

RECOGNIZING RAPE AS A METHOD OF TORTURE

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Introduction	821
I. History of the Prohibitions of Torture and Rape.....	823
A. The Prohibition of Torture	823
B. The Prohibition of Rape in International Law	830
II. The International Community's Failure to Link the Prohibition of Torture and the Prohibition of Rape	832
A. Addressing Women's Rights as Mainstream Human Rights ..	833
B. The Perception of Torture and Rape as Separate Offenses	843
C. The Context in Which Torture Occurs	850
III. Recognizing Rape as a Method of Torture - Article 1	853
A. The Act and the Requisite Suffering	853
1. Rape is a Physical and Mental Assault	853
2. Rape Causes Severe Pain and Suffering	854
B. The Purpose of Rape as Torture	857
1. Punishment.....	858
2. Interrogation	859
3. Intimidation or Coercion	859
4. Discrimination of Any Kind	861
C. The Requisite Person	862
Conclusion	864

INTRODUCTION

A twelve-year-old girl in Bosnia-Herzegovina is selected from among seventy detainees in a Serbian detention camp. She is raped over nine consecutive nights by various Serbian soldiers; one soldier raped her and her mother on the same night.¹ In Kashmir, India, members of the police forcibly enter a family's home. They beat the male occupants and rape the seventeen-year-old daughter.² In Peru, soldiers enter a village in an emergency zone and round up the villagers. They separate the women and children from the men. They beat or abduct the men; the women are raped.³ Guerrillas rape a young Salvadoran woman, forcing her to watch as they brutally murder her uncle and

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1. Tom Post, *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 33.

2. HUMAN RIGHTS WATCH, HUMAN RIGHTS IN INDIA: KASHMIR UNDER SIEGE, AN ASIA WATCH REPORT 60 (May 1991).

3. AMNESTY INTERNATIONAL, CAUGHT BETWEEN TWO FIRES 11 (Nov. 1989).

male cousins. The guerrillas later threaten to kill the young woman if she reports the incident. Subsequently, she is denied asylum in the United States because a judge concludes that she lacks a well-founded fear of persecution.⁴

Until recently, the atrocities committed against the female victims described above were not defined as torture. The acts perpetrated against the male victims, however, were consistently defined as such. This dichotomy between rape and torture illustrates the reluctance in the international community to recognize rape by a public official as a politically motivated offense against a woman. While acts of rape have been condemned as violations of human rights, they have rarely been identified as acts of torture, even when committed by a public official during an interrogation or as part of a governmental plan.

This Note will establish that while rape has not been treated as a method of torture, under certain circumstances it should be explicitly and unequivocally identified as such.⁵ The first section of this Note examines the history of the prohibitions against torture and rape. The second section explores the motivations underlying the failure to identify rape as a method of torture. It discusses the general failure of various international bodies to identify gender-specific violations of human rights as torture, with a particular focus on the failure to recognize rape. The final section examines the elements of torture set out in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. It demonstrates that rape has repeatedly been used as a method of torture.

The term rape as used throughout this Note should be read broadly to include any form of physical sexual assault on a woman resulting in the penetration or near-penetration of her body by any instrument or part of the anatomy, which takes place either by force or coercion.⁶ This Note limits itself to

4. *Campos-Guardado v. INS*, 809 F.2d 285, 287 (5th Cir.), *reh'g denied*, 814 F.2d 658 (5th Cir.), *cert. denied*, 484 U.S. 826 (1987).

5. This Note does not specifically address whether or when rape constitutes a war crime. This author, however, believes that allegations of rape should be examined under the principles applicable to war crimes, and under certain circumstances, be explicitly identified as such. *See infra* note 66. The author wishes to comment that this Note was written for the most part before the atrocities in former Yugoslavia came to light. While the Note addresses some of the issues raised by the situation, others unfortunately are not discussed.

6. Section 213.1(1) of the Model Penal Code defines rape as sexual intercourse between a male and a female who is not his wife if:

- (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
- (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance.

MODEL PENAL CODE (Official Draft 1962). I chose not to employ the definition of rape under the Model Penal Code because it does not reach cases where a woman is forced by circumstances to submit or consent without free will to a public official in exchange for food or other rights to which she is already entitled. *See discussion infra* text accompanying notes 259-62. Arguably, such conduct constitutes "gross sexual imposition" under Model Penal Code section 213.1(2)(a).

rape committed by public officials. Under this analysis, rape includes instances where a woman is either coerced by a public official to exchange sexual favors for certain entitlements for herself or her family⁷ or must engage in sexual intercourse because she fears for her safety.⁸

Historically, prohibitions on the use of torture and prohibitions of rape by public officials⁹ have developed independently of one another. Torture, originally an accepted method of punishment and interrogation, was first repudiated and condemned in the eighteenth century. Its prohibition under international law initially appeared in various treaties governing war. After World War II, torture was repeatedly prohibited in a succession of human rights declarations and covenants. In contrast, rape has been explicitly condemned under humanitarian law alone.¹⁰

In order to establish and emphasize that rape, under circumstances specified in Article 1 of the Torture Convention, must be recognized by the international community as a method of torture,¹¹ this discussion is limited in scope to rape of women. The absence of a discussion of the rape of men is intentional; however, it is not intended to dismiss or belittle its cruelty.¹²

I

HISTORY OF THE PROHIBITIONS OF TORTURE AND RAPE

A. *The Prohibition of Torture*

Until the eighteenth century, torture was an accepted method of punishment and interrogation within the legal institutions of various countries. It first appeared as a legitimate tool for interrogating witnesses and gathering evidence during the development of a legal system under the Greeks and Romans.¹³ Laws and custom generally regulated its use, limiting its application

7. Such instances occur with women refugees. See discussion *infra* text accompanying notes 259-62.

8. See, e.g., *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

9. The term public official is used to denote any individual identified with the State and to distinguish prohibitions on rape by authorities, which may constitute torture, from prohibitions on rape by private actors which result in criminal sanctions.

10. See *infra* text accompanying notes 58-74.

11. Sexual abuse is not discussed in this Note due to the complexity which such a discussion would add. I believe that even though similarities exist between sexual abuse and rape, the distinctions merit separate treatment. Rape, as distinct from sexual abuse, is a clearly definable act; sexual abuse, as any other abuse, includes a range of conduct which at times may amount to torture. A full discussion of sexual abuse as torture is beyond the scope of this Note.

12. The author recognizes that men may be raped as well. For example, in Turkey, prison officials use truncheons to anally rape men, before the men are due to testify in the courtroom, to discourage them from revealing the use of other forms of torture. *The Phenomenon of Torture: Hearings & Markup Before the Comm. on Foreign Affairs and its Subcomm. on Human Rights and Internal Organizations on H.J. Res. 605*, 98th Cong., 2d Sess. 10 (1984) [hereinafter *Hearings & Markup*] (testimony of Jeri Laber). The rape of men, however, is not as prevalent and does not raise the same recognition problems as does the rape of women. Where male genitalia have been physically abused, human rights monitors have consistently recognized the abuse as torture. See *infra* note 167 and accompanying text.

13. EDWARD PETERS, *TORTURE* 11-18 (1985).

to slaves accused of a crime or freemen accused of treason.¹⁴ By the thirteenth century, torture was adopted in Europe as a method employed by police to extract confessions from an accused prior to trial.¹⁵ At the same time, the Roman Catholic Church used torture in special inquisitions aimed at identifying and obtaining confessions from heretics for crimes against the Church.¹⁶

The first prohibition of torture appeared in the eighteenth century when European nations removed provisions permitting torture from their criminal codes.¹⁷ At the same time, torture was repudiated in the literature of the Enlightenment, which brought an end to the ancient justifications for torture, and for two centuries torture fell into disrepute within the legal system.

Analysts cite two distinct reasons for the condemnation of torture. According to Edward Peters, torture was condemned because it was "the institutional antithesis of human rights, the supreme enemy of humanitarian jurisprudence and of liberalism, and the greatest threat to law and reason."¹⁸ John Langbein put forth a more pragmatic reason for the transformation: the introduction of new sanctions or punishments and changes in the law of evidence.¹⁹ In the eighteenth century, sanctions other than death were introduced for lesser crimes. This development reduced the number of cases in which torture was a permitted punishment and granted judges greater latitude in selecting punishments.²⁰ Thus, through changes in the legal system, the frequency of torture decreased, and its systematic use was abandoned in England and across the European continent.²¹

Humanitarian law provisions extended the proscription of torture to time of war. Initially, provisions governing the law of war mandated a certain minimum level of treatment but did not explicitly outlaw torture. Lieber's Instructions, one of the earliest codifications of the law of war, protected a prisoner of war (POW) from "any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity."²² The Hague Conventions on Land Warfare of 1899 and 1907 similarly protected POWs from ill-treatment, albeit in vague language. It directed state signatories to treat POWs humanely²³ and forbade the killing or wounding of enemy soldiers who had laid down their

14. *Id.* at 18.

15. *Id.* at 46-47.

16. *Id.* at 53-54.

17. *Id.* at 74.

18. *Id.* at 75.

19. *Id.* at 83.

20. *Id.* at 83-85.

21. *Id.* at 90-91.

22. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, art. 56 (originally issued as General Orders No. 100, Adjunct General's Office, 1863), reprinted in THE LAWS OF ARMED CONFLICTS 11 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981).

23. Hague Conventions on Land Warfare, No. 6, July 29, 1899 & No. 7, Oct. 18, 1907, § I, ch. II, art. 4, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 22, at 70.

arms and surrendered.²⁴ The Geneva Conventions explicitly condemned the use of torture and finally extended the prohibition to the civilian population as a whole.²⁵

The twentieth century, however, has witnessed the reemergence of the practice of torture, primarily by states against their citizens, prompting a renewed and vocal condemnation of its use. The law in most countries expressly prohibits mental and physical torture;²⁶ however, non-governmental organizations and U.N. bodies report its persistent and continued use. In 1984, Amnesty International (Amnesty) released a lengthy report on the prevalence of torture worldwide.²⁷ It found that in the 1980s over one third of the governments of the world used or condoned the existence of torture in their country.²⁸ More recently, Amnesty's 1991 annual report noted that torture continues unabated in countries in four of the five continents.²⁹

Torture has repeatedly been condemned on the international level. Following World War II, a plethora of international human rights instruments extended the prohibition of torture to state signatories making them accountable to their citizens as well as other states for acts of torture.³⁰ Each covenant

24. *Id.* § II, ch. I, art. 23(c).

25. Common Article 3 outlaws the use of torture on "persons taking no active part in the hostilities." The 1949 Geneva Convention No. IV, Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter *The Geneva Convention IV*]. The Geneva Convention Relative to the Treatment of Prisoners of War proscribes physical or mental torture or any other "form of coercion" intended to elicit information from a POW. Aug. 12, 1949, art. 17, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter *The Geneva Convention I*], reprinted in part in LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACTER & HANS SMIT, *INTERNATIONAL LAW CASES AND MATERIALS* 175-85 (Basic Documents Supp. 2d ed. 1987).

26. *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment: Analytical Summary by the Secretary-General*, 19 U.N. GAOR, 30th Sess., Provisional Agenda Item 75, at 16, U.N. Doc. A/10158 (1975). The report specifically named Bahrain, Ecuador, the Federal Republic of Germany, Finland, Hungary, the Philippines, Romania, the Sudan, Swaziland, and Thailand.

27. Amnesty International was founded in England in 1961 by Peter Benenson as "a publicity campaign to highlight the 'forgotten prisoners'." AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* (1984).

28. *Id.*

29. AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT* (1991).

30. The Universal Declaration of Human Rights, adopted in 1948, first condemned torture in Article 5. G.A. Res. 217, U.N. GAOR U.N. Doc. A/810, at 71 (1948), reprinted in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 381-86. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), reiterated the Universal Declaration's prohibition. 213 U.N.T.S. 221, Europ. T.S. No. 5, reprinted in part in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 466. The 1966 International Covenant on Civil and Political Rights reintroduced the word "cruel." G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 99 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter *Political Covenant*]. The American Convention on Human Rights was signed in 1969. O.A.S., OFFICIAL RECORDS, doc. 65, rev. 1, corr. 1, Jan. 7, 1970, 9 I.L.M. 101, 673 (1970), reprinted in part in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 490-509. The African Charter on Human and Peoples' Rights, adopted in 1981, followed suit. G.A. Res. 35/197, 35 U.N. GAOR Supp. No. 48, at 208, U.N. Doc. A/35/48 (1981), reprinted in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 490-525. Ironically, however, the Standard Mini-

contained a parallel provision (often in the article governing torture and usually in the same sentence) prohibiting the use of "cruel, inhuman or degrading treatment or punishment."

Evidence compiled by international bodies and human rights organizations, which indicated the continued use of torture despite its universal condemnation, forced the international community to assume a more aggressive stance toward the use of torture over the past two decades. In 1975, the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration Against Torture).³¹ On December 10, 1984, the General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), which built upon the foundation established by the Declaration Against Torture.³² Finally, in 1985, a Special Rapporteur on Torture was appointed under the auspices of the Commission on Human Rights.³³

The Declaration Against Torture, drafted by the Fifth United Nations Conference on the Prevention of Crime and Treatment of Offenders pursuant to Resolution 3218 of the Twenty-Ninth session of the General Assembly,³⁴ contained the first international definition of torture.³⁵ Article 1 defined tor-

num Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, does not explicitly prohibit torture since it does not refer to it by name. 2076 U.N. ESCOR (259th mtg.) at 35, U.N. Doc. E/Res/1608-2130 (1977). Rule 31 of the Standard Minimum Rules bans "all cruel, inhuman or degrading punishments" but only for disciplinary offenses. *Id.* Interrogation of an accused or a convicted individual is not mentioned.

31. G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10408 (1975) [hereinafter Declaration Against Torture].

32. G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. no. 51, at 197, 23 U.N. Doc. A/39/51, I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), reprinted in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 453 [hereinafter Torture Convention].

33. The Special Rapporteur on Torture was created by the Commission on Human Rights to conduct fact-finding about the use of torture. The Rapporteur is one of five specialized thematic bodies created by the Commission. The other four bodies are the Special Rapporteur on Summary or Arbitrary Executions, the Special Rapporteur on Religious Intolerance, the Working Group on Disappearances, and the Working Group on Arbitrary Detention. See HURST HANNUM, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 70-72 (2d ed. 1992); see also Nigel S. Rodley, *United Nations Action Procedures Against "Disappearances," Summary or Arbitrary Executions, and Torture*, 8 HUM. RTS. Q. 700, 725 (1986) (discussing the Special Rapporteur on Torture, the Special Rapporteur on Summary or Arbitrary Executions, and the Working Group on Disappearances). The work of the Special Rapporteur is addressed *infra* notes 151-56 and accompanying text.

34. Elliot Klayman, *Torture in International Law*, 51 TEMPLE L.Q. 449, 479-80 (1978).

35. This is the first definition adopted by the U.N.; however, it is not the first definition of torture. Amnesty International defined torture several years earlier in its first report on torture. AMNESTY INTERNATIONAL, REPORT ON TORTURE 35 (1975). The European Court provided a working definition of torture in *The Greek Case* in the 1960s. *The Greek Case*, in YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 186 (1969) [hereinafter *The Greek Case*].

The definition is formulated in terms of the degree of pain, intent, and purposes for which torture is employed. Klayman, *supra* note 34, at 483. Klayman's article provides a good description of the materials before the United Nations General Assembly which may have affected its thinking in forging a definition.

ture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.³⁶

The Declaration Against Torture also removed any ambiguity about justifications for torture.³⁷ Article 3 stipulated that exceptional circumstances, internal political instability, or any other public emergency could not be invoked as a justification for torture or inhuman treatment. Additionally, the Declaration mandated that states criminalize the acts defined in Article 1,³⁸ provide for a right of complaint for victims,³⁹ and prosecute substantiated allegations.⁴⁰

The Torture Convention builds upon the foundation created by the Declaration Against Torture. It is distinguishable from earlier human rights instruments open for ratification as it provides a comprehensive definition of torture. Article 1 of the Convention defines torture as:

an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions.⁴¹

The definition of torture in Article 1 resembles the definition adopted in the Declaration Against Torture but with several key modifications. The Tor-

36. Declaration Against Torture, *supra* note 31.

37. The European Court defined torture in terms of justification in *The Greek Case*, *supra* note 35. The inclusion of the word "unjustifiable" has given rise to criticism of the European Court's definition since the prohibition of torture in the European Convention is stated in absolute terms and permits no exception in time of public emergency or war. See Louise Doswald-Beck, *What Does the Prohibition of "Torture and Inhuman or Degrading Treatment or Punishment" Mean? The Interpretation of the European Commission and Court of Human Rights*, 25 NETHERLANDS INT'L L. REV. 24, 37 (1978); see also Klayman, *supra* note 34, at 485.

38. Declaration Against Torture, *supra* note 31, art. 8.

39. *Id.* art. 8.

40. *Id.* art. 10.

41. Torture Convention, *supra* note 32, art. 1.

ture Convention expands the scope of what constitutes torture by recognizing additional individuals who could commit the act and the purposes for which it might be committed.⁴² Second, the Convention recognizes a broader range of illicit purposes.⁴³ Finally, Article 1 of the Convention creates an elemental description of torture, thereby moving away from earlier formulations which defined torture as an aggravated form of inhuman treatment.⁴⁴ This eases the difficulty in distinguishing acts of torture from acts of inhuman treatment and may have enormous implications for victims of abuse.

The definition in Article 1 of the Convention establishes three elements necessary for an act to constitute torture. First, there must be a physical or mental act which gives rise to a specified degree of pain or suffering. Second, the perpetrator must inflict the pain and suffering for a purpose or with an intent listed in the Article. Third, the perpetrator must be a public official or a person acting in an official capacity. The definition does not state that the act must occur in a specific setting, although the Convention embraces torture committed in prison.⁴⁵

In contrast to earlier human rights treaties, the prohibition on cruel, inhuman, and degrading treatment or punishment in the Torture Convention is set out in a separate article. While Article 16 does not expressly define inhuman treatment, the language indicates that acts of inhuman treatment or punishment fall short of the definition of torture established in Article 1 and need not be intentionally committed.⁴⁶

The Torture Convention places clear proscriptions on the use of torture

42. The Declaration Against Torture only reaches conduct committed by or at the instigation of a public official. Declaration Against Torture, *supra* note 31, art. 11. The Torture Convention, however, encompasses acts perpetrated "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Torture Convention, *supra* note 32, art. 1.

43. The Declaration Against Torture declares as illicit for purposes of obtaining a confession or information, punishment for an act or suspected act, or intimidation. Declaration Against Torture, *supra* note 31, art. 2. The Torture Convention condemns torture for these purposes for an act or suspected act, as well as torture used to coerce an individual or a third person or "for any reason based on discrimination of any kind." Torture Convention, *supra* note 32, art. 1.

44. The Declaration Against Torture and the European Court of Human Rights both define torture in terms of inhuman treatment. The European Court's formulation has caused difficulty in applying the definition of torture, resulting in an excessively high standard for identifying torture. See Doswald-Beck, *supra* note 37; R.J. Spjut, *Torture Under the European Convention on Human Rights*, 73 AM. J. INT'L L. 267 (1979).

45. See Torture Convention, *supra* note 32, arts. 10, 11.

46. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Torture Convention, *supra* note 32, art. 16; see also Maxime E. Tardu, *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 56 NORDIC J. INT'L L. 303, 309-11 (1987).

and commands states to criminalize torture in domestic law,⁴⁷ investigate allegations of torture,⁴⁸ hold public officials accountable for their individual actions,⁴⁹ punish those found guilty of committing torture in their state,⁵⁰ and extradite or punish those responsible for committing torture in other states.⁵¹ Victims of cruel, inhuman, and degrading treatment or punishment are not entitled to the same broad protections as victims of torture.⁵² States are merely obligated to systematically review their procedures for treating individuals under arrest or detention,⁵³ launch impartial investigations where inhuman treatment or punishment is alleged,⁵⁴ and ensure the existence of a forum where the complainant may have her case impartially and promptly examined. The State is under no obligation to criminalize and punish inhuman treatment or to provide redress to the victim or her family. Since torture triggers broader protective and compensatory obligations under the Convention, identification of a particular offense as torture, as opposed to inhuman treatment, has enormous significance for the victim.

The Torture Convention created a Committee Against Torture which is responsible for interpreting Articles 1 and 16 and applying them to complaints presented before it.⁵⁵ The Committee Against Torture, pursuant to Article 17, should receive state reports, information from non-governmental organizations, and complaints filed by state parties or individuals alleging torture. It has only recently commenced the process of interpreting the definition established in Article 1 and, at the time of this writing, has not yet applied the definition to a complaint pending before it.

The Torture Convention, in contrast to the Political Covenant and the European Convention, invites non-governmental organizations to participate in the process and allows them to submit credible information revealing the systematic presence of torture in a country.⁵⁶ While the provision allowing such input is not compulsory, a state must affirmatively reserve not to be bound by it and few have opted to do so.⁵⁷ The information submitted by these organizations and their interpretation of Article 1 have considerable im-

47. Torture Convention, *supra* note 32, art. 4.

48. *Id.* art. 12.

49. *Id.* art. 2.

50. *Id.* art. 4.

51. *Id.* arts. 5, 7.

52. For a discussion of state obligations to combat torture and other forms of ill-treatment, see Tardu, *supra* note 46, at 311-15.

53. Torture Convention, *supra* note 32, art. 11 (read in conjunction with art. 16).

54. *Id.* art. 12 (read in conjunction with art. 16).

55. The Committee structure resembles other U.N. treaty-based bodies, such as the Human Rights Committee under the Political Covenant. It is composed of ten experts "of high moral standing and recognized competence in the field of human rights," who serve in an individual capacity. Each state party may nominate one person from its country. Article 17 of the Torture Convention suggests that states consider nominating someone who already serves on the Human Rights Committee. See Tardu, *supra* note 46, at 315-18.

56. Torture Convention, *supra* note 32, art. 20.

57. Andrew Byrnes, *The Committee Against Torture, in THE HUMAN RIGHTS ORGANS OF THE UNITED NATIONS* (Philip Alston ed., 1992).

pact on the conclusions the Committee Against Torture draws, with respect to both methods of torture and its prevalence throughout the world.

B. *The Prohibition of Rape in International Law*

The prohibition of rape by government representatives first appeared under the laws of war. In the Middle Ages, "ordinances of war" promulgated by various Kings of England shielded women in their role as non-combatants. Several ordinances explicitly prohibited rape, making it a crime punishable by death.⁵⁸ Medieval laws of war, however, did not always spare women from rape. The law distinguished between the place and manner in which the women were violated. A woman was protected if captured on a battlefield but was vulnerable if seized during an attack on a besieged town conquered by marauding forces.⁵⁹

Humanitarian law in the nineteenth century adopted the medieval protection of women but did not always explicitly prohibit rape. In provisions governing the law of war enacted prior to the Geneva Conventions of 1949, the prohibition was vague and couched by implication in terms such as "female honour" and "family honour and rights."⁶⁰ This vague language forced the interpreter to read the prohibition into it. Lieber's Instructions for the Government of Armies of the United States in the Field in 1863 explicitly introduced the prohibition of rape in the United States. Similar to medieval law, the crime was punishable by death or "such other severe punishment as may seem adequate for the gravity of the offense."⁶¹

Rape was not condemned outright under international humanitarian law until 1949. Neither the Hague Conventions of 1899 and 1907, nor the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War mention rape. The 1929 Prisoner Of War Convention "contained a general provision too vague to afford effective protection to women prisoners."⁶² Despite the premitter of the prohibition, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties following World War I concluded that forced prostitution was a breach of the laws and customs of

58. Ordinances of War made by King Richard II at Durham (1385) and the Ordinance of War made by King Henry V at Mawnt, *reprinted in* Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 23-24 (1992).

59. *Id.* at 25-26.

60. Two authors note this implication: JEAN PICTET, 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 202 (Jean Pictet ed., 1958); YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC & FUNDAMENTAL HUMAN RIGHTS (1982) (citing RULES OF CONDUCT WITH REGARD TO PERSONS (1880) ("female honour"), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 22, at 35; and the Hague Conventions on Land Warfare 1899, 1907, art. 46, *supra* note 23 ("family honour and rights").

61. LIEBER, *supra* note 22, art. 44.

62. Meron, *supra* note 58, at 30. See The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343, *reprinted in* 27 AM. J. INT'L L. 59 (1933). The 1929 Convention was replaced by the 1949 Convention, *supra* note 25.

war and recommended that guilty parties be held criminally liable.⁶³

Rape was first explicitly condemned under the 1949 Geneva Convention No. IV, Relative to the Protection of Civilian Persons in Time of War.⁶⁴ The prohibition, diluted by imprecise language, lacked an exacting penal sanction. Article 27 states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁶⁵ Unlike other crimes, including torture, rape was not considered a grave breach of the Convention mandating sanction or extradition of the culpable party.⁶⁶

The Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) reiterates the international prohibition of rape in time of war or armed conflict.⁶⁷ In continuation of the general trend in humanitarian law of avoiding specificity when referring to rape, Article 4 does not explicitly link the prohibition of rape to women but rather applies to “all persons who do not take a direct part or who have ceased to take part in hostilities.” Ironically, the drafters’ original intent was to provide specific and special coverage to women and an earlier draft of Article 6 contained a paragraph stating that “women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution, and any other form of indecent assault.”⁶⁸ This initial assertion, granting special protection to women, was diluted throughout the drafting process and was ultimately abandoned. The drafting committee, for example, added children to the special provision,⁶⁹ then combined the provision with the main provision of Article 6⁷⁰ and later dropped the word rape entirely.⁷¹ In the final draft, a special provision on children supplanted the provision on women and the term “woman” was re-

63. KHUSHALANI, *supra* note 60, at 11-12.

64. The Geneva Convention I, *supra* note 25, reprinted in part in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 175-85.

65. *Id.* art. 27.

66. Meron, *supra* note 58, at 30-31. The drafters’ failure to specify rape as a grave breach of the Geneva Conventions has given rise to serious controversy and debate within the human rights and women’s rights communities. Women’s rights groups argue that rape should be explicitly made a grave breach of the Geneva Conventions. See Slavenka Drakulic, Op-Ed, *Rape After Rape After Rape*, N.Y. TIMES, Dec. 13, 1992, at 17. Human rights groups maintain that rape is already a war crime where it constitutes torture or “wilfully caus[es] great suffering or serious injury to body or health.” See, e.g., *Letter to the Editor*, N.Y. TIMES, Jan. 4, 1993, at A14. Human rights groups agree, however, that specificity would eliminate any doubt on the issue. Article 147 of the Fourth Geneva Convention establishes that grave breaches include torture and “wilfully causing great suffering or serious injury to body and health.” PICTET, *supra* note 60, at 596-602. Grave breaches are generally considered to constitute war crimes.

67. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 32 U.N. GAOR Annex 1 (Agenda Item 115), at 2, U.N. Doc. A/32/396, reprinted in 16 I.L.M. 1442, art. 4 (1977).

68. THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE GENEVA CONVENTIONS 137 (Howard S. Levie ed., 1987).

69. *Id.* at 158.

70. *Id.* at 170.

71. *Id.*

moved completely from Article 6.⁷²

Rape is not expressly prohibited under any of the international human rights instruments. The prohibition, however, may be read into the language, as was the case with earlier humanitarian law provisions of the documents. Under certain circumstances, rape meets the European Court's definition of torture,⁷³ as defined in the Declaration Against Torture,⁷⁴ and the definition of torture set forth in Article 1 of the Torture Convention. Historically, however, even when such circumstances were present, human rights bodies failed to link the two prohibitions.

II

THE INTERNATIONAL COMMUNITY'S FAILURE TO LINK THE PROHIBITION OF TORTURE AND THE PROHIBITION OF RAPE

Prior to the ratification of the Torture Convention and the adoption of the internationally accepted definition of torture in Article 1, rape was rarely mentioned in the human rights context. The prohibitions of torture and of rape stood as isolated pillars, firmly grounded in international law but ideologically distinct. The human rights community acknowledged the existence of abuse with respect to rape allegations, but it failed to conceptualize such abuse as torture.

The failure to identify rape as a method of torture is partially rooted in a systematic blindness to the connection between issues of gender and gross human rights violations.⁷⁵ The fact that torture was defined in terms of inhuman treatment or punishment presented an additional problem.⁷⁶ When allegations of rape were reviewed, the rape was identified as a form of inhuman or degrading treatment, but not as a form of torture. The underlying assumption was that rape was a sexually, rather than politically, motivated offense.⁷⁷

The introduction of the State's responsibility to punish torturers and provide civil redress for its victims underscores the importance of identifying acts of rape as torture. While cruel, inhuman, and degrading treatment is prohibited, the Torture Convention imposes less onerous obligations upon states with respect to such treatments. Prior to the ratification of the Torture Convention, a state's obligation to punish those who torture, as opposed to those who inflict inhuman treatment, was debated within the international community.

72. *Id.*

73. *See supra* note 35.

74. *See supra* text accompanying notes 34-40.

75. Jessica Neuwirth, *Towards a Gender-Based Approach to Human Rights Violations*, 9 WHITTIER L. REV. 399 (1987).

76. *See infra* text accompanying note 130.

77. *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, *THE EVENTS IN EAST PAKISTAN* 41 (1971). The International Commission of Jurists assumed that young girls and women were kept by the Pakistani troops for their sexual pleasure. The report makes no effort to link the rapes to the Pakistani Army's stated purpose to brutalize the Bengali people in order to break their spirit during the civil war.

This debate was, however, largely academic.⁷⁸ Most conventions required that a state provide civil remedies where protected rights were violated, without distinguishing between torture and cruel and inhuman treatment or punishment. The clear mandate, under the Torture Convention, creates a substantive difference in remedies available to a victim.

Both Amnesty and the Special Rapporteur on Torture have recognized rape as a method of torture. This recognition followed in the wake of the ratification of the Torture Convention in 1985 and the adoption of an internationally accepted definition of torture in Article 1. The identification of rape as a method of torture, however, is incomplete. While both Amnesty and the Special Rapporteur have identified rape as torture, neither has set forth a clear standard for distinguishing between instances of rape which should be classified as torture and instances which would be more properly classified as inhuman treatment. Not every instance of rape constitutes torture, just as other forms of physical or mental abuse do not always rise to the level of torture.

The discussion below identifies several problems in the international community's approach to reviewing allegations of torture and rape. The Committee Against Torture and the human rights community must reassess their understanding of the link between rape and torture to provide women with equal protection from these treatments.

A. Addressing Women's Rights as Mainstream Human Rights

The failure to identify rape as a method of torture is rooted in the international community's predilection for addressing women's issues in terms of discrimination rather than in terms of mainstream human rights abuse. There exists an institutional division between those intergovernmental bodies created to monitor violations of *women's* rights and those established to deal with gross or mainstream violations of *human* rights. As a result, violations of women's human rights, particularly gender-specific methods of abuse, are not effectively reported so as to highlight the overlap with the broader category of human rights. The absence of an explicit recognition that rape can be employed as a method of torture is merely one example of this institutional failing.

Presently, two international bodies directly address the issue of women's human rights: the United Nations Commission on the Status of Women (Women's Commission) and the Committee on the Elimination of Discrimination Against Women (CEDAW). The Women's Commission was founded in 1946 by the United Nations Economic and Social Council (ECOSOC)⁷⁹ and func-

78. See generally Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451 (1990).

79. See generally Sandra Coliver, *United Nations Commission on the Status of Women: Suggestions for Enhancing its Effectiveness*, 9 WHITTIER L. REV. 435 (1987); Margaret Galey,

tions primarily as a monitoring body. It oversees the implementation of programs created to advance the role of women in social and economic development, suggests means to increase the participation of women in the U.N., and coordinates U.N. programs on women.⁸⁰ CEDAW was created pursuant to Article 17 of the Women's Convention. Similar to other conventional bodies, its jurisdiction is restricted to reports filed before it by states which are parties to the Convention.

The distinction made between women's rights and mainstream human rights is made clear by the fact that the Women's Commission lacks the authority possessed by other similarly constituted U.N. bodies to address gross violations of human rights. Furthermore, it works under a far more restrictive procedure. The Women's Commission was directed to "prepare recommendations and reports . . . on promoting women's rights in political, economic, civil, social and educational fields . . . [and to] make recommendations on urgent problems requiring immediate attention in the field of women's rights."⁸¹ Its ameliorative powers, however, are narrow. While the Women's Commission is empowered to receive complaints alleging violations of women's rights, the most the Commission can do is report that it has "taken note" of the complaints.⁸² It has no additional authority to address the problem, to suggest a remedy, or to comment on the pervasiveness of the abuse. These responsibilities have changed little over the years.

At the same time the Women's Commission was created, ECOSOC created a second body, the Human Rights Commission. ECOSOC directed the Human Rights Commission to:

[s]ubmit[] proposals, recommendations and reports to the [ECOSOC] regarding: . . . an international bill of rights; international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters; the protection of minorities; the prevention of discrimination on grounds of race, sex, language or religion; and any other matter concerning human rights not covered by the above.⁸³

The Human Rights Commission has considerably more authority to act than the Women's Commission. First, it meets every year while the Women's Commission is empowered to meet only every two years. Secondly, the Human Rights Commission is authorized to create subcommissions, which may meet outside the regular annual meetings of the Commission, to investigate particular concerns. Finally, while the jurisdiction and authority of the

International Enforcement of Women's Rights, 6 HUM. RTS. Q. 463 (1984) [hereinafter Galey, *International Enforcement*].

80. Coliver, *supra* note 79, at 436.

81. LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 526 (1973).

82. Galey, *International Enforcement*, *supra* note 79, at 465.

83. SOHN & BUERGENTHAL, *supra* note 81, at 524.

Women's Commission has changed little since 1947, the ECOSOC has granted the Human Rights Commission increased authority to combat gross human rights violations. For example, in 1967, the ECOSOC approved a resolution enabling the Human Rights Commission to receive thousands of communications regarding human rights violations annually. Further, in 1970, a second resolution was approved, enabling the Human Rights Commission to transmit egregious or gross violations of human rights to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.⁸⁴ These resolutions enable the Human Rights Commission to enter into direct communication in private sessions with governments to hold them accountable for their actions.⁸⁵

The ECOSOC has never extended the authority of the Women's Commission. The Women's Commission has focused its energies on holding worldwide conferences and initiating change within the U.N. treaty system. In addition to emphasizing the inequalities between men and women in the enjoyment of political, civil, and economic rights, these conferences have centered on attacking the barriers erected by states which deny women equal rights, inter alia, in voting, marriage, political life, education, and employment.⁸⁶ Initially, the Women's Commission helped draft the first U.N. Convention on women's rights. Although conventions addressing women's rights extend back to the early twentieth century, most were merely protective of women, doing little to remove the social, political, economic, and other barriers women faced.⁸⁷ In 1976, the General Assembly adopted the Declaration on the Elimination of All Forms of Discrimination Against Women. This declaration, authorized by the Women's Commission, was the first instrument to define the standard of discrimination against women. It was modified by the General Assembly and became the Women's Convention which was entered into force in 1981.⁸⁸

The Women's Commission has introduced a variety of measures designed to increase awareness of women's rights and to eliminate the barriers between men and women. Through the initiative of the Women's Commission, 1975 was designated International Women's Year, and a world conference on wo-

84. The Sub-Commission was created by the Human Rights Commission during its first session in 1947. It authorized the Sub-Commission to undertake studies concerning discrimination of any kind, with particular reference to the Universal Declaration of Human Rights, and to perform any other responsibility requested by ECOSOC. *Id.* at 525.

85. Galey, *International Enforcement*, *supra* note 79, at 467.

86. See Natalie Kaufman Hevener, *International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women*, 1 HARV. WOMEN'S L.J. 131 (1978).

87. *Id.*

88. The Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979), reprinted in part in RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* 220.1 (1986).

men's rights was held in Mexico City.⁸⁹ At the conference, a World Plan of Action to improve efforts in the areas of women's education, employment, and health was adopted.⁹⁰ Additionally, 1976-85 was declared the U.N. Decade for Women. During this period two conferences were held to monitor the implementation of the principles adopted in Mexico City.⁹¹

Only recently has the Women's Commission addressed the issue of violence against women, particularly physical abuse at the hands of public officials. This discussion, however, has not taken place within the context of torture. The notion that women endure alternate forms of torture and other physical or psychological human rights violations, solely because they are women, has been raised only in reports authored by non-governmental bodies.⁹²

The interplay between torture and rape has never been explored by the Women's Commission. In fact, the question of rape, either by a private individual or public official, was not examined by any intergovernmental body until 1985, when the Women's Commission released its first report on violence against women in detention. While the Women's Commission has recognized the prevalence of gender-specific abuse of detained women and the plight of female refugees, the language employed by the Commission in its reports and recommendations is vague. No attempt is made to identify physical abuse as torture and the term rape is referred to only by implication.⁹³ The Women's

89. Margaret Galey, *Promoting Nondiscrimination Against Women: The U.N. Commission on the Status of Women*, 23 INT'L STUD. Q. 273 (1979).

90. *Id.*

91. See REPORT OF THE WORLD CONFERENCE OF THE UNITED NATIONS DECADE FOR WOMEN: EQUALITY, DEVELOPMENT AND PEACE, U.N. Doc. A/CONF.94/35, U.N. Sales No. E. 80.IV.3 (1980); see also WORLD CONFERENCE TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE UNITED NATIONS DECADE FOR WOMEN: EQUALITY, DEVELOPMENT, AND PEACE, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. E.85.IV.10 (1985).

92. See, e.g., AMNESTY INTERNATIONAL, *WOMEN IN THE FRONT LINE* (1990); AMNESTY INTERNATIONAL, *RAPE AND SEXUAL ABUSE: TORTURE AND ILL-TREATMENT OF WOMEN IN DETENTION* (1991).

93. The reports labeled the abuse "physical violence against detained women that is specific to their sex." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, 31ST SESS. COMMISSION ON THE STATUS OF WOMEN, *PHYSICAL VIOLENCE AGAINST DETAINED WOMEN THAT IS SPECIFIC TO THEIR SEX: REPORT OF THE SECRETARY GENERAL*, U.N. ESCOR, 31 Sess., Oct. 1, U.N. Doc. E/CN.6/1986/11 (1986) [hereinafter 1986 COMMISSION ON THE STATUS OF WOMEN REPORT]; see also UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, 34TH SESS. COMMISSION ON THE STATUS OF WOMEN, *WOMEN IN AREAS AFFECTED BY ARMED CONFLICTS, FOREIGN INTERVENTION, ALIEN AND COLONIAL DOMINATION, FOREIGN OCCUPATION AND THREATS TO PEACE: REPORT OF THE SECRETARY GENERAL*, U.N. Doc. E/CN.6/1990/4, at 3 (1990) (asserting that women and children in armed conflicts and emergency situations risk "physical abuse"). Rape is specifically mentioned only in reference to refugee women. *Id.* at 13.

Cf. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, 32ND SESS. COMMISSION ON THE STATUS OF WOMEN, *REPORT OF THE SECRETARY-GENERAL ON PHYSICAL VIOLENCE AGAINST DETAINED WOMEN THAT IS SPECIFIC TO THEIR SEX*, U.N. Doc. E/CN.6/1988/9, at 5-7 (1988) [hereinafter 1988 COMMISSION ON THE STATUS OF WOMEN REPORT]. The report is based on state responses to questions about physical violence against detained women that is specific to their sex. Rape is not mentioned by the Commission but at the initiative of the state parties in reference to their laws.

The resolutions of the United Nations Congress on the Prevention of Crime and Treatment

Commission examined physical violence against imprisoned women on two occasions, but has never dealt with this subject within the context of torture. The Commission first sent correspondences to member nations requesting information on gender-specific violence against detained women in 1986.⁹⁴ The resulting report was only three pages long due to the poor response from the nations queried.⁹⁵ While rape was identified as an act of physical violence directed at women, not a single state acknowledged that prison officials had been accused of, or prosecuted for, raping female inmates.⁹⁶ The state responses reveal a tendency toward identifying the problems of female inmates as ones of maternity and motherhood. Many states focused primarily on the application of criminal sanctions against women who were pregnant or mothers of young children.⁹⁷

The second report contains considerably more data because a greater number of states responded to the questionnaire.⁹⁸ It provides a discussion of the laws governing the treatment of inmates and the special provisions protecting detained women, including prohibitions of rape. At the same time, the report fails to provide insight into gender-specific abuses which have occurred, been investigated, or prosecuted. Remarkably, the prohibition against torture was mentioned by several states, yet only one state⁹⁹ linked that prohibition to

of Offenders also suffers from the use of vague language. REPORT OF THE SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, U.N. Doc. A/CONF.121/22 (1985) [hereinafter U.N. SEVENTH CONGRESS]; U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, SIXTH U.N. CONGRESS ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, at 13, U.N. Doc. A/CONF.87/14/Rev.1, U.N. Sales No., E.81.IV.4 (1981) [hereinafter U.N. SIXTH CONGRESS]. While the U.N. SIXTH CONGRESS recognized that women as prisoners had distinctive problems which set them apart from men, the Congress' resolution on the subject implied a traditional limitation to pregnancy and childcare without noting the physical violability of women as prisoners and their susceptibility to rape. U.N. SIXTH CONGRESS, at 12-13. The U.N. SEVENTH CONGRESS elaborated slightly more on the issues affecting female detainees and victims. Its resolution reveals a growing awareness that women are particularly susceptible to certain abuses but it does not specify what constitutes the "particular situations." U.N. SEVENTH CONGRESS, at 76.

94. 1986 COMMISSION ON THE STATUS OF WOMEN REPORT, *supra* note 93, at 1; *see also* 1988 COMMISSION ON THE STATUS OF WOMEN REPORT, *supra* note 93, ¶ 1.

95. Eighteen countries replied: Argentina, Belgium, Bulgaria, Byelorussia Socialist Republic, Chad, Chile, the Federal Republic of Germany, Kuwait, Luxembourg, Poland, Portugal, Sweden, Ukraine, the USSR, the United Kingdom of Great Britain and Northern Ireland, and Zimbabwe. New Zealand replied but provided no information. 1986 COMMISSION ON THE STATUS OF WOMEN REPORT, *supra* note 94.

96. *Id.* at 1.

97. *Id.* at 2. The states provided the most detail about penal provisions or regulations which gave special treatment to women who were pregnant, breast-feeding, or had young children.

98. 1988 COMMISSION ON THE STATUS OF WOMEN REPORT, *supra* note 93. A total of forty-one countries replied to the questionnaire. *Id.* at 3.

Amnesty International, which has consultative status with the U.N., submitted a statement at this time in which it stated that rape should be understood as a form of torture. 1988 COMMISSION ON THE STATUS OF WOMEN REPORT, *supra* note 93, at 2. Amnesty International's statement was neither mentioned nor referred to by the Women's Commission.

99. China. 1988 COMMISSION ON THE STATUS OF WOMEN REPORT, *supra* note 93, at 7.

women, even though the intent of the report was to assess gender-specific physical violence against detained women.

The Committee on the Elimination of Discrimination Against Women (CEDAW), like the Women's Commission, has been granted limited authority to address violations of women's rights.¹⁰⁰ CEDAW, which operates under the Women's Convention, addresses neither the prohibition against torture, nor the right to life, both of which are commonly linked to mainstream human rights abuses. Only Article 6 provides some guarantee of physical integrity for women. Under that article, state parties agree to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."¹⁰¹ A proposal to include the words "and attacks on the physical integrity of women" was rejected.¹⁰² One analyst commented that while it was not clear what the amendment was meant to cover, "it seems that it would have committed State Parties to take all measures to prevent sexual crimes, such as rape, which violate the physical integrity of women."¹⁰³ The other articles are aimed at changing or eradicating political, economic, cultural, and social barriers which adversely affect women. Finally, in contrast to committees which address mainstream human rights, CEDAW is not empowered to receive individual communications or complaints against state parties alleging violations of rights secured by the Convention.

CEDAW recently adopted a report which may enable it to overcome some of the shortcomings of the Women's Convention.¹⁰⁴ In the report, CEDAW concluded that gender-based violence against women, including rape by public officials, constituted discrimination in violation of Article 1 of the Women's Convention.¹⁰⁵ Specifically, CEDAW asserted that:

Gender based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include . . . the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.¹⁰⁶

100. For a brief discussion on the basic inadequacies of the Women's Convention and CEDAW, see Theodor Meron, Comment, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT'L L. 213 (1990). In his editorial marking the tenth anniversary of CEDAW, Meron criticized the language of the Women's Convention and the location of its bodies. He concluded, "as a result, . . . the struggle against sex discrimination has not benefited from some salutary innovations in U.N. human rights procedures." *Id.* at 215; see also Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETHERLANDS INT'L L. REV. 419 (1985).

101. Women's Convention, *supra* note 88, art. 6.

102. Burrows, *supra* note 100, at 431.

103. *Id.*

104. U.N. CEDAW, 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/15 (1992).

105. *Id.* at 2.

106. *Id.*

It asked state parties to provide information on their laws and policies concerning gender-based violence in their reports.¹⁰⁷ This change, however, merely addresses weaknesses in the reports received from state parties. CEDAW is still precluded from receiving individual complaints alleging violations of rights secured under the Women's Convention.

Other conventional human rights bodies which address mainstream human rights abuses have not filled the void, under either the prohibition against torture or the provisions prohibiting gender discrimination.¹⁰⁸ A notable example is the extensive record of the Human Rights Committee. The Human Rights Committee was created pursuant to Article 28 of the Political Covenant.¹⁰⁹ It is empowered to receive communications filed by state parties to the Political Covenant who claim that a second state party is not complying with the terms of the Covenant,¹¹⁰ as well as complaints filed by individuals who claim to be victims of a violation by a state party.¹¹¹

Torture is prohibited by Article 7 of the Political Covenant which mandates that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."¹¹² The Human Rights Committee has generally linked the prohibition in Article 7 to the affirmative obligation in Article 10(1)¹¹³ which requires that a state party treat all persons deprived of their liberty "with humanity and respect for the inherent dignity of the human person." The Committee has a long history of receiving allegations of torture in violation of Article 7 and Article 10(1), the bulk of which originate in Latin America.¹¹⁴

The Political Covenant guarantees equality and the right to be free from discrimination in Articles 2(1), 3, and 26. Article 2(1) obligates each state to

107. Women's Convention, *supra* note 88, art. 18. (Under Article 18 of the Women's Convention, states must submit reports for consideration by CEDAW one year after ratifying the Convention and every four years thereafter.)

108. The Political Covenant, the European Convention, and the American Convention all contain provisions prohibiting discrimination on the basis of sex, but none focus their attention primarily on such issues. Discrimination on the basis of sex is prohibited by Article 1 of the American Convention. The Political Covenant contains provisions prohibiting discrimination in Articles 2(1), 3, and 26. The European Convention, in Article 14, mandates that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex. . . ." The non-discrimination principle has never been linked to gross violations of human rights.

109. Political Covenant, *supra* note 30.

110. *Id.* art. 41.

111. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 383 (1967), *reprinted in part in* HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 400-02.

112. Political Covenant, *supra* note 30. The general comment was later replaced without significant change. General Comment No. 20 (44), U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992).

113. *Report of the Hum. Rts. Comm.*, General Comment 7(16), U.N. GAOR, 37th Sess., Supp. No. 40, U.N. Doc. A/37/40 (1982).

114. The majority are from Uruguay and arise out of the internal conflict which gripped the nation in the 1970s and early 1980s.

guarantee the rights set forth in the Political Covenant to all individuals, without regard to sex or other distinctions. Article 3 mandates that states ensure the equal rights of women and men in their respective enjoyment of the rights set forth in the Covenant. Article 26 provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Human Rights Committee, however, has largely ignored the issue of gender in assessing and identifying violations of Article 7 or Article 10(1). Under its general power to interpret and determine the scope of the various articles of the Political Covenant, the Human Rights Committee has failed to state that rape may be an act of torture or that gender should be a consideration in assessing violations of either article.¹¹⁵ When the Human Rights Committee commented on the scope of the non-discrimination principle, it explicitly adopted the definition of sex discrimination enunciated by the Women's Convention. It made no effort, however, to clarify the definition with specific references to rights guaranteed in the Political Covenant. No reference was made to the prohibition against torture (Article 7) or to the interplay between gender and mainstream human rights abuses.¹¹⁶

This policy shortfall results in the absence of individual complaints alleging a gender-specific violation under either article. None of the individual complaints filed by women mentions rape, sexual assault, or any other form of sexual harassment suffered while in detention or state custody.¹¹⁷ Since the Human Rights Committee does not have authority to investigate and make independent findings of fact,¹¹⁸ a complainant must explicitly allege rape or

115. The Human Rights Committee commented on the scope of Article 7 in 1987. The Human Rights Committee had at least two opportunities to recognize that gender should be a consideration in assessing allegations of human rights abuses. First, when it issued its general comments on the scope of Article 7, the Committee could have mentioned gender-based violations. General Comment 7(16), *supra* note 113. Second, the Human Rights Committee had an opportunity to discuss gender when it issued general comments on the principle of non-discrimination in Article 26. *Report of the Hum. Rts. Comm.*, General Comment 18(37), U.N. GAOR, 45th Sess., Supp. No. 40 U.N. Doc. A/45/40 (1990) [hereinafter General Comment 18(37)].

116. General Comment 18(37), *supra* note 115, at 90.

117. One complaint filed by a woman, alleging torture and inhuman treatment, alludes to alleged threats to use more effective ways than conventional torture to make her talk. The communication does not specify what these threatened actions were. *Report of the Hum. Rts. Comm.*, Communication No. R.9/37, Submitted by Esther Soriano de Bouton (June 7, 1978), U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981). This absence is striking since rape and sexual abuse have been identified as common forms of ill-treatment and torture throughout the world. AMNESTY INTERNATIONAL, *WOMEN IN THE FRONT LINE*, *supra* note 92.

118. The Human Rights Committee's power to resolve individual complaints is set out in the Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S.

another gender-based abuse in violation of either article. This creates a vicious cycle whereby gender-based violations are ignored. Women do not petition the committee because rape has not been identified as a method of torture in contravention of Article 7 or Article 10(1) and the Committee does not review such complaints because none are filed.¹¹⁹

The most recent example of the dichotomy is evidenced by the State Department's method of reporting human rights abuses against women. The State Department began reporting on human rights abuses suffered by, or directed at, women in its "Country Reports on Human Rights for 1989."¹²⁰ The new initiative is the result of a 1989 Congressional decree directing the State Department to "pay special attention" to physical abuses against women.¹²¹ Interestingly, the decree lists dowry deaths, genital mutilation, and wife beating as specific abuses to be reported, but did not mention rape or other mainstream human rights abuses. In addition, the directive to report human rights abuses against women was given in the instructions for the section on "Discrimination Based on Race, Sex, Religion, Language or Social Status" and was not a general instruction to include abuses against women wherever they arose under the other sections of the Reports.

As a result, mainstream human rights abuses endured by women were not discussed qualitatively. The State Department discussed violations against women primarily in the section entitled "Discrimination Based on Race, Sex,

171, 6 I.L.M. 383 (1967), reprinted in HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 400. Under the Protocol, the Committee may receive communications only from individuals in those countries which have recognized the competency of the Committee. The individual must first exhaust all available domestic remedies unless the state prolongs review for an unreasonable period of time. Next, the individual must provide a written communication establishing the basis for the violation. The state party is then provided an opportunity to respond and provide an explanation or clarification. Article 5 of the Protocol clearly states that the ultimate resolution shall be based on "all written information made available to it by the individual and by the State party concerned." *Id.*

119. I do not imply that the Human Rights Committee alone is responsible for the general misperception about rape, and I recognize that other factors may prevent a woman from filing a complaint before the Human Rights Committee. Nonetheless, the Committee's failure to speak when it had the opportunity to do so is significant.

The failure of the Human Rights Committee to treat human rights abuses against women as gross violations of human rights was apparent at its March 1992 session at the United Nations in New York. This author, in conjunction with the Lawyers Committee for Human Rights and other organizations, presented the Human Rights Committee with information about widespread rape by the military in emergency zones and the indifferent response of the respective government. Only one member of the Committee, Bertil Wennergren, the representative from Sweden, referred to rape in any form and he did so only in the context of Peru's law on abortion. He asked whether rape victims were entitled to obtain an abortion. Hum. Rts. Comm., U.N. GAOR 35th Sess., 1134th Meeting, U.N. Doc. HR/CT/180 (1992) (press release) (on file with the author).

120. INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, HUMAN RIGHTS ABUSES AGAINST WOMEN: A WORLDWIDE SURVEY 2 (1990) [hereinafter INTERNATIONAL LEAGUE SURVEY] (containing excerpts from the U.S. STATE DEPARTMENT'S 1990 COUNTRY REPORTS ON HUMAN RIGHTS). The Reports are an annual survey of human rights conditions throughout the world compiled in each country by foreign service officers.

121. *Id.*

Religion, Language and Social Status"¹²² and, at times, failed to cross-reference these abuses in other sections which specifically addressed the issue.¹²³ Furthermore, the Reports focus primarily on abuses suffered by women in the private sector, at the hands of private actors. Rape by public officials, such as rape in detention, rape by the military, or remedies for rape or other abuses suffered at the hands of public officials are rarely discussed. Rape by public officials is mentioned in only seven countries¹²⁴ and is noticeably absent from the report on Peru.¹²⁵ Furthermore, rape by public officials is not mentioned in the section on torture.¹²⁶

The State Department revised the instructions in its directive in 1990. The new directive explicitly stated that:

If there is a pattern of rape and other sexual abuse of women, either during arrest and detention or as a result of operations by government or opposition forces in the field that should be discussed [in the section entitled torture and other cruel, inhuman or degrading treatment or punishment].¹²⁷

This change closed the loophole which had existed under the earlier directive and targeted abuse committed by public officials. As a result, rape, sexual abuse, and other methods of inhumane treatment of women at the hands of public authorities was mentioned,¹²⁸ and at times discussed at length,¹²⁹ in the torture and inhuman treatment section of the report.

To accord women equal protection under the universal prohibition against torture, women's rights must be analyzed and discussed, not only under the principle of non-discrimination, but also within the larger context of

122. *Id.*

123. *Id.* at 5.

124. Burma, El Salvador, Honduras, Iran, Somalia, Sudan, and Zaire. The list is not exhaustive since allegations of rape were included in the report only if filed by U.S. foreign service officers in that country. *Id.* at 2.

125. *Id.* at 5. Amnesty International has repeatedly reported widespread rapes by members of the Peruvian military in emergency zones. See, e.g., AMNESTY INTERNATIONAL, PERU: HUMAN RIGHTS IN A CLIMATE OF TERROR 39-41 (1991); CAUGHT BETWEEN TWO FIRES, *supra* note 3, at 10-11; see also AMERICA'S WATCH IN DESPERATE STRAITS: HUMAN RIGHTS IN PERU AFTER A DECADE OF DEMOCRACY AND INSURGENCY, AN AMERICAS WATCH REPORT 72 (1990).

126. The International League restricted its criticism to the failure to identify rape in detention as torture. This author would extend that criticism to all rape by public officials which may constitute torture under Article 1 of the Torture Convention. See *infra* Part II.C.

127. U.S. STATE DEPARTMENT, DOS INSTRUCTIONS FOR THE PREPARATION OF 1991 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (on file with the author).

128. U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991 (1992) [hereinafter COUNTRY REPORTS 1991]; see, e.g., INTERNATIONAL LEAGUE SURVEY, *supra* note 120, at 102 and the discussion under the following countries: Botswana, Cameroon, Cote d'Ivoire, Egypt, El Salvador, Ethiopia, India, Kenya, Malawi, Pakistan, and Togo. A discussion of rape was still noticeably absent from the country report on Peru. See PERU: HUMAN RIGHTS IN A CLIMATE OF TERROR, *supra* note 125.

129. The widespread use of rape in prisons and by the military was discussed in depth in the section on Pakistan. COUNTRY REPORTS 1991, *supra* note 128, at 102.

mainstream human rights. While abuses of women's rights are partially the result of discriminatory practices in a state, many such abuses fall within the broad restrictions on a state's right to torture, kill, or otherwise mistreat individuals under its control. The underlying motivations for violations of women's rights are not solely related to gender, but rather, are often the same as those which lead to the violation of men's rights. Since the torturer employs rape in order to achieve the same purposes as any other act of torture, such acts should be accorded the same legal treatment. As demonstrated by the change made in the State Department directive, abuses directed against women will be identified as mainstream human rights abuses only when monitoring bodies assume an affirmative responsibility to report the abuse as such.

B. *The Perception of Torture and Rape as Separate Offenses*

Rape and torture have consistently been viewed as distinct offenses by the international community. As mentioned above, rape has been addressed, for the most part, under humanitarian law, not traditional human rights instruments. Over the last forty-five years, since the advent of international human rights monitoring, rape has garnered only sporadic attention. While several international human rights bodies have acknowledged that rape is a human rights abuse, rape has consistently been analyzed apart from other forms of torture or abuse, both semantically and substantively. As a result, rape is the only form of physical aggression that a torturer may employ which has not been consistently identified as torture.

This separation stems from the perception of rape as a sexually or privately motivated offense rather than a politically motivated one.¹³⁰ Thus, allegations of rape have consistently been assessed differently from other acts of physical violence committed by public actors. When rape has been identified as a human rights abuse it is labeled as "ill-treatment" rather than torture. When a woman has endured other forms of torture in addition to rape, the abuse is labeled as "torture and rape."

The most striking example of this approach occurred in *Cyprus v. Turkey*,¹³¹ a case presented before the European Commission of Human Rights (European Commission).¹³² The case stemmed from Turkey's invasion and partial occupation of Cyprus in July 1974. The Cypriots alleged violations of numerous rights under the Convention, including the rights secured under Ar-

130. Charlotte Bunch, *Women's Rights as Human Rights: Toward a Revision of Human Rights*, 12 HUM. RTS. Q. 486, 488 (1990).

131. 4 Eur. H.R. Rep. 482 (1982).

132. The European Commission is part of a two-tier system under the European Convention, *supra* note 30. Its task is to review alleged violations of the Convention. Within this system, the European Commission reviews complaints filed either by state parties alleging that a signatory state has violated the European Convention or by individuals who claim to be victims of a violation of a right secured under the Convention. Cases may then be referred by the Commission to the Court for a determination. The European Court's jurisdiction is limited in contentious matters to cases referred to it by the European Commission.

ticle 3. The government accused the Turks of wholesale and repeated rapes of women of all ages and mental conditions, including enforced prostitution. Women and girls from various villages were collected by the troops, placed in houses, and raped. Many rapes were accompanied by brutal abuse or were followed by the killing of the woman. The European Commission concluded that the acts were imputable to Turkey and constituted inhuman treatment in contravention of Article 3 of the Convention.¹³³ The Commission did not assess whether the rapes fell short of torture.

When *Cyprus v. Turkey* came before the European Commission, the Torture Convention and its definition of torture was not yet in force.¹³⁴ Torture, however, was defined in the Declaration Against Torture, which had been adopted by the General Assembly the previous year.¹³⁵ The European Commission's conclusion in *Cyprus v. Turkey*, when examined under the definition of torture in the Declaration Against Torture, cannot withstand criticism.¹³⁶ Application of the three element test for torture as established by Article 1 in the Declaration Against Torture should have led the European Commission to conclude that the rapes constituted torture.¹³⁷

The facts of the case reveal that every element of the definition of torture in the Declaration Against Torture was present. The first element requires the use of a physical or mental assault giving rise to severe pain or suffering. It

133. 4 Eur. H.R. Rep. at 537.

134. The Convention was ratified in 1984. See *supra* note 30.

135. The case was decided in 1976, one year after the Declaration Against Torture was adopted by the General Assembly. See *supra* text accompanying note 36 for the definition of torture under the Declaration.

In addition, the European Court, the reviewing body above the Commission, developed a working definition of torture and inhuman treatment in the Greek Case.

[I]nhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. Torture is often used to describe inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. . . .

The Greek Case, *supra* note 35.

The Court added another element. It determined that Article 3 was implicated only if the torture or inhuman treatment was committed by a "person exercising public authority." *Id.* at 195. The definition viewed as a whole closely resembles the definition in Article 3 except for the European Court's use of the word "unjustifiable."

136. Cyprus alleged that the rapes amounted to ill-treatment within the meaning of Article 3. Even so, the prohibition against torture is contained within the same article. When presented with such profound evidence of abuse, the Commission should not have limited itself given the precedential effect of its decision. Interestingly, twenty years later, European Community leaders condemned similar acts perpetrated in Bosnia-Herzegovina against Muslim women as a crime against humanity. Alan Riding, *European Inquiry Says Serbs' Forces Have Raped 20,000*, N.Y. TIMES, Jan. 9, 1993, at A1. The passage of time does not excuse the European Commission's failure to judge and condemn the acts committed in Cyprus under the most severe standard available.

137. The European Commission should have reached the same result — that the rapes were torture — had it applied the definition adopted by the European Court in the Greek Case. See *supra* note 35. The Commission itself acknowledged that the inhuman treatment caused severe suffering, the brutality was purposefully wrought on the Cypriots, and Turkey was responsible. 4 Eur. H.R. Rep. at 537-38.

cannot be disputed that, whether individual or wholesale, rape involves both a physical and mental assault. In addition, as the Commission itself stated, the rapes caused "severe wounding."¹³⁸ The Commission did not elaborate whether the term "severe wounding" was distinct from the language "severe pain or suffering" used in Article 1 of the Declaration Against Torture. The use of such language, however, combined with the facts and circumstances of this case, give rise to the assumption that the terms may be used interchangeably.¹³⁹ If, however, the Commission intended to provide a basis for holding that the rapes committed did not constitute torture by eschewing the exact language of Article 1, it should have so stated.

Second, the wholesale rape of Cypriot women was a purposeful action intended to intimidate not only the individual victims, but the entire Cypriot population. The Commission conceded that the Turkish troops' behavior was aimed at destroying and eradicating the Greek population in the areas occupied by the troops to create a Turkish populated area.¹⁴⁰ In its holding, the Commission found the Turkish government responsible for the rapes since it not only failed to curb the abuse, but it intended for it to occur.

It would be inaccurate to identify rape under circumstances such as these as solely a sexual attack. The rapes were not sporadic but systematic and accompanied by other forms of brutal treatment on the entire population, thereby supporting the assertion that rape and other brutal treatment was an institutionalized method of warfare and intimidation on the population.¹⁴¹ The participation of the commanding officers, and their full awareness of the impact of those acts on the populace, buttress this conclusion as well as satisfy the third element, infliction by a state or quasi-state official.¹⁴²

138. *Id.* at 536.

139. The Commission stated that " 'women of all ages from 12 to 71 [were repeatedly raped], sometimes to such an extent that the victims suffered hemorrhages or became mental wrecks. In some areas, enforced prostitution was practised, all women and girls being collected and put into separate rooms in empty houses, where they were raped repeatedly by the Turkish troops.' In certain cases, 'members of the same family were repeatedly raped, some in front of their own children. In other cases, women were brutally raped in public. Rapes were on many occasions accompanied by brutalities such as violent biting of the victims to the extent of severe wounding, hitting their heads on the floor and wringing their throats almost to the point of suffocation.' In some cases 'attempts to rape were followed by the stabbing or killing of the victim. Victims of rape included pregnant and mentally retarded women.' " *Id.* at 536.

140. *Id.* at 538. More recently, Bosnian Serbs have systematically raped at least 20,000 Muslim women as part of their campaign of "ethnic cleansing" in Bosnia-Herzegovina. Riding, *supra* note 136; see also Stephen Engelberg, *Conflict in the Balkans: Refugees from Camps Tell of Agony and Terror*, N.Y. TIMES, Aug. 7, 1992, at 8, col. 1; *Religious Groups Decry Mass Rape in Bosnia: Evidence Cited That Serbian Forces are Attacking Muslim Women as a 'Weapon of War'*, N.Y. TIMES, Dec. 23, 1992, at 22. In other parts of the former Yugoslavia, similar tactics were also reportedly used against Serbian women. U.N. Doc. A/47/813 (1992).

141. Rape is an age-old method of warfare and intimidation. Soldiers throughout history have used mass rape to spread terror through a population. Examples include the pogroms in Russia and Poland, the massive rape of Armenian women by the Turks in 1895 and 1915, and the rapes of vengeance perpetrated by Congolese soldiers on Belgian women in 1960. SUSAN BROWNMILLER, *AGAINST OUR WILL* 127-30, 140-49 (1975).

142. *Cyprus v. Turkey*, 4 Eur. H.R. Rep. 482. Mass rape was similarly employed by Paki-

The Commission should have examined the rapes under the elemental analysis of Article 1 of the Declaration Against Torture, and should have concluded that the rapes fell within the definition of torture. The Commission's total failure to address the issue demonstrates its tendency to ignore gender-based human rights abuses. While the European Commission did not explicitly state that rape was treated differently because of the motivations of the actors, it has analyzed rape apart from other physical abuse.¹⁴³

In cases reviewed by the courts of the United States, the tendency to identify rape as a sexually or privately motivated offense is more apparent. At the same time, the political motivations of the perpetrator or torturer¹⁴⁴ in selecting rape as a method of abuse are largely ignored. The Board of Immigration Appeals (BIA) has routinely dismissed appeals for political asylum based on a well-founded fear of persecution where the applicant was raped.¹⁴⁵ The Board labeled the rapes and threats of reprisals as "personally motivated."¹⁴⁶ The Fifth Circuit agreed with the Board's conclusion and affirmed its order in *Campos-Guardado v. INS*, denying asylum to a Salvadoran woman.¹⁴⁷ Ms. Campos was forced to watch the torture and murder of her uncle and male cousin. She was then raped and threatened with death if she reported the incident. One of her assailants visited her at her family home where he repeated his threat to kill her and her family.¹⁴⁸ The focus in *Campos-Guardado* was erroneously placed solely on the motivation of the perpetrator rather than on the act or threats. The rape and the threats were in essence glossed over and subsumed by a misplaced concentration on the judicially imposed identification of the perpetrator's motive. The primary emphasis on motive is inconsistent with asylum cases involving physical abuse and death threats found in other circuits,¹⁴⁹ which implies that the Fifth Circuit applied a different stan-

stan during the civil war in 1971. The International Commission of Jurists reported that officers kept young girls locked up. THE EVENTS IN EAST PAKISTAN, *supra* note 77, at 40.

143. Cyprus also charged Turkey with violating Article 3 by beating and physically mistreating hundreds of Greek Cypriots in general and those who were detained in special camps. In one case, the beating resulted in death. *Cyprus v. Turkey*, 4 Eur. H.R. Rep. at 540.

144. I use the terms perpetrator, torturer, and rapist in this Note interchangeably since, under my analysis, they are one in the same.

145. For an explanation of the process of applying for and receiving asylum, see T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 615-743 (1985).

146. *Campos-Guardado v. INS*, 809 F.2d 285, 285 (5th Cir.), *reh'g denied*, 814 F.2d 658 (5th Cir.), *cert. denied*, 484 U.S. 826 (1987); *see also* *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (stating that "such strictly personal actions do not constitute persecution within the meaning of the Act").

147. *Campos-Guardado*, 809 F.2d at 289.

148. *Id.* at 287. I use the case to indicate the bias of United States courts in rape cases. The perpetrator in this case, however, was a guerrilla and not a Salvadoran official, raising a separate question under Article 1. The Ninth Circuit similarly concluded that the rape and other physical abuse was personally motivated by the man's personal animosity toward women. It granted her petition for asylum on other grounds, finding that she had a well-founded fear of persecution based on a political opinion which was imputed to her. *Lazo-Majano*, 813 F.2d at 1434-35.

149. *See, e.g.*, *Mendez-Efrain v. INS*, 813 F.2d 279 (9th Cir. 1987); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985).

dard when confronted by a rape allegation. In other cases, evidence of threats or acts of violence against one's family by security forces or guerrillas, without analysis of the assailant's motive, was sufficient evidence of a threat to one's life or grounds for a well-founded fear of persecution.¹⁵⁰

Even where international bodies or organizations have identified rape as a method of torture, they have not made the connection uniformly, nor have they created a workable standard to explain why rape is considered torture in one context and not in another. The most telling examples involve the only two bodies which have explicitly identified rape as a method of torture, the Special Rapporteur and Amnesty International. The Special Rapporteur was appointed in 1985 under the auspices of the Commission on Human Rights to "examine questions relevant to torture" and to report on the occurrence and extent of its practice.¹⁵¹ The post, filled from its inception by Mr. P. Kooijmans of the Netherlands, was originally created for one year, but has been renewed annually. The Special Rapporteur is authorized to solicit and receive information from a variety of non-governmental organizations as well as governments. While the mandate limits him to examination of the "question of torture," Mr. Kooijmans has chosen to review limited allegations of cruel, inhuman, or degrading punishment which, in his opinion, fall within a "grey area" between torture on one hand, and inhuman treatment or punishment on the other, and which could constitute an act of torture after "further analysis."¹⁵²

The Special Rapporteur, in contrast to other U.N. bodies, has repeatedly recognized the presence and use of gender-based torture such as rape, sexual assault, and sexual threats. His reporting of rape as a method of torture, however, is inconsistent. It is unclear from his reports when rape is torture and when it falls short of torture. In his first report, the Special Rapporteur listed rape as a method of physical torture.¹⁵³ He applied this analysis when describing a general range of abuses perpetrated in a country¹⁵⁴ but failed to specifically identify rape as torture when characterizing the abuse in an individual case. In individual cases, the Special Rapporteur semantically sepa-

150. *Mendez-Efrain*, 813 F.2d 279; *Hernandez-Ortiz*, 777 F.2d 509.

151. Question of the Human Rights of all persons subjected to any form of Detention or Imprisonment, Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report by the Special Rapporteur, Hum. Rts. Comm., United Nations, Economic and Social Council, ¶ 6, U.N. Doc. E/CN.4/1986/15 (1986) [hereinafter 1986 SPECIAL RAPPORTEUR'S REPORT].

152. *Id.* ¶ 23.

153. *Id.* ¶ 119.

154. In the case of Egypt, the Commission on Human Rights reported that sexual abuse and rape, directed either at the detainee or at the detainee's relatives, were methods of physical and psychological torture allegedly used in Egyptian prisons. United Nations, Economic and Social Council, Hum. Rts. Comm., United Nations, Economic and Social Council, ¶ 55, U.N. Doc. E/CN.4/1990/17 [hereinafter 1990 SPECIAL RAPPORTEUR'S REPORT]. In the case of Algeria, the Special Rapporteur stated that the methods of torture allegedly used in military camps and police stations included "sexual violence." *Id.* ¶ 25. He did not define the term "sexual violence." See also ¶ 59 (the case of El Salvador).

rated rape from torture, thereby giving the impression that two distinct abuses occurred. In one case, he wrote, that a woman, while being questioned, was "tortured and sexually molested and forced to say she was guilty of the accusation."¹⁵⁵ He did not state that she was tortured and specify that the torture included, inter alia, sexual molestation. This type of semantic separation was repeated in numerous descriptions of individual cases.¹⁵⁶ Under Article 1, the sexual assault, whether standing alone or in conjunction with other abuse, should be viewed as torture since it was used to force the woman to confess.

In 1991, Amnesty International released a report, *Women in the Front Line*, which detailed the abuses perpetrated against women.¹⁵⁷ *Women in the Front Line* was the first comprehensive report published by Amnesty International which focused exclusively on abuses suffered by women.¹⁵⁸ The report identified rape as "a common method of torture" used against women.¹⁵⁹ Amnesty International asserted that rape was a method of torture as defined by Article 1 of the Torture Convention. Its reasoning mirrored the language employed in the Convention.¹⁶⁰ The report stated that:

[Rape was] both a physical violation and injury, and an assault on a woman's mental and emotional well-being. Interrogators and other governmental officials have used rape as a form of torture in attempts to intimidate women from pursuing particular activities and to extract information or 'confessions' from them. Rape constitutes an especially humiliating assault [and] often carries traumatic social repercussions.¹⁶¹

Considered in this light, rape is a method of torture precisely because it fulfills the three essential elements set out in Article 1.¹⁶²

Women in the Front Line, however, failed to present a clear standard for identifying when rape constitutes torture. While Amnesty International limited its recognition of rape as torture to cases of actual detention, the report did not consistently distinguish between rape-in-custody as torture and rape-in-custody as a human rights abuse. In one case, a woman was raped while in custody in Myanmar purportedly to punish her for participating in prohibited

155. *Id.* ¶ 117(c).

156. *Id.* ¶¶ 117(a), 118 & 170.

157. WOMEN IN THE FRONT LINE, *supra* note 92.

158. Amnesty International has released other documents which identify and catalog human rights abuses suffered by women. *Focus: Ill-treatment of Women in Detention*, 18 AMNESTY INT'L NEWSLETTER, Apr. 1988, at 3; *Women: Victims and Fighters*, AMNESTY INTERNATIONAL USA, Mar. 1987; *Women's Human Rights Denied*, AMNESTY INTERNATIONAL USA, Oct. 1983. In 1988, it dedicated a section of its newsletter to the ill-treatment of women in detention; Amnesty labeled rape as a method of torture for the reasons stated above.

159. WOMEN IN THE FRONT LINE, *supra* note 92, at 18.

160. *Id.* at 2.

161. *Id.* at 18.

162. These terms are borrowed from the 1986 SPECIAL RAPORTEUR'S REPORT, *supra* note 151.

“trading practices.”¹⁶³ Amnesty International did not identify this rape as torture even though it possessed the three elements of torture: the rape was a physical act perpetrated by a public official for a purpose included in Article 1. Given the circumstance surrounding this rape, the report should have explained why it failed to identify it as torture.

The distinction is not solely one of semantics but also one of substance. If rape is to be recognized as a method of torture, then the language must accurately state it.

Legal language does more than express thoughts. It reinforces certain world views and understandings of events. Its terms and its reasoning structure are the procrustean bed into which supplicants before the law must express their needs. Through its definitions and the way it talks about events, law has the power to silence alternative meanings — to suppress other stories.¹⁶⁴

Torture victims and their families rely on legal standards established by international bodies as the basis for their appeals as well as the grounds for seeking redress against their governments. Most victims lack adequate domestic remedies since their government often condones the use of torture or is intimately involved in its use.¹⁶⁵ Thus, victims often are forced to seek redress from intergovernmental bodies. It is essential, therefore, that these bodies establish a clear standard to hold offending governments accountable.¹⁶⁶

The semantic separation of the terms “rape” and “torture” has arguably already led to substantive distinctions between the two terms and the perception that they should be read as definite and different. When a woman is raped by her torturer, the rape is part and parcel of the abuse she endures, not something separate. As such, the woman suffers torture, an element of which is rape. Semantically separating rape and torture pushes the identification of rape into the “not torture but something else” category, thereby diminishing women’s protection from torture. Rape becomes the one physical act a torturer may employ which is not identified as torture. This failure to view rape as a method of torture illustrates why the use of clear terminology is essential.

The separate treatment of rape is unwarranted, especially given the consistent reports of rape by state officials and the identification of physical abuse of male genitalia as torture.¹⁶⁷ Whatever perverse pleasure a torturer may

163. WOMEN IN THE FRONT LINE, *supra* note 92, at 20.

164. Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989).

165. Klayman, *supra* note 34, at 479.

166. This assertion comes from Amnesty International’s own testimony before the Senate. See *Hearings & Markup*, *supra* note 12 (testimony of Amnesty International). Klayman argues that the only truly effective means of combating torture occurs at the international level because of the government’s intimate involvement. Klayman, *supra* note 35, at 479.

167. An ABA delegation which visited Turkey in 1989 reported that the rape of men and women, fondling of breasts, and the squeezing of testicles were common methods of torture. Robin L. Dahlberg, Christopher Keith Hall, Rhoda H. Karpatkin & Jessica A. Neuwirth, *Tor-*

experience from employing such methods of abuse is irrelevant to whether or not the victim was tortured.

C. *The Context in Which Torture Occurs*

Intergovernmental and nongovernmental bodies which monitor the use of torture consistently limit their analysis to cases in which the victim was in detention. The term detention has been read to encompass prisons, army barracks, police stations, and special detention centers. Interestingly, this narrow interpretation stands in stark contrast to the definition of torture in Article 1 and the working definitions employed prior to the ratification of the Torture Convention, neither of which specify who may be a victim of torture or where the torture must take place.¹⁶⁸ Similarly, Amnesty International has limited its assertion that rape is a method of torture to detainees.¹⁶⁹ In its written testimony submitted before the Senate Foreign Relations Committee, the organization argued that rape of women and children in custody is a form of torture because it is an intentional infliction of pain and suffering.¹⁷⁰ In *Women in the Front Line*, Amnesty International recognized that rape is a human rights abuse suffered by women both in custody and in areas under police or military control but stopped short of identifying rape outside detention as torture.¹⁷¹

The tendency to limit the identification of abuses as torture to cases in which an individual is detained in a traditional location has a deleterious im-

ture in Turkey: The Legal System's Response, 45 REC. OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 21 (Jan.-Feb. 1990) [hereinafter ABA REPORT]; see also AMNESTY INTERNATIONAL, PERU: HUMAN RIGHTS IN A CLIMATE OF TERROR, *supra* note 125, at 37-41; AMNESTY INTERNATIONAL, IRAN: VIOLATIONS OF HUMAN RIGHTS 19 (1987); NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 22, 34, 37-40, 44-47 (1986). The personal accounts contained in the Nunca Mas Report reveal that the purposes motivating the rape and genital abuse were indistinguishable.

168. Amnesty International defined torture as "systematic and deliberate infliction of acute pain in any form by one person on another, or on a third person, in order to accomplish the purpose of the former against the will of the latter" in its first report on torture. AMNESTY INTERNATIONAL, REPORT ON TORTURE 35 (2d ed. 1975). The European Court defined torture in the Greek Case as "inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment." *The Greek Case*, *supra* note 35, at 86. Notably, neither definition refers to location.

169. WOMEN IN THE FRONT LINE, *supra* note 92, at 18. One reason for the narrow approach may be the language of Amnesty International's mandate. Amnesty International limits its work to "oppos[ing] the death penalty and torture or other cruel, inhuman or degrading treatment or punishment of all prisoners without reservation." (emphasis added). TORTURE IN THE EIGHTIES, *supra* note 27, at 264. Amnesty International's mandate, therefore, contains the assumption that only prisoners may be tortured and the organization apparently reads the term prisoner in the traditional sense.

170. *Amnesty International, Written Testimony of Amnesty International USA on the Convention on the Elimination of All Forms of Discrimination Against Women, submitted to the Sen. Foreign Relations Comm.* (Aug. 2, 1990) [hereinafter *Written Testimony of Amnesty International*] (on file with the author).

171. WOMEN IN THE FRONT LINE, *supra* note 92, at 18-22.

pact on the recognition of rape or other abuses of women as torture. Torture of women, especially when the chosen method is rape, does not always take place in prisons or other traditional places of detention. In states of emergency or situations of internal strife, a woman's home can become her torture chamber. Women trapped by circumstance or custom in their homes are vulnerable to assault by members of security forces, police, and military.¹⁷² Rape is the chosen method of torturing women precisely because of their physical and social vulnerability.¹⁷³ The intimidation of the populace and the suppression of political activism is most effectively accomplished when officials rape women in their homes because family members often witness the attack and share in the feeling of degradation and powerlessness.¹⁷⁴ The elements of torture, as defined in Article 1, are all present: the physical and mental attack and the resulting severe pain and suffering; the purpose of intimidation or punishment; and infliction by a state or quasi-state official.

The Torture Convention does not limit its coverage to detainees, nor does it state that torture must occur when an individual is in the physical custody of a state, such as in a prison. The language of the Torture Convention, while extending coverage to detainees,¹⁷⁵ does not lend itself to the narrow reading that torture can occur solely in prisons.¹⁷⁶ Article 1 contains no such conditional language. Additionally, other articles suggest that any act which fits under the definition of torture in Article 1 must be recognized and punished as such. Article 2(1) provides that a state party must take effective measures to ensure torture does not occur "in any territory under its jurisdiction." The provision focuses solely on general area and not specific location. Article 4 indicates that the prohibition of torture and punishment of offenders should be interpreted broadly. It instructs state parties to criminalize all actual or attempted torture with "appropriate penalties which take into account [torture's] grave nature." Finally, Article 13 stipulates that "[e]ach State Party shall ensure that any individual who alleges he [or she] has been subjected to torture in any territory under its jurisdiction has the right to complain to, and have his [or her] case promptly and impartially examined by, its competent authorities."

Others have rejected a narrow view of where torture may occur. The Human Rights Committee expressly recognized that the prohibition of torture

172. Ximena Bunster-Burotto, *Surviving Beyond Fear: Women and Torture in Latin America*, in JUNE C. NASH & HELEN ICKEN SAFA, *WOMEN AND CHANGE IN LATIN AMERICA* 303-05 (1986).

173. *See id.*

174. *Id.* at 304-05. Susan Brownmiller recounted the story of a young, recently married woman in Bangladesh who was raped by two soldiers in her bridal bedroom in front of her husband. The family was forced to stand helplessly outside and listen to her screams, guarded by other soldiers. The young woman was later forced to live in a shelter for rape victims, rejected by her family and village. BROWNMILLER, *supra* note 141, at 82. The rapes were part of a pattern of abuses inflicted on the Bengali in an effort to quell a civil war.

175. Torture Convention, *supra* note 32, arts. 10, 11 & 12.

176. *See* Byrnes, *supra* note 57.

and inhuman treatment extended to individuals in non-traditional settings, such as educational and medical institutions.¹⁷⁷ The Committee asserted that “the scope of protection required [under Article 7] goes far beyond torture as normally understood” and that “[the distinction depends] on the kind, purpose and severity of the particular treatment.”¹⁷⁸ Location is not mentioned.¹⁷⁹

The focus on traditional settings, as opposed to public officials’ power and control over the victim,¹⁸⁰ discriminates against women and deprives them of the full protection of the prohibition against torture. Furthermore, it is inconsistent with general notions of state power and responsibility. The location where the public official commits the torture or ill-treatment is legally irrelevant because the official’s power and authority are portable. A public official, such as a police officer or soldier, who enters a woman’s home while serving in his official capacity or acting under color of law, is no less capable of torture in this setting than he is in a traditional setting.

In assessing cases involving human rights abuses perpetrated by the military, police, or security forces, which occur in non-traditional settings such as a person’s home, the Committee Against Torture and other bodies which monitor compliance with the prohibition against torture should determine whether the individual was acting under the color of state law or within his official capacity at the time the abuse occurred. In the United States, courts have recognized that a police officer who rapes or threatens a woman with rape while on duty acts within the scope of his employment.¹⁸¹ As one court wrote:

a police officer is entrusted with a great deal of authority . . . [T]he police officer carries the authority of the law with him into the community. The officer is supplied with a conspicuous automobile, a badge and a gun to ensure immediate compliance with his directions. The officer’s method of dealing with his authority is certainly inci-

177. General Comment 7(16), *supra* note 113.

178. *Id.*

179. The European Commission, similarly, did not limit the protection of Article 3 of the European Convention to cases of actual detention. The rapes found to violate Article 3 in *Cyprus v. Turkey* occurred in numerous settings, including homes and in public. 4 Eur. H.R. Rep. at 536-37.

180. J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 120 (1988). Burgers and Danielius suggest that in defining who may be a victim of torture, one should focus on whether the individual was under the de facto power or control of the person inflicting the pain or suffering. *Id.* The Special Rapporteur, Mr. Walter Kalin, on occupied Kuwait similarly noted that “rapes committed by members of the Iraqi occupying forces during the exercise of their official functions, especially in the context of house searches . . . can be considered to constitute torture.” Report of the Special Rapporteur on Occupied Kuwait, U.N. Doc. E/CN.4/1992/26, ¶ 184 (1992).

181. See, e.g., *Los Angeles Held Liable for Rape by Officer*, N.Y. TIMES, Sept. 8, 1991, at 27. The State Supreme Court held the City of Los Angeles responsible for a rape committed by an on-duty police officer in the victim’s home. The woman had been stopped for alleged drunk driving.

dental to his duties; indeed, it is an integral part of them.¹⁸²

The Court found that rape or the threat of rape perpetrated by an on-duty police officer flowed from the very exercise of this authority.

III

RECOGNIZING RAPE AS A METHOD OF TORTURE - ARTICLE 1

The Torture Convention introduced a new standard for determining when a physical or mental assault constitutes torture. The definition consists of three elements: an act (1) causing severe physical or mental suffering; (2) committed for a purpose; and (3) by a public official or a private individual acting with the acquiescence or consent of a state authority.¹⁸³ Where the abuse suffered by an individual meets these three elements, an act of torture has occurred. Human rights monitors, therefore, should analyze rape under this elemental standard to ascertain whether the rape constituted torture. As demonstrated below, rape clearly falls within the parameters of Article 1 in many cases and is a common method of torture.

A. *The Act and the Requisite Suffering*

1. *Rape is a Physical and Mental Assault*

Article 1 of the Torture Convention provides that in order for an act to be considered torture it must cause severe physical or mental pain and suffering. Both the Special Rapporteur and Amnesty International concluded that rape can fall within the parameters of this initial requirement. In his first report, the Special Rapporteur listed rape as one of the many methods of physical torture.¹⁸⁴ Amnesty International asserted that rape was "both a physical violation and injury, and an assault on a woman's mental and emotional well-being."¹⁸⁵ Others have echoed this conclusion.¹⁸⁶

Rape is by definition a physical assault. It is a physical act of violence perpetrated by the hand or body of one on the body of another. It requires force and physical contact to accomplish penetration.¹⁸⁷ For a woman, a rape is

sexual invasion of the body by force, an incursion into the private, personal inner space without consent — in short, an internal assault from one of several avenues and by one of several methods —

182. *White v. County of Orange*, 212 Cal. Rptr. 493, 496 (1985); see also *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991).

183. See generally Tardu, *supra* note 46, at 304-09.

184. 1986 SPECIAL RAPPOREUR'S REPORT, *supra* note 151, ¶ 119.

185. WOMEN IN THE FRONT LINE, *supra* note 92, at 18.

186. PETERS, *supra* note 13, at 169-70. In a list of methods of torture used in the late twentieth century compiled by Amnesty International, Anti-Torture Research (ATR), and the International Rehabilitation & Research Centre for Torture (RCT), rape and sexual assault were listed as both "somatic" and psychological torture. ATR is an international biomedical society. *Id.*

187. Susan Estrich, *Real Rape*, 95 YALE L.J. 1087, 1107 (1986).

[which] constitutes a deliberate violation of emotional, physical and rational integrity and . . . a hostile, degrading act of violence.¹⁸⁸

Under criminal law in the United States, rape is defined in sexual terms as heterosexual copulation which takes place by force, without a woman's consent.¹⁸⁹ Feminists differ on whether rape is an act of violence or a violent act of sex,¹⁹⁰ but no one denies that rape is a physical act.

Rape has also been defined as a psychological assault. Feminists argue that rape is a means of intimidating or coercing women. Susan Brownmiller has asserted that "[rape] was nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear."¹⁹¹ Rape reinforces a woman's sense of powerlessness and vulnerability, especially when perpetrated by prison officials or other state agents.¹⁹² Rape is also a psychological method of torture because of its impact on the woman's family or community. Women, as wives, mothers, and sisters, are also raped for the purpose of psychologically assaulting and injuring men.¹⁹³

2. Rape Causes Severe Pain and Suffering

Prior to the adoption of the Torture Convention, there was disagreement surrounding the degree of pain and suffering required for an act to constitute torture. The pain and suffering element was considered the characteristic distinguishing torture and inhuman treatment.¹⁹⁴ The fact that the ban on torture was joined in the same article, often in the same sentence, with the prohibition on inhuman and degrading treatment or punishment only exacerbated the problem of articulating a clear distinction between the two. The Human Rights Committee, for example, was content for many years to conclude that Article 7 of the Political Covenant was violated without establishing whether the culpable state party had tortured or merely ill-treated the complainant.¹⁹⁵ The inquiry into the degree of pain and suffering, however, is

188. BROWNMILLER, *supra* note 141, at 5.

189. *Id.* at 424; Estrich, *supra* note 187, at 1093.

190. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 173 (1989).

191. BROWNMILLER, *supra* note 141, at 5.

192. Neuwirth, *supra* note 75, at 404.

193. *Id.* at 403.

194. See generally 25 CASE OF IRELAND V. THE UNITED KINGDOM, EUROPEAN COURT OF HUMAN RIGHTS SERIES A: JUDGMENTS AND DECISIONS 66 (1978) [hereinafter IRELAND V. U.K.].

195. The Human Rights Committee Reports made no distinction between torture and inhuman treatment in the majority of cases between 1981 and 1985. See, e.g., *Reports of the Hum. Rts. Comm.*, U.N. GAOR, 40th Sess., Supp. No. 140, U.N. Doc. A/40/40 (1985); U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1982), Communications Nos. R.7/28, R.8/33, R.9/37, R.12/52; U.N. GAOR, 38th Sess., Supp. No. 40 (1984), U.N. Doc. A/38/40, Communications Nos. 49/1979, 74/1980, 80/1980, 107/1981; U.N. GAOR, 38th Sess., Supp. No. 40, (1985), U.N. Doc. A/39/40, Communications No. 124/1982.

A distinction was made between torture and inhuman treatment in: *Report of the Hum. Rts. Comm.*, U.N. GAOR, 41st Sess., Supp. No. 40, U.N. Doc. A/41/40 (1986), Communica-

irrelevant under the Torture Convention since Article 1 speaks only in terms of "pain and suffering, whether physical or mental" and not in terms of intensity.¹⁹⁶

Rape causes severe physical pain and suffering in the victim. Women who are raped endure not only the initial attack but they also risk contracting sexually transmitted diseases, developing gynecological ailments, or becoming pregnant.¹⁹⁷ Often torturers force animals or objects into a woman's body, causing permanent trauma and injury.¹⁹⁸ A woman in Sri Lanka was unable to sit or squat after a police baton was forcibly inserted into her vagina.¹⁹⁹ Thousands of women and girls in Bangladesh developed gynecological infections and many became pregnant following the mass rapes perpetrated by the Pakistani Army in 1971.²⁰⁰

Raped women also suffer psychological and emotional trauma. They suffer the emotional trauma associated with being victimized. Many endure degrading and humiliating treatment which accompanies rape. Amnesty International reports that some women have been stripped naked in front of their community prior to being raped,²⁰¹ while others have been raped in the presence of their family.²⁰² In many countries, women suffer the judgment of their society and families in addition to the physical and emotional trauma of the rape. In countries where female chastity is a central tenet of society communities often ostracize women who have been raped and consider them unmarriageable.²⁰³ The rapist/torturer in such a society often chooses rape over other methods of torture precisely because of these norms and their impact on women.²⁰⁴ He may also rape because humiliation and fear often constrain

tion No. 147/1983; U.N. Doc. A/43/40 (1988), Communication Nos. 159/1983, 161/1983; U.N. Doc. A/44/40 (1989), Communication No. 162/1983.

196. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 89 (1987). This is an important change from the Declaration Against Torture which defined torture as an "aggravated form of inhuman treatment." The Inter-American Convention Against Torture also abandoned the element of degree. *Id.* at 90; *see also* BURGERS & DANIELIUS, *supra* note 180, at 117-18.

197. In Bosnia-Herzegovina, the Serbs made forcible impregnation of Muslim women by Serbian men an objective of their campaign of "ethnic cleansing." Serbian fighters, known as Chetniks, reportedly told their Muslim victims that "they would be forced to bear 'Chetnik children.'" John F. Burns, *150 Muslims Say Serbs Raped Them in Bosnia*, N.Y. TIMES, Oct. 3, 1992, at A5, col. 5; *see also* Drakulic, *supra* note 66.

198. Bunster-Burotto, *supra* note 172, at 310.

199. *Focus: Ill-Treatment of Women in Detention*, *supra* note 158, at 5; *see also* CAUGHT BETWEEN TWO FIRES, *supra* note 3, at 10.

200. BROWNMILLER, *supra* note 142, at 84.

201. WOMEN IN THE FRONT LINE, *supra* note 92, at 19; *see also* *Focus: Ill-Treatment of Women in Detention*, *supra* note 158.

202. Bunster-Burotto, *supra* note 172, at 311; *see also* BROWNMILLER, *supra* note 141, at 82.

203. BROWNMILLER, *supra* note 141, at 84; Sanjoy Hazarika, *Indian Study Urges Changes in the Nation's Prison System*, N.Y. TIMES, June 5, 1983, at A10.

204. WOMEN IN THE FRONT LINE, *supra* note 92, at 18. Ximena Bunster-Burotto argued that sexual assault is purposefully used in Latin American countries to violate a woman's dignity and sense of herself. According to Bunster-Burotto, Latin American women are supposed

women from denouncing what transpired.²⁰⁵ The Pakistani Army chose rape as its method of abuse during its efforts to quell the uprising in Bangladesh. The majority of the victims were Moslem, members of a society which believes "in purdah isolation and female chastity."²⁰⁶ In India, a country where rape by police is a common occurrence,²⁰⁷ families reportedly have refused to receive their daughters upon their release from prison.²⁰⁸

In determining whether a particular instance of rape gives rise to severe pain or suffering, one must look beyond the physical act and consider the social, cultural, and political environment in which the victim lives. It is beyond question that rape in general causes severe pain and suffering in the victim. Specific cultural attitudes and traditions exacerbate this pain and suffering by establishing an interpretive framework governed by a society's moral standards.²⁰⁹ The social and cultural background of a woman give meaning to the suffering imposed by rape because: "[t]he ideological conceptions, the myths, and the realities of the paradigmatic vision of Woman, are much of the ground from which springs a woman's sense of herself and from which she derives the emotional needs and the gratifications that give meaning to her life."²¹⁰ The woman's identity creates a context for the interpreter and provides clues as to the impact of rape. According to Amnesty International, rape is purposely selected as a form of gender-specific torture due to its impact on the victim. In many countries the police and military opt to use rape, as opposed to other forms of abuse, because cultural views on rape may discourage a woman from reporting such abuse.²¹¹

Finally, the judicial system often aggravates the pain and anguish of rape by denying the victims any remedy.²¹² Allegations of custodial rape are rarely investigated and the public officials responsible for the act are rarely con-

to represent the ideal of the Virgin Mother (Madonna) in their society. Society values women and women value themselves as mothers. Rape is used to destroy and negate this image. Rape, as a result, is a "culturally defined moral debasement and physical battering . . . whereby the [woman] is to undergo a rapid metamorphosis from Madonna — respectable woman and/or mother — to whore." Bunster-Burotto, *supra* note 172, at 298-301.

205. WOMEN IN THE FRONT LINE, *supra* note 92, at 22; *see also* Lazo-Majano v. INS., 813 F.2d 1432 (9th Cir. 1987); *Written Testimony of Amnesty International*, *supra* note 170.

206. BROWNMILLER, *supra* note 141, at 84. Serbian fighters use rape as an integral part of their "ethnic cleansing" campaign to ensure that Muslim women and girls would never want to return to their homes and native villages. Post, *supra* note 1.

207. Sanjoy Hazarika, *For Women in India Prisons, A 'Grim Picture'*, N.Y. TIMES, Feb. 29, 1988, at A9.

208. WOMEN IN THE FRONT LINE, *supra* note 92, at 19.

209. REPORT ON TORTURE, *supra* note 168, at 36.

210. Bunster-Burotto, *supra* note 172, at 307.

211. WOMEN IN THE FRONT LINE, *supra* note 92, at 22. The experiences of Madhu Kishwar, a researcher in India who investigated allegations of gang rapes in Delhi after the anti-Sikh pogroms in 1984 bear out this proposition. She found that the Sikh women either denied that they suffered any abuse or were not willing to discuss or describe their experience. Madhu Kishwar, *Learning to Take Women Seriously*, INDEX ON CENSORSHIP, Oct. 1990, at 21; *see also* Report of the Special Rapporteur on Occupied Kuwait, *supra* note 180, at ¶ 111 & ¶ 183.

212. Neuwirth, *supra* note 75, at 404 n.29.

victed.²¹³ Amnesty International reported that almost every custodial rape allegation filed with the police in India was dismissed or returned.²¹⁴ Allegations of custodial rape in Turkey have suffered a similar fate.²¹⁵ According to Amnesty International, some doctors have refused to examine women raped in custody without receiving authorization from the police.²¹⁶ Soldiers based in emergency zones in Peru rape with impunity and with the acquiescence of their superiors. Officials stated that rape was to be expected where troops were stationed in rural locations.²¹⁷ In South Korea, state prosecutors initially refused to indict a police detective accused of sexually assaulting a female student during interrogation. The detective was later convicted and the student was compensated for her "vast psychological damage."²¹⁸

B. *The Purpose of Rape as Torture*²¹⁹

For an act to constitute torture, the perpetrator must abuse the victim for one of several purposes. Article 1 of the Torture Convention defines intent by reflecting on the purpose motivating a particular offense. Torture, as such, is thus an instrument or a means to an end rather than an end in itself. Critics argue that the purpose requirement is inadequate because: "it omits basic subconscious motivations of torturers, common to many forms of such behaviour, which are often related to inferiority feelings, anomie, alienation, and to the consequent craving for power over victims."²²⁰ Article 1 specifies several purposes underlying the act of torture: (1) to obtain information or a confession from the victim or a third person; (2) to punish the victim or a third person for an act she committed or is suspected of committing; (3) to intimidate or coerce the victim or a third person; or (4) for any reason based on discrimination of any kind. The former two purposes represent the historic role of torture²²¹ while the latter purposes symbolize growing recognition of the modern motivations behind it. The listed purposes should be read as illustrative rather

213. WOMEN IN THE FRONT LINE, *supra* note 92, at 19.

214. *Id.* Turkish newspapers reported that a physician in the Capa Medical Faculty Gynecology Department refused to examine a woman brought in by police. She was allegedly raped as part of her torture while in custody. Human Rights Foundation of Turkey (HRFT), Documentation & Special Communication Service, May 25, 1991 (on file with the author).

215. AMNESTY INTERNATIONAL, TURKEY: BRUTAL AND SYSTEMATIC ABUSE OF HUMAN RIGHTS 45 (Jan. 1989) [hereinafter TURKEY: BRUTAL AND SYSTEMATIC ABUSE]. A prosecutor determined that "no grounds for prosecution" existed where Seviye Koprü alleged that she was raped by police at the Izmir Police Headquarters in Turkey. Her appeal was rejected.

216. *Id.*; see also Dahlberg, Hall, Karpatkin & Neuwirth, *supra* note 167, at 48-50.

217. CAUGHT BETWEEN TWO FIRES, *supra* note 3, at 11.

218. THE REUTERS LIBRARY REPORT, June 13, 1989 (p.m. cycle). The term "sexual assault" was used by several authors without an explanation as to whether the author meant rape or something short of rape. It is clear, however, that the assault was a physical one. The exact distinction between sexual assault and rape is beyond the scope of this Note.

219. See generally Natan Lerner, *The U.N. Convention on Torture*, 16 ISRAEL Y.B. ON HUM. RTS. 126 (1986).

220. Tardu, *supra* note 46, at 305.

221. ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 89 (1990).

than exhaustive since "the number [of purposes] is almost unlimited, and any list is bound to be incomplete."²²²

It is difficult to draw lines between rape for punishment, intimidation, or a discriminatory purpose and rape used to coerce a confession because politically and socially active women are often raped, not only to punish them for their past activities, but also to discourage the woman and others from continuing such activities in the future.²²³ Turkish authorities reportedly use rape as one of several techniques to accomplish each of the four purposes stated in Article 1.²²⁴ Many of the examples cited below illustrate that the torturer's motivation can be multi-faceted.

1. *Punishment*

Rape has been used as a method of torture designed to punish individuals and communities for beliefs or activities of which the government or military disapproves. Some women are raped to castigate them for their involvement in particular activities or criminal offenses while others are raped in retaliation for the actions of a family member.²²⁵ As a result of her efforts to report her husband's disappearance, soldiers in Peru abducted, raped, and murdered Marìa Guinarita Pisco Pisango.²²⁶ Soldiers detained and raped a young girl and her aunt after they violated an officially declared curfew in Myanmar.²²⁷ In Guatemala, security forces kidnapped, brutally abused, and raped an American-born nun reportedly to punish the Church for its work in that country.²²⁸

While men are killed, abducted, or beaten in retaliation for their endeavors, torturers are often content to rape women.²²⁹ Asia Watch reported that Indian police, known as the Central Reserve Police Force (CRPF), entered homes in Kashmir, India where they beat male family members and raped women.²³⁰ The local chairman, a male, of an agricultural cooperative founded as part of a controversial land reform movement and his son were tortured and then murdered in El Salvador. The three women in his home at the time, were forced to bear witness to the gruesome killings, raped, and threatened

222. Tardu, *supra* note 46, at 305-06. The Torture Convention employs the words "such as" when introducing the above-mentioned purposes, implying that other purposes are also covered and prohibited. *Id.* at 306; see also BURGERS & DANIELIUS, *supra* note 180, at 118-119.

223. Bunster-Burotto, *supra* note 172, at 307.

224. TURKEY: BRUTAL AND SYSTEMATIC ABUSE, *supra* note 215, at 19-20.

225. WOMEN IN THE FRONT LINE, *supra* note 92, at 18-22. Rape is not the only penalty. Women who are active in community affairs or organizing efforts to improve their lives are often targets of the security forces. They are killed, disappeared, detained, tortured in other ways, and threatened. CAUGHT BETWEEN TWO FIRES, *supra* note 3, at 10.

226. WOMEN IN THE FRONT LINE, *supra* note 92, at 22.

227. *Id.* at 20.

228. *Prime Time Live* (ABC television broadcast June 6, 1991) (comments of Diane Sawyer).

229. Women are also killed, abducted, or physically abused, but rape often supplants a torturer's need to abduct or kill a woman.

230. KASHMIR UNDER SIEGE, *supra* note 2, at 60-61.

with death if they reported the incident.²³¹ In Peru, security forces rounded up villagers and then separated women and children from men. The men were beaten, tortured, or taken away and the women were raped.²³²

2. Interrogation

Throughout history, torture has been used to extract confessions or information in the process of interrogation.²³³ Often the purpose of the torture is not simply to extract information, but rather, to intimidate the victims and to discourage others from various activities.²³⁴ Interrogators torture, in the words of one victim, "to soften a man [or woman] up" after their arrest and to establish their omnipotence over the individual; the interrogation often never takes place.²³⁵

Torturers employ rape to elicit information during the course of the woman's interrogation or the interrogation of a male relative. Politically and socially active women are particularly vulnerable to rape under these circumstances.²³⁶ Kwon In Suk, a female labor activist and student in South Korea, was sexually assaulted by a police detective during questioning about a forged identification card.²³⁷ Torturers exploit familial relationships, often detaining and raping mothers, sisters, daughters, and wives, to learn the whereabouts of a relative wanted by the authorities.²³⁸ In some cases, interrogators often rape women and girls in front of a relative, in an effort to extract information from the tortured third party. In another case, the seventeen-year-old sister of a suspected socialist was raped by her interrogator because she could not provide information regarding her brother.²³⁹

3. Intimidation or Coercion

Torture is often employed by a government to instill fear in the population at large²⁴⁰ and to discourage the proliferation of political opposition.²⁴¹

231. *Campos-Guardado v. INS*, 809 F.2d 285, 287 (5th Cir.), *reh'g denied*, 814 F.2d 658 (5th Cir.), *cert. denied*, 484 U.S. 826 (1987). For a discussion of the case, see Maureen Mulligan, *Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion*, 10 B.C. THIRD WORLD L.J. 356, 373 (1990). It should be noted that acts of torture committed by rebel groups against civilians are not covered by the Torture Convention. Tardu, *supra* note 46, at 306.

232. CAUGHT BETWEEN TWO FIRES, *supra* note 3, at 11.

233. See discussion *supra* part I.A.

234. *Hearings & Markup*, *supra* note 12 (testimony of Amnesty International).

235. JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 38-41 (1988). See generally NUNCA MAS, *supra* note 167.

236. Bunster-Burotto, *supra* note 172, at 307.

237. THE REUTER LIBRARY REPORT, July 23, 1988 (p.m. cycle); THE REUTER LIBRARY REPORT, Jan. 29, 1988 (p.m. cycle).

238. See also Bunster-Burotto, *supra* note 172, at 309.

239. AMNESTY INTERNATIONAL, "OPERATION BLUEBIRD": A CASE STUDY OF TORTURE AND EXTRAJUDICIAL EXECUTIONS IN MANIPUR 7 (Oct. 1990).

240. *Hearings and Markup*, *supra* note 12, at 65 (prepared statement of Alejandro Artucio); see also UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, HUM. RTS. COMM., ¶ 53, U.N. Doc. E/CN.4/1988/17 (1988) [hereinafter 1988 SPECIAL RAPPORTEUR'S REPORT].

The Special Rapporteur concluded that some countries utilize torture to enforce behavior in conformity with particular norms.²⁴² As a result, the term intimidation, as well as the term third person, must be read broadly so as to embrace society at large.

Wholesale rape is a common technique of torture where a government or military regime desires to influence and intimidate the populace. The rapes can be either an explicit military policy, or an implied element of a general plan to spread terror and quell rebellion. Peruvian security forces have intimated that the wives and daughters of community leaders in emergency zones "will pay the price" if the leaders continue their activities.²⁴³ Hundreds of thousands of women and girls were raped during the Pakistani Army's unsuccessful campaign to curb a civil war in Bangladesh in 1971.²⁴⁴ Women and girls were raped, brutalized, and killed by the Turkish Army when it invaded Cyprus in 1974. The Turks sought to forcibly remove the Greek Cypriot population from one half of the island in order to create a Turkish enclave.²⁴⁵ A similar pattern of abuse is unfolding in Bosnia-Herzegovina.²⁴⁶ Rape was not an explicit strategy in either Bangladesh or Cyprus, but the repression and intimidation of the population, by any means possible, was intended. Wholesale rape was one of these means.²⁴⁷ In Bosnia, rape appears to be an explicit Serbian policy aimed at humiliating Bosnian Muslims and encouraging their flight from the region.²⁴⁸

Rape is also used to intimidate individual women. Five women scheduled to testify in a judicial investigation on abuses perpetrated by the Assam Rifles in Manipur, India were detained and sexually assaulted.²⁴⁹ The assaults were part of a pattern of abuses targeted at witnesses scheduled to testify about abuses perpetrated by the Assam Rifles.²⁵⁰ Additionally, torturers use rape in the process of interrogation to intimidate women from pursuing certain activi-

241. CASSESE, *supra* note 21, at 90.

242. Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights Resolution 1985/33, U.N. Doc. E/CN.4/1987/13, ¶ 75 [hereinafter 1987 Special Rapporteur's Report].

243. CAUGHT BETWEEN TWO FIRES, *supra* note 3, at 11. A state of emergency was declared in 1982 as a result of the growing conflict between the Shining Path guerrillas and the Peruvian government.

244. BROWNMILLER, *supra* note 141, at 78-87.

245. *See supra* text accompanying note 140.

246. *See supra* note 140.

247. In the case of Cyprus, the European Commission concluded that the abusive behavior of the troops in general was a tactic of repression. The mass rapes were part of this abuse. *Cyprus v. Turkey*, 4 Eur H.R. Rep. 482 (1982).

248. Post, *supra* note 1, at 32-33 ("There does seem to be a widespread pattern of on-the-ground commanders encouraging — or even ordering — their men to rape. The testimonies of so many victims and witnesses, and of some captured Serb perpetrators, have a consistency that cannot be accidental."); Peter Maass, *The Rapes in Bosnia: A Muslim Schoolgirl's Account*, THE WASH. POST, Dec. 27, 1992, at 1.

249. OPERATION BLUEBIRD, *supra* note 239, at 57.

250. *Id.* at 53-57. Male witnesses received death threats, were detained, tortured, and killed.

ties.²⁵¹ Finally, rape is employed as a method of pressuring male relatives or friends.²⁵²

4. *Discrimination of Any Kind*

Acts which meet the requisite level of pain and suffering may be perceived as torture where they are perpetrated for discriminatory motives. Discrimination is defined in several international human rights conventions, particularly the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief²⁵³ and the Women's Convention.²⁵⁴ Article 1 of the Women's Convention defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁵⁵

The definition of racial discrimination as well as religious intolerance and discrimination follow the same model.

Rape is routinely used to impair or negate the recognition, enjoyment, and exercise of a woman's rights. First, governments deny women the opportunity to participate in community and political affairs on an equal basis with men by torturing socially and politically active women. Torturers rape and sexually assault politically active women to "punish" them for their work and to deter others from participating in the same activities.²⁵⁶ Second, torturers negate a detained woman's right to respect for her inherent dignity and physical integrity by raping her.²⁵⁷ Finally, the mass rape of women in times of war and civil strife eviscerates the protection granted to women under the Geneva Conventions and Protocol II.²⁵⁸

Female refugees are particularly vulnerable to sexual extortion and rape. In the words of a legal advisor to the United Nations High Commissioner on

251. *WOMEN IN THE FRONT LINE*, *supra* note 92, at 18.

252. *Written Testimony of Amnesty International*, *supra* note 170; *see also* *WOMEN IN THE FRONT LINE*, *supra* note 92, at 27-28.

253. G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/55 (1981), 21 I.L.M. 205 (1982), *reprinted in* HENKIN, PUGH, SCHACTER & SMIT, *supra* note 25, at 421-25.

254. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 88, at 193.

255. *Id.*

256. Bunster-Burotto, *supra* note 172, at 307.

257. Principle 1 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment stipulates: "All persons under any form of detention or imprisonment shall be treated with respect for the inherent dignity of the human person." G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 298, U.N. Doc. A/43/49 (1989).

258. *See supra* notes 25 & 67.

Refugees: "Rape, abduction, sexual harassment, physical violence and the not infrequent obligation to grant 'sexual favors' in return for documentation and/or relief goods remain a distressing reality for many women refugees along escape routes and in border areas, camps, settlements and urban centres."²⁵⁹ Public officials with authority over a woman's fate, such as border guards, soldiers, and refugee camp administrators, extort sexual favors in exchange for food, services, or a positive determination of the woman's refugee status.²⁶⁰ The officials exploit the woman's situation and negate the full enjoyment and exercise of her rights. She is often forced to relinquish her physical integrity in exchange for rights and benefits to which she is already entitled. Sexual extortion of refugee women constitutes a method of torture under Article 1 of the Torture Convention: the victim endures severe physical and psychological suffering, much the same as a woman who is raped; the act is perpetrated based on discrimination against her as a female refugee;²⁶¹ and the actor is a public official.²⁶²

Rape is also motivated by religious and ethnic discrimination, as witnessed by the "ethnic cleansing" campaign employed predominantly by Serbs in the former Yugoslavia. In Bosnia and Herzegovina, a province of the former Yugoslavia which declared independence, Serbian soldiers have targeted and raped Muslim and Croatian women in a systematic and organized manner.²⁶³ The Serbian objective is to scar the women so traumatically so as to ensure the women never want to return to their native towns and homes.²⁶⁴ The physical abuse is often accompanied by attacks on religious facilities, such as churches and mosques.²⁶⁵ The rapes are an integral part of the Serbian campaign to remove Muslim, and sometimes Croatian, populations from certain areas to create Serbian populated enclaves.

C. *The Requisite Person*²⁶⁶

The question of who commits torture has not been resolved by any of the bodies vested with the duty to apply the prohibition.²⁶⁷ Article 1 of the Tor-

259. Anders B. Johnsson, *The International Protection of Woman Refugees: A Summary of Principal Problems and Issues*, 1 INT'L J. OF REFUGEE L. 221, 226 (1989).

260. *Id.* at 227.

261. The withholding of services and due process to sexually extort a woman discriminates against her based solely on her gender. Male refugees are not susceptible to the same abuse. While male refugees endure many hardships associated with their refugee status, they are not denied basic rights and services based on their gender.

262. Torture Convention, *supra* note 32, art. 1.

263. Drakulic, *supra* note 66; Post, *supra* note 1, at 33; *see also* Roy Gutman, *Mass Rape: Muslims Recall Serb Attacks*, *Newsday*, Aug. 23, 1992, at 7.

264. Riding, *supra* note 135.

265. *Id.*

266. This Note does not attempt to explore the issue of the identity and status of the perpetrator as the author believes that this is beyond the scope of the Note. The author proceeds under the assumption that the perpetrator carries the necessary elements identifying him as a public official.

267. RODLEY, *supra* note 196, at 90.

ture Convention covers only those acts of torture perpetrated by or with the "acquiescence of a public official or other person acting in an official capacity."²⁶⁸ It is clear from the various international provisions regulating the treatment of prisoners that "public officials" include prison officials and employees,²⁶⁹ law enforcement personnel,²⁷⁰ certain health care personnel,²⁷¹ and members of the military.²⁷²

The extent to which private actors are covered, however, remains an open question. International legal scholars assert that the language encompasses the conduct of certain classes of individuals acting with quasi-public authority. The wording of Article 1 arguably covers actions committed by paramilitary forces or death squads which act with the actual or implied support of government officials.²⁷³ Andrew Byrnes has maintained that a "private individual, employed or used by a State official to inflict maltreatment on other private individuals . . . would be capable of committing 'torture' within the meaning of Article 1."²⁷⁴

The use of the term "acquiescence," as giving rise to state liability for the actions of private individuals, presents a difficult question in the case of rape. "Acquiescence" is defined as "passive compliance, inaction, silence or the like, construed as signifying acceptance or consent."²⁷⁵ But, is a state liable for cultural biases, perceptions of women and actions based on those perceptions of which the State is aware but fails to challenge? When are states responsible for acts committed by private individuals which meet the stated criteria? At what point do the actions of private individuals become public acts? A dictionary reading of the word "acquiescence," suggests that a state may be responsible where a pattern of abuse emerges which is not addressed by the state's legislative or judicial system.

The mass rape of school girls in Kenya highlights the difficulty of this issue. The media reported that over seventy school girls were raped by their male classmates in Kenya following the girls' decision not to join the boys in a protest.²⁷⁶ The girls barricaded themselves in a small dormitory building in a futile attempt to protect themselves from the wrath of their male classmates. The boys broke through the barricade and dragged seventy or more girls to the fields where the boys raped them. Nineteen girls were smothered to death

268. Torture Convention, *supra* note 32, art. 1.

269. Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and Treatment of Offenders, Rules 53-54 U.N. Doc., *supra* note 30.

270. Code of Conduct for Law Enforcement Officials, G.A. Res. 169, U.N. GAOR, 34th Sess., Supp. No. 46, at 186, U.N. Doc. A/34/46 (1979).

271. Principles of Medical Ethics, G.A. Res. 194, U.N. GAOR, 37th Sess., Supp. No. 51, at 210-11, U.N. Doc. A/37/51 (1982).

272. The Geneva Convention IV, *supra* note 25.

273. RODLEY, *supra* note 196, at 91.

274. Byrnes, *supra* note 57.

275. THE AMERICAN HERITAGE DICTIONARY 12 (New College Edition 1979).

276. Timothy Dwyer, *Kenya's Haunted by Girls' Deaths*, CHI. TRIB., Aug. 18, 1991, at 25.

in the initial attack. The press reported that while the mass rape was extraordinary, rape perpetrated by boys on their female classmates is an expected occurrence in Kenya.²⁷⁷

Did the rapes at the boarding school in Kenya constitute torture? To resolve that question, one must decide what acquiescence by state actors means within the context of torture. The girls in Kenya suffered not only the physical assault but also permanent psychological harm. Their male classmates taught them a bitter lesson in asserting oneself and standing up for what you believe in. Second, the rapes had a purpose: to punish the girls for disagreeing with the boys and to intimidate them from disobeying a male's prerogative in the future. Furthermore, the boys' actions were discriminatory. The girls who disagreed were raped, an act specific to their gender and based on their identity as girls. The press reports did not reveal what happened to any male peers who did not want to participate in the protest. Third, state officials acquiesced in the rape at the boarding school by failing to address and condemn prior instances of rape in the partially state-run school system.²⁷⁸

Identifying the rapes which occurred in Kenya as torture raises many difficult policy issues concerning both human rights in general and gender-based torture in particular. I do not disregard the difficulties but believe that shedding the Torture Convention's light on these acts may steer a thoughtful debate that will benefit both human rights in general and contribute to an understanding of gender-based torture specifically. A complete answer to the question of when a private individual acts with the acquiescence of a public official is beyond the scope of this Note but it is one question that the Committee Against Torture must consider when it interprets Article 1.

CONCLUSION

When I decided to write this Note, I sought simply to present the definition of torture and juxtapose it against the use of rape by public officials to show that rape is a common method of torture. As this Note reveals, the fact that rape is employed as a method of torture is evident; therefore, one needs to ask why recognition by international human rights organizations has been so slow. Institutional divisions between bodies which address mainstream human rights and those created specifically to represent women's rights, a genuine bias about rape, and a narrow view of what constitutes torture, have all contributed to the international community's failure in this matter.

However, this Note reveals that a larger problem continues to exist beyond recognition of rape as a method of torture. Women's rights remain

277. *Rape was common at Kenyan school before tragedy: headmaster*, AGENCE FRANCE PRESSE, July 24, 1991. The headmaster callously stated that "[N]one of the boys intended to kill, this must have been a joke turned nasty. The boys just wanted to have a nice time with their girls and this has been the case whenever there were disturbances in the school in the past." *Id.*

278. Rapes have been reported at other schools prior to this episode. Dwyer, *supra* note 276.

marginalized by mainstream human rights groups and are not addressed with the force used to combat abuses targeted at men. Mainstream bodies have largely ignored gender-based abuse while women's rights bodies are relegated to second-class status within the world community. A change is needed in the international forum to eradicate, not only the discrimination directed at women by their governments, but also the segregation of women's rights from the mainstream human rights agenda within the international system.

The tragedy that is unfolding in the former Yugoslavia presents the international community with a unique opportunity to partially rectify this systemic failure. The use of rape as a tool of war and repression must be resoundingly condemned at the highest level. The crimes should be thoroughly investigated and the culpable parties — rapist and commanding officer alike — should be punished. Furthermore, the international community should make it clear that rape and other gender specific violations constitute torture or “wilfully causing great suffering” where employed by governments in such circumstances and will not be tolerated. A full reading of the Geneva Conventions demands that rape receive the same condemnation as other pernicious attacks on a person's physical integrity.

