

MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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The applicability of the prohibition of torture and other ill-treatment to the context of
domestic violence in the light of private and public dichotomy

How does it impact women's life in Afghanistan?

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Abstract for Master's Thesis

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<p>Abstract:</p> <p>Human rights are traditionally concerned with the violations committed by States, whereas private individuals often perpetrate violence against women. Therefore, some scholars consider this approach the rationale for the so-called "public/private dichotomy", which draws the line between both spheres and becomes a source of women's disadvantage in human rights law. Women's abuse in the private sphere is often ignored and labelled as a "private family matter." Thus, despite the advances in the field of women's human rights, domestic violence is still among the privatised and less remedied patterns of gender-based violence. However, considering the severity of the mental and physical pain and suffering and the involvement of the same use of torture techniques in most cases, domestic violence is remarkably comparable to state-sponsored torture and ill-treatment in confinement conditions. Given the parallels between official torture or other ill-treatment and domestic violence, this thesis proposes expanding the definition of torture by the convention against torture and, thus, incorporating domestic violence within the rubric of torture discourse. In so doing, a more abstract value of alerting perpetrators and the general public will be formed and consequently will hold States more accountable for acts of violence committed by private individuals in their territories.</p>	
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1. INTRODUCTION

1.1. Background of the study

Violence against women (here VAW) is one of the critical social mechanisms by which women are forced into a subordinate position compared to men¹ and has dire consequences for women's mental and physical health worldwide. Reports suggest that violence against women hinders all women's abilities to exercise their human rights, and it circumscribes women's capacity to function as full citizens in society.² In 2013, the World Health Organization (here WHO) published a report estimating that approximately 35% of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence.³ Even in the most recent report of WHO, this figure has not decreased at all and "has remained largely unchanged over the past decade."⁴ Further, domestic violence, contrary to some perceptions, is neither an exceptional incident nor a mere 'bagatelle' of lower extent but portrays one of the prevailing sources of violence, humiliation, and death globally – approximately on a par with all of the killing and abuse induced in a given period of time by all of the world's armed conflicts taken together.⁵ The bulk of these incidents is connected to intimate partner violence. It is perhaps best to conclude that violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.⁶ Hence, numerous experts and scholars see VAW, especially domestic violence, as an indication of the historically

¹ UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, available at: <https://www.refworld.org/docid/3b00f25d2c.html> [accessed 16 January 2022]

² Fried, S. T. (2003). Violence against women. *Health and Human Rights*, 6(2), 88–111. <https://doi.org/10.32380/alrj.v0i0.848>, P. 4

³ WHO, (2013), *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, p. 20

⁴ WHO. (2018). *Global, regional, and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women*. Executive summary. Geneva: World Health Organization; 2021. License: CC BY-NC-SA 3.0 IGO.

⁵ Mc Evoy, Claire & Hideg, Gergely. (2017). *Global Violent Deaths 2017: Time to Decide*. p. 10. As cited in Domestic Violence and the Prohibition of Torture and Ill-Treatment. <https://www.ohchr.org/en/special-procedures/sr-torture/domestic-violence-and-prohibition-torture-and-ill-treatment>

⁶ Copelon, R. (1994). *Understanding Domestic Violence as Torture*. Human Rights of Women: National and International Perspectives. Ed. Rebecca J Cook. Philadelphia: University of Pennsylvania Press

unequal power relationship between men and women. They argue that this imbalance has driven pervasive cultural stereotypes and attitudes that perpetuate a cycle of violence over time.⁷ The inescapability of domestic violence suggests that it is neither random nor isolated, nor can it be clarified by the abnormal characteristics of the abuser or the victim. Instead, domestic violence has been characterised as a systemic and structural phenomenon, a means of the patriarchal dominance constructed on male supremacy and female inferiority.

Furthermore, domestic violence within the private sphere of the woman's life is the main common form of sex-based violence against a woman. Its consequence is seen in nearly all areas of her life. The adverse impacts of the abuse women share in private spheres can be profound, extending beyond the well-being and happiness of women as individuals and the prosperity of society as a whole. Thence, current cultural attitudes acknowledge domestic violence as a clear wrong and subject it to disdain and contempt.⁸

1.2. Statement of the problem and research methodology

As mentioned earlier, VAW is perhaps the most disgraceful and pervasive human rights violation; it knows no limitations of geography, culture, or wealth. As long as VAW persists, we cannot claim to be making real progress toward equality, development, and peace.⁹ The challenge is that human rights have traditionally been concerned with safeguarding individuals against state breaches. In the meantime, VAW is often committed by non-state actors such as an intimate partner, these acts remain out of sight, even if it is remarkably comparable to the state-sponsored torture in confinement. Not to mention that the prohibition of torture is rated among the most important human rights¹⁰ and has been promoted to the status of *jus cogens*,¹¹

⁷ For more information read the Report of the U.N. Secretary-General, A/61/122/Add.1, *In-depth Study on all Forms of Violence Against Women: Report of the Secretary-General*, July 6, 2007, pp. 28-30, available at [A/RES/58/185](#)

⁸ Tania, T. (2016). *Criminalizing "Private" Torture*, 58 Wm. & Mary L. Rev. 183. P.38 <https://scholarship.law.wm.edu/wmlr/vol58/iss1/5>

⁹ Quoted by Kofi Annan, *Review and Appraisal of the Implementation of the Beijing Platform for Action: Report of the Secretary-General*. (E/CN.6/2000/PC/2)

¹⁰ Edwards, A. (2010). *Violence against Women under International Human Rights Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511779671, p. 199

¹¹ *Prosecutor v. Furundžija*. (2002). International Criminal Tribunal for the Former Yugoslavia, 121 International Law Reports 213L; *Belgium v. Senegal*, Questions relating to the Obligation to Prosecute or Extradite, Order of

meaning that any other norms that conflict with a norm of jus cogens are regarded as invalid.¹² Indeed it is not unexpected that VAW has not traditionally been considered to come within the range of torture prohibition. Howbeit, similarities between both acts of torture and domestic violence have been described by many feminists,¹³ claiming that "when stripped of privatization, sexism, and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence."¹⁴ Catharine MacKinnon, a feminist scholar, proposes the potentiality of this idea. She argues that at least one way to reduce the VAW's pervasiveness is to tackle international human rights norms, particularly the prohibitions of torture, and employ them to sexual violence with greater precision and responsibility than has previously been the case. Align with this idea, Rhonda Copelon, in her pathbreaking article "Recognizing the Egregious in the Everyday: Domestic Violence as Torture", first set forth the theory that domestic violence, when the state fails to intervene, can constitute a form of torture that implicates state responsibility under the UN Convention Against Torture.¹⁵ Copelon argues for the application of international and national torture laws to domestic violence by stretching the state action requirement to include the state's complicity in permitting domestic violence.¹⁶ Accordingly, international human rights bodies have embraced two pragmatic strategies to tackle domestic violence. Firstly, to include VAW as a form of sex discrimination and, secondly, to creatively re-interpret existing human rights provisions to apply to women's experiences.¹⁷ For instance, the UN's "gender mainstreaming

11 July 2011, I.C.J. Reports 2011; *Al-Adsani v. United Kingdom*, European Court of Human Rights, Application No.5763/97

¹² *Vienna Convention on the Law of Treaties* (adopted on 22 May 1969 entered into force on 27 January 1980) 1155 U.N.T.S 331, Article 53.

¹³ See, generally, Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. *Columbia Human Rights Law Review*, 25; Catherine A. MacKinnon. (1993). *On Torture: A Feminist Perspective on Human Rights*.

¹⁴ Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. *Columbia Human Rights Law Review*, 25. p. 296.

¹⁵ As cited in: Caroline Bettinger-Lopez. (2012). *The Challenge of Domestic Implementation of the International Human Rights Law in The Cotton Field Case*, 15 *Cuny. L. Rev.* 315-334

¹⁶ Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. *Columbia Human Rights Law Review*, 25. p. 295

¹⁷ Edwards, A. (2011). *Violence against Women under International Human Rights Law*. Cambridge: Cambridge University Press, P, XI

agenda"¹⁸ employs the latter strategy of interpretative inclusion rather than textual amendments.¹⁹ However, the United Nations Committee Against Torture's (here "the Committee") General Comment No.2 is a masterstroke in this regard, as it fills the gap concerning the applicability of the convention against torture and other cruel, inhuman, or degrading treatment or punishment (here "CAT") to non-state individuals and in the private sphere because this is where the states fail to play their role, based on due diligence.²⁰ General Comment No.2 states that:

“State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person, such as race, nationality, religion, sexual orientation, age, immigrant status etc., to determine how women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.”²¹

Unfortunately, it is a harsh reality that in far too many cases, society accuses women of the domestic violence perpetrated upon them and prejudices them as provoking and deserving of violence at home, making the prosecution of domestic violence extremely difficult.²² In contrast, as an act strongly denounced, torture focuses on the defendant's culpability and distracts us from our absurd cultural fixation on blaming victims of domestic violence.²³ While

¹⁸ "Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies, or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring, and evaluation of policies and programmes in all political, economic, and societal spheres so that women and men benefit equally, and inequality is not perpetuated." For more information refer to: <https://www.unwomen.org/en/digital-library/publications/2015/02/gender-mainstreaming-issues>

¹⁹ Edwards, A. (2011). *Violence against Women under International Human Rights Law*. Cambridge: Cambridge University Press, P, XI

²⁰ General Comment No. 2, ¶ 18, January 2008

²¹ UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2. Para, 22

²² Cheryl, H. (1996). *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1851 supra note 118.

²³ Ibid. 39.

research on victims of domestic violence reveals deep pain and suffering that can easily be reconciled with cases of torture, the only way to truly fight violence against women is to re-interpret it with the UNCAT. A torture statute would encompass the full scope of domestic violence²⁴ and demonstrate it as heinous as torture itself. In the meantime, it would also connect the dots between sporadic acts of violence, thus, would indicate the terrifying whole rather than misdemeanor battery charges.²⁵ Further, at the national level, domestic violence as torture and other ill-treatment would enable the criminal justice system and the public to comprehend its full scope and atrocity because current criminal law misses the incremental terror of violence at homes by fracturing it into individualized misdemeanor ill-treatments.²⁶ Dubbing violence against women a felony crime, the same as torture, might help the public stop blaming victims for domestic violence since they realize that torture techniques can control the mind and warp the will of even the most stoic soldiers.²⁷

Thus, in light of the widespread presence of domestic violence worldwide, this study mainly aims to address the applicability of the prohibition of torture and other ill-treatment to the context of domestic violence in the light of private and public dichotomy. Thereupon, this study postulates the hypothesis that the idea that violence against women constitutes torture and other cruel, inhuman, or degrading treatment or punishment will benefit from the symbolic value of the stigma tied to this human rights violation as an absolute and non-derogable right; and thus, will effectuate far-reaching obligations for states under human rights law.

Moreover, to carry out the idea, the thesis uses a legal-dogmatic methodology that analyzes international human rights instruments, such as the UN convention against torture, the convention on the elimination of all forms of discrimination against women and other relevant human rights bodies while engaging in some related academic works of literature such as Rhonda Copelon's writings (*Recognizing the egregious in every day: Domestic violence as torture and Understanding domestic violence as torture*) and Alice Edwards's (*The feminizing' of torture under international human rights law*) as main references. In due course, the study

²⁴ See, generally, Zorza, J. (1992). *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. Crim. L. & Criminology 46, 46-53.

²⁵ Tania, T. (2016). *Criminalizing Private Torture*, 58 Wm. & Mary L. Rev. 183, P.6, <https://scholarship.law.wm.edu/wmlr/vol58/iss1/5>

²⁶ Ibid., P.2.

²⁷ Ibid., P.7.

will partly assess the effective application of international law and human rights standards on the Taliban's de facto authorities in Afghanistan. According to a recent report from the UN, confining women and girls to the home is no different from being in prison and will likely pave the way for more domestic violence incidents than before. Hence, the treatment of women and girls by the Taliban, from the point of view of UN experts, "may be a crime against humanity."²⁸ As a result, regarding the grave violation of women's rights in Afghanistan, its inclusion in this study has emerged as an obvious and timely instance in order to analyse the relevancy of the UNCAT with the issue of violence against women.

1.3. Significance of the Study

The idea of conducting the present study came from the objective observation of inequality, discrimination, and subsequent torture and other ill-treatment against women and girls. After completing the library studies and understanding the available resources, the relevant resources were reviewed, and the research was conducted. The findings of this study provide a basis for a better understanding of violence against women, especially domestic violence. In addition, examining the status of women in Afghanistan under the Taliban's non-recognized *de facto* regime can provide the necessary legal answers to the questions posed in the media concerning women's human rights in the country. The findings can also pave the way for women and men to understand a proper relationship meaning since the traditional perceptions can be highly inhumane and gender-biased concerning women's status in society.

1.4. Limitations

This thesis is centred on the relevance of torture and other ill-treatment to the context of violence against women in the private and public spheres. Although research has been conducted in this field for years, it is still one of the most debatable ideas in women's rights fora. Further, the present thesis partly analysis the impact of incorporating domestic violence within the torture definition by the UNCAT on the lives of women in Afghanistan. The country is currently under the control of *de facto* authorities and thus experiencing one of the darkest

²⁸ Bennett, R., Tanck, D. E., Radačić, I., Broderick, E., Techane, M. G., Xanthaki, A., Shaheed, F., Voule, N., & Lawlor, M. (2022, November 25). Afghanistan: Latest Taliban treatment of women and girls may be crime against humanity, say UN experts. OHCHR. Retrieved November 27, 2022, from <https://www.ohchr.org/en/statements/2022/11/afghanistan-latest-taliban-treatment-women-and-girls-may-be-crime-against>

historical stages regarding women's rights. This thesis, however, will not delve into portraying the detailed legal structure of the Country and previously enacted laws.

Moreover, it is important to mention that in the thesis, violence against women and domestic violence are employed synonymously. Although domestic violence is not exclusive to women, since it also endures other groups such as men, children or disabled persons, this thesis does not include them in the argument. The groups other than women and girls require separate research and analysis and have their own slots in international human rights law.

1.5. Organization of the Research

In order to examine these claims, the present thesis will be structured into five chapters. The first chapter is "Introduction"; In this chapter, the research pays attention to the problem statement, research questions, hypothesis, significance of the research, research methodology, and the research organization.

The second chapter is entitled "Conceptual Definitions"; In this chapter, the central concepts are defined in detail; for instance, the definition of torture and its elements, violence against women, especially domestic violence, and Positive States Obligation to Prevent torture are all put under consideration.

Chapter three is entitled "The applicability of the prohibition of torture and other ill-treatment to the context of domestic violence." this chapter explicitly addresses the feministic claim that considering the situation, domestic violence can amount to torture or other ill-treatments.

"The impact of incorporating domestic violence within the definition of torture and other ill-treatment on the Status of women in Afghanistan" is the fourth chapter of the present research. This chapter will take a brief look at women's human rights status in the private and public spheres. It seems necessary since the country is currently ruled by the *de facto* authorities and all the previously enacted laws are suspended, and the vital rationale is that international law "abhors a vacuum". Secondly, this thesis will examine the employment of the prohibition of torture and other ill-treatment in the context of domestic violence in Afghan women's life.

2. CONCEPTUAL DEFINITIONS

2.1. Background to and Definition of Violence against Women

Violence has always been an aspect of the human experience, and its consequence can be noticed in different forms worldwide. More than a million people lose their lives yearly, and

many more suffer non-fatal injuries due to self-inflicted, interpersonal or collective violence.²⁹ Indeed, the human cost of grief and pain cannot be calculated since it is mostly invisible. While technology advancements have made certain grounds of violence – terrorism, wars, riots, and civil unrest – visible to television audiences daily, much more violence happens out of sight in homes, workplaces, and even in the medical and social institutions set up to care for people.³⁰ Otherwise stated, some causes of violence are easy to see; however, others are deeply rooted in human life's social, cultural, and economic fabric.³¹ For instance, domestic violence is often invisible, ignored, or underreported for different reasons, such as shame, fear of being blamed, lack of trust in the legal system and the police, and fear of retribution by perpetrator or honour killings.

However, feminist theorists do not consider individual and family grounds sufficient to explain this kind of violence. Although they believe these factors can aggravate violent behaviour, their focus is on the patriarchal structure of society that allows men to exercise power over women. The factors causing violence against women will be further elaborated on in the upcoming chapters. Here, however, the form and nature of gender-based violence will be examined. Any comprehensive study of violence should begin by defining its different forms of it in such a way as to facilitate their scientific dimensions.³² *Violence* was first described as giving physical harm to another person intentionally or perceived as an intentional act.³³ However, the terms violence, spousal abuse, domestic violence, intimate violence, family violence, wife bashing, wife battering, and woman abuse are often used interchangeably.³⁴ In 1993, the United Nations defined violence against women as any form of gender-based violence that, in addition to being

²⁹ See, generally, Dahlberg, L.L., & Krug, E.G. (2006). *Violence: a global public health problem*. *Ciencia & Saude Coletiva*, 11, 277-292.

³⁰ Ibid., P.3.

³¹ Ibid., P.3.

³² See, generally, Dahlberg, L.L., & Krug, E.G. (2006). *Violence: a global public health problem*. *Ciencia & Saude Coletiva*, 11, 277-292. P.5

³³ Gelles, R. J., & Straus, M. A. (1988). *Intimate violence: The causes and consequences of abuse in the American family*. New York: Simon & Schuster.

³⁴ Gelles, R. J. 1993. "Through a Sociological Lens Social Structure and Family Violence", in R. J. Gelles and D. R. Loseke (Eds.), *Current Controversies on Family Violence*. Newbury Park: Sage Publications.

harmful to women, also constitutes a deprivation of their individual or social liberty.³⁵ Otherwise stated, violence refers to any threatening behaviour or psychological, physical, sexual, financial, or emotional abuse committed by one person against another in a relationship.³⁶ In other words, violence was first described as giving physical harm to another person intentionally or perceived as an intentional act.³⁷ The UN Declaration on the Elimination of Violence against Women (DEVAW) is the one which provides a broad definition. DEVAW uses *gender-based violence* (GBV), a term which arose within the women's rights movement, to articulate women's exposure to violence in the context of patriarchy for the first time.³⁸ The DEVAW reads:

"Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether in public or private life."³⁹

DEVAW also recognizes that VAW manifests historically unequal power relations between men and women.⁴⁰ However, CEDAW's⁴¹ definition covers a broad range of results – including psychological harm, deprivation, and maldevelopment. Hence, it mirrors a growing recognition among researchers and practitioners of the need to incorporate into the definition that violence does not necessarily result in injury or death but still poses a substantial hindrance to

³⁵ Ali, T. S., Mogren, I., & Krantz, G. (2013). Intimate partner violence and mental health effects: A population-based study among married women in Karachi, Pakistan. *International journal of behavioral medicine*, 20(1), 131-139.

³⁶ Netto, G., Pawson, H., & Sharp, C. (2009). Preventing Homelessness Due to Domestic Violence: Providing a Safe Space or Closing the Door to New Possibilities? *Social Policy & Administration* issn, 43(7), 719–735.

³⁷ Gelles, R. J., & Straus, M. A. (1988). *Intimate violence: The causes and consequences of abuse in the American family*. New York: Simon & Schuster.

³⁸ COFEM. (2017). *Reframing language of 'gender-based violence' away from feminist underpinnings*, Feminist Perspectives on Addressing Violence Against Women and Girls Series, Paper No. 2, Coalition of Feminists for Social Change. P.2

³⁹ UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, available at: <https://www.refworld.org/docid/3b00f25d2c.html> [accessed 14 January 2022]

⁴⁰ DEVAW, United Nations, New York, 20 December 1993. Para.6. Available at: [Declaration on the Elimination of Violence against Women](#)

⁴¹ UN General Assembly, CEDAW, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 7 January 2022]

individuals, families, communities, and healthcare systems globally.⁴² As stated before, GBV can take many forms: domestic violence, child marriage, female genital mutilation (FGM), intimate partner violence (IPV), and sexual assault or rape. In this regard, GBV infers the savagery that happens due to normative role expectations and perceived gender power inequality and is a move from alluding simply to "men committing violence against women." GBV is a notion that includes women, men, LGBT, and gender-nonconforming individuals; however, women and girls are the most at risk and the most affected by gender-based violence.⁴³ That being the case, the present study uses VAW to cover all kinds of violence against women.

Moreover, since VAW is rooted in unjust power relations and social and cultural norms that disempower women⁴⁴ and can have severe psychological, physical, economic, and social repercussions, which can happen in private or public spheres, it is impossible to find a nation liberated from the curse of VAW. Many historic factors embody creating and expanding violence against women, for instance, the approval of domestic violence in the shape of cultural acceptance and the existence of misconceptions and myths about it. Myths about domestic violence can sometimes restrain efforts to fight it. These myths develop because it can be challenging to comprehend why one individual would hurt another. Domestic violence myths can be described as an idea that "minimizes the crime, blames the victim and exonerates or at least excuses the perpetrator."⁴⁵ In other words, domestic violence myths serve to blame victims, excuse perpetrators, or minimize the crime and have wide historical acceptance on both the individual and the societal level.⁴⁶ Hence, domestic violence can be better understood

⁴² Ibid., 5.

⁴³ Ott, M. (2021, June 4). *Series: What Does That Mean? Gender-based Violence* | Women for Women International. <https://www.womenforwomen.org/>

⁴⁴ Ibid.

⁴⁵ Peters, J. (2008). *Measuring Myths about Domestic Violence: Development and Initial Validation of the Domestic Violence Myth Acceptance Scale*. *Journal of Aggression, Maltreatment & Trauma*, 16(1), 1-21.

⁴⁶ Bryant, S. A. (2003). *University students' attitudes about attributing blame in domestic violence*. *Journal of Family Violence*, 18(6), 369.

as a chronic syndrome characterized by episodes of physical violence and the emotional and psychological abuse the perpetrators use to maintain control over their partners.⁴⁷

In order to combat such perceptions and reduce gender-based violence, profound steps have been taken at the international level. For instance, DEVAW and CEDAW were institutionalized in line with this goal. CEDAW helped pave the way for human rights advocates, organizations, and other institutions to raise their voices for victims of domestic violence in the national criminal justice system. Following from the CEDAW, state parties have a range of specific obligations to ensure that all necessary steps are taken to prevent and punish gender-based violence, including within the private sphere.⁴⁸ Additionally, through appropriate measures, CEDAW reminds states of their obligation to continue combating cultural standards, factors, and patriarchy that degrades women. As mentioned before, article 5 of CEDAW requires states to "take all appropriate measures to modify social and cultural patterns and practices that are prejudicial to women and perpetuate their inequality"⁴⁹ For instance, the existence of the patriarchal structure in societies and victim-blaming attitude must be condemned. Patriarchy is a concept that can be defined as "the relationship of a dominant group (men) considered superior to a subordinate group considered inferior (women) in which mutual obligations and reciprocal rights mitigate the dominance."⁵⁰ Patriarchy is also considered "a system of male dominance."⁵¹

Although there is no explicit and direct provision on domestic violence against women, the CEDAW highlights in General Recommendations 19 on violence against women that GBV blocks women from enjoying their liberty just as men do.⁵² Further, comments on articles 2(f)

⁴⁷ Hegarty K, Hindmarsh ED, Gilles MT. (2000). *Domestic violence in Australia: definition, prevalence and nature of presentation in clinical practice*. The Medical Journal of Australia. As cited in: *Journal of Epidemiology and Community Health*, 01 Aug 2007, 61(8):676-680

⁴⁸ Beninger, C. (2014). *The Effectiveness of Legislative Reform in Combating Domestic Violence: A Comparative Analysis of Laws in Ghana, Namibia and South Africa*. Netherland Quarterly of Human Rights, Vol. 32/1, 77, 81, 83-84. <http://journals.sagepub.com/doi/10.1177/016934411403200105>

⁴⁹ Ibid.

⁵⁰ See, generally, Lassen, I., & Majstorović, D. (2011). *Living with Patriarchy: Discursive Constructions of Gendered Subjects Across Cultures*.

⁵¹ Christ, C. P. (2016). *A New definition of Patriarchy: Control of Women's Sexuality, Private Property, and War*. *Feminist Theology*, 24(3), 214. <https://doi.org/10.1177/0966735015627949>

⁵² CEDAW General Recommendation No. 19 - 1992 - Violence Against Women. CEDAW. 1992.

and 10(c) of the CEDAW emphasize that due to traditional values, attitudes, and standards, there are women who will have to be submissive to men and may have stereotypical roles that lead to violence and different forms of abuse.⁵³

Moreover, in the CEDAW's General recommendation No. 35, the Committee deems GBV against women to be rooted in gender-related aspects such as the ideology of men's privilege over women, social norms regarding masculinity, the need to maintain male control or power, enforce gender roles and prevent, discourage or punish what is believed to be unacceptable female manners. These factors also contribute to the explicit or implicit social acceptance of gender-based VAW, often viewed as a private matter, and to its widespread impunity.⁵⁴

Besides, domestic violence can be characterised as misusing a relationship's power to control another person through violence and abuse. These ill-treatments can have different forms, such as physical assault, psychological abuse, social abuse, economic abuse, or sexual assault. Hence, it is not simply an argument. Thus, it is a pattern of coercive control that one individual practices over another. Abusers employ bodily and sexual violence, threats, emotional insults and financial deprivation as a method to overpower their victim.⁵⁵

2.2.The Concept and Definition of Torture and Other Ill-treatments

According to International Human Rights Law, the prohibition of torture is absolute, and no exceptions are allowed; the prohibition is enshrined in both treaty and customary international law. Any state action contrary to customary international law is automatically a breach of an international obligation of that State. The most important international legal treaty that sets out the definition of the prohibition and the content of the international legal obligations of States concerning the prohibition is the United Nations convention against torture and other cruel, Inhuman or degrading treatment or punishment (here, the CAT). A widely accepted definition of torture is provided in Article 1 of this convention. The article reads:

"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the

⁵³ Ibid.

⁵⁴ General Recommendation No. 35, *supra* n 1. para. 9

⁵⁵ Domestic violence.(2005). *Older women can be victims too. National center on elder abuse.* Washington DC

instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."⁵⁶

This definition includes both physical and psychological pain with a particular motive committed by a public official or individuals in an official capacity. Besides, the prohibition of torture is also articulated in the ICCPR, which states that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."⁵⁷ In addition, other regional human rights instruments also address the issue of torture. For instance, article 3 of the ECHR reads:

"No one shall be subjected to torture or inhuman or degrading treatment or punishment."⁵⁸

A noteworthy point regarding the issue of torture in international and regional human rights instruments is that there is a shared denominator among these provisions; torture is knotted with other similar concepts, such as inhuman and degrading or ill-treatment. This resemblance can exceptionally be problematic from time to time. For instance, to decide cases, courts often do not make a specific reference to one of these forms of ill-treatment but rather address the article as a whole. In other words, they examine the allegations not based on a clear definition of the different forms of ill-treatment but in the light of the nature, purpose, and severity of the treatment applied.⁵⁹ Although all major universal and regional human rights treaties expressly prohibit torture, cruel, inhuman, and degrading treatment or punishment, none of them offers a definition of the term as a whole or its components and the concepts have been interpreted and applied in a wide range of cases before judicial and quasi-judicial bodies, albeit with varying precision.⁶⁰ According to international human rights law, torture is the intentional infliction of severe pain or suffering on a powerless person, whether physical or mental, for purposes such

⁵⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 2 January 2022]

⁵⁷ The International Covenant on Civil and Political Rights, 1976, article 7

⁵⁸ Art.3 ECHR

⁵⁹ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para 4

⁶⁰ UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 20 July 2017, A/72/178, para.25

as obtaining information or confession, punishment, intimidation, coercion, or for any reason based on discrimination. In comparison, ill-treatment refers to any cruel, inhuman, or degrading treatment or punishment, which, unlike torture, does not necessarily require the intentionality and purposefulness of the act, the severity of the pain or suffering caused by it or even the powerlessness of the victim.⁶¹

Although, the distinction between torture and other ill-treatment always depends on the definition of the applicable treaty. However, in general, it is crystal clear that torture and other ill-treatment are unquestionably prohibited. The broad scope of this prohibition covers a wide variety of more or less aggravated forms of inflicting pain or suffering, all of which are conclusively unlawful but only some of which qualify as torture.⁶² Thus, for instance, the American Commission on Human Rights held that:

"...inhumane treatment includes unjustifiable conduct that causes severe physical, mental or psychological pain or suffering, and that treatment or punishment of an individual may be degrading if he is severely humiliated in front of others or he is compelled to act against his wishes or conscience"⁶³, thus, considering the evolving nature of the mentioned concepts it seems necessary to focus on the evolving interpretation of the definition of torture and other ill-treatment and how the human rights courts and treaty bodies interpret their prohibition. Although the concept of torture has undergone significant shifts in its interpretation in recent years, these changes have never been consistent and vary case by case. For instance, the ECHR found rape as torture in *Aydin v. Turkey*⁶⁴ in 1997. The Court states:

The accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amount to torture in breach

⁶¹ Méndez, J. (2012). Secretary-General, U., & UN. Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Punishment, *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* :. United Nations Digital Library System. Retrieved 17 September 2022, para.9 from https://digitallibrary.un.org/record/733853/files/A_67_279-EN.pdf.

⁶² Ibid., para.27.

⁶³ IACHR, Report No. 92/05, Case 12.418, Michael Gayle v. Jamaica, 24 October 2005. Para.61

⁶⁴ *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997, <https://hudoc.echr.coe.int/eng?i=001-58371>

of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.⁶⁵

The mentioned judgment by the ECtHR is a remarkable and progressive decision. A finding that the rape was sufficient to constitute torture marked a very clear departure from the previous approach of the European Commission in *Cyprus v Turkey*, which had dismissed the suggestion of torture despite evidence of mass rape by security forces.⁶⁶ Hence, the Court found that there had been a continuing violation of Article 3 (prohibition of inhuman or degrading treatment). The silence of the Turkish authorities in the face of the real concerns of the relatives attained a level of severity that could only be categorized as inhuman treatment.⁶⁷

Whilst changes in human rights concepts are beneficial and valuable to stay up to date and comprehend the needs of the time, this development should not be faltered, as mentioned in the examples above. The absolute prohibition of torture is a precious achievement in international law since, as a *jus cogens* norm, the prohibition of torture can be used to hold states accountable for their actions regardless of whether they have ratified specific treaties. Additionally, the prohibition of torture carries an extreme symbolic value; because such repugnant behaviour treats individuals as a means rather than ends unto themselves and violates their inherent human dignity.⁶⁸

Nonetheless, the ambiguity of the definitions of the prohibition of torture and other ill-treatment has reduced the scope of human rights developments in regional and international courts in the context of domestic violence. The lack of a clear line between these different forms of ill-treatments and the sometimes ambiguous behaviour of the courts and treaty bodies paves the way for continued criticism. For instance, one of the firmest criticisms has been made by feminists. Feminists' critique concerning the definition of torture usually points out that people are protected from state violence, though women experience violence most often in

⁶⁵ Ibid., para 83.

⁶⁶ *Cyprus v Turkey* (1982) 4 EHRR 482. As cited in: McGlynn, C. (2009). *RAPE, TORTURE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS*. *International and Comparative Law Quarterly*, 58(3), 565–595.

⁶⁷ Ibid.

⁶⁸ American University Center for Human Rights & Humanitarian Law. (2017). *The Prohibition of Torture: An Introductory Guide*. Newsletters & Other Publications. 15.
https://digitalcommons.wcl.american.edu/fac_works_pubs/15

private spheres. They argue that one of the reasons for this ambiguous behaviour by the Courts and treaty bodies is that the private sphere is mostly out of the reach of the State's intervention since it is deemed a private matter.

In most cases, the states fail to protect individuals from gender-based violence, which can even amount the same pain and suffering as torture.⁶⁹ Human rights organizations have widely accepted these criticisms. From time to time, the issue of domestic violence, genital mutilation, and rape have been included in the category of torture. However, the practice concerning these issues is inconsistent, but developments towards a more gender-oriented definition of torture can be seen.⁷⁰ In the following paragraphs, this thesis examines torture elements separately to explore the issue further. The definition of torture given by the various treaty bodies incorporates three elements: pain and suffering, purpose and official capacity. The mentioned elements will be discussed in the following sub-chapters.

2.2.1. Pain and Suffering

As per Article 1 of the CAT, torture is an act by which severe pain or suffering is deliberately inflicted. Torture is distinguished from other forms of abuse because of the severity of the pain it causes. Moreover, this elemental requirement is perhaps the most challenging aspect of torture in terms of evaluation. The other two elements (purpose and official capacity) are mostly objectively provable - it is usually possible to determine objectively whether the perpetrator has a connection to the State or for what specific purpose the torture was committed. Nevertheless, the nature and extent of the pain and suffering the person has suffered are entirely different. These usually depend on the personality characteristics of the victim - for example, gender, age, religion, cultural beliefs, or health. Some types of abuse are objectively classified as torture - for example, electric shock to the genitals or nail-cutting. However, torture is not limited to these familiar examples and naturally involves other forms of mental or physical suffering. Therefore, it is essential not to forget the psychological forms of abuse that often have long-term consequences for the victim, as their physical injuries may heal but not the psychological harm. In the following chapters, this element of the definition of torture by UNCAT will be examined in detail.

⁶⁹ Edwards. A. (2006). *The feminizing of torture under international human rights law*. Leiden journal of international law, vol.19/02, 6/2006. P.356

⁷⁰ Ibid., p.387.

2.2.2. Specific Purpose

Article 1 of UNCAT suggests that torture is an act in which severe pain or suffering is inflicted with the purpose of "obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." However, it remains unclear from the human rights treaty bodies' practice which "purposes" would be regarded as satisfactory for an act to constitute torture. For instance, as mentioned in the previous paragraphs, the ECtHR argues that a differentiation should be made between torture and other forms of ill-treatment. Hence, there is an exact ambiguity about the purposefulness of torture and what purposes, if any, are applicable to the torture definition.

2.2.3. Official Capacity

As noted in the previous paragraphs, torture is usually carried out either by state officials, with their consent, or by their representatives. For an act to be considered torture, a potential public official must be involved. However, given the common purpose of torture, which includes obtaining information, it is not surprising that the perpetrators of such behaviour are state agents involved in the criminal interrogation process and those responsible for maintaining the country's security. Since there is no definition of torture in the jurisdictions of the ECHR, ICCPR, and the ACHR, thus, the nexus between the violent act and the state is not explicitly required by them. However, the CAT is straightforward in describing the connection that must be established between a particular act and a state to hold the latter accountable for it. The Special Rapporteur on torture expressed that the UNCAT goes beyond the traditional concept of State responsibility and includes acts that are not directly inflicted by the State officials but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture. Female genital mutilation, domestic violence and trafficking of human beings may also be covered.⁷¹

Furthermore, as the content of Article 7 of the ICCPR does not utilize expressions such as "public officials" or "person acting in an official capacity," its scope is seen more extensively

⁷¹ Nowak, Manfred. (January 2008) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/7/3, 15, Para, 1(f)

by academics comparing the definition by the CAT. The HRC and the ECtHR have applied the principles of due diligence and positive state obligation, which will be discussed in the upcoming sub-chapter, to establish the nexus between the act and the state. For instance, based on Article 3 of the ECHR, the ECtHR explicitly held that states ought to “take reasonable steps to prevent ill-treatment” to carry out an “effective official investigation.”⁷² In the view of the fact that only the abuses perpetrated by state agents are recognized as torture, this element of torture is the most criticized by academics and practitioners because this requirement can be a serious obstacle to putting VAW in the category of torture and thus excludes it from the scope of protection of the torture prohibition. Hence, it is to the disadvantage of women, as almost all violent incidents against women occur in the private sphere and are entirely “rendered invisible.”⁷³ Being undetectable has paved the way for the spread of this type of violence. Because in torture, substantive violence establishes a mechanism for control rather than an end in and of itself.⁷⁴ Such threats punctuated with occasional violence prove considerably more effective than constant violence.⁷⁵ The only significant dissimilarity between domestic violence and the catalogue of torture techniques used elsewhere is that the act of torture is consistently associated with the victim's imprisonment. In this section, we examine the obligations of the states concerning VAW.

2.2.4. Positive States Obligation

The shift from a traditional society to a modern one means changing the behavioural patterns and discourse that govern societies. One of these behavioural patterns is the violent treatment of women in private spheres and mostly in the form of intimate partner violence. Since the perpetration of domestic violence is mainly rooted in the cultural practices of individuals to prioritize men over women, it becomes a hierarchy between the sexes and, consequently, ends up with the superiority of men in the family. Thus, violence against women is part of the existing social reality that needs to be realized and reduced through legislative and cultural

⁷² E.g. *Z and Others v United Kingdom*, ECtHR, Judgement of 10 May 2001, para. 73.

⁷³ Gallagher, A. (1997). *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, in *Human Rights Quarterly*, Vol. 19, p. 291

⁷⁴ See e.g., Hernán, R. (2007). *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. RED CROSS 591, 614-15

⁷⁵ See, generally Karla, F, et al. (1993). *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2128-29

means. In this way, states can play a preventive and effective role in combating domestic violence. In this regard, a considerable number of states have developed encouraging approaches to fulfil their human rights obligations to address VAW.

Moreover, international human rights bodies, for instance, the Inter-American Court of Human Rights and the European Court of Human Rights, have explicitly and extensively considered the obligations of states to prevent violations of the prohibition of torture and other ill-treatment in their case law. The mentioned Courts have mandated nations to execute *due diligence* to promote, protect and fulfil human rights. *Due diligence* binds States to take steps to stop human rights violations before they happen. For instance, in the *Osman v Turkey* judgment, the ECtHR held that the state's positive obligation to prevent the violation was engaged when "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party."⁷⁶ In the context of violence against women, the positive state obligation to prevent the offences against an individual can be invaluable because it mandates states to investigate the cases and take the necessary measures to prevent these abuses from happening. For instance, in the *Osman v Turkey* judgment, the ECtHR held that states are required "to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."⁷⁷

Moreover, due diligence causes states to be liable for human rights violations perpetrated by the State or State agents and non-State actors. State parties are accountable for private acts if they neglect to proceed with due diligence to stop human rights abuses, investigate and punish acts of violence, and provide compensation.⁷⁸ The use of the language by the court, in this case, seemed significantly relevant to this research. For instance, the phrase "ought to have known" is a major achievement by the judicial systems to push states for a more active role in cases where the authorities have the knowledge concerning the "real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party."⁷⁹

Nevertheless, in *Volodina v Russia* case, which will be analysed, later on, Judge Pinto de Albuquerque, in a separate opinion, states that:

⁷⁶ *Osman v Turkey*, ECtHR, 6 October 2005, para. 116.

⁷⁷ *Osman v Turkey*, ECtHR, 6 October 2005, para. 116. *The Ruling on Art.2 ECHR*.

⁷⁸ CEDAW. (1994). *General Recommendation 19: Violence against women*, 11th session, 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 84, para. 9.

⁷⁹ *Osman v Turkey*. Para, 116.

"the Osman test fails to fulfil its purpose if taken word for word. A 'real and immediate risk' in the context of domestic violence implies that the risk, namely the batterer, is already in the immediate vicinity of the victim and about to hit the first blow. Were the test to be applied in such a manner, two concerns arose. Firstly, any protective measure proposed by the State would be too late, and secondly, the State would have a legitimate justification for not acting in a convenient way since it is implausible to think that the victim will always be accompanied by a State representative who may jump in to help. Hence, the 'immediacy' of the Osman test does not fit well in the context of domestic violence."⁸⁰

Due diligence as a concept of state responsibility concerning non-state acts was first formed in *Velasquez Rodriguez v. Honduras*, a case heard by the Inter-American Court of Human Rights (IACHR) in 1988.⁸¹ The case is associated with the kidnapping and disappearance of Angel Manfredo Velasquez Rodriguez, a graduate student. Leaning on evidence that affirmed a pattern of parallel disappearances tied to state suppression of dissidents, the court held that Velasquez Rodriguez's disappearance was "carried out by agents who acted under cover of public authority."⁸² According to the special rapporteur on torture, the language used in article 1 of the CAT concerning consent and acquiescence by a public official extends State obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals.⁸³ In his January 2008 report to the Human Rights Council, the Special Rapporteur includes an entire section on torture and ill-treatment in the private sphere, where he specifically states that private acts of violence against women, such as female genital mutilation, and domestic violence, may constitute torture if the state fails to act with due diligence.⁸⁴

Moreover, in the case of *Velasquez Rodriguez v. Honduras*, the IACHR held that "the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfil the duties it assumed" under the American Convention on Human Rights.⁸⁵ These duties created a positive obligation to ensure Velasquez Rodriguez's "free and full exercise of his

⁸⁰ *Volodina v. Russia*, Application no. 40419/19 (ECtHR 14 September 2021), Para 12

⁸¹ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, para 172 (July 29, 1988).

⁸² *Ibid.* para, 182.

⁸³ Nowak, Manfred. (January 2008). *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/7/3, 15, para. 31.

⁸⁴ *Ibid.* para 44.

⁸⁵ *Ibid.* para, 182.

human rights."⁸⁶ Expanding on this analysis, the court found that an illegal act "which violates human rights, and which is initially not directly imputable to a State can lead to the international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the American Convention on Human Rights."⁸⁷ Hence, states are responsible under international law for human rights violations and acts of violence against women perpetrated by the state or any of its agents.⁸⁸ Such responsibility arises from State actions and omissions and failure to take positive measures to protect and promote rights.⁸⁹

However, states are the main actors in the international arena, but not the only ones. It has been a frequent occurrence in international law that for long periods entities have existed, frequently claiming to be States or governments, which controlled more or less clearly defined territories without being recognized—at least by many States—as States or governments.⁹⁰ In other words, only the sovereign state used to be the bearer of rights and duties. Though following the Second World War and the emergence of international enforcement mechanisms sought to combat human rights violations, not merely states but also individuals and other entities with legal personalities can directly claim the rights deriving from a treaty of international law. For instance, ff pragmatic international law assumes that *de facto* regimes are bearers of international legal rights; this means that they must also have duties.⁹¹ Given the *erga omnes* applicability of fundamental human rights, there can be no doubt that they belong to the catalogue of duties of *de facto* regimes, meaning *de facto* regimes are similar to states and are bound to respect human rights wherever they exercise jurisdiction.⁹² Further, in the *Namibia* Advisory Opinion, the International Court of Justice (ICJ) stated that:

⁸⁶ Ibid., para 82.

⁸⁷ Ibid. para 172.

⁸⁸ A/RES/56/83

⁸⁹ UN General Assembly, CEDAW, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 27 October 2021]

⁹⁰ Frowein, J. A. (2010). *De Facto Regime*. In Max Planck Encyclopedia of Public International Law. Oxford: Oxford University Press. (Online ed)

⁹¹ Heintze, H. (2010). *Are De Facto Regimes Bound by Human Rights*. IFSH (ed.), OSCE Yearbook 2009. P.5

⁹² Ibid., P.5.

"...physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."⁹³

Therefore, human rights protection may become the responsibility of the *de facto* regime.⁹⁴ Thus, these regimes are required to respect human rights and "we need not abandon human rights thinking in the absence of a government ready to carry out all the traditional functions of statehood."⁹⁵ For instance, in the case of Afghanistan, the *de facto* Taliban rulers are required to respect human rights. The argument will be further elaborated on in the forthcoming chapters.

In addition, the prohibition of torture can and does apply to *de facto* regimes and armed groups under international humanitarian law, where these groups are parties to the conflict, irrespective of their relationship with any government.⁹⁶ Many *de facto* authorities often use torture systematically in camps and detention centres. Torture is also used as a means of warfare and in pursuance of a policy of "ethnic cleansing."⁹⁷ These regimes use torture mainly as a political weapon to maintain and enforce control over the members of the group and the local population. Also, torture is employed as a means to force information about government operations, rival groups, informers, presumed defectors, and critics.⁹⁸ The minimum standards contained in common Article 3 of the 1949 Geneva Conventions prohibit the use of torture.⁹⁹ Though, the minimum standard also faces challenges. For instance, the applicability of international humanitarian law is restricted to parties to armed conflict. It excludes many *de facto* regimes and armed groups that are not a party to an armed conflict, particularly during times of peace. In addition, it is also often vague whether a conflict has acquired the requisite threshold, and the various sides of a conflict may renounce that international humanitarian law

⁹³ Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971, Para, 118

⁹⁴ Heintze, H. (2010). *Are De Facto Regimes Bound by Human Rights*. IFSH (ed.), OSCE Yearbook 2009. P.5

⁹⁵ Cf. Andrew, C. (2006). *Human Rights Obligations of Non-State Actors*, Oxford, p.14

⁹⁶ Redress. (2006). *Not Only the State: Torture by Non-State Actors – Towards Enhanced Protection, Accountability, and Effective Remedies*. Prevention through Documentation Project, P.20, Available online at: <http://www.redress.org/downloads/publications/Non%20State%20Actors%2009%20June%20Final.pdf>

⁹⁷ *Ibid.*, p.21.

⁹⁸ *Ibid.*, p.23.

⁹⁹ *Ibid.*, p.37.

obligations apply.¹⁰⁰ Further, the importance of the prohibition of torture as a common minimum standard binding on parties to a conflict, both as a matter of treaty and customary international law, is not reached by any supervisory or complaint system under international law.¹⁰¹ Individual obligation for severe breaches of international humanitarian law is well established, and there are by now different avenues to keep perpetrators accountable.¹⁰²

However, UN bodies have not taken any steps to date that concentrate mainly on torture by *de-facto* authorities, armed groups, and other non-governmental actors. Moreover, the initiatives and responses of human rights treaty bodies and UN organs are primarily piecemeal. The international practice is mainly *ad-hoc*, as there is no coherent and concerted UN procedure to address relevant actors directly within the existing human rights system.¹⁰³

De facto regimes, armed groups, paramilitaries, and others have a duty not to use torture, neither as a subject of international human rights nor humanitarian law where relevant. However, the extent to which human rights need to be observed as a matter of customary law is an open question.¹⁰⁴ Intensive discussion of this culminated in the adoption of the Turku Declaration on minimum humanitarian standards in 1990.¹⁰⁵ These minimum standards are derived from non-derogable human rights and international humanitarian law and must be observed by all sovereign states.¹⁰⁶

If one examines the case-law of the ECtHR, we will see that the court has dealt with issues related to non-state actors and human rights violations in its own way. In the terminology of the ECtHR, *de facto* regimes are "self-proclaimed authorities." For instance, in the case of *Mozer v. the Republic of Moldova and Russia*. This case concerned the detention of a man

¹⁰⁰ Redress. (2006). *Not Only the State: Torture by Non-State Actors – Towards Enhanced Protection, Accountability, and Effective Remedies*. Prevention through Documentation Project, P.37

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Redress. (2006). *Not Only the State: Torture by Non-State Actors – Towards Enhanced Protection, Accountability, and Effective Remedies*. Prevention through Documentation Project, P.37

¹⁰⁴ Heintze, H. (2010). Are De Facto Regimes Bound by Human Rights. IFSH (ed.), OSCE Yearbook 2009. P.6

¹⁰⁵ See, Eide, A., Rosas, A., & Meron, T. (1995). *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*. American Journal of International Law, 89(1), 215-223. As cited in: Heintze, H. (2010). Are De Facto Regimes Bound by Human Rights. IFSH (ed.), OSCE Yearbook 2009. P.6

¹⁰⁶ Ibid.

suspected of fraud, as ordered by the courts of the *self-proclaimed*¹⁰⁷ Moldavian Republic of Transnistria (the MRT).¹⁰⁸ The applicant claimed that he had been unlawfully arrested and did not receive medical help. The applicant maintained that his complaints fell within the jurisdiction of both Moldova and Russia.¹⁰⁹ The Court came to the conclusion that the facts complained of fell within the jurisdiction of both the Republic of Moldova and of Russia under Article 1 (Obligation to respect human rights) of the Convention.

Further, the Court stated that the Republic of Moldova, having fulfilled its obligations regarding the applicant by making significant legal and diplomatic efforts to support him, had not violated his rights under the Convention. At the same time, having regard to its finding that Russia had exercised effective control over the "MRT" during the period in question, the Court concluded that Russia was responsible for the violations of the Convention.¹¹⁰ Accordingly, the ECtHR's viewpoint concerning the non-recognized entities is that the Convention is assumed to apply throughout the territory of a Member State despite any complication facing the central authorities in ensuring compliance by a regional or local authority.

However, no international bodies of law set obligations on such actors to take preventive actions. Hence, international standards applicable to states can be used, particularly in *de facto* regimes that operate some form of the criminal justice system, especially where such entities have declared their commitment to upholding relevant international standards.¹¹¹ There are no express international human rights law regulations that provide for non-state actors' obligation to afford compensation for torture. The willingness of a *de facto* regime to subscribe to the gamut of preventive measures depends to a large degree on its ideology and positioning vis-à-vis the international community.¹¹² However, Due to the lack of sufficient outside monitoring, it can be challenging to establish what steps, if any, *de facto* regimes have taken in response to torture.¹¹³

¹⁰⁷ The Court first used the expression in *Ilascu and Others v Moldova and Russia*. 48787/99, ECtHR, 8 July 2004

¹⁰⁸ · *Mozer v. the Republic of Moldova and Russia* (Application no. 11138/10), Grand Chamber judgment, ECtHR

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Redress, 'Not Only the State: Torture by Non-State Actors – Towards Enhanced Protection, Accountability, and Effective Remedies', *Prevention through Documentation Project*, May 2006 (The Redress Trust: London, England 2006). P.37.

¹¹² Ibid.

¹¹³ Ibid.

3. Relevance of the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment to the context of domestic violence

3.1. Applicability of Torture Definition to domestic violence

The previous chapter has indicated that different human rights bodies have employed positive state obligation and due diligence to establish the state's responsibility concerning the heinous acts of torture and other ill-treatment by the state or non-state actors. This chapter, however, examines the relevance and applicability of torture and other cruel, inhuman, or degrading treatment or punishment definition by UNCAT to the context of domestic violence. The UNCAT has set that States are the duty-bearers and therefore have the obligation for actions and omissions committed by State agents or private actors acting in an official capacity.¹¹⁴ According to UNCAT, states have due diligence to prevent, protect and respond to acts of torture and other forms of ill-treatment.¹¹⁵ Hence, officials or individuals with an official capacity who know, or have reasonable grounds for acknowledging that private individuals are imposing torture, are regarded to have consented to the act if they are not fulfilling their responsibilities. If they fail to stop the acts or do not provide any remedies, they are considered to be assisting the offence. The idea proposes that not just torture and other ill-treatment committed by private individuals are prohibited, but these acts should not be let go unpunished. Article 7 ICCPR and General Comment No. 20 on the provision also hold States to provide the protection necessary for all prohibited acts beneath the provision, whether committed by individuals acting in their official or private capacity.¹¹⁶ Despite all the presumption of expanding UNCAT's scope on the acts committed by private individuals, the idea has been particularly criticised by feminists. In contemporary theory, several theoretical approaches to the gender-related killing of women and girls have arisen. The feminist strategy is related to patriarchy, which emphasises the fact that power is unequally allocated between women and men in society, meaning that violence is often used as a means by men to keep women under control.¹¹⁷ According to feminists, national laws also have not been able to address the issue of

¹¹⁴ UN Committee Against Torture, General Comment no. 2: Implementation of Article 2 by States parties, CAT/C/GC/2, 24 January 2008, para. 15.

¹¹⁵ Ibid, para. 18.

¹¹⁶ HRC, ICCPR General Comment No. 20: Article 7, 10 March 1992, para. 2.

¹¹⁷ Corradi, C. et al. (2016). *Theories of femicide and their significance in social research*. Current Sociology, vol. 64, No.7 International Sociology Association, p. 5.

domestic violence as much as they should. While having a statutory means, prosecutors get the possibility to prosecute severe domestic violence as torture routinely. By taking such a strategy, countries would at least reduce a few existing issues in this regard. Current domestic violence statutes fail to capture its cumulative horror instead of fracturing the patterns of domestic violence into constituent, *de minimis* parts.¹¹⁸ Unlike most violent crime charges, torture would constitute a felony with sentences commensurate with the defendant's infliction of horror. Courts would no longer equate an egregious, repeated pattern of violence conducted with the intention of controlling another human being with a mere bar fight. The focus would shift to the defendant's intent to inflict severe pain and psychological scars rather than whether the defendant caused actual bodily harm.¹¹⁹ This current gap in criminal law can be solved by expanding domestic violence laws. Although the laws regarding sexual assault or pattern of conduct exist in some countries, this, however, at best, could help with a few incoherent misdemeanour charges such as trespassing. However, a specific statute would force the justice system to look at the full span of evidence necessary to punish the defendant's wrongdoing better and protect victims from murder.¹²⁰ Since, almost uniquely among murder victims, domestic violence victims often approach the criminal justice system for help\ multiple times before ending up dead.¹²¹ Currently, the international human rights framework and jurisprudence recognize rape as a human rights violation and a manifestation of gender-based violence against women and girls that could amount to torture.¹²² For instance, under particular circumstances, rape meets the European Court's definition of torture; however, before drafting the CAT and adopting the internationally accepted definition of torture in Article 1, rape was rarely mentioned in the human rights context. The prohibitions of torture and rape stood as isolated pillars, firmly grounded in international law but ideologically distinct. The human rights community acknowledged the existence of abuse concerning rape allegations, but it

¹¹⁸ See Tuerkheimer, D. (2004). *Recognizing and remedying the harm of battering: A call to criminalize domestic violence*. *Journal of Criminal Law and Criminology*, 94(4), 959-1031. <https://doi.org/10.2307/3491414>

¹¹⁹ Tania, T. (2016). *Criminalizing "Private" Torture*. 58 *Wm. & Mary L. Rev.* 183 P.33

¹²⁰ *Ibid.*, 34.

¹²¹ See Adame, Jaime. (Feb.24, 2014). *Are Domestic Violence Homicides Preventable?* Available at: [Are Domestic Violence Homicides Preventable? | The Crime Report](#)

¹²² <https://undocs.org/A/HRC/47/26>

failed to conceptualize such abuse as torture.¹²³ The failure to identify rape as a method of torture is partially rooted in systematic blindness to the connection between issues of gender and gross human rights violations.¹²⁴ However, with the constant actions of human rights organizations and activists in this field, the views on this subject entered a new stage. For instance, more than two decades ago, the UN Special Rapporteur on violence against women articulated that "the idea that domestic violence should be understood and treated as a form of torture and, when less severe, ill-treatment, deserves consideration."¹²⁵

" Domestic violence typically involves some form of bodily and psychological suffering, including death in some cases. Secondly, domestic violence, like torture, is purposeful behaviour which is committed deliberately. Men who beat women partners commonly exercise control over their impulses in other settings, and their targets are often limited to their partners or children. Thirdly, domestic violence is generally committed for specific purposes, including punishment, coercion, and the diminution of the woman's personality. Lastly, like torture, domestic violence occurs with at least the tacit involvement of the State if the State does not exercise due diligence and equivalent safety in preventing domestic abuse. This argument claims that, as such, domestic violence may be comprehended to constitute a form of torture."¹²⁶

International law and psychological experts have also argued that domestic violence can constitute torture or cruel, inhuman or degrading treatment or punishment.¹²⁷ For instance, Metin Başoğlu¹²⁸ believes that "a direct comparison of 228 domestic violence survivors with

¹²³ See D. Blatt. (1992). *Recognizing Rape as Method of Torture*. Review of Law and Social Change, 19, 4, 821–865

¹²⁴ Neuwirth, J. (1987). *Towards a Gender-Based Approach to Human Rights Violations*, 9 Whittier L. REV.399

¹²⁵ Radhika, C. (5 February 1996). *The Special Rapporteur on Violence Against Women, its Causes and Consequences*, Report of the Special Rapporteur: Submitted in accordance with Commission on Human Rights Resolution 1995/85, 52nd Sess, UN Doc E/CN.4/1996/53. para 50

¹²⁶ Ibid., para 44.

¹²⁷ Claire, W. (2013). *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*. 24 Hastings Women's LJ 457; Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. Columbia Human Rights Law Review, 25. As cited in: *Supplementary Submission of Amnesty International Violence Against Indigenous Women and Girls in Canada and the issue of "acquiescence" under articles 1 and 16 of the Convention against Torture*. Available at: [INT CAT CSS CAN 33074 E.pdf \(ohchr.org\)](https://www.ohchr.org/en/huridocda/huridoca/doc/INTCATCSSCAN33074E.pdf)

¹²⁸ Metin Başoğlu, PhD, Professor of Psychiatry, is the founder and currently co-director of the Istanbul Center for Behavior Research and Therapy in Turkey. He is the editor of the book called "Torture and Its Definition in International Law: An Interdisciplinary Approach." Başoğlu with the assistance from prominent mental health,

109 tortured women showed that domestic violence was not distinguishable from torture in the nature and severity of the trauma, its mental effects, and the psychological processes that lead to posttraumatic stress disorder and depression."¹²⁹ The findings in this book suggest that "both torture and domestic violence share the same contextual characteristic: helplessness under the control of others. As such, they support the recognition of domestic violence as torture by international law."¹³⁰ Başoğlu further expresses that "although gender-based violations, including rape and domestic violence, are already recognized as torture in international law, their commonalities with torture have not been adequately investigated."¹³¹

Hence, international jurisprudence has been developed to support the idea that private gender-based violence can hold the States accountable, including for torture or other ill-treatment. For instance, in *Opuz v Turkey*,¹³² the ECtHR considered the State of Turkey's responsibility in a case where the applicant's husband used violence from the beginning of the relationship, made death threats, and eventually killed the applicant's mother. Turkish authorities did not interfere despite complaints, considering this a "family matter."¹³³ ECtHR stated there had been a violation on the part of the State. The Court agreed that the applicant's treatment had been sufficiently severe to engage Article 3. In the meantime, as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's integrity by her husband, article 3 of the ECHR has been violated by Turkey.

Hence, jurists and experts have documented that the physical and/or psychological abuse characteristic of both official torture and domestic violence is comparable in both kind and severity.¹³⁴ For example, rape can be found in both contexts and is the most devastating form

human rights, and international law scholars, sought to facilitate a proper theory and evidence-based understanding of torture and domestic violence in international law. For more information: [2_BASOGLU — Tulane University Traumatology Institute \(tulane-traumatologyinstitute.com\)](#)

¹²⁹ See generally, Başoğlu, M. (Ed.). (2017). *Torture and its definition in international law: An interdisciplinary approach*. Oxford University Press. Pp.107-138

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² *Opuz v Turkey*, (Application no 33401/02), European Court of Human Rights, Judgment 9th June 2009.

¹³³ Ibid., para.195.

¹³⁴ Radhika, C. (5 February 1996). *The Special Rapporteur on Violence Against Women, its Causes and Consequences*, Report of the Special Rapporteur: Submitted in accordance with Commission on Human Rights Resolution 1995/85, 52nd Sess, UN Doc E/CN.4/1996/53. para 46

of sexual violence in terms of severity. *The Prosecutor v. Jean-Paul Akayesu* is the first case in which the Court (ICTR, the International Criminal Tribunal for Rwanda) defined rape in international law. This case is critical because it established for the first time that sexual violence constitutes a crime against humanity and a mechanism of genocide by a state official. Further, the conviction of rape as a crime against humanity carried ‘the first definition of the legal elements of rape at an international judicial forum.’¹³⁵ The court defined rape as a "physical invasion of a sexual nature committed on a person under circumstances which are coercive."¹³⁶ Undoubtedly, the *Akayesu* judgment contributed to some groundbreaking perceptions of rape and sexual violence as genocide and crimes against humanity, providing extensively to the international criminal law on gender-based crimes. In other words, rape outside the context of domestic violence can inflict pain and suffering that is severe enough to satisfy the torture threshold that has been pointed out in the literature.¹³⁷ Besides the existing literature and theories on this issue, the approach in some human rights courts seems to be changing. For instance, again, the ECtHR considered the suffering caused by rape as severe as torture, saying that it “leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.” Thus, it held that “feeling debased and violated both physically and emotionally.”¹³⁸ On the merits of the case, the Court held that:

"Evidence adduced confirmed beyond reasonable doubt that applicant raped and ill-treated in detention and also subjected to other forms of bodily and psychological suffering, horrifying and humiliating experiences, accumulation of acts of violence and particularly rape, amounted to torture."¹³⁹

Extensive analysis shows that these judgments are tremendous achievements in human rights history since it is a great leap forward in the international comprehension of the issue of sexual violence. In this part of the research, firstly, an attempt is made to address the ongoing paradigm shift that increasingly defines various forms of violence against women, especially domestic

¹³⁵ *Prosecutor v Akayesu*, 17 June 1997, ICTR-96-4-1, *Amended Indictment*, Counts 1-3. n.4, p.73.

¹³⁶ *Prosecutor v Akayesu*, ICTR-96-4-T September 2, 1998. para. 688

¹³⁷ See D. Blatt. (1992). *Recognizing Rape as Method of Torture*. Review of Law and Social Change, 19, 4, 821865, pp. 854 – 857.

¹³⁸ See *Aydin v Turkey*, ECtHR (1997); *MC v Bulgaria*, ECtHR, Judgment of 4 December 2003

¹³⁹ *Ibid*.

violence, within the category of torture and focuses on the parallels between these forms of violence and the behaviours traditionally defined as torture. Secondly, it will reveal characteristics of the definition of torture that make it challenging to apply to violence against women. To do so, a distinct look at the elements of torture is essential.

3.2. Official Capacity

UNCATs Article 1 explicitly states that ill-treatment becomes torture when the pain or suffering is inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Feminists see the link between an act with the officials as a result of larger male-dominance perceptions. According to feminists, two versions of the public and private dichotomy have been particularly powerful in shaping women's social and legal status in society; the split between the market and the family and the split between the state and civil society.¹⁴⁰ At the height of their influence, these distinctions exercised significant control over law expansion in various areas, including VAW.¹⁴¹ For example, cases of rapes committed by dates, boyfriends, acquaintances, and other no strangers are far less likely to result in prosecution and conviction than rapes by strangers.¹⁴² Arguably, women are more likely to suffer violence at the hands of private individuals and/or within the familial context than by public officials outside the domestic sphere.¹⁴³ These critiques go even further by saying, “when a woman is tortured by her husband in her home, humanity is not violated”¹⁴⁴ Thus, rape inside the homes without officials' act is where change should be expected. Since only the abuses perpetrated by state agents are recognized as torture or other ill-treatments, this elemental requirement is the most criticized by academics and practitioners.

However, the Special Rapporteur on torture expressed that the UNCAT goes beyond the traditional concept of State responsibility and includes acts that are not directly inflicted by the

¹⁴⁰ Frances E. Olsen. (2000). *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. REv.1497

¹⁴¹ Goldfarb, S. (2000). *Violence Against Women and the Persistence of Privacy*, Ohio State Law Journal, vol. 61, no. 1F, 1-87. ISSN: 0048-1572 p, 19

¹⁴² See generally, Linda A. F. (1993). *Sexual Violence: Our War Against Rape*. New York: William Morrow and Co. *supra* note 48.

¹⁴³ See generally, Edward, A. (2006). *The 'Feminizing' of Torture Under International Law*, Leiden Journal of International Law, No. 19.

¹⁴⁴ Mackinnon, C.A., (1994). *Rape, Genocide and Women's Human Rights*, 17 Harv. Women's L.J 5. P,6

State officials but executed with their active or passive agreement or were possible to occur due to their lack of intervention, which would have been possible. Under this extended responsibility, inter-prisoner abuse may fall under the definition of torture. Female genital mutilation, domestic violence and trafficking of human beings may also be covered.¹⁴⁵ Then years later, another HRC's Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Méndez, Juan E. has suggested that torture and ill-treatment can occur in both custodial and extra-custodial contexts as well as in both the public and the private sphere; however, these may be defined.¹⁴⁶ He further elaborates that depending on the circumstances, the pain, suffering or humiliation resulting from domestic violence can range from comparatively moderate and brief to extremely severe and long-lasting, but being abusive by definition always amounts to a violation of physical, mental and emotional integrity that is incompatible with human dignity.¹⁴⁷ Thus, regardless of questions of State responsibility and of individual criminal culpability, both of which need to be separately assessed, domestic violence, therefore, always amounts to cruel, inhuman or degrading treatment or punishment and very often to physical or psychological torture.¹⁴⁸ That being said, both domestic violence and torture tend to escalate over time, sometimes resulting in death or leaving women's bodies incapacitated or permanently disfigured.¹⁴⁹ Women who experience such violence, whether in their homes or prison, suffer depression, anxiety, loss of self-esteem and a feeling of isolation. Indeed, battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture as well as by victims of rape.

Furthermore, not specifically a case concerning violence against women but in the form of domestic violence *A. v. the United Kingdom*¹⁵⁰ can be exemplified concerning the case law of

¹⁴⁵ Nowak, Manfred. (January 2008). *Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment*, UN Doc. A/HRC/7/3, Para, 1(f)

¹⁴⁶ Méndez, J. (2012). *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* :. United Nations Digital Library System. Retrieved 17 September 2022, para.9, from https://digitallibrary.un.org/record/733853/files/A_67_279-EN.pdf.

¹⁴⁷ Ibid., para.9.

¹⁴⁸ Ibid., para.10.

¹⁴⁹ UN Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development : report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, 15 January 2008, A/HRC/7/3

¹⁵⁰ *A. v. the United Kingdom*, judgement 23 September 1998, para. 21

the ECtHR. In the case of *A. v. the United Kingdom*, the ECtHR considered a complaint concerning a minor whose stepfather had repeatedly beaten him. The Court, referring to the beatings, found that “treatment of this kind reaches the level of severity prohibited by article 3”¹⁵¹ of the ECHR. The Court further stated that “the failure to provide adequate protection constitutes a violation of article 3 of the Convention”.¹⁵² Since these acts are committed by private actors, not by state officials or other persons in an official capacity, the element of a public official can be the most questionable character of the definition concerning its utilization to the context of domestic violence. Correspondingly, the link between the act and public officials deeply displays the public and private dichotomy since it excludes women from the scene.¹⁵³

Hence, it is to the disadvantage of women, as almost all violent incidents against women occur in the private sphere and are entirely "rendered invisible."¹⁵⁴ Being undetectable has paved the way for the spread of this type of violence. Because in torture, substantive violence establishes a mechanism for control rather than an end in and of itself.¹⁵⁵ Such threats punctuated with occasional violence prove considerably more effective than constant violence.¹⁵⁶ In general, it can be said that measures have been taken in this regard at the international level and the national level; there have been significant and progressive law reforms regarding sexual assault in many countries, accompanied by increasing public awareness of the problem. Yet, despite the success of law reforms on sexual assault generally, the particular issue of sexual assaults perpetrated against women by their husbands remains a relatively taboo and misunderstood topic.¹⁵⁷ A side glimpse at the national level shows that the danger of retaliation to the women

¹⁵¹ *A. v. the United Kingdom*, judgement 23 September 1998, para. 21.

¹⁵² *Ibid.*, para. 21.

¹⁵³ See, generally, Thornton, Margaret. (1995). *The Cartography of Public and Private* in Thornton, Margaret (ed.), *Public and Private: Feminist Legal Debates*.

¹⁵⁴ Gallagher, A. (1997). *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, in *Human Rights Quarterly*, Vol. 19, p. 291

¹⁵⁵ See e.g., Hernán, R. (2007). *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. RED CROSS 591, 614-15

¹⁵⁶ See generally Karla, F, et al. (1993). *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2128-29

¹⁵⁷ Melanie. R., & Vasanthi. V. (2015). *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, P,157, Available at: <https://brooklynworks.brooklaw.edu/bjil/vol41/iss1/3>

who have used the legal system is serious, especially for poor and minoritized women afraid of involving the police due to fear of their children being taken from them or abused in their communities. The behaviour of the police as the first official reference and refuge for women has a significant impact on shaping the subconscious perception of the victim from the criminal justice system. Therefore, it is necessary to note that while the aim of punishing and criminalizing VAW as a form of torture or other ill-treatment at the international level is the aim, it is not sufficient, and more should be done in terms of caring for the women through the protection and prevention of retaliation at the national level.

3.3. Pain and Suffering

A sum of 87,000 women was intentionally killed in 2017, and more than half of them (58%) were killed by intimate partners or family members, meaning that 137 women worldwide are killed by their family members every day.¹⁵⁸ One of the thresholds that must be reached for acts to amount to torture is the causing of severe pain and suffering.¹⁵⁹ The UNCAT explicitly prohibits the infliction of severe physical or mental suffering.¹⁶⁰ However, the severity and intensity of the pain and suffering cannot be clearly defined. Again, this aura of uncertainty is problematic, as it has been used to exclude certain treatments from being qualified as torture. As far as physical pain and suffering are discussed, it is perhaps useful to recall that the argument has, at times, gone well off track.¹⁶¹ Researches show that the physical and psychological grief and pain caused by domestic violence frequently end at extreme levels, claiming that several stats of battered women were similar in cruelty to "classic" acts of torture.¹⁶² A de novo comparison has also been made through the UN special rapporteur on torture.¹⁶³ In terms of the intentionality, purposefulness and severity of the inflicted pain and suffering, domestic violence often falls nothing short of torture and other cruel, inhuman or

¹⁵⁸ For more details check: UNODC, *Global Study on Homicide 2018* (Vienna, 2018). Available at: [Global study on homicide \(unodc.org\)](https://www.unodc.org/unodc/en/homicide/unodc.org)

¹⁵⁹ Reyes, H. (2007). *The worst scars are in the mind: Psychological torture*. International Review of the Red Cross, P.6, 89(867), 591-617. doi:10.1017/S1816383107001300

¹⁶⁰ Ibid., p.6.

¹⁶¹ Ibid.

¹⁶² See Copelon, R. (1994). Recognizing the egregious in the everyday: domestic violence as torture. *Columbia Human Rights Law Review*, 25. p. 300.

¹⁶³ See *Infra* P.20

degrading treatment or punishment.¹⁶⁴ Accordingly, after these bitter experiences, women suffer from various psychological complications such as fear, anxiety, and depression, and in many cases, they commit suicide. In addition, reports suggest that the prevalence of asthma, irritable bowel syndrome, diabetes, frequent headaches, chronic pain, difficulty sleeping, and activity limitations is significantly higher among women who have suffered physical violence at the hands of an intimate partner or been raped or stalked by any perpetrator.¹⁶⁵ In both public and private life, violence or the threat of violence terrorizes many women and keeps them from freely and wholly contributing to the social, economic, and political development of their societies, hinders women's abilities to exercise their human rights, and it circumscribes women's capacity to function as full citizens in society.¹⁶⁶ In other words, domestic violence often includes some form of physical cruelty. For instance, "beating with hands or objects, biting, spitting, punching, kicking, stabbing, strangling, scalding, burning, and attempted drowning."¹⁶⁷ There is physical harm and a lot of psychological damage present in the acts of domestic violence.

"A comprehensive and constantly developing research literature supports the argument that domestic violence is associated with many traumatic psychological reactions. The trauma theory presents the psychological and physical impact of traumatic experiences, including violence, on sufferers. Research on a wide variety of acute and chronic trauma has established that exposure to severe traumatic occurrences can lead to special mental states both during and following the trauma. During trauma exposure, such altered mental states can include flashbacks and other forms of re-experiencing the

¹⁶⁴ Méndez, J., Secretary-General, U., & UN. Human Rights Council. Special Rapporteur on Torture and Other Cruel, I. (2012). Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :. United Nations Digital Library System. Retrieved 17 September 2022, para.2, from https://digitallibrary.un.org/record/733853/files/A_67_279-EN.pdf.

¹⁶⁵ Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. *supra note* 121, at 62.

¹⁶⁶ Fried, S. T. (2003). *Violence against women, Health and Human Rights*, 6(2), 88–111. <https://doi.org/10.32380/alrj.v0i0.848>, P. 4

¹⁶⁷ Copelon, R. (1994). Recognizing the egregious in the everyday: domestic violence as torture. *Columbia Human Rights Law Review*, 25, p. 311.

incident, a generalized flattening of impact to avoid overwhelming emotions associated with the trauma, and pathological feelings of shame or guilt."¹⁶⁸

The severity of the harm is the distinctive characteristic between torture and other ill-treatment to the European Court of Human Rights. The Court first raised the issue and named it the *threshold of severity* in the *Ireland v. UK*¹⁶⁹ case, stating that it is necessary to draw a clear line between torture and other concepts, such as ill-treatment and degrading behaviour since torture carries a *special stigma*.¹⁷⁰ The Court held that techniques used for interrogation by the British authorities caused "intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation,"¹⁷¹ however, they did not necessarily cause serious physical injury. The Court further ruled that using "deep interrogation" techniques has breached Article 3 of the ECHR and thus amounted to "inhuman and degrading treatment."¹⁷² However, not as severe as to amount to torture. Since the Court, in its practice, often states that the ECHR is a living instrument, the idea of distinctness between torture and other forms of ill-treatment has been relative in the practice of the Court. At times, the Court makes a clear distinction between torture and other forms of ill-treatment; at other times, this distinction may fade away. For instance, in the case of *Selmouni v France*¹⁷³, the Court stated that "certain acts which were classified in the past as inhuman and degrading treatment as opposed to "torture" could be classified differently in the future due to the "increasingly high standard being required in the area of the protection of human rights."¹⁷⁴

Furthermore, the European Court of Human Rights has once again added to its ever-growing body of case law on the issue of domestic abuse with its December 14, 2021, ruling in *Tunikova and others v. Russia*. The case concerned acts of domestic violence, including death threats, physical injuries and one case of severe mutilation, which the applicants sustained by their ex-

¹⁶⁸ Audrey E, Stone. (1998). *Presenting Battered Women's Expert Testimony: Trial and Error*, 271 PLI/EsT. 255,292.

¹⁶⁹ *Ireland v United Kingdom*, ECtHR, Judgement of 18 January 1978.

¹⁷⁰ *Ibid.*, para. 167.

¹⁷¹ *Ireland v United Kingdom* (1979-80) 2 EHRR 25, Para 167

¹⁷² *Ibid.*

¹⁷³ *Selmouni v France*, available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58287&filename=001-58287.pdf>

¹⁷⁴ *Selmouni v France*, ECtHR, Judgment of 28 July 1999. Para.102

partners.¹⁷⁵ The Court found that the applicant's bodily injuries and the mental consequence of her ex-partner's controlling and coercive conduct had reached the needed level of severity under Article 3 of the Convention and had triggered the authorities' responsibility to protect her from abuse and violence imposed by her former partner.¹⁷⁶ In other words, the mentioned ruling by the ECtHR raises issues regarding the court's conceptualisation of domestic violence. In particular, the query of whether domestic violence should be regarded as torture under Article 3 of the European convention on human rights. In the Tunikova case, the claimant had maintained physical injuries, including one case of extreme mutilation, at the hands of their ex-partners and received death threats. The ECtHR expressed that there had been a violation of article 3, which is the right to be free from torture and inhuman or degrading treatment. Further, the court held that the state had "failed to take adequate measures to protect victims of domestic violence and conduct an effective investigation due to continuing structural problems." The court accordingly found a violation of Art. 3 ECHR under its substantive and procedural limb.¹⁷⁷

Three out of the four claimants pleaded that they had been subjected to severe forms of domestic violence, which has caused them severe and brutal suffering that amounted to "torture" instead of "inhuman or degrading treatment". In their view, identifying the severe cases of domestic abuse as 'torture' would highlight the abuse's gravity in the public's eyes and the authorities assigned with monitoring and responding to abuse.¹⁷⁸ Though "there remains an argument by three applicants that the treatment of which they have been victims should be not

¹⁷⁵ ECHRCaseLaw. (2021, December 16). Retrieved November 23, 2022, from <https://www.echrcaselaw.com/en/echr-decisions/the-court-awarded-370000-euros-to-a-woman-victim-of-gender-and-domestic-violence-battery-kidnappings-and-amputation-by-spouses/>

¹⁷⁶ Ibid., para 9.

¹⁷⁷ Strasbourg Observers. (2022, February 18). *Poll: Best and Worst ECtHR judgment and best separate opinion of 2021*. Strasbourg Observers. Retrieved November 22, 2022, from <https://strasbourgobservers.com/2022/02/16/poll-best-and-worst-ecthr-judgment-and-best-separate-opinion-of-2021/>

¹⁷⁸ McQuigg, D. R. (2022, July 26). *Domestic abuse as torture? recent jurisprudence of the European Court of Human Rights*. Queen's Policy Engagement. Retrieved November 22, 2022, from <http://qppl.qub.ac.uk/domestic-abuse-as-torture-recent-jurisprudence-of-the-european-court-of-human-rights/>

only described as falling under Article 3 of the Convention but also characterised as constituting torture."¹⁷⁹ However, the Court held that:

"the additional characterisation, although important for the applicants and capable of influencing the public perception of domestic violence, is not necessary in the circumstances of the present case, in which there is no doubt that the treatment inflicted on the applicants attained the necessary threshold of severity to fall within the scope of Article 3 of the Convention."¹⁸⁰

Volodina v Russia is another case against Russia concerning domestic abuse by an intimate partner, which can be seen as a significant development of the jurisprudence of the ECtHR towards including violence against women, especially domestic violence, under the limb of article 3 of the European Convention on Human Rights.

Valeriya Volodina was subjected to violence over three years by her former partner. The perpetrator has assaulted, kidnapped, stalked, threatened to kill her and her son, stolen from, and intimidated her. Even when she was expectant, her former partner attacked her so severely that the pregnancy was compromised, and on medical recommendation, she had an abortion.¹⁸¹ The ECtHR found that "the fear, anxiety and powerlessness that the applicant must have experienced in relationship with his controlling and coercive behaviour" were severe enough to violate Article 3. Nevertheless, the majority decision was that Volodina had experienced inhuman treatment rather than torture.¹⁸² Further, the ECHR recalled that violence against women is a violation of customary international law, declaring explicitly the same conclusion made by the CEDAW Committee in General Recommendation 35.¹⁸³

However, in a separate opinion, Judge Pinto de Albuquerque expressed that his argument was that it should have gone further – the pain and suffering experienced by Volodina were so severe that the ECHR should have acknowledged it as torture instead of ill-treatment.¹⁸⁴ Albuquerque further expresses that,

¹⁷⁹ *Tunikova and Others v. Russia*, ECtHR, 55974/16. Para 77.

¹⁸⁰ *Ibid.*, para 77.

¹⁸¹ Center for Women, Peace and Security. (2020, June 19). *Tackling Violence against Women*. Retrieved November 23, 2022, from <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/volodina-v-russia-2019/>

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

“in spite of the flattering parts mentioned above, it is crucial to pinpoint three areas in which my opinion separates from that of the majority. It is undeniable that the mental and bodily pain endured by the claimants falls within the category of Article 3 treatment. Article 3, however, is characterised by thresholds of severity and the intention and purpose behind the perpetrator’s and complicit State’s measures – or inaction, with consideration to the latter. In *Ireland v. United Kingdom*, the Court contrasted torture from inhuman or degrading treatment by showing that torture consists of “deliberate inhuman treatment causing very serious and cruel suffering.”¹⁸⁵

Albuquerque persists in claiming that the case at hand could effortlessly be considered torture because it has all the extents and components required for an act to be announced torture.

"Given all of the circumstances of the case, which portray an accumulation of disturbing elements of harmful masculinity leading to the serious infringement of the applicant's dignity and bodily and psychological integrity, as well as the purposive behaviour of the perpetrator, I wonder what more is required to achieve a finding of torture under Article 3. In the case at hand, the elements of torture were indeed fulfilled."¹⁸⁶

Contrary to the ECtHR, the Human Rights Committee (HRC) has not found it essential to define or distinguish between forms of ill-treatment used in Article 7 of the ICCPR.¹⁸⁷ Furthermore, in its General Comment on Article 7, the HRC states that the purpose of the provision is to protect the "integrity and dignity of the individual"¹⁸⁸ and that the inclusion of the terms "cruel, inhuman or degrading treatment or punishment" extended the "scope of protection required far beyond torture as normally understood."¹⁸⁹ Thus, whatever the interpretation of these human rights bodies, one thing is apparent, torture is a heinous act prohibited in absolute terms. However, it is not entirely clear whether the prohibition of other

¹⁸⁵ *Volodina v. Russia*, Application no. 40419/19 (ECtHR 14 September 2021), Para 6

¹⁸⁶ *Volodina v. Russia*, Application no. 40419/19 (ECtHR 14 September 2021), Para 10

¹⁸⁷ Edwards. A. (2006). *The feminizing of torture under international human rights law*. Leiden journal of international law, vol.19/02, 6/2006. P.208

¹⁸⁸ HRC, General Comment No. 7: Article 7, para. 1.

¹⁸⁹ HRC, General Comment No. 7: Article 7, para. 2.

forms of ill-treatment can be said to have the same status as torture in terms of its qualification as *jus cogens*.¹⁹⁰

Overall, domestic violence is a serious social problem with major consequences for those affected in families and communities.¹⁹¹ Since it causes untold misery, cutting short lives and leaving countless women in pain and fear in every country. While not necessarily lethal, domestic violence can also lead to debilitating health consequences such as addiction, depression, and post-traumatic stress disorder for the victim and even their children. However, despite the widespread nature of the issue, it has been considered a private matter best dealt with within the home, not a public policy issue.¹⁹²

3.4. Purpose

The CAT's definition of torture requires not just an act that causes severe pain or suffering and is inflicted intentionally by the officials or persons with official capacity, but also it is done purposefully. The purpose, as is mentioned in CAT's article 1, is "obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." Copelon suggests that even in the context of official torture, the purpose of collecting information from the victim is often only a pretext, with the interrogation process seeking more at the destruction of the victim than the actual acquisition of essential data.¹⁹³ Hence, feminists have widely criticized this element of torture by CAT for ostensibly backing the "male" concept of torture that occurs only in the context of an arrest, interrogation, or detention.¹⁹⁴ However, some authors have reasoned an extensive

¹⁹⁰ Rodley, N. (2014). *Integrity of the Person*. In: Moeckli, Daniel and Shah, Sangeeta and Sivakumaran, Sandesh and Harris, David, (eds.) *International Human Rights Law* (Second edition). Oxford University Press, Oxford, pp. 174-194. ISBN 9780199654574, P.177

¹⁹¹ See NOU (2003) 31:61, *Men's violence against women in intimate relationships*, available at <http://www.regjeringen.no/en/dep/jd/documents-and-publications/nouer/2003/nou-2003-31/16.html?id=373044>.

¹⁹² Subrata, P. (1999). *Combatting Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 *Cardozo J. Int'l & Comp. L.* 243

¹⁹³ Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. *Columbia Human Rights Law Review*, 25. P.333

¹⁹⁴ Edwards, A. (2010). *Violence against Women under International Human Rights Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511779671, p. 375

range within article 1 of the CAT to apply it to VAW by intimate partners.¹⁹⁵ These claims are established on the premise that acts of violence against women, such as domestic violence and rape, are gender crimes that are not perpetrated randomly but are perpetrated against women just because they are women.

For this reason, the special rapporteur on torture to the UN Human Rights Council has authoritatively categorized domestic violence as a form of torture¹⁹⁶ since the purpose element requirement is always fulfilled in gender-specific violence against women, which is inherently discriminatory.¹⁹⁷ Similarly, another UN Special rapporteur on torture and other ill-treatment states that “domestic violence degrades, humiliates, coerces, brutalizes and otherwise violates the physical, mental and emotional integrity of persons who are often subjected to controlling and disempowering situations or environments. In this context, pain or suffering is generally inflicted intentionally, or even systematically, for purposes such as punishment, intimidation or coercion of any kind, or to express or consolidate gender-based or other forms of discrimination”.¹⁹⁸ Further, like war, domestic violence is a veritable “scourge” of inhumanity, traumatizing innumerable children, women and men on a daily basis and devaluing human society for generations to come. Contrary to war, however, domestic violence is yet vastly considered a “private matter”, a social taboo to be dealt with at the constraint of the perpetrator in the perceived legal “black hole” of the home.¹⁹⁹ In light of these observations, the Special Rapporteur considers it timely and applicable to lead a cautious and sober analysis of domestic violence from the standpoint of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.²⁰⁰

¹⁹⁵ Ibid., p.376.

¹⁹⁶ Manfred, N. (15 January 2008). *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the right to Development*. UNDOC A/HRC/7/3.

¹⁹⁷ Ibid., para.12.

¹⁹⁸ Méndez, J. (2012). Secretary-General, U., & UN. Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Punishment, *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* .: United Nations Digital Library System. Retrieved 17 September 2022, para.9 from https://digitallibrary.un.org/record/733853/files/A_67_279-EN.pdf.

¹⁹⁹ UN. (n.d.). *Domestic violence and the prohibition of torture and ill-treatment*. OHCHR. Retrieved November 22, 2022, from <https://www.ohchr.org/en/special-procedures/sr-torture/domestic-violence-and-prohibition-torture-and-ill-treatment>

²⁰⁰ Ibid.

Copelon also argues that “sexualized violence seeks to destroy a woman based on her identity as a woman.”²⁰¹ She further explains that domestic violence impacts women disproportionately, not merely rape but also domestic violence.²⁰² The practitioners and even the international community endorsed this kind of recognition of the VAW with discriminatory objectives. For instance, DEVAW states that:

“Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men.”²⁰³

Regional human rights courts have also emphasised this hidden dimension of the torture definition. Applying the UNCAT, the European Court often requires the purposive element, although not always. For instance, in the *Salman v. Turkey* judgment, the ECtHR held:

In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction embodied in Article 3 between this notion and that of inhuman or degrading treatment.²⁰⁴ In addition to the severity of the treatment, there is a purposive element, as recognized in the UNCAT.²⁰⁵

The accumulated case law since the *Soering*²⁰⁶ decision in 1989 regarding anticipatory ill-treatment in a third country has witnessed liberal judicial policy gradually broadening sources of risk to comprise the conduct of private actors such as terrorists and organized criminals.²⁰⁷ For instance, in *A vs the United Kingdom*, the Court unambiguously approved the horizontal effects²⁰⁸ of Article 3 concerning positive duties. The consequence of realizing the obligation

²⁰¹ Copelon, R. (1994). *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*. 5 Hastings Women's L.J. Vol.5. p. 246.

²⁰² See, Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. Columbia Human Rights Law Review, 25. p. 339.

²⁰³ DEVAW, GA Res. 48/104, 20 December 1993, Preambular para. 6.

²⁰⁴ *Salman v. Turkey*, 34 Eur. H.R. Rep. 17, . 114 (27 June 2000).

²⁰⁵ Ibid.

²⁰⁶ *Soering v. The United Kingdom*, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989

²⁰⁷ Arai-Yokoi, Y. (2003). *Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR*. Netherlands Quarterly of Human Rights, 21, 385 - 421. P.14

²⁰⁸ Contrary to the originally conceived idea that human rights are vertically applied to the relations between the state and the individual, the horizontal application of human rights, also known by the German word

of a State for acts of private individuals might, in the future, prove sustainable long past the point where the traditional line drawn between vertical and horizontal effects of human rights could be said to be blurred.²⁰⁹ The recognition of the horizontal effects of Article 3 within the discourse of the "privatization" of human rights concepts will be pivotal for addressing issues specifically of gender concern.²¹⁰ In other words, the expanding scope of State obligations deriving from Article 3 may have implications for gender issues, including domestic violence against women.²¹¹ Although torturers within the home may make use of fewer physical chains than our paradigmatic examples, they utilize every other trade tool.²¹² Almost every torture technique catalogued in human rights scholarship matches the strange and sadistic ways batterers routinely exercise power: from the creative and sporadic use of violence to sensory deprivation to attacks on the victim's personality.²¹³ Indeed, domestic violence cases typically involve a pattern of violence rather than random individualized acts; it is done for the purpose of control, accompanied by the use of other techniques that we associate with torture.²¹⁴ In torture, substantive violence establishes a mechanism for control rather than an end in and of itself.²¹⁵ Such threats punctuated with occasional violence prove considerably more effective than constant violence.²¹⁶ The mentioned pattern of occasional violence is almost the same as

"Drittwirkung", explains the application of human rights provisions in the private sphere. For more information check: Hunter, H., Myriam, C. (2011). *Horizontal Application of Human Rights in France: The Triumph of the European Convention on Human Rights*. Available at SSRN: <https://ssrn.com/abstract=2626442>

²⁰⁹ Ibid.

²¹⁰ Clapham, A. (1993). *Human Rights in the Private Sphere*, Oxford University, Clarendon.

²¹¹ Grdinic, E. (2000). *Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence*, *Hastings Int'l & Comp. L. Rev.*, No. 23, p. 217.

²¹² Tania, T. (2016). *Criminalizing "Private" Torture*. 58 *Wm. & Mary L. Rev.* 183, <https://scholarship.law.wm.edu/wmlr/vol58/iss1/5>

²¹³ Grdinic, E. (2000). *Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence*, *Hastings Int'l & Comp. L. Rev.*, No. 23, p. 8.

²¹⁴ Ibid., 9.

²¹⁵ See Reyes, H. (2007). *The worst scars are in the mind: Psychological torture*. *International Review of the Red Cross*, 89(867), 591-617. doi:10.1017/S1816383107001300

²¹⁶ See Karla, F. (1993). *et al., The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 *SMU L. REV.* 2117, 2128-29

domestic violence. The only major distinction between domestic violence and the catalogue of torture techniques used elsewhere is that we normally associate torture with the kidnapping or confinement of the victim.²¹⁷ However, the empirical evidence of domestic violence shows that the preparators do this in different ways; for instance, victims are beaten, insulted, placed under house arrest, isolated, barred from any contact with others, and physically assaulted if they do so. The resulting isolation may not match that of solitary confinement, but it still takes an enormous psychological toll.²¹⁸ Given the similarities between the functions of torture by CAT and domestic violence, there seems to be a possibility to include domestic violence based on its purposive elements in the rubric of torture's definition.

3.5. Overview

The chapter focused on the violence against women, especially domestic violence and proposed that depending on the circumstance and the severity of the pain and suffering resulting from VAW, it can always amount to a violation of the physical and mental integrity of the victim, thus irrespective of the state's involvement, domestic violence can amount to physical and psychological torture or cruel, inhuman or degrading treatment or punishment. The consequences of violence against women are far more significant than they can be ignored since there is not much difference between what we traditionally know about torture and what a woman feels during a bitter experience of violence.

Although domestic violence is one of the major public health issues and a violation of women's human rights²¹⁹, it has been sidelined by the international community. Acknowledging the facts regarding torture and its status as outlined above, it is not unexpected that this pattern of violence has not traditionally been deemed to come within the extent of the torture's absolute-ban status. However, for the reasons discussed in this study, international law can and should place more specific pressure on the states to help remedy this plague-like systematic violence.

²¹⁷ See e.g. Tania, T. (2016). *Criminalizing "Private" Torture*, 58 Wm. & Mary L. Rev. 183, P.17

²¹⁸ Cacioppo, J.T., & Patrick, W. (2008). *Loneliness: Human Nature and the Need for Social Connection*. New York: W.W. Norton.

²¹⁹ *Violence against women*. (2021, March 9). <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>

Nevertheless, similarity has been described by many feminists,²²⁰ claiming that "when stripped of privatization, sexism, and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence."²²¹ Catharine MacKinnon, another feminist scholar, proposes the potentiality of this idea. She argues that one of the ways to at least reduce the pervasiveness of the VAW is to tackle international human rights norms, particularly prohibitions on torture, and employ them to sexual violence with greater precision and responsibility than has previously been the case.²²² Domestic violence should be seen through the lenses of psychological and physical control; hence be treated as torture; otherwise, making any real progress towards equality, peace, and development can hardly be practical. There is also a need to empower domestic violence survivors by shifting the culture's blame from a woman being a victim to a perpetrator.²²³ Hence, constituting gender violence as torture will be critical in removing gender discrimination and insisting on effective prevention of VAW through legal, socio-economic, and cultural differences in the status of women.

Peter Koojmans was the first special rapporteur on torture who called rape as a form of official torture.²²⁴ It was the first step in identifying gender-based violence as a form of torture and human rights violation; since such forms of violence have always been ambiguous on the human rights agenda. Thus the need to regulate domestic violence as a form of torture is rising. One of the main reasons for the sluggish pace in recognizing VAW as a form of torture is part of the patriarchal hierarchy, which has firmly rooted in insubordination and discrimination against women.²²⁵ Patriarchal hierarchy has had a devastating effect on the accountability and visibility of VAW, especially when State interventions are not accountable in the face of

²²⁰ See, generally, Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. *Columbia Human Rights Law Review*, 25; Catherine A. MacKinnon. (1993). *On Torture: A Feminist Perspective on Human Rights*.

²²¹ Copelon, R. (1994). *Recognizing the egregious in the everyday: domestic violence as torture*. *Columbia Human Rights Law Review*, 25. p. 296.

²²² See, generally, McGlynn, C. (2008) *Rape as 'torture'?* Catharine MacKinnon and questions of feminist strategy., *Feminist legal studies.*, 16 (1). pp. 71-85.

²²³ See Weeks, W., & Gilmore, K. (2020). *How violence against women became an issue on the national policy agenda*. In *Making social policy in Australia*, Routledge, pp. 141-153.

²²⁴ See Edwards, A. (2010). *Violence against Women under International Human Rights Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511779671, p. 3

²²⁵ Ibid.

violence but are quick to sanction female disobedience and flaws publicly.²²⁶ Scholars like Celina Romany challenged State-centrism stating that patriarchal hierarchy has given men the power they exercise at home. Therefore, without a proactive State, the violated woman does not get justice in the system,²²⁷ which means that exercising due diligence, to date, has managed to be state-centric and delimited to reacting to violence when it happens, largely ignoring the duty to prevent and compensate and the accountability of non-State actors.²²⁸ Due diligence must be explored at “different levels of intervention: individual women, the community, the State and the global level,” and she has proposed approaches for each level of intervention.²²⁹ Overall, various factors have contributed to the spread of violence against women. Firstly, there is a large-scale persistent downplay concerning this specific form of violence and a highly rooted perception of the so-called public/private dichotomy. Secondly, estimating similarities among the acts traditionally accepted as torture and violence against women uncovers the notable parallels based on the pain and suffering element and the specific purpose those acts follow. However, state involvement, as per the definition of torture by the CAT, seems the most challenging barrier to realizing violence against women, especially domestic violence as torture.

²²⁶ Ibid.

²²⁷ Gaer, F. D. (2011). *Rape as a form of torture: The experience of the Committee against Torture*, *Cuny L. Rev.*, 15, 293.

²²⁸ Yakin Erturk, *Former Special Rapporteur on Violence Against Women, its Causes and Consequences*. N. Doc. E/CN.4/2006/61

²²⁹ Ibid.

4. The impact of incorporating domestic violence within the definition of torture and ill-treatment on the status of women in Afghanistan

"He who knocks on your door in the middle of the night,
has come to kill the light.

We had better hide the Lights in the dark closets."²³⁰

4.1. An overview

It will not be irrelevant to take a brief look at the status of women and girls in Afghanistan under the *de facto* authorities of the Taliban before analyzing the impacts of incorporating domestic violence into the torture and other ill-treatment definition.

Violence against women exists worldwide in different manifestations; however, it is more striking in developing nations such as Afghanistan, where social structures greatly support men's dominance over women. Researchers at Bristol University surveyed 1.17 million women and men in 49 low and middle-income countries from 2005 to 2017 based on demographics and health factors. According to this survey, "country-level factors, especially the political condition, played an essential role in accepting domestic violence. It was more prevalent in countries with frequent and intense political conflict."²³¹ The societal acceptance of VAW was higher in South Asia, with nearly half the population (47%) justifying VAW and in Sub-Saharan Africa (38%), compared with Latin America and the Caribbean (12%), Europe and Central Asia (29%).²³² "The widespread justification of domestic violence in highly patriarchal societies suggests that women have internalized the idea that a husband who physically punishes his wife or verbally reprimands her has exercised a right that serves her interest. They perceive this behaviour as legitimate disciplining, rather than an act of violence."²³³ This multi-

²³⁰ Quote by Ahmad Shamlou. Nobel Prize nominated poet, Ahmad Shamlou (December 12, 1925 – July 23, 2000), is one of the most influential cultural figures in Persian language. He is also a writer, translator, encyclopedist, and critic. Available at: [Ahmad Shamlou poems in English — Niloufar Talebi](#)

²³¹ Sardinha L, Nájera Catalán HE (2018) *Attitudes towards domestic violence in 49 low- and middle-income countries: A gendered analysis of prevalence and country-level correlates*. PLoS ONE 13(10): e0206101. Para, 11. <https://doi.org/10.1371/journal.pone.0206101>

²³² Ibid., Para 26.

²³³ Ibid., Para 27.

country study addresses a significant knowledge gap on how various systemic economic, social, and political empowerment elements, including those associated with broader gender inequalities such as national female literacy rates, multidimensional deprivation, women's labour force participation, women's participation in the public sphere, the presence and quality of laws on such kinds of abuses, political conflict and levels of democracy influence societal attitudes towards this form of damaging act amongst women and men across the globe.²³⁴ The survey highlights that women's national literacy rate appeared as the most influential socio-economic factor for the acceptance of violence against women in society. However, a paradigm shift toward gender equality is occurring in wealthy countries.²³⁵ Industrialization included women in the workforce, thus providing them with a venue to venture into literacy and educational opportunities, participation in government, and reduced fertility and early marriage. While there are some efforts toward a more equitable sharing of power in developing societies, classic patriarchy still retains all the elements of the totalitarian authority of senior male figures. For instance, Afghanistan's context is permeated by a cultural definition of masculinities and femininities passed on from generation to generation. Detrimental traditional practices shape the present threats to Afghan women and men; thus, such practices suppress women and make them vulnerable to violence.²³⁶ Cultural factors in this context refer to the structure of Afghan society based on which violence against women is perpetrated. However, citing the current situation in Afghanistan under the rule of the Taliban is complicated since it has not yet been recognized as a *de jure* state by the international community. Considering that the country is experiencing one of its most resentful times in human rights under the Taliban *de facto* regime, researching the status of women in the country seems even more critical.

4.2. A Torture stigma and its impact on *de facto* authorities

In Afghanistan, women suffer from the patriarchal ideology that dominates society. The mentality of being a man, and thus, being superior, is an unchangeable principle. For instance, most men are against the Taliban and have fought against them, but they have the same

²³⁴ Ibid., Para 29.

²³⁵ Inglehart, R., & Norris, P. (2003). *Rising tide: Gender equality and cultural change around the world*. Cambridge, UK: Cambridge University Press.

²³⁶ Echavez, C. R, Mosawi, S. M., & Pilongo, L. W. (2016). *The other side of gender inequality: Men and masculinities in Afghanistan*. Kabul: Afghanistan Research and Evaluation Unit. P.4

backward attitude as the Taliban about women's societal position.²³⁷ With the existence of such a mentality, women are considered physically weak and incapacitated. They are always viewed as the "second sex" since "they share some common characteristic not held by the rest of the population and who are uniquely vulnerable concerning risk and/or experiences surrounding violence."²³⁸ The responsibility for this injustice and violence lies with the immediate family, communities, religious organizations, health and education institutions, professionals, and law enforcers.²³⁹ Many Afghans, including some religious leaders, reinforce these harmful customs by invoking their interpretation of Islam. These practices are often inconsistent with international law and violate women's human rights.²⁴⁰ For instance, child marriage, giving away girls for dispute resolution, forced isolation in the home, exchange marriage, and honour killings – cause suffering, humiliation, and marginalization for millions of Afghan women and girls.

Meanwhile, they are also subjected to rape, forced marriage, torture, killing, fear, domestic violence perpetrated by both husbands and mothers-in-law²⁴¹, social exclusion, and separation from their homes and family members.²⁴² Unfortunately, women in Afghanistan have limited freedom to escape these norms and customs that dictate a subservient position for them. By the same token, domestic violence at home is so prevalent and pervasive that practically every Afghan woman will experience it in her lifetime.²⁴³ Thus, they are oppressed and suppressed

²³⁷ Povey, E.R. (2003). *Women in Afghanistan, Passive Victims of the Borgia or active social Participants?* Development in Practice, 13, 266-277, p. 4

²³⁸ Brownridge, D. A. (2009). *Violence against women: Vulnerable populations*. Routledge. P, 1, <https://doi.org/10.4324/9780203877432>

²³⁹ Amnesty International. (2021, November 1). *Afghanistan: Taliban wasting no time in stamping out human rights says new briefing*, P.4, [Press release]. <https://www.amnesty.org/en/latest/news/2021/09/afghanistan-taliban-wasting-no-time-in-stamping-out-human-rights-says-new-briefing/>

²⁴⁰ Ibid., P,7.

²⁴¹ Gibbs, A., Said, N., Corboz, J., & Jewkes, R. (2019). *Women's Lived Experiences of Conflict*. <https://journals.sagepub.com/doi/pdf/10.1177/1077801220935191>

²⁴² Povey, E.R. (2003). *Women in Afghanistan, Passive Victims of the Borgia or active social Participants?* Development in Practice, 13, 266-277, p.4

²⁴³ Diya, N. and Lauryn, O., 2008. [online] Humanitarianresponse.info. Available at: <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/Living%20with%20Violence%20%20A%20National%20Report%20on%20Domestic%20Violence%20in%20Afghanistan%2C%20Global%20Rights%2C%202008.pdf> [Accessed 17 October 2021].

in private and public spheres, presenting a severe human rights challenge. Afghan Women comprise nearly 49% of the 30.4 million people in the country and are among the worst off globally compared to men and women from other countries. Their situation is deplorable in health, deprivation of rights, protection against violence, economic productivity, education and literacy, and public participation.²⁴⁴ Reports indicate that Afghan women are subjected to increasingly uncertain circumstances, suggesting that women who partake in public life face threats, harassment, and aggression.²⁴⁵ The pattern of attacks against women operating in the public sphere sends a strong message to all women to stay at home.²⁴⁶ Subsequently, portraying the deteriorating condition of fundamental human rights, particularly those of women in Afghanistan, has become a significant concern for human rights activists and scholars.

Moreover, recent literature on domestic violence in Afghanistan has highlighted the clustering of violence within families and how extreme forms of violence, such as honour killings, are often an extension of the use of violence against women more broadly.²⁴⁷ While the long-term conflict in the country is one of the main factors in forming gender-based violence, comprehending violence against women in the family is critical. There is slight evidence of how the war itself may be a reason for VAW in Afghanistan or how this may be impacting household violence in this context.²⁴⁸ However, focusing on women's lived experiences of conflict and domestic violence, the interconnections between the "public" spaces of the conflict and the "private" spaces of the home highlight the nuanced interconnections within and between these spaces.²⁴⁹ This interconnection illustrates the long-lasting feminist debates concerning the separation of public and private spheres. The public sphere is often described as men's rightful place and the private sphere suitable for women.²⁵⁰ In other words. the

²⁴⁴ *National Action Plan for the Women of Afghanistan (NAPWA)*. The UN Secretary-General's Database on Violence Against Women, <http://sgdatabase.unwomen.org/uploads/National%20Action%20Plan%20for%20the%20Women%20of%20Afghanistan%202007%20to%202017.pdf>

²⁴⁵ *Silence is Violence – End the Abuse of Women in Afghanistan*, United Nations Human Rights – Office of the High Commissioner for Human Rights, P, 38 http://www.ohchr.org/Documents/Press/VAW_Report_7July09.pdf

²⁴⁶ *Ibid.* p.39.

²⁴⁷ *Ibid.*, p.3.

²⁴⁸ *Ibid.*, p.3.

²⁴⁹ *Ibid.*, p.11.

²⁵⁰ *See generally*, MacKinnon, C. A. (1989). *Toward a feminist theory of the state*. Harvard University Press.

patriarchal system in Afghanistan that contains women in the home depends on clear divisions between public and private spheres and gendered notions of who rightfully belongs in these spaces. To this end, the conflict in the country is often used to justify the need for women's security and the home as a "safe" space in ways that obscure how these patriarchal dogmas form new vulnerabilities for women during conflict. The patriarchal structure is the grounds for demonstrating the core cause of women's subordination and the power relations between the two sexes. These power relations are characterised by a hierarchical, material base that promotes men's independence and enables them to dominate women. Such patriarchal social arrangements are based on the belief that since men and women are biologically different, men are entitled to more power than women.²⁵¹ Research shows that domestic violence in heterosexual relationships results from men's desire to exercise power and control over their female partners.²⁵² Otherwise stated, domestic violence is the consequence of hetero-patriarchy; gender and power are fundamental to understanding a man's violence against his intimate female partner.²⁵³ Even today, the power within them is not gender-neutral but structured into the institution of marriage and intimate heterosexual relationships to the disadvantage of women.²⁵⁴ Hence, it is vital to understand the relationship between law, power, and space²⁵⁵ since there is a common understanding that relations between men and women are constituted within a particular set of power relations. The patriarchal structure is the grounds for demonstrating the core cause of women's subordination and the power relations between the two sexes. These power relations are characterised by a hierarchical, material base that promotes men's independence and enables them to dominate women. Such patriarchal social arrangements are based on the belief that since men and women are biologically different, men

²⁵¹ Sultana, A., 2010. Patriarchy and women's subordination: a theoretical analysis. Arts Faculty J. 1–18.

²⁵² Dobash, R.E., Dobash, R.P., 2017. When Women Are Murdered. Handbook on Homicide Wiley-Blackwell, Oxford, pp. 131–148.

²⁵³ See, Websdale, N. and Chesney-Lind, M. 1998, "Doing Violence to Women: Research Synthesis on the Victimization of Women", in L. H. Bowker (Ed.), *Masculinities and Violence*. Thousand Oaks, California: Sage Publications.

²⁵⁴ Kurz, D. 1993, "Social Science Perspectives on Wife Abuse: Current Debates and Future Directions", in P. B. Bart and E. G. Moran (Eds.), *Violence Against Women The Bloody Footprints*. Newbury Park: SAGE Publications.

²⁵⁵ See Nicholas K Blomley, *Law, Space, and the Geographies of Power* (Guildford Press, 1994)

are entitled to more power than women.²⁵⁶ Research shows that domestic violence in heterosexual relationships results from men's desire to exercise power and control over their female partners.²⁵⁷ Otherwise stated, domestic violence is the consequence of heteropatriarchy; gender and power are fundamental to understanding a man's violence against his intimate female partner.²⁵⁸ Even today, the power within them is not gender-neutral but structured into the institution of marriage and intimate heterosexual relationships to the disadvantage of women.²⁵⁹ Hence, it is vital to understand the relationship between law, power, and space²⁶⁰ since there is a common understanding that relations between men and women are constituted within a particular set of power relations. Thus, in the case of Afghanistan, this country is considered a part of the classic "patriarchal belt"²⁶¹, where men benefit from the extensive support of social structures to dominate women. Despite the attempts for a fair distribution of power among men and women, masculinity has preserved elements of authoritarianism and totalitarianism for senior men such as fathers, great-grandfathers, uncles/mothers, sons of uncles/mothers/aunts and brothers. The existing cultural definitions related to the characteristics of being a man (masculinity) and being a woman (femininity), which are transmitted from generation to generation in Afghanistan, are rooted in the context and structure of this society. Harmful and institutionalised traditions have also formed the current threats to Afghan women and men; These practices oppress women and make them vulnerable to violence.²⁶² In such nations, women are degraded as inferior beings, making their conditions more lamentable and exposing them to numerous forms of violence. The inferior

²⁵⁶ Sultana, A., 2010. Patriarchy and women's subordination: a theoretical analysis. *Arts Faculty J.* 1–18.

²⁵⁷ Dobash, R.E., Dobash, R.P., 2017. When Women Are Murdered. *Handbook on Homicide* Wiley-Blackwell, Oxford, pp. 131–148.

²⁵⁸ See, Websdale, N. and Chesney-Lind, M. 1998, "Doing Violence to Women: Research Synthesis on the Victimization of Women", in L. H. Bowker (Ed.), *Masculinities and Violence*. Thousand Oaks, California: Sage Publications.

²⁵⁹ Kurz, D. 1993, "Social Science Perspectives on Wife Abuse: Current Debates and Future Directions", in P. B. Bart and E. G. Moran (Eds.), *Violence Against Women The Bloody Footprints*. Newbury Park: SAGE Publications.

²⁶⁰ See Nicholas K Blomley, *Law, Space and the Geographies of Power* (Guildford Press, 1994)

²⁶¹ Caldwell, John C. (1982). *Theory of fertility decline*, London, UK: Academic Press.

²⁶² See generally, Mosawi, S. M. (2016). *The Other Side of Gender Inequality: Men and Masculinities in Afghanistan*.

social status of women and the consequential power imbalances between women and men are the underlying grounds for harmful and discriminatory patterns and physical and sexual abuse against girls and women in Afghanistan. According to Human Rights Watch, roughly 87% of Afghan girls and women encounter abuse in their lifetime. A law on the elimination of violence against women, which was passed by the parliament of Afghanistan back in 2009, had been praised as a hard-won achievement by activists though it has since been mostly overlooked, with few victims capable of seeking justice.²⁶³

Additionally, the historically entrenched perception of domestic violence as a private concern has revealed that domestic violence gets very small attention in the public sphere. Hence, the split between public and private spheres is employed to justify the state's involvement in what is perceived as personal matters, actually meaning anything that impacts women's lives.²⁶⁴ Separating the private and public spheres to justify domestic violence and noninterference by the state is not unique to Afghanistan. As in all societies, VAW results from socially entrenched gender norms and injustices.²⁶⁵ Although Afghanistan has its unique gender norms and structures, for instance, male guardianship and *purdah* (secluding women from the gaze of men or strangers), as one of the mechanisms through which gender norms and structures manifest VAW in this context.²⁶⁶

Unfortunately, the country is currently living in a legal vacuum under the *de facto* authorities. While suspending the country's relevant laws and constitution, the Taliban has issued new restrictions on citizens, especially women, in separate orders. On 31 August 2021, the US government announced the end of its 20-year-long war in Afghanistan. Consequently, the Taliban and its allies took over the country.²⁶⁷ After gaining power, the Taliban introduced a

²⁶³ Glinski, S. (2021). *Violence starts at home': The Afghan women tackling domestic abuse at its source*. The Guardian. Retrieved September 28, 2022, from <https://www.theguardian.com/global-development/2021/jan/29/violence-starts-at-home-the-afghan-women-tackling-domestic-abuse-at-its-source>

²⁶⁴ Ibid., 11.

²⁶⁵ See generally, Anderson, K. L. (2005). *Theorizing gender in intimate partner violence research*. Sex Roles, Vol. 52 Iss. 11-12.

²⁶⁶ Gibbs, A., Said, N., Corboz, J., & Jewkes, R. (2019). *Women's Lived Experiences of Conflict*. P,12. <https://journals.sagepub.com/doi/pdf/10.1177/1077801220935191>

²⁶⁷ Yousaf, F., & Jabarkhail, M. (2021). *Afghanistan's future under the Taliban regime: Engagement or isolation?* Journal of Policing, Intelligence and Counter Terrorism, 1–18. <https://doi.org/10.1080/18335330.2021.1982139>

new cabinet of 33 people with no female members. Since their takeover, they have issued numerous media statements and have demonstrated a 'new' side to their political ideology and messaging.²⁶⁸ With the victory of the Taliban, there are many global concerns about Afghanistan returning to 25 years ago (1996-2001). The Taliban has sought to portray moderate figures and has promised that women's rights will be protected under Islamic law. However, the Taliban's behaviour is dramatic and aimed at consolidating the foundations of its power at the beginning of victory. Under the Taliban's rule, women's human rights are violated. The Special Rapporteur on the status of human rights in Afghanistan is gravely concerned concerning the increased levels of violence against women and girls, including domestic violence, the failure of mechanisms for victims to pursue protection, aid and accountability, and the usage of the informal justice system to cope with such matters.²⁶⁹ He further illustrates that reports represented acts such as kicking, punching, slapping, and beatings with cables, sticks and pipes, tools and electric shocks to sensitive body parts and even, in some cases, women were subject to public flogging and shaming or kept in private prisons.²⁷⁰ Hence, there are cases concerning extra-judicial killings, torture, disappearances, discriminatory restrictions and treatment, mental well-being, education rights, and other women's fundamental rights. Although the Taliban announced that the "war was over"²⁷¹ after regaining control of Afghanistan, resistance was raging against them across the country.²⁷²

²⁶⁸ Ibid., p.2.

²⁶⁹ HRC – UN Human Rights Council (formerly UN Commission on Human Rights): Situation of human rights in Afghanistan; Report of the Special Rapporteur on the situation of human rights in Afghanistan [A/HRC/51/6], 6 September 2022, para,33 https://www.ecoi.net/en/file/local/2078445/A_HRC_51_6_AdvanceUneditedVersion.docx (accessed on 17 September 2022)

²⁷⁰ HRC – UN Human Rights Council (formerly UN Commission on Human Rights): Situation of human rights in Afghanistan; Report of the Special Rapporteur on the situation of human rights in Afghanistan [A/HRC/51/6], 6 September 2022, para,59 https://www.ecoi.net/en/file/local/2078445/A_HRC_51_6_AdvanceUneditedVersion.docx (accessed on 17 September 2022)

²⁷¹ Reuters. (2021, August 16). *Taliban spokesman says “war is over in Afghanistan” - Al Jazeera.* <https://www.reuters.com/world/asia-pacific/taliban-spokesman-says-war-is-over-afghanistan-al-jazeera-2021-08-15/>

²⁷² Tawfeeq, M. N. H. (2021, September 3). *Afghanistan: Heavy clashes erupt between Taliban and anti-Taliban group in Panjshir province.* CNN. <https://edition.cnn.com/2021/09/02/asia/afghanistan-taliban-national->

According to reports,²⁷³ Afghanistan has had one of the worst human rights records since the Taliban took over the country. "The Taliban maintain systematic discrimination against women and girls by introducing approaches that have harshly denied women's rights to freedom of movement and expression and sabotaged girls' rights to education and employment," said Yamini Mishra, Amnesty International's South Asia Director.²⁷⁴ Women and girls are psychologically horrified, physically stoned, sexually harassed, and socially imprisoned inside their homes, and thus, it is a blatant war against women. Not surprisingly, the Taliban created religious police (propagation of virtue and prevention of vice) to lash women without male companions²⁷⁵, beat men who do not pray, and jail those who shave or even trim their beards. Whereas in 1996, the group enforced these restrictions from day one, this time, however, the Taliban appears to be executing them slowly to avoid international scrutiny.²⁷⁶

Moreover, the Taliban have caused a wave of infringements, from reprisal attacks and limitations on women to crackdowns on demonstrations, the media, and civil society."²⁷⁷ For instance, the UN Committees (CEDAW, CRC) have expressed their concern due to the restrictive rules and continuous reports of targeted attacks on women and girls, including academics, health workers, human rights defenders, media employees, civil servants, and many

[resistance-clash-intl-hnk/index.html](#) also see, McKay, H. (2021, September 6). *Despite Taliban's victory claims, resistance forces vow to continue fight in the face of US "betrayal."* New York Post. <https://nypost.com/2021/09/06/afghan-resistance-continues-to-fight-taliban-after-us-withdrawal/>

²⁷³ Amnesty International. (2021b, November 1). *Afghanistan: Taliban wasting no time in stamping out human rights says new briefing.* <https://www.amnesty.org/en/latest/news/2021/09/afghanistan-taliban-wasting-no-time-in-stamping-out-human-rights-says-new-briefing/>

²⁷⁴ *Afghanistan: Global petition calls on the international community to stop the Taliban's suppression of women's and girls' rights.* (2022, March). Amnesty International. <https://www.amnesty.org/en/latest/news/2022/03/afghanistan-global-petition-calls-on-international-community-to-stop-the-talibans-suppression-of-womens-and-girls-rights/>

²⁷⁵ A. (2020, July 29). *Taliban beat two women over outing without male partners.* Afghanistan Times. <https://www.afghanistantimes.af/taliban-beat-two-women-over-outing-without-male-partners/>

²⁷⁶ Mobasher, M. B., & Shah, M. Q. (2021b, December 17). *Examining the Taliban's Words, Thoughts, and Deeds, Part II: Hostage Diplomacy.* The Diplomat. [Examining the Taliban's Words, Thoughts and Deeds, Part II: Hostage Diplomacy – The Diplomat](#)

²⁷⁷ Amnesty International. (2021, November 1). *Afghanistan: Taliban wasting no time in stamping out human rights says new briefing* [Press release]. <https://www.amnesty.org/en/latest/news/2021/09/afghanistan-taliban-wasting-no-time-in-stamping-out-human-rights-says-new-briefing/>

others who have contributed to the country's development over the past 20 years, as well as those exercising their right to education.²⁷⁸ Furthermore, the Taliban has instilled anxiety among females by searching out high-profile women.²⁷⁹, denying women freedom of movement outside their homes, imposing compulsory dress codes²⁸⁰, severely curtailing access to employment and education, and restricting the right to peaceful assembly.²⁸¹ Attacks on human rights defenders have been reported on a near-daily basis since. The Taliban conduct door-to-door searches for human rights defenders, forcing many into hiding.²⁸² For instance, according to the reports from Amnesty International, a journalist was detained during women's protests on 8 September 2021. He was severely tortured and had his arm broken. He was taken inside the Police district. When the Taliban released him, they made him wear new clothes because his clothes had become wet from his blood."²⁸³ After seizing power in Afghanistan, the Taliban pledged to conflict with Afghan women. Their radical interpretation of Islam prevents women from secondary education²⁸⁴, being involved in television dramas²⁸⁵, playing

²⁷⁸ OHCHR. (2021, August 30). *Afghanistan: UN committees urge Taliban to honour their promises to protect women and girls* [Press release]. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27414>

²⁷⁹ Shaheed, M. (2022, January 21). *Rights Groups: Taliban Arrest 4 Afghan Women at Homes*. VOA. <https://www.voanews.com/a/rights-groups-taliban-arrest-4-afghan-women-at-homes/6406330.html>

²⁸⁰ Editorial. (2022, January 8). *Wearing hijab made mandatory for women in Afghanistan*, <https://www.newsncr.com/world/wearing-hijab-made-mandatory-for-women-in-afghanistan-talibans-religious-police-issued-a-decree-by-putting-up-posters/>

²⁸¹ *Afghanistan: Taliban Abuses Cause Widespread Fear*. (2021, September 27). [Press release]. <https://www.hrw.org/news/2021/09/23/afghanistan-taliban-abuses-cause-widespread-fear>

²⁸² Amnesty International. (2021, November 1). *Afghanistan: Taliban wasting no time in stamping out human rights says new briefing* [Press release]. <https://www.amnesty.org/en/latest/news/2021/09/afghanistan-taliban-wasting-no-time-in-stamping-out-human-rights-says-new-briefing/>

²⁸³ Ibid.

²⁸⁴ Graham-Harrison, E. (2021, September 18). *Taliban ban girls from secondary education in Afghanistan*. <https://www.theguardian.com/world/2021/sep/17/taliban-ban-girls-from-secondary-education-in-afghanistan>

²⁸⁵ Popalzai, E. (2021, November 22). *Women banned from Afghan television dramas under new Taliban*. Retrieved December 18, 2021, from <https://www.cnn.com/2021/11/22/asia/taliban-women-banned-tv-drama-afghanistan-intl/index.html>

sports²⁸⁶, and even appearing in society. Since the international community does not legally recognize the country, thus, evaluating the extent to which one can regard individuals in the territories of *de facto* regimes seems to be complicated under the international law concerning the human rights obligations of such political entities.

First, according to international law, international humanitarian law is binding on all non-State actors, including *de facto* regimes.²⁸⁷ Hence, in the case of Afghanistan, the country "is currently governed by the customary and treaty rules applicable to armed conflicts of a non-international character."²⁸⁸ Afghanistan ratified the four Geneva Conventions in 1956 and adhered to the two Additional Protocols in June 2009, with Additional Protocol II coming into force on 24 December 2009.²⁸⁹ Under international humanitarian law, both State and non-State actors are accountable for the conduct of hostilities; however, several views have been promoted in the publications to explain the opposability of international humanitarian law to non-State actors in terms of the international legal nature of insurgents.²⁹⁰ *De facto* regimes are marked by their denial of the authority of the State government and political control of territory with the object of establishing a sovereign and independent State.²⁹¹ In terms of the typology of non-State actors, *de facto* regimes are insurrectional or equivalent movements.²⁹² It appears to be an established rule of international law that the actions of insurrectional or other movements that succeed in establishing a new State in part of the territory of a pre-existing

²⁸⁶ Beaumont, P. (2021, September 8). *Afghan women to be banned from playing sport, Taliban say*. Retrieved December 21, 2021, from <https://www.theguardian.com/world/2021/sep/08/afghan-women-to-be-banned-from-playing-sport-taliban-say>

²⁸⁷ See generally, Zegveld. (2002). *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press.

²⁸⁸ Bellal, Annyssa and Giacca, Gilles and Casey-Maslen, Stuart. (March 18, 2011). *International Law and Armed Non-State Actors in Afghanistan*, International Review of the Red Cross, Volume 93, Number 881, March 2011, P,5.

²⁸⁹ Ibid., 7.

²⁹⁰ See, Kleffner .(2011). *The applicability of international humanitarian law to organized armed groups*. 93(882) International Review of the Red Cross 443 at 454-456.

²⁹¹ Cullen, A., Wheatley, S. (2013). *The human rights of individuals in de facto regimes under the European Convention on Human Rights*. Human Rights Law Review, 13 (4) . pp. 691-728. Doi:10.1093/hrlr/ngt033, p.38

²⁹² Ibid.

State will be considered to be an act of the new State.²⁹³ Though, as to whether the international law obligation is opposable to a State but actionable against the insurrectional movement *as if it were a State* at the moment of the impugned act or omission or whether the norm must be opposable to the insurrectional movement *as a non-State actor*.²⁹⁴ The first possibility would hold the movement responsible for the human rights obligations opposable to the territorial State;²⁹⁵ the second argument holds that an insurrectional movement is responsible for those international law norms opposable to the movement, which become actionable once statehood is achieved.²⁹⁶

However, certain international humanitarian law standards have equivalents in human rights law, affirming, inter alia, rules to protect human life, ban torture, define certain basic rights regarding the criminal justice approach, and prohibit discrimination.²⁹⁷ Keeping the systematic overlap between IHL and IHRL in mind, it seems odd that a non-state actor is prosecuted under one legal regime for violating international law and not held accountable for the same acts under another regime.²⁹⁸

According to Menno Kamminga, the most important category of rights belonging to individuals is human rights in the present age. He further concurs that when human rights are developed due to treaty obligations accepted by the State, it is problematic to conclude that individual beneficiaries of these rights should be declined "simply because they have ended up under the

²⁹³ Article 10(2), International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, 12 December 2001 A/RES/56/83.

²⁹⁴ Cullen, A., Wheatley, S. (2013). *The human rights of individuals in de facto regimes under the European Convention on Human Rights*. Human Rights Law Review, 13 (4). p.38

²⁹⁵ See, generally, Ronen, Y. (2005). *Status and Human Rights Obligations of Non-recognized De Facto Regimes in International Law: The Case of 'Somaliland*. By Michael Schoiswohl. Leiden, Boston: Martinus Nijhoff Publishers, 2004. Pp. xvi, 352. Index. \$125, £100. *American Journal of International Law*, 99(4), 953-959. doi:10.2307/3396705

²⁹⁶ Article 10(2), International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, 12 December 2001 A/RES/56/83. para 16.

²⁹⁷ Berman, P. (1996). *The ICRC's Advisory Service on International Humanitarian Law: The challenge of national implementation*. *International Review of the Red Cross*, 36(312), 338-347. doi:10.1017/S0020860400089944

²⁹⁸ Clapham, A. (2006). *Human rights obligations of non-state actors in conflict situations*. *International Review of the Red Cross*, 88(863), 491-523. doi:10.1017/S1816383106000658

jurisdiction of a successor State."²⁹⁹ Thus, *de facto* authorities have the same obligation as their predecessors³⁰⁰ and are bound by customary international law and universal human rights treaties. Human Rights Committee has taken the same stand concerning the obligation of non-state actors. In the Committee's view, the International Covenant on Civil and Political Rights, which normatively overlaps with the rights enshrined in the Universal Declaration of Human Rights, "belong to the people living in the State party's territory,"³⁰¹ and "such protection devolves with the territory and continues to belong to them,"³⁰² therefore, will not be affected by newly emerged factors. Assuming that there is currently a shortage of accountability for any human rights infringements at the national level, the international community must make every attempt required to prevent, monitor and punish human rights abuses in Afghanistan committed by the Taliban *de facto* authorities.³⁰³ Otherwise stated, as a UN member, Afghanistan is tied to several human rights instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights and the Convention against torture and other cruel, inhuman or degrading treatment or punishment.³⁰⁴ By consenting to UN membership, the international community holds a state as an accountable member, though, on the other hand, by signing the UN Charter, the state bears the obligations as a consequence, including respecting human rights.³⁰⁵ Accordingly, the UN Secretary-General has called for "compliance to the international duties of Afghanistan, including all international agreements to which it is a party." Even as a *de facto*, unrecognized government, the Taliban is treated as a state organ for the purpose of the law of state

²⁹⁹ Menno T. Kamminga (1996). *State Succession in Respect of Human Rights Treaties*, European Journal of International Law, Volume 7, Issue 4, , Pages 469–484.

³⁰⁰ Mullerson, R. (1993). *The Continuity and Succession of States, by Reference to the Former Ussr and Yugoslavia*. International and Comparative Law Quarterly, 42(3), 473-493. doi:10.1093/iclqaj/42.3.473

³⁰¹ Human Rights Committee, General Comment No 26: Continuity of obligations, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1; 5 IHRR 301 (1998) at para 4.

³⁰² Ibid.

³⁰³ Gossman, P. (September 14, 2021). *With Taliban in Power, Only International Action Can Save Afghans: Afghanistan is Emblematic of Crises the ICC was Created to Address*, Human Rights Watch. <https://www.hrw.org/news/2021/09/14/taliban-power-only-international-action-can-save-afghans>.

³⁰⁴ Malley, W. (2018). *Transition in Afghanistan: Hope, Despair and the Limits of State building*, Taylor & Francis Group, London.

³⁰⁵ Thakur, R. C. (2006). *The United Nations, peace and security : from collective security to the responsibility to protect*. Cambridge : Cambridge University Press, <http://www.loc.gov/catdir/toc/ecip063/2005032574.html>

responsibility. Thus, they are accountable for violating the state's international obligation. In addition, as a victorious insurgency, the Taliban is also responsible for its past breaches as an insurgent group before it became the government.

Meanwhile, the Taliban would stay determined to respect international humanitarian law, including limitations on the conduct of hostilities, protection of civilians, humane treatment of prisoners, and an obligation to investigate and punish war crimes by ISIS-K.³⁰⁶ International criminal law also applies to individual Taliban members.³⁰⁷ Further, it is increasingly well-settled that human rights duties apply to *de facto* governmental authorities exercising territorial control.³⁰⁸ Withal, obligations under the ratified treaties remain in place, regardless of the particular authorities exercising effective power,³⁰⁹ meaning that the Taliban must comply with human rights and also exercise due diligence in suppressing foreseeable terrorist threats to the right to life.³¹⁰

In his study on *de facto* regimes, Jochen Abraham Frowein deals with questions concerning the status, rights, and duties of non-recognized *de facto* regimes.³¹¹ He uses the term "*non-recognized de facto*" regime for entities that effectively control territory and claim to be independent but are not recognized either as a new state or as the government of an existing state.³¹² On that basis, the Taliban are to be considered a stabilized but unrecognized *de facto*

³⁰⁶ Austin, H., & Siemaszko, C. (2021, August 27). *What is ISIS-K? Islamic State group's affiliate behind Kabul airport attack*. NBC News. <https://www.nbcnews.com/news/world/what-isis-k-islamic-state-group-s-affiliate-behind-kabul-n1277750>

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ UN Human Rights Council. (2021, December). *Afghanistan: Humanitarian crisis threatens basic human rights*. Nada Al-Nashif. <https://news.un.org/en/story/2021/12/1107902>

³¹⁰ Ibid.

³¹¹ See generally, Frowein, J. A. (2010). *De Facto Regime*. Max Planck Encyclopedia of Public International Law. Oxford: Oxford University Press.

³¹² Wolfrum, R., & Philipp, C. E. (2002). *The Status of the Taliban: Their Obligations and Rights under International Law*, Max Planck Yearbook of United Nations Law Online, 6(1), 559-601. doi: <https://doi.org/10.1163/18757413-00601012>

regime,³¹³ enjoying limited rights and duties under international law.³¹⁴ As shown above, these *quasi-states*³¹⁵ are bound to the minimum obligations of IHL and ICL. These norms protect the inhabitants of the territory under these regimes' control. While these basic norms only protect against the most vicious forms of ill-treatment of human dignity, they "deliver for a minimum set of humanitarian standards, which remain relevant when core human rights are endangered the most."³¹⁶ The minimum standards contained in common Article 3 of the 1949 Geneva Conventions prohibit the use of torture.

Hence, the prohibition of torture and other ill-treatment applies to *de facto* regimes and armed groups under international humanitarian law where these groups are parties to the conflict, irrespective of their relationship with any government.³¹⁷ As already mentioned, most *de facto* regimes systematically use torture in custody and detention centres. Torture is also used as a means of war and in pursuance of a policy of "ethnic cleansing,"³¹⁸ for instance, the *de facto* security forces in Afghanistan unlawfully killed 13 ethnic Hazaras³¹⁹, including a 17-year-old girl, in Afghanistan's Daykundi province.³²⁰ Such groups mainly use torture as a political weapon to maintain and enforce control over the members of the group and the local

³¹³ See generally, Frowein, J. A. (2010). *De Facto Regime*. Max Planck Encyclopedia of Public International Law. Oxford: Oxford University Press, note 91, 231

³¹⁴ Wolfrum, R., & Philipp, C. E. (2002). *The Status of the Taliban: Their Obligations and Rights under International Law*, Max Planck Yearbook of United Nations Law Online, 6(1), 559-601. P.27, doi: <https://doi.org/10.1163/18757413-00601012>

³¹⁵ Weller, M. (2009). *Settling Self-determination Conflicts: Recent Developments*. 20 European Journal of International Law, supra n 12 at 130.

³¹⁶ Ronen, Y. (2005). *Status and Human Rights Obligations of Non-recognized De Facto Regimes in International Law: The Case of 'Somaliland*. By Michael Schoiswohl. Leiden, Boston: Martinus Nijhoff Publishers. American Journal of International Law, 99(4), 953-959. doi:10.2307/3396705

³¹⁷ Redress (2006). *Not Only the State: Torture by Non-State Actors – Towards Enhanced Protection, Accountability, and Effective Remedies*, Prevention through Documentation Project.

³¹⁸ Ibid., P.21.

³¹⁹ The Hazaras are a Persian-speaking ethnic group native to, and primarily residing in the Hazarajat region in central Afghanistan and generally scattered throughout Afghanistan. For more information see: [Hazaras - Wikipedia](#)

³²⁰ Amnesty International. (2021, October 5). *Afghanistan: 13 Hazara killed by Taliban fighters in Daykundi province – new investigation*. <https://www.amnesty.org/en/latest/news/2021/10/afghanistan-13-hazara-killed-by-taliban-fighters-in-daykundi-province-new-investigation/>

population. Hence, torture is employed as a means to force information about government operations, rival groups, informers, presumed defectors, and critics. On account of these facts, the Special Rapporteur on the situation of human rights in Afghanistan expressed grave concern about the staggering regression in women and girls' enjoyment of civil, political, economic, social and cultural rights since the Taliban took power. In no other country have women and girls so rapidly disappeared from all spheres of public life, nor are they as disadvantaged in every aspect of their lives.³²¹

Despite such an inhumane situation, unfortunately, there are no express regulations of international human rights law that provide for the obligation of non-state actors to afford compensation for Torture and Other ill-treatments. Since the willingness of a *de facto* to subscribe to the gamut of preventive measures depends mainly on its ideology and positioning *vis-à-vis* the international community.³²² Otherwise stated, the international practice is mainly *ad-hoc* as there is no coherent and concerted UN procedure to address relevant actors directly within the existing human rights system.³²³ Since the "international human rights obligations still address mainly states as the primary guarantors and violators of human rights,"³²⁴ the existence of these regimes is challenging to the international community, especially in realising the fundamental human rights of these territories. For instance, under the rule of the Taliban, current Afghanistan has all the requirements of a *de facto* regime, the effectiveness and control over the territory; still, the stand of the international community lacks clarity concerning the breaches happening in the country.

Although not with a coherent and clear approach, as a *de facto* regime exercising effective control, the Taliban are an immediate duty-bearer given Afghanistan's legal obligations under international treaties, such as the obligation to eliminate discrimination against women, ensure

³²¹ Bennett, R. (2022). *Report of the Special Rapporteur on the situation of human rights in Afghanistan*. Human Rights Council. A/HRC/51/6. Para, 21. Available at: https://www.ohchr.org/sites/default/files/2022-09/A_HRC_51_6_AdvanceEditedVersion-EN.docx

³²² Ibid., 37.

³²³ Ibid., 37.

³²⁴ Blockmans, S. (2002). *International Law*, by Antonio Cassese, Oxford University Press, Leiden Journal of International Law, 15(3), 718-720. doi:10.1017/S0922156502220336. pp. 375-396

women's right to equal participation in civic and public life and decision-making fora.³²⁵ In other words, the *de facto* authorities effectively control the country. They, therefore, are responsible for fulfilling the obligations emanating from the international human rights and humanitarian treaties to which Afghanistan is a party, regardless of whether there is recognition of a formal change of government.³²⁶ Clearly, the international community is trying to lay out a new system; however, as with any state that systematically infringes international law, enforcement will be challenging concerning Afghanistan. A suite of threats and rewards is known under international law, including diplomatic compromises, dispute settlement, countermeasures, sanctions, multilateral acts, conditionality on foreign aid, holding Taliban supporters such as Pakistan, and eventually, the carrot of recognition of the rewarding bilateral relationships which can follow.³²⁷ Since the *de facto* authorities in Afghanistan want to break the isolation, it would be efficient if the international community put more pressure on them. For instance, the Taliban arrested and tortured two journalists from *Etilaateroz*, a news agency based in Kabul, who was covering women's protests against the policies of the Taliban. Immediately after the news leaked into the media, the *de facto* police had to release them due to pressure from regional and international human rights organizations. Such pressure, however, concerning violence against women, especially domestic violence, is very little or even non-existent. Cases of violence against women are underreported, given that they are deemed as a private concern and those victim protection mechanisms, such as emergency centres and shelters, are lacking. Women very rarely apply to the authorities to seek justice due to social stigma and surrounding negative stereotypes. Domestic violence thus becomes to be seen as a family affair and a private plight of being a woman.³²⁸

³²⁵ Afghanistan: Update to the Human Rights Council Urgent Debate. OHCHR. (2022, July 1). Retrieved September 18, 2022, from <https://www.ohchr.org/en/speeches/2022/07/afghanistan-update-human-rights-council-urgent-debate>

³²⁶ Bennett, R. (2022). *Report of the Special Rapporteur on the situation of human rights in Afghanistan*. Human Rights Council. A/HRC/51/6. Para, 19. Available at: https://www.ohchr.org/sites/default/files/2022-09/A_HRC_51_6_AdvanceEditedVersion-EN.docx

³²⁷ Saul, B. (2021, December 20). *Recognition" and the Taliban's International Legal Status*. ICCT. <https://icct.nl/publication/recognition-talibans-international-legal-status/>

³²⁸ SJI submission to UN Special Rapporteur on domestic violence as a form of torture, <http://www.srji.org/upload/medialibrary/5d6/SJI-2019-05-15-Submissions-to-the-UN-Rapporteur.pdf>

According to Human Rights Watch organisation, in such situations, the international community should push for and observe obligations from the Taliban de facto authorities regarding the prevention of forced and child marriage and providing aid and justice for women and girls encountering violence in the home.³²⁹ This is an example of the international community's perception of how to deal with the Taliban and the human rights status of women in Afghanistan. This country, which has been involved in misogyny and patriarchal structure for decades, even before the Taliban took over and the presence of international forces and the widespread presence of human rights organisations, could not fight against gender violence; how could it combat it in the current situation? It is a question that can be responded to by building sensitivity towards the issue of violence against women by placing it under the definition of torture. Therefore, the present chapter suggests that considering domestic violence as torture or other ill-treatment can at least hold states and even *de facto* authorities to be more accountable.

5. Conclusion

In order to conclude, it is required to restate the problem and the study's objectives. In general, this study aimed to examine the applicability of the prohibition of torture and other ill-treatment to the context of domestic violence in the light of private and public dichotomy with an overview of its impacts on women's life in Afghanistan.

The home is often considered a safe place where people take refuge by fleeing the outside world's unrest, apprehension, horror, and violence. In other words, the only relatively safe place a person can have in this turbulent world is expected to be the intimate and warm environment of home and family. However, ominous phenomena such as violence and aggression have penetrated this intimate environment, and instead of love, violence has prevailed. For many women and children worldwide, a home is where they have to endure the kind of violence and ill-treatment perpetrated on them by their loved ones, in the shape of domestic violence, which is a part of a daily experience for them in different cultures and societies. Domestic violence against women is currently one of the most critical forms of violence against women's human rights, which is associated with negative psychological and physical health consequences.

³²⁹ Barr, H. (2021, September 7). *How the International Community Can Protect Afghan women and girls*. Human Rights Watch. Retrieved November 23, 2022, from <https://www.hrw.org/news/2021/09/02/how-international-community-can-protect-afghan-women-and-girls>

Violence against women includes all kinds of verbal, physical, and sexual assaults that violate a woman's physical body, sense of self and trust, regardless of age, race, ethnicity, or country. It has been recognised as a prominent public health practice and human rights issue.³³⁰ According to the World Bank, worldwide, it has been estimated that violence against women is one of the profound grounds of death and incapability among women of reproductive age as cancer and a greater cause of ill-health than traffic casualties and malaria combined altogether.³³¹ In other words, violence against women, especially domestic violence, is one of the most common types of gender-based violence in the field of human rights and in the international discourse on combating violence, which threatens the harmony and safety of women in private spheres. The factors causing domestic violence in different nations are diverse and should be studied further. However, the widespread VAW in public and private spheres can be due to the patriarchal structures in most societies that still transmit male dominance in the form of abuse and restriction on women. The patriarchal structure paves the way for the lack of balance in the separation of duties and unequal rights between women and men within the family based on gender characteristics and prevents the family domain from fulfilling its main task of protecting all member's rights equally without any discrimination. The patriarchal structure does not favour females but males, leading to women having less valued roles and becoming less visible. It has had a devastating effect on the visibility of VAW, especially when state interventions are not accountable in the face of violence but are quick to sanction female disobedience and flaws publicly.³³² Scholars such as Celina Romany challenged state-centrism, stating that patriarchal hierarchy has given men the power they exercise at home; therefore, the violated woman does not get justice in the system without a

³³⁰ Joachim, J. (2000). Shaping the human rights agenda: the case of violence against women. In M. K. Meyer & E. Prugl (Eds.), *Gender politics in global governance* (pp. 142–160). Lanham: Rowman and Little Field.

³³¹ World Bank (1993). *World Development Report 1993: Investing in Health*; MORSE, M. (2020). *Five things world leaders can do right now to advance gender equality*. unfoundation.org. Retrieved September 30, 2022, from <https://unfoundation.org/blog/post/five-things-world-leaders-can-do-right-now-to-advance-gender-equality/>

³³² See Edwards, A. (2010). *Violence against women under international human rights law*. Cambridge University Press.

proactive state.³³³ Hence, VAW continues to be an epidemic that suppresses, tortures, and sometimes causes the victim's death.

Meanwhile, one of the most significant achievements of international protection, especially in the international human rights field, is the absolute prohibition of torture and other ill-treatment, which is heightened as a rule with a peremptory nature; hence, it can never be restricted or interrupted regardless of the circumstances. According to the UNCAT, torture has elements that make it different from other forms of ill-treatment and means any act with a particular motive that causes severe pain and suffering and is committed by a public official or another person in an official capacity. Thus, domestic violence in the private sphere, by intimate partners or other private individuals, falls outside the tortures definition by the relevant provisions developed in the human rights convention. However, comparisons of findings shown in this thesis revealed the parallels between torture or other ill-treatment by officials, on the one hand, and the experience of battered women at home and the level of pain and suffering accompanied by the purposive element in domestic violence, on the other hand. Countless cases of domestic violence worldwide demonstrate that it is done for the purpose of controlling the victim and nearly employs the same typical techniques associated with official torture. In both torture and domestic violence, victims are beaten, insulted, isolated, barred from any contact with others, and physically assaulted. The resulting isolation may not match that of solitary confinement, but it still takes an enormous psychological toll.³³⁴ However, an unacknowledged difference is in how individuals view both violent behaviours. Aside from downplaying VAW in most cultures and often being denied and labelled as a "private family matter", the UNCAT's definition requirement of the involvement of the state actor for an act to be announced as torture remains one of the obstacles to realising that domestic violence can amount to torture or other ill-treatment. However, it can be seen that attitudes toward violence against women are shifting. For instance, according to an interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, depending on the circumstances, the pain, suffering or humiliation resulting from domestic violence can range from comparatively moderate and brief to extremely severe and long-lasting but, being abusive by definition always amounts to a violation of physical, mental and emotional integrity that is incompatible with

³³³ Gaer, F. D. (2011). *Rape as a form of torture: The experience of the Committee against Torture*. Cuny L. Rev., 15, 293.

³³⁴ Jhon T. Cacioppo & William P. (2008). *Loneliness: Human and The Need for Social Connection*. PP, 99-108

human dignity.³³⁵ Thus, regardless of questions of State responsibility and of individual criminal culpability, both of which need to be separately assessed, domestic violence, therefore, always amounts to cruel, inhuman or degrading treatment or punishment and very often to physical or psychological torture.³³⁶

Furthermore, the thesis also discussed in detail the jurisprudence of the European Court of Human Rights as one of the most reliable institutions for the comprehension of domestic violence as a breach of Article 3 (prohibition of torture, inhuman or degrading treatment) of the European Convention on Human Rights. The manner in which domestic violence has been conceptualised in the ECtHR's judgments has evolved over time. According to the ECtHR, "the prohibition of ill-treatment under Article 3 covers all forms of domestic violence without exception, and every such act triggers the obligation to investigate."³³⁷

However, the jurisprudence of human rights institutions (such as ECtHR in the cases of *A. v. the United Kingdom* and *Tunikova vs Russia*) has shown that there is a prospect in the human rights system for the application of torture definition to the private acts of domestic violence. Hence, concerning the prohibition of torture in acts perpetrated by private individuals, state accountability is established in the shape of *due diligence*. In *A. v. the United Kingdom*, the ECtHR held that "the failure to provide adequate protection constitutes a violation of article 3 of the Convention." Such judgments can bear the much-needed potential to alleviate the public/private dichotomy and expand the state's obligations to prevent VAW.

Further, the issues which arose, for instance, in *Tunikova vs Russia* and other judgements concerning whether domestic violence should be realised as torture, as opposed to inhuman or degrading treatment, are illustrative of the evolution of the European Court of Human Rights case law. After going through the lens of different bodies of law and their perspectives and judgements, there is no doubt that domestic violence will usually fall within the extent of article 3 of the ECtHR; instead, the main concern is whether domestic violence can constitute torture or not. Arguably, this would be a progressive step and huge development in women's human

³³⁵ Méndez, J. (2012). Secretary-General, U., & UN. Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Punishment, *Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* :. United Nations Digital Library System. Retrieved 17 September 2022, para.9 from https://digitallibrary.un.org/record/733853/files/A_67_279-EN.pdf.

³³⁶ Ibid., para.9.

³³⁷ *Volodina v. Russia* , Application no. 40419/19 (ECtHR 14 September 2021), Para 98

rights field, as it would produce a decisive statement involving the gravity of this heinous act in private spheres and would be "capable of influencing the public perception of domestic violence." as the court stated in *Tunikova* case. Hence, both *Tunikova* and *Volodina* cases describe how the Court's jurisprudence on domestic violence has matured from a reliance mostly on article 8 to a situation whereby article 3 is commonplace, and the argument has become whether the Court should expressly conceptualise domestic violence as torture.³³⁸

Consequently, international and regional bodies of law have long acknowledged that violence by private perpetrators can amount to torture or ill-treatment whenever official authorities have reasonable grounds to consider that such acts are being perpetrated by private individuals and fail to act based on due diligence to prevent and investigate, prosecute and punish such acts. In such incidents, the state is obliged to punish the perpetrators according to the law; otherwise, the state is accountable under the CAT convention for consenting to the acts such as domestic violence and other forms of gender-based violence. The absolute ban on torture bears a special stigma, as mentioned before and thus, torture belongs among the considerable and grave crimes under international law. By acknowledging that VAW can fall under the definition of torture or other ill-treatment, the same gravity and stigma are attached to such forms of violence. Another way stated, conceptualizing domestic violence as torture will reveal the deep associations of such heinous acts with types of violence that are universally denounced as human rights violations since they deny human dignity and integrity. Hence, considering domestic violence under the rubric of torture may be in an evolving phase in international law; nonetheless, based on what has been discussed in earlier chapters, it is being conducted on the exemplary path. Such evolution delivers significant space for the silenced voices of many women by realizing their unfortunate, shocking experiences. Additionally, it helps the worldwide campaign change the nature of specific behaviour from acceptable to unlawful.³³⁹ The World Health Organization, for instance, estimates that one in three women globally experience violence in their lifetime. In the meantime, according to the UNWOMEN reports,

³³⁸ McQuigg, D. R. (2022, July 26). *Domestic abuse as torture?* recent jurisprudence of the European Court of Human Rights. Queen's Policy Engagement. Retrieved November 22, 2022, from <http://qpol.qub.ac.uk/domestic-abuse-as-torture-recent-jurisprudence-of-the-european-court-of-human-rights/>

³³⁹ Buss, D. (2011). *Domestic Violence and International Law*. By Bonita Meyersfeld. Oxford: Hart Publishing, 2010. 368 pages. *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 48, 575-579. p.267. doi:10.1017/S0069005800010213

violence against women has increased since the Covid-19 outburst³⁴⁰, and the pandemic has revealed the failure of prior initiatives to respond to abuse against women effectively.

Hence, as mentioned earlier, the prohibition of torture has gained the status of peremptory norms in international law, from which no exception is allowed, meaning that for crimes such as domestic violence, rape, or female genital mutilation, there cannot be any compromises. For example, a victim cannot be forced into marrying her rapist, an issue that has a powerful standing in the traditional culture of some countries. In Afghanistan, if a woman who is raped becomes pregnant, she will likely have to marry the man who savagely disrespected her soul and body.³⁴¹ The obligation to criminalise VAW also mandates that all allegations of such offences are exhaustively and effectively investigated and that the perpetrators are charged and punished. In the same way, in a country like Afghanistan, which is in an unknown legal vacuum, including violence against women among the cases of torture can at least prevent the justification of such types of violence under the name of culture and religion.

In short, the thesis proposed articulating domestic violence under the official definition of Torture and other ill-treatment as a coherent and authoritative international legal right against severe and systemic forms of domestic violence. Adopting such measures, on the one hand, seem to be a benchmark toward enabling not only the international community but also individuals and nongovernmental organisations to challenge their governments through national legal mechanisms since it will develop a more abstract value of alerting perpetrators, victims, and the general public, and on the other hand, State parties and other entities such as *de facto* authorities (i.e., Afghanistan) will become more accountable for gender-based violence happening in their territories.

³⁴⁰ UN. (2021, November 24). *Covid-19 and violence against women: What the data tells us*. UN Women – Headquarters. Retrieved November 22, 2022, from <https://www.unwomen.org/en/news-stories/feature-story/2021/11/covid-19-and-violence-against-women-what-the-data-tells-us>

³⁴¹ Akbar, N. (2013, July 26). *No justice for rape victims in Afghanistan*. UN Dispatch. Retrieved November 22, 2022, from <https://www.undispatch.com/no-justice-for-rape-victims-in-afghanistan/>

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