PART A: ARTICLES

CONCEPTUALISING INVOLUNTARY STERILISATION AS 'SEVERE PAIN OR SUFFERING' FOR THE PURPOSES OF TORTURE DISCOURSE

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Abstract

The definition of torture contained in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires an 'act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person'. In this article it is argued that involuntary sterilisation constitutes an act which intentionally causes both severe physical and mental pain and suffering, thereby satisfying the first requirement of the definition of torture. In this way, this article takes torture discourse beyond the traditional context and adopts a distinctly gendered approach to the definition of torture by focusing on the involuntary sterilisation of women.

1. INTRODUCTION

The word 'torture' tends to evoke graphic images of prisoners being subjected to unspeakable horrors. The concept of 'torture' is often associated with specific types of behaviour; such as the pulling out of fingernails or electrocution of genitals. In recent decades, there has been an evolution in the interpretation of the concept of torture under international law. In this article, I argue that the interpretation of the definition of torture has developed such that it is no longer limited to the traditional context of horrors inflicted upon a prisoner. Within this wider framework in which torture may be perpetrated, I specifically consider the issue of involuntary sterilisation of women. In this context 'involuntary sterilisation' is a sterilisation procedure which is carried out on a woman without her full and informed consent.

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It is generally accepted that there is an absolute prohibition of torture under international law. This prohibition is enshrined in both treaties and customary international law (as a *jus cogens* norm to be precise).[1] The seminal international legal document which stipulates both the nature of the prohibition and the content of States' international legal obligations with respect to the prohibition is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2] Article 1 of CAT provides the most widely accepted definition of torture.[3] According to this definition

> the term 'torture' means *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person* for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third

1 For examples of treaties enshrining the prohibition of torture, see International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 *United Nations Treaty Series* (UNTS) 171, Article 7 (entered into force 23 March 1976); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31, Articles 3, 12 and 50 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85, Articles 3, 12 and 50 (entered into force 21 October 1950); Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135, Articles 3, 17, 87 and 130 (entered into force 21 October 1950); Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287, Articles 3, 32 and 147 (entered into force 21 October 1950); Statute of the International Criminal Tribunal for the former Yugoslavia, Articles 2(b) and 5(f), annexed to Resolution 827, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc. S/RES/927, 1993; Statute of the International Criminal Tribunal for Rwanda, Articles 3(f) and 4(a), annexed to Resolution 955, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc. S/RES/955, 1994; Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90, Articles 7(f), 8(2)(a)(ii), 8(2)(c)(i) and 55(1)(b) (entered into force 1 July 2002); European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, *European Treaty Series* (ETS) 5, Article 3 (entered into force 3 September 1953); and American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123, Article 5(2) (entered into force 18 July 1978). For a discussion of the status of the prohibition of torture as a peremptory norm of international law, see Kooijmans, Peter, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 3; and Nowak, Manfred and McArthur, Elizabeth, *The United Nations Convention against Torture: A Commentary,* Oxford University Press, Oxford/New York, 2008, pp. vi and 8. The *jus cogens* status of the prohibition of torture was also acknowledged in ICTY, *Prosecutor vs Furundžija,* judgment of 10 December 1998, Case No. IT-95–17/1-T.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

3 According to Nigel S. Rodley, former special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the definition of torture set out in Article 1 of CAT has largely proven to have become the benchmark; Rodley, Nigel S., 'The Definition(s) of Torture in International Law', *Current Legal Problems,* Vol. 55, 2002, pp. 467 and 474. See also Manfred Nowak and Elizabeth McArthur who categorise CAT as the '[m]ost important among all international instruments' dealing with torture; Nowak and McArthur, *op.cit.* (note 1), p. vi.

> person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[4]

This article focuses on the first component of the definition of torture – the requirement for an act which intentionally causes severe pain or suffering, whether physical or mental – and argues that the involuntary sterilisation of a woman *prima facie* meets this requirement of the definition.[5] A detailed analysis of the remaining requirements of the definition of torture contained in Article 1 of CAT is therefore beyond the scope of this article. However, the general overview of these requirements provided in section 3 indicates that involuntary sterilisation also meets the 'purpose' and 'public official' requirements of the definition of torture.

Section 2 of this article considers the evolving interpretation of the definition of torture as well as the significance of categorising involuntary sterilisation as torture. Section 3 provides a contextual framework for this article by way of an overview of the other requirements in the Article 1 CAT definition. Section 4 discusses the 'act' and 'intention' aspects of the requirement that for conduct to amount to torture, it must constitute an 'act by which severe pain or suffering (…) is intentionally inflicted' and Section 5 discusses the actual pain and suffering experienced by women who are the subjects of involuntary sterilisation. This section is divided into two subsections; the first subsection considers the physical pain and suffering caused by involuntary sterilisation and the second subsection considers the mental pain and suffering caused by involuntary sterilisation. I acknowledge that this distinction between physical and mental pain or suffering is somewhat artificial. Kooijmans eloquently articulates this artificiality when he states that '[t]orture is the violation par excellence of the physical and mental integrity – *in their indissolubable interdependence* – of the individual human being.'[6] Nonetheless, in the interests of accurately and systematically adhering to the structure of the definition contained in CAT and in order to convey my argument in a clear and comprehensive manner, I have structured the article in this way.

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4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 2, Article 1(1) (emphasis added).

5 It should be noted that this article does not consider the consequences of labelling involuntary sterilisation as torture. For example, I do not discuss whether there are any circumstances in which it may be justifiable to sterilise a severely intellectually disabled woman who is not capable of consenting to the procedure. Such considerations may impact upon whether involuntary sterilisation should in all cases be categorised as torture given that the prohibition of torture permits no exceptions or derogations. This is an important consideration but one which is beyond the scope of this article. This article restricts its analysis to whether, *prima facie*, involuntary sterilisation falls within the intentional infliction of severe pain and suffering requirement contained in Article 1 of CAT.

6 Kooijmans, *op.cit.* (note 1), para. 4 (emphasis added). See also Copelon, Rhonda, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture', *Columbia Human Rights Law Review*, Vol. 25, 1994, pp. 291 and 310.

2. A PARADIGM SHIFT

2.1. THE EVOLVING NATURE OF TORTURE DISCOURSE

The conceptualisation of different forms of violence against women as torture is a relatively recent phenomenon. This article seeks to embrace the ongoing paradigm shift which is increasingly encompassing various forms of violence against women within the rubric of torture discourse. It seeks to embrace this paradigm shift and extend it even further by discussing involuntary sterilisation within the framework of torture discourse.

As mentioned briefly in the introduction, the traditional framework in which the prohibition of torture is discussed is the context of interrogation, punishment or intimidation of a detainee. However, the reality that torture may be perpetrated in numerous ways and in various contexts is gradually being acknowledged and the discourse has begun to incorporate a gendered approach. In his August 2000 *Note on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, the United Nations Secretary-General specifically notes that the 'Special Rapporteur has continued to receive information according to which women are subjected to gender-specific forms of torture, including rape, sexual abuse and harassment, virginity testing, *forced abortion or forced miscarriage*'.[7] The approach of the Committee against Torture has become increasingly expansive as regards gender-based concerns.[8] In this context, the Committee against Torture has highlighted gender as a 'key factor' and has stipulated that the 'contexts in which females are at risk include deprivation of liberty, medical treatment, *particularly involving reproductive decisions*, and violence by private actors in communities and homes.'[9] Further, in its 2004 Concluding Observations on the Czech Republic, the Committee expressed concern with respect to allegations of involuntary sterilisation of Romani women.[10]

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7 United Nations Secretary-General, *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General*, UN GAOR, 55th sess, Agenda Item 116(a), UN Doc. A/55/290, 11 August 2000, para. 5 (emphasis added).

8 Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties,* UN Doc. CAT/C/GC/2, 24 January 2008, para. 18. For examples of the Committee against Torture's approach to domestic violence, see Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Greece*, 33rd sess, UN Doc. CAT/C/CR/33/2, 10 December 2004, para. 5; *Conclusions and Recommendations of the Committee against Torture: Ecuador*, 35th sess, UN Doc. CAT/C/ECU/CO/3, 8 February 2006, para. 17; and *Conclusions and Recommendations of the Committee against Torture: Argentina*, 33rd sess, UN Doc. CAT/C/CR/33/1, 10 December 2004, para. 6. For an example of the Committee against Torture's approach to female genital mutilation, see *Conclusions and Recommendations of the Committee against Torture: Cameroon,* 31st sess, UN Doc. CAT/C/CR/31/6, 5 February 2004, para. 7.

9 Committee against Torture, *General Comment No. 2, op.cit.* (note 8), para. 22 (emphasis added).

10 Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Czech Republic*, 32nd sess, UN Doc. CAT/C/CR/32/2, 3 June 2004, para. 5.

More recently, in his January 2008 Report to the Human Rights Council the Special Rapporteur on Torture dedicated an entire section to 'Strengthening the Protection of Women from Torture' in which he discussed rape and sexual violence, corporal punishment, women-specific aspects of detention, intimate partner violence, female genital mutilation, human trafficking and women in the *refoulement* or refugee context.[11] As part of this discussion the Special Rapporteur also focussed on violence against pregnant women and denial of reproductive rights. Referring to forced sterilisation, he noted that 'forced sterilization has been found to constitute "a permanent and ongoing form of persecution" and to "involve drastic and emotionally painful consequences that are unending".'[12] The Special Rapporteur on Violence against Women has also conceptualised various forms of violence against women as torture. For example, on numerous occasions female genital mutilation (FGM) has been referred to as a form of torture. In this context, Coomaraswamy, a former Special Rapporteur on Violence against Women, specifically referred to the 'severe pain and suffering' element of the definition of torture and to the invasion of the physical integrity and bodily autonomy of girls who are subjected to this practice.[13]

In addition to the international bodies, the regional bodies have also demonstrated a willingness to include gender specific violations within the rubric of torture discourse. For example, both the Inter-American Commission and the Inter-American Court have held that rape may constitute torture in certain circumstances.[14] Similarly, at the international criminal law level, both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have categorised rape as torture in certain circumstances.[15] Thus it seems that the international human rights system is adopting an increasingly expansive interpretation of the prohibition of torture and cruel, inhuman or degrading treatment, particularly in the context of gender based concerns, and that the issue of involuntary sterilisation has been included in torture related discourse. With this in mind, it does not seem to be a huge paradigm shift to conceptualise involuntary sterilisation as constituting

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11 Nowak, Manfred, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/7/3, 15 January 2008, pp. 6–21.

12 *Ibidem*, para. 39 (citations omitted).

13 Coomaraswamy, Radhika, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. E/CN.4/2002/83, 31 January 2002, para. 6. See also Ertürk, Yakin, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. A/HRC/4/34, 17 January 2007, para. 56.

14 Inter-American Commission on Human Rights, *Mejía* vs *Perú* [1996], Series 1, No. 5/96; and Inter-American Court on Human Rights, *The Miguel Castro-Castro Prison* vs *Peru* [2006], Series C, No. 160.

15 See, for example, *Prosecutor* vs *Akayesu,* judgment of 2 September 1998, Case No. ICTR-96–4-T, para. 597; *Prosecutor* vs *Mucić, Delić, Landžo & Delalić,* judgment of 16 November 1998, Case No. IT-96–21-T; *Prosecutor* vs *Furundžija,* judgment of 10 December 1998, Case No. IT-95–17/1-T. It should be noted that, unlike FGM (for example), men may also be the victims of rape. However, rape is nevertheless frequently regarded as a gender-based offence given that women are disproportionately targeted in this way.

an 'act by which severe pain or suffering, whether physical or mental, is intentionally inflicted' for the purposes of the definition of torture set out in Article 1 of CAT.

2.2. THE SIGNIFICANCE OF CATEGORISING INVOLUNTARY STERILISATION AS TORTURE

Prior to launching into a discussion of the way in which the involuntary sterilisation of women violates the 'severe pain and suffering' component of the CAT definition of torture, it is useful to take a step back and ask the question: even if one accepts that the interpretation of the definition of torture has been evolving to incorporate certain forms of violence against women, why should involuntary sterilisation be framed within the context of the discourse on torture? After all, the specific requirements set out in the definition of torture contained in Article 1 of CAT render it a difficult offence to establish. Surely it would make more sense to discuss the involuntary sterilisation of women as a violation of the right to privacy, right to marry and found a family or right to be free from discrimination – these rights are not defined with the same level of specificity as is provided in the Article 1 definition of torture.[16] Indeed, involuntary sterilisation does constitute a violation of all of these rights. However, this article focuses on the right to be free from torture because this right stands apart from other rights. Unlike the other rights, the right to be free from torture is an absolute right; it permits no derogation. Further, it is a norm of *jus cogens* and as such is binding on all States.[17] Coomaraswamy invoked a similar rational when discussing religious extremism and harmful traditional practices in her capacity as Special Rapporteur on Violence against Women. She posed the following question and answer:

> How do we fight laws and practices that are violent towards women while respecting the dignity of the people who have come to see these practices as tradition? The Special Rapporteur suggests that we use jus cogens, principles of international law that cannot be derogated from by States because they form the basis of international consensus. States are bound whether they give their express consent or not since the norm is of universal applicability. The prohibition against torture is one of these norms. In this context, cultural practices that are irreversible and cause 'severe pain and suffering' must be seen as torture and universally condemned.[18]

Thus the prohibition of torture, as a *jus cogens* norm, could be used to hold a State responsible for instances of involuntary sterilisation irrespective of whether the State

16 See, for example, Articles 17, 23 and 26 of the International Covenant on Civil and Political Rights.

17 For a discussion of the status of the prohibition of torture as a peremptory norm of international law, see Kooijmans, *op.cit.* (note 1), para. 3; and Nowak and McArthur, *op.cit.* (note 1), pp. vi and 8. The *jus cogens* status of the prohibition of torture was also acknowledged in *Prosecutor* vs *Furundžija, supra* note 1.

18 Coomaraswamy, Radhika, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. E/CN.4/2003/75, 6 January 2003, para. 67.

actively consents. The prohibition of torture is of universal application and is therefore binding on States irrespective of whether they have ratified specific treaties.

Further, the prohibition of torture carries with it an intense symbolic value; it represents the value which international law places on bodily integrity and human dignity. Thus there is a unique stigma attached to torture. Amnesty International has referred to torture as a 'social cancer'; in its famous decision of *Ireland* vs *the UK,* the European Court of Human Rights referred to the 'special stigma' that attaches to a finding of torture.[19] Jeremy Waldron describes the term 'torture' as carrying with it the ability to 'shock and disgust'; as connoting 'serious moral judgment'. He discusses the 'sacredness' of the prohibition of torture, classifying it as a 'legal archetype'.[20] A consequence of the stigma and sense of horror which attaches to torture is that a violation of the right to be free from torture is frequently regarded as more serious and more significant than a violation of most other rights. Therefore, categorising involuntary sterilisation as torture is an effective mechanism for encapsulating the gravity of the offence.

As stated previously, the focus of this article is on the 'severe pain or suffering' element of the Article 1 definition of torture. However, in order to give some context to the discussion the following Part provides an overview of the way in which involuntary sterilisation satisfies the other elements of the definition of torture.

3. CONTEXT

3.1. 'PURPOSE' REQUIREMENT

The Article 1 definition of torture requires not only that an act which causes severe pain or suffering be intentionally inflicted on a person, but that such pain or suffering is inflicted for one of the enumerated purposes. These purposes include the extraction of information, punishment, intimidation, 'or for any reason based on discrimination of any kind'. Involuntary sterilisation constitutes gender-based discrimination.[21] While the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has not explicitly categorised restrictions on reproductive freedom as a form of gender-based discrimination, in its General Recommendation on violence against women, the Committee states that the 'definition of discrimination

19 Amnesty International, *Report on Torture 7,* AI, London, 1973; and European Court of Human Rights, *Ireland* vs *the United Kingdom,* 18 January 1978, Vol. 25, Series A, para. 167. See also European Court of Human Rights, *Aksoy* vs *Turkey,* 18 December 1996, VI ECHR 21987/93, para. 63.

20 Waldron, Jeremy, 'Torture and Positive Law: Jurisprudence for the White House', *Columbia Law Review*, Vol. 105, 2005, pp. 1681–1750, at p. 1681.

21 For a definition of 'discrimination', see Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13, Article 1 (entered into force 3 September 1981).

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering'.[22] Involuntary sterilisation may be construed as falling within this conceptualisation of discrimination.[23]

In theory, both men and women may be subjected to involuntary sterilisation. However, in reality, women are disproportionately affected by this practice. Women have been targeted for involuntary sterilisation in numerous countries and contexts. For example, in the United States in the 20th century (as recently as the 1970s) African-American and Hispanic women were subjected to involuntary sterilisation; in Puerto Rico from the 1950s to the 1970s a significant percentage of the female population was subjected to involuntary sterilisation; in Peru as late as this century women were targeted for involuntary sterilisation; the Indian sterilisation campaign disproportionately affected women; in countries as diverse as Brazil, China and Slovakia concern continues to be expressed over the targeting of women for involuntary sterilisation.[24] To demonstrate the point that involuntary sterilisation may be viewed as a form of gender-based discrimination, it is useful to consider some of the concluding observations of the various human rights committees which addressed issues relating to health and family planning between the years 1993 and 2005.

In its 1999 *Concluding Observations on Peru*, the Committee on the Elimination of Racial Discrimination (CERD Committee) took note 'of the allegations of forced sterilization of women belonging to indigenous communities'[25] and in its 2004 *Concluding Observations on Slovakia*, the CERD Committee expressed concern 'about reports of cases of sterilization of Romani women without their full and

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22 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, 11th session, UN Doc. A/47/38, 1992, para. 6.

23 Involuntary sterilisation may be regarded as falling within this definition of gender-based discrimination because the brutal invasion of bodily integrity inherent in involuntary sterilisation may be construed as a form of violence which disproportionately affects women and which inflicts 'physical, mental or sexual harm or suffering'.

24 See, for example, Shapiro, Thomas M., *Population Control Politics: Women, Sterilization, and Reproductive Choice,* Temple University Press, Philadelphia, 1985; Trombley, Stephen, *The Right to Reproduce: A History of Coercive Sterilization,* George Weidenfeld and Nicolson Ltd, London, 1988; Corrêa, Sonia, *Population and Reproductive Rights: Feminist Perspectives from the South,* Zed Books Ltd, London, 1994, p. 30; Dean, Bartholomew *et al*., '"The Amazonian Peoples" Resources Initiative: Promoting Reproductive Rights and Community Development in the Peruvian Amazon', *Health and Human Rights*, Vol. 4, No. 2, 2000, pp. 219–226, at p. 219; Getgen, Jocelyn E., 'Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report', *Boston College Third World Law Journal*, Vol. 29, 2009, pp. 1–34, at p. 1; Sen, Amartya, 'Fertility and Coercion', *The University of Chicago Law Review*, Vol. 63, No. 3, 1996, pp. 1035–1061, at p. 1035; Parker, Richard and Aggleton, Peter (eds), *Culture, Society and Sexuality,* 2nd ed., Routledge, New York, 2007; Chen, Ying, 'China's One-Child Policy and Its Violations of Women's and Children's Rights', *New York International Law Review*, Vol. 22, 2009, pp. 1–151, at p. 1; and Bond, Johanna E., 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights', *Georgetown Journal of Gender and the Law*, Vol. 5, 2004, pp. 897–916, at p. 897.

25 Committee on the Elimination of Racial Discrimination, 54th sess, UN Doc. A/54/18, 1–19 March 1999, para. 155.

informed consent.'[26] In its 1999 *Concluding Observations on Japan*, the Human Rights Committee (HRC) stated that '[w]hile forced sterilization of disabled women has been abolished, the necessary legal steps should be taken to provide a right of compensation to persons who were subjected to forced sterilization.'[27] Further, in its 2001 *Concluding Observations on Peru*, the HRC asserted that '[r]ecent reports of forced sterilizations, particularly of indigenous women in rural areas and women from the most vulnerable social sectors, are of concern. The State party must take the necessary measures to ensure that persons who undergo surgical contraception procedures are fully informed and give their consent freely.'[28] In addition, in its 2003 *Concluding Observations on Slovakia*, the HRC expressed 'concern at reports of forced or coerced sterilization of Romani women.'[29] In its 2005 *Concluding Observations on China*, the Committee on Economic, Social and Cultural Rights (ICESCR Committee) was 'deeply concerned about reports of forced abortions and forced sterilizations imposed on women'.[30] In its 2002 *Concluding Observations on Peru*, the CEDAW Committee noted with concern that 'mention is made of numerous cases of sterilization of women without prior informed consent'.[31]

The fact that in all of these concluding observations reference is made to the involuntary sterilisation of women, as against men, demonstrates that while theoretically both men and women may be subjected to involuntary sterilisation, in practice it is predominantly women who are subjected to this procedure. Consequently, involuntary sterilisation may be conceptualised as a form of gender-based discrimination thereby satisfying the element of 'purpose' in Article 1 of CAT.[32]

3.2. 'PUBLIC OFFICIAL' REQUIREMENT

Another element of the Article 1 definition of torture is the requirement that the 'pain or suffering' in question 'is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Thus in order for a State to violate the prohibition of torture, there must be a link between the State and the pain or suffering experienced. Legal authorisation of involuntary sterilisation procedures directly implicate the State in any pain and suffering resulting

26 Committee on the Elimination of Racial Discrimination, 59th sess, UN Doc. A/59/18, 23 February – 12 March 2004, para. 389; and Hartmann, Betsy, *Reproductive Rights and Wrongs: The Global Politics of Population Control,* rev. ed., Harper & Row, New York, 1995, pp. 244 and 246.

27 Human Rights Committee, 54th sess, UN Doc. A/54/40, 21 October 1999, para. 173.

28 Human Rights Committee, 56th sess, UN Doc. A/56/40, 26 October 2001, para. 76.

29 Human Rights Committee, 58th sess, UN Doc. A/58/40, 24 October 2003, para. 82.

30 Committee on Economic, Social and Cultural Rights, 34th sess, UN Doc. E/2006/22, 25 April – 13 May 2005, para. 165.

31 Committee on the Elimination of All Forms of Discrimination against Women, 26th sess, UN Doc. A/57/38, 14 January – 1 February 2002, para. 484.

32 For a more detailed discussion of the reasons why women are disproportionately targeted for involuntary sterilisation procedures, see Hartmann, *op.cit.* (note 26).

from such authorisation. A law which authorises involuntary sterilisation is in many ways directly analogous with a law which authorises FGM in that both types of laws are laws which authorise violence against women, the consequence of which is severe pain and suffering.[33] Further, even in the absence of permissive legislation, where an involuntary sterilisation procedure is carried out in a public hospital or by a State employed medical practitioner, there is a clear link with the State.

In its General Comment No. 2 on the implementation of Article 2 by States parties, the CAT Committee, when articulating the scope of State obligations and responsibility, asserted that 'each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, *hospitals*, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions…'[34] The specific reference to hospitals in this general comment further bolsters the argument that the State bears responsibility for an involuntary sterilisation procedure which is performed in a public hospital. In addition, in relation to FGM, the Special Rapporteur on Torture has specifically stated that 'from a human rights perspective, medicalization does not in any way make the practice more acceptable. Even in contexts where FGM has been recognized as a criminal offence, but where public hospitals offer this "service", it constitutes torture or ill-treatment.'[35] In fact, there are numerous examples of circumstances in which doctors have been actively involved in the perpetration of torture. For example, doctors have participated in: medical experiments conducted on prisoners, psychiatric abuse for political purposes, the evaluation of a victim's capacity to withstand torture, and the supervision of torture through the provision of medical treatment in the event of complications.[36] Following this logic, an involuntary sterilisation procedure will not be acceptable simply because it is performed in a sanitary, medical environment (as opposed, for example, to an unhygienic space set up for the specific purpose of performing mass sterilisations).[37] In fact, where this procedure is performed in a public hospital the public nature of the hospital is sufficient to impute responsibility to the State even if the practice is prohibited by law.

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33 For a discussion of the notion that FGM and involuntary sterilisation are forms of violence against women, see Coomaraswamy, Radhika, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. E/CN.4/1999/68/Add.4, 21 January 1999.

34 Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties,* UN Doc. CAT/C/GC/2, 24 January 2008, para. 15 (emphasis added).

35 Nowak, *op.cit.* (note 11), para. 53.

36 British Medical Association, *Medicine Betrayed: The Participation of Doctors in Human Rights Abuses,* Zed Books, London, 1992.

37 For example, in Peru during the reign of Alberto Fujimori 'health care providers denied women their fundamental rights to informed consent when professionals pressured women to undergo surgical sterilization during "Tubal Ligation Festivals" and at locations designated for food aid distribution.' See Getgen, Jocelyn E., 'Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report', *Boston College Third World Law Journal*, Vol. 29, 2009, pp. 1–34, at pp. 1 and 12.

A 2006 decision of the Committee on the Elimination of Discrimination against Women recognises this connection between involuntary sterilisation and the State. In *Andrea Szijjarto* vs *Hungary,*[38] a Hungarian Romani woman was subjected to coerced sterilisation by medical staff at the public hospital in Fehérgyarmat. The CEDAW Committee found that the 'failure of the State party, *through the hospital personnel*, to provide appropriate information and advice on family planning' constituted a violation of the Convention on the Elimination of Discrimination against Women.[39] Similarly, the State of Hungary was responsible for the hospital's failure to obtain informed consent and the deprivation of the woman's right to decide the number and spacing of her children in violation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[40] Thus the CEDAW Committee held the State of Hungary responsible for an involuntary sterilisation procedure performed in one of its public hospitals.

The question of whether a State can be held responsible for the activities of private actors is more complicated. Unfortunately, the jurisprudence of the CAT Committee is not particularly helpful when considering State responsibility for the actions of private actors. The only case that the Committee has heard which has raised the issue of whether the actions of wholly private actors (who do not belong to armed groups opposing the government) can be attributed to the State is the case of *Hajrizi Dzemajl* et al vs *Serbia and Montenegro.*[41] In this case, which involved police officers standing by and watching as a crowd destroyed a Roma settlement, the CAT Committee found that the malicious and wide-scale destruction of property occurred with the acquiescence of public officials. Further, comments of the CAT Committee outside the dispute-resolution arena indicate that it may be willing to adopt a broad approach and to embrace the notion of indirect State responsibility. For example, in its General Comment No. 2 the CAT Committee specifically extended State responsibility for acts causing severe pain or suffering to include acts committed by private actors. It stated that

> [t[he Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials *or private actors* consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts (…) *The Committee has applied*

38 Committee on the Elimination of Discrimination against Women, Communication No. 4/2004, UN Doc. A/61/38, 14 August 2006.

39 Committee on the Elimination of Discrimination against Women, *Andrea Szijjarto* vs *Hungary,* Communication No. 4/2004, UN Doc. A/61/38, 14 August 2006, para. 11.2 (emphasis added).

40 Opened for signature 18 December 1979, 1249 UNTS 13, Article 1 (entered into force 3 September 1981).

41 Committee against Torture, Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000, 21 November 2002.

> *this principle to States parties' failure to prevent and protect victims from gender-based violence*, such as rape, domestic violence, female genital mutilation, and trafficking.[42]

Further, according to the Special Rapporteur on Torture, 'the language used in article 1 of the Convention concerning consent and acquiescence by a public official clearly extends State obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals.'[43] In his January 2008 report to the Human Rights Council the Special Rapporteur includes an entire section on torture and ill-treatment in the private sphere where he specifically states that private acts of violence against women, such as intimate partner violence and FGM, may constitute torture if the State fails to act with due diligence.[44] This concept of State responsibility to exercise due diligence has also been discussed by the Special Rapporteur on Violence against Women. For example, in her January 2006 report to the Commission on Human Rights former Special Rapporteur Ertürk states that '[u]nder the due diligence obligation, States have a duty to take positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence.'[45]

In comments directly referential to the issue of involuntary sterilisation, Coomaraswamy has specifically stated that 'State policies contribute to violence against women, manifested in forced abortions, forced sterilization and contraception, coerced pregnancy, and unsafe abortions.'[46] The CAT Committee seems to agree and has raised involuntary sterilisation as an issue of concern. For example, in its 2006 *Conclusions and Recommendations on Peru*, the Committee expressed its concern at reports of women undergoing involuntary sterilisation.[47] Further, in its 2004 *Conclusions and Recommendations on the Czech Republic*, the Committee specifically expressed concern about '[a]llegations regarding some incidents of uninformed and involuntary sterilizations of Romani women, as well as the Government's inability to investigate due to insufficient identification of the individual complainants.'[48] These statements suggests a willingness to attribute State responsibility to pain and suffering caused by private actors where the State has failed to act to prevent or investigate properly such pain and suffering. Therefore, it would seem that the attitude expressed by the CAT Committee in its conclusions and recommendations suggests that where the State fails to act to prevent, investigate or punish violence against women in the

42 Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties,* UN Doc. CAT/C/GC/2, 24 January 2008, para. 18 (emphasis added).

43 Nowak, *op.cit.* (note 11), para. 31.

44 *Ibidem,* para. 44.

45 Ertürk, Yakin, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. E/CN.4/2006/61, 20 January 2006, para. 2.

46 Coomaraswamy, *op.cit.* (note 32), para. 45.

47 Committee against Torture, 36th sess, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

48 Committee against Torture, 32nd sess, UN Doc. CAT/C/CR/32/2, 3 June 2004, para. 86(k).

form of involuntary sterilisation procedures, the pain and suffering resulting from such procedures may be imputed to the State.

4. MEANING OF 'ACT' AND 'INTENTION'

As stated above, the first requirement of the definition of torture contained in Article 1 of CAT (and the focus of this article) is an act by which severe pain or suffering is intentionally inflicted. It is clear that a sterilisation procedure constitutes an act and that the requirement for an 'act' is consequently satisfied when considering the issue of involuntary sterilisation. Less clear is whether the pain and suffering which frequently emanates from an involuntary sterilisation procedure may be viewed as 'intentionally inflicted'. In comparison with other aspects of the definition of torture, commentators and the Committee against Torture itself generally bypass this requirement without comment (seemingly assuming it to be a non-issue in most cases).

In the discussions regarding intention which permeate the scholarly discourse, leading commentators on CAT specifically state that 'intentionally' in the context of the Article 1 definition of torture means 'not negligent' thereby presuming that it includes foreseeability of pain and suffering. Burgers and Danelius state that '[a]ccording to the definition in article 1, torture must be an *intentional* act. It follows that where pain or suffering is the result of an accident or of mere negligence, the criteria for regarding the act as torture are not fulfilled.'[49] Thus, in this context 'negligence' is to be equated with 'carelessness'. Nowak and McArthur have commented that '[p]urely negligent conduct (…) can never be considered as torture'[50] and Boulesbaa has affirmed that the term 'intentionally' as used in Article 1 'implies the exclusion of negligent conduct.'[51] These comments imply that while pain or suffering arising from negligent conduct is not sufficient to fulfil the Article 1 requirement that such pain or suffering be 'intentionally' inflicted, where pain or suffering is the foreseeable consequence of a non-negligent act this will be sufficient to fulfil the intention requirement.

Some commentators explicitly include the foreseeability of pain and suffering within the concept of intention. For example, Copelon states that the 'intent required under the international torture conventions is simply the general intent to do the act which clearly or foreseeably causes terrible suffering.'[52] Accordingly, it seems that in the context of the definition of torture set out in Article 1 of CAT, the intentional infliction of pain and suffering includes pain and suffering which is the foreseeable

49 Burgers, J. Herman and Danelius, Hans, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 118.

50 Nowak and McArthur, *op.cit.* (note 1), p. 73.

51 Boulesbaa, Ahcene, 'Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the U.N. Convention on Torture', *Florida International Law Journal*, Vol. 5, 1990, pp. 293–326, at pp. 293 and 309.

52 Copelon, *loc.cit.* (note 6), pp. 291 and 325.

consequence of the conduct in question but excludes pain and suffering resulting from negligent conduct. Interestingly, this interpretation of Article 1 has also been accepted in the domestic jurisprudential context. For example, in the United States case of *Zubeda* vs *Ashcroft*[53] the court stated that

> we conclude that the Convention simply excludes severe pain or suffering that is the unintended consequence of an intentional act. The regulation does state: 'in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.' However, the regulation immediately explains: '[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.' The intent requirement therefore distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted *or the forseeable consequence of deliberate conduct*.

Thus it seems that in the context of the Article 1 definition of torture, the interpretation of 'intentionally' includes conduct whose consequence is foreseeably pain and suffering. The remainder of this article argues that sterilising a woman without her informed consent amounts to a significant invasion of her physical integrity and autonomy; the negative consequences of such an action span the mental, physical and emotional aspects of a woman's being. While the infliction of such pain and suffering may not be the objective of the procedure, such a consequence is foreseeable and therefore falls within the meaning of 'intention' for the purposes of the Article 1 definition of torture.

5. SEVERE PAIN OR SUFFERING

The definition of torture contained in Article 1 of CAT requires 'severe pain or suffering, whether physical or mental'. Subjecting a woman to an involuntary sterilisation procedure frequently causes severe pain or suffering. With respect to physical pain and suffering, there are two ways to conceptualise the pain and suffering caused by involuntary sterilisation. First, the actual operation may cause pain and suffering as traditionally conceptualised. For example, it may be conducted in circumstances where there are inadequate pain management facilities. Second, even in circumstances where the operation does not cause pain and suffering as traditionally conceptualised, the procedure itself constitutes a violent invasion of a woman's physical integrity and bodily autonomy. I argue that, following Jeremy Waldron's conceptualisation of torture, such an invasion of physical integrity is sufficient to constitute physical pain and suffering for the purposes of the Article 1 definition of torture.

With respect to mental pain and suffering, the social and cultural construction of female identity is such that female identity is bound up with reproductive capacity.

53 333 F 3d 463, 473 (3rd Cir 2003) (emphasis added, citations omitted).

Thus the pain and suffering resulting from an involuntary sterilisation procedure is exacerbated by the social and cultural view that a woman's ability to reproduce is integral to her identity as a woman. Further, involuntary sterilisation may lead to numerous mental health sequellae including depression, trauma, anxiety, emotional pain and stress, negative self-esteem, and negative perception of the self as a woman.

5.1. PHYSICAL PAIN OR SUFFERING

As stated above, the physical pain and suffering caused by involuntary sterilisation may take a number of forms. It may take the form of physical pain and suffering as literally understood. It may also take the form of a violent invasion of a woman's physical integrity. A study comparing levels of post-operative pain in women undergoing sterilisation by microinsert (Essure) with levels of post-operative pain in women undergoing laparoscopic sterilisation found that 31 percent of the Essure group and 63 percent of the laparoscopic sterilisation group reported moderate or severe pain.[54] Another study of pain following laparoscopic sterilisation found that pain is severe in some patients and absent in others and that women frequently experience nausea, abdominal pain or shoulder pain following this procedure.[55] However, in developed countries where the sterilisation procedure is conducted in sanitary conditions, by skilled personnel, with appropriate pain management facilities, sterilisation is generally regarded as a reasonably simple and safe operation following which pain can generally be managed.[56] The situation may of-course be different in developing countries where a sterilisation procedure is conducted in unsanitary conditions, by unskilled personnel. Mechanisms for pain management are frequently unavailable in developing countries thereby exacerbating the pain experienced by women in such a situation.[57] Thus while common sense indicates that there is a direct causal link between involuntary sterilisation and severe pain and suffering in countries with inferior medical facilities, in the context of developed countries the medical literature indicates that although post-operative pain is common, it can generally be effectively managed. Further, while there is always a risk that certain complications will arise from a sterilisation procedure thereby causing severe pain and suffering, this is true of all medical procedures and the materialisation of such complications are the

54 Duffy, Sean *et al.*, 'Female Sterilisation: A Cohort Controlled Comparative Study of ESSURE Versus Laparascopic Sterilisation', *British Journal of Obstetrics and Gynecology*, Vol. 112, 2005, pp. 1522–1528, at p. 1522.

55 Dobbs, Frank F. *et al.*, 'Pain After Laparoscopy Related to Posture and Ring Versus Clip Sterilization', *British Journal of Obstetrics and Gynaecology*, Vol. 94, 1987, pp. 262–266, at p. 262.

56 EngenderHealth, *Contraceptive Sterilization: Global Issues and Trends*, EngenderHealth, New York, 2002, p. 139; and Wilson, Earle W., 'Sterilization', *Bailière's Clinical Obstetrics and Gynaecology*, Vol. 10, No. 1, 1996, pp. 103–119, at p. 115.

57 Size, Matt, Soyannwo, Olaitan A. and Justins, Douglas M., 'Pain Management in Developing Countries', *Anaesthesia*, Vol. 62, Suppl. 1, 2007, pp. 38–43, at p. 38.

exception rather than the rule.[58] Thus a literal interpretation of the physical pain or suffering component of the prohibition of torture may lead one to conclude that in many instances of involuntary sterilisation there is no violation.

Nevertheless, it is difficult to reconcile the position that sterilisation procedures frequently do not cause severe physical pain or suffering with the reality of the physically invasive nature of involuntary sterilisation and the clear infringement of bodily integrity and autonomy. According to Jeremy Waldron, each area of law has an 'archetype', a 'particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law.'[59] In Waldron's view, the prohibition of torture is a legal 'archetype'; it is

58 All surgical sterilisation procedures involve a risk (though often slight) of future complications. For example: 1) A clip on the fallopian tube may produce persistent pain without associated pathology such as infection, adhesions or damage to other organs; Robson, Stephen and Henshaw, Richard, 'Intractable Pelvic Pain Following Filshie Clip Application', *Australian and New Zealand Journal of Obstetrics and Gynaecology*, Vol. 37, No. 2, 1997, pp. 242–243, at p. 242; 2) Tubal sterilisation with Filshie Clips may give rise to chronic and severe pelvic pain. Further, Filshie Clip migration may result in abscess formation or organ penetration; Hiemstra, Ellen, Weijenborg, Philomeen T.M. and Jansen, Frank Willem, 'Management of Chronic Pelvic Pain Additional to Tubal Sterilization', *Journal of Psychosomatic Obstetrics*, Vol. 29, No. 3, 2008, pp. 153–156, at p. 153; Daucher, James A. and Weber, Anne M., 'Chronic Abdominal Pain After Laparascopic Sterilization Clip Placement', *Obstetrics & Gynecology*, Vol. 108, No. 6, 2006, pp. 1540–1543, at p. 1540; Miliauskas, John R., 'Migration of Filshie Clip into the Urinary Bladder with Abscess Formation', *Pathology*, Vol. 35, No. 4, 2003, pp. 356–357, at p. 356; 3) Doctors have reported a case of chronic pelvic pain believed to be related to the development of a hydrosalpinx between two Hulka clips; Frishman, Gary N. and Brest, Norman A., 'Hulka Clip Application as a Potential Cause of Chronic Pelvic Pain', *Contraception*, Vol. 45, 1992, pp. 325–327, at p. 325; 4) Surgical interruption of the fallopian tube may be followed by hydrosalpinx formation and tubal torsion, symptoms of which include recurrent acute pelvic pain; Russin, Lincoln D., 'Hydrosalpinx', *Radiology*, Vol. 159, 1986, pp. 115–116, at p. 115; 5) Essure tubal sterilisation may result in tubal perforation, whose symptoms may include severe and persistent pain. Persistent pelvic pain has also been reported where there is no evidence of tubal perforation or other explanation for the pain other than the mode of sterilisation itself; Langenveld, Josje *et al.*, 'Tubal Perforation by Essure: Three Different Clinical Presentations', *Fertility and Sterility*, Vol. 90, No. 5, 2008, pp. 2011.e5–2011.e10, at p. 2011.e5; and Beckwith, Andrew W., 'Persistent Pain After Hysteroscopic Sterilization with Microinserts', *Obstetrics & Gynecology*, Vol. 111, 2008, pp. 511–512, at p. 511; and 6) Sterilisation increases the risk of future hysterectomy; Olenick, Iviva, 'The Risk of Hysterectomy Quadruples After Women Undergo Sterilization', *Family Planning Perspectives*, Vol. 30, No. 6, 1998, p. 297; and EngenderHealth, *Contraceptive Sterilization: Global Issues and Trends*, EngenderHealth, New York, 2002, pp. 139 and 152. Death is a rare but possible consequence of sterilisation. According to one study, the most frequently reported causes of death related to sterilisation are infection, anaesthetic complications, and haemorrhage; Strauss, Lilo T. *et al.*, 'Sterilization-Associated Deaths: A Global Survey', *International Journal of Gynaecology and Obstetrics*, Vol. 22, 1984, pp. 67–75, at p. 67.

59 Waldron, *loc.cit.* (note 20), pp. 1681 and 1722–1726. Examples of legal archetypes (in United States law) which Waldron presents include *habeus corpus* statutes representing liberty and freedom from physical confinement and the case of *Brown* vs *Board of Education,* 347 US 483 (1954), which represents the law's commitment to desegregation.

'vividly emblematic of our determination to sever the link between law and brutality'.[60] Considering specifically the rule against torture as an 'archetype' in United States law, Waldron discusses the principle of procedural due process with particular reference to the case of *Rochin* vs *California*.[61] In this case, the suspect was forced to ingest an emetic solution which caused him to bring up two morphine capsules which he had swallowed as a means of destroying evidence. The Supreme Court held that the capsules were inadmissible as evidence on the basis that 'force so brutal and so offensive to human dignity' was constitutionally prohibited and that there was little difference between forcing a confession from a suspect's lips and forcing a substance from his body.[62] I would argue by analogy that invading a woman's physical integrity by subjecting her to involuntary sterilisation is similarly brutal and offensive to human dignity.

Waldron summarises his argument in this way: 'the prohibition on torture is a legal archetype emblematic of our determination to break the connection between law and brutality and to reinforce its commitment to human dignity, even when law is at its most forceful and its subjects are at their most vulnerable.'[63] When conceptualised as a core mechanism for separating law from brutality, the essence of the element of 'severe pain or suffering' is a resistance to legally sanctioned brutality or, phrased differently, the violent invasion of physical integrity. This notion is not entirely novel. In the context of the United States 'war on terror' Seth Kreimer has commented that '[t]orture is alien to our Constitution both because it impinges on bodily integrity, and because it assaults the autonomy and dignity of the victim.'[64] Article 5 of the American Convention on Human Rights – the article which specifically addresses the prohibition of torture – begins with the statement that '[e]very person has the right to have his physical, mental, and moral integrity respected.'[65] In addition, a number of Special Rapporteurs have specifically made the link between torture and the invasion of physical integrity.[66] Further, in a case involving judicial corporal punishment, the European Court of Human Rights (finding a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which

60 Waldron, *loc.cit.* (note 20), pp. 1681 and 1727.

61 342 US 165 (1952).

62 Waldron, *loc.cit.* (note 20), pp. 1681 and 1731–1732.

63 *Ibidem*, pp. 1681 and 1739.

64 Kreimer, Seth F., 'Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror', *University of Pennsylvania Journal of Constitutional Law*, Vol. 6, 2003, pp. 278–325, at pp. 278 and 294–295.

65 American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123, Article 5(1) (entered into force 18 July 1978).

66 See, for example, Kooijmans, *op.cit.* (note 1); Rodley, Nigel S, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. E/CN.4/1992/SR.21, 21 February 1992; and Nowak, Manfred, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175, 28 July 2008.

prohibits 'torture and inhuman or degrading treatment or punishment')[67] stated that

> although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as 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.*[68]

This broader conceptual approach to the meaning of torture seems to have been adopted in other contexts. The development of the conceptualisation of rape as torture is an interesting example. After years of viewing rape as essentially a crime against honour, both international human rights law and international criminal law have begun to categorise rape as torture in certain circumstances. In a similar vein to Waldron's rejection of a strict definitional approach to torture, in the case of *Akayesu*[69] the International Criminal Tribunal for Rwanda rejected an approach to the crime of rape which rests on 'a mechanical description of objects or body parts'.[70] Instead, the tribunal expressed the view that it is more useful to focus 'on the conceptual framework of State sanctioned violence'.[71] Specifically analogising rape with torture, the tribunal stated that

> [l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. *Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture* when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[72]

When finding that rape in a particular context constitutes torture, decisions of both international human rights and international criminal law institutions have tended to systematically establish the various elements of the definition of torture, finding that the victim endured severe pain or suffering.[73] Yet it strikes me that in the case of rape, the true repugnance of the offence rests on those components of the offence which

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67 Opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

68 European Court of Human Rights, *Tyrer* vs *the United Kingdom,* 25 April 1978, ECHR, Vol. 26, Series A, para. 33 (emphasis added).

69 International Criminal Tribunal for Rwanda, *Prosecutor* vs *Akayesu,* judgment of 2 September 1998, Case No. ICTR-96–4-T.

70 *Ibidem,* para. 597.

71 *Idem.*

72 *Idem* (emphasis added).

73 See, for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor* vs *Mucić, Delić, Landžo & Delalić,* judgment of 16 November 1998, Case No. IT-96–21-T; International Criminal Tribunal for the former Yugoslavia, *Prosecutor* vs *Furundžija,* judgment of 10 December 1998, Case No. IT-95–17/1-T; and Inter-American Commission on Human Rights, *Mejía* vs *Perú* [1996], Series 1, No. 5/96.

cannot be easily measured but that seem to encapsulate the essence of the severe pain or suffering requirement – that being, the assault on bodily integrity and autonomy; the brutality of the invasion of personhood. While not directly articulated in this way, this view seems to be inherent in many of the decisions finding rape to constitute torture in certain circumstances. For example, in the case of *Prosecutor* vs *Mucić, Delić, Landžo & Delalić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia specifically stated that it

> considers the rape of any person to be a despicable act which *strikes at the very core of human dignity and physical integrity.* The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological.[74]

Coomaraswamy has expressed similar sentiments, conceptualising rape as torture and stating that rape constitutes 'an intrusion into the most private and intimate part of a woman's body, as well as an assault on the core of her self'.[75] In relation to other extreme forms of violence against women, Coomaraswamy has also advocated for a conceptualisation of these offences as torture and has utilised this broad approach to the severe pain and suffering element of the offence of torture in her comments on the need to ensure that the gravity of these crimes is appreciated. For example, she has stated that

> those cultural practices that involve 'severe pain and suffering' for the woman or the girl child, those that do not respect the *physical integrity* of the female body, must receive maximum international security and agitation. It is imperative that practices such as female genital mutilation, honour killings, Sati or any other form of cultural practice that *brutalizes the female body* receive international attention, and international leverage should be used to ensure that these practices are curtailed and eliminated as quickly as possible.[76]

Similarly, in her discussion of domestic violence as torture Rhonda Copelon emphasises the seriousness of the invasion of bodily integrity. She states that '[t]hrough scrutiny and control of her body – forced nakedness, sexual abuse and rape, control over food, sleep and bodily functions – *captors and batterers aim to destroy women's sense of autonomy and dignity.*'[77] When conceptualised in this way, it seems reasonable to assert that involuntary sterilisation causes severe physical pain and suffering even when performed by skilled medical personnel, with all necessary medication and resources, under sanitary conditions. Thus severe *physical* pain or suffering is sufficient to satisfy

74 *Prosecutor* vs *Mucić, Delić, Landžo & Delalić, supra* note 73, para. 495.

75 Coomaraswamy, *op.cit.* (note 33).

76 Coomaraswamy, *op.cit.* (note 13), para. 6 (emphasis added).

77 Copelon, *loc.cit.* (note 6), pp. 291 and 346 (emphasis added).

the pain or suffering requirement of the definition of torture. Nonetheless, while this alone is sufficient for the purposes of the Article 1 definition, the following section takes the argument one step further and posits the view that involuntary sterilisation causes both physical and mental pain and suffering.

5.2. MENTAL PAIN OR SUFFERING

In all societies, from the most liberal to the most conservative, the pain caused by an inability to have children is linked with society's construction of female identity as being bound up with reproductive capacity. This does not mean that the only reason women desire to have children is because society deems that they should – many women would desire children even if existing patriarchal constructs were dismantled. However, the fact that women are still socially constructed as child-bearers and child-rearers clearly impacts upon women's self-perception. Women who are unable to reproduce are often viewed as 'lesser' women. This is the case irrespective of the particular social and cultural context. Cousineau and Domar make the point that in 'many cultures, individuals perceive their childlessness as a sign of diminished status, defectiveness, and reduced competence.'[78] Further, the World Health Organization has observed that in developing countries some infertile women 'choose suicide over the torturous life and mental anguish caused by infertility.'[79] Indeed, it seems that the more patriarchal a society, the more a woman's worth is measured in accordance with her fertility. Thus in Egypt, there is a well-known metaphor that 'a flowerpot without flowers is not a flowerpot'.[80] While not quite as overt, this is also the case in Western societies which pride themselves on having eschewed the hallmarks of patriarchy. Germaine Greer eloquently makes the point when she states that '[a]ll women are encouraged to identify themselves as potential mothers from childhood; no men see themselves primarily as potential fathers'.[81]

Thus all societies, whether developed or developing, construct female identity as being interwoven with reproductive capacity. Women who are 'childless' are frequently constructed as selfish and career-driven or inferior objects of pity.[82] Throughout the ages infertility has been construed as a curse, a punishment for bad

78 Cousineau, Tara M. and Domar, Alice D., 'Psychological Impact of Infertility', *Best Practice & Research Clinical Obstetrics and Gynaecology*, Vol. 21, No. 2, 2007, pp. 293–308, at pp. 293 and 296.

79 World Health Organization, *Current Practices and Controversies in Assisted Production*, World Health Organization, Geneva, 2003, p. 16.

80 Inhorn, Marcia C., *Infertility and Patriarchy: The Cultural Politics of Gender and Family Life in Egypt,* University of Pennsylvania Press, Philadelphia, 1996, p. 58.

81 Greer, Germaine, 'Afterword', in: Haynes, Jane and Miller, Juliet (eds), *Inconceivable Conceptions: Psychological Aspects of Infertility and Reproductive Technology,* Brunner-Routeledge, East Sussex/New York, 2003, pp. 207–216, at pp. 207 and 214.

82 Ireland, Mardy S., *Reconceiving Women: Separating Motherhood from Female Identity,* The Guilford Press, New York/London, 1993, p. 7.

behaviour, a symbol of a woman's inferiority.[83] The idea that a woman may choose not to have children or that there may be other pursuits which adequately fulfil her remains an anathema within a mainstream society which casts such women as either deficient or deviant.[84] Thus infertile women suffer from a stigmatisation in which they are essentially cast as inferior on the basis that they do not fulfil society's definition of women as mothers. In general, it seems that stigmatisation gives rise to an increased risk of numerous health problems including depression, hypertension, coronary heart disease and stroke.[85] In fact, a recent study on the relationship between perceived stigma, disclosure patterns, support and distress in new attendees at an infertility clinic found 'a direct pathway from stigma to infertility-specific distress (…) [o]f particular interest is that for women, there was a significant pathway from infertility-related distress to generalized distress'.[86] The point is that society's values and expectations significantly contribute to the severity of the pain and suffering which a woman may endure upon learning that she cannot bear a child. Thus when considering the pain and suffering resulting from involuntary sterilisation, it is necessary to bear in mind the social and cultural construction of female identity as being interwoven with reproductive capacity.

Involuntary sterilisation has been strongly condemned as the cause of acute mental pain and suffering. In General Recommendation No. 19 the CEDAW Committee specifically states that compulsory sterilisation adversely affects women's mental health.[87] In a case involving the sterilisation of a Hungarian Romani woman without her knowledge or informed consent, the CEDAW Committee found that there was a violation of Articles 10, 12 and 16 of CEDAW.[88] As part of this decision the CEDAW Committee specifically notes the woman's assertion that 'the sterilization has had a profound impact on her life for which she and her partner have been treated medically for depression' and that 'her loss of fertility caused psychological trauma and had a detrimental effect on her private life'.[89]

At the domestic level, the United States Court of Appeal for the Ninth Circuit has, in the asylum context, referred to involuntary sterilisation as involving 'drastic

83 Inhorn, Marcia C. and Van Balen, Frank (eds), *Infertility around the Globe: New Thinking on Childlessness, Gender, and Reproductive Technologies*, University of California Press, Berkeley, 2002.

84 Ireland, *op.cit.* (note 82), p. 13.

85 Major, Brenda and O'Brien, Laurie T., 'The Social Psychology of Stigma', *Annual Review of Psychology*, Vol. 56, 2005, pp. 393–411, at p. 393.

86 Slade, Pauline *et al.*, 'The Relationship between Perceived Stigma, Disclosure Patterns, Support and Distress in New Attendees at an Infertility Clinic', *Human Reproduction*, Vol. 22, No. 8, pp. 2309–2317, at p. 2316.

87 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women,* UN Doc. A/47/38, 29 January 1992, para. 22.

88 *Szijjarto* vs *Hungary,* Committee on the Elimination of Discrimination against Women, Communication No. 4/2004, UN Doc. A/61/38, 14 August 2006.

89 *Ibidem,* paras 2.4 and 7.7.

and emotionally painful consequences that are unending.'[90] In its 1979 report on sterilisation, the Law Reform Commission of Canada devoted a section specifically to the psychological impact of sterilisation. In this section the Commission stated that 'researchers who have carried out psychological studies in this area argue that one of the potential psychological effects of sterilization when done without personal consent is the definition of self as deviant and as unworthy of the rights of parenthood.'[91] This view of destruction of parts of the self as being a consequence of involuntary sterilisation emerges frequently in the literature. For example, Kennedy states that '[n]on-consensual non-therapeutic sterilisation involves the destruction of an essential feature of a person's identity, of that which at a very basic level represents a sense of self.'[92]

Indeed, Rhonda Copelon (in her discussion of domestic violence as torture) cites the findings of Ximena Bunster-Burotto as to the effects of rape and sexual slavery; Bunster-Burotto emphasises that it is 'the humiliation, disorientation and, particularly the *attack on her identity as a woman* that render it among the most effective forms of torture.'[93] This emphasis on the attack on a woman's identity as a woman is also relevant in the context of FGM, a practice which has been labelled as torture on numerous occasions.[94] FGM may be viewed as a mechanism for destroying a woman's sexual identity, rendering her docile and submissive. It is a means of socially constructing a female identity such that a 'sense that the self and its integrity has been destroyed pervades the psyche of the mutilated woman and may lead to suicide.'[95] Thus Coomaraswamy has commented that FGM is viewed by those who practice it as being integral to the formation of female identity and is a clear expression of patriarchal power structures in the way that it defines and controls women.[96] Further, she has also commented that the regulation of female sexuality in general continues to be an underlying cause of many practices that constitute violence against women.[97]

Involuntary sterilisation has occurred (and still occurs) in numerous contexts. China's one child policy and the often brutal methods by which the policy is enforced are well known. Numerous people have borne testimony to the instances of forced abortion and forced sterilisation which have become symbols of the broader ideology

90 United States Court of Appeals for the Ninth Circuit], *Qu* vs *Gonzales* 399 F.3d 1195 (9th Cir. 2005) 2946.

91 Law Reform Commission of Canada, *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons*, Working Paper No. 24, Law Reform Commission of Canada, Ottawa, 1979, p. 49.

92 Kennedy, Ian, 'Patients, Doctors and Human Rights', in: Blackburn, Robert and Taylor, John (eds), *Human Rights for the 1990's,* Mansell, London, 1991, pp. 81–108, at p. 105.

93 Copelon, *loc.cit.* (note 6), pp. 291 and 315 (emphasis added).

94 See, for example, Nowak, *op.cit.* (note 11).

95 Lax, Ruth F., 'Socially Sanctioned Violence against Women: Female Genital Mutilation is its Most Brutal Form', *Clinical Social Work Journal*, Vol. 28, No. 4, 2000, pp. 403–412, at pp. 403 and 410.

96 Coomaraswamy, *op.cit.* (note 13), para. 14.

97 Coomaraswamy, *op.cit.* (note 18), para. 65.

of suppressing individual rights for the benefit of the majority.[98] One example is the testimony of two Tibetan Buddhist monks who witnessed a Chinese mobile birth control team in 1987. They reported that '*all* pregnant women had abortions followed by sterilization, and *every* woman of child-bearing age was sterilized. "We saw many girls crying, heard their screams as they waited for their turn to go into the tent"'.[99]

Whatever the context, involuntary sterilisation remains a source of severe mental pain and suffering. For example, in the context of sterilising people with intellectual disabilities, studies suggest that many people with an intellectual disability understand the effects of sterilisation, maintain negative feelings towards the procedure, and (as occurs in people without an intellectual disability) exhibit signs of 'depression, sexual insecurity, symbolic castration and regret over loss of child-bearing ability.'[100] Further, the view has been expressed that most people with an intellectual disability 'can understand the implications of sterilization' and that '[s]terilizing mentally handicapped people against their will can produce serious and significant psychological damage.'[101] In addition, sterilisation of women with intellectual disabilities has also been associated with loss of self-esteem, increased anxiety, degraded status and perception of the self as deviant.[102]

In the United States context, many women were sterilised as part of the United States eugenics revival (that began in the early 20th century and continued into the 1970s) which advocated the sterilisation of people with intellectual disabilities. In the words of one such woman, '[s]terilization is a terrible thing to do to a woman. They had no right to do that to me. They never ask you about it. They told me that it was just for my appendix and then they did that to me.'[103] In a more recent Australian context, in 2001, Women With Disabilities Australia convened a forum entitled the National Forum on Sterilisation and Reproductive Health of Women and Girls with Disabilities. As part of this forum, the women discussed the impact of sterilisation on women with disabilities. Among the sentiments expressed as part of this discussion, one woman stated that '[t]he psychological effects are huge – it takes away your feelings of womanhood', another declared that she felt as though she had been 'raped', a third

98 See, for example, Chen, Ying, 'China's One Child Policy and its Violations of Women's and Children's Rights', *New York International Law Review*, Vol. 22, 2009, pp. 1–151, at p. 1.

99 Herzer, Eva and Levin, Sara B., 'China's Denial of Tibetan Women's Right to Reproductive Freedom', *Michigan Journal of Gender and Law*, Vol. 3, 1996, pp. 551–568, at pp. 551 and 561.

100 Roos, Philip, 'Psychological Impact of Sterilization on the Individual', *Law & Psychology Review*, Vol. 1, 1975, pp. 45–56, at pp. 45 and 52.

101 Christie, Ronald J. and McCracken, Eric C., 'Sex and the Mentally Retarded: Is Sterilization the Answer?', *Canadian Family Physician*, Vol. 29, 1983, pp. 1474–1479, at pp. 1474 and 1477.

102 Smith, S.M., 'Critical Issues in Psychiatry and Reproduction', *Advances in Contraception*, Vol. 7, 1991, pp. 173–180, at pp. 173 and 179; and Brady, Susan M., 'Sterilization of Girls and Women with Intellectual Disabilities', *Violence against Women*, Vol. 7, No. 4, 2001, pp. 432–461, at pp. 432 and 447.

103 Trombley, Stephen, *The Right to Reproduce: A History of Coercive Sterilization,* George Weidenfeld and Nicolson Ltd, London, 1988, p. 171.

claimed that '[b]ecause I will not go through obvious menopause, in my culture that means I have no marker for becoming an "elder".'[104]

It is not only women with disabilities who have been the victims of involuntary sterilisation procedures. One of the most well-known United States cases addressing the issue of involuntary sterilisation is *Madrigal* vs *Quilligan,*[105] a case involving ten Mexican women who were subjected to involuntary sterilisation in the Los Angeles County Hospital in circumstances indicative of race-based and class-based discrimination. While the court ultimately found in favour of the hospital, Judge Jesse Curtis conceded that 'there is no doubt that these women have suffered severe emotional and physical stress'.[106]

Across the ocean in Europe women have also been subjected to involuntary sterilisation procedures. The plight of Romani women is particularly poignant given that the targeting of these women also betrays the race-based and class-based discrimination which frequently form an integral component of the policies and practice of involuntary sterilisation. There are numerous testimonies of women who have been subjected to involuntary sterilisation which affirm the pain and enduring suffering that are frequently a consequence of this experience. For example, in the words of Agáta, a Slovakian Romani woman who is a victim of involuntary sterilisation,

> I was in terrible pain, but I was not given any pills, any injection. Later on, doctors came and brought me to the operating room [for a C section] and there they gave me anesthesia. When I was falling asleep, a nurse came and took my hand in hers and with it she signed something. I do not know what it was. I could not check because I cannot read, I only know how to sign my name. And, moreover, I was sleepy and tired. When I was released from the hospital, I was only told that I would not have any more children (…) I was so healthy before, but now I have pain all the time. Lots of infections…[107]

Similar sentiments are expressed by Stela, another Slovakian Romani woman, who states that 'I want more children. I get nervous sometimes thinking about this (…) I feel pain because I do not have more children.'[108] Thus it is apparent that among the effects of involuntary sterilisation are enduring mental pain and suffering. This is true across all contexts in which involuntary sterilisation has occurred.

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104 Dowse, Leanne and Frohmader, Carolyn, *Moving Forward: Sterilisation and Reproductive Health of Women and Girls with Disabilities,* Women With Disabilities Australia, Rosny Park, 2001, p. 34.

105 639 F.2d 789 (1981).

106 Quoted in: Shapiro, Thomas M., *Population Control Politics: Women, Sterilization, and Reproductive Choice,* Temple University Press, Philadelphia, 1985, p. 91.

107 Center for Reproductive Rights and Poradňa pre občianske a l'udské práva, *Body and Soul: Forced Sterilization and other Assaults on Roma Reproductive Freedom in Slovakia*, 2003, p. 53, available at: http://reproductiverights.org/en/document/body-and-soul-forced-sterilization-and-other-assaults-on-roma-reproductive-freedom.

108 *Ibidem*, pp. 56–57.

6. CONCLUSION

The Special Rapporteur on Violence against Women, its Causes and Consequences has categorised involuntary sterilisation as a form of violence against women.[109] Involuntary sterilisation may also be a violation of numerous other human rights, such as the right to privacy[110] or the right to marry and found a family.[111] Such categorisations are helpful but fail to encapsulate the true nature of the invasion which occurs when a woman is subjected to involuntary sterilisation – the denial of human dignity and attack on bodily integrity – which is most aptly reflected in the prohibition of torture.

In this article it is demonstrated that, while the prohibition of torture may have originally been conceptualised so as to apply in the context of interrogation, punishment or intimidation of a detainee, the international community has begun to recognise that torture may also occur in other contexts. Thus the reasoning in this article is consistent with the current trend of conceptualising the prohibition of torture as relevant in circumstances beyond the traditional context.

In this article it is argued that involuntary sterilisation is an act which constitutes the intentional infliction of severe pain or suffering, both physical and mental. It therefore satisfies the first requirement of the definition of torture contained in Article 1 of CAT. A sterilisation procedure clearly constitutes an 'act'. It is foreseeable that pain and suffering will result from an involuntary sterilisation procedure, thereby satisfying the intention requirement. When performed in circumstances in which medical skills, sanitary facilities, necessary resources and appropriate medication are lacking, involuntary sterilisation frequently causes severe *physical* pain and suffering. When physical pain and suffering is understood more broadly as encompassing the invasion of personal autonomy and physical integrity, involuntary sterilisation causes *physical* pain and suffering irrespective of whether it is carried out by skilled medical personnel using high quality medical resources and equipment. Further, involuntary sterilisation causes severe *mental* pain and suffering. The social construction of female identity as being linked with reproductive capacity provides some context for the suffering which women experience when they are deprived of their capacity to bear children. This suffering has been recognised at both the international and domestic level and victims of involuntary sterilisation have been outspoken in their descriptions of the mental pain endured as a result of such a procedure. In addition, the contextual overview provided in section 3 demonstrates that involuntary sterilisation also meets the other elements prescribed by the Article 1 definition of torture.

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109 See, for example, Coomaraswamy, *op.cit.* (note 33).

110 See, for example, International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, Article 17 (entered into force 23 March 1976).

111 See, for example, *ibidem*, Article 23.