THE DUTY TO INVESTIGATE CRIMES OF TORTURE IN NATIONAL LAW AND PRACTICE

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Introduction

The present submission focuses on the limitations of the penal paradigm shaping the duty to investigate incidents of torture (or other cruel, inhuman, or degrading treatment or punishment), based on a case study critically examining the special criminal justice pathway in responding to Violence Against Women (VAW) in Ecuador. It is our considered submission that the primacy of individual criminal accountability in framing the state's obligation to investigate credibly suspected or alleged incidents of torture or other ill-treatment, including VAW, can serve to decontextualise and impoverish the way we understand and respond to such human rights violations. On this basis, we argue that the centrality of criminal law should be rethought. We make the case for rethinking the duty to investigate torture and ill-treatment to accommodate the identification of systemic and structural factors contributing to the abuses at issue, and to trigger the pursuit of transformative reparations and guarantees of non-repetition.

The authors have all conducted extensive research on the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment, and on VAW. Dr Silvana Tapia Tapia has over nine years of experience researching VAW empirically. Her findings have been published in journals like Feminist Theory, Feminist Legal Studies, and Socio-Legal Studies. Her recent monograph *Feminism, Violence Against Women, and Law Reform: Decolonial Lessons from Ecuador* (Routledge Social Justice Series 2022), maps the history of criminal law reform on violence against women (VAW) in Ecuador and addresses the inefficacy of specialised courts in providing effective protection for survivors who file domestic violence complaints. Dr Mattia Pinto's doctoral thesis has examined the relationship between human rights and criminal law in the context of torture and human trafficking. Dr Pinto's findings have been published in leading legal journals (e.g. *Human Rights Quarterly* and *International Journal of Law in Context*) and book chapters. Professor Natasa Mavronicola has written a monograph on the right not to be subjected to torture or inhuman or degrading treatment or punishment (*Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute*

Rights and Absolute Wrongs (Hart Publishing 2021 – awarded the Society of Legal Scholars Birks Book Prize for Outstanding Legal Scholarship 2022) and several articles and book chapters on the subject.

The special criminal justice pathway for VAW in Ecuador

Regulatory frameworks in Ecuador

In 2008, a new Constitution was enacted in Ecuador, which proclaimed the human right to "a life without violence in the public and private sectors" (Art. 66) and specifically mentioned gender-based violence (Art. 77). In 2014, a new Penal Code was adopted, which criminalises various forms of VAW that were previously considered misdemeanours (Art. 155 et seq.).[1] It also introduced a new offence: femicide.[2] In addition, the Code established a 'specialised and expedited'[3] procedure to report and investigate VAW misdemeanours (Art. 643) and criminal offences (Arts. 558 and 651.1), as well as several rules for judges to issue protection/restraining orders (Art. 651.2). Many of these legislative acts were adopted to implement international human rights commitments.[4]

In 2018, the National Assembly (Parliament) adopted a new 'Law To Prevent And Eradicate Violence Against Women'. This law supplemented the Penal Code's articles on psychological VAW to facilitate criminal prosecution, it expanded the types of 'lesser' injuries that are criminally prosecutable as misdemeanours, and added 'patrimonial', 'symbolic' and 'digital' violence, which had been omitted in the Penal Code (Art. 10).

The specialised criminal courts for 'violence against women and the family' hear all misdemeanours and criminal offences categorised as 'violence against women or members of the family nucleus' in the Penal Code. This excludes rape, which is heard by ordinary criminal courts under ordinary procedural rules.

It is important to note, however, that even though criminal laws have multiplied, budgetary allocations to provide services to victims have not. In April 2022, the National Network of Shelters (private houses that receive partial state contributions) denounced that the Human Rights Secretariat reduced the amount of money allocated to shelters from USD 126,000 to

[1] Physical violence is punished with the same penalties as the offence of assault (bodily harm) increased by one-third (Art. 156). Psychological violence is punishable by imprisonment of six months to one year, and if the offence is committed against persons in one of the priority care groups, in a situation of double vulnerability or with catastrophic or highly complex illnesses, or if the victim suffers from a mental illness or disorder as a result of the psychological violence, the penalty is imprisonment of one to three years (Art 157).

[2] Femicide is defined as the murder of a woman resulting from unequal power relations based on her sex/gender and is punished with imprisonment of twenty-two to twenty-six years (Art. 141).

[3] In practice, the procedure is expedited only in the case of misdemeanours. In the case of criminal offences, the specialised courts are competent only up to the 'preparatory' phase of the trial. For the trial perse, the case files are re-directed to the ordinary criminal courts, under the ordinary procedure. However, there is little empirical data to document how either of these procedural models is working in practice, given that, as explained below, the attrition rates (when cases are 'dropped') are very high.

[4] S. Tapia Tapia, 'Feminism and penal expansion: the role of rights-based criminal law in post-neoliberal Ecuador' (2018) 26(3) *Feminist Legal Studies* 285.

$111,000.[5] Moreover, to the present date, the government has only executed 5% of the budgeted yearly funds to eradicate and prevent gender-based violence.[6] Additionally, the government's state downsizing plan has also reduced budgetary allocations for the Integrated Protection Service for Victims of Violence. In January 2020, around half of the staff across the country were notified of the non-renewal of their contracts.[7]

Challenges, impediments, and obstacles to effective national investigations and prosecutions

In Ecuador, gender-based discrimination, sexism, and misogynistic violence are deeply rooted and widespread problems. The most recent 'National Survey On Gender Violence And Family Relations' indicates that, on average, 64.9% of the female population have experienced at least one type of gender-based violence throughout their lives. The groups that are ethnically identified as Indigenous and Afro-Ecuadorian suffer the highest rates of VAW in its different forms.[8] This is despite the country's adherence to several human rights instruments that compel states to criminalise and prosecute these conducts, as well as international court judgments that have found Ecuador responsible for not criminally investigating and punishing VAW.[9]

Dr Tapia Tapia's research on the operation of the specialised mechanisms for investigating, prosecuting, trying and punishing VAW in Ecuador produced several findings. On the one hand, economic inequality highly impacts women's ability to access protection, since a degree of financial independence and time away from care work are necessary to navigate any legal process successfully.[10] Furthermore, due to lacking financial resources and/or a place to go with their children, women are frequently unable to leave their violent households.

On the other hand, for many survivors, prosecuting and punishing the aggressor is not a priority: for the most part, they want effective protection and the cessation of ongoing violence. At the same time, they find various obstacles when they do decide to file a formal complaint (usually motivated by the need to do so to obtain a protection/restraining order). As empirical research shows, women find criminal trials costly, cumbersome, stigmatising, disruptive and ostracising: for many poor women, even affording childcare and transport to attend a hearing,

[5] Primicias, 'Casas de acogida hacen cuentas para operar con menos recursos públicos' (Primicias, 17 April 2022) https://www.primicias.ec/noticias/sociedad/casas-acogida-mujeres-reduccion-presupuesto/.

[6] S. España, 'Ecuador responde al año más sangriento contra las mujeres con un presupuesto mínimo' (El País, 10 September 2022) https://elpais.com/internacional/2022-09-10/ecuador-responde-al-ano-mas-sangriento-contra-las-mujeres-con-un-presupuesto-minimo.html.

[7] El Universo, 'Servicio a víctimas de violencia se queda a la mitad del personal en Ecuador' (El Universo, 13 January 2020) https://www.eluniverso.com/noticias/2020/01/13/nota/7688340/servicio-victimas-violencia-se-queda-mitad-personal.

[8] INEC, 'Encuesta Nacional sobre Relaciones Familiares y Violencia de Género contra las Mujeres – ENVIGMU' (November 2019) https://www.ecuadorencifras.gob.ec/documentos/web-inec/Estadisticas_Sociales/Violencia_de_genero_2019/Principales%20resultados%20ENVIGMU%202019.pdf.

[9] For example, *Paola del Rosario Guzmán Albarracín y familiars*, Inter-American Commission of Human Rights, No 110/18 Case 12.678 (5 October 2018).

[10] K. Friederic, 'Violence against women and the contradictions of rights-in-practice in rural Ecuador' (2013) 41(1) *Latin American Perspectives* 19.

is difficult.[11] Yet, justice operators focus on advancing the trials and 'empowering' complainants to pursue a conviction. As noted, restraining/protection orders are subordinated to the progress of the criminal trial: they are issued only after an official complaint is filed, in which the complainant should explicitly ask for protective measures. If the trial does not advance (for example, because the complainant 'fails' to attend a hearing), the protection order is rendered ineffective due to a lack of legal grounds to maintain it.[12] At the same time, the specialised courts are not connected to public services that provide safe housing, healthcare, food, and access to financial help.[13]

Underreporting is also a reality despite the existence of specialised procedural rules to report VAW. The emergency service, ECU-911, receives an average of 290 daily emergency calls related to domestic violence; however, it is estimated that not even 30% of the women who call eventually file a formal complaint, and the great majority of those who do, never obtain a judicial decision.[14] This is largely because violence survivors are afraid of retaliation if they report their abusive partner. They also fear rejection by friends and family and losing the economic support the aggressor provides to their children. Often, after filing an initial complaint, they withdraw from the process because they want to avoid incurring additional costs or the aggravation of violence.[15]

When domestic violence is reported to emergency services, calls are generally re-directed to the police. This is problematic, as many women in Ecuador feel alienated from state institutions and have negative experiences of interaction with the police: they report inadequate handling, police agents attempting to mediate and push them to reconcile with the aggressor, and even making friends with him.[16] Although there are small, specialised police divisions with competence for domestic violence, most emergency calls are attended to by non-specialised agents. In those cases, police passivity is commonplace. Usually, agents do not respond on time and do not offer useful resources or information, such as how to reach institutions that could provide refuge and advice.[17]

Victim participation and protection

Women are largely abandoned by public authorities in Ecuador. As described above, their lived experiences are almost never considered in legal processes, and they lack effective protection from continuing violence. 2022 presents the highest number of femicides ever recorded: a woman is killed every 28 hours. 206 women have been killed between 1 January and 3 September 2022. 32 of the victims were survivors of violence, 13 had been sexually assaulted and 8 held judicial protection/restraining orders — that is, a specialised criminal

[11] S. Tapia Tapia, 'Beyond Carceral Expansion: Survivors' Experiences of Using Specialised Courts for Violence Against Women in Ecuador' (2012) 30(6) *Social & Legal Studies* 848.
[12] K. Bedford and S. Tapia Tapia, 'Specialised (in)security: violence against women, criminal courts, and the gendered presence of the state in Ecuador' (2021) 7 *Latin American Law Review* 21.
[13] Ibid.
[14] La Hora, '97% de las denuncias por violencia intrafamiliar no superan la investigación previa' (La Hora, 26 October 2021) https://www.lahora.com.ec/pais/mujeres-falta-sentencias-violencia-intrafamiliar/.
[15] Tapia Tapia (n 11).
[16] Ibid.
[17] Ibid.

court had knowledge of the case.[18] More than 50% of the suspected killers were in a romantic relationship with the victim. It is documented that when gender-based violence worsens, it can become fatal and result in femicide.[19]

Crucially, the staff of the Prosecutor's Office for Equity and Security in Gender Issues have recognised that 'the possession of a protection/restraining order is no guarantee to prevent women from being victims of violence and even femicides'.[20] Because the orders are lost when the trial is no longer pursued, or because they do not include measures such as safe housing, 'the protection/restraining order becomes a crumpled piece of paper that is found, in most cases, in the victim's pocket when forensic agents pick up her corpse'.[21]

Accountability and redress beyond the penal frame

Key human rights bodies delineate the obligation to investigate suspected or alleged violations of the right not to be subjected to torture or ill-treatment through a focus on measures capable of identifying and punishing those responsible.[22] This shapes a dominant understanding of accountability and redress for torture and ill-treatment, including VAW, as consisting chiefly of individual criminal accountability, pursued through criminal investigation, criminal trial and criminal punishment. This approach in our view unduly narrows the character and scope of the inquiry and response required, particularly with respect to forms of abuse that are widespread within particular institutions or indeed society at large, such as police brutality and corruption, inhuman and degrading conditions of detention, or VAW. The limitations of this approach are evident in the case of the special measures undertaken to address VAW in Ecuador, which have remained within the penal frame while side-lining or neglecting other potent measures of redress and protection, including the provision of shelter and housing.

The narrow parameters of the criminal process tend to lead to a narrow, individualised and decontextualised[23] 'diagnosis' of the nature and causes of the harm inflicted, and accordingly of the 'cure' to be provided. A focus on punishing the individual(s) responsible can mean that serious abuses are understood and treated as though they implicate lone individuals or groups acting aberrantly in isolated incidents, even though it is widely observed that torture and ill-treatment are often part of broader systems or patterns of abuse, of which many are aware if not implicated, and which are often sustained by normative, institutional, systemic and structural enabling factors or social 'pathologies'.[24] In other words, even if individual criminal accountability is achieved – a rarity in respect of all too many instances of torture and ill-

[18] Fundación Aldea, '206 femi(ni)cidios en Ecuador ¡Nos declaramos en alerta nacional y vigilia permanente!' (ALDEA, 16 September 2022) http://www.fundacionaldea.org/noticias-aldea/tercermapa2022.

[19] M. Lagarde, 'Preface: feminist keys to understanding feminicide' in R.-L. Fregoso and C. Bejarano (eds), *Terrorizing Women: Feminicide in the Americas* (Duke University Press 2010).

[20] Primicias, 'Boletas de auxilio no garantizan la seguridad de las víctimas de agresión' (Primicias, 5 February 2022 https://www.primicias.ec/noticias/sociedad/femicidio-boleta-auxilio-ciclo-violencia-mujeres/.

[21] R. Hidalgo, 'Justicia para las mujeres' (4pelagatos.com, 28 January 2022 28) https://4pelagatos.com/2022/01/28/justicia-para-las-mujeres/.

[22] See, for example, *El-Masri v FYROM*, European Court of Human Rights, App No 39630/09 (13 December 2013) paras 182, 255.

[23] K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1069, 1071.

[24] See D. Celermajer, *The Prevention of Torture: An Ecological Approach* (CUP 2018).

treatment,[25] including VAW – this can serve to individualise a systemic/structural problem. Tackling the 'bad apple(s)' through the criminal process can obscure and, thus, effectively absolve the 'rotten orchard'[26] (collective or institutional malpractice or discrimination, for example), as well as the wider ecosystem of abuse: the structures and systems that empower abusers and, by creating vulnerability and marginalisation, including through socioeconomic disadvantage, expose or subject people to torture and other ill-treatment (including VAW). This limited and limiting 'diagnosis' of the problem also limits the response to it. The primacy placed on establishing criminal wrongdoing and issuing criminal punishment side-lines other forms of reparation for the victims and wider 'communities of harm'[27] and effective guarantees of non-repetition. Below, we consider briefly what can be gained by placing more emphasis on guarantees of non-repetition and transformative reparations.

Guarantees of non-repetition

One avenue for rethinking investigations of torture and ill-treatment, including VAW, is through the requirement for guarantees of non-repetition. This is an element of the reparations required for gross violations of international human rights law according to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles). We believe that adopting it in respect of incidents, patterns, and systemic occurrences of torture and ill-treatment, including VAW, is a fruitful pathway to providing more meaningful redress, reparation, and protection to all those who have been harmed or stand to be harmed by such abuse.

According to the UN Basic Principles, guarantees of non-repetition 'should include, where applicable, measures such as: '(a) Ensuring effective civilian control of military and security forces', […] '(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders', […] '(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises', […] and '(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law'.

For the purposes of our brief submission, we are particularly concerned with (h), although we recognise the relevance of many of the other elements identified in this non-exhaustive list. We would suggest that, as Dr Tapia Tapia's research in Ecuador demonstrates, there is cause for identifying and reforming laws (or indeed the lack thereof) relating to a range of areas that materially impact persons facing abuse, including in respect of: access to justice (not isolated to criminal justice), financial support; divorce; child custody; welfare support; access to

[25] N. Melzer, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer' (UN General Assembly 2021) A/76/168; T. Kelly, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty* (University of Pennsylvania Press 2013) 144.
[26] M. Punch, 'Rotten Orchards: "Pestilence", Police Misconduct and System Failure' (2003) 13 *Policing and Society* 171.
[27] See F. Ni Aolain, 'Sex-based Violence during the Holocaust – A Reevaluation of Harms and Rights in International Law' (2000) 12 *Yale Journal of Law and Feminism* 43.

healthcare; access to education; access to safe housing; insulation of (potential) victims-survivors from immigration control; etc.

Transformative reparations

The pursuit of non-recurrence can be taken a step further through transformative reparations. While the traditional objective of reparations is to restore victims' situation before the harm occurred, *transformative* reparations are based on the premise that it is undesirable to return systematically disadvantaged survivors to marginalisation, inequality and insecurity.[28] This type of reparation seeks to transform the circumstances in which the violation(s) occur(red), including the social, cultural and political conditions that enabled or facilitated rights violations.[29] The concept of transformative reparations recognises that reparations can truly repair histories and/or patterns of harm if they bring about structural changes and contribute to the construction of a more just and inclusive society. This means, for example, tackling the deep-seated structures at the root of torture and ill-treatment, including VAW, to prevent similar violence from occurring again.

We believe that there is great scope for reparations with transformative potential to redress acts of torture and ill-treatment, including VAW, at the national and local levels, particularly because these abuses tend to be all too pervasive and shaped by a range of societal and institutional factors that constitute an 'ecosystem' of abuse.[30] Thus, a transformative approach to reparations should offer a process to ensure participation of and redress for all survivors, but also and especially an opportunity for survivors and those at risk to access and shape institutions from which they were previously excluded and challenge structures that contribute(d) to their victimisation.[31] The focus is on countering systemic oppression and inequality, fostering community building and education, access to safe housing, understanding of trauma and healthcare support as well as institutional reform, and to strengthen the capacities and respect for the agency of survivors.[32]

The need to look beyond the criminal process

The criminal process does not promote societal transformations or secure wide-ranging guarantees of non-recurrence: convictions do not secure structural and systemic measures emanating from the state and its institutions whose failures have contributed to the rights violations.[33] It is the state, and not the individual convicted, that can redistribute wealth, resources and power, by changing laws (beyond the criminal law), funding healthcare and

[28] R. Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 *Netherlands Quarterly of Human Rights* 625, 637-638; W. Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3(1) *International Journal of Transitional Justice* 28.

[29] Uprimny Yepes (n 28); S. Weber, 'From Victims and Mothers to Citizens: Gender-Just Transformative Reparations and the Need for Public and Private Transitions' (2018) 12 *International Journal of Transitional Justice* 88; B. McGonigle Leyh and J. Fraser, 'Transformative reparations: changing the game or more of the same?' (2019) 8(1) *Cambridge International Law Journal* 39.

[30] Celermajer (n 24).

[31] P. Gready and S. Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339, 358.

[32] S. Gready, 'The Case for Transformative Reparations: In Pursuit of Structural Socio-Economic Reform in Post-Conflict Societies' (2022) 16(2) *Journal of Intervention and Statebuilding* 182, 193.

[33] S. Williams and E. Palmer, 'Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia' (2016) 10 *International Journal of Transitional Justice* 311, 314.

rehabilitation services, providing access to safe housing, work and education, as well as radically reforming violent institutions. Second, criminal trials are not designed to engage substantively with the structural causes of violence to be repaired, such as poverty, systemic discrimination, social marginalisation, police corruption, political instability, and economic injustice. Third, the criminal process inevitably creates a distinction between 'deserving' victims – who have been vindicated in a criminal court – and the all too many who have not.[34] Even the victims who are allowed to participate in the criminal process, as the case of Ecuador shows, are assigned a peripheral role and are never treated as the main agents of change.

We would therefore urge the Rapporteur to consider advancing an understanding of state obligations of investigation of torture and ill-treatment that moves beyond the penal paradigm and that accordingly looks beyond the *crime* (and, by implication, the punishment) of torture and other forms of ill-treatment, including VAW, to wider understandings of the wrongs and harms at issue, of how relevant actors are to be held accountable for them, and of what measures are needed to secure full reparation to victims of such abuses.

Conclusion

For the reasons stated above, we recommend that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment consider how the duty to investigate torture and ill-treatment may be re-conceptualised to accommodate or even prioritise accountability mechanisms that go beyond the penal frame, such as guarantees of non-repetition and transformative reparations. We believe that these mechanisms provide the foundations for a more effective response to torture and other ill-treatment than the criminal justice system, but they may also help overcome social problems created by or inherent in the criminal justice system, which encompasses actors and institutions (notably the police and the prison) that all too often inflict torture and ill-treatment.

[34] Leyh and Fraser (n 29) 54.