A RESPONSE TO FIVE QUESTIONS POSED BY MS. DUBRAVKA ŠIMONOVIĆ, SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES

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A Response to Five Questions Posed by Ms. Dubravka Šimonović, Special Rapporteur on Violence against Women, its Causes and Consequences

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The Five Questions

1. **Do you consider that there is a need for a separate legally binding treaty on violence against women with its separate monitoring body?**
2. **Do you consider that there is an incorporation gap of the international or regional human rights norms and standards?**
3. **Do you believe that there is a lack of implementation of the international and regional legislation into the domestic law?**
4. **Do you think that there is a fragmentation of policies and legislation to address gender-based violence?**
5. **Could you also provide your views on measures needed to address this normative and implementation gap and to accelerate prevention and elimination of violence against women?**

PREFACE: Our responses to the five questions posed are specific, focussed on illustrating that the non-derogable human right of women and girls not to be subjected to torture perpetrated by non-state actors is presently not considered addressable under United Nations legally binding treaties that States parties have ratified. Our responses to the five questions are based on contextualizing this knowledge by sharing our specific experiences.

CONTEXTUALIZING OUR EXPERIENCES

RESPONSE TO QUESTION 1: In the following text we describe and share our experiences as praxis evidence as to why we are absolutely certain that there must be a new legally binding human rights instrument with its separate monitoring body that specifically addresses all forms of violence against women and girls with the flexibility to address emerging violations.

Contextualizing our 2008 CEDAW Committee experience as members of an NGO, we attended the CEDAW Committee hearing of Canada, having submitted a shadow report titled, Torture of Canadian Women by Non-State Actors in the Private Sphere: A Shadow Report.

During the questioning of Canada CEDAW Committee expert Ms. Tan asked:

"Moreover, some acts involving family violence constituted torture and it was appropriate to ask whether the Government, as part of its many family violence initiatives, had examined the issue of non-State-actor torture by family members " (CEDAW/C/SR.855 (A), 29 January 2009, para. 36).

Ms. Morency (Canada) responded by stating that;

> *"[W]hat was sometimes referred to as torture by non-State actors was covered by criminal law as simple, aggravated or sexual assault, forcible confinement, kidnapping or trafficking in persons*" (CEDAW/C/SR.855 (A), 29 January 2009, para. 46).

On October 20, 2008 during the CEDAW Committee hearings Canadian NGOs collaborated and presented to the Committee a joint statement that addressed all concerns that had been presented to the CEDAW Committee. This joint statement was read by Sharon McIvor. The following sentence was included in the joint statement, "*Extreme violence against women that takes the form of torture by non-state actors is not adequately defined or punished in Canada's criminal law*". On November 7, 2008 the CEDAW Committee released its Concluding Observations of the Committee on the Elimination of Discrimination against Women: Canada. Torture of women and girls by non-State actors was the only human rights violation that the CEDAW Committee did not address in its concluding observations. A response that clearly negated the CEDAW General Recommendation 19, 7(b) which states that no one shall be subjected to torture; furthermore, ignoring that the Canadian governmental delegate had stated that although torture by non-State actors happened in Canada it was renamed another crime.

Since 2008, we have taken every opportunity to connect with CEDAW Committee experts to promote awareness about non-State torture victimization. In 2014 we presented Ms. Nicole Ameline, CEDAW Chair with this brief, Non-State Torture Happens to Women & Girls during the Geneva NGO Forum – Beijing+20. Attending the 59th CSW, also in 2014, it became clear during a presentation on the CEDAW Convention that CEDAW General Recommendation 19, 7(b) is considered 'soft law' thus not legally binding on States parties. Approaching the CEDAW expert presenter for advice we were told to submit another shadow report. It is our opinion that when women and girls have withstood and survived torture by non-State actors and consented to expose their testimonies, being told that submitting another shadow report under a General Recommendation which has no legally binding bit to it is a form of secondary structural revictimization that negates upholding their human right not to be subjected to such torture.

The not legally binding position of 'soft law' was clearly stated to us by a Canadian governmental delegate in her email which said, "Canada's longstanding view is that the general comments and concluding observations of the UN treaty bodies are not legally binding" (E. Brady, email communication, July 11, 2013). This Canadian governmental position and the CEDAW Committee decision of 2008 reflect a human rights discriminatory perspective that ignores article 5 of the Universal Declaration of Human Rights which states no one shall be subjected to torture and article 2 which declares that all articles of the Declaration are applicable to women and men equally.

More generally, there are equally newer forms of violence, especially targeting girls, that require enunciation in a normative text. For instance, online abuse, coercive control, grooming, to name but a few.

RESPONSE TO QUESTION 2: The above described experience represents an incorporation gap of the international or regional human rights norms and standards and renders women and girls powerless to expect human rights justice when States parties can claim that they do not have due diligence responsibilities to uphold recommendations that are based on 'soft law'.

Contextualizing our Committee against Torture experience in 2012, we represented our non-governmental organization, the Canadian Federation of University Women (CFUW) speaking to its shadow report which recommended the essential need for the *Criminal Code of Canada* be amended to include torture committed by non-State actors. Being present, we listened to the Government of Canada delegation state to the Committee that it should not be addressing acts of violence against women and the Chair's response that holding such a position would be discriminatory. The Committee's Concluding Observations (CAT/C/CAN/CO/6) to Canada stated that incorporating the Convention into Canadian law strengthens the legal protection of persons so tortured by allowing them to cite the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in court (para. 8), voicing that State parties should be considered authors, complicit or otherwise responsible under the CAT for consenting to or acquiescing in acts of torture committed by non-State officials or private actors (art. 2). Canada was also reminded that it should strengthen its due diligence efforts to stop acts of torture committed by non-State officials or private actors, providing remedies to victims (para. 20). Canada was identified as one of the States parties that were challenging the Committee's capacity to issue General Comments saying that General Comments create new obligations that, "are not contained in the text of the Convention" (p. 11).[1] To date, Canada has not amended its *Criminal Code*.

The above example is not unique to Canada: it has been borne out by the global legal research (including case searches) that demonstrate soft law as non-binding and therefore states do not see themselves bound by it. A new normative instrument would fill this gap.

RESPONSE TO QUESTION 3: Yes, absolutely, we believe and know that there is a lack of implementation of the international and regional legislation into our domestic law.

[1] International Service for Human Rights. (2012). Committee against torture. *Human Rights Monitor*, *3*, 9-11. Retrieved from: http://www.ishr.ch/sites/default/files/hrm/files/hrmq_july_2012_ok_small.pdf

Contextualizing our Universal Periodic Review (UPR) experience, again as representatives of CFUW, we attended Canada's 2013 Universal Periodic Review session. Prior to the review CFUW and NCWC (National Council of Women of Canada) submitted a joint submission with a section titled "VAW: Specifically Torture by Non-State or Private Actors", asking that Canada criminalize torture perpetrated by non-State actors (pp. 4-5). In the 2013 Report of the Working Group on the Universal Periodic Review Canada, paragraph128.47 reads, "Step up the implementation of the recommendations of the Committee against Torture . . . " (A/HRC/24/11, June 28, 2013). The purpose of the UPR process is to assess how States parties are respecting their human rights obligations. The Universal Declaration of Human Rights is fundamental to this assessment thus promoting that no one, including women and girls, are subjected to torture perpetrated by State or non-State actors (article 5). The CAT proclaims in its preamble the Universal Declaration of Human Rights as a "common standard of achievement for all peoples". The Committee against Torture oversees States parties due diligence operationalization of the CAT which relates to the comment made in paragraph 128.47, stated above. Canada has yet to criminalize torture perpetrated by non-State actors.

Globally, soft law permits the state to cherry pick; hard laws do not. Soft laws can and do lead to fragmentation of policies and legislation. It is therefore imperative for women and girls to be able to live dignified, safe and healthy lives to impose obligations (hard law) on states that are enforceable.

RESPONSE TO QUESTION 4: Yes, there is a fragmentation of policies and legislation to address gender-based violence in relation to torture by non-State actors in Canada as we have contextualized. Additionally, in general review of States party laws seldom is torture by non-State actors specifically identified and seldom applied as a human and legal right of women and girls.

RESPONSE TO QUESTION 5: CONCLUSION. Views on measures needed to address this normative and implementation gap and to accelerate prevention and the elimination of violence against women that amounts to torture by non-State actors includes:

1. Holding a human rights meeting to specifically address forms of non-State actor torture of women and girls.
2. Ensuring that the development of a separate legally binding treaty on violence against women and girls includes a clear identification article on non-State torture.
3. Developing and sharing educational resources, for example, this ground-making Fact Sheet: Torture in the Private Sphere makes visible three categories of non-State torture inflicted against women and girls.

4. Girls are included in our response because torture is identified as a form of violence perpetrated against girls in the 2007 CSW agreed conclusions; however, seldom is this identified as a fundamental human rights violation suffered by girls of many ages.