MenschenRechtsMagazin
Informationen | Meinungen | Analysen

ISSN 2941-1149 | 29 (2024) 1 | pp. 5–22

Essay

Domestic Violence Plus State Acquiescence Equals Torture – A Good Idea but a Complex Reality

Victoria Priori[1]

[1]Geneva Academy of International Humanitarian Law and Human Rights, Switzerland.

Contents

I. Introduction
II. Domestic Violence and Torture—Are the Two Even Similar?
III. UNCAT: A Sui Generis Human Rights Treaty and the Discrete Crime of Torture
IV. Acquiescing Torture: Finding a Suitable Definition
V. Domestic Violence as Torture—Some Unaccounted yet Important Implications
VI. Conclusions

Abstract

Domestic violence against women is a far-reaching and widespread phenomenon. The main idea underlying this work is that domestic violence (in its extreme forms) should be considered within the international criminal framework for torture. In particular, the work explores how through the notion of acquiescence provided for in Art. 1 of the UN Convention against Torture, the state and its agents can be held responsible in cases of domestic violence. While acquiescence represents a powerful notion to allow for the application of the torture criminal definition to domestic violence, the practicalities of such an approach are complex, with many questions left unanswered. Ultimately, the root obstacle to a smooth application of Art. 1 to instances of domestic violence is not the state requirement provided for in the definition, but rather the sui generis nature of the UN Torture Convention.

Keywords

torture, domestic violence, acquiescence, due diligence, state responsibility, individual criminal responsibility

Citation:
Victoria Priori, Domestic Violence Plus State Acquiescence Equals Torture, in: MRM 29 (2024) 1, pp. 5–22.
https://doi.org/10.60935/mrm2024.29.1.1.

Received: 2023-11-16
Accepted: 2024-01-24
Published: 2024-06-12

I. Introduction

In March 2021, the World Health Organisation (WHO) published estimates according to which "worldwide, almost one third of women aged 15–49 years who have been in a relationship report that they have been subjected to some form of physical and/or sexual violence by their intimate partner".[1] The phenomenon is widespread across continents with estimates slightly changing from one region to another, but overall depicting a similar pattern whereby the subjugation of women to different types of domestic violence is nothing but a common practice.[2] It is crucial to acknowledge that physical or sexual offences are simply two of the many facets of domestic violence. For the purpose of this work, the notion of domestic violence mirrors that given by the United Nations (UN) and goes beyond sexual and physical violence, taking into consideration psychological, emotional and economic violence.[3] Moreover, from a methodological point of view, it is worth stressing—as shown by the aforementioned statistics—that the present work adopts a narrower focus, assessing the specific case of domestic violence against women.[4] Nevertheless, the considerations and arguments put forward throughout the work could arguably apply by analogy to domestic violence against members of the LGBTQIA+ community, men as well as children.[5]

The objective of the present work is to discuss some of the implications, issues and consequences arising from the conceptualisation of domestic violence against women through the prism of torture. Analysing domestic violence through the lens of torture allows for an accurate depiction of the seriousness of such violence, that many times escapes public scrutiny. Aside from this, the work highlights the possible implications for both state and individual criminal responsibility emerging from understanding domestic violence within the legal framework of torture. In doing so, the analysis clearly differentiates between the separate offence of torture also known as the discrete crime of torture as defined in Art. 1 of the UN Convention against Torture of 1984 (UNCAT) and the prohibition

---

1 Violence against Women (World Health Organization), available at: https://www.who.int/news-room/fact-sheets/detail/violence-against-women (last visited 16 November 2023). The estimates range from 22% in high-income countries and Europe to 25% in the Americas and 33% in the WHO African countries. See also Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2019), UN Doc. A/74/148 (1). As Nils Melzer mentions victims are usually exposed to domestic violence for a protracted period of time, or even a lifetime.

2 *Celina Romany*, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in: Rebecca J. Cook (ed.), Human Rights of Women National and International Perspectives, 1994, pp. 85–115 (100). See also *Charlotte Bunch*, Women's Rights as Human Rights: Towards a Re-Vision of Human Rights, in: Human Rights Quarterly 12 (1990), pp. 486-498 (486).

3 What is domestic abuse? (United Nations), available at: https://www.un.org/en/coronavirus/what-is-domestic-abuse (last visited 16 November 2023). See also *Lesley Cooper/ Julia Anaf /Margaret Bowden*, Contested Concepts in Violence Against Women: 'Intimate', 'Domestic' or 'Torture'?, in: Australian Social Work 59 (2006), pp. 314-327 (317).

4 For the purpose of the analysis, women include everyone who identifies as a woman. Therefore, the pronouns she/her are used throughout the work.

5 See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016), UN Doc. A/HRC/31/57 (11). See also Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (fn 1), p. 10.

of torture as imposed on states under other international human rights law treaties.[6] When considering the discrete crime of torture emphasis is put on acquiescence as it could represent a powerful avenue to expand the application of the torture criminal framework to cover domestic violence against women.

To achieve its aim, the analysis proceeds as follows. Section 2 builds the case for why domestic violence can be considered qualitatively similar to acts of torture. Section 3 introduces the peculiar nature of UNCAT and makes the distinction between the violation of the prohibition of torture as an obligation imposed on states and the discrete crime of torture. Section 4 focuses only on the discrete crime of torture and discusses the notion of acquiescence as a possible path to attribute private instances of torture (such as domestic violence) to the state. Section 5 examines some possible implications originating from the assimilation of domestic violence with the crime of torture in relation to state and individual criminal responsibility. Section 6 concludes.

II. Domestic Violence and Torture—Are the Two Even Similar?

As a first step, it is necessary to outline that compared to other private violations, domestic violence has been often equated to torture and proposals to include it within the torture protective framework have been frequently advanced.[7] It is also important to mention that all of these proposals have been looking at domestic violence as torture from a human rights point of view, hardly considering the criminal implications of considering domestic violence as torture. For instance, in 1996 the Special Rapporteur on violence against women, its causes and consequences claimed that "the argument that domestic violence should be understood and treated as a form of torture [...] is one that deserves consideration".[8] Moreover, General Recommendation No. 35 by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been crucial, explicitly providing that violence against women can and should be understood—in certain cases—as amounting to torture or cruel, inhuman or degrading treatment.[9] In addition, Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment have paid attention to the issue of domestic violence for

[6] See *Paola Gaeta*, When is the Involvement of State Officials a Requirement for the Crime of Torture?, in: Journal of International Criminal Justice 6 (2008), pp. 183-193 (192).

[7] *Rhonda Copelon*, Recognizing the Egregious in the Everyday: Domestic Violence as Torture, in: Columbia Human Rights Law Review 25 (1994), pp. 291–368 (296); *Shazia Qureshi*, Reconceptualising Domestic Violence as 'Domestic Torture', in: Journal of Political Studies 20 (2013), pp. 35–49 (36); *Tania Tetlow*, Criminalizing Private Torture, in: William & Mary Law Review 58 (2016), pp. 183–250 (189); *Katherine M. Culliton*, Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas, in: Harvard International Law Journal 34 (1993), pp. 507-562 (549).

[8] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1995/85 (1996), UN Doc. E/CN.4/1996/53 (14).

[9] Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 35 on Gender Based Violence against Women, Updating General Recommendation No. 19 (2017), UN Doc. CEDAW/C/GC/35 (6). See CEDAW, General Recommendation No. 19: Violence against Women (1992).

more than a decade now.[10] In 2008, Special Rapporteur *Nowak* already considered domestic violence among the phenomena in need of the torture protective framework.[11] Unfortunately, as of now, only the very specific offence of rape has been labelled as torture by the Committee against Torture (CAT) in General Comment No. 2.[12] Despite this being a major advancement, more shall be done, as rape represents only one of the many offences that women may experience along the spectrum of domestic violence. Other treaty bodies such as the Human Rights Committee (HRC) also argued that domestic violence can amount to torture—in this specific case contradicting Art. 7 of the International Covenant on Civil and Political Rights (ICCPR).[13]

Whilst most of the human rights treaties provide for a prohibition of torture without necessarily defining what is meant by it, Art. 1 of UNCAT represents the most detailed and complete definition of torture at the international level. Thus, it is worth assessing whether domestic violence could meet the required elements of torture under the UNCAT. First and foremost, both domestic violence and torture include some form of physical and/or psychological suffering which usually persists over time.[14] Secondly, in both cases the behaviour is committed with intent. Thirdly, as with torture, domestic violence is committed with some motive in mind, being this the intimidation or the punishment of women.[15] Art. 1 of UNCAT provides that a certain conduct would amount to torture when it is committed "for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind".[16] However, by introducing the words 'such' and 'as' it is clear that the listed objectives were not meant to be exhaustive. Moreover, the discriminatory element typical of torture can always be considered fulfilled when the offence is committed "on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality".[17] Importantly, Special Rapporteur *Nowak* highlighted a fourth common feature between torture and domestic violence—powerlessness, whereby victims are in a state of

[10] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (fn. 1). See Committee against Torture (CAT), Report of the Committee (2001), UN Doc. A/56/44 and also CAT, Report of the Committee (2002), UN Doc. A/57/44 specifically the Considerations on the report submitted by Zambia. Many other concluding observations refer to domestic violence. See CAT, Consideration and Recommendations of the Committee against Torture on the Russian Federation (2007), UN Doc. CAT/C/RUS/CO/4; CAT, Concluding Observations on the Initial Report of Qatar (2022), UN Doc. CAT/C/QAT/CO/1; CAT, Considerations and Recommendations of the Committee against Torture on Greece (2004), UN Doc. CAT/C/CR/33/2.

[11] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak (2008), UN Doc. A/HRC/7/3 (13).

[12] CAT, General Comment No. 2 (2008), UN Doc. CAT/C/GC/2.

[13] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak (fn. 11), p. 13.

[14] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy (fn. 8), p. 12.

[15] *Copelon* (fn. 7), p. 329.

[16] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, UNGA Res 39/46.

[17] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fn. 5), p. 4.

constant fear which eventually allows the perpetrator to establish complete control over them.[18]

Setting aside the commonalities between domestic violence and torture and focusing more on consequences, for similar conducts victims have been displaying the same complex posttraumatic stress disorder, irrespective of whether they have been subjected to these practices by a state official or non-state actor.[19] Going one step further, violence by an intimate partner may have worse and more long-lasting psychological effects on the victim when compared to violence inflicted by a distant and unknown state oppressor.[20] Thus, if the acts committed by private individuals in the context of domestic violence against women are similar to the ones deployed by state agents when committing torture, and the effects on victims are the same, why should the two phenomena be treated differently?[21]

At this point, it may be interesting to explore other implications that arise from considering domestic violence within the criminal framework for torture. Other than allowing victims to bring cases against the state for reparations, by considering domestic violence as torture women may have stronger claims when filing a complaint or a case before courts.[22] Interestingly on this matter, the states of Michigan and California introduced a torture statute and have applied this framework to domestic violence.[23] Notably, under the umbrella of torture, the cumulative pattern typical of domestic violence is grasped. Contrarily, "current domestic violence statutes fail to capture its cumulative horror, instead fracturing the patterns of domestic violence into constituent, *de minimis* parts".[24] This is of great relevance, as many of the offences typical of domestic violence—if taken separately—may remain legal or be classified as simple misdemeanours, thus influencing sentencing, rules of evidence[25] and bail considerations.[26] Moreover, labelling domestic violence as torture would permit to move beyond the infliction of physical suffering, encompassing the psychological pain and emotional violence to which victims of these horrendous practices are exposed and that oftentimes elude scrutiny.

Aside from these considerations, labelling domestic violence as torture has also other important implications for the victims. Applying the protective framework of torture

[18] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Manfred Nowak* (fn. 11), p. 7. The element of powerlessness was reiterated by the Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (fn. 1), p. 5.

[19] OMCT, Thematic Briefing: Protecting Women from Violence through the UN Convention against Torture (2018) (11).

[20] *Qureshi* (fn. 7), p. 39.

[21] One of the possible limits of this approach would be the procedural burden for the CAT and the possible overload of individual complaints, among others.

[22] This is especially true for societies where female members are considered in charge of the family's honour. See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak (fn. 11), p. 23. Nowak reports that victims of sexual violence in Guatemala felt more protected when violence against them was treated and labelled as torture.

[23] *Tetlow* (fn. 7), p. 232.

[24] Ibid, p. 187. Moreover, a torture statute would make the perpetrator's purpose of controlling the victim relevant.

[25] Ibid, p. 214.

[26] Ibid, p. 205. This is what happened with stalking statutes—they allowed to grasp the pattern dimension.

allows to bring domestic violence under public scrutiny.[27] This is of utmost importance, as for many years, the dichotomy public/private sphere has been casting a shadow on these episodes of private violence.[28] Historically, human rights treaties and bodies have addressed only issues taking place in the public space meaning that the world of women, mostly perceived as related to domestic and private family life, has not been considered within the human rights discourse.[29] Nowadays, this division between public and private is no longer acceptable[30] and in fact, many UN Special Procedures and Committees, among which the CAT started addressing domestic violence in their reports and recommendations.[31]

Furthermore, by labelling domestic violence against women as torture, the gravity and seriousness of the offences is emphasised.[32] The label 'torture' carries a specific stigma and "helps undoing the discriminatory victim-blaming narrative".[33] By labelling domestic violence as torture, victims would no longer be blamed nor depicted as "weak and pathetic or masochistic and fickle because the public recognises that techniques of torture can control the mind and warp the will of even the most stoic soldiers".[34] Moreover, labelling domestic violence as torture would allow to avoid using words and expressions as domestic or intimate violence that are highly problematic. Indeed, the domestic and the intimate are usually safe spaces, representing "a benign realm or a haven from stress and danger".[35] Hence, terms such as intimate partner violence underline inherent contradictions where in a space that should protect and be the symbol of love, violence against women is perpetrated. These expressions "put up a barrier to recognising that, in certain contexts, violence perpetrated in the private arena is, in reality, familial or relational torture on a par with state actor torture".[36]

Importantly, it should be noted that not all the cases of domestic violence may be assimilated to torture. Drawing a line between those instances where such violence can amount to torture and those where this parallel is not suitable, is un-

[27] *Dorothy Q. Thomas/Michele E. Beasely*, Domestic Violence as a Human Rights Issue, in: Human Rights Quarterly 15 (1993), pp. 36-62 (61).

[28] Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo (2014), UN Doc. A/HRC/26/38. See OMCT, Thematic Briefing (fn. 19) and *Lee Hasselbacher*, State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection, in: Northwestern University Journal of International Human Rights 8 (2009), pp. 190-251 (192).

[29] *Felice Gaer*, Violence against Women by Private Actors: Is There State Responsibility under the Convention against Torture? (OMCT SOS-Torture Network), available at: https://www.omct.org/en/resources/blog/violence-women-private-actors-state-responsibility-convention-torture (last visited 16 November 2023). See *Hilary Charlesworth*, What are "women's international human rights"?, in: Rebecca J. Cook (ed.), Human Rights of Women: National and International Perspectives, 1994, pp. 58–84 (60). *Romany* (fn. 2), p. 90.

[30] *Andrew Clapham*, International Human Rights and Private Bodies: Two Approaches, in: Human Rights in the Private Sphere, 1993, pp. 89-133 (93).

[31] *Gaer* (fn. 29).

[32] OMCT, Thematic Briefing (fn. 19), p. 6.

[33] Ibid, p. 6. See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Manfred Nowak* (fn. 11), p. 6.

[34] *Tetlow* (fn. 7),p. 188.

[35] *Cooper/Anaf /Bowden* (fn. 3), p. 316.

[36] Ibid.

clear. Possible ways of distinguishing may be the degree of seriousness of the violence or even the persistence over time. These two requirements together with gender, age and the state of health of the victim among others have been used by the European Court of Human Rights (ECtHR) to argue that domestic violence amounted to ill-treatment under Article 3 of the European Convention on Human Rights (ECHR).[37] Now, in the case of domestic violence as torture, the criteria could suitably be the same (seriousness, persistence over time, gender, age, state of health, etc.) but the threshold would arguably be higher. However, whilst this work acknowledges that not every single case of domestic violence can nor should be understood within the torture legal framework, developing precise criteria or thresholds to understand how to differentiate between cases of domestic violence is beyond the scope of the analysis.

III. UNCAT: A *Sui Generis* Human Rights Treaty and the Discrete Crime of Torture

Having briefly sketched out some similarities between domestic violence against women and torture, the analysis now looks at highlighting the specific nature of UNCAT as a human rights treaty, differentiating between the discrete crime and the prohibition of torture imposed on states. It is worth stressing the importance of keeping the discrete crime and the prohibition of torture separate since the obligations arising for states are entirely different. Under most human rights treaties, the prohibition of torture is phrased in absolute terms, simply requiring that no one shall be subjected to torture. Examples are Art. 7 of the ICCPR, Art. 3 of the ECHR, Art. 5 in the African Charter on Human and Peoples Rights and Art. 7 of the Universal Islamic Declaration of Human Rights.[38] Additionally various treaty bodies such as the HRC have been explicit in recognising the application of the prohibition of torture to acts committed in the private sphere.[39]

Directly related to this horizontal application of human rights is the state's duty to protect, meaning that the state needs to act with due diligence to prevent and put an end to private violence in as much as respecting human rights in itself. However, when looking at the duty to protect in relation to private violations of the absolute prohibition of torture, courts and tribunals have assessed a whole set of positive obligations that states need to undertake such

[37] For instance, the European Court of Human Rights (ECtHR) to determine whether cases of domestic violence could amount to ill-treatment under Art. 3 of the ECHR looked at similar requirements. See ECtHR, Case of Rumor v Italy (72964/10), Judgment of 27 August 2014, para. 57 and ECtHR, Case of Valiulienė v Lithuania (33234/07), Judgment of 26 March 2013 at para. 65.

[38] See International Covenant on Civil and Political Rights of 16 December 1966, UNTS vol. 999 p. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No. 5; African Charter on Human and Peoples' Rights ("Banjul Charter") of 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Universal Islamic Declaration of Human Rights of 19 September 1981 (2008), Refugee Survey Quarterly, 27 (2008), pp. 70–80.

[39] Human Rights Committee (HRC), General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (2004), UN Doc. CCPR/C/21/Rev.1/Add.13. See HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) at para 2. This position was shared firstly in 1982 with General Comment No. 7.

as the duty to implement legislative measures, the duty to investigate and many others. [40] Importantly, when a breach of these positive obligations is found, the state is not responsible for the violation of the substantive limb of the right. Moreover, when dealing with the state's duty to protect in relation to violations of the prohibition on torture, courts and tribunals have not drawn a clear line between conducts that amount to torture and those that instead qualify as cruel, inhuman or degrading treatment. The main underlying reason to avoid exploring this distinction is that there is no difference concerning the obligations for states under the duty to protect such right. Once a violation of the right is found, the state has the same positive obligations irrespective of the qualification of the acts as torture or cruel, inhuman or degrading treatment. Needless to say, that when there are violations of the positive obligations to protect the right, the state will have to provide reparations, just as when there is a substantial violation of the right. The only difference may be in terms of the amount of reparations to be provided.

Therefore, if under most human rights treaties the prohibition of torture is unconditional, absolute and applicable also in the private sphere, the situation is different under the only treaty at the international level specifically designed to tackle torture, the UNCAT of 1984. First and foremost, UNCAT shall be considered as a human rights treaty *sui generis* as it contains the definition of the discrete crime of torture and provides for many intrusive obligations in relation to the criminalisation of torture both at the international and domestic level.[41] For instance, the obligation for state parties to criminalise domestically all acts of torture as enshrined in Art. 4 or Art. 8 dealing with extradition clearly demonstrate the criminal aspects of the Convention.[42]

Moreover, if it was not relevant under other human rights treaties, when it comes to the UNCAT, it is fundamental to distinguish conducts that amount to torture from those that qualify as inhuman, cruel or degrading treatment. This is an important point to keep in mind if the ultimate objective is to achieve the most comprehensive protection for victims. Starting from Art. 2 requiring states to adopt legislative, administrative, and judicial measures domestically, most of the obligations only apply in relation to torture. Similarly, Art. 4 only requires states to domestically criminalise torture, while the provision is silent concerning cruel, inhuman or degrading treatment. Consequently, it is

[40] See for example *Alastair Mowbray*, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, 2004. Specifically look at the chapters on Art. 2 and 3 dealing respectively with the right to life and the prohibition of torture. *Laurens Lavrysen*, Human Rights in a Positive State, 2017. See also *Jean-François Akandji-Kombe*, Positive Obligations under the European Convention on Human Rights, in: Human Rights Handbooks No. 7 (2007) and *Monika Florczak-Wator*, The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State, in: International and Comparative Law Review 17 (2017), pp. 39–53. Specific to the Inter-American Court of Human Rights (IACtHR) see *Laurens Lavrysen*, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights, in: Inter-American and European Human Rights Journal 7 (2014), pp. 94–115. On gender-based violence specifically see *Jill Marshall*, Positive Obligations and Gender-based Violence: Judicial Developments, in: International Community Law Review 10 (2008), pp. 143-169.

[41] *Paola* Gaeta, 'Another Step in What It Means to Be Human'—Prohibition v. Criminalization of Torture as a Private Act, in: Journal of International Criminal Justice 19 (2021), pp. 425-438 (428).

[42] Convention against Torture (fn. 16).

clear that if under human rights treaties the classification between torture and inhuman, cruel and degrading treatment does not alter states' obligations, this distinction has broad and important ramifications under UNCAT.[43] Keeping this in mind, the analysis now verts on torture as a discrete crime and the related obligations for states under UNCAT, excluding the criminalisation of torture as an underlying act for war crimes or crimes against humanity from the discussion.

Considering the discrete crime of torture, as already mentioned, the definition under Art. 1 of UNCAT is unsurprisingly more detailed compared to any other provision in human rights treaties. Importantly, other than the elements analysed above, a conduct qualifies as torture, if 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".[44] Therefore, if the state is found to commit, consent, instigate or acquiesce certain acts through its agents, these could be classified as torture. The role reserved to the state in committing, consenting and instigating torture through its agents is quite clear and characterised by an active involvement in the conducts. This active involvement of state officials reflected in Art. 1 represents the preference of certain delegations to limit UNCAT to situations that could be easily labelled as official or state-sponsored torture.[45] However, considering the discrete crime of torture as only applying to state-sponsored torture would be reductive. In fact, when one considers UNCAT, the matter "is not IF the violence by non-state actors is torture or ill-treatment but rather WHEN".[46] Indeed, despite mentioning consent and instigation, Art. 1 of UNCAT also refers to acquiescence. Grasping the exact meaning of acquiescence for the purpose of Art. 1 is fundamental as it permits for an expansive application of the Convention to cases where there is a less direct involvement of the state machinery.[47] In this case, the notion of acquiescence represents a possible path for victims of domestic violence to benefit from protection afforded to victims in relation to the discrete crime of torture.

IV. Acquiescing Torture: Finding a Suitable Definition

1. Acquiescence under the UN Convention against Torture

Acquiescence was inserted in Art. 1 of UNCAT as a compromise notion to bridge the positions of those states and delegations wanting a complete and absolute prohibition of torture as contained in other human rights treaties and those that aimed at regulating and prohibiting only official or state-sponsored torture.[48] This concept

[43] *Copelon* (fn. 7), p. 359.

[44] Convention against Torture (fn. 16).

[45] *Herman Burgers/Hans Danelius*, The United Nations Convention against Torture—A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1988, pp. 114-172 (120). In cases where there was no state involvement, the national penal machinery would be presumed to normally function.

[46] OMCT, Thematic Briefing (fn. 19), p. 7.

[47] See *Barbara Alexander Cochrane*, Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims in: American University International Law Review 15 (2000), pp. 895–939 (919). *Gaeta* (fn. 41), p. 434.

[48] Acquiescence was not mentioned in the Draft Convention proposed by Sweden. See Question

was introduced under the guidance of the United States during the preparatory works to stress the duty of public officials to prevent acts of torture.[49] What is clear is that the notion of acquiescence made its appearance in the torture protective framework as a synonym for failure to prevent.[50] Despite being introduced in the torture definition in the 1980s, nowadays the meaning of acquiescence is still not entirely clear.[51]

In order to understand what is meant by acquiescence in the context of the discrete crime of torture, the interpretation given by the CAT shall be the starting point. According to the Committee, in order to qualify as acquiescence there must be actual or constructive knowledge of the torturous behaviour on the side of state authorities.[52] Moreover, in its General Comment No. 2, the Committee attached the notion of acquiescence to that of due diligence claiming that when state authorities know or have reasonable grounds to believe that torture is being committed and fail to exercise due diligence by not preventing, punishing and prosecuting private behaviours, the state would be consenting or acquiescing to these acts of torture or ill treatment.[53] Consequently, for the Committee, the notion of due diligence and acquiescence are closely linked and once the knowledge of torturous acts is estab-

of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment and in Particular the Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment (1978), UN Doc. E/CN.4/1285 (2). See *Alice Edwards*, The 'Feminizing' of Torture under International Human Rights Law, in: Leiden Journal of International Law 19 (2006), pp. 349-391 (371). Despite the inclusion of the term acquiescence, the scenario for which this passive involvement of the state was envisioned was that of a male political dissenter or criminal being tortured with involvement (direct or indirect) of the male member of state authorities, being him a police officer or a military. For its gendered nature, the definition contained in Art. 1 is very much criticised by feminist scholars.

[49] Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1978), UN Doc. E/CN.4/1314 (6).

[50] *Gaeta* (fn. 41), p. 434. *Gerrit Zach*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I Substantive Articles, Art.1 Definition of Torture, in: Manfred Nowak/Moritz Birk/Giuliana Monina (ed.). The United Nations Convention Against Torture and Its Optional Protocol: A Commentary, 2019, pp. 23–71 (32). *Nina H. B. Jørgensen*, Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases, in: Chinese Journal of International Law 16 (2017), pp. 11-40 (22).

[51] For a brief introduction to the concept of acquiescence in general international law *see Marques Antunes*, Acquiescence, Max Planck Encyclopedia of Public International Law (2006), available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1373 (last visited 16 November 2023). It provides a detailed account of the jurisprudence on acquiescence. For example, see Permanent Court of International Justice (PCIJ), Case of the SS 'Lotus' (France v Turkey) (Series A No 10) of 7 September 1927 at 18–31 and PCIJ, Palmas Island Arbitration (United States of America v Netherlands) (1928) 2 Report of International Arbitral Awards at 866-869. See also more recent the International Court of Justice (ICJ), Fisheries Case (United Kingdom v Norway) of 18 December 1951, ICJ Report 1951 at 134-39 and ICJ, Right of Passage over Indian Territory Case (Portugal v India) of 12 April 1960, ICJ Report 1960 at 39-44.

[52] On constructive knowledge see UK Government, Allegations of UK Complicity in Torture (2009), available at: https://assets.publishing.service.gov.uk/media/5a758896e5274a545822c40e/7714.pdf (last visited 12 November 2023). For the UK when defining acquiescence constructive knowledge is sufficient. However, not everyone agrees. *Jørgensen* (fn. 50), p. 30. Whether constructive knowledge is enough to establish acquiescence is not a settled matter. The author raises this point in relation to the ECtHR jurisprudence. See *Edwards* (fn. 48), p. 387. *Edwards* also claims that it is unclear whether constructive knowledge is sufficient.

[53] CAT, General Comment No. 2 (fn. 12).

lished and the state failed to act according to due diligence, acquiescence flows as a logical consequence.

This link between due diligence and acquiescence can also be retrieved from the case of *Hajrizi Dzemajl* before the CAT. In this precise instance, the Committee found that the Yugoslav police acquiesced private acts of torture and ill-treatment because knowing the risk that these individuals were facing, police officers did not take any preventive or protective measures and additionally failed to properly investigate the acts. This case stands out compared to many other decisions by the Committee where either the notion of acquiescence was not analysed, or it was simply mentioned how it differs from mere inaction given that it requires a purposeful refusal to act.[54] Importantly, concerning the link between acquiescence under UNCAT and the due diligence framework typical of other human rights' treaties, the Committee was not exhaustive in detailing the relationship between these two concepts, and so it remains to be seen whether there is a substantive difference among the two notions.[55] Moreover, the relationship between failure to prevent and acquiescence remains quite blurred. Indeed, despite being considered as synonyms, it appears that preventive measures taken prior to the violations are not considered by the Committee within the notion of acquiescence as provided for in Art. 1 of UNCAT, only adding to the confusion.[56]

Furthermore, reports by UN Special Rapporteurs on torture *Nowak*, *Méndez* and more recently *Melzer* resorted to the notion of due diligence to assess the manners in which states might acquiesce private acts against both women and the LGBTQIA+ community, failing to live up to their international obligations.[57] In order to attribute torture to the state through the notion of acquiescence, for the Committee the risk and knowledge must be specific to the individual(s) in question, meaning that a general context of state tolerance or passivity would not be enough.[58] Therefore, mere inability to act or a general pattern of violence would not qualify as acquiescence under UNCAT according to the Committee. Similarly, the absence of a general pattern of human rights violations would not automatically entail that there is no specific and personal risk for one individual.[59]

---

[54] Cases where the notion of acquiescence could have better addressed are for instance CAT, *G.R.B v Sweden* (1998), UN Doc. CAT/C/20/D/083/1997; CAT, *S.V et al v Canada* (2001), UN Doc. CAT/C/26/D49/1996 and CAT, *H.M.H.I v Australia* (2002), UN Doc. CAT/C/28/D/177/2001.

[55] CAT, General Comment No. 2 (fn. 12).

[56] *Edwards* (fn. 48), p. 374. Pre-abuse preventive measures such as enacting domestic legislations or training are hardly discussed by the CAT under Art. 1 but could still amount to violations of other provisions of the Convention.

[57] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak (fn. 11), p. 15. Nowak mentions due diligence in relation to failure to investigate, prosecute or pass laws that protect women as well as discriminatory laws that may all be conducive of an environment in which domestic violence is perpetrated. When looking at female genital mutilation, Special Rapporteur *Nowak* claims that if the laws authorise such practice in the country, any mutilation would then be carried out with the acquiescence of the state. For this, see para 53. Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (fn. 1), p. 9. Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fn. 5), p. 15.

[58] In CAT, *H.M.H.I. v. Australia* (fn. 54) the Committee claimed that it looked at the existence of a general pattern of human rights violations in Somalia, but this was insufficient to establish a personal risk of the complainant.

[59] This was mentioned in CAT, *S.V. et al v Canada* (fn. 54).

2. Acquiescence and Due Diligence under Human Rights Law

Given the proximity put forward by the Committee between due diligence obligations and acquiescence, it is worth discussing how courts, tribunals and UN Special Procedures have interpreted this concept when dealing with human rights violations. Human rights courts and tribunals have upheld a similar approach to that of the Committee. The Inter-American Court of Human Rights (IACtHR) for instance in the case *Lopez Soto v Venezuela* claimed that a general context of state inaction is not enough for the Court to establish state responsibility through acquiescence; what is needed instead is awareness and knowledge linked to the particular case to examine.[60] In this case, the failure to react to the specific complaint made to the police was a determinant factor to establish the acquiescence of the Venezuelan government. However, in a few instances, the Inter-American Court looked into the general context and the specific vulnerability of certain individuals or social groups to determine acquiescence by the state.[61] An important example is the *Pueblo Bello* case. In this judgement, the Court claimed that the specific knowledge of the attack was not necessary and the general knowledge of the danger for the inhabitants of the region was sufficient to trigger state's positive obligations to prevent.[62]

Moving to the jurisprudence of the European Court of Human Rights, the 'Osman test' has become the benchmark to assess state responsibility for failure to prevent private violations, particularly in relation to the right to life.[63] Despite being framed mostly in connection to the right to life, the European jurisprudence was similarly applied also concerning the prohibition of torture. Overall, the Osman test requires that the state is aware or has knowledge of a real and immediate risk for the individual or victims in question and fails to take appropriate preventive measures. Some criticism in relation to this test arises in situations of structural risk, as according to the Osman test, the general context is not a factor to consider when establishing state responsibility.[64] This inadequacy to situations where there is some form of structural risk proves to be extremely detrimental for cases of domestic violence against women, as oftentimes such violence occurs in a climate of widespread

[60] IACtHR, *Case of López Soto y Outros vs Venezuela* Merits (Series C No. 362) of 26 September 2018. Very relevant are paras 119, 125, 130, 141, 170, 197. See IACtHR, *Case of the Mapiripán Massacre v. Columbia* (Series C No. 134) of 15 September 2005. IACtHR, *Case of González et al. ("Cotton Field") v. Mexico* (Series C No. 205) of 16 November 2009. IACtHR, *Case of Gutiérrez Hernández and Others v Guatemala* (Series C No. 339) of 24 August 2017.

[61] *Franz Christian Ebert/Romina I. Sijniensky*, Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?, in: Human Rights Law Review 15 (2015), pp. 343-368 (360).

[62] IACtHR, *Case of the Pueblo Bello Massacre v. Colombia* Merits (Series C No. 140) of 31 January 2006. See *Ebert/ Sijniensky* (fn. 61), p. 360. Another case in which the importance of the structural risk was highlighted is IACtHR, *Case of Castillo Gonzalez et al. v. Venezuela* Merits (Series C No. 256) of 27 November 2012. For the importance of the general context instead see IACtHR, *Concurring Opinion of Judge Cecilia Medina Quiroga in relation to the Judgement of the Inter-American Court of Human Rights in the Case of González et al. ("Cotton Case") v. Mexico* (Series C No. 205) of 16 November 2009.

[63] For example, see ECtHR, *Case of Osman v The United Kingdom* (87/1997/871/1083), Judgement of 28 October 1998. See ECtHR, *Case of Rantsev v Cyprus and Russia* (25965/04), Judgment of 7 January 2010.

[64] *Ebert/Sijniensky* (fn. 61), p. 363.

tolerance or inaction by the authorities.[65] Even in *Opuz v Turkey*, the leading case concerning domestic violence, when looking at Art. 3 and the prohibition of torture, a general context was not sufficient for the Court to find that Turkey failed in its protection of the Turkish woman and her mother from domestic violence by her partner.[66] Cases following *Opuz* have been recognising more and more the peculiar features of domestic violence, yet the risk must still be real, imminent and specific to the victim.[67] In a nutshell, for the European and Inter-American human rights courts the mainstream approach has been to require a specific prior knowledge of domestic violence on the side of state authorities and a failure to prevent this violence. Only by satisfying these two elements can acquiescence be established.

Aside from a more expansive approach exceptionally put forward by the IACtHR in the *Pueblo Bello* case, a general context of tolerance or inaction by state authorities instead appears sufficient to establish acquiescence according to some UN Special Procedures. In this case, acquiescence could be proved if the state is aware of a general climate of violations and fails to respond, depending on the prolongation and seriousness of this general context.[68] Some criteria that have been put forward as delineating situations where acquiescence by state authorities could be easily established are laws exempting marital rape, defence of honour, sexual mutilations and other tribal traditional practices or a pattern or non-prosecution of domestic violence.[69] These abovementioned scenarios all point to the relevance of the general context for the establishment of state acquiescence, and could allow women that have not reported their incidents to the police, making state authorities aware of the specific risk they are facing, to still have a case against the state, enormously opening their possibilities to

[65] This inadequacy in the case of domestic violence was also highlighted by Judge Pinto de Albuquerque in the concurring opinion to ECtHR, Case of Valiulienė v Lithuania (fn. 37). By questioning the need of providing the imminency of the risk the judge aligns more towards the idea that a general context and real risk for a segment of the population is sufficient.

[66] ECtHR, *Case of Opuz v Turkey (33401/02)*, Judgment of 9 June 2009. The general context was analysed by the Court to establish a violation of Art. 14 dealing with discrimination. However, beyond discrimination, the Court still argued that it was necessary to demonstrate the existence of a real and immediate risk for the individual in question, thus aligning with the rest of the jurisprudence by the ECtHR according to which a general context is not sufficient.

[67] This reasoning was also upheld in ECtHR, Case of Talpis v Italy (41237/14), Judgment of 18 September 2017 at paras. 101 and 122. The Court speaks about considering the recurrence of episodes in the case of domestic violence but there must be a real and immediate risk for the victim. A general context is only enough for violations of Art. 14.

[68] Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the Context of Migration (2017), UN Doc. A/HRC/36/39Add.2, at para. 42. It speaks about systematic impunity and generalised inaction for private violations by the state and how this creates a general context of acquiescence for what regards enforced disappearance. See IACHR, Business and Human Rights: Inter-American Standards—Special Rapporteurship on Economic, Social, Cultural and Environmental Rights REDESCA (2019), CIDH/REDESCA/INF.1/19. See Committee on Enforced Disappearance (CED), Statement on "non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances" (2023), UN Doc. CED/C/10.

[69] Report by the Special Rapporteur, Mr. *P. Kooijmans*, Appointed Pursuant to Commission on Human Rights Resolution 1985/33 (1986), UN Doc. E/CN.4/1986/15 (13). *Robert McCorquodale/Rebecca La Forgia*, Taking Off the Blindfolds: Torture by Non-State Actors, in: Human Rights Law Review 1 (2001), pp. 189–218 (209). *Copelon* (fn. 7), p. 355. These criteria have also been upheld by UN Special Rapporteurs on torture, starting with *Manfred Nowak* in 2008 (fn. 11), p. 15.

get justice and redress.[70] Moreover, when regular practices of female mutilation or honour killings are still in place, the lack of state interference could be interpreted as passive acceptance of these behaviours, ultimately proving acquiescence.

Overall, it appears that also when it comes to human rights, acquiescence has been interpreted as a failure to act in relation to due diligence. Interpretations of acquiescence have been varying concerning the roles of the general context and the specific and personalised risk for the victim. A few Special Procedures have up until now provided a more expansive interpretation of acquiescence, looking into whether state authorities were aware of a general context of abuses and risk, without putting the burden of demonstrating an immediate and personalised risk on the victim. On a different note, regional human rights courts have generally interpreted the notion of acquiescence in a stricter manner where the general context matters less and what has to be demonstrated is the actual or constructive knowledge of state authorities *vis-à-vis* a personal and individual risk for the victim in question. Acquiescence was established in most cases involving some exchange or complaint with the police or other state authorities.[71] Importantly, the Committee has been interpreting acquiescence in line with the overall approach of human rights courts and tribunals—requiring a personalised and specific risk for the victim and a failure of due diligence by the state organs and/or officials. Moreover, all the positive obligations inserted in the UNCAT's Articles for states to prevent, punish, investigate and remedy acts of torture perfectly align with the due diligence framework as it is the case also with the Preamble of the Convention.[72] Ultimately, while due diligence seems a good framework to interpret acquiescence, the exact boundaries of the concept in relation to due diligence, a general context or failure to prevent are still unclear, turning acquiescence into a powerful yet mysterious notion with unexploited potential.

All in all, a glimpse of hope remains that the Committee will start considering the relevance of the general context as some UN Special Procedures are already doing, so to enhance even further the protective framework for women victims of domestic abuses. In doing so, a dangerous environment conducive to these violations would be sufficient, without victims having to prove a personalised and specific risk. Whether this combined approach to acquiescence between the Committee and UN Special Procedures will become the mainstream understanding of acquiescence when looking at the discrete crime of torture and possibly even beyond is still to be seen.

---

[70] Other than UN Special Procedures see HRC, Views Adopted by the Committee at Its 114th Session (29 June 24 July 2015), UN Doc. CCPR/C/114/D/2134/2012. The Committee pointed to the relevance of the general context to establish acquiescence and stated that a greater probative value should be attached to the general context.

[71] ECtHR, *Case of Kontrová v. Slovakia* (7510/04), Judgment of 31 May 2007; ECtHR, *Case of Branko Tomašić and Others v. Croatia* (46598/06), Judgment of 15 January 2009; ECtHR, *Case of Avsar v Turkey* (25657/94), Judgment of 10 July 2001. *Culliton* (fn. 7), p. 522.

[72] *Jon Bauer*, Obscured by 'Willful Blindness': States' Preventive Obligations and the Meaning of Acquiescence under the Convention against Torture, in: Columbia Human Rights Law Review 52 (2021), pp. 738–825 (790). See Immigration and Refugee Board Canada, Consolidated Groups in the Immigration and Refugee Protection Act (2002), available at: https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Documents/ProtectLifVie_e.pdf (last visited 10 November 2023).

V. Domestic Violence as Torture—Some Unaccounted yet Important Implications

At this point of the analysis, having highlighted how acquiescence could represent a powerful avenue to bring private violations into the definition of the discrete crime of torture, it is time to discuss some of the implications arising for victims both in relation to state and individual criminal responsibility. Regarding state responsibility, the implications of considering domestic violence within the criminal framework for torture are straightforward. Acquiescence in the case of Art. 1 of UNCAT represents a definitional element of the primary rule rather than a specific rule of attribution for state responsibility.[73] Thus, the conduct of private individuals committing domestic violence—if acquiescence can be established—becomes the act of the state *per se*, meaning that stakes are higher compared to when the state failed in its positive obligations to prevent private violations. For instance, torture as a crime carries a specific stigma and courts and tribunals may be more cautious in attributing the conduct to the state. However, despite this possible reputational issue and the greater perceived seriousness attached to the crime of torture,[74] the consequences of finding state responsibility through the notion of acquiescence would be exactly the same as for other human rights treaties, *i.e.* reparations. Therefore, whether state responsibility is triggered by the conduct being the action of the state *per se,* or whether the state violated its positive obligations to prevent private violations makes no difference concerning the consequences. This equality of consequences could indicate the inadequacy of the regime for state responsibility in differentiating among situations.[75] State responsibility is a unified system whereby whether the state failed in its positive obligations or instead the state itself committed the wrongful act does not affect the consequences. At this point, one could question whether the proposal of Roberto Ago to draw a distinction between wrongful acts and crimes when it comes to state responsibility should have been retained in order to make more accurate assessments of different situations.[76]

Moving now to individual criminal responsibility, some questions arise in relation to the responsibility of the state officials acquiescing instances of domestic violence.

---

[73] *Marko Milanovic*, State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights, in: Gábor Kajtár/Basak Çali/Marko Milanovic (ed.), Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence and Standards of Review in the Practice of International Courts and Tribunals, 2022, pp. 221-241 (236).

[74] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak (fn. 11), p. 6.

[75] Some scholars approve of this unified system—entailing that violations of positive and negative obligations should be considered the same. See *Stephanie Palmer*, A Wrong Turning: Article 3 ECHR and Proportionality, in: The Cambridge Law Journal 65 (2006), pp. 438-451 (446).

[76] Second report on State responsibility, by soberto Ago, Special Rapporteur—the origin international responsibility (1970), Yearbook of the International Law Commission vol. II at paras. 12-30. Third Report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility (1971), Yearbook of the International Law Commission vol. II at para. 41. See *George Abi-Saab,* The Uses of Article 19, in: European Journal of International Law 10 (1999), pp. 339–351 (347). See *Joseph H. Weiler, Antonio Cassese and Marina Spinedi*, International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, 1989.

The state agent's criminal responsibility would inevitably arise if one considers the domestic criminalisation for acts of torture through various modes of liability required under Art. 4 of UNCAT. Therefore, if the domestic court decides to interpret a specific case of domestic violence within the criminal framework for torture, the official acquiescing this conduct would be criminally responsible for torture. If one considers that the involvement of the state agents corresponds to acquiescence, in accordance with the mainstream approach of the Committee and other human rights courts and tribunals, when state officials are informed of the possible risk and do not act, the implications are enormous. For instance, if a woman complains of the abuses suffered to state agents and they do not intervene, could the agents be found responsible for acquiescing torture before a domestic court? As a result, could a state officer considered to acquiesce torture in a case of domestic violence be arrested in every UNCAT state party? Could the agent be extradited? In extreme cases of domestic violence, these possible criminal implications may work as an incentive for state agents not to dismiss the victim's claims and actually better address the possible risks for the woman in question.

Even if such an interpretation could provide incentives to better look and assess cases of domestic violence, some questions at the domestic level remain unanswered. For instance, under what modes of criminal responsibility could the state agent be found responsible for torture? Further, what would be the corresponding *mens rea* required? These questions get even more complicated when considering the ascription of criminal responsibility for state agents in the context of general context and structural risk. Notably, while in the previous section it has been mentioned that hopefully the Committee would start considering acquiescence in situations where there is a general context or pattern of violence, could it be that simply because the authorities are aware of the structural risk faced by women, every serious case of domestic violence would entail their criminal responsibility for torture? This would unrealistically put a burden on state agents to know what happens within households, with strong implications for other rights such as the right to privacy. Moreover, assuming that a state agent could be criminally responsible in situations of structural risk without any closer link to the crime would be in violation of many, if not every, domestic criminal principles.

A similar set of questions originates *vis-à-vis* the private individual directly committing domestic violence, if considered as torture. Could the individual carrying out violence against women be charged with torture in the first place? Theoretically, the answer should be yes. However, compared to the criminal responsibility of the state agents acquiescing the conducts, establishing criminal responsibility for private individual is surprisingly more complex. In fact, the individual committing this violence would not know whether the requirement of the state's acquiescence for the crime of torture will be satisfied or not. Moreover, if one considers the situation of a woman complaining of the continuous abuses suffered to state agents and these do not intervene, could the violence committed before the complaint be categorised as torture since the element of acquiescence is now satisfied? How to reconcile the criminal responsibility of the private perpetrator with the *ex-post facto* state acquiescence? Can the responsibility of the direct perpetrator be conditioned on something that happens after the commission of the crime and upon which the individual has no control? Does the indi-

vidual's knowledge of this *ex-post* state acquiescence matter at all or is it sufficient that the acts are committed with the required mental element? Would it be more appropriate to only qualify the acts after the complaint as torture? Moreover, as for the state agent, would considering domestic violence as torture mean that a violent husband could be arrested when travelling to a UNCAT state party? What would the implications for a regarding extradition under UNCAT?

Just to complicate the matter even further, in the case of the private perpetrator, the general context could in no way be enough to find the responsibility of the individual committing these abuses. Assuming that if there is a general context or pattern of violence against women and that state authorities are aware of it, every instance of private domestic violence could amount to torture and the perpetrator should know this is simply unworkable from a criminal point of view. Importantly, both concerning the criminal responsibility for the state agent acquiescing these practices and the direct perpetrator, it should be noted that not every case of domestic violence may be considered as torture. As previously mentioned, classifying what cases might amount to torture and which ones do not is a very complex issue, beyond this analysis. However, understanding this distinction is fundamental or the possible ramifications of these implications for criminal responsibility would be unrealistic, absurd and completely impractical.

VI. Conclusions

The present work analysed and put forward some of the major questions and issues that emerge when applying the torture criminal framework contained in UNCAT to certain instances of domestic violence, being these characterised by physical or psychological violence. Notwithstanding the similarities between the two phenomena, the level of seriousness or consistency over time required to allow for the consideration of domestic violence as torture is not clear. Moreover, whether other types of private violence could be envisioned within the torture criminal framework remains in need of assessment. In fact, as shown in the present work, there are commonalities between domestic violence and torture as well as public statements that justify such an interpretation. However, nothing excludes that a similar reasoning could apply to other instances of private violence.

Initially, the analysis clearly differentiates the framework for the prohibition of torture under human rights law from the discrete crime, discussing the peculiar nature of UNCAT as a *sui generis* human rights treaty. Then, as a first step, the work considers how state responsibility can be considered both for the prohibition of torture as a state obligation and the discrete crime. In doing so, the main difference is that when domestic violence is understood as a violation of the prohibition of torture, the state would be responsible for the duty to protect this right also in relation to the acts of private parties. In this case, however the substantive violation of the prohibition of torture would not be attributed to the state. Contrarily, when looking at domestic violence through the lens of the discrete crime of torture under UNCAT, thanks to the notion of acquiescence, the conduct amounting to torture would become the conduct of the state. Crucially, irrespective of whether state responsibility is triggered by a failure in positive obligations or the conduct *per se*, under the international regime

of state responsibility the consequences are the same. Questions on whether this is a gap in the system and a better way forward concerning state responsibility would have been to keep different layers of consequences instead of a unified system remain open. Ultimately, for what regards the regime of state responsibility there is no additional consequence for victims arising from considering domestic violence as included in the definition of the discrete crime of torture. To reach this conclusion, the work elaborated upon the notion of acquiescence contained in UNCAT as it is precisely thanks to this concept that the state and its agents could come into the picture for cases of domestic violence. When looking at acquiescence, the approach taken so far by most human rights courts and tribunals and shared by the CAT requires that authorities are aware of a real, specific and personalised risk for the victim and fail to act.

Second, aside from attributing the conduct to the state, the notion of acquiescence has serious and important implications for the individual criminal responsibility of state authorities involved and for the private perpetrator of domestic violence. If on the one hand, thanks to the notion of acquiescence, these instances of private violence enter the torture criminal framework; on the other hand, the practicalities of such an approach are complex and full of obstacles. The main issues arise concerning the temporal dimension of the crime and the mental element required on the side of both the state agent and the individual in order to charge them directly or through other modes of criminal liability for torture at the domestic level. Questions also originate in relation to other obligations under UNCAT such as the possible arrest or extradition of individuals convicted for torture. Notwithstanding these practical concerns in the application of the definition of the discrete crime of torture to domestic violence, the root cause of this complex implementation resides in the *sui generis* nature of UNCAT. Albeit Special Rapporteurs rightly mention domestic violence as torture in their statements, a word of caution is needed when dealing with the discrete crime of torture. All of the doubts and issues discussed throughout the work point to the fact that while UNCAT was drafted with serious criminal obligations having repercussions at the domestic level for individuals, the practical effects of such an implementation were hardly taken into account.

To conclude, underlying the whole analysis is the idea that for too long it has been the case that "when a woman is tortured by her husband in her home, humanity [was] not violated".[77] It is time to challenge this understanding and the torture criminal framework and specifically acquiescence represent a powerful tool to conceptualise domestic violence as torture and finally provide the adequate and much-needed redress to victims. Through acquiescence both the individual and state responsibility regimes are brought into the picture, granting victims important avenues to seek redress and justice compared to other human rights treaties. Yet, if UNCAT has the potential to become a powerful tool for victims of domestic violence, up to this very moment the *sui generis* nature of the treaty poses the major impediment to implementation.

[77] *Catharine A. Mackinnon*, Rape, Genocide and Women's Human Rights, in: Harvard Women's Law Journal 17 (1994), pp. 5-16 (6).