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Gynaecological and Obstetric Violence:
meeting the threshold of ill-treatment?
A feminist reading of Article 3 of the European
Convention on Human Rights

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Abstract

The phenomenon of gynaecological and obstetric violence (GOV) is a growing yet underreported practice which affects women disproportionately worldwide. It has already been addressed by the jurisprudence of Human Rights Courts, such as the European Court of Human Rights (ECtHR), as well as treaty bodies, despite lacks in the international legal framework of a formal legal recognition. The contribution offers a reading of Article 3 of the European Convention of Human Rights (ECHR) with a feminist approach, focusing on GOV as example of an experience disproportionately targeting women and a form of gender-based violence, and assess whether the phenomenon – not only limited to the most serious violations, such as forced sterilizations – should be approached by the ECtHR as meeting the threshold of inhuman or degrading treatment, thus triggering Article 3 ECHR.

La violenza ostetrica e ginecologica (VOG) è una pratica in crescita, poco denunciata, che colpisce le donne in modo sproporzionato in tutto il mondo. Casi di VOG sono già stati affrontati dalla giurisprudenza dei tribunali per i diritti umani, come la Corte europea dei diritti dell'uomo (Corte Edu), e dai comitati internazionali, nonostante manchi nel quadro giuridico internazionale un riconoscimento formale. Il contributo offre una lettura dell'articolo 3 della Convenzione europea dei diritti dell'uomo (Cedu) alla luce del metodo femminista, concentrandosi sulla VOG come esempio di esperienza che colpisce in modo sproporzionato le donne e di forma di violenza di genere, indagando se il fenomeno – non solo limitatamente alle violazioni più gravi, come le sterilizzazioni forzate – debba essere affron-

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tato dalla Corte Edu quale condotta che supera la soglia prevista dall'articolo 3 Cedu.

1. Introduction

“As a social and systemic phenomenon, obstetric and gynaecological violence is situated at the convergence of two structural crises: discrimination based on gender and the under-resourcing of healthcare systems and institutions”¹. With this statement, the report on gynaecological and obstetric violence (hereinafter GOV) drafted by the FEMM Committee of the European Parliament opens its analysis of the phenomenon. This is also considered one of the key findings of the report itself, since it points out two crucial yet under evaluated aspects: the gender-based nature of the GOV, of the violation, and the problematic issues within the medical sector. The report, which assessed the prevalence and prevention measures enacted by the 27 Member States (MS) of the European Union concerning GOV, shows a lack in harmonization concerning its definition, or better a lack thereof. What emerges though is that none of the 27 MS is *not* affected by it. Women throughout the Europea Union have experienced and continue to experience GOV.

The purpose of this contribution is to use GOV as a case study for a feminist reading of Article 3 of the European Convention on Human Rights (ECHR). The article enshrines the prohibition of ill-treatment within the Convention, and it has been invoked in those cases brought in front of the European Court of Human Rights (ECtHR) concerning the most serious forms of GOV, such as forced abortions and forced sterilizations. Even though in the cases analysed, the Strasbourg Court found a violation of Article 3, the question remains open as to whether other forms of GOV, “less serious”, may trigger a violation of the same article. This sparks several other questions, concerning the nature of the prohibition of ill-treatment (criticised by feminist legal scholarship as unreceptive to women’s instances and reflective of a more male-oriented conceptualization); its “ladder” approach by the ECtHR; and ultimately, concerning the severity threshold test.

The feminist method to legal analysis, which aims at unveiling inherent biases of the law, can offer some insights as to the issues raised, especially in the context of gender-based violence against women. Indeed, GOV is a form of violence disproportionately affecting women and with a clear gendered nature, a cultural and societal issue, settled in either the non-conformity of some women to the pre-determined and stereotyped notions of what a mother is, should be and should do, or the unwillingness to become one.

2. Going beyond patterns of oppression: a brief appraisal of the feminist method to international legal analysis

Though sharing some traits with critical legal studies, the feminist method to international legal analysis can be considered more recent. Its formal origin can be traced back to the 1990s, when Charlesworth, Chinkin and Wright published in the American Journal of International Law their shared reflection on the need to approach traditional areas of international law “from a perspective that regards

¹ S. Brunello and others, *Obstetric and Gynaecological Violence in the EU – Prevalence, legal frameworks and educational guidelines for prevention and elimination*, 2024, PE 761-478, [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/761478/IPOL_STU\(2024\)761478_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/761478/IPOL_STU(2024)761478_EN.pdf).

gender as important”². Further elaborated by Charlesworth alone in 1999³ and later by Chinkin and Charlesworth again⁴, the legitimacy of feminism applied as a method of legal analysis has been established in manuals⁵ and used as a practical tool by several scholars⁶. Some have also moved beyond feminism and integrated the feminist perspectives with ecocentrism, leading to ecofeminist approaches⁷, and with post-human theories, fostering the so-called post-human feminist approaches⁸.

All abovementioned approaches share the basic trait of critical analysis, thus engaging the legal field with a deconstructing mindset. Feminist methods in particular aim at challenging the law starting from the assumption that law in general, and international law in particular, are gendered and reflective of a specific perspective⁹. According to Chinkin and Charlesworth (though their position is far more articulated and complex than the following account, which for a lack of space cannot be properly addressed) this is due – among other reasons – to the fact that when international law was being drafted, women (as well as other marginalized groups) were left outside the chambers where law-making was happening¹⁰. The authors continue by proposing a metaphor to explain the aim of the feminist method, which can be compared to an archaeological dig, trying to extract and expose, layer by layer, the inherent biases of the law¹¹. Said biases are due, as mentioned, to the historical moment of the drafting of international law which saw the absence of women from the actual drafting processes; to the way in which the law is interpreted and applied and to the gendered nature of some basic concepts which lead to a different positing of men and women. Going further with the excavation (borrowing the archaeological comparison) the result is a number of biases which, layered one after the other, contribute to patterns of oppression¹² towards women. The aim of the feminist method is not merely a destructive one though, nor simply an extractive one. More precisely, it aims to unveil said biases, to disrupt those patterns of oppression and to contribute to a reshaping and rethinking of

2 H. Charlesworth, C. Chinkin, S. Wright, *Feminist Approaches to International Law*, in *The American Journal of International Law*, 1991, 85, 4, pp. 613 ff.

3 H. Charlesworth, *Feminist Methods in International Law*, in *The American Journal of International Law*, 1999, 93, 2, pp. 379 ff.

4 H. Charlesworth - C. Chinkin, *The Boundaries of International Law*, Manchester, MUP, 2000.

5 See: A. Bianchi, *International Law Theories*, Oxford, OUP, 2016; R. Deplano, N. Tsagourias (eds.), *Research Methods in International Law: A Handbook*, Cheltenham, Northampton, Edward Elgar, 2021, J. Klabbers, *International Law*, Cambridge, CUP, 2023.

6 L. Hodson, T. Lavers, *Feminist Judgments in International Law*, Oxford, Hart Publishing, 2019.

7 S. De Vido, *Approcci giuridici femministi al diritto internazionale: verso un diritto eco-femminista e post-umano?*, in *La Comunità Internazionale*, 2023, LXXVII, pp. 453-481.

8 E. Jones, *Feminist Theory and International Law: Posthuman Perspectives*, Oxon, Routledge, 2023.

9 This particular aspect is a common trait shared with Third World Approaches to International Law (TWAIL) or Postcolonial Approaches to International, whose perspectives start from the assumption that international law has been drafted by and for Western countries. Again, due a lack of space, the much deeper complexity of these methods of legal analysis cannot be fairly accounted for here. For more detailed appraisals of these methods see, among others: A. Bianchi, *op. cit.*; R. Deplano, N. Tsagourias, *op. cit.*

10 H. Charlesworth, C. Chinkin, *ivi*, p. 49. According to the others the power differentials between women and men is still reflected and mirrored in the absence of women from international legal institution, as well as in the preference of the use of the term “he” to identify a generic person, rather than the commonly used English expression “they” which actually refers to a generic person, avoiding to expressly mention gender. This is suggestive of which is the person which drafters have in mind when engaging in law-making.

11 *Ibidem*.

12 *Ibidem*.

the law. It promotes self-awareness to some extent and invites international law and its scholars to look within its boundaries and to try to unveil inherent forms of discrimination.

What the feminist method does not do however, and this should be addressed beforehand, is to limit its theoretical and conceptual field to *only* women's rights or women's issues. Surely, the attention to the perspective of women is right there in the name: *feminism* is inextricably embedded in women's experiences. As a systematically discriminated category, women's experiences offer a unique point of view and should be regarded as both a starting point and a point of landing, yet they are not to be intended as the *sole* interest of this method of legal analysis. The aim is the disruption of a pattern embedded into the law which focuses and comes from a male-oriented perspective. Carrying on with the archaeological comparison, digging through the layers while trying to unveil the oppression which derives from privileging one perspective over others may lead to uncovering several forms of oppression, on the basis of gender, sexual orientation, ethnicity. Hence, approaching the excavation aiming to find just that *one* form of oppression may prove detrimental in the long-term, and it is to be avoided. Indeed, Chinkin and Charlesworth warn that within feminism itself it is fundamental to move beyond purely "local concerns"¹³, anticipating in that sense intersectionality¹⁴ applied to the feminist method. The authors continue:

"[...] the use of feminist theories on a global level requires attention to the way that these theories can privilege some women's experiences over others. In some international contexts, "women" may well be an appropriate category in the struggle against domination by men, while other situations call for a more particularised category."¹⁵

Thus, the feminist method should be more interested in addressing the silences of international law¹⁶, and in decoding them it should pay attention to "the way that various dichotomies are used in its structure", such as, among others, the binary opposition between the categories of *male* and *female*¹⁷. Ultimately though, the goal of the feminist method should be that of going in the opposite direction of what has been thus far the mainstream approach – i.e. privileging a male-centric perspective – and rather favour inclusion, "adding the voices and experiences of those who have been structurally marginalised by disciplinary canons"¹⁸.

13 *Ibidem*, p. 55.

14 On law and intersectionality see: K. Crenshaw, *Mapping the margins: Intersectionality, identity politics, and violence against women of color*, in *Stanford Law Review*, 1991, pp. 1241 ff., K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in H. Lutz, M.T. Herrera Vivar, L. Supik (eds.), *Framing Intersectionality: Debates on a Multi-faceted Concept in Gender Studies*, Oxon, Routledge, 2016; L. Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women*, Cambridge, CUP, 2017.

15 H. Charlesworth, C. Chinkin, *ivi*, p. 55.

16 This conceptualization of the feminist approach as a method which should not be limited solely to instances particularly close to women's experiences has been promoted not only by Chinkin and Charlesworth but also by Emily Jones, who posited that posthuman feminism is able to appreciate much more also in those fields which traditionally have been left out from the feminist discourse, such as military technology and rights of nature. See: E. Jones, *op. cit.*

17 H. Charlesworth, C. Chinkin, *ivi*, p. 49. It should be underlined that the reference to "male" and "female", "man" or "woman" within these pages is intended as based on gender and is interpreted as the result of socially constructed roles.

18 G. Heathcote, P. Zichi, *Feminist Methodologies*, in *op. cit.*, R. Deplano, N. Tsagourias (eds.), p. 464.

3. Women's experiences left outside ill-treatment

This contribution moves from the assumption at the basis of the feminist method, namely that international law and particularly the field of human rights law has developed, has been interpreted and applied in many instances favouring one perspective, leaving unaddressed or better, *not properly addressed*, experiences which are typically lived by women. Despite being a phenomenon affecting individuals worldwide, despite its absolute prohibition, ill-treatment¹⁹ serves as an example of a violation of fundamental human rights which has been conceptualized and interpreted with a male-oriented vision²⁰. On the issue, Chinkin and Charlesworth²¹ first and more extensively Sifris²² later have pondered over the male-oriented perspective through which torture has been conceptualized and interpreted. The former in particular reflect on the *public/private* divide which has characterised traditional international law, and which at the beginning was used as resistance to international law dealing with issues such as violence against women (VAW)²³. They argue that the prohibition of torture is limited:

“A central feature of the international legal definition of torture is that it takes place in the public realm: it must be ‘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’. Although many women are victims of torture in this ‘public’ sense, by far the greatest violence against women occurs in the ‘private’ non-governmental sphere”²⁴.

The authors continue by sharing the findings of the 1996 report of the Special Rapporteur on Violence against Women, who concluded that some severe forms of domestic violence could qualify as torture²⁵. They continue: “[...] both the torture victim and the abused women are isolated and live in a state of terror; they suffer physically and psychologically; they develop coping mechanisms that come to dominate their existence; both forms of violence are committed intentionally in order to terrorise, intimidate, punish or to extort confessions of often non-existent deviant behaviour”²⁶.

The Special Rapporteur on torture, Manfred Nowak, issued in 2008 a report on a gender sensitive interpretation of the prohibition of torture, cruel or inhuman and degrading treatment. The report was part of a wider set of initiatives such as the Human Rights Council Resolution 6/30 and the Secretary General's request for an in-depth study of the forms of VAW which aimed at ending impunity for

19 The term ill-treatment will be used as an umbrella term comprising torture and cruel, inhuman or degrading treatment. See: A. Reidy, *The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights*, in *Human Rights Handbooks*, 2003, 6.

20 A. Edwards, *The “Feminizing” of Torture under International Human Rights Law*, in *Leiden Journal of International Law*, 2006, 19, p. 387.

21 H. Charlesworth, C. Chinkin, *ivi*, p. 234.

22 See: R. Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture*, Oxon and New York, Routledge, 2014.

23 S. De Vido, *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011*, Milano, Mimesis, 2016.

24 H. Charlesworth, C. Chinkin, *ivi*, p. 234.

25 HRC, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/1996/53, 4 January 1996.

26 H. Charlesworth, C. Chinkin, *ivi*, p. 234-235.

VAW and promoting awareness on the matter²⁷. The specific aim of the report was “to ensure that the torture protection framework is applied in a gender-inclusive manner with a view to strengthening the protection of women from torture”²⁸. Two aspects which emerged from the report deserve particular attention in light of the analysis carried out within these pages.

First and foremost, the Special Rapporteur addressed the already mentioned *private/public* divide. Traditionally, and for the way in which the prohibition of torture had been applied, the scope of the prohibition seemed to be limited to instances belonging to the *public* sphere of an individual’s life, thus, as highlighted by Chinkin and Charlesworth, and Sifris, leaving outside the scope of application experiences which are more peculiar to women, who up until recently did not have much space in the *public* field²⁹. According to the Special Rapporteur however, the language of Article 1 of the Convention against Torture (CAT) *clearly* extends the scope of application, thus also State’s obligations, to 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”³⁰.

Secondly, and particularly relevant for cases of gynaecological and obstetric violence, the Special Rapporteur added a fifth element to the four traditionally recognised elements required to meet the threshold for torture, namely severe pain and suffering (physical or mental); intent; purpose; state involvement. He argued for the addition of the criterion of *powerlessness*, to be interpreted as a situation which arises when: “one person exercises total power over another, classically in detention situations, where the detainee cannot escape or defend him/herself”³¹, though not limiting the application to the traditional boundaries of torture, those of detention, by adding that “if it is found that a victim is unable to flee or otherwise coerced into staying by certain circumstances, the powerlessness criterion can be considered fulfilled”³².

The criterion of powerlessness was later addressed and expanded by Sifris – as well as other feminist legal scholars³³ – who interpreted it as a key element to effectively challenge the male-centric perspective on torture. Indeed, if read through a gendered lens, the condition of powerlessness is shared between traditional situations of torture, i.e. during detention, as well as in conditions of intimate partner violence, of rape, and, as it will be demonstrated, in cases of gynaecological and obstetric violence.

27 HRC, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc. A/HRC/7/3, 15 January 2008, para. 25.

28 *Ibidem*, para. 26.

29 According to Chinkin and Charlesworth the public world is the male world, and thus operating in the public realm or concerning itself with the public realm, international law does indeed privilege a male-centric perspective. However, as the authors warn, international law did, both directly and indirectly, also affect the private sphere even by omission. H. Charlesworth, C. Chinkin, *ivi*, p. 56. On the issue of public/private divide see also: A. Edwards, *ivi*, pp. 352-356.

30 HRC, *ivi*, para 31.

31 *Ivi*, para. 28.

32 *Ibidem*.

33 See R. Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, in *Columbia Human Rights Law Review*, 1994, 25, pp. 291-367; C.A. MacKinnon, *On Torture: A Feminist Perspective*, in *Human Rights in the Twenty-First Century: A Global Challenge*, K.E. Mahoney and P. Mahoney (eds.), Dordrecht, Martinus Nijhoff Publishers, 1993.

3.1. Gynaecological and obstetric violence as a case study

Looking at ill-treatment through the added criterion of powerlessness and a gendered lens allows to expand the traditional contours of the phenomenon. To that extent, GOV serves as an example to demonstrate how experiences which affect women *because* they are women could be construed as ill treatment, and that the traditional limits of the notions of torture and inhuman or degrading treatment should be extended to tackle an inherent bias of the law. In a 2021 article on GOV in South America, Larrea *et al.* focused on abortion-related OV and reported accounts from several women who had experienced it as a dehumanizing process. Furthermore, the authors reflected on the power dynamic which occurs within hospitals, between the doctor and its patient, though not expressly referring to powerlessness, this can be easily inferred from the accounts of women who underwent forms of GOV³⁴.

But what accounts for GOV? First, it should be clarified that the term gynaecological and obstetric violence is preferred within these pages in opposition to the more common “obstetric violence” (OV) as an umbrella term which is able to appreciate the multi-faceted and complex nature of the phenomenon, which extends this form of violence to all reproductive health-services. Indeed, OV alludes to experiences more centred around childbirth, hence running the risk of leaving unaddressed similar forms of violence which happen in the wider context of reproductive health care services, such as abortion for instance. Thus, the choice of terms within these pages will be to address the issue as GOV, rather than only OV³⁵.

Such choice of terminology was shared by the French legislator³⁶ in a recent attempt to legally define GOV, which is currently not a legally defined phenomenon in many parts of the world, with a few notable exceptions, such as those of Venezuela and Argentina³⁷. It should be highlighted that while the French draft law specifically refers to *gynaecological and obstetric* violence, the Venezuelan and Argentina laws, the first ever to be drafted on the matter, refer to obstetric violence. Venezuela’s Organic Law on Women’s Rights to a Violence-free Life, while providing a definition of OV specifically, refers to “dehumanizing treatment” and “loss of autonomy”, similar to powerlessness over their

³⁴ S. Larrea and others, “Hospitals Have Some Procedures That Seem Dehumanising To Me”: Experiences of Abortion-Related Obstetric Violence in Brazil, Chile and Ecuador, in *Agenda: Empowering Women for Gender Equity*, 2021, 35, 3, pp. 54-68.

³⁵ L. Bernardini, S. Dal Monico, *A Way Forward: Criminal Law as a Possible Remedy in Addressing Gynecological and Obstetric Violence?*, in *International Review of Penal Law*, 2024, 95, 2, pp. 269-295. Further on gynecological and obstetric violence, see: C. Pickles, J. Herring (eds.), *Childbirth, Vulnerability and Law. Exploring Issues of Violence and Control*, Oxon, Routledge, 2019; R. Chadwick, *The Dangers of Minimizing Obstetric Violence*, in *Violence Against Women*, 2023, 29, 9, pp. 1899-1908; F. Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*, in *Reproductive Health Matters*, 2019, 24, 47, pp. 56-64; C. Moreno-García, S. Heidari, *Gender-based Violence: a barrier to Sexual and Reproductive Health and Rights*, in *Reproductive Health Matters*, 2016, 24, 47, pp. 1-4; E. Kukura, *Obstetric Violence*, in *The Georgetown Law Journal*, 2018, 106, pp. 721-803; V. Perrotte, A. Chaudhary, A. Goodman, “At Least Your Baby Is Healthy”: *Obstetric Violence or Disrespect and Abuse in Childbirth Occurrence Worldwide: A Literature Review*, in *Open Journal of Obstetrics and Gynecology*, 2010, 10, pp. 1544-1562; C. Pickles, “Obstetric Violence”, “Mistreatment” and “Disrespect and Abuse”: *Reflections on the Politics of Naming Violations During Facility-based Childbirth*, in *Hypathia*, 2022, 38, pp. 628-649; P. Quattrocchi, *Obstetric Violence Observatory: Contributions of Argentina to the International Debate*, in *Medical Anthropology*, 2019, 28, 8, pp. 762- 776.

³⁶ Proposition de loi No. 982, 2023.

³⁷ Art. 15(13), Ley Orgánica No. 38.668 *sobre el Derecho de las Mujeres a una Vida Libre de Violencia* of 23 April 2017; Art. 6(e), Ley No. 26.485, *Ley De Proteccion Integral No. Para Prevenir, Sancionar Y Erradicar La Violencia Contra Las Mujeres En Los Ambitos En Que Desarrollen Sus Relaciones Interpersonales* of 11 March 2009.

body's natural processes and their sexuality³⁸.

The French definition paints a more complex picture. Firstly, it addresses the phenomenon, as mentioned, as GOV and not simply OV, highlighting within the definition that it takes place in the context of gynaecological and obstetric care while at the same time underscoring the gendered element of this form of violence, which violates the individual's dignity through degrading or humiliating comments or behaviours. It states that GOV amounts to sexist offences committed imposing on a person any sexual or sexist comments or behaviours that either violate their dignity by being degrading or humiliating, or create an intimidating, hostile or offensive context³⁹. Interestingly so, both the legal definitions mentioned fix the contours of GOV within the realm of ill-treatment, though one prefers the word "dehumanizing" as opposed to "degrading". Moreover, the preamble of the draft law states that the phenomenon is a form of gender-based violence, meaning that it affects women disproportionately, acknowledging also transgender people.

At the international level, soft law attempts to define GOV were proposed by the WHO⁴⁰, which defined OV (not GOV) as abuse, disrespect and mistreatment in childbirth perpetrated at the hands of healthcare professionals, again underlining the element of violation of human dignity. A noteworthy attempt was also undertaken by the Special Rapporteur on Violence against Women, Dubravka Šimonovi, who in 2019 issued a report on the mistreatment towards women in the context of childbirth and obstetric violence, promoting a human rights-based approach to the matter⁴¹. Though comprehensive and detailed, in as much as it catalogues the behaviours and different forms of OV⁴², the report fails to provide a working definition which could have been used as basis for international and national legislative attempts to regulate GOV.

The value and crucial contribution of the report though goes beyond the non-delivery of a definition, for several reasons. First, the report lists behaviours and practices which can amount to GOV, such as symphysiotomy (the surgical separation and widening of the pelvis to facilitate childbirth)⁴³; forced sterilization and forced abortions⁴⁴; restraining detained women during labour as well as post-childbirth detention⁴⁵; and other practices such as episiotomies or "husband" stitching⁴⁶; as well as

38 *Ibidem*.

39 The original text of the draft law is available here: https://www.assemblee-nationale.fr/dyn/16/textes/l16b0982_proposition-loi.

40 For other noteworthy attempts to address GOV (or OV) see: PACE, *Obstetrical and Gynaecological Violence*, Res. 2306(2019), 3 October 2019. EP, *Resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health*, Res. 2020/2215(INI), 24 June 2021.

41 HRC, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Human Rights-Based Approach to Mistreatment and Violence Against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence*, UN Doc. A/74/137, 11 July 2019.

42 It should be noted that the report mentions obstetric violence, not gynecological and obstetric violence.

43 HRC, *ivi*, para. 20.

44 *Ibidem*, para. 21. See also: S. Dal Monico, *Di violenza ostetrica e ginecologica, vulnerabilità ed intersezionalità: prospettive emergenti nella giurisprudenza della Corte Europea dei Diritti Umani e della Corte Interamericana dei Diritti Umani*, in *Pluralità & Diritto*, R. Palavera, N. Pascucci, A. Sammassimo (eds.), Urbino, UUP, 2024, pp. 139-162.

45 HRC, *ivi*, para. 22-23. To the same conclusion came also the Inter-American Court of Human Rights in *Manuela et al. v. El Salvador*, a case it decided in 2021, where a young woman who was suspected of having procured herself an abortion – though she was claiming that her baby was stillborn – was shackled to her bed even though she was not able to move due to her health condition. Indeed, she was being treated due to a condition consequent to the (natural) abortion and due to a postpartum gesticulosis. See: IACtHR, 2 November 2021, *Manuela et al. v. El Salvador*. See also: S. Dal Monico, *op. cit.*

verbal abuse or sexist remarks which lead to profound humiliation⁴⁷. The second important contribution of the report concerns the gendered nature of the phenomenon. It shows that the practices are embedded into gender, underscoring that this form of violence affects women⁴⁸ *because* of their gender and *because* of the stereotypes still surrounding the idea of the woman (or of the person which does not conform to the socially prescribed gender norms) who needs to respond to certain characteristics (the good mother and virgin mother stereotype for instance). In particular, the Special Rapporteur on VAW stated that these types of practices are “part of a continuum of the violations that occur in the wider context of structural inequality, discrimination and patriarchy”⁴⁹. Lastly, the report recalled the jurisprudence of the regional Courts of Human Rights, specifically the Interamerican Court of Human Rights (IACtHR) and the ECtHR, which in some limited cases of forced sterilization found a violation of the right to be free from cruel, inhuman or degrading treatment, thus highlighting the connection between GOV and the violation of the prohibition of ill-treatment which is particularly relevant for the purposes of this contribution⁵⁰.

From the definitions and attempts at defining the notion of GOV a few significant characteristics can be highlighted, relevant for the assessment of the phenomenon as ill treatment. First, from the French draft law and the report of the Special Rapporteur the clear nature of GOV as a gender-based phenomenon emerges, thus recognising the gendered element embedded in these practices, anchored to a certain conceptualization of the role of the woman⁵¹. Secondly, GOV infringes upon the individual’s dignity, which is at the core of the prohibition of ill treatment. Ultimately, and particularly connected to the previous point, GOV refers to *unconsented* medical procedures, and more in general to practices which determine a loss of autonomy of the victim’s own sexual and reproductive processes. Indeed, certain procedures such as episiotomies, abortions and sterilizations do not constitute abuses *per se*, but it become such when they are inflicted upon individuals without their prior, informed and willing consent and when they entail a situation of powerlessness, by which patients cannot flee or are forced into staying due to the circumstances.

46 *Ibidem*, paras. 27-30. Other practices named are manual fundal pressure to facilitate childbirth also known as *Kristeller manoeuvre*; lack of respect for privacy and or confidentiality; uterine scraping and surgical miscarriage procedures; lack of autonomy and decision making in the preferred labour choice.

47 *Ibidem*, para. 31. Women worldwide have reported being mocked, scolded, insulted and yelled at by healthcare personnel. Some also described threats of withholding treatment or even, in some cases, also threats of physical violence. The report by the FEMM Committee of the European Parliament highlights the necessity of addressing the issue of GOV with an intersectional approach, to grasp categories which could be more at risk of discriminations, hence more vulnerable. For instance, migrant women were more likely to face GOV by being denied access to facilities as well as being subjected to physical, verbal, mental and emotional abuse; moreover, all migrant women reported a lack in accessing GO care properly due to the fact that they were not provided with an interpreter or someone who spoke their language who could help them. See: S. Brunello and others, *ivi*, pp. 40 ff.

48 As mentioned, due to a lack of space the dimension of trans, intersex and non-binary people who may undergo GOV will not be tackled, though the gendered nature of the phenomenon does indeed apply to them as well.

49 HRC, *ivi*, para. 9.

50 *Ibidem*, paras. 62-66.

51 *Ibidem*, and *supra*, the French draft law.

4. Ill-treatment and the ECtHR's approach to cases concerning GOV

Establishing the conducts constituting GOV is fundamental in attempting to assess whether it can amount to ill-treatment. The jurisprudence of the ECtHR concerning violations of Article 3 is rather vast and has been particularly receptive of the principle of the "living instrument", namely that the ECHR has to be interpreted in light of the time in which it is being applied, attentive to the changes in society's perception and understanding of certain issues. It is with this principle in mind that the Court found in *Selmouni v. France* that the punching, kicking and beating of a defendant while in custody, his rape with foreign objects and forcing him to put his face near the genitals of a male officer amounted to torture, while in *Ireland v. United Kingdom* 20 years prior, the Court had found that similar practices only amounted to inhuman treatment⁵².

The first approach to the prohibition of ill-treatment by the Strasbourg judges was to construe it as a ladder, as a prohibition which included three separate steps, yet connected: the prohibition of degrading treatment or punishment; the prohibition of inhuman treatment or punishment, the prohibition of torture. The first to elaborate such a distinction between the conducts of ill-treatment was the then European Commission of Human Rights in the *Greek case*⁵³. According to the Commission: "all torture must be inhuman and degrading treatment, and inhuman treatment also degrading"⁵⁴. Hence, torture includes inhuman and degrading treatments, but it goes beyond that. As per the Commission's conceptualization, torture describes inhuman treatments which have been inflicted purposefully, meaning with the intent of obtaining a confession or any information, or the perpetration of punishment which makes it an *aggravated* form of inhuman treatment⁵⁵. Such stepped approach was confirmed and adopted by the Court in several cases, such as in *Dikme v. Turkey*⁵⁶ and *Aksoy v. Turkey*⁵⁷; as well as in *Selçuk and Asker v. Turkey*⁵⁸ and in *Chember v. Russia*⁵⁹, to name a few⁶⁰. To dis-

52 See ECtHR, 28 July 1999, *Selmouni v. France*; ECtHR, 18 January 1978, *Ireland v. United Kingdom*. In the latter case, of 20 years prior to *Selmouni*, the Court assessed that questioning through the so-called "five techniques" of interrogation, which meant that detained persons were: forced in a spread-eagled position against a wall for up to 20 or 30 hours a day; blinded with a dark hood; subjected to hearing a loud hissing noise; deprived of sleep and food amounted to inhuman treatment, even though the then European Commission of Human Rights had found such conducts amounting to torture.

53 ECtHR, 5 November 1969, *The Greek Case*.

54 *Ibidem*.

55 See: M. Evans, *Getting to Grips with Torture*, in *International and Comparative Law Quarterly*, 2002, 51, p. 382; A. Reidy, *op. cit.*; Mark E. Villiger, *Handbook on the European Convention on Human Rights*, Leiden / Boston, Brill | Nijhoff, 2023; M.K. Addo, N. Grief, *Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?*, in *European Journal of International Law*, 1998, 9, pp. 510-524.

56 ECtHR, 11 July 2000, *Dikme v. Turkey*. The applicant, while in custody, was punched and kicked, his life was threatened and later he was stripped and was hanged by his arms tied behind his back, while being beaten and subjected to electroshock, with electrodes attached to his feet and genitals. The Court concluded that the pain and suffering to which Mr. Dikme was subjected was severe enough to amount to torture and found Turkey responsible of violating the prohibition of torture under Article 3 ECHR. See paras.: 12-15; 96-97.

57 ECtHR, 18 December 1996, *Aksoy v. Turkey*. Mr. Aksoy was also stripped naked and hanged by his arms, tied behind his back. He too was beaten while hanging, electrocuted with electrodes attached to his genitals, and in the meantime had water thrown at him, all while being blindfolded. Mr. Aksoy reported that such treatment caused a temporal paralysis of his arms and hands, and that when he asked to see a doctor, he was refused medical treatment. See paras.: 14-15; 96-97.

58 ECtHR, 19 April 1998, *Selçuk and Asker v. Turkey*. The Court found that the premeditated destruction of the homes of the two applicants met the threshold for inhuman treatment. Such destruction, operated at the hands of the security forces of

tinguish between conducts, as well as to assess whether the treatment of an individual reached the level required to trigger a violation under Article 3, the Court has introduced the minimum level of severity test. Namely, for a conduct (despite the nature of the conduct itself) to be considered prohibited under Article 3, it must reach a minimum level of severity – i.e., of pain and suffering – which subsequently, according to the greater or lesser *intensity* of such suffering is qualified as either torture, inhuman treatment or degrading treatment⁶¹. Such appreciation is carried out by the Court on case by case basis, and it is relative to the circumstances of the case.

Despite the rigidity which may be implied in a ladder approach, the jurisprudence of the ECtHR on the matter has been anything but rigid. Without the parameters of threshold for torture and inhuman or degrading treatment or punishment strictly defined, the Court availed itself of the definition at the international level provided by CAT, and of its power concerning interpretation, and was able to widen the parameters of Article 3 to include *non-refoulement*⁶² as a violation of Article 3, as well as the rape of a young woman, still underage, as amounting to torture⁶³.

The Court has also decided on cases concerning GOV. Though not precisely identified as such, it has ruled on issues of forced sterilization, which constitute one of the most serious conducts of GOV. For instance, in *V.C. v. Slovakia*⁶⁴ and *N.B. v. Slovakia*⁶⁵, the Court had to decide whether the forced sterilization of the two applicants entailed a violation of Article 3 ECHR. Despite the similarities between the cases, the two happened in two different hospitals in Slovakia. In *V.C.*, a young woman of

the country, left the applicants deprived of their livelihoods and forced them to move elsewhere, para. 77.

⁵⁹ ECtHR, 3 July 2008, *Chember v. Russia*. The applicant, who injured his spine during a military training course, was refused medical treatment after his injury. He was later moved to another military facility and forced to carry out heavy physical tasks, since no medical condition was documented. Later the applicant collapsed and was rushed to the medical unit, where he finally received treatment, having his condition finally acknowledged and leading to his discharge from the military service. According to the assessment of the Court, due to the knowledge of the applicant's superiors who were aware of his injury, and despite that forced him to carry out the abovementioned tasks, thus acting deliberately and in a calculated way to cause him suffering, the Court found such treatment as amounting to inhuman, hence found Russia in violation of Article 3 ECHR. See paras.: 7-16; 52-57.

⁶⁰ See also: S. Bartole, B. Conforti, G. Raimondi, *Commentario alla Convenzione Europea dei Diritti dell'Uomo e Delle Libertà Fondamentali*, Padova, CEDAM, 2001, pp. 55-56; S. Bertole, P. De Sena, V. Zagrebelsky, *Commentario breve alla Convenzione Europea dei Diritti dell'Uomo*, Padova, CEDAM, 2012.

⁶¹ *Ibidem*, p. 56.

⁶² On the jurisprudence of the ECtHR on non-refoulement, see, among others: L. Jakulevičienė, *Principle of non-refoulement in the context of the recent ECtHR caselaw and the EU migration and asylum pact*, in *The Journal of the Academy of European Law*, 2023, 24, pp. 379-369; E. Hamdan, *The Principle of Non-refoulement under the ECHR and the CAT*, The Hague, Brill | Nijhoff, 2016.

⁶³ See: ECtHR, 25 September 1997, *Aydin v. Turkey*. This was one of the first cases where the Court handled a case of rape as amounting to torture. The applicant, a minor female of Kurdish origin, was arrested by Turkish authorities alongside other members of her family, from which she was separated upon suspicion of ties with the PKK (Workers' Party of Kurdistan). Upon arrival at the gendarmerie headquarters, she was brought into a room blindfolded, where a male officer later entered, forcibly removing her clothes, beating her and eventually raping her from behind. She was then ordered to get dressed, though covered in blood, and subsequently brutally beaten and threatened not to disclose about the rape. In the end, the Court assessed that: "the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention", para. 86.

⁶⁴ ECtHR, 8 November 2011, *V.C. v. Slovakia*.

⁶⁵ ECtHR, 12 June 2012, *N.B. v. Slovakia*.

Roma origin, unemployed, uneducated and who spoke only Roma and a local dialect, went to Prešov hospital as she was in labour, about to deliver her second child. She was in pain due to the labour, and while she was waiting to receive a C-section, she was told by the medical staff that if she were to get pregnant again, her life and that of her baby could be severely endangered and that they recommended sterilization. The applicant was asked to sign a document, authorizing the sterilization procedure to be administered after the C-section was performed, but later complained of the fact that she did not know what sterilization actually meant (not speaking the language fluently); that she did not know that it was an irreversible procedure; and that she was asked to sign a document she did not fully understand⁶⁶.

In *N.B.*, the circumstances of the case were quite similar. The applicant, after the delivery of her second child at Gelnica hospital, was (forcibly) sterilized. She too was a young woman of Roma origin, not quite fluent in the Slovak language, and she was asked to sign a document which she did not fully comprehend upon her arrival to the hospital, after having been administered several drugs to ease her pain and help her muscles to relax and prepare for the delivery. She reported feeling intoxicated because of the medications, and that the staff of the hospital had to help her sign the documents, as she was too tired and too confused. Furthermore, she too was presented with a life-threatening scenario by a doctor, who told her that she could die if she did not sign the papers⁶⁷. In both cases, the Court found a violation of Article 3 by Slovakia, hence finding that what both women underwent met the thresholds of Article 3⁶⁸. The Court dealt also with cases of forced abortions, such as *G.M. and Others v. Moldova*, where it found violations of both the procedural and substantive limbs of Article 3 for all applicants⁶⁹.

The cases presented at the ECtHR, concerning forced abortions and forced sterilizations, were found as having “attained the threshold of severity required to bring it within the scope of Article 3”⁷⁰. In its decisions, the Court did not venture to state whether the forced sterilizations amounted to torture or to inhuman or degrading treatment, limiting its considerations to the attainment of the severity threshold and the consequent breach of Article 3, thus possibly suggesting a departure by of the Court from the ladder approach to ill-treatment which had characterized its initial jurisprudence on matters concerning violations of Article 3. In all cases of GOV, the Court noted the lack of a clear intention to cause ill-treatment to the applicants and expressly mentioned it within its decisions, yet did not consider it relevant as to the recognition of the violations⁷¹. Rather, in both cases the Court insisted on the element of consent: according to the judges the conduct of the medical staff (i.e. the procedure and the manner to which the patient was asked to agree to it) displayed a gross disregard to her to right of autonomy and of choice. This treatment, capable of arousing fear, anguish and inferiority as

66 ECtHR, *V.C. v. Slovakia*, *cit.*

67 ECtHR, *N.B. v. Slovakia*, *cit.*

68 In the words of the Court: “The sterilisation procedure, including the manner in which the applicant was requested to agree to it, was liable to arouse in her feelings of fear, anguish and inferiority and to entail lasting suffering. [...] Although there is no indication that the medical staff acted with the intention of ill-treating the applicant, they nevertheless displayed gross disregard for her right to autonomy and choice as a patient. In the Court’s view, the treatment to which she was subjected as described above attained the threshold of severity required to bring it within the scope of Article 3”. See: ECtHR, *V.C. v. Slovakia*, *cit.*, paras. 118-119.

69 ECtHR, 22 November 2022, *G.M. and others v. The Republic of Moldova*.

70 See: ECtHR, *V.C. v. Slovakia*, *cit.*, para. 119; *N.B. v. Slovakia*, *cit.*, para. 80. *G.M. and others v. The Republic of Moldova*, *cit.*, para. 134.

71 See: ECtHR, *V.C. v. Slovakia*, *cit.*; ECtHR, *N.B. v. Slovakia*, *cit.*, para. 73; ECtHR, *G.M. and others v. The Republic of Moldova*, *cit.*, para. 113.

well as lasting suffering were above the threshold of severity required for Article 3, thus bringing the treatment within the scope of the prohibition of ill-treatment⁷².

Yet, the cases the ECtHR dealt with concern the most severe cases of GOV, such as forced abortions and forced sterilizations, and the Court indeed found that they do meet the threshold to be considered as ill-treatment. It could be therefore argued that by the established jurisprudence of the Court, cases of GOV amount to ill-treatment. However, GOV is also an umbrella term, as mentioned, which ranges between different practices and behaviours, all sharing some traits such as gender-based violations, the infringement upon human dignity and the lack of prior, informed and willing consent. Therefore, it needs to be asked whether all forms of GOV meet the severity threshold for ill-treatment and whether the conceptualization of ill-treatment as a ladder, divided into torture, inhuman treatment and degrading treatment is effective in the evaluation of gender-based forms of violence.

5. Widening the parameters of ill-treatment through the feminist method: considerations *de lege lata* and *de lege ferenda*

Even though some cases in the jurisprudence of the ECtHR seem to suggest that a change in approach is in the works, it is difficult to conclusively state that the Court is abandoning the separation between torture and IDT altogether⁷³. Therefore, the Court is yet to set clearly on either the wider approach to violations of Article 3 or its original ladder interpretation. The feminist method is useful in drawing two sets of considerations on the matter. The following paragraphs will offer some reflections *de lege lata*, considering the ladder approach to ill-treatment, thus separating the conducts, and *de lege ferenda*, reflecting on a wider approach to violations of Article 3 by looking at GOV as a case study. In the first case, the feminist method highlights the necessity of interpreting the criteria for torture and inhuman or degrading treatment with a gender-sensitive approach focusing on the element of consent (or lack thereof), while in the second case it pushes the reflections a little deeper (continuing with the metaphor of the feminist method as an archaeological dig) in asking whether such scaled interpretation of ill-treatment is effective in cases of gender-based violence against women and violations of their sexual and reproductive rights.

5.1. Considerations *de lege lata*

In conceptualising violations of women' sexual and reproductive rights as torture or CIDT, Sifris noted: "once we accept the existing criteria, then the normative question may be relevant from a moral, ethical and philosophical perspective but not from a legal perspective. From a legal perspective, the question is whether, in a given factual context, the conduct in question meets the criteria for torture or CIDT"⁷⁴. In the context of considerations *de lege lata*, hence working within the not yet dismantled scale-approach to ill-treatment of the ECHR, the feminist method proposes a gendered lens through which the criteria necessary for the different conducts of ill-treatment can be interpreted; to effectively appreciate and evaluate violations of women' sexual and reproductive rights, as is the case for GOV.

⁷² *Ibidem*.

⁷³ S. Bartole, B. Conforti, G. Raimondi, *ivi*, pp. 58-59.

⁷⁴ R. Sifris, *ivi*, p. 269.

5.1.1. GOV as torture

Torture has been described as ill-treatment which: i) causes severe physical or mental pain and suffering; ii) has a purpose; iii) is inflicted by or with the acquiescence of an official⁷⁵. In regards to the first element, the severe pain, both mental and physical, reports and studies on GOV seem to suggest that the level of harm inflicted upon the patient is enough to meet the first threshold⁷⁶. This is true both from a physical (in the case for instance of episiotomies, forced sterilizations, forced abortions, and female genital mutilations – FGMs – in particular) as well as from a mental perspective, as the psychological scarring derived from such procedures, from the deprivation of self-determination and personal autonomy, from the tearing of the bond between patient and doctor is not to be underestimated. This may lead to conclude that the severity threshold for ill-treatment can be met by practices of GOV, not necessarily only for the most serious ones, to be operated on a case by case basis and in light of the factual context and circumstances of the case.

Nonetheless, the issue concerning the evaluation of the severity threshold both to assess the triggering of Article 3 and subsequently of the different conducts raises a number of concerns in light of women's pain and suffering, which will be addressed in the paragraph dedicated to considerations *de lege ferenda*. Suffices to say, if the scale-approach is adopted, such criteria should be read with a gender oriented perspective.

Concerning to the second criterion, the purposive character of torture has been criticised by feminist scholars as reinforcing the 'male' dimension of torture, limiting it to situations of deprived liberty, arrest and interrogation⁷⁷. The issue raised is not on the purposive character in *itself*, rather in the very restrictive delimitation it has been accorded. It could be argued that, since the prohibition of torture is, as the Court in *Aydin v. Turkey* stated, "one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment"⁷⁸ and that it entails "the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering"⁷⁹, that such a restrictive approach is indeed necessary.

However, said restrictive approach has been questioned by the ECtHR itself, by extending the parameters of torture to non-refoulement and, even more so in light of the feminist method. According to Edwards, the intention of the drafters of the UNCAT was indeed to provide an extensive interpretation of the notion of "purpose", more focused on its existence rather than on the lack thereof to qualify an act as torture⁸⁰. For Evans, it is indeed the purposive character that should be given attention to recognise an act as torture or inhuman treatment⁸¹. Following the feminist method, which aims to dismantle the patterns of oppression towards women, such extensive approach should be preferred in cases where women's experiences are to be decided, referring to "any purpose" instead⁸². In instances of torture concerning women, such as rapes, domestic violence and cases of GOV as well, the element of purpose is to be found in the discrimination due to her gender. As posited by Sifris: "the discrimi-

75 *Ibidem*, p. 375.

76 See: S. Brunello and others, *op. cit.*; S. Larrea and others, *op. cit.*, and also M.T.R. Borges, *A Violent Birth: Reframing Coerced Procedures During Childbirth as Obstetric Violence*; in *Duke Law Journal*, 2015, 67, pp. 827-862.

77 A. Edwards, *ivi*, p. 375.

78 ECtHR, *Aydin v. Turkey*, *cit.*, para. 81.

79 *Ibidem*, para. 82.

80 A. Edwards, *ivi*, p. 375.

81 See above.

82 A. Edwards, *ivi*, p. 376.

nation that is frequently inherent in both of these forms of restrictions on women's reproductive freedom is to a large extent based on socially constructed assumptions about women's nature and women's role in society"⁸³. Furthermore, according to United Nations Convention against Torture (CAT), at Article 1, torture is a practice intentionally inflicted upon a person for the purposes of extracting a confession or information, of punishing them for having committed or be suspected of having committed a specific act; of coercing them into doing something or intimidating them and "for any reason based on *discrimination of any kind*"⁸⁴. Hence, discriminatory grounds are already considered at the international level as elements which could amount to purpose in the case of torture.

Lastly, for what concerns the public official element, a few arguments can be presented. In its report on a gender-sensitive interpretation of torture, the Special Rapporteur on torture established that "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"⁸⁵. Hence, State obligations extend also to conducts of individuals perpetrated in a private setting, not only in the public realm. However, a different argument can be made for hospital staff. According to Sifris, when procedures such as forced abortions, forced sterilizations and FGMs are performed in public hospitals, by staff which is employed by the State, the public nature of the hospital is enough to allow the conducts to be attributable to the State – even if the practice is prohibited by law – hence, entailing State responsibility⁸⁶.

However, the link should not be limited to the direct attributability of the conduct to the State. On the one hand, women subjected to forms of GOV find themselves in a situation of *powerlessness*, where a figure which they regard and is perceived as an *authority* (the medical staff in charge of their life and that of their child in the case of pregnant women, for instance) is forcing upon them a conduct which is humiliating, dehumanizing and which deprives them of their autonomy, rendering them unable to avoid it either through coercion or due the circumstances. A feminist interpretation would shift the focus from the mere procedural element (or the lack thereof) to a more extensive interpretation in light not only of the findings of the Special Rapporteur Nowak, but also of due diligence obligations in human rights law⁸⁷.

Moreover, such argument could ensure the protection of women's rights even in those contexts where GOV is performed in private facilities, not run by State-employed doctors⁸⁸. If the focus is on the *purpose* for which the conduct is being inflicted on the receiving individual, and on the attainment of the *level* of pain and suffering meeting the threshold of Article 3, then the public character and the notion of the direct link seems to be an aspect which, in a balancing effort, could be more extensively interpreted. This seems to be corroborated if considering the feminist critique to the public/private divide which has been mentioned above.

A further element to be taken into account in support of the previous arguments on the *public cri-*

83 R. Sifris, *ivi*, p. 146.

84 Emphasis added. UNGA, *United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984.

85 HRC, *ivi*, para. 31.

86 R. Sifris, *ivi*, p. 155. Sifris recalls how the CEDAW Committee also reached a similar conclusion in a case brought against Hungary, where it found that through the hospital personnel, the State had failed to provide information and advice to the applicant concerning family planning, hence entailing a violation of Article 10(h) of CEDAW. On the responsibility of States for violations of women's health occurring in hospitals, see, among others: S. De Vido, *Violence Against Women's Health in International Law*, Manchester, MUP, 2021.

87 See A. Edwards, *ivi*; R. Sifris, *ivi*; S. De Vido, *ivi*.

88 See S. De Vido, *ivi*, on the element of the public function carried rather than de jure qualification.

terion concerns the nature of GOV itself, as evidenced by the reports both at regional and international level. GOV does not correspond to isolated instances, but rather to a widespread phenomenon, a form of gender-based violence, which is descriptive of a certain socially and culturally embedded approaches towards women. As Chinkin and Charlesworth stated: “if violence against women is understood not just as aberrant behaviour but as part of the structure of the universal subordination of women, it cannot be considered a purely ‘private’ issue”⁸⁹.

5.1.2. GOV as inhuman or degrading treatment

An appreciation of GOV as either torture or IDT should be, as mentioned, on a case-by-case basis. However, if conducts of GOV can amount to torture, in those cases in which the severity threshold is assessed as lower by the Court, and there is a lack of clear intent or purpose by the perpetrators, such conducts may well amount to inhuman treatment, or, in the case of demining, debasing and humiliating comments or behaviours, to degrading treatment, read with a gender-sensitive perspective.

In this context, the jurisprudence of the IACtHR is more appreciative of the characters of GOV. When presented with cases of GOV, the IACtHR has identified them as such (whereas the ECtHR did not), as forms of gender-based violence against women⁹⁰ and as a form of inhuman or degrading treatment. For instance, in *I.V. v Bolivia*, the IACtHR recalled the findings of the Interamerican Commission concerning the violation of Article 7 of the Belém Do Pará Convention which provides for the right to a life free from violence for women. In its findings, the Commission stated that the performing of a non-consensual sterilization in Argentina and Venezuela was recognised as a form of OV⁹¹. Furthermore, the Court eventually found Bolivia responsible for the violation of Article 5(1) and 5(2) of the American Convention, thus recognising that the applicant’s forced sterilizations constituted cruel, inhuman and degrading treatment “contrary to human dignity”⁹².

The same conclusion concerning the inhuman and degrading nature of some forms of GOV was also shared by the Special Rapporteur Šimonovi⁹³ as well as by CEDAW. According to CEDAW’s General Comment No. 35: “violations of women’s sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment”⁹⁴.

89 H. Charlesworth, C. Chinkin, *ivi*, p. 235. See also S. De Vido, *ivi*.

90 See IACtHR, 16 November 2022, *Britze Arce v. Argentina*, paras. 75 and 85.

91 IACtHR, 30 November 2016, *I.V. v. Bolivia*, para. 143.

92 *Ibidem*, para. 270.

93 HRC, *ivi*, para. 25. The report refers to episiotomies as potentially amounting to inhuman or degrading treatment, as well as to the findings of CEDAW concerning certain forms of forced medicalization as amounting to inhuman treatment.

94 CEDAW, *General Comment No. 35 on gender-based violence against women, updating General Recommendation No. 19*, UN Doc. CEDAW/C/GC/35, 26 July 2017, para. 18.

5.2. Considerations *de lege ferenda*

The previous paragraph delved into reflections based on how the prohibition of ill-treatment *has been* approached in the past, offering insights on how to interpret the established criteria, which could be interpreted with a gender oriented perspective, were the Court to remain set on separating torture from ill treatment and degrading treatment. This paragraph offers reflections on how the prohibition *could be* approached in the future, leaving aside the strict separation between the conducts of ill-treatment, and rather reasoning on violations of the prohibition of ill-treatment altogether. Such considerations arise when applying the feminist method to the interpretation of Article 3 ECHR and revolve around the threshold test. As mentioned, the aim of the feminist method is to address the inner biases within the law and to unravel those *silences* where forms of discriminations disproportionately impacting individuals based on their gender may nestle. In light of this aim, as well as the UN Committee against Torture (UNCAT) quasi-jurisprudence and certain developments in the jurisprudence of the ECtHR, a deeper look at the severity threshold test is necessary.

Even though it is possible, as demonstrated, to find GOV as amounting to either one of the conducts prohibited under Article 3, thus meeting the threshold required within the scope of Article 3, if a gender-sensitive interpretation is applied, the question which still needs to be asked is whether such test, in the context of violations of women's sexual and reproductive rights specifically, and more broadly in cases of gender-based violence against women, is effective. Indeed, the pain and suffering caused by an episiotomy may impact women differently, as may the degrading and debasing comments associated with GOV. Leaving the evaluation of the severity of the pain and suffering to the Court, on a case by case basis, may raise some concerns.

The contours of the minimum threshold have not been defined, as determined by the UNCAT as well in deciding in another case against Slovakia, where it stated "that the definitional threshold between ill-treatment and torture is often not clear and that the conditions that give rise to ill-treatment frequently facilitate torture"⁹⁵. Operating this distinction on such undefined grounds runs the risk of minimising psychological harm for instance⁹⁶. Furthermore, this would determine an imbalance not only in the evaluation of the violation itself but also in terms of reparations for the victims, if a State were found responsible for torture or IDT.

The ECtHR has in certain cases avoided the use of the severity test. In *Ribitsch v. Austria* for instance, it stated that the simple use of unnecessary physical force towards a person deprived of their liberty is enough to trigger Article 3, without determining whether the minimum level of severity was met⁹⁷. Discussions on possible openings and changes in the ECtHR's approaches to ill-treatment have been proposed by feminist scholars⁹⁸ as well as by other scholars, who have also proposed a change in the scale-approach to torture and inhuman treatment⁹⁹.

95 UNCAT, 21 January 2021, *Lucia Černáková v. Slovakia*.

96 See: S. De Vido, *ivi*, p. 137.

97 ECtHR, 4 December 1995, *Ribitsch v. Austria*, para. 38. See also: S. Bartole, B. Conforti, G. Raimondi, *ivi*, p. 59.

98 See: R. Sifris, *op. cit.*; A. Edwards, *ivi*, pp. 349-391; A. Byrnes, *The Convention Against Torture*, in K.D. Askin, D.M. Koenig (eds.), *Women and International Human Rights Law*, 1999, II, pp. 183-208; C.A. MacKinnon, in *op.cit.*; K.E. Mahoney and P. Mahoney (eds.), Dordrecht, pp. 21-31; R. Copelon, *Recognising the Egregious in the Everyday: Domestic Violence as Torture*, in *Columbia Human Rights Law Review*, 1999, 25, pp. 291-367.

99 See: M. Evans, *ivi*, p. 382. Evans suggested an approach enhancing a "horizontal model" to approach ill-treatment instead of the "vertical model" deployed by the ECtHR. With this horizontal approach, torture and inhuman treatment would stand alongside one another, separated only by their purposive character, thus avoiding the social stigma that has thus far

In *Ribitsch*, the Strasbourg judges acknowledged that the context in which the violation occurred, i.e., detention, rendered the conduct, i.e. unnecessary physical force, prohibited under Article 3, thus within the scope of the prohibition of ill-treatment. Feminist critiques have however underlined how the criterion of detention limits the scope of application to the *public* (male) field. Bearing in mind the feminist critiques as well as the jurisprudence of the ECtHR and the gender-sensitive approach to ill-treatment suggested by the Special Rapporteur, in the context of sexual and reproductive rights of women, the element which could bring conducts within the scope of Article 3 is not so much the public element, rather the lack of prior, informed and willing consent and the loss over a woman's reproductive and sexual processes, which renders them situationally powerless. Any recourse to unconsented medical procedures, performed on patients without their prior, informed and willing consent may lead to the infringement of their dignity, the core content of Article 3, and could be construed as ill-treatment within the scope of Article 3.

Therefore, in light of the feminist method, when approaching gender-based violations of women's rights, the Court should refrain from adopting the ladder approach to Article 3 and follow on the path which has started, adopting a wider approach to the prohibition of ill-treatment, so as to avoid minimizing women's experiences and their pain as well as placing higher stigma on certain conducts instead of others, and lastly to more effectively evaluate reparations.

6. Conclusion

The purpose of this paper was to investigate, through the feminist method, whether GOV can amount to ill-treatment as per Article 3 ECHR. It has emerged that forms of GOV do amount to ill-treatment, and that even the "less serious" forms of GOV so far unaddressed by the jurisprudence of the ECtHR could be brought within the scope of Article 3, as they arouse feelings of debasement in victims, of humiliation, and they ultimately constitute a violation of an individual's dignity, protected under Article 3 ECHR.

The application of the feminist method, as an archaeological dig, has allowed us to dissect the contours of ill-treatment, its limits and to highlight how women's experiences have been left outside the scope of application of the article, and how it demands a more extensive interpretation of the provision as well as a rethinking of the notion of ill-treatment, with a more gender-sensitive approach. The widening of the notion of what amounts to torture as well as its attributability to States for acts committed in the private realm should not be interpreted as an underappreciation of the severity of prohibition, but rather as a recognition of those dimensions – women's – so far left outside from these considerations. Ultimately, the contribution reflected on whether such separation is useful – and effective – in the context of GOV and women's rights. A gender-sensitive interpretation of the ECHR, especially in light of the Istanbul Convention¹⁰⁰, is a further argument in support of such considerations, both *de lege lata* and *de lege ferenda*.

Recognising that gender-based phenomena, such as GOV, which tend to occur mostly in the private realm are indeed not to be disregarded as a matter outside from the state's interests and responsibilities, would allow to tackle the root causes of gender-based violence, which are to be found at a

been placed on torture. Torture would be ill-treatment which has a *specific* purpose, with this being the aggravating factor. "If we choose to place a greater stigma on the purposive ill-treatment of individuals than of the non-purposive humiliation of individuals, then that is a moral and not a legal judgment", p. 383.

¹⁰⁰ On the matter, see: M. Frulli, S. De Vido, *Preventing and Combating Violence Against Women and Domestic Violence*, Cheltenham, Northampton, Edward Elgar, 2023.

structural, institutional as well as societal level.