

Sexual Violence and Torture in Armed Conflict: A Comparative Analysis Through the Lens of Feminist Legal Theory

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This article examines feminist legal theory by exploring the androcentric nature of international law in addressing sexual violence, with a particular focus on rape as a form of torture and its impact on women's bodily integrity and agency. Despite being one of the most severe forms of violence during armed conflict, sexual violence remains inadequately addressed within mainstream human rights law and gender-specific legal frameworks. This article investigates gaps in legal recognition and protection, emphasizing how the separation between courts addressing women's rights and those addressing human rights violations perpetuates insufficient reporting and categorization of gender-based crimes. Using a doctrinal legal research methodology, this article analyzes statutes, case law, and international and regional treaties, supplemented by secondary sources such as feminist legal theory and journal articles. A comparative legal analysis further evaluates the treatment of torture in international and regional instruments. Findings highlight the inadequacies of existing frameworks in protecting women from gender-specific violence, particularly in conflict zones. The article advocates for a more integrated and gender-sensitive approach within international human rights law to effectively prevent and address sexual violence, ensuring dignity and equality for women.

Keywords: Armed conflict, Feminist legal theory, Human rights violation, Rape, and Torture

Introduction

Immanuel Kant, a German philosopher, secularised rights in the late 18th century, emphasizing human responsibility to respect others' dignity. He argued that all humans are rational and autonomous moral agents, regardless of sex, and should not be used as a means to others' ends.² The right to bodily integrity is widely recognized as a fundamental human right; however, it is often violated through practices such as torture and sexual violence, particularly against gendered- based victims.

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² Emily Jackson, "Abortion, Autonomy and Prenatal Diagnosis," *Social & Legal Studies* 9, no. 4 (2000): 467–494.

The expression "respect for the inherent dignity of the human person" is found in several international legal instruments. For instance, Article 10 of the International Covenant on Civil and Political Rights states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Similar clauses can be found in the American Convention on Human Rights (1969)³ and the African Charter on Human and Peoples' Rights (1981).⁴ Human dignity and integrity are not specifically mentioned in the European Convention on Human Rights. Rather, the European Courts have refined these principles through case law, especially when it comes to how they have interpreted Articles 3 and 8, which have been used to uphold the right to integrity. Judge Tulkens, for example, noted in her dissenting opinion in *M.C. v. Bulgaria*⁵ that rape violates human integrity and the right to autonomy, stating that "Rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to autonomy as well" a component of the right to respect for private life as guaranteed by Article 8.

The phrase "dignity of the human person" is not defined explicitly, despite the fact that international conventions frequently mention human dignity. Dignity is the quality by virtue of which human beings possess moral rights or moral standing.⁶

J. Raz emphasizes how important it is to protect human dignity, arguing that doing so entails treating humans as persons capable of planning and plotting their future.⁷ Consequently, upholding people's autonomy and right to decide their own fate is part of honoring their dignity. Self-governance, or behaving in accordance with one's own desires and regulations, is what is meant by autonomy.⁸ The more general ideas of human dignity and personal freedom are strongly related to personal autonomy. All people do, nevertheless, have the right to be free from unauthorized physical interference. According to Fabre, the philosophical concept of ownership is intimately related to the idea of bodily integrity.⁹ Such intrusions, which violate a person's psychological and physical integrity and are based in the idea of ownership of one's body, include torture and other severe bodily injury, including sexual abuse.

Nonetheless, men frequently try to restrict women's autonomy when it comes to their sexual and reproductive lives under patriarchal societal structures, interpreting social standards in a way

³ American Convention on Human Rights, 1969, art. 5.1.

⁴ African Charter on Human and Peoples' Rights, 1981, art. 4.

⁵ *M.C. v. Bulgaria*, Application No. 39272/98, European Court of Human Rights, 2003.

⁶ Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001).

⁷ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 221.

⁸ L. Fastrich, "Human Rights and Private Law," in *Constitutionalism and the Role of Parliaments*, ed. K. Ziegler (Oxford: Oxford University Press, 2007), 23–34.

⁹ Cécile Fabre, *Whose Body Is It Anyway?: Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006).

that serves their demands. Heterosexism typically supports men's sexual relationship initiating and controlling behaviors, including using contraception.¹⁰ Sexual violence against women frequently takes many different forms, such as forced prostitution, forced pregnancy, rape, abduction, strip searches, and other atrocities. These crimes are frequently carried out by members of state organizations, regular military forces, security forces, paramilitary groups, aid workers, peacekeepers, and even ordinary citizens.¹¹ Surprisingly, during armed conflict a woman is used as bait by a mercenary soldier, she is reduced to an object or war prize, which undermines her dignity and raises ethical concerns about such actions.

Feminist authors contend that because modern international human rights law is frequently viewed as androcentric and prioritizes men's rights, women's rights are devalued within it.¹² Consequently, women with limited autonomy and agency are typically excluded from the concept of personhood. Because of this division, there is little reporting of gender-specific violations, which frequently fall under broader areas of human rights. Because of this, problems like rape against women and other sexual assault have not been adequately acknowledged as types of torture under conventional human rights frameworks, especially instruments that are gender-specific.¹³ Furthermore, the impact of sexual humiliation on the agency and bodily integrity of victims is not sufficiently examined in the legal setting.¹⁴

The purpose of this article is to investigate how international human rights law treats rape as grave forms of torture during times of war conflict. It also investigates how gender-specific mechanisms and mainstream human rights frameworks address and categorize these crimes, which disproportionately affect women. This article contributes to the feminist legal theory by contending that sexual humiliation to women's bodies breaches their dignity and integrity as human being.

This essay employs a doctrinal legal research methodology that integrates both primary and secondary sources of law. Primary sources include statutory law, case law, and international treaties, while secondary sources consist of academic articles, legal commentaries, and scholarly books. By analyzing these sources, the article aims to provide a comprehensive examination of the legal treatment of sexual violence and its impact on victims' bodily integrity and agency.

¹⁰ Lori L. Heise, *Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights* (New York: Center for Health and Gender Equity, 1995), 242.

¹¹ A. Nwotite, "Protection of Women against Sexual Violence during Armed Conflicts: International Humanitarian Law Perspective," (2023) 1 *Preorg Journal of Gender and Sexuality Studies*.

¹² V. Spike Peterson and Laura Parisi, "Are Women Human? It's Not an Academic Question," in *Gendered States: Feminist (Re)Visions of International Relations Theory*, ed. V. Spike Peterson (Boulder, CO: Lynne Rienner Publishers, 1998), chap. 6, 142.

¹³ M. E. Baaz and P. M. Stern, *Sexual Violence as a Weapon of War?: Perceptions, Prescriptions, Problems in the Congo and Beyond* (London: Zed Books Ltd, 2013).

¹⁴ Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law," *Michigan Journal of International Law* 30 (2008): 1.

Conceptualization of Torture in International Law and Regional system

Torture encompasses a range of abuses, from verbal assaults to physical and psychological suffering or humiliation, all of which are inflicted intentionally upon the victim.¹⁵ David Sussman argued that a person who is tortured is forced to surrender their autonomy by inflicting suffering on themselves.¹⁶ Although the prohibition of torture is a *jus cogens*¹⁷ norm from which no derogation is allowed, torture continues to be used during war or armed conflict due to the lack of accountability of government authorities or private individuals acting on behalf of the government.

Prior to the adoption of the Universal Declaration of Human Rights (UDHR)¹⁸, the prohibition of torture was initially addressed under International Humanitarian Law (IHL), focusing specifically on the treatment of prisoners of war (POWs) rather than detainees in general. Additionally, regional frameworks such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR) strengthen this prohibition and establish mechanisms to ensure accountability.

International Humanitarian Law (IHL)

Lieber's Code is one of the earliest codifications of the laws of war, offering protection to prisoners of war (POWs) from "any revenge wreaked upon them by the intentional infliction of suffering, disgrace, cruel imprisonment, deprivation of food, mutilation, death, or any other barbarity."¹⁹ Similar protections are provided under the Hague Conventions on Land Warfare of 1899 and 1907, which, albeit in vague language, oblige signatories to treat POWs humanely.²⁰ The Geneva Conventions further condemn the use of torture, extending this prohibition to the civilian population as a whole.²¹

Regarding protected persons, the prohibition against causing "physical suffering or extermination" specifically includes bans on murder, torture, corporal punishment, mutilation, medical experimentation, and "any other measure of brutality, whether applied by civilian or

¹⁵ Ronald C. Slye and Beth Van Schaack, *International Criminal Law and Its Enforcement: Cases and Materials* (New York: Foundation Press, 2007).

¹⁶ David Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33, no. 1 (Winter 2005): 4.

¹⁷ *Jus cogens* refers to a set of universal principles of international law that are considered peremptory and non-derogable.

¹⁸ Universal Declaration of Human Rights, 1948.

¹⁹ 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, ed. Dietrich Schindler and Jiri Toman, 2nd ed. (Leiden: Martinus Nijhoff, 1981).

²⁰ Hague Conventions on the Land Warfare, 1899 and 1907, § 1, ch. II, art. 4.

²¹ Common Article 3 of the Geneva Conventions, 1949, prohibits torture on any person who is *hors de combat* and no longer taking an active part in hostilities.

military agents."²² However, the Geneva Conventions do not explicitly define what constitutes torture. Strictly speaking, IHL lacks a precise definition of torture, though the ICRC's Commentary suggests that "the word torture refers especially to the infliction of suffering on a person to obtain confessions or information from that person or another."²³ IHL also stipulates that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to extract information of any kind."²⁴ Moreover, torture is classified as a grave breach of the Geneva Conventions.²⁵

Common Article 3 of the Geneva Conventions guarantees protection against "violence to life and person, particularly murder of all kinds, mutilation, cruel treatment, and torture," as well as freedom from "outrages upon personal dignity, particularly humiliating and degrading treatment."²⁶ Although the Geneva Conventions do not precisely define humane or inhumane treatment, these standards are arguably developed through the interpretation of the positive and negative obligations related to the treatment and interrogation of persons, as outlined in the Geneva Conventions and Additional Protocols I (API)²⁷ and II (APII)²⁸. Acts causing severe humiliation or degradation may be deemed "outrages upon human dignity." The International Criminal Tribunal for the Former Yugoslavia (ICTY) defines this as: (i) the accused intentionally committed an act that is generally seen as causing serious humiliation or degradation; and (ii) the accused knew their actions could have such an effect. Serious humiliation must be intense enough to outrage any reasonable person.²⁹

International Human Rights Law (IHRL)

The twentieth century saw the resurgence of torture, primarily by states against their own citizens. In response, following World War II, international human rights instruments extended the prohibition of torture to signatory states, holding them accountable both to their citizens and to other states for acts of torture.

²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV), August 12, 1949, art. 32; International Committee of the Red Cross (ICRC), *Commentary on the Geneva Conventions of 12 August 1949, Volume IV*, ed. Jean S. Pictet (Geneva: ICRC, 1958), 598.

²³ International Committee of the Red Cross (ICRC), *Commentary on the Geneva Conventions of 12 August 1949, Volume III*, ed. Jean S. Pictet (Geneva: ICRC, 1960), art. 130.

²⁴ Geneva Convention Relative to the Treatment of Prisoners of War (GCIII), August 12, 1949, arts. 17, 87, and 130.

²⁵ Ibid

²⁶ Geneva Conventions, Common Article 3(1)(a)-(c); *Nicaragua v. United States of America, Military and Paramilitary Activities in and Against Nicaragua* (Merits), Judgment, [1986] I.C.J. Rep. 14, paras. 218, 255; *Abella v. Argentina* ("La Tablada"), Case 11.137, Inter-Am. Comm'n H.R., Report No. 5/97, OEA/Ser.L/V/II.95 Doc. 7 rev. (1997), paras. 155–156.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 5.

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 4(a)

²⁹ *Prosecutor v. Kovač*, Case No. IT-96-23-PT, Judgment, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia (ICTY), June 12, 2002.

The prohibition of torture was enshrined in Article 5 of the Universal Declaration of Human Rights (UDHR), which states: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." This condemnation is echoed in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) of 1966, which adds a prohibition on non-consensual medical and scientific experimentation.³⁰ Furthermore, Article 10 of the ICCPR guarantees the humanity and respect for the inherent dignity of all persons deprived of their liberty.

Despite the universal condemnation of torture, international bodies and human rights organizations have noted its continued use by states. The United Nations General Assembly took a significant step by adopting the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (The Declaration Against Torture) in 1975.³¹ Subsequently, in 1984, the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention).³²

The African System

The human rights system in Africa upholds the positive right of every human being to be treated with dignity and prohibits torture and other forms of cruel treatment. The African Charter on Human and Peoples' Rights (ACHPR) stipulates in Article 5 that every person has the right to have his or her legal status recognized and to have the fundamental dignity of a human being respected. It is forbidden to use any kind of force or dehumanize people in any way, including slavery, the slave trade, torture, and harsh, inhumane, or degrading punishment or treatment.

In Article 5, the term "all forms of" is sufficiently broad to include restrictions against both state and non-state actors.³³ The African Commission on Human and Peoples' Rights acknowledged human dignity in *Purohit and Moore v. The Gambia*³⁴ as a "inherent basic right" that applies to every person, regardless of mental capacity, and is violated when a state subjects someone to "personal suffering and indignity,"³⁵ which varies depending on the situation.

³⁰ Universal Declaration of Human Rights, December 10, 1948, art. 7.

³¹ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of December 9, 1975, accessed September 23, 2024, <http://www2.ohchr.org/english/law/declarationcat.htm>.

³² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 of December 10, 1984, accessed September 23, 2024, <http://www2.ohchr.org/english/law/cat.htm>.

³³ *Uzoukwu v. Ezeonu II* (1991), 6 Nigerian Weekly Law Report, 708 (Supreme Court of Nigeria).

³⁴ *Purohit and Moore v. The Gambia*, Communication No. 241/2001, African Commission on Human and Peoples' Rights, 33rd Ordinary Session, May 15–29, 2003, para. 57.

³⁵ *Modise v. Botswana*, Communication No. 97/1993, African Commission on Human and Peoples' Rights, 28th Ordinary Session, October 23–November 6, 2000, para. 91.

According to Articles 60 and 61 of the ACHPR, the Commission can interpret the Charter based on international legal sources such as UN treaties and customary international law. For instance, the Commission used the UN Convention Against Torture (UNCAT) and international humanitarian law to define and treat torture in *Democratic Republic of Congo v. Burundi, Rwanda, and Uganda*.³⁶ But the Commission has always viewed torture as an especially serious kind of maltreatment that needs to be outlawed completely. According to the Commission's ruling in *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria*³⁷, article 5 forbids not only torture but also cruel, inhuman, or degrading treatment, which includes acts that cause severe physical or mental suffering, degrade people, or force them to take action.

The Protocol to the ACHPR on Women's Rights³⁸ mandates States Parties to protect women from violence, arbitrary restrictions, and harmful practices. It prohibits exploitation, cruel, inhuman, or degrading punishment and treatment, ensuring women's physical integrity.³⁹

American System

The American Convention on Human Rights (ACHR), which was modeled after the American Declaration of the Rights and Duties of Man, states in Article 5 that "every person has the right to have their physical, mental, and moral integrity respected." Apart from the Convention, a vast body of law on safeguarding personal integrity has been established by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, based on a variety of reports, opinions, and rulings.

Nonetheless, there is no clear definition of torture or cruel, inhuman, or degrading treatment in the ACHR. The Inter-American Convention to Prevent and Punish Torture (IACPPT)⁴⁰ must be consulted in order to fully understand the idea of torture within the Inter-American system. According to IACPPT Article 2(1), torture is defined as:

"any act committed with the intent to inflict bodily or mental pain or suffering for any reason, including but not limited to criminal investigation, intimidation, personal punishment, prevention, penalty, or other objectives."

³⁶ *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, Communication No. 227/1999, African Commission on Human and Peoples' Rights, 33rd Ordinary Session, May 15–29, 2003, para. 70.

³⁷ *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria*, African Commission on Human and Peoples' Rights, Communication Nos. 137/1994, 139/1994, 154/1996, and 161/1997, 24th Ordinary Session, October 22–31, 1998, para. 79.

³⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, September 13, 2000, entered into force November 25, 2005.

³⁹ Ibid. art.4

⁴⁰ Inter-American Convention to Prevent and Punish Torture (IACPPT), adopted December 9, 1985, entered into force February 28, 1987, accessed September 24, 2024, <http://www.oas.org/juridico/english/treaties/a-51.html>.

Even in cases when there is no physical or emotional suffering, torture can also involve the employment of techniques meant to destroy the victim's identity or impair their physical or mental abilities. The UN Convention Against Torture (UNCAT) defines torture more narrowly than the IACPPT because it uses the term "any other purpose" instead of "such purposes as," and it does not stipulate that the pain or suffering must be "severe."

Objective elements such as the length of the suffering inflicted, the technique employed, the goal, the sociopolitical setting, and the arbitrary restriction of liberty are taken into consideration by the Commission and Court when evaluating whether an act constitutes torture. They also take into account subjective elements including the victim's fragility, age, and gender.⁴¹

The Inter-American Commission has made the protection of women's human rights a priority in order to promote gender equality. It has established the Rapporteurship on the Rights of Women and affirmed that women have the right to live free from discrimination and violence, which is central to the Inter-American human rights framework.⁴² However, in recent years, the Commission has expressed concern about various forms of violence against women, including sexual assault, cruel treatment, and psychological and physical torture, particularly in contexts of armed conflict⁴³ and political unrest.⁴⁴ In cases where women are sexually assaulted by state actors, such as members of the armed forces, the Commission considers rape to be a serious violation of women's personal integrity and dignity.

The Inter-American Court of Human Rights has made significant progress in addressing institutional violence against women. In the *Castro Castro Prison* case, the Court emphasized the violence experienced by female political prisoners in Peru as a reflection of the historical discrimination faced by women.⁴⁵ In a different case, the court cited international human rights jurisprudence and the definition of violence in the *Belem do Para* Convention to establish that sexual violence is a "paradigmatic form of violence against women."⁴⁶ This type of violence has repercussions beyond the individual victim and constitutes a violation of their right to privacy,

⁴¹ *Ximenes-Lopes v. Brazil*, Inter-American Court of Human Rights (IACHR), Series C, No. 149, Judgment of July 4, 2006, para. 127.

⁴² Inter-American Commission on Human Rights (IAComHR), *Access to Justice for Women Victims of Violence in the Americas*, January 20, 2007, OEA/Ser.L/V/II Doc 68 ("Report on Access to Justice"), para. 32, accessed September 24, 2024, <http://www.cidh.oas.org/women/Access07/exesummary.htm>.

⁴³ Inter-American Commission on Human Rights (IAComHR), *Violence and Discrimination against Women in the Armed Conflict in Colombia*, October 18, 2006, OEA/Ser.L/V/II.Doc 67 ("Report on Women in Colombia").

⁴⁴ Inter-American Commission on Human Rights (IAComHR), *The Right of Women in Haiti to Be Free from Violence and Discrimination*, March 10, 2009, OEA/Ser.L/V/II Doc. 6 ("Report on Right of Women in Haiti").

⁴⁵ *Penal Miguel Castro Castro Prison v. Peru*, Inter-American Court of Human Rights (IACtHR), Series C, No. 160 (2006).

⁴⁶ *Rosendo Cantú and Others v. Mexico*, Inter-American Court of Human Rights (IACtHR), Series C, No. 216, para. 109 (2010).

including the right to develop intimate relationships.⁴⁷ According to Abi-Mershed, the convention establishes new normative standards specifically responsive to gender-based violence.⁴⁸ Despite these advances, the Commission and the Court continue to face challenges in ensuring the fulfillment of the promise of gender equality and a life free from violence for women under the Inter-American System.

European System

The European Convention on Human Rights (ECHR) explicitly prohibits torture and other forms of ill-treatment under Article 3, which simply states, "No one shall be subjected to torture or inhuman or degrading treatment or punishment." However, the article does not define "torture." The concept of torture has evolved through the European Court of Human Rights (ECHR) and the European Commission's jurisprudence on a case-by-case basis.

The European Commission of Human Rights definitively defines "degrading treatment" as any form of treatment or punishment that grossly humiliates the victim in front of others or forces the detainee to act against their will or conscience.⁴⁹ In *Ireland v. United Kingdom*⁵⁰, the Court addressed the "five techniques" used during interrogations that caused severe physical and emotional distress, resulting in psychiatric disorders.⁵¹ Although this treatment was deemed inhumane, it did not meet the standard of severity required to be considered torture.

Article 15 of the ECHR stipulates that nations cannot deviate from their commitments under Article 3, even during times of war or national emergency, underscoring the absolute character of the prohibition on torture.⁵² In *Aydin v. Turkey*⁵³, the Court applied the elements of torture as outlined in *Ireland v. United Kingdom* to a rape case. Turkish police detained a young woman suspected of being involved with the Kurdistan Workers' Party (PKK), blindfolded her, beat her, sprayed her with high-pressure cold water, and raped her. The victim's fragility and the long-lasting psychological harm inflicted led the Court to conclude that the rape of a detainee by a state official constituted an extremely heinous and disgusting form of ill-treatment. The accumulation of physical and psychological violence, particularly the brutal act of rape, was considered to be torture, violating Article 3.⁵⁴ Similarly, in *Akkoc v. Turkey*⁵⁵, the ECHR

⁴⁷ Ibid., para. 119.

⁴⁸ Elizabeth Abi-Mershed, Deputy Executive Secretary, Inter-American Commission on Human Rights, Organization of American States (OAS), Washington, D.C.130.

⁴⁹ The Greek Case (1969), 12 Yearbook of the European Convention on Human Rights.

⁵⁰ *Ireland v. United Kingdom* (1978), 2 EHRR 167.

⁵¹ Ibid., para. 167

⁵² European Convention on Human Rights, art. 15(1)–(2).

⁵³ *Aydın v. Turkey* (1997), 25 EHRR 251.

⁵⁴ *Ireland v. United Kingdom* (1978), 2 EHRR 167, paras. 83–86.

⁵⁵ *Akkoç v. Turkey* (2002), 34 EHRR 51; *Algür v. Turkey* (2002), ECtHR, No. 32574/96.

determined that the applicant's treatment, which included electric shocks, physical and sexual abuse, and intimidation, resulted in significant psychological injury and constituted torture.

The European Court of Human Rights has established a definitive meaning of human dignity, respect, and moral integrity through its jurisprudence on Articles 3 and 8 of the European Convention on Human Rights. Article 8 addresses the protection of private and family life.

There is some overlap between these articles. In *Costello-Roberts v. United Kingdom*,⁵⁶ a seven-year-old student at a private boarding school was subjected to corporal punishment by the headmaster. The Court found that, in the particular circumstances, the punishment did not violate Article 8 and was not harsh enough to violate Article 3. The Court did not, however, rule out the idea that abusing a child by hitting them without their parents' permission may compromise their moral and physical integrity and so be a breach of Article 8. Feldman makes the argument that the preservation of children's moral integrity and dignity is a necessary condition for the legitimacy of corporal punishment.⁵⁷

The Court affirmed the right to moral and physical integrity guaranteed by Article 8 in *X and Y v. Netherlands*.⁵⁸ One of the candidates in this instance, a female over 16 with mental disabilities, was sexually assaulted. It was not possible for the girl's guardian to submit a criminal complaint on her behalf because Dutch law did not allow for criminal proceedings in such circumstances. Court did not feel the need to consider the issue under article 3, it did determine that the inability to pursue criminal charges for the rape which violated article 8.⁵⁹

Defining Torture

The Declaration against Torture introduced the first international definition of torture. According to Article 1, torture is defined 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 purposes such as obtaining information or a confession, punishing for an act committed or suspected, or intimidating the individual or others. It excludes pain or suffering that results solely from, or is inherent in, lawful sanctions in line with the Standard Minimum Rules for the Treatment of Prisoners.”

Furthermore, Article 3 of the Declaration against Torture prohibits justifying torture or inhuman

⁵⁶ *Costello-Roberts v. The United Kingdom* (1994), 1 FCR 65.

⁵⁷ David Feldman, "Human Dignity as a Legal Value—Part 1," (1999) *Public Law* 682

⁵⁸ *X and Y v. Netherlands* (1985), 8 EHRR 235.

⁵⁹ *M.C. v. Bulgaria* (2003), Application No. 39272/98, European Court of Human Rights, where violations of Article 3 and Article 8 of the ECHR were found.

treatment under any exceptional circumstances, including political instability or public emergencies. The Torture Convention builds on the Declaration against Torture by providing a broader definition of torture. It describes torture as:

“any act that intentionally inflicts severe physical or mental pain or suffering on a person, for purposes such as obtaining information, punishment for an act committed, intimidation, or for reasons based on discrimination, when inflicted by or with the consent or acquiescence of a public official or someone acting in an official capacity. Lawful sanctions, however, are not considered torture.”⁶⁰

The Convention introduces several modifications compared to the Declaration against Torture. For example: the declaration limits torture to acts by or instigated by public officials, while the convention expands this to acts committed "with the consent or acquiescence" of a public official or someone acting in an official role. The European Commission of Human Rights (ECHR), in the Greek Case⁶¹, noted that torture is an "aggravated form of inhuman treatment." This notion was echoed in the Declaration against Torture, but not in the Torture Convention, which only refers to "severe pain and suffering." The Rome Statute of the International Criminal Court defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, on a person under the control of the accused, excluding lawful sanctions.”⁶²

Elements of Torture

According to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the key elements of torture are now generally accepted⁶³.

These include:

Deliberate infliction of injury

The Torture Convention requires that acts of torture are committed for specific purposes, such as obtaining information, punishment, intimidation, or discrimination.⁶⁴ Torture, under the Torture

⁶⁰ United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Resolution 39/46, December 10, 1984, Article 1.

⁶¹ European Commission of Human Rights, quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 3rd ed. (Oxford: Oxford University Press, 2009), 91.

⁶² International Criminal Court (ICC), *Rome Statute of the International Criminal Court*, Article 7.2(e), U.N. Doc. A/CONF.183/9, July 17, 1998.

⁶³ *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Judgment, para. 111, International Criminal Tribunal for the Former Yugoslavia (ICTY), December 10, 1998; Antonio A. Cassese, Guido G. Acquaviva, Mary De Ming Fan, and Alex A. Whiting, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), 259.

⁶⁴ International Criminal Court (ICC), *Rome Statute of the International Criminal Court*, Article 7(1)(f), U.N. Doc. A/CONF.183/9, July 17, 1998.

Convention, must be inflicted deliberately. Unintentional neglect by authorities does not qualify. Both the ICTY and the ECHR uphold the need for intent.⁶⁵ The ECHR has also shifted the burden of proof onto the government, as seen in *Selmouni v. France*⁶⁶, where the court concluded that if a person in police custody is injured upon release, the state must explain the injuries.⁶⁷ Similarly, the Inter-American Convention to Prevent and Punish Torture, as interpreted by the Inter-American Court of Human Rights (IACHR) in *Morales v. Guatemala*⁶⁸, examines the circumstances to infer intent, rather than relying solely on the perpetrator's true intent.

The Rome Statute, however, does not require a specific purpose for torture to qualify as a crime against humanity but emphasizes that the victim must be under the control of the perpetrator. The ICTY has consistently required this purposive element, especially in cases linking rape to torture, as seen in *Prosecutor v. Delalic*⁶⁹, where the purposes listed in the Torture Convention were considered representative. In the case of *Prosecutor v. Furundzija*⁷⁰, the trial chamber upheld the list of purposes outlined in the Torture Convention, but further emphasized that "humiliating the victim" should also be considered among the possible purposes of torture.⁷¹ This conclusion was based on the overarching principle of international humanitarian law, which aims to protect human dignity.

In regional human rights protection, the European Court of Human Rights (ECHR) has consistently adhered to the Torture Convention's definition. In *The Greek Case* (1969), the ECHR defined torture as inhuman treatment with a specific purpose, such as obtaining information, confessions, or inflicting punishment.⁷² In more recent cases like *Egmez v. Cyprus*⁷³ and *Denizci v. Cyprus*⁷⁴, the ECHR concluded that, although officials subjected victims to varying degrees of intentional ill-treatment, the acts did not amount to torture as the victims were unable to prove that the officers' intent was to extract a confession.⁷⁵ Similarly,

⁶⁵ *Prosecutor v. Kunarac*, Case No. IT-96-23 and IT-96-23/1-A, Judgment, para. 153, International Criminal Tribunal for the Former Yugoslavia (ICTY), June 12, 2002.

⁶⁶ *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149.

⁶⁷ *Ibid.*, 193.

⁶⁸ *Morales v. Guatemala*, Inter-American Court of Human Rights, No. 37, March 8, 1998.

⁶⁹ *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, paras. 470-471, International Criminal Tribunal for the Former Yugoslavia (ICTY), November 16, 1998.

⁷⁰ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, International Criminal Tribunal for the Former Yugoslavia (ICTY), December 10, 1998.

⁷¹ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, para. 162, International Criminal Tribunal for the Former Yugoslavia (ICTY), December 10, 1998.

⁷² Report of the European Commission of Human Rights on *The Greek Case*, 1969, 12 Y.B. Eur. Conv. on H.R.

⁷³ *Egmez v. Cyprus*, Judgment, European Court of Human Rights, December 21, 2000.

⁷⁴ *Denizci v. Cyprus*, Judgment, European Court of Human Rights, May 23, 2001.

⁷⁵ *Denizci v. Cyprus*, 2001-V Eur. Ct. H.R. 225, 312-13.

Article 2 of the Inter-American Convention also highlights the purposive element of torture.⁷⁶

The purposive element has been particularly relevant in cases of rape. For example, in *Mejia v Peru*⁷⁷, the court determined that rape by a state official constitutes torture when its purpose is to punish or intimidate the victim.

Public Official as Actor

In order to establish an act of torture under the Torture Convention, it must be shown that the act was “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.” Consequently, even severe abuses will not be classified as torture under the Torture Convention unless there is state involvement.⁷⁸ This approach is based on the premise that when a private individual commits acts of torture without the involvement of state authorities, the domestic legal system traditionally handles the prosecution and punishment of the perpetrator.⁷⁹

However, the Human Rights Committee has interpreted the protection offered by Article 7 of the International Covenant on Civil and Political Rights (ICCPR) more broadly, stating that it is not limited to acts committed or instigated by public officials. The Committee has emphasized that states are responsible for acts of torture committed by private parties when they fail to take effective measures to prevent or address such abuse.⁸⁰ The UN Special Rapporteur on Torture has similarly affirmed that the state action requirement is satisfied when public officials are “unwilling to provide effective protection from ill-treatment,” which includes ill-treatment carried out by non-state actors.⁸¹

The Committee Against Torture (CAT) has highlighted numerous specific instances of torture experienced by women, particularly expressing concern over sexual violence and assault against female detainees and prisoners by law enforcement personnel. In 2008, the CAT indicated that, in cases involving non-state actors, its work was guided by the “due diligence” standard rather than the traditional analysis of the elements of torture.

⁷⁶ *Egmez v. Cyprus*, 2000–XII Eur. Ct. H.R. 315, 336; *Tibi v. Ecuador*, Case 12.124, Report No. 90/00, Inter-American Court of Human Rights (IACtHR), September 7, 2004, §146.

⁷⁷ *Mejia v. Peru*, Report No. 5/96, Case 10.970, Annual Report of the Inter-American Commission on Human Rights (IACHR), OEA/Ser.L/V/11.91, doc. 7 rev., February 28, 1996, 157.

⁷⁸ Gail H. Miller, *Defining Torture* (2005), 4.

⁷⁹ J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers, 1988), 119–120.

⁸⁰ *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 166, International Criminal Tribunal for the Former Yugoslavia (ICTY), June 12, 2002.

⁸¹ U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 4: Methods of Combating Torture*, para. 8.

In its General Comment No. 2, the CAT clarified that when state authorities, or others acting in an official capacity or under the color of law, are aware or have reasonable grounds to believe that acts of torture or ill-treatment are being perpetrated by non-state officials or private actors, and they fail to take appropriate measures to prevent, investigate, prosecute, and punish those responsible, the state bears responsibility under the Convention. In such cases, state officials may be considered as authors, accomplices, or otherwise responsible for consenting to or acquiescing in these impermissible acts. The Committee further noted that when a state fails to exercise due diligence in stopping, sanctioning, and providing remedies for victims of torture, it enables non-state actors to commit such acts with impunity, thus rendering the state's indifference or inaction a form of encouragement or de facto permission.

The European Court of Human Rights (ECHR) adopted this broader understanding of the state action requirement in *Z and Others v. United Kingdom*⁸², where the court held the government accountable for inhuman and degrading treatment inflicted upon four children by their parents. The court ruled that, beyond the requirement of state involvement articulated in the Torture Convention, states must take measures to ensure that individuals within their jurisdiction are protected from torture or ill-treatment, even when the harm is inflicted by private individuals.

The Committee Against Torture, which monitors state compliance with the Torture Convention, has also somewhat relaxed the state action requirement, particularly in cases involving states with ineffective governments. In *Elmi v. Australia*⁸³, for example, a Somali citizen challenged Australia's decision to deport him to Somalia.⁸⁴ The Committee, noting the lack of effective government or legitimate state actors in Somalia, held that severe ill-treatment by groups that had established "quasi-governmental institutions" and were exercising prerogatives comparable to those of legitimate governments constituted torture.⁸⁵

Under the Geneva Conventions, criminal responsibility for acts of torture and inhuman treatment is determined by the status of the perpetrator, and Article 11 of Additional Protocol I prohibits torture under all circumstances, whether committed by military personnel or civilians.⁸⁶ However, the Rome Statute of the International Criminal Court emphasizes the "irrelevance of official capacity," stating that the statute applies "equally to all persons without any distinction based on official capacity."

⁸² *Z and Others v. United Kingdom*, App. No. 29392/95, European Court of Human Rights (ECtHR), 34 Eur. H.R. Rep. 97, 131 (2002).

⁸³ *Elmi v. Australia*, Communication No. 120/1998, U.N. Human Rights Committee, U.N. Doc. CCPR/C/72/D/120/1998 (July 25, 2002).

⁸⁴ *Elmi v. Australia*, Communication No. 120/1998, U.N. Committee Against Torture, 22nd Session, U.N. Doc. CAT/C/22/D/120/1998, para. 3.1 (1999).

⁸⁵ *Ibid.*, paras. 6.5–7 (1999).

⁸⁶ Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, art. 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 147; Additional Protocol I to the Geneva Conventions of 1949, June 8, 1977, art. 11(1).

In contrast, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has shown some inconsistency regarding the requirement of state action in torture convictions. In *Prosecutor v. Delalić*⁸⁷ and *Prosecutor v. Furundžija*⁸⁸, both the trial and appeals chambers required the involvement of a public official. However, in *Prosecutor v. Kunarac*⁸⁹, the Appeals Chamber held that the involvement of a public official is not a requirement under customary international law for establishing individual criminal responsibility for torture outside the framework of the Torture Convention.⁹⁰

Severe Pain

The concept of "severe pain or suffering" under the Convention Against Torture refers to the infliction of intense physical or mental distress on a person, excluding pain or suffering that arises naturally from lawful sanctions. The Convention itself is recognized as reflective of customary international law.⁹¹ Under this framework, physical torture may encompass acts causing pain or suffering that is less severe than "extreme pain or suffering" or "pain...equivalent in intensity to the pain associated with serious physical injury, such as organ failure, impairment of bodily function, or even death." However, the Convention does not explicitly define the term "severe."

Given this lack of clarity, international courts have broadly interpreted the term "severe" in the context of torture. It has been observed that determining the threshold for inhuman treatment qualifying as torture is "virtually impossible."⁹² Nevertheless, in *Prosecutor v. Brđanin*⁹³, the International Criminal Tribunal for the former Yugoslavia (ICTY) examined the level of suffering or pain required to meet the threshold of torture. The tribunal assessed not only objective factors such as the "nature, purpose, and consistency of the acts committed," but also subjective elements, including the victim's "physical or mental condition, the effect of the treatment, the victim's age, sex, state of health, and position of inferiority."⁹⁴

In the same case, the trial chamber emphasized that a permanent injury is not required to establish torture. Further, in another case, the ICTY considered the "specific social, cultural, and religious background of the victims," noting that suffering could be exacerbated by certain social and cultural conditions.⁹⁵

⁸⁷ *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, paras. 473, 494, International Criminal Tribunal for the Former Yugoslavia (ICTY), November 16, 1998.

⁸⁸ *Prosecutor v. Furundžija*, Case No. IT-95-17-T, Judgment, para. 111, ICTY, December 10, 1998.

⁸⁹ *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1, Judgment, ICTY, June 12, 2002.

⁹⁰ *Ibid.*, para. 148.

⁹¹ Antonio Cassese, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), 261.

⁹² Beth Van Schaack and Ronald C. Slye, *International Criminal Law and Its Enforcement* (New York: Foundation Press, 2007), 517.

⁹³ *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, September 1, 2004.

⁹⁴ *Ibid.*, para 484.

⁹⁵ *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, para. 237, November 30, 2005.

It is important to recognize that purely mental torture also falls within the definition of torture. The threat of torture, in particular, can constitute psychological torture if it reaches the requisite level of severity.⁹⁶ The court noted that the threat or real danger of subjecting a person to physical harm can, under certain circumstances, cause such moral anguish that it amounts to "psychological torture."⁹⁷

Torture in Custody with Reference to Women's Experiences

When we think of torture, the image that often comes to mind is that of a male detainee in a police cell subjected to electric shocks, repeated beatings, stress positions, mock executions, or similar practices. However, women can also be tortured in their homes, as well as in police or other official custody, and are regularly subjected to torture during conflicts as part of the strategies employed by belligerent parties. Gender-based violence against women has been a widespread practice during wars, taking many forms, including rape, forced sexual intercourse or other sexual acts with family members⁹⁸, forced impregnation⁹⁹, forced pregnancy¹⁰⁰, sexual humiliation¹⁰¹, sexual mutilation and medical experimentation on women's sexual and reproductive organs¹⁰², forced abortion¹⁰³, forced sterilization¹⁰⁴, forced prostitution¹⁰⁵, being compelled to exchange sexual favors for essential items, being compelled to exchange sexual favors for the return of children¹⁰⁶, trafficking in women, pornography¹⁰⁷, and forced cohabitation or marriages¹⁰⁸. Additionally, Amnesty International, the United Nations Committee Against Torture¹⁰⁹, and other governmental and non-governmental organizations

⁹⁶ Committee Against Torture (CAT), *Report on Argentina*, U.N. Doc. A/45/44, 1990, para. 154.

⁹⁷ *Urrutia v. Guatemala*, Inter-American Court of Human Rights, Series C No. 103, Judgment, November 27, 2003, para. 92.

⁹⁸ Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Bantam Books, 1975), 31–113.

⁹⁹ Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women*, U.N. Doc. E/CN.4/1998/54 (1998).

¹⁰⁰ A. Stiglmeier, "The Rapes in Bosnia-Herzegovina," in *Mass Rape: The War Against Women in Bosnia-Herzegovina*, ed. A. Stiglmeier (Lincoln: University of Nebraska Press, 1994), 131–137.

¹⁰¹ M. Goldenberg, "Memoirs of Auschwitz Survivors: The Burden of Gender," in *Women in the Holocaust*, ed. D. Ofer and L.J. Weitzman (New Haven: Yale University Press, 1998).

¹⁰² Jessie Duarte and Nomvula Mokonyane, speaking at the workshop on Gender and the Truth and Reconciliation Commission (medical experimentation carried out on women in detention during the apartheid years in South Africa), Centre for Applied Legal Studies, University of Witwatersrand, March 19, 1996.

¹⁰³ International Women's Rights Action Watch (IWRAP), "Women's Watch," 6(3) (1993).

¹⁰⁴ Asia and Pacific Development Centre, *Women and Armed Conflict: A Statement on the Situations and Forwarding of Recommendations to the 42nd Session of the UN Commission on the Status of Women*, New York, March 2-13, 1998.

¹⁰⁵ U. Dolgopel & S. Paranjape, *Comfort Women: An Unfinished Ordeal* (1994).

¹⁰⁶ C. Twagiramariya & M. Turshen, "Sexual Politics of Survival in Rwanda," in *What Women Do in Wartime: Gender and Conflict in Africa* (1998), 101, 109.

¹⁰⁷ Catharine A. MacKinnon, "Turning Rape into Pornography: Postmodern Genocide" (1993).

¹⁰⁸ Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Aftermath* (1996).

¹⁰⁹ United Nations High Commissioner for Human Rights, "Conclusions and Recommendations of the Committee Against Torture: United States of America," CAT/C/24/6 (Concluding Observations/Comments), May 15, 2000.

have found that custodial sexual misconduct against women is extensive. For example, Amnesty International has documented the use of rape, acts of sexual humiliation, and threats of harm to women's reproductive systems as methods of torture in detention centers worldwide.¹¹⁰

In 1995, the Fourth United Nations World Conference on Women highlighted the vulnerability of women to violence from public officials (including police, prison officials, and security forces) in both conflict and non-conflict situations.¹¹¹ Women in custody may face the same or similar abuses as men, but are particularly at risk of rape and other forms of sexual torture and humiliation. To punish them for their activities or to weaken their resistance, threats of rape, actual rape, and sexual humiliation are often used to elicit information or a confession during interrogation. The UN Special Rapporteur on Torture has noted that custodial violence against women very often includes rape and other forms of sexual violence, such as threats of rape, inappropriate touching, "virginity testing," being stripped naked, invasive body searches, and insults and humiliations of a sexual nature.¹¹²

During war, the sexual violation of enemy women is often seen as a means of satisfying the conquerors.¹¹³ Women's bodies frequently become battlegrounds in men's wars, where they are maimed, sexually mutilated, enslaved, and repeatedly raped as part of the warring parties' strategy to break the will of the civilian population.¹¹⁴ Kaminsky notes that in the experience of arrest and internment in prison, power is stripped from the victim and transferred to the interrogators.¹¹⁵ The victim becomes entirely dependent on the interrogators for basic necessities like food, clothing, and shelter. The torturers exercise control over every aspect of the victim's life, including sleep, movement, speech, and even life and death.

Torture leaves victims with deep psychological trauma and physical injuries, with women often suffering more acutely than men in such situations. For instance, during apartheid in South Africa, pregnant women were subjected to electric shocks; medical care was withheld, leading to miscarriages; invasive body searches and vaginal examinations were carried out; and women

¹¹⁰ Amnesty International, *Women in the Frontline* (1991).

¹¹¹ Julie Ashdown and Mel James, "Women in Detention," *International Review of the Red Cross* 92 (2010): 125.

¹¹² Manfred Nowak, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3, January 15, 2008, para. 34.

¹¹³ Susan Brownmiller, "Making Female Bodies the Battlefield," *Newsweek*, 1993, 37.

¹¹⁴ V. Spike Peterson, "Gendered Nationalism: Reproducing 'Us' versus 'Them'," in *The Women and War Reader* (1998), 43; Radhika Coomaraswamy, *Violence Against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict (1997-2000)*, UN Doc. E/CN.4/2001/73, January 23, 2001, paras. 44-45.

¹¹⁵ Amy Kaminsky, *Reading the Body Politic: Feminist Criticism and Latin American Women Writers* (Minneapolis: University of Minnesota Press, 1993).

were raped, forced to have intercourse with other prisoners, and subjected to foreign objects, including rats, being inserted into their vaginas. In some cases, women's fallopian tubes were flooded with water, sometimes permanently damaging their ability to bear children.¹¹⁶

Ana Guadalupe Martinez, a political activist, was arrested and imprisoned by the Salvadoran army in 1976 during the El Salvador liberation. In her writings as a political prisoner, she describes how she was tortured in the Secret National Guard Prison. She spent months without clothes, which left her feeling disempowered, unprotected, and more vulnerable to abuse. She also describes physical torture, including being beaten with fists, boots, wooden paddles, whips, and chairs, with electrical shocks being the worst.¹¹⁷ Probes were placed on various parts of her body, including her vagina, water was splashed on her, and she was electrocuted.¹¹⁸

Feminist critique on international law regarding gender-based violence and torture

According to Alice Edwards, the adoption of the law prohibiting torture indicates a 'gendered' perspective, emphasizing men's experiences over women's.¹¹⁹ Feminist critics, particularly of the Torture Convention, argue that the definition of torture stresses "severe pain and suffering" done by public officials or anybody acting in an official capacity. Feminists contend that this focus ignores the fact that women are more likely to encounter abuse at the hands of private individuals, leaving such crimes largely outside the purview of international law.

In this perspective, women are typically shown as the wives, mothers, or daughters of male victims, rather than as autonomous torture victims. Rhonda Copelon criticized this privatized conception, stating that "when stripped of privatization, sexism, and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence".¹²⁰ According to Catharine MacKinnon, the fact that torture is used on both men and women distinguishes it from other forms of domestic or sexual abuse.¹²¹ She calls this a "double standard," arguing that whereas domestic or sexual abuse is largely ignored because it is viewed as a "women's problem," torture draws international attention since it affects both men and women.¹²² The vulnerability of women to sexual abuse has long been overlooked within the UN

¹¹⁶ Judith Gardam, *Women, Armed Conflict, and International Law* (The Hague: Kluwer Law International, 2001), 34.

¹¹⁷ Ana Guadalupe Martinez, *Las Cárceles Clandestinas de El Salvador* (San Salvador: 1992), 51.

¹¹⁸ Lois Ann Lorentzen, "Women's Prison Resistance," in *The Women and War Reader* (1998), 195.

¹¹⁹ Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2010), 209.

¹²⁰ Rhonda Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture," *Human Rights Quarterly* 21, no. 2 (1999): 296.

¹²¹ Catharine A. MacKinnon, "On Torture," in *Human Rights in the Twenty-First Century: A Global Challenge*, edited by Richard Pierre Claude and Burns H. Weston (Philadelphia: University of Pennsylvania Press, 1992), 21.

¹²² *Ibid.*, 22.

framework, reflecting women's subordinate place in society and within the international community. Sexual violence is frequently portrayed as an assault on personal dignity, rather as a violation of fundamental human rights.

However, MacKinnon contends that torture and sexual assault serve similar purposes—control, intimidation, and elimination—and finds little difference between the two. She acknowledges the need to establish a state connection to prove torture and argues that the state cannot be immune to crimes against women. She believes rape and sexual violence are indications of systemic power structures, with the state either allowing or participating in these abuses.

Byrnes observes that, even within these established frameworks, international legal laws frequently fail to accurately reflect the scope of abuses suffered by women in public places.¹²³ She also underlines the significance of tackling these inequities using a more intersectional approach that takes into account the various forms of discrimination that women encounter.

Regarding women's autonomy, dignity, and bodily integrity, feminist legal theory emphasizes that consent is a critical concept in law, serving as an expression of self-determination.¹²⁴ Consent ensures that individuals maintain control over their bodies and sexual capacities, safeguarding their autonomy. In cases of sexual assault, the issue of consent is crucial in protecting bodily integrity.¹²⁵ However, in situations like rape, there is no need to question consent, as it is evident that the woman did not have the freedom to make an autonomous choice about her body.

In the Furundzija¹²⁶ case, the International Criminal Tribunal for the former Yugoslavia (ICTY) highlighted the importance of upholding human dignity regardless of gender. The definitions of rape and forced pregnancy are based on principles of bodily integrity and human dignity, emphasizing that individuals should be treated as autonomous agents. The ability to control who can touch one's body and how is fundamental to both human dignity and autonomy.¹²⁷ In this context, consent serves as a representation of agency, a concept that is increasingly central in international law.¹²⁸

¹²³ Andrew Byrnes, "The Convention Against Torture," in *Women's Human Rights: The International and Comparative Law Casebook*, ed. Kelly Dawn Askin and Doreen M. Koenig, vol. 1 (New York: Transnational Publishers, 2000), 184.

¹²⁴ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

¹²⁵ AT v. Hungary, Communication No. 2/2003, CEDAW, 2005.

¹²⁶ Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, December 10, 1998.

¹²⁷ R v. Ewanchuk (1999) para 289, S.C.R. 330, (Can.).

¹²⁸ Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795; repr., Eastford, CT: Martino Fine Books, 2012).

Rape in Armed Conflict

In all forms of armed conflict, whether internal or external, women are sexually abused regardless of whether the main causes of the conflict are nationalist, religious, ethnic, or political. In times of conflict, men from all sides—including the enemy and allies—rape and sexually assault women. Historically, sexual violence against women in armed conflict has been overlooked. Reliable evidence of wartime rape appeared in World War I, but after the war, these atrocities were largely ignored.¹²⁹ Victims received no redress, and perpetrators faced no punishment.

Wartime sexual violence during World War II is well documented. The International Military Tribunal of Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) sought to hold major wartime offenders accountable and established categories of war crimes, crimes against humanity, and crimes against peace.¹³⁰ However, neither tribunal explicitly classified rape as a crime against humanity, resulting in significant neglect of such offenses.¹³¹ The IMTFE indictment did, however, hold Japanese defendants accountable for "mass murder, rape, pillage, torture, and other barbaric cruelties inflicted upon defenseless civilians."¹³² Despite recognizing gender-specific offenses in the IMTFE's indictment, few rape or sexual crime charges were brought before the Tokyo Tribunal.¹³³

The nine-month Bangladeshi War of Independence led to the emergence of Bangladesh from East Pakistan. During this conflict, rape was used systematically as targeted sexual violence against women, particularly Muslim Bengali women.¹³⁴ The International Commission of Jurists reported that young girls and women were kept by Pakistani troops for sexual pleasure, with rape often seen as a sexually motivated crime rather than a politically motivated one.¹³⁵ Nayanika Mookherjee's work emphasizes this as an early instance of international recognition of conflict-related rape, which served political and strategic purposes with genocidal intent.¹³⁶ The resulting atrocities caused thousands of unwanted pregnancies, abortions, and suicides. Additionally, survivors faced social ostracism, further compounding their trauma and marginalization.

¹²⁹ A.J. Toynbee, *The German Terror in France: A Historical Record* (New York: George D. Doran, 1917).

¹³⁰ Charter of the International Military Tribunal, Article 6, The Avalon Project: Documents in Law, History and Diplomacy, Yale University Law School, accessed (21.07.2024), <http://avalon.law.yale.edu>

¹³¹ "The Molotov Note on German Atrocities in Occupied Soviet Territory," January 7, 1942, accessed (27.01.2024), <https://www.marxists.org/history/ussr/great-patriotic-war/pdf/atrocities.pdf>.

¹³² IMTFE Indictment, Article 6.

¹³³ Kas Wachala, "The Tools to Combat the War on Women's Bodies: Rape and Sexual Violence Against Women in Armed Conflict," *The International Journal of Human Rights* 16, no. 3 (2012): 533–553.

¹³⁴ Nayanika Mookherjee, "'Remembering to Forget': Public Secrecy and Memory of Sexual Violence in the Bangladesh War of 1971," *Journal of the Royal Anthropological Institute* 12, no. 2 (2006): 433.

¹³⁵ International Commission of Jurists, *The Events in East Pakistan* (Geneva: 1971), 41; and Deborah Blatt, "Recognizing Rape as a Method of Torture," *New York University Review of Law and Social Change* 1991-1992, 832.

¹³⁶ Laura Smith-Spark, "Women's Bodies Have Become Part of the Terrain of Conflict," *BBC News*, December 8, 2004, Amnesty International.

Conversely, during the war in the former Yugoslavia, allegations of forced impregnation were part of a larger policy of ethnic cleansing in Bosnia.¹³⁷ Women were subjected to sexual atrocities, with reports indicating that women were raped "at least 10 times a day for 21 days or until impregnated, and then held for too long to safely obtain an abortion."¹³⁸ Women continue to be vulnerable to sexual violence even from those tasked with restoring international peace and security, as seen by the allegations of sexual abuse and rape made against members of United Nations peacekeeping operations.¹³⁹

Judith Gardam contends that sexual violence against women during armed conflict is more the rule than the exception.¹⁴⁰ Treating a woman as bait for a mercenary soldier reduces her to an object or trophy of war, negating her personhood and undermining our moral judgment of such acts. The issue is not just about gender; it's about power and control, influenced by male soldiers' perceptions of their privileges, the strict military hierarchy, and existing disparities among women.¹⁴¹ Coomaraswamy notes that "to rape a woman is to humiliate her community," signifying a collective defeat for the victim's community in failing to protect their women.¹⁴² Although sexual violence was acknowledged as a weapon of war—rape was, for instance, "massive, organized, and systematic" in the former Yugoslavia—the Special Rapporteur on Human Rights observed it as a method of ethnic cleansing intended to dehumanize, shame, and terrorize entire ethnic groups.¹⁴³ Gender stereotypes that further subjugate women are exacerbated by war.

¹³⁷ Siobhan K. Fisher, "Occupation of the Womb: Forced Impregnation as Genocide," *Duke Law Journal* 46 (1996–1997): 106.

¹³⁸ The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1994), 59.

¹³⁹ There have been press report of abuses committed against women by UNTAC in Cambodia and UN forces in Somalia; *The Guardian* 19 February 1994.

¹⁴⁰ Judith Gail Gardam and Michelle J. Jarvis, *Women, Armed Conflict, and International Law* (The Hague: Kluwer Law International, 2001), 30.

¹⁴¹ Cynthia Enloe, "The Gendered Gulf," in *The New World Order at Home and Abroad: Collateral Damage*, ed. Cynthia Peters (Boston: South End Press, 1992), 97.

¹⁴² Radhika Coomaraswamy, "Sri Lanka—Of Kali Born: Women, Violence, and the Law," in *Freedom from Violence: Women's Strategies from Around the World*, ed. Margaret Schuler (New York: UNIFEM WIDBOOKS, 1992), 49–61.

¹⁴³ Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Report Pursuant to Commission Resolution 1992/S-1/1 of August 1992, E/CN.4/1993/50.

Definition of Rape

A broad definition of rape and sexual violence was given by the trial chamber in the Akayesu case¹⁴⁴:

"Although rape is generally understood to be non-consensual sexual intercourse in some national jurisdictions, variations on the act of rape may involve the insertion of objects or the use of bodily orifices that are not thought to be intrinsically sexual".

Rape is any physical act of sexual assault carried out on an individual under coercive circumstances. The chamber made it clear that coercive circumstances can exist in situations like armed conflict or the presence of threatening military forces without necessarily requiring the use of physical force.¹⁴⁵ Additionally, the chamber recognized that sexual violence could involve acts without physical contact or penetration.¹⁴⁶

On the other hand, regardless of the use of force or compulsion, rape is basically defined as an unwanted act committed without consent. The definition of rape was expanded by the ICTY. The trial chamber in *Prosecutor v. Delalic*¹⁴⁷ upheld this concept, in line with the ICTR's interpretation, after first adhering to the Akayesu term. Subsequently, the ICTY included aspects from several penal codes to the legal definition of rape in the *Furundzija* trial.

The ICTY outlined common elements of rape¹⁴⁸:

1. Sexual Penetration, however slight:
 - Vaginal or anal penetration by the perpetrator's penis or any object.
 - Oral penetration by the perpetrator's penis.
2. Coercion or Force: Including threats of force against the victim or a third party.

The tribunal emphasized the need for precise definitions, expanding rape beyond intercourse to include penetration of the vagina or anus with any sexual organ or object. In *Prosecutor v. Kunarac*¹⁴⁹, the court highlighted the absence of consent as essential to defining rape, especially in cases where women were held in de facto custody and considered legitimate sexual prey by their captors.¹⁵⁰ The Appeals Chamber concluded that such detentions created coercive circumstances that nullified any possibility of consent.¹⁵¹

In 2005, the *Semanza*¹⁵² ruling noted that the Akayesu definition was "broad," while the ICTY's definition was "narrower," focusing on the non-consensual penetration of the vagina, anus, or mouth by the perpetrator's penis.¹⁵³ The trial chamber asserted that the mental element for rape as a crime against humanity involves the intention to carry out prohibited sexual penetration with the knowledge of the victim's lack of consent.¹⁵⁴

¹⁴⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, §6.4, Rape, paras. 597, 599.

¹⁴⁵ *Ibid.*, para. 688.

¹⁴⁶ *Ibid.*, para. 686.

¹⁴⁷ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, 1998.

¹⁴⁸ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, para. 185, December 10, 1998.

¹⁴⁹ *Prosecutor v. Kunarac*, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, February 22, 2001.

¹⁵⁰ *Prosecutor v. Kunarac*, Case No. IT-96-23-A & IT-96-23/1-A, Appeals Judgment, para. 132 (2002).

¹⁵¹ *Ibid.*

¹⁵² *Prosecutor v. Semanza*, Case No. ICTR-97-20-T (2003).

¹⁵³ *Ibid.*, para. 344.

¹⁵⁴ *Ibid.*, para. 346.

Rape, according to this defining analysis, is defined as an unwanted bodily intrusion that occurs without the victim's consent and is invariably characterized by non-consensual encounters that are frequently violent. At its core, rape is a crime that violates people's personal autonomy and sexual freedom.

Recognition of Rape as a Method of Torture

According to the UN Special Rapporteur to the Human Rights Commission:

"Since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture."¹⁵⁵

Rape was considered as torture, according to rulings by the European Court of Human Rights in *Aydin v. Turkey*¹⁵⁶ and the Inter-American Commission on Human Rights in *Mejia Egocheaga v. Peru*¹⁵⁷. In the *Prosecutor v. Delalic*¹⁵⁸ case of the International Criminal Tribunal for the Holocaust, the tribunal determined that rape could qualify as torture, noting that "the violence suffered by [the witness] in the form of rape was inflicted upon her by [the defendant] because she is a woman... This represents a form of discrimination which constitutes a prohibited purpose for the offense of torture." In many cases, rape is an obvious example of torture that falls under the concept of torture.¹⁵⁹

Severe Pain and Suffering

Article 1 of the Torture Convention states that an act must cause great pain or suffering, either mental or physical, in order for it to be classified as torture. Since that rape is a kind of physical torture according to the Special Rapporteur's list, it satisfies all the requirements for torture.¹⁶⁰ In addition to causing excruciating physical pain and suffering, rape exposes victims to the danger of sexually transmitted diseases, gynecological conditions, and unintended pregnancy.¹⁶¹ Torturers may inflict lifelong trauma and injury by employing objects or animals.¹⁶²

¹⁵⁵ Cited in *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Judgment, para. 491.

¹⁵⁶ *Aydin v. Turkey* (1997), 3 Butterworths Human Rights Cases 300.

¹⁵⁷ *Mejia Egocheaga v. Peru* (1996), 1 Butterworths Human Rights Cases 229.

¹⁵⁸ *Prosecutor v. Delalic*, Case No. IT-96-21, Judgment, 16 November 1998.

¹⁵⁹ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, para. 941.

¹⁶⁰ U.N. Doc. E/CN.4/1986/15, para. 153.

¹⁶¹ Deborah Blatt, "Recognizing Rape as a Method of Torture," *New York University Review of Law and Social Change* 19 (1992): 821–865, 853.

¹⁶² Ximena Bunster-Buratto, "Surviving Beyond Fear: Women and Torture in Latin America," in June Nash and Helen Safa, eds., *Women and Change in Latin America* (New York: Bergin & Garvey, 1986), 310.

Physical and Mental Assault

Rape is defined by Amnesty International as "an assault on women's mental and emotional well-being, as well as a physical violation and injury."¹⁶³ Rape, according to Susan Brownmiller, is a sexual invasion of the body by force, an incursion into the private, personal inner space without consent - in short, an internal assault by multiple ways, involving an intentional violation of emotional, physical, and cognitive integrity... an aggressive, dehumanizing violent act.¹⁶⁴ Women who are sexually assaulted have psychological and emotional trauma, which is frequently made worse by societal moral norms imposed by cultural and traditional frameworks. For example, in order to create Chetnik offspring as a method of ethnic cleansing, Serb soldiers forced Muslim women to become pregnant during the Bosnian War.

Purpose

Rape is one form of torture that has been used to punish people or groups for views or actions that governments find objectionable. In the Akayesu case¹⁶⁵, the perpetrator was found guilty of genocide on a criminal basis for seriously injuring Tutsi women in order to eradicate the Tutsi population.¹⁶⁶ Torture is used during interrogations with the intention of intimidating victims and discouraging others from engaging in specific actions, rather than only obtaining information or confessions. Rape is a way for criminals to violate the fundamental dignity and physical integrity rights of incarcerated women.

Coercion

The ICTR trial chamber determined that rape is defined as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive" because there isn't a globally accepted definition of the crime.¹⁶⁷ Therefore, governments or military regimes frequently utilize rape as a kind of torture to subjugate and frighten populations.

Prohibition of Rape

No international human rights instrument specifically forbids rape as a *jus cogens* standard. Part of the reason rape is not recognized as a form of torture is a systemic indifference to the relationship between grave human rights crimes and gender concerns.¹⁶⁸ Although it has been held that sexual violence is covered by the International Covenant on Civil and Political Rights

¹⁶³ Amnesty International, *Women in the Front Line* (London: Amnesty International, 1990), 18.

¹⁶⁴ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam Books, 1975), 5.

¹⁶⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (September 2, 1998).

¹⁶⁶ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, paras. 707, 731–33 (September 2, 1998).

¹⁶⁷ *Ibid.*, para. 688.

¹⁶⁸ Jessica Neuwirth, "Towards a Gender-Based Approach to Human Rights Violations," *Whittier Law Review* 9 (1987): 399.

(ICCPR) and the Universal Declaration of Human Rights (UDHR) under the prohibition of "inhuman or degrading treatment," these documents do not expressly list rape as a violent crime against women based on their gender. According to Patricia Viseur-Sellers, because rape is not regarded as a separate *jus cogens* violation, states frequently treat sexual violence as less serious than other peremptory norms.¹⁶⁹

Throughout history, the law of war has prohibited rape. The Fourth Geneva Convention explicitly prohibits rape and forced prostitution under Article 27. Additionally, Additional Protocol I and II also forbid rape. However, these provisions tend to frame rape within a gendered context, seeking to "protect" women as "objects of special respect." Accordingly women are recognized as objects of law rather than subjects in law. States party to these conventions is bound by these provisions, as they have become customary international law.¹⁷⁰

The jurisprudence of the Yugoslav Tribunal unequivocally defines rape as an act of torture. In *Prosecutor v. Furundzija*¹⁷¹, the trial chamber emphatically stated that sexual violence is universally considered a grave offense with no exceptions. It declared that "the prohibition of rape and serious sexual assault has evolved in customary international law into universally accepted norms of international law prohibiting rape and serious sexual assault, applicable in any armed conflict."¹⁷²

Furthermore, the trial chamber emphasized the legal obligation of states to prosecute these crimes when they occur during armed conflict. As a principle of international law, *jus cogens* is broadly acknowledged, although its precise boundaries are up for debate. Genocide, crimes against humanity, war crimes, torture, aggression, piracy, slavery, and dangers to international peace and security are typically considered *jus cogens* rules.¹⁷³ However, rape is not considered as free standing crime. Rape is classified as an act of war, genocide, or crimes against humanity in the statutes of the International Criminal Court (ICC), the International Criminal Tribunal (ICTR), and the International Criminal Court (ICTY).¹⁷⁴ There is a growing consensus that the prohibition of rape has become a necessary and sufficient condition to maintain international peace and security.

¹⁶⁹ Patricia Viseur-Sellers, "Sexual Violence and Peremptory Norms: The Legal Value of Rape," *Case Western Reserve Journal of International Law* 34, no. 2 (2002): 287, 296.

¹⁷⁰ K. D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (The Hague: Martinus Nijhoff Publishers, 1997), 249.

¹⁷¹ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, 73 (December 10, 1998).

¹⁷² *Ibid.*, paras. 168–169.

¹⁷³ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed. (The Hague: Kluwer Law International, 1999), 68.

¹⁷⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), arts. 2–3; Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 4; Rome Statute of the International Criminal Court (ICC), art. 8.

Conclusion

Sexual violence in armed conflict represents one of the most heinous violations of human rights, functioning as both a weapon of war and a tool of torture. It transcends physical harm, leaving deep psychological scars on sufferers. Rape in conflict settings is not an incidental consequence of war but a calculated strategy used to dehumanize victims, exert dominance, and undermine whole communities involved. Therefore, such an act systematically undermines personal and collective dignity, perpetuating cycles of fear, oppression, and inequality. These atrocities, which are recognized under international law as war crimes, crimes against humanity, and even acts of genocide in certain situations, necessitate immediate intervention, accountability, and appropriate sanctions.

Therefore, this article highlights the importance of human dignity in addressing sexual violence, focusing on autonomy, equality, and bodily integrity. This article contributes to the feminist legal theory by critically analyzing how deep-rooted gender inequalities and societal norms sustain sexual violence during armed conflicts. The assertion is made that rape against women in the context of armed conflicts originates from entrenched gender inequalities and societal norms that subordinate women and undermine their autonomy. Sexual violence during wartime illustrates that abuse directed at women is not an independent issue but rather a manifestation of deep-rooted discrimination ingrained in social and cultural norms. Consequently, this article advocates for a transformative approach by classifying rape as a separate *jus cogens* violation, elevating its importance alongside other peremptory norm to tackle systemic discrimination and safeguard women's rights worldwide.