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Violence against Women as Torture and Positive State Obligations to Prevent – How much Diligence is Due?

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"[T]he public and the private worlds are inseparably connected; […] the tyrannies and servilities of the one are the tyrannies and servilities of the other."

– Virginia Woolf, Three Guineas (1938)

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1. Introduction

In 2013, the World Health Organisation (WHO) published a report estimating that 35,6% of women worldwide have experienced either physical and/or sexual violence by their intimate partner or non-partner sexual abuse.[1] This is the first global systematic analysis of all available scientific data on prevalence rates of violence against women, and it confirms what has been claimed in reports concerning women's rights for years and has become the basis of various campaigns[2] to raise awareness about the tremendous scale of violence against women: that "one in three women will be raped, beaten, coerced into sex or otherwise abused in her lifetime."[3]

On 1 August 2014, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)[4] will enter into force, stating in its Article 3 (a) that violence against women is to be "understood as a violation of human rights and a form of discrimination against women." Seemingly stating the obvious at first sight, this assertion is far from being self-evident in international law. For a binding legal document to directly and unambiguously state that violence against women is a human rights violation can be seen as an almost revolutionary step.[5] Despite the staggering statistics revealing that violence against women is a global phenomenon, there is no universally agreed binding treaty norm explicitly prohibiting violence against women.[6]

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[1] World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, 2013, p. 20.
[2] For example, the "One Billion Rising for Justice" Movement derives its name from the estimation that one out of three women experiences violence in her life time, which equals one billion of the current world population, see www.onebillionrising.org; see further "One in Three Women" Campaign, www.oneinthreewomen.com.
[3] See, e.g., United Nations Development Fund for Women (UNIFEM*), Not A Minute More. Ending Violence against Women*, 2003, p. 6.
[4] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, will enter into force 1 August 2014.
[5] There are two other legally binding regional instruments that expressly prohibit violence against women: The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted in 1994 by the Organisation of American States, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2000 by the African Union. However, they do not contain a comparable statement of principle on the status of violence against women as a human rights violation.
[6] Edwards, Alice, *Violence against Women under International Human Rights Law*, 2011, p. 3. For the two relevant regional treaties that preceded the Istanbul Convention, see FN 5.

This is because human rights law is traditionally concerned with protecting individuals from violations by the state; violence against women, however, is often perpetrated by private individuals, be it domestic abuse by an intimate partner or rape by a stranger. It is this so called "public/private dichotomy" that has been argued to be the source of women's disadvantage in international law generally, and human rights law specifically.[7] By drawing a line between the public and the private sphere, and making only the former a concern for human rights law, the many violations women suffer in private have traditionally been rendered invisible.[8]

In the absence of specific provisions in human rights law, two main strategies have been developed by feminists and women's rights advocates to integrate violence against women into the existing framework. Firstly, to conceptualise it as a form of sex discrimination, and secondly, to reinterpret existing human rights provisions so that they apply to women's experiences.[9] This thesis is concerned with the latter strategy, in particular with the reinterpretation of the prohibition of torture. My premise is that the right to be free from torture is an adequate as well as a particularly powerful basis for reconceptualising and responding to violence against women. It is adequate because the horrors experienced by women at the hands of private perpetrators, especially in situations of domestic abuse, are often strikingly similar to situations of state-sponsored torture in custody; it is powerful, because the recognition that violence against women can constitute torture benefits from the symbolic value of the special stigma that attaches to this human rights violation and from the torture prohibition's status as an absolute and non-derogable right, which brings about especially far-reaching obligations for states under human rights law.

In order to examine these claims, this thesis will be structured into two main parts: The first part (Chapter 2 and 3) will aim at lending support to my first claim, i.e. that a re-conceptualisation of violence against women as torture is adequate. To do so, Chapter 2 will first give an overview of the prohibition of torture in international human rights

[7] The public/private dichotomy and its effect on women will be discussed in detail in Chapter 3.1.3.
[8] See, generally, Romany, Celina, 'Women as Aliens: A feminist critique of the Public/Private Distinction in Human Rights Law' in *Harvard Human Rights Journal*, Vol. 6, 1993.
[9] Edwards, 2011, p. xi.

law. It will outline the relevant provisions in international and regional instruments and discuss the different definitions of torture that have emerged from the jurisprudence of different human rights bodies. Chapter 3 will then apply the main elements that have been distilled from the definitions of torture to situations of violence against women, in particular domestic violence and rape, highlighting parallels between these forms of violence and such conduct that was traditionally imagined to fall within the scope of torture. It will further critique the traditional conceptualisation of torture from a feminist perspective, in particular the above mentioned public/private distinction as an underlying reason for this narrow approach.

The second part of this thesis will then discuss my second claim, i.e. that the recognition of violence against women can bring about especially far-reaching obligations for states. In order to examine these obligations, Chapter 4 will first address whether the state-centric human rights system can accommodate private actors; this is an important preliminary question, as the forms of violence against women that this thesis is concerned with are perpetrated by private individuals. Chapter 5 will then finally proceed to explore the positive state obligations under the prohibition of torture, focussing on the extent to which states are required to take positive measures to prevent and protect women from violence by private individuals.

The methodology used consists in analysing instruments of international human rights law and relevant jurisprudence of human rights bodies, as well as drawing on academic literature, in particular from the field of feminist legal scholarship. For the second part, a strong focus will be given to case law; however, due to the limited scope of this thesis, only the most significant examples can be taken into account in each chapter, leading to a more extensive discussion of the jurisprudence of some human rights bodies than others.

With regard to terminology, for the purpose of this thesis "violence against women" means any act that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women[10] and "domestic violence" refers to physical,

[10] This definition is based on Art. 3 (a) of the Istanbul Convention, but narrower in its scope.

sexual or psychological violence that occurs within the family or domestic unit or between former or current spouses or partners.[11]

2. The Prohibition of Torture in International Human Rights Law

The prohibition of torture is ranked among the most important human rights[12] and a provision outlawing torture and other cruel, inhuman or degrading treatment is included in virtually every human rights treaty on the international as well as the regional level. Both the prohibition of torture and of other ill-treatment have clearly emerged as norms of customary international law, with the former also constituting a rule of *jus cogens*, i.e. a peremptory rule of international law that cannot even be modified by treaty.[13] Unlike many other human rights provisions, the prohibition of torture and other forms of ill-treatment is absolute, with no restrictions or exceptions permitted under any circumstances, and it is non-derogable even in times of public emergency or war.[14]

2.1 Provisions in International and Regional Instruments

The first modern prohibition against torture is found in Article 5 of the Universal Declaration of Human Rights 1948 (UDHR)[15] which provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[16] The International Covenant on Civil and Political Rights 1966 (ICCPR)[17] contains the same

[11] Again, the definition of "domestic violence" is a narrowed version of the definition in Article 3 (b) of the Istanbul Convention.
[12] Edwards, 2011, p. 199.
[13] Rodley, Nigel S., 'Integrity of the Person' in Moeckli, Daniel, Shaw, Sangeeta & Sivakumaran, Sandesh (eds.), *International Human Rights Law*, 2014, pp. 176 – 177.
[14] Ibid.
[15] Universal Declaration of Human Rights 1948, GA Res. 217 A (III), 10 December 1948.
[16] Ibid., Art. 5.
[17] International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976.

wording in its Article 7, which adds another phrase specifically referring to non-consensual medical or scientific experimentation.[18]

On the regional level, a prohibition against torture is included in the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR),[19] the American Convention on Human Rights 1969 (ACHR),[20] the African Charter on Human and Peoples' Rights 1981 (ACHPR),[21] the Arab Charter on Human Rights,[22] as well as the Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN Human Rights Declaration).[23]While Article 3 ECHR and Article 5 (2) ACHR are almost verbatim replications of the wording in the UDHR,[24] Article 5 ACHPR differs from this most common phrasing in as much as it includes the prohibition of torture into a wider provision that stipulates the respect of human dignity, listing torture as well as slavery as specific manifestations of exploitation and degradation.[25]

One main characteristic that all of these provisions share, however, is the fact that they do not include a definition of the term "torture", nor of the concepts of cruel, inhuman or degrading treatment or punishment. Thus, there is no definition of torture in any general human rights declaration or treaty on the international or the regional level.

By contrast, a definition has been included in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT),[26] an instrument exclusively dealing with the prohibition of torture. The Convention was

[18] Article 7 ICCPR reads: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
[19] European Convention on the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entered into force 3 September 1953, as amended.
[20] American Convention on Human Rights, 22 November 1969, entered into force 18 July 1978.
[21] African Charter on Human and Peoples' Rights, 27 June 1981, entered into force 21 October 1986.
[22] Arab Charter on Human Rights, 22 May 2004, entered into force 15 March 2008.
[23] ASEAN Human Rights Declaration, adopted on 28 November 2012.
[24] Art. 3 ECHR does not include the word "cruel"; Art. 5 (2) ACHR includes an additional sentence stipulating that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person".
[25] Art. 5 ACHPR reads: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."
[26] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force 26 June 1987.

drafted in the 1970s due to growing concern among the international community that the existing prohibition of torture had proved insufficient.[27] In the face of widespread torture being used as a tool of political repression in many autocratic regimes,[28] the UNCAT sought to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[29] Article 1 of the UNCAT states:

> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
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> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

A separate provision, Article 16, further obliges states to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The definition of torture in the UNCAT closely follows the wording contained in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975,[30] a non-binding General Assembly Resolution that had preceded the drafting of the binding UNCAT.

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[27] Burgers, J. Herman & Danelius, Hans, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1988, p. 13.
[28] Ibid.
[29] Preambular para. 7 UNCAT.
[30] United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX), 9 December 1975.

Apart from this, the only other written definition of torture in human rights law is laid down in the regionally applicable Inter-American Convention to Prevent and Punish Torture 1985 (IACPPT).[31] Although the Convention does not refer to the Inter-American Court as its supervisory body, the Court has explicitly extended its own jurisdiction to monitor compliance with the IACPPT for states that are parties to this treaty as well as the American Convention on Human Rights.[32]

As the only binding *international* human rights instrument containing a definition of torture,[33] the UNCAT has thus "proven to be the first port of call for most bodies seeking to identify practices of torture."[34] However, the definition is formally only applicable to the states parties to the UNCAT and only authoritative for the treaty body called upon to monitor their compliance, i.e. the Committee against Torture. As each international and regional treaty body is autonomous in its interpretations, the exact content and scope of the right to be free from torture has been elaborated in different ways in different jurisdictions.

The following section will examine how the prohibition of torture and other ill-treatment has been interpreted by different human rights bodies and, in particular, how the term "torture" has been defined in their jurisprudence. It will mainly discuss cases and general comments of the Committee against Torture and the Human Rights Committee, the bodies competent to monitor the UNCAT and the ICCPR respectively, as

[31] Inter-American Convention to Prevent and Punish Torture, 9 December 1985, entered into force 28 February 1987. Art. 2 provides: "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article." Art. 3 determines who is to be held guilty of torture, listing "(a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so. (b) A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

[32] See *Paniagua Morales and Others v Guatemala* ("Panel Blanca"), IACtHR, Judgement of 8 March 1998, paras.133–36.

[33] Note, however, that there is now a written definition of torture in international criminal law, laid down in Article 7 (2) (e) Rome Statute of the International Criminal Court, discussed below at 4.2.

[34] Rodley, 2014, p. 179.

well as judgments of the European Court of Human Rights, which interprets and applies the provisions of the ECHR. The section is focussed on these bodies, as they have elaborated on the normative content of the torture prohibition in most depth and detail. However, in order to explain the origin of the principle of due diligence, which will be shown to play a major role with regard to the interpretation of torture, reference to seminal jurisprudence of the Inter-American Court of Human Rights (which is competent to apply the ACHR in individual cases) will be made.

2.2 Concepts and Definitions of Torture

Three general elements can be distilled from the definition of torture as provided for in Article 1 UNCAT: the severity of the pain or suffering; the specific purpose this harm is intentionally inflicted for; and the connection of the act with a public official.[35] The following consideration of the definition of torture as articulated by various treaty bodies will thus follow this structure, discussing the relevance of each of these elements in their respective jurisdictions in three sub-chapters.

2.2.1 Pain or Suffering

The pain or suffering caused by torture is generally understood to include both physical and mental harm.[36] That this harm must be of a serious nature, i.e. that the pain or suffering has to be "severe", is also common to most interpretations of torture under human rights law.[37] In this context, it has been particularly challenging for human rights bodies to draw a line between torture and other forms of ill-treatment, such as inhuman and degrading treatment. While the purpose of the act (as discussed below) plays a stronger role for the distinction between these acts in the jurisprudence of the Human Rights Committee and the Committee against Torture, the severity of harm has served as the main distinguishing feature between torture and inhuman and degrading treatment for the European Court of Human Rights.

[35] See Evans, Malcolm D., 'Getting to Grips with Torture' in *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 375.
[36] Edwards, 2011, p. 207.
[37] Rodley, 2014, p. 179.

The Court introduced its "threshold of severity" approach in *Ireland v UK*,[38] stating that a distinction between torture and other forms of ill-treatment was necessary due to the "special stigma" attached to torture.[39] According to the Court, the minimum level of severity that is needed for conduct to fall within the scope of Article 3 ECHR at all is to be assessed with regard to "all the circumstances of the case such as the duration of the treatment, its physical and mental effects and in some circumstances the sex, age and state of health of the victim."[40] Presumably, the Court would also take these factors into account when delineating torture from other forms of ill-treatment. The assessment is therefore "relative",[41] and the Court has refrained from drawing up a list of conduct that will automatically constitute torture.[42] Thus, the Court has followed its often reiterated conception of the Convention as a "living instrument" also with regard to interpretations of what acts can be qualified as torture. In particular, it has expressly noted in *Selmouni v France*[43] that "[c]ertain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future" due to the "increasingly high standard being required in the area of the protection of human rights."[44] This case also included the Court's first reference to the definition of torture as laid down in the UNCAT,[45] which led to an emphasis of the purpose of the conduct as another criterion for distinguishing torture from other forms of ill-treatment in its subsequent jurisprudence.[46]

By contrast, the Human Rights Committee (HRC) has not found it to be essential to define or distinguish between the terms used in Article 7 of the ICCPR.[47] In much of its jurisprudence, the HRC has discussed ill-treatment in a broad sense, finding violations of Article 7 without specifying which of its elements was fulfilled.[48] In its 1982 General

[38] *Ireland v United Kingdom,* ECtHR, Judgement of 18 January 1978.
[39] Ibid., para. 167.
[40] Ibid., para. 162.
[41] Ibid.
[42] Association for the Prevention of Torture & Centre for Justice and International Law, *Torture in International Law. A Guide to Jurisprudence*, 2008, p. 59.
[43] *Selmouni v France,* ECtHR, Judgment of 28 July 1999.
[44] Ibid., para. 102.
[45] Ibid., para. 100.
[46] See e.g. *Aktaş v Turkey*, ECtHR, Judgment of 24 April 2003, para 313.
[47] Edwards, 2011, p. 208.
[48] Ibid.

Comment on Article 7, the HRC stated that the purpose of the provision was to protect the "integrity and dignity of the individual"[49] and that the inclusion of the terms "cruel, inhuman or degrading treatment or punishment" extended the "scope of protection required (…) far beyond torture as normally understood."[50]

Due to the UNCAT's structure with two separate provisions referring to torture and other ill-treatment respectively,[51] the Committee against Torture (CAT)has had to be more precise in its articulation of which term exactly it invokes when finding a state to be in breach of the UNCAT. Although subject to controversial discussions in legal theory and not entirely clear from the CAT's jurisprudence, the distinguishing feature between torture and cruel, inhuman or degrading treatment is mainly held to be the purposive element included in Article 1, but omitted from Article 16 of the UNCAT.[52] Unlike in the (early) interpretations of torture by the European Court, it is therefore not the severity and intensity, but rather the specific purpose that is the decisive element for the qualification of an act as torture under the UNCAT. Similar to the HRC, however, the CAT has noted in its 2008 General Comment that "the definitional threshold between ill-treatment and torture is often not clear",[53] thus also acknowledging an overlap between the terms.

It should be noted that, in addition to being difficult to determine in practice, the distinction between these terms is without legal ramifications to the extent that the prohibition of torture as well as other forms of ill-treatment is absolute and non-derogable under the ECHR and ICCPR.[54] The UNCAT, however, does provide for some differences in legal consequences attached to the qualification of either torture according to Article 1

[49] HRC, General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment) (1982) [hereinafter GC No. 7 (HRC)], para. 1.
[50] Ibid., para. 2.
[51] See above at 1.1
[52] See, e.g. Nowak, Manfred, *The United Nations Convention Against Torture. A Commentary*, 2008, p. 69; Rodley, 2014, p. 179. Evans, 2002, p. 375. For the different wording of Article 1 and Article 16 see above at 2.1.
[53] CAT, General Comment No. 2: Implementation of Article 2 by States Parties (2008) [hereinafter GC No. 2 (CAT)], para. 3.
[54] See Art. 4 ICCPR and Art. 15 ECHR explicitly stipulating non-derogability; see GC No. 2 (CAT), para. 3 also clarifying the non-derogable status of Art. 16 UNCAT. The jurisprudence of the ECtHR and the HRC further clarified the absolute character of the prohibition of (cruel), inhuman and degrading treatment, see Kälin, Walter & Künzli, Jörg, *The Law of International Human Rights Protection*, 2009, p. 333.

or those forms of ill-treatment listed in Article 16. Most notably, the principle of universal jurisdiction as laid down in Article 5 (2) of the UNCAT only applies to acts of torture.[55] Moreover, it is not entirely clear whether the prohibition of other forms of ill-treatment can be said to have the same status as torture in terms of its qualification as *jus cogens*.[56]

Acts that typically have been characterised as torture by the regional and international human rights bodies are acts of severe ill-treatment during custody and interrogation, carried out for the purpose of obtaining a statement or confession, of intimidating the victim or a third person, or as a punishment.[57] These acts included systematic beatings, electric shocks, burns, repeated immersion in a mixture of water, blood, vomit, or excrement, extended hanging from hand chains, tying a person's hands behind their back and suspending them in the air ('Palestinian hanging'), standing for great lengths, mock executions,[58] and, more recently, rape.[59]

2.2.2 Purpose

As mentioned above, the definition of torture in Article 1 of the UNCAT contains a list of purposes for which the severe pain or suffering is inflicted on a person, explicitly mentioning the purpose of "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." However, this seems to be a non-exhaustive list, as can be inferred from the phrase "such purposes as" that precedes the enumeration.[60] It is also evident from the *travaux préparatoires* of the Convention that most delegations

[55] Nowak, 2008, p. 571.
[56] Rodley, 2014, p 177.
[57] Kälin & Künzli, 2009, p. 325.
[58] Joseph, Sarah & Castan, Melissa, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, 2013, p. 240 (with further references to case law of the Human Rights Committee); Nowak, 2008, pp. 70 – 73, discussing case law of the Committee against Torture; Jacobs, Francis G., White, Robin & Ovey, Clare, *The European Convention on Human Rights*, 2010, p. 172, summarising the jurisprudence of the European Court of Human Rights.
[59] See, e.g. *Aydin v Turkey,* ECtHR, Judgment of 25 September 1997.
[60] Burger & Danelius, 1988, p. 118.

agreed that the list of purposes in Article 1 was meant to be indicative.[61] However, most commentators have argued that this cannot be understood as *any* other purpose being sufficient to fulfil the definition, but only purposes that have "something in common" with those expressly listed. [62] The common element of the purposes referred to in the definition is argued to be the existence of a connection with the interests or policies of the state and its organs.[63] Further, all these purposes are interpreted to refer to situations in which the person the act is inflicted on is a detainee or at least under the factual power and control of the perpetrator.[64]

In this regard, a comparison with the Inter-American Convention to Prevent and Punish Torture is particularly interesting, as its definition of torture does contain a reference to "any other purpose" in addition to those listed.[65] Generally, the IACPPT's approach to the purpose of torture is more expansive, expressly including as "purposes" such open-ended concepts as "personal punishment" or "preventive measures" and adding that "[t]orture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."[66]

With regard to the ICCPR and the ECHR, the purposive element has not been elaborated on in much detail by the Human Rights Committee and the European Court respectively, although for different reasons. As discussed above, the Human Rights Committee does not "consider it necessary to (…) establish sharp distinctions between the different kinds of punishment or treatment";[67] thus inquiries into the purpose of the conduct have not proven necessary for finding a violation of Article 7 ICCPR. As both of its General Comments on Article 7 state that the distinction between torture and other forms of ill-treatment depends on "the kind, purpose and severity" of the conduct,[68] it can

[61] Nowak, 2008, p. 75.
[62] See Burger & Danelius, 1988, p. 118; Nowak, 2008, p. 75.
[63] Burger & Danelius, 1988, p. 119; Nowak, 2008, p. 75.
[64] Burger & Danelius, p. 120; Nowak, p 75.
[65] Article 2 IACPPT, see supra at FN 31.
[66] Ibid.
[67] Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment) (1992) [hereinafter GC No. 20 (HRC)], para. 4.
[68] See GC No. 7 (HRC), para 2; GC No. 20 (HRC), para 4 (here: nature, purpose and severity").

be assumed that the purpose requirement has been endorsed by the Human Rights Committee.[69] It remains unclear from its jurisprudence, however, which purposes exactly would be considered sufficient. While the European Court does insist on drawing lines between the different forms of ill-treatment,[70] the same ambiguity exists concerning the question what purposes – if any – are relevant for torture: as mentioned above, the Court has softened its traditional insistence on only severity as the decisive factor for distinction and has started to refer to the UNCAT definition of torture in its more recent jurisprudence, mentioning also explicitly its purposive element.[71] However, it remains to be seen if the Court will retain this element in its future jurisprudence, and if so, which purposes it would consider to suffice.

2.2.3 Public Officialdom – Consent or Acquiescence and Due Diligence

The third element of the definition of torture as derived from Article 1 UNCAT, namely the requirement that there be a connection of the act with the state, is the element in which the UNCAT definition differs the most from the concepts of torture as developed by other international and regional human rights bodies. This is because Article 1 UNCAT expressly requires that the pain or suffering 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", whereas the ICCPR and ECHR, due to the absence of a definition of torture in these treaties, are silent on the issue of whether torture has to be committed by a state official or must at least be connected with the state. In their jurisprudence, the Human Rights Committee and the European Court of Human Rights have subscribed to the doctrine of "due diligence" for establishing a link between the material act and the state, as will be discussed below.

[69] Joseph & Castan, 2013, p 220.
[70] See above at 2.2.1.
[71] McGlynn, Clare, 'Rape, Torture and the European Convention on Human Rights' in *International and Comparative Law Quarterly*, Vol. 58, 2009, pp. 580 – 581, with reference to *Ilhan v Turkey*, ECtHR, Judgment of 27 June 2000, para. 85, and *Salman v Turkey*, ECtHR, Judgment of 27 June 2000, para. 114.

The concept of due diligence was first elaborated by the Inter-American Court of Human Rights in its landmark case *Velásquez Rodríguez v Honduras*, decided in 1988.[72] Interpreting Article 1 (1) of the American Convention on Human Rights that stipulates a duty for states to "respect the rights and freedoms recognised [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise" of these rights, the Court held that this entailed the obligation to prevent, investigate and punish any violation of the rights laid down in the Convention.[73] It thus found that the requirement to "ensure" the exercise of these rights imposed on states positive obligations that went beyond the merely negative duty to "respect" the rights and freedoms of individuals, i.e. to refrain from active violations by state agents.[74] In an often cited passage of the judgment the Court held that:

> "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."[75]

This decision thus established the link between an act committed by a non-state actor and the state that is accountable for this act under human rights law through the concept of due diligence, which has been endorsed and applied by many human rights bodies.[76] For example, the HRC now generally interprets the ICCPR as including the obligation for states to employ due diligence with regard to responding to human rights-violations that were not directly perpetrated by the state.[77] The European Court of Human Rights, while not using the term "due diligence" in its decisions – referring to positive obligations of

[72] *Velásquez Rodríguez v Honduras*, IACtHR, Judgement of 29 July 1988.
[73] Ibid., para. 166.
[74] For a general overview of negative and positive obligations in human rights theory see Kälin & Künzli, 2009, pp. 96 – 98.
[75] *Velásquez Rodríguez v Honduras* (1988), para. 172.
[76] Bourke-Matignoni, Joanna, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' in *Due Diligence and Its Application to Protect Women from Violence*, 2009, pp. 50 – 51.
[77] Ibid., p. 51.

the states instead – has developed a very similar standard in practice.[78] Following the Inter-American Court's line of argumentation, both bodies have interpreted the requirement for positive state action to derive from the general obligation to "ensure" or "secure" the rights recognised by the respective Conventions, stipulated in Article 2 (1) ICCPR and Article 1 ECHR.[79]

With regard to the prohibition of torture in particular, the Human Rights Committee has only had a few opportunities to discuss the due diligence standard in individual cases involving Article 7, as the vast majority of complaints brought under this article concerned torture by state actors.[80] However, in its General Comment No. 31 of 2004 on the nature of the general legal obligation imposed on state parties, the Committee explicitly stated that a requirement "to exercise due diligence to prevent, punish, investigate or redress" violations by non-state actors is "implicit in Article 7."[81] The European Court, in turn, has found a violation of Article 3 ECHR due to a state's failure to fulfil its positive obligations implied in the prohibition of torture, inhuman and degrading treatment in several cases. It has specifically stipulated a duty to "take reasonable steps to prevent ill-treatment",[82] to carry out an "effective official investigation",[83] and to punish crimes effectively[84] as such positive obligations deriving from Article 3. The nexus between the material act and the state has thus been established through the concept of due diligence in the jurisdictions of the ICCPR and the ECHR.

The UNCAT, however, is explicit in defining the link that must be established between a certain act and a state in order to hold the latter accountable for it. Article 1 provides for two different levels of involvement of state officials that make the act attributable to the state: First, if the act is carried out by a public official directly or instigated by him or her; second, if the act is carried out with the consent or acquiescence

[78] Ibid.
[79] See Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, 2004 [hereinafter GC No. 31 (HRC)], para. 8 for the HRC; *Sevtap Veznedaroglu v Turkey*, ECtHR, Judgement of 11 April 2000, para. 32 for the ECtHR.
[80] Edwards, Alice, 'The 'Feminizing' of Torture under International Human Rights Law' in *Leiden Journal of International Law*, Vol. 19, 2006, p. 366.
[81] GC No. 31 (HRC), para. 8.
[82] E.g. *Z and Others v United Kingdom*, ECtHR, Judgement of 10 May 2001, para. 73.
[83] *Sevtap Veznedaroglu v Turkey*, ECtHR (2000), para. 32.
[84] E.g. *M. C. v Bulgaria*, ECtHR, Judgement of 4 December 2003, paras. 148 – 153.

of a state official. While in the first case a public official perpetrates the act either personally or incites, induces or solicits their perpetration, i.e. is in some form actively involved in them,[85] the terms "consent or acquiescence" are much broader and could be interpreted to cover a range of situations in which a state in some way or another permits pain and suffering to be inflicted by non-state actors.[86] Nonetheless, the express reference to the nature of the link that has to exist between the act and the state seems to narrow the scope of interpretation in comparison to the open-ended than the concept of due diligence.[87]

2.3 The Traditional Understanding of Torture

The primary objective of the UNCAT was to eliminate torture committed by public officials for purposes connected with their public functions.[88] The same can be said of Article 7 ICCPR, which was intended to ban state-sponsored terror against political dissidents and other persons under state custody.[89] The frequent concurrent raising of Article 7 and Article 10(1) (right to humane treatment in detention) reflects and reinforces this early understanding of torture[90] and the restrictive interpretations of the purpose requirement discussed in Chapter 2.2.2 demonstrate the same narrow conceptualisation. Thus, the form of torture traditionally accepted as prohibited under international law involves a state actor as the perpetrator and a victim – usually imagined to be male – who is a political dissident or a prisoner of a common crime.[91]

[85] Wendland, Lene, *A Handbook on State Obligations under the UN Convention against Torture*, 2002, p. 28.
[86] Nowak, 2008, p. 78; Ingelse, Chris, *The UN Committee against Torture: An Assessment*, 2001, p. 210.
[87] See Nowak, 2008, p.78.
[88] Burger & Danelius, 1988, p. 119.
[89] Edwards, 2011, p. 209.
[90] Ibid.
[91] Ibid, p. 2010.

3. Violence against Women and the Traditional Conceptualisation of Torture – Feminist Critiques

As described in the introductory chapter of this thesis, physical and sexual violence against women at the hands of their intimate partners or other private individuals is a global phenomenon of pervasive prevalence, affecting more than a third of women worldwide.[92] Considering the early understanding of torture outlined above, it is unsurprising that this form of violence has not traditionally been considered to fall within the scope of the torture prohibition. However, an analogy has been drawn by many feminists,[93] arguing that "when stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence".[94]

In this context, it has been suggested that the main obstacles to recognising privately committed violence against women as a form of torture – thus a grave violation of human rights – are the persistent trivialisation of this form of violence on the one hand, and the role of the so-called public/private dichotomy in international law on the other hand.[95] In the following, this claim will be examined by analysing the extent to which the definition of torture can be applied to acts of violence against women and exploring the conceptual and legal challenges for its application.

3.1 Applicability of the Torture Definition to Violence against Women

Following the structure of the elements of torture that have been distilled from different definitions in human rights law in Chapter 2, the subsequent sub-chapters will

[92] World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, 2013; see FN 1 and accompanying text.
[93] See, generally, MacKinnon, Catherine A., 'On Torture: A Feminist Perspective on Human Rights' in Mahoney, Kathleen E. & Mahoney, Paul (eds.), *Human Rights in the Twenty-First Century: A Global Challenge*, 1993; Copelon, Rhonda, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' in *Columbia Human Rights Law Review*, Vol. 25, 1994; Meyersfeld, Bonita C., 'Reconceptualizing Domestic Violence in International Law' in *Albany Law Review*, Vol. 67, 2003; Dworkin, Andrea, *Life and Death. Unapologetic Writings on the Continuing war Against Women*, 1997, pp. 152 – 168. Edwards, 2006.
[94] Copelon, 1994, p. 296.
[95] Ibid., p. 295.

discuss these elements with regard to violence against women, in particular domestic violence and rape. This will help to highlight parallels between these forms of violence and such conduct that is traditionally envisioned to fall within the torture definition and on the one hand, and will reveal aspects of the definition that are problematic for its application to violence against women, on the other hand.

3.1.1 Pain or Suffering

Domestic violence takes many forms; the 2013 prevalence study carried out by the World Health Organisation[96] is based on a definition of intimate partner violence as including acts such as slapping, pushing, shoving, hitting with the fist or an object, kicking, dragging, beating up, choking, burning, or using a weapon such as a knife or a gun on the victim.[97] These methods of intimate violence resemble common forms of torture in state-custody, which are also often carried out without the use of special equipment, but instead consist in the infliction of pain through means available in everyday life.[98]

Many feminist writers have further pointed out that the physical as well as mental pain and suffering inflicted by acts of domestic violence often reaches extreme levels, arguing that many reports of abused women were clearly comparable in brutality with "classic" acts of torture.[99] More recently, the comparison has also been made by the UN Special Rapporteur on Torture, stating in his 2008 report to the Human Rights Council that

> "[a]s with female detainees who experience torture, battered wives may be beaten with hands and objects, kicked, strangled, stabbed or burned. Rape and other forms of sexual abuse are used by intimate partners as well as by prison guards or police officers. In both scenarios, physical violence is usually accompanied by insults, varied forms of humiliation, and threats to kill or harm the victim or her

[96] See FN 1.
[97] WHO, 2013, p. 6.
[98] Copelon, 1994, p. 311 referring to Burgers & Danelius, 1988, p. 117 stating that "the most characteristic and easily distinguishable case [of torture] is that of infliction of physical pain by beating, kicking or similar acts" and "with the help of objects such as canes, knives [and] cigarettes".
[99] See Copelon, 1994, pp. 300 – 303, 309 – 319; Meyersfeld, Bonita, *Domestic Violence and International Law*, 2012, p. 115; MacKinnon, 1993, pp. 22 – 25.

> family members (often children). Domestic violence, as well as torture, tends to escalate over time, sometimes resulting in death or leaving women's bodies mutilated or permanently disfigured. Women who experience such violence, whether in their homes or in a prison, suffer depression, anxiety, loss of self-esteem and a feeling of isolation. Indeed, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture".[100]

That rape outside the context of domestic violence can inflict pain and suffering that is severe enough to satisfy the torture threshold has been pointed out in literature[101] and UN reports[102] for decades, and has now also been firmly established by the case law of human rights bodies.[103] The European Court, for example, has discussed the suffering inflicted by rape stating that it "leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence" and that forced penetration causes "acute physical pain" which, in that case, was considered to have left the victim "feeling debased and violated both physically and emotionally."[104]

With regard to the material act, it should thus be clear that acts of violence against women, in particular domestic violence and rape, can amount to the same level of severity as acts traditionally understood to be comprised by the torture definition. In fact, the concrete physical acts involved in violence against women by their intimate partners or other private individuals are often strikingly similar to acts that are typical for torture in state custody: in both contexts, victims are commonly beaten, kicked, strangled, stabbed, burned and raped. While not every act of domestic violence or sexual abuse will be extreme enough to cause severe pain and suffering, it is important to underline that these

[100] 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. 45.
[101] See, e.g. Blatt, Deborah, 'Recognizing Rape as a Method of Torture' in *N.Y.U. Review of Law and Social Change*, Vol. 19, 1992, pp. 854 – 857.
[102] See, e.g. Commission on Human Rights, Summary Record of 21st Meeting, 48th Session, UN Doc. E/CN.4/1992/SR.21, 21 February 1992, para. 35; Report of the Special Rapporteur, Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/1995/34, 12 January 1995, paras. 16 19.
[103] See, e.g., *Aydin v Turkey*, ECtHR (1997); MC v Bulgaria, ECtHR, Judgment of 4 December 2003; Miguel Castra-Castro Prison v Peru, IACtHR, Judgment of 25 November 2006.
[104] *Aydin v Turkey*, ECtHR (1997), para. 83.

forms of violence clearly *can* – and arguably often do – have the same devastating physical and psychological effects on their victims as official torture does.

3.1.2 Purpose

The purposive element required by the torture definition of the UNCAT has been subject to much feminist criticism due to its seeming reinforcement of the "male" conceptualisation of torture as only taking place within the context of arrest, interrogation, or detention.[105] However, many have argued that there is interpretative scope within the provision to apply it to violence against women by private actors.[106] In particular, the last alternative purpose enumerated in the definition ("any reason based on discrimination of any kind") has been pointed out as especially relevant to acts such as domestic violence and rape.[107]

This is based on the assumption that acts of violence against women, such as domestic violence and rape, are crimes of gender that are not committed randomly, but directed against women precisely because they are women.[108] In this context, Rhonda Copelon has contended that rape is "sexualised violence that seeks to destroy a woman based on her identity as a woman"[109] and Kelly Askin has argued that if "gender were not a factor, grossly disproportionate instances of sexual violence would not be committed against women."[110] In that sense, a discriminatory intent is inherent in the commission of these crimes as they are directed against women because of their gender, asserting male dominance and women's inequality in society.[111]

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[105] Edwards, 2006, p. 375.
[106] See, e.g. Edwards, 2006, p. 376; McGlynn, 2009, pp. 580 – 586;
[107] See Edwards, 2006, p. 376; McGlynn, 2009, pp. 382 – 385.
[108] See, e.g. Romany, Celina, 'State Responsibility goes Private' in Cook, Rebecca J. (ed.), *Human Rights of Women: National and International Perspectives*, 2011, p. 100.; Bunch, Charlotte, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' in *Human Rights Quarterly*, Vol. 12, 1990, pp. 486, 490.
[109] Copelon, Rhonda, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law' in Hastings Women Law Journal, Vol. 5, 1994, p. 246.
[110] Askin, Kelly D., 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' in *The American Journal of International Law*, 1999, p. 103.
[111] See McGlynn, pp. 583 – 586.

As not only rape, but also domestic violence affects women disproportionately,[112] these arguments can be made for both forms of violence against women. The recognition of violence against women as crimes of gender with discriminatory intent has also found support internationally. For example, the Declaration on the Elimination of Violence against Women states in its preamble that "violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men".[113] It has therefore been argued that the purposive element required by the UNCAT torture definition will most often be satisfied in cases of violence against women, as this kind of violence can generally be seen as being committed for the purpose of gendered discrimination.[114]

In addition, it has been pointed out that rape could also come within other prohibited purposes listed in the UNCAT definition, namely intimidation, coercion or punishment.[115] In her powerful seminal piece on domestic violence as torture, Rhonda Copelon further convincingly drew parallels between each of the purposes mentioned in the UNCAT definition and the purposes of intimate partner violence, including the purpose most commonly and directly associated with state-sponsored torture, i.e. "obtaining information or a confession".[116] Comparing reports of victims of official torture and victims of domestic violence, she points out that even in the context of official torture, the purpose of eliciting information from the victim is often only a pretext, with the process of interrogation aiming more at the destruction of the victim than the actual obtainment of meaningful information.[117] Similarly, the physical abuse of women is often preceded or accompanied by an "interrogation" by their partner, revolving around an actual or suspected failure of the woman to properly carry out her role as perceived by her partner.[118] Moreover, domestic violence might serve the purpose of punishing a

[112] Copelon, 1994, p. 339.
[113] Declaration on the Elimination of Violence against Women, GA Res. 48/104, 20 December 1993, Preambular para. 6.
[114] McGlynn, 2009, p. 585.
[115] See Ibid.
[116] Copelon, 1994, pp. 329 – 340.
[117] Ibid, pp. 332, 333.
[118] Ibid., p. 333.

woman for these perceived transgressions,[119] or of keeping her in a state of intimidation in order to ensure her obedience and to assert control.[120]

In this context it is also important to consider the more expansive list of purposes included in the definition of torture of the Inter-American Convention to Prevent and Punish Torture.[121] In addition to explicitly listing "personal punishment" and "preventive measures" as possible purposes of torture, Article 2 of the Convention states that methods "intended to obliterate the personality of the victim or to diminish his physical or mental capacities" shall also be comprised within the notion of torture.[122] All three elements seem to be even more open to interpretation for the purpose of bringing domestic violence within the scope of torture, as the punishment is of a personal nature in this private context and violence might also serve to prevent the woman's disobedience. It could also be argued that domestic violence aims at the debilitation of the victim, thus at diminishing his or her physical or mental capacities.[123] Rhonda Copelon has further suggested that the purpose of obliterating the personality of the victim mentioned in this definition "captures the ultimate horror of both torture and domestic violence as an assault on human dignity."[124]

Taking into account the parallels between the functions of official torture and those of domestic violence, it is thus possible to bring the latter within the definition of torture also with regard to its purposive element, even when considering only the purposes explicitly listed in the UNCAT definition. Rape outside the context of intimate partner abuse can also be argued to be for a purpose listed in the UNCAT when it is understood to be a crime of gender that inherently discriminates against women. Thus, the purpose requirement of the torture definition is not in itself an obstacle for the conceptualisation of privately committed violence against women as torture.

[119] See ibid., pp. 333 – 337.
[120] Ibid, p. 338.
[121] See discussion at 2.1.
[122] Art. 2 IACPPT; see above at FN 31.
[123] Copelon, 1994, p. 341.
[124] Ibid.

3.1.3 Public Officialdom – The Public/Private Dichotomy

The third element of torture as distilled from different definitions in human rights law, namely the requirement that the infliction of pain and suffering be linked to the state, has been the most criticised in feminist literature, as it is seen as the greatest barrier for bringing women's experiences of violence within the scope of the torture prohibition.[125] The reason for this criticism is obvious: by insisting on a nexus between the violent act and the state, violence against women committed by their intimate partners or other private individuals seems to be excluded from the scope of protection of the torture prohibition, as it is not perpetrated by a state official.

The requirement of a link between the violent act and the state is seen as a particularly strong manifestation of the so-called public/private distinction in international law, which is said to cause women's exclusion from it.[126] This distinction is particularly evident in the theory of state responsibility for human rights abuses, as only "public" violations are of concern to human rights law, while "private" acts are an issue of national law.[127] The feminist argument thus is that by privileging the public sphere of life, international law leaves the private or family sphere – in which many women spend most of their lives – unregulated and unprotected.[128] This evidently disadvantages women, as the many violations they suffer in private are "rendered invisible".[129] According to many feminist scholars, the reason for this structure of international law is that the system reflects male experiences and concerns, as it was originally created almost exclusively by men and with men in mind.[130] As Margaret Thornton puts it, "[t]he public

[125] Edwards, 2006, p. 371.
[126] See, generally, Romany, Celina, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in *Harvard Human Rights Journal*, Vol. 6, 1993; Thornton, Margaret, 'The Cartography of Public and Private' in Thornton, Margaret (ed.), *Public and Private: Feminist Legal Debates*, 1995; Sullivan, Donna J., 'The Public/Private Distinction in International Human Rights Law' in Peters, Julie & Wolper, Andrea (eds.), *Women's Rights, Human Rights: International Feminist Perspectives*, 1995.
[127] See, generally, Kälin & Künzli, pp. 78 – 85.
[128] See, e.g., Bunch, 1990.
[129] Gallagher, Anne, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System' in *Human Rights Quarterly*, Vol. 19, 1997, p. 291.
[130] See Chinkin, Christine, *Feminism: Approach to International Law*, Max Planck Encyclopedia of Public International Law, www.mpepil.com, para. 3.

sphere, mediated through law, has enabled bench-mark men to construct normativity, like God, in their own image."[131]

According to this feminist argument, the male bias has meant that legal rights have been defined in terms of what men fear will happen to them,[132] and what men fear is oppression from the state.[133] Women, on the other hand, fear oppression by men in the private sphere, which has been referred to as creating a "hierarchy of oppressions".[134] With regard to torture in particular, men are more likely than women to be subjected to abuse at the hands of public officials, while women are more likely to be physically or sexually abused by private individuals.[135] However, as stated above, these private acts are seemingly excluded from the definition of torture in human rights law, as a link to the state, thus the involvement of a public official, is required.

As discussed above, this aspect of the prohibition of torture is particularly pronounced in the definition of torture included in the Convention against Torture, as Article 1 of the UNCAT explicitly states that the pain and suffering must 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".[136] This is not expressly required in the jurisdictions of the ICCPR, ECHR, or the ACHR, as these treaties lack a definition of torture.[137] However, as outlined in Chapter 2.2.3, the torture prohibition in these treaties has been interpreted in light of the doctrine of "due diligence", thus also requiring a link between the act and a public official in order to hold the state responsible. Under this doctrine, the act can be attributed to a state if it has failed to exercise due diligence with regard to preventing, investigating and punishing violations by private actors.[138] While this seems to allow for a looser connection between the act and the state than the one required by the UNCAT, some form of state involvement must still be demonstrated in order for the

[131] Thornton, Margaret, The Category of Public and Private, 1995, p. 13.
[132] Edwards, Alice, 'Everyday Rape. International Human Rights Law and Violence against Women in Peace Time' in McGlynn, Clare & Munro, Vanessa (eds.), *Rethinking Rape Law. International and Comparative Perspectives*, 2010, p. 93.
[133] Edwards, 2011, p. 66.
[134] See ibid.
[135] Edwards,2010, p. 93.
[136] See Chapter 2.1.
[137] See discussion in 2.1.
[138] See above at 2.2.3.

conduct to be qualified as torture, even when all other elements of the definition are satisfied.

Violence against women, such as domestic violence committed by intimate partners and sexual abuse by other private individuals, thus seems to be difficult to bring within the definition of torture, in particular with regard to the UNCAT definition. As these acts are committed by *private* persons, not by state officials or other persons in an official capacity, the state seems to be absent from them. The element of public officialdom that is explicitly or implicitly included in the definition of torture under international human rights law can thus be said to be the most problematic aspect of the definition with regard to its application to violence against women.

3.2 Violence against Women as Torture – The State-Actor Requirement as the Major Stumbling Block

As noted in the introduction to this chapter, it has been argued that violence against women committed by their intimate partners or other private individuals in their everyday life is no less grave than official torture carried out by state agents in custody or detention. The lack of recognition of these acts of private violence against women as comparable to or in fact constituting torture has been said to be due to the constant trivialisation of these forms of violence on the one hand, and the public/private distinction in international law on the other hand. The previous chapters have examined domestic violence and rape by private individuals with regard to their similarity or otherwise to official torture and have pointed out challenges for the conceptualisation of these forms of violence as torture.

It has been demonstrated that domestic violence can reach extreme levels of brutality and in fact often consist of the very same acts carried out by state officials in traditional settings of torture, for example beating, kicking, choking and raping. That the act of rape can inflict severe pain and suffering has been made clear by the Special Rapporteur on Torture and several human rights bodies, which is the very reason why this

form of violence, when committed in state custody, is now unambiguously recognised as meeting the threshold of inhumane and degrading treatment at the very least.[139]

With regard to the purposive requirement of the torture definition, it has been argued that domestic abuse by intimate partners and rape by other private individuals do in fact serve purposes that are very similar to those listed in the UN Convention against Torture or the Inter-American Convention to Prevent and Punish Torture. In particular, both forms of violence against women can be viewed to constitute gender discrimination and thus satisfy the element of being "based on discrimination of any kind" as listed in the UNCAT. Moreover, it should be noted that it is still unclear from the jurisprudence of the Committee against Torture if only those purposes explicitly listed in Article 1 UNCAT would satisfy the definition or if "any purpose" – as stated in the definition of the IACPPT – would be accepted. As neither domestic violence nor rape are randomly committed, both forms of violence against women are definitely for *some kind* of malevolent purpose, be it one of those listed in the UNCAT, or such as personal punishment (as also mentioned in the IACPPT), assertion of control over a woman, or using violence as an outlet of general frustration. In my view, the text of Article 1 of the UNCAT lends itself to a broad interpretation of the purpose requirement and does not call for a narrow construction of acceptable purposes as it has originally been suggested by most commentators.[140] As has been argued above, however, even the narrowly framed list of explicitly stated purposes of the UNCAT can accommodate violence against women by private actors, such as domestic abuse and rape.

It thus seems that the element of pain and suffering and the purposive requirement of the torture definition are no legal obstacles for the conceptualisation of violence against women as torture, whether it is the degree of severity or the specific purpose of the conduct that is viewed as the decisive factor for the distinction between torture and other forms of ill-treatment.[141] While not every act of domestic violence and sexual abuse will be severe enough to reach the required threshold of pain, it has been demonstrated that

[139] Nowak, 2008, p. 78.
[140] See above at 2.2.2.
[141] See discussion above at 2.2.1 and 2.2.2.

violence against women *can* and does often reach an extreme level of brutality that is very well comparable to acts that are traditionally imagined to come within the scope of the torture definition. In addition, it is possible to argue that these forms of violence automatically satisfy the purposive requirement of being based on discrimination, if violence against women is understood as a product of women's systematic subordination.[142] Even if one does not subscribe to this assumption and moreover insists that only those purposes specifically listed in Article 1 of the UNCAT are acceptable to meet the definition of torture, it has been clearly shown that domestic violence and rape *can* serve one of those purposes in individual cases. A failure to recognise the parallels between these forms of violence and traditional forms of torture can therefore only be based on a refusal to acknowledge the extent of harm done to women and the underlying purposes of violence against them. With respect to these two elements of the definition, I therefore submit that – as it has been suggested above – it is indeed the trivialisation of violence against women that is an obstacles to its re-conceptualisation as torture.

The second obstacle was said to be the so-called public/private distinction in international law which is argued to disadvantage women, as many violations of their rights are committed in private sphere. This has been discussed with regard to third element of torture in human rights law, namely the requirement that the act be linked to the state. The public/private distinction has been found to be particularly relevant for the issue of violence against women, due to the fact that such pervasive forms of violence as domestic abuse by intimate partners or rape by other private individuals are not committed by state actors and thus seem to be excluded from the scope of protection of international law, and in particular from the scope of the prohibition of torture in human rights law. It therefore seems that the public/private distinction as manifest in the state actor requirement of the torture definition is indeed another major obstacle for bringing privately committed violence against women under the torture definition.

In this case, however, a mere shift in attitude is not enough to overcome the obstacle. While the other two elements of the torture definition offer enough interpretative scope to apply them to many situations of domestic violence and rape – if one is willing

[142] See Edwards, p. 583.

not to trivialise, but acknowledge the severity and underlying purposes of these forms of violence – the third element does in fact constitute a *legal* challenge for bringing violence against women by private actors within the scope of the torture prohibition.

From a legal perspective, the state-actor requirement of the torture definition in human rights law thus seems to be the major stumbling block for the integration of violence against women into the protective scope of the definition. The UNCAT definition, which explicitly requires the act to be committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", seems to be particularly problematic in this context. The concept of "due diligence" as employed in the jurisprudence of the Human Rights Committee, the European Court of Human Rights and the American Court of Human Rights, allows for more interpretative room, but still requires a link between the privately committed act and the state.

4. The Role of Non-State Actors under the Torture Prohibition

As outlined in Chapter 2, the traditional conceptualisation of torture was confined to situations of abuse by state agents, most typically in detention, and inflicted on political dissidents for the purpose of extracting a confession, intimidating or punishing them.[143] This early understanding has been heavily criticised by feminist scholars, arguing that the narrow framing of the torture prohibition failed to recognise the parallels of privately committed violence against women and official torture and thus excluded women from the scope of protection of the prohibition, which has been discussed in Chapter 3. An examination of the three main elements of torture that have been distilled from the definition under human rights law has shown that acts of violence against women can reach the same level of severity as state-sanctioned torture and can moreover be seen to be committed for the same purposes, leaving only the element of public officialdom problematic for the application of the definition to such acts as domestic violence or rape by private persons.

[143] See above at 2.3.

Within the state-centric system of international law, in which the primary responsibility for human rights violations rests on the state,[144] the question arises whether there is room to accommodate acts of private individuals regarding the prohibition of torture. The following sub-chapter will therefore explore the position of different human rights bodies with respect to the role of non-state actors under the torture prohibition by examining relevant pronouncements in General Recommendations and individual cases. The focus will be on the jurisprudence of those human rights bodies that have been discussed in Chapter 2, i.e. the Human Rights Committee, the Committee against Torture and the European Court of Human Rights. Building on Chapter 2.2.3, in which the concepts of "consent and acquiescence", "due diligence" and "positive obligations" have been introduced, this section will discuss how these concepts have been employed with respect to violent acts committed by private individuals.

However, the issue of human rights obligations of non-state actors is a rapidly evolving field in international law,[145] with important developments currently taking place in various legal fora. This chapter will therefore also take into account relevant developments in international criminal law. While being a different branch of international law, the latter is nonetheless intertwined with the field of human rights and can inform and fertilise its jurisprudence.[146] The second sub-chapter will thus discuss developments in international criminal law with regard to the state-actor requirement of the prohibition of torture.

4.1 Responsibility of the State for Private Harm under the Torture Prohibition

As discussed above in Chapter 2.2.3, Human Rights Committee has endorsed the doctrine of due diligence for the purpose of assessing whether an act committed by a private individual can be attributed to a state. Concerning the role of these private actors under the torture prohibition of Article 7 ICCPR, an evolution can be observed in the

[144] See, generally, Kälin & Künzli, pp. 78 – 85.
[145] See only Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, 2006.
[146] Cryer, Robert, 'International Criminal Law' in Moeckli, Daniel, Shaw, Sangeeta & Sivakumaran, Sandesh (eds.), *International Human Rights Law*, 2014, pp. 497 – 498.

Committee's General Comments on Article 7, issued in 1982 and 1992. In its first Comment, the Committee stated that states had to ensure protection against ill-treatment "even when committed by persons acting outside or without any official authority",[147] which clearly extends state responsibility to officials who act beyond their prescribed authority. While it has been claimed that "purely private harm" had yet to be included within the scope of Article 7 by the HRC,[148] it could also be argued that the wording "persons acting *without any* official authority" [my emphasis], could have already been interpreted as meaning private actors. In any way, this was clarified by the Committee's second General Comment on Article 7 (which replaced the first),[149] stating unambiguously that Article 7 prohibits acts "whether inflicted by people acting in their official capacity, outside their official capacity *or in a private capacity*" [my emphasis].[150]

In addition, there was one significat individual case in which the HRC found a violation of Article 7 ICCPR concerning the acts of private persons.[151] In *Wilson v Philippines*,[152] the HRC held that the state was responsible for violent acts that had been committed against the imprisoned complainant by fellow inmates. The Committee found that the victim had been beaten either "by the prison guards, upon their instigation or with their acquiescence",[153] thus attributing also the prisoner-on-prisoner violence to the state. While the HRC did not elaborate on what exactly it meant by "acquiescence", the facts of the case indicated that the prison guards knew about the abusive behaviour of other inmates but did nothing to stop it.[154] The use of the term "acquiescence" – instead of a reference to due diligence – was somewhat surprising, given that this language is more usually associated with the UNCAT than the ICCPR;[155] however, the finding that acts of private persons can be attributed to the state under their obligations arising from Article 7 ICCPR is in line with the Committee's General Comments and indicates the HRC's

[147] GC No. 7 (HRC), para. 2
[148] See Edwards, 2011, p. 239.
[149] GC No. 20 (HRC), para 1.
[150] Ibid., para. 2; see also para 13.
[151] Joseph & Castan, 2013, p. 226.
[152] *Albert Wilson v. Philippines*, CAT, 30 October 2003.
[153] Ibid., para 7.3.
[154] See ibid., paras. 2.1, 7.3.
[155] Edwards, 2006, p. 366.

willingness to expand the scope of protection of the torture prohibition to privately committed harm.

The CAT, in turn, has also found that violent acts perpetrated by private persons could be attributed to the state under the prohibition of torture in one individual case.[156] Employing the concept of "acquiescence", the Committee held in *Dzemajl et al. v Yugoslavia,*[157] that the destruction of a Roma settlement by a non-Roma mob was attributable to public officials, as the police had been present while several hundred people set houses on fire, destroyed cars and slaughtered animals, but did not take any appropriate steps in order to halt the violence or protect the Roma inhabitants.[158] Moreover, the Committee against Torture explicitly stated in its General Comment No. 2 that the concepts of consent or acquiescence could extend the responsibility of the state to harm committed by private actors,[159] thus clarifying that it viewed the Convention against Torture to offer interpretative scope to accommodate harm done by private individuals.

With regard to the ECHR, the European Court of Human Rights has handed down several judgments in which it found a violation of Article 3 ECHR due to a state's failure to fulfil its positive obligations where the conduct complained of what that of private parties. The cases of *Costello-Roberts v United Kingdom*[160] and *A. v United Kingdom*[161] are the leading authorities in this respect.[162] The first case concerned the corporal punishment of a seven year old boy by a headmaster of a private school,[163] while in the second case the violent action in question was the beating of a child by his stepfather. While the majority of the judges considered the treatment in *Costello-Roberts* not to be

[156] Other cases involving non-state actors with positive findings by the CAT were based on complaints concerning Article 3 CAT (non-refoulement) to states in which the complainants claimed to be at risk of torture by non-state armed groups (see discussion below at 5.2). *Dzemajl* is thus the only positively decided case in which private individuals in the more narrow sense were concerned.
[157] *Dzemajl et al. v Yugoslavia,* CAT, 21 November 2002.
[158] See ibid., paras. 2.6 – 2.9, 9.2.
[159] Ibid., para. 18.
[160] *Costello-Roberts v United Kingdom,* ECtHR, Judgment of 25 March 1993.
[161] *A. v United Kingdom,* ECtHR, Judgment of 23 September 1998.
[162] Jacobs, White & Ovey, 2010, p. 177.
[163] See *Costello-Roberts v United Kingdom,* ECtHR (1993) paras. 7 – 12.

severe enough to reach the threshold of Article 3,[164] the Court stated in both cases that, as a matter of principle, the state can be held responsible for acts of private individuals under Article 3. In *A.*, the Court made clear its conceptual approach, stating that "the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together 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."[165] This line of argument was subsequently used in a variety of cases concerning violence committed by private individuals, which will be discussed below in Chapter 5.

While none of the above discussed General Comments or cases concerned violence against women, the general conclusions to be drawn from them have important implications for the prospect of bringing violent acts such as domestic abuse by an intimate partner or rape by other private individuals within the scope of the torture prohibition under human rights law. The HRC, the CAT and the ECtHR have all made clear that they consider violent acts of private individuals to fall under the prohibition of torture in specific circumstances. If there is room to accommodate privately committed harm within the scope of the torture prohibition in principle, this should mean that such acts of private violence that are disproportionally inflicted on women can also benefit from its protection. This will be examined in Chapter 5.

4.2 Direct accountability of private individuals? Developments in International Criminal Law

Both the ICTY and the ICTR, which were established by the UN Security Council to deal with war crimes, crimes against humanity and genocide after the Yugoslav wars and the

[164] See also the discussion of the "threshold of severity" doctrine of the European Court in 2.2.1.
[165] *A v United Kingdom*, ECtHR (1998), para. 22; see also general discussion of the Court's positive obligations doctrine at 2.2.3.

Rwandan Genocide respectively,[166] have sought to define torture in their jurisprudence, which is listed as a war crime and a crime against humanity in both statutes.[167] Similar to the vast majority of human rights instruments, which prohibit torture only in general terms without defining it,[168] the statutes of the criminal tribunals did not contain a definition of the crime of torture either. In the absence of any definition also in international humanitarian law,[169] the tribunals have often turned to the Convention against Torture for guidance, but have questioned whether the element of public officialdom is a necessary requirement in international humanitarian law.[170]

Initially, both the ICTY and the ICTR held that the state actor requirement of the torture definition was applicable also in the context of humanitarian law. In the case of *Akayesu*,[171] the Trial Chamber of the ICTR cited the definition of torture in Article 1 UNCAT, stating that one of the essential elements of torture was that the perpetrator was "an official or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity."[172] In *Furundžjia*, both the Trial and the Appeal Chambers held that there was "general acceptance of the main elements" of the definition laid down in the Convention against Torture and thus considered Article 1 of the UNCAT to reflect customary international law.[173] The Trial Chamber in the case of "*Čelebići*

[166] See SC Res. 827, adopting the Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/Res/827 (1993); SC Res. 955, adopting the Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/Res/955 (1994).
[167] See Arts. 2 (b), 5 (f) ICTY Statute; Arts. 3 (f), 4 (a) ICTR Statute.
[168] See above at 2.1.
[169] International humanitarian law is a specific body of international law that only applies during armed conflict, establishing rules for warring parties that restrict the permissible use of certain means and methods of warfare and grant protection to civilians or wounded, sick, and imprisoned combatants; see Gasser, Hans Peter & Thürer, Daniel, *International Humanitarian Law*, Max Planck Encyclopedia of Public International Law, para 32, www.mpepil.com. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 form the core of current IHL treaty law; see ICRC Website, Treaties and Customary Law, http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm.
[170] Sivakumaran, Sandesh, 'Torture in International Human Rights and International Humanitarian Law. The Actor and the Ad Hoc Tribunals' in *Leiden Journal of International Law*, Vol. 18, 2005, pp. 541 – 542.
[171] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).
[172] Ibid., paras. 593, 594.
[173] See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (10 December 1998), paras. 160 – 162; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeals Judgment (21 July 2000), para. 111.

Camp",[174] while still holding that the definition of torture contained in the UNCAT was representative of customray international law,[175] nonetheless proceeded to broaden the official actor requirement to include officials of non-state entities, arguing that this was necessary in the context of international humanitarian law "in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-state entities."[176]

However, the approach of the tribunals with regard to the relevance of the public official element in the context of humanitarian law changed radically in their later jurisprudence. In Kunarac et al.,[177] the Trial Chamber of the ICTY held that the Convention against Torture only served as an "interpretational aid" and that the customary law status of the state actor requirement was "contentious",[178] eventually concluding that, for the purposes of international humanitarian law, there was no such requirement.[179] This was based on the Trial Chamber's view that the characteristic trait of torture as a war crime or a crime against humanity was to be found "in the nature of the act committed rather than in the status of the person who committed it."[180] The Appeals Chamber later confirmed this shift, stating unambiguously that "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention."[181] As this new approach was subsequently followed in a number of cases at both tribunals[182] and also upheld on appeal,[183] it can now be considered to be settled jurisprudence that with respect to individual criminal responsibility for an act of torture – outside the Convention against Torture – the perpetrator may be a member of an

[174] Prosecutor v. Delalić, Mucić, Delić, and Landžo (*Čelebići* Camp), Case No. IT-96-21-T, Judgment (16 November 1998)

[175] Ibid., para. 459.
[176] Ibid., para 473
[177] Prosecutor v. Kunarac, Kovač, Vuković, Case No. IT-96-23&23/1, Judgment (22 February 2001)
[178] Ibid., paras. 482 - 484.
[179] Ibid., paras. 496, 497.
[180] Ibid., para 495.
[181] Prosecutor v. Kunarac, Kovač, Vuković, Case No. IT-96-23&23/1, Appeals Judgment (12 June 2002), para. 148.
[182] See, e.g. Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment & Sentence (15 May 2003), paras. 342, 343.
[183] Prosecutor v. Kvočka, Case No. IT-98-30/1, Judgment (2 November 2001).

armed opposition group, a mercenary, or even a purely private individual with no organisational affiliation.[184]

It should further be noted that the statute of the International Criminal Court (ICC) now contains a definition of torture as a crime against humanity, providing that "torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused".[185] As can be seen from this formulation, the state actor requirement (as well as the purposive element) have been dropped from the definition. While the victim needs to be "in the custody or under the control of the accused", the perpetrator is not required to be a public official, nor must the act be instigated, consented to or acquiesced in by a state agent. Similarly, the Elements of Crime pertaining to the ICC's statute, which define torture when committed as a war crime, do not include any reference to a public official.[186] It can thus be concluded that, for the realm of international criminal law, it has been clarified that private individuals can indeed commit torture, even if there is no connection between their conduct and the state. Under international criminal law, these private individuals are thus directly accountable for torture when committed as a war crime or a crime against humanity. While these developments have no direct impact on the prohibition of torture as developed under human rights law, they can still be interpreted as part of a wider trend towards more accountability of private actors for human rights violations, which, in turn, could inform human rights jurisprudence when interpreting the extent of state obligations under the prohibition of torture.

[184] Sivakumaran, 2005, p. 545.
[185] See Art. 7 (2) (e) Rome Statute.
[186] See Art. 8 (2) (a) ii-1 and Art. 8 (2) c i-4 Elements of Crime pertaining to the ICC Statute.

5. The Extent of Positive State Obligations – The Duty to Prevent Violence against Women

The previous chapter has shown that the concepts of "due diligence", "consent or acquiescence" and "positive state obligations" have all been employed by human rights bodies to establish a state's responsibility for an act of torture when the violence was committed by a private individual. As has been discussed in Chapter 2.2.3, the principle of due diligence includes duties of the state to prevent, investigate and punish violations by private actors,[187] which corresponds to the standards developed by the European Court under its doctrine of "positive obligations".[188]

From this list of duties imposed on states, the duty to prevent violations is the most far-reaching, as it requires states to not only respond to abuses once they have been committed, but also take measures *before* such abuses occur. This might have important implications for the protection of women from violence committed by their intimate partners or other private persons, in particular if the concept of prevention is interpreted widely by human rights bodies.

This chapter will therefore examine the extent of this obligation to prevent under the prohibition of torture in international human rights law, comparing the extent of the obligation under the concept of "due diligence", as applied by the Human Rights Committee, the Inter-American Court of Human Rights and, in essence, by the European Court of Human Rights,[189] and "consent and acquiescence", as applied by the Committee against Torture. As discussed in Chapter 3.2, the latter concept seems to be more restrictive with regard to state responsibility for private acts and has thus been subject to "near unanimous feminist critique."[190] However, it might have potential to be interpreted more broadly than it has been traditionally and therefore imply a standard that is comparable to what is required under the principle of "due diligence" with regard to

[187] See also *Velásquez Rodríguez v Honduras,* IACtHR (1988), para. 166.
[188] See above at 2.2.3.
[189] The standards are very similar in practice, although the European Court does not use the term "due diligence", see above at 2.2.3.
[190] Edwards, 2006, p. 365.

prevention of violence by private actors. This last point will subsequently be addressed in the Conclusion.

5.1 The Duty to Prevent under the Concept of Due Diligence

The European Court of Human Rights and the Inter-American Court of Human Rights have dealt most extensively with the state obligation to prevent abuses under the prohibition of torture and other ill-treatment. From their case law, an evolution can be observed from a narrowly framed duty to prevent concrete events under specific circumstances to further reaching obligations to take measures on a much more general level in order to prevent certain risks from materialising. This evolution will be outlined in the following.

The European Court of Human Rights confirmed that states had an obligation to protect individuals in their relations with other private persons in its *Osman v Turkey* judgment. Ruling on Article 2 of the ECHR (right to life), the Court held that a state's positive obligation to prevent offences against a person was engaged when "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."[191] In this circumstances, the state is required "to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[192] This formulation, which was later dubbed the "Osman Test",[193] introduced strict criteria for establishing a failure of the state to comply with the European Convention on the basis of its positive obligation to prevent. The reference to a real and *immediate* risk of an *identified* individual makes clear that this can only apply to situations in which the state has been informed of a concrete threat to a particular person's life. If this test were to be applied also with respect to Article 3 ECHR (torture prohibition) and to situations of violence against women, this would mean that the state has an obligation to prevent concrete attacks on concrete women if the authorities had knowledge – or, in

[191] *Osman v Turkey*, ECtHR, 6 October 2005, para. 116
[192] Ibid.
[193] See Xenos, Dimitris, *The Positive Obligations of the State under the European Convention of Human Rights*, 2012, p. 111.

the words of the Court "ought to have known" – of the risk of the attack in this specific case. For example, an incident of domestic abuse could meet the *Osman* criteria if the woman had already tried to seek help from the police due to previous instances of violent behaviour or threats by her intimate partner and the authorities were therefore aware of the risk and further attacks seemed likely in the particular circumstances, but the authorities did nothing to prevent more assaults.

In fact, the Court did apply this test with respect to a state's duty to prevent torture or ill-treatment only a few years later, albeit still not in relation to violence against women. In *Z v United Kingdom*[194] the Court found the state to be in breach of Article 3 ECHR because it had failed to protect four children from the neglect and abuse they suffered at the hands of their parents.[195] The Court first reiterated its formula that an obligation to ensure that individuals within a states' jurisdiction are not subjected to torture or other ill-treatment flowed from a combined reading of Article 1 and Article 3 of the ECHR, which it had first stated in *A v United Kingdom*. It then went on to explain that "[t]hese measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[196] While the Court explicitly referred to the relevant paragraph of its *Osman* judgment, the scope of preventive obligations implied in this formulation could already be interpreted to be broader than in *Osman*, as no concrete mention was made of a "real and immediate risk" of this ill-treatment or of an "identified individual" in relation to whom the states' obligation was invoked. Further, the emphasis placed on children and "other vulnerable persons" as being in particular need of effective protection was an interesting development, as it pointed to the possibility of finding especially far-reaching preventive obligations for the state also with regard to women, if their particular vulnerability to violence by private actors were also to be recognised in the future. At that time, the judgment was described

[194] *Z v United Kingdom*, ECtHR, Judgment of 25 October 1999.
[195] Ibid., paras 74, 75.
[196] Z v United Kingdom (2001), para. 73.

to be "the most far reaching pronouncement yet on the scope of state responsibility under Article 3 ECHR."[197]

In the Inter-American system, a standard similar to the *Osman* test was developed with respect to states' positive obligations to prevent violations by private actors. In its *Pueblo Bello* judgment of 2006, the Inter-American Court held with respect to, inter alia, the prohibition of inhumane treatment, that:

> "[a state's] obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of *real and imminent danger* for a *specific individual or group of individuals* and by the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State, because the specific circumstances of the case and the execution of these guarantee obligations must be considered" [my emphasis].[198]

Thus, the Inter-American Court, referring also to the *Osman* judgement of the European Court,[199] recognised a duty of the state to prevent specific individuals from specific attacks by other private persons, if the authorities were aware that these individuals were in danger. However, similar to the case law of the European Court at this point, the limits of this preventive duty were narrowly drawn and emphasised to be restricted to individual cases and not to extend to a general duty to prevent abuses.[200]

Interestingly, in its subsequent judgement in *González et al. ("Cotton Field") v Mexico*[201] the Inter-American Court did mention precisely such a general failure of the state to comply with its obligation of prevention. However, this general failure did not lead to the state's responsibility in the specific case. Although the Court considered proven that the state was fully aware of the general pattern of violence against women

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[197] Evans, p. 379.
[198] Case of *Pueblo Bello Massacre v Colombia*, IACtHR, Judgment of 31 January 2006, para. 123.
[199] See ibid., para 126.
[200] See ibid.: "Also, the Court acknowledges that a State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction. Indeed, the nature erga omnes of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals […]."
[201] *González et al. ("Cotton Field") v Mexico,* IACtHR, Judgment of 16 November 2009.

that existed in Ciudad Juárez at the time the crimes in question were committed,[202] it was held that the authorities had no knowledge of the "real and imminent danger" for the three specific victims *in particular*.[203] Thus, the state could not be attributed with the disappearance of the three women, although it had failed to have a "general policy" in place that could have ended or reduced attacks on women in this area generally.[204]

The Court held, however, that after the state had been informed about the women's disappearance, it had to be aware of the real and imminent risk that they would be sexually abused, subjected to ill-treatment and killed, because this had been the general pattern in similar cases.[205] As the state still failed to take appropriate measures at this point, in particular, to promptly carry out exhaustive search activities, it could be held responsible for the subsequent ill-treatment and killing of the young women.[206]

The Court thus divided the facts into two crucial periods of time: the time prior to the report of the women's disappearance and the time in between the report and the discovery of their dead bodies. While the "general" failure to take measures against the pattern of violence in Ciudad Juárez did not lead to the state's responsibility for the disappearances of the concerned individual women, its failure to search for them once the authorities knew about their disappearance *was* attributed to the state under its obligation to prevent.[207]

The question arises how an explicit finding of a state's general failure to comply with its preventive obligations is compatible with absolving the state from its responsibility in a specific case related to this general failure, as this specific case might have been prevented had the state taken policy measures against the general pattern of violence. In my view, the Court's finding of the state's failure "in general" could have been argued to lead to its responsibility also for the concrete manifestation of the risk – which the state failed to reduce – in this particular case. In the *"Cotton Field"* case, this

[202] Ibid., para 278.
[203] Ibid. para. 282.
[204] Ibid.
[205] Ibid., para. 278.
[206] Ibid., para 283.
[207] Ibid.

would not have led to a different result, as the Court arrived at the conclusion that the state was responsible for the women's ill-treatment – the incidents following their disappearance – anyway; however, this interpretation could have important ramifications for other cases.

Two other aspects of the *"Cotton Field"* judgment are noteworthy in the context of state obligations to prevent violence against women. Firstly, the Court emphasised the particular vulnerability of the women in Ciudad Juárez, due to the pattern of abuses that existed at the time the women were attacked.[208] Secondly, it specifically referred to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Pará"),[209] pointing out that this Convention placed even greater obligations of due diligence on states in cases of violence against women. Both issues will be discussed below.

Returning to the jurisprudence of the European Court, another important development regarding the extent of preventive obligations took place in the 2009 landmark case *Opuz v Turkey*,[210] in which the Court articulated a state's obligation to prevent abuses in relation to domestic violence. The complaint concerned a series of grave abuses at the hands of the applicant's husband over a period of twelve years, which caused severe physical and psychological injuries to the applicant and her mother and eventually resulted in the death of the latter.[211] The first important element of the judgment was that the Court confirmed that domestic violence can indeed meet the threshold of Article 3 ECHR,[212] although the violence was not expressly qualified as torture, but generally as ill-treatment without further specification.[213]

The second notable element is the way in which the Court elaborated on the state's duty to protect the applicant and her mother from this violence. With regard to Article 3,

[208] Ibid, para. 284.
[209] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Pará"), adopted on 9 June 199, entered into force 5 March 1995.
[210] *Opuz v Turkey*, ECtHR, Judgment of 9 June 2009.
[211] See ibid., paras. 13 – 54.
[212] See discussion at 3.1.1.
[213] See paras. 158, 161. This is untypical for the European Court, as it usually distinguishes between different forms of ill-treatment; see above at 2.2.1.

the Court first reiterated, as previously in *Z v United Kingdom*, that the state's obligation under Article 1 to secure the rights of the ECHR to everyone within its jurisdiction, taken together with Article 3, required the state to take preventive measures to protect individuals from ill-treatment administered by other private individuals.[214] It then went on to state that "[c]hildren and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."[215] This seems to be a much broader formulation than the previously applied *Osman* test; in fact, none of the three criteria contained in *Osman* – real and immediate risk, knowledge of the state of this particular risk, identified individual who is at risk – are included in this wording. This is particularly interesting in view of the fact that with regard to Article 2 (right to life), the Court *did* reference and repeat the *Osman* test verbatim,[216] therefore suggesting that the extent of preventive obligations was different under Article 3 and Article 2. In my view, this could be read as a beginning recognition by the Court that the prohibition of torture entailed more general duties of prevention for states, going beyond the protection only in cases where the state had concrete knowledge of a specific risk to one particular person. In this case, the Court found that not only had the authorities' response to the serious abuses by the applicant's husband been manifestly inadequate,[217] but also that the legislative framework of the state should have enabled the prosecuting authorities to pursue the criminal investigation against the perpetrator despite the withdrawal of complaints by the applicant.[218] It therefore seems that the preventive duties of the state are engaged at a much earlier point in time and a more general level that transcends the specific circumstances of this individual case: the state failed to comply with its positive obligation to prevent abuses by private individuals already when it did not have an appropriate legislative system in place, not only at the time when it did not take measures to protect Ms Opuz from the violent behaviour of her husband. The crucial point is that the authorities were not only unwilling, but partly also *unable* to take appropriate measures, because the laws in effect

[214] See ibid., para 159.
[215] Ibid.
[216] See *Opuz v Turkey*, ECtHR (2009), para. 129.
[217] Ibid., para. 170.
[218] Ibid., para. 168.

at the time did not allow them to take certain steps that would have been necessary for an effective protection of the applicant. In the specific circumstances of the *Opuz* case, the failure of the state was not *only* based on the general shortcomings in the state's legal system, but also on the concrete conduct of the authorities specific situations where the legal framework would have allowed them to take more effective measures. However, the extension of the scope of preventive duties in this judgment is remarkable.

In addition, it should be noted that, in this case, the Court did in fact consider that the applicant, as a woman, fell within the group of "vulnerable individuals" who are particularly entitled to state protection.[219] Ms Opuz' vulnerability was held to be based on the previous history of violence suffered by her at the hands of her husband, and the generally vulnerable situation of women in south-east Turkey,[220] where a high prevalence of domestic violence and a culture of impunity was noted in an earlier passage of the judgment.[221] Moreover, the Court underlined that "in interpreting the provisions of the Convention and the scope of the State's obligations in specific cases […] the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW [Convention on the Elimination of All Forms of Discrimination against Women] , as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention, which specifically sets out States' duties relating to the eradication of gender-based violence."[222] In an earlier section of the judgment, the Court had analysed international and comparative-law material that it considered to be relevant for the case, discussing, inter alia, a General Recommendation and case law of the CEDAW Committee.[223] These considerations are similar to the Inter-American Court's pronouncements in *"Cotton Field"*; both Courts have recognised the particular vulnerability of women in a certain geographical area, and have referred to standards

[219] See ibid., para. 160.
[220] Ibid.
[221] Ibid., paras. 91 – 105 (in which the Court considered several NGO reports on the situation of women in this area).
[222] Ibid., para. 164.
[223] See paras. 72 – 90. The CEDAW Committee is the treaty body monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (adopted in 1979 by GA Res. 34/180, entered into force 3 September 1981).

regarding the prevention of violence against women that have been developed or were developing in other legal fora.

The most recent development concerning the scope of preventive obligations under the prohibition of torture and other ill-treatment took place at the European Court in its 2014 Grand Chamber Judgment *O'Keeffe v Ireland*.[224] The case concerned the question of the responsibility of the State for the sexual abuse of a nine year old schoolgirl by a lay teacher in an Irish National School in 1973. Significantly, the Court found that the state had failed to *structure* the system of primary education in a way that would have protected the applicant from the abuse.[225]

After again citing the combined reading of Article 1 and Article 3 as the basis for positive state obligations to prevent violations by private individuals, the Court formulated this obligation in the following way:

> "This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[226]

Importantly, the Court emphasised in a subsequent paragraph that this obligation was *not* confined to individual cases in which the state knew or ought to have known of the ill-treatment of a particular student.[227] The Court clarified that, unlike in the *Osman* case, there had not been an "operational failure to protect the applicant" because "until complaints about [the teacher] were brought to the attention of the State authorities in 1995, the State neither knew nor ought to have known that this particular teacher […] posed a risk to this particular pupil."[228] Instead, the state had failed to protect children in privately managed primary schools *generally*, as the authorities "ought to have been

[224] *O'Keeffe v Ireland*, ECtHR, Judgement of 28 January 2014.
[225] See O'Keeffe v Ireland Press Release, ECHR 027 (2014).
[226] Ibid., para. 144.
[227] See ibid., para. 148.
[228] Ibid.

aware of the risk of sexual abuse of minors such as the applicant in National Schools at the relevant time",[229] but "nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring."[230]

This is clearly a further expansion of the extent of preventive duties posed on states as part of their positive obligations under Article 3 ECHR. In this case, unlike in *Opuz*, it was the general failure to have a particular system in place *alone* that lead to the responsibility of the state for the individual case of abuse, although it was found that the state did not have knowledge of the particular risk to this particular student and had therefore not failed to take operational measures in relation to this identified individual. Moreover, the failure of the state was not based on the absence of a particular criminal law provision in the state's legal system[231] – the sexual abuse of a minor was prohibited under Irish criminal law at the time[232] – but only on the lack of useful detection and reporting mechanisms under its general framework of laws.[233] I submit that these findings could prove pivotal for cases of violence against women in future jurisprudence of the European Court and could also have wider implications for the advancement of preventive duties as part of states' positive obligations under the prohibition of torture and ill-treatment in human rights law. This will be discussed in Chapter 6 (Conclusion).

5.2 The Duty to Prevent under the Concept of Consent or Acquiescence

As discussed above, the Committee against Torture has found a violation of the UNCAT in one individual case involving violence by private actors (*Dzemajl et al. v Yugoslavia*),[234] in which it applied the "consent or acquiescence" element contained in the definitions of Article 1 (torture) as well as 16 (cruel, inhuman or degrading treatment

[229] Ibid., para. 168.
[230] Ibid.
[231] This had been the basis of a state's failure to comply with its positive obligations in prior cases at the ECtHR; see, e.g. *M.C. v. Bulgaria*, ECtHR, Judgment of 4 December 2003.
[232] See ibid., para. 63.
[233] See ibid., paras. 152, 153 – 169.
[234] See discussion above in Chapter 4.1.

or punishment) of the UNCAT.[235] In this case, the police found that the state had "acquiesced" in the violent attack on a Roma settlement, because the police had failed to protect the inhabitants and their property from the ill-treatment at the hands of several hundred raging non-Roma neighbours.[236] However, the facts of the case were particularly stark: the police had not only been informed of the pending attack in advance, but was actually even present at the scene of the events but did not intervene to halt the violence, but instead "moved their police car to a safe distance and reported to their superior officer."[237] In contrast to their complete inaction regarding the pogrom against the Roma population, the present officers did, however, "ensure that the fire did not spread to any of the surrounding buildings, which belonged to the non-Roma."[238] Under these circumstances, the obligation of the state to protect individuals from abuses by others was therefore more directly engaged than, for example, under the *Osman* test described above; the police has a legal obligation to take action when witnessing violence between private individuals, but remained completely passive in this case.[239]

This was, however, already the most expansive interpretation of "consent and acquiescence" of the CAT in an individual case concerning the acts of private individuals.[240] Prior to this decision, the Committee had interpreted this requirement very restrictively in a series of cases concerning Article 3 of the UNCAT, i.e. the non-refoulement provision, which prohibits states from expelling, returning or extraditing a person to another State where there is a substantial risk that this person will be subjected to torture.[241] All of these cases had concerned the pending expulsion of persons to states where non-state armed groups were in control of at least parts of the state's territory and the complainants feared ill-treatment by them. In all of these cases except *Elmi v*

[235] For the elements of Article 1 and 16, see discussion above at 2.1.
[236] See prior discussion of this case at 4.1.
[237] *Dzemajl et al. v Yugoslavia*, CAT (2002), para. 2.8.
[238] Ibid., para. 2.9.
[239] See ibid., para. 2.8 ("police officers present failed to act in accordance with their legal obligations").
[240] See Edwards, 2011, pp. 242 – 249; Joseph & Castan, 2013, pp. 220 – 225. Most recently, the CAT has taken a decision that seems to imply a wider interpretation of "consent or acquiescence", but does not explicitly apply this element in its consideration of the merits of the case (*Njamba and Balikosa v. Sweden*), see below in 5.2.
[241] *G.R.B. v Sweden* (CAT 83/1997), 15 May 1998; *S.V. et al. v Canada*, (CAT 49/1996), 15 May 2001; *Elmi v Australia* (CAT 120/1998), 14 May 1999; *HMHI v Australia* (CAT 1777/2000, 1 May 2002.

Australia, the complaints failed because the CAT found that the governments of the respective states did not acquiesce in the actions of the non-state actors, but were merely unable to protect individuals, as they did not have control over some parts of their territory or the non-state armed groups generally. Only in *Elmi* the CAT found that the state had an obligation to refrain from forcibly returning the complainant to Somalia, where he feared to be tortured by non-state warring factions. However, the Committee did not arrive at this conclusion by applying the "consent or acquiescence" element of the torture definition, but instead by creating the "fiction"[242] that the warring clans were in fact comparable to government authorities and could thus be seen to fall within the term "public officials or other persons acting in an official capacity".[243]

It has been pointed out that also in the above mentioned cases, in which the complaint failed, the central governments were unable to protect individuals in their jurisdiction from torture by non-governmental groups and the only difference was that in those cases, a *de jure* government still existed.[244] The underlying principle of the Committee's reasoning seemed to be that inability to protect a person from non-state actors was distinguishable from unwillingness to take reasonable steps of protection, as it was the case in *Dzemajl*.[245] It seemed that in order to satisfy the "consent or acquiescence" requirement, something more than "inability to act" was needed, and that as long as a government did not agree with the conduct of the non-state actors in general, it could not be seen to acquiesce in its actions.[246] This can be contrasted to the above-discussed jurisprudence of the European Court in *Opuz v Turkey* and *O'Keeffe v Ireland*, in which the state's inability to act (caused by the failure to have certain laws or policies in place) did lead to its responsibility under the prohibition of torture.[247]

I would thus argue that, compared to the obligations of protection and prevention under the due diligence standard, this early reasoning of the CAT implied that the state

[242] See McCorquodale,Robert, 'Taking Off the Blindfolds: Torture by Non-State Actors' in McCorquodale, Robert (ed.), *International Law Beyond the State. Essays on Sovereignty, Non-State Actors and Human Rights*, 2011, p 213.
[243] See *Elmi v Australia*, CAT (1998), paras. 5.5, 6.5.
[244] Joseph & Castan, p. 225.
[245] Ibid., p. 224.
[246] Edwards, 2011, p. 246.
[247] See above in 5.1.

was to be held responsible for violence by non-state actors only under much more restricted circumstances. Applied to situations of violence against women by private individuals, this jurisprudence suggested that there were no preventive obligations for states unless their authorities were directly witnessing the attack and nonetheless failed to intervene (as it was the case in *Dzemajl*). While there might have been some room for interpretation concerning the extent to which the authorities had to be purposefully refusing to act in order to be considered to "acquiesce", it is highly doubtful that, under this early jurisprudence, the state's preventive duties could have amounted to an obligation to have certain laws or policies in place as it was required in the cases of *Opuz* and *O'Keeffe*. It can be envisaged that the absence of such laws and policies would have been interpreted by the CAT as causing the authorities' inability to act in concrete cases, which – as has been shown above – seemed not to satisfy the requirement of "acquiescence".

However, it has been pointed out by commentators that the elements of "consent or acquiescence" could be interpreted in a much broader way and that the CAT has not been attuned to the interpretative scope of these concepts in its early jurisprudence.[248] For example, in one of the above mentioned cases (*G.R.B. v Sweden*), the complainant submitted that she had been raped by members of a terrorist group at whose hands she feared to be ill-treated upon her return to Peru, and that the police had shown no interest in the matter when the incident was reported.[249] The CAT, however, did not analyse whether this could amount to "acquiescence" by the state;[250] in fact, the Committee did comment on this part of the complaint at all.[251] These cases thus indicated that the threshold of "consent and acquiescence", as interpreted by the CAT, was indeed higher than that under due diligence.

In contrast to the above discussed jurisprudence, the CAT expressed a much more expansive understanding of the definition of torture in its 2008 General Comment No. 2

[248] Edwards, 2011, p. 246; McCorquodale, 2011, p. 205.
[249] *G.R.B. v Sweden*, CAT (1998), para. 2.3.
[250] As McCorquodale has argued, this would have required the CAT to decide whether the government of Peru had properly investigated the rape, how many rapes reported had not been investigated and whether the non-state actors were able to rape due to the lack of state action; see McCorquodale, 2011, p. 205.
[251] See ibid.

on the implementation of Article 2 by state parties, stating that states' responsibility can be engaged in cases where the authorities "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" these acts.[252] In these cases, state officials should be considered as "authors, complicit, or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[253] In addition to the significant fact that the Committee explicitly referred to the due diligence standard (which will be discussed below), it can be noted that this formulation implies more far-reaching duties of prevention for states than what was suggested by the Committee's earlier jurisprudence. The wording "know or had reasonable grounds to believe" resembles the formulation used by the European Court discussed above ("knew or ought to have known") and clearly goes beyond situations in which the state authorities witnessed violations by private actors directly. Thus, it can be argued that it is no longer necessary for the state to "exhibit acquiescence to each single act of abuse.[254]

Moreover, the Committee explicitly pointed to the application of 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."[255] Feminist scholars have thus praised the adoption of this General Comment as a key achievement concerning the Committee's approach to violence against women,[256] pointing also to other parts of the comment that indicate a more expansive interpretation of Article 1 UNCAT generally, and a more gender-inclusive approach in particular. For example, a whole section of the comment was dedicated to the "protection of individuals and groups made vulnerable by discrimination or marginalisation"[257], mentioning "gender" as one of the grounds of vulnerability, and stating that "the protection of certain […] marginalised

[252] Ibid., para. 18.
[253] Ibid.
[254] See also Gaer, Felice, 'Rape as a Form of Torture. The Experience of the Committee against Torture' in *CUNY Law Review*, Vol. 15, 2012, pp. 301, 302.
[255] GC No. 2 (CAT), para. 18.
[256] See Gaer, 2012. Copelon, Rhonda, 'Gender Violence as Torture: The Contribution of CAT General Comment No. 2' in *CUNY Law Review*, Vol. 11, 2008.
[257] See GC No. 2 (CAT), section V. (paras. 20 – 24)

individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment."[258] Further, the comment points to contexts "where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm",[259] which can be interpreted to apply to situations of violence against women by private actors, such as domestic violence by intimate partners or rape by other private individuals.

Lastly, with regard to the extension of preventive duties for private acts in general, it should be noted that the General Comment emphasised the obligation to take preventive measures transcended the items enumerated specifically in the Convention,[260] and stated that it was "important" that the general population be educated on the history, scope, and necessity of the prohibition of torture and that law enforcement and other personnel be trained to recognise and prevent ill-treatment.[261] Whether this means that, in the future, a failure to carry out such far-reaching preventive measures could actually be held to lead to a breach of the UNCAT in individual cases of ill-treatment remains to be seen.[262] The CAT has clearly demonstrated, however, that it is now willing to interpret the elements of "consent and acquiescence" in a much broader way than in its earlier jurisprudence, leading to higher requirements of preventive measures for states, and that it is was aware of the particular risk of torture women face in the private sphere.

In line with this new approach, the Committee has found a violation of Article 3 UNCAT (non-refoulement) in a recent case where the risk of torture was based on the potential acts of both state officials and non-state actors.[263] The complainants, a mother and her daughter, had claimed they feared to be subjected to rape if they were to be returned to the Democratic Republic of the Congo (DRC). In this case, the Committee considered the general danger of sexual violence in the DRC, without distinguishing between rape by state officials and members of non-state armed groups and civilians and concluded that, given the "alarming levels of violence against women across the country", there were substantial grounds to believe that the complainants were in danger of being

[258] Ibid., para 21.
[259] Ibid., para. 15.
[260] Articles 3 and 15 of the UNCAT list specific preventive measures.
[261] GC No. 2 (CAT), para. 25.
[262] See also below at Chapter 6.
[263] *Njamba and Balikosa v. Sweden*, CAT, 14 May 2010.

subjected to torture.[264] While the Committee did not elaborate on whether or not it considered the government to acquiesce in the actions of these non-state actors, leaving its conceptual approach rather unclear, the decision can be read as a confirmation of the CAT's growing willingness to move away from the restrictive interpretation of the torture prohibition in its early jurisprudence.[265]

6. Conclusion

Violence against women, such as domestic abuse by intimate partners and rape by other private individuals has not traditionally been considered torture, as it falls outside the scope of how torture was conceptualised when the relevant prohibitions were formulated in human rights law (see Chapter 2.3). However, a comparison between acts of violence against women and such acts traditionally imagined to constitute torture has revealed significant parallels with regard to the level of pain and suffering as well as the underlying purposes of domestic abuse and rape on the one hand, and "traditional" forms of torture in state detention on the other hand (see Chapter 3.1). Apart from the trivialisation of violence against women, the state actor requirement of the torture definition in human rights law has been identified as the major obstacle to the recognition that these forms of violence against women can fall within the scope of the prohibition of torture; this is because acts such as domestic violence and rape are committed by private individuals who are not accountable under the state-centric system of human rights law (see Chapter 3.2). The public/private distinction in human rights law, which feminists have argued to disadvantage women, is therefore also entrenched in the male-gendered prohibition of torture, in particular in the definition of torture in Article 1 of the UNCAT, as it explicitly contains and element of public officialdom (see Chapter 3.1.3).

However, the jurisprudence of human rights bodies has shown that there is room to accommodate privately inflicted harm within the system of human rights generally, and the prohibition of torture in particular. While – unlike in international criminal law –

[264] Ibid., paras. 9.5, 9.6.
[265] See Gaer, 2012, pp. 305, 306.

private perpetrators of torture cannot be held directly accountable under human rights law, states can be responsible for their acts if a link can be established between these acts and public authorities (see Chapter 4).

With regard to the prohibition of torture, state responsibility can be established either through the concept of "due diligence" (as it is done, for example, in the jurisdictions of the European Court of Human Rights, the Inter-American Court of Human Rights and the Human Rights Committee), or through the element of "consent or acquiescence" (which is required by the torture definition of the UNCAT). The standard of due diligence requires states to respond to human rights violations by private actors by investigating, prosecuting and punishing these acts, but also to *prevent* abuses (see Chapter 2.2.3).

It is this duty to prevent that has been the subject of study in Chapter 5. Two questions have been discussed in this context: Firstly, what is the extent of this positive state obligation, i.e. how far-reaching are the measures of prevention that a state is required to take in order to not be responsible for violations by private actors? Secondly, is the required extent of prevention different for the concepts of "due diligence" and "consent or acquiescence"?

The examination of relevant case-law has revealed a clear expansion of the required degree of prevention in relation to both concepts. As regards the doctrine of due diligence, the regional courts in the European and the Inter-American system have contributed most significantly to the jurisprudential development of preventive duties posed on states. From the case flow of both courts, a clear evolution has been observed: while in earlier cases, the state was only found to be responsible for violations if it failed to intervene in cases where it was aware of a concrete risk to a specific person, the scope of the duty to prevent was gradually expanded to include failures on a more general level, such as a lack of certain laws or policies (see Chapter 5.1).

With respect to the CAT and its application of the elements of "consent or acquiescence", a review of its early jurisprudence has shown that this requirement was in fact interpreted much more restrictively than the due diligence standard as developed by

the above-mentioned bodies. Thus, the feminist argument that the state actor requirement in the UNCAT definition is particularly problematic for its application to violence against women seemed to be confirmed by the CAT's earlier interpretation of "consent or acquiescence". However, in General Comment No. 2 the Committee against Torture has indicated its willingness to interpret these elements more broadly in the future and demonstrated its heightened awareness of the particular vulnerability of women in this context, both of which also seemed to be confirmed in its subsequent jurisprudence (see Chapter 5.2).

With respect to the questions stated above (what is the extent of preventive obligations in human rights law and is it different under the concepts of "due diligence" and "consent and acquiescence"?), I submit the following: Firstly, while the degree of preventive measures required under the jurisdiction of the UNCAT is less clear than under the jurisdiction of human rights bodies applying the due diligence standard when interpreting the prohibition of torture, the concepts seem to become more and more similar to each other in human rights law. For example, the Human Rights Committee, which usually follows the doctrine of due diligence,[266] has used the language of "acquiescence" in the above-discussed case *Wilson v Philippines*[267] to establish the responsibility of the state for the acts of private individuals. It is also worth noting that when the Inter-American Court first introduced the concept of "due diligence" to human rights law in its seminal decision *Vélasquez Rodríguez*, it actually referred to acquiescence in framing the due diligence standard, stating that

> "[w]hat 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 [my emphasis]."[268]

The Committee against Torture has, in turn, referred to the due diligence standard in its recent General Comment No. 2, explaining that where state authorities fail to exercise

[266] See discussion above in Chapter 2.2.3.
[267] See Chapter 4.1.
[268] *Vélasquez Rodríguez v Honduras*, IACtHR (1988), para. 173; see also Edwards, 2011, p. 250.

due diligence to prevent, investigate, prosecute and punish torture by non-state actors, the state should be considered to consent or acquiesce in these impermissible acts.[269]

Secondly, with regard to the concrete extent of preventive obligations posed on states under the prohibition of torture, it can be noted that there has been an evolution in the case law of the European and the Inter-American Court of Human Rights, with the former being particularly progressive. Under this jurisprudence, more is required from states than merely intervening in situations where the authorities are aware of a particular risk to an identified person. Both regional courts have found that a failure to have certain policies or laws in place can lead to a failure of states to comply with their preventive duties under the principle of due diligence in general,[270] and the European Court has advanced to actually holding a state responsible for privately committed acts of violence that became possible due to the state's lack of a protective structure, although the authorities did not have knowledge of a concrete risk to the individual person concerned.[271] I submit that these developments bear great potential for the expansion of states' obligations to prevent violence against women and could thus help to overcome the public/private distinction entrenched in the prohibition of torture. If states are required to adopt certain policies of prevention against such abuses as domestic violence and rape by private individuals, this can have a very real and important effect on women's lives.

The question remains, of course, which *kind* of preventive measures (in form of general policies or services) states would be required to have in place in order to comply with their preventive duties. I suggest that, to answer this question, guidance could be drawn from such specialised regional instruments as the Convention of Belem do Pará and the Istanbul Convention. While the former has been referenced by both Courts in their jurisprudence already (see Chapter 5.1), the latter will only enter into force on 1 August 2014, stipulating very concrete obligations for ratifying states, such as the provision of easily accessible shelters for victims of domestic violence (Article 23), the operation of a state-wide 24/7 telephone helpline free of charge (Article 24), and the

[269] See GC No. 2 (CAT), para. 18; see also above in Chapter 5.2.
[270] *"Cotton Field"* Case, IACtHR (2009); *Opuz v Turkey*, ECtHR (2009); see above at 5.1.
[271] *O'Keeffe v Ireland*, ECtHR (2014).

establishment of rape crisis centres to provide for medical and forensic examination, trauma support and counselling for victims (Article 25). While at this point in time it seems unrealistic that these obligations would be interpreted to be benchmarks for state obligations, with a failure to carrying them out resulting in a breach of the torture prohibition, there is certainly potential to use these standards as a point of reference also for states' obligations under the prohibition of torture in the future.

As Rhonda Copelon has said, recognising violence against women as torture has "heuristic, cultural and personal value".[272] This thesis has aimed to show that, in addition to the more abstract value of alerting perpetrators, victims and the general public to the special gravity of this form of violence, its re-conceptualisation has the potential to lead to very concrete improvements in women's lives. Through progressive international human rights jurisprudence, developing and advancing states' positive obligations to prevent privately committed violence, a higher standard of women's protection from abuses such as domestic violence and rape can be reached; the public/private distinction can thus be at least mitigated.

[272] Copelon, 2011, p. 263.

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