



NATIONAL CENTER ON SEXUAL EXPLOITATION

Standing Committee on Access to Information, Privacy and Ethics, 43rd Parliament, 2nd Session
Brief Submission | *Protection of Privacy and Reputation on Platforms such as Pornhub*
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“When your rape is entertainment, your worthlessness is absolute.”
— Andrea Dworkin, *Letters from a War Zone*¹

Introduction

MindGeek, a company with a complex system of subsidiaries,² boasts 115 million daily visitors to its various websites³ and controls a large percentage of the pornography distributed online.⁴ Pornhub alone had 42 billion site visits in 2019 and 6.83 million videos uploaded.⁵ Particularly through its flagship tube site Pornhub, MindGeek has hosted a surfeit of illegal content, including rape videos and other non-consensually produced videos, child sexual abuse material (CSAM), and non-consensually shared pornography,⁶ for which it is now being investigated by this Committee.

The National Center on Sexual Exploitation (NCOSE) Law Center writes in support of the investigation, specifically, to describe the human rights abuses represented by MindGeek’s facilitating, hosting, distributing, and monetizing non-consensual content on its sites. This brief will outline how nonconsensual content on MindGeek websites is violating international legal norms against slavery and torture.

The dominant legal frameworks for assessing and regulating pornography have characterized it primarily as something that is said or expressed instead of something that is done.⁷ This brief seeks to reveal what is done. Rape is not transformed into speech because someone decided to film it. The camera’s presence, if anything, exacerbates the torture, sexual violence, and abuse in

¹ ANDREA DWORKIN, LETTERS FROM A WAR ZONE 279 (1988).

² See *MindGeek corporate group*, OPENCORPORATES.COM, https://opencorporates.com/corporate_groupings/MindGeek (last visited Feb. 13, 2021).

³ See MINDGEEK.COM, <https://www.mindgeek.com/> (last visited Feb. 13, 2021).

⁴ See *How a (Canadian-founded) company you’ve never heard of took control of the porn industry*, NATIONAL POST (July 12, 2016), <https://nationalpost.com/news/how-a-canadian-founded-company-youve-never-heard-of-took-control-of-the-porn-industry>.

⁵ See *The 2019 Year in Review*, PORNHUB (Dec. 11, 2019), <https://www.pornhub.com/insights/2019-year-in-review>.

⁶ See Harriet Grant, *World’s biggest porn site under fire over rape and abuse videos*, THE GUARDIAN (Mar. 9, 2020), <https://www.theguardian.com/global-development/2020/mar/09/worlds-biggest-porn-site-under-fire-over-videos-pornhub>.

⁷ CATHARINE MACKINNON, ONLY WORDS 39 (1996) (“Pornography has to be done to women to be made[.]”).

pornography: it memorializes and disseminates and monetizes them; it does not change them into materially different things.⁸

Content on MindGeek platforms violates international legal norms against slavery

The prohibition against slavery is a *jus cogens* norm under international law, making compliance with it non-optional for states.⁹ *Jus cogens* status is reserved for the most serious human rights abuses, including genocide and crimes against humanity.¹⁰

Sex trafficking is one form that slavery takes.¹¹ The main international treaty for stopping trafficking in persons, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol), defines sex trafficking as the “recruitment, transportation, transfer, harbouring or receipt of persons,” for prostitution or “other forms of sexual exploitation,” where the person is either a minor, or “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person[.]”¹² Notably, consent is not a defense where these means are used.¹³

The United Nations model law on trafficking in persons defines sexual exploitation to include “the obtaining of financial or other benefits through the involvement of another person in . . . pornographic acts or the production of pornographic materials.”¹⁴

For comparison purposes, United States federal law on sex trafficking, under which NCOSE, along with several other law firms, has just sued MindGeek, includes a more direct commercial requirement: sex trafficking occurs if there is a commercial sex act involving a person under 18

⁸ Consider, for example, the role that pornography played in the Bosnian genocide. Serbian soldiers created rape and extermination camps for the Bosnian women, made pornography of the abuses, and showed them on the evening news. The pornography was part of a deliberate attempt to destroy and demoralize an entire ethnic group by committing real atrocities and broadcasting them. See Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 6–7 (1994). See also THOMAS TRZYNA, PORNOGRAPHY AND GENOCIDE: THE WAR AGAINST WOMEN 64 (2019).

⁹ Rep. of the Int'l Law Comm'n, Peremptory norms of general international law (*jus cogens*) at 142, 147, U.N. Doc. A/74/10, <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> (2019).

¹⁰ Peremptory norms, *supra* note 9, at 142, 147.

¹¹ See, e.g., U.N. Off. of the High Comm'r, *Human Rights and Human Trafficking: Fact Sheet No. 36*, at 4 (2014), https://www.ohchr.org/documents/publications/fs36_en.pdf (trafficking in persons implicates the right to be free from slavery); *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (July 1, 2010), https://ec.europa.eu/anti-trafficking/sites/default/files/rantsev_vs_russia_cyprus_en_4.pdf (ECHR decision finding that the state failure to investigate and prosecute trafficking in persons as defined by Palermo Protocol violated the right to be free from slavery).

¹² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a), 344, Nov. 15, 2000, 2237 U.N.T.S. 319, <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>.

¹³ Palermo Protocol, Art. 3(b)-(d), *supra* note 12.

¹⁴ United Nations Office on Drugs and Crime, Model Law against Trafficking in Persons, art. 5 (1)(s), https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf (last visited Feb. 13, 2021).

or a person induced by force, fraud, or coercion.¹⁵ A commercial sex act is “any sex act, on account of which anything of value is given to or received by any person.”¹⁶

While the US law defines coercion to include threatening physical, legal, psychological, financial, or reputational harm;¹⁷ the Palermo Protocol’s language about coercion is clearer and more expansive, as it explicitly references abuses of power and disallows a consent defense. However, the US language involving predicate offenses is broader: anyone who “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means” or “benefits, financially” from sex trafficking can be held liable.¹⁸

The Palermo Protocol is less clear about the liability of sex trafficking profiteers, although the UN model law recommends criminalizing those who profit from trafficking in persons, suggesting the following language: “*Anyone* who knowingly makes use of or profits from labour or services performed or rendered under conditions of exploitation as defined in article 8, paragraph 2” (emphasis added).¹⁹

While Pornhub contains user-provided content, it also has a formal Content Partner Program which includes Brazzers, Fake Taxi, and Kink.com,²⁰ and once included GirlsDoPorn, whose leaders are currently being prosecuted for sex trafficking.²¹ Pornhub owns some of the entities it describes as Content Partners, including Brazzers, Babes.com, Reality Kings, and Twistys.²² Pornhub also has a webcam program called Modelhub, where people create pornography of themselves and receive a percentage of the website’s earnings.²³ Pornhub profits in several ways: advertising, including through TrafficJunky, which MindGeek owns, selling user data,²⁴ revenue from videos sales and premium memberships, and revenue from Modelhub tips.²⁵

Because Pornhub has monetized pornographic content through advertisements and premium subscriptions, it is facilitating and profiting from commercial sex acts. Any content involving minors is per se sex trafficking. Non-consensually produced pornographic content is also legally a form of sex trafficking. This includes all filmed rape, as well as any content involving force,

¹⁵ 18 U.S.C. § 1591 *et seq.*

¹⁶ 18 U.S.C. § 1591(e)(3).

¹⁷ 18 U.S.C. 1591(e)(2).

¹⁸ 18 U.S.C. §§ 1591, 1595. Criminal liability requires knowledge or reckless disregard (except for advertising, which requires actual knowledge); civil liability attaches to those to profit from what they know or should know is a sex trafficking venture.

¹⁹ Model Law against Trafficking in Persons, *supra* note 14 at 35.

²⁰ See *Pornhub Network Content Partner Program*, PORNHUB.COM, <https://www.pornhub.com/partners/cpp> (last visited Feb. 13, 2021).

²¹ See Samantha Cole and Emanuel Maiberg, *Pornhub Finally Removes Girls Do Porn*, VICE (Oct. 14, 2019), https://www.vice.com/en_us/article/43kb5q/pornhub-finally-removes-girls-do-porn.

²² See *Mindgeek*, WIKIPEDIA, <https://en.wikipedia.org/wiki/MindGeek> (last visited Feb. 17, 2021).

²³ See *Modelhub and Selling Videos*, PORNHUB.COM, <https://help.pornhub.com/hc/en-us/articles/360046712793-Modelhub-and-Selling-Videos> (last visited Feb. 17, 2021).

²⁴ See *Terms of Service*, PORNHUB.COM (Last modified: Dec. 8, 2020), <https://www.pornhub.com/information#privacy>.

²⁵ Models receive up to 65% of on-demand videos, 80% of revenues from fan-only videos, and 80% of any tips. Pornhub takes a portion of the money, including tips, in addition to a 15% processing fee. See *Earnings and Payments*, PORNHUB.COM, <https://help.pornhub.com/hc/en-us/articles/360046090414-Earnings-and-Payments> (last visited Feb. 13, 2021).

fraud, abuse of power or vulnerability, or any other coercion—whether from an external trafficker or through MindGeek-owned studios, Modelhub program, or Content Partner.

MindGeek does not even try to verify consent on Pornhub and intimated that it would be impossible to do so at a recent Committee hearing.²⁶ As has already been detailed before this Committee, Pornhub has refused to remove abusive and illegal content in a timely fashion when asked,²⁷ and apparently stores a copy of all content on its servers, even CSAM.²⁸

Several examples of MindGeek knowingly profiting from sex trafficking on its sites are already before this Committee, so we only mention one: in the GirlsDoPorn case, women were told they were being considered for modeling jobs and flown to San Diego.²⁹ On arrival, the perpetrators told them the gig was actually for pornography, but that it would be put on DVDs only for private collections abroad. They gave the women drugs and alcohol, rushed them to sign the contracts, and in some cases threatened them with legal action if they backed out, or prevented them from leaving until they did the scenes.

In stark contrast to their assurances, GirlsDoPorn distributed the videos to the world through Pornhub.³⁰ GirlsDoPorn was an official Pornhub Content Partner,³¹ with a channel that had more than 600 million views.³² Many of the women’s reputations, health, and lives were ruined as a result, and several became suicidal.³³ The survivors sued in civil court, and were awarded over 12 million dollars last January. The US federal government is now prosecuting the

²⁶ *Protection of Privacy and Reputation on Platforms such as Pornhub: Hearing Before the Standing Comm. on Access to Information, Privacy and Ethics*, 43d Parliament, at 01:40:25 (Feb. 5, 2021) [hereinafter *Ethics Comm. Hearing*], <https://www.rev.com/transcript-editor/Edit?token=KDNs1U0hV9wN5UpsCPQVtIMyrXA0YD-PoAcxDwPnPz8YgR6MEO1t5Aj2mR9A3KaHOiQltUVairF5cavte-FtAus1ShA&loadFrom=DocumentDeeplink&ts=6025.83> (statement of David Tassillo, Chief Operating Officer of MindGeek). “So when, it goes back to the, the process of the upload that, uh, we were discussing before. What we do is when the, when the compliance officers are running through the, the actual piece of material, they look for any sign of duress or anything that would insinuate that there is no consent. *There’s no, it would obviously be impossible to say, to have I consent to this video before every single video*, when the contents being uploaded to the site. So we look for any signs that the consent would not be available. And if that was ever depicted, that’s the type of content that wouldn’t make it up the site.” *Id.* (emphasis added). At 1:22:40, Mr. Tassillo seems to imply that it would be impossible to do consent verification for each video uploaded to their sites, so the reviewers just look for visual clues that the content is non-consensual (usually with the sound turned off). This seemed like a particularly telling admission.

²⁷ Megha Mohan, *I was raped at 14, and the video ended up on a porn site*, BBC NEWS (February 10, 2020), <https://www.bbc.com/news/stories-51391981>.

²⁸ *Ethics Comm. Hearing*, *supra* note 26, at [01:43:32](#) (statement of David Tassillo: “Once again, I go back to what I, what I told the committee before this content was suspended. It’s, hasn’t been deleted. So if there is anything law enforcement is still able to ask for any piece of information on any one of those pieces of content.”).

²⁹ Pauline Repard, *22 women win \$13 million in suit against GirlsDoPorn videos*, LOS ANGELES TIMES (Jan. 2, 2020), <https://www.latimes.com/california/story/2020-01-02/lawsuit-girlsdoporn-videos>.

³⁰ Proposed Statement of Decision, *Jane Doe Nos. 1-22, v. GirlsDoPorn.Com*, No. 37-2016-00019027 at 34 (Cal Super. Ct. 2020), <https://sanfordheisler.com/wp-content/uploads/2020/01/GDP-Courts-Proposed-Statement-of-Decision.pdf>.

³¹ Complaint, ¶ 110, *Jane Doe Nos. 1-14 v. MindGeek*, No. 20CV2440 W RBB (S. D. Cal. Dec. 15, 2020).

³² Statement of Decision, *supra* note 30 at 34.

³³ Statement of Decision, *supra* note 30 at 4.

perpetrators.³⁴ One male performer pled guilty to sex trafficking and conspiracy to commit sex trafficking in December 2020,³⁵ and a cameraman pled guilty to conspiracy to commit sex trafficking in January 2021.³⁶

Pornhub waited more than two years after the civil lawsuit was filed³⁷ – until GirlsDoPorn owners were indicted – to remove the sex trafficking channel,³⁸ and people could still access the videos as late as December 2020.³⁹ In the meantime, MindGeek continued to profit from the views the abuse videos continued to garner. That is, MindGeek deliberately facilitated and monetized pornographic content produced through slavery in the form of sex trafficking.

Content on MindGeek platforms violates international legal norms against torture

The prohibition against torture is also a *jus cogens* norms under international law.⁴⁰ Article 1 of the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture) defines torture as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as 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, when such pain or suffering 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴¹

While the Convention against Torture’s definitions are limited to state actors, international human rights law increasingly recognizes that human rights norms and related obligations do not only apply when the state is the violator.

³⁴ United States Department of Justice, *GirlsDoPorn Owners and Employees Charged in Sex Trafficking Conspiracy*, JUSTICE.GOV (Oct. 10, 2019), <https://www.justice.gov/usao-sdca/pr/girlsdoporn-owners-and-employees-charged-sex-trafficking-conspiracy>.

³⁵ United States Department of Justice, *Adult Film Performer Pleads Guilty in GirlsDoPorn Sex Trafficking Conspiracy*, JUSTICE.GOV (Dec. 17, 2020), <https://www.justice.gov/usao-sdca/pr/adult-film-performer-pleads-guilty-girlsdoporn-sex-trafficking-conspiracy>.

³⁶ United States Department of Justice, *Cameraman Pleads Guilty in GirlsDoPorn Sex Trafficking Conspiracy*, JUSTICE.GOV (Jan. 21, 2021), <https://www.justice.gov/usao-sdca/pr/cameraman-pleads-guilty-girlsdoporn-sex-trafficking-conspiracy>.

³⁷ Pornhub still had GirlsDoPorn as a Content Partner in August 2019. Samantha Cole, *Pornhub Is Still Working With Company Sued for Manipulating Women Into Porn*, VICE (Aug. 12, 2019), <https://www.vice.com/en/article/8xw9dx/pornhub-still-hosting-girls-do-porn>. The first complaint was filed in March 2017. See Second Amend. Compl. *Jane Doe Nos. 1-22, v. GirlsDoPorn.Com*, No. 37-2016-00019027 (Cal Super. Ct. 2020), <https://sanfordheisler.com/wp-content/uploads/2019/08/Complaint-Does-1-14.pdf>. It alleged conduct that violated federal sex trafficking statutes, though it did not contain a direct claim for sex trafficking beneficiary claim.

³⁸ See Sean Hollister, *Pornhub removes Girls Do Porn, finally drawing a line at sex trafficking charges*, THE VERGE (Oct. 14, 2019), <https://www.theverge.com/2019/10/14/20914593/pornhub-girls-do-porn-mindgeek-remove-channel-videos>. GirlsDoPorn was indicted in October 2019.

³⁹ Complaint, *supra* note 31, ¶ 63.

⁴⁰ Peremptory norms, *supra* note 9, at 142, 147.

⁴¹ A/RES/39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* December 10, 1984.

For example, Article 7 of the Rome Statute of the International Criminal Court, dealing with crimes against humanity, defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;”⁴² Article 2 (2)(e) of Draft Convention on Crimes against Humanity defines torture the same way.⁴³

These more recent definitions no longer consider torture to be exclusively state-perpetrated or state-motivated, and anticipate that non-state actors can be violators. Additionally, states have a duty to prevent non-state actors from violating human rights, a point of particular import for women and children, who are much more likely to face human rights abuses at the hands of private actors.

International courts have gradually begun ruling consistent with these principles, beginning with *The Prosecutor v. Jean-Paul Akayesu*, in which the International Criminal Tribunal for Rwanda explicitly compared rape to torture (though did not consider applying it outside official government acts):

The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture . . . does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence . . . Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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.⁴⁴

Similarly, the European Court of Human Rights (ECHR) has ruled that sexual violence can violate the European Convention on Human Rights as a form of torture,⁴⁵ but has gone further in also declaring that state failure to protect a child from domestic violence, committed by private actors, violated the prohibition on torture.⁴⁶

⁴²A/CONF.183/9, the Rome Statute of the International Criminal Court, art. 7, Jul. 17, 1998.

⁴³ Draft Articles on Prevention and Punishment of Crimes Against Humanity 3 (2019), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf (“‘[T]orture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions[.]”).

⁴⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 597 (Int’l Crim. Trib. for Rwanda, Sept. 2, 1998), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

⁴⁵ *Aydin v. Turkey*, Judgment, 57 Eur. Ct. of H.R. 86 (Sept. 25, 1997) (“[T]he Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention.”). Note, however, that the abuses in the *Aydin* case occurred while the complainant was in police custody.

⁴⁶ *A. v. U.K.*, Judgment, 100 Eur. Ct. H.R. 22, 24 (Sept. 23, 1998), http://www.cirp.org/library/legal/A_v_UK1998/ (“The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to

Despite the limitations of the Convention’s definitions, the Committee Against Torture itself wrote in a Comment that where a state knows non-state actors are engaging in torture, and fails to try to “prevent, investigate, prosecute, and punish” them:

[T]he State bears responsibility and its officials should be considered as authors, complicit . . . under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts . . . with impunity, the State’s indifference or inaction provides a form of . . . de facto permission. The Committee has applied this principle to States parties failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.⁴⁷

The Convention against Torture, as interpreted, and consistent with later treaties and international jurisprudence, forbids torture by non-state actors, including when it occurs through gender-based violence and sex trafficking, and imposes on states-parties an affirmative duty to hold private offenders accountable.

MindGeek has displayed, hosted, and monetized content that constitutes torture under international law. The following titles and actual acts are all depicted in videos that either appeared on Pornhub, or on a Pornhub Content Partner site:

- Turning the Tables: Device bondage, corporal punishment, extreme bastinado, flogging, caning, nipple clamps, squirting orgasms.⁴⁸
- Annihilation of [name removed]: Extreme caning, full body zipper, sybian orgasm, blindfolds, ass-fucking, pussy-fucking, bastinado, flogging, electrical shock.⁴⁹
- Fragile Captive - a Device Bondage Feature. Hot slut gets tormented in devise bondage by sadistic capture.⁵⁰
- Depraved Domination. Sensory deprivation, flogging, spanking, nipple clamps, pegs, breath control, fear-play, and made to cum.⁵¹
- Holding Her Down and Spanking Her Before Forcing Her to Have Sex⁵²

secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see, *mutatis mutandis*, the H.L.R. v. France judgment of 29 April 1997, *Reports* 1997-III, p. 758, § 40). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.”)

⁴⁷ Comm. Against Torture, General Comment 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), https://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html.

⁴⁸ <http://kink.com>. Note that to avoid re-exploiting persons exploited in pornography, I do not link directly to the videos cited, but to the websites on which they were found.

⁴⁹ <http://kink.com>

⁵⁰ <http://kink.com>

⁵¹ <http://kink.com>

⁵² <http://pornhub.com>

- Brunette Slave Tied Gagged and Anal Trained⁵³
- Busty German Slave [name removed]: Tongue Tied, Tit Torture and Rough⁵⁴
- BBW, Amateur Slave, Extreme Needle, BDSM, and Caged Cattle Prod⁵⁵

Some may object that the Convention against Torture can hardly be taken to address pornography, because films like those described above are merely fantasies engaged in by consenting adults, to which the law can have nothing to say. We have three responses.

First, MindGeek, as already noted above, does not verify consent. And at least some content has been displayed and monetized on Pornhub that does not even pretend to be consensual. For example, Rose Kalemba, who was forced at knifepoint by a man into a car near her home, endured an extreme, twelve-hours long gang rape and stabbing from two men, while a third man filmed the assault.⁵⁶ The men threatened to kill her, but eventually let her go.⁵⁷ Ms. Kalemba, who was 14, attempted suicide after visiting the hospital for her injuries.⁵⁸ Without her knowledge, the perpetrators uploaded the filmed torture, which was also CSAM, to Pornhub.⁵⁹

Ms. Kalemba discovered her rape had been publicized when her classmates at school, who saw the videos, began mocking and bullying her for them.⁶⁰ The video titles included these: “teen crying and getting slapped around,” “teen getting destroyed,” and “passed out teen.” One video had over 400,000 views, and Ms. Kalemba was visibly unconscious in some of the content.⁶¹ For six months, Ms. Kalemba repeatedly requested that Pornhub remove the videos, but Pornhub refused to do so.⁶² She then wrote to Pornhub posing as an attorney, and the videos were removed within 48 hours.⁶³

Second, the films described above are not fantasies. If the male appetite was simply for obviously faked/fantasy violence, obvious gross violence such as Ms. Kalemba’s would not have garnered nearly half a million views. A person doing something to another person’s body is outside the realm of fantasy. If pornography was purely about fantasy, Pornhub would be filled with animations and perhaps some faked special-effects violence; there would be no real bodies in it. Men know how to do that, but they do not use this knowledge in pornography. There do not appear to be any stunt doubles in pornography; the violence – including the violence that amounts to torture – is real.

⁵³ <http://pornhub.com>

⁵⁴ <http://pornhub.com>

⁵⁵ <http://pornhub.com>

⁵⁶ Megha Mohan, *I was raped at 14, and the video ended up on a porn site*, BBC NEWS (February 10, 2020), <https://www.bbc.com/news/stories-51391981>.

⁵⁷ Mohan, *supra* note 56.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Third, consent is not a defense to torture under international law⁶⁴ – nor should it be, given the objective harm at issue. The law historically has focused on state violators, and so the consent question was never raised (no one wonders whether men consent to violence committed against them by the state). While this is shifting, the bias that characterizing men’s torture of women as sex instead of as a human rights abuse still exists.

As the feminist legal theorist Catharine MacKinnon notes: “Internationally, torture has a recognized profile . . . Victims are beaten, raped, shocked with electricity, nearly drowned, tied, hung, burned, deprived of sleep, food, and human contact.”⁶⁵ MacKinnon condemns the gendered “double standard” that classifies torture differently when men do it women:

Why isn’t this political? The abuse is neither random nor individual. The fact that you know your assailant does not mean that your membership in a group chosen for violation is irrelevant to your abuse. It is still systematic and group-based . . . It would seem that something is not considered political if it is done to women by men, especially if it is considered to be sex.⁶⁶

The danger in this bias is especially apparent in asphyxiation, a common feature of pornography on Pornhub,⁶⁷ and increasingly, ordinary sexual encounters, and is objectively dangerous to those subjected to it. It is very easy to endanger a person through strangulation; “it can take more pressure to open a canned drink than to occlude the jugular vein,” and it is “more lethal” than waterboarding,” which is considered torture under international law.⁶⁸

Strangulation can cause cardiac arrest, organ failure, depression, PTSD, seizures, stroke (it “may be the second most common cause of stroke in women under 40”), suicidality, speech disorders, incontinence, paralysis, miscarriage,⁶⁹ and even death.⁷⁰ Consensual does not mean safe. Women can die when men choke them, whether they consent to it or not.⁷¹

⁶⁴ See, e.g., *supra* note 41. Article 2 of the Convention against Torture permits no exceptions to the ban on torture: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

⁶⁵ CATHARINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 17 (2006).

⁶⁶ MacKinnon, *supra* note 65.

⁶⁷ See, e.g., Nicholas Kristof, *The Children of Pornhub*, THE NEW YORK TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> (“Yet there’s another side of the company: Its site is infested with rape videos. It monetizes child rapes, revenge pornography, spy cam videos of women showering, racist and misogynist content, and footage of women being asphyxiated in plastic bags.”).

⁶⁸ Helen Bichard et al., *The Neuropsychological Outcomes of Non-Fatal Strangulation in Domestic and Sexual Violence: A Systematic Review* 4, PsyArXiv (2020), <https://psyarxiv.com/c6zbv/>. “To put this into context, waterboarding has now been internationally outlawed as a form of torture, correctly considered inhumane and unacceptably dangerous, even when its stated objective is to prevent multiple deaths. In waterboarding, however, it is only the airway which is occluded. Strangulation is more lethal: not only is breathing interrupted, but also blood flow to and from the brain . . . There is something societally flawed about banning the waterboarding of terrorists, whilst ignoring the intimate terrorism (Johnson, 2010) of those millions of women around the world who are regular victims of strangulation.” *Id.* at 33.

⁶⁹ *Id.* at 5, 7, 17-20, 22, 30.

⁷⁰ Anna Moore and Coco Khan, *The fatal, hateful rise of choking during sex*, THE GUARDIAN (Jul. 25, 2019), <https://www.theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex>.

⁷¹ See Bichard, *supra* note 68, at 32. It is unlikely that anyone is giving informed consent to strangulation, as most people are unaware of the risks, and the act itself disables a person’s capacity to give or withdraw consent: “The

Conclusion

Of course, to MindGeek, slavery and torture are not gross human rights abuses that they are responsible to avoid profiting from; they are entertainment categories, fetishes supported by their platform, using persons whose consent MindGeek did not even bother to verify.

In the days following the terrible police-perpetrated murder of George Floyd, Pornhub hosted and monetized George Floyd⁷² and police-brutality-themed pornography.⁷³ Pornhub also has Holocaust pornography and slavery role play targeting black women,⁷⁴ with titles like “Black slave girl brutalized,” “You should get your own black slave.” “African busty sluts get tortured by white master,” “BLACK PATROL- White Cops Track down and F*ck a Black Deadbeat Dad.”⁷⁵

There is no degradation, humiliation, torture, or abuse that pornography has not sexualized, and racism is no exception. This is a particularly disturbing trend given that creating pornography of racial atrocities was a feature of the Jim Crow South.⁷⁶

In short, MindGeek has found a way to monetize human rights abuses. They must be held accountable. We do not yet know how many women and girls, especially women and girls of color, were raped, tortured, humiliated, and degraded to create this empire, their trauma compounded by millions of people consuming it as entertainment. It is impossible to have any true degree of gender or racial equality in a society where this is acceptable, and especially where it is profitable.

We commend the Committee’s investigatory work thus far, and call on the Committee to consider the full extent of MindGeek’s crimes, particularly those which implicate the company in facilitating, enabling, and profiting from serious human rights abuses.

potential onset of dyspraxia, amnesia, and unconsciousness itself (in as little as four seconds) are disabling: the very organ that is needed to withdraw consent is compromised by the activity to which that consent applies. The term ‘consenting kink’ is therefore a potentially fatal misnomer.”

⁷² Laila Mickelwait (@LailaMickelwait), TWITTER (May 29, 2020),

<https://twitter.com/LailaMickelwait/status/1266578040022163456>; Christen Price (@Christen_P5), TWITTER (June 2, 2020), https://twitter.com/Christen_P5/status/1267919413963042816.

⁷³ Price, *supra* note 72.

⁷⁴ Laila Mickelwait (@LailaMickelwait), TWITTER (Apr. 4, 2020),

<https://twitter.com/LailaMickelwait/status/1246629199647059968>.

⁷⁵ See screenshots in Christen Price, *The Long Racism of the Sex Industry*, ENDSSEXUALEXPLOITATION.ORG (Jun. 12, 2020), <https://endsexualexploitation.org/articles/the-long-racism-of-the-sex-industry/>.

⁷⁶ See, e.g., ANDREA DWORKIN AND CATHARINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS* 60-61 (1998) (writing that lynching pornography existed to teach Black people that they “belong in a subordinate position and should stay there or they will be horribly brutalized, maimed, and murdered like this one was. Another point of lynching is that whites see the body. Its display teaches them that they are superior and this was done for them. Photographs were sometimes taken of lynchings and made available for 50 cents apiece. Compare such a photograph with a 1984 Penthouse spread in which Asian women were bound, trussed, and hung from trees. One cannot tell if they are dead or alive. In both cases, individuals are hung from trees; often the genitals were displayed. In both cases, they are people of color. In both cases, sexual humiliation is involved.”).

About the National Center on Sexual Exploitation Law Center

The National Center on Sexual Exploitation (NCOSE) Law Center is a nonpartisan and nonsectarian entity that believes law is one of the greatest tools for defending human dignity against sex trafficking, pornography, child sexual abuse, and other forms of sexual violence.

The NCOSE Law Center promotes and participates in key, precedent-setting cases and advocates in US state and federal legislatures to impact policy for those who have experienced sexual harm.