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Dear Ms Pimentel, Mr Zermatten,

AMNESTY INTERNATIONAL'S SUBMISSION ON THE PROPOSED JOINT GENERAL COMMENT ON HARMFUL PRACTICES

Amnesty International welcomes the opportunity to respond to the call made by the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW) and the UN Committee on the Rights of the Child (CRC, collectively the Committees) for submissions in advance of a joint CEDAW / CRC General Comment on harmful practices.

The organization would like to express at the outset its support for this initiative. The drafting of this General Comment provides a key opportunity for the Committees to clarify legal duties to address and eradicate harmful practices affecting girls, irrespective of the type of practice involved, or its cultural justification or background.

General remarks on the scope of the definition of "harmful practice"

Analysis and work on harmful practices has historically been focused on issues such as female genital mutilation (FGM) and forced and early marriage. Stereotypical views of such practices are that they are confined to developing countries with specific religious or cultural beliefs. More recent analysis of women's and girls' rights has a much more nuanced view of including the prevalence of patriarchal cultures in all regions of the world, and the complexity of intersectional discrimination.[1] Harmful practices, which are grounded and justified in such intersectional discrimination, are expressed in a wide variety of acts which result in harm, including physical and mental pain and suffering, contrary to the right not to be subjected to torture or other cruel, inhuman or degrading treatment.[2]

[1] See most recently, the report of the current Special Rapporteur on violence against women, its causes and consequences, "Multiple and intersecting forms of discrimination and violence against women", UN Doc A/HRC/17/26, 2 May 2011.

[2] In the report of the first Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, "Cultural practices in the family that are violent towards women" (UN Doc E/CN.4/2002/83, 31 January 2002), FGM, honour killing, pledging of girls for economic and cultural appeasement, witch hunting, caste, marriage (forced and early marriage, dowry, virginity testing, codes of marital obedience) discriminatory laws, son preference, restrictive practices (denial of women's right to freedom of movement, menstruation taboos, enforced dress codes) practices which violate women's

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This joint General Comment is an important opportunity to emphasise the unacceptability of such practices, outlining the social and cultural requirements prevalent in harmful practices across cultures, across all regions of the world. For example, social requirements that girls and women are, or are perceived to be, sexually chaste, justify killings committed in the name of "honour" in South Asia and Turkey, for example. Similar social requirements for women and girls to be sexually faithful to one man underpin defences based on "provocation" or "crimes of passion" in other regions, such as Europe and Latin America.

Social and cultural requirements about the sexuality of women and girls are particularly prevalent in harmful practices.[3] These include beliefs that

- sexually active girls are worthless, and that virginity is the most important indicator of a girl's personal value;
- the sexuality of women and girls must be controlled by others (husbands, fathers or other family members);
- women and girls are not entitled to enjoy their sexuality according to their own wishes, including making the choice not to be sexually active;
- girls and women cannot make their own choices about sexual and reproductive health and access to reproductive health services without intervention from third parties, such as husbands, or the parents of adolescent girls,
- sexual contact without full and free, genuine consent is acceptable and lawful: such attitudes justify rape within marriage, and legal and social stereotypes that a woman or girl who does not physically fight back against rape is consenting, or that being out late at night or dressed in certain ways justifies rape;
- transgression of social codes relating to sexuality justifies acts of violence against women and girls.
- lesbian, bisexual and transgender girls and women are particularly subject to violence (including so-called "corrective rape") because they are deemed to transgress sexual and gender norms.

This General Comment is an important opportunity to emphasise, according to the 1995 Beijing Declaration and Platform for Action, the right of women and girls to a safe and satisfying sex life, free of violence and coercion, and that social or cultural requirements to limit this right are unacceptable.

Legal responsibility of state and non-state actors

It is important to note 'harmful practices' are often interpreted as concerning only the actions (or omissions) of non-state actors. States parties also engage in what could be called 'harmful practices' (such as virginity testing, 'protective' custody, provision of information about gender roles and sexual and reproductive health that does not conform to human rights or health care requirements, for example). It is important that the General Comment emphasises the role of states as perpetrators of harmful practices. The persistence of such acts by states constitutes encouragement to non-state actors in maintaining harmful practices. It is also important to emphasise states' obligations to take positive action to eradicate harmful practices. States must be held to account for their failure to exercise due diligence to eradicate harmful practices and the gender stereotyping with supports and motivates them.

Many harmful practices also constitute crimes under national or international law, particularly killings, assault, torture, and rape (where a child is too young to consent to sexual contact, or

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sexual and reproductive rights, beauty and incest, were all identified as forms of harmful cultural practice within the family.

[3] See particularly, the report of the Special Rapporteur on violence against women, its causes and consequences, above, note 2, generally.

when sexual acts are forced or coerced, in any way that affects a girl's ability to give free and genuine consent). The Committees should make it clear that crimes against women and girls cannot be justified by reference to social and cultural norms.

Gender stereotyping: a root cause and reason for the persistence of harmful practices

The obligation to transform gender stereotypes is an important provision of the Convention on All Forms of Discrimination against Women, and other human rights treaties.[4] An important contribution of this proposed General Comment would be for the Committees to propose a strong definition of 'harm" or "harmful' that consistently identifies the kind of violations of women's and girls' rights in a manner that discloses reality of their experience. One of the functions of gender stereotyping is to downgrade the suffering of women and girls as normal and acceptable, because it is so prevalent, it is seen as unremarkable, a normal part of life, and therefore acceptable. Such harms include coercive early sexual experiences in adolescent girls,[5] sexualised bullying in schools, denial of access to sexual and reproductive education and services to preserve sexual "purity" in adolescent girls, or denial of abortion to child and adolescent victims of rape.

Across all forms of harmful practice, irrespective of the type of practice or the culture which supports it, gender stereotyping is an important causal factor. This General Comment could make a very important contribution by outlining in practical detail promising practices which states can take to eradicate and transform gender stereotypes, particularly methods which emphasise women's and girls' right to participate in and shape their own culture, and also, which emphasise that temporary special measures to address gender stereotyping and gender inequality are legal and necessary. [6]

Protection and reparation

Amnesty International recommends that this General Comment makes detailed and comprehensive guidance on appropriate methods of protection and remedies for girls who are at risk of harmful practices. This should include the right to seek asylum for gender-based persecution, and if the girl remains in her own country, the provision of protection which does not violate her rights, and allows her choice and autonomy – for example, protective custody should not be used.

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[4] The Convention on the Elimination of All Forms of Discrimination against Women, Article 5(a) contains the obligation

> "[T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

See also: the International Convention on the Elimination of Racial Discrimination, Article 5 c) and d); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 13 September 2000,Article 2(2); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994); Article 6 (b), Article 7(a) and 7(b) of the International Convention on the Rights of Persons with Disabilities, Article 8(1)(b); Committee on Economic, Social, and Cultural Rights, paragraph 19 of General Comment 16, (UN Doc E/C.12/2005/4) 12 August 2005 and paragraph 20 of General Comment 20, UN Doc E/C.12/GC 20, 2 July 2009; CEDAW paragraph 7 of General Recommendation 25 on temporary special measures, Thirtieth Session, 2004.

[5] *"From invisible to indivisible: promoting and protecting the right of the girl child to be free from violence"* UNICEF, April 2008, page 47.

[6] See the report by the Special Rapporteur on violence against women cited above, note 1, at paragraph 92.

Appropriate methods of reparation for victims of harmful practice should be identified. Such guidance should include methods of consulting affected girls and women about the kinds of remedies they need. Limitation periods for bringing criminal cases or legal actions to secure civil remedies should not deny child victims a remedy – any limitation period should start to run after the age of 18.

Female Genital Mutilation (FGM)

Further to these general remarks on the overall content of the General Comment, Amnesty International would like to make some further comments based on the organization's campaign on FGM, which is centred on the experience of women and girls in Europe living with, or at risk of, FGM.

FGM is a global issue affecting women and girls from all regions, constituting gender based and child-specific persecution. The World Health Organization (WHO) defines it as all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.

In addition to the severe pain during and in the weeks following the cutting, women who have undergone FGM experience various long-term effects - physical, sexual and psychological. As the Committees are aware, long-term consequences include chronic pain, chronic pelvic infections, and development of cysts, abscesses and genital ulcers. The health consequences continue throughout the woman's life, often producing repetitive trauma when she is about to give birth. FGM is also linked to maternal and infant mortality. A multi-country study by the WHO in six African countries showed that women who had undergone FGM had significantly increased risks for adverse events during childbirth, and that genital mutilation in mothers has negative effects on their newborn babies.[7] After childbirth, women of some communities who have had their vaginas stitched up (infibulations) have them re-closed (reinfibulation), which needs a repeated un-stitching (deinfibulation) later. Such cutting and re-stitching of a woman's genitalia results in tough and painful scar tissue,[8] as well as ongoing pain and trauma throughout her life.

For strategies aimed at the elimination of genital mutilation to be effective, a combination of criminal sanctions and preventative approaches are necessary, involving members of practicing communities in their development, as well as international cooperation.[9] Criminalisation can not be the only solution: any criminal sanctions should be supported by preventive measures and, in that respect, States should implement the due diligence principle which requires effective prevention, protection, and reparation, not just criminalization.[10]

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[7] WHO Study Group. Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African countries (Lancet, June 2006)

[8] WHO. Female genital mutilation. An overview. Geneva: World Health Organisation 1998.

[9] It was reiterated by the Commission on the Status of Women. See : UN Doc. E/CN.6/2010/11, 2010, Resolution 54/7 Ending female genital mutilation, Commission on the Status of Women

[10] This has been clearly stated by the Special Rapporteur on torture in June 2011. Statement by Juan E. Méndez, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, June 1, 2011, http://www.stop-stoning.org/node/1853:

" *The purpose of my presentation is twofold: to reiterate that FGM in its form and cruelty amounts to torture and cruel, inhuman or degrading treatment or punishment as set forth in article 1 and 16 of the CAT; and to emphasise States' obligations to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether perpetrated by the State or by private persons, and to provide redress, reparation and rehabilitation to victims of torture and ill-treatment.*"

Criminalization alone is not sufficient to discharge the duty of due diligence

To prevent the ongoing practice of FGM, states parties must develop a legal and policy framework that would respect the due diligence principle. Many states parties have criminal legislation which defines the practice of FGM as an offence, either as a specific criminal act or as an act of bodily harm or injury. For example, in the EU, specific criminal provisions have been adopted in nine EU Member States, for example: Austria, Belgium, Cyprus, Denmark, Italy, Portugal, Spain, Sweden and the UK. In some other states parties, FGM is addressed under general criminal law provisions in the Penal Code.[11] However, states parties must combine these efforts with preventive measures to be effective.

The effectiveness of criminal law alone, as indicated by the number of cases brought to court, has been limited owing to issues around conditions attached to the extraterritorial application of criminal law, the secrecy surrounding the practice within communities, the reluctance of girls to formally implicate parents and the reluctance of professionals to follow through on all complaints and concerns.[12]

States parties have agreed to take all appropriate measures to protect the rights in the Conventions.[13] While legislation is crucial in protecting women and girls from this harmful practice, the emphasis should be on strong preventive measures. In the majority of cases the crime is instigated by parents or other close family members, making criminal law an unattractive avenue for some who have been subjected to the procedure. In this context therefore it is imperative to recognise the social pressures forcing those affected to conform to tradition that often lies at the core of this practice. There are numerous cases documented of instances where girls residing in Europe, for example, have been mutilated whilst abroad on family holiday,[14] as well as anecdotal evidence and criminal cases pointing to the practice being carried out within Europe.[15]

Preventative measures must be formulated in cooperation with the communities affected by or practicing FGM, accounting for the above factors. This would include cross border cooperation, as discussed below.

Awareness-raising, training and knowledge-sharing on outreach to practicing communities is needed to strengthen preventative capacity of social services, prosecutors and child protection officers. Professionals in the education and health care sectors would also benefit from FGM training and capacity building. The Committees should reaffirm that involvement of relevant stakeholders and affected communities in all phases of the decision-making process is crucial. In particular, the Committees should encourage States to involve young people in this process: they are key agents in changing beliefs and attitudes towards the practice.[16]

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[11] Leye E, Sabbe A, *Overview of legislation in the European Union to address Female Genital Mutilation: challenges and recommendations for the implementation of laws,* Expert paper, Expert Group Meeting on good practices in legislation to address harmful practices against women, 25 to 28 May 2009

[12] Leye E, Deblonde J, García-Añón J, Johnsdotter S, Kwateng-Kluvitse A, Weil-Curiel L, Temmerman M. An analysis of the implementation of laws with regard to female genital mutilation in Europe. Crime Law Soc Change (2007) 47:1-31.

[13] UN Convention on the Elimination of All Forms of Discrimination against Women, article 3; UN Convention on the Rights of the Child, article 2.2.

[14] Powell R. et al. Female genital mutilation, asylum seekers and refugees: the need for an integrated European Union agenda. Health Policy 70 (2004) 151–162.

[15] Weil-Curiel, Linda, *Combating sexual mutilation in France through the application of the law,* C.A.M.S., 2002.

[16] See the *Young People Speak Out (YPSO!)* programme developed by FORWARD UK (http://www.forwarduk.org.uk/what-we-do/uk-programmes/ypso). Also UN Commission on the Status of Women, Resolution 54/7 Ending female genital mutilation, , E/CN.6/2010/11, 2010, "§3 Calls upon States to strengthen advocacy and awareness-raising programmes, to mobilize girls and boys to take an active part in developing preventive and elimination programmes to address harmful traditional practices, especially female genital mutilation, and to engage communities and religious leaders, educational

Amnesty International agrees with the findings of a report funded under the EU Daphne programme that reporting a suspected case of FGM is a main area of concern.[17] The duty of professionals to report is an important element, which would need to be accompanied by clear guidelines and protocols explaining the level of risk and the different steps in the reporting process. This duty would need to balance the role of the law in punishing perpetrators with the reality that compulsorily subjecting those who have experienced FGM to a criminal process may act as a disincentive to seeking essential health care. The duty would need to balance the role of the law in punishing perpetrators whenever a case of FGM comes to light, with giving victims some autonomy in whether or not to make a report: where there is a strict obligation on medical professionals to report any case of FGM, this may discourage girls from seeking medical care, because they know that family members will be subject to criminal investigation. A supportive intervention resulting from reporting would be beneficial. Professionals reporting cases of FGM, and those who act on such reports, would need to be trained in supporting child or adolescent survivors of FGM within their family and cultural situation for reporting methods to be effective.

As highlighted in the UN Secretary-General's report on the Girl Child:
"Innovative processes of legal reform are taking into consideration the degree of social acceptance of the practice, aware that if support for the practice is high, legal measures that are solely punitive cannot be enforced. In countries of prevalence as well as in countries of immigration there are now examples of legislation that complement punitive measures with educational activities designed to promote a process of consensus towards abandonment and to provide appropriate services for those affected by the practice. In countries of immigration they include training for health and social workers who may come into contact with women that have been subjected to the practice or girls at risk. [...] There is also increasing attention to ensuring consistency and complementarity between domestic measures and international cooperation policies."[18]

Medicalisation does not fulfil due diligence

Usually, FGM is performed in poor hygienic conditions by traditional excisors at the request of the family. In certain cases, medicalisation of FGM has been presented as a way of reducing the negative health effects of FGM and involves performing FGM under hygienic and controlled conditions, by medically skilled personnel, and often performing a pricking or incision instead of infibulation. The performance of FGM by medical professionals occurs in a number of African countries.[19] The Indonesian government also recently issued a government regulation permitting FGM ('sunat perempuan').[20] Medicalisation has repeatedly been suggested as a harm-reduction strategy in EU Member States.[21] However, the WHO, the International Council of Nurses (ICN), the International Confederation of Midwives (ICM) and the Federation of Gynaecologists and Obstetricians (FIGO) have all declared their opposition to the medicalisation of FGM and have advised that it should not be performed by health

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institutions, the media and families and provide increased financial support to efforts at all levels to end these practices;"

[17] Leye E, Sabbe A, *Responding to female genital mutilation in Europe – Striking the right balance between prosecution and prevention*, 2009, Daphne Programme

[18] Report of the Secretary-General, 'The girl child', UN Doc. A/64/315, 2009, para 74.

[19] This is particularly true for Egypt as shown by the comparison in the DHS surveys of 1995 and 2000 in which performance by traditional practitioners reduced from 79.6 per cent (1995) to 38.3 per cent (2000) and performance by medical personnel raised from 17.3 per cent (1995) to 61.4 per cent (2000). It has been also the case in Guinea and Mali. Yoder, PS Abderrahim N Zhuzhuni A Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis. Calverton, Macro International Inc. 2004.

[20] http://www.amnesty.org/en/library/asset/ASA21/015/2011/en/23769b87-8f0d-49da-97d4-02048f85188f/asa210152011en.html

[21] Health Care in Europe for Women with Genital mutilation, Leye, E. and all, Health Care for Women International (2006) 27, 362-378, pp. 367-369.

professionals or in health establishments under any circumstances. A main argument against medicalisation is that it goes against the principle of medical ethics which is "do not harm". Furthermore, FGM of any form is a violation of human rights. "Light" versions of FGM, like incision or pricking, or performance of FGM by medical professionals, risks promoting the message that FGM is acceptable and thus legitimises the practice.[22] In line with the position of the Special Rapporteur on torture,[23] the Committees should reiterate their opposition to the medicalisation of the practice.

Child protection as a mechanism for enforcement

Another tool used by a number of states parties in seeking to eradicate FGM is child protection laws and measures. Some states parties have adopted specific measures applicable to girls at risk of being subjected to FGM which include voluntary child protection measures (providing information, hearings with the family, counselling and warnings to the family) and compulsory child protection measures (suspending parental authority, removing the child, withdrawal of travel permission).[24] It would be important to clarify how the best interests of the child requirement impacts on child protection rules and criminal sanctions with regard to FGM, specifically on measures related to the withdrawal of parental authority or custody.

Training for state officials in addressing FGM in an informed and professional manner[25]

Factors obstructing an effective implementation of both criminal and child protection laws to FGM include the lack of sensitivity and negative attitudes of both professionals and practicing communities confronted with FGM. Both are influential in terms of the process of law enforcement, specifically in the reporting of cases and investigating or uncovering evidence.[26] It would be helpful for the Committees to clarify the importance of decision makers, professionals and communities having access to a basic level of knowledge and understanding regarding the practice, including its cultural context and health and personal implications.

Importance of cross border cooperation

In committing to protect the rights of women and/or children, states parties to these Conventions have agreed to take all appropriate measures to protect the rights codified.[27] With regard to the practice occurring within immigrant populations, the social dynamic of a practice like FGM underline the need for collective agreement and cooperation to end the practice within that community. This may require extending the obligations of the states parties to legislate or otherwise regulate activities that occur in other countries, where it relates to the rights in question. The Committees should therefore urge States to include a wide definition of

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[22] Leye E, Powell RA, Nienhuis G, Claeys P, Temmerman M. Health care in Europe for Women with Genital Mutilation. Health Care for Women International. (2006)27, 362-378.
[23] Statement by Juan E. Méndez, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 1 June 2011, http://www.stop-stoning.org/node/1853.

[24] Leye E, Sabbe A, Overview of legislation in the European Union to address Female Genital Mutilation: challenges and recommendations for the implementation of laws, Expert paper, Expert Group Meeting on good practices in legislation to address harmful practices against women, 25 to 28 May 2009
[25] UN Commission on the Status of Women, Resolution 54/7 Ending female genital mutilation, E/CN.6/2010/11, 2010, §2 "Emphasizes that awareness-raising, community mobilization, education and training are needed to ensure that all key actors, government officials, including law enforcement and judicial personnel, health-care providers, religious and community leaders, teachers, employers, media professionals and those directly working with girls, as well as parents, families and communities, work to eliminate attitudes and harmful practices that negatively affect girls;"
[26] Leye E, et al (2007), op cit.
[27] Convention on the Rights of the Child, article 4; Convention on the Elimination of All Forms of Discrimination against Women, article 3.

the principle of extraterritoriality in their criminal provisions related to FGM: the definition should extend to acts committed outside of the state and the implementation of the principle of extraterritoriality should not rely on FGM being a crime in the country in which the act has taken place.

In recognition of the weaknesses of focussing too strongly on criminal law, however, it is imperative to link efforts in countries of origin with communities living in other regions as well. In particular, states should put in place a programme for the prevention of the practice and ensure that women and girls who have been subjected to the practice have access to adequate health care (including, where necessary, counselling and reconstructive surgery). Further, it is crucial to build bridges between stakeholders in countries of origin and destination countries linking organisations, community leaders, health professionals and government representatives. The pressure to subject girls to FGM comes from families and communities both in the countries of origin and in destination countries. The practice itself is cross-border in nature, being performed in a variety of countries, and therefore requires a cross-border approach in terms of cooperation. Coordinated approaches between countries of origin and migrant communities will assist in ensuring that advances in combating FGM in countries of origin become known in the diaspora.

FGM constitutes a gender based and child-specific persecution which can entitle women and girls to refugee status and international protection

The UN High Commissioner for Refugees (UNHCR) has stated: "[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation ... are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by state or private actors."[28] It would be helpful for the Committees to support this finding by making it clear that the risk of undergoing FGM should be a valid ground for a refugee claim.

FGM is a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution. The UNHCR Guidance Note on Refugee Claims relating to FGM clarifies this point in stating that FGM constitutes a form of gender-based violence amounting to gendered persecution and child specific persecution. The UNHCR guidelines on child asylum claims further calls for a gender and age sensitive interpretation of the refugee definition, stating that FGM can be seen as a form of child-specific persecution.[29]

Despite these guidelines there is great variation amongst states in the recognition of refugee status for girls at risk of gender based and child specific persecution in their country. Possible reasons include the lack of explicit laws and guiding policies nationally, and inadequate provision of legal support and other services.[30] Asylum interviewing and questioning techniques require gender sensitive and child sensitive measures to ensure that women and girls do not face further stigmatisation upon arrival in destination countries. Furthermore, measures should be employed to prevent violence against women and girls in the asylum procedure including within reception conditions, detention facilities and throughout the treatment of their applications.

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[28] UN Doc. HCR/GIP/02/01, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002

[29] UN Doc. HCR/GIP/09/08, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009

[30] Leye E, Sabbe A, *Responding to female genital mutilation in Europe – Striking the right balance between prosecution and prevention*, 2009, Daphne Programme.

Right to a remedy and reparations

As a part of any document on harmful practices, it would be important for the Committees to outline how the right to a remedy, including reparations, would come into effect with regard to harmful practices. The unique nature of harmful practices, often being linked to culture and identity, means that remedies would need to be creative to accommodate the multiple harms caused (physical, mental and social harms). It would be helpful if the Committees could clarify the complexities arising where harms are caused by non state actors but this has been facilitated by states parties not fulfilling obligations, as set out in this General Comment.

Conclusion

Amnesty International reiterates its support for this process and looks forward to further consultation with members of the Committees on this important initiative.

Yours sincerely,

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