 Agreed Conclusions Elimination of all Forms of Discrimination and Violence against the Girl Child (2007) states were to “*take special measures for the protection of girls affected by armed conflict and by post-conflict situations and, in particular, protect them from sexually transmitted diseases, such as HIV/AIDS, gender-based violence, including rape and sexual abuse, and sexual exploitation, torture, abduction and forced labor, paying special attention to refugee and displaced girls; and take into account the special needs of girls affected by unilateral measures not in accordance with international law and the Charter of the United Nations and by armed conflicts in the delivery of humanitarian assistance and disarmament, demobilization, rehabilitation assistance and reintegration processes, and that girls living under foreign occupation must also be protected in accordance with the provisions of international humanitarian law;*⁸⁵ *condemn all forms of violence against girls and take effective legislative and other measures to prevent and eliminate all such violence, including physical, mental, psychological and sexual violence, torture, child abuse and exploitation, hostage-taking, domestic violence, trafficking in or sale of children and their organs, pedophilia, child prostitution, child pornography, child sex tourism, gang-related violence and harmful traditional practices in all settings.*⁸⁶

⁸³ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019 Para 23

⁸⁴ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 24.

⁸⁵ CSW 51 Agreed Conclusions Elimination of all Forms of Discrimination and Violence against the Girl Child (2007). Armed Conflict, Para 14.7(a).

⁸⁶ CSW 51 Agreed Conclusions Elimination of all Forms of Discrimination and Violence against the Girl Child (2007). Armed Conflict, Para 14.9(a).

2.3.2. *Forced sterilization*

Forced sterilization is an act of violence and a form of social control and violates a person's right to be free from torture and ill-treatment. Gender often intersects with other characteristics such as race, nationality, sexual orientation, socioeconomic status, age and HIV status to render women and girls at risk of torture and other ill-treatment in the context of sterilization (CAT/C/CZE/CO/4-5, A/HRC/29/40/Add.2) The European Court of Human Rights found that the sterilization of a Roma woman who consented to the procedure only during delivery by caesarean section violated the prohibition of torture and ill-treatment.⁸⁷

The Human Rights Committee has also referred to the sterilization of women without their consent as a breach of ICCPR article 7.⁸⁸ The Special Rapporteur has also stressed that, given the particular vulnerability of women with disabilities,⁸⁹ 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.⁹⁰

2.3.2. *Corporal punishments: flogging/stoning*

Torture may also be used as a means to punish an exclusively or predominately gender-based crime. In one country, for example, flogging is prescribed for women who fail to conform to strict Islamic dress laws. Flogging and death by stoning of women for adultery are also prescribed in some penal provisions.⁹¹

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

⁸⁷ **A/HRC/31/57** Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016.

⁸⁸ 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.

⁸⁹ 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>.

⁹⁰ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 38 citing 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.

⁹¹ **E/CN.4/1995/34** QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, Para 22.

(CEDAW).⁹² 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.⁹³ 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.

2.3.2. Honor Crimes

Crimes committed in the name of so-called honor are acts of violence that are disproportionately, although not exclusively, committed against girls and women because family members consider that some suspected, perceived or actual behavior will bring dishonor to the family or community. Such forms of behavior include entering into sexual relations before marriage, refusing to agree to an arranged marriage, entering into a marriage without parental consent, committing adultery, seeking divorce, dressing in a way that is viewed as unacceptable to the community, working outside the home or generally failing to conform to stereotyped gender roles. Crimes in the name of so-called honor may also be committed against girls and women because they have been victims of sexual violence.⁹⁴

Such crimes include murder and are frequently committed by a spouse, female or male relative or a member of the victim's community. Rather than being viewed as criminal acts against women, crimes committed in the name of so-called honor are often sanctioned by the community as a means of preserving and/or restoring the integrity of its cultural, traditional, customary or religious norms following alleged transgressions. In some contexts, national legislation or its practical application, or the absence thereof, allows for the defense of honor to be presented as an exculpatory or a mitigating circumstance for perpetrators of such crimes, resulting in reduced sanctions or impunity. In addition, prosecution of cases may be impeded by unwillingness on the part of individuals with knowledge of the case to provide corroborating evidence.⁹⁵

The Convention on the Rights of the Child, on the other hand, obliges States parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children (art. 24 (3)). In addition, it provides for the right of the child to be protected from all forms of violence, including physical, sexual or psychological violence (art. 19) and requires States parties to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment (art. 37 (a)). It applies the four general principles of the

⁹² Statement by Yakin Ertürk, Special Rapporteur on violence against women, Istanbul, 26 November 2007, pp. 2-3.

⁹³ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 40 citing See A/60/316, paras. 18-28.

⁹⁴ **CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1** Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 29.

⁹⁵ **CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1** Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 30.

Convention to the issue of harmful practices, namely protection from discrimination (art. 2), ensuring the best interests of the child (art. 3 (1)), upholding the right to life, survival and development (art. 6), and the right of the child to be heard (art. 12).⁹⁶

The enactment of legislation alone is, however, insufficient to combat harmful practices effectively. In accordance with the requirements of due diligence, legislation must therefore be supplemented with a comprehensive set of measures to facilitate its implementation, enforcement and follow-up, and monitoring and evaluation of the results achieved.⁹⁷

Contrary to their obligations under both Conventions, many States parties maintain legal provisions that justify, allow or lead to harmful practices, such as legislation that allows for child marriage, provides the defense of so-called honor as an exculpatory or mitigating factor for crimes committed against girls and women or enables a perpetrator of rape and/or other sexual crimes to avoid sanctions by marrying the victim.⁹⁸

In States parties with plural legal systems, even where laws explicitly prohibit harmful practices, prohibition may not be enforced effectively because the existence of customary, traditional or religious laws may actually support those practices.⁹⁹

2.4. Human trafficking

Human trafficking is a particularly egregious human rights violation and a form of gender-based violence specifically targeting girls and women for exploitation and placing them at high risk of physical and psychological abuse, trauma and disease. Trafficked women and girls are routinely subjected to confinement, severe physical and sexual abuse, humiliation and threats for the purposes of commercial sexual exploitation, domestic servitude, forced and bonded labor and organ removal. These practices unequivocally amount to torture and ill-treatment (A/HRC/13/39).¹⁰⁰ Traffickers range from being private persons to being part of organized crime or militias. Public officials can actively acquiesce in or facilitate trafficking operations, for instance by accepting bribes or inducements and certifying or ignoring unlawful working conditions or whenever States fail to exercise due diligence to protect trafficking victims from the actions of private actors, punish perpetrators or provide remedies, they are viewed to be acquiescent or

⁹⁶ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 32.

⁹⁷ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019 Para 41

⁹⁸ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 42.

⁹⁹ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices 2019, Para 43.

¹⁰⁰ A/HRC/31/57 Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016, Para 40.

complicit in torture or ill-treatment (A/HRC/26/18).¹⁰¹ 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.¹⁰²

2.5. Modern-day slavery: migrant torture

A study conducted by the United Nations Office on Drugs and Crime (UNODC) demonstrated that illegal migrants are often victims of torture, rape, kidnapping and imprisonment in captivity. These are the [types of extreme violence](#) to which migrants, who use human trafficking networks to flee their countries of origin, are often subjected. Despite the seriousness of these crimes, little action is taken by the authorities to curb them. In some cases, national public officials are even complicit in the abuses. These are the conclusions of a study released by the United Nations Office on Drugs and Crime (UNODC). The report "[Abused and Neglected](#)" analyzes interviews conducted over the past three years with migrants, traffickers and experts in the field to determine the different types of violence inflicted on men and women, and to present the motivations that lead to abuse during migration routes.¹⁰³

Highlights as it related to women or girls included that abuses encountered during the smuggling operation are highly gendered.¹⁰⁴ Women report a much higher exposure to sexual violence while migrating and report “not having access to sufficient health care” as a significant obstacle, showing an increased need for such services likely linked to the impact of sexual violence experienced as part of their journey.¹⁰⁵

Physical violence and inhuman and degrading treatment are the most prevalent forms of abuses encountered by migrants in transit. Though often inflicted with no apparent reason, physical violence is also used as a form of punishment, intimidation or coercion. The most severe forms of violence, such as torture, often have extortion as the purpose and are associated with other forms

¹⁰¹ **A/HRC/31/57** Report of the Special Rapporteur Juan E Mendez on torture and other cruel, inhuman or degrading treatment or punishment 2016, Para 41.

¹⁰² **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 58 citing 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.

See also **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 56 citing United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons (New York, 2006), p. 156.

¹⁰³ Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022

¹⁰⁴ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 4.

¹⁰⁵ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 4.

of abuses and crimes, including kidnapping or coercion. Several court cases analyzed in the Study led to the understanding that in many instances, smuggled men and women were intentionally separated in order to exercise different types of violence upon them; while men would suffer severe forms of physical violence including torture practices, women would primarily be targeted for sexual torture.¹⁰⁶

Sexual violence is an unfortunate common feature of all smuggling routes that affects female migrants in a much larger proportion than men. It is inflicted as a form of retaliation for alleged misconduct or by lack of other means, as a form of payment, where women are coerced into sexual services in order to pay for transportation or bribes. As reported to the UNODC Observatory on Migrant Smuggling by a case worker in West Africa, “women can use sex as a currency to pay their smugglers or kidnappers and move on”¹ and a law enforcement officer “kickbacks and sex-for-passage (usually affecting women and girls), have been the most common types of bribery along the smuggling corridor”². Generally, the analysis suggests that, due to a variety of gendered factors, women are more likely to be short of money earlier and more frequently during the migration process, making them more vulnerable to sexual abuse to compensate with in-kind payment in the form of what the Study refers to as “transactional rape”.¹⁰⁷ Sexual violence is also perpetrated for no purpose other than a demonstration of power, misogyny, racism or sexual gratification. The Study also highlights the impact of sexual violence on women and girls and the social and medical consequences of abuses such as unwanted pregnancies and abortion that may be difficult to address on the move. Sexual violence could also be used as a means to coerce fellow migrants who are forced to witness the rape of travel companions, while at times technology is being used to perpetuate the victimization and stigmatization by the broadcasting of material depicting sexual violence among the community of the victim.¹⁰⁸

Although many migrants who reach North Africa do not originally intend to cross the Mediterranean, a significant portion of them eventually does, sometimes through coercion of a smuggler or to flee exploitation. During the sea crossing in the Mediterranean, migrants are exposed to considerable risks, including death at sea. It is in fact in the Mediterranean Sea where almost half of the detected migrant fatalities worldwide are recorded. While men are the majority of those undertaking the sea journey, women appear to be disproportionality at risk of dying on this route.¹⁰⁹

The violence and abuses that migrants experience during a smuggling operation is not always considered as a relevant factor in national legislation pertaining to smuggling. In these situations,¹¹⁰ Charges may not lead to more severe penalties for perpetrators, despite the obligation of States Parties to do so in Art. 6 (3) of the Smuggling of Migrant Protocol.

¹⁰⁶ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 4.

¹⁰⁷ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 5.

¹⁰⁸ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 5.

¹⁰⁹ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 6.

Another significant factor may be the lack of reporting by victims. In the case of sexual violence, same sex intercourse (in the case of LGBTQI+ victims) may be a criminal offence; sex outside marriage may be considered adultery while forced or clandestine abortion may be illegal - even when all these are caused by sexual violence or against the will of the victims. This exposes the victims to criminalization and the risk of being charged and prosecuted themselves, a fact that severely discourages the reporting of such abuses.¹¹¹

Several reports exist about migrants and refugees being detained in centres reportedly run by militias, paramilitary, or criminal groups in Libya, where migrants are subjected to extreme violence and neglect. Other practical barriers to reporting are due to the involvement or complicity of public officials in the abuse of the migrants.¹¹²

Finally, the nature of the crime, the modus operandi of smugglers and the speed at which migrants move (especially in the Central American context) may also explain the lack of reporting. The overall reluctance to report is influenced by a widespread sense of impunity and lack of trust in the authorities, in addition to the irregular status of migrants that may expose them to detention and deportation, and the potential delays to their journey if they are to take their case to the authorities.¹¹³

¹¹⁰ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 6.

¹¹¹ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 6.

¹¹² Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 6.

¹¹³ Modern day slavery migrant torture Abused and Neglected: UNODC study reveals violence suffered by migrants Brasilia, January 5, 2022, pp 7.

3. What can be done?

Gaps in effectively prosecuting state and non-State actors has created a culture of impunity which severely undermines the effectiveness and credibility of States' international commitments towards eradicating torture and ill-treatment of women and girls. It also compounds the pain and suffering inflicted by torture and ill-treatment by proliferating and prolonging the trauma and injustice endured by individual victims and wider communities.¹¹⁴ This in turn results in continuing violations of the enjoyment of women or girls' human rights and is a major impediment to achieving gender equality, development, peace and the internationally agreed development goals,¹¹⁵ including the Sustainable Development Goals.¹¹⁶

These crimes remain underrecognized and underreported particularly at the community level, owing to social stigma and inadequate reporting and response services, as well as its pervasiveness, which reflects discriminatory norms that reinforce stereotypes and gender inequality and the corresponding impunity and lack of accountability,¹¹⁷ focusing on the most vulnerable, including refugees, internally displaced persons and those affected by conflicts.¹¹⁸

But these barriers are not new. Violence against women has been present for decades and is rooted in discriminatory,¹¹⁹ historical and structural inequality in power relations between men and

¹¹⁴ A/76/168 Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021, Para 3.

¹¹⁵ UN General Resolutions 63/155. Intensification of efforts to eliminate all forms of violence against women Para 2 2008 UN General Resolutions 65/187 Intensification of efforts to eliminate all forms of violence against women Para 2, 2011

¹¹⁶ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence Preamble 2022: *Reaffirming* the 2030 Agenda for Sustainable Development ¹¹⁶ to build peaceful, just and inclusive societies which are free from fear and violence, where there can be no sustainable development without peace and no peace without sustainable development, and to protect human rights and promote gender equality and the empowerment of women and girls, envisaging a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination...underscoring the particular significance of the 2030 Agenda for victims and survivors of sexual and gender-based violence, in the public and private spheres, online and offline, including trafficking and sexual exploitation and abuse as well as sexual harassment, in need of protection, redress and empowerment, see also: UN General Resolutions 63/155. Intensification of efforts to eliminate all forms of violence against women Preamble 2008 Preamble see also UN General Assembly Resolution **75/161**. Intensification of efforts to prevent and eliminate all forms of violence against women and girls Preamble : *Recalling* the commitment to eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation, contained in Sustainable Development Goal 5, in particular targets 5.2 and 5.3, and the commitment to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels, contained in Sustainable Development Goal 16, and taking into account the commitment to leave no one behind,.

¹¹⁷ UN General Assembly Resolution **76/304** Intensification of efforts to eliminate all forms of violence against women, Preamble.

¹¹⁸ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022, Para 3(a).

women and continues to exist in the 21st century.¹²⁰ Despite being warned that states should refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination of violence against women,¹²¹ normative, institutional and procedural shortcomings, as well as systematic denial, deliberate obstruction and purposeful evasion of accountability, remain widespread globally. This has created a structural “accountability gap” of “systemic proportions”¹²² resulting in, for example, a continuing pervasiveness of violence against women and girls in all its different forms and manifestations worldwide¹²³ including gender-related crimes such as torture.¹²⁴

Given the ubiquity of torture and ill-treatment throughout history and the world, a meaningful pursuit of accountability for torture and ill-treatment should involve a historical reckoning with practices of torture and ill-treatment, seeking truth and reparation, including effective guarantees of non-repetition.¹²⁵ It should trigger “a discussion about the underlying structural causes of the violence”,

¹¹⁹ UN General Assembly Resolution **67/144**. Intensification of efforts to eliminate all forms of violence against women Para 2, 2013; UN General Assembly Resolution **69/147**. Intensification of efforts to eliminate all forms of violence against women and girls, Para 2 2015.

¹²⁰ UN General Assembly Resolution **76/304** Intensification of efforts to eliminate all forms of violence against women Preamble and Para 2(i), 2022; UN General Assembly Resolution **63/155**. Intensification of efforts to eliminate all forms of violence against women Preamble 2008 see also UN General Assembly Resolution **65/187** Intensification of efforts to eliminate all forms of violence against women Preamble see also UN General Assembly Resolution **67/144**. Intensification of efforts to eliminate all forms of violence against women Preamble 2013; UN General Assembly Resolution **69/147**. Intensification of efforts to eliminate all forms of violence against women and girls Preamble 2015.

¹²¹ UN General Assembly Resolution **63/155**. Intensification of efforts to eliminate all forms of violence against women Preamble Para 9 2008; UN General Assembly Resolution **65/187** Intensification of efforts to eliminate all forms of violence against women, Para 8 2011; UN General Assembly Resolution **67/144**. Intensification of efforts to eliminate all forms of violence against women Paragraphs 9-10 2013; UN General Assembly Resolution **69/147**. Intensification of efforts to eliminate all forms of violence against women and girls Paragraphs 4 and 5 2015; UN General Assembly Resolution **75/161**. Intensification of efforts to prevent and eliminate all forms of violence against women and girls Preamble 2020

¹²² UN General Assembly Resolution **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021, Para 2.

¹²³ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022 Preamble; UN General Resolution **63/155**. Intensification of efforts to eliminate all forms of violence against women, Para 2 2008; UN General Resolution **65/187** Intensification of efforts to eliminate all forms of violence against women, Para 2 2011; UN General Assembly Resolution **67/166** Intensification of efforts to eliminate all forms of violence against women; UN General Assembly Resolution **67/144**. Intensification of efforts to eliminate all forms of violence against women, Para 3 **69/147. Intensification of efforts to eliminate all forms of violence against women and girls preamble and para 3 75/161. Intensification of efforts to prevent and eliminate all forms of violence against women and girls Preamble.**

¹²⁴ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022 Preamble.

¹²⁵ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 34 citing [A/HRC/19/61](#), para 47-77 and 78-79.

including its ‘gendered manifestations’”.¹²⁶ E.g. *We must* address the structural and underlying causes of such violence through designing and implementing appropriate domestic policies that are aimed at transforming discriminatory social attitudes and social and cultural patterns of conduct as well as other root causes of sexual violence that condone such violence with a view to preventing and eliminating, in all public and private spheres, including online spaces, discrimination, gender stereotypes, negative social norms, attitudes and behaviors, and unequal power relations. Publicizing the societal and economic costs of violence and working with local communities¹²⁷ as well as recognizing the importance of having an open, inclusive and transparent engagement with civil society could also contribute to supporting the implementation of measures to provide access to justice, remedies and assistance for victims and survivors of sexual and gender-based violence.¹²⁸

Recognizes that a culture of impunity could result in an increase in sexual exploitation and abuse, and in this regard underlines the necessity of immediate, safe and appropriate measures, including through investigations and prosecution where appropriate, and of reporting to the United Nations promptly on action taken.¹²⁹

This culture of impunity also reiterates the need to intensify other efforts to prevent and eliminate all forms of violence against women and girls throughout the world.¹³⁰ For example, include gender-related crimes and crimes of sexual violence in national and international legislation as was the case in the Rome Statute of the International Criminal Court¹³¹ along with efforts to combat impunity for sexual and gender-based violence such as ad hoc international criminal tribunals’ recognition that rape and other forms of sexual violence can constitute (e.g. a crime against humanity or torture) and ending impunity by ensuring accountability.¹³²

The pervasiveness of violence against women and girls in all its different forms and manifestations worldwide underscores that victims of sexual exploitation and abuse should be at the core of the United Nations efforts, throughout the United Nations system, in implementing the zero-tolerance policy, in this regard highlights the importance of providing expeditious support to them.¹³³

¹²⁶ [A/HRC/14/22](#), para. 62.

¹²⁷ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022 Preamble, Para 2 (i).

¹²⁸ UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022, Preamble.

¹²⁹ UN General Assembly Resolution **76/303** United Nations action on sexual exploitation and abuse 2022, Para 7.

¹³⁰ UN General Resolutions 63/155. Intensification of efforts to eliminate all forms of violence against women, Preamble 2008 see also UN General Assembly Resolution 65/187 Intensification of efforts to eliminate all forms of violence against women 2011 Preamble.

¹³¹ United Nations, *Treaty Series*, vol. 2187, No. 38544.

¹³² UN General Assembly Resolution **76/304** International cooperation for access to justice, remedies and assistance for survivors of sexual violence 2022, Preamble.

¹³³ UN General Assembly Resolution **76/303** United Nations action on sexual exploitation and abuse 2022, Para 14.

4. Recommendations

CSW 51 Agreed Conclusions Elimination of all Forms of Discrimination and Violence against the Girl Child (2007)

States should “take special measures for the protection of girls affected by armed conflict and by post-conflict situations and, in particular, protect them from sexually transmitted diseases, such as HIV/AIDS,

gender-based violence, including rape and sexual abuse, and sexual exploitation, torture, abduction and forced labor, paying special attention to refugee and displaced girls; and take into account the special needs of girls affected by unilateral measures not in accordance with international law and the Charter of the United Nations and by armed conflicts in the delivery of humanitarian assistance and disarmament, demobilization, rehabilitation assistance and reintegration processes, and that girls living under foreign occupation must also be protected in accordance with the provisions of international humanitarian law;”¹³⁴ they should “condemn all forms of violence against girls and take effective legislative and other measures to prevent and eliminate all such violence, including physical, mental, psychological and sexual violence, torture, child abuse and exploitation, hostage-taking, domestic violence, trafficking in or sale of children and their organs, pedophilia, child prostitution, child pornography, child sex tourism, gang-related violence and harmful traditional practices in all settings.”¹³⁵

2014 Geneva NGO Forum – Beijing+20 UN ECE Regional Review, (3th-5th November, 2014).
NGO Declaration and Recommendations

Specific Recommendations from the Forum.

Section 2. Violence Against Women and Conflict Building a Culture of Peace.

Paragraph 2(i) Ensure National Laws criminalize non-State torture perpetrated by non-state actors and hold perpetrators accountable for gender-based non-state torture crimes.¹³⁶

UN Special Rapporteurs

States have a duty to ensure that perpetrators of torture must be accountable for their crimes. This is a fundamental component of State obligations derived from the absolute and non-derogable prohibition of torture and ill-treatment. Individual accountability for torture and ill-treatment requires that individuals involved in violations of the prohibition, whether through acts or omissions, take or are assigned responsibility for their misconduct, face appropriate consequences and contributed to repair the harm caused for the benefit of victims, their next of kin and the wider community.¹³⁷

¹³⁴ **CSW 51 Agreed Conclusions** Elimination of all Forms of Discrimination and Violence against the Girl Child (2007)
Armed Conflict Para 14.7(a).

¹³⁵ **CSW 51 Agreed Conclusions** Elimination of all Forms of Discrimination and Violence against the Girl Child (2007)
Armed Conflict Para 14.9(a).

¹³⁶ 2014 Geneva NGO Forum – Beijing+20 UN ECE Regional Review, (3-5 2014 November) NGO Declaration and Recommendations; Specific Recommendations From the Forum; Section 2.Violence Against Women and Conflict Building a Culture of Peace, Paragraph 2(i).

State failure to establish appropriate accountability mechanisms or to take reasonable and adequate measures to secure accountability for torture and ill-treatment violates the prohibition on torture and ill-treatment and should be condemned accordingly on the national, regional and international planes. Moreover, it should be recalled that widespread or systematic breaches of the prohibition of torture and ill-treatment not only engage the legal responsibility of States but may also give rise to individual criminal responsibility for crimes against humanity and war crimes before international and national courts. Failure to take the measures required by law to ensure accountability for torture and ill-treatment gives rise to legal responsibility, including not only State responsibility but also, in some circumstances, individual responsibility under international criminal law.¹³⁸

States should criminalize rape using a definition of rape that covers all persons, includes marital rape and all acts of penetration of a sexual nature, and explicitly includes lack of consent at its centre. Aggravating and mitigating circumstances should be revisited and aligned with human rights standards.¹³⁹

UN General Assembly Resolutions/Declarations

Declaration on the Elimination of Violence against Women adopted by the General Assembly in resolution 48/104.¹⁴⁰ Specifically, 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”.

States

States must strengthen measures to address all violence against women and girls¹⁴¹ by punishing all perpetrators whether these acts are perpetrated by the State, by private persons or by non-State actors.¹⁴²

¹³⁷ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16th, 2021, Para 24.

¹³⁸ **A/76/168** Torture and other cruel, inhuman or degrading treatment or punishment Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer 2021 Holding States and individuals responsible for accountability deficits, Para 74.

¹³⁹ A/HRC/47/26 Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, Para 112.

¹⁴⁰ **A/HRC/7/3** Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2008 Para 31 the Declaration on the Elimination of Violence against Women adopted by the General Assembly in resolution 48/104.¹⁴⁰ Article 4 (c) of this Declaration proclaims that

¹⁴¹ UN General Assembly Resolution **76/303** United Nations action on sexual exploitation and abuse 2022, Preamble.

¹⁴² UN General Assembly Resolution **76/303** United Nations action on sexual exploitation and abuse 2022 Preamble UN General Resolutions 63/155. Intensification of efforts to eliminate all forms of violence against women, 2008 Para 3; UN General Assembly Resolution 67/144. Intensification of efforts to eliminate all forms of violence against women

Some States, when criminalizing torture, have recognized that the crime of torture may be committed by non-state or private actors, without a nexus to a State or quasi-State entities.¹⁴³ Examples from the region that recognize the responsibility of private individuals and non-state actors include Argentina¹⁴⁴ or the Criminal Code of Guatemala, which criminalizes torture committed by members of organized groups or gangs having terrorist, insurgent or subversive purposes or any other criminal purpose.¹⁴⁵

4.1. Recommendations by the UN Independent United Nations human rights experts in 2021

States should:

1. In any territory under their jurisdiction respect their obligation to monitor and prevent violations of human rights committed by armed non-State actors or violations by armed non-State actors empowered to exercise governmental authority or acting with Government acquiescence;
2. Properly investigate all allegations of human rights violations by armed non-State actors, prosecute and punish perpetrators, and ensure adequate reparation and redress to victims, in full compliance international human rights law and standards;
3. Provide appropriate redress, reparations and other assistance to victims, in cases of both direct and indirect responsibility for abuses committed by armed non-State actors, in particular in cases where armed non-state actors are unable or unwilling to meet their responsibilities in this regard;
4. Contribute to and/or support the clarification and codification of human rights responsibilities of armed non-State actors;
5. Evaluate current mechanisms for holding armed non-State actors accountable and identify approaches to effectively address protection and justice gaps and vacuums;
6. Encourage the adoption by armed non-State actors of policies, practices and codes of conduct for human rights protection;
7. Develop guidelines for human rights-based engagement with armed non-State actors.
8. adopt a gender-sensitive approach and ensure that these recommendations are implemented taking into account the heightened risk of abuse against women and children, including for sexual and gender-based crimes, and child soldier recruitment;
9. ensure that the experiences of groups with specific vulnerabilities and individuals within these groups, such as migrants, minorities, LGBTI, older persons and persons with disabilities among others, are fully integrated in the implementation of these recommendations.

Para 8 **69/147. Intensification of efforts to eliminate all forms of violence against women and girls** Para 7 and 8 see also **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16th, 2021 citing [A/73/207.](#)

¹⁴³ APT-CTI Anti torture guide, p. 24.

¹⁴⁴ Argentina, Article 144 (3) (1) Criminal Code of Argentina.

¹⁴⁵ **Overview of anti-torture legislation in Latin America and the Caribbean** 2017, pp 13 – I left some examples out as I could not find language that included non-state parties without a connection to the government etc.

Armed non-State actors should:

1. expressly commit and signify their willingness to respect, protect and fulfil human rights;
2. implement their human rights responsibilities in their codes of conduct or other internal documents;
3. ensure proper and genuine accountability within their ranks and organizations for abuses of human rights.

Other stakeholders should:

1. engage directly and concretely with armed non-state actors with the aim to encourage respect for human rights;
2. if acting as permanent monitoring and reporting mechanisms, ensure that they effectively and transparently assess and report on the compliance of armed non-State actors with human rights;
3. encourage and support armed non-State actors in adopting and adhering to international human rights standards.