# Table of Content

Methodology .................................................................................................................. 3
Definitions of Torture and The Feminist Approach ............................................................ 4

**Section I: Rape as Torture in the Regional and International Jurisprudence** .................. 6
- International Criminal Law .............................................................................................. 6
- Regional Systems of Protection of Human Rights ........................................................... 8
- United Nations Treaty bodies .......................................................................................... 9

**Section II: The Advantages of the Feminist Strategy of Including Rape in the Category of Torture** ........................................................................................................... 11
- Ensuring a protection for the victims ................................................................................. 11
- Facilitating the finding of persecution for female asylum seekers .................................... 12
- Associating the ‘torture symbolic’ to instances of rape ..................................................... 12

**Section III: A Critical Perspective on the Feminism Strategy and its Impact on the Jurisprudence and on Women’s Rights** ........................................................................ 14
- A Potentially Temporal and Fragile Strategy .................................................................. 14
- A wrongful symbolic: the importance of the terminology .............................................. 15
- A higher standard of proof for women .............................................................................. 16
- An Elimination of the Gender Discrimination .................................................................. 17

**Section IV: Conclusions and Recommendations** .......................................................... 20

Bibliography ....................................................................................................................... 22
Table of Cases ..................................................................................................................... 25
Table of Legislation ............................................................................................................ 27
Seeing Rape as Torture: A Successful Feminist Strategy under a Critical Magnifying Glass

By Andréanne Charpentier-Garant

Feminist advocates stressed that human rights were international norms that reflected men’s experiences; they also demonstrated that the interpretation and application of these norms marginalized women. In response, feminists have advocated for a better legal response to women’s realities, amongst other things by proposing a rereading of existing human rights norms so that they would include violence against women.

This strategy adopted by the feminist activists has had a major impact on the development of the international jurisprudence; one of its practical applications was the conceptualization of rape as a form of torture. Since international and regional instruments did not provide for an explicit prohibition of rape, their approach was to support favorable interpretations of alternative provisions, such as the prohibition of torture. Through regional and universal human rights bodies, and also through the fast development of international criminal jurisprudence in the late 1990s, instances of sexual violence against women were interpreted as being part of human rights provisions and humanitarian law. Conceptualizing rape as torture (and also as an act of genocide) was seen as a success of the feminist activism and, as recognized by Edwards, it should not be underestimated.

Recognizing the advancement brought to women’s rights by the Rape=Torture (R=T) strategy does not prevent us from discussing its “mixed results.” The human rights bodies are now addressing some women-specific preoccupations, and this is a major success. However, 15 years have passed since the groundbreaking decision of Aydin v. Turkey by the European Court of Human Rights (ECtHR), and the equation between rape and torture has not been sufficiently reassessed by feminist advocates. Such a strategy, even if positive and successful, should not stay

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1 This research was presented to Leo Zwaak and Brianne McGonigle as a requisite for the ‘Human Rights Case Law’ course. It is also one of the mandatory works as part of the LL.M in Human Rights and International Criminal Law from Utrecht University. In November 2012, it was selected in the graduate category of the St. John Macdonald Young Scholar Award (Canadian Council on International Law).
3 The Inter-American Convention on violence against women is an exception, see Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para), OAS General Assembly, twenty fourth regular session, 9 June 1994, entered into force 28 March 1996.
unquestioned.

As will be presented in Section I, cases alleging torture based on factual instances of rape were brought in front of international and regional bodies. The advantages to conceptualizing rape as torture will be the object of Section II. However, the main purpose of this paper is to identify the limits of the strategy conceptualizing rape as torture and of its results. There is a need for an analysis of such an approach and this paper attempts, after exposing the strategy and its relevance, to identify its weaknesses from a critical feminism perspective (Section III). Based on the recent international and regional jurisprudence, it is now essential to do such an assessment to understand the limits of the strategy; it will allow us to conclude by proposing alternative and complementary approaches (Section IV).

Methodology
This paper adopts a feminist legal theory to approach international law. Hence, with regards to its logic or its use of jurisprudence and doctrine, it does not differ substantively from any other legal theory.

However, feminist writers share different “ideals about rules”. Their objective is usually to expose certain bias in substantive and procedural rules, while bringing to light discrimination based on gender. The method adopted thus approaches law asking some specific questions; the “women question”, as proposed by Bartlett, will be a leading one throughout this paper. Feminists use the legal method. They try to show where and how existing legal concepts and procedures disadvantage women or fail to take them (or their perspective) into consideration, this in order to achieve political change. Consequently, one of the main interests of our investigation is its capacity to include and be sensitive to cases and approaches not already reflected in legal doctrine.

This article thus proposes a legal analysis by an in-depth review of the jurisprudence of the ECtHR and also refers to a number of relevant decisions from the inter-American system of human rights, international criminal tribunals and specialized human rights bodies. Our method is mainly discursive; it aims to open a constructive dialogue on the feminist strategy presented earlier.

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7 Edwards and McGlynn have made similar enterprises. Their respective work and conclusions will be presented and referred to throughout this paper. However, new case law, especially from the ECtHR, has been published; their analysis will thus be complemented and criticized in this paper.


Various articles by renowned feminist writers and human rights scholars are being referred to, either because they support the argument proposed in this paper or because their positions are being challenged.

**Definitions of Torture and The Feminist Approach**

Before entering the core of the analysis, it is important to propose some basic definitions of torture and to introduce the evolution of the feminist critiques of these provisions.

This paper does not adopt one specific definition of torture, since the various bodies, courts and tribunals apply distinct definitions and elaborate different criteria in their jurisprudence.\(^{13}\) Despite their differences, attempting a general definition can still be useful. It can be said that torture is a non-derogable right\(^{14}\) and that it constitutes the most severe form of ill-treatment prohibited by international law.\(^{15}\) Consequently, its first criteria is usually the fact that a certain level of severity needs to be reached to conclude that conducts amounted to torture.\(^{16}\) Additionally, in order to constitute torture, the perpetrator and the circumstances surrounding the conduct or treatment need to demonstrate that a specific purpose was behind the intentionally imposed treatment.\(^{17}\) Finally, the abuse must involve the participation of a public servant.\(^{18}\)

The traditional conception of torture is that it “most usually appl[ies] in circumstances of abuse within state custody, that is, typically by male government officials against male detainees for the purposes of extracting information or a confession.”\(^{19}\) The intention of the drafters of Art. 7 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 1 of the United Nations Convention against Torture (UNCAT), for example, have been perceived as being to ban and take action “against state-sponsored terror against political dissidents, and secondarily to the same types of harm perpetrated against non-political prisoners.”\(^{20}\)

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\(^{13}\) Various international instruments prohibit torture, some of the relevant provisions are Art. 5 of the UDHR, Art. 7 of the ICCPR, Art. 5 of the ACHR, Art. 3 of the ECHR, Art. 2 of the Inter-American convention on Torture and Art. 1 UNCAT.

\(^{14}\) See, for example, IACtHR in *Maritza Urrutia v. Guatemala*, Ser. C, No. 103, 27 November 2003, par.89 and *Gomez-Paquiyauri Brothers v. Peru* (Merits, Reparation and Costs), 8 July 2004, para. 111.

\(^{15}\) On the hierarchy of harm, see *Greek Case*, European Commission report of 5 November 1969, Yearbook 12.


\(^{17}\) McGlynn, C. (2009) “Rape, torture and the European Convention on Human Rights”, *International and Comparative Law Quarterly*, Vol. 58, No. 3, p. 581; Interestingly, discrimination against women was considered by the ICTY in the *Celibici Camp* case as a “purpose” as required by the torture provision, see *The Prosecutor v. Zejnil Delalic et al.*, No. IT-96-21-T, Trial Judgment, 16 November 1998. This question will be further addressed in Section III.

\(^{18}\) The third requirement is not part of the test in the inter-American system; however, its analysis is usually made when looking at the state responsibility to confirm the violation of a right linking to an obligation of the state, see IACtHR, *Bueno Alves v Argentina* (Fondo, Reparaciones y Costa), Serie C No.164, 11 May 2007, para. 79.

\(^{19}\) Edwards, A. (2006), p. 158; see ECtHR, *Republic of Ireland v. The United Kingdom*, Series A, No. 25, 18 January 1978. It is very frequent in the jurisprudence that the violation of the prohibition of torture is linked to the right to liberty.

Partly for these reasons, the definitions of torture have been the object of quasi-unanimous disapproval of feminist writers.\(^{21}\) In effect, throughout the 1990s, feminist scholars and women’s rights advocates largely challenged the traditional definition of torture. It has been said that the scope of the provision was limited both by the fact that it required a public official participation (or acquiescence) and a specific purpose (interrogation/intimidation/etc.). Even if the text of the clauses can be considered gender-neutral, scholars argued that “women have historically gained access to the protective scope of the torture prohibition on male-defined and male-determined terms.”\(^{22}\) Moreover, it is relevant to mention that the women-specific instruments do not refer to torture,\(^{23}\) giving the impression that it is not a crime they are victim of.

It was sustained that the private/public dichotomy explains why the definition of torture is in effect man-oriented; it does not include instances of violence in the domestic domain.\(^{24}\) As will be shown, this critique is less relevant than it used to be, since the ECtHR, the inter-American system, the Human Rights Committee (HRC) and the Committee against Torture (CAT) overcame this issue.\(^{25}\) On one hand, sexual violence and rape committed in the private sphere have been found to generate state responsibility through their positive obligation.\(^{26}\) Fortin’s work presents a great overview of the jurisprudence of the numerous human rights bodies and proposes an interesting analysis of its evolution. On the other hand, cases involving government agents using rape and sexual violence on women in custody are now routinely found to violate the torture or ill-treatment provisions of numerous international and regional instruments.\(^{27}\) Instances of sexual violence within the traditional circumstances of torture are quite common. It has been said to be “a cheap form of torture” that leaves little evidence while being brilliantly effective.\(^{28}\)


\(^{23}\) The CEDAW, for example, does not include any provision on torture and instances of genital mutilation are considered by the Committee as harmful traditional practices detrimental to health, see Edwards, A. (2006), p. 377, referring to CEDAW General No. 14 Female Circumcision, UN Doc. A/45/38 (1990).


\(^{25}\) Edwards takes the time to underline that the due diligence test and the positive obligation of the state in cases of non state actors violations emerged in men’s rather than women’s cases. She thus affirms that “until an issue is of relevance to men, it is not an issue worth pursuing at the level of international law, and it will remain marginalized.” Edwards, A. (2011), p. 239.


\(^{27}\) This practice is very common. In Kenya and in Sri Lanka, for example, female political prisoners not to be raped are exceptions, reported by Pearce, H. (2002) “An examination of the international understanding of political rape and the significance of labelling it torture”, International Journal of Refugee Law, Vol. 14, No. 4, p. 556.

Section I: Rape as Torture in the Regional and International Jurisprudence

Through the regional human rights bodies, and also through the fast development of international criminal jurisprudence in the late 1990s, instances of sexual violence against women were interpreted as being part of human rights provision and humanitarian law. As stated earlier, the principal obstacle was that the main binding human rights instruments did not provide for an explicit prohibition of it, such as rape. This section will offer a brief presentation of how the prohibition against torture has been interpreted in instances of rapes and how such a reconceptualization has been applied by various courts, tribunals, commissions, and/or committees.

International Criminal Law

The integration of the strategy of conceptualizing rape as torture in international criminal proceedings arose out of the need for the prosecution of the persons most responsible for widespread and systematic sexual violence in situations of armed conflict or mass violence. Within the framework of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), acts of sexual violence were “first characterized as forms of genocide, torture, and other serious war crimes.” These two international criminal tribunals opened the way for the ones that were to follow, and also for the human rights bodies. Indeed, their practice was perceived as being “both conceptually and substantively powerful for the advancement of women’s right.”

The ICTR decision in the Akayesu case is a groundbreaking one. The case held in 1998, which was the first ever judgment by an international tribunal for the crime of genocide, was unprecedented in at least two other respects: first, because it recognized that rape and sexual violence constitute genocide if committed with the specific intent of destroying, in whole or in part, a particular targeted group, and secondly because it was the first attempt to define rape under international law. With regards to torture, the Chamber also made an important statement: “Like torture, rape is a violation of personal dignity and rape in fact constitute torture when 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.” Listing various purposes for which rape can be inflicted, the ICTR clearly linked rape with torture, but did not propose that such an equation was valid in all cases.

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29 If our investigation takes women as a category, it also tries to avoid the misleading or dangerous tendencies of considering it a homogenous one (see Bartlett, K. T. (1989), p. 835). The topic of this paper is limited to instances of rape, but some aspect of the analysis could be applied to the broader category of sexual violence against women. In the sub-section about gender discrimination, as will be argued, the conclusion could also be generalized to instances of gender-based sexual violence, and victims could be man, and especially homosexuals. These details will be discussed in the relevant sub-sections.

Adopting the same line of reasoning, the ICTY also addressed instances of rape through the prohibition of torture in some of its decisions. Only three months after Akayesu, the Celibici Camp case was an occasion for the Tribunal to affirm that rape could amount to torture when certain criteria were met.\textsuperscript{33} The Trial Chamber also adopted the view that rape could amount to torture in Furundzija.\textsuperscript{34} Developing a bit more on the purposive element, the Trial Chamber in Furundzija sustained that rape could be used to obtain information, but could also be committed specifically because of the gender of the victim.\textsuperscript{35} Proposing that humiliation was very close to the notion of intimidation listed in the Torture Convention,\textsuperscript{36} the accused was held responsible for committing the crime against humanity of torture for the rapes carried out with the purpose of humiliating the women victims.

It is also relevant to cite the Kunarac Appeal decision in which the Chamber made a strong affirmation on the severity of rape:

\begin{quote}
The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.\textsuperscript{37}
\end{quote}

Such a wording suggests that the ICTY Chamber considers that rape always equals to torture; the human rights bodies have not adopted a similar approach, as will be shown below.

Finally, the International Criminal Court (ICC) includes war crimes and crimes against humanity for the specific acts of sexual violence. As provided for in the Rome Statute, rape and sexual slavery are crimes under the jurisdiction of the Court.\textsuperscript{38} Consequently, with regards to the aims of this paper, it is relevant to mention that the ICC subsumed the crime of torture into rape as a crime against humanity in the case against Bemba.\textsuperscript{39} The Pre-trial Chamber sustained that the material elements of torture were also the ones for the acts of rape, refusing to do a cumulative charging of both rape and torture. Jean-Pierre Bemba was thus charged with the crime of rape as a crime against humanity, and not for the crime of torture. Thus, the ICC does not have to adopt the strategy analyzed in this paper since rape is, in itself, a crime under its Statute.

\begin{footnotes}
36 Art.1(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, Res. 39/46, 10 December 1984, entered into force 26 June 1987.
39 The Prosecutor v Jean-Pierre Bemba Gombo, Doc. No. ICC-01/05-01/08-424, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, para. 312.
\end{footnotes}
Regional Systems of Protection of Human Rights

The ECtHR adopted the first international decision proposing the equation between rape and torture. *Aydin v. Turkey*\(^{40}\) represents a reversal of the European Commission Report decision in *Cyprus v. Turkey*.\(^{41}\) In the latter, the Commission held that the instances of rape and the widespread sexual violence committed against the population of Cyprus amounted to ill-treatment, but did not reach the severity required by torture.\(^{42}\) More then 20 years later, in *Aydin*, the ECtHR held for the first time that rape amounted to torture after having analyzed the circumstances of the situation.\(^{43}\)

The Inter-American Court of Human Rights followed the same line of reasoning and, in *Raquel Martí de Mejía v. Peru*, held that rape by a state agent for the purpose of extracting information and intimidating constituted an act of torture.\(^{44}\) Hence, the inter-American system adopted an approach similar to the ECtHR, opting for the progressive interpretation of the torture provision. Rape can thus amount to torture in both the European and the inter-American systems, depending on the circumstances of the case at hand.

Moreover, the 1995 Report on the Situation of Human Rights in Haiti by the Inter-American Commission linked rape and sexual violence to gender discrimination. It affirmed that:

> […] the rape and other sexual abuse of Haitian women inflicted physical and mental pain and suffering in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resists the regime and sustain the civil society particularly in the poor communities. Rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women.\(^{45}\)

This interesting approach will be further addressed in the following section.

Of note, the Inter-American system differs from the European one in that it has a Convention specifically on violence against women that entered into force in 1996.\(^{46}\) Referring to the *Belem*

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42 It is relevant to mention that in this case, just as in *Aydin*, some of the victims were women and children. Moreover, the *Cyprus v. Turkey* is a great example of the private/public dichotomy. While the majority of the rape occurred in private, the decision wrongfully focuses on the detention cases, see McGlynn, C. (2009), p. 568.
43 Of note, the decision gives a lot of importance to the vulnerability of the victim, specifying that “in the case at hand”, rape amounts to torture. The victim was a 17 years old girl. While in custody for 3 days, she has been raped by members of the Turkish security forces. The purpose of the interrogation was to gain information on alleged terrorist activities. The treatment she suffered include being stripped naked, beated, spayed with cold jets of water and raped. The factual basis of the case amounts to the traditional circumstances of torture cases, including captivity and political opponents.
46 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (*Belem do Pará*), OAS General Assembly, twenty fourth regular session, 9 June 1994, entered into force 28 March 1996. In Europe, there is Draft Convention on violence against women and domestic violence, the entry into force is to be expected when state start ratifying it, see Council of Europe: Ad Hoc Committee on Preventing and Combating
do Para Convention, the Court’s decision in the Castro-Castro Prison case can be considered as “gender sensitive.” After concluding on a violation of the right to physical integrity as provided for the inter-American Convention, the Court also found violations of both the Inter-American Convention to Prevent and Punish Torture because of the digital penetrations that suffered the inmates and of the Belem do Para Convention. The combination of the torture provisions and the women specific clauses of the Belem do Para Convention renders this decision truly relevant for the purpose of this study. However, these references to discrimination in the torture cases have not been systematical in the practice of the Inter-American Court. The possibility of considering rape as gender discrimination will be considered as a complementing strategy proposed in the last section of this paper.

When looking at the African system of protection of human rights, one could identify a concordant jurisprudence, although not quite identical. In 2000, the African Commission faced a case in which instances of rape by government agents had been committed while in custody. The Commission found a violation of Art. 5 of the ACHPR but was not clear in specifying if the acts of rape described in the Communication constituted torture or ill-treatment. The R=T strategy has thus not yet been clearly adopted by the African system.

**United Nations Treaty bodies**

It is worth mentioning some decisions of the Human right Committee (HRC), the Committee against torture (CAT) and the Committee on the Elimination of Discrimination against women (CEDAW).

The HRC has first addressed sexual violence in a number of cases concerning men victims. Slowly, instances of violence against women became part of the framework of the Committee. One of the particularities of the HRC is that it does not always apply the distinction between torture and inhuman treatment; indeed, the Committee often declares of violation of its Art. 7 without specifying if the conduct consists of inhumane treatment or of torture. Despite this approach, the Special Rapporteur on torture clearly linked sexual violence with torture.

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52 In 2008, the Special Rapporteur on Torture, Manfred Nowak, adopted a report opening a door to linking torture to sexual and domestic violence and women's rights in what could be characterized as a holistic approach to rape as

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The CAT faced numerous relevant cases and acknowledged that rape reached the severity threshold of torture. At first, the Committee seemed reluctant in explicitly recognizing rape as torture. As an example, in *Kisoki v. Sweden* in 1996, rape was erased from the committee’s consideration of the case.\(^{53}\) However, in the following years, the R=T equation was adopted.\(^{54}\) The recent decisions of the CAT show that the violence suffered by women is viewed as being of the nature and the severity required by Art.1 of the Torture Convention. Even if the violations by non-state actors are not automatically encompassed by the protection provided for by the Convention, there is new development in favor of the inclusion of gender-related harm.\(^ {55}\)

There is nowadays an overall recognition that rape can constitute torture, but while the ICTY affirmed that all rapes constituted torture, the ECtHR has been more reticent in making such a generalization. Edwards, as an observer, notes that “there is very limited guidance offered by either committee [CEDAW and CAT] to determine on what legal basis these forms of violence against women may be said to be relevant to the torture prohibition, or why they specifically meet the torture threshold.”\(^ {56}\) This is a critique that will be further addressed in Section III. In conclusion, the present section demonstrated that it is a new practice shared, with some minor differences, by all major international and regional organs.

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Section II: The Advantages of the Feminist Strategy of Including Rape in the Category of Torture

In the absence of adequate international regulation on violence against women, international and regional human rights bodies have adopted two main strategies to incorporate such violence into the existing human rights framework. The first strategy is to conceptualize violence against women as a form of sex/gender discrimination. As previously mentioned, the IACtHR decision in the *Castro-Castro prison* case, for example, included an analysis of gender discrimination in its ruling. It is also the approach adopted by the CEDAW Committee. The second strategy, at the center of the present paper, is to do a reinterpretation of existing laws so that they include women’s experience. International human rights bodies have adopted these two strategies, but as we have shown in Section I, rape is most commonly tackled with the second one. This section briefly presents advantages, from a feminist perspective, of conceptualizing rape as a form or torture.

The reinterpretation strategy allows the inclusion of women’s experiences in categories previously focused on men’s realities. As presented earlier, the definition of torture was perceived as “manly neutral”, but international institutions adopted progressive interpretation proposing to reread torture clauses allowing the inclusion of violence against women; the private/public dichotomy was overcome. Edwards explains this phenomenon as an attempt to “extend these broad rights to cover the varying situations of women, even if their situations are not strictly covered by the terms in which the rights are expressed.” These examples show, in practice, creative interpretations of international law so that the question of violence against women is put on the agenda.

Ensuring a protection for the victims
When rape is considered under the torture provisions, it grants an important protection to women. The prohibition against torture is an international legal requirement. Therefore, depending on the instrument invoked, it provides for sanctions and binding penalties for its violation. Furthermore, the torture provisions are absolute. They do not allow derogation or restriction. The prohibition against torture is a peremptory norm of international law and is considered *jus cogens*. Therefore, if the torture provisions apply to rape cases, it provides for a serious and true protection for victims.

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59 This is, of course, not surprising since it is the only way the Committee can have competence on the matter.
60 “By understanding rape as a form of torture, it is possible to counter the gendered division and develop the concept of torture from its position as a traditionally and overwhelmingly male concern; it is necessary to recognize that the idea of a torture victim as ‘male political prisoner of conscience’ is not the whole picture.” Pearce, H. (2002), p. 537.
Moreover, numerous countries have ratified the United Nations Convention against Torture, which includes a provision on universal jurisdiction. As a result, all ratifying States have the obligation to investigate and prosecute violations of the Convention, even if the alleged crimes were not committed on their territory. If rape is torture, then any State may trial a rapist, even if it is not a national and/or the crime has not been committed on his national territory. The Convention also requires states to extradite individuals who have allegedly committed torture as provided for by Arts. 7 and 8 of the UNCAT.

Various characteristics of the torture provisions support the idea that conceptualizing rape as torture will offer an important protection to victims and will increase the capacity of the human rights bodies to engage state responsibility to instances of sexual violence against women.63

Facilitating the finding of persecution for female asylum seekers
When adopting the R=T strategy, the human rights bodies and international courts also indirectly recognize that there is a purpose behind the rape committed. Whether it is humiliation, intimidation or discrimination, it is acknowledged that the act of rape has a purpose dependent on the circumstances of each case. Consequently, Pearce suggests that such a development would have a positive impact for women seeking a refugee status after being victims of rape.64

The importance of knowledge of the local conditions from which asylum seekers are fleeing is vital in awarding the appropriate status and large factor in developing this understanding is to contextualize these claims within a wider picture in order to understand individual incidents of rape as part of an established procedure of degrading and inhumane treatment which take place like any other form of torture.65

She considers that “[o]nce it can be accepted incontrovertibly that rape constitutes torture, it becomes less of a leap to conclude that rape can also constitute persecution.”66 If rape can be understood as being part of persecution, then the Refugee Convention applies to a larger group of women since rape becomes “a legitimate reason to claim asylum when related to one of the five grounds.”67 Consequently, the strategy could possibly have positive impact through its indirect effect on the interpretation of other international treaties, such as the Refugee Convention.

Associating the ‘torture symbolic’ to instances of rape
Another important argument in favor of the R=T strategy is the symbolic and discursive impact that the association between rape and torture has. While commenting on McKinnon’s arguments,

63 This idea has also been developed in Human Rights Council, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak”, UN Doc. A/HRC/7/3, 15 January 2008, para. 26 et seq.

64 The Refugee Convention is also one that has been strongly criticized by feminist activist for not including women’s realities, despite the fact that two third of the refugees are women. It has been said that the Convention and its interpretation penalizes women, since rape was not consider as a sufficient proof of persecution; see also Castel, J. (1992) “Rape, Sexual Assault and the Meaning of Persecution”, International Journal of Refugee Law, Vol. 4, No. 37, pp. 39-56.


66 Pearce, H. (2002), p. 549; The importance of the concept of persecution in the definition of the refugee status can be better understood looking at Art.1 of Convention relating to the Status of Refugees, UN GA Res.429 (V), 14 December 1950, entered into force 22 April 1954.

Edwards recalls that “viewing rape as a form of torture, for instances, is thought to equate the severity of the assault with one of the most serious human rights violations.” 68 The author also identifies that “[u]nderlying these strategies is an intention to benefit from the symbolic labels of such peremptory norms”. 69 As the Trial Chamber in Furundzija expressed, such a symbolic also attempts to deter behaviors and this could possibly have a positive impact on the issue of sexual violence. 70

By relying on a terminology that invokes “the most disapproval”, 71 the strategy has the advantage of proponing a simplistic approach (an automatic R=T) 72 while bringing attention to the issue of violence against women. As will be developed in the next section, one of the fundamental questions that this paper wishes to raise is whether rape needs or should need such an association/dependence with torture in order to reach any severity threshold. Didn’t the ICTY in Kunarac affirm that rape is “obviously such an act” that “establish per se the suffering of those upon whom [it is] inflicted”? 73

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70 “Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.” The Prosecutor v. Furundzija, No. IT-95-17-1-T, Trial Judgment, 10 December 1998, para.154.
72 This argument was brought by McGlynn, C. (2009), p. 573.
73 The Prosecutor v. Kunarac et al., No. IT-96-23 and IT-96-23/1, Appeal Judgment, 12 June 2002, para. 150.
Section III: A Critical Perspective on the Feminism Strategy and its Impact on the Jurisprudence and on Women’s Rights

This last section aims at identifying the limits of the practice of conceptualizing rape as torture within the framework of the human rights bodies, and especially of the ECtHR. Within the jurisprudence of the Court, instances of sexual violence, and especially rape, have been dealt with the R=T strategy through Art. 3 of the Convention. If the emergence within the European system of a Draft Convention on the specific issue of violence against women is encouraging, it becomes even more relevant to assess the current strategy.

Indeed, when questioned and challenged from a critical feminist perspective, the equation between rape and torture is visibly insufficient and problematic. The analysis of the international and regional jurisprudences allowed us to identify four independent but interrelated critics, which will be detailed in the following section. As a conclusion, different alternatives to the strategy analyzed and complementary approaches will be suggested.

A Potentially Temporal and Fragile Strategy
First, the strategy is fragile precisely because of the fact that it is only a strategy. When rape is not explicitly included in the general human rights treaties, it enters the human rights domain “through the backdoor.” Only recently have women-specific human rights’ preoccupations been included in regional conventions such as the Convention Belem do Para in the inter-American system and the yet-to-enter into force European Convention on domestic violence and violence against women.

One of Edwards’ first critiques is that the rereading of human rights provisions is subject to “the political environment in which it is posited.”74 As an example, if mass violence in the 1990s brought the momentum and the necessity to address these issues, the political atmosphere completely changed following 9/11 when the torture provisions were redrawn, but this time with a narrower perspective.75 The author explains that “tying the hopes of women’s rights to traditional rights that were initially conceived to apply to a specific, ‘male’ set of circumstances is a strategy vulnerable to the peaks and troughs of the system of international relations as a whole.”76 It could thus be argued that with the strategy of rereading rape into torture provisions, the protection against rape might lead to mixed record and inconsistent case outcomes.77 For this reason, a complementary strategy proposing human rights provisions addressing the specific issue of sexual violence would guarantee a stable and foreseeable protection from the law.

The R=T strategy is “open to criticism for playing into the male-gendered international system by seeking to raise the profile of violence against women through equating the seriousness of the harm with male conceptions of torture, rather than as grave human rights violations in their own right.”\textsuperscript{78} Even with the R=T strategy, feminist advocates could still argue that “women’s experiences are seen as an exception to the main or general understandings of those particular provisions.”\textsuperscript{79} Indeed, domestic violence cases could hardly be considered as a traditional torture case; they could merely be an exception to the rule.

Furthermore, the decisions of the committees, and especially of the ECtHR, “do not assist outsiders in understanding fully the meaning and impact of their decisions, which in turn affects the legitimacy of their decisions and their acceptance by states parties and by victims.”\textsuperscript{80} In Aydin and in the following cases, rape was considered by the Court to amount to torture. However, the ECtHR did not affirm in its ruling that all rape would amount to torture; on the contrary, it appears from the decisions exposed in Section I that the reasoning gave a lot of importance to the circumstances of the case and the vulnerability of the victims. Are all acts of rape, as argued by Pearce\textsuperscript{81} and affirmed by the Kunarac Appeal Decision,\textsuperscript{82} a form of torture? Why is that so?

In conclusion, the jurisprudence of the ECtHR fails to give the appropriate reasoning to justify such a generalization and this affects the stability and the legitimacy of the strategy.

**A wrongful symbolic: the importance of the terminology**

One additional limitation of the conceptualization of rape as torture is the fact that rape is not prohibited \textit{per se}. If rape is not named, it remains invisible. There is thus no ‘expressive value’,\textsuperscript{83} such as one that could name the specific harm of gender based sexual violence. Furthermore, associating rape to the symbolic of torture might also bring a wrongful understanding of the phenomenon.

The norms and the terms used to refer to the violations have an impact on our understanding of the problem. Rayburn wrote on the rhetoric in rape cases and affirmed that “the language we use to describe rape and its consequences in a large way dictates our understanding of the experience.”\textsuperscript{84} It should be acknowledged that international law “operates at both a direct and a subtle level to exclude women.”\textsuperscript{85} Hence, if rape does not have its own meaning and symbolic

\textsuperscript{82} \textit{The Prosecutor v. Kunarac et al.}, No. IT-96-23 and IT-96-23/1, Appeal Judgment, 12 June 2002, para. 150.
within the framework of the regional human rights bodies, there is no clear message stating the prohibition of rape.

Rape is a large social phenomenon; numerous women throughout the world will be victim of it. On the other hand, torture could be considered as an exceptional practice. If it is true that the circumstances of the landmark case did resemble the typical torture case (*Aydin v. Turkey* was a situation of in detention maltreatment against alleged political opponents), it is not always the case. Women suffer rape in their marriage, in their house, from respected people who do not necessarily fit the profile of the “torturer”. The symbolic of rape conceptualized as torture might not represent accurately the true experience lived by the victim.

As a consequence, with the *R=T* strategy, there is a possibility that the human rights bodies are imposing a symbolic worse than what rape should actually be. Of course rape is a horrible thing that most of us cannot comprehend. Rayburn talks about the practice of imposing death penalty to the crime of rape and addresses the issues related to the symbolic of rape as an experience “worse than death.” He stresses that:

> Giving a penis-with-intent the ability to permanently destroy any person it touches is to deny any chance for recovery and a meaningful life. None of this is to blame those who do not recover, but rhetoric that traps womyn and children into a cover of isolation and reliving agony should not be supported. That rape is a horror that most of us cannot comprehend is not a reason to inflict our inherent ignorance upon those who have already suffered.

In the same line of idea, there is no point in framing the law in a way that would cause people to re-experience the violence they have suffered. Women-specific provision, in that sense, allow the application of provisions that encompass women’s reality and do not force a wrongful symbolic.

**A higher standard of proof for women**

In the light of the recent jurisprudence, one could also argue that the *R=T* strategy imposes a higher standard of proof on women. It is important to first recall that defending rape allegations and responding to them is a very difficult enterprise; evidence is hard to gather and the lapse of time between the event and the answer by the courts can be problematic. As was highlighted by Edwards, “[t]his observation is not merely theoretical. The practical effect of holding women to the same standards as men de jure is to impose additional burdens on women de facto.” As an example, the IACtHR confirmed the acts of torture in both *Dianne Ortiz v. Guatemala* and *Loayza-Tamayo v. Peru*, but decided that the rapes could not be proven taking into account the “nature of the fact.”

86 “[F]or those who have never experienced the act of being raped, understanding the impact of rape is an epistemological impossibility. Attempts to generalize one’s own experience to that of being raped is a hopeless exercise as demonstrated by the endless frustration of those who have given accounts of being raped,” Rayburn, C. (2004), p. 1125.

Additionally, the credibility of women bringing their case in front of judicial bodies is too often a relevant factor. As identified by Edwards, this was for example the case in *Aydin v. Turkey*.\(^91\)

Hence, because rape is protected through the torture provision, women “must first substantiate that they have been raped and then that rape amounts to torture, or alternatively that any distinctions in their treatment compared to the norm (read: male) justifies the creation of an exception to the rule.”\(^92\) The strategy thus requires women to go through extra demonstrations and justifications, which could be qualified as an unequal treatment under international law.

**An Elimination of the Gender Discrimination**

It has been mentioned that women have long been excluded from the human rights framework and, as explained throughout this paper, the conceptualization of rape as torture is one way of providing women with some of the protection provided by international human rights treaties. Nevertheless, one of the danger of the R=T strategy is that it risks subsuming rape under the concept of torture, leading to a failure to notice and recognize the gender basis of the violation.\(^93\)

This tendency to forget about the gender dynamic of the cases the human right bodies are confronting has been identified by other scholars. Edwards, for example, notes that:

> [o]ne limitation to this approach [R=T] has been a lack of competence on the part of the members of the treaty bodies, who collectively continue to display difficulty in identifying and taking account of gender dimensions in case law, or who otherwise cannot agree by consensus on its relevance.\(^94\)

In the *Aydin* case for example, the ECtHR analyzed the act of rape on a 17 years old girl. The Court considers the discrimination on the ground of “her race of ethic identity”, but wasn’t she also targeted because she was a woman? One could doubt that if Sükrän Aydin would have been a man, she would have suffered the same kind of sexual violence by the Turkish Security Forces.\(^95\) The ECtHR case *A.S. v. Sweden* was also denounced for not dealing adequately with the gender aspects of the case.\(^96\)

\(^91\) In the weeks following the event, the victim got married and, with regards to these facts, the author noted that the judges “engaged in what could only be described as inappropriate questioning of the post-rape action of the complainant, thus disputing her credibility on the question of the allege rape,” Edwards, A. (2011), p. 227.


\(^95\) It is also interesting to ask these same questions with regard to the 2012 ECtHR case *Zontul v. Greece*. A boat transporting Turkish nationals migrating to Italy was intercept by Greek coastal guards. The applicant, while in custody, was asked to undress by two coastguards officers when he was in the bathroom. One of them threatened him with a truncheon and then raped him with it. The following morning, the detainees when on a hunger strike after this incident, which provoked a 2 hours truncheon beatings. The decision by the ECtHR is based on Art.3 (torture), but the facts of the case also seem to indicate that the applicant was homosexual, and thought to be so by the authorities. There is no reference to a possible gender discrimination in the reasoning of the Court, even though, as argued by McGlynn, “all acts of sexual violence, including male rape, are gendered and discriminatory”, McGlynn, C. (2009), p. 584; see ECtHR, *Zontul v. Greece*, Application No. 12294/07, 17 January 2012.

As presented in the previous section, the inter-American system did consider the discrimination nature of the conduct in communication reporting instances of rape, however, it has not been the case in the European system. If sex is one of the factors taken into consideration by the ECtHR when it assesses the vulnerability of the victim, the Court only addresses questions linked to Art. 3. Such an approach does not encompass in-depth analysis of the gender components of the violations; on the contrary, it conditions the application of the R=T equation to some “extreme” cases.

Interestingly, even if the ECtHR does not approach rape cases with a discriminatory analysis like the IACtHR, a gender discrimination analysis was nonetheless included in a recent domestic violence case against Turkey. It is also relevant to mention that the MC v. Bulgaria decision is a step in the right direction since the Court applied the concept of discrimination in assessing the “effective equality” and the concept of ‘non-consensual acts’. Overall, the practice of the European Court would nonetheless enter in the phenomenon Edwards qualifies as “gender blindness.”

Considering rape and sexual violence as a discriminatory act is not a new idea; we already explained that this was the other main strategy adopted by human rights bodies to address women’s reality. In its General Comments No. 19, the CEDAW affirmed, “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.” Moreover, the CEDAW must find a discriminatory element to address an issue or to consider a petition admissible.

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98 ECtHR, Republic of Ireland v. The United Kingdom, Series A, No. 25, 18 January 1978.
99 As mentioned in Section II, the ECtHR did not recognized that all instances of rape amounted to torture. Its analysis gives a lot of importance to the circumstances of the case and the vulnerability of the victims.
100 In Opuz v. Turkey, the complainant is a woman who suffered extremely violent and life-threatening domestic violence. The Police and judicial authorities failed to take the appropriate measure to intervene and protect the women, see ECtHR, Opuz v. Turkey, Application No. 33401/02, 9 June 2009, para. 177 et seq. Of note, the Court refers to various inter-American cases and to the CEDAW General Comments and Convention. It also uses the national statistic and report relating to domestic violence analyzing the failure of the State to protect the victims of this kind of violence throughout the country.
103 Edwards, A. (2011), p. 223; She also mentions another case from the HRC in which the Committee neglected the specific form of harm suffered by women, see HRC, Gedumbe v. Democratic Republic of the Congo, Communication No. 641/1995, 26 July 2002.
104 One of the most emblematic domestic violence case is A.T. v. Hungary. In this case, gender discrimination was the main legal basis for the state’s obligation to combat effectively violence against women, CEDAW, A.T. v. Hungary, Communication No. 2/2003, 26 January 2005; see also Rudolf, B. and A. Eriksson. (2012), p. 519; It has also been used in some national jurisdiction. For example, “Sexual assault is in the vast majority of cases gender-based. It […] constitutes a denial of any concept of equality for women” Canadian Supreme Court, R. v. Osilin (1993) 4 SCR 595, para. 669.
Rape has to be understood as a crime against women. As explained by Gibson, rape has been throughout most of recorded history a “heinous crime against men: a humiliation inflicted upon a nation, an affront to a man’s pride as a guardian of his women.”

When rape is conceptualized as torture, it amounts to a reproduction of that pattern. The crime is not analyzed with a gender component but, again, with an emphasis on the collectivity and the group to which the women “pertains.” Because it is seen as the target of the attack, the collectivity is at the core of our understanding of the act, while we forget that women are the direct victims.

Poignantly, reacting to the Akayesu judgment finding that rape and sexual violence are constitutive elements of the crime of genocide, Hilary Charlesworth pointed out that the decision,

simply illustrates the inability of the law to properly name what is at stake: rape is wrong, not because is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition. In this account, the violation of a woman’s body is secondary to the humiliation of the group. In this sense, international criminal law incorporates a problematic public/private distinction: it operates in the public realm of the collectivity, leaving the private sphere of the individual untouched. Because the notion of the community implicated here is one defined by men within it, the distinction has gendered consequences.

In conclusion, and in line with Chinkin radical thinking, including women’s preoccupations within the framework of the human rights bodies cannot, in itself, be transformative; gender-awareness is needed and needs to be included in the decision making process.

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Section IV: Conclusions and Recommendations

The purpose of this paper was not to argue that human rights should not be a tool for feminist activism. Existing norms under human rights provisions and their progressive interpretation are very important, otherwise women’s realities would fall outside of the protection of the existing framework. The prohibition of torture has been a useful tool in slowly including sexual violence within the scope of protection of human rights bodies. The starting point of this analysis is that the doubts raised in Section III are not incompatible with the current strategy; they are complementary.

The main conclusion reached in this paper is that the R=T strategy tends to wipe away the gender component of the conduct, and this is something that should change. As recognized by numerous international bodies, women are victims of rape because they are women. This aspect of their suffering should not remain absent from the jurisprudence of a human rights body like the ECtHR. As previously mentioned, a recent case concerning domestic violence proposed a gender analysis and the Court held that such violence could amount to a violation of Art. 14 (discrimination).111 As highlighted, recognizing that there is a political purpose in the rape of a woman does not bar a subsequent gender analysis of the event.

The future step undertaken by the ECtHR could be what Crenshaw defined as the theory of intersectionality:

> to bring together the different aspects of an otherwise divided sensibility, arguing that racial and sexual subordination are mutually reinforcing, that black women are commonly marginalized by a politics of race alone or a politics of gender alone, and that a political response to each form of subordination must at the same time be a political response to both.112

Indeed, it is in part what is needed for the ECtHR to include the gender component into its current practice of conceptualizing rape as torture. The theory of intersectionality is still very relevant today.113 The gender analysis should be part of the Court’s analysis in sexual violence cases and, as stressed by Bartnett, “its analysis of gender must occur not apart from but within the context of multiple identities.”114 Categories are not mutually exclusive and a woman part of a political minority, suffering rape, will most probably be suffering from a double discrimination. The intersectionality approach would thus be a better answer to its reality.115 Since the ECtHR is not a topic-oriented institution like the CEDAW, CERD or CAT, such an approach is definitely within its reach.

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111 ECtHR, *Opuz v. Turkey*, Application No. 33401/02, 9 June 2009, para. 177 et seq.
113 In 2006, the European Journal of Women’s Studies published a special issue on intersectionality.
Another important critique made was the symbolic associated with the strategy. An international norm specifically on rape or sexual violence might have an expressive value closer to how the person actually feels about what was lived. Combined with a gender approach, this could allow a more accurate translation of what happened to the individual.\footnote{See Vakulenko, A. (2010), p. 211.} As previously mentioned, a European Convention on sexual violence against women and domestic violence is awaiting ratifications. This should be an important tool for the ECtHR to follow the inter-American system in including an overall analysis of the gender component of the violations. Based on the \textit{Belem do Para} Convention, the IACtHR dealt with cases involving gender-based sexual violence, such as \textit{Gonzales v. Mexico},\footnote{\textit{Gonzalez et al. v. Mexico}, Ser. C, No. 205, 16 November 2009, para. 128 et seq.} in an interesting and progressive way: first identifying the systematic discrimination\footnote{“Distintos informes coinciden en que aunque los motivos y los perpetradores de los homicidios en Ciudad Juarez son diversos, muchos casos tartan de violencia de género que ocurre en un contexto de discriminacion sistematica contra la mujer.” \textit{Gonzalez et al. v. Mexico}, Ser. C, No. 205, 16 November 2009, para. 133.} and second, naming and describing the phenomenon including a gender component.\footnote{The homicide of a woman for reason of gender is being called femicide, \textit{Gonzalez et al. v. Mexico}, Ser. C, No. 205, 16 November 2009, para. 143.} 

In the end, with or without the rereading of the torture provisions as including instances of rape, international law treats women unequally under international law. It should nevertheless be acknowledged that women are no longer excluded entirely; the feminist strategy has been successful and brought the issue of sexual violence on the agenda of the human rights bodies and now. The human rights framework now offers some protection to rape victims. However, as expressed by Edward, one of the paradox of feminist advocates and academic in the area of international human rights is that, with the inclusion strategy or the so-called ‘gender mainstreaming’, “the more that women work within the structures of existing law and institutions, the more the power and sexual inequalities inherent in the system can be reinforced.”\footnote{Edwards, A. (2011), p. xii.} She proposes a dual approach: playing by the rules while questioning and challenging them. She suggests that “[w]omen must therefore continue to play by men’s rules, all the time slowly chipping away at the walls of the house around them and questioning the system from within.”\footnote{Edwards, A. (2011), p. xiii.} Her solution appears to be in line with the approach adopted in this paper.
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