



Human Rights Law Clinic Papers 2018

SEXUAL AND GENDER BASED VIOLENCE AS A FORM OF TORTURE OR ILL-TREATMENT: GREY AREAS, CASE LAW, LEGAL PERSPECTIVES

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1. Introduction

This memorandum will highlight the issue of sexual and gender-based violence (SGBV) within the OSCE region. SGBV has been found to occur within closed facilities, but there is a lack of research into the issue and in turn little acknowledgment of its occurrence and GBV in general has inadequate policy frameworks and preventative measures in place.¹ With mounting jurisprudence to support rape as a form of torture, this project will investigate whether other forms of SGBV could constitute torture, concentrating on highlighting potential weakness or 'grey areas' in arguing SGBV constitutes torture, and in what circumstances an alternative plea may be appropriate. Due to the increased threat of SGBV as a means to extract confessions, this memorandum will focus upon police custody, pre-trial detention and prison / correctional facilities.

In order to achieve this, this memorandum will firstly discuss the issue of SGBV within closed detention facilities within the OSCE region. It will then look at international and regional jurisprudence relating to this issue to assess the interpretation of the definition of torture within the law, and to determine potential grey areas which may struggle within these interpretations. Finally, it will use the information I have gathered to formulate a legal argument which explains how the identified grey areas could constitute torture, and in which circumstances torture or ill treatment would form a suitable pleading strategy as opposed to other pleas of maltreatment. As an issue which is widely under-researched, most of the information gathered is from general torture jurisprudence and literature, however the definitions, interpretations and law can be easily applied to SGBV as a reflection of the evolving definition of torture to encompass sexual violence, something which will also be explored within this memorandum.

2. Background

Sexual violence is a type of gender-based violence (GBV) which involves: "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, sex trafficking", when this act targets an individual or multiple individuals because of their gender, or

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¹ CEDAW, 'General Recommendation No.35 on gender-based violence against women, updating general recommendation No.19' (2017) UN Doc CEDAW/C/GC/35.

expectations of gender within a society, then it becomes SGBV.² SGBV affects both men and women, but affects women disproportionately due to continuing gender inequality and stereotypes that women should be sexually obedient and submissive.³ The term SGBV is important as it acknowledges the dual aspect of the violence as sexual as well as a form of discrimination on the grounds of gender, sexual orientation or identity.⁴

2.1. SGBV in police custody, pre-trial detention and prison / correctional facilities

SGBV occurs more commonly within closed facilities due to its association with humiliation, degradation and as a method of control.⁵ Detained individuals are already vulnerable due to deprivation of liberty, and particularly within pre-detention facilities, SGBV may be used to exacerbate feelings of helplessness to coerce individuals into confessing crimes or making statements.⁶

Women are particularly vulnerable in pre-detention facilities which are typically not gender sensitive as they are often under the control of male guards and there is increased opportunity for violence due to isolation and intimate interactions such as strip searching.⁷ The unnecessary use of pre-trial detention also places potentially innocent individuals at risk, as even first-time offenders or those who have committed non-violent crimes are still held for lengthy periods in pre-trial detention due to inefficient criminal procedures.⁸

2.2. A necessary association with torture

Freedom from torture is absolutely prohibited under international law, this is reflected within many international treaties and the ICJ have given the opinion that the prohibition of torture is a well-established rule of customary international law due to the *opinion juris* of States and its universal application.⁹ The importance of associating SGBV with a right prohibited under customary international law, is the fact that it then becomes applicable to all States regardless of ratifications or signatures, and enables any State found to be in breach to be held accountable without exception.

² — 'Glossary of Terms from Programming Essentials and Monitoring and Evaluation Sections' (*UN Women*) <www.endvawnow.org/en/articles/347-glossary-of-terms-from-programming-essentials-and-monitoring-and-evaluation-sections.html> accessed 10 October 2017.

³ OSCE

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ UNCAT, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/HRC.

⁸ Ibid.

⁹ *Questions relating to the Obligation to Prosecute or Extradite, (Belgium v Senegal) Judgment* [2012] ICJ

The concept of torture has a unique stigma which associates it with a higher degree of seriousness than other human rights, the word torture rouses thoughts of extreme abuse, shock and greatly immoral acts.¹⁰ The UN Committee Against Torture (CAT) reiterates the severity of the crime of torture in General Comment Number 2, which states that ‘Naming and defining this crime will promote the Convention’s aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture.’, this General Comment emphasizes the importance of acknowledging and publicizing torture as absolutely prohibited, and using shame as a tool to reduce its occurrence through public education and pressure.¹¹

2.3. Justification for this project

There is little existing research in to SGBV in closed detention, and it remains a ‘taboo’ subject.¹² Further research in to the issue and in particular associating it with torture, will highlight the need for further discussion and the importance of education, training and protocols in closed facilities to prevent SGBV – or in some instances an introduction of these – particularly in police custody and pre-trial detention where there is greater motivation and opportunity. Whilst sexual violence against women continues to evolve as a human rights issue,¹³ many institutions have developed protocols to respond to it, but they do not necessarily consider the gender dimension often associated.¹⁴ Awareness of the issue of SGBV ensures consideration of the discriminatory aspects of sexual violence¹⁵ and assists with the development of preventative measures which are fully inclusive of the motivations behind sexual violence, and in turn sensitive to situations when such incidents are likely to take place.

A further consideration are cultural attitudes towards sexual violence and the impacts which this has upon victims. In some cultures, sexual purity is closely associated with honour and status¹⁶ and victims of sexual abuse often fail to report their abuse due to the social repercussions of a loss of honour, such as family exclusion or even further violence.¹⁷ Withholding the trauma of sexual abuse can increase psychological suffering, as it removes

¹⁰ Ronli Sifris, ‘Conceptualising Involuntary Sterilisation as ‘severe pain or suffering’ for the Purpose of Torture Discourse’ (2010) 28 Netherlands Quarterly 523,529.

¹¹ UNCAT, ‘General Comment No.2: Implementation of Article 2 by State Parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 11.

¹² OSCE (n 3).

¹³ Felice D Gaer, ‘Rape as a Form of Torture: The experience of the Committee Against Torture’ (2012) 15 City Uni of NY Law Review 293.

¹⁴ OSCE (n 3).

¹⁵ Ibid.

¹⁶ Sezgin Cihangir, ‘Gender Specific Honor Codes and Cultural Change’ (2012) Group Processes and Intergroup Relations 319,321.

¹⁷ Juliet A Schiller, ‘Using Torture Against Women’ (2011) 26 Peace Review 388.

the opportunity to acknowledge and discuss the abuse and its impacts.¹⁸ Enabling discussion on sexual violence can be empowering for victims and assists with transforming the experience from shameful to a story of survival and dignity.¹⁹ Condemning sexual violence as ‘torture’ also assists with changing cultural attitudes, as it removes any blame from the victim and shifts it towards the perpetrator, this change of perspective may contribute to altering reactions to victims of sexual violence and aid in their recovery and likelihood to report abusive crimes.²⁰

Exposing torture shames the state involved, this shame makes states more likely to act and fulfil their obligations to prevent and punish those involved with torture within their jurisdiction.²¹ There is also a prohibition of the inclusion of statements collected by means of torture,²² in order to discourage it and prevent the use of unreliable statements and possible miscarriages of justice in national courts²³ as seen in cases such as *Bram v The United States* (1897).²⁴

3. Jurisprudence and the Definition of Torture

Due to the under researched nature of SGBV, there is little existing jurisprudence relating specifically to SGBV, however many of the definitions and interpretations of the law within general torture jurisprudence can also be applied to aspects of SGBV and assist with assessing torture as a suitable plea for SGBV cases. Similarly, there is limited national jurisprudence relating to torture, which may be due to the shame attached to being connected with this issue,²⁵ and so this memorandum focuses upon International and regional jurisprudence which can be applied to the OSCE region. The Conventions discussed all use the term ‘severe’ to describe mental and physical suffering which amounts to torture but offer no further guidance on the thresholds of severe.²⁶ The following case law demonstrates interpretations of the convention which have shaped the developing scope of the minimum threshold of severity and what is considered torture, and will assist with formulating a legal argument.

The International Covenant on Civil and Political Rights (1966), fails to give any detailed information on the acts which may be considered torture, the decisions of the

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Gaer* (n 13).

²¹ *Schiller* (n 17).

²² UNCAT 1987, art 15.

²³ HRC, ‘General Comment No.20: Article 7’ (10 March 1992) UN Doc HRI/Gen/1/Rev.1, para 12.

²⁴ *Bram v. United States* 168 US 532, 543–561 (US Sup Ct, 1897).

²⁵ *Schiller* (n 17).

²⁶ UNCAT 1987, art 1.1.

Human Rights Committee do not distinguish between torture and other forms of ill treatment but refer to them collectively as Article 7.²⁷ In cases where the treatment of prisoners described to the Committee is not considered severe enough to amount to torture, then a breach of Article 10 is often used as a lesser alternative.²⁸

Pinto v Trinidad and Tobago (1996) failed to successfully argue a breach of Article 7 as the HRC found that the conditions experienced by the male detainees bringing the case, were not different to those experienced by the other prisoners.²⁹ This emphasises a need for the abuse to be selective, in order for it to be considered torture. In *Boodoo v Trinidad and Tobago* (2002), the Committee found a violation of article 7 when the complainant was beaten, forced to strip naked and squat in front of prison guards and also received threats of further violence after informing the UN of his ill treatment.³⁰ Although it was a combination of the ill treatment which was found to amount to torture, the finding acknowledges that there are different factors within torture, including the humiliation of forced nudity, and the consideration of threats of torture as harmful. In 2003, the decision in *Cabal & Pasini v Australia* supported previous findings in the need to prove irregular treatment to other detainees in order for a consideration of torture.³¹ The Committee failed to find a violation of Article 7 after complainants described experiencing strip and cavity searches at each visit, because this process was applied to each prisoner and was said to be carried out to minimise embarrassment.³² In each of the identified cases, the Committee indicated the need for detailed information on the types of abuse combined with identification of the individuals involved as vital in considering a complaint truthful and admissible.

Many of the complaints brought to the Committee Against Torture (CAT) relate to Article 3 of the United Nations Convention Against Torture (1984) and the extradition of individuals who fear they may be tortured if expelled, and so do not directly relate to considerations of what amounts to torture. Despite this limitation, the text of the Convention and General Comments of the Committee contribute to understandings of torture and how it should be interpreted. The CAT puts emphasis on there being a purpose behind torture, listing confession extraction, intimidation or coercion, punishment and discrimination as examples when performed by a public official.³³ In the CAT Report on Argentina (1990), the committee further widened the scope for definitions of torture when they acknowledged that as mental torture is a part of the definition of torture, that threats of torture may themselves

²⁷ APT and CEJIL 'Torture in International Law: A Guide to Jurisprudence' <www.apr.ch/content/files=res/jurisprudenceguide.pdf> accessed 10 March 2018, 9.

²⁸ Ibid.

²⁹ *Pinto v Trinidad and Tobago*, HRC Communications No 512/1992, 16 July 1996, 8.3.

³⁰ *Boodoo v Trinidad and Tobago*, HRC Communications No 721/1996, 2 April 2002.

³¹ *Cabal and Pasini v Australia*, HRC Communications No 1020/2001, 7 August 2003.

³² Ibid, para 4.20.

³³ UNCAT 1984, art 1.1.

amount to torture, although somewhat vague with the use of the word 'may' it at least supported the consideration of threats as torture.³⁴

The European Court of Human Rights (ECtHR) has more case law relating to torture, and this may be due to the binding nature of judgments as more appealing to those making complaints.³⁵ One of the earliest cases seen by the ECtHR went a step further in interpreting the definition of torture when it distinguished between different types of ill treatment. In *The Greek Case* (1969), the court identified three levels of ill treatment, the lowest being degrading which they described as treatment which is grossly humiliating or requires an individual to act against their will.³⁶ The next level of ill treatment was inhuman which had to cause a minimum of unjustifiable, severe mental and physical suffering.³⁷ Finally, for a judgment of torture, there must be a purpose behind the treatment, and it must also amount to degrading as well as inhuman before it may be considered torture.³⁸

Historically, the ECtHR relied upon bodily injury as a threshold for severity, for example in *Ireland v The United Kingdom* (1978) the Court placed more emphasis upon the amount of suffering as opposed to a purpose, and at what point suffering becomes torture.³⁹ In this case the techniques used included sleep and food deprivation, noise and hooding but due to the lack of bodily injury, the Court deemed the treatment not severe enough to amount to torture, but instead inhuman and degrading treatment.⁴⁰ Similarly to this opinion, the Court discussed threats of torture during consideration of *Campbell and Cosans v The United Kingdom* (1982), and stated that threats of torture may amount to a breach of Article 3 of the European Convention on Human Rights (1953) as at least inhuman treatment, but failed to take it a step further as torture.⁴¹ In more recent cases, the Court's case law has developed to acknowledge the different elements of torture as more than just harm, in *Selmouni v France* (2000), the Court returned to the idea of the purposive element of torture as opposed to the severity of treatment, for the first time since *The Greek Case*, and referenced UNCAT which had not previously been done by the Court, which is relevant as it recognises that the jurisprudence of other Courts or Committees may also be considered alongside their own.⁴² Even more importantly, the court suggested that the definition of torture could evolve and that acts not previously classified as torture may be considered so

³⁴ UNCAT 'Report on Argentina' (1990) UN DOC A/45/44, s184.

³⁵ Steven Greer, 'Europe' in Daniel Moeckli et al (eds) *International Human Rights Law* (4th edn, Oxford 2014) 424.

³⁶ *APT* (n 27) 56.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ireland v United Kingdom* App No 5310/71 (ECHR, 18 January 1978).

⁴⁰ *Ibid.*

⁴¹ *Campbell and Cosans v The United Kingdom* App No 7511/76 (ECHR 25 February 1982) para 26.

⁴² *Selmouni v France* App No 00025803/94 (ECHR 28 July 1999) para 97.

in the future, indicating potential for the expansion of the scope of Article 3.⁴³ This expansion of the scope is supported by more recent judgments such as *Hellig v Germany* (2011) when the court found forced nudity to amount to a violation of Article 3 due to its humiliating and debasing nature.⁴⁴

3.1. Grey Areas

Having dissected various torture jurisprudence, it is clear that whilst physical violence is regularly acknowledged to amount to torture, there are conflicting comments regarding purely mental abuse and whether this alone can amount to torture. The case law has also shown that a common cause of failures to prove torture occurs when the treatment received cannot be distinguished from that of other prisoners, and that in order for abuse to be acknowledged, it must be clearly expressed as targeted treatment which is unacceptable in closed detention.

Based upon these observations, this memorandum focuses on the following areas of SGBV which I feel are more likely to struggle with a plea of torture:

- Threats of torture
- Forced nudity
- Inappropriate supervision (for example during changing or showering)
- Unnecessary invasive / aggressive strip searching

As they cause minimal or no physical damage and are less overtly sexual, they may be less convincing as forms of torture due to previous emphasis on pain and physical suffering rather than psychological harm. As these acts can be carried out more discretely and alongside prison daily routines, it may also be easier for them to be excused as a normal part of prison life as opposed to abuse.

4. A Legal Argument for SGBV as a Method of Torture

Feminist theory suggests that the current definitions of torture are gendered in considering typically male experiences of torture.⁴⁵ Unlike men, women are more likely to encounter psychological and sexual torture, and the emphasis upon physical suffering does not

⁴³ *APT* (n 27) 60.

⁴⁴ *Hellig v Germany* App No 20999/05 (ECHR 7 July 2011).

⁴⁵ Sifris (n 10) 523.

incorporate these other methods.⁴⁶ It is only recently that violence against women has been viewed as a human rights issue as opposed to a private or health matter, and it was the comments of Koojimans, the Special Rapporteur on Torture in 1986 who said that rape in prison should be regarded as torture, which awakened discussion.⁴⁷ Developments in women's rights as human rights, including the Convention on the Elimination of all forms of Discrimination Against Women (1979) and more recently the Istanbul Convention (2011), have influenced attitudes towards violence against women, and there has been an evolution of the definition of torture to incorporate rape, as seen particularly in war tribunal jurisprudence⁴⁸ and the CAT General Comment No.2 which specifically refers to rape as a method of torture.⁴⁹

The CAT has suggested that the threshold for 'severe' mental and physical suffering may be lowered if the victim is particularly sensitive.⁵⁰ This acknowledgement of levels of sensitivity may be interpreted to apply to juveniles in detention and any person deprived of liberty who is experiencing restricted autonomy under the instruction of others, but should also be considered applicable to women. Failures to take measures to create a gender sensitive environment could themselves constitute discrimination and increase vulnerability, as treating male and female prisoners identically fails to consider the existing disadvantages women face.⁵¹ There may also be women who have already experienced sexual abuse outside of prison, and are at increased risk of revictimisation, adding a further layer of vulnerability.⁵²

4.1. SGBV and Definitions of Torture

The ECtHR's breakdown of torture and ill treatment in *The Greek Case* provides a good summary of the different aspects of ill treatment which are regularly referred to in all definitions of torture, and so I will use this as a guide in considering how my selected SGBV grey areas may correlate with definitions and interpretations of torture.

⁴⁶ F Allodi; S Stiany, 'Women as Torture Victims' (1990) 35 *The Canadian Journal of Psychiatry* 144, 144.

⁴⁷ *Gaer* (n 13) 293.

⁴⁸ *Ibid*, 294.

⁴⁹ *General Comment No 2* (n 11).

⁵⁰ *APT* (n 27) 13.

⁵¹ CEDAW, 'General Recommendation No.28 on the core obligations of States parties under article 2 of the Convention on the Elimination of Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28.

⁵² Coid J; Petruckevitch A; Fedar G; Chung W; Richardson J and Moorey S, 'Relation between childhood and sexual and physical abuse and risk of revictimization in women' (2001) 358 *Lancet* 450.

The lowest form of ill treatment considered by the court is ‘degrading’ treatment which they depict as acts which are grossly humiliating and interfere with human dignity.⁵³ Van der Rijt discusses the need for viewing torture from a different perspective as a: “profound violation of human dignity” as opposed to amounts of harm.⁵⁴ This fits in with the idea of removing gendered perspectives of torture and incorporating considerations of the impacts of sexual torture as a violation of dignity, enabling SGBV to fulfil the degrading element of torture. During torture the victim’s body becomes a weapon against themselves as it is used as a tool to send a message of dominance from the abuser.⁵⁵ This combination of helplessness and inequality amounts to a loss of dignity and can be applied to any situation when a victim’s body is used against them.⁵⁶ When discussing Female Genital Mutilation (FGM), Special Rapporteur on Violence Against Women, Coomaraswamy called it an: “invasion of physical integrity and bodily autonomy”, recognizing the association between intimate physical abuse and loss of dignity.⁵⁷ Although forced nudity, inappropriate supervision or invasive strip searches do not involve bodily mutilation, the victim’s self-determination is lost due to the control of the authority carrying out the torture, and this removal of basic human rights also takes away their dignity.⁵⁸ This idea is supported in *Tyrer v The United Kingdom* (1978) when the court said:

Although the applicant didn’t suffer any severe or long lasting physical effects, his punishment – whereby he was treated like an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of (the prohibition) to protect, namely a person’s dignity and physical integrity.⁵⁹

The dignity of strip searches, in general, has been a contested issue due.⁶⁰ Searches by male guards on female detainees have been described as reinforcing gender subordination, and also provide increased opportunity for abuse.⁶¹ If there are already doubts regarding the dignity of legal strip searches, then the molestation and physical contact associated with aggressive / invasive searches as a method of SGBV must be considered to be an even

⁵³ *APT* (n 27) 57.

⁵⁴ Jan-Willem Van der Rijt, ‘Torture, Dignity and Humiliation’ (2016) 54 *Southern Journal of Philosophy* 480.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Sifris* (n 10) 527.

⁵⁸ *Van der Rijt* (n 54).

⁵⁹ *Tyrer v The United Kingdom* App No 5856/72 (ECHR 25 April 1978) para 33.

⁶⁰ Kim Shaya Buchanan, ‘Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse’ (2005) 88 *Marq L Review* 751.

⁶¹ *Ibid.*

more severe assault upon a person's dignity. When discussing the impacts of rape, Coomaraswamy described it as: "an intrusion in to the most private and intimate part of a woman's body as well as an assault on the core of herself",⁶² although there are clear distinctions between rape and sexual assault during strip searches, there are parallels which can be drawn, including the invasion of a women's intimate, private parts without her consent.

The humiliating nature of nudity and sexual contact is closely related to behavioural norms and cultural beliefs.⁶³ The very use of the term 'private' in the Coomaraswamy quotation above indicates that cultural attitudes forbid exposure or uninvited physical contact. In *Hellig v Germany* the link between nudity and humiliation was drawn by the ECtHR when an inmate was forced to remain nude for 7 days which was described as capable of: "arousing feelings of fear, anguish and inferiority capable of humiliating and debasing him".⁶⁴ This case demonstrates that the ECtHR recognised the link between nudity and feelings of humiliation and inferiority. Given the impact of abuse upon the state of mind of the person, the failure to uphold behavioural norms by exposing a person must therefore be considered degrading and in turn, ill treatment.

Another consideration for the components of ill treatment and torture is the purpose element of torture, which for SGBV in closed detention is quite clear. The UNCAT definition of torture highlights four main purposive elements, including confession extraction, punishment, intimidation / coercion and discrimination.⁶⁵ CEDAW describes GBV as a form of discrimination in their General Recommendation No.19 and similarly the 2016 report by the Special Rapporteur on torture stated that the purpose element is always fulfilled if the act is carried out on the basis of gender.⁶⁶ In the case of pre-detention, it is also likely to have a coercive nature with the intention of extracting a confession or statement, so multiple purposes may be at play, all of which fulfil the requirements under the UNCAT definition of torture.⁶⁷

Whilst the elements of degrading treatment and purpose are more straightforward to prove in a SGBV case, the abuse must first reach the 'minimum threshold of severity'⁶⁸ and then also fulfil the definition of inhuman treatment as 'severe' mental and physical suffering.⁶⁹ The term 'severe' is emphasised throughout torture jurisprudence and the

⁶² Sifris (n 10) 541.

⁶³ *Cihanger* (n 16).

⁶⁴ *Hellig v Germany* (n 44) para 56.

⁶⁵ UNCAT 1984, art 1.1.

⁶⁶ *Special Rapporteur on Torture* (n 7) para 8.

⁶⁷ *Ibid*, para 20.

⁶⁸ Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' 583 ICLQ 565,569.

⁶⁹ UNCAT 1984, art 1.1.

difficulty lies in the fact that the severity of an act is subjective.⁷⁰ Therefore, the interpretation of the minimum threshold varies on the basis of factors such as duration of the abuse and the sex, age and health of the victim. This is evident in the differing judgments in torture jurisprudence, however the individual circumstances of each case may also account for inconsistencies.⁷¹ People perceive pain differently, and it is suggested that unless you have experienced pain similar yourself, then you will likely underestimate its severity.⁷² In trying to prove the severity of abuse in torture cases, this idea is even more troublesome as often the abuse is extreme and not relatable. Further, in the case of psychological abuse, the effects are less visible and therefore even harder to explain.⁷³ Although the idea of making torture 'relatable' in order to be persuasive seems farfetched, it is true that a Judge or Committee would make a less subjective, and more informed decision if the effects upon the victim were more familiar to them. In SGBV cases, this could be achieved by emphasising not only the short-term effects, but also the long-term effects which incorporate more familiar psychological terms such as depression and anxiety, that will continue to occur in situations outside of torture. Similarly, the social impacts of SGBV, such as exclusion or damaged family relationships, most people have experienced even to the smallest degree. Identifying these more relatable conditions may help to encourage more empathy towards victims and a greater appreciation of the pain experienced so that it is not underestimated, and the threshold of severity can be reached.

4.2. Interpreting SGBV as 'Severe' Physical and mental suffering

The physical and mental impacts of SGBV will vary between victims, and in the grey areas I have identified are likely to have more psychological than physical impacts. Nonetheless, invasive and aggressive strip searching may cause genital swelling and abdominal pain or bleeding,⁷⁴ there may also be secondary infections or further pain if access to medical facilities and medication is restricted.⁷⁵

There are many common psychological impacts of torture, many of which could apply to victims of SGBV. The Istanbul protocol 1999 clarifies that torture can have sexual aspects

⁷⁰ Loran F Nordgren; Mary Hunter Morris McDonnell; George Loewenstein, 'What Constitutes Torture? Psychological Impediments to an Objective Evaluation of Enhanced Interrogation Tactics' (2011) 22 *Psychological Science* 689, 689.

⁷¹ *McGlynn* (n 68) 570.

⁷² *Nordgren* (n 70) 659.

⁷³ *Ibid.*

⁷⁴ Eugene Kinyanda; Seggane Musisi; Christine Biryabarema; Issac Ecati; Henry Oboke; Ruth Ojiambo-Ochieng; Juliet Were-Oguttu; Jonathan Levin, 'War related sexual violence and its medical and psychological consequences as seen in Kitgum, Northern Uganda: A cross-sectional study' (2010) 10 *BMC Int Health and Human Rights* 28.

⁷⁵ *Sifris* (n 10) 536.

without involving sexual abuse, which is an important comment for the grey areas I have identified which are not as overtly sexual but should certainly still be categorised as sexual abuse.⁷⁶ The short term psychological impacts of SGBV in closed facilities include fear, helplessness, distress, difficulty sleeping, all of which is exacerbated by the entrapment and inability to escape the perpetrator.⁷⁷ Nudity also heightens psychological consequences as being nude enhances the likelihood of potential abuse,⁷⁸ with this in mind you could equate the act of forced nudity as equally psychologically damaging as threats of torture, as both invoke psychological fears that worse is to come. For those suffering revictimization, the fear of what may happen will be heightened as they relive their previous experiences and have a greater clarity of the suffering involved.

Long term psychological effects, particularly when the torture may not be seen as extreme as some forms of torture, are necessary to stress that the severity needs to consider more than just the effects on the victim at the time of the incident, but also, its repercussions. The Istanbul Protocol also suggests less emphasis upon the actual act of torture but instead recognises that people will respond to experiences differently depending on their interpretation, personality and social surroundings and beliefs.⁷⁹ This awareness of the different ways people respond to situations promotes a different perspective of torture which focuses less upon the act itself in considering severity, but instead upon the reactions of the victim and the influence upon their everyday and life long term. Long term suffering may include depression, flashbacks, anxiety, a damaged concept of self, PTSD – although this is a western concept and so may not hold as much weight in all OSCE countries – and potentially substance abuse.⁸⁰ Abuse can also heavily affect personal relationships, victims may have a fear of forming close relationships and even suffer sexual dysfunction for years due to their traumatic experience.⁸¹ The cultural stigma associated with sexual abuse can lead to the breakdown of family relationships, destroying the victim's support system and connection with society.⁸² The victim may also develop a fear of authority which initiates a chain reaction to poverty and isolation as it inhibits work opportunities.⁸³ Social impacts could be considered the most devastating upon a victim as it prolongs the distress and prevents recovery. Loewenstein went as far as to say: "Social distress can be as psychologically damaging as physical pain", and as torture jurisprudence has previously put emphasis upon pain as a leading factor in assessing severity, suggesting social impacts as

⁷⁶ Istanbul Protocol 1999, para 158.

⁷⁷ *McGlynn* (n 68) 577.

⁷⁸ *Istanbul Protocol* (n 76) para 215.

⁷⁹ *Ibid*, para 234.

⁸⁰ *Ibid*, Section B.

⁸¹ *Allodi* (n 46) 147.

⁸² *Schiller* (n 17).

⁸³ *Istanbul Protocol* (n 76) para 241.

equal to pain helps build upon an argument that aspects of torture other than physical pain should contribute to considerations of what is 'severe'.⁸⁴ This is especially relevant for victims of SGBV where the abuse itself may not be considered as severe, but who then experience psychological suffering or social impacts afterwards as a result, as it supports the need to look beyond the extent of damage caused by the act itself and consideration of the long term effects which can extend suffering and therefore raise the level of severity experienced.

Whilst previous jurisprudence has placed more focus upon physical suffering, there is evidence to support threats of abuse as enough to amount to torture. A key example of this was *Gafgen v Germany* (2010), where the ECtHR judged that threats of torture constitute a violation of Article 3 of the ECHR.⁸⁵ There have also been cases where the mothers' of prisoners have successfully brought cases of torture in circumstances where information regarding their son's fate have been withheld and in turn caused them severe distress.⁸⁶ These cases provide support in circumstances where a victim may have been tortured with threats against family members, although special consideration is given to the parent-child bond over other relationships.⁸⁷

4.3. Differentiating between Abuse and Acceptable Treatment of Prisoners

The analysis of torture jurisprudence highlighted the possibility for abuse to be misinterpreted as acceptable treatment of prisoners, as there was a need to prove that suspected torture was unique to that victim and not all prisoners in detention.⁸⁸ In *Cabal & Pasini v Australia*, strip searches at every visit were not found to be a violation due to their applicability to all inmates, but the Committee failed to consider whether alternative measures to ensure security would have been more appropriate.⁸⁹ Since this case the European Committee for the Prevention of Torture have stated that strip searches should be considered in relation to individual circumstances based upon selective criteria, rather than generalized.⁹⁰ Although strip searches in themselves may serve a security purpose and not amount to SGBV, considerations of their appropriateness will help to establish the line between security measures and abuse and assist with minimizing opportunity for SGBV to take place in the future.

⁸⁴ *Nordgren* (n 70) 690.

⁸⁵ *Gafgen v Germany* App No 22978/05 (ECHR 1 June 2010).

⁸⁶ *Kurt v Turkey* App No 24276/94 (ECHR 25 May 1998).

⁸⁷ *APT* (n 27) 84.

⁸⁸ *Pinto v Trinidad and Tobago* (n29)

⁸⁹ *Cabal & Pasini v Australia* (n 31) para 8.2.

⁹⁰ Tom Daems, 'Ceci N'est Pas Une Fouille À Corps': The Denial of Strip Searches in Belgian Prisons' (2014) 19 *Sociology of Crime, Law and Deviance* 75.

The Council of Europe European Prison Rules (2006) also provide guidance on strip searches stating that the process should avoid humiliation and that no internal searches should be carried out by prison staff, this aids in furthering the notion that unnecessary and invasive strip searches are never acceptable, and are always questionable if performed by prison staff.⁹¹ They also advise that clothing should not be degrading or humiliating and that there needs to be privacy in sanitary facilities, these rules again associate nudity with degradation by emphasising a need for appropriate clothing and privacy in situations when prisoners are nude or partially dressed, as in sanitary facilities.⁹² The Council finally confirms that these rules apply not only to convicted prisoners, but also those in custody, so these rules can also be applied to those in police custody and pretrial detention.⁹³ Whilst offering some guidance on the treatment of prisoners, the COE European Prison Rules leave monitoring of prisons up to National governments, which creates potential for noncompliance to occur in countries with poor national guidelines, and for prisoners to remain vulnerable to acts of SGBV.⁹⁴

5. Conclusion

The definition of torture continues to evolve in line with changing attitudes which encompass a more gender inclusive perspective of human rights.⁹⁵ Whilst jurisprudence throughout history has placed emphasis upon pain as defining torture, more recent jurisprudence suggests a shift towards acknowledging the psychological and sexual aspects of torture and the need to consider not just physical pain, but also psychological and social impacts.⁹⁶ As violence against women gains momentum as a human rights issue, it opens discussion for previously avoided topics of human rights abuse, such as SGBV and enables consideration of expanding the scope of torture to encompass them.

It is clear that the grey areas identified individually fulfil aspects of the definition of torture such as humiliation, degradation and have a purpose, it is the interpretation of 'severity' which bodes the most problems for a potential plea of torture. Invasive and aggressive strip searches are likely to be more successful as the invasive and physical nature of that type of abuse is acknowledged as severe, however threats of torture, forced nudity and inappropriate supervision may struggle to reach the minimum threshold of severity depending on the duration of the treatment, and the age/sex of the victim. It could

⁹¹ Council of Europe European Prison Rules 2006, para 54.6.

⁹² *Ibid*, para 19.3.

⁹³ *Ibid*, para 10.3(b).

⁹⁴ *Ibid*.

⁹⁵ *Gaer* (n 13).

⁹⁶ *Ibid*.

be argued that juveniles and women should be considered particularly vulnerable and CAT have stated that the severity threshold should be lowered to account for vulnerable persons, enabling the potential for abuse not normally severe enough to be reconsidered in the case of women and juveniles.⁹⁷ Emphasis upon this vulnerability alongside the psychological suffering and long term affects - particularly if the abuse was short in duration, as this may be perceived as less severe - will assist in reaching severity by extending the concept of abuse as beyond the moment it occurs, as often victims are affected well beyond this. Psychological torture is becoming increasingly used due to its less evident and long-term debilitating nature, and so bringing more cases of psychological torture will raise awareness of this, and increase jurisprudence to support future cases.⁹⁸ All human rights Bodies and Committees categorise ill treatment and torture within the same violation, and so providing that the minimum level of severity can be reached, abuse which does fully fulfil the definition of torture may still be considered a violation within the same category as degrading or inhuman treatment.⁹⁹ In the case of abuse which may struggle to reach the minimum level of severity, a violation of Article 10 of the ICCPR could also be considered, as this is commonly used to sanction violations which are considered lesser than ill-treatment or torture for those deprived of liberty.¹⁰⁰ Alternative pleas to torture and ill treatment could focus upon the discrimination aspects of SGBV, for example through the use of CEDAW, however this would be dependent upon ratification of the convention, as well as reservations which are plentiful,¹⁰¹ it would also fail to incorporate male victims of SGBV and would not be as impactful as torture and ill treatment.

The lack of clarity in International law places reliance upon national legislation for interpretation which creates opportunity for misinterpretation or avoidance of obligations by States who fail to implement preventative measures correctly domestically. International law needs to see more pioneering expansion of the term 'severe' through acknowledgment of the increase in sexual violence as a form of torture, and less reliance upon national law. Once the line between acceptable and unacceptable treatment is clear, States are bound to work towards the development of protocols incorporating prevention of SGBV as part of their obligations under the relevant Conventions.

In moving forward with the prevention of SGBV and treatment of female detainees in police custody, pretrial detention or prison/ correctional facilities, what is emphasised

⁹⁷ *APT* (n 27) 13.

⁹⁸ Susmita Thukral, 'Understanding Shame and Humiliation in Torture' (*Humiliation Studies*, 2004) <www.humiliationstudies.org/documents/ThukralFinalHumiliation.pdf> accessed 29 March 2018, 2.

⁹⁹ *APT* (n 27) 9.

¹⁰⁰ *Ibid.*

¹⁰¹ Michael L Buenger, 'Human Rights Conventions Reservations: An Examination of a Critical Deficit in the CEDAW' 20 *Buff. Hum. RTS L Rev* 67,79.

regularly is the need for female prison guard supervision of female detainees.¹⁰² Although this may not always be possible, it should be viewed as the ideal, and absolutely necessary in situations when abuse is more likely, such as taking statements, searches or when potential victims are held in isolation.¹⁰³ Particular attention needs to be paid to those vulnerable to abuse, including juveniles, women and anyone who has suffered previous abuse and risks revictimisation.¹⁰⁴ A more gender sensitive approach to torture will ensure a move away from interpretations of torture as a painful act, and instead assess the affects upon the personhood both in the moment and in the long term.

¹⁰² Standard Minimum Rules for the Treatment of Prisoners 1955; COE European Prison Rules 2006.

¹⁰³ *Special Rapporteur on Torture* (n 7).

¹⁰⁴ COE European Prison Rules (n 91) para 25.4.

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