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GENDER VIOLENCE AS TORTURE: THE CONTRIBUTION OF CAT GENERAL COMMENT NO. 2

*Rhonda Copelon**

Violence against women persists in every country in the world as a pervasive violation of human rights and a major impediment to achieving gender equality. Such violence is unacceptable, whether perpetrated by the State and its agents or by family members or strangers, in the public or private sphere, in peacetime or in times of conflict. The Secretary-General has stated that as long as violence against women continues, we cannot claim to be making real progress towards equality, development and peace.¹

INTRODUCTION

By crystallizing the content of and giving teeth to the norm prohibiting torture, the United Nations Committee Against Tor-

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¹ Report of the U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶ 1, U.N. Doc. A/61/122/Add.1 (July, 6 2006), available at <http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm> [hereinafter Sec'y Gen, *In-depth Study*].

ture's ("CAT Committee" or "Committee") General Comment No. 2² ("General Comment" or "Comment") is a tremendous step forward. First, as the panelists who have preceded me have discussed, the General Comment closes the holes bored by counter-terrorism policies—especially those approved and used by the Bush administration—into the absolute and non-derogable prohibition on torture.³ Second, it makes clear the applicability of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention," "CAT Convention" or "Convention")⁴ to non-official or private conduct, whether by institutions or individuals, where the State acquiesces or fails to exercise due diligence.⁵ And third, it eliminates long-standing discrimination in the norm against torture by clearly situating within the framework of the Torture Convention gender violence and abuse—both official and officially countenanced private violence—against women and gender transgressors including non-conforming women and lesbian, gay, bisexual, transgender, and queer ("LGBTQ") folk.⁶

It is particularly significant that, despite the crisis respecting State-inflicted torture, the Committee gave commensurate attention to the often less noticed, but ubiquitous epidemic of private violence against women.⁷ In November 2007, Mr. Andreas Mavromatis, then Chair of the CAT Committee, opened the final public discussion of the General Comment No. 2 by identifying domestic violence as one of most crucial issues for the Committee to address especially given the epidemic nature of such violence.⁸ In 2000,

² U.N. Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/28/Add.5 (Jan. 24, 2008) [hereinafter General Comment No. 2].

³ *Id.*; see also Margaret Satterwaithe, *De-Torturing the Logic: The Contribution of CAT General Comment 2 to the Debate over Extraordinary Rendition*, 11 N.Y. CITY L. REV. 281 (2008).

⁴ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter CAT Convention].

⁵ General Comment No. 2, *supra* note 2, ¶ 18.

⁶ *Id.* ¶¶ 18-24.

⁷ *Id.* ¶¶ 21-24.

⁸ U.N. Comm. Against Torture, 39th Sess., Summary Record of the First Part (Public) of the 782nd Meeting, Nov. 5, 2007, ¶ 4, U.N. Doc. Nov CAT/C/SR.782 (Feb. 22, 2008) ("Some of them [referring to States parties] made additional suggestions, notably to include domestic violence among the acts covered by article 2. The Committee had itself raised that point repeatedly in recent times, since that was one of the worst forms of ill-treatment, if only because of the extent of the phenomenon. . . ."). As the Summary Record is not a verbatim transcript, this rendition does not comport precisely with the Chair's statement as I recall it.

after Ms. Felice Gaer,⁹ one of the pioneers of gender work in the human rights system, joined as an expert, the Committee began frequently to question States parties regarding various forms and incidences of gender violence both in official custodial situations, in institutional contexts beyond prisons, and in situations of non-State violence, including rape, female genital mutilation, forced sterilization and abortion, trafficking, and domestic violence.¹⁰ Ms. Gaer also played a critical role as co-rapporteur on the General Comment, by which time the Committee had two more female members and at least one male member with expertise in issues of gender violence.¹¹

These developments are the result of the global women's human rights movement's insistence on the recognition of violence against women as a human rights issue and the integration of gender into the work of the human rights system.¹² This in turn

⁹ Felice Gaer is the Director of the American Jewish Committee's Jacob Blaustein Institute for the Advancement of Human Rights; she also serves as the Vice Chair of the Committee Against Torture. See Felice Gaer, *Opening Remarks: General Comment No. 2*, 11 N.Y. CITY L. REV. 187 (2008).

¹⁰ E.g., U.N. Comm. Against Torture, *Concluding Observations of the Committee Against Torture*, Sweden, ¶ 23, U.N. Doc. CAT/C/SWE/CO/5 (2008) (noting "concern about the persistence of violence against women and children, including domestic violence and crimes committed against women and children in the name of honour"); Czech Republic, ¶ 6 (n), U.N. Doc. CAT/C/CR/32/2 (2004) (recommending that the State party "[i]nvestigate claims of involuntary sterilizations, using medical and personnel records, and urge the complainants, to the extent possible, to assist in substantiating the allegations"); Colombia, ¶ 10 (e), U.N. Doc. CAT/C/CR/31/1 (2004) (recommending that the State party "[i]nvestigate, prosecute and punish those responsible for rape and other forms of sexual violence, including rape and sexual violence that occur in the framework of operations against illegal armed groups"); Russian Federation, ¶ 6 (e), U.N. Doc. CAT/C/CR/28/4 (2002) (noting concern that "despite numerous allegations of violence against women in custody, no formal complaint has been received [by the State party] on this issue"); Ukraine, ¶ 5 (m), U.N. Doc. A/57/44 (2002) (recommending that the State party "[t]ake effective measures to prevent and punish trafficking of women and other forms of violence against women"); Greece, ¶ 88 (d), U.N. Doc. A/56/44 (2001) (affirming that "[s]teps should be taken to prevent and punish trafficking of women and other forms of violence against women").

¹¹ Ms. Nora Sveaas and Ms. Essadia Belmir began their terms in 2005. Committee Against Torture Membership, <http://www2.ohchr.org/english/bodies/cat/members.htm> (last visited, Mar. 27, 2009). Mr. Claudio Grossman, who joined the Committee in 2003, was the Rapporteur on Women Rights when he served as a member of the Inter-American Commission on Human Rights. See <http://www.wcl.american.edu/faculty/grossman/> (last visited Apr. 10, 2009).

¹² These demands were crystallized in the Vienna Declaration and Programme of Action and implemented through various initiatives in the human rights system. Vienna Declaration and Programme of Action, ¶¶ 38, 40, U.N. Doc. A/CONF.157/23 (1993) [hereinafter Vienna Declaration]. For history of various initiatives regarding violence against women, see Sec'y Gen, *In-Depth Study*, *supra* note 1, ¶¶ 24–54. While today gender integration has led to undermining rather than strengthening auto-

created a climate that brought attention to these issues and led to the election and appointment of feminist and gender-competent personnel in the treaty bodies and among the special rapporteurs. Recognition of various forms of gender violence as torture, and, where less severe or lacking in impermissible purpose, as cruel, inhuman or degrading treatment or punishment ("ill-treatment"), has been an important goal in the process of gender integration. Other human rights authorities and international criminal courts took up the issue of gender violence as torture before the CAT Committee joined the process. Thus, gender violence, including domestic violence, was gradually integrated into the fabric of the Committee's work.¹³ The recognition and process created by General Comment No. 2 opens the possibility of consistent attention to this issue. The value of the process will depend upon both the engagement of NGOs, who provide essential material for the Committee's assessment of State compliance with the Convention, and the continued openness and will of the Committee and the States parties.

Understanding the potential of the General Comment to generate this dialogue is the focus of this short Article. I will start with a brief discussion of the reasons why I believe gender violence escaped sanction for so long as well as the recent recognition of gendered torture in international law. The second part examines the various provisions of the General Comment, both gender-specific and gender-neutral, that are pertinent to the definition of gender violence and abuse as torture and its prevention.

While drawing on various forms of gender violence, the Article gives particular attention to the applicability of the Committee's recognition that domestic violence—the most private and most ubiquitous form of gendered cultural violence inflicted disproportionately but not exclusively on women—must be understood as torture or cruel, inhuman or degrading treatment or punishment. I was drawn to this question in 1991 in a workshop on gender violence at the Latin American and Caribbean Feminist Meeting (*Encuentro Feminista*). Too familiar with torture as a result of their experience under string of recently unraveling dictatorships, Latin American feminists were insistent that what women experienced in

mous women's entities and organizations, the notion that the human rights system had to desist from excluding women from its protections through integrating gender has caused a significant change in the personnel of and concerns addressed by the human rights system. See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005).

¹³ See, e.g., *supra* note 10.

the home as domestic violence should be recognized as torture. As a result, I studied this question and was stunned by the largely unseen parallels between the official and domestic systems of violence and subordination, the former being condemned while the latter was largely tolerated by States throughout the world. In 1994, I published *Recognizing the Egregious in the Everyday: Domestic Violence As Torture*,¹⁴ which argued for understanding domestic violence as a system of physical and psychological control and for treating severe domestic violence as torture. That this understanding has gained official recognition in General Comment No. 2 is thus particularly thrilling as I believe unveiling gender violence as torture is critical to eliminating discrimination in the norm of torture; emphasizing the urgency of concerted and effective prevention through legal, cultural and socio-economic change in the status of women; and empowering the survivors of domestic violence by shifting the blame that culture has imposed on women from victim to perpetrator.

I. GENDER AND TORTURE

In 1986 when Peter Kooijmans, the first Special Rapporteur on Torture, listed rape as a form of official torture and noted that State-tolerated traditional practices involving sexual mutilation could be considered torture, it was a huge, and to some radical, breakthrough.¹⁵ Although the founding human rights documents¹⁶ all condemned sex discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)¹⁷ had entered into force in 1981 (“CEDAW Conven-

¹⁴ Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence As Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 325–29 (1994) [hereinafter Copelon, *Recognizing the Egregious*]. An earlier version was published as *Intimate Terror: Domestic Violence As Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca Cook ed., 1994). The original work, as well as this Article, were supported by grants from the Professional Staff Congress, City University of New York (PSC CUNY) Research Foundation.

¹⁵ See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 119, 138, U.N. Doc. E/CN.4/1986/15 (1986) (prepared by Peter Kooijmans).

¹⁶ U.N. Charter art. 55(c); Universal Declaration of Human Rights, art. 2, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights [ICESCR] arts. 2(2) & 3, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3, 6 I.L.M. 360 (1967); International Covenant on Civil and Political Rights [ICCPR], Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

tion”), gender violence was invisible on the human rights agenda and even the CEDAW Convention did not explicitly include it.¹⁸

The explanation is rooted in the patriarchal hierarchy that underlies and perpetuates deeply rooted gender discrimination and the subordination of women. Male control over women and female submission are staples of patriarchy that take different forms in different times and cultures. Common to this diversity, violence against women is extensive and the harm it entails is either justified, trivialized, or denied. Further, to maintain this gender hierarchy, life is constructed into separate spheres: a “public” sphere identified generally with male power, rationality, and entitlement and a feminine “private” or familial one, identified with female chastity, emotionality, subservience, and obedience, though again what is considered “public” or “private” varies considerably in different contexts.¹⁹ At the core of the construction of gender are hierarchy and hetero-normativity. The hierarchy favors males and dis-empowers females, channeling them into less visible or less valued roles, notwithstanding that in many cultures women are the breadwinners and staple of the community. At the same time, the strict dualism of the gender hierarchy underpins heterosexuality as the norm for sexuality and family, protecting hetero-normativity through law, religion, and culture as against alternative forms of intimate or personal relations that are outlawed or stigmatized as threatening to the basic structure of life and even the security of the nation.

Accordingly, when I speak of gender here, I am incorporating the way that both female and male roles and the hetero-normative dyad are constructed, preserved, and exclude gender “transgressors” who reject the roles, relationships and identities that society has ordained for them. This includes women who break out of ascribed roles for work, community, political involvement or sexual relationships, as well as LGBTQ folks who reject hetero-normative sexual and/or gender identities. The effect of this gender scheme on the visibility of and accountability for gender violence can be devastating: it tends to insulate the sphere of intimate, or family relations from State intervention even in the face of violence at the same time as it presumes and publicly sanctions female and LGBTQ disobedience.²⁰

¹⁸ *Id.*

¹⁹ See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 38-61 (2000).

²⁰ See Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender, Identity and In-*

In such a scheme, violence against women is only rarely treated as violence, let alone torture. Rape and other gender violence have been viewed as justifiable. Marital rape, for example, had long been accepted in domestic law based on the legal presumption that women give irrevocable consent to sex when they take the marriage vows. Lesbian women or women suspected of being lesbian may be raped in an effort to make them “real” women.²¹ Internationally, although the laws of war called for protection against rape and implicitly embraced it within its prohibitions, rape was generally treated as the reward of soldiers, an inevitable, collateral, even if not felicitous consequence of war, and was rarely prosecuted until the mid-1990s.²² Domestic violence has often been justified or excused by the batterer or society as a legitimate response to women’s “failures,” while women have been conditioned to accept it as such.²³

Justification, trivialization and denial also play a significant role. Rape remains one of the most common but least prosecuted or punished offenses in both domestic and international contexts.²⁴ For the woman who has access to justice and the stamina to charge rape, a myriad of discriminatory doubts as to the veracity of her claim are raised by the accused as well as by officials.²⁵ Sexual

ternational Human Rights Law: Contextualising the Yogyakarta Principles, 8 HUM. RTS. L. REV. 207 (2008).

²¹ *Id.* at 209–10.

²² KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 217–22 (1997). See Patricia Viseur Sellers & Kaoru Okuizumi, *International Prosecution of Sexual Assaults*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 45, 47 (1997); Patricia Viseur Sellers, *Rape Under International Law*, in WAR CRIMES: THE LEGACY OF NUREMBERG 159, 160–61 (Belinda Cooper ed., 1999).

²³ See Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J., 243–65 (1994) [hereinafter Copelon, *Surfacing Gender*].

²⁴ MAJA KIRILOVA ERIKSSON, REPRODUCTIVE FREEDOM: IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 478 (1999) (stating that “rape and other grave violations of women’s reproductive rights under international humanitarian law committed all over the world have for centuries remained . . . the least prosecuted crimes”); ECOSOC, Comm’n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶ 263, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994) (prepared by Radhika Coomaraswamy) (describing rape as the “least condemned war crime”); see Copelon, *Surfacing Gender*, *supra* note 23.

²⁵ See Michelle Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and the Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 955–66 (2004); Kathy Mack, *Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 329 (1993); see also Carol Smart, *Feminism and the Power of Law*, in LAW AND VIOLENCE AGAINST WOMEN: CASES AND

slavery of approximately 200,000 “comfort women” forced to serve the Japanese military during the Second World War, was denominated prostitution, excusing perpetrators and stigmatizing and relegating its victims to marginalized invisible lives.²⁶ At the same time, the law in most places draws a line between good and bad women, criminalizing adultery and voluntary prostitution rather than treating the former as sexual autonomy and latter as a form of work. Likewise, battered women may be denied access to justice altogether, their calls for help ignored, or they may face police or judges who admonish them to go home and “behave” even when the danger or their physical wounds are apparent. Anglo-American common law recognized the husband’s right to moderate chastisement, sometimes referred to by courts and in the popular press as an application of the “rule of thumb”—permitting a husband to punish his wife with a rod no thicker than a thumb.²⁷ Among the most extreme forms of violence against women, stoning is still practiced, with legal or traditional sanction in some countries today.²⁸

Opposition to recognizing rape as a grave human rights violation was illustrated in 1994 when the Inter-American Commission on Human Rights was first asked by a coalition of women’s groups and advocates in Haiti and the United States to declare that official and tolerated unofficial rape under the illegal Cedras regime was torture. The discussion in the then all-male conference of experts went like this:

One of the commissioners proposed that rape be recognized as torture. Another member objected in words to the effect: “*You put it in, you take it out. I don’t see what the big deal is.*” The first then reminded the Commissioners that it couldn’t write rape out of torture when it had consistently treated the picana (elec-

MATERIALS ON SYSTEMS OF OPPRESSION 440–41 (Beverly Balos & Marie Louise Fellows eds., 1994).

²⁶ See Women’s International War Crimes Tribunal For the Trial of Japan’s Military Sexual Slavery, Final Judgment, Case No. PT-200-1-T (Dec. 4, 2001), *available at* <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf>; IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997).

²⁷ The feminist claim that wife-beating provided the origin of the term “rule of thumb” has been disproved, but there remains evidence that the expression was used in legal cases and in the popular press in Britain and the United States beginning in mid-18th century. See *State v. Rhodes*, 61 N.C. 453, 454 (1868) (holding that “[t]he Defendant had a right to whip his wife with a switch no bigger than his thumb”); *State v. Oliver*, 70 N.C. 44, 45 (1874) (holding that “[t]he doctrine of years ago, that a husband had the right to whip his wife, provided he used a switch no longer than his thumb, no longer governs decisions of our courts”).

²⁸ See, e.g., The Global Campaign to Stop Killing and Stoning Women!, <http://www.stop-stoning.org> (last visited Nov. 19, 2008).

tric prod) on the penis as torture.²⁹

This settled the issue, at least formally as attitudes die hard, and the Commission issued the first human rights treaty body decision clearly treating rape as a form of torture.³⁰ Paradoxically, by comparison to the difficulty of recognizing female rape as torture, electricity on the penis, which, though a form of rape under current definitions, will likely continue to be exclusively referred to as torture.³¹

Patriarchal ideology also constructed the private sphere of family and intimate relations as off-limits to State intervention even where violence was concerned. Thus, although Anglo-American courts rejected the “rule of thumb” as, for example, “a remnant of feudal authority,” this did not, for over a hundred years, change the result for a battered woman. Rather the courts substituted privacy for the rule of thumb, trusting in the husband’s moderation in relation to “misbehavior” in order to protect him from “vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.” In other words, by adopting a hands-off policy, the public sphere supported the violent exercise of power in the so-called private sphere.³² But the impact of the public/private dichotomy was felt far beyond the home, insulating from accountability even official abuse of women in public institutions. For example, rape of a female detainee by a prison guard has been treated as beyond the scope of official duty.³³ Casting the rape as a

²⁹ Recounted to author by member of the Commission.

³⁰ Inter-Am. C.H.R., *Report on the Situation of Human Rights in Haiti, Conclusions and Recommendations*, OEA/Ser.L/V/II.88, doc. 10 rev., ¶¶ 131–34 (1995) [hereinafter *Haiti*, Inter-Am. C.H.R.]. See also Raquel Martí de Mejía v. Perú, Case 10.970, Inter-Am. Ct. H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 rev. ¶ 157 (1996) [hereinafter Martí de Mejía, Inter-Am. Ct. H.R.] (finding that rape may constitute torture in some circumstances); Miguel Castro-Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 306 [hereinafter Castro-Castro, Inter-Am. Ct. H.R.].

³¹ The International Criminal Court, Elements Annex, defines rape as a war crime and as a crime against humanity where there is “penetration, however slight.” International Criminal Court, *Elements of Crimes*, arts. 8(2)(b)(xxii)-1, 8(2)(e)vi-1 & 7(1)(g)-1, U.N. Doc. PCNICC/2000/1/Add.2 (2000). The *Akayesu* Judgment similarly defined rape as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” Prosecutor v. Akayesu, No. ICTR-96-4-T, Crimes Against Humanity ¶ 598 (1998). Both definitions encompass the placing of an electric prod on or a wire into the penis.

³² See, e.g., *Bradley v. State*, 1 Miss. 156 (1824), overruled in *Harris v. State*, 14 So. 266 (1894); Reva B. Siegel, “*The Rule of Love*: Wife Beating As Prerogative and Privacy,” 105 YALE L. J. 2117 (1996). For a valuable compendium on Domestic Violence, see ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* (2d ed. 2008).

³³ See Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 235–36 (2003).

personal act as opposed to an abuse of power also implied that it was consensual or even that the prisoner instigated it.

The trivialization of gender violence and the public-private divide seemed even more powerful when translated to international law. Before 1990, international human rights law focused mainly on what qualified as extreme or gross harm that States do directly and what became the global women's human rights movement was in formation. Rape in prison was a possible candidate for international scrutiny, but community or private violence in the kitchen, bedroom or the streets was seen as a "domestic" matter, belonging to the sovereignty of States and beyond the ken of international law. In the early 1990s, as the global women's human rights movement was coalescing, some mainstream human rights leaders feared that recognition of violence against women, beyond direct State violence, would "dilute" human rights. State-centric thinking—that the power of the State to do harm trumps all other power—thus, minimized (and still tends to minimize) the harm that private actors can do, whether they be armed groups or violent spouses. Further, the view that State violence is worse than private violence is rooted in the theory that where the violence is private, the State will provide redress. The theory founders, however, where the State does not have the will or effective mechanisms for intervention and protection against private violence. In such situations, the brutality of the private actor knows no limits.

Challenging State-centrism, scholars like Celina Romany, argued that the power that men exercise in the home —permitted by State inaction—constructs a "parallel state" for women.³⁴ Without a pro-active State, the battered woman does not have access to justice. Additionally, her individual poverty or lack of resources, responsibility for children, the external and internalized culture of female obedience, and the threat that attends any resistance, including leaving, makes escape impossible—or at least seem impossible.³⁵ Feminist theory that the State has obligations to exercise due diligence with respect to non-State violence was supported by key developments in human rights law. The 1988 ground-breaking decision of the Inter-American Court in the case of *Velásquez Rodríguez* recognized State responsibility for what it treated as private

³⁴ See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca Cook ed., 1995).

³⁵ See, e.g., Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLORADO LAWYER 19 (1999); Martha Mahoney, *Legal Images of Battered Women: Redefining Issues of Separation Assault*, 90 MICH. L. REV. 1 (1991).

paramilitary violence where the State failed to exercise due diligence to prevent, investigate and punish the perpetrators as well as provide redress to victims.³⁶ The ruling was based on a crucial principle of international political and civil rights—that the State has the responsibility not only to *respect* (do no active wrong) but also positively to *ensure* protection of the rights protected by the Conventions through the exercise of due diligence. Thus, contrary to the negative approach of the U.S. Constitution,³⁷ international human rights demands that States take responsibility to protect the basic civil and political rights of all those subject to its jurisdiction against the acts of third parties.

While scholarship and precedent clearly contributed to the sea-change in the international response to gender violence, the consolidation of the global women's human rights movement and its revelation of the epidemic nature of private gender violence forced recognition that the positive obligations central to political and civil rights must apply with full force to the elimination of violence against women. The U.N. Committee on the Elimination of Discrimination Against Women ("CEDAW Committee") took the lead in its General Recommendation No. 19, recognizing gender violence as a form of discrimination against women, dispensing with the need to compare the treatment of men and women, and outlining States parties' responsibility to prevent violence against women.³⁸ As a result of the work of the women's human rights caucus and the production of a ground-breaking women's tribunal on violence against women, the World Conference on Human Rights in Vienna in 1993 followed, representing a watershed in the official process of re-conceptualizing human rights and violence against women from a gender perspective.³⁹ Thereafter, this was

³⁶ Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser.C) No. 4, (1988) [hereinafter Velásquez Rodríguez, Inter-Am. Ct. H.R.].

³⁷ See generally *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (finding no federal civil rights jurisdiction for failure of state to protect battered child); see also *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 754 (2005) (finding no federal civil rights jurisdiction where state fails to enforce judicial protective order).

³⁸ CEDAW Comm., General Recommendation No. 19, Violence Against Women, U.N. Doc. A/47/38 (1992) (noting that discrimination against women includes gender-based violence—violence directed against a woman because she is a woman, or violence that affects women disproportionately) [hereinafter CEDAW, General Recommendation 19].

³⁹ In addition to the issues of gender-violence discussed herein, see Vienna Declaration, *supra* note 12, art. 2, ¶ 18 (emphasizing the "full and equal enjoyment by women of all human rights" and the importance of the full participation of women in development and in all spheres of life); *id.* ¶ 19 (the elimination of covert as well as

consolidated and advanced through such international developments as the General Assembly Declaration on the Elimination of Violence Against Women⁴⁰ and the creation, by the U.N. Human Rights Commission in 1994, of the U.N. Special Rapporteur on Violence Against Women, Its Causes and Consequences,⁴¹ which has produced a significant body of both thematic and country reports.⁴² All this quickly laid the foundation for continuing attention to violence against women.

Still, resistance to recognizing gender violence as torture persisted notwithstanding that the international definition of torture surely encompassed it. For example, the original Legal Advisors to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia resisted charging rape as the war crime of torture.⁴³ Was it a failure to envision the full gravity of the harm? Or was/is there something threatening to heterosexuality if non-voluntary sexual intercourse—not an uncommon experience for women—can carry the “special stigma” of torture? Fortunately, with the guidance of Patricia Viseur-Sellers as the gender legal advisor, who discussed rape as torture in the first panel,⁴⁴ the Chief Prosecutor, Richard Goldstone, saw it differently and authorized her to bring the cases that established rape as torture in time of war.⁴⁵ In addi-

overt discrimination); *id.* ¶ 41 (the importance of “enjoyment by women of the highest standard of physical and mental health,” and access to family planning and education). See, e.g., Center for Women’s Global Leadership, *available at* <http://www.cwgl.rutgers.edu/index.html> (Dec. 15, 2008); CHARLOTTE BUNCH & NIAMH REILLY, DEMANDING ACCOUNTABILITY: THE GLOBAL CAMPAIGN AND VIENNA TRIBUNAL FOR WOMEN’S HUMAN RIGHTS 36 (1994); Donna J. Sullivan, *Women’s Human Rights and the 1993 World Conference on Human Rights* 88 A.M. J. INT’L L. 152, 167 (1994).

⁴⁰ G.A. Res. 48/104, U.N. GAOR, U.N. Doc. A/48/104 (1993)[hereinafter G.A. Decl. Violence Against Women].

⁴¹ U.N. Office of the High Comm’r for Human Rights [OHCHR], *Question of Integrating the Rights of Women into Human Rights Mechanisms of the United Nations and the Elimination of Violence Against Women*, U.N. Doc. E/CN/4/RES/1994/45 (Mar. 4 1994).

⁴² The excellent reports of the U.N. Special Rapporteurs on Violence Against Women, Its Causes and Consequences, (Radhika Coomaraswamy and Yakin Ertürk) are available at the Office of the United Nations High Commissioner for Human Rights website. <http://www2.ohchr.org/english/issues/women/rapporteur/annual.htm> (last visited Apr. 20, 2009).

⁴³ Conversation between author and legal advisors.

⁴⁴ See Patricia Viseur-Sellers, *Sexual Torture As a Crime Under International Criminal and Humanitarian Law*, 11 N.Y. CITY L. REV. 339 (2008).

⁴⁵ See Prosecutor v. Celibici, Case No. IT-96-21, (Nov. 16, 1998); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, (Dec. 10, 1998) Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Appeal Chamber Judgment (July 21, 2000); Prosecutor v. Kunarac, Kovac, & Vuković, Case No. IT-96-23&23/1-A, Trial Chamber Judgment (Feb. 22, 2001); and most importantly, Prosecutor v. Kunarac, Kovac, & Vukovic, Case No. IT-96-23&23/1-A, Appeal Judgment (June 12, 2002).

tion, the Inter-American and European human rights systems recognized official rape as torture.⁴⁶ Kooijmans's assertion that rape in prison could be torture was affirmed by successive Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment.⁴⁷ The unanimity on the question of official or war rape as torture has thus placed rape *a fortiori* in the category of a non-derogable *ius cogens* norm.⁴⁸

Gradually as well, the notion that privately inflicted gender violence could constitute torture or cruel, inhuman or degrading treatment or punishment when the State has acquiesced gained currency. The Inter-American Commission's Haiti report recognized rape as torture when the State took no action against paramilitaries and roving gangs (*zenglendos*).⁴⁹ The Special Rapporteur on Violence Against Women was the first rapporteur to put the issue of treating domestic violence as torture or ill-treatment on the table.⁵⁰ And the CAT Committee began to question and

⁴⁶ Martí de Mejía, Inter-Am. Ct. H.R., *supra* note 30; *Aydín v. Turkey*, 25 Eur. Ct. H.R. 251 (1997); *see also Haiti*, Inter-Am. C.H.R., *supra* note 30, ¶ 133 ("The Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the Convention, but also a form of torture.").

⁴⁷ Quoting from Mr. Kooijmans's 1992 report, Mr. Rodley stated that "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." U.N. ECOSOC, Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 18, 19, U.N. Doc. E/CN.4/1995/34 (Jan. 12, 1995) (*prepared by* Nigel S. Rodley) (quoting U.N. ECOSOC Comm'n on Human Rights, 48th Sess., Summary Record of the 21st Mtg., ¶ 35, U.N. Doc. E/CN.4/1992/SR.21 (Feb. 21, 1992)).

⁴⁸ While the recognition of rape as torture has been important to treating rape as a *ius cogens* violation, it should be noted that the greater visibility of rape and sexual violence generally has led to their direct acceptance as non-derogable crimes. In particular, see arts. 7(1)(g) and 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute, describing rape as also constituting a grave breach and serious violation of the Geneva Conventions. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) [hereinafter Rome Statute].

⁴⁹ *See* Inter-Am. C.H.R., *Haiti*, *supra* note 30, ¶¶ 131–34.

⁵⁰ *See* U.N. ECOSOC, Comm'n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences. . . : A Framework for Model Legislation on Domestic Violence*, ¶ 50, U.N. Doc. E/CN.4/1996/53, (Feb. 2, 1996) (*prepared by* Radhika Coomaraswamy). *Cf.* U.N. ECOSOC, Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 15–24, U.N. Doc. E/CN.4/1995/34 (Jan.

comment to States about non-official rape and domestic violence.

The years 2007-2008 saw major progress. The CAT Committee's General Comment placed the range of gender violence—from public to private—squarely within the frame of the Torture Convention.⁵¹ And, the Special Rapporteur on Torture devoted a major section of his annual report to analyzing a broad range of gender violence, including privately inflicted violence, as torture and ill-treatment.⁵² Both address gender violence not only in relation to harmful non-Western cultural practices, but most impor-

12, 1995) (*prepared by* Nigel S. Rodley) (identifying a range of gender violence against women detained by the State as torture).

⁵¹ See General Comment No. 2, *supra* note 2.

⁵² U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008) (*prepared by* Manfred Nowak) [hereinafter Nowak, *Strengthening the Protection of Women from Torture*]. This Article will make brief reference to the Nowak report in relation to issues addressed by the General Comment and thus does not do justice to the totality of his study and the important doors it opens. At the same time as it is an important contribution to the field, I want to signal a major concern: his assertion that powerlessness should be added as an additional, essential element of torture. *Id.* ¶¶ 28–29. He offered this argument originally as an additional means of distinguishing ill-treatment from torture where the person is not yet in State custody. See U.N. ECOSOC, Comm'n on Human Rights, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur on the Question of Torture*, ¶¶ 39–40, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005) (*prepared by* Manfred Nowak). In my view, this is problematic for any form of violence as even a person in official detention may not be powerless. Beyond that, it is particularly problematic when applied to gender violence—and especially private gender violence such as battering. Mr. Nowak explains that surrounding circumstances can be taken into account to determine a woman's powerlessness (e.g., the nature of the act, such as rape; the lack of access to justice or legal separation from the violent relationship; or discriminatory laws). And he states that “[a]s applied to situations of ‘private’ violence, . . . the degree of powerlessness of a victim must be tested. If it is found that the victim is unable to flee or otherwise coerced into staying by certain circumstances, the powerlessness criterion can be considered fulfilled.” Nowak, *Strengthening the Protection of Women from Torture*, ¶ 28. The problem with this approach is that it calls for refocusing the torture assessment on the condition of the victim of the violence rather than on the acts of the perpetrator. The discriminatory question—“Why didn’t she leave?”—which blames the woman for her abuse is back on the table. The powerlessness criterion also ignores that many women subjected to private violence are not in fact powerless, but rather are making decisions—often to acquiesce and survive or protect others—within the frame of very limited options and the fear of accessing help, including justice. Mr. Nowak’s formulation suggests that to be tortured the battered woman must be reduced to a state of learned helplessness, a theory, which, though applicable to some battered women, has been repudiated as denying the agency that battered women so carefully and desperately exercise. See Copelon, *Recognizing the Egregious*, *supra* note 14, at 341–50. While one can cite many factors that enhance women’s vulnerability to intimate violence, it should be sufficient evidence of control that the batterer succeeds in inflicting severe physical or mental violence.

tantly in relation to garden-variety rape, domestic violence, and denial of reproductive rights which are the staples of patriarchal cultural practices globally. Additionally, while the Torture Rapporteur focused on violence against women, the CAT Committee explicitly encompasses the risk of torture faced by other gender transgressors.

Thus, incrementally, the challenge that Kooijmans set forth in 1986, and that was pursued by the global women's human rights movement, gained traction: first, in recognizing rape and other sexual abuse in prison or war as torture in human rights and international criminal law; and then, in piercing the public-private distinction to identify State responsibility for torture by non-State actors. The General Comment is particularly significant because it consolidates this understanding as the considered and formal interpretation of the Convention against Torture that will guide its review of State reports. It thus encourages non-governmental submissions respecting gender violence, signals an end to the era of discriminatory application of the norm of torture as well as underscores the urgency of State responsibility to exercise due diligence to prevent, punish, and eliminate it.

II. THE GENERAL COMMENT FROM THE PERSPECTIVE OF GENDER

While other human rights treaty bodies have issued General Comments dedicated to gender discrimination as well as integrated gender concerns in other topics,⁵³ the CAT Committee integrated gender throughout General Comment No. 2.⁵⁴ Gender integration is intended to ensure that gender perspectives inform all aspects of the problem being addressed. While that can be extremely positive and avoid the marginalization of gender issues, nonetheless, a focus on gender is also critical to the process of fully understanding and addressing the issues that gender presents.⁵⁵ By mainstreaming gender, the General Comment makes clear that gender is a pervasive issue. At the same time, the full and detailed treatment of the subject is not possible given the limitations of space and generalization. Accordingly, the General Comment should be read with these limitations in mind and, it is hoped, that

⁵³ See U.N. Human Rights Comm., *General Comment No. 28, Article 3: Equality of Rights Between Men and Women*, U.N. Doc. A/55/40 (2000); U.N. ECOSOC, Comm. on Economic, Social and Cultural Rights, *General Comment No. 16, Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, U.N. Doc. E/2006/22 (2005).

⁵⁴ See General Comment No. 2, *supra* note 2.

⁵⁵ Vienna Declaration, *supra* note 12.

the CAT Committee will also develop a General Comment exclusively devoted to gender.

The goal of General Comment No. 2 is to enhance the States parties' process of preventing torture. Effective prevention is accomplished to begin with through clarifying definitional issues as to what constitutes torture under Article 1, and the relationship between ill-treatment and torture. After discussing the Committee's view of the scope of gender in the first section, the definitional implications will be discussed in the second section. The final section addresses the applicability of the General Comment's specific measures of prevention to gender violence. As a general principle, the General Comment emphasizes that the obligation to take "effective" measures to prevent torture under Article 2 is not exhausted by the specific measures provided in the Convention,⁵⁶ and thus recognizes the evolving nature of the process of review, revision, and the implementation of new measures.⁵⁷

As a result, one can hope that the States will take the issues of gender more seriously and that the reporting dialogue will productively advance both theory and practice. For the nonce, this General Comment provides a sound basis, explicitly and implicitly, for the Committee, to provide more thorough-going attention to gender at the same time as it provides interpretation that can assist the application of the torture framework to gender violence in other contexts. In this process, the involvement of NGOs in preparing Shadow Reports remains crucial.

A. *The Scope of Gender*

In the section entitled, "Protection of individuals and groups made vulnerable by discrimination or marginalization," the Committee states:

The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status, etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or

⁵⁶ General Comment No. 2, *supra* note 2, ¶ 13.

⁵⁷ *Id.* ¶¶ 4, 14.

sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.⁵⁸

Based on its review of a number of gender issues in States reports, including violence against gay men and transgender people,⁵⁹ the Committee makes clear that both men and women are subject to gender discrimination, and that individuals may be targeted on the basis of their actual or perceived transgression of socially approved hetero-normative gender roles in their societies.⁶⁰ The General Comment thus understands gender to be a social construction of roles as opposed to a term applicable only to women⁶¹ or limited to the notion of a biological male-female dichotomy. That the Committee includes, within the meaning of “socially determined gender roles,” targeting based on one’s actual or perceived sexual orientation and transgender identity is made explicit by its inclusion of these categories in its discussion of the scope of discrimination.⁶² At the same time, it does not purport to be a full explanation of gender, leaving out, for example, issues of hierarchy and power.⁶³

Further, like the Committee on the Elimination of Racial Discrimination (“CERD Committee”),⁶⁴ the CAT Committee recog-

⁵⁸ General Comment No. 2, *supra* note 2, ¶ 22.

⁵⁹ See, e.g., U.N. OHCHR, Comm. Against Torture, *Concluding Observations of the Committee Against Torture, Argentina*, ¶¶ 34, 35 U.N. Doc. A/60/44 (2004); Venezuela, ¶ 80, U.N. Doc. A/58/44 (2002); Egypt, ¶ 41, 42, U.N. Doc. A/58/44 (2002); Brazil, ¶ 119, U.N. Doc. A/56/44 (2001).

⁶⁰ General Comment No. 2, *supra* note 2, ¶ 22.

⁶¹ Its definition thus encompasses but is not limited by the CEDAW Committee’s view that gender violence, in the context of women, is “violence that is directed against a woman because she is a woman or that affects women disproportionately,” CEDAW, General Recommendation 19, *supra* note 38, ¶ 6. Since CEDAW’s framework is the elimination of discrimination against women, it would engage issues of sexual orientation and transgender identities when the individual suffers discrimination on account of being a woman. See, e.g., CEDAW Committee, *Annual Report to the General Assembly at Its Forty-Ninth Session*, ¶ 270, U.N. Doc. A/49/38 (Apr. 12, 1994).

⁶² General Comment No. 2, *supra* note 2, ¶ 21. It could be argued that identifying “gender” as a ground of discrimination alongside sexual orientation and transgender identity in this paragraph could be read to limit gender to women. By elaborating the broader understanding of gender in the next paragraph, the Committee clarifies doubt about the scope of the term gender.

⁶³ Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 14–15 (2005).

⁶⁴ See, e.g., U.N. OHCHR, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 25, Gender Related Dimensions of Racial Discrimination, annex V, U.N. Doc. A/55/18, (Mar. 20, 2000); see also Kimberlee Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour*, 43 STANFORD L. REV. 1241 (1991).

nizes that gender is not a free-floating aspect of identity, but one that intersects and is intertwined with the status of the person or other characteristics.⁶⁵ Thus, gender is understood as producing distinct forms of gender-based discrimination that varies with its impact on minoritized groups.⁶⁶ It also applies to people for whom gender may be a reason for incarceration,⁶⁷ including women incarcerated for adultery or as a result of charging rape, and sex workers and others detained or punished for their non-conformity to traditional gender roles.⁶⁸ The recognition that these and other marginalized groups are at a special risk of torture requires not only prosecution and punishment of abusers, but also positive measures to prevent this abuse. Thus, this brief discussion of gender is an important contribution to ensuring that the principle of non-derogability applies to all gender transgressors, as well as women, before the Committee and in other contexts.

B. Article 1 Considerations: The Definition of Torture As Applied to Gender Violence

The General Comment insists that States parties should use, as a minimum, the Convention's definition of torture.⁶⁹ Article 1(1) defines torture as involving four elements: 1) the intentional infliction on a person; 2) of severe physical or mental pain or suffering; 3) for such purposes as interrogation, punishment or intimidation or coercion or a third person, or "for any reason based on discrimination of any kind"; and 4) when perpetrated or instigated by or with the consent or acquiescence of a State official or person acting in official capacity.⁷⁰ In lieu of the first three elements, Article 16 identifies cruel, inhuman or degrading treatment or punishment as conduct "which do[es] not amount to torture" and reiterates the same State involvement requirement.⁷¹

This section will examine the definition as clarified and elaborated by the General Comment with particular attention to the applicability of the norm against torture to gender violence. In this regard, I will draw particularly on the example of domestic violence because it represents both the most endemic form of violence experienced by women worldwide as a function of the

⁶⁵ See General Comment No. 2, *supra* note 2, ¶ 22.

⁶⁶ See *id.*

⁶⁷ *Id.* ¶ 21.

⁶⁸ *Id.* ¶ 22.

⁶⁹ General Comment No. 2, *supra* note 2, ¶ 9.

⁷⁰ CAT Convention, *supra* note 4, art. 1(1).

⁷¹ CAT Convention, *supra* note 4, art. 16(1).

culture of patriarchy and, in terms of its intensely intimate character, reflects the full spectrum of torture and ill-treatment.

1. Intentional Infliction

The General Comment clarifies that the element of intent is not subjective but rather objective.⁷² The intent required is general: that the person voluntarily engaged in conduct that made severe pain or suffering objectively foreseeable,⁷³ thereby distinguishing torture from accidents, disease, or consensual beneficial medical treatment. The notion that the perpetrator must specifically intend to torture was proposed by the United States and rejected in the drafting of the Convention.⁷⁴ It was then adopted by the U.S. Senate as a limiting interpretation for domestic purposes.⁷⁵ But the Convention is not limited in its application to sadists. Thus, it is irrelevant to the definition of torture that an accused rapist defends on the ground that he did not intend to rape, but only intended, for example, to obtain sexual gratification, as was argued by one of the accused in *Prosecutor v. Kunarac*.⁷⁶ Batterers frequently argue that they lost control and acted impulsively. But this is neither a legally cognizable excuse, nor is it consistent with the dynamics of battering where the batterer acts with the purpose of exercising control, and often plans his attack or exhibits reasonable impulse control in other contexts.⁷⁷

2. Severe Pain or Suffering

The General Comment does not discuss the standard of severe pain or suffering but it is relevant insofar as it treats the relationship between ill-treatment and torture. As the General Comment explains, “by comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of imper-

⁷² General Comment No. 2, *supra* note 2, ¶ 9.

⁷³ Compare, e.g., Rome Statute, *supra* note 48, art. 30.

⁷⁴ See J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 41, 46 (1988) [hereinafter BURGERS & DANIELIUS] (providing a history of the travaux préparatoires by the Special Rapporteurs of the Convention Against Torture).

⁷⁵ For example, a United States understanding of its obligations under the Convention states, “That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain. . . .” CAT Convention, *supra* note 4 (Declarations and Understandings made upon ratification).

⁷⁶ *Prosecutor v. Kunarac, Kovac, & Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 129–30, 344 (June 12, 2002).

⁷⁷ See Copelon, *Recognizing the Egregious*, *supra* note 14.

missible purposes.”⁷⁸

The significance of the General Comment for gender violence in this regard is two-fold. First, it concretizes the applicability of the Convention to gender violence by identifying a non-exclusive list, including rape, domestic violence, female genital mutilation and trafficking⁷⁹ of forms of violence, both official and private, as to which the State has the obligation of prevention. It also identifies as contexts wherein females are at particular risk of torture or ill-treatment, including deprivation of liberty, medical treatment, particularly involving reproductive decisions, and communal gender violence.⁸⁰

Second, the General Comment addresses the fact that the “definitional threshold between ill-treatment and torture is often not clear”⁸¹ and that the two tend to be inextricably intertwined. The General Comment points to the fact that “conditions that give rise to ill-treatment frequently facilitate torture” and therefore the effective prevention of torture requires parallel measures to prevent ill-treatment.⁸² This closes a loophole that has been used not only with regard to counterterrorism but also to violence against women. Further, the Committee concludes that ill-treatment is also non-derogable and that the prevention of ill-treatment is a non-derogable measure.⁸³

The Committee’s understanding of the relationship between torture and ill-treatment is particularly apt with regard to the character and need to prevent domestic violence. While the pain and suffering inflicted by rape is accepted as *per se* meeting the severity threshold of torture,⁸⁴ domestic violence may be different. It usually involves a cycle that begins with ill-treatment and involves escalating mental and physical violence, interrupted by pleas for forgiveness, followed then by rising tension and escalating physical and/or mental violence, creating severe pain or suffering as, ending not infrequently, in death.⁸⁵ While domestic violence does not

⁷⁸ General Comment No. 2, *supra* note 2, ¶ 10.

⁷⁹ *Id.* ¶ 18.

⁸⁰ *Id.* ¶ 22.

⁸¹ *Id.* ¶ 3.

⁸² *Id.*

⁸³ *Id.*; see also Sir Nigel Rodley, *Reflections on Committee Against Torture General Comment No. 2*, 11 N.Y. CITY L. REV. 353 (2008).

⁸⁴ See, e.g., Prosecutor v. Kunarac, Kovac, & Vukovic, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 149–51 (June 12, 2002).

⁸⁵ See LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (1984); see also Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992).

involve official custody or control, it does involve *de facto* custody or control generally exercised in a situation of much greater privacy—that is, out of the potentially restraining sight of others (apart perhaps from children or others living in the family) and beyond the reach of, at least, nominal rules and potential reporting. Thus, the Committee’s understanding of the fine line between ill-treatment and torture and the ease with which one becomes the other is frequently played out in the context of privatized gender violence. Importantly, the General Comment makes clear that the full range of preventive measures under the Convention cannot await the moment when the violence is so severe that it qualifies as torture.

3. Impermissible Purposes

Here again, the General Comment clarifies that the element of purpose in the definition is not intended to require subjective inquiry but rather consideration of the goals and consequences of the violence objectively.⁸⁶

It is also clear that the purposes stated in Article 1(1) do not exhaust the category of impermissibility. As torture and CIDT are considered non-derogable, clearly the purposes identified in Article 2(2) are off-limits: “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency.”⁸⁷ The General Comment’s emphasis on the non-derogability of both torture and CIDT is fundamental, as well as its reference to the *ius cogens* status of torture under customary international law.⁸⁸ With respect to gender, the General Comment adds to this list of impermissible claims “any religious or traditional justification that would violate this absolute prohibition.”⁸⁹ This significantly clarifies the scope of non-derogability as it addresses one of the most common justifications applied to gender violence and abuse. Additionally, it makes operational statements in previous documents that reject such claims when asserted to justify violence against women.⁹⁰

⁸⁶ General Comment No. 2, *supra* note 2, ¶ 9.

⁸⁷ CAT Convention, *supra* note 4, art. 22.

⁸⁸ General Comment No. 2, *supra* note 2, ¶ 1.

⁸⁹ *Id.* ¶ 5.

⁹⁰ See, e.g., World Conference on Human Rights, Vienna, June 14–25, 1993, *Report of the World Conference on Human Rights*, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993) (prepared by the Secretary-General); Vienna Declaration, *supra* note 12, ¶ 5; Fourth World Conference on Women, Beijing, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, ¶ 124, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1995); CEDAW, General Recommendation 19, *supra* note 38, ¶ 20.

The General Comment makes another important point about impermissible purpose: it emphasizes, indeed italicizes, the language of the Convention that gets less attention than most—“*any reason based on discrimination of any kind*.”⁹¹ Consistent with the principle of non-derogability, the General Comment adopts a broad, but not exclusive, list of persons subject to discrimination based on permanent or temporary identities, both attributed and real.⁹² As noted above, it names as grounds for discrimination, “gender, sexual orientation, [and] transgender identity . . .”⁹³ and recognizes that gender discrimination is an intersectional matter.⁹⁴ It provides that “the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture,”⁹⁵ This incorporates hate crimes and calls for including violence and threats of violence committed to subordinate, marginalize, intimidate or humiliate the victim based on their identity with a disfavored class.

By recognizing the full scope of gender and emphasizing discrimination as an impermissible purpose, the General Comment makes clear that violence directed at any person based on actual perceived sexual or gender identity, or that affects that group disproportionately,⁹⁶ can be torture. Sexualized violence and harassment constitute gender violence, as they assault sexual autonomy and gender identity—concepts at the heart of gender—whether whether the targeted person is situated as hetero-normative or transgressive.

For example, in the torture of men in Abu Ghraib, gender as well as cultural identity was utilized as a means of discrimination to humiliate and intimidate and theoretically interrogate male prisoners in the process. The humiliation had multiple gendered meanings. The sexualized treatment of the men was designed to evoke homophobic shame of being feminized at the same time as it inscribed the idea of hyper-masculine identity identified with dominance, control, and the power to inflict or be free of sexualized abuse. Women were used to represent dominance and control to further drive home the message of emasculation. These methods were intentionally linked with assumptions about the particular cultural impact of these practices on Arab men and thus repre-

⁹¹ See General Comment No. 2, *supra* note 2, ¶ 20.

⁹² See *id.* ¶ 21.

⁹³ *Id.*

⁹⁴ *Id.* ¶ 22.

⁹⁵ *Id.* ¶ 20.

⁹⁶ See General Comment No. 2, *supra* note 2, ¶ 22.

sented discrimination based on religion, ethnicity, and gender.⁹⁷

The rape of women is gendered in that it is based on notions of women as male property and, paralleling the Abu Ghraib situation, a particularly effective assault on women's identity and sexuality. Domestic violence against women is gendered because it is disproportionately based on a person's status as a woman. Additionally, domestic violence is generally fed by discriminatory gendered assumptions about male entitlement and female obedience as well as by real or imagined female transgression thereof.⁹⁸ Obviously transgressive sexual orientation and transgender identity also belong squarely in this framework.

Where an official is the aggressor, the impermissible purpose is directly attributable to the State. The question then is whose purpose is dispositive where a private person is the aggressor. In the context of domestic violence, there is no question that all of the impermissible purposes are likely to apply to the batterer's conduct. The battered woman or partner is usually isolated; jealousy reigns and the smallest error or independent action is cause for violence. Thus the domestic interrogation: "What did you do?" "Where were you when I called?" "Why is this dirt on the floor?" etc. As with torture, it is not the information but the submission of the victim that is usually the purpose. Battering may be inflicted as punishment often for petty or imagined "infractions" or "disobedience"—for example, "the coffee is cold"; "you're ugly"; "you're been screwing the neighbor." Coercion, intimidation and humiliation—tools of subordination—are the persistent purposes of both torture and battering. And by definition, gender-based violence is discriminatory at the same time it may be racially or ethnically motivated or based on age, disability, poverty, economic dependence or greater resources or status.

While one noted torture expert is of the view that the purpose must be the State's, the current Rapporteur on Torture states that "the purpose element is always fulfilled if the acts can be shown to be gender-specific."⁹⁹ In my view, the latter's view is more consis-

⁹⁷ See, e.g., Jasbir K. Puar, *Abu Ghraib: Arguing Against Exceptionalism*, 30.2 FEMINIST STUDIES 522–34 (2004); Rosalind P. Petchesky, *Rights of the Body and Perversions of War: Sexual Rights and Wrongs Ten Years Past Beijing*, 57 INT'L SOC. SCI. J., 184, 301 (2005); ERIC SAAR & VIVECA NOVAK, *INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER'S EYE-WITNESS ACCOUNT OF LIFE AT GUANTANAMO* 191 (2005).

⁹⁸ Copelon, *Recognizing the Egregious*, *supra* note 14 (elaborating that gender-based violence should be recognized as an international human rights violation).

⁹⁹ Conversation of author with former U.N. Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Sir Nigel Rodley (Apr. 2, 2009). By contrast the current Torture Rapporteur, Mr. Nowak, writes: "In

tent with the framework and goals of the Convention and the latter's would deny the application of torture to most State-tolerated private violence. The purposes element in Article 1(1) is tied not to the State actor but to the infliction of severe pain or suffering.¹⁰⁰ The argument would be more plausible if State involvement in the form of consent or acquiescence were not included. As discussed later, the General Comment makes clear that acquiescence is actual or constructive notice of the danger and the failure to exercise due diligence to prevent the violence, punish the perpetrators and repair the victims. Consent too may be inferred from non-action. Neither Article 1(1) nor the General Comment suggests that the consenting or acquiescing public official must share the purpose of the perpetrator. Accordingly, it is fair to say that where the State consents to or acquiesces in private conduct, it acquires responsibility for the purposes of the batterer. This is perhaps most clearly illustrated in relation to the purpose of discrimination. If a State party stands by or fails to take reasonable and necessary measures in the face of gender violence, the inevitable effect is impunity and thereby the perpetuation of the discriminatory violence.

The General Comment clarifies that where the State fails to exercise due diligence, it "bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."¹⁰¹ In other words, if an official is to be held criminally liable through facilitation, aiding and abetting or otherwise, he or she needs to have the purpose to further the batterer's criminal activity or knowledge of the batterer's intention to do the violence.¹⁰² The issue of State responsibility for violation of the human right to be free from torture does not require criminal complicity. The General Comment explains: "Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or *de facto* permission."¹⁰³ In such a

regard to violence against women, the purpose element is always fulfilled if the acts can be shown to be gender-specific"—i.e. "... in its form or purpose ... [the violence] is aimed at 'correcting' behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women." Nowak, *Strengthening the Protection of Women from Torture*, *supra* note 52, ¶ 30 and n.7.

¹⁰⁰ CAT Convention, *supra* note 4, art. 1(1).

¹⁰¹ General Comment No. 2, *supra* note 2, ¶ 18.

¹⁰² Compare Rome Statute, *supra* note 48, art. 25.

¹⁰³ See General Comment No. 2, *supra* note 2, ¶ 18.

situation, it is fully appropriate to ascribe to the State the purposes of the batterer since the State, through impunity, is in fact advancing them.

4. State Involvement

a. *Official Acts and Actors*

It is a given that States parties are responsible for torture committed, instigated or permitted by their officials.¹⁰⁴ The Convention refers not only to officials, but to others “*acting in official capacity*,” and wisely so, for otherwise States could nullify their responsibility to prevent torture by devolving power and institutional control to others whether *de jure* or *de facto*.¹⁰⁵ The General Comment addresses this problem by identifying persons “acting in an official capacity” as those who are “acting on behalf of the State, in conjunction with the State, under its direction or control or otherwise under colour of law.”¹⁰⁶ The Committee interprets “colour of law” to apply to privately owned or run facilities where “personnel are acting in an official capacity on account of their responsibility for carrying out the State function.”¹⁰⁷ This responsibility applies to all contexts of custody or control, including not only prisons, but hospitals, schools, institutions that care for children, the aged, mentally ill or disabled, or in military service.¹⁰⁸ This expansion of the monitoring responsibility of the Committee is sorely needed given the often-appalling treatment and conditions in these institutions and the trend toward privatization of prisons or security forces that could otherwise enable officials to evade their human rights obligations. In all these contexts, women and/or girls are at risk.¹⁰⁹

b. *Private Actors*

The General Comment also grapples quite effectively with the

¹⁰⁴ CAT Convention, *supra* note 4, art. 1(1).

¹⁰⁵ *Id.* art. 1.

¹⁰⁶ General Comment No. 2, *supra* note 2, ¶ 15.

¹⁰⁷ *Id.* ¶ 17.

¹⁰⁸ *Id.* ¶ 15.

¹⁰⁹ See, e.g., HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS, (2001), *available at* <http://www.hrw.org/legacy/reports/2001/uslgbt/toc.htm>; SILVIA RIVERA LAW PROJECT, IT’S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NYS MEN’S PRISONS (2007); NAT’L ECON. & SOC. RIGHTS INITIATIVE, DEPRIVED OF DIGNITY (2007); Catherine Hawes, *Elder Abuse in Residential Long-Term Care Facilities: What Is Known About Prevalence, Causes, and Prevention*, Testimony Before the U.S. Senate Committee on Finance (June 18, 2002), *available at* <http://finance.senate.gov/hearings/testimony/061802chtest.pdf>.

public-private distinction, recognizing that States have both negative and affirmative obligations to prevent torture and ill-treatment.¹¹⁰ The CAT Convention explicitly extended official responsibility, limited to State infliction or instigation in the 1975 General Assembly's declaration on torture and other ill-treatment,¹¹¹ by adding the words "consent or acquiescence" to the definition of torture in Article 1 of the Convention. This represented a compromise between those who wanted to include purely private torture and those who felt that the State has to be the responsible party. Consent or acquiescence is not a strict liability standard but implies a level of awareness. It was added to ensure that officials could not escape responsibility by claiming ignorance of violations not committed by public officials, but for which such officials should bear some responsibility.¹¹² Several years later, as discussed earlier, the decision of the Inter-American Court on Human Rights in the Case of *Velásquez Rodríguez* crystallized this in applying the obligation of due diligence to non-State violence based on the obligation to "ensure" civil and political rights found in both the American Convention on Human Rights and the ICCPR.¹¹³

The General Comment makes a significant contribution by clarifying the meaning of "consent or acquiescence in Article 1(1)."¹¹⁴ It makes clear that it is sufficient if officials or others acting in official capacity "know or have reasonable grounds to believe that acts of torture are being committed" by private persons.¹¹⁵ Presumably, the Committee would include threatened acts of torture as well since prevention is the paramount duty and threats are included in the definition of torture. The General Comment also links the concept of consent or acquiescence to that of "due diligence" applied in other Conventions and documents.¹¹⁶ Due dili-

¹¹⁰ See generally General Comment No. 2, *supra* note 2.

¹¹¹ U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34 at 91, U.N. Doc. A/10034 (1975).

¹¹² BURGERS & DANIELIUS, *supra* note 74, at 41-46.

¹¹³ See *Velásquez Rodríguez*, Inter-Am. Ct. H.R., *supra* note 36.

¹¹⁴ See General Comment No. 2, *supra* note 2, ¶ 18.

¹¹⁵ *Id.*

¹¹⁶ E.g., CEDAW General Recommendation 19, *supra* note 43, ¶ 9; U.N. Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, ¶ 27, U.N. Doc. E/C.12/2005/4 (2005). For more information on the development of this theme in the context of gender violations see the report by the Special Rapporteur on Violence Against Women. U.N. ECOSOC,

gence, according to the Comment, requires that the State intervene and prevent, investigate, prosecute and punish non-State officials and private actors.¹¹⁷ Prevention is an overarching obligation that is not confined to the specifics of the Convention.¹¹⁸ It requires full implementation of the positive obligations specifically demanded by the Convention¹¹⁹ as well as those measures that have emerged as important in the experience of the Committee.¹²⁰ Due diligence also includes, but is not limited to, “remedies to victims.”¹²¹ Article 14 of the Convention speaks of “redress,” including “an enforceable right to fair and adequate compensation” for victims or their survivors and “the means for as full rehabilitation as possible.”¹²² Thus “remedies to victims” or “redress” should be understood as an equitable response, shaped by the situation and the victims’ needs and thus fairly encompasses the internationally evolved understanding of reparations.¹²³

Regarding another aspect of consent or acquiescence addressed by the Convention,¹²⁴ the General Comment addresses Article 3’s prohibition on State participation in transferring a person to the custody or control of a person or institution known to have

Comm’n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standard As a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (*prepared by Yakin Ertürk*).

¹¹⁷ General Comment No. 2, *supra* note 2, ¶ 18.

¹¹⁸ CAT Convention, *supra* note 4, art. 2; *see, e.g.*, General Comment No. 2, *supra* note 2, ¶¶ 1–4.

¹¹⁹ *See* CAT Convention, *supra* note 4, arts. 10–16; *see generally* General Comment No. 2, *supra* note 2.

¹²⁰ General Comment No. 2, *supra* note 2, ¶¶ 14, 24, 25.

¹²¹ *Id.* ¶ 18.

¹²² CAT Convention, *supra* note 4, art. 14.

¹²³ *See, e.g.*, ECOSOC, Comm’n on Human Rights, *The Administration of Justice and the Rights of Detainees: Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, U.N. Doc. E/CN.4/Sub.2/1996/17 (May 24, 1996) (*prepared by* Theo van Boven); ECOSOC, Comm’n on Human Rights, *Civil and Political Rights Including the Question of Independence of the Judiciary, Administration of Justice, Impunity: The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (*prepared by* M. Cherif Bassiouni). Of particular relevance are the recent analyses of reparations from a gender perspective. *See, e.g.*, Nairobi Declaration on Women’s and Girls Right to a remedy and Reparation, Mar. 19–21, 2007 (the product of a meeting of survivors and advocates, sponsored by the Coalition on Women’s Human Rights in Conflict Situations), available at http://www.womensrightscoalition.org/site/reparation/signature_en.php; INT’L CTR. FOR TRANSITIONAL JUSTICE, WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Mario ed., 2006).

¹²⁴ CAT Convention, *supra* note 4, arts. 2, 3.

engaged in torture or ill treatment without adequate safeguards.¹²⁵ While this applies clearly to the policies of rendition utilized by the United States and others in an attempt to facilitate torture of so-called terrorists without responsibility,¹²⁶ it also applies to the right of non-refoulement in situations of gender violence. For example, it should preclude a justice system from returning battered women to dangerous homes or communities or to contexts, where, for example, women may be subjected to forced marriage¹²⁷ or rape victims, required to marry the perpetrator.¹²⁸

Further related to the element of State responsibility for conduct committed by other than State officials is the General Comment's clarification of the territorial scope of the Convention.¹²⁹ The obligation to prevent torture applies to all persons subject to the factual control of the State, including all persons exercising *de facto* or *de jure* authority "in the name of, in conjunction with or at the behest of the State party."¹³⁰ This applies to the major problem of gender violence committed on or near military bases, in off-shore prisons, or "during military occupation or peacekeeping operations."¹³¹ In terms of extra-territorial application, it is further noted that the Convention obliges a State party to extradite or prosecute foreign nationals, when a perpetrator, both official and private, is found within the territorial reach of a State.¹³²

In sum, General Comment No. 2 provides important guidance as to the application of the Convention to gender violence,

¹²⁵ See General Comment No. 2, *supra* note 2, ¶ 19.

¹²⁶ See Satterwaithe, *supra* note 3.

¹²⁷ See *Bah v. Mukasey*, 529 F.3d 99, 109–10 (2d Cir. 2008) (citing *In re Alima Traore*, No. A72 169 850 (B.I.A. Apr. 14, 2008)).

¹²⁸ U.S. federal law, for example, is not consistent with the international standards and thus does not clearly guarantee the right of non-refoulement to women seeking to escape private gender violence. *Withholding of removal under section 241(b)(3)B) of the Act and withholding of removal under the Convention Against Torture*, 8 C.F.R. § 208.16 (c) (2002). Cases denying relief based upon insufficient state involvement include *Moshud v. Blackman*, 68 Fed.Appx. 328, 335 (3d Cir. 2003) (requiring "willful acceptance by the State"); *Matter of J-E*, 23 I & N Dec. 291, 297 (B.I.A. 2002) (requiring, that the victim be in the official custody or control) and *Toure v. Ashcroft*, 400 F.3d 44, 50 (1st Cir. 2005) (noting that the applicant would not be tortured by a government official or agent and ignoring that despite criminal prohibition there had been no prosecution). Cases granting relief despite limiting federal regulations include *Azanor v. Ashcroft*, 364 F. 3d 1013, 1020 (9th Cir. 2003); *Matter of D K*, B.I.A. (# redacted) (Elizabeth, NJ, Immigration Court, Aug. 1, 2000). See Nowak, *Strengthening the Protection of Women from Torture*, *supra* note 52.

¹²⁹ See General Comment No. 2, *supra* note 2, ¶¶ 7, 16. See also, Walter Kälin, *Extra-territorial Applicability of the Convention Against Torture*, 11 N.Y. CITY L. REV. 293 (2008).

¹³⁰ General Comment No. 2, *supra* note 2, ¶ 18.

¹³¹ *Id.* ¶ 16.

¹³² CAT Convention, *supra* note 4, art. 5(2).

strengthening the foundation for treating such violence as torture and where less severe or lacking in impermissible purpose (unlikely in cases of gender violence) as cruel, inhuman or degrading treatment or punishment. It also clarifies the State's responsibility for gendered torture inflicted by non-officials and private actors and thus closes a potentially huge and discriminatory gap in the monitoring and implementation of the CAT Convention.

C. Gendered Measures of Prevention

While the proper definition of torture and State responsibility therefore is itself a fundamental measure of prevention, the General Comment also addresses specific measures of prevention, certain of which are particularly significant to the prevention of gender violence.

1. Codifying Torture As Torture

The General Comment insists that States use, as a minimum, the Convention's definition.¹³³ The General Comment's call to States to codify and prosecute violence that meets the elements of torture as "torture" is important not only to the individual victim, the perpetrator, the State and the Committee in their ability to monitor torture; it is also important to the public's ability to understand when torture occurs and to be able challenge it as such.¹³⁴ As we have seen with respect to the "word games" and minor charges lodged by the Bush administration against a handful of low-level perpetrators of torture and ill-treatment at Abu Ghraib prison, the seriousness of the violence in the eyes of the public, as well as the appropriate punishment, is affected by referring to torture euphemistically as abuse or harsh treatment.

Naming violence and abuse as torture, where it meets the elements of torture, is especially important when it concerns gender violence. This applies to the gendered aspect of torture in Abu Ghraib, as well as to gender violence generally, whether committed by officials or private persons. Naming violence that has been traditionally trivialized or denied as torture is especially significant to enabling victims of gender violence to shift the responsibility to the perpetrator and confront the traditional shame that may silence raped or battered women and sexual minorities. Naming violence as torture also serves to heighten public consciousness of the gravity of this violence as well as the urgency of preventive and reme-

¹³³ General Comment No. 2, *supra* note 2, ¶ 9.

¹³⁴ *Id.* ¶ 11.

dial responses. As a legal matter, it makes it difficult to obscure violations of the CAT Convention as well as the ICCPR and international customary law and it clarifies the status of such violence as an *ius cogens* norm. This is not to diminish the significance of the fact that gender violence, falling short of the elements of torture, also qualifies as ill-treatment that is likewise a grave and non-derogable violation of the Convention and customary international law. Nonetheless, the Convention makes a distinction and it should apply across the board. It is no longer legitimate, as previously discussed, to argue that State inflicted violence is inherently worse than privately inflicted violence and it perpetuates historic gender discrimination to do so.

Consistent with Convention Article 1(2), the General Comment provides that “[the definition of torture] has to be considered without prejudice to any higher degree of protection contained in any international instrument or national law” and that States are free to adopt broader definitions of torture.¹³⁵ Whereas, from the perspective of human rights law, some form of State involvement is required, there is no reason to domestically limit the prosecution of those who inflict violence essentially meeting the first three elements of torture to one requiring State action. Nor need a State require both severity of harm and purpose. The broader approach, reserved to States, allows a purely private violator to be charged with torture under domestic law. The naming of the offense then turns on and reflects the particular seriousness of the violent crime. Although this point will be questioned by those who believe that the State element is constitutive of the norm of torture rather than a required element of human rights treaties, such a domestic definition moves toward a more effective application of the norm against torture—akin to the international treatment of slavery, which does not depend on State action or omission. To eliminate the State element is also fully consistent with the principle of non-derogability.

2. No Amnesties

Impunity for private gender violence does not usually come in the shape of formal amnesty for recognized crimes, but rather in the common failure of legislation to prohibit such violence, or, more commonly today, the failure of police and justice systems to investigate, prosecute, and punish such violence. This is particularly true of sexualized and domestic violence as well as attacks on

¹³⁵ *Id.* ¶ 27.

sexual and gender transgressors. The General Comment recognizes this in linking the failure to exercise due diligence to impunity.”¹³⁶

The question of prosecution and punishment of gender violence as torture, however, presents a conundrum when applied particularly to intimate violence. In some cases, such measures—considered fundamental by the Convention¹³⁷—may be insufficient and even counter-productive to the goal of preventing gendered torture. When, for example, battered women view the criminal justice system as unfair because it is infested by race, class and gender discrimination, or by garden-variety corruption and cronyism, they may be loathe to invoke the process. Women may be opposed to subjecting a partner, even a violent one, to a racist system, or, they may have no choice but to make a trade-off between violence and a source of economic support for the family.¹³⁸ Further, the danger of retaliation from the batterer for using the legal system, if access to justice exists, may loom too large. Whereas middle class and majority women may have recourse to alternatives to police intervention, poor and minoritized women may fear that involving the police will result in their own arrest or seizure of their children or increased surveillance and abuse in their communities. The prospect of harassing cross-examination and other discriminatory inquiries deter women from pressing charges in rape and other gender violence cases.

In such contexts, criminal punishment operates neither as an effective punishment nor possible deterrent. Thus, in considering whether there is impunity for gender violence, it is necessary to examine the degree to which legal, material, racial, gender, class and cultural barriers that may impede access to justice by women subjected to gender violence have been addressed. Beyond that, it is necessary to examine whether punishment in the form of incarceration is the most appropriate response.¹³⁹ In other words, the fact that a victim may avoid utilizing the legal system in response to

¹³⁶ General Comment No. 2, *supra* note 2, ¶ 18.

¹³⁷ See CAT Convention, *supra* note 4, art. 4.

¹³⁸ Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 932–33? (2003). See Sarah M. Buel & Lisa Davis, CERD Shadow Report, Domestic Violence and Law Enforcement (Oct. 24, 2007) The report is a response to the periodic State report of the United States to the United Nations Committee on the Elimination of Racial Discrimination.

¹³⁹ See Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 156 (Incite! Women of Color Against Violence, ed., 2006). See generally DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE (Natalie J. Sokoloff & Christina Pratt eds., 2005); Jenny

severe gender violence may stem not from the lesser gravity of the violence, but from the conditions of discrimination, isolation and vulnerability under which she labors. Thus, while criminalization and punishment are a fundamental societal expression of the norm against gender violence, they are not sufficient and care must be taken in this context that they not be applied in such a way as to undermine prevention and protection.

3. Positive Measures to Prevent Gender Violence and Abuse

The General Comment underscores the positive responsibilities of States parties to protect such persons who are “especially at risk of torture.”¹⁴⁰ It calls for positive measures of prevention and protection, signaling the Committee’s concern that laws against torture and ill-treatment are not evenhandedly and effectively enforced where marginalized populations and individuals are at issue.¹⁴¹

4. Training and Employment

The General Comment calls for gender training of staff with the goal of building gender and other institutional competence in dealing with marginalized, at risk populations.¹⁴² It also calls for eliminating employment discrimination and promoting the hiring of persons from minoritized backgrounds and communities in all facets of State systems, including educational, medical, and legal, which serve or exercise custody over these populations.¹⁴³ Having a diverse workforce reflective of the population at issue will enhance the possibility of empathy between those in control and those controlled and, thus, of “building a culture of respect” thereby contributing to the prevention of torture.¹⁴⁴ While identification does not always equate with empathy and institutional practice can override it, the goal is identify those who will bring cultural

Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).

¹⁴⁰ See General Comment No. 2, *supra* note 2, ¶ 21.

¹⁴¹ *Id.* ¶ 21.

¹⁴² “Gender competence” is a term coined by Patricia Viseur-Sellers, former Gender Legal Advisor to the International Tribunal for the Former Yugoslavia, in an effort to get away from the notion that effective response to gender issues and person at risk is simply a matter of sensitivity, as opposed to one of awareness, empathy, training, and practice.

¹⁴³ General Comment No. 2, *supra* note 2, ¶ 24.

¹⁴⁴ See Ervin Staub, *The Psychology and Culture of Torture and Torturers*, in *PSYCHOLOGY AND TORTURE*, 49, 72 (Peter Suedfeld ed., 1990).

knowledge and sensitivity to the process and thus contribute in formal and informal ways to minimizing harassment and violence. As to women, there is not only the need to have women to protect the privacy interests of those under their control; the literature further indicates that women police, for example, tend to be more effective at negotiating conflicts as opposed to resorting to violence.¹⁴⁵

5. Protection for Female Detainees

Because the Convention requires positive measures to prevent torture, the General Comment recognizes the need for gender-specific measures to protect those deprived of liberty and notes, as an example, the importance of same-sex guards in prisons when privacy is involved.¹⁴⁶ Having female police to protect arrested women's privacy is a parallel need. At the same time, strict monitoring of and sanctions for sexual harassment and rape of women (including vaginal searches) subject to police control, in or outside of jails—particularly sex workers and transgender people—falls within this concern. The unique reproductive characteristics of women also call for protective measures to avoid torture and ill-treatment. These include, for example, provision of sanitary materials to menstruating women,¹⁴⁷ humane treatment of pregnant women, and preventing the practice of shackling women giving birth.¹⁴⁸

6. Monitoring of private violence

This concern, which is the subject of major international documents,¹⁴⁹ is addressed in a single line,¹⁵⁰ indicating the limitation of a mainstreaming gender. Nonetheless, it is critical to the effective application of the Convention to preventing private violence. It embraces reporting on laws and other programs designed to prevent private violence whether in the community or in intimate settings. Since the fact of law does not necessarily affect reality without enforcement, the General Comments seeks reporting on

¹⁴⁵ See Mangai Natarajan, *Women Police Stations As a Dispute Processing System: The Tamil Nadu Experience in Dealing with Dowry-Related Domestic Violence Cases*, 16 WOMEN & CRIM. JUST. 87 (2005).

¹⁴⁶ General Comment No. 2, *supra* note 2, ¶ 14.

¹⁴⁷ Castro-Castro, Inter-Am. Ct. H.R., *supra* note 30.

¹⁴⁸ U.N. Comm. Against Torture, *Concluding Observations of the Committee Against Torture*, United States of America, ¶ 33, U.N. Doc. CAT/C/USA/CO/2 (2006).

¹⁴⁹ See, e.g., Sec'y Gen, *In-Depth Study*, *supra* note 1.

¹⁵⁰ General Comment No. 2, *supra* note 2, ¶ 25.

the incidence of and responses to private gender violence as a baseline.

7. Disaggregation of Information

The General Comment notes the “frequent[] lack of specific and sufficient information on the implementation of the Convention with respect to women.”¹⁵¹ It calls upon States parties to disaggregate statistics based on key factors including race, age, and gender, which should include not only women but also other gender transgressor where identification is possible and is not a method of harassment.¹⁵² This is necessary to ensure effective monitoring by both State and the Committee¹⁵³ and should apply not only to reports on incidents of custodial violence but also to private and community-based violence, as well as to employment and other areas of potential discrimination.

7. Public Education

Though public education, as opposed to training of officials, is not mentioned in the Convention, the General Comment wisely includes it as an important preventive measure.¹⁵⁴ The insistence on public education is linked to the goal of having a constituency that is educated about and sensitive to incidents of torture committed by those who abuse the public trust.¹⁵⁵ This is particularly important in relation to gender violence given that, until recently, gender violence has been so widely tolerated and culturally accepted and, in many contexts, it still is. The Committee specifically recognizes that educational initiatives, in schools and in communities, are critical to changing attitudes and conduct that support and perpetuate this violence.¹⁵⁶ This is consistent with all the key documents that address the prevention of violence against women generally.¹⁵⁷

¹⁵¹ *Id.* ¶ 22.

¹⁵² *Id.* ¶ 23. For further elaboration see section II(A.) “A. The Scope of Gender,” *supra* text accompanying notes 58-103.

¹⁵³ General Comment No. 2, *supra* note 2, ¶ 23.

¹⁵⁴ *Id.* ¶¶ 14, 25.

¹⁵⁵ *Id.* ¶ 25.

¹⁵⁶ *See id.*

¹⁵⁷ *See, e.g.*, CEDAW, General Recommendation 19, *supra* note 38, ¶¶24(f) and (r) (ii); G.A. Decl. Violence Against Women, *supra* note 40, arts. 4(j) and (o); Sec’y Gen, *In-depth Study*, *supra* note 1, ¶¶336-354; Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belem do Para”) arts. 7(e), 8, June 9, 1994 33 I.L.M. 1534, available at <http://www.unhcr.org/refworld/docid/3ae6b38b1c.html>.

CONCLUSION

Though limited in detail, the General Comment combines both an important theoretical as well as practical approach to monitoring the broad range of gender violence that should be treated within the framework of the Convention, whether as torture or ill-treatment. It also emphasizes that the naming of violence, and thus gender violence, as torture is required in many situations. This has important legal implications: it supports the *ius cogens* nature of gender violence; it underlines the human rights of women and gender transgressors to reliable protection whether it be in relation to official or private violence; and it underscores the urgency of and priority that must be given to the project of prevention.

Understanding gender violence as torture has heuristic, cultural and personal value. In the years since the publication of my 1994 article, many women who have survived domestic violence as well as battered women's advocates have reported to me that understanding the experience of battering as torture was revelatory and empowering in that it shifted the burden of responsibility and shame to the perpetrator and enabled them to understand their victimization within the framework of human rights. I am grateful therefore to the women in Latin America who inspired this work and hopeful that the CAT Committee's monitoring of gender violence will contribute, on a global to local level, to the process of empowering the victims, marginalizing the perpetrators, eliminating the practice altogether, and enabling women to enjoy full equality in rights.

The parallels between domestic battering and torture underscore further the point that patriarchal violence and dominion in the home is a powerful matrix for violence, fear, militarism and the acceptance of domination as domestic and foreign policy. As Virginia Woolf wrote in 1938, "[T]he public and private worlds are inseparably connected . . . the tyrannies and servilities of the one are the tyrannies and servilities of the other."¹⁵⁸

¹⁵⁸ VIRGINIA WOOLF, *THREE GUINEAS* 142 (Harcourt Mifflin Harcourt 1966) (1938).