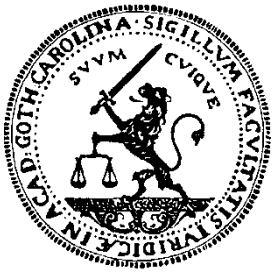

FACULTY OF LAW
Lund University

Sofie Flodman

Systemic Violence against Women as a Violation of International Human Rights Law

Master thesis
30 credits

Supervisor: Ulrika Andersson

Master´s Programme in International Human Rights Law

Spring 2012

Contents

Summary

Notwithstanding the extensive prevalence of violence against women, with its devastating consequences, this violence is a neglected issue within the international human rights regime. These acts of violence are not one-off incidents, isolated from one another – the violence is structural and systemic and thereby the state has a responsibility. Nevertheless, violence committed by private individuals has been, and still is to quite some extent, seen as a private issue and states have been reluctant to interfere at the same time as it has been an issue falling within the states' sovereign powers.

The internationalising elements of systemic violence are, however, to an ever-increasing extent being recognised. Today, we can with certainty claim that systemic violence against women is an issue within the international human rights regime, but can we claim that there is an international law prohibiting systemic violence? By analysing international instruments and bodies, the thesis strives to find an answer to this question.

In the process of clarifying the notion of systemic violence against women, this thesis is as well examining the criticism of the gendered nature of the public/private dichotomy, as demonstrated by radical feminist legal theory. This is mainly done in the light of the international provisions on torture.

After analysing international instruments and bodies, this thesis concludes that there is an international human rights law prohibiting systemic violence. If adopting a contemporary approach to customary international law, there is authoritative evidence of a universal legal principle prohibiting systemic violence. Further, there is such a prohibition due to the fact that systemic violence impairs or nullifies a woman's ability to enjoy her human rights – systemic violence is not a violation of human rights *per se*. Moreover, in order to adequately crystallise systemic violence as a violation of international human rights law, there is a need of additional work such as: to specify the substance of different forms of systemic violence as well as the responsibilities of states; to integrate systemic violence into mainstream instruments and bodies and; to acknowledge systemic violence as a violation of human rights *per se*.

Sammanfattning

Oaktat att våld mot kvinnor är så omfattande och med de förödande konsekvenser som det innebär, är detta våld ett försummat problem inom de internationella mänskliga rättigheterna. Våld mot kvinnor är inte enskilda och isolerade händelser – våldet är strukturellt och systematiskt och därmed har staten ett ansvar. Likväl har våld som begås av privata individer setts som en privat fråga, vilket det fortfarande ses som i stor utsträckning, och stater har varit motvilliga till att ingripa samtidigt som detta problem har varit en del av staters självbestämmanderätt.

De internationella elementen hos systematiskt våld mot kvinnor börjar emellertid i allt större utsträckning att bli erkända. Vi kan idag med säkerhet påstå att systematiskt våld mot kvinnor är ett högst aktuellt ämne inom de internationella mänskliga rättigheterna, men kan vi påstå att systematiskt våld mot kvinnor är förbjudet inom internationell rätt? Genom att analysera internationella instrument och organ, ämnar denna uppsats att hitta ett svar på denna fråga.

I processen att klargöra hur systematiskt våld mot kvinnor mottas inom den internationella rätten undersöker uppsatsen dessutom den kritik som radikalfeminismen framför av den delning som görs mellan den privata och den publika sfären inom de internationella mänskliga rättigheterna. Denna analys görs huvudsakligen i ljuset av de internationella föreskrifterna om tortyr.

Efter att ha analyserat internationella instrument och organ dras slutsatsen att systematiskt våld är ett brott mot de internationella mänskliga rättigheterna. En tillämpning av den moderna teorin om hur internationell sedvanerätt uppkommer visar att det finns auktoritativa bevis på att systematiskt våld är förbjudet inom den internationella rätten. Denna rättsliga princip består i att systematiskt våld hindrar kvinnor från att åtnjuta sina mänskliga rättigheter – systematiskt våld är inte ett brott mot de mänskliga rättigheterna i sig. För att ytterligare stärka och befästa systematiskt våld som ett brott mot de mänskliga rättigheterna behöver fler åtgärder att vidtas, exempelvis: att definiera olika typer av systematiskt våld likväl som att specificera vilket ansvar stater har; att integrera systematiskt våld inom internationella instrument och organ med en bred omfattning och; att erkänna systematiskt våld som ett brott mot de mänskliga rättigheterna i sig.

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DEWAV	Declaration on the Elimination of Violence against Women
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Problem

Violence against women is universal and it is not random – the common denominator is being a woman. Women face violence at the hands of the state, the community and the family. It is prevalent in every society in the world and it cuts across boundaries of culture, ethnicity and wealth. The violence is a result of historically unequal power relations between women and men and the inequality is structural and systemic. It has been claimed that '[v]iolence against women is the greatest human rights scandal of our times'[1].

The perpetrator is in most cases a private individual, not a state agent, and most girls and women are abused by someone they know – a husband, a boyfriend, a father, a brother, an uncle or a friend. Violence committed by private individuals has been, and still is to quite some extent, seen as something only concerning the individuals themselves and since occurring within the private sphere, states have been reluctant to interfere. This non-interference involves an acceptance of violence against women and contributes to its continuance.

Due to the conception of the private nature of this form of violence, it has been an issue falling within the states' sovereign powers, thereby a neglected issue within the international human rights regime. Governments, courts and policy-makers are, however, to an ever-increasing extent recognising the public and internationalising elements of systemic violence against women.

Today, we can with certainty claim that systemic violence against women is an issue within the international human rights regime, but can we claim that there is an international law prohibiting systemic violence? By analysing international instruments and bodies, the thesis strives to find an answer to this question.

What I claim is that the right to be free from systemic violence shall qualify as an international human rights law. I claim this due to the severe and dreadful nature of this form of violence and my idea of international law as being an important body of law in regulating state behaviour by setting a standard for states to endeavour.

[1] Amnesty International, 'It's in our hands: Stop violence against women' (Amnesty International Publications 2004) 1

1.2 Purpose and research questions

The general purpose with this thesis is to examine international instruments and bodies to clarify the notion of systemic violence against women as a human rights violation. By doing this, the thesis aims to contribute to an understanding of the need of further advancement in order to adequately incorporate systemic violence into the human rights regime – in terms of systemic violence as a violation of international human rights law.

A minor part of the analysis of the notion of systemic violence within the regime will be composed of an examination of the criticism of the gendered nature of the public/private dichotomy, as demonstrated by radical feminist legal theorists. This analysis is thought of as being a tool in the process of clarifying the notion of systemic violence against women as a human rights violation.

To fulfil this purpose, the following research questions are important and appropriate to examine:

- What are the sources of international law and how do we know if a violation of a right has reached the status as an international law?
- Radical feminist legal theory is criticising international human rights law for not encompassing women's rights and argue the main obstacle being the gendered nature of the public/private dichotomy – what does this critique imply?
- How is systemic violence received and answered in international instruments and bodies?
- How is the gendered nature of the public/private divide visible when studying the international provisions on torture?

1.3 Scope and delimitations

In order to examine these questions, the thesis will focus on the main international institution, namely the United Nations (UN) and its organs. However, as being far from the only institution creating policies and principles there is a need to scrutinise other bodies as well. Therefore, the thesis will likewise examine instruments and bodies of the Council of Europe, the Inter-American system as well as the African system.

There will be a presentation of the sources of international law with a focus on customary international law due to its importance when studying human rights law. There are two main approaches to customary international law, the traditional and the contemporary, which will be examined.

Further focus in this thesis will be put on literature written by radical feminist theorists in order to examine what is implied when claiming that the human rights regime is gendered.

This thesis will only examine violence against women, thus having a gender-perspective due to its analysis of the intersection between gender and violence. I refer to the victim as female and the perpetrator as male. This means that when speaking of systemic violence and other forms of violence I refer to violence committed by men against women only.

The restricted scope of this thesis makes it necessary to make delimitations as to coverage. If there is a principle in international law prohibiting systemic violence, states have a corresponding duty to protect women. This means that states must take reasonable steps and implement certain measures in order to fulfil this obligation. The substance and nature of these measures will not be examined in this thesis. Consequently, focus is on whether there is a principle in international human rights law prohibiting systemic violence and not what such an obligation entails.

1.4 Method, theory and sources

The method used in this thesis can be defined as a 'traditional legal method'. This involves a consultation of different legal sources in order to answer the research questions – both primary sources and secondary sources. All sources have been carefully selected in order to produce a result of high reliability.

When examining the sources of international law my method has involved turning to both primary sources, *i.e.*, the Statute of the International Court of Justice (ICJ Statute), as well as to secondary sources in the form of academic literature addressing and elaborating on the nature of the sources of international law. When analysing the gendered nature of the public/private dichotomy, writings of prominent radical feminist legal scholars have been examined. Further, my method when studying the notion of systemic violence within the human rights regime has comprised analysing international conventions, declarations, resolutions and reports as well as jurisprudence of international courts and treaty monitoring bodies. In addition to strictly academic material, official websites of UN, Council of Europe, Organization of American States and African Commission have been used.

The thesis is partly having a radical feminist legal perspective. The criticism of the gendered nature of the public/private dichotomy, as demonstrated by radical feminist legal theory, will be studied and thereafter used as a tool in analysing the notion of systemic violence within the regime. This perspective has been chosen for two main reasons; my personal curiosity in learning about this criticism and the value of the critique in the light of the regime in present time.

1.5 Disposition

This thesis will have the following structure. The chapter following this introduction, Chapter 2, provides a background to systemic violence in connection to international human rights law. First, the reader is provided a presentation of systemic violence and how it is understood in this thesis. Its internationalising elements will also be analysed. Thereafter, there will be a short introduction to the doctrine of state responsibility as well as an examination of the sources of international law. The chapter is meant to provide the reader with some basic knowledge needed in order to grasp the following study.

Chapter 3 is examining what radical feminist theory argues to be the main reason for the marginalisation of women's rights – the public/private dichotomy. The chapter opens with explaining what this divide signify, before analysing what this school of thought refers to when claiming that the divide is gendered.

Subsequently, Chapter 4 provides an analysis of international instruments and bodies. This chapter is disposed differently than the other chapters in this thesis. After studying a specific category of instruments or a specific institution there is a subchapter providing the reader with some implications and comments. The desire is to make the research more clear and comprehensible, as there are quite a big number of instruments being studied. This chapter ends with an analysis of the international provisions on torture in the light of systemic violence against women as well as the criticism examined in Chapter 3.

Lastly, in Chapter 5, the results of the thesis are analysed and later summarised and concluded in Chapter 6.

2 Systemic violence – its nature and place in international law

This chapter will serve as an introduction to systemic violence and its place in international law. I claim that the right to be free from systemic violence shall qualify as an international human rights law. Following this claim, there is a need to explain why I make this argument as well as what this entails. Further, the reader will be provided with a presentation of the sources of international law, having a focus on customary international law, as being of particular importance for international human rights law and, more specific, its importance for women's human rights.

2.1 Systemic violence

2.1.1 Definition of systemic violence and its internationalising elements

The thesis is focusing on a form of violence that will be referred to as systemic violence. This is not the same as systemic intimate violence. Systemic violence comprises systemic intimate violence but is broader in the sense that it also includes what is often referred to as acquaintance rape. This is understood as rape and other forms of sexual violence by a man whom the woman has just met or knows superficially. What I claim is that the right to be free from systemic violence shall qualify as an international human rights law. To claim that the right to be free from systemic intimate violence shall qualify as an international human rights law would leave this severe form of violence outside the responsibility of states.

Accordingly, the thesis has its focus on the abuse that falls within the definition of systemic intimate violence as well as acquaintance rape. To define systemic violence and to explain the difference between systemic violence and systemic intimate violence, I will use the definition of systemic intimate violence as understood by the legal scholar Bonita Meyersfeld in her book *Domestic Violence and International Law*.[2]

Meyersfeld's definition of systemic intimate violence encompasses five elements: 1) severe emotional or physical harm or the threat thereof; 2) a continuum of harm as opposed to one-off incidents; 3) committed predominantly by men against women within intimate relationships; 4) the victim belongs to a group more vulnerable to harm - in this case women as a group; and 5) the violence is systemic in the sense of states failure to

[2] Bonita Meyersfeld, Domestic Violence and International Law (Hart Publishing 2010)

intervene.[3] Meyersfeld refers to systemic intimate violence as constituting the severe forms of domestic violence.

International law only copes with severe forms of physical, psychological and emotional harm. This is evident if looking at, *i.a., A v the United Kingdom* where the European Court of Human Rights (ECtHR) argued that physical harm must reach 'a minimum level of severity'[4] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which is applicable when there has been 'severe pain and suffering'[5]. Michael Johnson, a sociology theorist, distinguishes between what he calls 'patriarchal terrorism' and 'common couple violence'. Johnson explains the former as acts of terrorism in the sense of patriarchal traditions of husband's and men's right to control their wives and women. This control is a systematic use of violence and other forms of abuse. 'Common couple violence' on the other hand, is not systematic and less a product of patriarchy. Johnson refers to these incidents as minor forms of violence.[6] The former should trigger the responsibility of states under international law whereas the latter should not. Although, it is debatable and questionable which acts of men's violence against women – if any – are not systemic and not a product of the patriarchal society that we live in, I find Johnson's two definitions of violence, to some extent, useful in explaining which acts of violence that should trigger international law. However, I would like to ask the reader to be very careful when making this distinction since the violence referred to as 'common couple violence' is only to be found in very exceptional cases. In addition, there may be a risk of states to abuse this distinction in order to escape from their international responsibilities.

The element of continuum of harm refers to the case where acts of violence individually are not being of a severe nature but when an accumulation of acts over a prolonged period of time, are sufficiently severe to pose a violation of the woman's human rights.[7]

The third element in Meyersfeld's definition of systemic intimate violence is the requirement of the abuse to appear between intimates. This element is necessary in order to label the abuse as domestic violence. As Meyersfeld describes, violence between intimates distinguishes from other forms of violence in society – one feature being the woman's ability to escape due to the abuse taking place in her private sphere, in her home.[8]

---

[3] Bonita Meyersfeld, Domestic Violence and International Law (Hart Publishing 2010) 111
[4] A v the United Kingdom App no 100/1997/884/1096 (ECtHR 23 September 1998) para 20
[5] UNCAT (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 art 1
[6] Michael P Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women' (1995) 57 Journal of Marriage and the Family 283, 285-286
[7] Bonita Meyersfeld, Domestic Violence and International Law (Hart Publishing 2010) 118-122
[8] Bonita Meyersfeld, Domestic Violence and International Law (Hart Publishing 2010) 122-123

The fourth element is the vulnerability of women as a group to this form of violence. Violence against women is a product of traditional and historical attitudes where women are discriminated and dominated by men. Prejudice of stereotyped roles and practices justify violence as a form of control of women. The locus being the home, poses the queries of when state interference in the private sphere shall be justified. And the threat of increased violence if the woman is separating from the man, economic difficulties and the society's stigma against abused women, makes it difficult for her to leave the abusive relationship.[9]

The final element refers to the action of the state – or rather the lack of action. The violence is systemic in the sense that the state is failing to adequately protect women from violence – that is to prevent as well as to respond to this violence in the form of police investigation, prosecution, conviction, economic assistance, health care, shelters *etc*.[10]

Having the definition of systemic intimate violence, it is apparent that acquaintance rape does not fall within its definition. I have chosen to include this form of violence in my study since it has similar characteristics as systemic intimate violence. It is a form of severe physical, psychological and emotional harm, committed predominantly by men against women, the victim belongs to a group more vulnerable to harm and a group in society which is being discriminated, and the violence is systemic. What distinguishes an acquaintance rape from systemic intimate violence is that the former does not take place within an intimate relationship and as a consequence, it is normally a one-off incident.

Acquaintance rape, just as domestic violence, is structural and systemic and there is a high prevalence of acquaintance rape in all societies as well as a lack of response from state authorities. Therefore, I claim that the right to be free from both systemic intimate violence and acquaintance rape shall qualify as an international human rights law. Henceforth, when referring to both these forms of abuse, the term systemic violence will be used, whereas when referring to the former only, the term systemic intimate violence will be used.

2.1.2 An issue for international law?

It would not make sense to write a thesis with the purpose to examine international and regional instruments and bodies in order to find out about the notion of systemic violence as a human rights issue, without asking the question why it is useful – if it is – to formulate a norm prohibiting systemic violence in international law.

[9] Bonita Meyersfeld, Domestic Violence and International Law (Hart Publishing 2010) 123-134

[10] Bonita Meyersfeld, Domestic Violence and International Law (Hart Publishing 2010) 134-142

International law is often criticised for being a weak body of law. It is argued that the body lacks effective enforcement mechanisms and an authority with the competence and resources to ensure that states comply with their international obligations.[11] I claim, however, that international law is an important body of law in that it regulates state behaviour by setting a standard for states to endeavour. This theory, as opposed to compliance due to force, is supported by legal scholars and can be referred to as the 'theory of non-coercive state compliance'[12].

International law has an expressive as well as an implementing function. To label a form of harm, which falls outside the scope of the international legal framework, is to classify a lawful behaviour as unlawful. This expressive character of international law has a reformative effect in the way that it exerts an influence on national laws. The implementing function of international law requires states to change their laws in order to correspond with international standards.[13]

The identification of mass rape by the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia, is an example of the expressive value of international law.[14] Prohibiting a conduct in international law, gives international bodies the tool to hold states responsible for its failure to protect its people at the same time as it puts a pressure on states to change its national laws – either through compulsion or through non-coercive means. Female genital cutting, which is a form of gender-based violence, is another example of a struggle within the international community that has had a great influence on domestic legal systems.[15]

Having this knowledge, I argue that prohibiting systemic violence in international law would have a not insignificant potential to change how states respond to this form of abuse.

---

[11] See *e.g.* Harold Hongju Koh, 'Why do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599, 2610-2611; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935

[12] Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2010) 252-254

[13] Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2010) 266-269

[14] See *e.g.* the analysis by Meyersfeld in Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2010) 269-274

[15] See *e.g.* the analysis by Meyersfeld in Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2010) 279-283

2.2 Doctrine of state responsibility in relation to systemic violence

If we would conclude that systemic violence is an international human rights violation, the state would have a corresponding duty to protect this right. This means that if the state fails to protect a woman from systemic violence, the state would be in breach of international law and accordingly, the principles of state responsibility would be applicable. This subchapter will briefly identify the principles of the doctrine of state responsibility.

The doctrine of state responsibility holds a state responsible for '[e]very internationally wrongful act'[16]. There are two elements of an internationally wrongful act: first, the act or omission shall be attributable to the state under international law; second, the act or omission shall constitute a breach of an international obligation.[17] This doctrine distinguishes between two sets of rules. The primary rules of state responsibility define the content of state responsibility, whereas the secondary rules define the obligations that arise when a state violates a human right.[18]

Originally, the focus of the doctrine was on direct action of the state in the public sphere, *i.e.*, when a state organ or a state agent conducted a wrongful act.[19] As a response to the fact that state agents are not the sole – or even the primary – perpetrator of human rights violations, the doctrine has been re-interpreted and expanded to hold the state accountable for violations that was not originally considered human rights issues. Accordingly, states can be held liable for failing to meet their international obligations even when substantive breaches of human rights are derived from the acts of private individuals. The recognition to hold a state accountable for its failure to exercise due diligence in preventing, investigating and punishing violations of non-state actors was recognised in the case of *Velasquez Rodriguez v Honduras*.[20] According to this theory, a state has a duty to 'take reasonable steps to prevent human rights violations and to use the means at the state's disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'[21]. This development of state responsibility is particularly important in the case of systemic violence since this violence is taking place within the private sphere.

---

[16] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) UN Doc A/56/10 art 1
[17] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (November 2001) UN Doc A/56/10 art 2
[18] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (November 2001) UN Doc A/56/10 para 1
[19] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (November 2001) UN Doc A/56/10 chapter II
[20] *Velasquez Rodriguez v Honduras* (IACtHR 29 July 1988)
[21] *Velasquez Rodriguez v Honduras* (IACtHR 29 July 1988) para 174

2.3 Sources of international law

There is no doubt that violence against women is a global human rights concern. There are countless of international instruments, bodies, reports and statements, focusing on and discussing violence against women. Despite this attention within various areas of the human rights regime, there is less clear whether a prohibition of systemic violence is part of international law. This subchapter will examine the sources of international law with the aim to serve as a foundation when analysing international instruments and bodies in Chapter 4.

2.3.1 Generally accepted sources

There are four recognised sources of international law, being: 1) treaties and conventions; 2) customary international law; 3) general principles of law; and 4) legal jurisprudence.[22] These sources are defined in article 38 of the Statute of the International Court of Justice (ICJ Statute).[23] The Permanent Court of International Justice, later replaced by the International Court of Justice (ICJ), was established as the first permanent international court to settle controversies between states. Thereby, there was a need to decide on the applicable sources of law.[24] However, it is argued that article 38 of the ICJ Statute is inadequate in the way that there are other sources of international law not mentioned in this provision. UN resolutions and declarations are two of these sources.[25] This will be further discussed below.

The most authoritative sources of international law are treaties and conventions. A treaty or a convention binds a state when the state has signed the same and thereby the state is obliged to fulfil the principles contained in the specific instrument. The binding nature of a treaty is stated in the Vienna Convention on the Law of Treaties (VCLT).[26]

Customary international law is an 'international custom, as evidence of a general practice accepted as law'[27]. It consists of two elements: 1) a consistent practice of states, being both widespread and established; and 2) *opinio juris* – a subjective element understood as the belief that the state is obliged to do what it is doing. In other words, the state is acting in

[22] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 115
[23] ICJ Statute (adopted 26 June 1945, entered into force 24 October 1945)
[24] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 118
[25] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 119, 136-137. See also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007)
[26] VCLT (adopted 23 May 1969, entered into force 27 January 1980) art 26
[27] ICJ Statute (adopted 26 June 1945, entered into force 24 October 1945) art 38 (b)

accordance with international law from a sense of legal obligation.[28] This was later re-stated in the ICJ judgement, *North Sea Continental Shelf*.[29] Due to the complexities of customary international law and its importance to answering the research questions, this source will be further discussed in the next subchapter.

General principles of law are to be turned to in the case where the issue in question is not regulated in any treaty and there is no established rule of custom. Legal scholars have not come to an agreement on the nature of these principles. It is suggested that these general principles of law can be derived from various systems of municipal law when shared and developed by a majority of them.[30] The subsidiary sources, the fourth source as declared by the ICJ Statute, are judicial decisions and teachings. This comprises judgements of international and regional courts and national jurisprudence as well as teachings of respected legal scholars.[31]

2.3.2 Complexities of customary international law

Customary international law has become an important source of law in the area of human rights. As will be discovered in Chapter 4, there is no international treaty prohibiting systemic violence or systemic intimate violence, thus render the necessity to analyse customary international law.

The elements of customary international law are problematic and they raise a number of questions. When is a practice widespread? How does one determine what states actually believe as opposed to what they say? What if a state agree that something is law but at the same time fails to comply with the same? Is custom or *opinio juris* weightier?

The number of states needed in order to fulfil the requirement of a widespread and consistent state practice is particularly important in regard to systemic violence, having in mind the lack of criminalisation of this form of violence in many states of the world. It is argued that a practice must not be applied in every single state as long as it is consistent and widespread.[32] An important element of a customary international law is its generality. It is proposed that two main factors shall be taken into account: 1) 'express acceptance of the rule by a reasonable number of states belonging to various

[28] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 122
[29] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark/Netherlands)* ICJ Reports 1969 para 77
[30] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 127-129
[31] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 129-130
[32] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 124

regional groups and representing different political, economic and ideological approaches'[33]; and 2) 'acquiescence by other states'[34]. This concludes that the conduct of states shall be consistent in general. If a state does not comply with a given rule, this should be seen as a breach of customary international law rather than as recognition of a new rule. This is the case even when there are several states acting inconsistent with a specific rule.[35] Further, it is argued that customary international law can develop already when a principle is generally accepted at an international conference. That means that a rule can become customary international law before the actual convention has been signed.[36]

To determine a state's actual belief is quite difficult, therefore, *opinio juris* is in this thesis understood as statements of belief and not actual beliefs. This means that a treaty is conceived as *opinio juris* rather than state action – it states the legality of state action.[37]

Given the high prevalence of violence against women in every community of the world and the reluctance of states to intervene in the private sphere, would it be correct to assume that systemic violence is not prohibited in customary international law? Due to the existence of violence, it is difficult to see that states are acting as if there was such a prohibition, as well as if they believe that they are legally obliged to act in conformity with the same. The problem of this so-called 'two-element theory'[38] has been argued and analysed by countless legal scholars. As a respond to this debate, there has developed two main approaches to customary international law, namely, traditional and modern or contemporary approaches.

2.3.2.1 Traditional approach

The traditional approach to customary international law emphasises state practice. This theory requires a general and consistent practice of states and perceives *opinio juris* as a secondary element in the sense that it determines whether the state is legally bound by a rule or not. The traditional approach is action-based but both elements must be present in order to constitute a legal rule.[39]

---

[33] Louis B Sohn, '"Generally Accepted" International Rules' (1986) 61 Washington Law Review 1073, 1074

[34] Louis B Sohn, '"Generally Accepted" International Rules' (1986) 61 Washington Law Review 1073, 1074

[35] Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 124-125

[36] Louis B Sohn, '"Generally Accepted" International Rules' (1986) 61 Washington Law Review 1073, 1077

[37] See *e.g.* Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation' (2001) 95 The American Journal of International Law 757, 757-758

[38] For this classification, see *e.g.* Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 122

[39] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation' (2001) 95 The American Journal of International Law 757, 757-758. There are other views as well within the traditional theory of customary

A study on the ICJ's interpretation of customary international law, as advocated by some legal scholars, suggests two additional elements: 1) the practice in question must be evident among a majority of 'specially affected' states; and 2) the practice must take place over a period of time.[40]

2.3.2.2 Contemporary approach

The contemporary approach is, as opposed to the traditional approach, primarily focusing on the subjective element – *opinio juris.*[41] It emphasises statements rather than state practice and principles in international human rights instruments derived from the Charter of the UN as well as other universal instruments, are recognised as legal rules.[42] Advocates of the contemporary theory argue that international principles of law can be derived from *i.a.*, declarations and resolutions adopted by the UN General Assembly, diplomatic correspondence, international and national judicial judgements, practice of international organs, domestic legislation, opinion of official legal advisers and a pattern of treaties focusing on the same issue.[43] Resolutions and declarations passed by the UN General Assembly, adopted unanimously or near-unanimously, demonstrate evidence of *opinio juris.*[44] Due to the features of this theory, contemporary custom can develop faster than traditional custom.

2.3.2.3 Traditional or contemporary?

There is support for the contemporary approach to customary international law, but it is contentious and has been criticised amongst legal scholars. Some of this support can be found in the jurisprudence of the ICJ. In the judgement of *Nicaragua v the US,* the ICJ claimed that non-binding General Assembly resolutions may be evidence of *opinio juris.*[45]

One main criticism of the contemporary theory is its lack of a general and consistent state practice – the lack of an inductive process. Thereby, it has been argued that it cannot be justified as a social phenomenon or a social

---

international law, however, this approach is argued to be the most accepted, see *e.g.* Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2010) 10-11

[40] Jo Lynn Slama, 'Opinio Juris in Customary International Law' (1990) 15 Oklahoma City University Law Review 603, 617-618

[41] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation' (2001) 95 The American Journal of International Law 757, 757-758

[42] Thomas Buergenthal, Dinah Shelton and David Stewart, *International Human Rights in a Nutshell* (4th edn, West 2002) 395

[43] Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 3

[44] J Patrick Kelly, 'The Twilight of Customary International Law' (1999-2000) 40 Virginia Journal of International Law 449, 484

[45] *Case concerning the military and paramilitary activities in and against Nicaragua* (*Nicaragua v the US)* (ICJ June 27 1986) cited in Patrick Kelly, 'The Twilight of Customary International Law' (1999-2000) 40 Virginia Journal of International Law 449, footnote 157

fact. Instruments being of a recommendatory nature, as resolutions and declarations, cannot serve as evidence of binding obligations as they are often enacted due to the fact that states are not willing to sign a treaty because of the legal commitment. Another argument, not in favour of the contemporary approach, is that state practice often is contrary to human rights norms.[46] The strength in this later statement is questionable. It may be a relevant argument in the case of other areas of international law, but of less relevance in the case of human rights – this area of international law is directly affecting the lives of people, regulating the most fundamental aspects of private life. Can we justify the traditional approach to customary international law when states are violating the most fundamental rights of people in the case of such grave acts as rape where fundamental values are at stake simply because the practice of states is contrary to these principles? That would, without doubt, be both inappropriate and offensive.

[46] J Patrick Kelly, 'The Twilight of Customary International Law' (1999-2000) 40 Virginia Journal of International Law 449, 484-489

3 Radical feminist critique of the human rights regime

3.1 Public/private dichotomy

International human rights law claims to protect fundamental rights of all human beings.[47] This is a statement feminist legal theorists do not agree with. Feminist legal theory criticises the human rights regime for the marginalisation of women's rights. In other words, they claim that women-specific experiences of human rights abuses have not been adequately recognised. This school of thought basically argues for the inclusion of women in the human rights protection system.

The criticism presented here is what radical feminist legal theory argues to be the main obstacle for the inclusiveness of women's rights, namely the gendered nature of the public/private dichotomy. The public/private divide is the central concept, which the human rights regime is based on and radical feminism argues for the need to erase this institutionalisation.[48] An examination of this dichotomy is particularly relevant in a study of systemic violence due to the private nature of this violence.

Following subchapter will describe and analyse what radical feminists mean when arguing the human rights regime to be gendered. The theory will thereafter, in Chapter 4, be applied to the torture provisions in international human rights law.

3.2 The gendered nature of the public/private dichotomy

Historically, women have been excluded from the public sphere of life, that is to say the labour market, education, politics *etc.* Places, which has been – and still is – dominated by men. Women, on the other hand, has been consigned to the private sphere of family and relationships with the primary responsibility of bearing and rearing children and taking care of the household, including taking care of the husband so that he can provide for the family. This boundary between the public and the private sphere was

[47] See *e.g.* Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

[48] See *e.g.* Nadine Taub and Elizabeth M Schneider, 'Women's Subordination and the Role of Law' in D Kelly Weisberg (ed), *Feminist legal theory: Foundations* (Temple University Press 1993); Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994)

more clear in former times, however, it is still evident in all societies of the world.

This split of women and men into different parts of the community has entailed a marginalisation of the experiences of women and their well-being within the human rights discourse – a conceptualisation of these issues as private issues has kept them outside the scope of international human rights law.[49]

This division can be found at two levels within the human rights discourse. At the first level is the question of which issues should come under international supervision – defined as human rights – and what should belong to the state's sovereign power – defined as a private issue. At the second level is the question of whether only the relationship between the individual and the state – the public sphere – should fall within the boundaries of international human rights law, or whether relationships between individuals – the private sphere – should as well come within the human rights framework.[50]

Men dominate both the public sphere and the private sphere. The public sphere is regulated by laws, whereas the law is largely absent in the private sphere, or there are laws but the states are reluctant to guarantee that women are protected in accordance with the same. The fact that laws to a large extent are absent in the private sphere, has in itself involved the male dominance and female subordination.[51]

3.2.1 State responsibility stops on the doorstep

As briefly described in Chapter 2, the doctrine of state responsibility defines the norms of a state's responsibility for an international wrongful act. Despite progresses of the doctrine to better protect women's rights, radical feminists argue that the gendered nature of the public/private divide is still reflected in the doctrine of state responsibility. This subchapter will explain what feminists refer to when criticising the second level of the public/private dichotomy.

International law was historically primarily concerned with the relations among states while international human rights law was originally focused

---

[49] See *e.g. Celina* Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994); Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters (ed), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995)

[50] Ivana Radacic, 'Human Rights of Women and the Public/Private Divide in International Human Rights Law' (2007) 3 Croatian Yearbook of European Law & Policy 443, 450-451

[51] Nadine Taub and Elizabeth M Schneider, 'Women's Subordination and the Role of Law' in D Kelly Weisberg (ed), *Feminist legal theory: Foundations* (Temple University Press 1993) 11-13

on violations committed directly by the state against individuals in the public sphere, in accordance with the idea of non-interference. Due to this focus, abuses of women within the home and private sphere have been left outside the scope of human rights. This conceptualisation of the human rights regime has resulted in an insufficient recognition of private acts of violence against women as human rights violations, since these acts are committed by private persons within the private sphere.[52]

Due to the fact that 'private' issues are left to the state's discretion, human rights have a great influence in the private sphere – by indirect means. The outcome of this divide, as argued, is to some extent a non-existing regulation of cultural and religious customs and practices that might allow, as well as render, the suppression and subordination of women.[53]

3.2.2 Human rights as male rights

Following subchapter is examining the criticism of the conceptualisation of human rights. Feminists argue that the gendered nature of the public/private divide can be seen in the primacy within the regime given to first-generation rights, *i.e.*, the civil- and political rights. This is done at the expense of the second-generation rights, *i.e.*, the social-, economic-, and cultural rights – despite the recognition of the indivisibility and interdependence of first and second generations of rights.[54] Civil- and political rights are constructed in accordance to what men fear will happen to them. This is often referred to as 'human rights are men's rights'.[55]

The liberal ideology reflected in the civil- and political rights discourse has predominantly been defined with the aim to protect individuals from direct governmental interference in private life. This has involved a contribution by states in the construction of the separation of private and public life.[56]

Economic discrimination against women is common in every part of the world. This involves discrimination within the labour market as well as within the family. Women are discriminated in many societies in respect of access to education and medical care. When women's access to economic sources is either hampered or denied, the consequence is women's dependency upon men, which in turn means a reinforcement of violence against women. In addition, the state is both constructing and sustaining the

---

[52] Alice Edwards, *Violence against women,* (Cambridge University Press 2011) 64-65
[53] Hilary Charlesworth and Christine Chinkin, *The boundaries of international law: A feminist analysis* (Manchester University Press 2000) 56-58
[54] Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights (adopted 15 December 1989) UNGA Res 44/130
[55] Hilary Charlesworth, 'What are "Women's International Human Rights"?' in Rebecca J Cook (ed), *Human rights of women: National and International Perspectives* (University of Pennsylvania Press 1994) 71
[56] Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters (ed), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 126-127

power relations by actively regulate some areas of law, such as maternity leave, parents' allowance, often in a way less favourable to women. The consequence is a contribution to the existing subordination of women and women's dependency upon men. Women are actively placed in the private sphere. This state of dependency is contributing to systemic violence.[57]

The language used in the law is also supporting the exclusion of women from the scope of the protection of human rights. It is argued that the use of a masculine vocabulary, *i.a.*, the use of the masculine pronoun, is working to directly exclude women, as well as in a more discrete and indirect way.[58] The UNCAT's definition of torture is exemplifying this criticism, as will be analysed later in this thesis.[59]

[57] Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters (ed), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 133-134

[58] Hilary Charlesworth, 'What are ”Women's International Human Rights”?' in Rebecca J Cook (ed), *Human rights of women: National and International Perspectives* (University of Pennsylvania Press 1994) 68

[59] See Chapter 4

4 Systemic violence in international instruments and bodies

This chapter will study international instruments and bodies with the aim to see how systemic violence is received and answered within the international human rights law regime. In the first part, UN instruments and bodies are analysed before exploring the approach of regional human rights law within three different regional systems – European, Inter-American, and African system. The chapter will end with an analysis of the international provisions on torture in the light of the gendered nature of the public/private dichotomy.

4.1 Systemic violence within UN instruments and bodies

4.1.1 The binding convention and its monitoring body

The first part of this chapter is examining the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[60] and the work of its monitoring body.

4.1.1.1 CEDAW

CEDAW, known as the women convention, was adopted by the UN General Assembly in 1979. It defines what constitutes discrimination against women and it sets up an agenda for appropriate measures and policies to eliminate discrimination against women.[61] The treaty brings the state into the private realm, however, violence against women is not at all mentioned in the text of CEDAW.

Although, there is no explicit reference to systemic violence or systemic intimate violence in the text of CEDAW, a prohibition on this violence may be deduced from article 1; a state's failure to protect a woman from this form of violence, which would have the effect of impairing or nullifying her

[60] CEDAW (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180
[61] CEDAW (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 arts 1-3

ability to enjoy her human rights, on the basis of sex, may be interpreted as falling within this provision.[62]

As of September 2012, 187 states are party to CEDAW.[63] This is more than 90 percent of UN's member states. However, it has one of the highest rates of reservations.[64] A number of them being of a significant nature, thus it may be questioned which legal obligations that can be deduced from CEDAW. [65] Some states have even made reservations to CEDAW's core provision, article 2,[66] despite the fact that a reservation may not be 'incompatible with the object and purpose of the treaty'[67].

There is no other international treaty specifically addressing violence against women. The thesis will therefore proceed to examine whether there are other international and regional instruments as well as jurisprudence of national and regional bodies providing any evidence of a prohibition of systemic violence in international customary law.

4.1.1.2 General Recommendation No 19

As examined above, the text of CEDAW is not explicitly addressing violence against women as a form of discrimination, aside from the provision dealing with prostitution and trafficking.[68] This omission was later – to some extent – corrected when addressed in General Recommendation No 19[69], where the CEDAW Committee declared that '[g]ender-based violence is a form of discrimination'[70]. Gender-based violence is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'[71]. It widened the definition of violence to

[62] See support for this interpretation in *i.a.* Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2010) 27
[63] See the official website of the UN Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed 7 September 2012
[64] The international law of treaties allows a state to make reservations to a treaty, see VCLT (adopted 23 May 1969, entered into force 27 January 1980) art 19
[65] To find out more about the nature of the reservations, see Jo Lynn Southard, 'Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women' (1996) 8 Pace International Law Review 1, 20-21
[66] See the official website of the UN Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed 7 September 2012
[67] VCLT (adopted 23 May 1969, entered into force 27 January 1980) art 19(c)
[68] CEDAW (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 art 6
[69] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38
[70] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38 para 1
[71] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38 para 6

encompass physical, sexual and psychological abuse, occurring both in the public and private spheres of life.[72]

The violence addressed is violence committed both by private and public actors and states may be responsible for private acts of violence if failing to act with due diligence.[73] Family violence is particularly addressed and it is conceived as a form of violence occurring in every society and affecting women of all ages.[74]

4.1.1.3 Jurisprudence of the CEDAW Committee

As discussed in Chapter 2, decisions of international bodies are sources of international law. This subchapter will analyse the jurisprudence of the CEDAW Committee.

The adoption of the Optional Protocol to CEDAW made it possible for the CEDAW Committee to receive communications by or on behalf of private individuals. Only states that have ratified the protocol are subject to this jurisdiction.[75] As of September 2012, 104 states are party to the Optional Protocol.[76] The first decision was adopted in 2002 and since then there have been ten decisions on communications. Three of these rulings address domestic violence, thus of importance for this thesis.

In the individual communication *Ms AT v Hungary*[77], the applicant claimed that she had been subject to severe domestic violence on several occasions by her husband. The woman claimed that the state was in breach of CEDAW for its failure to provide her effective protection. The CEDAW Committee found that the Hungarian state had failed in its obligations to prevent and protect the applicant from violence because of the lack of specific legislation to combat domestic violence and temporary protection such as shelter and restraining order. The applicant's human rights and fundamental freedoms were violated and particularly her right to security of person.[78]

---

[72] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38 para 6
[73] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38 para 9
[74] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38 para 23
[75] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) UN Doc A/RES/54/4 art 1
[76] See the official website of the UN Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en> accessed 7 September 2012
[77] *Ms AT v Hungary,* CEDAW Committee, Communication No 2/2003 (adopted 26 January 2005) UN Doc CEDAW/C/32/D/2/2003
[78] *Ms AT v Hungary,* CEDAW Committee, Communication No 2/2003 (adopted 26 January 2005) UN Doc CEDAW/C/32/D/2/2003 paras 9.3-9.6

In *Goekce (deceased) v Austria*[79], the woman was killed by her husband. She made several reports to the police, however, she was not consistent in her reports and she did not decide to leave her violent husband. Due to these circumstances, the state argued the difficulty to protect the woman from her husband.[80] This ambivalence is of frequent occurrence in situations of domestic violence and if the Austrian state had had this knowledge, their response would probably have been different.

In the case of *Fatma Yildirim (deceased) v Austria*[81], the woman was also killed by her husband after being abused during a long period of time. She made several reports and asked for the husband to be detained but the only response she got from the authorities was a discussion from the police with the husband.

Austria did have a comprehensive policy in regard to domestic violence. There was, however, a lack of enforcement.[82] The CEDAW Committee found that the state had failed to exercise due diligence in order to protect these women in both cases.[83] The Committee further stated that the 'perpetrator's rights cannot supersede women's human rights to life and physical and mental integrity'[84].

4.1.1.4 Implications and comments

So, what are the implications of CEDAW in relation to systemic violence? Since the text itself does not address this form of violence, a strict interpretation of international law – contemplate the treaty only – would result in the conclusion that systemic violence is not prohibited. Further, the number of reservations to CEDAW, have an effect on the existence of its principles in customary international law in relation to non-signatory states – both in terms of whether the provisions are customary international law as well as the substance of the same. This is due to the language of the reservations so one must examine those in order to find out about the exact reach in international customary law. However, since CEDAW in itself does not prohibit systemic violence, apparently neither would the provisions of CEDAW as international customary law prohibit systemic violence.

---

[79] *Goekce (deceased) v Austria,* CEDAW Committee, Communication (adopted 6 August 2007) No 5/2005 UN Doc CEDAW/C/39/D/5/2005

[80] *Goekce (deceased) v Austria,* CEDAW Committee, Communication (adopted 6 August 2007) No 5/2005 UN Doc CEDAW/C/39/D/5/2005 paras 4.13-4.14

[81] *Fatma Yildirim v Austria,* CEDAW Committee, Communication No 6/2005 (adopted 1 October 2007) UN Doc CEDAW/C/39/D/6/2005

[82] *Goekce (deceased) v Austria,* CEDAW Committee, Communication (adopted 6 August 2007) No 5/2005 UN Doc CEDAW/C/39/D/5/2005 para 12.1.2

[83] *Goekce (deceased) v Austria,* CEDAW Committee, Communication (adopted 6 August 2007) No 5/2005 UN Doc CEDAW/C/39/D/5/2005 para 12.1.4; *Fatma Yildirim v Austria,* CEDAW Committee, Communication No 6/2005 (adopted 1 October 2007) UN Doc CEDAW/C/39/D/6/2005 para 12.1.5

[84] *Goekce (deceased) v Austria,* CEDAW Committee, Communication (adopted 6 August 2007) No 5/2005 UN Doc CEDAW/C/39/D/5/2005 para 12.1.5; *Fatma Yildirim v Austria,* CEDAW Committee, Communication No 6/2005 (adopted 1 October 2007) UN Doc CEDAW/C/39/D/6/2005 para 12.1.5

General recommendations, as non-treaty instruments, are not binding upon states party to CEDAW. They are interpretations of the provisions in the Convention made by the CEDAW Committee – they are not instruments written and adopted by member states in the General Assembly. Although they provide important guidance on how to interpret and apply the actual text, the contribution to customary international law, on the other hand, is disputed.

In addition, General Recommendation No 19 does not state that violence against women is a violation of human rights in itself. What it does argue is that violence against women is a form of discrimination, which impairs or nullifies the enjoyment of her human rights.[85] The link between violence and discrimination is of course both important and correct but this liberal approach to systemic violence is inadequate in combating the same. However, more important in respect of the purpose with this thesis is the fact that systemic violence, within the framework of CEDAW, is not perceived as a violation of human rights *per se* – states are obliged to prevent, protect and investigate due to other human rights violations, such as the right to life and the right to liberty and security of person.

In *Ms AT v Hungary,* the Hungarian state acknowledged that it was not ready to secure the 'internationally expected'[86] protection for victims of domestic violence. By doing so, Hungary accepted both that there is such an international obligation as well as the fact that the state is compelled to comply with the same. Although, Hungary apparently lacked the conduct element, this statement is evidence of *opinio juris* – the belief that Hungary is obliged to adhere to this principle. Applying a contemporary approach, this communication may be evidence of a prohibition of domestic violence in customary international law.

An examination of the communications dealing with domestic violence reveals that the CEDAW Committee is focusing less on the link between violence against women and discrimination. However, the Committee is still not recognising domestic violence as a violation of human rights in itself. Being the monitoring body to the only women-specific treaty with an international reach, and still today perceiving domestic violence as a violation of a woman's human rights due to the fact that it violates other human rights, is noteworthy.

[85] CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38 para 7
[86] *Ms AT v Hungary,* CEDAW Committee, Communication No 2/2003 (adopted 26 January 2005) UN Doc CEDAW/C/32/D/2/2003 para 7.4

4.1.2 Non-binding gender-specific instruments and institutions

4.1.2.1 DEVAW

The Declaration on the Elimination of Violence against Women (DEVAW)[87] was adopted by the UN General Assembly in 1994. DEVAW refers to violence against women occurring in the family, in the public and violence attributable to the state.[88] Both domestic violence and non-spousal violence are specifically addressed in the text – physical, sexual and psychological.[89] It prescribes that states should prevent and investigate this violence, prosecute and punish the perpetrators, and provide remedy for the victim.[90]

4.1.2.2 Beijing declaration and platform for action

The fourth World Conference on Women took place in Beijing in 1995. The conference was hosted by the UN and 189 states were represented.[91] The Beijing Declaration, drafted at the conference, reveals that states are resolute to 'prevent and eliminate all forms of violence against women and girls'[92]. It refers to domestic violence in relation to health issues[93] and further claims that violence against women impairs and nullifies her ability to enjoy other human rights.[94]

4.1.2.3 The Special Rapporteur on violence against women

UN Commission on Human Rights appointed a Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur). The mandate of the Special Rapporteur is, *i.a.*, to find information on violence against women as well as receive such information and adopt and recommend measures to eliminate violence against women.[95] The Special Rapporteur is writing reports on specific forms of violence and doing country visits.

---

[87] DEVAW (adopted 20 December 1993) UN Doc A/RES/48/104
[88] DEVAW (adopted 20 December 1993) UN Doc A/RES/48/104 art 2
[89] DEVAW (adopted 20 December 1993) UN Doc A/RES/48/104 art 2(a)
[90] DEVAW (adopted 20 December 1993) UN Doc A/RES/48/104 art 4
[91] See the official website of UN Women <http://www.un.org/womenwatch/daw/beijing/beijingdeclaration.html> accessed 15 September 2012
[92] Beijing Declaration and Platform for Action (15 September 1995) UN Doc A/CONF.177/20/Add.1 para 29
[93] Beijing Declaration and Platform for Action (15 September 1995) UN Doc A/CONF.177/20/Add.1 para 100
[94] Beijing Declaration and Platform for Action (15 September 1995) UN Doc A/CONF.177/20/Add.1 para 224
[95] UNCHR Resolution 1994/45 (adopted 4 March 1994)

The second Special Rapporteur, Yakin Ertürk, has taken the standpoint that there is a rule of customary international law that obliges states to act in due diligence in order to prevent and respond to violence against women. As a base for her claim, Ertürk points at the practice of states and *opinio juris*.[96]

The Special Rapporteur's report on violence in the family provided a draft model legislation. The purpose was to assist states in their work of meeting and adopting the international requirements in regard to domestic violence. Stressing the legislative obligations of states has been answered in the way of enactment of special legislation on domestic violence in various states. As of 2006, 89 states were reported having legislation addressing domestic violence, while 60 of these states had specific domestic violence laws.[97]

4.1.2.4 Implications and comments

Declarations are not legally binding instruments. Adopting a contemporary approach to customary international law would however recognise DEVAW as a legal norm prohibiting violence against women – it is a UN General Assembly declaration adopted with a near-unanimous vote and a statement of the *opinio juris* of member states. Referring to article 2(a) of DEVAW, systemic intimate violence as well as systemic violence would consequently be prohibited if adopting the contemporary approach.

The fourth World Conference had a representative value, however, its merits in respect of systemic violence as a violation of international customary law is more doubtful. The Beijing Declaration does not claim that this form of violence is a violation of human rights in itself. At its best, the conference may bring the opinion of these states that all forms of violence against women is of an international concern and that states are responsible to prevent and protect women from systemic violence.

The appointment of a Special Rapporteur specifically targeting violence against women is a great contribution to the recognition of the international elements of systemic violence. The enactment of special legislation on domestic violence in various states may be evidence of states thinking there are international obligations to protect women from systemic violence and to respond to the same as well as the belief that they must comply with these obligations.

---

[96] UNCHR, 'The due diligence standard as a tool for the elimination of violence against women – Report of the Special Rapporteur on violence against women, its causes and consequences', Yakin Ertürk (30 January 2006) UN Doc E/CN.4/2006/61 para 29

[97] UN Special Rapporteur on violence against women, '15 Years of the United Nations Special Rapporteur on violence against women, its causes and consequences 1994-2009 – a critical review' (25 November 2008) 11-12 <http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf> accessed 20 September 2012

4.1.3 Mainstream UN instruments and bodies

4.1.3.1 UN General Assembly resolutions

UN General Assembly passed its first resolution on domestic violence in 1985, Resolution 40/36.[98] It invites member states concerned to take action in order to prevent domestic violence and to obtain appropriate assistance to victims.[99] It further invites member states to amend their criminal and civil legislation as to address domestic violence as well as adopt measures in order to enact and enforce these laws.[100] UN bodies and the Secretary-General are urged to take measures to combat domestic violence – elucidating its public element.[101]

Five years later, the second resolution on domestic violence was adopted by the UN General Assembly.[102] Although it was not until the third resolution on domestic violence was passed that, arguably, additional developments were taken – Resolution 58/147 on elimination of domestic violence against women.[103] The preamble states that 'domestic violence against women and girls is a human rights issue'[104]. It refers to domestic violence as not only occurring in marital relationships, but also between individuals related through blood or intimacy.[105] Of importance is also its recognition of domestic violence as being of a public concern and that it requires states to take serious action.[106] The resolution encompasses a specific reference to the responsibility of states to protect women from, and prevent, domestic violence also when this violence is condoned by the state.[107]

In 2005 the UN General Assembly passed Resolution 59/167 on the elimination of all forms of violence against women, addressing violence in the public as well as in the private sphere.[108] Resolution 61/143 on the intensification of efforts to eliminate all forms of violence against women recognises that all forms of violence against women violate her enjoyment of all human rights and fundamental freedoms.[109] This resolution is more precise and specific in how violence against women is perceived within the UN General Assembly in the way this form of violence is interconnected with poverty, health, economic and social standards, marginalisation of violence, and custom and religion, as well as in its recommendations to the states. It also stresses that there are obstacles in the implementation of the international standards in regard to violence against women and that states

[98] UNGA Res 40/36 (29 November 1985) UN Doc A/RES/40/36
[99] UNGA Res 40/36 (29 November 1985) UN Doc A/RES/40/36 art 2
[100] UNGA Res 40/36 (29 November 1985) UN Doc A/RES/40/36 art 7(a) and (b)
[101] UNGA Res 40/36 (29 November 1985) UN Doc A/RES/40/36 art 5
[102] UNGA Res 45/114 (14 December 1990) UN Doc A/RES/45/114
[103] UNGA Res 58/147 (19 February 2004) UN Doc A/RES/58/147
[104] UNGA Res 58/147 (19 February 2004) UN Doc A/RES/58/147 preamble
[105] UNGA Res 58/147 (19 February 2004) UN Doc A/RES/58/147 para 1(a)
[106] UNGA Res 58/147 (19 February 2004) UN Doc A/RES/58/147 para 1(d)
[107] UNGA Res 58/147 (19 February 2004) UN Doc A/RES/58/147 para 3
[108] UNGA Res 59/167 (22 February 2005) UN Doc A/RES/59/167 para 8
[109] UNGA Res 61/143 (30 January 2007) UN Doc A/RES/61/143 preamble

must criminalise all forms of violence.[110] Never before has the UN General Assembly, in a resolution, expressly taken the position that tradition and custom cannot be invoked as a justification for any forms of violence.[111]

Two additional resolutions on the intensification of efforts to eliminate all forms of violence against women were passed in 2008 and 2009.[112] The latter is adding to the obligations of states in combating violence against women. It develops and specifies the responsibilities of states in that it stresses the important role of the family and it urges the engagement of men and boys.[113] I argue that placing a bigger responsibility on men is a key factor in combating violence against women.

4.1.3.2 Other UN resolutions

The Office of the High Commissioner for Human Rights, with the mandate to promote and protect human rights all over the world and to mainstream human rights within the UN, has adopted a resolution addressing violence against women. It emphasises the duty of states to exercise due diligence to prevent, investigate and punish violence against women.[114]

The Commission on Human Rights and the Human Rights Council have also passed a number of resolutions addressing violence against women. The former has adopted resolutions that urge for the elimination of domestic violence and encourages other UN bodies to consider violence against women in their specific work.[115]

The Human Rights Council has passed resolutions that address the need to incorporate human rights of women into the work of the UN[116], emphasise the link between violence against women and discrimination and that strongly condemns all violence against women occurring both in the public and private sphere.[117] Moreover, it has requested treaty bodies and other bodies to analyse within their particular area of human rights how violence is affecting women, with the aim to incorporate this into their work.[118]

---

[110] UNGA Res 61/143 (30 January 2007) UN Doc A/RES/61/143 paras 4 and 6
[111] UNGA Res 61/143 (30 January 2007) UN Doc A/RES/61/143 para 5
[112] UNGA Res 62/133 (7 February 2008) UN Doc A/RES/62/133; UNGA Res 63/155 (30 January 2009) UN Doc A/RES/ 63/155
[113] UNGA Res 63/155 (30 January 2009) UN Doc A/RES/ 63/155 paras 6 and 15
[114] UNCHR Res 2002/50 Integrating the Human Rights of Women throughout the United Nations system (23 April 2002) UN Doc E/CN.4/RES/2002/50
[115] UNHCR Res 2001/49 Elimination of Violence against Women (24 April 2001) UN Doc E/CN.4/2001/49 paras 2, 22-26
[116] UNHRC Res 6/30 Integrating the Human Rights of Women throughout the United Nations system (14 December 2007) UN Doc A/HRC/6/30
[117] UNHRC Res 7/24 Elimination of Violence against Women (28 March 2008) UN Doc A/HRC/7/42 preamble, para 1
[118] UNHRC Res 6/30 Integrating the Human Rights of Women throughout the United Nations system (14 December 2007) UN Doc A/HRC/6/30 para 9

4.1.3.3 UN Secretary-General report

In 2006, the Secretary-General published the report *In-depth study on all forms of violence against women.*[119] In the report Kofi Annan, who was the Secretary-General at the time, classifies violence against women as a human rights violation, although not as a human right violation in itself. The classification encompasses both domestic violence and acquaintance rape. This conclusion is drawn from a study of various national and regional instruments and bodies.[120] The report is specific in its acknowledgment of a detailed and wide range of obligations of states in order to comply with the international obligation to prohibit violence against women.[121] It confirms that this violence is of a public concern[122] and recognises the high prevalence of both domestic violence and acquaintance violence.[123]

4.1.3.4 General Comment No 28

General Comment No 28 was adopted by the UN Human Rights Committee in the year of 2000, which is responsible for the implementation of the International Covenant on Civil and Political Rights (ICCPR).[124] This document is a commentary on article 3 of the ICCPR, which provides states to 'ensure the equal right of men and women to the enjoyment of all civil and political rights'[125], in the covenant. It refers to discriminatory actions taking place both in the public and the private sphere[126] as well as recognising that violations of women's rights have its roots in tradition, history, religion and culture.[127]

In the commentary, the UN Human Rights Committee further states that in order to comply with article 7 of the ICCPR, there is a need for states to provide information on domestic laws and practices with regard to domestic violence, rape and other forms of violence.[128] Article 7 of the covenant provides that '[n]o one shall be subjected to torture or to cruel, inhuman or

---

[119] UN Secretary-General, 'In-depth study on all forms of violence against women' (2006) UN Doc A/61/122/Add.1
[120] UN Secretary-General, 'In-depth study on all forms of violence against women' (2006) UN Doc A/61/122/Add.1 paras 30-37
[121] UN Secretary-General, 'In-depth study on all forms of violence against women' (2006) UN Doc A/61/122/Add.1 paras 242-274
[122] UN Secretary-General, 'In-depth study on all forms of violence against women' (2006) UN Doc A/61/122/Add.1 para 172
[123] UN Secretary-General, 'In-depth study on all forms of violence against women' (2006) UN Doc A/61/122/Add.1 paras 112-117, 128-131
[124] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI)
[125] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI) art 3
[126] UNHRC, General Comment No 28: Equality of rights between men and women (adopted 29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 4
[127] UNHRC, General Comment No 28: Equality of rights between men and women (adopted 29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 5
[128] UNHRC, General Comment No 28: Equality of rights between men and women (adopted 29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 11

degrading treatment or punishment'[129]. By doing so, General Comment No 28 brought violence within the private sphere into the scope of the ICCPR.

4.1.3.5 Implications and comments

The language in Resolution 40/36 as well as Resolution 45/114 are not authoritative. They 'invite' member states to do certain matters, suggesting the resolutions being advisory in nature. Referring to member states 'concerned' as opposed to all member states, also suggests the permissive character.

The language in Resolution 58/147 is more authoritative than in previous resolutions. Instead of 'inviting' states to take certain actions, the language is replaced by words as 'strongly condemns' and 'serious action'. This resolution is progressing in that it directly states that domestic violence is a human rights issue, although this is not the same as declaring that domestic violence is a violation of human rights.

Recognising that all forms of violence against women violate her enjoyment of all human rights and fundamental freedoms, was first expressly spelled out in the resolution passed in 2007, Resolution 61/143. Doing so 22 years after the first resolution on domestic violence was passed, proves how sensitive this issue is as well as the reluctance from the international community to step into the private sphere. In the same resolution, the UN General Assembly further stressed that there are obstacles in the implementation of the international standards in respect of violence against women. In doing so, the Assembly implies that the states are obliged to comply with what is set out in their resolutions, otherwise they are in breach of international law.

Notwithstanding the non-authoritative language in the resolutions they do express how the member states think the law ought to be, thus paving the way for a standard of state-practice. According to the contemporary approach to customary international law, UN General Assembly resolutions may constitute *opinio juris* – being statements passed by 193 member states ought to be evidence of what these states believe they are obliged to do in order to comply with international law.

None of the UN General Assembly resolutions explicitly state that violence against women is a violation of human rights in itself. However, examining the recently passed resolutions, it is evident that they claim that violence against women violates her enjoyment of all human rights, both systemic intimate violence and systemic violence, and that states are obliged under international law to take measures to protect women from systemic violence as well as to investigate, prosecute and punish the perpetrators.

[129] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI) art 7

The UN Human Rights Council is an inter-governmental body within the UN with the mandate to address violations of human rights as well as to make recommendations on them. The Council is comprised of 47 member states and as being a state-driven institution, its recommendations on specific human rights issues are of significant importance in respect to international lawmaking.[130]

The report by the Secretary-General is an important contribution in finding a norm prohibiting systemic violence in customary international law. By acknowledging that there are international responsibilities of states in regard to systemic violence, it confirms that this form of violence has a place in international human rights law. It is also a significant contribution in being a report written by the Secretary-General as having a non-gender-specific position.

General Comment No 28 is authoritative for two main reasons. First, it constitutes a huge step in the process of mainstreaming women's human rights and more specifically systemic violence. Second, bringing domestic violence and rape into the provision concerning torture and inhuman treatment, acknowledges that private acts of violence are as cruel as acts of violence committed by state authorities.

4.2 The approach of regional human rights law to systemic violence

This subchapter will examine instruments and bodies within three different regions of the world, namely Europe, America and Africa.

4.2.1 European system

4.2.1.1 ECHR

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[131] does not provide an explicit prohibition on sexual violence. The ECtHR has, however, interpreted articles 3 and 8 of the ECHR as to place positive obligations on states to take steps to ensure that individuals are protected from rape and other forms of sexual violence. Article 3 of the ECHR ensures the prohibition of torture; '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'[132].

[130] See the official website of the Office of the High Commissioner for Human Rights, UN Human Rights Council <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspxhttp://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed 12 September 2012

[131] ECHR, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953)

[132] ECHR, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) art 3

Article 8 of the ECHR provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'[133]. There have not been many rulings by the ECtHR on cases concerning rape and it was not until 2007 when domestic violence was directly addressed by the ECtHR. However, this issue has now been addressed in a series of cases.

4.2.1.2 Jurisprudence of the ECtHR

In *Opuz v Turkey*[134], the ECtHR found a violation of article 3 of the ECHR due to the state's failure to take protective measures in order to protect the applicant from domestic violence.[135] The Court took the position that domestic violence may be of the severity as to reach the threshold of harm to trigger international law.

The only case before the ECtHR concerning an acquaintance rape is the case of *MC v Bulgaria.*[136] The applicant was a fourteen-year-old girl who alleged that she had been raped twice during the same night by two different men. In the domestic proceedings none of the alleged perpetrators denied having sexual intercourse with the applicant, but said that she had consented.

The ECtHR found that Bulgaria was in breach of articles 3 and 8 of the ECHR. In the assessment, the ECtHR looked at whether the Bulgarian state had fulfilled its positive obligations under the two provisions and elaborated on the reach of the due diligence obligation. The ECtHR found that the practice to prosecute acts of rape only where there is evidence of significant physical force, as alleged by the applicant, was not refuted by the Bulgarian state. Since the authorities had focused on 'direct' proof in order to prove lack of consent, they had failed in their investigation to establish all the surrounding circumstances. The ECtHR held that Bulgaria's positive obligations entailed to adopt criminal law and to effectively punish all forms of rape, as well as execute this legislation by effectively investigate and prosecute allegations of rape.[137]

4.2.1.3 Council of Europe resolutions

The resolutions adopted by the Parliamentary Assembly of the Council of Europe are authoritative and important evidence of customary international law. The Assembly consists of people from national parliaments from 47 member states, thus representing a considerable part of the states in the world.

The Council of Europe has passed several resolutions addressing violence against women. Resolution 1512, which was adopted in 2006, confirms that domestic violence against women is 'one of the most widespread violations

[133] ECHR (adopted 4 November 1950, entered into force 3 September 1953) art 8(1)
[134] *Opuz v Turkey* App no 33401/02 (ECtHR 9 June 2009)
[135] *Opuz v Turkey* App no 33401/02 (ECtHR 9 June 2009) para 176
[136] *MC v Bulgaria* App no 39272/98 (ECtHR 4 December 2003)
[137] *MC v Bulgaria* App no 39272/98 (ECtHR 4 December 2003) paras 169-182

of human rights'[138] and emphasises the obligation of states to combat this violence in all member states.[139]

4.2.1.4 Council of Europe Convention on preventing and combating violence against women and domestic violence

In 2011, the Committee of Ministers of the Council of Europe adopted the Convention on preventing and combating violence against women and domestic violence.[140] As of September 2012, it has been signed by 23 states and ratified by one state. It has not yet entered into force due to the lack of ratifications needed in order to enter into force.[141]

This legally binding instrument is providing a comprehensive legal framework to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women.[142] It entails specific definitions of different acts of violence as well as an extensive scope of state obligations. Violence against women is understood as a form of discrimination against women as well as a violation of human rights.[143]

4.2.1.5 Implications and comments

The jurisprudence of the ECtHR is a source of international law. In the ruling in the case of *Opuz v Turkey*, the Court established that domestic violence is a form of violence triggering international law, thereby acknowledging the internationalising elements of intimate violence. The recognition of domestic violence as a human rights issue is a crucial development as the ECtHR steps into the private sphere by obliging the state to take positive measures in order to protect women from ill-treatment and their respect for private and family life.

Following the ruling in *MC v Bulgaria,* the ECtHR indicates that rape will always fall within the scope of article 3 of the ECHR, *i.e.*, rape constitutes sufficient severity as to meet the threshold for ill-treatment. This case is also significant since it is the first case before the ECtHR concerning acquaintance rape. The case of *MC v Bulgaria* further implies that when a

[138] Council of Europe, 'Resolution 1512 Parliaments United in Combating Domestic Violence against Women' (28 June 2006) para 2
[139] Council of Europe, 'Resolution 1512 Parliaments United in Combating Domestic Violence against Women' (28 June 2006) para 2
[140] Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No:210 (adopted 11 May 2011) (hereinafter Council of Europe Convention on violence against women)
[141] See the Official website of the Council of Europe <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG> accessed 22 September 2012
[142] Council of Europe Convention on violence against women, CETS No:210 (adopted 11 May 2011) art1(1)
[143] Council of Europe Convention on violence against women, CETS No:210 (adopted 11 May 2011) art 3(a)

state fails in an individual case, which can be linked to a systemic problem of a restrictive approach in the prosecution of rape, the state may be in breach of the ECHR. In doing so, the ECtHR acknowledges violence against women as being systemic and structural.

There are several aspects of relevance in the reasoning of the ECtHR in the case of *MC v Bulgaria*; the adoption of an international definition of rape as to encompass any non-consensual sexual act, irrespective of physical resistance by the victim[144]; the consideration of the ECtHR under both article 3 and article 8 of the ECHR, recognising rape as violating physical integrity and personal and sexual autonomy as well as declaring that an act of rape infringes fundamental values[145]; the obligation to not only create necessary measures but also to ensure an effective investigation and prosecution; and the recognition of the systemic and structural nature of this violence.

The definition of violence against women as constituting a violation of human rights, as stated in the Council of Europe Convention on violence against women, is of great significance. This means that the drafters took the position of declaring that violence against women is a violation of human rights *per se*. Although this convention is not yet in force, it does provide a significant evidence of *opinio juris*.

4.2.2 Inter-American system and African system

4.2.2.1 The Convention of Belem Do Para

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Convention of Belem Do Para[146], binds signatories of the Inter-American system. It was adopted in 1994 and as of September 2012, 32 states have ratified the convention.[147]

The Convention of Belem Do Para addresses violence against women in the public and private sphere.[148] It has a detailed prohibition of both domestic violence and acquaintance violence when referring to violence that 'occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual

[144] *MC v Bulgaria* App no 39272/98 (ECtHR 4 December 2003) para 166
[145] *MC v Bulgaria* App no 39272/98 (ECtHR 4 December 2003) para 150
[146] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Convention of Belem Do Para) (adopted 9 June 1994, entered into force 5 March 1995)
[147] See the official website of the Organization of American States <http://www.oas.org/juridico/english/sigs/a-61.html> accessed 25 September 2012
[148] Convention of Belem Do Para (adopted 9 June 1994, entered into force 5 March 1995) art 1

abuse'[149]. In addition, it institutes a right to be free from violence and establishes a responsibility on states to fulfil this right.[150]

4.2.2.2 African Union instruments

In 2003 the African Union adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.[151] As of September 2012, 28 states have ratified the Protocol, whereas an additional 18 states have signed it but not yet ratified the same.[152]

The Protocol on the rights of women in Africa does not explicitly refer to specific forms of violence; it addresses 'all forms of violence'. It acknowledges every woman's right to respect for life, integrity and security of person and that 'all forms of exploitation, cruel, inhuman or degrading, punishment and treatment shall be prohibited'[153]. The states have a corresponding responsibility to ensure the prohibition of all forms of violence, including the enactment and enforcement of laws.[154]

The African Union has also adopted a framework to eliminate domestic violence by 2015.[155]

4.2.2.3 Implications and comments

The most important contribution of the Convention of Belem Do Para of a norm prohibiting systemic violence in international human rights law is that it establishes a specific and explicit right to be free from violence. In that way it is more authoritative than many other legal instruments. Together with the Council of Europe Convention on violence against women, it definitely brings a prohibition of systemic violence closer to constituting international law. However, its regional character limits its strength as proof of customary international law.

There are 53 member states in the African Union and 46 of these have signed the Protocol on the rights of women in Africa. Adding this significant number of parties to the fact that it is a legally binding treaty,

---

[149] Convention of Belem Do Para (adopted 9 June 1994, entered into force 5 March 1995) art 2(a)
[150] Convention of Belem Do Para (adopted 9 June 1994, entered into force 5 March 1995) art 3
[151] The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereinafter the Protocol on the rights of women in Africa) (adopted 7 November 2003, entered into force 25 November 2005)
[152] See the official website of the African Commission on Human and People's Rights <http://www.achpr.org/instruments/women-protocol/> accessed 26 September 2012
[153] The Protocol on the rights of women in Africa (adopted 7 November 2003, entered into force 25 November 2005) art 4(1)
[154] The Protocol on the rights of women in Africa (adopted 7 November 2003, entered into force 25 November 2005) art 4(2)(a)
[155] First African Union Conference of Ministers Responsible for Women and Gender, Implementation Framework of the Solemn Declaration on Gender Equality in Africa' (Dakar, Senegal October 2005) AU/MIN/CONF/WG/3(1)

provides a good evidence of a principle in international law obliging the states to protect women from systemic violence. This is a strong statement of the states beliefs that they have an obligation to protect women from systemic violence as well as an obligation to investigate and punish the perpetrators.

4.3 A few aspects of the gendered nature of the regime in regard to systemic violence

One of the main critiques of the human rights regime as not being gender-inclusive is the provision of torture in international law. Torture has been recognised as being male-gendered in nature, partly because of the requirement of the perpetrator being a state official. In the early 1990s, legal scholars increasingly studied the analogy of rape and domestic violence to torture. From the victim's perspective, these forms of violence committed by a state agent or by a private person may not be different at all.

This subchapter is exploring the international provisions on torture in the light of systemic violence and the gendered nature of the public/private dichotomy with the aim to see if the provisions on torture are still gendered.

4.3.1 The gendered nature of the UNCAT's definition of torture

Article 1(1) of the UNCAT defines torture as '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 […] when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official*'[156].

There are several gendered aspects of this definition. The first aspect is the requirement of consent or acquiescence of a public official. Radical feminist scholar argue that this is contributing to the gendered nature of the public/private divide since the victim is most likely to be a man and violence against women is consequently falling outside the scope of the definition – due to this form of violence appearing in the private sphere.[157]

[156] UNCAT (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 art 1(1) (emphasis added)
[157] See *e.g.* Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law' (2006) 19 Leiden Journal of International Law 349, 368

This apprehension has appeared to be real if looking at the jurisprudence of the UNCAT Committee. In *GRB v Sweden*[158], the applicant claimed that she had been raped by members of a guerrilla group and she feared to be raped again upon return to Peru. On that ground she argued that Sweden would violate the UNCAT if forcing her to return.[159] The UNCAT Committee found no breach since the state party does not violate the convention when the expelled person might risk being tortured by a non-state agent, without the consent or acquiescence of the government.[160] This decision was reached despite the fact that the rape had been reported to the police, thus leaving the police with knowledge about the situation.[161]

The reasoning of the UNCAT in the case of *GRB v Sweden* has been criticised for cementing the gendered nature of the public/private divide in international human rights law. The criticism comprise the lack of the UNCAT Committee to consider the issue of state acquiescence. If there would be an analysis of the link between the state and the act of rape, it would entail whether a proper investigation of the rape was done by the state, the number of reported rapes that had not been investigated, as well as whether the rape was possible due to lack of state action.[162] This reasoning – or lack thereof – disclose a confusion and a lack of knowledge by the UNCAT committee in how 'acquiescence' should be applied.[163] There is a similar reasoning by the UNCAT Committee in *SV et al v Canada*[164], where the Committee failed to recognise abuse of non-state actors as falling within the torture provision.

Expanding on the reasoning in the case of *Hajrizi Dzemajl et al v Yugoslavia*[165], it might imply a possibility to hold a state responsible for a specific act of sexual violence committed by a private actor, when failing to take appropriate measures in order to protect the applicant. However, this could be the case only if the state was having knowledge about the specific situation.

A second gendered aspect of the definition of torture is the requirement of the suffering to be inflicted for a particular purpose, for instance the purpose of obtaining a confession or information. This prerequisite is, to a great extent, narrowing the reach of the provision. It is claimed to mainly encompass abuses perpetrated in state custody, thus a situation more suited to protect the experiences of men.[166]

---

[158] *GRB v Sweden* (1998) UN Doc CAT/C/20/D/83/1997
[159] *GRB v Sweden* (1998) UN Doc CAT/C/20/D/83/1997, para 3.1
[160] *GRB v Sweden* (1998) UN Doc CAT/C/20/D/83/1997, para 6.5
[161] *GRB v Sweden* (1998) UN Doc CAT/C/20/D/83/1997, para 2.3
[162] Robert McCorquodale and Rebecca La Forgia, 'Taking off the Blindfolds: Torture By Non-state Actors' (2001) 1 Human Rights Law Review 189, 209-210
[163] Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law' (2006) 19 Leiden Journal of International Law 349, 371-372
[164] *SV et al v Canada* (1996) UN Doc CAT/C/26/D/49/1996
[165] *Hajrizi Dzemajl et al v Yugoslavia* (2002) UN Doc CAT/C/29/D/161/2000
[166] Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law' (2006) 19 Leiden Journal of International Law 349, 368

A third criticism in relation to the gendered nature of the definition of torture is the use of the masculine pronoun 'him' – it implies that torture only takes place in the context of investigations by the state of criminal acts. It is argued that the language in legal instruments is essential in the construction and reinforcement of the subordinate position of women. It is claimed to take away the human factor in the context.[167]

4.3.2 Report of the Special Rapporteur on torture

Manfred Nowak, the Special Rapporteur on torture, submitted a report in 2008 on torture where he exclusively addressed torture in relation to violence against women.[168] The purpose with the report was to make torture gender-inclusive and in so doing, the report draws on the parallels between 'classic' torture and domestic violence among other forms of violence against women.

An important commentary in the report is found in regard to the role of the state. As mentioned above, the definition of torture requires the act to be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official'[169]. This element has been used to limit the state responsibility to the public sphere. However, the Special Rapporteur confirms that by using words such as 'consent' and 'acquiescence' in the text, it evidently extends the obligations of states into the private sphere.[170] The report acknowledges that state acquaintance can take many different forms. State responsibility is engaged when *i.a.*, a state implements discriminatory laws due to the state's complicity in domestic violence, and when a state fails to protect women from this violence as well as to prevent these acts.[171]

Nowak further acknowledges that the 'purpose' element in the definition of torture is always fulfilled when there is an act of violence against a woman. This is because one of the features listed in the definition is discrimination

[167] See *e.g.* Hilary Charlesworth, 'What are "Women's International Human Rights"?' in Rebecca J Cook (ed), *Human rights of women: National and International Perspectives* (University of Pennsylvania Press 1994) 68
[168] UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (15 January 2008) UN Doc A/HRC/7/3
[169] UNCAT (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 art 1(1)
[170] UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (15 January 2008) UN Doc A/HRC/7/3 para 31
[171] UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (15 January 2008) UN Doc A/HRC/7/3 para 46

and due to the fact that gender-specific violence is a form of discrimination this element is always fulfilled.[172]

The report is not specifically discussing acquaintance rape, although it is mentioned in the text that the list of forms of violence that may constitute torture or cruel, inhuman and degrading treatment is not exhaustive and it does mention that sexual violence may fall under the provision.[173]

4.3.3 Rape as torture under article 3 of the ECHR

The ECtHR recognised for the first time that an act of rape could constitute torture in the judgement of *Aydin v Turkey*.[174] In this case, a seventeen-year-old woman was raped by a member of the security forces while she was in custody. This was groundbreaking in that the ECtHR acknowledged that rape could reach the severity of harm to amount to torture. On the other side, this is the only ruling where the Court has recognised rape as torture – and the perpetrator was an agent of the state. This leaves us with the question if rape can constitute torture when the perpetrator is a private individual.

The purposive criterion for torture has been widely criticised by feminist scholars due to the suggestion that torture only takes place within state detention and similar institutions. An examination of the ECtHR's jurisprudence reveals that this element has comprised getting information of some sort or a confession.[175] Recognising the discriminatory purpose of rape as fulfilling the purposive element is still absent in the Court's jurisprudence.[176]

Clare McGlynn argues, by way of analysing the ECtHR's jurisprudence, that whether an act of rape constitutes torture is not solely dependant upon the status of the perpetrator, rather it depends on several criterion such as, in addition to the status of the perpetrator, the age and sex of the victim, the place of the rape as well as the abuse of trust.[177] The case of *Kaya v*

---

[172] UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (15 January 2008) UN Doc A/HRC/7/3 para 30

[173] UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (15 January 2008) UN Doc A/HRC/7/3 para 44

[174] *Aydin v Turkey* App no 57/1996/676/866 (ECtHR 25 September 1997)

[175] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 International and Comparative Law Quarterly 555, 580-582; See also *Aydin v Turkey* App no 57/1996/676/866 (ECtHR, 25 September 1997)

[176] For a discussion on this, see Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 International and Comparative Law Quarterly 555, 580-586

[177] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 International and Comparative Law Quarterly 555, 569-580, 586-589

Turkey[178] is one of the cases that McGlynn is referring to as supporting her standpoint that there must not be a direct act of a state official in order to constitute torture. McGlynn argues that since the Court kept on discussing whether an act of harm amounted to torture even when the Court had noted that state agents were not directly responsible for the death of the person in question, was a clear implication of this.[179]

4.3.4 Implications and comments

The report of the Special Rapporteur on torture is of big significance in the process of developing a norm in international human rights law prohibiting domestic violence. It is authoritative in several aspects: 1) it is a report written by the Special Rapporteur on torture; 2) the report is expanding the provisions on torture as to include domestic violence as well as acquaintance rape; 3) this is done in regard to a UN mainstream legally binding convention and; 4) defining domestic violence as an act of torture brings considerable weight to engage the responsibility of states and, thus, as the status of domestic violence as a human rights violation.

One of the critiques of the torture provision is that it requires the act of harm to be for some 'purpose'. Due to the report of the Special Rapporteur on torture, this criticism may have been answered and likewise the connection to a state official.

However, the report of the Special Rapporteur on torture is not in line with the jurisprudence of the UNCAT Committee. The Committee is restrictive in its interpretation of acts of violence committed by non-state actors. The reasoning of the Committee further implies a requirement of an actual knowledge by the state of a specific situation. If considering systemic violence in the light of this solid established link between the state and the perpetrator is to a considerable extent leaving systemic violence against women outside the scope of state responsibility.

The torture provision in UNCAT has been re-interpreted as to better encompass the specific situation of women. Some of the criticism has been answered but, although the report in itself is contributing to a less gendered nature of the torture provision as well as to the notion of systemic violence as a prohibition in international human rights law, there is a need to be cautious in not exaggerating the contribution of the report before being aware of how the torture provision will be interpreted and applied by the Human Rights Committee in future cases.

The issue in the jurisprudence of the ECtHR is not whether the acts of private individuals fall within the provision of ill-treatment and torture, it is rather the question of whether rape can only amount to the severity of

[178] *Kaya v Turkey* App no 22535/93 (ECtHR 28 March 2000)
[179] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 International and Comparative Law Quarterly 555, 588-589

torture when committed by a state official. This classification is not relevant when considering state responsibility under international law but it adds to the perception that a private act of rape is less severe as well as having a lower status as a prohibition in international law. Compared to the torture provision in UNCAT, the provision on torture in ECHR is less gendered.

5 Analysis

The most authoritative source of international law is international conventions. As has been discovered in this thesis, there is no international convention specifically addressing violence against women. CEDAW addresses discrimination against women but not violence against women. Notwithstanding a partial correction of this textual gap when the General Recommendation No 19 was passed, it did not to any appreciable extent contribute to bringing systemic violence closer to being a violation of human rights due to general recommendations not being binding upon states party to CEDAW. Furthermore, the standpoint taken in the recommendation is that violence against women is a form of discrimination which impairs or nullifies a woman's enjoyment of her human rights. An examination of the jurisprudence of the CEDAW Committee, however, provides clear evidence that the Committee is of the opinion that domestic violence is prohibited and that states have an obligation under international law to protect women from this form of violence.

The principle in DEVAW is that violence against women is prohibited both in the public and the private sphere. Moreover, the position taken in the Beijing Declaration is that violence against women impairs and nullifies her ability to enjoy other human rights whereas the second Special Rapporteur on violence against women, Yakin Ertürk, has taken the standpoint that there is a rule of customary international law that obliges states to act in due diligence in order to prevent and respond to violence against women.

There are a fairly big number of UN mainstream instruments addressing violence against women. It is evident from a study of UN General Assembly resolutions that the Assembly claims that there is a prohibition of systemic violence within international law and that states have a corresponding obligation to prevent systemic violence and to protect women from the same, as well as to investigate, prosecute and punish the perpetrators.

Furthermore, in the report written by the Secretary-General, Kofi Annan classifies violence against women as a human rights violation and acknowledges that states have a responsibility under international law to respond to all forms of violence, specifically addressing domestic violence and acquaintance rape.

In addition, the adoption of General Comment No 28 by the UN Human Rights Committee is a striking evidence of the mainstreaming of violence against women as well as an attempt to erase the line between the public/private divide. It is authoritative in acknowledging that domestic violence, although not perpetrated by state officials, is no less dreadful than violence committed by the state, thus being a form of ill-treatment.

In the jurisprudence of the ECtHR, the Court has taken the standpoint that both domestic violence and acquaintance rape trigger international law and that these forms of violence are forms of ill-treatment. The ECtHR is clear in that states have a responsibility to protect women from systemic violence as well as an obligation to ensure an effective investigation and prosecution.

The most progressive developments in how systemic violence is understood are found within the European and Inter-American systems. The Council of Europe Convention on violence against women explicitly states that violence against women is a violation of human rights *per se*. A similar position is found in the Convention of Belem Do Para as constituting an explicit right to be free from systemic violence.

To conclude so far, it is evident that, even though not expressly stated in all the instruments analysed, courts, monitoring bodies and other institutions claim that systemic violence is prohibited and that states have a corresponding duty to respond to this violence. The general principle found is that violence against women impairs or nullifies a woman's ability to enjoy her human rights. This standpoint differs from a principle proclaiming that violence against women is a violation of human rights *per se*. The notion is that individual people violate national laws whereas states violate international laws. Moreover, the legal consequences and the obligations of states may, arguably, not be that different. In both scenarios, systemic violence against women is prohibited and states thereby have a responsibility under international law to protect women from this form of violence. But, when failing to see systemic violence against women as a violation of human rights in itself, the human rights regime is partly denying the structural and systemic nature of this violence, *i.e.*, the state's participation and responsibility every single time a woman is being the victim of an act of systemic violence. These acts of violence are not isolated from one another and the state's role in sustaining the violence is thereby not being adequately acknowledged.

I am of the opinion that if establishing that systemic violence against women is a violation of international human rights law *per se*, there would be a more solid connection between the act of violence and the state. Furthermore, such a principle would be weightier and most likely result in states regarding systemic violence as a more serious human rights violation.

What I claim, hitherto, is that there is a principle prohibiting systemic violence. However, this is not the same as claiming that there is an international law prohibiting systemic violence. In order to find out about whether there is such a prohibition in international law we must examine this knowledge in the light of how a principle becomes a legal principle – an international law.

As has already been established, there is no international treaty prohibiting systemic violence. Next step is therefore to examine whether there is such a prohibition in customary international law.

The traditional approach to customary international law requires a consistent practice of states, being both widespread and established. It also requires the element of *opinio juris.* The widespread requirement does not involve a practice in every single state as long as it is general. Without digging too deep into the practice of states, I am willing to claim that this element is not fulfilled. There is no evidence of a general prohibition of systemic violence in the practice of states having in mind the lack of investigations and prosecutions as well as other measures in order to prevent and protect women from systemic violence. In addition, such a state practice shall exist in states belonging to various regional groups. Moreover, if looking at the ICJ's interpretation of customary international law, the practice shall be found in specially affected states.

The contemporary approach to customary international law emphasises the *opinio juris* of states. Due to the difficulty in determining a state's actual belief, this subjective element is understood as statements of beliefs. As evident from the analysis above, there are countless of international and regional instruments and institutions claiming that there is a prohibition of systemic violence against women in international law and that states have a corresponding obligation to respond to this violence in order to protect women.

The big number of documents adopted by the UN General Assembly, represented by 193 member states, and the UN Human Rights Council, being an inter-governmental body and state-driven institution, are clear and authoritative evidence of the *opinio juris* of states. Representatives from these states do believe that there is a prohibition of systemic violence in international law and they believe that they have a legal obligation to comply with the same. The authoritative features are even clearer remembering that they are mainstream UN bodies.

Not only is the *opinio juris* of states to be found within the member states of the UN. The three big regions examined in this thesis – Europe, America and Africa – all provide clear evidence of a belief that systemic violence is prohibited in international law as well as the belief that they must comply with this prohibition. The Council of Europe Convention on violence against women, a previously adopted convention already signed by 23 states, claims that violence against women is a violation of human rights in itself. Also, judicial judgements from the ECtHR, as being recognised as a source from where international principles of law can be derived from, state that there is a prohibition of systemic violence.

Furthermore, a significant number of states within the Inter-American system and the African system have signed and ratified respective instrument. Adding to the authority of these instruments is the fact that they are legally binding on these states.

The many responses of states to statements and recommendations of specific measures to adopt in order to protect women from systemic violence, passed by various institutions, are also evidence of acting from a sense of legal obligation. These responses have, among others, been in the form of enactment of domestic legislation specifically addressing systemic violence and the implementation of measures in order to respond to violence against women in a more adequate way.

Accordingly, there is a pattern among international, regional and domestic organs belonging to various regional groups, representing different political, economic and ideological approaches, stating the belief that there is an international law prohibiting systemic violence as well as the belief that they must comply with the same from a sense of legal obligation.

Systemic intimate violence has been addressed to a bigger extent than systemic violence. This is at least clear if examining jurisprudence from the CEDAW Committee and the number of UN General Assembly resolutions specifically targeting domestic violence. Notwithstanding this, in regard to the evidence of a prohibition in international law, this fact should not be of any note. Most of the instruments and institutions as well as those being of a more authoritative nature in respect of customary international law, claim that there is a prohibition of systemic violence.

The study of the provisions on torture reveals that the human rights regime is still gendered. Situations more likely to happen to women are treated differently than situations more likely to happen to men – there is a prohibition of torture whereas there is no explicit prohibition of systemic violence in any international convention and the regime is as well reluctant to interpret systemic violence as to fall within the torture provisions – thus demonstrating human rights as male rights. Furthermore, it is evident that the regime is failing to see the structural and systemic nature of this violence seeing that the UNCAT Committee persists in finding an actual knowledge by the state of a specific situation in order to hold a state accountable for acts of systemic violence.

6 Conclusion

In the light of this reasoning, I conclude that there is an international human rights law prohibiting systemic violence. If adopting a contemporary approach to customary international law, there is authoritative evidence of a universal legal principle prohibiting systemic violence. This legal principle has not yet been properly crystallised, although still constituting an international law.

There is an international law prohibiting systemic violence due to the fact that systemic violence impairs or nullifies a woman's ability to enjoy her human rights – systemic violence *per se* is not a violation of international human rights law.

If adopting a traditional approach to customary international law, the conclusion is not the same. There is not evidence of a consistent and widespread state practice needed in order to establish a prohibition of systemic violence in customary international law. Whether a traditional or a contemporary approach shall be used, legal scholars are of different opinions. This is not a question to be answered in this thesis. However, I advocate the contemporary approach as being the only appropriate theory in respect of systemic violence against women.

More needs to be done in order to adequately crystallise systemic violence as a violation of international human rights law. There is a need to specify the substance of different forms of systemic violence as well as in greater detail specify the responsibilities of states. The Council of Europe Convention on violence against women is a good model of this. The process of integrating systemic violence into mainstream instruments and bodies needs to be further developed as well as acknowledging systemic violence as a violation of human rights *per se*. If these developments were to be taken, systemic violence as a violation of international human rights law would be less contentious and it would hold a more superior status.

Bibliography

Legal instruments

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980)

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para) (adopted 9 June 1994, entered into force 5 March 1995)

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) UN Doc A/RES/54/4

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 7 November 2003, entered into force 25 November 2005)

Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No:210 (adopted 11 May 2011)

Literature

Amnesty International, 'It's in our hands: Stop violence against women' (Amnesty International Publications 2004) 1

Boyle A and Chinkin C, *The Making of International Law* (Oxford University Press 2007)

Brownlie I, *Principles of Public International Law* (7th edn, Oxford University Press 2008)

Buergenthal T, Shelton D and Stewart D, *International Human Rights in a Nutshell* (4th edn, West 2002)

Charlesworth H, 'What are ”Women's International Human Rights”?' in Cook R J (ed), *Human rights of women: National and International Perspectives* (University of Pennsylvania Press 1994)

Charlesworth H and Chinkin C, *The boundaries of international law: A feminist analysis* (Manchester University Press 2000)

Edwards A, 'The 'Feminizing' of Torture under International Human Rights Law' (2006) 19 Leiden Journal of International Law 349

Edwards A, *Violence against women* (Cambridge University Press 2011)

Hathaway O A, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935

Johnson M P, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women' (1995) 57 Journal of Marriage and the Family 283

Kelly J P, 'The Twilight of Customary International Law' (1999-2000) 40 Virginia Journal of International Law 449

Koh H H, 'Why do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599

McCorquodale R and La Forgia R, 'Taking off the Blindfolds: Torture By Non-state Actors' (2001) 1 Human Rights Law Review 189

McGlynn C, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 International and Comparative Law Quarterly 555

Meyersfeld B, *Domestic Violence and International Law* (Hart Publishing 2010)

Radacic I, 'Human Rights of Women and the Public/Private Divide in International Human Rights Law' (2007) 3 Croatian Yearbook of European Law & Policy 443

Roberts A E, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation' (2001) 95 The American Journal of International Law 757

Romany C, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Cook R J (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994)

Slama J L, 'Opinio Juris in Customary International Law' (1990) 15 Oklahoma City University Law Review 603

Sohn L B, '"Generally Accepted" International Rules' (1986) 61 Washington Law Review 1073

Southard J L, 'Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women' (1996) 8 Pace International Law Review 1

Sullivan D, 'The Public/Private Distinction in International Human Rights Law' in Peters J (ed), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995)

Taub N and Schneider E M, 'Women's Subordination and the Role of Law' in Weisberg D K (ed), *Feminist legal theory: Foundations* (Temple University Press 1993)

Thirlway H, 'The sources of international law' in Evans M D (ed), *International Law* (2nd edn, Oxford University Press 2006)

United Nations documents

UNGA Res 40/36 (29 November 1985) UN Doc A/RES/40/36

Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights (adopted 15 December 1989) UNGA Res 44/130

UNGA Res 45/114 (14 December 1990) UN Doc A/RES/45/114

CEDAW Committee, General Recommendation No 19: Violence against Women (1992) UN Doc A/47/38

Declaration on the Elimination of Violence against Women (adopted 20 December 1993) UN Doc A/RES/48/104

UNCHR Resolution 1994/45 (adopted 4 March 1994)

Beijing Declaration and Platform for Action (15 September 1995) UN Doc A/CONF.177/20/Add.1

UNHRC, General Comment No 28: Equality of rights between men and women (adopted 29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10

UNHCR Res 2001/49 Elimination of violence against women (24 April 2001) UN Doc E/CN.4/2001/49

ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) UN Doc A/56/10

UNCHR Res 2002/50 Integrating the Human Rights of Women throughout the United Nations system (23 April 2002) UN Doc E/CN.4/RES/2002/50

UNGA Res 58/147 (19 February 2004) UN Doc A/RES/58/147

UNGA Res 59/167 (22 February 2005) UN Doc A/RES/59/167

UN Secretary-General, 'In-depth study on all forms of violence against women' (2006) UN Doc A/61/122/Add.1

UNCHR, 'The Due Diligence Standard as a Tool for the Elimination of Violence against Women – Report of the Special Rapporteur on violence against women, its causes and consequences', Yakin Ertürk (30 January 2006) UN Doc E/CN.4/2006/61

UNGA Res 61/143 (30 January 2007) UN Doc A/RES/61/143

UNHRC Res 6/30 Integrating the Human Rights of Women throughout the United Nations system (14 December 2007) UN Doc A/HRC/6/30

UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (15 January 2008) UN Doc A/HRC/7/3

UNGA Res 62/133 (7 February 2008) UN Doc A/RES/62/133

UNHRC Res 7/24 Elimination of violence against women (28 March 2008) UN Doc A/HRC/7/42

UN Special Rapporteur on violence against women, '15 Years of the United Nations Special Rapporteur on violence against women, its causes and consequences 1994-2009 – a critical review' (25 November 2008) <http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf> accessed 20 September 2012

UNGA Res 63/155 (30 January 2009) UN Doc A/RES/ 63/155

Council of Europe documents

Council of Europe, 'Resolution 1512 Parliaments United in Combating Domestic Violence against Women' (28 June 2006)

African Union documents

First African Union Conference of Ministers Responsible for Women and Gender, Implementation Framework of the Solemn Declaration on Gender Equality in Africa' (Dakar, Senegal October 2005) AU/MIN/CONF/WG/3(1)

Websites

Official website of the UN Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed 7 September 2012

Official website of UN Women <http://www.un.org/womenwatch/daw/beijing/beijingdeclaration.html accessed 15 September 2012> accessed 15 September 2012

Official website of the Office of the High Commissioner for Human Rights, UN Human Rights Council <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspxhttp://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> accessed 12 September 2012

Official website of the Council of Europe <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG> accessed 22 September 2012

Official website of the Organization of American States <http://www.oas.org/juridico/english/sigs/a-61.html> accessed 25 September 2012

Official website of the African Commission on Human and People's Rights <http://www.achpr.org/instruments/women-protocol/> accessed 26 September 2012

Table of cases

CEDAW Committee

Ms AT v Hungary, CEDAW Committee, Communication No 2/2003 (adopted 26 January 2005) UN Doc CEDAW/C/32/D/2/2003

Goekce (deceased) v Austria, CEDAW Committee, Communication (adopted 6 August 2007) No 5/2005 UN Doc CEDAW/C/39/D/5/2005

Fatma Yildirim v Austria, CEDAW Committee, Communication No 6/2005 (adopted 1 October 2007) UN Doc CEDAW/C/39/D/6/2005

ECtHR

Aydin v Turkey App no 57/1996/676/866 (ECtHR 25 September 1997)

A v the United Kingdom App no 100/1997/884/1096 (ECtHR 23 September 1998)

Kaya v Turkey App no 22535/93 (ECtHR 28 March 2000)

MC v Bulgaria App no 39272/98 (ECtHR 4 December 2003)

Opuz v Turkey App no 33401/02 (ECtHR 9 June 2009)

IACtHR

Velasquez Rodriguez v Honduras (IACtHR 29 July 1988)

ICJ

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark/Netherlands) ICJ Reports 1969

Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v the US) (ICJ June 27 1986)

UNCAT Committee

SV et al v Canada (1996) UN Doc CAT/C/26/D/49/1996

GRB v Sweden (1998) UN Doc CAT/C/20/D/83/1997

Hajrizi Dzemajl et al v Yugoslavia (2002) UN Doc CAT/C/29/D/161/2000