

**Amnesty International India Foundation**1074/B-1, First Floor, 11<sup>th</sup> Main, HAL 2<sup>nd</sup> Stage, Indira Nagar, Bangalore – 560 008

To:

Member of Parliament

New Delhi,

India.

Subject: Vote for a New Law on Violence against Women in India

Dear Representative,

The protests and public debate, which followed the rape and death of a 23-year-old student in Delhi in December 2012, have brought the need for better laws and practices addressing violence against women in India to national and international attention. On 24 December 2012, the Indian government constituted the Verma Committee, a panel of legal experts “to look into possible amendments to the criminal law so as to provide for quicker trial and enhanced punishment for criminals, accused of committing sexual assault of extreme nature against women”.<sup>1</sup> On 23 January 2012, the Verma Committee submitted its report to the Government, after consultations with members of the public and civil society groups.<sup>2</sup> The report contained recommendations on a wide range of issues that impact the safety of women and gender discrimination, ranging from laws on violence against women, child sexual abuse and honour killings, to principles of sentencing, the creation of adequate safety measures for women, police reforms, and electoral reform. In response, Prime Minister Manmohan Singh publicly complimented the report, and said the government would be prompt in pursuing the recommendations.<sup>3</sup>

In this context, it is disappointing that, on 3 February 2013, the President promulgated the Criminal Law (Amendment) Ordinance 2013 [Ordinance], which, while constituting prompt action, did not pursue the recommendations of the Verma Committee. **This Ordinance, which is now in force, is problematic because it violates international human rights law and standards and because it does not reflect many of the Verma Committee’s recommendations.** The Ordinance was implemented after a hurried cabinet meeting on 1 February 2013, where its provisions were apparently discussed. No public consultation was held on the Ordinance text and civil society groups and members of the public were not given an opportunity to respond to its provisions.

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<sup>1</sup> “Committee of Eminent Jurists to Suggest Amendments to Criminal Law” available at <http://pib.nic.in/newsite/erelease.aspx?relid=91179> (accessed on 20 February 2013). The Committee asked members of the public, judiciary, media, public figures, academicians and human rights organizations for their suggestions, and also expanded its mandate to include “connected areas such as gender justice, respect towards womanhood, and ancillary matters”. See “Justice J.S.Verma Committee holds its First Meeting”, available at <http://pib.nic.in/newsite/erelease.aspx?relid=91179> (accessed on 20 February 2013).

<sup>2</sup> “Report of the Committee on Amendments to Criminal Law”, available at [http://www.thehindu.com/multimedia/archive/01340/Justice\\_Verma\\_Comm\\_1340438a.pdf](http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf) (accessed on 20 February 2013). The report lists organizations and individuals consulted during drafting.

<sup>3</sup> See, for example, “PM assures Verma Panel of fast action” 30 January 2013, Hindustan Times, available at <http://www.hindustantimes.com/News-Feed/DelhiGangrape/PM-assures-Verma-panel-of-fast-action/Article1-1003931.aspx> (accessed on 20 February 2013)

After hearing news of the Cabinet meeting, Indian human rights organizations asked the President not to sign the Ordinance,<sup>4</sup> but it was promulgated shortly thereafter.

In this session of Parliament, we understand that the government will be tabling a new draft law on violence against women which may include some provisions from the Ordinance. Amnesty International calls on you to:

- Support a new draft law that addresses violence against women in India, but which does not contain those aspects of the Ordinance, or any other provisions, that violate India's international human rights obligations.
- Ensure that the draft law is referred to a Parliamentary Standing Committee, and that public and civil society groups are adequately consulted on the provisions.

### **Specific Recommendations:**

Amnesty International asks that you keep in mind the following recommendations while discussing a new law on violence against women:

### **Definitions**

1. Parliament should repeal sections 354 (assault or criminal force to woman with intent to outrage her modesty) and 509 (word, gesture or act intended to insult the modesty of a woman) of the Indian Penal Code. All forms of violence against women should be defined with respect to the physical and mental integrity of the victim, and not be based on notions of modesty, decency, or morality.
2. Parliament should expand the understanding of consent in the Ordinance to be in line with the current status and scope of this concept in international human rights standards, specifically acknowledging that psychological pressure and taking advantage of a coercive environment can constitute forms of coercion.
3. Parliament should eliminate sanctions on consensual sexual activities between adolescents, while protecting all children against sexual abuse. The difference in sentencing guidelines between various laws should be eliminated. The law should protect the additional rights of alleged perpetrators under the age of 18 as stipulated in international standards.
4. The Indian Penal Code should reflect the different forms of violence against women in a comprehensive manner. Parliament should introduce a new definition of sexual assault, which acknowledges the differing impacts of different forms of violence on the physical and mental integrity of the victim, and provides for punishments that are proportionate, effective, and dissuasive.
5. The exception for sexual assault by a husband must be removed.
6. Parliament should ask the government to put in place a comprehensive plan to address the problem of trafficking which includes various aspects of the Palermo Protocol and implements article 6 of the CEDAW, and which addresses trafficking in a manner that ensures that the rights of voluntary adult sex workers are not compromised. The

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<sup>4</sup> Several women's groups protested the promulgation of this Ordinance. The reasons for protest have included the hasty and transparent manner in which it was passed, that many recommendations of the Verma Committee were ignored, the non-recognition of marital rape, and that sexual violence by the armed forces still requires governmental permission to be prosecuted. See, for example, "Protest against Ordinance" *The Hindu*, 6 February 2013, available at <http://www.thehindu.com/news/national/karnataka/protest-against-ordinance/article4383033.ece> (accessed 25 February 2013); "President gives assent to Ordinance to fight sexual crimes" *Deccan Herald*, 6 February 2013 available at <http://www.deccanherald.com/content/309601/president-promulgates-ordinance-crime-against.html> (accessed on 25 February 2013).

government's plan must also protect children from sexual exploitation, including through commercial sex acts.

### **Enhanced Punishment**

7. The death penalty should be removed as a form of punishment in this Ordinance. The punishment attached to the various kinds of violence against women should be proportional, dissuasive, effective, and without recourse to the death penalty.
8. Indian law should clarify that persons sentenced to life imprisonment for violence against women are allowed the same opportunity for executive/ judicial review of their sentence as other prisoners in India. The law must also clearly eliminate sentences of life without the possibility for release for offenses committed by persons under the age of 18.
9. Indian law should not provide for mandatory sentences.

### **Other Essential Elements of an Effective Law addressing Violence against Women**

10. Parliament should repeal section 377 of the Indian Penal Code with immediate effect and the government should release any prisoners held for engaging in consensual adult sexual activity.
11. Any laws which provide immunities from prosecution for sexual violence, including those, which lead to de facto immunity, should be repealed. Furthermore, crimes of sexual and gender-based violence in situations of armed conflict should be investigated and prosecuted based on the understanding that acts of sexual and gender-based violence in conflict may amount to war crimes. The issue of command responsibility should be investigated. Where such violence is widespread or systematic, it should be investigated as a possible crime against humanity.
12. Parliament should incorporate specific concerns about sexual and gender-based violence during communal violence – including specific sexual and gender-based crimes, reparations for victims, and gender-sensitive procedures – into law.
13. The Prevention of Torture Bill, 2010, should be revised, and sexual violence by which severe pain or suffering, whether physical or mental is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity should be expressly recognized as constituting torture

We have attached to this letter a briefing that explains the above recommendations in more detail, outlines India's obligations under international human rights law, and explains why these obligations require the implementation of these recommendations.

Ananth Guruswamy

Chief Executive, Amnesty International India

## Annexe

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### India's International Human Rights Obligations

India ratified the Convention on the Elimination of Discrimination against Women on 9 July 1993. In its General Comment No. 19, the CEDAW Committee has found that the definition of discrimination in article 1 of the CEDAW includes “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>5</sup> The CEDAW Committee has recommended that states parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act; that states parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity, and that effective complaints procedures and remedies, including compensation, should be provided.<sup>6</sup>

In 1993, the UN General Assembly passed the Declaration on the Elimination of Violence against Women unanimously. This Declaration defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. Amongst other things, the Declaration asks states to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons” and “[d]evelop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence”.<sup>7</sup> This declaration, while not binding in nature, can be read as an expression of the status and scope of the right to non-discrimination, as it relates to violence against women, under international law.

In conclusion, the Indian state has an obligation to take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.

Through its ratification of the International Covenant on Civil and Political Rights,<sup>8</sup> the Convention on the Rights of the Child,<sup>9</sup> and of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime [Palermo Protocol],<sup>10</sup> the Indian state has also incurred additional obligations to protect the rights to equal protection of rights, to privacy (including physical integrity), and to combat trafficking. The Convention on the Rights of the Child also provides guidance on how to address adolescent sexuality while protecting all children against sexual abuse. Further, the International Covenant on Civil and Political Rights and the

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<sup>5</sup> CEDAW Committee, General Recommendation No. 19 (11<sup>th</sup> session, 1992) on Violence against Women, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed on 20 February 2013).

<sup>6</sup> CEDAW Committee, General Recommendation No. 19 (11<sup>th</sup> session, 1992) on Violence against Women, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed on 20 February 2013).

<sup>7</sup> ‘Declaration on the Elimination of Violence against Women’ A/RES/48/104, 85th plenary meeting, 20 December 1993, available at <http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed on 20 February 2013).

<sup>8</sup> India acceded to the ICCPR on 10 April 1979.

<sup>9</sup> India acceded to the CRC on 11 December 1992.

<sup>10</sup> India ratified the Palermo Protocol on 5 May 2011.

Convention on the Rights of the Child contain detailed provisions on the rights of those processed by the criminal justice system, whether adult or children, which are of relevance here.

### **Amnesty International's Principal Concerns with Criminal Law (Amendment) Ordinance 2013**

As previously mentioned several aspects of the recently promulgated Ordinance are problematic and violate India's obligations under international human rights law. Some of Amnesty International's principal concerns with the Ordinance are explained below:

#### ***Definitions***

##### 1. Retention of the concept of 'modesty'

The Ordinance retains sections 354 and 509 of the Indian Penal Code, which punish "assault or criminal force to woman with intent to outrage her modesty" and the use of any "word, gesture or act intended to insult the modesty of a woman".

##### *1.1 Amnesty International's Concern:*

These provisions fall short of the status and scope of international standards on non-discrimination and equality which,<sup>11</sup> as applied to the treatment of rape and other sexual violence, require these crimes to be defined as infringements against the physical and mental integrity of the victim, rather than as a crime against morality or honour. Using the concept of modesty to address violence against women perpetuates stereotypes about women's expected conduct and behaviour that link a woman's value to her "honour" rather than her intrinsic worth as a human being. Decisions in Indian courts have demonstrated how using the concept of outraging modesty to punish violence against women is inadequate and inappropriate, and causes harm by perpetuating gender stereotypes in a manner that impede women's access to justice.<sup>12</sup>

##### *1.2 Amnesty International's Recommendation*

Parliament should repeal sections 354 and 509 of the Indian Penal Code. All forms of violence against women should be defined with reference to the physical and mental integrity of the victim, and not notions of modesty, decency, or morality.

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<sup>11</sup> See, for example, article 1 and 15 of the Convention on the Elimination of Discrimination against Women, which India ratified on 9 July 1993.

<sup>12</sup> For example, in 1974, the case of a man who had "caused injuries to the vagina of a seven and a half month old child by fingering" came to the courts. As there was no penile penetration, there could be no charge of rape, and only a charge for outraging the modesty of a woman was possible. A High Court acquitted the man because they believed that modesty should be defined subjectively with reference to the woman concerned. They found that the seven-month-old child in this case was "of too tender an age and was physically incapable of having any sense of modesty". The family had to appeal to the Supreme Court. The judgement was eventually overturned and the man was found guilty by the Supreme Court. However, even at the Supreme Court, one judge dissented saying "no reasonable man would say that a female child of that age was possessed of womanly modesty". *State of Punjab vs Major Singh*, AIR 1967 SC 63.

## 2. Definition of Consent

The definition of consent contained in the Ordinance is an improvement over the understanding of consent that existed previously in the Indian Penal Code. Notably, the new definition requires “an unequivocal, voluntary agreement when the person by words, gestures or any form of non-verbal communication communicates willingness to participate in the specific act”.<sup>13</sup> However, in order for the understanding of consent to fully comply with international human rights standards, the definition of consent must also encompass situations where the perpetrator negates the victim’s ability to give such free and un-coerced agreement to sexual contact, through the use of force, threat of force, or coercion.

### 2.1 *Amnesty International’s Concern*

The Ordinance does not recognize the perpetrator taking advantage of an existing coercive environment as a form of coercion. While such coercion is commonly associated with situations of conflict or war, regional courts have recognized that this type of coercion can exist in peace-time as well.<sup>14</sup> Similarly, the definition of consent must acknowledge that psychological pressure on the victim can constitute coercion.<sup>15</sup> Psychological pressure could include the shaming or humiliation of the victim where the perpetrator threatens to publicize the sexual acts as a form of blackmail to secure the victim’s submission, threats of social boycotts, etc.

International norms recognize certain situations in which sexual autonomy can be said to have been compromised:<sup>16</sup> situations where the perpetrator uses force or threatens to use force; where the perpetrator uses coercion, or where he or she creates fear of violence, applies duress (including detention), psychological oppression, or abuses his or her power; coercive environments in which a perpetrator takes advantage of a victim; and other conditions, including age, where various forms of natural incapacity or reduced capacity exist which affect the individual’s ability to give genuine consent.

### 2.2 *Amnesty International’s Recommendation*

The understanding of consent in the Ordinance should be expanded to be compatible with the status and scope of this concept as expressed in evolving international human rights and humanitarian standards, specifically acknowledging that psychological pressure and taking advantage of a coercive environment are forms of coercion. The ICC Elements of Crimes provide a definition of consent that reflects this understanding: “The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.<sup>17</sup>

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<sup>13</sup> See Explanation 3 to section 375 of the Criminal Law (Amendment) Ordinance 2013.

<sup>14</sup> See for example, the European Court of Human Rights’ judgment in *M.C. v. Bulgaria*, application 39272/98, judgment of 4 December 2003.

<sup>15</sup> The definition of rape in the ICC Elements of Crimes acknowledges that psychological pressure may constitute coercion. This understanding is also reflected in the judgements of international courts including *Prosecutor v Furundžija*, IT-95-17/1-T (10 December 1998).

<sup>16</sup> These are reflected in the ICC Elements of Crimes. For more on sexual autonomy see The Beijing Platform for Action, paragraph 97. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

<sup>17</sup> See Article 7 (1) (g)-1 (2) of the ICC Elements of Crimes, available at <http://www2.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (accessed on 20 February 2013).

### 3. Increase in the Age of Consent

The Ordinance raises the age of consent for sexual activity from 16 to 18 years of age, making the age of consent compatible with the Protection of Children against Sexual Offences Act [POCASO Act], which was passed in India in 2012.<sup>18</sup>

#### 3.1 *Amnesty International's Concern*

The law in its current form criminalizes consensual sexual activity between adolescents, that is, children above the age of 11 but below the age of 18. While states have an obligation to protect children from sexual coercion and violence,<sup>19</sup> to meet their international obligations states must at the same time recognize the growing capacity of adolescents to express their sexuality.<sup>20</sup> Children who are either engaging in consensual sexual activity, or who are victims of sexual assault, should not be criminalized or punished, regardless of their age.<sup>21</sup> The state must take into account a child's age and maturity when determining whether consent to sexual activity is meaningful. Where consent was not given or not meaningful, a sexual encounter may be considered sexual abuse and must be investigated and, if relevant, prosecuted as such. Where prosecution is appropriate, alleged perpetrators of sexual abuse who are under the age of 18 must be tried within international guidelines on children in conflict with the law.<sup>22</sup> All stages of investigation, prosecution, and any punishment must take into account the evolving capacity of the children involved, and their need for support and accompaniment.

Furthermore while provisions in this Ordinance overlap with the POCASO Act, both provide different penalties for the same act. For example, under sections 7 and 8 of the POCASO Act touching the "vagina, penis, anus, or breast of a child" or making "the child touch the vagina, penis, anus or breast of that person or another person" carries a maximum sentence of five years.

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<sup>18</sup> Section 2, Protection of Children against Sexual Offences Act, 2012.

<sup>19</sup> Article 19 of the CRC states that "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement".

<sup>20</sup> Committee on the Rights of the Child, General Comment No. 4 (2003) CRC/GC/2003/4 "Adolescent health and development in the context of the Convention on the Rights of the Child" available at <http://daccessddsny.un.org/doc/UNDOC/GEN/G03/427/24/PDF/G0342724.pdf?OpenElement> (accessed on 25 February 2012).

<sup>21</sup> International standards stipulate that children must not be criminalized for acts that would not be crimes if they were adults. See, for example, article 56 of the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), A/RES/45/112, 14 December 1990, available at <http://www.un.org/documents/ga/res/45/a45r112.htm> (accessed on 25 February 2013). See also Committee on the Rights of the Child, General Comment No. 10 (2007) CRC/C/GC/10, "Children's rights in juvenile justice" paragraphs 8 & 9, available at <http://www2.ohchr.org/english/bodies/crc/comments.htm> (accessed on 25 February 2013).

<sup>22</sup> See, for example, the Convention on the Rights of the Child, 1989; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, 29 November 1985, available at <http://www.un.org/documents/ga/res/40/a40r033.htm> (accessed on 25 February 2013); ECOSOC Resolution 1997/30 "Administration of juvenile justice" 21 July 1997 available at <http://www.un.org/documents/ecosoc/res/1997/eres1997-30.htm> (accessed on 25 February 2013); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, A/RES/45/113, 14 December 1990, available at <http://www.un.org/documents/ga/res/45/a45r113.htm> (accessed on 25 February 2013).

However, the same conduct carries a minimum sentence of ten years under this Ordinance. The law should provide coherent guidance on sentencing.

### *3.2 Amnesty International's Recommendation*

The Parliament should eliminate sanctions on consensual sexual activities between adolescents, while ensuring the protection of all children against sexual abuse. The difference in sentencing guidelines between various laws should be eliminated. The law should protect the additional rights of alleged perpetrators under the age of 18 as stipulated in international standards.

## 4. Limited Definition of Sexual Assault

The Ordinance replaces the crime of “rape” in the Indian Penal Code with the broader crime of “sexual assault”. Commendably, the Ordinance also criminalizes several forms of violence against women including acid attacks, stalking and voyeurism, which were previously not expressly covered by the Indian Penal Code.<sup>23</sup>

### *4.1 Amnesty International's Concern*

There is a need to prevent, prosecute, and punish all forms of violence against women. However, replacing “rape” with a broad definition of sexual assault as the Ordinance does at present is not sufficient. There are many forms of sexual assault that are still not recognized by this Ordinance. For example, physical contact of a sexual nature that does not involve touching the vagina, anus, penis, or breast is not considered sexual assault (but would be punished as a form of sexual harassment).

### *4.2 Amnesty International's Recommendation*

The Indian Penal Code should reflect the different forms of violence against women in a comprehensive manner. The Rome Statute, an expression of evolving international human rights and humanitarian standards, has a much broader definition of sexual assault than the Ordinance. The definition in the ICC Elements of Crimes separates out the various forms of assault, and could be used as a drafting guide.<sup>24</sup>

## 5. Possible Disproportionate Sentencing for Sexual Assault

The new sections 375 (a) to 375 (d) criminalize penetrative sexual assault, while section 375 (e) criminalizes one form of non-penetrative sexual assault, that is, the touching of the “vagina, penis, anus, or breast of the person” or making “the person touch the vagina, penis, anus or breast of that person or another person”.

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<sup>23</sup> See sections 4 and 6 of the Criminal Law (Amendment) Ordinance 2013.

<sup>24</sup> The ICC Elements of Crimes, for example, define the Crime against Humanity of Rape and the Crime against Humanity of Sexual violence differently. While the understanding of coercion is the same in both, Article 7 (1) (g)-1 (1) defines rape as: “The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body” while Article 7 (1) (g)-6 (1) defines sexual violence as “The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent”.



### 5.1 *Amnesty International's Concern*

The only form of non-penetrative sexual assault criminalized by the Ordinance (contained in 375 (e)) does not carry an express requirement of intent. The new section 376 of the Indian Penal Code punishes all sexual assault with a minimum of seven years and a maximum of life imprisonment. Technically, if someone was to push another person on a crowded bus so as to make the second person unintentionally touch a woman's breast, this act could attract the same punishment as penetrative sexual assault, which could go up to life imprisonment depending on the discretion of the judge.

The manner in which this provision is drafted therefore creates the possibility of disproportionate sentencing.

The national laws of several countries create different categories of criminalized sexual violence against women - including the United Kingdom<sup>25</sup> and South Africa<sup>26</sup> - which are then given different punishments to account for the perceived impacts of these different forms of violence on the physical and mental integrity of the victim. Other laws in India have also followed this approach. The POCASO Act, for example, provides for different penalties, and separate definitions, for penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, and the sexual harassment of children.

### 5.2 *Amnesty International's Recommendation*

A new definition of sexual assault should be introduced, which acknowledges the differing impacts of different forms of violence on the physical and mental integrity of the victim, and provides for punishments that are proportionate, effective, and dissuasive.

## 6. Limited Recognition of Sexual Assault within a Marriage

The Ordinance provides only a limited recognition of rape and sexual assault within a marriage. Under the Ordinance, if a man sexually assaults his wife who is over 16 years of age, it is not a

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<sup>25</sup> For example, the Sexual Offences Act 2003, Section 1 states: Rape. A person (A) commits an offence if— (a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b)B does not consent to the penetration, and (c)A does not reasonably believe that B consents. (2)Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. (3)Sections 75 and 76 apply to an offence under this section. (4)A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life. Section 3 states Sexual Assault: (1)A person (A) commits an offence if— (a)he intentionally touches another person (B), (b)the touching is sexual, (c)B does not consent to the touching, and (d)A does not reasonably believe that B consents. (2)Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. (3)Sections 75 and 76 apply to an offence under this section. (4)A person guilty of an offence under this section is liable— (a)on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; (b)on conviction on indictment, to imprisonment for a term not exceeding 10 years.

<sup>26</sup> See the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007. Section 3 defines rape as “Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape”. Section 5 defines sexual assault as “(1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault. (2) A person (“A”) who unlawfully and intentionally inspires the belief in a complainant (“B”) that B will be sexually violated, is guilty of the offence of sexual assault”. Available at <http://www.info.gov.za/view/DownloadFileAction?id=77866> (accessed 20 February 2013).

crime.<sup>27</sup> Only a man who sexually assaults his wife while the spouses are “living separately under a decree of separation or under any custom or usage”<sup>28</sup> can be punished, with sentences ranging from two to seven years, which is distinct and lower than the punishment given to sexual assault outside a marriage.

### *6.1 Amnesty International's Concern*

This exception for marital sexual assault by a husband from the definition of sexual assault in the Ordinance violates the rights to equality and sexual autonomy of married women and girls. International standards require the effective prosecution of any acts of sexual violence, with no exemptions for perpetrators because of their marital status. This issue was explicitly addressed when the CEDAW Committee submitted its latest report on India, where it concluded that

The Committee urges the State party to widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception for marital rape from the definition of rape.<sup>29</sup>

### *6.2 Amnesty International's Recommendations*

This exception for sexual assault by a husband must be removed.

## 7. Definition of Trafficking

The Ordinance introduces a broader definition for the trafficking of persons than that which existed in Indian law previously. Notably, the definition states that exploitation shall include “prostitution and other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the forced removal of organs”. This definition also states that ‘the consent of the victim is immaterial in a determination of the offence of trafficking’. This differs from the previous provision in the Indian Penal Code.<sup>30</sup>

### *7.1 Amnesty International's Concern*

By stating that exploitation includes all forms of prostitution and not just forced prostitution and making the consent of the person involved in sex work irrelevant, the Ordinance risks criminalizing consensual adult sex work, and impacting the right to sexual autonomy, and livelihood of adults who engage in commercial sex work voluntarily. Where voluntary sex work is conflated with trafficking, research has shown this may lead to coercive or overreaching interventions such as brothel raids or “rescues” that often violate human rights and actually decrease the safety for sex workers. For example, such interventions may drive sex workers away

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<sup>27</sup> See section 8 Criminal Law (Amendment) Ordinance 2013, “Exception. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault”.

<sup>28</sup> See section 8 Criminal Law (Amendment) Ordinance 2013.

<sup>29</sup> Concluding Comments of the Committee on the Elimination of Discrimination against Women, CEDAW/C/IND/CO/3, 2 February 2007, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/243/98/PDF/N0724398.pdf?OpenElement>. When these comments were made, section 375 and 376 of the Indian Penal Code addressed ‘rape’ and not ‘sexual assault’.

<sup>30</sup> Prior to the Ordinance, section 370 of the Indian Penal Code read as follows: “Whoever imports, export, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as slave, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.”

from established sex work collectives or contribute to a forced heightened mobility of sex workers, undermining the connections and social fabric that can help keep them safe.<sup>31</sup>

India has ratified several international instruments that address the human rights implications of trafficking, including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1951 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children [Palermo Protocol]. The Indian state is under an international law obligation to address trafficking, however it must do so while respecting the rights of those it seeks to protect.

The definition of trafficking in the Ordinance bears similarities with the definition in the Palermo Protocol, but with some notable differences. For example, the Palermo Protocol states that “Exploitation shall include, at a minimum, **the exploitation of the prostitution of others** or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs [emphasis added]”. The CEDAW also clarifies in its article 6 a state obligation to take measures to “suppress all forms of traffic in women and exploitation of prostitution of women”.<sup>32</sup> These definitions make it clear that international standards are not meant to apply to consensual sex work but rather make a distinction between such voluntary activities, the exploitation of prostitution, and trafficking itself.

International law is equally clear with regard to the prohibition on the involvement of children—that is all those under 18—in commercial sex acts. This sentiment is spelled out through the Convention on the Rights of the Child, its Optional Protocol on the sale of children, child prostitution, and child pornography, and in ILO Convention Number 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor. Under these treaties, states are obliged to protect children from economic exploitation, sexual exploitation, and any work that is likely to be hazardous or harmful to a child’s health or physical, mental, or social development.<sup>33</sup> The “use, procuring, or offering” of a child for prostitution or pornography is considered a “worst form of child labor,” for which states shall design and implement action programs to eliminate as a priority.<sup>34</sup> India’s Penal Code and policies on trafficking or sex work must reflect this sentiment.

### *7.2 Amnesty International’s Recommendation*

The government should put in place a comprehensive plan to address the problem of trafficking which includes various aspects of the Palermo Protocol and implements article 6 of the CEDAW, and which addresses trafficking in a manner that ensures that the rights of voluntary adult sex workers are not compromised. The government’s plan must also protect children from sexual exploitation, including through commercial sex acts.

### ***Enhanced Punishment***

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<sup>31</sup> See, for example, John Goodwin, “Sex Work and the Law in Asia and the Pacific,” UNDP/UNAIDS/SNAP, 2012, at <http://www.snap-undp.org/elibrary/Publications/HIV-2012-SexWorkAndLaw.pdf> (accessed on 8 January 2012).

<sup>32</sup> Article of the CEDAW: States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article6> (accessed on 20 February 2013).

<sup>33</sup> Convention on the Rights of the Child, arts. 32(1) and 34.

<sup>34</sup> ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention), adopted June 17, 1999, 38 I.L.M. 1207 (entered into force November 19, 2000), arts. 3(b) and 6(1).

## 8. Capital Punishment

The Ordinance provides for the option of capital punishment in three situations: 1) When sexual assault is accompanied by an injury that causes the death of the victim; 2) where it leaves the victim in a “persistent vegetative state”; and 3) in the case of certain repeat offenders.

### 8.1 *Amnesty International's concern*

The introduction of the death penalty in the Ordinance is a regressive step for India's human rights standing. International law and standards clearly indicate that the death penalty is only permissible for the “most serious crimes”, crimes that involve intentional killing,<sup>35</sup> and have called upon all states that still maintain the death penalty not to extend the scope of its application.<sup>36</sup> The Ordinance makes “causing death” punishable by death, even if this was not done with the intention to kill. Sentencing to death those who cause a victim to be in a persistent vegetative state also violates this norm.

Research indicates that death sentences are often imposed arbitrarily in the Indian judicial system. In a 2008 report titled ‘Lethal Lottery’, Amnesty International found that “whether an accused is ultimately sentenced to death or not is an arbitrary matter, a decision reliant on a number of extremely variable and often subjective factors - ranging from the competence of legal representation (in particular at the trial court stage) to the interest of the state in the case (whether to appeal or not) to the personal views and even idiosyncrasies of the judges who sit on the various benches hearing the case”.<sup>37</sup> This inherent subjectivity is also selective and discriminatory: individuals with less wealth and influence are more likely to be sentenced to death, as also acknowledged by the Supreme Court of India.<sup>38</sup>

Furthermore, the death penalty is a violation of the internationally recognized right to life, and Amnesty International opposes it in all cases without exception, regardless of the nature or circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution. Introduction of the death penalty places India at odds with clear regional and global trends. Out of 41 countries in the Asia-Pacific region, 17 have abolished the death penalty for all crimes, 10 are abolitionist in practice and one – Fiji – uses the death penalty only for exceptional military crimes. Worldwide, 140 countries are abolitionist in law or in practice. In 2011, only 21 states in the world executed, making 90 percent of the world executions-free.

### 8.2 *Amnesty International's Recommendation*

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<sup>35</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN document A/67/275, 9 August 2012.

<sup>36</sup> UN Commission on Human Rights resolution 2005/59, adopted on 20 April 2005. The UN Human Rights Committee has stated that the extension of the scope of application of the death penalty raises questions as to the compatibility with Article 6 of the International Covenant on Civil and Political Rights, to which India is a State Party.

<sup>37</sup> See generally, Amnesty International and People's Union of Civil Liberties, “Lethal Lottery: The Death Penalty in India” May 2008 available at <http://www.amnesty.org/en/library/asset/ASA20/007/2008/en/16f59d0b-15fc-11dd-8586-f5a00c540031/asa200072008eng.pdf> (accessed on 20 February 2013) .

<sup>38</sup> In his dissenting judgment in *Bachan Singh*, Justice Bhagwati commented, “death penalty has a certain class complexion or class bias in as much as it is largely the poor and the down-trodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows”. *Bachan Singh v. State of Punjab* (AIR 1980 SC 898).

The death penalty should be removed as a form of punishment in this Ordinance. Violence against women must be subject to effective, proportionate, and dissuasive punishment, without recourse to the death penalty.

#### 9. Life imprisonment with no opportunity of early release

The Ordinance prescribes life imprisonment for certain offences. For example, section 370 (6) says that a public servant convicted of the trafficking of a minor shall be “punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life”. Elsewhere, 376 (1) states that whoever commits sexual assault may be imprisoned for a term which “may extend to imprisonment for life”.<sup>39</sup>

##### 9.1 *Amnesty International’s Concerns*

Under Indian law, several offences are punishable by life imprisonment. As per the Supreme Court of India, a sentence of “imprisonment for life” means a sentence for the entire natural life of the prisoner unless the appropriate government chooses to exercise its discretion to remit either the whole or part of the sentence.<sup>40</sup> State governments have the authority to make rules regarding when, how, and under what criteria premature or early release is to happen.

The Ordinance provides for two types of life sentences: “imprisonment for life” and “imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life”. By creating this category of offences that are specifically punishable with life imprisonment “which shall mean imprisonment for the remainder of that person’s natural life”, the Ordinance raises the possibility that certain life sentences cannot be remitted or commuted by an executive or judicial process at a later point in time.

Life imprisonment without the possibility of early release raises serious human rights concerns. Article 37(a) of the Convention on the Rights of the Child categorically prohibits the imposition of “life sentencing without possibility of release” for offenses committed by persons below 18 years. In addition, Article 10 (3) of the ICCPR, which India acceded to in 1979, states that “[t]he penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation’. To deny a prisoner the option to review his/her sentence at a later point in time is to not acknowledge the ability of the prison system to rehabilitate offenders. Such a sentence would also potentially violate the prohibition against cruel, inhuman or degrading punishments in article 7 of the ICCPR.

##### 9.2 *Amnesty International’s Recommendations*

While it is necessary to provide effective and dissuasive punishments for sexual violence, Indian law should clarify that persons sentenced to life imprisonment for violence against women are allowed the same opportunity for executive/ judicial review of their sentence as other prisoners in India. The law must also clearly eliminate sentences of life without the possibility for release for offenses committed by persons under the age of 18.

#### 10. Mandatory Life Imprisonment

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<sup>39</sup> Sections 326A, 370(3), 370(4), 370(5), 376 (1) and 376 (2) provide for ‘imprisonment for life’, while sections 370 (6), 370 (7), 376A, 376D, and 376E provide for “imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life”.

<sup>40</sup> See for instance *Gopal Vinayak Godse vs. The State of Maharashtra and others* 1961 (3) SCR 440.

Certain offences under the Ordinance carry mandatory life sentences.<sup>41</sup> For example, section 370 (6) says that a public servant convicted of the trafficking of a minor shall be “punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life”.

#### 10.1 *Amnesty International’s Concerns*

Mandatory sentences take away judicial discretion to sentence individuals according to the facts of a case and particular circumstances. Mandatory sentences thus take away the ability of courts to sentence individuals in a manner proportional to the crime committed.

#### 10.2 *Amnesty International’s Recommendations*

While it is necessary to provide effective and dissuasive punishments for sexual violence, Indian law should not provide for mandatory sentences.

### **Other Essential Elements of an Effective Law addressing Violence against Women**

A comprehensive and effective law on violence against women would include additional provisions addressing different facets of the problem. Below is an illustrative, not exhaustive, list of some essential elements of an effective law addressing violence against women:

#### 1. Consensual same-sex relations should be de-criminalized

The Ordinance does not repeal section 377 of the Indian Penal Code. Section 377 is titled “Unnatural Offences” and states as follows:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”

This section has been interpreted and used to prosecute consensual adult same-sex activity.

#### 1.1 *Amnesty International’s concerns*

By criminalizing consensual same-sex conduct, the Indian state is violating the human rights to non-discrimination, equality, privacy (including physical autonomy), and freedom of expression. Section 377 must be repealed immediately.

India’s Supreme Court asked the executive branch for the reasons for retaining this provision in 2009. While the Indian Ministry of Health and Family Welfare noted that the use of section 377 against adults engaging in same-sex consensual sex led to harassment and hampered HIV/AIDS prevention efforts, the Indian Ministry of Home Affairs found retention of this section necessary to

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<sup>41</sup> See sections 370 (6) [trafficking of a minor by a public servant], 370 (7) [repeat trafficking of a minor], and 376E [certain repeat offenders].

compensate for the lacunae in Indian rape law and to punish child sexual abuse.<sup>42</sup> In 2009, the High Court of Delhi had read section 377 to exclude consensual adult same-sex conduct, finding that the provision violated the rights of equality before the law, freedom of expression, and the right to a life of dignity and privacy.<sup>43</sup> An appeal against this judgment is pending before the Supreme Court. However, given the passage of the POCSA Act in 2012, and the amendment of the definition of rape in the Ordinance, the concerns of the government no longer stand as child sexual abuse and a wider range of sexual assault can now be punished under criminal law without recourse to section 377.

### *1.2 Amnesty International's Recommendations*

Parliament should repeal section 377 of the Indian Penal Code with immediate effect and the Indian government should release any prisoners held for engaging in consensual adult sexual activity.

## 2. Immunities for security forces should be removed

Several Indian laws make it mandatory to obtain the permission of the government before any security forces personnel can be prosecuted for “civilian” offences. Section 6 of the Armed Forces Special Powers Act, 1958, is a longstanding example of such a provision, which states that “No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act”. Similar provisions exist in other laws as well.<sup>44</sup>

In practice, the government rarely if ever grants permission for prosecution under these provisions, leading to a state of *de facto* impunity. This is particularly true of cases of rape and other forms of sexual violence in Jammu and Kashmir, several north-eastern states, and central India, where rights abuses by security forces in times of conflict are not adequately investigated or prosecuted.

### *2.1 Amnesty International's Concerns*

The Ordinance does not do away with this requirement for permission, despite recommendations from the Verma Committee asking for an urgent review of “AFSPA-like provisions”.<sup>45</sup> International law mandates that all perpetrators of sexual violence should be prosecuted, and that immunities for this crime violate state obligations.

### *2.2 Amnesty International's Recommendations*

Any law which provides immunities from prosecution for sexual violence, including those, which lead to *de facto* immunity, should be repealed. Furthermore, crimes of sexual and gender-based

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<sup>42</sup> See *Naz Foundation v government of NCT*, WP(C)7455/2001, available at [http://www.nazindia.org/judgement\\_377.pdf](http://www.nazindia.org/judgement_377.pdf) (accessed on 20 February 2013).

<sup>43</sup> “India: Historic ruling against “sodomy” laws, the first step to equality” Amnesty International, available at <http://www.amnesty.org/en/for-media/press-releases/india-historic-ruling-against-%E2%80%9Csodomy%E2%80%9D-laws-first-step-equality-20090702> (accessed on 20 February 2013).

<sup>44</sup> See for example section 22 of the Jammu and Kashmir Public Safety Act, 1978; section 197 of the Code of Criminal Procedure, 1973; and section 6, Jammu And Kashmir Disturbed Areas Act, 1992.

<sup>45</sup> “Report of the Committee on Amendments to Criminal Law”, available at [http://www.thehindu.com/multimedia/archive/01340/Justice\\_Verma\\_Comm\\_1340438a.pdf](http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf) (accessed on 20 February 2013). See page 151, “There is an imminent need to review the continuance of AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible”.

violence in situations of armed conflict should be investigated and prosecuted based on the understanding that acts of sexual and gender-based violence in conflict may be considered war crimes. The issue of command responsibility should be investigated. Where the violence is widespread or systematic, it should be investigated as a possible crime against humanity.

### 3. Better protection for sexual violence during communal violence

The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 is currently pending before the Parliament. This Bill empowers the government “to take effective measures to provide for the prevention and control of communal violence and to rehabilitate the victims of such violence, for speedy investigation and trial of offences including imposition of enhanced punishments”.

#### 3.1 *Amnesty International's concerns*

The Communal Violence Bill does not pay enough attention to the specific experiences of women in the context of communal violence. As the CEDAW Committee noted in its 2007 concluding comments on India's implementation of the CEDAW:<sup>46</sup>

“The CEDAW Committee welcomes the State party's statement that recommendations from this Committee will be considered for inclusion in the proposed Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, and recommends the incorporation into the Bill of: sexual and gender-based crimes, including mass crimes against women perpetrated during communal violence; a comprehensive system of reparations for victims of such crimes; and gender-sensitive victim-centered procedural and evidentiary rules.”

Section 17 of this Bill introduces the requirement of governmental sanctions for the prosecution of public servants who acted in bad faith in times of communal violence, which perpetuates the problem of official de facto impunity.

#### 3.2 *Amnesty International's Recommendations*

Concerns surrounding sexual and gender based violence during communal violence – including specific sexual and gender based crimes, reparations for victims, and gender-sensitive procedures – should be incorporated into law.

### 4. The Definition of Torture should Include Sexual Violence

The Prevention of Torture Bill, 2010 is currently pending before the Indian Parliament. Amnesty International has already noted its various concerns with the Torture Bill in its present form, has pointed out where the Bill fails to comply with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and has provided extensive recommendations on how to redress this.<sup>47</sup>

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<sup>46</sup> Concluding Comments of the Committee on the Elimination of Discrimination against Women, CEDAW/C/IND/CO/3, 2 February 2007, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/243/98/PDF/N0724398.pdf?OpenElement>

<sup>47</sup> See Amnesty International, India: Briefing on the Anti-Torture Bill, ASA 20/030/2010, available at <http://www.amnesty.org/en/library/info/ASA20/030/2010>. India signed the Convention Against Torture in 1997 but has yet to ratify it. When a State signs a treaty, the signature is subject to ratification, acceptance or approval. A State that signs a treaty is obliged to refrain, in good faith, from acts that would defeat the object and purpose of that treaty.



#### *4.1 Amnesty International's Concerns*

In particular, the Bill does not expressly recognize that sexual and gender based violence may constitute torture under the UNCAT. International law is clear that where the violence is either committed by state actors, such as the police, the armed forces and prison staff, or at the instigation of or with the consent or acquiescence of officials, rape and other sexual violence occasioning severe pain and suffering, whether physical or mental, constitutes torture.<sup>48</sup>

#### *4.2 Amnesty International's Recommendations*

The Prevention of Torture Bill, 2010, should be revised, and sexual violence by which severe pain or suffering, whether physical or mental is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity should be expressly recognized as constituting torture.

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<sup>48</sup> See, for example, European Court of Human Rights, case of *Aydin v. Turkey* (57/1996/676/866), Judgment of 25 September 1997, para 86; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR Chamber I, judgment of 2 September 1998, para. 597; *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber, Judgment of 10 December 1998, paras. 264-9. See also Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3, 15 January 2008, paras. 30, 68 for how the purpose element is met where the act is a form of gender discrimination, such as violence against women.