Submission to

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

for her forthcoming report on

Identifying, Documenting, Investigating and Prosecuting Crimes of Sexual Torture Committed during War and Armed Conflicts, and Rehabilitation for Victims and Survivors

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About the submitting organizations

The **Global Justice Center** is an international human rights organization dedicated to advancing gender equality through the rule of law. GJC seeks to promote gender equality by focusing on and advocating for change in two primary areas: fighting for sexual and reproductive rights and demanding justice for sexual and gender-based violence.

Human Rights Watch is a non-profit, non-partisan organization that investigates and reports on violations of fundamental human rights in over 100 countries to secure the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending actors to end abusive practices.

Ipas Impact Network works globally to advance reproductive justice. Ipas believes that all people have the right to make fundamental decisions about their own bodies and health. It works with partners across Africa, Asia and the Americas to ensure that reproductive health services, including abortion and contraception, are available and accessible to all.

For more than 35 years, **Physicians for Human Rights** (PHR) has used science and the uniquely credible voices of medical professionals to document and call attention to severe human rights violations around the world. PHR, which shared in the Nobel Peace Prize for its work to end the scourge of landmines, uses its investigations and expertise to advocate for persecuted health workers and facilities under attack, prevent torture, document mass atrocities, and hold those who violate human rights accountable.

I. Introduction

Over the years, parties to armed conflicts have systematically used sexual and reproductive violence against civilians to demoralize, terrorize, destroy, and even alter the ethnic compositions of entire communities.[1] A large proportion of the victims of this violence, sometimes over 80%, are children.[2] Stark examples include Rwanda, where nearly 250,000-500,000 women were raped in one hundred days as a part of the genocide in 1994,[3] and an estimated 20,000 "*enfants mauvais souvenirs*" (children of bad memories) were born from these rapes.[4] In Bosnia, women were held in rape camps, repeatedly raped until they became pregnant, and intentionally confined until it was too late for them to obtain an abortion.[5] Boko Haram raped hundreds of women and girls and held them in sexual slavery.[6] During one rescue of victims kidnapped by Boko Haram, at least 214 women and girls were found to be pregnant.[7]

More recently, the UN confirmed that Russian forces have committed numerous acts of rape and other sexual violence, with victims ranging from age four to eighty-years-old, which the UN said in some cases amounted to torture and war crimes.[8] The UN has also documented armed gangs in Haiti using sexual violence to punish individuals associated with rival gangs, and to "assert power and control over people". While most victims have been women and girls, men and boys have also been abused and subjected to violence. LGBTQ+ individuals have also suffered grave sexual violence in Haiti, with LBTQ+ women recounting incidents of "corrective rape" to "cure" them of "homosexuality."[9] Sexual violence in conflict settings can amount to torture and other cruel, inhuman and degrading treatment (CIDT) in violation of international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL).

While all people in conflict settings have a right to protection from sexual violence and to reparations for such grave harm, all too often the compounded or independent reproductive harms individuals suffer go unrecognized and unremedied. For example, reproductive violence such as forced pregnancy, forced abortion, forced contraception and forced sterilization occurs regularly in conflict. Additionally, other reproductive rights violations such as lack of access to abortion, particularly when pregnancies are the result of rape, and to contraception and/or sexual and reproductive health (SRH) information and services to enable individuals to prevent unwanted pregnancies occur frequently in crisis contexts. Maternal mortality and morbidity rates are also disproportionately high in conflict settings due to inadequate living conditions and lack of access to prenatal and maternal health care.[10]

To fully address the severity and magnitude of sexual and reproductive violence and reproductive rights violations in conflict, each individual harm should be identified, investigated, and remedied, and those responsible should be held to account. Among other things, access to safe abortion care should be guaranteed as an element of the remedy for both sexual and reproductive violence, as well as an individual right as ensured under IHRL and IHL.

Through this submission, the signatories seek to contribute to the Special Rapporteur's critical analysis by demonstrating that: (1) Reproductive violence in conflict settings is a distinct violation apart from sexual violence; and (2) Denial of abortion services for victims of sexual and reproductive violence in armed conflict can amount to torture and other cruel, inhuman, or degrading treatment (CIDT). To conclude, this submission will provide specific responses to the Special Rapporteur's questions concerning *challenges, impediments and obstacles to effective identification, documentation, investigation and prosecution of crimes of sexual torture and related ill-treatment* and *rehabilitation*.

II. Reproductive Violence in Conflict Settings is a Distinct Violation apart from Sexual Violence

Sexual violence in armed conflict has received greater attention over the years, including through the recognition of rape as a war crime and an act of genocide in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR),[11] the enumeration of a range of sexual violence crimes in the 1998 Rome Statute of the International Criminal Court (ICC),[12] and the inclusion of sexual violence charges in multiple cases before the Court. Yet despite this increased attention, other types of gendered harms and violence continue to go unnoticed and unremedied. Significantly less attention has been given to the differentiated and compound impacts of reproductive violence in conflict settings.

Reproductive violence is a distinct form of violence because it constitutes a "violation of reproductive autonomy or [...] is directed at people because of their reproductive capacity."[13] While a distinct category, reproductive violence can occur at the same time as or as a result of sexual violence (both of which fall under the umbrella of gender-based violence).[14] Reproductive violence generally entails a deprivation of control over one's fertility and reproductive health decisions, particularly when it occurs in the presence of violence and coercion.

Examples of reproductive violence include forced pregnancy, forced abortion, forced contraception and forced sterilization, all of which can lead to significant physical, mental, emotional, and SRH consequences, such as unwanted pregnancies, miscarriage, infections, fistula, sexually transmitted infections, depression, anxiety, or post-traumatic stress disorder.[15] In Colombia, for example, paramilitary and guerrilla groups controlled women's and girls' reproductive actions and decisions, including through forced abortions, forced pregnancies and sexual slavery. In this context, "[p]regnancies were prohibited from being carried to term because it was thought to interfere with women's duties of providing sexual services to male militia members. Women who refused to have abortions could face torture and death."[16] While there is growing recognition that reproductive violence is more widespread than previously recognized in conflict settings, it has still been largely ignored or simply folded into the category of "sexual violence".[17] Experts and scholars have critiqued this type of collapsing and conflation of sexual and reproductive violence[18] as essentializing "female victimhood", reproducing patriarchal, heteronormative and racialised narratives of women's

agency and sexuality, and conceptualizing conflict-related violence as exceptional, which can naturalize the day-to-day, systemic violence that women and girls face.[19] Additionally, critics argue that by predominantly focusing on sexual violence, systems set up to respond overemphasize sexualized aspects of the experience of women and girls in ways that "overlook the varied nature of the gendered harms they may experience, such as displacement or unequal distribution of property, as well as the wider connections between poverty, violence and gender."[20]

Recent developments nevertheless suggest that a greater sensitivity to the reproductive dimensions of conflict-related or large-scale violence is emerging. Two notable developments in this regard are the Colombian Constitutional Court's 2019 decision on forced abortion and forced contraception within the FARC,[21] and the International Criminal Court's conviction in 2021 of Dominic Ongwen on charges of forced pregnancy, the latter which constitutes the first case involving charges for reproductive violence at an international criminal tribunal.[22]

In the ongoing conflict in Ethiopia, the UN International Commission of Human Rights Experts on Ethiopia (ICHREE) has similarly identified reproductive violence in Tigray as a separate abuse in a context where rape and other forms of sexual violence are occurring on a "staggering scale".[23] In addition to the grave impact of acts of sexual violence perpetrated by armed actors associated with all parties to the conflict, the Commission highlighted the reproductive violence that survivors faced following sexual violence, as well as attacks on health facilities that limited their ability to provide care, including for unwanted pregnancies.[24] The Commission critiqued the lack of access to post-rape medical and psychosocial assistance in Tigray and the long delays survivors face when they attempt to access much-needed services, such as "abortion services; care for uterine prolapse, traumatic fistula, infection, and other complications; and anti-retroviral medication and pain medication . . .", which "endangers the lives, health and well-being of survivors, violates their sexual and reproductive rights, and compounds their trauma."[25] The Commission not only brought attention to reproductive violence (as separate from sexual violence) in its report, it also highlighted the differing intent underlying such violence–"to render the victims infertile and … to destroy the Tigrayan ethnicity"[26]--which underscores the distinct nature of reproductive violence.

In addition to the high incidence of reproductive violence in conflict settings, the harm to victims of such violence is frequently compounded by lack of access to obstetric and antenatal care, to contraceptive information and services, including emergency contraception, and to safe abortion and post-abortion care,[27] which can further increase the severity and impact of the harms they have experienced. Conflict and post-conflict settings often face disintegrating health infrastructure which can have detrimental consequences for reproductive health, particularly women's and girls' reproductive health. Significantly and concerningly, a lifetime risk of maternal mortality in fragile states has been estimated to be 1 in 54.[28]

Importantly, sexual violence is not always associated with reproductive violence. An example is forced nudity, which is a form of sexual violence that does not necessarily directly impact on reproductive health or autonomy. Conversely, reproductive violence does not always involve sexual

violence. Examples include forced abortion or forced imposition of contraception. Distinguishing between sexual violence and reproductive violence is therefore conceptually possible and practically necessary because it enables a more nuanced analysis of patterns of impunity for gender-based violence under international, humanitarian, and criminal law and more robust approach to accountability for these crimes.

While myriad forms of reproductive violence can, depending on the specific circumstances of the case, meet the legal criteria to constitute torture or other CIDT, this submission focuses on lack of access to safe abortion care for survivors of conflict-related sexual violence as torture or other CIDT for the reasons elaborated in the introduction.

III. Denial of Abortion Services for Victims of Sexual and Reproductive Violence in Armed Conflict Can Amount to Torture and Other Cruel, Inhuman, or Degrading Treatment

It is widely recognized that IHL and IHRL apply to situations of armed conflict and provide complementary and mutually reinforcing protections.[29] One such protection is the prohibition on torture and other CIDT.

While distinct regimes of law, and distinct prohibitions exist within each regime, looked at as a whole, there are significant similarities, common elements, and shared jurisprudence between IHL and IHRL. One common thread is that a minimum level of suffering must be demonstrated to prove torture and other CIDT,[30] another is the requirement to establish torture, that the suffering be inflicted for some prohibited purpose.[31] These elements will be addressed, in turn, below.

A. Severity of suffering and denial or lack of access to safe abortion care for victims of sexual and reproductive violence in armed conflict

When seeking to establish that the required level of suffering exists in order to establish torture or other CIDT, both IHL and IHRL consider objective elements related to the severity of the harm and subjective elements related to the condition of the victim.[32] Relevant factors include the environment and duration of acts, isolation, physical or mental condition of the victim, prevailing cultural beliefs and sensitivity, and the victim's gender, age, social, cultural, religious or political background, or past experiences.[33]

Generally, there is no requirement of permanent injury to establish a requisite level of suffering;[34] suffering can be physical or mental,[35] and one single act can be sufficient, but torture or other CIDT can also result from a combination or accumulation of several acts which, taken individually, may not amount to a violation.[36]

While there has yet to be a case addressing safe abortion care and torture or other CIDT under IHL, human rights treaty bodies and courts have long acknowledged that denial of abortion services in certain cases meet the required severity of suffering to constitute torture or other CIDT.[37]

The UN Committee again Torture (CAT Committee) has routinely expressed concern that criminalization of or restrictions on safe abortion care when a pregnancy is a result of rape can be a form of torture or other CIDT.[38] The CAT Committee has specifically noted that denial of abortion care and restrictive abortion laws can in some cases cause "physical and mental suffering so severe in pain and intensity as to amount to torture."[39] The Committee has also found that laws criminalizing abortion that lack exceptions in cases of life or the health of a pregnant person, or in cases of rape, incest, or fetal impairment, may constitute torture and other CIDT.[40]

Similarly, the UN Human Rights Committee (HRC) has expressed concern that States' restrictive abortion laws could run afoul of their international legal obligations to prevent torture or other CIDT under Article 7 of the ICCPR.[41] For example, in *L.M.R. v. Argentina*, the HRC found an Article 7 violation where Argentinian authorities continually obstructed the provision of a safe and legal abortion for a 19-year-old rape survivor with a mental disability.[42] Notably, L.M.R. eventually received an illegal abortion, but the HRC nevertheless found a violation of Article 7 emphasizing the article's coverage of mental suffering and L.M.R.'s specific vulnerabilities. The HRC has found similar Article 7 violations in the context of obstruction or denial of safe abortion care outside of contexts of rape or sexual violence in *K.L. v. Peru* (2005),[43] *Mellet v. Ireland* (2016),[44] and *Whelen v. Ireland* (2017).[45]

Regional and national courts have also found denial of safe abortion care to amount to torture and/or CIDT, [46] as has the former UN Special Rapporteur against Torture, Juan Mendez. In his report for the thirty-first session of the Human Rights Council, Special Rapporteur Mendez noted that "[t]he denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill treatment."[47]

Findings that denial of abortion in cases of rape can amount to torture and/or other CIDT, by treaty bodies, courts, or UN Special Procedures, are on the firmest possible footing in contexts of armed conflict. In some cases, rape, which *per se* meets torture's severity threshold,[48] results in pregnancy. Rape in conflict, especially when committed against children or through acts of gang rape, often causes physical injuries that complicate pregnancy and childbirth,[49] including genital, pelvic and rectal injuries, gynecological disorders, pelvic pain and disorder, and sexually transmitted infections.[50] Compounding these physical maladies are the general conditions imposed by war, including barriers to accessing health care, malnutrition, anemia, malaria, exposure, stress, infection, disease–all of which combine to increase risks of maternal mortality.[51]

In addition to the physical impacts on pregnancy, rape in armed conflict carries psychological, social, and socio-economic consequences. Survivors may experience post-traumatic stress disorder, depression, anger, anxiety and fear, shame, self-blame and low self-esteem, and suicidal thoughts or behaviour.[52] Within their families and communities, survivors may encounter abandonment by partners/spouses, social stigma, isolation or rejection from communities, or culturally-specific feelings or perceptions related to 'dishonor', 'purity' and reputation.[53] Socio-economically, survivors may struggle to maintain or obtain education or livelihood opportunities, leading to increased financial hardship, vulnerability and risk of exploitation.[54]

For victims, pain and suffering associated with a rape is often compounded by their inability to obtain safe abortion care. Pregnancy and being forced to bear the child of a perpetrator have been found to prolong and deepen the harm to the victim, causing great anguish and shame.[55] When safe abortion care is denied or unavailable, victims' bodily autonomy and physical integrity are violated on multiple levels–first in the perpetration of rape, and again when they are prevented from exercising decision-making power over their own body. This compounded violation can perpetuate a victim's feelings of loss of control, exacerbating mental and emotional trauma.[56] Moreover, where safe abortion care is unobtainable, victim's may instead seek out clandestine or unsafe services, to the detriment of their health and lives, and suffer additional mental anguish and fear due to the "pain of unsafe treatment with uncertain outcomes, no proper aftercare and the possibility of being imprisoned if found out."[57]

The weight of the jurisprudence and the reality of the varied consequences of being denied or unable to obtain an abortion in cases of rape in armed conflict make clear that such denials or difficulties will often meet a level of severity high enough to qualify as torture or other CIDT.

B. "Prohibited purpose" and denial or lack of access to safe abortion care for victims of sexual and reproductive violence in armed conflict

A constitutive element of torture under IHRL and IHL is that it is committed for a specific purpose.[58] The Convention against Torture's approach, which has been followed by the ICTY and International Criminal Court, prohibits acts "for such purposes as" obtaining information or a confession; punishing, intimidating or coercing the victim or a third person; and discriminating, on any ground, against the victim or a third person.[59] The inclusion of "such purposes as" makes it clear that the list is not exhaustive, but simply illustrative in nature.

Notably, the list's express inclusion of "discrimination of any kind" acknowledges the risks and harms inherent in "othering", objectifying, or otherwise singling out a particular group. Along these lines, the CAT has recognized, "discrimination of any kind can create a climate in which torture and ill-treatment of the 'other' group subjected to intolerance and discriminatory treatment can more easily be accepted."[60]

Discrimination, of course, is often the central scaffolding of denials of, and limits on access to, safe abortion care. Legislation and policy-level efforts that restrict abortion facilitate conceptions of abortion as morally wrong and/or socially unacceptable,[61] and are rooted in patriarchal notions of control, ownership and domination over women, girls, and pregnant bodies. Put plainly, restricting or otherwise failing to provide health services that only pregnant people require constitutes discrimination.[62] In fact, human rights experts have confirmed that "criminalization of or other failure to provide services that only women require, such as abortion and emergency contraception, constitute discrimination based on sex".[63] The CEDAW Committee has explicitly stated that "it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."[64] This Committee has also long recognized that neglecting, overlooking or failing to accommodate women's specific health needs, including in relation to pregnancy, is a form of discrimination against women.[65]

Along these lines, the former Special Rapporteur against Torture, Juan Mendez, has noted that gender discrimination often underpins experiences of torture and other CIDT in health-care settings and that, "this is particularly true when seeking treatments such as abortion that may contravene socialized gender roles and expectations."[66] Similarly, the CEDAW Committee has recognized that women's access to SRH services is essential for achieving substantive equality and has called on states to prioritize the provision of SRH services, including safe abortion services, to mitigate the impact of armed conflict on sexual and reproductive health and maternal mortality.[67] In kind, the HRC, in its General Comment 28 (equality of rights between men and women), stated that interference with women's access to reproductive health care, including failure to ensure that women do not have "to undergo life-threatening clandestine abortions" violates their right to non-discrimination.[68]

If legislative or policy-level restrictions on or denials of safe abortion care are discriminatory in non-conflict settings, then such restrictions and denials in armed conflict where victims of sexual or reproductive violence are often specifically targeted on discriminatory grounds (*i.e.*, because of their gender (real or perceived), sexual orientation, disability, race, color, ethnicity, age, religion, economic or indigenous status), will often be even more egregious. Indeed, denials of reproductive autonomy following violations of bodily integrity are symptomatic of broader structural discriminations and are deeply rooted in gender stereotypes–all conspiring and compounding to nullify the enjoyment of fundamental human rights.

IV. Specific Responses to the Special Rapporteur's Questions

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

A significant impediment to effectively investigating, prosecuting and remedying sexual torture and related ill-treatment is the all-too-frequent presumption that sexual violence is the primary form of

gendered harm that individuals, particularly women and girls, suffer in conflict. This impacts the analytical lens applied to conflict-related violence and thus contributes to underinclusive investigations, prosecutions, remedies and reparations. It also contributes to crucial gaps in emergency assistance to victims.

As referenced earlier, reproductive violence and violations of sexual and reproductive rights, in particular, when involving denial of abortion following rape, can amount to torture and other CIDT. Yet failing to identify and separately address such violations undermines accountability measures and lays the groundwork for inadequate reparations for victims.

Moreover, with respect to torture or other CIDT emerging from lack of access to abortion care following sexual violence, a major obstacle to the provision of such care are the family planning and reproductive health restrictions attached to the United States Government's ("USG") foreign assistance funding.

The USG is the single largest donor to humanitarian aid programs, as well as international family planning and reproductive health programs globally. However, despite this laudable support, these funds come with restrictions that result in the denial or lack of adequate availability of safe abortion care for victims of sexual or reproductive violence in conflict.

More specifically, the USG currently and consistently since 1973, has interpreted the Helms Amendment to the Foreign Assistance Act of 1961 in an overly broad and deeply harmful manner.[69] The Helms Amendment provides that no US foreign aid funds "may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions."[70] Today, this provision is the basis of a USG policy for foreign assistance funds applying a total ban on abortion speech or services, with no exceptions for rape, incest and life endangerment.[71]

B. Rehabilitation

The disintegration of health systems and wider infrastructure in conflict settings is both a primary barrier to rehabilitation and more specifically to restoring victims' sexual and reproductive health and remedying their related human rights.[72]

In the context of sexual and reproductive violence amounting to torture or other CIDT and resulting in pregnancy, the option of safe abortion care is a necessary rehabilitative measure.

Article 14 of the Convention against Torture calls for states parties to ensure victims have access to "the means for as full rehabilitation as possible".[73] In interpreting Article 14 in its General Comment 3, the CAT Committee noted that rehabilitation for victims "should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and

participation in society."[74] The Committee goes on to clarify that the obligation in Article 14, "refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture."[75] Rehabilitation approaches should "account [for] a victim's culture, personality, history and background and [be] accessible to all victims without discrimination and regardless of a victim's identity or status within a marginalized or vulnerable group."[76]

Taking the contours of Article 14's obligation as a departure point, the UN Secretary-General's Guidance Note for reparations for conflict-related sexual violence further sets out that "[r]ehabilitation aims to provide victims with all essential services that are needed to help them to move on and to carry out their life in a dignified way."[77] More specifically, in his annual reports on conflict-related sexual violence, the Secretary-General has repeatedly called on states to adopt survivor-centered approaches when providing redress and rehabilitative services, "including…sexual and reproductive care, access to emergency contraception, safe and timely abortion care…"[78]

The Secretary-General's approach regarding comprehensive rehabilitative services, including safe abortion care, has also been adopted in the UN Security Council's Resolutions on Women, Peace, and Security, including Resolution 2467 (calling for survivors or conflict-related sexual violence to receive all the care required by their specific needs and without any discrimination)[79], Resolution 2122 (noting the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination)[80], and 2106 (urging UN entities and donors to provide non-discriminatory and comprehensive health services, including sexual and reproductive health).[81]

More generally, the CEDAW Committee has highlighted the importance of reparations regimes including gendered assessments of the harm that is suffered, and that reparations measures should address a victim's specific needs and the structural inequalities that enabled the violations, with a view to ensuring these violations do not continue.[82] The CEDAW Committee has called for reparative measures to be transformative, meaning that they address "the structural inequalities which led to the violations of women's rights, respond to women's specific needs and prevent their re-occurrence."[83]

As stated earlier in this submission, a victim's pain and suffering resulting from conflict-related sexual and/or reproductive violence can reach the highest levels of severity. When that violence results in pregnancy, those harms can be compounded, constantly reminding the victim of the violation and leading to greater risk of stigmatization and social or familial ostracization. Under these circumstances, the option and availability to terminate the pregnancy is not only a necessary rehabilitative avenue to "restore and repair the harm suffered", but it is also specifically recommended by the UN Secretary-General and included under the umbrella of services called for by the UN Security Council.

V. Recommendations

- Efforts to document, prosecute and redress sexual torture and other related CIDT occurring during armed conflict should take into account both—and distinctly—sexual and gender-based violence, and reproductive violence targeting a person's agency over their fertility or their autonomy about whether, and in what circumstances, to reproduce.
- Efforts to document, prosecute, and redress torture and other related CIDT occurring during armed conflict should include examining denial or lack of access of safe abortion care to victims of sexual and reproductive violence as a distinct form of torture or other related CIDT.
- States, multilateral organizations, and other humanitarian aid donors should specifically fund the provision of sexual and reproductive health care, including safe abortion care, for those affected by armed conflict, and should ensure that their funds are separated from US funds to minimize the reach and impact of the Helms amendment and other US abortion restrictions.
- Victims of sexual and reproductive violence in armed conflict, including when such violence amounts to torture or other related CIDT, should have access to safe abortion care as a form of reparations for the human rights violations suffered.
- The impact of multiple and intersecting forms of discrimination on the ability of women, girls and others who can become pregnant should be taken into account in all policies and measures to address the occurrence of and reparations for sexual and reproductive violence in armed conflict.

Endnotes

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[21] Colombian Constitutional Court, Sentencia SU599/19, 2019, Judgment, https://www.corteconstitucional.gov.co/Relatoria/2019/SU599-19.htm.

[22] International Criminal Court, Appeals Chamber, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of4 February 2021, Case No. ICC-02/04-01/15-2022-Red, pp. 379-402, 15 December 2022.

[23] Report of the Commission of Human Rights Experts on Ethiopia, UN Doc. A/HRC/51/46, 2022.

[24] Id., para. 66.

[25] Id., paras. 67-68.

[26] Id., para. 70.

[27] Center for Reproductive Rights, Factsheet: Sexual and Reproductive Health and Rights in Conflict, 2020, https://reproductiverights.org/wp-content/uploads/2020/12/GLP_GA_SRHR_FS_0817_Final_Web.pdf.

[28] WHO, UNICEF, UNFPA, World Bank Group, and the United Nations Population Division, Trends in Maternal Mortality: 1990 to 2015, at 26 (2012), http://apps.who.int/iris/bitstream/10665/194254/1/9789241565141_eng.pdf.

[29] See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25. See also, International

Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions* (2014), pp. 36-37, https://www.icrc.org/en/doc/assets/files/other/icrc-002-0703.pdf.

[30] An exception to this general trend is that the definition of torture under the Inter-American Convention against Torture does not include a severity requirement. However, the severity requirement is either expressly required or has been interpreted into the elements of torture under the Convention against Torture, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Geneva Conventions of 1949.

[31] Severity and prohibited purpose are the most significant shared elements between international human rights, humanitarian, and criminal law. To establish torture or other CIDT under IHL or international criminal law (ICL), there is no "official actor" requirement. (See, ICTY, *Kunarac* Trial Judgment, 2001, para. 496, confirmed in Appeal Judgment, 2002, para. 148. See also ICRC Commentaries 2016, First Geneva Convention, common Artcle 3, para. 645, and International Criminal Court, Elements of Crimes, Articles 8(2)(a)(ii)-1 and 8(2)(c) (i)-4 (war crime of torture), and Article 7(1)(f) (crime against humanity of torture). Moreover, under IHL, there is no "prohibited purpose" requirement for "cruel or inhuman treatment" (see ICRC Commentaries, First Geneva Convention, common Article 3, para. 618; ICC Elements of Crimes, Article 8(2)(c)(i)-3 (war crime of cruel treatment).

[32] See ICRC Commentaries 2016, First Geneva Convention, para. 553, 619; Mursic v. Croatia, Case No.
7334/13, Judgment (Merits and Just Satisfaction), European Court of Human Rights (Grand Chamber), 20 October 2016, para. 97; Ximenes-Lopes v Brazil, Inter-American Court (2006) §127.

[33] See ICTY, *Mrkšic* Trial Judgment, 2007, para. 514; *Krnojelac* Trial Judgment, 2002, para. 182; *Limaj* Trial Judgment, 2005, para. 237; *Haradinaj* Retrial Judgment, 2012, para. 417; *Naletilic and Martinovic* Appeal Judgment, 2006, para. 300; *Brdanin* Trial Judgment, 2004, paras 483–484; *Kvocka* Trial Judgment, 2001, para. 143; and *Martic* Trial Judgment, 2007, para. 75.

[34] See ICTY, *Kvocka* Trial Judgment, 2001, paras 148–149; *Br anin* Trial Judgment, 2004, para. 484; *Limaj* Trial Judgment, 2005, para. 236; *Mrkšic* Trial Judgment, 2007, para. 514; and *Haradinaj* Retrial Judgment, 2012, para. 417. See also *Brdanin* Appeal Judgment, 2007, para. 249 ('physical torture can include acts inflicting physical pain or suffering less severe than "extreme pain or suffering" or "pain … equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death').

[35] See ICTY, *Kvo ka* Trial Judgment, 2001, para. 149; see also *Limaj* Trial Judgment, 2005, para. 236; *Haradinaj* Retrial Judgment, 2012, para. 417; and *Mrkši* Trial Judgment, 2007, para. 514; See Third Convention, Article 17, and Additional Protocol I, Article 75(2)(a)(ii). Suffering can be only mental. See ICRC Commentaries 2016, First Geneva Convention, para. 622, citing ICTY, *Naletili and Martinovi* Trial Judgment, 2003, para. 369; Inter-American Court of Human Rights, *Loayza Tamayo* v. *Peru*, Judgment, 1997, para. 57; European Court of Human Rights, *Ireland* v. *UK*, Judgment, 1978, para. 167; and
CAT Committee, 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. 13.

[36] ICRC Commentaries of 2016, First Geneva Convention, para. 619, citing: European Court of Human Rights, *Dougoz* v. *Greece*, Judgment, 2001, para. 46; *Iovchev.* v. *Bulgaria*, Judgment, 2006, para. 137; and CAT Committee, Consideration of reports submitted by States parties under Article 19 of the Convention: Israel, UN Doc. A/52/44, 10 September 1997, para. 257.

[37] See for example, HRC, K.L. v Peru, Comm. No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, L.C. v Peru, Comm. No. 22/2009, UN Doc. CEDAW/C/50/D/22/2009 (2011); HRC, Mellet v Ireland, Comm. No. 2324/2013, UN Doc.

CCPR/C/116/D/2324/2013 (2016), paras 7.6, 7.7, 7.8; HRC, Whelan v Ireland, Comm. No. 2425/2014, Annex II, UN Doc. CCPR/C/119/D/2425/2014 (2017), paras 7.7, 7.8, 7.9, 7.12. See also CAT Committee, Concluding Observations: Peru, UN Doc. CAT/C/PER/CO/5-6 (2012), para. 19; CAT Committee, Concluding Observations: Czech Republic, UN Doc. CAT/C/CZE/CO/4-5 (2012), para. 12; CEDAW Committee, General Recommendation 35 on gender-based violence against women (updating General Recommendation 19), UN Doc. CEDAW/C/GC/35 (2017), para. 18. Denial of abortion services in some circumstances, including rape, may also violate international humanitarian law. See, for example, Common Article 3 of the Four Geneva Conventions, Article 75(2) of AP1, Article 4(2) of AP II. Rule 90 of the Doswald-Beck et al. ICRC study.

[38] See 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); Honduras: U.N. Doc. CAT/C/HND/CO/2, paras. 47, 48 (26 August 2016); Kenya: U.N. Doc. CAT/C/KEN/CO/2, para. 28 (19 June 2013); Nicaragua: CAT/C/NIC/CO/1 (10 June 2009), para. 16 and 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; Philippines: U.N. Doc. CAT/C/PHL/CO/3, paras. 39, 40, (2 June 2016); Poland: U.N. Doc. CAT/C/POL/CO/5-6, para. 23 (23 December 2013); Sierra Leone: U.N. Doc. CAT/C/SLE/CO/1, para. 17 (20 June 2014).

[39] CAT Committee, Concluding Observations on the seventh periodic report of Poland, U.N. Doc. CAT/C/POL/CO/7, para. 33(d), 29 August 2019.

[40] CAT Committee, Concluding Observations: Paraguay, U.N. Doc. CAT/C/PRY/CO/4-6, para. 22, (2011); CAT Committee, Concluding Observations: Nicaragua, U.N. Doc. CAT/C/NIC/CO/1, para. 16, (2009).

[41] Human Rights Comm., General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) (noting that in assessing a State's compliance with Article 7 of the ICCPR, the Committee would examine whether States provided access to safe abortion for women who became pregnant as a result of rape), tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.10&Lang=en; Human Rights Comm., Concluding Observations to Peru, ¶ 14, U.N. Doc. CCPR/C/PER/CO/5 (2013) (The HRC observed that Peru's criminalization of abortion was incompatible with its obligations under Article 7 and recommended that Peru revise its laws to allow abortion in cases of rape or incest); Human Rights Comm., Concluding Observations to Ireland, ¶ 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014) (The HRC, citing to Article 7, expressed concern that Ireland continued to prohibit abortion in most circumstances and highlighted the "severe mental suffering caused by the denial of abortion services to women seeking abortions due to rape, incest, fatal foetal abnormality or serious risks to health." The Committee concluded by recommending that Ireland undertake significant reforms, namely that it "[r]evise its legislation on abortion, including its Constitution, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality" to comply with its obligations under the ICCPR).

[42] L.M.R. v. Argentina, HRC, UN Doc. CCPR/C/101/D/1608/2007 (2011), para. 10.

[43] HRC found that denying a therapeutic abortion to a 17-year old girl who was pregnant with an anencephalic fetus and compelling her to carry the pregnancy to term and endure the inevitable death of her child four days after birth, which caused foreseeable and substantial "mental suffering", violated her right to not be subjected to torture and other CIDT (Art. 7, ICCPR). (K.L. v. Peru,

HRC, UN Doc. CCPR/C/85/D/1153/2003 (2005), para. 6.3. The HRC further found that denying K.L. a therapeutic abortion violated her right to private life. Id.)

[44] HRC found that prohibiting and criminalizing abortion and preventing a pregnant woman from undertaking an abortion in her home country after learning her fetus had a fatal abnormality subjected her to severe emotional and mental pain and suffering, in violation of her rights to freedom from CIDT, as well as her rights to privacy and equality before the law (Arts. 7, 17 and 26 of the ICCPR). Significantly, it was of no relevance that the denial of abortion care accorded with Irish law, because as the HRC reiterated, states parties to the ICCPR may not invoke any kind of justification or extenuating circumstances to excuse a violation of Article 7, which is absolute in nature and allows for no limitations. (Mellet v. Ireland, HRC, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013, para. 7.6 (2016).)

[45] HRC again found the Irish government in violation of Article 7 when it denied a pregnant woman an abortion after learning her fetus had a fatal anomaly and suggested that she travel elsewhere to terminate her pregnancy. The Committee noted that the petitioner's "high level of mental anguish" was a direct result of the Irish law that prohibited and criminalized abortion in circumstances of fatal fetal anomalies, which amounted to CIDT. Whelan v. Ireland, HRC, Commc'n No. 2425/2014, paras. 7.4, 7.7, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).

[46] See, e.g., P & S v. Poland, No. 57375/08, Eur. Ct. H.R. (2012), R.R. v. Poland, Eur. Ct. H.R. No. 27617/04, in which the European Court of Human Rights held that denying safe abortion care to, respectively, a minority aged survivor of rape and in a context of severe fetal impairment, amounted to inhuman and degrading treatment. See also Constitutional Court of Colombia, C-355/06, https://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm, where in 2006 the Colombian Constitutional Court found that forcing the continuation of a pregnancy resulting from rape amounts to CIDT.

[47] Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (J. Mendez), UN Doc. A/HRC/31/57, para. 44, 5 Jan. 2016.

[48] See ICTY, *Delalic* Trial Judgment, 1998, paras 495–497; *Kunarac* Appeal Judgment, 2002, para. 151; ICTR, *Akayesu* Trial Judgment, 1998, para. 682; European Court of Human Rights, *Aydin* v. *Turkey*, Judgment, 1997, paras 82–86; UN CAT, T.A. v. Sweden, Decisions, 2005, paras 2.4 and 7.3; and Inter-American Commission on Human Rights, Case 10.970 (Peru), Report, 1996, p. 185. See also UN Commission on Human Rights, Torture and other cruel, inhuman or degrading treatment or punishment, Report by the UN Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119.

[49] Harvard Humanitarian Initiative & Oxfam International, Now The World Is Without Me: An Investigation Of Sexual Violence In Eastern Democratic Republic of Congo, Apr. 2010, at 41. See also See Save the Children, Unspeakable Crimes against Children: Sexual Violence in Conflict, 2013, at v; Cassandra Clifford, Presentation at the 7th Global Conference on Violence and the Contexts of Hostility: Rape as a Weapon of War and It's [sic] Long Term Effects on Victims and Society, Budapest, Hungary (5-7 May 2008), http://tssi.org/files/BMJCliffordPaper.pdf.

[50] See International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (second edition March 2017) (Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office), page 25, box 6.

[51] See Harvard School of Public Health & Physicians for Human Rights, The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan, 20 Oct. 2004, at 20; see also Médecins Sans Frontières, "I Have No Joy, No Peace of Mind": Medical, Psychological, and Socio-Economic Consequences of Sexual Violence in Eastern DRC, 2004, at 11.

[52] See International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (second edition March 2017) (Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office), page 26, box 6.
[53] Id.
[54] Id. See also Save the Children, Unspeakable Crimes against Children: Sexual Violence in Conflict, 2013, at v.
[55] Jill Trenholm, Women Survivors, Lost Children and Traumatized Masculinities: The Phenomena of Rape and War in Eastern Democratic Republic of Congo, Digital Comprehensive Summaries of Uppsala Dissertations from the Faculty of Medicine 920 (2013), at 49. See also Id. at 43 ("Many women told of how they were repulsed by their child born of rape, seen as representative of the perpetrator and the trauma endured.").
[56] Amnesty International, The Impact of the Complete Ban of Abortion in Nicaragua: Briefing to the United Nations Committee against Torture (2009), at 23; see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (Juan E. Méndez), ¶ 31, U.N. Doc. A/HRC/22/53 (1 Feb. 2013).
[57] Amnesty International, The Impact of the Complete Ban of Abortion in Nicaragua: Briefing to the United Nations Committee against Torture (2009), at 13.
[58] See CAT Art. 1; ICTY, *Kunarac* Trial Judgment, 2001, para. 485. Cf. the jurisprudence from the European Court of Human Rights that folds purpose under the severity analysis: "In order to determine whether the threshold of severity has been reached, other factors may be taken into consideration, in particular: (a) the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 of the Convention (European Court of Human Rights, Khlaifia and Others v. Italy, Grand Chamber, 2016, § 160).
[59] Convention against Torture, Art. 1; ICTY, *Kunarac* Trial Judgment, 2001, para. 485; ICC, Elements of Crimes, Articles 8 (2) (a) (ii)-1 and 8 (2) (c) (i)-4.
[60] Contribution of CAT to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, UN Doc. A/CONF.189/PC.2/17 (2001) p.2.
[61] K. Kimport, K. Cockrill and T.A. Weitz, 'Analyzing the impacts of abortion clinic structures and processes: A qualitative analysis of women's negative experiences of abortion clinics', Contraception, 85, 2012, pp. 204-210.
[62] See Joint Statement by the UN Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on the situation of human rights defenders, on violence against women, its causes and consequences, and the UN Working Group on the issue of discrimination against women in law and in practice, Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights, 'The 2030 Agenda for Sustainable Development and its implementation mark a unique opportunity to ensure full respect for sexual and reproductive health and rights which must be seized', 2015,
www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490&LangID=E.
[63] Id.
[64] CEDAW Committee, General Recommendation 24: Article 12 of the Convention (Women and Health), UN Doc. A/54/38/Rev.1, chap. I, 1999, para. 11.
[65] Id., paras. 6, 11, 12; CEDAW Committee, Alyne da Silva Pimentel Teixeira v Brazil, Comm. No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008 (2011); R.J. Cook and V. Undurraga, 'Article 12

[Health]', in M. Freeman, C. Chinkin and B. Rudolf (eds.), The UN Convention on Elimination of All Forms of Discrimination against Women: A Commentary, 2012, pp. 311-333, pp. 326-327; see also CESCR, General Comment 22, Right to sexual and reproductive health), UN Doc. E/C.12/GC/22, 2016, paras 9-10, 28, 34; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/66/254, 2011, paras. 16 and 34; UN Working Group on the issue of discrimination against women in law and in practice, Report of the Working Group, Human Rights Council, UN Doc. A/HRC/32/44 (2016), para. 23; HRC, Mellet v Ireland, Comm. No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013, 2016, concurring opinions of members: Cleveland, Ben Achour, and Rodríguez Rescia, de Frouville and Salvioli.

[66] Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (J. Mendez), UN Doc. A/HRC/31/57, para. 42, 5 Jan. 2016.

[67] See CEDAW Committee, General Recommendation 30, (women in conflict prevention, conflict and post-conflict situations), UN Doc. CEDAW/C/GR/30 (2013) para. 52(c); CEDAW Committee, Concluding Observations: Central African Republic, UN Doc. CEDAW/C/CAF/CO/1-5 (2014), para. 40(b); Democratic Republic of the Congo, UN Doc. CEDAW/C/COD/CO/5 (2006), paras 35-36. Provision of SRH services in humanitarian settings requires ensuring available, accessible, adequate and quality services without discrimination; ensuring people who seek services can make informed and autonomous decisions, without spousal, parental or third-party consent; protecting individual's privacy and confidentiality and ensuring access to justice and effective remedies when individual rights are violated. See CEDAW Committee, General Recommendations 30 and 33.

[68] HRC, General Comment 28 (equality of rights between men and women), UN Doc. CCPR/C/21/Rev.1/Add. 10 (2000), para. 20.

[69] For more information about US foreign aid and restrictions on abortion, see Global Justice Center, Submission to the United Nations Committee against Torture 59th Session List of Issues Prior to Reporting – United States June 2016, tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCAT%2FICS%2FUSA%2F24567&Lang=en. See also Congressional Research Service, Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Law and Policy, 15 July 2022, https://sgp.fas.org/crs/row/R41360.pdf.

[70] Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 104(f)(1), 75 Stat. 424, as amended by the Foreign Assistance Act of 1973 (P.L. 93-189).

[71] K. Moss, J. Kates, The Helms Amendment and Abortion Laws in Countries Receiving U.S. Global Health Assistance, KFF - Global Health Policy, 18 January 2022, https://www.kff.org/global-health-policy/issue-brief/the-helms-amendment-and-abortion-laws-in-countries-receiving-u-s-global-health-assistance/#:~:text=While%20the%20Helms%20Amendment%20applies,and%20other%20FP%2FRH%20restrictions%20%E2%80%9C.

[72] See Sneha Barot, In a State of Crisis: Meeting the Sexual and Reproductive Health Needs of Women in Humanitarian Situations, 20 Guttmacher Policy Review (Feb. 13, 2017), https://www.guttmacher.org/gpr/2017/02/state-crisis-meeting-sexual-and-reproductive-health-needs-women-humanitarian-situations.

[73] CAT, Art. 14.

[74] Committee against Torture, General Comment 3, U.N. Doc. CAT/C/GC/3, para. 11, 13 December 2012.

[75] Id., para. 12, 13 December 2012.

[76] Id., para. 15, 13 December 2012.
[77] Guidance note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, p. 18, June 2011, https://digitallibrary.un.org/record/814902?ln=en&v=pdf.
[78] UN Secretary-General Annual Report on Conflict Related Sexual Violence - 2023, U.N. Doc. S/23/413, para. 92(a). See also reports from 2022 (U.N. Doc. S/22/272, para 76(h)), 2021 (U.N. Doc. S/21/312, para. 71(c)); 2019 (U.N. Doc. S/2019/280, 136(b)).
[79] UNSCR 2467, para. 16(a).
[80] UNSCR 2122, pp 8.
[81] UNSCR 2016, para. 19.
[82] See CEDAW Committee, General Recommendation 30 (Women in Conflict Prevention, Conflict and Post-Conflict Situations), UN Doc. CEDAW/C/GC/30, 2013. para. 79.
[83] CEDAW Committee, General Recommendation 30 (Women in Conflict Prevention, Conflict and Post-Conflict Situations), UN Doc. CEDAW/C/GC/30, 2013. para. 79.