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Reparations for Torture: Helping Women and Girls

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The world climate is an organic social environment constantly growing and changing provoking waves of peace and violence in every corner of the globe. In these times of turmoil, international institutions have played a significant role in unifying nation States and establishing core human rights fundamental to the human race. Among these rights is the basic principle that each individual should live and be free from the infliction of torture. While contemporary examples of torture are generally associated with infliction of cruel and degrading punishment on men suspected of terrorism or those abused by tyrannical governments, women and girls who experience sexual and gender-based violence are often left out of the conversation and consequently prohibited from obtaining reparations.

Article 1 of the Convention Against Torture defines torture as “any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as to obtain from him or a third person information or a confession . . .”¹ International law has extended prohibitions of those acts which would amount to torture, but lack the necessary purpose or involve less severe physical or mental pain as a means to protect all persons from being subjected to “cruel, inhuman or degrading treatment.”² Essentially, international law has expanded the original definition to encompass instances of torture not previously considered in an attempt to provide the utmost protections and reparations. This shift in the international legal framework should bring hope to female torture survivors that they might find recognition for their experiences and redress, but legal and societal obstacles still stand in the way of securing justice and obtaining reparations.

¹ Art. 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 39/46 of 10 December 1984. Accessible at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

² The Legal Prohibition Against Torture, Human Rights Watch (2004) <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#What> discussing the Convention Against Torture and its evolution to include more types of violence.

Torture against women and girls is used as a means to “exert control, to dominate and encourage submission”³ in societies wrought with political or civil turmoil, but can also occur in social settings that promote male dominance. Particularly for women and girls, torture can be experienced in a variety of ways and places including detainment cells by police officers, as a means of exerting supremacy by warring political groups, and by their own husbands in the home. These women and girls are “maimed, sexually mutilated, enslaved, raped – often repeatedly. . . .”⁴ Many of these women and children are forced into domestic labor, marital unions, pregnancies, and sexual slavery as a result of social hierarchies that make them more vulnerable to violence. Most also come from marginalized societies where equal public status is not recognized for women and girls making access to judicial systems that make it feasible to move their claims forward.

Access to and the obtainment of reparations for crimes of torture should be a strong interest for the international community in its obligation to prevent and redress the torture of women and girls. Reparations have been codified in a number of treaties and agreements including the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and have been affirmed by a number of international institutions and regional instruments as a means to reconcile the pain and suffering experienced.⁵ However, many legal institutions do not

³Ferstman, Carla., *Procedural and Substantive Obstacles to Reparations for Women Subjected to Violence* (2010) available at: http://www2.ohchr.org/english/issues/women/rapporteur/docs/side_event_june2010/CarlaFerstman.pdf

⁴ Id. at 2.

⁵ International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14). Some examples of regional instruments are: European

adequately address the consequences of the unique violence forced on women even with calls for international recognition. The multiple issues women and girls face procedurally and socially has previously been the focus of the Special Rapporteur's Report, which highlighted the need for restructuring reparations programs for sexual and gender-based crimes.⁶ In that report, the Special Rapporteur cited the challenges of putting questions of gender-sensitive reparations on international and domestic agendas as well as the types of systemic violations women are often subjected to, particularly in times of widespread conflict or authoritarian repression.⁷

International Laws Prohibiting Torture and Providing Reparations

Generally, the protection of human life has been the goal of human rights instruments, but more recently have aimed to create affirmative obligations to protect individuals from specific types of crimes. A number of international legal instruments have solidified the prohibition of torture and victim's rights to reparations. The Convention on the Elimination of all Forms of Discrimination Against Women explicitly asserts that the State has the duty to develop domestic legislation aimed at remedying discrimination against women, which is the root cause of gender-based violence.⁸ The right to reparations is also codified in as a duty of States who are parties to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Arts. 5(5) and 41) and American Convention on Human Rights (ACHPR) (1981) (Art. 21(2)).

⁶Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/14/22 (April 19, 2010).

⁷ Id.

⁸ Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (Art. 2).

Punishment.⁹ “Although a coherent theory and practice for remedies for victims of human rights violations does not yet exist under international law, the right of individuals to reparations for the violation of their human rights has been increasingly recognized.”¹⁰

This right to be free from torture and to obtain remedies has also been supported through a range of regional human rights instruments and declarative instruments.¹¹ The prohibition of torture is non-derogable, and one of the most fundamental norms of international human rights, identified as a violation of customary international law and as a *jus cogens* norm by international law.¹² This illustrates the general trend of States to both recognize and formally instill the concept of reparations into legal institutions, though what is actually required of reparations programs remains somewhat fuzzy.

In 2005, the UN General Assembly adopted the “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”¹³ These guidelines provide that the “modality of reparations must be proportional to the gravity of the violation.”¹⁴ The categories of such reparations include: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. This marks one of the most comprehensive instruments guiding

⁹ Article 14 of the Article Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Also see the International Covenant on Civil and Political Rights (art. 2) and the Universal Declaration of Human Rights (art. 8).

¹⁰ Manjoo, *supra* note 6 at 6.

¹¹ See, European Convention on Human Rights (art. 41) and the American Convention on Human Rights (art. 10).

¹² OHCHR, *Preventing Torture: An Operational Guide for National Human Rights Institutions*, (May 2010) available at:

http://www.ohchr.org/Documents/Countries/NHRI/Torture_Prevention_Guide.pdf

¹³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted on 16 December 2005 (A/RES/60/147, 21 March 2006).

¹⁴ *Id.*

how and what reparations should be implemented for torture victims, but is much broader than necessary to address victims of sexual violence. While there is no means of providing redress that would restore any woman or child experiencing gender-violence to their former selves, the reparation guidelines permit States to fall short on other fronts. Because many of these women face obstacles to obtaining reparations, the system itself fails unless it provides means of destroying those barriers and creating gender equality that would make access to the courts more feasible.

Issues Preventing Women and Girls from Obtaining Reparations

The notion of a right to reparations, both procedural and substantive, is a multifaceted concept influenced by social constructs, legal systems, and policies that affect women differently. Women and girls are faced with a unique set of issues that define both the type of torture they are subjected to as well as the barriers they face in bringing claims and obtaining reparations. That is not to say that men cannot and do not experience sexual violence, rather that women and girls experiences it on much higher level. Many women and girls, as a result of political and civil unrest, are subjected to gender-based sexual violence and are repeatedly and symbolically used as “tools of war” to humiliate and subordinate whole populations.¹⁵ Due to the existing inclination to keep topics of a sexual nature private, these victims are habitually faced with stigmatization by their communities making it difficult to seek justice or find help and increases their chances of becoming impoverished and isolated. Sexual torture offenses also pose procedural barriers to bringing and proving claims in different judicial systems; even when

¹⁵ Manjoo, Rashida., “Gender-Based Violence and Justice in Conflict and Post-Conflict Areas”, 44 Cornell International Law Journal 11 at 14 (2011).

women and girls can make it through the judicial system, reparation programs are generally inadequate to provide the type of services and resources needed to rectify these types of crimes.¹⁶

The hierarchical mode by which offenses of torture and the means of redress are built leaves many women to be left outside of categories that would traditionally trigger the need for reparations. “This was the case in Peru, where violations were ordered on a scale of gravity and rape ended up at the bottom because, allegedly, and implausibly, unlike murder and disappearances, other violations of physical integrity, and imprisonment, it was considered that rape did not end victims’ lives, affect their ability to generate income, or interrupt their life projects.”¹⁷ Contrary to that international trend, women and girls face significant offenses that can and do end their lives in a number of ways. Gender-based crimes are not only in the form of rape but also forced marital unions, forced impregnations, displacement, forced domestic labor, etc. All of which can lead to significant psychological, emotional, and physical manifestations making it impossible to continue on with the natural flow of their daily lives. Without societal and legal changes to substantive laws and a reclassification of rape and other gender-based crimes of torture, women will consistently find their claims to torture and reparations shuffled off to the side.

One expert has identified that the failure of investigative bodies to probe crimes from a gender perspective provides inadequate evidence and less gender-based charges for torture making redress unavailable.¹⁸ She also found, the inability to collect the evidence essential to prove claims of torture, particularly in instances of rape and genital mutilation, have posed a

¹⁶ Rubio-Martin, Ruth., *What Happened to the Women? Gender and Reparations for Human Rights Violations* at 23 Social Science Research Council (NY 2006).

¹⁷ Rubio-Marin, Ruth. *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*. Cambridge University Press page 79 (2009).

¹⁸ Ferstman, *supra* note 3.

substantial deterrent to claims brought by women and children. As with much DNA evidence, lackluster action by State officials diminishes chances of attaining physical proof, which is especially harmful in communities where a woman's social status makes her word unbelievable.¹⁹ Without substantial evidence, which sometimes cannot be procured without posing a danger to the victim, many of these claims will not progress through the necessary stages of the court system in order to receive reparations in the form of medical and psychological services and monetary compensation.²⁰ Evidence collection, including victim and witness accounts, can also be extremely traumatic forcing victims to balance their need for justice with the possibility that they may never prove their claims or face severe backlash, and in some cases prosecution, for admitting that they are sexual-torture survivors.²¹

Other societal barriers to judicial systems also prevent women and girls from bringing successful claims of torture and obtaining reparations. Many women and girls are from marginalized societies where their public status and lack of knowledge hinder them from exercising their rights or accessing judicial systems. While NGOs have made efforts to target these particular groups for services, generally services are received through word-of-mouth referrals. Some cannot access the courts due to geographical location or unwillingness of the community, both domestically and internationally, to recognize sexual their torture or prosecute state agents.²² Often times, this can be seen as States giving transgressors liberty to continue unpunished. These barriers and the lengthy road to justice often deters women and girls from coming forward.

¹⁹ Id. at 6.

²⁰ Id.

²¹ Id.

²² Id. at 3.

Part of the underlying issue, in regards to women and reparations and reparations given to victims in general, is the temporary nature of the remedies that exist. NGOs take on the brunt of reparation distribution and provide rehabilitative services on an impermanent basis. For women, this only patches up the wounds that were inflicted, but does nothing to ensure that new wounds for themselves and future generations are not incurred. Notions of redistributive justice and social policy should address the entire population and seek to transform cultures that make female subordination plausible. In contemporary social structures where the patriarchy is the dominant force, there will always be pervasive obstacles to prosecuting torture, attaining reparations for women and girls, and protecting them from re-offense.

Country Comparison

History is ripe with detailed accounts of gender-based and sexual torture of women and girls and the ensuing consequence of their inability to find justice or obtain reparations. During the wartime violence in Bosnia and Herzegovina, over 20,000 women and girls were subjected to sexual and physical violence in “rape camps” from military and paramilitary groups.²³ Currently, less than 1% of those estimated to be victims of these war crimes of sexual violence have brought their claims to court and only 123 cases involving sexual violence charges have been completed.²⁴ The lack of action by the state to prosecute these crime and hold government agents responsible for their conduct has dissuaded victims from coming forward with their claims and ushered in a sense of impunity. The drawn out process of filing these claims in the

²³ “Bosnia and Herzegovina: Last chance for justice over 20,000 wartime sexual violence survivors”. Amnesty international (Sept. 12, 2017).

<https://www.amnesty.org/en/latest/news/2017/09/bosnia-and-herzegovina-last-chance-for-justice-for-over-20000-wartime-sexual-violence-survivors/>

²⁴ Id.

court system has left many survivors without justice or access to reparations. “Women victims of sexual violence tend to experience high rates of unemployment and poverty and are among the most vulnerable economic groups in Bosnia.”²⁵ Without a formal reparations scheme, only around 800 survivors have obtained any form of monthly allowance and basic benefits, most as a result of being forced to change their residency status and give up other rights to public services.²⁶ While NGOs have long advocated for more to be done, without recognition, hopes for adequate reparations in the forms of monetary compensation, medical services, and psychological assistance will not be established in many of these victims’ lifetimes.

Unfortunately, the Bosnian experience is not an anomaly, but speaks to the pervasive nature of governments around the world who have yet to adequately address providing reparations and justice for victims of sexual and gender-based violence. Countries like the Republic of Uganda, Mexico, and the Democratic Republic of the Congo all have significant incidents physical and sexual torture against women and girls, which are discussed below, who have yet to be provided adequate reparations for those victims. Many of these women have been left for years without psychological or medical treatment or without seeing the prosecution of those who committed such acts.

In the Republic of Uganda, the torture of women and girls predated, but increased during, the armed conflict between the Ugandan Government and the Lord’s Resistance Army (LRA). At the end of some twenty years of violence, problems of issuing reparations for the sexual and gender-based violence of women and girls became evident.²⁷ The UN Special Rapporteur on

²⁵ Id.

²⁶ Id.

²⁷ Office of the High Commissioner for Human Rights, “What the victims want: reparations for Northern Uganda” (Feb. 24, 2012) available at: <http://www.ohchr.org/EN/NewsEvents/Pages/ReparationsForNorthernUgandans.aspx>.

Violence Against Women, Rashida Manjoo, believed that this violence was a direct result of “pre-existing and often cross-cutting structural subordination and systemic marginalization.”²⁸ She suggested that reparations needed to be linked to “individual reparation and structural transformation . . . to subvert instead of reinforce patterns of discrimination and inequality...”²⁹ Currently, the State is still working on creating a reparations scheme to meet the needs of victims of the LRA conflict, although some reparations are available through the ICC’s Trust Fund for Victims. Evidence of the necessary tailored-nature of these reparations was illustrated in working groups where participants agreed that standard monetary compensation was not enough. Other suggestions included: proper treatment of the dead (from identification to burial), public acknowledgement by the State, livestock to ensure they can support themselves financially, and a process to enable victims to speak about the wrongs done to them.³⁰

The Democratic Republic of the Congo was recently cited by the Special Rapporteur’s report for its limited progress on implementing recommendations to end widespread gender violence and provide reparations for victims of torture.³¹ There, reparations schemes are often useless for victims as reparations are seldom ever seen. While victims are provided medical and psychological services during trial, barriers to obtaining reparations post-conviction are evident almost immediately. Many victims face significant stigma from their communities, and in some cases are being forced to marry their perpetrators. It is all too common for women to be forced into traditional mechanisms of redress which allow community leaders to arbitrate rape cases and require perpetrators to pay the victim’s families money or in-kind reparations. Due to pervasive

²⁸ *Id.*

²⁹ *Id.*

³⁰ UN Women and UNDP, “Reparations, Development, and Gender” (Dec 2010).

<https://www.un.org/ruleoflaw/files/Kampala%20workshop%202011-%20Reparations,%20Development%20and%20Gender.pdf>

³¹ Manjoo, *supra* note 6 at 5.

poverty, post-trial complexities, and lack of effort by the Congolese government, any monetary compensation awarded through formal court systems is almost never received.³² To add insult to injury, victims are dissuaded from bringing those claims due to the extensive procedural requirements that force them to pay for their judgement to be passed on to various government ministries before their reparation awards are paid out by the State.³³ International donors do not generally finance post-trial procedural requirements, thus making obtainment of reparations nearly impossible.³⁴

In Mexico, sexual torture against women and girls remains endemic triggering “Gender Alerts” for various cities throughout the country that pose significant threats to women. “A lack of accurate, up-to-date and disaggregated data about gender-based violence constituted a major obstacle to tackling the problem.”³⁵ The Mexican government offered monetary compensation to the “Women of Atenco” after accepting responsibility for police-inflicted sexual torture.³⁶ However, it was rejected by the victims because it did not ensure those responsible would be held accountable.³⁷ Those same victims testified, in November of 2017, before the Inter-American Court and demanded an investigation into the torture by police officer.³⁸ Their claims echo the need for more comprehensive reparations schemes to provide services and redress outside of mere monetary compensation.

³² Aho, Randi., “Congo Court Reparations Elude Sexual Violence Victims”
<http://www.passblue.com/2013/07/15/congo-court-reparations-elude-sexual-violence-victims/>

³³ Id.

³⁴ Id.

³⁵ Amnesty International, Mexico 2016/2017

<https://www.amnesty.org/en/countries/americas/mexico/report-mexico/>

³⁶ Id.

³⁷ Id.

³⁸ Id.

However, there have been some attempts to rectify violations of human rights committed against women and girls and to engender reparations. After the Indonesian occupation of Timor-Leste towards the end of the 21st century, women and girls who were suspected of being related to men involved in the oppositions or who were from communities suspected of being associated with the opposition were subjected to detainment, torture, and sexual abuse.³⁹ Under United Nations' regulation, the Commission for Reception, Truth and Reconciliation (CAVR) was established and ordered to uncover the truth regarding human rights violations and assist in rehabilitation of dignity for victims⁴⁰ CAVR, contrasting the stagnating response to sexual violence by the State government, established an urgent reparations program in response to the studies of women whom had survived the conflict and were victims of some form of sexual torture. While more work still needs to be done, the attempt of CAVR, and region NGOs, to break the stigma on female survivors of torture and create a comprehensive reparations scheme tailored to gender-based torture is progress desperately needed in other parts of the world.

In the Republic of India, victims of sexual and gender-based torture can find redress through a series of statutes, executive schemes and judicial orders. Notably, the Indian Supreme Court has made it possible for reparations programs to consider the pain and suffering associated with the torture as an additive to mere monetary compensation for lost earnings and expenses.⁴¹ This marked considerable progress towards recognizing the rehabilitation of survivors in the reparations scheme. India has also implemented support for victims through non-governmental

³⁹ Galuh Wandita, "Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims" discussing the formation of CAVR.

⁴⁰ UNTAET, Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (UNTAET/REG/2001/10), 13 July 2001.

⁴¹ Redress., "A Report on Reparations and Remedies for Victims of Sexual and Gender Based Violence" at 47 <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/01/REDRESS-Project-on-Reparations-and-Remedies-for-SGB-Victims-FINAL-28-January-20166.pdf>

organizations that provide financial assistance, medical and psychological services and counseling, and holistic protection for victims and their families.⁴² These groups also consistently make recommendations to local, regional, and national legal institutions regarding changes to legal structures and state sponsored reparations aimed at providing more engendered services to victims.

The Republic of Ireland has created a comprehensive reparations scheme for endemic abuse of women and girls in laundries and industrial schools during the 19th and 20th centuries. Victims can now apply for reparations through two exclusive schemes: the Residential Institutions Redress Board and an Ad Hoc Restorative Justice Scheme.⁴³ Though it has been criticized for making it unclear who can apply for reparations under which scheme, both programs include reparations not traditionally thought of in regards to sexual and gender-based torture. Among these types of reparations is a state apology, enhanced medical services, access to a state pension, an ex gratia payment (to express the State's reconciliatory intent), an advocate to aid in making application decisions, and free legal advice.⁴⁴ These types of reparations schemes are especially beneficial to women and girls who face difficult evidentiary problems in proving their claims.

Moving Forward: Making Accessibility and Obtainment of Reparations Possible

The barriers for women and girls to obtain reparations, tasked with addressing and rectifying the violence that they have endured, should be at the center of the discussion on torture and redress. This type of torture and States' obligations to prohibit, prevent, and redress the

⁴² Id. at 50.

⁴³ Id. at 55.

⁴⁴ Id. at 58-62

violence perpetrated on women and girls around the world needs to be addressed. These States should enact new legislation aimed at achieving these goals and the development of reparations systems that adequately address the issues that women and children torture victims face. All groups and institutions tasked with providing services and redress for torture should focus on all available forms of rehabilitation beyond monetary compensation. While monetary compensation for the pain that has been inflicted is an essential part, psychological, medical, and educational services are vital to securing a future for victims. Claims of sexual and gender-based violence are incredibly sensitive and often go unreported because of the social ramifications of such an admission. Providing safe spaces for women to come forward, with the aid of psychological services and support systems, could ease the procedural aspects of judicial claims and prevent further trauma that could stifle the process.

Human Rights Advocates also urges the Council to:

1. Request the General Assembly to stabilize the budget for the Voluntary Fund for Victims of Torture (VFVT)⁴⁵ in order to fully implement long-term reparations plans and provide aid. The VFVT has made positive steps towards assisting victims and their families with rebuilding their lives by providing immediate and essential services and remedies.
2. - Request States, with the aid of NGOs, to provide mobile court systems to remote regions where access to justice is unavailable and create and maintain programs that educate women and girls on their rights. These programs should create efficient avenues for victims to access the court systems and understand the claims process for reparations.
- Request States to change reparations concepts away from restoring women and girls back to their former selves, and instead focus on rehabilitative services and influencing

⁴⁵ “United Nations Voluntary Fund for Victims of Torture”
<http://www.ohchr.org/EN/Issues/Torture/UNVFT/Pages/WhattheFunddoes.aspx>

the social conditions that made the gender-based and sexual violence possible in the first place. As part of the States' duty to prevent re-offense, this is imperative to preventing new and reoccurring violence against women.

- Urge States to improve investigative techniques that make the process of investigating claims easier on women and children, while providing interim services available during the court process. Services such as medical treatment, counseling, and legal aid would ease the trauma of the court process on survivors and their families.

- Urge States to implement legislation aimed at improving the status and public voice of women and children, particularly in marginalized communities. They should seek to prohibit all forms of gender-based torture and establish protections for women and children in public and at home.

3. Request that the Special Rapporteur develop a comprehensive and detailed reparations scheme which specifies the type of reparations necessary for victims of sexual torture and the mechanisms by which victims can apply for such services. By providing narrowly-tailored guidelines for reparations, States can better formulate thorough reparations programs that address each category of redress.