

An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture

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‘It is not passion or lust gone wrong. It is first and foremost an act of aggression with a sexual manifestation.’¹

Abstract

This study aims to discuss and define rape as a form of torture in order to elevate the status of a crime which is consistently under-represented and under-estimated. Rape is seen as a crime committed by one individual against another as a specifically personal, sexual crime, an interpretation which ignores the wider motivations of the act which can be founded on political, religious, cultural grounds, as part of a larger oppressive regime of subordination. Where rape has been assimilated, from the criminal act, into a key weapon of war or violence, it has become instrumental in campaigns for the devastation, destruction and alienation of society, its power extended by the knowledge that the intimate damage done to the actual rape victim will reverberate through the larger social context. It is essential for this type of torture to be recognized as such in order for its victims to be able to fully benefit from the protection and the prevention of further violence.

1. Introduction

Rape is a crime which is notoriously hard to prosecute successfully on even a domestic level. Despite the frequency and familiarity of this crime, it is met with a response that is neither as serious nor as energetic

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¹ C. Niarchos, ‘Women, war and rape: Challenges facing the ICTY’ *Human Rights Quarterly*, Vol. 17, No. 4, 1995, 649–690, 650.

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as should be merited. Rather, the prevalence of rape in society has come to be seen as something of an inevitability, to be condemned but never to be addressed in a manner that sees an end in sight. Acceptance of rape has almost become endemic; a social imitation perhaps, of the legal impotence with which the crime is met. In recent years, there have been several well-publicised events, which have documented the implementation of rape as a premeditated and methodical system of devastation and destruction, most virulently exemplified in the genocide in Rwanda and the ethnic cleansing campaigns of Bosnia-Herzegovina. This paper seeks to raise the profile of rape by incontrovertibly defining it as a contemporary form of torture by examining the international incidence of rape as it is used as a strategic weapon to humiliate and devastate. This intention will clearly meet with resistance from those unwilling to admit to the actual horror and full meaning of the act of rape and perhaps more legitimately from those reluctant to apply the label torture to any instance which would reduce the impact of so heavily loaded a term. Through the examination of the current definitions of torture it will be asserted that rape and other forms of sexual violence are used very much as a form of torture and ergo that torture is consistently committed through rape. I will refer to the current manifestations of rape in its widespread use as a weapon of war and crime against humanity, as it has been defined in the tribunals at The Hague and Arusha. Additionally, I will examine how rape has been construed as persecution in asylum law.

For the purpose of this paper it is necessary to clarify what should be understood by the term 'sexual violence' which will be employed, and which encompasses the other methods of ill-treatment not categorised as rape per se. The word rape has an explicit and narrow remit,² and the specific classification fails to encompass various other methods of sexual violence which can be equally painful and degrading. The term sexual violence will be used to cover the following: Violence to the sexual organs; physical sexual assault that implies direct physical contact; psychological sexual assault, like forced nakedness, sexual humiliations and threats; as well as a combination of these.³ This wider definition is crucial in order to include the experiences of women who have not been raped in the conventional sense, but have nevertheless been exposed to the creative mind of the torturer who is able to match the pain and ignominy of rape through a variety of methods.

² Rape consists in the forced or non-consensual penetration of the human body with the penis, or with an object such as a truncheon, stick or bottle. A. Callamard, *Documenting Human Rights Violations by States Agents; Sexual Violence*, (Canada, 1999), 8.

³ I take my definition from Lunde & Ortmann, 1990 in E. Axelsen & N. Sveaass, 'Psychotherapeutic understanding of women exposed to sexual violence in political detention' in *Nordisk Sexologi*, No. 12, 1994, 1-12.

Additionally, although in this paper the focus of sexual violence will be on that which is committed against women, it is necessary to acknowledge that sexual violence is not a phenomenon exclusively directed at women and there is much documented evidence of sexual violence perpetrated against men from a wide variety of sources.⁴ Thus, the comments and conclusions made in this paper will for the greater part be just as pertinent to men as women. However, the focus is directed firmly upon women because sexual violence is unquestionably a greater threat to women. There are various surveys which attempt to document the international situation of violence to women;⁵ numerous countries, for example, India, Peru and the United States,⁶ support a level of aggression and subordination that is both appalling, yet even in states where women's rights are vocalised and proudly proclaimed, the reality can be very different. The continuing gravity of the situation of violence to women can be adduced from the number of initiatives underway to address it.

There has been a certain level of resistance towards a developing canon of women's rights — in 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women, in 1994 the Commission on Human Rights appointed a Special Rapporteur on Violence against Women and the Beijing Declaration and Platform for Action, 1995, affirmed 'that violence against women both violates and nullifies or impairs the enjoyment by women of their human rights'⁷ — from those concerned with the implications inherent in creating a programme which would make the rights of women distinct and segregated from the general corpus of human rights. It has been reiterated time and time again, from the initial codification of human rights into the two International Covenants in 1966 to the 1993 Vienna Declaration, that the rights proscribed should be 'universal, indivisible and interdependent and interrelated.' The idea of separate women's rights undermines this principle, although the limited success of

⁴ See M. Peel, 'Sexual abuse of men in detention in Sri Lanka,' *The Lancet*, Vol. 355, June 2000, 2069–2070 and H. van Tienhoven, 'Sexual Violence; A method of torture also used against male victims,' in *III International Conference: 'Health, Political, Repression and Human Rights.'* ACTAS Proceedings, 24–29 Nov. 1991, 393–395.

⁵ See Benninger-Budel & Lacroix, *Violence Against Women: A Report*, (OMCT, 1999).

⁶ 'In India reports of army personnel raping women have become so persistent that the Assam High Court issued an order in March 1991 prohibiting soldiers from taking women to army camps for interrogation,' 'Rape and Sexual Abuse: Torture and ill-treatment of women in detention, December 1991,' AI Index: ACT 77/11/91, Distr: SC/PG/CC, 3. 'In Peru women have been threatened, raped and murdered by government security forces . . . and by the Communist Party of Peru . . . many times the same woman has been the victim of violence by both sides,' *Human Rights Watch Thematic reports/The HRW Global report on Women's Human Rights* (August 1995). In the US a 1999 Government report indicated a serious problem of sexual abuse of women in state and federal prisons. (www.hrw.org/background/wrd/fireplus.htm).

⁷ Benninger-Budel, 15, above n. 5.

anti-discrimination measures has made gender-specific campaigns essential. However, while simultaneously supporting efforts such as the Convention Against the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women (DEVAW), it is necessary for states, the UN, NGOs and the like to continuously state that women's rights are human rights and must be assimilated far more emphatically under fundamental human rights provisions.

By understanding rape as a form of torture, it is possible to counter the gendered division and develop the concept of torture from its position as a traditionally and overwhelmingly male concern; it is necessary to recognize that the idea of a torture victim as a 'male political prisoner of conscience'⁸ is not the whole picture. Although women do not usually take the most centrally active political positions in society because of the various cultural or religious constraints made on them, there are still numerous ways in which women become involved and can assume a political dimension for which they are punished with numerous methods of torture.⁹ The prevalence of sexual violence reveals the popularity of one of the most insidious weapons of repression and which is yet a form of brutality that goes largely without address or redress. The classic defence towards addressing violence towards women has been the concept of a public/private divide which sees the social sphere of women as traditionally outside the realm of the state and official involvement. While the complexities of domestic violence and state responsibility is a problem yet to be resolved, there is a major incidence of sexual violence which is clearly outside the domestic arena of home and family and which to ignore as such greatly undermines a commitment to human rights. The 'demarcation of public and private life within society is an inherently political process that both reflects and reinforces power relations'¹⁰ particularly where gender is concerned. Rape and other forms of sexual violence are used in a wide range of situations which has prompted 'a critical need to place gender-based violence within the context of women's structural inequality'¹¹ and where the claim of encroaching in the private sphere is a smokescreen used to avoid action. A more evolved understanding of

⁸ Lisa Kojs, 'Dance, sister, dance!' in Bertil Duner, (ed.) *An end to torture: Strategies for its eradication* (UK, 1998), 88.

⁹ Women may be used to pass messages, hide others, provide care as well as partaking in political activity usually ascribed to men. Additionally women will often have the political opinion of their husband or family imputed on to themselves (*Lazo-Majano v. INS*, below n. 105).

¹⁰ D. Sullivan, 'The Public Private distinction in International Human Rights Law' in Peters & Wolpers (eds.) *Women's Rights/Human Rights*, (Routledge, 1994) 126-134, 128.

¹¹ Sullivan, above n. 10, 134. Gender-based violence is not the same as sexual violence as it includes other discriminatory practices such as FGM, forced sterilisation, domestic violence etc.

sexual violence would reveal the public/private divide as a false dichotomy and provide a powerful basis for action.

Rape and other forms of sexual violence are an international problem and while the egregious stories of rape camps and ethnic cleansing receive widespread condemnation, it is revealing to briefly examine the status of rape in the UK to exemplify the legal impotence of women in even a civilised democratic society. The most telling statistic in the UK is the fact that only 6 per cent of all reported rapes end in a conviction,¹² a figure which has continued to fall since 1985, and is compounded by the fact that only a fraction of all rapes are actually reported.¹³ The likelihood of a woman succeeding in achieving a conviction is simply enormous while women are 'systematically humiliated in court and . . . find the experience extremely distressing.'¹⁴ A recent analysis of both prosecuting and defence barristers confirmed a series of factors which damaged the access of women to a fair trial. These included the quality of the prosecuting barrister compared to the defence, a perception in society which believes that women should 'act in a certain way'¹⁵ and the incorporation of a woman's sexual history in her cross-examination. The significance of the UK experience of rape is merely that despite the social, economic and political variations across cultures there is 'an astounding convergence of cultures in regard to the basic tenets of patriarchy and the legitimacy, if not necessity, of violence as a mechanism of enforcing that system'¹⁶ and that the vulnerability of women in the event of rape is unhappily mirrored in their lack of power in the international legal context. The question is, therefore, in understanding when this consistent and widespread crime against women constitutes a form of torture that will make it indefensible to such an extent that state authorities and governments are forced to initiate the resources and exhibit the will to combat it. There is certainly some legitimacy in the argument that all acts of rape are in some way forms of torture, owing to the level of violence and intimidation involved. However, such an argument would prove difficult and controversial and obfuscate the particular issue of this study, which is to highlight the series of situations wherein the role and the function¹⁷ of the rape is unmistakably enacted as torture and should be recognized as such.

¹² Home Office Report 1997 figure in J. Temkin, 'Prosecuting and defending rape: Perspectives from the Bar,' in *Journal of Law and Society*, Vol. 27, No. 2, June 2000, 219–248, 222.

¹³ Seventy-five per cent of women reporting sexual assault to the London rape clinic in 1975 failed to tell the police of their attack. J. Temkin, *Rape and the legal process*, (London, 1987), 11.

¹⁴ Temkin, above n. 12, 221.

¹⁵ Temkin, above n. 12, 232.

¹⁶ R. Cook, *Human Rights of Women; National and International perspectives*, (Penn Press, 1994), 120.

¹⁷ K. Gilmore, *The rape in torture; The torture in rape*, (Australia, 1989), 23.

2. Rape as torture

The highest international authority on torture is the UN Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment.¹⁸ Article 1 defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity.

The vital components for torture to have been enacted are, therefore, the element of severe harm whether physical and/or psychological, the motivation for the abuse and the agent of the abuse. The interpretation of torture varies from jurisdiction to jurisdiction and the decisions which inform the assorted definitions will be examined in due course.

There is extensive evidence which documents the use of sexual violence within a torture scenario, where other forms of torture are also being exercised and where it is clear that electrodes applied to the genitals or a gun barrel forced into a vagina or a conventional act of rape are interchangeable techniques which form part of the habitual routine of the torturer. A Danish investigation examined the cases of 283 individuals who had been tortured; 61 per cent of whom reported receiving sexual torture.¹⁹ The figure for the men was 56 per cent whereas the figure for the women was 80 per cent. This study reveals what seems to be a general trait, namely that rape and sexual abuse are forms of torture frequently used against women.²⁰ It is vital to understand this sexual violence as torture not only when it provides a part of the episode of torture but when it is the only form of torture being applied and furthermore when the torture consists solely of conventional rape, that is to say that other than being raped the victim is not subjected to any other form of torture. This is the crucial premise underlying this study; the understanding of rape as torture where the

¹⁸ Article 1, December 10, 1984, 23 ILM 1027 (1984) Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁹ Which included 1) violence against any of the sexual organs, 2) physical sexual assault — that is, sexual acts involving direct physical contact, which can be between torturer and victim, between victims, between victim and an animal between all three, 3) mental sexual assault — that is, forced nakedness, sexual humiliations, sexual threats and witnessing others being sexually tortured, and 4) a combination of these in Lunde & Ortmann, 'Prevalence and Sequelae of Sexual Torture' in *The Lancet*, Vol. 336, Aug. 1990, 289–291.

²⁰ Fornazzari and Freire, 1990 in Fischman et al, 'The Impact of Political Repression Upon gender-related violence,' in *Family Violence and Sexual Assault Bulletin*, Vol. 15, No. 1, 21–25.

torturer needs none of the paraphernalia normally associated with him, no torture chamber, and no instruments of torture. Practically and prosaically, rape is a cheap form of torture which can leave little evidence while being brilliantly effective. Clinical examinations of rape victims have established that the trauma experienced in terms of both the physical symptoms and emotional distress is akin to that of other torture victims, and therefore the possibility that defining rape as torture might trivialise the significance of the label torture is unfounded and false.²¹ It is no coincidence that sexual violence is so common a method of torture, 'torturers frequently concentrate torture on bodily functions important for somatic as well as psychological well-being, thus common loci of torture are the brain and sexual organs.'²²

In order to further understand the crime of rape as torture, it is necessary to refute the belief that the rapist is always motivated by personal reasons of sexual desire and sexual gratification. Even in non-political situations where the attack is directed towards a randomly selected individual, the prime motivation is likely to be either power or anger: 'rape, then, is a pseudo-sexual act, a pattern of sexual behaviour that is concerned much more with status, aggression, control and dominance than with sensual pleasure or sexual satisfaction.' If it is clearly recognized that rather than a sexual impulse, a rapist acts out of 'uncontrolled hostility, a sense of inadequacy or a quest for power', then it becomes easier to see rape in detention or rape of an ethnic enemy as a form of torture. The idea of rape as only a personal sexual crime which is used for example to distinguish rape from falaka or beatings or any other conventionally understood form of torture, is then rejected. Falaka and rape could be and indeed are, methods of torture used interchangeably, rape is used perhaps because of its superior efficiency to other forms of torture because of its capabilities in achieving a stronger degree of suffering and destruction of the individual. There are several reasons why rape is so popular a form of punishment; it is cheap, it is convenient and it can be carried out so that no visible evidence is left in the manner of scarring and bruising, or, alternatively, to further increase the legacy of the suffering through impregnation or the transmission of disease. The establishment of torture is of particular value to counter the attitude present in some cultures which further diminishes the severity of the assault where the rape of the women has a symbolic significance which fails to recognize the affront to personal integrity enacted in rape and instead views the rape as a crime 'against honour or custom'.²³ Consequently the injury to the individual is seen

²¹ See Burgess & Holstrom, 'Rape Trauma Syndrome' (1974) 131 (9) *American Journal Of Psychiatry*.

²² Lisa Kois, above n. 8, 88.

²³ www.hrw.org/background/wrd/fiveplus.htm.

as secondary to the insult made to the wider community and the chance of a claim of redress is greatly reduced.

The establishment of rape as a form of torture has been made by a number of crucial sources. Amnesty International states emphatically in its 1992 report on the torture and ill-treatment of women in detention:

[i]n countries around the world, government agents use rape and sexual abuse to coerce, humiliate, punish and humiliate women. When a policeman or a soldier rapes a woman in his custody, that rape is no longer an act of private violence but an act of torture or ill-treatment for which the state bears responsibility . . .²⁴

Richard Goldstone, when he was standing as the Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda, recognized rape as a form of torture under the UN Convention against Torture. Justice Goldstone, stated that:

Sexual assaults, committed particularly against women, can constitute torture under the Statute of the Tribunal, and will be prosecuted as transgressions of International Humanitarian Law by my office. Our legal position is also consistent with the evolving norm of torture. The Special Rapporteur on Torture . . . identified rape and sexual assaults as common forms of torture. The sexual assaults committed in the conflicts in the former Yugoslavia and Rwanda correspondingly provide the basis for justiciable charges of torture.²⁵

Goldstone goes on to recommend a review of all previous indictments and 'where an evidentiary basis exists to charge torture we will seek leave to amend'. The UN Special Rapporteur stated: '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 right to physical integrity of the human being, they accordingly constituted an act of torture'.²⁶ Furthermore, a report by the UN Division for the Advancement of Women on Gender-based Persecution recommended in 1997 that 'sexual violence should be considered to be within the definition of torture for the purposes of the UN Convention Against Torture'.²⁷ While it is irrefutable that rape when it is performed by an agent of the state or with state acquiescence is torture there is growing case law 'which makes it clear that positive obligations on the state are

²⁴ Steiner & Alston, *International Human Rights in Context*, (Oxford, 1996), 932.

²⁵ Letter from Justice Richard Goldstone to Professor Rhonda Copelon, 8 Sept. 1995, in *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Human Rights Watch, 1996), 32.

²⁶ Pieter Kooijmans in A. Callamard, above n. 2, 13. The Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflicts states that 'Rape and Sexual abuse constitutes torture and inhuman treatment which causes suffering and serious bodily injury', 16.

²⁷ UN Division for the Advancement of Women, *Gender-based Persecution: Report of the Expert Group Meeting*, Toronto, Canada, 9-12 Nov. 1997, 13.

now an integral part of considering whether a state has fulfilled its human rights obligations²⁸ and therefore violations which are less directly attributable to states can be encompassed under the definition of torture.

3. Rape at the ICTY and ICTR

The international criminal tribunals of both Rwanda and the former Yugoslavia have major international significance because of the reach of their jurisdiction and the impact their judgments will have in the countries in which they have immediate authority, as well as influencing international perceptions and standards in respect of crimes against humanity and crimes of war and contributing substantially to the framework of the nascent International Criminal Court. The findings of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR) will reverberate, and for this reason their handling of crimes concerning sexual violence is of vital importance. There has been evinced, from within the authorities of the tribunals themselves, an attitude which firmly supports the need for comprehensive investigation into sexual violence which has translated into indictments of those responsible. The chief prosecutors have made individual statements asserting the gravity with which sexual crimes will be approached and the efforts that will be introduced to achieve this particular form of justice. Goldstone's statement on sexual violence has been mentioned already; Carla Del Ponte, the current chief prosecutor of the tribunals, described a prosecution strategy which 'focuses on leadership investigative targets as well as perpetrators of particularly serious crimes or sexual violence in relation to the armed conflict'²⁹ as part of a policy of the 'normalisation' of the prosecution of sexual violence as a serious violation of international humanitarian law.

The extent of sexual violence in the genocide in Rwanda and the various conflicts in the former Yugoslavia are by no means isolated incidents of organized campaigns of sexual terror. Rape has consistently featured as a consequence of war: during the Second World War it is estimated that Japanese soldiers abducted between 100,000 and 200,000 mostly Korean women who were then forced into prostitution, and during the Bangladeshi war of independence the estimated number of women raped ranges from 250,000 to 400,000.³⁰ The recent events in

²⁸ D. Sullivan in Callamard, 19, above n. 2.

²⁹ In 'FRY: (Kosovo) Rape as a weapon of ethnic cleansing,' *HRW Report*, March 2000, Vol. 12 No. 3, (D), 4. The tactics employed in the Bosnian conflict were witnessed again in Kosovo.

³⁰ See S. Swiss & J. Giller, 'Rape as a Crime of War,' *Journal of the American Medical Association*, Vol. 270, No. 5, Aug. 1993, 612-615.

Sierra Leone have provided the latest episode in the large-scale victimisation of women. The raping and other forms of sexual violence employed in Sierra Leone has been documented by Amnesty International who have stated that the systematic nature of the attacks 'indicated a deliberate strategy . . . to instill terror' and which constitutes 'a weapon of war'.³¹ However, it is disingenuous to believe that this brutality is limited only to times of conflict; the establishment of conflict, whether internal or international, has been a moot point at the tribunals where rape has been tried either as a crime against humanity or as a war crime, dependent partly on the nature and structure of the conflict.³² The efficacy of rape as a concerted form of violence is clear; rape has not only the implication of directly causing pain and suffering to the individual, but the wider ramifications are such that rape can effectively destroy entire communities because of the significance of the positions that women hold as mothers, wives and daughters. However the scale of the violence in Rwanda and the former Yugoslavia, which was witnessed and comprehensively documented by the media, forced the international community to include the campaigns of rape amongst the crimes to be prosecuted. That figures can only be estimated is due to the lack of a comprehensive fully-funded reporting initiative in either country; in Rwanda, where it is unknown how many people were slaughtered in the genocide, it is thought that there were between 250,000 and 500,000 cases of rape, the figure in the former Yugoslavia is put at between 20,000 and 50,000. The endemic nature of the violence can perhaps be understood by the tribunal's indictment of Tadić,³³ a relatively minor official, but who was nevertheless charged with 132 counts of murder, torture and rape. The horror of what happened in the former Yugoslavia and in Rwanda cannot easily be understood, statistics do not translate the meaning of the events that took place in which a 'war [was] fought on and through women's bodies . . . rape as a military strategy'.³⁴

It is constructive to again highlight the motivation behind the rapes which was in both situations based principally on the fact of ethnicity, and therefore an expedient form of torture. The second point to clarify is the issue which concerns the responsibility of the perpetrator which ranged widely over the spectrum of government officials, policemen, soldiers, paramilitaries who were not acting as individuals in their

³¹ 'Sierra Leone, Rape and other forms of sexual violence against girls and women.', 29 June 2000, AI Index AFR 51/35/00 DISTR.SC/CC/CO.

³² A war crime can only be prosecuted when it has taken place within the specific parameters of an armed conflict according to the Geneva Conventions.

³³ See further discussion of the Tadić Case (*Prosecutor v. Dusko Tadić*) (1995) ICTY, *Human Rights Law Journal*, Vol. 16, 426.

³⁴ Niarchos, above n. 1, 651.

personal capacity but as part of a larger force working with a specific target of intimidation and discrimination in mind. In their report on Kosovo, where the campaign of sexual violence seen in the Bosnia-Herzegovina conflict was repeated, Human Rights Watch remark on the unlikelihood of senior officials being unaware of the attacks and that at the same time there were no warnings or guidelines issued to inform personnel of the unacceptability of such behaviour.³⁵

The Statute of both the ICTY and the ICTR explicitly identifies rape as a crime against humanity due partly of the findings of a UN investigation which collected extensive evidence of rape. Article 3(g) of the statute of the ICTR identifies rape as a crime against humanity if the rape was 'committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds'.³⁶ The Rome Statute of the ICC similarly identifies 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as a crime against humanity when it is carried out in a 'widespread or systematic attack against any civilian population,' furthermore the ICC has jurisdiction in respect of war crimes in particular 'when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. These provisions illustrate a development from the original international tribunal in Nuremberg which failed to specifically prosecute rape which was apparently 'folded into the general category of ill-treatment of the civilian population'.³⁷ The international tribunals also develop the other source of international law condemning rape; the Geneva Conventions: Article 3 of the Geneva Conventions prohibits 'violence to life and person', 'cruel treatment', 'torture'³⁸ and 'other outrages on personal dignity'. Article 4 (2) (e) of the second protocol of the Geneva Convention prohibits outrages upon personal dignity, in particular 'humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault'.³⁹ There are also a number of crimes enumerated under the conventions which constitute a 'grave breach' and although rape is not specifically mentioned the International Convention of the Red Cross in 1992 stated that it interpreted rape as an example of a grave breach of torture and inhuman treatment or 'willfully causing great suffering or serious injury to body or health'.⁴⁰

³⁵ HRW, above n. 25, 32.

³⁶ <http://www.un.org/icty/basic/statut/statute.htm>.

³⁷ Niarchos, above n. 1, 665.

³⁸ UN Special Rapporteur on Torture has stated that rape is a form of torture, see *HRW Report (Kosovo)*, above n. 29, 30.

³⁹ Article 3 and Protocol II are for non-international armed conflicts. The grave breach provisions are found in all four 1949 conventions.

⁴⁰ In *HRW*, above n. 25, 32.

Despite the enormous part that rape and other forms of sexual violence played in these conflicts, the reality in both Arusha and The Hague reflects a paucity in the actual number of indictments of rape. There are several reasons for this disproportionate outcome, many of which could be overcome. Usually rape in these situations is being prosecuted alongside other atrocious, inhuman acts which tend to subsume the incidence of sexual violence and prevent it from receiving the individual condemnation from which it would benefit. Many of the reasons for which women have not reported rape to the tribunals are shared by all women who have been raped and the issue of shame and the stigma attached to rape cannot be overplayed. Other reasons are procedural; the legal process of redress is a structure dominated overwhelmingly by men, a clear obstacle preventing reluctant women from putting their confidence in a process they are unsure of. Sensitivity to the plight of these women needs to be introduced at every level with the incorporation of female personnel, documenting of evidence by NGOs and government bodies to the medical constituent of the process which could also be developed.⁴¹ Despite the familiarity and history of rape, it is handled with surprising ignorance and insensitivity, an example of the underdeveloped nature of its prosecution was found by HRW who questioned many women in Rwanda who were not even aware that the tribunal existed. Equally the tribunals are criminal courts which need to produce criminal responsibility beyond reasonable doubt. War zones are not easy places to gather compelling evidence of rape, evidence which can be difficult to produce in any instance of rape.

3.1 Judgments

The ICTR has recognized rape as a crime against humanity and the customs of war, and has also recognized rape as a form of genocide. In August 1997 the prosecutor began to charge those guilty of sexual violence and in the case of Jean-Paul Akayesu (September 1998) the bill of indictment was amended to include accusations of rape. The Chamber made it clear that for their purposes rape constituted genocide 'in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such'.⁴² This case also necessitated a definition of rape to be established due to the lack of a set precedent.⁴³ The Chamber

⁴¹ The UN has now created a gender unit in Kosovo. 'The failure of investigators to document gender-based crimes in wars further shrouds the widespread nature of the crime. Because the testimonies aren't documented, the abuse of women is overlooked.' *HRW Shattered Lives*, above n. 25, 25.

⁴² <http://www.icttr.org/ENGLISH/cases/Akayesu/index.htm>.

⁴³ Below n. 45. It was declared that 'sexual violence, including rape is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.' The ICTR also decided that 'coercive circumstances' need not only apply to force but equally to threats and intimidation.

reiterated the fact that the systematic program of rape was directed explicitly at the Tutsi female population, that these rapes resulted in the 'physical and psychological destruction of Tutsi women, their families and their communities . . . and to the destruction of the Tutsi group as a whole'.⁴⁴ Akayesu, who had been the Mayor of the district of Taba, was found guilty on nine of fifteen counts, including Count 1: Guilty of the crime of Genocide, including the campaign of rape which he encouraged and committed, and Count 13: Guilty of Crime against Humanity (Rape). The *Musema* judgment (February 2000) also contributes to the status of rape at the ICTR in the tribunal's seventh conviction of genocide, where Alfred Musema was found guilty on three of nine counts of genocide, rape and crimes against humanity, 'generating further case law regarding rape and other forms of sexual attack as being components of genocide and crimes against humanity'.⁴⁵

The ICTY similarly has a facility to prosecute rape as a crime against humanity and the most significant cases so far have recognized rape as torture and as a war crime. By March 1999, the ICTY had indicted 27 individuals in relation to 130 individual crimes that involved either rape or sexual assault.⁴⁶ The openness to prosecute rape can be witnessed in the words of Judge Vohrah who stated that:

such acts [of forcible sexual penetration] can constitute an element of a crime against humanity, (enslavement under Article 5(c), torture under Article 5(f), rape under Article 5(g), violations of the laws and customs of law (torture under Article 3 and Article 3(1)(a) of the Geneva Conventions), and a grave breach of the Geneva Conventions (torture under Article 2(B)).⁴⁷

The *Celebici* case found Hazim Delic (1998) guilty of breaches of the Geneva Conventions (torture) and war crimes (torture) for the rapes committed. The ICTY based the standard of torture on the Torture Convention and the conclusion was based on the acknowledgement that rape satisfies both the level of serious harm both physically and psychologically and on the decision that 'rape and other forms of sexual violence constitute torture when they are intentionally inflicted upon a victim by an official or with official instigation, consent or tolerance for any of the purposes listed above.'⁴⁸ The *Furundzija* case⁴⁹ (December 1998) found the defendant guilty of a war crime through command responsibility; the rape of a Bosnian woman, a decision that has been

⁴⁴ A Tutsi woman who was married to a Hutu man was not raped, she said, because her ethnic background was not known. Below n. 45.

⁴⁵ J. Coll Metcalfe, 'The Musema Judgment, Judgment raises questions at the International Tribunal' at <http://www.internews.org/PROJECTS/ICTRAnalysis-2-00.html>.

⁴⁶ www.icty.org.

⁴⁷ Callamard, above n. 2, 15.

⁴⁸ Celebici judgment in *HRW Report (Kosovo)*, above n. 29.

⁴⁹ <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>.

recently confirmed in the court of appeal. The ICTY following in the vein of its acknowledgement that '[i]nternational case law . . . evinces a momentum towards addressing through the legal process, the use of rape in the course of detention and interrogation as a means of torture'.⁵⁰ The '*Foca*' case, decided in February 2001, was significant as it indicted eight Bosnian Serbs of crimes against humanity and violating the laws or customs of law, three of whom were found guilty of rape, torture and enslavement. They were accused as the men behind the 'rape camp' that was established in the town of Foca, where women were held and subjected to rape and gang rape for periods of up to a year. The decision was the first at the Hague to convict the accused based on rape and enslavement as crimes against humanity, crimes which had been organized and perpetrated as part of a 'systematic attack on the civilian population'.⁵¹

The experiences of Rwanda and the former Yugoslavia will undoubtedly draw greater recognition and understanding to the campaigns of sexual violence which emerge in various international conflicts, so that they may come to be seen as an integral part of the aggression and therefore fully deserving of the condemnation and punishment of all war crimes. The rapes in Rwanda and the Former Yugoslavia were part of huge campaigns, as the statistics and stories of rape camps, gang rapes and the rape of pre-pubescent girls testifies to, yet it must be borne in mind that whenever rape is enacted as a mechanism of torture, even an isolated attack, it is a violation of international customary law.⁵² The significance of the concrete classification of rape as torture is necessary to prevent the high profile attention to rape bestowed at the international tribunals from becoming a short-lived or 'fashionable' episode, as rape as torture should always be treated as a 'violation of the highest order'.⁵³

4. Rape under the ECHR and IACHR

Article 3 of the European Convention on Human Rights (ECHR) states very clearly that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.⁵⁴ There is a purposeful lack of specification provided in the convention which has allowed for a wide

⁵⁰ Strumpen Darrie, 'Rape: a survey of current international jurisprudence', 7:12, *Hum Rts Brief Wash. Coll. Law*, 12, at 14 (1999).

⁵¹ 'Trial opens in Hague on Sex crimes during Bosnian War,' *International Herald Tribune*, 22 Mar. 2000.

⁵² Violates the corpus of international law against torture, see earlier. A single rape is a war crime whereas rape or sexual violence must be widespread to constitute a crime against humanity.

⁵³ Kois, above n. 8, 90.

⁵⁴ Article 3, ECHR.

range of issues to be considered under the article.⁵⁵ The basis for admissibility for a case to constitute a violation is based on a ‘minimum level of severity’⁵⁶ which the Court has interpreted broadly. Unlike the UN Human Rights Committee which employs the definition ‘torture . . . cruel, inhuman or degrading treatment or punishment’⁵⁷ as a fixed unit, the ECHR has developed a hierarchy of harm by which violations can progressively attain a status of ‘degrading’ or ‘inhuman’ treatment or punishment or ‘torture’;⁵⁸ torture being emphatically worse than degrading treatment. The commission found in the case of *Cyprus v. Turkey*⁵⁹ that ‘wholesale and repeated’ rapes carried out by Turkish troops constituted ‘inhuman’ treatment and were therefore a violation of Article 3. The case law of the ECHR has, however, developed in recent years and it would appear that sexual torture is now treated more rigorously. The most pertinent case to consider is that of *Aydin v. Turkey*,⁶⁰ in which a seventeen-year-old Turkish citizen of Kurdish origin was abducted by her local gendarmerie and taken to their headquarters. The treatment she was subjected too included being stripped naked, beatings, being sprayed with cold jets of water and rape. The Commission crucially noted that she was raped because of her involvement with the PKK⁶¹ and the case was referred to the Court who found Turkey guilty of violations of Articles 3 and 13. In the Court’s decision of a finding of a violation of Article 3 it refers expressly to the act of rape in detention as amounting to torture and states that it would have reached this decision even had the other forms of ill-treatment not taken place.⁶² Amnesty International submitted material to the court in this case referring to the development of torture under the ICTY and citing the case of *Fernando and Raquel Mejia v. Peru*⁶³ stating that rape by a state agent for the purposes of ‘extraction of information’ or as a means of ‘intimidation’ would be ‘considered to be an act of torture under current interpretations of international human rights

⁵⁵ Detention, immigration, extradition, corporal punishment and transsexuality cases have all been decided under Article 3.

⁵⁶ *Ireland v. UK*, judgment of 18 Jan. 1978, Series A. No. 25, (1979–1980) 2 EHRR 25.

⁵⁷ Article 7, International Covenant on Civil and Political Rights.

⁵⁸ Developed in the *Greek Case*.

⁵⁹ *Cyprus v. Turkey* Applications 6780/74 and 6950/75 10/7/76, (1982) 4 EHRR 482, paras. 357–374.

⁶⁰ Case of *Aydin v. Turkey* (57/1996/676/866) Judgment, Strasbourg, 25 Sept. 1997.

⁶¹ ‘It would appear probable that the applicant was subjected to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and/or to deter her family and other villagers from becoming implicated in terrorist activities’, para. 180, of the Commissions report in the Judgment, 12, below n. 63.

⁶² Below n. 63, 25.

⁶³ *Fernando and Raquel Mejia v. Peru*, Case No. 10, 970, judgment of 1 Mar. 1996, Report No. 5/96, *Inter-American Yearbook on Human Rights*, 1996, 1120.

standards'.⁶⁴ The Inter-American Commission on Human Rights (IACHR) found that the sexual violence suffered by the victim was a violation of Article 5 and noted that the damage was both physical and psychological.⁶⁵ Both *Aydin* and *Mejia* were raped by individuals who, it was accepted, were not acting in their private capacities for a personal reason but as agents of the state, acting either for the state or with the state's acquiescence to whatever degree this compliance manifested itself.⁶⁶ The *Mejia* decision of 1996 in turn follows the findings of the IACHR concerning the rape of women in Haiti. In 1993 the United States granted asylum to a Haitian woman who had been raped and beaten by military personnel for her pro-democracy activities on the grounds of political persecution. On the basis of this unpublicised judgment, the Commission was presented with evidence documenting the systematic rape of women in Haiti imputed to be pro-democracy sympathisers. In 1995 the IACHR issued a report which found their treatment to constitute torture under the UN Convention Against Torture.⁶⁷

There is clearly a finite amount of case law at the international level to support the claims of women who have been raped and these particular judgments are crucial to further development. Once it can be accepted incontrovertibly that rape constitutes torture, it becomes less of a leap to conclude that rape can also constitute persecution. Torture does not immediately qualify as persecution and it is necessary to analyse rape as persecution as distinct from rape as torture. However this extension of the argument has an important dimension to the developed understanding of rape to enable the cases of asylum seekers who are forced to flee from regimes in which they are in danger of suffering rape and sexual violence, especially as these individuals are scrutinised more and more.

5. Rape under the 1951 Refugee Convention⁶⁸

The international response to rape as torture will develop and become more sophisticated with every judgment which confirms the severity of the act of rape, and as this body of evidence catalogues the crime of rape it will simultaneously strengthen the argument that rape amounts to persecution and, therefore, is a legitimate reason to claim asylum when related to one of the five grounds. While it has been argued here in a

⁶⁴ Above n. 63, 16.

⁶⁵ Also a violation of Article 11, ECHR, Right to privacy.

⁶⁶ Although it should be noted that the ECHR does not explicitly require that a public official perpetrate the rape for it to be considered torture, Strumpfen Darrie, above n. 50, 13.

⁶⁷ For a full discussion of the case of the Haitian women see N. Kelly, 'Political Rape as Persecution: A Legal Perspective,' *Journal of American Medical Women's Association*, Vol. 52, No. 4, 188–190.

⁶⁸ See J. Hathaway, *The Law of Refugee Status*, (Butterworths, 1991).

clear and dialectic manner why rape should amount to torture, asylum cases under each domestic jurisdiction are argued on the merits specific to each situation and what has been presented here in defining rape as torture is insufficient as proof of persecution. Despite the international consensus that violence towards women must be challenged, the positive action hitherto promised has never been realised in the arena of immigration where the maltreatment and injustices suffered by women continues to be underplayed and largely unacknowledged. 'Women have specific protection needs . . . their experiences differ',⁶⁹ yet the construction of the 1951 Convention, as has been long recognized, lends itself to the experience of the male refugee — in an echo of the Torture Convention — in a way that severely penalizes the female refugee, despite the fact that over two thirds of the world's refugees are women.⁷⁰ The weaker position of female asylum seekers has in recent years been given the special attention it deserves and needs; there has been a need for this disparity to be addressed not only in terms of the various manifestations of gender persecution, but the treatment of female refugees needs to be reviewed holistically.⁷¹ In respect of this there has been a renewed effort by various international agencies to address the plight of women refugees and the meaning of gender-based persecution and in turn to improve the accuracy in determining refugee status in these situations. Women can be persecuted in different ways and because of different reasons to men; for example, 'women are more likely than men to be persecuted because of kinship . . . the activities or views of their spouses or male relatives [and for the same reason] may have political opinions imputed to them.'⁷² Women are therefore persecuted both for being female and then harmed in a way that exploits them as women through sexual violence.⁷³ Knowledge of the campaigns in the former Yugoslavia and Rwanda illustrates the extremes of the maltreatment of women who are persecuted in a way that most exploits their being women, but is treatment, nevertheless, that is

⁶⁹ N. Berkowitz, *Asylum Gender Guidelines* (Draft version), (IAA 2000), 2.

⁷⁰ J. Castel, 'Rape, Sexual Assault and the Meaning of Persecution,' 4 *IJRL*, 37 (1992).

⁷¹ Again it is necessary to note that sexual violence suffered by refugees is not exclusively a female issue but many of the related issues of powerlessness that women rape victims undergo do not impound so heavily on men.

⁷² Violence and Women's Refugee Status at www.austlii.edu.au/au/other/alrc/publications/reports/69/vol11/ALRC69Ch11.html, 3.

⁷³ Women are discriminated against in a variety of ways unrelated to any political, religious, ethnic or other reason but instead principally because they are women. With respect to the Refugee Convention in this study I am concerned with only the establishment of rape and other forms of sexual violence as persecution where the woman is able to establish membership to either a political, ethnic, national, religious or social group. Note the development of 'women' as a social group. 'States in the exercise of their sovereignty, are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of article 1 A (2) of the 1951 UN refugee Convention'. Conclusion no. 39, para. (k),

shared by women worldwide. It is vital for the experience of female refugees to be universally realised and this is possible through the wider understanding of the position of women, facilitated by a familiarity with the societal constructs of their place of origin and an idea of their experiences. The experiences of women asylum seekers has been an area of traditional silence and the advances that can be made in improving the treatment of these women is very much based on the recognition of the female asylum seeker's claim as an individual, independent of her husband or family.

To satisfy the criteria of the 1951 Convention in conjunction with the 1967 Protocol, the individual must establish that 'owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, [the individual] is outside the country of his nationality and is unable . . . or unwilling to avail himself of the protection of that country.'⁷⁴ Nowhere in the 1951 Convention is persecution explicitly defined, allowing for a certain degree of flexibility in the interpretation of cases while at the same time providing room for confusion and uncertainty especially seen in the area of rape and other forms of sexual violence. Hathaway has defined persecution as 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.'⁷⁵

Seventy African female clients to the Medical Foundation in 1997–8 who had been raped had experienced violations which included vaginal and anal penetration by penis, bottle and other foreign objects. Of these rapes, 57 per cent of women were raped in a prison or a police station and over 90 per cent were carried out by either a policeman, a soldier or by some other member of a security force. And over 74 per cent of these rapes were accompanied by beatings.⁷⁶ The context of the majority of these rapes is not simply a situation of criminal intent of a male subjugating a woman to his personal sexual desires but is instead the employment of a particularly devastating form of harm by a person of

(1985), on Refugee Women and International Protection in Overview of UNHCR and International Developments Wairimu Karago given at the Symposium on Gender Based persecution. 22–23 Feb. 1996. In terms of the Convention, there has been a move towards the establishment of gender as a subdivision of the 'social' category of the membership of a particular group criteria. 'The UNHCR Executive Committee stated in its 41st session in 1990 that severe discrimination experienced by women and prohibited by CEDAW can form the basis for the granting of refugee status,' in 'Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, *Women Refugee Claimants Fearing Gender-Related Persecution*,' Immigration and Refugee Board, Ottawa, Canada 1993. For further discussion see A. Stanley & V. Tennant, 'Women Asylum Seekers: An Alternative Approach', *Immigration and Nationality Law and Practice*, Vol. 12, No. 2, 54–59, and D. Neal, Women as a Social Group: Recognising Sex-based Persecution as Grounds for Asylum, *Columbia Human Rights Review*, Vol. 20, No. 1, 1988, 203–227.

⁷⁴ 1951 Convention, Article 1 C (5).

⁷⁵ Hathaway, above n. 74, 105.

⁷⁶ Petra Clark's analysis of 209 clients from Kenya, Nigeria, Uganda, Congo and Angola to the Medical Foundation 1997–8 (unpublished).

authority. It seems that this form of ill treatment should be unequivocally interpreted as persecution. The actual details of these cases also help to envisage the experiences of some of these women, which are often too appalling or abstract to comprehend. Although asylum is clearly not a reward for past persecution but a mechanism to prevent future persecution, there is within the refugee convention provision at point 136 of the UNHCR Handbook for Procedures and Criteria for Determining Refugee Status which interprets the second paragraph of Article 1 C (5) 'a refugee . . . who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the country of nationality'.⁷⁷ The handbook expands on 'compelling' reasons as 'very serious persecution in the past', which have proved so 'atrocious' as to make repatriation unacceptable under humanitarian principles.⁷⁸ The sexual violence implemented in Rwanda would surely meet this criteria. And while no country could claim to be free from the threat of sexual violence there are unquestionably countries that take a sterner approach in combating it than others.

The importance of knowledge of the local conditions from which asylum seekers are fleeing is vital in awarding the appropriate status and a large factor in developing this understanding is to contextualise these claims within a wider picture in order to understand individual incidents of rape as part of an established procedure of degrading and inhumane treatment which take place like any other form of torture. Although it may be argued that the rape is motivated by sexual gratification it must be reiterated that in a situation of coercion and violence rape's primary function is to harm and intimidate the victim and any sexual enjoyment is a secondary result. Although as an interesting comment and contrasting opinion, a UN Expert meeting recommended that 'the number of persons at risk of persecution is irrelevant to the definition of conduct as persecution. It is agreed that serious violations of human rights meet the definition of persecution whether they are perpetrated against one or many people'.⁷⁹

The Executive Committee of the High Commissioner for Refugees encouraged the 'development and implementation of criteria and guidelines on responses to persecution specifically aimed at women . . . these guidelines should recognize as refugees women whose claim to refugee status is based upon a well-founded fear of persecution . . . including persecution through sexual violence or other gender-related persecution'.⁸⁰ Similarly, the Platform for Action

⁷⁷ 1951 Convention, Article 1 C (5) in J. Hathaway.

⁷⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, 31.

⁷⁹ UN Report, above n. 30.

⁸⁰ UN doc A/AC.96/878, III A. I. (o) in 'Gender-Related Persecution: An analysis of Recent Trends' in *IJRL* Special Issue 79 (1997).

adopted at the Beijing Fourth World Conference on Women in September 1995 called upon states to consider 'recognising as refugees those women with persecutory claims'.⁸¹ UNHCR, in 1991, issued Guidelines on the Protection of Refugee Women⁸² and there are a number of countries that have begun to introduce imitative models. The response can be seen in the Gender Guidelines which several jurisdictions *Canada, Australia, the Immigration and Naturalisation Service (INS) of the United States and the UK* have adopted in recent years to address this huge issue to both examine the meaning of 'persecution' and to develop the procedural structure for persons claiming asylum on grounds of all forms of gender-based persecution. The number of cases where it is argued that rape or sexual violence constitute persecution is small, yet this development is significant to the wider development of refugee law. These guidelines interpret persecution in the context of international and national human rights standards and 'increasingly recognize gender violence, including rape and sexual abuse, as internationally protected human rights'.⁸³ The Australian Guidelines state 'Australian case law has referred to internationally agreed standards of human rights in recognizing persecution. Whilst there are areas of uncertainty, it can generally be stated that the more fundamental the right threatened, the more likely that the breach of that right amounts to persecution'.⁸⁴ The Australian guidelines have been written with a sensitivity and understanding of this issue. They go on to state that 'rape and other forms of sexual assault are acts which inflict severe pain and suffering (both mental and physical) and which have been used by many persecutors . . . [s]uch treatment clearly comes within the bounds of torture as defined by the Convention against Torture'.⁸⁵ These guidelines, like the UK guidelines, are applicable to all levels of decision-making in the asylum process.

New Zealand has similarly implemented a careful and creative examination of sexual violence-prompted claims. New Zealand jurisprudence accepts that persecution may be defined as 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.⁸⁶ Clearly, when the violations are carried out through the direct control of the state the claim to persecution is stronger than

⁸¹ Benninger-Budel, above n. 10.

⁸² UNHCR issued a second set of guidelines addressing Sexual Violence and Refugees in 1995.

⁸³ Nancy Kelly, 189, above n. 73.

⁸⁴ Australian Guidelines, para 4.5 quoted in *Violence and Women's Refugee Status*, above n. 78.

⁸⁵ Above n. 78.

⁸⁶ Haines, R 'Gender-based Persecution: New Zealand Jurisprudence' given at the *UNHCR Symposium on Gender-based persecution* (Palais des Nations, Geneva, Feb. 1996). There are in New Zealand four situations in which there can be said to be a failure of State protection:

- (i) Persecution committed by the state concerned
- (ii) Persecution condoned by the state concerned

if the violator seems to be acting only in his individual capacity. Although the highly developed opinion applied in New Zealand has accepted that the reach of the State's power is such that it bears responsibility for persecutory acts which take place outside its direct authority and institutions by interpreting the positive obligations on a state to protect its peoples. This understanding of state responsibility can be mirrored in a number of other international judgments. The case of *Velasquez v. Honduras* at the Inter-American Court of Human Rights⁸⁷ found the State of Honduras responsible for the involuntary disappearance of Velasquez Rodriguez under the American Convention on Human Rights. The seminal decision of the court ascertained that the state was obliged to 'prevent, investigate and punish any violation of the rights recognized by the convention.'⁸⁸ This decision has international significance because of the positive obligation it infers on the state, that therefore the state's failure to punish repeated or notorious breaches of the rights to life and physical integrity breaches its obligations under customary international law. This responsibility can be established in three ways: either through a direct agent of the state, through complicity in the act, or through a failure to act. It has been argued that the anti-discrimination clause of the ICCPR can be employed to 'require that the same level of state resources used to enforce criminal acts of violence are devoted to crimes against women.'⁸⁹ General Comment 20 of the Human Rights Committee confirms this idea by affirming that states must ensure individuals' protection against acts of torture 'whether inflicted by people in their official capacity, outside their official capacity or in a private capacity.'⁹⁰ This focus on the failure to protect victims offers a framework for establishing state responsibility for gender-based violence by non-state actors, but its application to particular forms of violence has yet to be developed.⁹¹ The concept of state responsibility and its enforcement is necessary to the development of the international commitment to human rights that has to make every effort to instigate the ideals it purports to support. Whilst there will always be rogue nations for whom international profile and respectability carry little weight, treatment of refugees is an area in which those countries who do wish to demonstrate their belief in human rights can do so and guidelines can

(iii) Persecution tolerated by the state concerned

(iv) Persecution not condoned or tolerated by the state concerned, but nevertheless present because either the state refuses or is unable to offer adequate protection.

⁸⁷ Judgment of 29 July 1988, 28 ILM 294 (1989).

⁸⁸ Harris, *Cases & Materials on International Law*.

⁸⁹ Kenneth Roth in R. Cook, above n. 16, 22.

⁹⁰ C. Chinkin in 'Women's rights as Human rights under International Law' in Gearty & Tomkins (ed.) *Understanding Human Rights*, 553–572, (GB, 1996), 564.

⁹¹ D. Sullivan, above n. 10, 130.

introduce methods in which problems can be addressed. At the same time the guidelines will reinforce an international standard on the protection of this vulnerable group of women.

The fact that the number of claims made by women to claim asylum on the grounds of gender-based persecution is small can be attributed to several factors, but it is easy to say with certainty that the numbers of women declaring themselves victims of gender-based persecution is not a fair reflection on the actual figures. In the specific area of rape, it is estimated that over 50 per cent of refugee women have been raped.⁹² These figures can only be mere speculation when the women themselves are silent on the issue. A large proportion of women who are claiming asylum originate in countries where the society is dictated by a strongly patriarchal culture, where women are not involved in economic or political arenas of society and are instead very much confined to the private sphere and in cases of sexual violence 'the nexus between the individual and the state is generally more complex than in more 'public' forms of persecution.'⁹³ Violence against women often occurs in private and there is a growing debate on the level of state protection that should be provided. The incidence of domestic violence is endemic worldwide and the issue of whether protection can be given in the form of asylum has yet to be established.

This public/private divide engenders an attitude as a consequence of which women taking part in the asylum process will be totally unused to speaking and putting their case forward. The husband or father will take on the interviewing procedure entirely without input from the female. Several versions of refugee guidelines make basic recommendations such as the provision of female status determination officials, with the aid of a female interpreter when necessary, and that women asylum seekers should have the option of being interviewed independently of family members. These procedural changes are as crucial as the attitudinal change. It is also clarified that a failure to describe episodes of rape and sexual violence should not be discounted if they are submitted at a later date. It is hard for women to discuss this intimacy on the spot. It is also likely that even given the opportunity to divulge their experiences to a female official, women will again fail to discuss an experience of rape because of the stigma attached to such treatment. It is not uncommon for women from some cultures to conceal or deny a rape in order to protect her sexual integrity because of an attitude which sees a rape victim as failing to protect her sexual integrity and in some way instigating the rape. And in a similar vein women

⁹² Black Women's Rape Action Project, quoted in 'Condemned to be raped' in *The Journal*, 7 May 1999.

⁹³ Chinkin, above at n. 98, 564.

will fear the repercussions of reporting the rape which could mean rejection by her husband or family.⁹⁴ And a quite different reason for failure to report the rape is perhaps even more tragic and which occurs in situations where the rape was so ubiquitous that from her point of view it does not even need mention. For example in Kenya or Sri Lanka for a female political prisoner not to be raped would be exceptional.

Two cases which have been previously noted for their significance⁹⁵ echo this response in their interpretation of persecution, the first in the case of a Kurdish woman from Turkey whose gang rape by Turkish police meant she had suffered persecution and similarly the granting of asylum to a Kenyan woman who was raped by police officers because of her alleged political opposition. In both these cases both the issue of 'state responsibility and grounds for persecution were clear'⁹⁶ satisfying the criteria which enabled the favourable judgment. Where these factors are not as unambiguous the granting of asylum is less certain. A Ghanaian woman who was raped by police because of her father and brother's political activism had her appeal dismissed and instead was granted only exceptional leave to remain because of the psychological trauma she had experienced.⁹⁷ The same judgment was reiterated in the case of a Tamil woman who feared rape by the army in northern Sri Lanka, the opinion given was that 'atrocities such as rape would not come within the Convention . . . unless it was systematic or condoned by state inaction against the perpetrators, neither of which [the claimant] had shown.'⁹⁸ Asylum was refused to a male Sri Lankan who was sexually assaulted and raped by a soldier while being held captive on the grounds that the treatment constituted 'a deplorable but isolated incident which amounted to a criminal act but did not indicate any policy of persecution toward [the claimant]'.⁹⁹ The issue of the persecution forming a 'sustained' or 'systematic' violation of human rights is crucial, 'persecution, unlike torture, always involves a persistent course of conduct'.¹⁰⁰ These decisions reveal the misconception or at least limited understanding about the use of rape and other forms of sexual violence in conflict and persecutory situations. In the case of Sri Lanka for example there is extensive reported incidence of rape in detention which would point to a well-established strategy and reveal the erroneous assumption made by the judge in this case.¹⁰¹

⁹⁴ I am indebted to Petra Clark from the Medical Foundation for these remarks.

⁹⁵ Appeals Nos. HX/73695/95 (17 May 1996) (unreported) and HX/70880/96 (10 Feb. 1997) (unreported) in Heaven Crawley, *Women as Asylum Seekers; A Legal Handbook*, (Norwich, 1997), 59.

⁹⁶ Above n. 31, 59.

⁹⁷ Appeal No. HX/73663/94 (27 Oct. 1995) (unreported).

⁹⁸ *R v. IAT Ex p. Subramaniam* (Feb. 1999) [1999] Imm. A.R. 359.

⁹⁹ *R v. SSHD Ex p. Romy* [1999] Imm. A.R. 483.

¹⁰⁰ *Faraj v SSHD* [1999] INLR 45119 in Berkowitz, above n. 69, 8.

¹⁰¹ See M. Peel, above n. 4.

Where rape has been interpreted as persecution the decision-making body of the relevant jurisdiction will have been convinced of the political dimension of the relationship between the violator and victim, the significance in asylum claims is upon this causal link and proving it is crucial to the case. However even when this link can be proved the rape will still, on occasion, be viewed as a criminal act. A report by the Legal Aid Commission of New South Wales, Australia, remarked that not only was rape accorded little attention and often seen as irrelevant to a refugee claim, 'even where it is accepted . . . that a woman has been raped by the military or other government official, she then has to demonstrate that the person who raped her was not acting in his private capacity rather than his official capacity before it is considered relevant to her claim for refugee status.'¹⁰² Australian Refugee decisions have accorded refugee status by finding rape as part of a continuum of persecutory behaviour, but this finding is not a consistent feature of Australian jurisprudence. This inconsistent attitude illustrates a universal trend and one that is echoed in the unsuccessful case of *Campos-Guardado v. INS*¹⁰³ who failed to prove that the rape of her and the female members of her family constituted persecutory treatment. They were attacked by the same guerrillas that had tortured and killed the male members of her family, yet the Board of Immigration Appeals finally concluded that the threat of violence and the violence they faced was 'personally motivated with no political manifestation.'¹⁰⁴ However in the case of *Lazo-Majano v. INS*,¹⁰⁵ the claimant was granted asylum based on the decision that the perpetrator of the rape had imputed political opinions upon the applicant. The Appeal Court overruled the previous decision declaring: 'Persecution is stamped on every page of this record [the victim] was singled out to be bullied, beaten, injured, raped and enslaved.'¹⁰⁶ The extent to which state responsibility is thought to extend cannot be firmly calculated, for example the Canadian Federal Court of Appeal in the *Ward* case rejected the Immigration Appeal Board's finding that 'there need not be State complicity to constitute persecution'¹⁰⁷ although other decisions have contradicted the dubious decision of the *Ward* case. It is however clear that asylum judgments will be less certain if the persecution has not been either enacted 'by the state, or from which the state can provide protection but chooses not to do so.'¹⁰⁸

¹⁰² Violence and Women's Refugee Status, above at n. 72.

¹⁰³ *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987)

¹⁰⁴ Below n. 107.

¹⁰⁵ *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir.1987).

¹⁰⁶ Above n. 105.

¹⁰⁷ *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689.

¹⁰⁸ Berkowitz, above n. 69, 8.

New Zealand case law has carried several decisions where sexual violence has been found to constitute persecution. Cases in which asylum was granted include a Kashmiri Muslim woman who feared rape from the Indian army, and a Croat woman who feared rape by Serbs, on the grounds that they were in danger of persecution. A Bangladeshi woman from the Chittagong Hills who had been raped by Bangladeshi army officers and a Sikh woman who was detained by Punjabi police officers and sexually assaulted were found to have been persecuted, as was a Peruvian woman who was raped by a terrorist group after refusing to join them, and two Burmese sisters of Shan ethnicity who feared persecution including sexual violence at the hands of the Burmese army.¹⁰⁹ Canadian and United States courts and tribunals have made decisions where rape and threats of rape have clearly been understood ‘as degrading and constitute quite clearly an attack on the moral integrity of the person and hence persecution of the most vile sort’¹¹⁰ yet other cases in which the treatment would seem to have been undoubtedly persecutory have seen reverse decisions. These contrasting decisions have so far defied attempts to identify a consistent approach.

6. Conclusion

There is fundamentally a lack of cohesion underlying the attitude to the political dimension of the incidence of rape and sexual violence. Although individual jurisdictions and decisions have sometimes reached a decision that not only acknowledges the severity of the rape but also provides appropriate redress and punishment, perpetrators are able, to a great extent, to liberally harm and defile their victims with little fear of retribution. Although there is a growing body of law that supports and defends the need to prosecute individuals whose actions can be attributed to the state, such as to leave the latter in breach of its international human rights obligations, the inconsistency in practice prevents women from relying on the law in the event of their subjugation to torture through rape. The progress that has been made has not translated into concrete change; for every positive decision confirming the gravity of rape, there are dozens which fail to address this truth and explain the violence away. Despite the fact that the most significant bodies have stated that rape is torture, it is still maintained by some authorities that the experience of watching a mother or sister raped would constitute more of a bona fide form of torture than the rape itself.

¹⁰⁹ Above at n. 17.

¹¹⁰ *Smith, R. v.* (1993) 84 C.C.C. (3d) 221(N.B.C.A.).

Rape is used extensively as a form of torture and, as such, there is a strong argument for a much more forthright stance to be taken in combating it in international law. The international profile of rape and all forms of sexual violence should be raised as it is a form of violence 'which is brutal, systematic and structural [it] must be seen as no less grave than other forms of inhumane and subordinating violence, the prohibition of which has been recognized as *jus cogens* or peremptory norms by the international community.'¹¹¹ It is indicative of the status of women that sexual violence towards women has not become established as a principle of *jus cogens* despite the other developments in legal attitudes towards rape which have evolved dramatically in the last fifty years. These developments would benefit from a strong consensus of rape as torture, widespread agreement of which would reinforce the level of severity and strengthen those cases where rape is tried under one or other of these laws. The issue of state involvement, which is a significant factor of this study, has no doubt prevented the development of methods of prevention and stronger prosecution of this violence. The situation is obviously complex when the perpetrators of the crime are the same individuals responsible for the safety of the public, yet 'the official failure to condemn or punish rape gives it an overt political sanction, which allows rape and other forms of torture to become tools of military strategy.'¹¹² Torture is prohibited under international law and the gendered divide of rape should not be allowed to act as a license for its use. Governments and states at every level must be clearly informed as such. 'The impunity of the perpetrators of torture is one of the main contributing factors to its perpetuation.'¹¹³ Under the UN Convention Against Torture, states are required to take a number of courses of action. Offences which fall under the remit of torture must be prosecuted and tried under domestic criminal law and be accompanied by a preliminary inquiry. Article 10 requires 'that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment'.¹¹⁴ Moreover, Article 14 demands that 'each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate

¹¹¹ R Cook, above n. 16, 13. Cook's discussion is on the wider question of gender-based violence.

¹¹² AI report Rape and sexual abuse: Torture and ill-treatment of women in detention, 2.

¹¹³ OMCT, Violence Against Women; A Report (Geneva, 1999), 227.

¹¹⁴ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 23 ILM 1027 (1984) and 24 ILM 535 (1985).

compensation, including the means for as full a rehabilitation as possible.¹¹⁵ The Convention provides for a great deal of scope in the understanding of rape as torture although it has suffered from a lack of political will to make it more effective to circumstances in which women are the victims. The treaty body, the Committee against Torture, has 'done little in the past to integrate a gender perspective into its work . . . [and] has addressed forms of torture inflicted upon women which are basically identical to those inflicted upon men and not the gender-specific ones',¹¹⁶ a disappointing stance when it would seem appropriate for such a body to form a far more progressive approach. It is imperative that rape is prosecuted so that its gravity is publicly recognized and condemned, rather than the situation in Sierra Leone where the sexual violence went unheeded because of a blanket amnesty that was part of an accord that ended the conflict last July.¹¹⁷

Rape and sexual violence is the physical manifestation of the general subordination of women. Yet this physical element of discrimination needs to be addressed at a legal and political level in order for the less virulent forms of abuse to be combated. There are innumerable changes that could be made at procedural level, in the various legal systems that have been discussed here; more training, support and understanding could be incorporated in order that the conception of rape as torture enables women to benefit from the protection they deserve.

¹¹⁵ In fact, under Article 16 these requirements still apply if the treatment does not amount to torture but as cruel, inhuman or degrading punishment.

¹¹⁶ OMCT Report, above n. 5, 65.

¹¹⁷ Douglas Farah, 'A War against Women', www.washingtonpost.com/wp-dyn/articles/A50884-2000Apr10.html