

## STUDENT PAPER

## Rape as torture

## An evaluation of the Committee against Torture's attitude to sexual violence

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## 1. Introduction

In the early 1990s, feminist critics were concerned that neither international human rights law nor international humanitarian law provided adequate protection to women suffering from violence. On the human rights front, the law was criticised on the basis that it reproduced the public/private dichotomy that it was argued had subordinated women for generations.<sup>1</sup> The public sphere was one of politics, employment and economics; a man's world. The private sphere was one of family, children and the home; a woman's world. Feminists argued that in providing protection against excesses of State power, human rights law protected the male experience in the public sphere but failed to protect women from the violence they suffered at the hands of private actors. Therefore, recognition of rape as torture was a triumph for those who had worked to force the international community to connect issues of gender and human rights law: there is broad consensus that the prohibition of torture constitutes a rule of customary international law<sup>2</sup> and it is widely recognised that the prohibition of torture constitutes a principle of *jus cogens*.<sup>3</sup> Torture is a peremptory norm of international law from which no derogation is permitted.<sup>4</sup> As

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1 For a discussion of the private/public dichotomy see H. Charlesworth *et al.*, 'Feminist Approaches to International Law', 1991 *American Journal of International Law* 85, pp. 613-645, C. Chinkin, 'A Critique of the Public/Private Dimension', 1999 *European Journal of International Law* 10, no. 3, pp. 387-395, R. Eisler, 'Human Rights: Towards an Integrated Theory for Action', 1987 *Human Rights Quarterly* 9, p. 297, G. Binion, 'Human Rights: A Feminist Perspective', 1995 *Human Rights Quarterly* 19, pp. 509-526.

2 *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, 10 December 1998 ('*Furundzija Judgment*'), Para. 160.

3 Human Rights Committee, General Comment No. 24 (52)(1994), UN Doc. CCPR/C.21.Rev.1/Add.6 (1994) at Para. 10.

4 See General Comment No. 2, 'Implementation of Article 2 by States Parties', UN Doc. CAT/C/GC/2/CRP/1/Rev.4 (2007), Advance Unedited Version at Para. 1 and Art. 53 of the Vienna Convention on the Law of Treaties.

such, when rape is seen as torture, it is treated under one of the strongest protections that international law can offer.

But, somewhat ironically, defining rape as torture also meant that lawyers representing the victims of rape were forced to define the offence with reference to the Convention against Torture, a human rights treaty whose text has been criticised as being extremely women-unfriendly. The Convention against Torture has been said by feminist critics to demonstrate the ‘grip’ that the private/public dichotomy has on international human rights law.<sup>5</sup> Unlike earlier conventions containing a prohibition of torture,<sup>6</sup> the definition of torture in Article 1 of the Convention against Torture contains an explicit requirement that the prohibited act be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. On the basis that women suffer violence at the hands of non-State actors more than they do at the hands of State actors, many feared that the ‘public official’ requirement in the Convention’s definition of torture would exclude women’s concerns from the Convention’s scope. Also, writers expressed concern that Article 1’s requirement that the torture be perpetrated 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’, would exclude rape from the definition of torture. Although the purposes listed in Article 1 are not exclusive, it was thought that any extra purposes would have to be in the same ‘public’ genre as the purposes already listed. Unfortunately there was a tendency to regard rape, even by a prison guard or public official, as an act committed due to a private motive.<sup>7</sup> In short, there was a fear that the definition of torture in Article 1 would prove to be a strait-jacket which would prevent the Committee against Torture from being able to respond to a more female experience of torture.

As June 2008 marked the twenty-first anniversary of the Convention against Torture coming into force,<sup>8</sup> this article reviews recent developments by the Committee against Torture in order to evaluate how real the feminist criticisms of the Convention have proved to be. The article is composed of two parts. The first part considers two decisions by the Committee against Torture from 2007 in which rape was found to be torture for the first time. In analysing these two decisions, the article considers how the Committee approached Article 1’s requirement that torture must be an act of ‘severe pain and suffering’ and also the requirement that torture must be perpetrated for a prohibited purpose. The second half of the article evaluates the Committee’s approach to the terms ‘acquiescence’ and ‘consent’ in the definition of torture in Article 1 and considers how the development of a ‘due diligence’ principle might provide assistance to women suffering violence at the hands of private actors. To conclude, the article reviews the Committee’s Conclusions and Recommendation to see if they give an indication of the direction in which we will see the ‘jurisprudence’ of the Committee developing in relation to violence against women in future years.

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5 See Charlesworth *et al.*, *supra* note 1, p. 627.

6 The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, the Geneva Convention Relative to the Treatment of Prisoners of War 1949, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, the European Convention of Human Rights 1950, the International Covenant of Civil and Political Rights 1966 and the American Convention on Human Rights 1969.

7 A. Byrnes, ‘The Convention Against Torture’, in: K. Askin *et al.* (eds.), 1999 *Women and International Human Rights Law* 3, pp. 183-208 at pp. 195-196 and J. Burgers *et al.*, *The United National Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1988, p. 118.

8 The Convention against Torture came into force on 26 June 1987.

## **2. The Committee against Torture’s ‘jurisprudence’ on rape**

### **2.1. Background**

Despite the development of a strong body of jurisprudence in other international law forums confirming that rape constitutes torture under international law, until recently there had been no finding from the Committee against Torture itself that rape could fall within the definition of torture in Article 1 of the Convention against Torture. In fact, the Committee has been referred to as a treaty body that has ‘shied away from explicitly finding that rape is a form of torture’.<sup>9</sup> The Committee’s decision in *Kisoki v. Sweden*<sup>10</sup> attracted particular criticism in this regard. In the case of *Kisoki v. Sweden* brought under Article 3 of the Convention,<sup>11</sup> the author of the complaint, a Zairian citizen residing in Sweden, complained that she had been raped by Zairian security forces in her home in front of her children. She was then held for a year in a detention centre where she was brutally beaten, forced to live in unsanitary conditions, raped more than ten times by prison guards, beaten, burnt and struck with batons. Although the Committee concluded that substantial grounds existed for believing that the author would be in danger of being subjected to torture if she was returned to Zaire, its findings somewhat strangely included no examination of, or even any reference to, the sexual violence that the complainant had suffered.<sup>12</sup> The consequence of this is that the case provides no guidance on the grounds on which the Committee was satisfied that the applicant had been tortured. As a result, it remains unclear whether the Committee considered that the accumulated treatment suffered by the complainant amounted to torture or whether it would have made a similar finding on any of the individual grounds of ill-treatment alleged, including the rape. A statement to this effect, like that made by the European Court of Human Rights in the case of *Aydin v. Turkey*,<sup>13</sup> would have clarified the Committee’s approach to rape and provided a long overdue statement confirming that rape constitutes torture under Article 1 of the Convention. On the basis of this decision, it is not surprising that in assessing the Committee’s attitude to sexual violence, commentators have concluded that the Committee has shown an active reluctance to address issues of sexual violence even when they present themselves.<sup>14</sup>

### **2.2. C.T. and K.M. v. Sweden**

However, on 22 January 2007, the Committee against Torture published two decisions which contain statements that rape can amount to torture under Article 1 of the Convention. The first case, *C.T. and K.M. v. Sweden*,<sup>15</sup> was brought by C.T., a citizen of Rwanda, and her son, K.M., born in Sweden in 2003. The complainants alleged that their forced deportation to Rwanda would amount to a breach of Article 3 of the Convention. C.T., the mother, claimed that she was detained in Rwanda in 2002 for her membership of the PDR-Ubuyanja party and that during her detention she was repeatedly raped, under the threat of execution and became pregnant with her

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9 See A. Edwards, ‘The Feminizing of Torture under International Human Rights Law’, 2006 *Leiden Journal of International Law* 19, pp. 439-391 at p. 370. However, it is noted that there have been very few communications before the Committee raising allegations of rape.

10 *Pauline Muzonzo Paku Kisoki v. Sweden*, Communication No. 41/1996, 8 May 1996, UN Doc. CAT/C/16/D/41/1996 (1996).

11 Art. 3 of the Convention against Torture obliges States not to expel a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

12 See Edwards, *supra* note 9, p. 370.

13 In *Aydin v. Turkey*, Judgment of 27 September 1997, Application No. 57/1996/676/866 the Court made clear that although the ill-treatment that Mrs Aydin had suffered included being stripped, beaten, sprayed with cold water from high-pressure jets, put in a car tyre and spun around and raped by an individual in military clothing, the rape on its own would have been sufficient for the Court to make a finding of torture under Art. 3 of the European Convention on Human Rights.

14 See Edwards, *supra* note 9.

15 *C.T. and K.M. v. Sweden*, Communication No. 279/2005, 17 November 2006, UN Doc. CAT/C/37/D/279/2005 (2007).

son, K.M. She claimed that if she was returned to Rwanda she would be immediately detained and tortured by the Rwandan Directory of Military Intelligence and subjected to rape and interrogation in order to make her reveal how she had escaped. In its findings, the Committee concluded that there were substantial grounds for believing that the complainants would be in danger of being subjected to torture if returned to Rwanda. With regard to the sexual violence that she had suffered in prison, the Committee held that:

‘the first named complainant was repeatedly raped in detention and as such was subjected to torture in the past. On examining the dates of her detention and the date of birth of her son, the Committee considers it without doubt that he was the product of rape by public officials, and is thus a constant reminder to the first named complainant of her rape’.<sup>16</sup>

Whilst the Committee showed concern that the perpetrators of the rape were ‘public officials’, the passage suggests that the Committee has a relaxed attitude to the ‘pain and suffering’ and ‘purpose’ requirements within Article 1 of the Convention. The fact that the Committee did not explicitly analyse whether these two requirements were met, suggests that it might consider the ‘severe pain and suffering’ and ‘purpose’ elements of the definition of ‘torture’ to be necessarily fulfilled by the act of rape. As one of the first decisions by the Committee that confirms that rape constitutes torture under Article 1 of the Convention, the statement ‘she was repeatedly raped’ and ‘as such was subjected to torture’ is undeniably a landmark in the jurisprudence on sexual violence but it is also something of an anti-climax in its brevity.

### **2.3. *V.L. v. Switzerland***

The second decision published on 22 January 2007, *V.L. v. Switzerland*,<sup>17</sup> is in many ways a more helpful decision in terms of revealing the Committee’s attitude to sexual violence as torture because the Committee provides a more detailed legal analysis of the definition of torture. The complainant, V.L., who was not represented by counsel before the Committee, claimed that her return to Belarus would violate Article 3 of the Convention. She alleged that prior to her departure from Belarus she was interrogated and raped by three police officers seeking information about the whereabouts of her husband. During these interrogations, she was also beaten and penetrated with objects. After complaining to the officer-in-charge about the sexual abuse, the complainant suffered a campaign of harassment against her until, one day, the same officers who had raped her, kidnapped her, drove her to an isolated spot and raped her again. A key argument made against her, by Switzerland, was that she had failed to mention the sexual abuse in the early stages of the asylum process. In its findings, the Committee provided a detailed examination of the situation in Belarus, as regards women and sexual abuse and, importantly, rejected the argument that the complainant’s delay in reporting the rape to the national authorities was relevant. It stated:

‘It is well known that the loss of privacy and prospect of both humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears

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<sup>16</sup> *Ibid.*, Para. 7.5.

<sup>17</sup> *V.L. v. Switzerland*, Communication No. 262/2005, 20 November 2006, UN Doc. CAT/C/37/D/262/2005 (2007).

absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members’.<sup>18</sup>

The decision, in this respect, shows attentiveness and sensitivity to gender issues that has not been previously seen in the Committee against Torture’s ‘jurisprudence’.

With regard to the rape itself, the Committee’s conclusions in *V.L. v. Switzerland* are also of greater significance than its conclusions in *C.T. and K.M v. Sweden* because, in its finding, the Committee explicitly shows how the applicant’s experience fulfilled each constituent element of the definition of torture in Article 1 of the Convention against Torture. The Committee stated:

‘The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering [severe pain or suffering, whether physical or mental] perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender [prohibited purpose]. Therefore, the Committee believes that the sexual abuse by the police [public official or other person acting in an official capacity] in this case constitutes torture (...)’ (my words in square brackets)<sup>19</sup>.

This clear and deliberate analysis makes it clear beyond doubt how rape fits the definition of torture and gives a strong indication that the Committee has confined its prior reluctance to address sexual violence as torture to the past.

#### **2.4. Severe pain and suffering**

The decision in *V.L. v. Switzerland* is also important because the Committee’s words ‘the acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering’ strongly suggest that the Committee considers the severe pain and suffering element of the definition of torture to be satisfied *per se* in situations where the applicant has suffered multiple rapes. This statement distances the Committee from early case law from other human rights forums in which sexual violence was treated as the lesser offence of ‘inhuman or degrading treatment’, rather than torture. When the European Commission examined claims by Cyprus that hundreds of girls and women had been systematically and repeatedly raped by Turkish troops during Turkey’s invasion of Cyprus in 1974,<sup>20</sup> somewhat shockingly, the Commission did not even consider whether the rapes might amount to ‘torture’ and concluded instead that the sexual violence constituted ‘inhuman treatment’. On the basis that it is generally understood that the difference between torture and inhuman and degrading treatment ‘derives principally from a difference in the intensity of the suffering inflicted’,<sup>21</sup> the early categorization of rape as ‘inhuman or degrading treatment’ suggested that it was a crime of a lesser intensity of suffering or a lesser degree of severity than a crime that fell into the category of torture. However, since then, many human rights courts and international criminal tribunals have confirmed that rape should be characterised as torture to reflect the great severity of the crime. One of the most

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18 *Ibid.*, Para. 8.8.

19 *Ibid.*, Para. 8.10.

20 *Cyprus v. Turkey*, European Commission of Human Rights, Admissibility Decision of 26 May 1975, Application No. 6780/74 and 690/75, p. 128, Para. (b).

21 *Ireland v. the UK*, Judgment of 18 January 1978, Application No. 5310/71, Para. 167. Also see General Comment No. 2 from the Committee against Torture which states ‘In comparison to torture, ill treatment differs in the severity of pain and suffering and may not require proof of impermissible purposes’, see *supra* note 4, p. 3 at Para. 10.

important statements on this issue has come from the International Criminal Tribunal for the former Yugoslavia (the ‘ICTY’) Appeals Chamber in the case of *Kunarac, Kovač and Vuković*.<sup>22</sup> Here, the Court stated that the ‘severe physical or mental pain or suffering’ required for a finding of torture is satisfied *per se* by the act of rape. The Appeals Chamber stated: ‘Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as torture’. The use of the word ‘necessarily’ indicates that the Court considered the ‘severe pain or suffering’ threshold always to be met in instances where the victim has been raped. Importantly, in *V.L. v. Switzerland*, the Committee against Torture is seen to adopt a similarly strong approach. Like the ICTY Appeals Chamber in *Kunarac, Kovač and Vuković*, the Committee stated: ‘[t]he acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering [emphasis added]’. The implication of the word ‘surely’ is that the Committee considers that the severe physical or mental pain or suffering required for a finding of torture is established *per se* by multiple acts of rape.<sup>23</sup>

### 2.5. Location of torture

Of equal significance in *V.L. v. Switzerland* are the Committee’s comments about the location of the torture. Whilst according to ‘traditional constructions of torture’ the pain and suffering of torture ‘is (...) within state custody (...) typically by male government officials against male detainees for the purposes of extracting information or confession’,<sup>24</sup> it has been recognised that the torture of women, especially when the method of torture is rape, does not always take place in traditional places of detention. In Blatt’s words: ‘In states of emergency 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’.<sup>25</sup> As a result, it has been argued that the traditional focus on torture that takes place in detention discriminates against women and deprives them of protection from the torture they often suffer in non-traditional settings.<sup>26</sup> Whilst the wording of Article 1 of the Convention does not specify that torture can only occur in places of detention, hitherto the jurisprudence from the Committee has tended to focus on torture occurring in prisons and places of detention. However, the decision in *V.L. v. Switzerland* sends a very clear statement from the Committee that it is ready to look beyond places of detention in order to find and address the more female experiences of torture, no matter where they take place. The Committee stated:

‘In assessing the risk of torture in the present case, the Committee considers that the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities (...). Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities’.<sup>27</sup>

22 Prosecutor v. *Kunarac, Kovač and Vuković*, Case No. IT-96-23 and IT-96-23/1-A, Para. 150. It is interesting to note that the case of *Kunarac, Kovač and Vuković* was the first indictment in the history of international war crimes prosecutions with charges based solely on crimes of sexual violence against women. See R. Dixon, ‘Rape as a Crime in International Humanitarian Law: Where to from Here?’, 2002 *European Journal of International Law* 13, no. 3, pp. 697-719 for a discussion on the significance of this judgment for women.

23 This was also implied in *C.T. and K.M. v. Sweden* where the Committee said ‘the first named complainant was repeatedly raped in detention and as such was subjected to torture in the past’, but the statement in *V.L. v. Switzerland* is more explicit in this regard. However, it should be noted that as both *V.L. v. Switzerland* and *C.T. and K.M. v. Sweden* deal with cases of multiple rapes, it remains unclear whether the Committee’s comments would also apply to one instance of rape.

24 See Edwards, *supra* note 9, p. 358.

25 D. Blatt, ‘Rape as a Method of Torture’, 1991-1992 *New York University Review of Law & Social Change* 19, pp. 822-865 at p. 851.

26 *Ibid.*, p. 852.

27 *V.L. v. Switzerland*, *supra* note 17, Para. 8.10.

This decision indicates that the Committee is prepared to recognise what feminists have long pointed out: that ‘the official’s power and authority are portable’.<sup>28</sup> As long as the three constituent elements of the definition are satisfied, it makes no difference whether the pain and suffering is inflicted in a prison or in a woman’s home. The Committee’s attitude in this respect is also confirmed in its second General Comment which it issued in November 2007 on Article 2 of the Convention. Here, the Committee states that ‘[t]he contexts in which women are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes’.<sup>29</sup>

## **2.6. Prohibited purpose**

The Committee’s decision in *V.L. v. Switzerland* also lays to rest concerns that the ‘prohibited purpose’ requirement in Article 1 might exclude sexual violence from the Convention’s scope. Article 1 of the Convention states that the act in question must be ‘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 reasons based on discrimination of any kind’. Whilst there is nothing to indicate that the purposes listed in Article 1 are exhaustive, commentators on the Convention have opined that any additional purposes should be ‘similar’ to those stated<sup>30</sup> and that they should refer to ‘state purposes or, at any rate, the purposes of an organized political entity exercising effective power’.<sup>31</sup> As a result, in the early 1990s, feminist critics of the Convention expressed concern that the purpose requirement in Article 1 of the Convention against Torture might prevent rape being treated as torture under Article 1. Rape and crimes of sexual violence were all too often perceived to be ‘private acts’ motivated by sexual desire,<sup>32</sup> rather than offences that might involve the State. Even when perpetrated by prison guards or soldiers, rape was seen to be ‘a private matter or justified as an inevitable by-product of war’.<sup>33</sup> On the basis of this reasoning, there was a real and justifiable fear that the Committee might narrowly interpret the prohibited purposes listed in Article 1 to exclude a finding of rape.

Fears that any additional purposes should be of a similar ‘public’ nature to the purposes listed in Article 1 of the Convention have been proved to be unfounded by the jurisprudence of the Inter American Court of Human Rights and the ICTY. When considering the ‘purpose’ element with regard to rape,<sup>34</sup> the Court in *Fernando and Raquel Mejia v. Peru* added the further purpose of ‘humiliation’ to the prohibited purposes in the definition of torture, stating that the objective of rape, ‘in many cases, is not just to humiliate the victim but also her family or community’.<sup>35</sup> In support of its position the Court quoted from the UN Special Rapporteur’s Report on Peru from 1993, in which he stated that rape in Peru was often ‘used as a weapon to

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28 Blatt, *supra* note 25, p. 852.

29 See General Comment No. 2 from the Committee against Torture, *supra* note 4, Para. 22.

30 *Supra* note 7.

31 N. Rodley, ‘Definition(s) of Torture in International Law’, 2002 *Current Legal Problems* 55, pp.467-493 published also on the American Society for International Law (ASIL) website, pp. 1-31 at [http://www.asil.org/is060630/Rodley\\_Def\\_Torture\\_paper\\_06\\_06\\_30.pdf](http://www.asil.org/is060630/Rodley_Def_Torture_paper_06_06_30.pdf) (last accessed 8 August 2008), at p. 21 of the article on the ASIL website.

32 Chinkin, *supra* note 1, p. 393.

33 R. Copelon, ‘Gender Crimes as War Crimes’, 2000 *McGill Law Journal* 46, pp. 217-140 at p. 220 and C. Niarchos, ‘Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’, 1995 *Human Rights Quarterly* 17, no. 4, pp. 649-690, at p. 651: ‘Since the beginning, it [rape] has been ranked along with plunder as one of war’s ‘unfortunate byproducts’. The inevitability of wartime rape appears to be accepted by political and military leaders and until recently was largely ignored by historians, sociologists, and journalists’.

34 Although the purpose requirement in this definition is not identical to that under Art. 1 of the Convention against Torture, it contains similar components of ‘intimidation’ and ‘punishment’, and, as in Art. 1, the listed purposes are not exhaustive.

35 See *Fernando and Raquel Mejia v. Peru*, 1 March 1996, Report No. 5/96, Case No 10.970 in Annual Report of the Inter American Commission on Human Rights at Para. 3(a).

punish, intimidate and humiliate'.<sup>36</sup> In the *Furundzija* Judgment, the ICTY Trial Chamber likewise added the purpose of 'humiliation' to the list of prohibited purposes imported into international humanitarian law from Article 1 of the Convention against Torture.<sup>37</sup> Of equal significance, in its judgment in the *Čelebići* case, the ICTY Trial Chamber stated that it considered rape to be a form of 'discrimination' against women<sup>38</sup>. With this statement, the Court confirmed that rape fulfilled the 'purpose' requirement of the definition of torture which includes 'reasons based on discrimination of any kind'. To support its position, the Court referred to General Recommendation 19 from the CEDAW Committee in which it is recognised that violence directed against a woman, because she is a woman, represents a form of discrimination.<sup>39</sup> The Court also cited the words of the UN Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict on this point: '[I]n many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture'.<sup>40</sup> The Court concluded:

'[I]t is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict'.<sup>41</sup>

Here, the judgment seems to suggest that the purpose requirement in the definition of torture is always fulfilled in instances of sexual violence because in situations of conflict rape by, or at the instigation of, a public official, or with the consent or acquiescence of an official, will always on some level, be committed in order to punish, coerce, discriminate or intimidate.

In *V.L. v. Switzerland*, the Committee against Torture took a similar approach to the Inter American Court of Human Rights and the ICTY. Its statement that multiple rapes are 'perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender'<sup>42</sup> confirms the new purpose of 'humiliation' under Article 1 that was established in the cases of *Fernando and Raquel Mejia v. Peru* and *Furundzija*.<sup>43</sup> It also adds a new purpose of 'retaliation' and affirms that like the ICTY<sup>44</sup> and the CEDAW,<sup>45</sup> the Committee considers sexual violence to be a form of 'discrimination based on gender'. As such, *V.L. v. Switzerland* clearly demonstrates how far attitudes on sexual violence within the human rights dialogue have travelled since the early nineties. The decision

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36 Report by the UN Special Rapporteur, Mr Nigel Rodley, appointed pursuant to Commission on Human Rights Resolution 1932/32, UN Doc. E/CN.4/1994/31 (1994) at Para. 431.

37 *Furundzija* Judgment, *supra* note 2, Para. 162.

38 *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-I, 16 November 1998 (*Čelebići* Judgment), Para. 493.

39 General Recommendation 19 from the CEDAW Committee states 'The Convention in Art. 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty', General Recommendation No. 19, UN Doc. A/47/38 (1992).

40 Final report submitted by Ms Gay J. McDougall, UN Special Rapporteur on Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (1998), Para. 55.

41 *Supra* note 38, Para. 495.

42 *V.L. v. Switzerland*, *supra* note 17, Para. 8.10.

43 *Furundzija* Judgment, *supra* note 2, Para. 162.

44 *Čelebići* Judgment, *supra* note 38, Para. 493.

45 See CEDAW's General Recommendation 19, *supra* note 39.

recognises that rather than the prohibited purpose requirement in Article 1 precluding a finding of rape as torture, rape can fit *all* the prohibited purposes listed in Article 1, and more.

### **3. Violence against women by private actors**

#### **3.1. Introduction to due diligence and ‘acquiescence’**

Although *V.L. v. Switzerland* and *C.T. and K.M. v. Sweden* lay to rest concerns relating to the ‘pain and suffering’ requirement and the prohibited purpose requirement in the definition of torture, neither case addresses fears that the ‘public official’ requirement in the Convention’s definition of torture might exclude women’s experience of violence at the hands of non-State actors from the Convention’s scope.<sup>46</sup> However, as the purpose of this article is to review how real feminist criticisms of the Convention have proved to be, the second half of the article evaluates the Committee’s approach to violence by non-State actors by examining how the Committee approaches the terms ‘acquiescence’ and ‘consent’ in the definition of torture in Article 1.

Although feminists have expressed concerns that the ‘public official’ requirement in Article 1 will exclude violence by non-State actors from the Convention’s scope, it is clear that the definition of torture in Article 1 *is* capable of extending to situations in which violence is inflicted by non-State actors. Article 1 makes clear that ‘torture’ not only occurs in circumstances in which severe pain or suffering is intentionally inflicted by a public official or other person acting in an official capacity, but also in circumstances where a non-State actor inflicts the severe pain and suffering and a public official consents to, acquiesces in or instigates the act of torture. On this basis, it has long been pointed out that the words ‘consent’, ‘instigation’ and ‘acquiescence’ in Article 1 have the potential for the Committee against Torture to develop a doctrine of due diligence similar to that under other human rights treaty bodies.<sup>47</sup> The due diligence standard is a means by which a State can be held accountable for its failure to protect individuals from human rights abuses by private actors. The term refers to the fact that States have positive obligations under international law to prevent abuses by private actors and to investigate and punish such incidents when they occur. As such, it is said that a State fails to act with due diligence if it fails to prevent or punish violations of international law by non-State actors.<sup>48</sup> On the basis that government inaction is one of the greatest causes of violence against women, it has long been recognised that the notion of due diligence is an invaluable means by which violence against women can be challenged.<sup>49</sup> Article 4(c) of the Declaration on the Elimination of Violence against Women, adopted by the General Assembly, declares that States should ‘exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’.<sup>50</sup>

On the basis that the word ‘acquiescence’ in Article 1 of the Convention against Torture is defined as ‘agreement by silence or lack of objection’, the term has potential for the Committee to develop its own due diligence standard. It allows the Committee to hold States accountable in instances in which state officials have ‘acquiesced in’ violations by non-State actors. Indeed, the

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46 The perpetrators of the sexual violence were prison guards in *C.T. and K.M. v. Sweden* and police officers in *V.L. v. Switzerland*.

47 See R. McCorquodale & R. La Forgia, ‘Taking off the Blindfolds: Torture by Non-State Actors’, 2001 *Human Rights Law Review* 1, no. 2, pp. 189-218 and Edwards, *supra* note 9.

48 *Velasquez Rodriguez v. Honduras* Judgment of 29 July 1988, Inter American Court of Human Rights (Ser.C) No. 4, 1988, Para. 173.

49 Preliminary Reports submitted by the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, UN Doc. E/CN.4/1995/42(1994) at Para. 72.

50 Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993, UN Doc. A/RES/48/104, 23 February 1994.

Convention's *travaux préparatoires* show that the term 'acquiescence' was introduced into Article 1 expressly to ensure that the Convention covered situations where public officials fail to act in situations where torture is being committed by a non-State actor.<sup>51</sup> Moreover, as further support for the term's potential in this respect, it is noted that the word 'acquiescence' was used by the Inter American Court of Human Rights in one of the first and most famous articulations of the due diligence principle in human rights law. In the case of *Velasquez Rodriguez*, the Court stated:

'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention (...). What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the *acquiescence* of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention [emphasis added]'.<sup>52</sup>

Likewise, the term was used by the UN Secretary-General in his *In-depth Study on All Forms of Violence against Women* in which he concluded: 'State inaction leaves in place discriminatory laws and policies that undermine women's human rights and disempowers women (...). It also functions as approval of the subordination of women that sustains violence and *acquiescence* in the violence itself [emphasis added]'.<sup>53</sup> The use of the word 'acquiescence' in these key passages on 'due diligence' support the notion that there is potential for the development of a concept of due diligence by the Committee against Torture. However, whilst it has been recognised for some time that the word 'acquiescence' has potential in this respect, as yet there has been little indication from the Committee's 'jurisprudence' that such a development is on the Committee's agenda.

### 3.2. *The scope of the term 'acquiescence'*

The main reason why there has been uncertainty about the Committee against Torture's willingness to develop a due diligence doctrine is that there is very little jurisprudence from the Committee dealing with the scope of the term 'acquiescence' in relation to violence by non-State actors. As Edwards points out *Hajrizi Dzemajl et al. v. Serbia and Montenegro*<sup>54</sup> is the only case in which the Committee has so far shown itself to be willing to make a finding that there has been a violation of the Convention based on the notion of 'acquiescence'. In this case, the complainants, 65 persons of Romani origin, alleged that an incident in which several hundred ethnic Montenegrin individuals had burnt and destroyed their houses constituted 'torture' under

51 The *travaux préparatoires* to the Convention show that the term 'acquiescence' was suggested by the US delegation who proposed that it be used instead of the term 'instigation'. The reason for the US suggestion was that the US delegation did not consider that the term 'instigation' included the 'omission or failure of a public official to act when he had reasonable grounds to believe that torture had been or was being committed', A. Boulesbaa, *The UN Convention and the Prospects of Enforcement*, 1999, p. 26.

52 See *supra* note 47.

53 *In-depth Study on All Forms of Violence Against Women* by the UN Secretary-General, UN Doc. A/61/122/Add.1 (2006), p. 34.

54 *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, Communication No. 161/200, 21 November 2002, UN Doc. CAT/C/29/D/161/2000. I am grateful to Edwards for her discussion of this case. See Edwards, *supra* note 9, p. 373.

Article 1 of the Convention or ‘cruel, inhuman or degrading treatment’ under Article 16 on the basis that it occurred with the ‘consent and acquiescence’ of the police. The complainants argued that the police had failed to take preventive measures to protect the Roma community even though the Montenegrin citizens had explicitly informed the police of their intention to ‘exterminate’ the Roma and to ‘burn down’ their houses. Further, when the looting and burning took place, the police – even though they were present at the scene – failed to intervene. The complainants argued that the term ‘consent or acquiescence’ in Article 1 of the Convention implied a positive duty to take action to prevent violations. In support of this argument, the complainants cited passages from the decision of *Velasquez Rodriguez*,<sup>55</sup> the Human Rights Committee General Comment 20<sup>56</sup> and jurisprudence on positive obligations from the European Court of Human Rights.<sup>57</sup> In particular, the complainants argued that the Yugoslav police had had a ‘specific obligation’ to protect the Roma settlement and its citizens because they had been fully informed of the danger that the Roma community faced. In support of this argument the complainants cited the case of *Osman v. UK* in which the European Court of Human Rights stated that States have a duty to prevent offences by non-State actors in situations where they know, or ought to know, that a specific individual is in danger.

The passage from *Osman v. UK* which the applicants cited was as follows:

‘[W]here there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (...) it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and *immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (...) [emphasis added]’.<sup>58</sup>

In its conclusions, the Committee found that the burning and destruction of houses constituted ‘cruel, inhuman or degrading treatment or punishment’ under Article 16 of the Convention. Although the Committee did not make reference to case law from other treaty bodies in its findings, its findings hold echoes of *Osman v. the UK* cited above. The Committee found:

‘(...) the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the *immediate risk* that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying “acquiescence” in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about inaction by police and law enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened (concluding observations on the initial report of Slovakia (...) concluding observations on

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55 See *supra* note 47.

56 In its General Comment 20, the Human Rights Committee confirmed that States are under a positive obligation to take steps to ensure that everyone within their jurisdiction is protected from ‘torture or to cruel, inhuman or degrading treatment or punishment’ even when inflicted by private actors. The Committee stated ‘It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity’. General Comment 20, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), Para. 2.

57 *Osman v. UK*, Judgment dated 28 October 1998, Application No. 87/1997/871/1083, *Mahmut Kaya v. Turkey*, Judgment of 7 March 2000, Application No. 22535/93 and *Z and Others v. the UK*, Judgment of 10 May 2001, Application No. 29392/95.

58 *Osman v. UK*, Para. 116.

the second periodic report of the Czech Republic (...) concluding observations on the second periodic report of Georgia (...) [emphasis added].<sup>59</sup>

Satisfied that the incident fell within Article 16 of the Convention, the Committee went on to analyse whether there had been any violations of Article 12,<sup>60</sup> 13<sup>61</sup> or 14<sup>62</sup> of the Convention.

What does the case of *Hajrizi Dzemajl et al. v. Serbia and Montenegro* tell us about the scope of protection afforded by the term ‘acquiescence’? Clearly the case confirms that the Committee against Torture deems States to have a ‘specific obligation’ to prevent violations by private actors that is similar to that found in *Osman v. UK* from the European Court of Human Rights. Serbia and Montenegro was found to have ‘acquiesced’ in the cruel, inhuman and degrading treatment suffered by the Roma community on the basis that it failed in its ‘specific obligation’ to prevent a specific group of individuals in circumstances where the authorities knew that those individuals were at risk. However, the case gives no indication as to whether the terms ‘acquiescence’ or ‘consent’ in Article 1 might also suggest that State parties owe a more ‘general obligation’ to prevent human rights violations that is not linked to a specific individual or a specific risk and is not triggered by a particular event.<sup>63</sup> In addition to an obligation to prevent human rights abuses in circumstances where a specific individual faces a specific danger, the European Court of Human Rights has also found that States have a ‘general’ obligation to prevent violations which, although brought to light by a particular complainant, is owed not just to him or her, but to the population at large. An example of a ‘general’ obligation to prevent is a State’s obligation to ensure that effective legislation is in place to act as a deterrent to persons who might be tempted to inflict severe pain and suffering upon another. In the case of *A v. UK*, the European Court of Human Rights found that the UK’s law on corporal punishment was inadequate and failed to protect children from abuse by private actors. The Court stated that Article 1 of the European Convention on Human Rights<sup>64</sup> combined with Article 3: ‘requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals’.<sup>65</sup> The judgment confirmed that in circumstances where a State fails to have adequate legislation in place to protect individuals from acts that amount to torture, then it incurs responsibility for that failure because the State is deemed to have been complicit in the abuse suffered. It is clear that such a general obligation to prevent human rights abuses can be a powerful tool because it can be used to challenge cultures of impunity in which human rights abuses are seemingly tolerated.<sup>66</sup> It can also be used to challenge gender imbalances in society that are entrenched by and reflected in inadequate legislation. This was seen in the case of *M.C. v. Bulgaria* before the European Court of Human Rights that related to the rape of a young girl by two young men.<sup>67</sup> In this case, the Court conducted an in-depth analysis of Bulgaria’s criminal

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59 *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, Para. 8.10.

60 The obligation to conduct a prompt and impartial investigation.

61 The obligation for the competent authorities to examine the case.

62 The right to ensure that victims of torture obtain redress and compensation.

63 This purpose of this section is to address and further develop Edwards’ analysis of the difference between the due diligence standard applied in other human rights areas and the consent or acquiescence standard of the Convention against Torture. See *supra* note 9 at p. 374.

64 Art. 1 of the European Convention on Human Rights contains an undertaking that States parties will ‘secure to everyone within their jurisdiction the rights and freedoms’ in the Convention.

65 *A v. UK*, Judgment of 23 September 1998, Application No. 100/1997/884/1096 Paras. 22 and 23.

66 It is submitted that the general obligation to prevent torture in Art. 2 of the Convention against Torture is of no assistance at the stage of defining torture under Art. 1 on the basis of acquiescence, because Art. 2 only applies once an act has been defined as torture and the acquiescence requirement has been satisfied.

67 *M.C. v. Bulgaria*, Judgment of 13 November 2003, Application No. 39272/98.

law on ‘rape’ and found that the inadequate definition of ‘rape’ therein constituted a breach of Article 3 of the Convention.

However, despite the narrowness of *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, there seems to be no reason why the term ‘acquiescence’ cannot cover instances in which a State has failed to honour a more ‘general obligation’ to prevent human rights abuses by private actors. The distinction between ‘specific obligations’ and ‘general obligations’ becomes blurred in a situation where there is a systemic failure on the part of the government to investigate or prosecute human rights violations. In such a situation, the government’s failure to investigate and prosecute specific abuses can quickly lead to a general failure to prevent future abuses. A culture is created in which people believe that they can commit abuses with impunity. On this basis there would appear to be no reason why the term ‘acquiescence’ cannot be applied to circumstances beyond those envisaged by *Osman* (i.e. circumstances in which the police are aware that a particular individual is in danger and yet fail to provide protection) to situations in which a State sustains violence through systematic inaction. There is no doubt that a State that allows a climate of impunity whether through a lack of legislation or through a failure to implement its legislation is complicit in the abuses that ensue. The words of the UN Secretary-General in his *In-depth Study on All Forms of Violence against Women*, and his use of the term ‘acquiescence’, supports the use of the term in such a context:

‘State inaction (...) functions as approval of the subordination of women that sustains violence and *acquiescence* in the violence itself. State inaction with regard to the proper functioning of the criminal justice system has particularly corrosive effects as impunity for acts of violence against women encourages further violence and reinforces women’s subordination [emphasis added]’.<sup>68</sup>

The UN Secretary-General’s statement clearly refers to a broader sense of acquiescence than a situation in which a police official fails to intervene in a specific instance where an individual needs assistance. It refers to the State responsibility that is triggered by a government allowing a cycle of impunity. It covers a failure to legislate and a systematic failure to investigate and prosecute crimes.

### **3.3. Conclusions and Recommendations of the Committee against Torture**

Support for the sort of broader notion of ‘acquiescence’ set out above is found in comments that the Committee against Torture has made in relation to violence against women in its Conclusions and Recommendations.<sup>69</sup> It is noted that the Committee does not confine its comments to specific situations of sexual violence but often expresses concern about ‘sexual violence’ in general<sup>70</sup> in a country. Also, whilst in its early Conclusions and Recommendations the Committee was

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<sup>68</sup> See *supra* note 53.

<sup>69</sup> Art. 19 of the Convention against Torture requires States Parties to submit a report to the Committee on the measures they have taken to give effect to their undertakings under the Convention within one year of the Convention entering into force. Thereafter, States Parties are required to submit supplementary reports every four years. These reports are called ‘periodic reports’. Periodic reports submitted by States Parties are considered by the Committee which makes comments on the country’s implementation of the Convention. The Committee’s comments are called ‘Conclusions and Recommendations’, or, since May 2008, ‘Concluding Observations’. The Conclusions and Recommendations cited in this article are referred to by their UN document number followed by the name of the country which is under review in brackets. This last number in the UN document indicates which periodic report is being reviewed i.e. CAT/C/UKR/CO/4 is an abbreviation for Convention against Torture, Conclusions and Recommendations, Ukraine, 4<sup>th</sup> Periodic Report.

<sup>70</sup> UN Doc. CAT/C/UKR/CO/4 (Ukraine), Para. 5(m), UN Doc. CAT/C/DRC/CO/1 (Democratic Republic of Congo), Para. 12, UN Doc. CAT/C/TGO/CO/1 (Togo), Para. 20, CAT/C/CR/32/2 (Greece), Para. 5(k).

primarily preoccupied with sexual violence perpetrated by law enforcement personnel,<sup>71</sup> prison officers<sup>72</sup> and military personnel<sup>73</sup> in places of detention,<sup>74</sup> more recently the Committee's Conclusions and Recommendations show that it is showing an equal (if not greater) interest in sexual violence by non-State actors in the family sphere.<sup>75</sup> When reviewing the State parties' periodic reports, the Committee frequently expresses concern about the adequacy of legislation dealing with domestic violence<sup>76</sup> and/or rape,<sup>77</sup> criticises the authorities' failure to investigate, prosecute and punish perpetrators of domestic violence<sup>78</sup> and reproaches the lack of training for law enforcement personnel on domestic violence.<sup>79</sup> The Conclusions and Recommendations also show that the Committee regularly comments that States are under an obligation to 'prevent, combat and punish'<sup>80</sup> violence against women. In the Committee's examination of the Republic of Korea's second periodic report, it stated that it was concerned with the 'prevalence of domestic violence and other forms of gender based violence, including marital rape, and notes the low rate of indictments'.<sup>81</sup> In its examination of Albania's initial report, the Committee expressed concern at the 'reported prevalence of violence against women and girls, including sexual and domestic violence, and the reluctance on the part of the authorities to, inter alia, adopt legislative and other measures to counter this phenomenon'.<sup>82</sup> In both these instances, and in all the other instances where the Committee expresses concern about impunity and sexual violence, the Committee requires the State party in question to tackle this problem by establishing measures to prevent and punish violence against women.

Although the Committee rarely – if ever – refers to the term 'acquiescence' in its treatment of violence against non-State actors referred to above, the Committee's second General Comment published in November 2007 sheds much welcome light on the Committee's attitude to these issues. Importantly, it reveals that the Committee recognises that the terms 'consenting to' or 'acquiescing in' in Article 1 of the Convention imply that the States Parties have a positive obligation to prevent violence by non-State actors. The General Comment also shows that the Committee is prepared to use the words 'due diligence' in its analysis. The Committee states:

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71 UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25, UN Doc. CAT/C/NPL/CO/2 (Nepal), Para. 27, UN Doc. CAT/C/LKA/CO/2 (Sri Lanka), Para. 12, UN Doc. A/55/44-2001 (USA, 1<sup>st</sup> periodic report), Para. 175 (d).

72 UN Doc. A/55/44-2001 (USA, 1<sup>st</sup> periodic report), Para. 175 (d).

73 UN Doc. CAT/C/CR/31/3 (Colombia), Para. 12, UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25.

74 UN Doc. CAT/C/UZB/CO/3 (Uzbekistan), Para. 21, UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25, UN Doc. CAT/C/NPL/CO/2 (Nepal), Para. 27, UN Doc. CAT/C/BIH/1 (Bosnia and Herzegovina), Para. 16, UN Doc. CAT/C/DRC/CO/1 (Democratic Republic of Congo), Para. 12, UN Doc. CAT/C/LKA/CO/2 (Sri Lanka), Para. 12, UN Doc. CAT/C/GEO/CO/3 (Georgia), Para. 19, UN Doc. CAT/C/GTM/CO/4 (Guatemala), Para. 16, UN Doc. CAT/C/TGO/CO/1 (Togo), Para. 20, UN Doc. CAT/C/USA/CO/2 (USA), Para. 28, UN Doc. CAT/C/CR/34/UGA (Uganda), Para. 88 (f), UN Doc. A/55/44-2001 (USA, 1<sup>st</sup> periodic report), Para. 175 (d), UN Doc. A/58/44, 2003 (Estonia), 1<sup>st</sup> periodic report, Para. 45, UN Doc. A/57/44 (Zambia, 1<sup>st</sup> periodic report), Para. 6(c), UN Doc. A/57/44 (Russian Federation, 3<sup>rd</sup> periodic report), Para. 10 (e).

75 UN Doc. CAT/C/ISL/CO/3 (Iceland), Para. 15, UN Doc. CAT/C/IND/2 (Indonesia), Para. 16, UN Doc. CAT/C/SWE/CO/5 (Sweden), Para. 23, UN Doc. CAT/C/ZMB/CO/2 (Zambia), Para. 22, UN Doc. CAT/C/MKD/CO/2 (Macedonia), Para. 19, UN Doc. CAT/C/BEN/CO/2 (Benin), Para. 24, UN Doc. CAT/C/EST/CO/4 (Estonia), Para. 21, UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20, UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25, UN Doc. CAT/C/UKR/CO/5 (Ukraine), Para. 14, UN Doc. CAT/C/ITA/CO/4 (Italy), Para. 23, UN Doc. CAT/C/QAT/CO/1 (Qatar), Para. 20-22, UN Doc. CAT/C/KOR/CO/2 (Republic of Korea), Para. 17, UN Doc. CAT/C/CR/34/ALB (Albania), UN Doc. CAT/C/CR/34/BHR (Bahrain), Para. 103 (i), UN Doc. A/57/44 (Zambia, 1<sup>st</sup> periodic report), Para. 6(c).

76 UN Doc. CAT/C/EST/CO/4 (Estonia), Para. 21, UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20, UN Doc. CAT/C/ZMB/CO/2 (Zambia), Para. 22, UN Doc. CAT/C/BEN/CO/2 (Benin), Para. 24.

77 UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20, UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25, UN Doc. CAT/C/IDN/CO/2 (Indonesia), Para. 16.

78 UN Doc. CAT/C/EST/CO/4 (Estonia), Para. 21, UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20, UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25, UN Doc. CAT/C/UKR/CO/5 (Ukraine), Para. 14, UN Doc. CAT/C/IDN/CO/2 (Indonesia), Para. 16, UN Doc. CAT/C/SWE/CO/5 (Sweden), Para. 23, UN Doc. CAT/C/ZMB/CO/2 (Zambia), Para. 22, UN Doc. CAT/C/MKD/CO/2, Para. 19.

79 UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20, UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25, UN Doc. CAT/C/IDN/CO/2 (Indonesia), Para. 16, UN Doc. CAT/C/MKD/CO/2 (Macedonia), Para. 19.

80 UN Doc. CAT/C/ZMB/CO/2 (Zambia), Para. 22, UN Doc. CAT/C/MKD/CO/2 (Macedonia), Para. 19, UN Doc. CAT/C/BEN/CO/2 (Benin), Para. 24, UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20.

81 UN Doc. CAT/C/KOR/CO/2 (Republic of Korea), Para. 17.

82 UN Doc. CAT/C/CR/34/ALB (Albania), Para. 7(o).

‘(...) where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise *due diligence* to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. (...) The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking [emphasis added]’.

This passage shows the Committee’s awareness that the notion of due diligence is a particularly powerful tool for tackling violence against women by non-State actors. The passage also supports the view that the Committee is willing to take a broader view of the term ‘acquiescence’ than that illustrated by the case of *Hajrizi Dzemajl et al. v. Serbia and Montenegro*. On a practical level this means that women suffering violence within the private sphere are likely to be able to find protection under the Convention against Torture in a wide variety of circumstances. A woman who has suffered rape should be able to argue that the authorities have ‘acquiesced’ in her torture in instances where either the authorities failed to provide her with protection in a specific instance and also in circumstances where the authorities have created a culture of violence through a systematic failure to investigate or prosecute complaints of domestic violence. As such, it is clear that the term ‘acquiescence’ in Article 1 of the Convention may not only prove instrumental in holding the State responsible for its failure to respond to specific instances of abuse by non-State actors but that it also has the potential to be a valuable tool for challenging and transforming gender imbalances in society.

#### **4. Conclusions**

Before drawing conclusions on the purposive and public official elements of the definition of torture, it is helpful to step back and examine the Committee’s approach to gender more generally. A review of the Committee against Torture’s work in the last couple of years indicates that gender is now placed firmly on the Committee’s agenda. The Committee appears to be actively seeking out information on the female experience of torture.<sup>83</sup> An examination of the memos with which the Committee notifies State parties of the issues that will be considered during the examination of their report shows that the Committee is not limiting its enquiry to what measures States have taken to prevent sexual violence in detention,<sup>84</sup> but is also asking more broadly whether the State’s legislation prohibiting torture and cruel, inhuman and degrading treatment ‘includes specific provisions regarding *gender based breaches of the Convention, such as sexual*

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83 Many NGOs have had an important role to play in placing gender on the Committee against Torture’s agenda. One that should be particularly mentioned in this respect is the World Organisation against Torture (*Organisation Mondiale Contre la Torture*) which has lobbied very actively to ensure that violence against women is on the Committee’s agenda.

84 List of issues to be considered during the examination of the third report of Australia, UN Doc. CAT/C/AUS/Q/4, 6 June 2007, Item 4, List of issues to be considered during the examination of the fifth periodic report of Norway, UN Doc. CAT/C/NOR/Q/5, 7 June 2007, Item 17, List of issues to be considered during the examination of the fifth periodic report of Ukraine, UN Doc. CAT/C/UKLR/Q/5/Rev.1, 26 February 2007, Item 17.

*violence* [emphasis added].<sup>85</sup> The Committee generally follows this question with a request that the State Party describes specific measures taken to ‘prevent acts of sexual violence’ and to ‘provide data on investigation, prosecution and punishment of the perpetrators’.<sup>86</sup> There are also several instances where the Committee asks States Parties to provide information on the measures they have taken to ‘adopt legislation to prevent’ and ‘prevent and investigate’ domestic violence.<sup>87</sup> Another noticeable and fairly recent development is that the Committee now always requests States to provide all statistical data disaggregated by ‘sex, age, crime and geographical location’. This is a positive sign. It suggests that the Committee is trying to understand patterns of torture by age, sex, crime and area.<sup>88</sup> Are women between the ages of 21 and 28 more vulnerable to torture in detention than women between the ages of 40 and 60? Are more men raped in detention than women? Do women experience more violence than men in detention? The disaggregated information provided by States may soon allow such questions to be answered more accurately. This will not only ensure that measures can be more easily taken to prevent torture but it will also ensure that traditional constructions of torture can be replaced with more accurate notions of who is suffering torture, who is inflicting torture and where it is taking place.

It is also noteworthy that the Committee’s 2005 Guidelines on how States should report to the Committee under Article 19 specifically request States to provide information on the steps they have taken to monitor sexual violence against men and women in custody when they report to the Committee under Article 19.<sup>89</sup> The Committee’s previous guidelines made no mention of women and no mention of violence based on gender. Similarly, as we have seen in the previous section the Conclusions and Recommendations of the Committee against Torture in the last three years show a marked increase in the priority which the Committee is giving to gender issues, as a specific concern. Indeed, many of the recommendations and concluding observations from the Committee from late 2007 and 2008 devote a discrete couple of paragraphs to gender-based violence in ‘general’ that often begin with a specific heading: ‘Gender-based violence’,<sup>90</sup> ‘Gender-based violence and trafficking’,<sup>91</sup> ‘Domestic Violence’,<sup>92</sup> ‘Violence against women and

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85 List of issues to be considered during the examination of the fifth periodic report of Denmark, UN Doc. CAT/C/DNK/Q/5/Rev.1, 19 February 2007, Item 20, List of issues to be considered during the examination of the fourth periodic report of Italy, UN Doc. CAT/C/ITA/Q/4/Rev.1, 6 February 2007, Item 20, List of issues to be considered during the examination of the fourth periodic report of Mexico, UN Doc. CAT/C/MEX/Q/4, 19 October 2005, Item 42, List of issues to be considered during the examination of the fourth periodic report of Hungary, UN Doc. CAT/C/HUN/Q/4/Rev.1, 4 July 2006, Item 6, List of issues to be considered during the examination of the fourth periodic report of Guatemala, UN Doc. CAT/C/GTM/Q, 24 February 2006, Item 49, List of issues to be considered during the examination of the fourth periodic report of Peru, UN Doc. CAT/C/PER/Q, 21 February 2006, Item 12.

86 *Ibid.*

87 List of issues to be considered during the examination of the fourth periodic report of the Russian Federation, UN Doc. CAT/C/RUS/Q/4, 4 July 2006, Item 8, List of issues to be considered during the examination of the fourth periodic report of Mexico, UN Doc. CAT/C/MEX/Q/4, 19 October 2006, Item 41, List of issues to be considered during the examination of the fourth periodic report of Switzerland, UN Doc. CAT/C/34/L/CHE, 11 February 2005, Item 6.

88 See Para. 23 of General Comment No. 2 from the Committee against Torture which states: ‘The Committee has consistently recommended that States Parties provide data disaggregated by age, gender and other key factors in their reports to enable the Committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the States Parties and the Committee to identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. States Parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific relevant sectors of the populations, such as minorities, victims of torture, children and women’.

89 In contrast to the Committee’s old Guidelines on and the Content of Initial Reports under Art. 19 which contained no acknowledgment that women might experience torture differently to men, the new Guidelines published in 2005 contain a specific request to States parties to provide information on the steps they have taken to monitor sexual violence against men and women in custody when they report to the Committee under Art. 19. Art. 19 of the Convention requires State parties to submit to the Committee reports on the measures they have taken to give effect to their undertakings under the Convention.

90 UN Doc. CAT/C/NPL/CO/2 (Nepal), Para. 27.

91 UN Doc. CAT/C/JPN/CO/1 (Japan), Para. 25.

92 UN Doc. CAT/C/SWE/CO/5 (Sweden), Para. 23, UN Doc. CAT/C/EST/CO/4 (Estonia), Para. 21, UN Doc. CAT/C/LVA/CO/2 (Latvia), Para. 20, UN Doc. CAT/C/ITA/CO/4 (Italy), Para. 23.

children’,<sup>93</sup> ‘Violence against Women’,<sup>94</sup> ‘Violence against women, including sexual and domestic violence’<sup>95</sup> or ‘Sexual Violence and Abuse’.<sup>96</sup> This is a development that indicates that violence against women is now firmly on the Committee’s agenda.

It is also significant that the Committee is showing an interest in sexual violence that goes far beyond sexual violence in detention and also beyond torture committed by public officials. The Committee is regularly expressing concern about ‘sexual violence’ in general and ‘domestic violence’ against women. This suggests that, although the concept of ‘acquiescence’ has only been addressed once by the Committee in its ‘jurisprudence’, it is a central part of the Committee’s analysis when it considers a State’s reports under Article 19. In relation to this, it is interesting that at the end of its decision in *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, the Committee noted that it had already ‘reiterated on many occasions in Conclusions and Recommendations’ its concerns about ‘inaction by police and law enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened’. This comment indicates that the Committee’s Conclusions and Recommendations might provide clues as to the way in which the Committee’s ‘jurisprudence’ might develop. If this is the case, the strong body of comment condemning police inaction with regard to domestic violence seen in the Committee’s Conclusions and Recommendations may indicate that the Committee is ready to make a finding that domestic violence constitutes a breach of Article 1, in instances where the State has failed in its positive obligations to prevent it. It may just be waiting for the right case to come its way.

Against this backdrop of development, the Committee’s decisions in 2007 are not surprising. The decisions in *V.L. v. Switzerland* and *C.T. and K.M. v. Sweden* confirm what has already been illustrated in the Committee’s Conclusions and Recommendations, namely that rape by public officials is torture under Article 1. Although woefully overdue, the decisions are unquestionably key decisions in the history of the ‘jurisprudence’ from the Committee against Torture. It is predicted that erstwhile feminist critics of the Convention will read the decision in *V.L. v. Switzerland* with a degree of satisfaction. The Committee’s statement ‘The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliating and discrimination based on gender’<sup>97</sup> is surely a triumph for those who have been fighting to persuade the international community to throw off its what has been described as ‘myopia’<sup>98</sup> or ‘systemic blindness to the connection between issues of gender and gross human rights violations’.<sup>99</sup> The decision indicates that the Committee’s eyes are now open to the more female experience of torture and that it is aware of the underlying social issues of subrogation and violence against women that rape can reflect. The comment is also testament to the extent to which the international community’s perception of the crime of rape has changed over the last 15 or so years.

This article seeks to evaluate, and re-evaluate, the Committee against Torture’s attitude to sexual violence. For the first eighteen years of the Convention’s life, it seemed as if the Commit-

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93 UN Doc. CAT/C/ISL/CO/3 (Iceland), Para. 15.

94 UN Doc. CAT/C/ZMB/CO/2 (Zambia), Para. 22, UN Doc. CAT/C/UZB/CO/3 (Uzbekistan), Para. 21, UN Doc. CAT/C/BEN/CO/2 (Benin), Para. 24.

95 UN Doc. CAT/C/IDN/CO/2 (Indonesia), Para. 16.

96 UN Doc. CAT/C/LKA/CO/2 (Sri Lanka), Para. 13.

97 *V.L. v. Switzerland*, *supra* note 17, Para. 8.10.

98 A. Byrnes, ‘Methodological Myopia, Fundamental Flaw or Meaningful Marginalisation? Some Current Issues’, 1988-1989 *Australian Yearbook of International Law*, pp. 205-240.

99 See Blatt, *supra* note 25.

tee felt itself to be constrained by the traditional construction of torture as articulated in the definition of torture in Article 1. But finally, in the last three years, a review of the Committee's Conclusions and Recommendations and 'jurisprudence' suggests that the Committee is realising that the definition of torture in Article 1 does not need to be a strait-jacket. If the Committee adopts a flexible approach to the term 'acquiescence', this article has shown that the definition of torture is perfectly able to respond to female experiences of torture at the hands of both State actors and non-State actors. As a result, the categorization of rape as torture under human rights law has the potential to be a protection triumph for women.