RAPE, TORTURE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

CLARE MCGLYNN*

Abstract This article examines the legacy of the ground-breaking judgment in *Aydin v Turkey* in which the European Court of Human Rights held that rape could constitute torture. Ten years on, it examines jurisprudential developments in the conceptualisation of torture in the specific context of the offence of rape. It is argued that while all rapes should be found to satisfy the minimum threshold for Article 3, rape does not per se satisfy the severity of harm criterion for torture. Nonetheless, where the severity of harm is established, the case is made that the purposive element of torture is satisfied in all cases of rape. Finally, in relation to the scope of State responsibility for rape, particularly by private individuals, the article suggests that while the Court's achievements in recognizing rape as a serious harm are considerable, there remain further avenues for jurisprudential development which would ensure that rape as a form of torture is recognized in a wider range of situations and circumstances than is currently the case.

I. INTRODUCTION

Just over ten years ago the European Court of Human Rights issued the ground-breaking judgment in *Aydin v Turkey*.[1] For the first time, it recognized that an act of rape could constitute torture. This progressive judgment was hailed across the international community for its acknowledgement of the urgent need to develop legal mechanisms, particularly human rights norms, to bring perpetrators of sexual violence to justice. Further, its reinforcement of State liability for acts of rape was to have ramifications both within the jurisprudence of the European Convention on Human Rights and beyond. Indeed, not long after the judgment in *Aydin v Turkey*, the International Criminal Tribunal for Rwanda (ICTR) issued its landmark judgment in *Prosecutor v Akayesu* finding responsibility for genocide and war crimes

* Professor of Law, Durham Law School, Durham University. clare.mcglynn@durham.ac.uk. I should like to thank a number of colleagues and friends who have given very generously of their time to discuss the ideas in this article, including Neil Cobb, Alice Edwards, Erika Rackley, Colin Warbrick, Nicole Westmarland, Celia Wells and particularly Sonia Harris-Short and Ian Ward who both commented on earlier drafts of this work. The comments of the anonymous referees were of great assistance and my final thanks are due to Claire Crockford, Xavier L'Hoiry and Anna Shadbolt for their helpful research assistance.

[1] *Aydin v Turkey* (1998) 25 EHRR 251.

[*ICLQ* vol 58, July 2009 pp 565–595] doi:10.1017/S0020589309001195

based on rape.[2] Approximately ten years on, the time is ripe to review the legacy of *Aydin v Turkey*.

Since *Aydin v Turkey* there have been further developments in the European Court's jurisprudence on torture and on the applicability of the Convention to the crime of rape. In recent years, however, the 'torture debates' have generally focused on the validity of torture itself, predominantly in the context of growing national security concerns and the so-called 'war on terror', leaving the boundaries and outer limits of the *Aydin v Turkey* ruling on the applicability of torture protections to rape unclear.[3] In relation to the specific offence of rape, debate has tended to centre on the implications of Convention jurisprudence for substantive definitions of rape and criminal justice processes, most recently following the judgment in *MC v Bulgaria*, again leaving the scope of the torture prohibition largely unresolved.[4] This latter focus of attention is justified on the basis that to address the prevalence of rape, inadequate investigations and low conviction rates, it is crucial to ensure that states meet their positive obligations. Nonetheless, the scope of the torture prohibition remains significant on a general level, in view of the rhetorical and political impact of findings of torture, as well as for the individual, with the possibility of higher damages.

Accordingly, the aim of this article is to review the legacy of *Aydin v Turkey* by analyzing the Convention's torture provisions, specifically in relation to the offence of rape. Having outlined *Aydin v Turkey* and its immediate impact in section II below, section III considers whether any or all rapes satisfy the minimum level of severity to come within the scope of the Convention's Article 3 protection of inhuman or degrading treatment, followed by an analysis of the torture threshold of severe harm. Section IV examines the 'purposive' requirement for torture, with particular reference to debates on whether rapes, and other forms of sexual violence, automatically satisfy this element on the basis of their discriminatory intent. The responsibility of the State for rape, and particularly the attribution of responsibility where there is apparent consent or acquiescence, is considered in section V. Finally, section VI concludes that there are grounds for hoping that the European Court may

[2] *Prosecutor v Akayesu*, Case no ICTR-96-4-T, 2 September 1998.

[3] See, for example, the Special Issue on Torture in (2006) 2 EHRLR, the Special Issue 'Law as Cruelty: Torture as an International Crime' (2008) 6 Journal of International Criminal Justice 157 and the debates surrounding attempts by the UK, and other governments, to review the Court's absolute protection from deportation to face torture or ill-treatment established in *Chahal v UK* (1997) 23 EHRR 413 and reiterated again in *Saadi v Italy (Judgment)* (37201/06) (28 February 2008).

[4] *MC v Bulgaria* [2003] ECHR 646. See for example: I Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations' (2008) 3 EHRLR 357; C Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: the European Court's Judgment in *MC v Bulgaria*' (2005) 3 Journal of International Criminal Justice 447; P Londono, 'Positive Obligations, Criminal Procedure and Rape Cases' (2007) 2 EHRLR 158.

yet pursue a progressive agenda in treating rape as torture, by making such a finding in a wider range of circumstances than has hitherto been the case.

To this end, this article examines the current approach of the European Court to interpreting the torture prohibition in Article 3. This is not to suggest that Article 3, or the Court's jurisprudence, is ideal or adequate. Indeed, feminist critique has established the gendered nature of torture prohibitions internationally and has generated compelling agendas for the wholesale reform and re-imagining of torture prohibitions and human rights generally, in order to better protect women, particularly, from sexual violence.[5] In contrast to such fundamental and ultimately reconstructive approaches, this article concentrates on analysing and seeking re-interpretation of the existing definition and jurisprudence on rape and torture. In doing so, it provides a clear example of the ways in which States' human rights obligations are changing and developing, towards greater responsibility for harms caused by private individuals. Andrew Clapham suggests that this 'rethinking' of the human rights obligations of States particularly demands that we 'reconfigure traditional approaches to violence against women' and this article attempts to suggest ways of doing so.[6] The ambition is that if we expand the boundaries of Article 3, we may better ensure justice for victims of rape.[7]

II. *AYDIN V TURKEY*: BREAKING NEW GROUND

In *Aydin v Turkey* a 17-year-old woman was raped by a member of the Turkish security forces. Sukran Aydin had been taken into custody, ostensibly as part of a security operation, to gain information from her and other members of her family about supposed terrorist activities or sympathies. Her forcible detention lasted three days, during which time she was repeatedly beaten, sprayed with water whilst naked and, when blindfolded, raped. This was the first time that Aydin had had sexual intercourse and, following her experiences, she suffered long-term psychological after-effects. Just two years after its first ever finding of torture,[8] the Court was asked to consider whether her treatment, including the rape, amounted to torture under Article 3 of the European Convention which provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' The Court held that:

> Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not

[5] See A Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19 Leiden J of Intl L 349 and citations therein.

[6] A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford, 2006) 1.

[7] While this analysis focuses on rape, it has implications for all forms of sexual violence.

[8] *Aksoy v Turkey* [1996] ECHR 68.

> respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.[9]

The Court continued that, as well as the harm of the rape, the other treatment she suffered amounted to a 'series of particularly terrifying and humiliating experiences', especially having regard to her 'sex and youth and the circumstances in which she was held'.[10] Moreover, the suffering inflicted upon her by the security forces was 'for a purpose', namely to elicit information.[11] Against this background, the Court found that:

> 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 of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.[12]

This was a remarkable and progressive decision. A finding that the rape, in and of itself, 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.[13] But the context had changed. *Aydin v Turkey* was handed down at a time when public consciousness about the prevalence and egregious nature of rape in conflict zones had been heightened, especially in Europe with the conflict in the former Yugoslavia. Nonetheless, the Court's judgment did presage those of the international tribunals established to deal with the conflicts in Yugoslavia and Rwanda and their epoch-making judgments regarding gendered violence. The Court must therefore be credited for its recognition of the serious and harmful nature of rape, symbolized in the torture finding.

Even so, there were elements of the judgment which gave cause for concern. In particular, the Court appeared to emphasise the 'sex and youth' of the victim as particularly important, as well as highlighting that the acts had taken place in State detention and had been perpetrated by a State actor. While this was (and still is) the paradigmatic approach to constituting torture, it also raised the prospect of rendering the impact of *Aydin v Turkey* little more than symbolic: most rapes are perpetrated by private individuals against other private individuals and not therefore in State detention.

However, in the years following *Aydin v Turkey*, the Court's jurisprudence has developed in significant and important ways which have expanded the reach of human rights protections beyond paradigmatic examples of state coercion. Most notably in the field of rape, the doctrine of positive obligations has been deployed to great effect to bring to account state failures regarding the investigation and prosecution of previously marginalized forms of rape,

[9] *Aydin v Turkey* (n 1) para 83.
[10] ibid para 84.
[11] ibid para 85.
[12] ibid para 86.
[13] *Cyprus v Turkey* (1982) 4 EHRR 482.

particularly acquaintance rapes.[14] In this way, the concept of positive obligations has enabled the Court to hold states liable for breaches of human rights in a far greater range of circumstances than had hitherto been the case.[15] Most particularly, it has facilitated a means by which harms by private individuals have been held to account, where a failure to take action by the state has, in practice, facilitated the breach. This expanding jurisprudence, bringing 'non-state actors' to account for their human rights abuses, is particularly significant for victims of sexual violence.

But this does not necessarily mean that the Convention's protection of rape, and particularly rape as torture, has expanded. Indeed, at the same time that the scope of the concept of positive obligations and the responsibilities of non-state actors has been expanding, the Court has been setting clearer, more specific, and arguably more limiting, criteria necessary for a finding of torture. These developments in torture jurisprudence provide new challenges for those seeking to establish rape as torture. It is to these developments, and therefore an assessment of the overall impact of *Aydin v Turkey* on the conceptualization of rape as torture, that the following sections now turn.

III. RAPE, HARM AND THE TORTURE THRESHOLD

There are a number of different criteria which must be established before the Court will determine that a particular act or acts constitute torture, including the 'purpose' of the acts, the level of 'state responsibility' and the status of the perpetrator/s. Preliminary, however, to each of these considerations are the threshold questions of, first, the minimum requirements to fall within Article 3 and, secondly, the level of harm necessary to establish torture. Not only are these essential pre-conditions for a finding of torture, but they are also fundamental issues which reveal much about how the Court conceptualizes questions of harm and human rights, for example its relative insistence on physical or psychological harm and its development of Convention jurisprudence beyond the foundational attention on state-centric, public-oriented forms of abuse. These threshold questions also raise key concerns for feminist scholars and activists as they involve controversial matters of comparability among rapes and of appropriate strategies to bring perpetrators to justice. Finally, and most obviously, these threshold issues determine, for an applicant, the admissibility of their claim and levels of any damages.

Turning, therefore, to the first question, namely whether the particular rape, or indeed all rapes, satisfy the minimum requirements of Article 3, the Court has stated that for conduct to fall within Article 3, in general, it must 'attain a minimum level of severity'.[16] It has further, repeatedly, opined that the

[14] *MC v Bulgaria* (n 4).
[15] For example, *Costello-Roberts* [1993] ECHR 16.
[16] *Ireland v UK* (1979–80) 2 EHRR 25 para 162.

assessment of this minimum is 'relative' depending on 'all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.[17] In this way, the Court maintains flexibility in the application of Article 3. Its approach is conceptual, outlining the broad purpose and scope of the provision, rather than providing an exhaustive list of modalities; thereby providing flexibility, but also indeterminacy. Once this minimum threshold has been reached, the Court then considers whether the conduct constitutes torture, inhuman or degrading treatment or punishment, according to a hierarchy of severity, with torture being the most serious, followed by inhuman and then degrading treatment or punishment.[18]

In relation to the offence of rape, it is clear that rape can satisfy the minimum threshold of severity to come within Article 3. This much has been clear since the 1970s when the applicability of Article 3 to acts of rape was first considered in the context of the Turkey–Cyprus conflict. In reporting on the complaints of mass rape of Greek Cypriot women by the Turkish forces, the European Commission found that there was evidence of rape by Turkish soldiers, which were not isolated acts of indiscipline, and that the Turkish authorities had failed to take adequate measures to either prevent the rapes or to take subsequent disciplinary action.[19] It went on to hold that, as a consequence, there had been a breach of Article 3, namely that the rapes constituted 'inhuman treatment'.[20] For now, the important aspect of this first case is that the rapes under consideration satisfied the minimum level of severity to come within Article 3 which established that rape can come within Article 3. The next question is whether all, and any rape, satisfies the minimum threshold.

Since *Cyprus v Turkey*, a number of cases involving rape have come before the Court, each giving important indications of its approach. In *X and Y v the Netherlands* the Court held that the failure of Dutch law to proscribe the sexual violence of mentally disabled persons fell within, and breached, Article 8 on the right to private life.[21] When faced with a challenge to the criminalization of marital rape under Article 7 of the Convention, the Court was clear in its condemnation of rape, in all forms, referring to the 'essentially debasing character of rape' which it deemed 'so manifest' and, furthermore, that the immunity of husbands was not in conformity with the 'fundamental

[17] *Moldovan v Romania* [2005] ECHR 458 para 100.

[18] For a criticism of this hierarchical, or 'vertical', approach, see Malcolm Evans 'Getting to Grips with Torture' (2002) 51 ICLQ 365.

[19] *Cyprus v Turkey* (n 13) paras 371–374.

[20] There was no finding of torture, despite the evidence of mass rape, often committed with extreme violence and the evidence that the rapes were directed against Greek Cypriots, by Turkish forces, because of the differences in ethnic origin: *Cyprus v Turkey*, ibid, discussed in L Zilli, 'The Crime of Rape in the Case Law of the Strasbourg Institutions' (2002) 13 Criminal Law Forum 245, 250–251.

[21] *X and Y v the Netherlands* [1985] ECHR 4.

objectives of the Convention, the very essence of which is respect for human dignity and freedom'.[22]

Such cases identify the seriousness with which the offence of rape is approached in Convention jurisprudence generally. Specifically in relation to Article 3, in *E and others v the UK* the Court held that there was 'no doubt' that the rape, sexual abuse and violent assaults of a step-father on his young step-children fell within Article 3.[23] Nonetheless, the existence of many aggravating features of this case, the repeated abuse and victimization of young people, do not definitively tell us whether *any* rape, and therefore all rapes, will come within Article 3.

Perhaps this debate has been answered by the judgment in *MC v Bulgaria*.[24] In this case, the Court held that the failure of Bulgarian law to provide the necessary protection for victims of rape where there was no evidence of physical resistance by the victim, constituted a violation of the positive obligations of States under Article 3. In particular, it held that states have a positive obligation, inherent in Articles 3 and 8, to 'enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.[25] This suggests that as a failure in law to proscribe all forms of rape violates the positive obligations inherent in Article 3 any rape will constitute ill-treatment of sufficient severity to meet the threshold requirements of Article 3. In particular, the rape at issue in *MC v Bulgaria* was of a type often not taken seriously and wrongly assumed to be of less harm and consequence than stranger-rapes, namely an 'acquaintance rape' involving little physical violence or resistance. That the Court still found that this form of rape requires the protection of Article 3 implies that any rape will satisfy the minimum requirements for Article 3.

This is undoubtedly the correct approach, both in terms of the empirical evidence of the harm of rape and the seriousness of the wrong of rape in violating the sexual autonomy of individuals. In relation to the harm necessary to come within Article 3, it is significant that the Court recognises that what constitutes harm extends far beyond physical injury.[26] Many rapes do not entail severe physical injury and any that there is may be short-lived. But this does not mean that the rape is not injurious; it is that the wounds are psychological. Evidence suggests enduring and serious adverse effects of rape, with studies finding, for example, a high rate of post-traumatic stress disorder in rape victims.[27] One study of victims concluded that: 'Rape is

[22] *SW & CR v UK* [1995] ECHR 52 para 44.

[23] *E v the UK*, application no 33218/96, 26 November 2002, para 89.

[24] *MC v Bulgaria* (n 4).

[25] ibid para 153.

[26] The Court confirmed in *Dikme v Turkey* that assaults causing mental suffering 'may fall within the scope of Article 3 of the Convention even though they may not necessarily leave medically certifiable physical or psychological scars': [2000] ECHR 366, para 80.

[27] For a discussion of this research, see J Temkin, *Rape and the Legal Process*, (2nd edn, OUP, Oxford, 2002) 2.

an experience which shakes the foundations of the lives of the victims. For many its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating fear'.[28] Added to this weight of evidence is research establishing that many acquaintance rapes can actually be as traumatic, if not more, than the archetypal stranger-rape due to the breach of trust by, say, family member, partner, friend or colleague.[29] In other words, all rapes, and not just violent, stranger rapes, can result in serious, adverse and long-term consequences for victims.

Were the European Court to hold that a rape does not satisfy the minimum threshold for the protection of Article 3, it would also be failing to recognize that the seriousness of rape lies in its violation of sexual autonomy, a fundamental value to be protected by human rights norms and instruments. Emblematic of this recognition is the statement from the International Criminal Tribunal for the former Yugoslavia (ICTY) that: 'The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.'[30] Accordingly, it seems reasonably clear that the Court rightly considers that any rape satisfies the minimum threshold for Article 3.

On the assumption that all rapes do satisfy the minimum threshold for Article 3, the next and more complex question is which rapes, if not all, constitute torture? To examine this issue, we must turn to the Court's jurisprudence on torture and in particular the threshold issue: the factors which determine the difference between inhuman and degrading treatment, and torture.

The Court initially set the threshold for torture extremely high. In *Ireland v UK* the Court found that the interrogation practices under consideration, such as sleep and food deprivation, stress positions and hooding, did not amount to conduct sufficiently severe to be deserving of the sobriquet torture.[31] Indeed, it was not until 1996 that the Court made its first finding of torture in *Aksoy v Turkey*.[32] In this case, the Court emphasized the importance of Article 3 stating that it 'enshrines one of the fundamental values of democratic society'.[33] It went on to state that the distinction embodied in the Convention between inhuman and degrading treatment and torture had been included to allow the 'special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering'.[34] The treatment in *Aksoy*, including 'Palestinian hanging', was said to have caused 'severe pain' which was long lasting and appeared to have been 'administered with the aim of

[28] W Young, *Rape Study—A Discussion of Law and Practice*, (Wellington, New Zealand: Department of Justice, 1983) 34, discussed in Temkin, ibid 1–3.

[29] V Wiehe and A Richards, *Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape* (London, Sage, 1995).

[30] *Prosecutor v Delalic*, Judgment, IT-96-21-T, 16 November 1998, para 495.

[31] *Ireland v UK* (1979–80) 2 EHRR 25.

[32] *Aksoy v Turkey* (n 8) para 62.

[33] ibid.

[34] ibid para 63.

obtaining admissions or information'.[35] The Court concluded that 'this treatment was of such a serious and cruel nature that it can only be described as torture'.[36] Thus, *Aksoy v Turkey* delivered a clear statement that there is an unambiguous distinction between conduct which constitutes inhuman or degrading treatment and that which comes within 'torture'.[37]

Applying *Aksoy v Turkey*, the question becomes, is rape of such a 'serious and cruel nature that it can only be described as torture'? The answer of the ICTY is 'obviously'.[38] To explain more fully, it has stated that: '[S]ome acts establish per se the suffering of those upon whom they are inflicted. Rape is obviously such an act.'[39] Consequently, ['s]evere pain or suffering, as required by the definition of the crime of torture, can . . . be said to be established once rape has been proved'.[40] Such an approach has the benefit of simplicity: it always being clear that once rape has been established, the harm threshold for torture has been satisfied. It may obviate intrusive questioning of victims regarding the impact of the rape and its adverse effects. It may also ensure that the egregious nature of rape is better recognized, being assimilated with torture. For these reasons and more, it is an approach widely recommended by many feminist scholars.

Catharine MacKinnon, for example, has written powerfully of the violence which women suffer in the form of rape, asking 'why is torture on the basis of sex—for example, in the form of rape, battering, and pornography—not seen as a violation of human rights?'[41] She castigates the international community for failing to see violence against women as sufficiently serious and political to constitute torture and advocates a reconceptualization of rape as torture.[42] Her argument, followed by many others,[43] is that characterizing rape as torture would both acknowledge the serious harm that is rape, as well as drawing on the 'recognized profile'[44] of torture internationally, garnering national and international recognition of the egregious nature of all violence against women.

[35] ibid para 64.

[36] ibid.

[37] The Court did highlight other factors, such as the purpose of the treatment, namely for 'obtaining admissions or information': *Aksoy v Turkey* (n 8) para 64. Further, the status of the perpetrators was also likely to prove important, namely that the conduct in question was administered by the Turkish security forces in detention. These criteria are discussed further below.

[38] *Prosecutor v Kunarac*, (IT-96-23&23/1) Appeals Chamber, 20 June 2002, para 150.

[39] *Kunarac*, ibid paras 150–151.

[40] ibid. This has been affirmed in *Braanin* where it was said that rape is an act which 'appears by definition to meet the severity threshold': *Braanin* (IT-99-36) Trial Chamber, 1 September 2004, para 485.

[41] C MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge, Harvard University Press, 2006) 17, reproduced from her earlier essay 'On Torture: A Feminist Perspective on Human Rights', in K Mahoney and P Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge* (The Netherlands, Martinus Nijhoff Publishers, 1992) 21.

[42] Further discussed in C McGlynn, 'Rape as "Torture": Catharine MacKinnon and Questions of Feminist Strategy' (2008) 16 Feminist Legal Studies 71.

[43] For example, in the specific Convention context, Ivana Radacic has argued that the Court should make clear that 'any rape' reaches the level of severity for a finding of torture (n 4) 363.

[44] ibid (n 41) 17.

The contrary argument has been made by Karen Engle who argues that the ICTY's approach has 'reinforced the understanding that women are not capable of not being victimized by rapes'.[45] The danger of such an approach, she argues, is that it reifies the harm of rape, essentializing women's experiences as all constituting severe harm. While for many rape survivors, the rape has ruined their lives, threatened their livelihood through wrecking their well-being and destroyed the security and comfort that they took for granted in their lives; for others, it is serious, harmful, painful, and they move on.[46] Over-generalizing the trauma of rape, the argument goes, may add to the perception of rape as exceptional, as especially dreadful and to be feared: to be a 'fate worse than death'. Perhaps, Engle asks, 'feminist advocates should ask whether rape is really a fate worse than death'.[47]

This approach to differentiating between the harms of rape arguably reflects the fact that most legal systems recognize different forms of rape, paradigmatically child or 'statutory' rape, and take into account the varied contexts in which rape takes place, impacting for example on the sentencing of perpetrators.[48] Considering the issue of rape as torture, and to take just one example, rape by a State official may not be very different, from the victim's perspective, from rape by a private individual, but from society's perspective it may be more egregious. The State official is someone who is specifically responsible for upholding the law, someone to whom women should be able to turn for protection. Further, the consequences of State involvement may be more pernicious, with the possibility that the investigation, prosecution and punishment of the perpetrator may be compromised, if not entirely impeded. Thus, it may be that from a societal perspective, rape by a State official may be an aggravated form of rape, possibly impacting on sentencing and also possibly aggravating the conduct, bringing it within a threshold of severity for torture.[49] In other words, there is an argument that not all rapes should be treated the same as constituting the severe harm necessary for a finding of torture.

To return to the discussion about the threshold for torture under Convention jurisprudence and *Aydin v Turkey*, it is clear that the Court has not taken the approach that rape per se constitutes the severity of harm for torture. Indeed, it has introduced a number of possible features and characteristics which appear to be relevant to a determination of the torture threshold including the place

[45] K Engle, 'Feminism and its (Dis)Contents: Criminalising Wartime Rape in Bosnia and Herzegovina' (2005) 99 AJIL 778, 813.

[46] Rhonda Copelon makes this argument in respect of survivors of domestic violence, though she still argues that such violence should be recognized as torture: 'Intimate Terror: Understanding Domestic Violence as Torture', in R Cook (ed) *Human Rights of Women: National and International Perspectives* (Pennsylvania, University of Pennsylvania Press, 1994) 116.

[47] Engle (n 45) 813.

[48] McGlynn (n 42).

[49] For a similar example, see the discussion around the term 'genocidal rape', discussed in McGlynn (n 42) 79–80.

and circumstances of the rape, the status of the perpetrator and the victim's sex and youth.

Examining 'sex and youth' first, it is not exactly clear what implications are to be gleaned from this part of the judgment. It seems from the way in which the Court dealt first with the rape, then with the other harmful acts, that the reference to 'sex and youth' as aggravating factors refers to forms of 'terrifying and humiliating' experiences, other than the rape. It could be, therefore, that the Court considers these criteria relevant to the non-sexual ill-treatment. Nonetheless, when assessing the severity of treatment, the Court has said that these criteria are relevant and it is, therefore, important to consider what the Court might have meant, in the context of rape.

In relation to 'youth', this criterion is a factor emphasizing the vulnerability of the individual, both emotionally and physically, and clearly in the Court's view aggravates conduct, bringing it closer to torture. This seems relatively straightforward and ties in with the Court's repeated references to the need to ensure particular protection of 'vulnerable' individuals.[50] However, it is not immediately clear what the Court has in mind in relation to 'sex'.[51] Was the Court making a broader statement that for the victim to endure rape, and/or the other forms of torture inflicted on the victim in *Aydin v Turkey*, was worse as she was female, than had she been male? It would certainly be wrong to class female rape as 'worse' and therefore more harmful than male rape.[52] Were it an argument from chivalry that to inflict pain and torture on a woman is somehow worse than on a man, due to social assumptions about the role of women, this too would be undesirable. It may be possible to interpret the reference to the victim's 'sex' as alluding to the psychological impact of the rape on a virgin (as Aydin was) in a cultural context in which the loss of virginity, prior to marriage, even through rape, could have serious adverse consequences for a woman's future marriage prospects.[53] Nonetheless, it would be far preferable were the Court's references to 'youth and sex' to be taken as referring only to the non-sexual forms of ill-treatment,[54] indicating that in relation to rape, the victim's sex (or sexual status) is neither an

[50] This 'vulnerability' is most evident in matters involving children and/or education. See for example *A v UK* (1999) 27 EHRR 611, discussed in Clapham (n 6) 373–374.

[51] The ICTR and ICTY have also included 'sex' within their list of variables when considering whether torture has occurred. See further C Burchard, 'Torture in the Jurisprudence of the Ad Hoc Tribunals' (2008) 6 Journal of International Criminal Justice 159, 165.

[52] On the harm of male rape: G Mezey and M King, *Male Victims of Sexual Assault* (2nd edn, OUP, Oxford, 2000) and P Rumney, 'Policing Male Rape and Sexual Assault' (2008) 72 Journal of Criminal Law 67.

[53] Similar issues arose in *Prosecutor v Delalic* where the ICTY Trial Chamber emphasised that in considering whether rape gives rise to pain and suffering, one 'must not only look at the physical consequences, but also at the psychological and social consequences of rape' (n 30) para 486.

[54] However, even in such circumstances, it is not clear that a distinction on the grounds of 'sex' is justifiable.

aggravating factor, nor one lowering culpability, although youth may well aggravate the offence.

The other potentially aggravating factor, 'rape of a detainee by an official of the State', is related to key criteria for a finding of torture itself, namely the role of the State. But if we stay for now with considering this as an aggravating factor, which enhances the harm of rape from ill-treatment to torture, there are a number of issues to consider. The Court seemed to be suggesting that the status of the perpetrator, here a 'State official', aggravates the offence. A rationale for this is not expressed, but might be based on the fact that if the perpetrator is an agent of the State, it may make them appear, in the eyes of the victim, to be inviolable and thus a complaint is less likely and resistance may appear futile. For example, the very act of reporting the conduct may make the victim vulnerable again to persecution as the agent may well have knowledge of the complaint.[55] The Court recognized this in *Aksoy v Turkey* in which it stated that the victim's severe ill-treatment at the hands of State officials 'would have given him cause to feel vulnerable, powerless and apprehensive of the representatives of the State'.[56] The ICTY has made a similar argument stating that the 'condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official'.[57]

Arguably, this comes down to a question of trust, or rather abuse of trust, on the basis that we are all entitled to place trust in state officials, whether they be the security forces, the police, prison officers and the like. These are individuals who are supposed to act to protect citizens from harm and to act within the rule of law.[58] For such persons to breach this trust is an especially grave act as it can destroy the ability of the victim to trust any person in authority in the future, leaving that person feeling even more vulnerable and insecure. This is recognized in other jurisdictions, for example constituting an aggravating factor in sexual assaults.[59] This justification certainly seems plausible in relation to a State official, but also has clear parallels for other types of rape which must be made clear.

[55] This argument is put forward in Colin Yeo, 'Agents of the State: when is an official of the state an agent of the state?' (2002) 14 International Journal of Refugee Law 509, 523.

[56] *Aksoy* (n 8) para 56.

[57] *Delalic* (n 30) para 495.

[58] In *Costello-Roberts* (n 15) Article 3 was not found to be violated where a step-father hit the victim with a slipper a number of times. On the contrary, in *Tryer*, application no 5856/72, judgment of 25 April 1978, the treatment of the victim who was 'birched' in the Isle of Man was found to constitute degrading treatment contrary to Article 3. Among the factors distinguishing the two cases, the Court in *Tryer* emphasized the 'institutionalized character' of the violence as being significant (para 33). This is akin to the argument being made here regarding the breach of trust where a state official commits the violent acts.

[59] In sentencing guidelines produced in England and Wales in relation to sexual assaults, including rape, a number of aggravating factors are listed which will increase sentence and these include the abuse of power and/or abuse of a position of trust: Sentencing Guidelines Council, *Sexual Offences Act 2003—Definitive Guideline* (London, Sentencing Guidelines Council, 2007), 9–10, available at: http://www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf [accessed 26 May 2008].

To emphasize: it is abuse of trust or abuse of a position of power which is the aggravated harm, with abuse by a State official just one form of that violation. In this way, any rape which also involves an abuse of power or position of trust, be it by a partner or former partner, employer, teacher, or other private individual, will constitute an aggravating factor. Indeed, it is arguable that the abuse of trust could be more so in the latter types of case: it seems entirely possible that Sukran Aydin placed almost no faith or trust in the security forces in Turkey. To underline the point, this aspect of the ruling in *Aydin v Turkey* should be interpreted as meaning that it is the abuse of trust or position of power that is the crucial aggravating factor, of which just one example is abuse by a state official.[60]

Linked to the harm of rape by a State official, the Court appeared to place emphasis on the place of the rape. The Court in *Aydin v Turkey* referred to the rape of a 'detainee' being especially grave 'given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.'[61] This suggests that detention is a factor aggravating the treatment, making it more severe, and more likely to ground a finding of torture.[62] But it is important to emphasize that while state detention clearly will induce vulnerability in a detainee, it is the vulnerability that should be significant, not the site of the treatment. Therefore, exactly *where* that conduct takes place should not be over-emphasized. It should further be recognized that the vulnerability of detention can be reproduced in many other circumstances, for example in the home of a woman being raped and abused. Thus, it is a victim's inability to escape from the perpetrator, both psychologically and/or physically,[63] and their consequent fear regarding what will happen, which is significant. Accordingly, it is essential that the term 'detainee' in *Aydin* is not interpreted to mean a particular physical place, such as a state detention facility, but

[60] On the contrary, Radacic argues that whether 'an individual was raped by a state agent or by a private individual should not be relevant in assessing the severity of treatment, as distinct from establishing the responsibility of the state' (n 4) 364.

[61] *Aydin v Turkey* (n 1) para 83.

[62] It is certainly clear since *Ilhan v Turkey* [2000] ECHR 354 that for treatment to amount to torture it does not have to take place in state detention. In this case, the victim was beaten by security forces in a field near to his village, prior to being taken into detention. Thus, while the treatment under examination did not exclusively take place in detention, it was *an* element of the case and the fact of being taken into detention did confirm state involvement and the vulnerability of the victim. So, while the acts do not all need to take place within detention, to presage a finding of torture, thus far it has been *an* element in all torture cases. It would certainly be an arbitrary distinction were the *place* of the conduct in question to become a criterion for a finding of torture. Note that there is no specification regarding the place of the torture in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, S Treaty Doc No 100-20, 1465 UNTS 85, 114 (entered into force on 26 June 1987) Article 1.

[63] The ICTY recognized in *Kunarac*, when considering the crime of enslavement, that even when the women involved had the physical means to leave the house in which they were being held, via keys or the house being left open, in practice this was not a reasonable possibility as they had nowhere else to go and had no place to hide from their persecutors even had they left. They therefore had 'no realistic option whatsoever to flee the house' (n 38) para 742.

should instead denote either a physical place, but not limited to a state facility and including therefore the home, or even better a psychological condition such that the individual considers that they have no means of escape.[64] As Deborah Blatt has stated, a 'woman's home can become her torture chamber'.[65]

One final aspect relating to the severity threshold is that the Court has stated that the acts in question must be 'deliberate'.[66] This suggests that the conduct in question must not be accidental or unintentional.[67] This criterion maps onto the United Nations Convention Against Torture's requirement that acts of torture are 'intentional', which has been interpreted to mean that the acts are 'consciously and actively occasioned'.[68] This part of an inquiry into the nature of the conduct should not give rise to any particular problems: an act of sexual intercourse can scarcely be accidental or unintentional. Nonetheless, it is unfortunately conceivable that in the context of rape, it may be argued that the acts in question were not deliberate, but impulsive, in the 'heat of passion' and were the result of a loss of self-control and therefore not 'deliberate'. An enduring myth of rape, and of masculine sexuality, is that once unleashed, male libido is an unstoppable force. Such an argument, were it ever to be run, should be dismissed forthwith. All rapes are specific and deliberate acts over which the perpetrator retains control and the possibility of resistance. Further, there should be no requirement for pre-mediation or planning for acts to still be 'deliberate' and 'intended'.[69]

In essence, therefore, I am arguing that the Court in *Aydin v Turkey* established that an act of rape could satisfy the threshold of harm for torture, but implied that not all rapes will necessarily do so. Exactly which criteria will be considered by the Court, and how they will be interpreted, is moot, but it

[64] Rhonda Copelon has examined the criterion of state detention for a finding of torture in the domestic violence context and explains the reality that victims of domestic abuse do indeed feel imprisoned in their own homes and unable to leave. They are in effect in detention; detention at the hands of their abusers. Women do theoretically have the opportunity to leave, but it is now generally accepted that this does not conform to the reality of the victim's experience: Copelon (n 46) 138.

[65] D Blatt, 'Recognizing Rape as a Method of Torture' (1991–1992) 19 New York University Review of Law and Social Change 821, 851. Indeed, Blatt continues that in some circumstances of rape, such as mass rape, the 'intimidation of a populace is most effectively accomplished when officials rape women in their homes because family members often witness the attack and share the feelings of degradation and powerlessness' 851.

[66] *Aksoy* (n 8) para 63.

[67] For a discussion of this requirement in international criminal law, see Burchard (n 51).

[68] As discussed in E Smith, 'A Legal Analysis of Rape as Torture: Article 3 ECHR and the Treatment of Rape within the European System' in Michael Peel (ed) *Rape as a Method of Torture* (Medical Foundation for the Care of Victims of Torture, Report No 1000340, 2004) 202.

[69] Malcolm Evans discusses the practice of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment, which reports on the operation of Article 3, to reserve the term 'torture' to describe activities inflicted for a particular purpose and which have usually required some form of 'preparation', largely in terms of equipment for the conduct of torture. Were such an approach to be adopted, in general, to torture it would be regrettable as it would preclude acts of sexual violence which generally do not require, though often involve, forms of equipment. See Evans (n 18) 374.

seems from the above analysis that issues such as the status of the perpetrator, the age and sex of the victim, and the place of the rape may be relevant. I have sought to argue that within the confines of this approach, the Court should be encouraged to be as flexible as possible in its interpretations, to expand the boundaries of Article 3 to ensure that it recognizes the varied ways in which torture is carried out and in which the harms of rape and sexual violence are perpetrated. In other words, the Court must strive to move beyond a stereotypical view of torture, towards an acceptance of its multifaceted nature.

Further, it is clear that the Court has not taken the same approach to 'rape as torture' as that of the ICTY, which found that the act of rape per se constitutes the harm of torture. Such an approach does indeed have the benefit of simplicity and avoids problems of some rapes not being taken as seriously as others. Rhonda Copelon argues that a reason why rape, and other crimes of sexual violence, should be mainstreamed into international law, such that rape constitutes torture, is that 'history teaches us that there is an almost inevitable tendency for crimes that are seen simply or primarily as crimes against women to be treated as of secondary importance'.[70] This is true. But there is also the danger that if all rapes are subsumed under the term 'torture', such harms would be more easily forgotten and less easily recognized as gender-based, with the attention continuing to be on 'real' torture.[71] It may also be that in characterizing rape as torture, we fail to accept the diversity of experience of rape survivors who may not characterize their harms as 'severe' harms, sufficient to ground a torture claim. Kelly Askin has suggested that if we 'reverse the stigmas and stereotypes association with sex crimes', removing the 'shame and stigma' from victims, 'we take away much of the power held by the perpetrators of these crimes'.[72] Holding that not all rapes are of extreme severity may go some way towards reducing the stigma and stereotyping associated with the crime.

To conclude: my argument is that all rapes should be held to satisfy the minimum threshold for Article 3, on the basis that all European societies not only criminalise rape, but also treat it as a crime of particular gravity. Accordingly, it is appropriate and necessary to hold that all rapes constitute inhuman and/or degrading treatment. Such a finding is also vital to ensuring that states take greater responsibility, via their positive obligations, to prevent rape and convict rapists. However, it does not necessarily follow that all rapes per se entail the severe harm necessary for a finding of torture. The severity of the harm is necessarily subjective, varying to an extent from case to case. While this can have disadvantages, with some victims' harms not being taken

[70] R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000–2001) 46 McGill Law Journal 217, 234.

[71] See further McGlynn (n 42).

[72] K Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law 288, 347.

seriously, whereas a common 'standard' might obviate such intrusions into the victim's experiences, it also has advantages. It can take into account a victim's perspective and ensure that they are included in the process of assessing and determining what happened to them. Further, it has a more strategic point. This line of reasoning would mean retaining the label 'torture' for some acts which different societies hold as especially egregious, for example rape by state officials, as well as maintaining the label 'rape', with its own powerful associations and gendered meaning.

Further, I have argued that in considering the different elements which might aggravate rape, bringing it within the realms of torture, the elements highlighted by the Court in *Aydin v Turkey* should be broadly interpreted so as not to privilege specific forms of rape, by specific perpetrators, in specific physical contexts. Thus, the immediate imperative is to ensure that in determining severity, the Court does not rely on common myths and assumptions about rape. The Court should abide by its ruling in *Selmouni* which specifically endorsed a flexible approach to torture by stating that '[c]ertain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future'.[73] The Court so held on the basis that the 'increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of fundamental values in democratic societies'.[74]

IV. THE 'PURPOSE' OF RAPE

While the Court has emphasized the significance of the severity of treatment for it to constitute torture, from the late 1960s and the *Greek* case, the Court has also highlighted another important aspect to torture, namely its purpose.[75] In the *Greek* case, the Court held that 'the word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment'.[76] While this reference to purpose did not initially take on much significance, in recent years it has become clear that it now constitutes an important element to any torture inquiry.[77]

In finding there to have been torture in both *Aksoy v Turkey* and *Aydin v Turkey*, the Court made reference to the political context of the victims' detention and to the political purposes for which they were held, namely the extraction of information and intimidation generally.[78] In the subsequent

[73] *Selmouni v France* (2000) 29 EHRR 403, para 101.
[74] ibid.
[75] The *Greek* case, [1969] 12 YB 1.
[76] ibid 186.
[77] Indeed Evans argues that the Commission and Court 'have never fully subscribed to the severity of suffering approach, despite their mantra-like espousal of it over the years': (n 18) 373.
[78] In *Aydin v Turkey* the Court stated that the conduct in question was 'for a purpose, which can only be explained on account of the security situation in the region . . . and the need of the

cases of *Ilhan v Turkey* and *Salman v Turkey*, the Court made this 'purposive element' an explicit criterion for a finding of torture.[79] In doing so, the Court referred to the purposive condition in the UN Convention on Torture.[80] The UN Convention provides that for the relevant conduct to constitute torture it must be carried out for one of the prohibited purposes which are listed as: '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'.[81] While the severity threshold focussed on the victim, the purposive element transfers scrutiny to the perpetrator and the circumstances surrounding the conduct or treatment in question.

The rape in *Aydin v Turkey*, therefore, clearly came within a traditional purposive approach to torture, being ostensibly for political purposes regarding intimidation, coercion and the extraction of information or a confession.[82] Indeed, in cases such as *Aydin v Turkey* and *Aksoy v Turkey*, the Court did not undertake an evidential enquiry into whether or not the purpose has been met, making this assumption as the conduct took place in state custody. But such an assumption will not always be made, as was clear in *Denizci and others v Cyprus* and *Egmez v Cyprus* where a link between the ill-treatment and 'extracting a confession' had not been established.[83] While in both cases the allegation of torture was rejected on the lack of evidence of severity of harm, there was also a clear implication that the lack of purpose regarding confessions was relevant.

It is evident, therefore, that the Court's jurisprudence demands that the ill-treatment in question is carried out for a prohibited purpose and that, thus

security forces to elicit information': (n 1) para 85. These points were made without hearing evidence on this particular point. In other words, it was just assumed that this was the reason for the conduct and that this satisfied any insipient 'purposive' criterion. This is also the case in the more recent case of *Dikme v Turkey* (n 26).

[79] *Ilhan v Turkey* (n 62) para 85; *Salman v Turkey* (2002) 34 EHRR 17, para 114. See also *Akkoc v Turkey* (2002) 34 EHRR 51; *Mahmut Kaya v Turkey* [2000] ECHR 129, para 117.

[80] *Ilhan v Turkey* ibid; *Salman v Turkey* ibid. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 60), Article 1: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

[81] ibid.

[82] Zilli has criticized the reference to the purpose for which Aydin was raped as this ignores the fact that not only was her rape an action of discrimination on the grounds of her ethnicity, being Kurdish, but also of gender discrimination—she was raped because she was a woman: (n 20) 261–262.

[83] *Egmez v Cyprus* (2002) 34 EHRR 29, para 78 and *Denizci and others v Cyprus* [2001] ECHR 351, para 384.

far, the discussion of purpose has been solely linked to the extraction of confessions and information. The question following on from this is whether the purposive element will and should continue to be limited to such a narrow range of circumstances. The UN Convention definition of torture goes beyond this narrow conception, specifically referring to one of the proscribed purposes as being 'for any reason based on discrimination of any kind'. The Court has increasingly been looking to the UN Convention for guidance in developing its jurisprudence and I would argue that it certainly should do so in this area. If the Court were to consider this broader category of purposeful action in the UN Convention, the next area for debate is whether the act of rape itself constitutes 'discrimination of any kind'? If so, this would mean that the purposive element of torture is met in every case of rape. There has yet to be any ruling on this in relation to UN Convention,[84] but there has been discussion of this criterion before the ICTY.

When defending himself against the charge of rape as torture, Zoran Vukovic claimed that even if he had raped the victim, which he denied, he argued that he had committed the act out of a 'sexual urge, not out of hatred'.[85] In so arguing, he was trying to tap into a vein of thought which conceives of rape as a desperate act of sexual fulfilment, rather than one of violence and power. Most immediately for him, he was claiming that he did not rape for one of the prohibited purposes required for a finding of torture. The ICTY Trial Chamber rejected this argument, in part, on the basis that the prohibited purpose need only be part of the motivation and does not need to be the predominant or sole purpose.[86] In holding that part of the motivation may be a 'sexual urge', this ruling suggests that the sexual urge is distinguishable from any other purposes of rape. It is important for future rulings that it is recognized that while there may be a sexual urge in rape, there is *always* another element, namely the use of power. Every act of rape is an act of power and therefore with purposes beyond sexual gratification.

Further dicta from the ICTY confirm this approach. In *Prosecutor v Delalic* the ICTY Trial Chamber held that 'the violence suffered . . . in the form of rape, was inflicted upon her by Delalic because she is a woman . . . this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture'.[87] Kelly Askin argues that this 'acknowledges that females are often tortured in ways different than males, and singled out for discriminatory treatment because of their sex or gender'.[88] The import of this ruling is that all rapes of women will constitute a prohibited purpose as all women are raped because they are women.[89] Similarly, in *Kvocka* the Trial

[84] Edwards (n 5) 375–376.
[85] *Kunarac* (n 38), para 816.
[86] ibid.
[87] *Delalic* (n 30) para 941.
[88] Askin (n 72) 324.
[89] There is some debate as to whether or not this is the definitive conclusion from this case. In the subsequent *Kunarac* case the Trial Chamber held that rape and torture could be cumulatively charged. Rosalind Dixon has suggested this means, implicitly, that 'rape does not inherently embody gender discrimination as a constituent mental element': R Dixon 'Rape as a Crime

Chamber found that 'the rape and other forms of sexual violence were committed only against non-Serb detainees in the camp and that they were committed solely against women, making the crimes discriminatory on multiple levels'.[90]

Nonetheless, it must be recognized that the ICTY is dealing with international humanitarian law and discussions of the 'purposive' element of the definition of torture are not, therefore, tethered to state policies or interests. Thus, it has been argued that the purposive element of torture and the text 'discrimination of any kind' needs to be interpreted in the same context as other examples of purposes, namely confessions, the extraction of information and such like.[91] However, it is not clear that this has been definitively determined, with others emphasising that the definition of torture contained in Article 1 of the UN Convention does not list the purposes as exhaustive, specifically referring to 'such purposes as . . .'[92]

If we assume that rape is not a crime of 'passion-gone-wrong',[93] and that 'any other purpose' may be interpreted more broadly as including gendered violence, then what is it that is the purpose of rape? Catharine MacKinnon argues that all rapes are for a purpose—the maintenance of male dominance.[94] The abuse she says is 'neither random nor individual'; it is 'systemic and group-based' and is 'defined by the distribution of power in society'.[95] Rape is not an opportunistic, inexplicable crime committed by one aberrant individual against another. It exists because of, and perpetuates, women's inequality to men. Charlotte Bunch argues that violence against women is political and the 'message is domination: stay in your place or be afraid'.[96] This argument is echoed by Kelly Askin who contends that if 'gender were not a factor, grossly disproportionate instances of sexual violence would not be committed against

in International Humanitarian Law: where to from here?' (2002) 13 European Journal of International Law 697, 700, citing paras 443–460 of *Kunarac* (n 38). However, it could equally be the case that not every rape is torture as the other conditions for a finding of torture are not met. In this light, once the other prerequisites have been satisfied, the purposive burden has also been met.

[90] *Prosecutor v Kvocka*, ICTY-98-30-T (2 November 2001) para 560.

[91] See the discussion in Edwards (n 5) 375–376 and Smith (n 68) 206.

[92] H Burgers and H Danelius, *The United National Convention Against Torture—A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff, 1988) 118, discussed in Copelon 'Recognising the Egregrious in the Everyday: Domestic Violence as Torture' (1994) 25 Columbia Human Rights Law Review 291, 329.

[93] C Niarchos, 'Women, War and Rape: challenges facing the ICTY' (1995) 17 Human Rights Quarterly 649, 650.

[94] MacKinnon rightly asserts that sexual assault is 'best understood as social—attitudinal and ideological, role-bound and identity-defined—not natural'. In other words, there is no biological reason or justification, as such an explanation would not explain female sexual aggressors and male victims, or why many men do not sexually assault others (n 41) 240–241. That rape and sexual assault is gender based is also internationally accepted in various instruments including the UN Convention on the Elimination of all forms of Discrimination Against Women and the Council of Europe: MacKinnon (n 41) 241.

[95] ibid (n 41) 22.

[96] C Bunch, 'Women's Rights as Human Rights: Towards a Re-vision of Human Rights' (1990) 12 Human Rights Quarterly 486, 491.

women'.[97] Thus, sexual violence is gendered in that it is committed, primarily, by men against women and therefore constitutes discrimination. Rhonda Copelon argues that rape is 'sexualized violence that seeks to destroy a woman based on her identity as a woman'.[98] She continues that while men are raped, the 'humiliation in male rape is accomplished by reducing him to the status of a woman'. For this reason, she suggests, 'rape, whether carried out against women or men, is a crime of gender'.[99] In this way, all acts of sexual violence, including male rape, are gendered and discriminatory and are committed for reasons beyond sexual satisfaction.

This recognition of rape as a crime of gender with discriminatory intent has found support internationally. In relation to the UN Convention on the Elimination of All Forms of Discrimination Against Women, the Women's Committee issued a General Recommendation which stated that the 'definition of discrimination included gender-based violence, that is, violence directed against a woman because she is a woman or that affects women disproportionately'.[100] This clearly applies to rape, which predominantly affects women, and supports the argument that rape is a discriminatory act. Further support can be gained from the UN General Assembly which adopted a Declaration on the Elimination of Violence Against Women in 1993 which made it clear that violence against women is a 'manifestation of historically unequal power relationships between men and women'.[101] This proposition also has been jurisprudentially recognised, with the Canadian Supreme Court stating in *R v Oslin* that '[s]exual assault is in the vast majority of cases gender based. It . . . constitutes a denial of any concept of equality for women'.[102]

There is evidence that the European Court of Human Rights understands rape and other forms of sexual violence as being part of an overall picture of discrimination against women. In *MC v Bulgaria*, when surveying the range and purpose of sexual assault laws internationally, the Court referred specifically to the Council of Europe's recommendation on the need to take measures to combat violence *against women*.[103] The Council of Europe's recommendation affirmed that 'violence towards women is the result of an imbalance of power between men and women and is leading to serious discrimination

[97] K Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) 93 AJIL 97, 103.

[98] R Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law' (1994) 5 Hastings Women's Law Journal 243, 246.

[99] Copelon ibid.

[100] CEDAW GR No 19: Violence Against Women, UN Doc A/47/38 (1992), para 6, discussed in Edwards (n 5) 377. See also Copelon (n 46) 134.

[101] Discussed in Hilary Charlesworth and C Chinkin, *The Boundaries of International Law* (Manchester University Press, Manchester, 2000) 235.

[102] *R v Oslin* [1993] 4 SCR 595, 669.

[103] Recommendation of the Committee of Ministers of the Council of Europe on the Protection of Women Against Violence (2002), para 35, referred to in *MC v Bulgaria* (n 4) paras 101 and 162, emphasis added.

against the female sex, both within society and within the family'.[104] Moreover, the Court continued that there have been developments towards adopting laws and practices to prevent violence against women which form part of an 'evolution of societies towards effective *equality* and respect for each individual's sexual autonomy'.[105] The reference here to equality underlines the recognition that sexual assault laws are about women and discrimination and equality, as much as about preventing physical violence. In other words, it is essential to recognize that rape does not happen because of unfulfilled sexual desire, nor does it take place in a social and political vacuum. Gendered violence, including rape, takes place because women remain unequal in society and because it perpetuates such continuing inequalities. It has a purpose and that purpose is gendered discrimination, which should be interpreted as constituting a prohibited purpose for the purpose, so to speak, of constituting torture.

The focus here, thus far, has been on bringing rape within the 'discrimination of any kind' purpose. However, not only does and should rape satisfy this discriminatory purpose required for torture, but it could also come within other prohibited purposes, namely intimidation, coercion or even punishment. As the ICTR stated in *Akayesu*, like torture, rape is in fact 'used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person'.[106] Indeed, other jurisdictions take a more expansive approach to the 'purpose' of torture, with the Inter-American Torture Convention including as prohibited purposes 'personal punishment' and a general criterion of 'or for any other purpose'.[107] The ICTY has expanded the scope of the prohibited purposes in the definition of torture to include 'humiliation' holding that this was warranted 'by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity'.[108] In the particular case, the ICTY held that the victim was raped in order to 'degrade and humiliate' her.[109] Such approaches broaden the definition of torture quite significantly: a purpose of 'humiliation' could be found in a large number of rapes, perhaps even all rapes.

While feminist scholars have criticized the purposive criterion for torture, on the basis that it is 'reinforcing the "male" context of torture as it implies that torture only takes place within the context of arrest, interrogation and detention',[110] it seems clear that it is an essential element of a torture enquiry in Convention jurisprudence. Accordingly, my argument is that all rapes are

[104] Council of Europe, Committee of Ministers, Recommendation Rec (2002) to member states on the protection of violence against women, 30 April 2002.

[105] *MC v Bulgaria* (n 4) para 165, emphasis added.

[106] *Akayesu* (n 2) para 597.

[107] Discussed in Edwards (n 5) 382–384.

[108] *Prosecutor v Furundzija (Judgment)* ICTY-95-17/1-T, 10 December 1998, para 162.

[109] ibid paras 124, 130. Subsequent case law has doubted whether 'humiliation' is a prohibited purpose: see *Krnojelac* (ICTY-97-25), Trial Chamber, 15 March 2002, para 186 and *Simic et al* (ICTY-95-9), Trial Chamber, 17 October 2003, para 79, both discussed in Burchard (n 51) 168–170.

[110] As discussed in Edwards (n 5) 375.

for a purpose, whether it be discrimination, intimidation, coercion or other prohibited reason, such that they automatically satisfy this criterion for torture. There is no evidence yet that the Court will adopt such an interpretation of 'purpose'. However, in increasingly looking to the UN Convention for guidance, I suggest that the Court should endorse a broad interpretation of purpose, beyond just extraction of confessions and information, thereby taking cognizance of the fact that the problem of torture comes not just from physical harm but also from the loss of dignity and respect.[111] Furthermore, while the emphasis on purpose, as an element of torture, shifts the focus onto the perpetrator, as compared with the severity threshold which concentrates on the victim, we must ensure that we are not blinded into concentrating on supposedly individualised reasons for rape, such as sexual gratification, and remember the societal and political context of the reality of rape.

In sum, the claim that all rapes are for a prohibited purpose does not mean that all rapes will constitute torture. Not only must the threshold of severity be met, but the rape in *Aydin v Turkey*, it will be remembered, was perpetrated by a State official. Torture, under the Convention legal system, is about *State* responsibility for serious violence and abuse. A crucial definitional question then becomes what or who constitutes the State? And in what circumstances, therefore, is the State responsible for rape?

V. STATE RESPONSIBILITY FOR RAPE AS TORTURE

Aydin v Turkey was a clear example of rape by the State. Sukran Aydin was raped in detention by a State official for the purposes of intimidation and extraction of information. While this paradigmatic situation falls squarely within the torture protection of Article 3, the more interesting and challenging questions surround the boundaries of the concept of the State and therefore the reach of State responsibility for rape as torture.

Traditionally, the system of international human rights protection has been premised on ensuring state responsibility for breaches of those norms deemed sufficiently fundamental to qualify as 'human rights'. International protection has been necessary in order to hold individual States to account where the State itself is responsible for violating those fundamental rights, as in *Aydin v Turkey*. The international system of human rights protection, therefore, has been premised on securing *State* compliance with established norms and investigating possible *State* violations. The traditional rationale for this 'State actor' requirement is that 'private acts (of brutality) would usually be ordinary criminal offences which national law enforcement is expected to press. *International* concern with torture arises only when the State itself abandons

[111] On the status of the UN Convention approach to torture, the ICTY has opined that there is 'now a general acceptance of the main elements contained in the definition set out in article 1' of the UN Convention: *Furundzija* (n 108) para 153.

its function of protecting its citizenry by sanctioning criminal action by law enforcement personnel'.[112] Accordingly, the Convention system is about *State* responsibility for violations of the Convention. Similarly, and in the specific area of torture, the UN Convention restricts the scope of its definition of torture to conduct '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'.[113] A connection with the State must be established for there to be responsibility and jurisdiction under these legal regimes.

This may all appear obvious and was certainly settled jurisprudence until two particular changes and developments over the last decade or more. The first is the growing recognition that a state-centred approach to international law in general, and international human rights law in particular, is no longer appropriate. As Philip Alston has put it, 'the world is a much more poly-centric place than it was' and viewing the world through the prism of the state is a 'rather distorted image' for the 21st century.[114] Power is more diffuse and non-state actors are more and more responsible for activities hitherto confined to state control. This has an impact on the concept of state responsibility and the scope of the 'State actor' requirement in human rights law. The second development is the growing recognition that for human rights norms to make a real impact on the variety of ways in which peoples' rights are infringed, states need to be more proactive in ensuring protection of rights. Such an advance has meant that human rights obligations on States now extend far beyond the traditional confines of negative rights, towards positive requirements or obligations to take action to secure and protect rights.

Returning to the torture context, these developments have complicated the picture and have challenged the assumption that torture is only realized where acts are carried out directly by the state. A key area of critique of the state actor requirement is in relation to sexual violence and, in particular, its use in evading state responsibility for the prevalence of sexual violence. Indeed, as Alice Edwards remarks, the UN Convention torture definition, with its requirement for State participation, has been 'the object of near unanimous disapproval by feminist writers'.[115] For example, Hilary Charlesworth, Christine Chinkin and Shelley Wright argue that the 'severe pain and suffering that is inflicted outside the most public context of the State—for example, within the home or by private persons, which is the most pervasive and

[112] N Rodley, 'The Evolution of the International Prohibition of Torture' in Amnesty International, *The Universal Declaration of Human Rights 1948–1988: Human Rights, the UN and Amnesty International*, 63, discussed in H Charlesworth, C Chinkin and S Wright 'Feminist Approaches to International Law' (1991) 85 AJIL 613, 628.

[113] Article 1 (n 62).

[114] P Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed), *Non-State Actors and Human Rights* (OUP, Oxford, 2005) 3, 4. See also R McCorquodale, 'An Inclusive International Legal System' (2004) 17 Leiden J of Intl L 477.

[115] Edwards (n 5) 368.

significant violence sustained by women—does not qualify as torture despite its impact on the inherent dignity of the human person'.[116] They are therefore critical of the distinction drawn between acts by state officials, which may constitute torture, and acts by private persons, which will not. Such a distinction clearly has significant implications for the offence of rape, as it is most often perpetrated by private individuals against other private individuals.

However, in light of the developments and changes in human rights norms in recent years, it may be that the boundaries between State and non-State action are not as clear as they once were and therefore that there is increased scope for a broader concept of state responsibility. Indeed, Malcolm Evans refers to a 'dramatic broadening' of what falls within the scope of acts of state officials under Convention jurisprudence.[117] However, before addressing what constitutes State acts, the first question is to clarify whether, for acts to come within torture under Article 3, they must indeed be carried out by State officials.

As noted above, the UN Convention restricts the scope of acts of torture to conduct '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'. Thus, while the UN Convention is explicit in its definition of when State liability for torture will ensue, the European Convention is absent on such issues and the Court has been reluctant to draw clear boundaries. Nonetheless, in every case in which there has been a positive finding of torture, the conduct in question has been meted out by a state official.[118] But does this mean that for there to be torture there must have been acts of State officials? In *Kaya v Turkey* the Court considered whether Hasan Kaya had been tortured before being killed. The Court noted that it had not found that any State agent was directly responsible for Kaya's death,[119] but continued nonetheless to consider whether

[116] Charlesworth et al (n 112) 629.

[117] Evans (n 18) 378.

[118] In relation to acts by State actors, the Court does appear willing to draw the net wider than just state sanctioned acts. In *Cyprus v Turkey* (1982) 4 EHRR 482 while there was no finding of torture for the rape of Cypriot women by Turkish soldiers, there was inhuman treatment carried out by 'State actors' which was beyond their official authority. This responsibility for ultra vires acts has been accepted by the Human Rights Committee responsible for the implementation of the International Covenant on Civil and Political Rights. The Human Rights Committee has found that State responsibility extends to ultra vires acts of State officials, HRC GC no 7, para 2, by stating that state responsibility extends to acts 'whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity': HRC GC no 20, paras 2 and 13, discussed in Edwards (n 5) 365. This is a logical extension in the scope of acts attributed to States in that a victim may not know whether the person is acting under State authority, or ultra vires, and due to that lack of knowledge, the perception of the nature of the ill-treatment does not change. In other words, the aggravation of the harm of rape by a state official, as discussed above, is present whether or not the person is acting within their authority or not. Equally, control exercised by the state over its officials may well be greater if liability extends to ultra vires acts. Therefore, it is argued that the European Court should develop its jurisprudence, if/when confronted with this issue, to extend liability for ultra vires acts to encompass tortuous treatment, following the international example of the Human Rights Committee.

[119] *Kaya v Turkey* [2000] ECHR 129, para 114.

his treatment constituted torture. In setting out the relevant criteria, the Court referred to its previous jurisprudence on the 'special stigma' of torture, the requirement of very serious and cruel suffering and to the need to demonstrate a 'purposive element' to the conduct.[120] The fact that the Court explicitly stated that a State agent was not responsible for the acts in question, but continued to consider whether the treatment amounted to torture, is a clear implication that for a finding of torture, there does not have to be direct acts by a State agent. In the case itself, the Court held that it was the medical evidence which did not disclose a level of suffering of sufficient severity to amount to torture.[121]

While *Kaya v Turkey* cannot be taken as dispositive of this issue, clear implications can be drawn regarding the Court's approach. When considered together with other jurisprudence of the Court, it seems that this is another example of the Court retaining flexibility over the scope of Article 3, and the torture protection therein, in order to meet new demands and situations. The Court has often stated that the Convention must be interpreted as a 'living instrument which must be interpreted in the light of present-day conditions' and specifically in relation to torture it held in *Selmouni* that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently today'.[122] While *Selmouni* was about thresholds for torture, it demonstrates the flexibility being discussed. More specifically, in *D v UK*, concerning deportation to face ill-treatment, the Court held that there could be a violation of Article 3 even where the risk of harm to the individual concerned did not 'engage either directly or indirectly the responsibility of the public authorities' in the relevant State.[123] It continued that the Court 'must reserve to itself sufficient flexibility to address the application of that Article [Article 3] in other contexts which might arise'.[124]

Considering this line of case law, and its implications for the current discussion of rape and torture, it seems possible that a finding of torture may be possible even where the treatment at issue is not directly perpetrated by a State official. This does represent a significant departure (and advance) from traditional understandings of state responsibility for torture. Further, it would go some way towards meeting some feminist criticism of the state actor requirement in view of the fact that the vast majority of rapes are not perpetrated by State officials, but by private individuals and all such rapes could possibly constitute torture, so long as they met the threshold of severity of harm (the purposive element being met in all rape cases).

[120] ibid para 117.
[121] ibid para 118.
[122] *Selmouni v France* (n 73) para 101.
[123] *D v UK* (1997) 24 EHRR 423, para 49.
[124] ibid para 49, discussed in R McCorquodale and R La Forgia 'Taking off the Blindfolds: Torture by Non-State Actors' (2001) 1 Human Rights Law Review 189, 210–211.

Nonetheless, jurisdiction of the Convention is based on State responsibility and so there remains the requirement for a nexus to the state. This State responsibility can take a number of different forms, discussed below in three broad categories. First, there has been considerable debate and case law development in recent years surrounding the circumstances in which the acts of non-state actors can be attributed to the state. In the case of rape as torture, these debates have most resonance in states where there has been a breakdown in State power such that, for example, rebel groups are in de facto control of parts of territory. Thus in *Elmi v Australia* the Committee Against Torture (CAT), the supervisory body that interprets and applies the UN Convention on Torture, determined that actions by non-State actors could, in certain circumstances where they were acting with de facto State authority, be deemed sufficiently 'State-like' to bring those actions within the state responsibility requirement of the UN Convention.[125] Nonetheless, the Committee has interpreted this 'State-like' quality in a very limited way, restricting the scope of non-state actors and the concept of acquiescence to 'quasi-governmental structures which exercise effective control over a territory or where there is no central government'.[126] This is a very high threshold and, as Edwards points out, precludes the application of the UN Convention to many harms facing women.[127] Further, in the European context regarding rape, this approach to expanding the reach of State responsibility to non-state actors exercising de facto state control is of limited relevance as few rapes in such circumstances occur within Europe.[128]

The second and more common type of situation is where it is alleged that private individuals acted with state acquiescence or consent. As noted above, under the UN Convention state liability includes acts 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'. Much debate has surrounded the scope of this consent or acquiescence standard. A significant case in this respect is *Dzemajl v Yugoslavia*, under the UN Convention, in which it was held that the state had acquiesced to the cruel, inhuman or degrading treatment of the Roma complainants which was witnessed by the police and in respect of which there was a wholly inadequate investigation. The CAT decided that the relevant state authorities had 'acquiesced' in the ill-treatment on the basis that although the police 'had been informed of the immediate risk that the complainants were facing and had been present at the scene of events', they 'did not take any appropriate steps to protect the complainants'.[129] The CAT went on to affirm that although 'the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were

[125] (120/1998), 7 IHRR (2000). Discussed in McCorquodale and La Forgia, ibid 193–198.
[126] Edwards (n 5) 374.
[127] Edwards (n 5) 388.
[128] With the obvious exception of the Balkan conflict.
[129] *Dzemajl v Yugoslavia*, Communication No 161/2000, UN Doc CAT/C/29/D/161/2000 (11 November 1999) para 9.2.

committed with their acquiescence and constitute therefore a violation' of Article 16 prohibiting cruel, inhuman or degrading treatment by the state party.[130]

Dzemajl is an example of a case where the state was held responsible for cruel, inhuman or degrading treatment as a result of its consent or acquiescence. While this was a case of ill-treatment, rather than torture, there does not appear to be any valid reason why these principles should not equally apply to the torture prohibition.[131] Further, Edwards suggests that if the reasoning in this case were followed, 'it could prove pivotal to holding the state responsible in specific domestic or family violence or other non-state-actor cases'.[132] Similar cases can be found in Convention jurisprudence, though the language of consent or acquiescence is not used, but that of 'positive obligations' and some of the facts are less stark than in *Dzemajl* where the police were actually present and witnessing the violence. For example, in *Z v the UK*, the Court found a violation of Article 3 where a local authority had failed to take steps to protect children known to be at risk of ill-treatment by their parents.[133] The Court noted that states are required 'to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals'.[134] The Court continued that such measures should provide effective protection and 'include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.[135] Malcolm Evans emphasizes that this ruling seems 'to be the most far reaching pronouncement yet on the scope of State responsibility under Article 3'.[136]

This ruling is similar to *Kaya v Turkey* where the Court held that the State 'authorities knew or ought to have known' that Hasan Kaya was at risk of being targeted by 'certain elements of the security forces or those acting on their behalf'.[137] It continued that the failure to 'protect his life through specific measures and through the general failings in the criminal law framework placed him in danger not only of extra-judicial execution but also of ill-treatment from persons who were unaccountable for their actions'.[138] It concluded that 'the State is responsible for the ill-treatment suffered by Hasan Kaya after his disappearance and prior to his death'.[139]

[130] ibid para 9.2.

[131] Note that there was an Individual Opinion submitted by two members in dissent at the Committee's decision which argued that the conduct in question did amount to torture within the meaning of Article 1 of the UN Convention, discussed in Edwards (n 5) 373.

[132] Edwards (n 5) 373.

[133] *Z v UK* (2002) 34 EHRR 3. See also *Al Adsani v UK* (2002) 34 EHRR 11, para 38: 'It is true that taken together, Articles 1 and 2 place a number of positive obligations on the High Contracting Parties, designed to prevent and provide redress for torture and other forms of ill-treatment.' See also *A v UK* (1999) 27 EHRR 611, para 22.

[134] *Z v UK*, ibid.

[135] ibid para 73.

[136] Evans (n 18) 379.

[137] *Kaya* (n 119) para 74.

[138] ibid para 116.

[139] ibid.

While in both *Z v the UK* and *Kaya v Turkey* the State was held responsible for the ill-treatment, not torture, of the individuals involved, there is nothing to suggest that a similar finding could not be made in respect of torture. In *Z v the UK* the Court includes reference to torture when outlining its approach and in *Kaya v Turkey* it considered the possibility of torture, but rejected that claim only on the basis of the medical evidence, not principle. The Court classifies these cases as ones involving 'state responsibility' where the 'authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they know or ought to have known'.[140] This type of situation is distinguished from State responsibility 'where the framework of law fails to provide adequate protection',[141] but which is still characterized as part of the positive obligations of the State.

Arguably, the State responsibility in both of these cases, and similar ones, may be better characterised as responsibility due to the consent or acquiescence of the state to known harms, or those in which it was deemed that they ought to have had knowledge. In this way, as Nigel Rodley argues 'government officials at all levels may be held responsible if they failed to stop torture where it occurs. Failure so to act could well be interpreted at least as acquiesence'.[142] So, acquiescence encompasses both situations where the state has effectively lost control of part of a territory and where it takes no action in relation to the known activities of non-State actors and private persons.[143]

This analysis differentiates between two situations which have generally both been classed as involving the State's positive obligations: first, where the State is aware of the harm or possible harm, but fails to take action (as in *Z v the UK*) and, secondly, where there is a more generic failing on the part of the state, in terms of its legislative or administrative structures or processes. The former situation, it has been suggested above, should be characterised as engaging the responsibility of the State due to its consent or acquiescence, with the latter cases incurring States' 'positive obligations'. The value in separating out the different forms of positive obligations is in terms of culpability. *Z v the UK* arguably differs from other cases characterised as engaging the state's 'positive obligations' such as *X and Y v the Netherlands*, where the Dutch state failed to proscribe to a sufficient extent the rape of a mentally disabled individual and *MC v Bulgaria* where the Bulgarian state was held responsible for its failure to ensure that all rapes were appropriately investigated and proscribed by law. The difference is that in *Z v the UK* and similar cases the State has been put on notice and, in failing to take action, the State allowed the particular ill-treatment or torture to continue. In this way, the

[140] ibid para 115. [141] ibid.

[142] N Rodley, *The Treatment of Prisoners under International Law*, (2nd edn, Clarendon Press, Oxford, 1999) 100, quoted in McCorquodale and La Forgia (n 124) 206.

[143] As suggested by McCorquodale and La Forgia (n 124) 206.

State has direct responsibility for the acts, and analogising this to the UN Convention system, the state actor requirement therein would be fulfilled.

In relation to the offence of rape, this situation, in which the authorities have cognizance of a known risk, is most likely to occur in the context of other forms of sexual or gender-based violence, such as domestic abuse in the home. This is an area in which is it well recognised that States are generally poor at responding to instances of abuse brought to their attention. The increased level of culpability attributed to a 'consent or acquiescence' finding of torture or ill-treatment, may have an effect of ensuring greater cognizance is taken of reports to the relevant State authorities. This situation is differentiated from one in which a State has a 'mere inability to act or lack of knowledge' which would not satisfy the current UN Convention standard of 'consent or acquiescence'.[144]

Such circumstances differ from that in cases such as *MC v Bulgaria* where the failings identified by the Court, relating to the legislative, administrative and prosecutorial failings in respect of rapes not involving violence, applied equally to all citizens. In this sense, it is a universal failing which existed prior to any actual instance of abuse or harm in the case in question. In such circumstances, where the State was unaware of a particular risk by non-state actors, it cannot be held directly responsible for not preventing it. But it can be held responsible for either administrative failings in terms of investigations and/or for general inadequacies of the legislative framework. Thus, in *MC v Bulgaria* the State was not held responsible for the alleged rape itself, but merely for its failure to ensure an adequate investigation, as well as the State's failure to have in place the appropriate mechanisms for dealing with all forms of rape: both options being described as the 'next best thing'.[145] On the contrary, following the analysis suggested, in *Z v the UK* the State would be held directly responsible for the ill-treatment, with appropriate political and financial consequences.

This should not suggest that a finding that a State has violated its positive obligations is not significant. Indeed, it is possible to argue that it is only through such rulings, if they effect the necessary changes at state level, that real change and improvements will be generated. The situation is as stark as Clapham has claimed:

> 'If the national criminal system is unable or unwilling to prosecute certain acts of violence, it becomes a matter for the European Court of Human Rights, which will hold the state responsible for failing to protect individuals from non-state actor violence by ineffectively securing their human rights.'[146]

To conclude this section, it has been argued that the Court is more fluid in its approach to determining whether torture, or ill-treatment, has been established, than other human rights instruments. While all positive findings of

[144] Edwards (n 5) 374. [145] Evans (n 18) 379. [146] Clapham (n 6) 376.

torture to date have indeed involved State actors, there is no indication in the jurisprudence that this is an essential criterion for a finding of torture. It was then argued that the concept of positive obligations could usefully be developed so that where the State has been made aware of certain harms, or risk of harm, it is held liable for direct acts of torture (or ill-treatment) on the basis that it either consented or acquiesced in the treatment in question. Such a development would follow, and develop, the approach of the UN Convention, which the Court has been increasingly citing in recent cases. Such jurisprudential developments would ensure that States are held directly responsible for acts of rape in a greater number of situations than is presently the case. This direct responsibility for torture is important symbolically and has jurisprudential and financial implications. As Edwards has suggested, while feminist criticism of the UN Convention definition of torture is valid, this is not so much in relation to the fact that the claim has to be mounted against a public official or the State, since this is a prerequisite for any human rights violation under international law, but in relation to the fact that the concepts of 'consent or acquiescence have failed to be interpreted in a sufficiently broad manner'.[147]

VI. CONCLUSIONS

The United Nations has noted that 'significant efforts have been applied to redefine the meaning of human rights to encompass the specific experiences of women'.[148] Such efforts were successful in *Aydin v Turkey* which represented a significant triumph in ensuring recognition for the harm of rape as torture. Yet, *Aydin v Turkey* was a paradigmatic torture case, perpetrated by a state official, in State detention, for ostensibly political purposes. Since this judgment, the Court has developed its jurisprudence on torture, and on sexual violence, in a number of important ways. Specifically in relation to torture, the Court has entrenched the purposive element of the definition of torture, at the same time as retaining flexibility in its approach and, most remarkably, has alluded to the possibility of torture by private individuals. In its sexual violence case load, the Court has repeatedly emphasized the gravity of such harms, recognising their assault on human dignity and autonomy, and as a result has regularly found State responses totally inadequate.

Bringing these two strands of jurisprudence together, it is possible to be optimistic about the future approach of the Court to cases of rape as torture. Indeed, if the Court continues to develop its jurisprudence on torture, recognizing torture beyond the paradigmatic, it will begin to address the varied ways in which women are tortured and the fact that their torturers are so often

[147] Edwards (n 5) 375.

[148] Report of the Secretary-General submitted pursuant to Commission Resolution 1998/29, 18 December 1998, UN Doc E/CN.4/1999/92, para 12, discussed in Clapham (n 6) 15.

private individuals. Further, if the Court follows through its approach to sexual violence, as constituting a key factor in women's inequality and continuing as a result of societal and political failings, it will recognize that the purpose of such violence is discriminatory. And, if the Court advances its approach to state responsibility, demanding that states take greater steps to both forestall the occurrence of human rights abuses and take concrete action when informed of existing harms or risks of harm, more may be done to prevent sexual violence and better procedures may be put in place to investigate complaints and ensuring justice. My optimism is therefore contingent. Nonetheless, there are clear grounds for hoping that the Court may once again, as it did in *Aydin v Turkey*, show the international community the way forward in treating rape as torture.