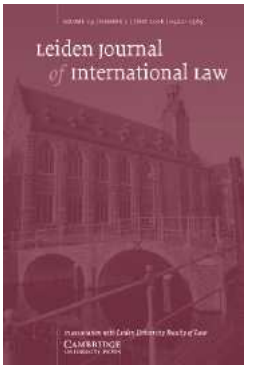
Leiden Journal of International Law

http://journals.cambridge.org/LJL

Additional services for ***Leiden Journal of International Law:***

Email alerts: Click here
Subscriptions: Click here
Commercial reprints: Click here
Terms of use : Click here



The 'Feminizing' of Torture under International Human Rights Law

ALICE EDWARDS

Leiden Journal of International Law / Volume 19 / Issue 02 / June 2006, pp 349 - 391
DOI: 10.1017/S0922156506003359, Published online: 13 July 2006

Link to this article: http://journals.cambridge.org/abstract_S0922156506003359

How to cite this article:
ALICE EDWARDS (2006). The 'Feminizing' of Torture under International Human Rights Law. Leiden Journal of International Law, 19, pp 349-391 doi:10.1017/S0922156506003359

Request Permissions : Click here

CAMBRIDGE JOURNALS

Downloaded from http://journals.cambridge.org/LJL, IP address: 192.167.90.29 on 24 Apr 2015

Leiden Journal of International Law, 19 (2006), pp. 349–391
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom doi:10.1017/S0922156506003359

The 'Feminizing' of Torture under International Human Rights Law

ALICE EDWARDS*

Abstract
International human rights law has been the subject of much scrutiny by feminist scholars over the past two decades, principally because of the way in which it is seen as privileging the realities of men's lives while ignoring or marginalizing those of women. The international prohibition on torture is identified by feminist writers as a classic example of this 'male'-gendered nature of human rights law. This article explores the extent to which key feminist critiques of the 1980s and 1990s are now reflected in the commentary and jurisprudence on torture of various international human rights bodies. It asks: have the critiques of international human rights law been satisfied by interpretations applied by international and regional bodies to this so-called 'male' right? It concludes by offering both caution and counsel – it cautions against the potentiality of new interpretations simply replacing old gender-based stereotypes with new ones and counsels international decision-makers to focus on the individual or personalized characteristics and circumstances of each claim, of which sex/gender may be but one factor.

Key words
definition of torture; due diligence; feminist theory; international human rights law; public/private dichotomy; torture

1. Context

International human rights law has been subject to much scrutiny by feminist writers over the past two decades. Principally, international human rights law has been criticized for privileging the realities of men's lives while ignoring or marginalizing those of women. Feminists have argued that human rights norms were initially articulated, and continue to be interpreted and applied, to reflect men's experiences, while overlooking the harms that most commonly or disproportionately affect women, such as illiteracy, poverty, or sexual violence.[1] The United Nations Convention against Torture 1984[2] (UNCAT) is identified as an example of this 'gendered' nature of international law, particularly because under its definition of torture the severe

* LLB (Hons.), BA (Tasmania), LL.M in Public International Law (Distinction) (Nottingham), Diploma in International and Comparative Human Rights Law (Institut international des droits de l'homme, Strasbourg); Adjunct Lecturer, University of Tulsa College of Law. The author is researching towards a doctoral degree through the Australian National University on the conceptualization of violence against women under international law. She has previously worked as a legal, protection and/or gender adviser to the UN High Commissioner for Refugees and has taught refugee and human rights law at the University of Tasmania and the Australian National University. She wishes to thank Professor Hilary Charlesworth and Susan Harris-Rimmer for their valuable comments on an earlier draft of this article.

1. A. Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', (1997) 19 *Human Rights Quarterly* 283.
2. GA Res. 39/46, 10 Dec. 1984; entered into force 26 June 1987.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

pain or suffering must be inflicted 'by a public official or other person acting in an official capacity'.[3] Although a few feminist writers acknowledge that women also suffer harm that falls within this circumscribed context of torture, they argue that even in these circumstances the international provisions do not fully reflect the nature and extent of violations faced by women in the public sphere.[4] As Catharine MacKinnon states, 'When what happens to women also happens to men, like being beaten and disappearing and being tortured to death, the fact that those it happened to are *women* is not registered in the record of human atrocity'.[5] This aspect of feminist reasoning on international law could be classified as deconstructionist in approach, as it seeks largely to criticize or deconstruct human rights law, without offering concrete ways in which human rights law could be developed to encompass the experiences of women.

In parallel to, and building on, the deconstructionist approach emerged what could be described as a reconstructionist feminist approach to human rights law. This approach focuses less on criticizing the 'male' nature of torture under international law and rejecting it on that basis as irrelevant to women's lives, and more on questioning and analysing the potential scope for such provisions to be interpreted and applied in favour of women. Feminist writers do not easily fall into one or other of these approaches, neither do the two approaches follow each other sequentially. However, international feminist writers of the mid- to late 1980s and early 1990s were more likely to fall into the deconstructionist approach as they sought to highlight, as a first step, the faults and problems of international human rights law. Only later did some of these same theorists and scholars seek to embrace human rights law as a tool to be used in pursuit of women's rights. In the absence of an explicit international treaty right protecting women against violence, women's rights activists and feminist academics began to argue that existing provisions could and should be revisited to incorporate better the concerns, experiences, and interests of women.[6] In other words, there has been an attempt to update traditional

3. See, e.g., H. Charlesworth, C. Chinkin, and S. Wright, 'Feminist Approaches to International Law', (1991) 85 AJIL 613, 628–30; H. Charlesworth and C. Chinkin, 'The Gender of *Jus Cogens*', (1993) 15 *Human Rights Quarterly* 63; A. Byrnes, 'The Convention Against Torture', in K. D. Askin and D. M. Koenig (eds.), *Women and International Human Rights Law* (1999), II, 183; C. A. MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in K. E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (1993), 21; R. Copelon, 'Recognising the Egregious in the Everyday: Domestic Violence as Torture', (1994) 25 *Columbia Human Rights Law Review* 291.

4. Byrnes, *supra* note 3, at 184.

5. C. A. MacKinnon, 'Rape, Genocide, and Women's Human Rights', (1994) 17 *Harvard Women's Law Journal* 5, 5 (emphasis in original).

6. See, e.g., R. J. Cook, 'State Responsibility for Violations of Women's Human Rights', (1994) 7 *Harvard Human Rights Journal* 125; A. P. Ewing, 'Establishing State Responsibility for Private Acts of Violence against Women under the American Convention on Human Rights', (1995) 26 *Columbia Human Rights Law Review* 751; D. Q. Thomas and M. E. Beasley, 'Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Domestic Violence as a Human Rights Issue', (1995) 58 *Albany Law Review* 1119; J. D. Wilets, 'Conceptualizing Violence: Present and Future Developments in International Law: Panel III: Sex and Sexuality: Violence and Culture in the New International Order: Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Perspective', (1997) 60 *Albany Law Review* 989; B. C. Alexander, 'Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence', (2000) 15 *American University International Law Review* 895; A. N. Wood, 'A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective', (2001) 12 *Hastings Women's Law Journal* 347; R. Lord, 'The Liability of Non-State Actors for Torture in Violation of

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

notions of torture to their contemporary setting. The first manifestation of this renewed hope in international law can be traced to the decisions delivered by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda after worldwide attention was paid to the mass rape, forced impregnation, sexual enslavement, and murder of thousands of women during the conflicts in these countries. It has been claimed that these wars were 'fought on and through women's bodies'.[7] Human rights courts and committees soon followed suit. Feminists writing during this phase could also be called integrationist, as they attempted to work for and to advocate women's rights within mainstream institutions. This approach, even if not an intended outcome, has contributed to the practice of gender mainstreaming[8] in so far as it seeks to understand and respond better to the interplay between the lives of women and international law. As Karen Knop asserts,

> The choice of an interpretative theory determines how to speak: it sets limits and terms of the conversation that may be had in international law. As such, interpretation rules in or out the sorts of reasoning that resonates most strongly with the groups affected.[9]

In this article, I explore the extent to which it can be said that key deconstructive feminist critiques are now reflected in the commentary and jurisprudence on torture of international and regional judicial and quasi-judicial bodies. Have interpretations applied by international and regional bodies to this so-called 'male' right against torture responded to these feminist critiques? Has the push by reconstructionists or integrationists borne fruit? While deconstructionist feminist scholars frequently refer to the definition of torture under the UNCAT as an example of male bias in the law, they tend to do so without considering its evolving interpretation and application adopted by various international and regional human rights bodies or, in fact, other variations of the torture prohibition, such as Article 7 of the International Covenant on Civil and Political Rights 1966[10] (ICCPR). This article seeks to do so. I undertake an in-depth review of the jurisprudence and other comments of the two main international treaty bodies dealing with torture, namely the Human Rights Committee (HRC) in its mandate over Article 7 of the ICCPR, and the Committee against Torture (CAT) over Articles 1 and 16 of the UN Convention against Torture.[11] In order to give a global picture I also highlight a number of relevant decisions of other international and regional bodies. I conclude that this reconstruction is not yet

---

International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', (2003) 4 *Melbourne Journal of International Law* 112; H. Pearce, 'An Examination of the International Understanding of Rape and the Significance of Labeling it Torture', (2003) 14 *International Journal of Refugee Law* 534.

7. C. Niarchos, 'Women, War and Rape: Challenges Facing the ICTY', (1995) 17 *Human Rights Quarterly* 649, 651.
8. See, *inter alia,* UN Report of Economic and Social Council, Mainstreaming the Gender Perspective into All Policies and Programmes in the United Nations System, UN Doc. A/52/3, 18 Sept. 1997; S/RES/1325 (2000) on Women, Peace and Security. For a review of gender mainstreaming within the United Nations, see S. Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (2004).
9. K. Knop, *Diversity and Self-Determination in International Law* (2002), 4.
10. UN Doc. A/RES/2200A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976.
11. The jurisprudence of the two treaty bodies reviewed for this article covers the period from the first case before each committee until 31 Dec. 2004.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

complete, but that some significant advances have been made towards guaranteeing protection against, and redress for, women-specific and women-related torture and other forms of ill-treatment. Male bias, though, continues to exist and to be reflected in the interpretation of specific provisions adopted by some international bodies. I end by raising both caution and counsel. While I acknowledge that incorporating women-specific concerns within the ambit of the torture prohibitions is an important step forward, I caution the feminist enterprise that its single focus on women-specific violations or those that disproportionately affect women may be contributing to the practice of 'essentializing' or 'stereotyping' women under international human rights law as apolitical victims of 'private' male sexual aggression, just as it has criticized human rights law for engaging in the same process. And I counsel international decision-makers to take account of the individualized or personalized nature of the specific claim, of which gender/sex may be but one factor.

For the purposes of this article 'gender' refers to the relationship between women and men based on socially or culturally constructed and defined identities, statuses, roles, and responsibilities that are assigned to one sex or another, and which reflect historical power imbalances. 'Sex', on the other hand, refers to a biological determination.

2. Feminist critiques

Three key critiques of international human rights law that also apply to the prohibition of torture can be distilled from the literature. It is against these critiques that I assess whether current judicial reasoning satisfies feminist concerns about the nature and operation of human rights law as applied to the example of torture. First, feminist scholars argue that international human rights law is conceived as a set of 'male' rights.[12] That is, rights are seen as being 'defined by the criterion of what men fear will happen to them'.[13] Writing in 1991, Hilary Charlesworth, Christine Chinkin, and Shelley Wright argued that 'the content of the rules of international law privilege men: if women's interests are acknowledged at all, they are marginalized'.[14] MacKinnon expresses this view as follows: 'Human rights have not been women's rights – not in theory or in reality, not legally or socially, not domestically or internationally'.[15] Feminists assert that international law has developed in a 'male', 'sexist', or 'gendered' way, or otherwise adopts the 'male' sex as the standard against which all individuals are judged. Women become the deviation from this standard.[16] It is asserted that the apparently non-gender-specific principles of

12. See, e.g., R. Eisler, 'Human Rights: Toward an Integrated Theory for Action', (1987) 9 *Human Rights Quarterly* 287; C. Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', (1990) 12 *Human Rights Quarterly* 486; Charlesworth et al., *supra* note 3; R. J. Cook, 'Women's International Human Rights Law: The Way Forward', (1993) 15 *Human Rights Quarterly* 230; Charlesworth and Chinkin, *supra* note 3; H. Charlesworth, 'Human Rights as Men's Rights', in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (1995), 103; G. Binion, 'Human Rights: A Feminist Perspective', (1995) 17 *Human Rights Quarterly* 509, 514.
13. Charlesworth et al., *supra* note 3; Charlesworth and Chinkin, *supra* note 3.
14. Charlesworth et al., *supra* note 3, at 614–15.
15. MacKinnon, *supra* note 5, at 5.
16. C. A. Littleton, 'Equality and Feminist Legal Theory', (1987) 48 *University of Pittsburgh Law Review* 1043, 1050–2; N. Naffine, 'Sexing the Subject (of Law)', in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (1995)

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

human rights law are in fact quite specific in their relevance and application to men's lives.[17] These arguments are frequently levelled against the definition of 'torture' under the UNCAT by stressing that women are more likely to suffer abuse at the hands of private citizens than by public officials, as is required by the definition.[18] Put another way, the form of torture traditionally accepted as prohibited under international law involves a male perpetrator – who is an official of the state, such as the police, security forces, or the military – and a male victim – who is a political dissident or a common criminal. If women are mentioned at all, it is as the wives, mothers, or daughters of these male victims, who occasionally find themselves caught up in such scenarios only by virtue of their familial relationship with the victim. That is, women gain access to the protective scope of the torture provisions on male-defined terms.

For cultural or non-Western feminists, the criticism is not only that women as a group are excluded from the protection of human rights law, but that *non*-Western women and *non*-Western values and experiences are absent from the whole debate.[19] Berta Hernández-Truyol goes further in anatomizing the norm as 'white, Western/Northern European, Judaeo-Christian, heterosexual, propertied, educated, male'.[20] Ironically, non-Western feminists criticize Western feminists for 'essentializing' women in their own image[21] – that is, white, Western/Northern European, Judaeo-Christian, heterosexual, propertied, educated, *women* – in a similar way in which feminists in general criticize the foundations of international law as 'normatizing' maleness. Ratna Kapur has criticized the reliance of international feminist theory on what she calls the 'authentic victim subject', namely 'the image that is produced is that of a truncated Third World woman who is sexually constrained,

---

18, 24–5; S. L. Bem, *The Lenses of Gender* (1993), 2; C. Gould, 'The Woman Question: Philosophy of Liberation and the Liberation of Philosophy', in C. Gould and M. W. Wartofsky (eds.), *Women and Philosophy: Toward A Theory of Liberation* (1976), 5–6; B. E. Hernández-Truyol, 'Women's Rights as Human Rights – Rules, Realities and the Role of Culture: A Formula for Reform', (1996) XXI *Brooklyn Journal of International Law* 605, 651; K. Mahoney, 'Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation', (1996) 12 *Brooklyn Journal of International Law* 799; U. A. O'Hare, 'Realizing Human Rights for Women', (1999) 21 *Human Rights Quarterly* 364, 365–6; MacKinnon, *supra* note 5.

17. H. Charlesworth, 'General Introduction', in Askin and Koenig, *supra* note 3, I, at xix, xx. See also A. Byrnes, 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalization?: Some Current Issues', (1992) 12 *Australian Yearbook of International Law* 205.
18. See, e.g., H. Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law', in Thornton, *supra* note 16, at 248–51; C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (1994), 85, 85–7; H. Charlesworth, 'The Mid-life Crisis of the Universal Declaration of Human Rights', (1998) 55 *Washington & Lee Law Review* 781.
19. See, e.g., E. Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', (1997) 19 *Human Rights Quarterly* 136; J. A. M. Cobbah, 'African Values and the Human Rights Debate: An African Perspective', (1987) 9 *Human Rights Quarterly* 309; J. Oloka-Onyango and S. Tamale, '"The Personal is Political" or Why Women's Human Rights are Indeed Human Rights: An African Perspective on International Feminism', (1995) 17 *Human Rights Quarterly* 691; K. Engle, 'Culture and Human Rights: The Asian Values Debate in Context', (2000) 32 *NYU Journal of International Law and Politics* 291; V. Amos and P. Parmar, 'Challenging Imperial Feminism', (1984) 17 *Feminist Review* 3; C. Harries, 'Daughters of Our Peoples: International Feminism Meets Ugandan Law and Custom', (1984) 25 *Columbia Human Rights Law Review* 493; T. E. Higgins, 'Anti-essentialism, Relativism, and Human Rights', (1996) 19 *Harvard Women's Law Journal* 89; N. Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism', (1993) 25 *Columbia Human Rights Law Review* 49; A. P. Harris, 'Race and Essentialism in Feminist Legal Theory', (1990) 42 *Stanford Law Review* 581.
20. Hernández-Truyol, *supra* note 16, at 651.
21. Higgins, *supra* note 19, at 89; Hernández-Truyol, *supra* note 16.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

tradition-bound, incarcerated in the home, illiterate, and poor'.[22] She argues that focusing on rape and sexual violence in feminist scholarship plays into the way in which women are 'essentialized' in human rights discourse.[23] It is particularly interesting to note in this context that the torture prohibition has been one of the key rights used to illegitimize traditional practices harmful to non-Western women, such as female genital mutilation, 'honour' crimes and dowry-related violence, and how this may in turn reinforce or perpetuate a particular image of Third World women. This aspect of 'essentialism', it is argued, also fails to recognize the multiple forms of oppression or discrimination that women may face simultaneously.[24] Relying on a single 'essence' of the self fails to recognize the intersection of, *inter alia*, race, ethnicity, class, religion, or sexual orientation.[25] While it is not possible to explore this critique in depth here, it is worth asking whether the practice of identifying multiple discriminations also compounds stereotypes. That is, does such a practice merely reinforce other stereotypes at the same time as gendered ones? We may no longer be speaking about 'women' as a monolithic category, but have we now moved to 'essentializing', for example, 'black versus white women', 'non-Western versus Western women', 'poor versus rich women', 'old versus young women', 'heterosexual versus homosexual women', as distinct categories or identities? In reality, the experiences of individual women may be influenced by a wide range of identity-based factors, alongside their own personalized experiences.

A second major limitation of international human rights law observed by feminist scholars is the choice of language within international instruments. Feminists commonly see language as supporting the exclusion of women from the scope of protection offered by human rights law. The constant use of masculine vocabulary, it is argued, operates at both a direct and a subtle level to exclude women.[26] In addition, it is said to 'reinforce hierarchies based on sex and gender, even if it is intended to be generic'.[27] In particular, feminists point to the use of the masculine pronoun, throughout international and even more modern human rights instruments, as creating a situation in which 'A man is sure that he is included; a woman is uncertain'.[28] In relation to torture under the UNCAT, the use of the masculine pronoun alone in

22. R. Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-colonial Feminist Legal Politics', (2002) 15 *Harvard Human Rights Journal* 1, 18.
23. Ibid., at 2. See also M. R. Mahoney, 'Victimization or Oppression? Women's Lives, Violence, and Agency', in M. A. Fineman and R. Mykitiuk (eds.), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994), 59–92.
24. See UN, On the Subject of Race, Gender and Violence against Women. Contribution of the UN Special Rapporteur on Violence against Women, Its Causes and Consequences, to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF. 189/PC. 3/5, 27 July 2001; Kapur, *supra* note 22.
25. J. E. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', (2003) 52 *Emory Law Journal* 71, 76; A. Edwards, 'Age and Gender Dimensions of International Refugee Law', in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 46. In this article I refer to the 'personalized' inquiry of refugee status determination and I identify compounding factors of persecution, such as age, gender, race, ethnicity, and so on.
26. H. Charlesworth, 'What are "Women's International Human Rights"?', in Cook, *supra* note 18, at 58, 68.
27. Charlesworth et al., *supra* note 3.
28. H. Bequaert Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights', in C. Gould (ed.), *Beyond Domination: New Perspectives on Women and Philosophy* (1983), 250, 259.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

the definition of proscribed behaviour has been criticized for giving an immediate impression of a male, rather than a truly human, right.[29] Its equivalent in Article 7 of the ICCPR similarly uses the male pronoun in its second sentence.

More radical feminists assert that rights language is 'fundamentally adversarial and negative', whereas 'Feminists seek a framework that emphasizes positive values such as helping, co-operating and acting out of love, friendship or relatedness, as well as fairness'.[30] In addition, legal institutions themselves are viewed as hierarchical, adversarial, and exclusionary.[31] West criticizes the individual as the subject of international human rights law as alienating to women whose experiences and concerns are 'not easily translated into the narrow, individualistic, language of rights'.[32] While acknowledging that there has been some broader use of women-inclusive language in international instruments more recently, in particular through 'gender mainstreaming' efforts, Chinkin does not consider such language to be transformative. She argues that 'All this activity has not really challenged the gendered assumptions about the structures of global political and economic power, nor of the construction of knowledge in the rapidly changing environment of international law'.[33] She argues that the best that has been achieved is an 'add women and stir' approach that does not demand any radical rethinking of programmes or gender-awareness.[34] While these critiques are made against human rights law generally, the fact that men continue to be the main users of the individual communications mechanisms established under the ICCPR and the UNCAT in relation to torture serves to reinforce, at first glance, their validity. Having said this, however, this article also evidences that women were among the first applicants to take advantage of such procedures, either on behalf of themselves or other persons, including other women, thus begging the question as to whether women actually do feel alienated by such 'adversarial' or 'hierarchical' procedures. Another observation that deserves attention is that women's claims to redress tend to fall within traditional understandings of the torture provisions. Very few cases have raised rape or other forms of sexual violence, and only an exceptional case has sought redress for harm outside state custody or by non-state actors, in spite of favourable commentary and jurisprudence on these forms of torture in recent years.

The third feminist critique that I wish to address in this article is the distinction drawn between the public and private spheres of everyday life for the purposes of international legal rules. No consideration of feminist theory could omit such a critique. The argument proceeds that law privileges the public sphere and thereby refuses to recognize the 'specificity of the female life in the private sphere'.[35] This

29. Charlesworth et al., *supra* note 3, at 628.
30. H. Bequaert Holmes and S. R. Petersen, 'Rights Over One's Own Body: A Woman-Affirming Health Care Policy', (1981) 3 *Human Rights Quarterly* 71, 73.
31. A. C. Scales, 'The Emergence of Feminist Jurisprudence: An Essay', (1986) 95 *Yale Law Journal* 1373; C. Smart, *Feminism and the Power of Law* (1989).
32. R. West, 'Feminism, Critical Social Theory and Law', (1989) *University of Chicago Legal Forum* 59, 59.
33. C. Chinkin, 'Feminist Interventions into International Law', (1997) 19 *Adelaide Law Review* 13, 26. See also H. Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', (2005) 18 *Harvard Human Rights Journal* 1.
34. Chinkin, *supra* note 33, at 6.
35. Naffine, *supra* note 16, at 18, 20 and 32.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

so-called public/private dichotomy is said to be at the source of women's exclusion from international human rights law, in particular because it is manifest in the theory of state responsibility for human rights abuses.[36] Ursula O'Hare refers to this as the 'gendered fault-line'.[37]

Given the state-based nature of international law, the main focus of human rights law has been on state misbehaviour directed against individuals, rather than on private attacks against women in their homes or in other private settings. In fact, some argue that the framework of civil and political rights is structured so as to safeguard activities in the private sphere (e.g. the right to privacy),[38] or that accepting statehood and sovereignty as fundamental components of the international legal order 'narrows our imaginative universe and the possibilities for reconstruction'.[39] Furthermore, the male-gendered conception of the public world as 'superior' to the private creates a 'hierarchy of oppressions' in which men fear oppression from the state, whereas women fear oppression by men in the private world.[40] Rhonda Copelon speaks of the 'persistent trivialization of violations against women',[41] while Catharine MacKinnon describes this phenomenon in the following way: 'When men sit in rooms, being states, they are largely being men'.[42] Because of this, she would argue, they do not, and cannot, represent women's interests. The public sphere has been consistently represented as the sphere of 'rationality, culture, and intellectual endeavour', compared with the domestic sphere as the sphere of 'nature, nurture, and non-rationality'.[43] Margaret Thornton argues that 'The public sphere, mediated through law, has enabled benchmark men to construct normativity, like God, in their own image'.[44]

On a practical level, the effect of distinguishing between the public and the private has 'rendered invisible', or at least less important, the many violations that women suffer in private.[45] In this way, it leaves the private or family realm, where the majority of women spend the bulk of their lives, unregulated, unprotected, and susceptible to abuse.[46] Women, for example, have trouble convincing law enforcement officials that violent acts within the home are criminal.[47] In fact, the public/private divide

36. O'Hare, *supra* note 16, at 368. See also H. Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law', in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (1993) 1; K. M. Culliton, 'Finding a Mechanism to Enforce Women's Rights to State Protection from Domestic Violence in the Americas', (1993) 34 *Harvard International Law Journal* 507; Ewing, *supra* note 6; Romany, *supra* note 18.
37. O'Hare, *supra* note 16, at 368.
38. See, e.g., C. A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Charlesworth et al., *supra* note 3, at 625–8.
39. Charlesworth, *supra* note 36.
40. F. E. Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', (1983) 96 *Harvard Law Review* 1497.
41. Copelon, *supra* note 3, at 295–6.
42. MacKinnon, *supra* note 5, at 15.
43. M. Thornton, 'The Cartography of Public and Private', in Thornton, *supra* note 16, at 2, 11–12.
44. Ibid., at 13.
45. Gallagher, *supra* note 1, 290; Binion, *supra* note 12, at 515–16; Romany, *supra* note 18; C. Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', (1993) 6 *Harvard Human Rights Journal* 87, 87.
46. Bunch, *supra* note 12; Charlesworth, *supra* note 18.
47. D. Russell and N. Van de Ven (eds.), *Crimes against Women: Proceedings of the International Tribunal* (1984), 58–67, 110–75.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

is said to be nowhere as pronounced as in relation to the issue of violence against women.[48] With regard to torture, Charlesworth and Chinkin point out that its interpretation has (so far) been strictly confined to state-sanctioned custodial-type scenarios, whereas women are much more likely to suffer 'private' violations.[49]

Not all feminists, however, conceptualize the public/private dichotomy in the same way. A few feminists have questioned whether the public/private divide might not be a 'false dichotomy'[50] to the extent that the 'private' *is* subject to 'legal regulation and outside scrutiny'.[51] For example, the 'family', as the ultimate symbol of the 'private' sphere, is subject to legal supervision, at least in relation to rights as to marriage, consent, and child-rearing.[52] Interestingly, other feminists have criticized the host of family-related provisions in international human rights law as over-emphasizing the woman as 'homemaker'.[53] Riane Eisler states that even though human rights law has attempted to regulate the private sphere, it has simply failed to do so in respect of issues that particularly touch women's lives.[54] Contrastingly, Karen Engle cautions against over-emphasizing the public/private distinction, as she argues that doing so may exclude important parts of women's experiences, that is, those within the 'public' sphere. She also contends that such arguments assume that 'private' is bad for women.[55] In other words, the criticism of the public/private dichotomy is itself value-laden and based on stereotypes concerning women's lives.

Even though the public/private distinction has been diluted over time through, for example, the recognition of state responsibility for 'private' abuses in cases where the state has not satisfied the requisite level of due diligence expected,[56] the criticism remains to the extent that such decisions are still tethered to the concept of state responsibility,[57] and there is a general lack of awareness that acts by private citizens can be human rights violations. This is certainly true in relation to the torture provisions, and it perhaps accounts for the obvious lack of gender-specific or gender-related claims brought by women. Moreover, international law assumes that the state is genderless. To the extent that it is viewed as genderless, feminists argue that state responsibility for the perpetuation of gender subordination goes

48. P. Goldberg and N. Kelly, 'International Human Rights and Violence Against Women' (1993) 6 *Harvard Human Rights Journal* 195; Binion, *supra* note 12, at 515, n. 25; O'Hare, *supra* note 16, at 368.
49. Charlesworth et al., *supra* note 3, at 627–8; Charlesworth and Chinkin, *supra* note 3; O'Hare, *supra* note 16, at 369.
50. Binion, *supra* note 12, at 518.
51. Eisler, *supra* note 12, at 293; B. E. Hernández-Truyol, 'Human Rights through a Gendered Lens: Emergence, Evolution, Revolution', in Askin and Koenig, *supra* note 3, I, 3; Binion, *supra* note 12.
52. See ICCPR, Art. 23, and ICESCR, Art. 10.
53. See, e.g., Charlesworth et al., *supra* note 3; D. Otto, 'A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women', in Askin and Koenig, *supra* note 3, I, at 115, 121 (criticizing the raft of provisions in the CEDAW which privilege the homemaker as the primary female subject of international law).
54. Eisler, *supra* note 12.
55. K. Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights', in Dallmeyer, *supra* note 36, at 143.
56. See discussion below under section 3.
57. See Cook, *supra* note 6, at 152. See also R. McCorquodale, 'An Inclusive International Legal Order', (2004) 17(3) LJIL 477.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

unrecognized.[58] It also masks the underlying patriarchal domination that belies gender-based violence.[59]

3. Evolving notions of 'torture'

3.1. Interpretations of Article 7 of the ICCPR

The majority of individual communications involving Article 7 of the ICCPR[60] before the Human Rights Committee concern traditional constructions of torture. Article 7 is most usually applied in circumstances of abuse within state custody, that is, typically by male government officials against male detainees for the purposes of extracting information or a confession. The fact that the Committee's jurisprudence consistently raises concurrently Articles 7 and 10(1)[61] reinforces these traditional constructions within the context of a deprivation of liberty. As early feminist writers predicted, very few cases have been decided outside state custody and thus omit from the picture a range of harm perpetrated against women. In spite of the fact that men have been and continue to be the main users of the HRC in respect of Article 7, it must be acknowledged at the outset that women were among the first applicants to the HRC, either on behalf of themselves or on behalf of other persons, including other women.[62] Many of these cases involved so-called traditionally 'male' claims of physical abuse, poor prison conditions, or disappearances.[63] This fact alone must challenge the feminist critique that international human rights law is irrelevant to women's lives, but it does confirm MacKinnon's view that when what happens to women is also happening to men, the former are forgotten altogether, including, it seems, by feminists. Such cases of politically active women who are subjected to state and public oppression are ripe to challenge gendered stereotypes of women. These cases must question whether it is the case that masculine language means that 'A man is sure that he is included [in human rights law]; a woman is uncertain'.[64] The reason why these cases have failed to break down or to contribute to breaking down such stereotypes is unclear, but the fact that there is a general lack of acknowledgement of the existence of such women and such cases must contribute to the silence. It is also a possibility that gendered stereotypes regarding the role and status of women are so entrenched that even when cases of women as human rights defenders or as political activists present themselves, they are seen as the exception and not the rule. None of these so-called 'atypical' cases highlighted in this article has gained international prominence. Conversely, the decisions in *Aydin* v. *Turkey* whereby

58. Romany, *supra* note 45, at 100.
59. Copelon, *supra* note 3.
60. Art. 7 provides: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] consent to medical or scientific experimentation'.
61. Art. 10(1) provides: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.
62. See, e.g., *Moriana Hernandez Valentini de Bazzano v. Uruguay*, HRC 5/1977; *Ann Maria Garcia Lanza de Netto v. Uruguay*, HRC 8/1977; *Esther Soriano de Bouton v. Uruguay*, HRC 37/1978; *Delia Saldias de Lopez v. Uruguay*, HRC 52/1979.
63. See, e.g., *Celis Laureano v. Peru*, HRC 540/1993; *Caroline Teillier Arredondo v. Peru*, HRC 688/1996.
64. Bequaert Holmes, *supra* note 28, at 259.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

a woman was raped in state custody, and *M.C.* v. *Bulgaria* in which a young girl was 'date-raped', have received widespread attention (see below). Both these cases represent the stereotypical woman as a 'helpless victim' – in the first case as a daughter of a politically active family and in the second as a young girl unwittingly in the wrong place at the wrong time.

While the Committee was slow to incorporate women-specific concerns within its concluding observations to state party reports, it now routinely does so. In particular, the Committee has condemned, under the rubric of comments on Article 7, the high incidence of violence against women, including domestic violence.[65] The Committee has mentioned the need for states to adopt specific legislation combating domestic violence,[66] including legislation criminalizing marital rape.[67] More specifically, it has called on states to ensure that their justice systems incorporate restraining orders to protect women from violent family members, provide shelters and other support to victims, establish measures to encourage women to report domestic violence to the authorities,[68] and offer 'material and psychological relief to victims'.[69] Additionally, the Committee has raised concerns over the persistence of female genital mutilation[70] and the high risk of clandestine abortions.[71] Citing Article 7, it has referred to discrimination against women in matters of personal status, particularly in relation to marriage and divorce and rights and duties of spouses.[72] In many of its concluding observations, Article 3 (equality between men and women) is referred to in conjunction with Article 7. In other reports, however, the Committee does not classify such violence as specifically an Article 7 issue.[73] Although the Committee has yet to consider such issues in terms of an actual communication, it is arguable that these obligations are benchmarks of state responsibility and that they give content to the 'due diligence' standard developing under international human rights law. All that can be said at this stage is that it remains to be seen whether the Committee will decide that failing to carry out or to implement any of these measures would individually or collectively constitute a breach of Article 7 in a particular case.

---

65. See, e.g., Sri Lanka (para. 20); Colombia (para. 14); Germany (para. 12); Lithuania (para. 9); Liechtenstein (para. 8); and The Gambia (para. 16(c)): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004).
66. See, e.g., Vietnam; Yemen (para. 6): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002); Sri Lanka (para. 20); Germany (para. 12): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004).
67. See, e.g., Sri Lanka (para. 20): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004).
68. See, e.g., Hungary (para. 10): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002); Lithuania (para. 9): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004).
69. See, e.g., Liechtenstein (para. 8): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004).
70. See, e.g., Uganda (para. 10): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004); Mali (para. 11): Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003); Sweden (para. 8); Yemen (para. 6): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002). In the 2003 report on Mali, the Committee called for the practice to be prohibited and criminalized.
71. See, e.g., Sri Lanka (para. 12); Colombia: Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004). Unsafe abortion has also been referred to in a number of states parties reports under Art. 6.
72. Yemen (para. 7): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002).
73. Either it does not refer to any particular article (e.g. Egypt (para. 3); Estonia (para. 6)) or it refers to other articles (e.g. Slovakia (para. 9) refers to Arts. 3, 9, and 26; El Salvador (para. 15) refers to Art. 9): Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

Other women-specific forms of harm have been condemned by the Committee, but not necessarily with reference to Article 7, such as the practice of levirate, whereby a widow is inherited by her deceased husband's brother or cousin,[74] unequal treatment in relation to punishment for adultery,[75] 'honour' crimes,[76] early marriage,[77] and polygamy. The Committee has not, though, forgotten the more traditional forms of ill-treatment within the context of detention, but has occasionally added a comment on women prisoners.[78]

The Human Rights Committee in its general comments has been slow to acknowledge the need (and requirement) for states to interpret and apply Article 7 of the ICCPR in a non-discriminatory way. Its General Comment (GC) No. 20 (1992) identifies two provisions that impact on the interpretation and application of Article 7, naming Articles 10 and 2(3) explicitly.[79] No reference is made, however, to Article 2(1) of the ICCPR. The omission of any reference to women's particular concerns, or to non-discrimination obligations more generally, in the Committee's general comments on torture plays into feminist critiques of the male bias of human rights law. Such an omission was only later 'corrected' by a subsequent general comment, GC No. 28 (2000), on the equality of rights between women and men. GC No. 28 (2000) incorporates the issue explicitly, albeit in a cursory way.[80] It indicates that breaches of Article 7 include domestic or other types of violence against women including rape, denial of access to safe abortion to women who have become pregnant as a result of rape, forced abortion or forced sterilization, and the practice of genital mutilation.[81] Paragraph 20 also refers to the fact that Article 7 rights may be at stake in the context of privacy. Identifying such a collection of women-specific concerns for inclusion within Article 7 clarifies the overall approach of the Committee and

74. The HRC referred to Arts. 3, 16, and 23 in relation to the practice of levirate in Mali: Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003).
75. The HRC referred to Arts. 3 and 26 in Egypt's report (para. 8): Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003).
76. The HRC referred to so-called 'honour' crimes committed mostly against girls and women of foreign extraction in Sweden (para. 8), without identifying a particular ICCPR Article: Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002).
77. The HRC referred to Arts. 3 and 26 in Sweden's report (para. 8): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002).
78. See, e.g., The Philippines (para. 11): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004), in which the HRC expressed concern about 'harassment, intimidation and abuse, including of detainees, many of whom are women and children, that have neither been investigated nor prosecuted'. See also concern over sexual abuse of female prisoners, Tanzania (para. 404): Report of the Human Rights Committee, UN Doc. A/53/40 (Vol. I) (1998).
79. Art. 2(3) provides: 'Each State Party to the present Covenant undertakes:

> To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; 'To ensure that any person claiming such a remedy shall have his [*sic*] right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; To ensure that the competent authorities shall enforce such remedies when granted.

80. HRC GC No. 28: The equality of rights between men and women (Art. 3) (2000), para. 11. HRC GC No. 28 (2000) replaces the earlier HRC GC No. 4: Equality of rights between men and women (Art. 3) (1981), that refers primarily to obligations extending beyond legislative measures to include practical measures of protection and affirmative action.
81. HRC GC No. 28: The equality of rights between men and women (Art. 3) (2000), para. 11. See also para. 15, which refers to separation of men and women in prisons.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

must be acknowledged as a significant step forward. Nonetheless, the mere listing of these harmful acts for inclusion within Article 7, without explaining *how* they fall within its terms, begs the question as to on what legal basis other similar harms may be said to be relevant to Article 7. In addition, their listing within a separate general comment on the issue of equality between women and men follows what has become a familiar, yet unsatisfactory, approach by UN treaty bodies, that of dealing with women's issues in isolation from mainstream human rights.[82]

3.1.1. Rape and other forms of sexual violence

In the light of the above statements issued by the HRC, it is surprising that very few applicants, male or female, have alleged a breach of Article 7 as a result of sexual violence, whether in or outside state custody.[83] The Committee has, however, had at least two opportunities to illustrate its gender-sensitive approach to this issue, but has failed on both occasions. The first case involved a male teacher from the Democratic Republic of Congo who taught at a consular school in Bujumbura, Burundi.[84] He accused a former ambassador of embezzling his salary 'in order to force him to yield his wife [to the ambassador]'.[85] The complainant argued that the arbitrary deprivation of his employment, the embezzlement of his salary, and the destabilization of his family caused by the alleged 'adultery' (language taken from the complaint itself) constituted torture and cruel and inhuman treatment.[86] He also claimed, *inter alia*, breaches of Articles 17 and 23(1) of the ICCPR.[87] The Committee found that the complainant's claims had been unsubstantiated as far as these particular provisions, including Article 7, were concerned, and ruled that these aspects of the case were, therefore, inadmissible. The Committee did not, however, state that such allegations fell outside the parameters of Article 7 should they have been otherwise substantiated. Of significance is the fact that the Committee did not comment on the fact that the complainant's wife was also an aggrieved party and arguably the proper complainant for such a communication, especially in relation to her 'forced' affair (potentially a case of sexual slavery). Instead, the author argued that being forced to provide his wife to the ambassador constituted ill-treatment *against him*, but not against his wife. Her circumstances are completely absent from

82. Charlesworth, *supra* note 33; *idem*, *supra* note 18.
83. See, e.g., *Alberto Grille Motta v. Uruguay*, HRC 11/1997, in which the HRC found evidence of torture and inhuman treatment, in which the perpetrators, together with other forms of maltreatment, inserted bottles or barrels of automatic rifles into the male author's anus; *Mohammed Ajaz and Amir Jamil v. Republic of Korea*, HRC 644/1995, in which the authors asserted that electric shocks had been applied to their genitals in order to force a confession, but on the evidence before it, the HRC found no violation; *Rodriguez v. Uruguay*, HRC 322/1998, in which one of the alleged violations was of electric currents being applied to his eyelids, nose and genitalia; *K.L.B.-W. v. Australia*, HRC 499/1992, in which a woman claimed to have been sexually assaulted as a hospital patient. Her case failed at the admissibility stage because the alleged assault occurred prior to the entry into force of the Optional Protocol on the state party concerned.
84. *Nyekuma Kopita Toro Gedumbe v. Democratic Republic of Congo*, HRC 641/1995.
85. Para. 2.1.
86. Paras. 3.1 and 3.2.
87. Art. 17 provides: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks'. Art. 23(1) provides: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

the communication. This is not the first case of this kind to show the Committee's blindness towards gender issues, or its lack of acknowledgement of violence against women. In an earlier case, information was provided in the author's statements that his pregnant wife had been visited by government forces while he was in prison, who ransacked their house and beat her, causing her to suffer a miscarriage. Although it is beyond dispute that the husband was a victim of egregious violations of Article 7, his wife was not added as a party to the communication, nor did the Committee comment on this omission or on the vicious attack on her.[88]

3.1.2. Mental torture

Sexual violence, of course, is not the only harm from which women seek protection and/or redress, although the focus on sexual violence within feminist literature could suggest otherwise. Since initial discussions over the terminology to be incorporated into Article 7, there has been no question that torture could include psychological forms of intimidation or threats of violence. The *travaux préparatoires* accept that Article 7 embraces both physical and mental torture.[89] This has been confirmed in HRC GC No. 20 (1992)[90] and endorsed in the Committee's 'views' on various individual communications.

Specifically relevant to women's experiences is the Committee's acceptance that Article 7 applies to 'indirect' torture or, in other words, the anguish, stress, or uncertainty suffered by third persons, such as close relatives of detained or 'disappeared' persons. The HRC stated in *Quinteros* v. *Uruguay* that

> the Committee . . . understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.[91]

This decision has given voice to the many claims of women as wives, mothers, sisters, and daughters of politically active men or imprisoned male criminals. It is notable, of course, that this decision arose in a case of a disappeared daughter. These experiences are no longer, in the words of Anne Gallagher,[92] rendered 'invisible', and

88. *Roberto Zelaya Blanco v. Nicaragua*, HRC 328/1988, para. 6.7. Blanco was an engineer and university professor who was sentenced to 30 years' imprisonment for outspoken criticism of the 'Marxist orientation of the Sandinistas' (para. 2. 1). He served ten years of the sentence and was subjected to serious forms of abuse.
89. UN Doc. E/CN. 4/SR. 149, paras. 33 and 38 (ET), para. 37 (PI), para. 39 (Chairman), para. 41 (RLO).
90. HRC GC No. 20: Torture and cruel, inhuman or degrading treatment or punishment (Art. 7) (1992), para. 5.
91. HRC 107/1981, para. 14. In *Quinteros v. Uruguay*, the HRC found that anguish and stress caused to the mother by the abduction and disappearance of her daughter by security forces and by the continuing uncertainty concerning her fate and whereabouts have breached Art. 7. Similarly, in *Schedkov v. Belarus*, HRC 886/1999, a breach was found where a mother was informed of neither the date or the hour, nor the place, of her son's execution, nor the exact place of her son's subsequent burial. The latter was found to amount to inhuman treatment. See also *Staselovich v. Belarus*, HRC 887/1999; *Jensen v. Australia*, HRC 762/1997; *C v. Australia*, HRC 900/1999; *Bondarenko v. Belarus*, HRC 886/1999; *Lyashkevich v. Belarus*, HRC 887/1999; *Sarma v. Sri Lanka*, HRC 950/2000. The Committee has not always taken into account the psychological harm to the family members of victims: see *Katombe L. Tshishimbi v. Zaire*, HRC 542/1993, in which the main victim had been abducted and was since missing. No mention was made of the suffering of the wife, the person submitting the application on her husband's behalf.
92. Gallagher, *supra* note 1, at 290.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

women have been able to achieve some recognition and redress for their *own* pain and suffering. Having said this, one must be mindful of the role that such cases play in further reinforcing accepted stereotypes of the passive role of women in torture cases, such that women are seen not as the immediate recipients of protection under the torture provisions, but rather as indirect or secondary beneficiaries.

3.1.3. Forced sterilization, female genital mutilation

In respect of the second sentence of Article 7 (specific prohibition of non-consensual medical or scientific experimentation), the Working Group commented during the drafting debate that 'Certain kinds of treatment became cruel, inhuman or degrading only because they were administered without the subject's free consent'.[93] Similarly, the Human Rights Committee has stated,

> The Committee . . . observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.[94]

It seems, therefore, that an absence of consent can be a contributing factor to the characterization of a particular act as torture or ill-treatment, whether or not it is within the context of medical or scientific experimentation. It can be inferred from the language of the general comment that experimentation within detention or imprisonment is only one example of such prohibited acts. In support of this, the Human Rights Committee has referred to the sterilization of women without their consent as a breach of Article 7, both in a number of concluding observations on states parties' reports[95] and in GC No. 28 (2000). In its concluding observations on Slovakia in 2003, the HRC raised concerns about the 'forced or coerced sterilization' of Roma women 'without free and informed consent'.[96] Similarly, the HRC has stated that female genital mutilation (FGM) is in breach of Article 7.[97] While not explicitly categorizing it as a breach of the second sentence of Article 7, it is arguable that FGM falls within this limb, not least for the fact that it is most commonly performed on girls who have not attained the age of majority. Whether it can be viewed as 'experimentation' is another question that would require some careful analysis, although the Committee's earlier jurisprudence tends to adopt a rather flexible approach to this aspect of Article 7. Of course, FGM may equally satisfy the overarching objective of Article 7. In spite of these statements by the Committee,

93. E/CN. 4/56 (Working Party); Third Committee, 13th Session in 1958; M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987), 147 and 158 respectively.
94. GC No. 20 (1992), para. 7.
95. See also Concluding Observations on Japan (1998) UN Doc. CCPR/C/79/Add. 102, para. 31; Concluding Observations on Peru (2000) UN Doc. CCPR/CO/70/PER, para. 21; Concluding Observations on Slovakia (2003) UN Doc. CCPR/CO/78/SCK, para. 12.
96. Slovakia (para. 12): Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003).
97. HRC GC No. 28 (2000) and Concluding Observations on Uganda (para. 10): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004); Mali (para. 11): Report of the Human Rights Committee, UN Doc. A/58/40 (Vol. I) (2003); Sweden (para. 8); Yemen (para. 6): Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

only a very few individual communications have raised issues of non-consensual experimentation, and most have fallen into the category of traditional forms of ill-treatment, such as the use of hallucinogenic drugs or electro-convulsions to force confessions.[98]

3.1.4. Biased tribunals

Another relevant category of cases for women is in relation to allegations that biased tribunals (or discrimination more generally) could give rise to claims under Article 7. I wish to highlight two such cases. The first complainant argued that hearings for refugee status by a biased tribunal amounted to cruel, inhuman, and degrading treatment. In this case, the applicant, a Ghanaian citizen seeking asylum in Canada, alleged that one of the commissioners, also of Ghanaian origin but of a different ethnicity to the applicant, was biased. The case was declared inadmissible on a number of grounds, including that the claimant had not complained about the bias during the proceedings for refugee status.[99] A second case raised sexist and racist bias in alleging that the Australian court system was corrupt and that it was biased against women and immigrants. On the facts before it, the Committee ruled that the applicant had not substantiated her claims, stating that they remained 'sweeping allegations'.[100] Although neither of these cases passed the admissibility stage, they remain important from a feminist perspective to the extent that neither the Committee nor the states parties involved[101] sought to argue that claims raising bias (or, for that matter, discrimination) are beyond the parameters of Article 7. This may suggest that should similar cases be raised in the future and if they can be substantiated, they would be considered by the Committee.[102]

3.1.5. Other non-conventional claims

The HRC has considered other 'unconventional' cases under Article 7, including allegations that compulsory military service or alternative service breaches Article 7;[103] that enforcement of a deportation order resulting in the permanent separation of an individual from his family and/or close relatives, and banishment from the only country the author ever knew and in which he grew up, amounts to cruel, inhuman, and degrading treatment;[104] and that the author's exclusion from military

98. See, e.g., *Luciano Weinberger Weisz v. Uruguay*, HRC 28/1978 (forced use of hallucinogenic drugs); *Estrella v. Uruguay*, HRC 74/1980 (forced use of hallucinogenic drugs); *Acosta v. Uruguay*, HRC 110/1981 (claimed subjected to psychiatric experiments for three years by the forced injection of tranquillizers every two weeks); *K.L.B.-W. v. Australia*, HRC 499/1992 (subjected involuntarily to a regime of electroconvulsion therapy, being maintained in deep sleep without food, and on drug dosages that exceeded forensic limits and without muscle relaxants).
99. *Kwame Williams Abu v. Canada*, HRC 654/1995.
100. *B.L. v. Australia*, HRC 659/1995.
101. Note, however, that in *B.L. v. Australia*, HRC 659/1995, there is no indication of the Australian government's response, or even if they were called upon to give one prior to the ruling on admissibility.
102. See also similar discussions arising in relation to the jurisprudence of the European Court of Human Rights, below at section 3.4.
103. See, e.g., *J.P.K. v. The Netherlands*, HRC 401/1990; *T.W.M.B. v. The Netherlands*, HRC 403/1990; *A.R.U. v. The Netherlands*, HRC 509/1992. These claims were unsuccessful.
104. *Charles E. Stewart v. Canada*, HRC 538/1993. The HRC declared the claim to be inadmissible on the basis of a lack of substantiation of the claim. See also *Canepa v. Canada*, HRC 558/1993. See further *Ngoc Si Truong v. Canada*, HRC 743/1997, in which the author claimed that removal to a country where he allegedly has

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

service due to a finding of guilt, without being given the possibility of mounting a defence, by a military tribunal that he 'tolerated the dishonourable lifestyle of his wife'[105] constituted 'an attack on his honour' and degrading treatment.[106] Given the comprehensive admissibility requirements of the Optional Protocol on individual communications, many of these cases have not, however, proceeded to a review on the merits, but it is noted that the Committee has not explicitly stated that they failed by reason of falling outside the scope of the provision. This in itself may reveal the potential to open up Article 7 beyond traditional forms of torture.

3.1.6. Failure to act, non-state actors, and due diligence

In its first general comment on Article 7 in 1982, the HRC stated that Article 7 prohibits ill-treatment 'even when committed by persons acting *outside or without* any official authority'.[107] Almost from the outset, therefore, the Committee included within Article 7 the *ultra vires* actions of public or government officials, although it had yet to include private harm. Rape and other violent acts that were not part of a deliberate government policy could not, therefore, be excused as being mere criminal activities of a few rogue officers, as had been past practice under national and international laws. Under this analysis the state has responsibility for its officials, even if they act beyond their prescribed roles and orders. The HRC's subsequent general comment issued in 1992 goes a step further by providing that Article 7 prohibits acts 'whether inflicted by people acting in their official capacity, outside their official capacity *or in a private capacity*'.[108] This GC expands the definition of torture to embrace the actions of non-state actors that are unrelated to any official position. Similarly, GC No. 31 (2004) on the nature of general legal obligations under the ICCPR clarifies that a state party's obligations will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair their enjoyment of those rights. This 2004 GC provides that a state would be in violation of its obligations as a result of permitting, or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by 'private' acts. This duty to take positive measures to protect persons against 'private' harm is, therefore, 'implicit' within Article 7.[109] These statements conform to the universally acknowledged decision of the

---

no legal status would amount to cruel, inhuman and degrading treatment. The HRC found that he had not substantiated his claim; in particular, they disputed that he would be stateless. See also *Francesco Madafferi et al. v. Australia*, HRC 1011/2001, separation from family pending removal would cause psychological and financial problems. HRC found violation of Art. 10(1), but did not address Art. 7.

105. No details are provided as to what this lifestyle entailed.

106. *V.E.M. v. Spain*, HRC 467/1991. The HRC declared the claim inadmissible, in accordance with Spain's reservation to Art. 5(2)(a) of the Optional Protocol, as the same matter had been examined and declared inadmissible by the European Commission on Human Rights. This decision was made notwithstanding the European Commission's summary dismissal of the case and that it had not been considered on its merits. No details were available on what the alleged 'dishonourable lifestyle' entailed.

107. HRC GC No. 7: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7) (1982), para. 2 (emphasis added).

108. HRC GC No. 20: Torture and cruel, inhuman or degrading treatment or punishment (Art. 7) (1992), paras. 2 and 13 (emphasis added).

109. HRC GC No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2) (2004), para. 8.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

Inter-American Court of Human Rights in *Velasquez Rodriguez* v. *Honduras*, which will be considered in more detail below.

In spite of the willingness expressed by the Committee to integrate 'private' harm perpetrated against women within Article 7, the exploitation of the 'due diligence' standard to do so remains embryonic in jurisprudential practice. There are only a handful of individual cases that directly discuss the question of persons acting outside their official capacity (in many cases it is assumed that their actions were officially condoned), and even fewer invoke liability as a result of failing to act to counter private acts of harm. In *Wilson* v. *The Philippines*[110] the Committee utilized language that appears to be more usually associated with the UNCAT than with the ICCPR, when it decided that a breach of Article 7 arose in circumstances where other inmates beat the author, either on the guards' direct orders or 'with their acquiescence'. The HRC did not explain precisely what it meant by 'acquiescence', nor did the facts of the case, but there was some indication that prisoner-on-prisoner violence was known to occur – if not to be encouraged – in specific circumstances, and that the guards did not intervene to stop it.[111] Concluding observations of the HRC on states parties' periodic reports have mentioned positive obligations such as enacting legislation outlawing torture and training state officials: efforts aimed at protecting individuals from and preventing future situations of abuse. So far, however, the Human Rights Committee's jurisprudence tends to refer exclusively to positive *post*-abuse measures, for example, duties to investigate claims, to prosecute and to punish offenders, and to pay compensation to victims. This dearth of individual communications gives rise to a plethora of questions as to why Article 7 has not been more proactively utilized by women. Although such an enquiry is outside the scope of this article, it is one that must be addressed.

3.1.7. Taking into account subjective factors, including sex and gender

Almost repeating the language used by the European Court of Human Rights in *Ireland* v. *United Kingdom*,[112] the HRC stated in *Vuolanne* v. *Finland* that

> the assessment of what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as *the sex, age and state of health of the victim.*[113]

Similarly, in the case of *Kindler* v. *Canada*, the HRC referred to 'personal factors' in determining whether the imposition of capital punishment would constitute a violation of Article 7.[114] These statements indicate that subjective factors are relevant to whether the nature of a particular act constitutes torture or another form of ill-treatment or punishment. That is, it is not a purely objective test. Obviously

110. HRC 868/1999.
111. Para. 7.3.
112. A25 ECHR (1978).
113. HRC 265/1987, para. 9.2 (emphasis added).
114. *Kindler v. Canada*, HRC 470/1991. The HRC also referred to the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

there are some forms of harm that would constitute a breach of Article 7 regardless of the particular characteristics of the victim. But there may be other forms of harm that would not reach the requisite level of seriousness of torture or a lesser form of ill-treatment or punishment if only so-called objective or neutral standards were applied. According to feminist scholars, applying only objective or neutral standards would be disadvantageous, if not discriminatory, for women, because the standard applied would most likely be 'male', or perhaps 'adult male'. Why taking subjective factors into account is important is illustrated by a few potential examples: intimidating language that may fall short of Article 7 abuse when applied against a male adult might reach the threshold if inflicted on a child; assaulting a known haemophiliac would be more serious than the same conduct perpetrated against a non-haemophiliac; solitary confinement or psychological forms of intimidation might be additionally severe for an individual with mental illness;[115] sexual intimidation of male Arab Muslims at the hands of female soldiers may take on a different tone than the same conduct perpetrated against non-religious Western men. The capacity of the HRC to take into account personalized or subjective factors in its deliberations, including sex and gender, is an essential part of 'gender mainstreaming', as well as more accurately applying the torture provisions to individual cases. Even though the Committee has stated that subjective factors are relevant, one can detect an obvious absence of such references in its jurisprudence. In *Darwinia R. Mónaco (Ximena Vicario)* v. *Argentina*, the Committee made reference to special protections owed to children under Article 24 of the ICCPR. However, in this particular case, it did not go on to use the child's age or maturity to help it to apply Article 7 in an age-friendly manner, but instead opted to make a finding under Article 24 itself.[116]

3.2. Interpretations of Articles 1 and 16 of the UN Convention against Torture

The UNCAT is one of the few international human rights instruments that provides a definition of 'torture'.[117] Several alternative wordings were proposed by states during the negotiation stages, although each of these came similarly within the

115. See similar arguments raised in relation to refugee law: Edwards, *supra* note 25.

116. *Darwinia R. Mónaco (Ximena Vicario) v. Argentina*, HRC 400/1990. The author's granddaughter (Ximena Vicario – XV) was taken to the headquarters of the federal police with her mother in February 1977; her father was apprehended the following day. Both parents and the child subsequently disappeared. An investigation was launched but the parents were never located. XV was subsequently found in the home of a nurse who claimed to have taken care of the child. The nurse was preventively detained by the state on grounds of having committed a crime of concealing the whereabouts of a minor and forgery of documents. In 1989 the author was given provisional guardianship of XV, but the nurse was also granted visiting rights. Although the grandmother objected to this in court, she was told she had no standing as she was neither the child's parents nor her legal guardian. Various other appeals were made against the visits on the basis that they were psychologically damaging to the child. The author claimed, *inter alia*, that the visits and the delayed proceedings constituted a breach of various rights, including Art. 7. The Committee did not rule on whether the visits amounted to psychological torture.

117. Other instruments that include a specific definition of 'torture' include the 1975 General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975, UNGA res. 3452 (XXX), 9 Dec. 1975; Art. 2 of the Inter-American Convention to Prevent and to Punish against Torture (see, below, fn. 200) and Art. 7(2)(e) of the Statute of the International Criminal Court (adopted 17 July 1995; entered into force 1 July 2002). The latter defines 'torture' in Art. 7(1)(f) 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'.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

traditional framework of state custody. Inspired by the 1975 General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975[118] (UN Declaration on Torture 1975), Article 1(1) of the UNCAT defines 'torture' as follows:

> For the purposes of this Convention, the term 'torture' means any 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 her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] 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.

Unlike Article 7 of the ICCPR, which has largely avoided feminist scrutiny, the definition of 'torture' in Article 1 of the UNCAT has been the object of the near-unanimous disapproval of feminist writers. In fact it is the definition itself that has been consistently highlighted by feminists to emphasize their point that human rights norms are not applicable to women's lives; very few have gone on to review how it has been applied in practice. In contrast, the lack of a definition in the ICCPR may be the reason why Article 7 has avoided the same level of scrutiny. Feminist criticisms of the UNCAT revolve around two main aspects of the definition. The first 'gendered' aspect of the definition is the requirement that the 'severe pain or suffering' must be 'inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an official capacity'. This part of the definition is considered to entrench the public/private dichotomy of international law, relegating violence against women to the 'private' and, therefore, beyond the frontiers of the definition and of legal protection. This same link to a public official is also a requirement for other, lesser forms of ill-treatment in Article 16. A second reason why the definition is criticized is because such pain or suffering must be inflicted for a particular 'purpose', such as for reasons of interrogation or extraction of a confession. This has been interpreted as confining the scope of the UNCAT to situations of abuse within state custody, a phenomenon more likely to affect men than women.

Like Article 7 of the ICCPR, 'freedom from torture' as found in the UNCAT is considered a non-derogable right.[119] Unlike Article 7, however, this non-derogable status does not expressly extend to 'cruel, inhuman or degrading treatment or punishment' in Article 16. This may well have been a drafting flaw, given the full non-derogable status of its counterpart in Article 7 of the ICCPR, but neither the *travaux préparatoires* nor the jurisprudence clear this up. Given the difficulty of demarcating the boundaries between the different heads of abuse, women may be unfavourably affected by this different standard applied to lesser forms of ill-treatment as they

118. UNGA res. 3452 (XXX), 9 Dec. 1975.
119. Art. 2(2) provides that 'No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as justification of torture'. Moreover, Art. 2(3) clarifies that superior orders may not be invoked as an excuse for acts of torture.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

begin to mount more non-traditional claims under the UNCAT. Following the trend of recent years in which the Committee has moved cautiously in embracing non-conventional claims, it is possible that many new forms of abuse may be relegated to consideration under Article 16. This could result in the correlative possibility that women may be unprotected in situations of public emergency, or face the prospect of return to a situation of cruel, inhuman, or degrading treatment or punishment that does not meet the higher threshold reserved for 'torture'.[120]

3.2.1. The nature or type of torture: in and outside state custody

The prevalence of violence against women and girls, including domestic violence, and the reluctance on the part of the authorities to combat these forms of abuse, have been cited in a number of concluding observations on state reports.[121] The Committee regularly 'expresses its concern' about sexual violence and assault against female detainees and prisoners carried out by law enforcement personnel,[122] including in order to extract information about their husbands or other relatives.[123] The Committee has further raised the issue of inter-prisoner sexual assaults.[124] It has recommended to the United States, for example, that it take action to investigate, prosecute, and punish those who violate the UNCAT, 'especially those who are motivated by discriminatory purposes or sexual gratification'.[125] The Committee has also condemned abuses and sexual assaults against female members of the families of detained and exiled persons in Tunisia, stating that it had received reports of dozens of women who were subjected to violence and sexual abuse, or sexual threats, in order to put pressure on or to punish their imprisoned or exiled relatives.[126]

More generally, Committee has expressed concerns regarding reports of sexual abuse, including sexual harassment of girls and homosexuals.[127] Its Concluding Observations on Cameroon expressed concern regarding the fact that the Criminal Code permits an exemption from punishment of a rapist if he subsequently marries the victim, as well as the lack of legislation outlawing female genital mutilation.[128] Similarly, in the Concluding Observations on the Peoples' Republic of China and Hong Kong Special Administrative Region, the Committee welcomed the 'increase

120. Art. 3 protection against return to torture has been held by the Committee as only applying to Art. 1, not Art. 16.
121. E.g., Concluding Observations on Greece, UN Doc. CAT/C/CR/33/2, 10 Dec. 2004, para. 5(k); Concluding Observations on Zambia, UN Doc. A/57/44, 25 Aug. 2002, para. 7(c).
122. See, e.g., Concluding Observations on the USA, contained in *Report of the Committee against Torture*, UN Doc. A/55/44 (2000), para. 179.
123. See Concluding Observations on Egypt, contained in *Report of the Committee against Torture*, UN Doc. A/54/44 (1999), para. 209. The Special Rapporteur on Torture has recognized sexual violence as a method of physical torture, UN Doc. E/CN. 4/1986/15, para. 119.
124. See Concluding Observations on The Netherlands, contained in *Report of the Committee against Torture*, UN Doc. A/55/44, 2000, para. 187.
125. See, e.g., Concluding Observations on the USA, contained in *Report of the Committee against Torture*, UN Doc. A/55/44 (2000), para. 180.
126. See Concluding Observations on Tunisia, contained in *Report of the Committee against Torture*, UN Doc. A/54/44 (1999), para. 99.
127. Concluding Observations on Greece, UN Doc. CAT/C/CR/33/2, 10 Dec. 2004, para. 5(h); Concluding Observations on Egypt, UN Doc. CAT/C/CR/29/4, 23 Dec. 2003, paras. 5(d) and (e).
128. Concluding Observations on Cameroon, UN Doc. CAT/C/CR/31/6, 5 Feb. 2004, para. 7.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

in sentences for certain sexual crimes, such as incest'.[129] Caroline Lambert argues that the welcoming of harsher penalties for this crime could be interpreted as recognition that incest, perpetrated by non-state actors, is a form of cruel, inhuman, or degrading treatment or punishment.[130] The Committee also congratulated China on abolishing the requirement of corroboration for sexual offences.[131] It has further mentioned specifically and praised moves to prosecute and punish violence against women, suggesting that such violence falls generally within the remit of the treaty.[132] It can be seen from the panoply of statements above that the Committee against Torture now openly views women-specific or gender-related harm as being of the same nature or severity as torture under Article 1 of the UNCAT. It has held that its jurisdiction extends over a range of harms to which women are either wholly (female genital mutilation, forced abortion, forced marriage) or disproportionately (rape in or outside custody, domestic violence) subjected. Plus, these statements reverse the Committee's former trend of making only gender-neutral (or gender-blind) observations on states parties' reports.

Yet there have been few individual communications raising rape or threats of rape, sexual violence, or other forms of gender-related harm before the Committee. In *Kisoki* v. *Sweden*, the Committee shied away from explicitly finding that rape is a form of torture. In fact, the Committee simply did not refer to the written testimony in which the complainant, a political activist of an opposition party in Zaire, had alleged that she was raped on more than ten occasions during her one year in detention.[133] That is, 'the sexualized nature of the torture, particularly the rape[s], was erased from the committee's consideration of the issue'.[134] Rather, the Committee stated that 'her political affiliation and activities, her history of detention and torture, should be taken into account when determining whether she would be in danger of being subjected to torture upon return'. While it can be inferred from this decision that rape in detention *is* a form of torture, rape as a form of torture is never explicitly articulated in the views, even when such an obvious case presents itself.

In a later case the Committee against Torture held that Sweden would be in breach of Article 3 of the UNCAT if it were to return to Iran an Iranian woman who was a widow of a martyr forced into a *sighe* or *mutah* marriage after the death of her husband and sentenced to death by stoning for having committed adultery with a Christian man.[135] While the Committee is not explicitly clear in its ruling, it can

129. Concluding Observations on China and Hong Kong Special Administrative Region, contained in *Report of the Committee against Torture*, UN Doc. A/55/44, 2000, para. 136.
130. C. Lambert, 'Partial sites and Partial Sightings: Women and the UN Human Rights Treaty System', in S. Pickering and C. Lambert (eds.), *Global Issues, Women and Justice* (Sydney Institute of Criminology Series No. 19, Sydney, 2004) 136, at 153.
131. Concluding Observations on China and Hong Kong Special Administrative Region, *supra* note 129, para. 136.
132. Concluding Observations on Georgia, UN Doc. A/56/44, 7 May 2001, para. 82(j).
133. *Pauline Muzonzo Paku Kisoki* v. *Sweden*, CAT 41/1996. See also *E. B. Abad v. Spain*, CAT 59/1996.
134. Lambert, *supra* note 130, at 152–3.
135. *A.S.* v. *Sweden*, CAT 149/1999. A *sighe* or *mutah* marriage is a short-term or fixed-term contract of marriage, usually accompanied by dowry payments, which is believed to have its origins in Islam. Its apparent aim is to avoid the repercussions of adultery or sexual intercourse outside marriage. The marriage ends without divorce on the expiration of the agreed period. If the marriage is consumated then the woman is not allowed to remarry until a certain period of time has elapsed. The practice is widely criticized by women's rights groups as denying to women internationally recognized human rights associated with equality and marriage, such as consent, mutual divorce, and joint responsibility for children.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

be inferred from its decision that either alone or in concert both these acts (the forced marriage and the punishment for adultery) amounted to a form of torture for the purposes of applying Article 3 non-refoulement protection.[136] While this is a progressive decision in terms of its final outcome, the Committee did not treat the gender aspects of the case with thoroughness. It did not, for example, elaborate on or mention in its final statements the sexual slavery attributed to this *sighe* or *mutah* marriage; her harsh questioning by Zeinab sisters, the female equivalents of the Iranian Revolutionary Guards, who investigate women suspected of 'un-Islamic behaviour'; or the domestic violence she suffered at the hands of her husband after being delivered to him by the police.[137]

3.3.2. Public officials, consent and acquiescence

Perhaps the most criticized aspect of Article 1 of the UNCAT as the greatest barrier to the inclusion of women's claims is the nexus requirement that the severe pain or suffering must be inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. [138] At the time of its drafting there was discussion as to whether or not the definition of torture should be limited to acts of public officials.[139] It was generally agreed that the Convention should apply both to acts committed by public officials and to acts for which public officials could be considered to bear some responsibility. Because of the inclusion of this phrase in Article 1, it has been criticized by feminist writers as implicitly excluding private acts. France was alone in arguing that an act of torture relates to the 'intrinsic nature of the act of torture itself, irrespective of the status of the perpetrator'.[140]

In *G.R.B.* v. *Sweden*,[141] in which the author said that she feared returning to Peru, where members of the Maoist Sendero Luminoso (Shining Path) guerrilla group had raped her and where she feared reprisals by this group on her return, the Committee found that her claim failed on two grounds. First, it held that the state party does not have an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-government entity, without the consent or acquiescence of the government. Such cases, it held, fall outside the scope of Article 3 of the Convention.[142] Second, she failed to show that she would be personally at risk.[143] Robert McCorquodale and Rebecca La Forgia rightly criticize this decision, as the Committee did not in fact deal with the issue of state acquiescence. They argue that what is required is for the Committee to decide whether the government of Peru had properly investigated the rape, how many rapes reported had not been investigated, and whether non-state actors were able to rape due to the lack

136. Para. 8.4.
137. Para. 2.5.
138. See, e.g., Charlesworth et al., *supra* note 3, at 628–30; Byrnes, *supra* note 3.
139. J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), 45.
140. Ibid.
141. CAT 83/1997.
142. CAT 83/1997, para. 6.5.
143. See also *M.P.S. v. Australia*, CAT 138/1999.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

of state action.[144] The author submitted that her parents had reported the rape to the police, 'but they did not show any interest in the matter'.[145] This decision is particularly troublesome in the light of the well-documented evidence of rape and other violence perpetrated against women by Shining Path, including the assassination of twelve leading feminists.[146] In fact, Human Rights Watch reports that the military also engages in widespread rape and that such abuse has been considered only as 'an occasional, regrettable excess'.[147] This decision shows that the Committee may not always grasp how the issue of 'acquiescence' should be applied, and indicates that while the definition of 'torture' has scope to include abuse by non-state actors where the state is taken as 'acquiescing' in that abuse, the Committee is not always attuned to it. The public/private dichotomy can, therefore, only be overcome when the Committee pays closer attention to it.

An earlier case, *S.V. et al.* v. *Canada*,[148] in which the author feared return to Sri Lanka due to the actions of the Liberation Tigers of Tamil Elam (LTTE, or Tamil Tigers), also failed. Like that in *G.R.B.* v. *Sweden*, this earlier ruling seemed to turn on the fact that Sri Lanka did not support the actions of the LTTE or any other insurgent group; that is, they did not consent to or acquiesce in their actions. Rather, they simply did not have control of the territory in which the group operates. These cases may suggest that in order to satisfy the 'consent or acquiescence' requirement, something more than an 'inability' to act is needed. The consent or acquiescence requirement implies some knowledge of the activities of the non-state actors, general agreement to those actions, or a purposive refusal to act. The extent to which complainants are required to inform or to complain to the local authorities in order to meet the 'consent or acquiescence' standard is another issue begging further analysis. The Committee in *S.V. et al.* v. *Canada* did not, however, consider the issue of whether LTTE members had attained a certain level of quasi-government status, at least as far as their control over a particular territorial area was concerned.

This case is to be contrasted with a subsequent decision in *Elmi* v. *Australia*,[149] in which the Committee was prepared to characterize the Somali warring factions as 'other persons acting in an official capacity' for the purposes of Article 1 of the UNCAT. The clans in question prescribed their own laws, had their own law enforcement mechanisms, and provided their own education, health, and taxation systems.[150] The Committee distinguished the *Elmi* case from *G.R.B.* v. *Sweden* because in *Elmi* there was a situation in which the non-state actors were in 'effective' control and there was an absence of a central government from which the author could have sought protection.[151] This reasoning will exclude almost all claims in which non-state groups directly perpetrate the harmful conduct in situations where the state

144. R. McCorquodale and R. La Forgia, 'Taking Off the Blindfolds: Torture by Non-State Actors', (2001) 1 *Human Rights Law Review* 189, 209–10.
145. CAT 83/1997, para. 2.3.
146. G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2002), 364; Americas Watch and Women's Rights Project, *Untold Terror: Violence against Women in Peru's Armed Conflict* (1992).
147. Ibid.
148. CAT 49/1996.
149. *Sadiq Shek Elmi v. Australia*, CAT 120/1998. For further analysis on *Elmi* v. *Australia*, see McCorquodale and La Forgia, *supra* note 144.
150. CAT 120/1998, para. 5.5.
151. CAT 120/1998, para. 5.2. McCorquodale and La Forgia, *supra* note 144, at 197.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

does not have effective control of territory. In fact, a subsequent, near-identical case, *HMHI* v. *Australia*,[152] involving a rejected Somali asylum-seeker claiming that his return to Somalia would breach Australia's obligations under Article 3, distinguished *Elmi*. The Committee did so by stating that the 'exceptional' situation of a country wholly lacking state authority (that existed at the time of the *Elmi* decision) no longer exists in Somalia, due to the existence of the transitional national government (TNG). The TNG was considered by the Committee to be a state authority, partly due to its relations with the international community. Because HMHI feared torture at the hands of non-state actors, and not from the new state authorities, his claim was considered to fall outside the scope of Article 3 of the UNCAT. However, what was not taken into account in this case was whether the state authority would acquiesce in those feared acts by other clans or other 'private' citizens, either through inaction or not having put in place measures to protect such persons against this type of fear, or due to impunity.

In contrast to the above decisions, the Committee has held that actions of non-state or private actors can fall within the UNCAT by virtue of the terms 'consent or acquiescence', albeit in more limited circumstances than under the ICCPR. In the case of *Dzemajl et al.* v. *Yugoslavia*,[153] the Committee was satisfied that the police had been informed of the immediate risk facing the complainants by a 'mob' of several hundred non-Roma residents, armed with stones, Molotov cocktails, and other objects, who broke the windows of cars and houses and then set them on fire. At the end of the attack, the whole settlement had been levelled and all properties belonging to the Roma residents were either burnt or completely destroyed.[154] In finding that the police had not taken any appropriate measures in order to protect the complainants, the police had 'acquiesced' in the actions in the sense of Article 16 and *ipso facto* in the sense of Article 1, although the latter was not found to have been breached.[155] If the reasoning in this ruling is followed, it could prove pivotal to holding the state responsible in specific domestic or family violence or other non-state-actor cases.

What these cases demonstrate is that the definition of 'torture' has been interpreted more restrictively by UNCAT than by other international treaty bodies. The specific wording in Article 1 of the UNCAT has given scope to the Committee to limit the types of case that would otherwise satisfy the torture threshold. This is not to say that the actions of non-state or private actors do not fall within the remit of Articles 1 or 16 of the UNCAT. The Committee itself has raised concern, for example, in its concluding observations on state reports about the perpetration of torture, arbitrary detention, or ill-treatment at the hands of 'traditional chiefs, sometimes with the support of the forces of law and order'.[156] However, what is clear is that not every act of a non-state actor will fall within the definition, as it will turn on the

152. *HMHI v. Australia*, CAT 177/2000.
153. CAT 161/2000.
154. Paras. 2.7–2.9.
155. The CAT has reiterated its concern regarding alleged failures of the state to prevent and to investigate fully and promptly violent attacks by non-state actors against ethnic and other minorities: see Concluding Observations on Croatia, UN Doc. CAT/C/CR/32/3, 11 June 2004, para. 8(f).
156. Concluding Observations on Cameroon, UN Doc. CAT/C/CR/31/6, 5 Feb. 2004, para. 4(c).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

role played by the state itself or other person acting in an official capacity, the latter being limited by the Committee's reasoning so far to quasi-governmental structures that exercise effective control over a territory and where there is no central government. This latter interpretation limits its application, therefore, to very few, if any, situations worldwide. The current interpretation of the UNCAT does not, therefore, protect women against brutal rapes or mass killings by rebel soldiers, for example, except where it can be said that the soldiers were in effective control of the territory and there was no central government. Similarly, the UNCAT does not protect women from harm if the state has no knowledge of it and cannot be said therefore to have consented or acquiesced in it, even if they may have failed in a more global sense in their responsibilities of due diligence. A mere inability to act or lack of knowledge would not meet the Committee's understanding of 'consent or acquiescence'.

At this juncture it is worth asking what, therefore, is the difference between the 'due diligence' standard applied in other human rights areas, and the 'consent or acquiescence' standard of the UNCAT? While this question demands detailed analysis, I wish to make just a few observations here. As far as can be determined from the approaches of the two treaty bodies, the due diligence standard requires states to take both pre- and post-abuse measures. For example, states are required to take steps to *prevent* domestic violence generally, including through legislation and other measures. If they fail to act at the level of due diligence required, they could be held responsible for an actual occurrence of domestic violence on their territory. Thus a state would be responsible for domestic violence if it were lawful for a man to beat or rape his wife under the law or the police were not instructed to prevent such violations or to offer assistance, whether or not they knew of or acquiesced in a particular incident. The state is also obligated to investigate, prosecute, and punish those responsible, and to offer compensation to those aggrieved. This is a positive outcome for women (and men) claimants.

In contrast, the 'consent or acquiescence' element of the UNCAT has been approached by the Committee against Torture as requiring *actual* knowledge of a particular incident and *actual* refusal to act. It does not seem to create obligations on a state to take any pre-abuse preventive measures, although a state may be held to breach other individual provisions of the UNCAT.[157] While this is a finer line to draw, it is possible for women victims of domestic violence who have suffered 'severe pain or suffering' and who have reported such incidents to the police to mount successful claims before the CAT if the police or other government officials fail in their duties to offer assistance, or to investigate, prosecute, or punish, alleged offenders. But this rationale will not protect women from the actions of non-state armed groups who control parts of the territory, so long as some form of recognized state structure exists, even if it is not wholly effective. There are myriad examples of women (and men) who are therefore not protected by the UNCAT. In addition,

157. E.g. by failing to enact legislative, administrative, judicial, or other measures to prevent acts of torture (Art. 2), to criminalize torture (Arts. 4 and 5), to educate and train law enforcement personnel, civil or military, medical personnel, public officials, or other persons involved in custody, interrogation (Art. 10), to investigate (Art. 12), etc.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

'acquiescence' has not (yet) been read as including an 'inability to act', by failing, for example, to have the appropriate mechanisms in place to prevent such actions or to protect persons against such harm. Feminist scholars are, therefore, right to criticize the definition of torture under the UNCAT, but not because of the need to link a particular harm to that of a 'public official' or the state (a prerequisite for any human rights violation under international law). Rather, the wording 'consent or acquiescence', as well as 'other person acting in an official capacity', has failed to be interpreted in the way the drafters of the treaty intended, as well as to reflect evolving realities. The Chairman-Rapporteur for two years of the drafting process stated that 'All such situations where responsibility of the authorities is somehow engaged are supposed to be covered by [this] rather wide phrase appearing in Article 1'.[158] This has not been the accepted interpretation of the Committee to date. The public/private dichotomy has therefore only been partly resolved under the UNCAT.

3.2.3. The purpose of the conduct

The second most criticized element of the definition of 'torture' in Article 1(1) of the UNCAT is that such harm is to be inflicted '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'. The purposive element is seen as reinforcing the 'male' context of torture, as it implies that torture only takes place within the context of arrest, interrogation, or detention. Although the inclusion of a list of purposes for which torture is committed in Article 1 has been synonymous with characterizing an act as 'torture' rather than a lesser form,[159] this was not necessarily the intention of the drafters. France in particular considered the motives of the perpetrators to be irrelevant.[160] The United States preferred to replace the list of purposes with a statement that the act must be 'deliberate and malicious'.[161] Sarah Joseph, Jenny Schultz, and Melissa Castan argue that what seems to have been intended is that the act ought to be inflicted purposively, and not merely by accident or randomly.[162] However, this interpretation appears to be subsumed within the criterion that the pain or suffering be inflicted 'intentionally', thus ruling out negligent or accidental conduct. Applying the interpretative maxim *noscitur a sociis*, it could be argued that the use of language 'such other purpose', following a list of approved purposes, requires the reason for the abuse to be akin to, or of the same genre, as those enumerated. Burgers and Danelius state that the list was intended to be indicative of 'the most characteristic examples'.[163] Restricting the listing to a specific set of purposes could have the effect of severely curtailing the acceptable purposes of Article 1 and would support feminist claims of the 'male' nature of human rights law.

158. Burgers and Danelius, *supra* note 139, at 120; McCorquodale and La Forgia, *supra* note 144.
159. Art. 16 forms of ill-treatment are not subjected to the same 'purpose' requirement.
160. Burgers and Danelius, *supra* note 139, at 46.
161. Ibid.
162. See in contrast S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2004), 197.
163. Burgers and Danelius, *supra* note 139, at 46.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

In contrast to the above, the drafting conference finally agreed that any listing should not be exhaustive, which arguably makes the listing only illustrative. Furthermore, it provides scope for decision-makers to read it in its widest sense, such that 'any purpose' would be sufficient, although this has not been the approach adopted by the Committee to date. Notably, too, the list of enumerated purposes was broadened from that included in the Declaration on Torture 1975 to include coercive and discriminatory purposes. Of these new purposes, the latter may prove particularly relevant to women's claims, because where torture is perpetrated on discriminatory grounds Article 1 provides that it can be for 'any reason', arguably removing the need to point to a particular 'purpose'. The 'discriminatory purposes' ground was not without its sceptics at the time of drafting, however. Included in the Working Group's report is a statement by the United Kingdom on the phrase:

> The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence.[164]

The 'discriminatory purpose' ground has been raised by at least one applicant, who argued that the Committee should take into account his Roma ethnicity, asserting that his membership of a 'historically disadvantaged minority group' renders him particularly vulnerable to 'degrading treatment'. He argued that 'All else being equal, a given level of physical abuse is more likely to constitute "degrading or inhuman treatment or punishment" when motivated by racial animus and/or coupled with racial epithets than when racial considerations are absent'.[165] Unfortunately, however, the Committee did not comment on this aspect of his claim, finding in any event that the alleged abuses amounted to torture within the meaning of Article 1. This noncommittal approach of the Committee is also evident in the fact that, unlike the Human Rights Committee, it has not made any pronouncements on the relevance or otherwise of subjective factors to a finding of torture or another form of ill-treatment.[166] Thus while there is interpretative scope within the provision to incorporate abuse wholly or predominantly perpetrated against women where it is based on discrimination, the Committee has yet to rule on it convincingly.

3.3. The Committee on the Elimination of All Forms of Discrimination against Women

An analysis of women and torture would not be complete without regard to the key women-specific international treaty: the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW, or Women's Convention).[167] What is immediately noticeable is that the Women's Convention does not contain a specific prohibition against 'torture' or other associated forms of ill-treatment. It seems that

164. Working Group Report UN Doc. E/CN. 4/L. 1470, para. 27.
165. *D. Dimitrijevic v. Serbia and Montenegro*, CAT 207/2002, para. 3.1.
166. Cf. the approach of HRC. See Y. Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), 114, 123.
167. GA res. 34/180, 18 Dec. 1979; entered into force 3 Sept. 1981.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

the female drafters of and female lobbyists to the Women's Convention failed to recognize the application of torture protections to women, even during the 1970s, a period of the increasing heavy-handedness of autocratic regimes in many parts of the world, including against women, either as activists themselves or by being implicated by membership of a family of politically active male relatives. Along the same lines, it is further clear that the drafters of the Women's Convention did not see fit to transfer the international prohibition on slavery or servitude to the Women's Convention, except in the form of a specific prohibition on trafficking and 'exploitation of prostitution'.[168] The Women's Committee has been back-pedalling ever since. These two omissions are good examples of how gendered assumptions about women and men, including by women themselves, can reduce the rights available to women, rather than enhance them. Making the assumption that torture was something that happened to men, or that it does not have a discriminatory element, has meant that the Women's Convention is short of one of the key human rights protections of all time. It has also meant that arguments in relation to female genital mutilation have been couched in terms of harmful traditional practices or acts detrimental to health, rather than as torturous acts.[169]

Thankfully, in 1992 the Women's Committee issued a general recommendation that declared that 'Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[170] It stated that

> The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.[171]

In spite of its omission of a torture prohibition, this general recommendation lists the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment as an example of rights and freedoms that may be impaired or nullified by discrimination. However, even by adopting this interpretation, the Women's Convention still only protects women if they are tortured *because* they are women – such as forms of sexually motivated torture – or if the particular form disproportionately affects them – such as domestic violence. It does not offer women protection against other forms of torture or ill-treatment wrongly viewed as 'male' or 'neutral' forms of harm, such as physical beatings or deprivation of food or water to political dissidents or common criminals while in state custody. For the Women's Convention to be implicated there must be a discriminatory element present.

Having said this, the Women's Convention has been progressive in as far as it includes both public and private discrimination. Article 2(e) of the Women's Convention and the Committee's General Recommendation No. 19 emphasize that the

168. Art. 6, Women's Convention.
169. CEDAW GR No. 14: Female Circumcision, UN Doc. A/45/38 (1990).
170. CEDAW GR No. 19: Violence against Women, UN Doc. A/47/38 (1992), para. 1. The Committee had previously issued a General Recommendation No. 12 on violence against women, which provides that Arts. 2, 5, 11, 12, and 16 require states parties to protect women against violence: GR No. 12 (1989).
171. CEDAW GR No. 19: Violence against Women, UN Doc. A/47/38 (1992), para. 6.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

Convention is not limited to action by or on behalf of a government, but includes action by any person, organization or enterprise.[172] This approach acts as an antidote to the due diligence standard of the ICCPR or the 'consent or acquiescence' requirement of the UNCAT. In addition, the general recommendation is helpful in clarifying what types of violence are gendered, listing family violence, forced marriage, dowry deaths, acid attacks, and female circumcision – which may be classified as torturous acts under other international instruments.

Under the Optional Protocol to the Women's Convention on individual communications and inquiries,[173] the Women's Committee has been able to hold that Hungary was in violation of the Convention in having failed in its duty to provide a female victim of domestic violence with effective protection from the serious risk to her physical integrity, her physical and mental health, and her life – such risks being posed by her common-law husband.[174] The Committee concluded that the state had failed in its obligations under the Women's Convention because it had not enacted specific legislation to combat domestic violence and sexual harassment, that no shelters existed for the immediate protection of a woman in the victim's circumstances with a disabled child, and that there was no injunctive relief, such as a restraining order, available to her. In addition, they ruled that a woman's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and to privacy.[175] Although the Committee did not analyse this case in the light of international torture provisions, its findings, specifically the itemizing of a plethora of action that ought to be taken by a state in order to fulfil its obligations of 'prevention and protection',[176] have definite ramifications for the due diligence standard applied by other bodies.

In spite of the positive decision of the Women's Committee in *A.T.* v. *Hungary* (above), its first inquiry under the Optional Protocol is less than satisfactory in its

172. Ibid., para. 9.
173. GA res. A/RES/54/4, 15 Oct. 1999; entered into force 22 Dec. 2000.
174. *A.T. v. Hungary*, CEDAW 2/2003; Views adopted on 26 Jan. 2005.
175. Ibid., Para. 9.3.
176. Hungary had indicated that the Hungarian parliament had adopted a resolution on a national strategy for the prevention and effective treatment of violence within the family, including the following: 'introducing a restraining order into legislation; ensuring that proceedings before the Courts or other authorities in domestic violence cases are given priority; reinforcing existing witness protection rules and introducing new rules aimed at ensuring adequate legal protection for personal security of victims of violence within the family; elaborating clear protocols for the police, child care organs and social and medical institutions; extending and modernizing the network of shelters and setting up victim protection crisis centres; providing free legal aid in certain circumstances; working out a complex nationwide action programme to eliminate violence within the family that applies sanctions and protective measures; training of professionals; ensuring data collection on violence within the family; requesting the judiciary to organize training for judges and to find a way to ensure that cases relating to violence within the family are given priority; and launching a nationwide campaign to address indifference to violence within the family and the perception of domestic violence as a private matter and to raise awareness of State, municipal and social organs and journalists' (ibid., para. 5.7). It also set out 'prompt and effective intervention by the police and other investigating authorities; medical treatment of pathologically aggressive persons and application of protective measures for those who live in their environment; operation of 24-hour "SOS" lines; organization of rehabilitation programmes; organization of sport and leisure activities for youths and children from violence-prone families; integration of non-violent conflict resolution techniques and family-life education into the public educational system; establishment and operation of crisis intervention houses as well as mother and child care centres and support for the accreditation of civil organizations by municipalities; and launching of a media campaign against violence in the family' (para. 5.8).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

references to and treatment of 'torture'. In this most disturbing and confronting report into the abduction, rape, and murder of poor and young women, including adolescents, in the Ciudad Juárez area of Chihuahua, Mexico, the Committee appears to adopt the interpretation of 'torture' of Article 1 of the UNCAT. Its statement at paragraph 67 illustrates its approach:

> As far as [the Committee] know[s], the method of these sexual crimes begins with the victims' abduction through deception or by force. [The women] are held captive and subjected to sexual abuse, including rape *and, in some cases, torture*, until they are murdered. Their bodies are then abandoned in some deserted spot.[177]

This approach to torture is much more conservative than that of other international and regional bodies. The use of the term 'torture' in this report is used in a very traditional sense to refer to physical or psychological pain or suffering applied by public officials or others acting in an official capacity to extract confessions or information from detainees. The Committee views torture quite separately from issues of rape or sexual crimes. In taking this approach, it does bring up the issue of whether it is worthwhile to label particular acts of violence against women as torture or ill-treatment, rather than simply as violence against women. Feminist activists and writers have harnessed the torture provisions because of the status attached to torture under international law. Viewing rape as a form of torture, for instance, is thought to equate the severity of the assault with one of the most serious human rights violations recognized under international law. It 'give[s] the crime specific symbolic significance that recognizes it as an affront to personal integrity, rather than as a crime against honour or custom'.[178] In addition, it has been considered necessary to prevent the high-profile attention to rape from becoming a short-lived or 'fashionable' episode,[179] since rape as torture should always be treated as a 'violation of the highest order'.[180] The same arguments can be made in relation to other harms predominantly affecting women. Having said this, however, it is also quite plausible that this approach is open to criticism for playing into the male-gendered international system by seeking to raise the profile of violence against women through equating the seriousness of the harm with male conceptions of torture, rather than as grave human rights violations in their own right.

3.4. Interpretations of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Akin to the jurisprudence arising out of the Human Rights Committee and the Committee against Torture, Article 3 of the European Convention for the Protection of

177. CEDAW, Report on Mexico, UN doc. CEDAW/C/2005/OP.8/MEXICO (emphasis added). See also paras. 232, 241, 273, 274.
178. Pearce, *supra* note 6, 540.
179. Ibid., at 547.
180. L. Kois, 'Dance, Sister, Dance!', in B. Duner (ed.), *An End to Torture: Strategies for its Eradication* (1998), 90. It is worth noting that this push to use existing instruments to the advantage of women has arisen alongside calls for the creation of separate instruments addressing violence against women, but has so far resulted only in a General Assembly Declaration on the Elimination of Violence against Women (GA res. 2263 (XXII), 7 Nov. 1967.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

Human Rights and Fundamental Freedoms[181] (ECHR) has typically been interpreted and applied within so-called traditional 'male' constructs of physical violence used as a means of extracting information or a confession, or intimidating detainees, by state officials.[182] However, there have been some notable exceptions.

3.4.1. Rape as 'torture'

In relation to the nature or severity of the harm, the European Court in *Aydin* v. *Turkey* in 1997[183] brought us one step nearer to deconstructing traditional conceptions of torture. The Grand Chamber of the European Court of Human Rights in this case ruled (14–7) that

> Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.[184]

The Grand Chamber referred to both the *sex* and *youth* of the applicant (as a seventeen-year-old female) in making its decision, as well as to associated conditions of her treatment.[185] The Court accepted that the 'accumulation of acts of physical and mental violence' and 'especially the cruel act of rape' amounted to torture in breach of Article 3, adding that the Court would have reached the same conclusion 'on either of these grounds taken separately'.[186] This case not only represents the first case where the European Court recognized rape as a form of torture, but it is also the first finding of 'torture', rather than a lesser form of ill-treatment, issued by the Court. Of course, not all the judges agreed with the majority ruling. The minority sought to engage in mathematical questioning as to the alleged date of sexual assault and the birth of the applicant's first child. They even suggested that her subsequent marriage to her cousin only a few days after the alleged rape was 'surprising in the cultural context of the region', although they did not provide any information to support such a statement, nor did they request information from the applicant as to the reasons for her 'quick' marriage.[187] In spite of the minority dissenting opinion, this decision represents a reversal of the 1976 European Commission Report in *Cyprus* v. *Turkey*,[188] in which it was concluded (12–1) that incidents of rape carried out by Turkish soldiers against Cypriot nationals constituted only 'inhuman treatment', and not torture, within the meaning of Article 3 of the ECHR.

---

181. Rome, 4 November 1950, as amended by its five protocols. Art. 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.
182. See, e.g., *Ireland v. United Kingdom*, ECHR A25 (1978), Judgment, 18 Jan. 1978.
183. ECHR Reports 1997-VI (GC), Judgment (Merits and just satisfaction), 25 Sept. 1997.
184. Ibid., para. 83.
185. Ibid., para. 84.
186. Ibid., para. 86.
187. See Joint Dissenting Opinion of Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gotchev, at 42–5.
188. Comm. Rep. 4 EHHR 482, 10 July 1976.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

3.4.2. Punishment

In a similar finding to the decision of the Committee against Torture in *A.S.* v. *Sweden*,[189] the Strasbourg Court in *Jabari* v. *Turkey*[190] held that it would be contrary to Article 3 of the ECHR to return the applicant, an Iranian woman, to Iran, since she faced being stoned to death for adultery. Such a punishment was held to constitute a form of treatment contrary to Article 3. While this case is viewed as a victory for women being subjected to this unequal law relating to adultery, the Committee did not use any arguments relating to its non-discriminatory application or to her unequal treatment as a woman before the law to assist it in characterizing the punishment as being in breach of Article 3. The actual punishment itself was considered to be in breach of Article 3 of the ECHR, regardless of any other extenuating or subjective circumstances of the case.

3.4.3. Due diligence

A third pioneering case before the Strasbourg Court in terms of women's claims is *MC* v. *Bulgaria*.[191] This case elaborated what a state is required to do in investigating rape allegations in order to meet the 'due diligence' standard. Before the Strasbourg Court, the applicant claimed that Bulgarian law and practice do not provide 'effective protection' against rape and sexual abuse, since only cases where the victim physically resists are prosecuted. In line with decisions of other international and regional bodies, the Court held that Bulgaria had a positive obligation both to enact criminal legislation to punish rape effectively and to apply this legislation through effective investigation and prosecution. In particular, the Court criticized the Bulgarian law for emphasizing force, rather than consent, in defining the crime of rape, noting that victims of sexual abuse, particularly girls below the age of majority, often fail to resist for a variety of psychological reasons or through fear of further violence from the perpetrator. The Court held that rape laws must reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. Not only is this a landmark decision in terms of the Court's emphasis on consent, rather than force, in relation to definitions of rape, it effectively applied concepts such as sexual autonomy and equality to support their findings.[192]

3.4.4. Discriminatory laws?

In a 1973 European Commission decision, it was held that racially discriminatory legislation, which prevented Asian residents in Kenya and Uganda who had retained their UK citizenship from entering the United Kingdom for the purpose of

189. See *supra* note 137.
190. ECHR Reports 2000-VIII, Final Judgment, 11 Oct. 2000.
191. ECHR Appl. No. 39272/98, 4 Dec. 2003. This case involved a fourteen-year-old girl who claimed that she had been raped by two men, aged twenty and twenty-one. Criminal investigations in Bulgaria found insufficient evidence that MC had been compelled to have sex with the two men. The district prosecutor terminated the proceedings on the grounds that the use of force or threats had not been established beyond reasonable doubt and that no resistance on her part had been established.
192. See also *X & Y v. The Netherlands*, A 91 ECHR (1985), in which the European Court found that failing to have a law allowing for criminal proceedings against perpetrators of sexual assault against a mentally handicapped girl violates the ECHR.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

settlement, constituted *inter alia* 'degrading treatment' within the meaning of Article 3 of the ECHR.[193] In this case the Commission stated that 'a special importance should be attached to discrimination based on race' and that such discrimination 'could, in certain circumstances, of itself amount to degrading treatment'.[194] The European Court, however, has not taken such a strict approach to discriminatory laws or treatment based on sex. While the Court in *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*[195] accepted the arguments of three women applicants lawfully and permanently settled in the United Kingdom that laws which refused permission for their husbands to join them in the United Kingdom were discriminatory on the basis of sex, race, and, in the case of Mrs Balkandali, birth, the Court was not satisfied that such discrimination constituted 'inhuman or degrading treatment' under Article 3. In its ruling the Court stated that 'the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and it was not designed to, and did not, humiliate or debase but was intended solely to achieve the aims' of limiting immigration and protecting the domestic labour market in times of high unemployment.[196] This decision does not rule out the possibility that sex-based discrimination may rise to the level of 'degrading treatment' in particular circumstances for the purposes of Article 3, but that the intention behind the treatment may excuse it from such characterization. Thus, discriminatory practices per se do not constitute a breach of Article 3.

3.5. The inter-American system of human rights

The inter-American system of human rights has proved to be at least as progressive as its European counterpart and perhaps more so. The Inter-American Court of Human Rights devised the 'due diligence' standard of state behaviour in order to allow harm perpetrated by non-state actors to be brought within the realms of human rights law. Its now famous case of *Velasquez Rodriguez* v. *Honduras*[197] found the state responsible for the 'disappearance' of Rodriguez because it failed to investigate, prosecute, and punish those responsible; that is, the state was responsible by reason of omission or failure to act:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[198]

It is important to highlight the fact that this case was decided in the absence of any gender analysis. Here, the 'disappeared' person fitted the traditional coverage of human rights law, yet the Court still found it necessary to comment on non-state

193. *East Asian Africans*, (1973) 3 EHRR 76.
194. Ibid., paras. 196 and 207.
195. ECHR A94 (1985), Judgment 28 May 1985.
196. Ibid., para. 91.
197. *Velasquez Rodriguez v. Honduras*, IACHR Ser. C, No. 4, Judgment 29 July 1988. See also *Godina-Cruz v. Honduras*, IACHR Ser. C, No. 5, 20 Jan. 1989.
198. *Velasquez Rodriquez v. Honduras*, *supra* note 197, para. 291.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

forms of harm. This is a fact that is often missing from feminist analyses of the law and it ought to remind us that it is not only women's claims that benefit from a collapsing of the division between the public and the private for the purposes of international law. Similarly, in international refugee law, the first cases that successfully accepted that the 'refugee' definition applied to non-state persecution where the state was unable or unwilling to protect the individual against such abuse did not involve a gender component.[199] The Court in *Velasquez Rodriguez* characterized the duty on states to exercise 'due diligence' as including obligations to prevent, investigate, and punish violations of human rights, and to ensure that victims are entitled to adequate compensation.[200] The duty to prevent, according to the Court,

> includes all those measures of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.[201]

Like its international and regional counterparts, the Inter-American Commission on Human Rights has expressly ruled that sexual abuse constitutes a violation of Article 5 of the American Convention on Human Rights.[202] In *Raquel Martí de Mejía* v. *Peru*[203] the Commission referred to both the physical as well as the mental suffering caused by the act of rape upon the applicant.[204] Additionally, the Commission mentioned expressly the fact that rape can cause a woman to suffer 'public ostracism', stating,

> The fact of being made the subject of abuse of this nature [that is, rape] also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

Although the American Convention on Human Rights does not offer a definition of torture for the purposes of Article 5, the Commission has stated that the definition elaborated in the Inter-American Convention to Prevent and Punish Torture 1985[205]

---

199. Edwards, *supra* note 25, at 60, n. 78.
200. *Velasquez Rodriquez v. Honduras*, *supra* note 197, paras. 173–4.
201. Ibid., para. 175.
202. Adopted at Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 Nov. 1969. Article 5 provides, *inter alia*:

    > Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Punishment shall not be extended to any person other than the criminal.

203. *Raquel Martí de Mejía v. Peru*, Case 10. 970, Report No. 5/96, IACHR, OEA/Ser. L/V. /II. 91 Doc. 7, at 157 (1996).
204. Note, also, the case of *Loayza-Tamayo v. Peru*, C33, Judgment 17 Dept. 1997, in which the Commission accepted that the applicant had been raped and that this constituted inhumane treatment, while the Court ruled that the accusation of rape could not be substantiated given the evidence. This case is interesting, since the Court was prepared to accept other evidence relating to incommunicado detention, solitary confinement, intimidation with threats of further violence, etc., but not in relation to the rape (para. 58). It is arguable that a different level of proof was expected for an accusation of rape.
205. OAS Treaty Series No. 67, Doc. OEA/Ser. L. V/II. 82 doc. 6 rev. 1, at 83 (1992); entered into force 28 Feb. 1987. Art. 2 of the IACPPT provides:

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

is relevant in the inter-American context.[206] Unfortunately, this means that the inter-American system adopts the criterion that the intentional act to inflict severe pain or suffering on the applicant must be committed by a *public official or by a private person acting at the instigation of the former*. In this case there was no issue, as the man who raped the applicant was a member of the security forces who was accompanied by a large group of soldiers. However, it may raise the same difficulties of interpretation in relation to private harm as those under the UNCAT, especially if the approach of the Committee against Torture is followed.

In terms of the 'purpose' criterion, the inter-American definition is broader in scope than that agreed at the international level and includes such open-ended concepts as 'personal punishment'. This squarely places gratuitous violence within the definition. Furthermore, the pain threshold is not indicated in the definition, thus suggesting that even the most minor of infractions could fall within its terms. In addition, it ought to be pointed out that the inter-American system has adopted a separate treaty on the prevention, punishment, and eradication of violence against women.[207] This treaty recognizes both public and private forms of violence against women,[208] and specifically identifies the right not to be subjected to torture as relevant to the protection of women against violence.[209]

3.6. International criminal law

Perhaps *the* landmark decision in terms of recognizing women's claims of having been subjected to torture (and genocide, war crimes, and crimes against humanity) during wartime emerged out of the conflicts in the former Yugoslavia and Rwanda.[210] Of particular significance is the decision of the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor* v. *Jean-Paul Akayesu*.[211] Although Akayesu was not initially charged with any crimes against women, as the trial developed evidence emerged relating to the large number of such crimes. It is noteworthy

---

> For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for the purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Art. 3 provides:

> The following shall be held guilty of the crime of torture:
> A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
> A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

206. *Raquel Martí de Mejía v. Peru, supra* note 203.
207. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted at Belem do Para, Brazil, 9 June 1994; entered into force 5 Mar. 1995; 33 ILM 1534 (IACVAW).
208. Ibid., Art. 1.
209. Ibid., Art. 4(d).
210. Note that crimes against humanity may also be committed during peacetime.
211. ICTR Case No. ICTR-96-4-T, 2 Sept. 1998; Case No. ICTR-96-4-T (AC), 1 June 2001.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

that it was only after serious lobbying by women's groups that the indictment was amended.[212] The ICTR found Akayesu, the local *bourgmestre* of Taba commune in Rwanda, guilty of crimes against humanity – for, *inter alia*, rape and sexual assault of female displaced civilians.[213] Under his command, armed local militias and/or the communal police regularly took undisclosed numbers of women from his commune office and subjected them to sexual assault, rape, and beating – often by multiple assailants. Many women were murdered. The trial chamber ruled that, in certain circumstances, rape may constitute a form of torture for the purposes of criminal liability. The trial chamber stated,

> Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the 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.[214]

While recognizing that rape is sufficiently serious to constitute 'severe pain or suffering' for the purposes of the definition of torture, the trial chamber's decision still linked torture to perpetration by agents of the state. However, the Appeals Chamber subsequently clarified its position, stating that 'outside the framework of the Convention against Torture, the "public official" requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity'.[215] While there have been some conflicting messages about whether the definition of torture in Article 1 of the UNCAT reflects customary international law,[216] the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Kunarac, Kovač and Vuković*[217] made a ruling similar to that of the ICTR in asserting that the UNCAT definition does not wholly reflect customary international law generally.[218] One of the accused, Vuković, claimed that even if it were proved that he had committed rape, he 'would have done so out of a sexual urge, not out of hatred', and therefore he had not committed rape for a prohibited purpose,

212. K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', (2003) 21 *Berkeley Journal of International Law* 288, 318.
213. The ICTR also ruled that rape can be a form of genocide.
214. Para. 687.
215. ICTR Case No. ICTR-96-4-T (AC), 1 June 2001.
216. See, e.g., *Prosecutor v. Delalić, Mucić, Delić and Landžo*, ICTY Case No. IT-96-21-I (21 Mar. 1996), which applied the UNCAT definition of torture in Art. 1. As all the elements of the definition were satisfied in this case, there was little discussion as to whether it was an appropriate definition. See also *Prosecutor v. Anto Furundzija*, ICTY Case No. IT-95-17/1-T; upheld on appeal, 21 July 2000. For more information see R. Lord, 'The Liability of Non-state Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', (2003) 4 *Melbourne Journal of International Law* 112; Askin, *supra* note 212; S. Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals', (2005) 18 LJIL 541.
217. ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001; upheld on appeal, Case No. IT-96-23 and IT-96-23/1, 12 June 2002, paras. 482 and 496. The trial chamber found the three defendants guilty of torture, rape, and enslavement as both crimes against humanity and war crimes, pertaining to a 'rape camp' near Foca, a small Bosnian town south-east of Sarajevo, where they held women for many months who were subjected to multiple rapes, including being 'sold' or 'rented out'.
218. See also *Prosecutor v. Krnojelac*, ICTY Case No. IT-97-25-T (15 Mar. 2002).

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

in this case discrimination.[219] The trial chamber did not accept this argument, instead ruling that

> There is no requirement under international customary law that the conduct must be solely perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose.[220]

This case was also the first ever conviction for enslavement in conjunction with rape.[221] These cases represent progressive advances away from traditionally 'male' constructions of 'torture' towards definitions that apply equally to women's gendered experiences as to those of men. Although these cases revolved around the conflicts in the former Yugoslavia and Rwanda, the definition of torture as a crime against humanity also applies in peacetime, provided that it forms part of a systematic or widespread attack against any civilian population. These advances have now been reflected in the Statute of the International Criminal Court (ICC). The definition of torture adopted by the Rome Conference creating the ICC removed the need for torture to be inflicted for a particular purpose, and while retaining the criterion of torture as perpetrated in custody, it covers other severe pain or suffering inflicted upon a person 'under the control of the accused'.[222]

4. Conclusion

So how far has international human rights law come in terms of incorporating the realities of women's lives in the torture provisions? Are the feminist critiques outlined in this article still relevant today, or can they be set aside as finally satisfied? It can be seen from the above review that significant progress has been made over the last decade to move away from traditional understandings of torture to a more women-friendly or gender-aware approach. Recognizing rape (and other forms of sexual violence) as meeting the severity threshold of torture must be acclaimed as a great leap forward, albeit long delayed. Commentary and jurisprudence indicate a departure from the view of rape 'as sexual, not political, a permissible "private" indiscretion, rather than as a tool of political domination'.[223] It is now accepted by every international and regional human rights body with a mandate over torture that rape is an act sufficiently serious as to constitute torture under international law.[224] This consensus position must now be said to crystallize rape into a prohibited

219. *Prosecutor v. Kunarac, Kovač and Vuković*, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001, para. 816.
220. Ibid.
221. Askin, *supra* note 212, at 333.
222. Art. 7(1)(f) of the ICC Statute lists 'torture' as a crime against humanity 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. For definition of torture, see *supra* note 113. See D. M. Koenig and K. D. Askin, 'International Criminal Law and the International Criminal Court Statute: Crimes against Women', in Askin and Koenig, *supra* note 3, vol. 2, at 3.
223. Copelon, *supra* note 3, n. 100, citing various US decisions. See also Bunch, *supra* note 12; D. Blatt, 'Recognizing Rape as a Method of Torture', (1992) 19 *NYU Review of Law and Social Change* 821.
224. The African Commission has similarly found that forced nudity, electricity burns, and sexual assaults 'constitute, together and separately, violations of Article 5'. See ACHPR 74/92, *Commission nationale des droits de l'homme et des libertés v. Chad* (Merits), in (1997) 4 International Human Rights Rep. 94.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

form of torture under customary international law. In addition to rape, the Human Rights Committee has added female genital mutilation, domestic violence, and forced abortion or forced sterilization as falling within Article 7 protections, while the Committee against Torture has referred to domestic violence, forced marriage, stoning for adultery, and incest as relevant to its mandate over torture. There has also been some recognition that discriminatory laws or conduct may breach the ill-treatment provisions, although they would probably not be of sufficient severity to reach the threshold reserved for findings of torture itself. In the absence of an international treaty outlawing violence against women, it could be argued that the torture provisions are fast becoming the key human rights protection in this area.[225]

Although the record of the committees has not always been consistent, with many decisions still continuing to omit references to or an analysis of relevant gender factors, the overall picture presented indicates an acceptance at the level of international law that the torture provisions can be interpreted and applied to reflect both the nature and the type of women's experiences. In fact, for those women who are human rights defenders or political activists, the torture provisions have always been available. As the Human Rights Committee stated in its first general comment on Article 7 of the ICCPR, 'As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood'.[226] This leads one to question whether the feminist critique that the law is 'male' or that it only incorporates 'male' experiences is still convincing. I would argue that the exclusion of women from the ambit of human rights law is less a question of terminology and drafting than of interpretation and application. In addition, many decisions prove that the sole appearance of the masculine pronoun (to the exclusion of the feminine pronoun), albeit an unacceptable drafting oversight, has not been a bar to interpretations that incorporate women's experiences. These advances have to a degree brought these instruments into the modern age, as well as taking better account of their non-discriminatory and equality foundations.

It has to be said, however, that positive findings of torture, in each of the cases mentioned in this article, still need to prove a connection between the act of abuse and the state. For some feminist scholars, therefore, attempts at dismantling the public/private divide remain unsatisfactory. Under the UN Convention against Torture and the American Convention on Human Rights, torture must be perpetrated by either a public official or another person acting in an official capacity, or with their consent or acquiescence (or at their instigation). In order to invoke state responsibility for private harm, the Committee against Torture has strictly construed the 'consent or acquiescence' element as requiring actual knowledge (it is still unclear whether constructive knowledge would suffice) of events in question, as well as a purposive refusal to act on the part of the public official or other person acting in an official capacity. Provided that a government official is aware of, for example, a domestic conflict and refuses to act or does not take appropriate steps to protect the

225. Note that Arts. 8 (slavery, servitude) and 9 (security of person) of the ICCPR have not been used to the same degree.
226. HRC GC No. 7 (1982), para. 2.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

applicant, there is a human rights violation by 'acquiescence'.[227] A problem remains, however, in relation to the interpretation given to who is an 'other person acting in an official capacity'. The Committee against Torture has required the 'other person acting in an official position' to exercise effective control of the territory in a state which does not have a central government. By this reasoning the Committee has ruled out, I would argue unreasonably, a whole range of situations in which women (and men) seek protection under the UNCAT. According to this reasoning women subjected to abduction, rape, or beating by rebel soldiers, for example, would not be protected by the torture provisions unless it can be proved that the rebel group had 'effective control of territory' and there was no central government. It limits this aspect of the UNCAT provisions to only very few countries and situations worldwide, and is therefore virtually worthless in this regard. Disappointingly, too, both the Inter-American Commission and Court on Human Rights have applied the definition of torture agreed by its own regional torture convention. Although this definition is broader than that under the Convention against Torture in its inclusion of concepts such as 'personal punishment', it nonetheless insists that acts of torture be perpetrated by 'a public servant or official' or at their instigation. In these two jurisdictions, therefore, the public/private dichotomy has not been entirely disassembled. The extent to which it remains supports feminist criticisms that statehood and sovereignty interfere with creative or reconstructionist interpretations of these provisions.[228]

In contrast to the above, non-state or private abuses are recognized under the ICCPR and the ECHR where the state fails to satisfy the evolving international law notion of 'due diligence'. Although the 'due diligence' standard is still somewhat elusive, it has allowed women's previously 'private' claims to become the responsibility of the state where it is either unable or unwilling to offer protection against such harm. At the level of international criminal responsibility, the ICTY and ICTR both concluded that the 'public' official requirement of the UNCAT is not part of customary international law. The Statute of the ICC has followed the same approach. International refugee law also accepts that where a claim to refugee status is based on the actions of a non-state actor as the source of the persecutory conduct, the claim will succeed if the state is 'unable or unwilling' to provide protection against that harm.[229] What is still unclear, though, is how vigilant the state must be in taking steps to prevent these types of abuse. Certainly, the European Court recognized that inadequate legislation and ineffective investigation would bring a state into violation of Article 3 of the ECHR for so-called 'date rape'.[230] This follows the decision of the Inter-American Court of Human Rights in *Velasquez Rodriguez* v. *Honduras*,[231] the

227. See *Dzemajl et al. v. Yugoslavia*, *supra* note 153.
228. Charlesworth, *supra* note 36.
229. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), para. 65; UNHCR, 'Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', UN Doc. HCR/GIP/02/01, 7 May 2002, para. 19. For a list of relevant cases see Edwards, *supra* note 25.
230. See *M.C. v. Bulgaria*, *supra* note 191.
231. *Supra* note 197.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

first decision of its kind to oblige states to investigate alleged disappearances and to prosecute and punish those responsible. However, international tribunals have not yet determined whether failing to train police adequately, to conduct publicity campaigns against domestic violence, or to provide shelters or counselling for women, individually or collectively (all factors mentioned in the concluding observations on states parties' reports by either the HRC or the CAT) would bring a state into violation of its obligations. Although the first decision of the CEDAW was framed as a case of discrimination (as no torture provision exists in the Women's Convention), it itemized a whole plethora of responsibilities that ought to be undertaken by the state to protect women against domestic violence. One may speculate that this decision will be useful in parallel jurisdictions to give content and meaning to the 'due diligence' standard, at least as far as cases of domestic violence are concerned. The specific obligations imposed on states under the UNCAT may also offer guidance to other international and regional mechanisms.[232]

While acknowledging that these developments are significant, even if the transformation is not yet complete, feminist advocates, lawyers, and decision-makers ought to be aware of the way in which evolving interpretations of torture may reinforce our inbuilt prejudices. Rather than deconstructing gendered stereotypes and assumptions perpetuated within international law concerning the roles, responsibilities, and statuses of women and men respectively, the new definitions or understandings of torture may actually reinforce them. Paying so much attention to sexual or domestic violence against women as forms of torture may perpetuate stereotypes which view women as apolitical victims of 'private' male sexual aggression. Most international adjudicatory bodies are willing to recognize female victims of sexual violence as victims of human rights violations. I question whether a consequence of this is a growing tendency only to view women as victims, and if they are victims, then they must be victims of sexual violence, rather than other types of physical or mental torture. Or, alternatively, it may lead to a perspective that sexual forms of violence are the most serious forms of harm to which women are subjected. As we have seen above, very little attention is paid to perceivably 'male' forms of torture carried out against politically active women by state agents. In our efforts to expand and clarify the scope of the torture provisions under international law, I caution against simply replacing old gender-based stereotypes with new ones. In fact, repeated assertions by feminist writers over the last two decades that human rights norms are 'male' and are conceived in terms of what men fear will happen to them may have contributed to the silence surrounding the perpetuation of like abuse against women in these contexts. As stated above, even the female drafters of and female lobbyists to the Women's Convention, itself a rare opportunity for the many and varied experiences of women be given a specific voice, failed to recognize the application of torture protections to women, including in the context of female prisoners in state custody. It is still not fully appreciated that gender-based forms of torture possess an element of discrimination.

232. *Supra* note 157.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

Moreover, it is rarely acknowledged by feminist writers that women were among the first applicants to the Human Rights Committee claiming an infringement of their human rights under Article 7 of the ICCPR, either on behalf of themselves or of other persons, including other women. The same is true in relation to the UNCAT. Many of these cases involved so-called traditionally 'male' claims of physical abuse in state custody, poor prison conditions, or disappearances. What they show is that women are not exempt from these actions simply by reason of their sex. Women do have political opinions, women do engage in political dissidence, and women are subjected to arrest, detention, or imprisonment for their political and non-political activities. As MacKinnon articulated, 'What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women'.[233] It appears that some feminist writers may have been caught by these assumptions and oversights too. Karen Engle's warning of the dangers of over-emphasizing the public/private dichotomy as being to the detriment of women may hold true in this context.[234]

The fact that women have brought a range of claims of torture before these human rights committees challenges feminist criticisms that women do not utilize these procedures because of their hierarchical, adversarial, or exclusionary nature. But they do not answer those charges entirely. What is noticeable from the review above is the rarity of women-specific or gender-related claims, whether by Western or non-Western women, something especially apparent when violations are widespread and now well documented.[235] This vacuum in the jurisprudence raises a range of unanswered questions as to why women have not (yet) taken advantage of these interpretative developments. Is it a question of difficulties for women in accessing these committees and structures? Are admissibility criteria biased against women? Could it be due to the fact that these committees only deal with 'past' abuse, in so far as a complainant must be a 'victim' of a violation, and that seeking redress, rather than prevention or protection against future harm, may not be relevant to particular women's experiences or needs? Does it arise out of the age-old reasons of shame and community ostracism, so that women are reluctant to complain to international (and, for that matter, domestic) mechanisms? Is it due to concern, as highlighted by Hannah Pearce in relation to the interpretation and application of the refugee definition by national courts, that inconsistency in practice prevents women from

233. MacKinnon, *supra* note 5, at 6.
234. Engle, *supra* note 36, at 143.
235. E.g. 250,000–500,000 women raped in the 1994 Rwandan genocide; 94 per cent of displaced households had experienced sexual assaults in the 1991–2002 civil war in Sierra Leone: E. Rehn and E. J. Sirleaf, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women's Role in Peace Building* (2002), 9; 50,000 girls captured by government forces are being kept as sex slaves in the northern territories of Sudan: J. Seager, *Atlas of Women in the World* (2003), 99; 250,000 East Timorese were forcibly deported into camps in West Timor and systematically raped: D. Farsetta, 'East Timorese Refugees in Militia Controlled Camps', in M. H. C. Pus (ed.), *The Devastating Impact of Small Arms and Light Weapons on the Lives of Women: A Collection of Testimonies* (2001); 20,000–50,000 women were raped in the armed conflict in former Yugoslavia: N. Quenivet, *Sexual Offences in Armed Conflict and International Law* (2005), 131. See also Human Rights Watch report, 'Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad', 2005; Amnesty International report, 'The Impact of Guns on Women's Lives', 2005; Human Rights Watch report, 'Positively Abandoned: Stigma and Discrimination against HIV-Positive Mothers and their Children in Russia', 2005; Amnesty International report, 'It's in Our Hands: Stop Violence against Women', 2004.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29

relying on the law?[236] Or is there still resistance on the part of lawyers, including feminist lawyers, advocates, non-governmental organizations, or women themselves, to recognizing that women's experiences, whether they mirror those of men, or are particular to women, satisfy the torture provisions? What these outstanding questions show is that gender-sensitive or gender-appropriate interpretations of torture only go so far in making these provisions applicable to the lives of women. Some of the positive interpretations outlined above certainly remove questions about the applicability of the torture provisions to women's gendered experiences, but they have not (yet) resulted in an active utilization of these mechanisms by women. While it has not been possible to discuss these issues in this article, these questions (and others) certainly deserve further analysis.

So where to from here? Although gender factors are rarely absent from the context of human rights violations – in respect of either the nature or type of that treatment or the reasons behind such treatment – feminist writers and advocates must stay attuned to the way in which women become 'essentialized' by the feminist debate. Rather than dividing human beings into two discrete, monolithic categories of women and men for the purposes of applying human rights law, the next stage in international adjudication must turn on the individual or personalized nature of human rights abuses – that is, decision-makers should take into account both objective and subjective factors of a particular case, including one's sex, as recognized by the HRC in *Vuolanne* v. *Finland*[237] but never subsequently applied, and as successfully employed by the majority in *Aydin* v. *Turkey*.[238] I would further suggest that the next step is to move beyond simply identifying 'multiple oppressions' or the 'intersectionality' of women's lives, as doing so may in itself produce and compound stereotypes by accumulating new 'victim' categories, such as those based on sex/gender in addition to class, caste, race, ethnicity, disability, nationality, or sexuality. By doing so, it is hoped that we may eventually reach a stage when better-informed decisions are made that reflect the seriousness of the harm to individual women, rather than whether or not their circumstances fit neatly within accepted gender-based and other stereotypes.

236. H. Pearce, *supra* note 6, at 558.
237. *Supra* note 113.
238. *Supra* note 183.

CAMBRIDGE JOURNALS
http://journals.cambridge.org Downloaded: 24 Apr 2015 IP address: 192.167.90.29