Government Accountability for Torture and Ill-Treatment in Health Settings

AN OPEN SOCIETY FOUNDATIONS BRIEFING PAPER

THE ABSOLUTE prohibition under human rights law of all forms of **torture and cruel, inhuman, and degrading treatment** ("torture and ill-treatment") does not apply only to prisons, pretrial detention centers, and other places where torture and ill-treatment are commonly thought to occur. It also applies to places such as schools, hospitals, orphanages, and social care institutions—places where coercion, power dynamics, and practices occurring outside the purview of law or justice systems can contribute to the infliction of unjustified and severe pain and suffering on marginalized people.

This briefing paper focuses on torture and ill-treatment in **health settings**, including hospitals, clinics, hospices, people's homes, or anywhere health care is delivered. It does not seek to stigmatize health providers as "torturers," but rather to focus on **government accountability** for placing health providers and patients in unacceptable situations whereby torture and ill-treatment is neither documented, prevented, punished, nor redressed.

The United Nations Human Rights Committee has explicitly recognized that the legal prohibition against torture and ill-treatment protects "in particular . . . patients in . . . medical institutions."[1] Yet, national, regional, and international mechanisms to promote accountability for and to prevent torture are rarely applied to health settings. Human rights bodies responsible for monitoring compliance with anti-torture provisions should **systematically examine health settings** in their reports and make actionable recommendations to governments on how to stop this abuse.

The Legal Definition of Torture and Ill-Treatment

The legal definition of torture and ill-treatment is broad enough to encompass a range of abuses occurring in health settings. Under international law, any **infliction of severe pain and suffering by a state actor or with state instigation, consent, or acquiescence** can, depending on the circumstances, constitute either torture or ill-treatment.[2]

Whether an act qualifies as "torture," "cruel and inhuman treatment or punishment," or "degrading treatment or punishment" depends on several factors, including the severity of pain or suffering inflicted, the type of pain and suffering inflicted (i.e. physical or mental), whether the pain and suffering was inflicted intentionally and for an improper purpose, and whether the pain and suffering is incidental to lawful sanctions. Generally speaking, cruel and inhuman treatment or punishment can be intentional or unintentional and with or without a specific purpose, while torture is always intentional and with a specific purpose.[3]

1 UN Human Rights Committee, Torture on Cruel, Inhuman, or Degrading Treatment or Punishment (Art 5): 03/10/92. CCPR General Comment. No. 20. Forty-fourth session, 1992.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], June 26, 1987, art. 1, 16

3 Manfred Nowak & Elizabeth McArthur, The United Nations Convention against Torture: A Commentary, p. 558. Article 1 of the Convention against Torture provides a non-exhaustive list of improper purposes that would support a finding of torture: "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 person, or for any reason based on discrimination of any kind."

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STOP TORTURE IN HEALTH CARE

Examples of Torture and Ill-Treatment in Health Settings

Torture and ill-treatment in health settings commonly occur among socially marginalized populations. People who are perceived as "deviant" by authorities, who pose a "nuisance" to health providers, who lack the power to complain or assert their rights, or who are associated with stigmatized or criminalized behaviors may be especially at risk. The following are **documented examples** of torture and ill-treatment against specific populations.

People needing pain relief, whether as part of palliative care or for chronic disease, injury, surgery, or labor may experience ill-treatment if their pain is severe enough and avoidable. Denial of pain relief is a pervasive problem among all of the populations discussed later in this briefing note: people with disabilities, women seeking reproductive health care, people living with HIV, people with tuberculosis, people who use drugs, sex workers, lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, and Roma. Denial of pain relief is also disturbingly common among children.

According to the World Health Organization, approximately 80 percent of the world's population—or tens of millions of people each year—have either no or insufficient access to treatment for moderate to severe pain, leading to profound physical, psychological, and social consequences.[4] In interviews with Human Rights Watch, people who had experienced severe pain in India "expressed the exact same sentiment as torture survivors: all they wanted was for the pain to stop. Unable to sign a confession to make that happen, several people [said] that they had wanted to commit suicide to end the pain, prayed to be taken away, or told doctors or relatives that they wanted to die."[5] A 28-year-old former drug user from Kyrgyzstan reported in 2006 that he had been given orthopedic surgery without anesthesia because doctors feared it would fuel his addiction. "They tied me down," he said. "One doctor held me down, pushed me to the table, and the second doctor gave the operation. I was screaming, awake, feeling all the pain, screaming and screaming as they hammered the nails into my bones."[6]

The reasons for denial of pain relief are many, including: ineffective supply and distribution systems for morphine; the absence of pain management policies or guidelines for practitioners; excessively strict drug control regulations that unnecessarily impede access to morphine or establish excessive penalties for mishandling it; failure to ensure that health care workers receive instruction on pain management and palliative care as part of their training; and insufficient efforts to ensure morphine is available.[7] Having considered these reasons, the former United Nations Special Rapporteur on Torture, Manfred Nowak, concluded that the "[f]ailure of governments to take reasonable measures to ensure accessibility of pain treatment, which leaves millions of people to suffer needlessly from severe and often prolonged pain, raises questions whether they have adequately discharged this obligation [to protect people under their jurisdiction from inhuman and degrading treatment]," and furthermore, that "the de facto denial of access to pain relief, if it causes severe pain and suffering, constitutes cruel, inhuman, or degrading treatment or punishment."[8] In a joint statement with the UN Special Rapporteur on the Right to Health, he additionally confirmed, "The failure to ensure access to controlled medications for pain and suffering threatens fundamental rights to health and to protection against cruel, inhuman and degrading treatment."[9]

People with disabilities are especially vulnerable to torture and ill-treatment in health settings, though this is not the only context where they suffer such abuse. The situation is especially dire for the thousands who

4 World Health Organization, Briefing Note: "Access to Controlled Medications Programme," (September 2008), cited in Human Rights Watch, *"Please, do not make us suffer any more...": Access to Pain Treatment as a Human Right* (March 2009), p. 11.

5 Human Rights Watch, *"Please, do not make us suffer any more,"* pp. 6–7.

6 Public Association Aman Plus, *Observance of the Rights of People Who Use Drugs to Obtain Health Care in the Kyrgyz Republic*, Open Society Institute and Soros Foundation Kyrgyzstan (December 2008).

7 Human Rights Watch, *"Please, do not make us suffer any more,"* p. 2.

8 UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/HRC/10/44, January 14, 2009, para. 72, http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/12/PDF/G0910312.pdf?OpenElement (retrieved August 4, 2009).

9 Letter from Manfred Nowak and Anand Grover, Special Rapporteur on the Right to the Highest Attainable Standard of Health, to Her Excellency Ms. Selma Ashipala-Musavyi, Chairperson of the 52nd Session of the Commission on Narcotic Drugs, December 10, 2008, p. 4, http://www.hrw.org/sites/default/files/related_material/12.10.2008%20Letter%20to%20CND%20fromSpecial%20Rapporteurs.pdf (retrieved November 6, 2009).

are forced to live for decades, and often for life, in long-stay closed institutions. Restrictions on legal capacity affecting the right to refuse treatment, mental health laws that override refusal to consent to treatment, laws that suspend the right to liberty, and stigmatization against people with disabilities in health care systems are of particular concern. In 2008, Manfred Nowak concluded, "The requirement of intent in article 1 of the Convention against Torture can be effectively implied where a person has been discriminated against on the basis of disability. This is particularly relevant in the context of medical treatment of persons with disabilities, where serious violations and discrimination against persons with disabilities may be masked as 'good intentions' on the part of health professionals."[10] Nowak went on to say that "forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment."[11]

In a recent report on Serbia, Mental Disability Rights International alleged torture and ill-treatment against children and adults in institutions marked by "unhygienic conditions and filth." Bedridden patients are forced "to urinate and defecate in metal buckets which are kept under their beds," locked away in "tiny isolation rooms" as punishment, subjected to lack of heat during the winter, and forced to sleep in bedrooms contaminated by mice and rats. Medical neglect had led to emaciated and dehydrated children lying in cribs, children with untreated hydrocephalus (an abnormal buildup of cerebral spinal fluid that causes swelling in the brain and skull and frequent death), and people with open cuts and sores, eye infections, and missing or rotten teeth.[12] Also documented were dehumanizing practices such as shaving residents' heads, denying them access to their personal clothes and effects, and imposing "work therapy" whereby residents are forced to do chores in exchange for rewards such as coffee. Similarly, in a psychiatric hospital in Kyrgyzstan, the NGO Mental Health and Society found that patients were forced to bake bread in the name of "labor therapy." Though the patients are unpaid for this work, the hospital charges the government market prices for the product.[13] Another major problem is the widespread and extensive use of physical restraints—sometimes throughout a patient's lifetime—without any standards controlling their usage or any justification for using them.

The use of cage beds in mental health facilities is a still-documented practice that violates the right to be free from torture and ill-treatment. In a 2003 report, the Mental Disability Advocacy Center (MDAC) documented the routine use of cage beds in Hungary, the Czech Republic, Slovakia, and Slovenia.[14] MDAC found that cage beds were routinely being used as a substitute for adequate staffing or as a form of punishment against people with severe intellectual disabilities, elderly people with dementia, and psychiatric patients. People were placed in cage beds for "hours, days, weeks, or sometimes months or years." A former user of psychiatric services said of the use of cage beds, "You feel like you would rather kill yourself than be in there for several days." Another reported having been rendered unconscious by an involuntary injection administered just after giving birth and then placed in a cage bed. When she woke up, she was not permitted to use the bathroom and "had to do it in the cage bed like an animal."

Women seeking reproductive health care frequently encounter "low-quality, often negligent and abusive care and treatment" that sometimes rises to the level of torture or ill-treatment.[15] In a 2011 briefing paper, the Center for Reproductive Rights (CRR) identified several violations of

10 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/63/175, July 28, 2008, para. 49.

11 Ibid, para. 63. A leading case in the area of torture and ill-treatment against persons with disabilities is the 2006 case of Ximenez-Lopes v. Brazil, in which the Inter-American Court of Human Rights found that Brazil had violated its obligations to protect a patient with a severe psychiatric disorder against inhumane treatment and the violation of his right to life. Among other abuses, the patient was physically assaulted as part of his "treatment" and subsequently died while interned in a mental health facility. Ximenes Lopes v. Brazil, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149.

12 Mental Disability Rights International, *Torment not Treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities* (November 2007).

13 B. Makenbaeva, *Budget of Mental Healthcare: Do the Public Money Flows Meet the Needs of People with Mental Health Problems?* (Mental Health and Society and Open Society Institute, 2009).

14 Mental Disability Advocacy Center, *Cage Beds: Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries* (2003). MDAC gives the following definition of "cage bed": "A bed with a cage placed on top of it to enclose a person within the confines of the bed. Often, a distinction is made between cage beds, constructed of metal bars, and net beds, constructed of metal frames and netting. Since the material with which it is constructed is of secondary importance, MDAC refers to both as cage beds."

15 *Ibid*.

women's reproductive rights, including verbal and physical abuse by health providers, extended delays in care leading to physical and emotional suffering, and involuntary detention in inhumane conditions for failure to pay medical bills. According to Human Rights Watch, medical staff at hospitals in Burundi have denied post-natal care, such as treating a baby's respiratory problems or removing the stitches from a caesarean delivery, to women who are locked up for failure to pay their medical bills.[16]

Forced and coerced sterilizations are also examples of torture and ill-treatment. Such practices have been documented against women living with HIV, Roma women, and women with mental disabilities, among other vulnerable and marginalized groups. According to CRR, "Experts recognize that the permanent deprivation of one's reproductive capacity without informed consent generally results in psychological trauma, including depression and grief." This issue has recently been litigated in countries as diverse as Chile, Namibia, and Slovakia. Both the UN Human Rights Committee and the Committee against Torture have addressed forced and coerced sterilization as a violation of the right to be free from torture and ill-treatment.[17] At the other extreme, women may be denied abortion or post-abortion care for the discriminatory and improper purpose of discouraging them from, or punishing them for, terminating their pregnancies, which can result in severe and long-lasting pain and suffering. The Committee against Torture has also considered denial of both abortion and post-abortion care in the context of the right to be free from torture and ill-treatment.[18]

People living with HIV in many countries report being mistreated by health providers or denied treatment in a manner that is cruel, inhuman, or degrading. In Vietnam, people living with HIV recently reported being ignored by health professionals, marked as HIV-positive on their clothes, segregated from other patients, and denied services such as lymph node incisions, in-patient admission, and cleaning.[19] Forced or compulsory HIV testing is also a common abuse that may constitute degrading treatment if it is "done on a discriminatory basis without respecting consent and necessity requirements…especially in a detention setting."[20] Unauthorized disclosure of HIV status to sexual partners, family members, employers, and other health workers is a frequent abuse of people living with HIV that may lead to physical violence, especially against women.[21]

Ill-treatment of people living with HIV in health settings is compounded by the association of HIV with criminalized behavior such as illicit drug use, homosexuality, and sex work. In Ukraine, injecting drug users living with HIV have been "denied emergency medical treatment, including by ambulances who refused to pick them up," "kicked out of hospitals," and "provided inadequate treatment by doctors who refused even to touch them."[22] In Jamaica, where HIV is stereotyped as a "gay disease," medical professionals have avoided touching the skin of people living with HIV with medical equipment, with one nurse saying she was "concerned about contracting the virus from patients who…'really hopelessly wanted you to get HIV too.'"[23] In Namibia, despite a policy of providing HIV prevention and treatment services free of charge to those who cannot afford them, sex workers who meet eligibility requirements are often discriminated against and denied these services.[24]

People with tuberculosis, a contagious and sometimes drug-resistant disease, have been unnecessarily detained for "treatment" in institutions where conditions can amount to ill-treatment. Detaining patients with tuberculosis is a form of administrative detention that is intended to prevent the further spread of disease; thus authorities must demonstrate that the detention is a necessary last-resort, and the detention itself should "respect human dignity, be culturally sensitive,

16 Human Rights Watch, *A High Price to Pay: Detention of Poor Patients in Hospitals* (September 2006), p. 35.

17 Center for Reproductive Rights, *Reproductive Rights Violations*, pp. 20-21

18 *Ibid*., pp. 22-24

19 Khuat Thi Hai Oanh, "Access to Tuberculosis Services among People Living with HIV in Vietnam," presentation at the World Lung Conference, 2007 (on file with the Open Society Foundations).

20 Report of the pecial Rapporteur on Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment to the Human Rights Council, A/HRC/10/44 (January 14, 2009), para. 65.

21 Suzanne Maman, et al, "The Intersections of HIV and Violence: Directions for Future Research and Interventions," *Social Science and Medicine* 50, pp. 459, 474.

22 Human Rights Watch, *Rhetoric and Risk: Human Rights Abuses Impeding Ukraine's Fight against HIV/AIDS*, p. 44.

23 Human Rights Watch, *Hated to Death*, p. 39.

24 Jayne Arnott and Anna-Louise Crago, *Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa* (2009), pg. 44, 46.

and be periodically reviewed by courts."[25] In practice, this is often not the case, and persons with TB are detained even when they are capable of adhering to infection control regimens and to treatment. In March 2008, *The New York Times* described the Jose Pearson Tuberculosis Hospital, a detention center for people with drug-resistant tuberculosis in South Africa, as "a prison for the sick," with razor wire to prevent patients from escaping, overcrowding, poor ventilation fueling the further spread of tuberculosis, and a single social worker for more than 300 detainees.[26] One detained patient told *The New York Times*, "I've seen people die and die and die. The only discharge you get from this place is to the mortuary." Poor conditions in TB treatment facilities can lead to the development of additional drug resistance and transmission to health care workers, resulting in patients that are more difficult and costly to treat.[27] Treatment in the community has been shown to be a more effective and less rights-violating alternative to detention of people with tuberculosis, who in any case have an absolute right to freedom from ill-treatment in confinement, and to due process to challenge their confinement.[28]

People who use drugs are a highly stigmatized and criminalized population whose experience of health care is often one of humiliation, punishment, and cruelty. In Ukraine, Human Rights Watch documented cases of drug users being kicked out of hospitals, provided treatment in an inadequate or abusive manner, and denied emergency care.[29] For example, one man said he had been denied a hospital room and told by a doctor, "Why do you come here and make more problems for us? You are guilty yourself for this." Another person was denied treatment for tuberculosis once the clinic workers found out she was a drug user: "I was staying at a tuberculosis clinic. My tuberculosis should have been [treated]. As soon as they found out that I was an addict, I was refused."[30] A report by the Eurasian Harm Reduction Network documented similar cases of ill-treatment, including the testimony of an outreach worker who brought a woman to a clinic for a leg abscess related to drug injection, only to be asked by the doctor, "Why do you mess with her, she's a drug addict!"[31] Limited coordination and integration of services in Ukraine and throughout Eastern Europe and Central Asia often forces patients to choose between TB, HIV, and drug treatment.[32]

A particular form of ill-treatment and possibly torture of drug users is the denial of opiate substitution treatment, including as a way of eliciting criminal confessions through inducing painful withdrawal symptoms.[33] The denial of methadone treatment in custodial settings has been deemed by both Manfred Nowak[34] and the European Court of Human Rights[35] to be a violation of the right to be free from torture and ill-treatment in certain circumstances. Similar reasoning ought to apply to the non-custodial context, particularly in instances where governments, such as the Russian Federation, impose a complete ban on substitution treatment.[36]

In many Asian countries, including Cambodia, China, Laos, Malaysia, Thailand, and Vietnam, thousands of children and adults who use drugs are administratively detained without due process in compulsory centers that purport to provide addiction treatment but in fact inflict abuse amounting to torture and ill-treatment. Practices documented in these centers include long hours of forced labor under extremely harsh conditions, partial lobotomy of drug users by inserting heated needles into their brain for up to a week,

25 Andrea Boggio, et al, "Limitations on Human Rights: Are They Justifiable to Reduce the Burden of TB in the Era of MDR- and XDR-TB?," *Health and Human Rights: An International Journal*, vol. 10, no.2 (2008). See also, United Nations, Economic and Social Council and U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

26 Celia W. Dugger, "TB Patients Chafe Under Lockdown in South Africa," *The New York Times*, March 25, 2008.

27 See, e.g. J. Jarand et al, "Extensively Drug-resistant Tuberculosis (XDR-TB) among Health Care Workers in South Africa," *Trop Med Int Health* 15(10) 1179-84; S. Naidoo, "TB in Health Care Workers in KwaZulu-Natal, South Africa," *Int J Tuberc Lung Dis* 10(6), 676-82.

28 Joseph J. Amon, Françoise Girard and Salmaan Keshavjee, "Limitations on Human Rights in the Context of Drug-Resistant Tuberculosis: A reply to Boggio et al.," *Health and Human Rights: An International Journal* 11/1 (2009), Perspectives, http://hhrjournal.org/blog/wp-content/uploads/2009/10/amon.pdf.

29 Human Rights Watch, *Rhetoric and Risk*, p. 48.

30 Eurasian Harm Reduction Network, *Sex Work, HIV/AIDS, and Human Rights in Central and Eastern Europe and Central Asia* (2006).

31 Aman Plus, *Observance of the Rights of Injecting Drug Users.*

32 See M. Curtis, *Building Integrated Care Services for Injection Drug Users in Ukraine* (World Health Organization, 2010); World Health Organization, United Nations Office on Drugs and Crime and Joint United Nations Programme on HIV/AIDS, *Policy Guidelines for Collaborative TB and HIV Services for Injecting and Other Drug Users* (Evidence for Action Technical Paper, 2008).

33 According to Manfred Nowak, "[I]f withdrawal symptoms are used for any of the purposes cited in [the] definition of torture enshrined in Article 1 of the Convention against Torture, this might amount to torture." A/HRC/10/44, para. 57.

34 A/HRC/10/44, para. 71.

35 *McGlinchey and Others v. United Kingdom*, Application No. 50390/99 (2003).

36 Human Rights Watch, *Lessons Not Learned: Human Rights Abuses and HIV/AIDS in the Russian Federation*.

imprisonment in thorn-tree cages, handcuffing of drug users to beds while they undergo withdrawal, suspension by the arms and legs for hours and beatings on the feet, and sexual abuse of inmates by guards.[37] Medical care is routinely denied. A doctor in one drug detention center in Guangxi Province, China, told Human Rights Watch, "The purpose of the detox center is really just disciplinary, it's not to give people medical care."[38]

Sex workers, like people who use drugs, face ill-treatment in health settings stemming from their criminalized status. A report on sex workers in Botswana, Namibia, and South Africa documented negative and obstructive attitudes on the part of medical workers, including denial of necessary health care services to sex workers.[39] One sex worker said, "I'm afraid to go to the clinic" because of harassment from nurses and doctors. A male sex worker seeking HIV treatment in Namibia said, "The nurse called a few other nurses and they were laughing at me." Another was chased out of a hospital after a doctor screamed, "You are a prostitute!" to her in front of other staff and patients. A sex worker in Kyrgyzstan said that when she went to the hospital with appendicitis, the nurse "became rude with me" after learning she worked in a sauna, "saying that girls like me should be killed or put in jail."[40] She was discharged from the hospital before her stitches were removed.

Breaches of privacy and confidentiality are a further indignity experienced by sex workers in health settings. In Macedonia in 2008, police rounded up more than thirty people in an area known for sex work and subjected them to forced testing for HIV, hepatitis B, and hepatitis C. Following the arrests, the Ministry of the Interior released a press announcement disclosing personal information about the detainees, and media outlets published photos and videos of them. The NGO Healthy Options Project Skopje (HOPS) is supporting several of the sex workers in litigation against the Ministry and the health clinic for breach of privacy and inhuman and degrading punishment.[41] In Austria, where registered sex workers are required to undergo weekly medical check-ups and take regular blood tests for sexually transmitted diseases, the Committee against Torture recently noted "reports of alleged lack of privacy and humiliating circumstances amounting to degrading treatment during medical examinations."[42]

Lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons have reported abuses in health settings that amount to cruel and degrading treatment. In Kyrgyzstan, doctors have refused to treat LGBTI persons and accompanied this refusal with cruel and degrading comments such as: homosexuality is "absurd," "condemned by Islam," or "abnormal," or that LGBTI people are "not our patients."[43] Health providers in Jamaica have "refused to treat men whom they knew or perceived to be gay and made abusive comments to them, at times instigating abusive comments by others."[44] In one case, "a health worker told a gay man with gonorrhea that he was 'nasty' and asked why he had sex with other men." Some health providers still treat homosexuality as a mental disorder, a form of discrimination that may also amount to cruel, inhuman, or degrading treatment, and subject them to "conversion therapy" with severe psychological consequences.[45]

Transgender people routinely face degrading treatment in health settings stemming from discrimination and prejudice on the basis of gender identity or presentation. In the United States, a 2010 report of the National Gay and Lesbian Task Force and the National Center for Transgender Equality documented cases of transgender people being refused care outright because they were transgender or gender non-conforming, postponing their own care due to fear of disrespect by medical providers,

37 Open Society Foundations, *Human Rights Abuses in the Name of Drug Treatment: Reports from the Field* (2010).

38 Human Rights Watch, *An Unbreakable Cycle: Drug Dependency Treatment, Mandatory Confinement, and HIV/AIDS in China's Guangxi Province* (December 2008), p. 28.

39 Open Society Foundations, *Rights Not Rescue: Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa* (2008)

40 Public Association Musaada, *Observance of the Rights of Sex Workers to Obtain Health Care: Monitoring of Human Rights in Medical Institutions in Osh City in the Kyrgyz Republic*, Open Society Institute and Soros Foundation Kyrgyzstan (December 2008).

41 Sex Workers Rights Advocacy Network (SWAN), *In Focus: Macedonia Alert: Police Raids, Detention, Involuntary STI-Tests* (November 2008), *available at* http://swannet.org/en/node/1219

42 Center for Reproductive Rights, *Reproductive Rights Violations as Torture and Cruel, Inhuman, or Degrading Treatment or Punishment: A Critical Human Rights Analysis* (April 2011), p. 19.

43 Open Society Foundations, *Access to Health Care for LGBT People in Kyrgyzstan* (July 2007), p. 20.

44 Human Rights Watch, *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic* (November 2004), p. 38.

45 See, e.g., D.C. Haldeman, "Therapeutic Antidotes: Helping Gay and Bisexual Men Recover from Conversion Therapies," *Journal of Gay & Lesbian Mental Health*, vol. 5, no. 3 (2001), pp. 117-130.

harassment in medical settings, and other abuses.[46] One survey respondent reported problems finding a doctor who would treat or "even look at you like a human being." A survey from Europe similarly found that transgender people avoided routine medical care because they anticipated prejudicial treatment.[47] Transgender people additionally face a particular form of ill-treatment in health settings stemming from arbitrary requirements that they undergo psychiatric evaluation, genital surgery, or even sterilization in order to officially change their gender. Such requirements are inherently a form of coerced medical treatment that may violate the right to be free from torture and ill-treatment.

Children born with intersex conditions or atypical sex organs (also called disorders of sex development) routinely face abuse amounting to ill-treatment in health settings.[48] These include a variety of forced, unnecessary, and irreversible medical procedures such as sterilization, hormone therapy, and genital-normalizing surgeries such as clitoral "reduction,"[49] considered genital mutilation by some intersex people.[50] These procedures are rarely medically necessary, but are performed for social reasons and can cause scarring, loss of sexual sensation, pain, incontinence, and lifelong depression.[51] They are typically performed without any legal restriction or oversight in an attempt to impose a biological gender of either male or female.[52] Parents are frequently pressured to consent to these procedures for their children without adequate information about the long-term risk to sexual function and mental health.[53] Intersex children are also often exposed to humiliating and unnecessary exams,[54] or are used as teaching tools or in unethical medical experiments.[55] In 2008, a German intersex woman, Christine Völling, successfully sued her surgeon for damages for removing her ovaries and uterus without her informed consent.[56]

Roma in Central and Eastern Europe face what the European Roma Rights Center (ERRC) has called "a consistent pattern of discriminatory treatment" by medical professionals.[57] Such discrimination may rise to the level of cruel, inhuman, or degrading treatment, as when health workers insult Roma patients and their families. In one case documented by the ERRC, a woman whose son had died after being released from the hospital, reportedly in good condition, said that in response to her demands to see her son's medical file a doctor said of her son's death, "It's not a big thing—one Gypsy less." Denial of medical care to Roma has taken the form of failure of ambulances to respond to requests for assistance coming from Roma neighborhoods, outright refusals by medical professionals to provide services to Roma, and demands for payment for services that ought to be provided at no cost. In one case, a 20-year-old Roma woman gave birth to a stillborn after an ambulance took 90 minutes to arrive at her home in a Roma settlement; one dispatcher mockingly told the woman's husband "to put his wife into a wheel-barrow and wheel her to the medical center." In another case, a woman was inappropriately charged for medical treatment for a spontaneous miscarriage, apparently because doctors assume that Roma women induce their own abortions to avoid paying the cost of surgical abortions.

46 J.M. Grant et al, *National Transgender Discrimination Survey Report on Health and Health Care* (National Center for Transgender Equality and National Gay and Lesbian Task Force, 2010).

47 S. Whittle et al, *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care* (International Lesbian and Gay Association – Europe and Transgender Europe, April 2008), p. 10.

48 See generally, Intersex Society of North America, www.isna.org; see also, Order Changing Guardianship (Identification of Minor Suppressed), Sentencia SU-337/99 (Corte Constitucional, May 12, 1999) (Colom.); *In re* Guardianship XX, Sentencia T-551/99 (Corte Constitucional, Aug., 2, 1999) (Colom.); Sentencia No. T-477/95 (Corte Constitucional, 1995) (Colom.), http://www.isna.org/node/516 (retrieved April 20, 2011).

49 P.A. Lee, C. Houk, C., S.F. Ahmed et al, "Consensus Statement on Management of Intersex Disorders," *Archives of Disease in Childhood* 91 (2006), pp. 554-63.

50 Dan Christian Ghattas, "Human Rights and 'I': Knowing Intersex Demands," Powerpoint presentation, Organisation Intersex International – Germany and TransInterQueer e.V., on file with Open Society Foundations.

51 Marcus De María Arana, *A Human Rights Investigation into the Medical "Normalization" of Intersex People* (San Francisco Human Rights Commission, 2005).

52 Hazel Glenn Beh and Milton Diamond, "An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?" *Michigan Journal of Gender and Law*, vol. 7(1) (2000), pp. 1-63.

53 A. Tamar-Mattis, "Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants," *Berkeley Journal of Gender, Law & Justice*, vol. 21 (2006), pp. 59-110

54 Advocates for Informed Choice, *Know Your Rights* (2010), http://aiclegal.org/publications/ (retrieved April 20, 2011).

55 A. Dreger and E.K. Feder, "Bad Vibrations," Hastings Center Bioethics Forum, June 16, 2010, online: http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=4730&blogid=140 (retrieved April 20, 2011); C. Elton, "A Prenatal Treatment Raises Questions of Medical Ethics," *Time*, June 18, 2010; S. Begley, "The Anti-Lesbian Drug," *Newsweek*, July 2, 2010.

56 Organisation Intersex International, "Congratulations to Christiane Völling," press release (February 6, 2008), http://www.intersexions.org/t886-press-release-congratulations-to-christiane-volling (retrieved April 20, 2011).

57 European Roma Rights Center, *Ambulance Not on the Way: The Disgrace of Health Care for Roma in Europe* (September 2006), p. 39.

A particularly humiliating practice is the segregation of Roma patients into rooms called "gypsy rooms" or the "Chinese quarter." According to the ERRC, these Roma wards are of inferior quality "in material and sanitary conditions and services." It has also been reported that Roma women accompanying their sick children are made to clean the ward.

Conclusion: The Need for Monitoring and Accountability

The preceding examples of torture and ill-treatment in health settings likely represent a small fraction of this global problem. In order to better understand and confront this problem, a necessary first step is for human rights organizations and official mechanisms to systematically include health settings among the places they document and advocate against torture and ill-treatment. Courts and tribunals which are confronted with cases of severe abuse in health settings should likewise consider whether these abuses rise to the level of torture and ill-treatment. While some have already done so, this has mostly been in the case of abuses occurring in prisons and pretrial detention centers, not traditional health settings.

An important way to prevent torture and ill-treatment is to monitor the human rights of people in the settings where such practices are likely to take place. The Optional Protocol to the UN Convention against Torture (OPCAT) obliges States Parties to establish independent "national preventive mechanisms" to carry out preventive visits to places of detention. For the reasons set out in this paper, health settings may well be considered places of detention where people are subject to torture and ill-treatment. For anyone with disabilities, States have further obligations to "ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities,"[58] and that the implementation of human rights is monitored,[59] with the participation of civil society, particularly people with disabilities and their representative organizations.[60]

The legal implications of a finding that abuse in health settings amounts to torture or ill-treatment are significant. With respect to addressing acts of cruel, inhuman, or degrading treatment or punishment, the Convention against Torture requires governments to provide education and information to public officials (including medical personnel), require a prompt and impartial investigation of allegations, and require an appropriate complaint mechanism.[61] With respect to torture, governments are additionally obliged to prosecute offenses and ensure a civil legal remedy for compensation of victims, among other things.

Real accountability for torture and ill-treatment in health settings, however, means identifying the laws, policies, and practices that lead to abuse, rather than simply singling out individual health providers as "torturers." Health providers may abuse the rights of patients because they are ordered to by authorities, because regulations restrict the type of care they can provide, or for other reasons beyond their control. These situations are sometimes referred to as **dual loyalty**, defined as "simultaneous obligations, express or implied, to a patient and a third party, often the state."[62] As part of their obligation to prevent torture and ill-treatment in health care, governments should take concrete steps to protect health providers from dual loyalty conflicts.

Torture and ill-treatment are antithetical to every notion of health care and human dignity. Health settings should be places where human rights are realized and fulfilled, not debased and violated. To stop the scourge of torture and ill-treatment in health care, health providers and anti-torture advocates must come together to listen to the stories of victims, understand the problem and its roots, and propose solutions.

58 UN Convention on the Rights of Persons with Disabilities, Article 16(3).

59 Ibid, Article 33(2).

60 Ibid, Article 33(3).

61 Convention against Torture, Article 16(1).

62 International Dual Loyalty Working Group, *Dual Loyalty & Human Rights In Health Professional Practice; Proposed Guidelines & Institutional Mechanisms* (2002), p. 11.

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