



Submission to

The United Nations Special Rapporteur on torture and other  
cruel, inhuman or degrading treatment or punishment

for her upcoming report on

**IDENTIFYING, DOCUMENTING, INVESTIGATING  
AND PROSECUTING CRIMES OF SEXUAL TORTURE  
COMMITTED DURING WAR AND ARMED CONFLICTS,  
AND REHABILITATION FOR VICTIMS AND  
SURVIVORS**

to be presented at the 79th session of the United Nations  
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## I. Introduction

DIGNITY wishes to commend the Special Rapporteur for taking up the issue of sexual torture in armed conflict, and in doing so highlighting the need to rethink how such crimes are considered and addressed. DIGNITY cannot agree more. This submission is based on several preliminary findings of a battery of research DIGNITY has undertaken into the role gender plays in the commission and response to torture and related ill-treatment (full report forthcoming December 2024).

In brief, the research seeks to understand the ways in which gender, as a social construct that structures power relations in society, informs which types of violence perpetrators choose to inflict against whom, how victims perceive such acts of violence, and how courts and judicial actors (largely fail to) account for how gender norms are intentionally invoked by perpetrators to increase suffering and achieve their tortuous purpose.

Perpetrators know what it means to be a “man” or “woman” in society, and in many cases choose their methodologies of violence in order to reinforce or exploit those norms to increase suffering. Indeed, acts of sexual torture are calibrated in light conceptions of “womanhood” or “manliness” and deployed accordingly. In conflict settings, women and girls are often targeted for sexual violence as mothers or daughters, invoking intense feelings of shame, stigma, defilement or dishonor. Men and boys, on the other hand, are also targeted for sexual violence, but in efforts to emasculate, demasculate, or otherwise challenge their role as patriarchs, leaders, protectors or political authorities.

For example, in Syria, whereas women and girls were systematically raped at check points or in front of male family members during house raids, sexual violations against men and boys took place primarily in detention facilities and were more likely to feature beatings and electric shocks of their genitals, or rape with objects.<sup>1</sup>

To fully address occurrences of sexual torture and related ill-treatment in armed conflict, investigators, prosecutors and judges must first understand how layered power dynamics of domination and control are communicated by resort to prevailing gender dynamics and norms.

This submission, in line with the Special Rapporteur’s Call for Inputs, is limited to sexual and gender-based violence committed as torture or related ill-treatment during armed conflict. As such, it takes departure from International Humanitarian Law’s (IHL) framework for prohibiting and preventing ill-treatment. It begins by making an overall observation regarding the stubborn siloes of “torture” and “sexual violence” in popular discourse. It then describes the ways sexual violence has been adjudicated by courts applying IHL to be ill-treatment—including by concluding with the observation that courts have been more willing to make determinations of sexual and gender-based violence under the lower severity thresholds of “humiliating” or “degrading” treatment, rather than torture and its “severe” threshold. Such a discrepancy is rooted in discrimination against women and the previously mentioned “siloes” between torture and sexual violence. It concludes by describing necessary changes in investigatory, prosecutorial, and judicial practices to remediate this gap and ensure the full scope of harms inflicted by acts of sexual and gender-based violence are accounted for in justice efforts.

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<sup>1</sup> See UN Commission of Inquiry for the Syrian Arab Republic, “I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic, U.N. Doc.A/HRC/37/72/CRP.3, paras. 9-26, 8 March 2018. See also, Human Rights Foundation, Framing Justice in Syria: The Road Towards Comprehensive Justice, April 2022, pp. 20-23.

## II. Popular Discourse Siloes: “Rape” and “Torture”

When stories of armed conflict make their way from the battlefield into news or other media outlets, torture and sexual violence are often linked together as the lurid and quintessential markers of atrocity. For example, in Ukraine, a US National Public Radio report explains how “murder, rape and torture, all alleged against Russian troops...constitute potential war crimes.”<sup>2</sup> The crisis in Mali, “has led to serious human rights violations, including extrajudicial killings, rape and torture.”<sup>3</sup> In Burkina Faso, U.N. research found that extremists “rape and torture women.”<sup>4</sup> The UN Fact-Finding Mission in Libya determined detainees were, “systematically tortured, raped or threatened with rape, including of female family members.”<sup>5</sup> In Ethiopia, Reuters reported that Eritrean soldiers “routinely killed civilians, gang-raped and tortured women.”<sup>6</sup> And in Myanmar BBC News describes how activists are “sexually assaulted and tortured.”<sup>7</sup>

These descriptions show both how sexual violence and torture are standard qualifiers for the horrors of war and that they are somehow meaningfully distinct. But this distinction, often echoed by human rights groups, is not always beneficial. From a legal perspective there can be good reasons to emphasize the overlaps between torture and sexual violence. Understanding such overlaps, and in particular the role that gender plays in informing the two, can uncover how patriarchal, heteronormative, and misogynist logics of power are exploited by perpetrators to increase their victim’s mental suffering. A better understanding of how prevailing gender norms are used by perpetrators as a tool for torture can pave the way for a more nuanced and accurate approach to sexual and gender-based violence (SGBV) as torture by investigators, prosecutors, and judges.

## III. Challenges, impediments and obstacles to effective identification, documentation, investigation and prosecution of crimes of sexual torture and related ill-treatment.

Put simply, institutional, sociological, and legal blindspots and embedded discriminations are major impediments to ensuring prompt and impartial investigations and prosecutions of sexual torture and related crimes committed during armed conflict. In order to overcome these blockages, investigators, prosecutors, and jurists must take an intersectional approach to apprehending and demonstrating the harms associated with being a victim of torture or related ill-treatment—including along their gender, racial, religious, age, class, ability, and other lines.

Historically, the façade between torture and SGBV in armed conflict stems in part from the stubborn tendency to view torture as an act that only occurs during interrogations, detention settings, or criminal investigations. While this is an overly narrow framing long-since rejected in

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<sup>2</sup> J. McCarthy, Russian forces' alleged murder, rape and torture of civilians may count as war crimes, NPR All Things Considered, 7 April 2022, <https://text.npr.org/1091487854>.

<sup>3</sup> UN News, Rape and torture among serious rights violations spawned by Mali crisis, 18 January 2013, <https://news.un.org/en/story/2013/01/430142>.

<sup>4</sup> K. Mahoney, 6 Faces of the Sahel Crisis, UNHCR Spotlight Report, 17 April 2020, <https://www.unhcr.org/spotlight/2020/04/6-faces-of-displacement-in-the-sahel/>.

<sup>5</sup> Report of the Independent Fact-Finding Mission on Libya, U.N. Doc. A/HRC/49/4, para. 27, 18 August 2022.

<sup>6</sup> M. Nichols, Men forced to rape family members in Ethiopia's Tigray, U.N. says, Reuters, 26 March 2021, <https://www.reuters.com/article/uk-ethiopia-conflict-un-idUKKBN2BI06J/>.

<sup>7</sup> L. Owen, Ko Ko Aung, Myanmar coup: The women abused and tortured in detention, BBC News, 9 December 2021, <https://www.bbc.com/news/world-asia-59462503.amp>.

IHL,<sup>8</sup> its provenance can be traced to the fact that many of 1949 Geneva Conventions' provisions expressly addressing torture or related ill-treatment implicitly or explicitly contemplate custodial settings.<sup>9</sup>

The false daylight is also owing to the fact that sexual violence as wartime violence has historically been seen as a unique category of violation occurring only against women. This is another damagingly limited lens that IHL has left behind,<sup>10</sup> but its effects endure. Take for example that two of the three places where rape is explicitly mentioned in the 1949 Geneva Conventions or their Additional Protocols only refer to women potential victims.<sup>11</sup> What is more, these two examples frame "rape, enforced prostitution, or any other form of indecent assault" as "attack[s] on their honor" rather than attacks against their physical person.<sup>12</sup> Further, it was not until 1998 that rape as a war crime was first interpreted in gender neutral terms that would apply the same to all sexes and genders.<sup>13</sup> Thus it was only relatively recently that "wartime rape" broke out of its narrow status as a violation only against women.<sup>14</sup>

Whatever the historical origin, a practical challenge to drawing out such overlaps is the absence of a definition of torture and other forms of ill-treatment in the Geneva Conventions. Instead, legal understandings of these acts have come through judicial interpretations, which draw on International Human Rights Law (most notably the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, which, in turn, only defines "torture" and other forms of ill-treatment).<sup>15</sup>

To be sure, as the prior work of the Special Rapporteur on Torture has made clear, human rights bodies have interpreted prohibitions of torture to be inclusive of acts of sexual violence.<sup>16</sup>

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<sup>8</sup> ICRC 1958 Commentaries to Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Article 32 - Prohibition of corporal punishment, torture, etc., p. 223, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-32/commentary/1958>.

<sup>9</sup> See e.g. common Article 3; First Geneva Convention, Article 12, second paragraph; Second Geneva Convention, Article 12, second paragraph; Third Geneva Convention, Article 17, fourth paragraph, Article 87, third paragraph and Article 89. Cf. Fourth Geneva Convention, Article 32 ("torture" and "other measures of brutality").

<sup>10</sup> ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 3 - conflicts not of an international character, para. 700, [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#614\\_B](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#614_B).

<sup>11</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Article 27 - Treatment I. General observations; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Arts. 76-77. The third place where rape is expressly mentioned in the Geneva Conventions or their Additional Protocols is in APII Art. 4(2) where rape is listed as an example of an outrage against personal dignity.

<sup>12</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Article 27 - Treatment I. General observations; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Arts. 76-77. The third place where rape is expressly mentioned in the Geneva Conventions or their Additional Protocols is in APII Art. 4(2) where rape is listed as an example of an outrage against personal dignity.

<sup>13</sup> ICTY, Kunarac Trial Judgment (2001), para. 442; ICTY, *Furundžija* Trial Judgment (1998), para. 171; ICTR, *Akayesu* Trial Judgment (1998), para. 597; ICC, Elements of Crimes, Arts. 7 (1) (g)-1, 8 (2) (b) (xxii)-1, 8 (2) (e) (vi)-1.

<sup>14</sup> Such a breakthrough would not have been possible without the groundbreaking work of feminist lawyers, law clerks, and judges and the international criminal tribunals.

<sup>15</sup> See ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 3 - conflicts not of an international character, paras. 626-645, [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#614\\_B](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#614_B).

<sup>16</sup> A. Edwards, The 'Feminizing' of Torture under International Human Rights Law, *Leiden Journal of International Law* 2006;19(2):349-391. doi:10.1017/S0922156506003359. A. Edwards, *Violence against Women under International Human Rights Law*. Cambridge University Press; 2010.

For its own part, IHL has held out sexual violence as particularly reprehensible. As far back as the Lieber Code of 1863 rape was explicitly prohibited.<sup>17</sup> Nearly 100 years later in the 1958 International Committee of the Red Cross (ICRC) Commentaries to Geneva Convention, Article 27, rape is described as an “outrage of the worst kind” that “revolt[s] the conscience of all mankind.”<sup>18</sup> Crucially however, as noted above, rape was codified in Article 27 as an attack against a woman’s “honor”--so while it was an outrage, it was an outrage with reference to her chastity and place in family or community, and not an outrage against her person or bodily integrity.

Importantly, IHL distinguishes itself from human rights law on torture and ill-treatment by taking “humane treatment” as its centerpiece and starting point. Indeed according to Jean Pictet, humane treatment is “in truth the leitmotiv” of IHL,<sup>19</sup> and the prohibitions on torture, cruel treatment, and outrages on personal dignity including humiliating and degrading treatment, all emanate from Common Article 3’s mandate of humane treatment.<sup>20</sup> To understand how SGBV is placed in IHL’s torture and ill-treatment framework, we must first understand the differences between these separate offenses, and the ways in which gender is woven through their commission.

### *Torture*

In the absence of a textual definition, the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) Foča trial held that under IHL, torture is: an act or omission, of severe pain or suffering, whether physical or mental, committed for such purposes as to obtain information or a confession, to punish, intimidate or coerce a victim or a third person, or to discriminate, on any ground, against the victim or a third person.<sup>21</sup>

This definition closely mirrors the definition in the U.N. Convention against Torture (CAT), excepting the public official requirement (CAT further requires that the violence be inflicted by or with the instigation, consent, or acquiescence of a state official).<sup>22</sup> This means that under IHL, the key criteria separating torture from other acts of ill-treatment are the degree of pain and suffering (severe) intentionally inflicted and that the act be committed for a prohibited purpose.

The “severe pain or suffering” requirement depends on a highly fact-specific analysis based on objective elements about the severity of harm and subjective elements about the condition of the victim.<sup>23</sup> In practical terms, this includes considering a number of factual elements, including, among others, the nature and context of the infliction of pain, the manner and method used, and the position of inferiority (or powerlessness) of the victim -- all of which intertwine with gender

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<sup>17</sup> Lieber Code (1863), Article 44.

<sup>18</sup> ICRC 1958 Commentaries to Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Article 27 - Treatment I. General observations, p. 205, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-27/commentary/1958>.

<sup>19</sup> See C. Droegge, "In truth the leitmotiv": the prohibition of torture and other forms of ill-treatment in international humanitarian law, Int'l Review of the Red Cross No.867, September 2007, <https://international-review.icrc.org/articles/truth-leitmotiv-prohibition-torture-and-other-forms-ill-treatment-international>.

<sup>20</sup> ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 3 - conflicts not of an international character, para. 555, [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#614\\_B](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016#614_B).

<sup>21</sup> ICTY, *Kunarac* Trial Judgment, 2001, para. 497.

<sup>22</sup> Convention against Torture, Art. 1.

<sup>23</sup> ICTY, *Kvočka* Trial Judgment, 2001, para. 143; ICTY *Brđanin* Trial Judgment, 2004, para. 483.

as a structuring logic of power relations and social contexts.<sup>24</sup> In other words, the nature of the pain inflicted, the method of violence committed, or the victim's position vis-à-vis the perpetrator will each be woven with their own gender dynamics which are relevant to a severity analysis. Such a view may reveal in finer grain how gender norms fit within a structure of power relations which perpetrators exploit to increase the suffering of their victims. Torture does not occur in a social vacuum. In committing violent acts, especially in situations of armed conflict, perpetrators leverage gender norms to exercise their power over their victim to intimidate, degrade, humiliate, discriminate, punish, control, and/or destroy their victim.<sup>25</sup>

The ICTY has found that “in certain circumstances the suffering can be exacerbated by social and cultural conditions and [a court] should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.”<sup>26</sup> Of course, gender, as a social construct, offers an extremely potent lens through which to interpret such harm.<sup>27</sup> Recalling the earlier referenced examples from Syria, being a female victim of sexual violence in Syria brings certain social and/or familial associations and reprobations. Accordingly, Syrian women were raped in front of family members to maximally invoke the shame and stigma associated with being a victim of sexualized violence. Indeed, in addition to being confronted with the challenges of surviving conflict-related sexual violence, many Syrian women were subsequently ostracized from their communities and/or families, and in some cases were murdered in so-called “honor-killings”.<sup>28</sup> On the other hand, being a Syrian male victim of sexual violence carried different connotations of fitness for roles of protectorship or political leadership. As a consequence, Syrian men's experience of sexual torture targeted their genitals as symbols of masculinity and patriarchal power, and featured rape with objects, including batons—reflecting a multi-layered symbolism of demasculization by means of literal instruments of the State's and regime's power.<sup>29</sup> Similar examples abound in Ethiopia,<sup>30</sup> Myanmar,<sup>31</sup> and Ukraine,<sup>32</sup> among others.

International courts and treaty bodies have already come a long way in this regard in ruling that rape *per se* meets torture's threshold of severity,<sup>33</sup> as well as finding electrocution of the genitals<sup>34</sup> and being forced to watch serious sexual attacks on an acquaintance constitute other overtly

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<sup>24</sup> ICTY, *Mrksić* Trial Judgment, 2007, para. 514; ICTY, *Krnjelac* Trial Judgment, 2002, para. 182; ICTY, *Limaj* Trial Judgment, 2005, para. 237; ICTY, *Haradinaj* Trial Judgment, 2012, para. 417; ICTY, *Naletilić and Martinović* Appeal Judgment, 2006, para. 300; ICTY, *Brđanin* Trial Judgment, 2004, paras 483–484; ICTY, *Kvočka* Trial Judgment, 2001, para. 143; and ICTY, *Martić* Trial Judgment, 2007, para. 75.

<sup>25</sup> ICTY, *Brđanin* Trial Judgment, 2004, para. 485.

<sup>26</sup> ICTY, *Limaj* Trial Judgment, 2005, para. 237.

<sup>27</sup> See Office of the Prosecutor of the International Criminal Court, Policy on Gender-Based Crimes - Crimes involving sexual, reproductive and other gender-based violence, para. 17, <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

<sup>28</sup> Human Rights Foundation, Framing Justice in Syria: The Road Towards Comprehensive Justice, April 2022, pp. 20-23.

<sup>29</sup> UN Commission of Inquiry for the Syrian Arab Republic, “I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic, U.N. Doc.A/HRC/37/72/CRP.3, paras. 43-50, 8 March 2018.

<sup>30</sup> Comprehensive investigative findings and legal determinations of the International Commission of Human Rights Experts on Ethiopia, U.N. Doc. A/HRC/54/CRP.3, paras. 134-159.

<sup>31</sup> UN Fact-Finding Mission in Myanmar, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, U.N. Doc. A/HRC/42/CRP.4.

<sup>32</sup> UN Independent International Commission of Inquiry, U.N. Doc. A/HRC/55/66, 24 March 2024, paras. 85-94.

<sup>33</sup> ICTY, *Kunarac* Appeal Judgment, para. 129; ICTY, *Brđanin* Trial Judgment, 2004, para. 1009.

<sup>34</sup> Human Rights Committee, *Rodríguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994). See also International Military Tribunal for the Far East, Case of the Major War Criminals, Judgment, 1948, in , in John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 22, pp. 49,663, 49,666.

gendered examples of torture.<sup>35</sup> But gender's role in the suffering emanating from torture or other acts of ill-treatment may not always be so overt, and instead may be found folded into the performances of power, domination, and conquest at play in conflict (or other) situations. For example, beyond the physical brutality of the sexualized assaults in Syria, one Syrian female detainee described verbal attacks concerning her reputation or "marriageability," whereas for her male counterparts verbal insults tended to relate to their political activity.<sup>36</sup>

This is not to say that gender-based violence and torture should be collapsed into each other -- that creates its own problems.<sup>37</sup> Instead, in looking at objective and subjective factors, the severity analysis in torture (or other acts of ill-treatment) should include appreciation for the prevailing structures and systems of power being brought to bear on a victim, and how gender influences those dynamics.

### *Cruel Treatment*

If humane treatment is the leitmotiv of IHL, prohibiting cruel treatment is its objective. In light of the absence of a definition of "cruel treatment" in IHL, the ICTY concluded that the prohibition of cruel treatment under Common Article 3 is a means to the ends of treating all persons taking no active part in hostilities humanely.<sup>38</sup> The Rome Statute of the International Criminal Court takes the same approach, effectively meaning that "cruel" and "inhuman" treatment are to be used interchangeably.<sup>39</sup>

As the ICTY has explained, to qualify as cruel or inhuman treatment, an act must cause physical or mental suffering of a serious<sup>40</sup> nature.<sup>41</sup> As with the case of torture, to determine whether the suffering meets the requisite threshold, there must be an individual assessment of circumstances of each case, considering both the objective elements related to the severity of the harm and the subjective elements related to the condition of the victim.

In this vein, the 2016 ICRC Commentaries to Article 12 of Geneva Convention I note that "in order to treat people humanely, it is important to understand and take into account the ways in which gender, economic, cultural and political factors shape social structures and affect men and women differently."<sup>42</sup> The Commentaries go on: "in order to treat female wounded or sick combatants with all consideration due to their sex" in the pursuit of treating them humanely,

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<sup>35</sup> ICTY, *Furundžija* Trial Judgment, 1998, para. 267. See also *Kvočka* Trial Judgment, 2001, para. 149. The Inter-American Commission on Human Rights found that being forced to witness others being raped amounted to cruel treatment; see Case 11.565 (Mexico), Report, 1999, para. 53.

<sup>36</sup> Human Rights Foundation, *Framing Justice in Syria: The Road Towards Comprehensive Justice*, April 2022, pp. 20-23.

<sup>37</sup> A. Edwards, *The 'Feminizing' of Torture under International Human Rights Law*, *Leiden Journal of International Law*. 2006;19(2):349-391. doi:10.1017/S0922156506003359.

<sup>38</sup> ICTY, *Tadić* Trial Judgment, 1997, para. 723.

<sup>39</sup> ICC, *Elements of Crimes*, Article 8(2)(a)(ii)-2 (war crime of inhuman treatment) and (c)(i)-3 (war crime of cruel treatment).

<sup>40</sup> Notably, the ICC differs from the ICTY here, with the ICC's *Elements of Crimes* requiring "severe" suffering for cruel/inhuman treatment as a war crime. See *Elements of Crimes*, Arts. Articles 8 (2) (a) (ii)-2, 8 (2) (c) (i)-3.

<sup>41</sup> ICTY, *Delalić* Trial Judgment, 1998, para. 551. See also ICTY, *Naletilić and Martinović*, Trial Judgment, 2003, para. 246; ICTY, *Kordić and Čerkez*, Trial Judgment, 2001, para. 256; ICTY, *Blaškić* Trial Judgment, 2000, paras 154-155; ICTY, *Limaj* Trial Judgment, 2005, para. 231; ICTY, *Orić* Trial Judgment, 2006, para. 351; ICTY, *Haradinaj* Trial Judgment, 2008, para. 126; ICTY, *Mrkšić* Trial Judgment, 2007, para. 514; ICTY, *Lukić and Lukić* Trial Judgment, 2009, para. 957; and ICTY, *Tolimir* Trial Judgment, 2012, para. 853.

<sup>42</sup> ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 12 - Protection and care of the wounded and sick, para. 1373, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/2016>.

“Parties to an armed conflict must ensure that their protection and care takes into account their specific needs with regard to hygiene, ante- and post-natal care and gynecological and reproductive health.”<sup>43</sup>

The U.N. Committee against Torture, European Court of Human Rights, and Inter-American Commission on Human Rights have followed this thread of gender as a probative subjective factor of suffering in determining that involuntary sterilization,<sup>44</sup> gender-based humiliation such as shackling women detainees during childbirth,<sup>45</sup> witnessing<sup>46</sup> others being raped, and denial of abortion services,<sup>47</sup> all constitute cruel and inhuman treatment, all of which would also amount to violations under common Article 3.

These determinations are reflective of the fact that acts of sexual and gender-based violence are not free of social, cultural, and political entanglements. They are acts that communicate something about the power differential between perpetrator and victim, and that are intended from the outset to limit, alter, or nullify the recognition, enjoyment or exercise of that victim’s human rights and dignity.

### *Outrages on Personal Dignity*

Like the previous two modes of ill-treatment, IHL does not define “outrages on personal dignity.” Again, the ICTY has filled in the gaps, formulating the following set of requirements: “the accused intentionally commits or participates in an act or omission which would be generally considered to cause serious humiliation, degradation, or otherwise be a serious attack on human dignity.”<sup>48</sup> Also like cruel treatment and torture, the assessment of whether an act meets these elements requires considering objective and subjective criteria related to its gravity.<sup>49</sup> As to a threshold, the ICTY used a “reasonable person” basis to determine whether a particular act was a sufficient outrage.<sup>50</sup>

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<sup>43</sup> ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 12 - Protection and care of the wounded and sick, para. 1434, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/2016>.

<sup>44</sup> See UN Committee against Torture, Consideration of reports submitted by States Parties under Article 19 of the Convention: Peru, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

<sup>45</sup> See UN Committee against Torture, Consideration of reports submitted by States Parties under Article 19 of the Convention: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 33.

<sup>46</sup> Inter-American Commission of Human Rights, REPORT N° 53/01, CASE 11.565, Ana, Beatriz and Celia Gonzalex-Perez v. Mexico, 4 April 2001, <https://cidh.org/annualrep/2000eng/chapteriii/merits/Mexico11.565.htm>.

<sup>47</sup> See, e.g., CAT Committee, Concluding Observations for Bolivia: U.N. Doc. CAT/C/BOL/CO/2, para. 23 (14 June 2013) and U.N. Doc. CAT/C/BOL/CO/3, paras. 28, 29 (29 December 2021); El Salvador: U.N. Doc. CAT/C/SLV/CO/3, paras. 30, 31 (19 December 2022); Kenya: U.N. Doc. CAT/C/KEN/CO/2, para. 28 (19 June 2013); Nicaragua: U.N. Doc. CAT/C/NIC/CO/2, paras. 27, 28 (7 December 2022); Peru: U.N. Doc. CAT/C/PER/CO/4, para. 23 (25 July 2006) and U.N. Doc. CAT/C/PER/CO/5-6, para. 15 (21 January 2013); CAT/C/PER/CO/7, paras. 40, 41, 18 December 2018. Committee Against Torture, Concluding Observations on the seventh periodic report of Poland, U.N. Doc. CAT/C/POL/CO/7, para. 33(d), 29 August 2019.

<sup>48</sup> ICTY, *Kumarac* Trial Judgment, 2001, para. 514, and Appeal Judgment, 2002, paras 161 and 163. See also ICTY, *Haradinaj* Trial Judgment, 2008, para. 132 (using ‘severe’ instead of ‘serious’); ICTR, *Bagosora* Trial Judgment, 2008, para. 2250; ICTR, *Renzabo* Trial Judgment, 2009, para. 809; ICTR, *Nyiramasubuko* Trial Judgment, 2011, para. 6178; SCSL, *Taylor* Trial Judgment, 2012, para. 431; SCSL, *Sesay* Trial Judgment, 2009, para. 175; and SCSL, *Brima* Trial Judgment, 2007, para. 716.

<sup>49</sup> See ICTY, *Aleksovski* Trial Judgment, 1999, para. 56; see also ICTY, *Kumarac* Trial Judgment, 2001, para. 504, and Appeal Judgment, 2002, paras 162–163.

<sup>50</sup> ICTY, *Aleksovski* Trial Judgment, 1999, para. 56.



Specific acts that have been considered as degrading treatment by international criminal tribunals include forced public nudity,<sup>51</sup> rape and sexual violence,<sup>52</sup> sexual slavery including the abduction of women and girls as “bush wives,”<sup>53</sup> and enduring the constant fear of being subjected to sexual violence.<sup>54</sup>

Notably, the International Criminal Court’s elements of crimes include outrages on dead persons, for example the mutilation of dead bodies<sup>55</sup> -- a category of acts that often contains a gendered element. For example, the International Criminal Tribunal for Rwanda (ICTR) found in the *Niyitegeke* case that such mutilations often targeted the deceased’s genitals.<sup>56</sup>

While none of the international criminal tribunals have attempted to distinguish between “humiliating” and “degrading” treatment, they generally more readily designate acts of sexual and gender-violence as “outrages” crimes rather than as “torture” or “cruel treatment.” This is a curious trend in light of the fact that all modes of ill-treatment require an objective and subjective evaluation of the severity of harm -- why are acts of sexual or gender-based violence more commonly categorized as outrages on personal dignity (relatively lower in severity), rather than torture or cruel treatment (relatively higher in severity)?

As described above, the opposite should be true -- gender norms and power relations should be seen as a tool of perpetrators to augment the suffering, mentally and socially, imposed on a victim. One explanation for the disparity in characterizations is humanitarian law’s historical bent to protect women’s “honor” -- invoking a woman’s place in the family and/or community -- rather than personal integrity, and hence the preoccupation with describing gendered violence in the terms of dignity. The discrepancy can also be understood with reference to lack of expertise and prioritization of gender-based analyses of the manner and means by which perpetrators choose to inflict pain and suffering. Neither victims, nor perpetrators are untethered from prevailing social, moral, religious or political contexts. Gender norms and social mores are as operative on the battlefield and detention settings as they are in corporate boardrooms and educational settings. This is evident in the differentiations between the sexual torture experienced by Syrian women and men described above. In the absence of gender-based analyses about what it means to be a victim of sexual or gender-based violence, as a woman, man, or queer person, investigators, prosecutors, and courts will fall short of fully capturing the extent of sexual torture in armed conflict.

### *Conclusion -- Seeing Gender Ahead*

Common Article 1 to the 1949 Geneva Conventions calls on all States Parties to respect and ensure respect for the Conventions in all circumstances.<sup>57</sup> Measures to “ensure respect” for the various prohibitions of ill-treatment might include diplomatic pressure exerted by third States on parties which are violating, for example, Article 3. This obligation, in turn, requires States to accurately apprehend the nature of the offenses occurring and how they may constitute

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<sup>51</sup> ICTY, *Kumarac* Trial Judgment, 2001, paras 766–774.

<sup>52</sup> ICTY, *Furundžija* Trial Judgment, 1998, paras 270–275; ICTR, *Ndindiliyimana* Trial Judgment, 2011, para. 2158.

<sup>53</sup> SCSL, *Taylor* Trial Judgment, 2012, para. 432.

<sup>54</sup> ICTY, *Kvočka* Trial Judgment, 2001, para. 173.

<sup>55</sup> See fn 49, ICC, Elements of Crimes, <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>.

<sup>56</sup> See ICTR, *Niyitegeke* Trial Judgment, 2003, para. 303, 312, 316.

<sup>57</sup> Common Article 1 to the Four Geneva Convention of 1949. See also, E. Stubbins Bates, Geneva Convention III Commentary: Unpacking the Potential of “Ensure Respect” in Common Article 1, Just Security, 30 October 2020, <https://www.justsecurity.org/73166/geneva-convention-iii-commentary-unpacking-the-potential-of-ensure-respect-i-common-article-1/>.

violations of IHL -- including gender-based violence and where such violence amounts to ill-treatment based on objective and subjective factors.

Moreover, the Conventions' grave breaches regime requires States to incorporate universal jurisdiction in national legislation so that any State Party, and not only States Parties to a particular armed conflict, can hold alleged offenders accountable, regardless of their nationality.<sup>58</sup> According to the 2016 ICRC Commentaries to Geneva Convention I, "it is widely acknowledged that, to be effective, penal sanctions must be sufficiently dissuasive: they should stop ongoing violations of humanitarian law and prevent their repetition or the occurrence of new violations."<sup>59</sup> To meet this goal, penal sanctions must sufficiently address the criminal acts occurring in conflict -- including all their gendered components.

States cannot prevent what they cannot see or do not acknowledge. If States, legal advisors, prosecutors, victims' advocates, military trainers, courts, and others are to fully deliver on their obligations to ensure respect for the Geneva Conventions, they must recognize all forms of gender-based violence and act accordingly -- including by placing these acts into their appropriate legal categories, where their gravity will be immediately apparent and universally condemned. Only then can these actors deliver on IHL's core mandate.

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<sup>58</sup> ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 49 - Penal sanctions, paras. 2863-2867, [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-49/commentary/2016#\\_Toc452054245](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-49/commentary/2016#_Toc452054245).

<sup>59</sup> ICRC 2016 Commentaries to Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), Article 49 - Penal sanctions, para. 2842, [https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-49/commentary/2016#\\_Toc452054245](https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-49/commentary/2016#_Toc452054245).