RECONCEPTUALIZING DOMESTIC VIOLENCE IN INTERNATIONAL LAW

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INTRODUCTION

And yet I fear you, for you're fatal then
When your eyes roll so. Why I should fear I know not,
Since guiltiness I know not, but yet I feel I fear.¹

This is the fact. Every day, throughout the world, women are subjected to extreme acts of physical violence, which take place within the beguiling safety of domesticity. The violence is severe, painful, humiliating, and debilitating. And it is common. It is a phenomenon that stretches across borders, nationalities, cultures, and race. A binding characteristic of communities throughout the world, almost without exception, is the battering of women by men.²

¹ Desdemona expresses her fear of Othello’s rage. WILLIAM SHAKESPEARE, OTHELLO act 5, sc. 2 (Norman Sanders ed., Cambridge Univ. Press 1984). ² The battery of women by male intimates has been documented literally throughout the world. Although reported statistics differ, some reports maintain that within a twelve month period as many as 50% of women around the world report being hit by their intimate partners. See CTR. FOR HEALTH AND GENDER EQUITY, POPULATION REPORTS, ENDING VIOLENCE AGAINST WOMEN 4 tbl.1 (1999), http://www.infoforhealth.org/pr/111/violence.pdf (last visited Nov. 11, 2003) [hereinafter ENDING VIOLENCE AGAINST WOMEN]. A United Nations international survey estimates that in each country, twenty to fifty percent of women suffer domestic violence. See UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, 1 (United Nations Children’s Fund Innocenti Research Ctr., Innocenti Digest No. 6, 2000), http://www.unicef-icdc.org/publications/pdf/digest6ie.pdf (last visited Nov. 11, 2003) [hereinafter UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS]. See, e.g., FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE IS A SERIOUS, WIDESPREAD SOCIAL PROBLEM IN AMERICA: THE FACTS, at http://endabuse.org/resources/facts (last visited Nov. 11, 2003): Around the world, at least one in every three women has been beaten, coerced into sex or
In this article I review the problem of domestic violence and propose a new approach, through international law, towards finding a solution. An emerging principle in international human rights law is that violence against women is a human rights violation. In the wake of this fledgling jurisprudence, it is possible to identify two specific manifestations of criminalized gender-based harm: namely, mass rape as a war crime or crime against humanity and female genital mutilation as a human rights violation. These crimes otherwise abused during her lifetime... On average, more than three women are murdered by their husbands or boyfriends in... [America] every day. In 2000, 1,247 women were killed by an intimate partner. The same year, 440 men were killed by an intimate partner.


7 There are several decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda that address sexual violence. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 37 I.L.M. 1399 (1998); Prosecutor v. Delalic, Case No. IT-96-21-T, 40 I.L.M. 630 (2001); Prosecutor v. Furundzija, Case No. IT-95-171-T, 38 I.L.M. 317 (1999). See also Kelly D. Askin, Prosecuting Wartime Rape and Other
jettisoned violence against women into the international legal discourse, paving the way for the criminalization of other forms of harm. I propose that there is a third category of violence against women that should also receive international attention simply because it is one of the most basic and fundamental rights of women that is being violated. This is the right to be safe from extreme forms of domestic violence, or what I call private torture.

Most States recognize the phenomenon of domestic violence. Many countries have taken social and structural steps to alleviate the distress experienced by women. However, legally, progress has been limited. While legislation may be enacted in a variety of countries to address domestic violence, the implementation of such legislation is peculiarly ineffective and the predominant mode of redress continues to emanate from sociologists, psychologists, and activists. A real solution continues to elude the law, lawmakers, and legal practitioners.

One of the main causes of the rift between the law against domestic violence and the implementation of such law, is the

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4 Askin, *supra* note 3, at 347–48:
The explosive development of gender-related crimes in international law within the last ten years reflects the international community’s denouncement of the crimes and the commitment to redress them . . . Further, the large and ever increasing number of human rights treaties, declarations or reports, conference or committee documents, U.N. resolutions and decisions by human rights bodies promulgated since the 1990s that condemn, protect against, prohibit, or outright criminalize gender-related violence reflects the commitment of the international community to afford accountability for these crimes, irrespective of the presence of an armed conflict.


5 See Report of the Special Rapporteur on violence against women, *supra* note 2, at 33, 36 (stating that in addition to being a legal problem, “domestic violence is a health, . . . economic, educational, developmental and human rights problem,” and the protections—including those provided by legislation—that commence after the incident do not “appear to have any important impact on the prevention of woman-battering”). In South Africa some of the most effective work is conducted by non-governmental organizations (“NGOs”) that service not only the legal, but also the social, emotional, and financial needs of battered women. See Robin S. Levi, *South Africa: Peace Starts At Home*, FAMILY VIOLENCE PREVENTION FUND, at http://endabuse.org/programs/printable/display.php?DocID=108 (last visited Nov. 15, 2003) (attributing the creation of services such as a female trauma center and a rape treatment center in South Africa to efforts by NGOs); see also Domestic Violence, Abuse of Elderly And Children Concern Conference Delegates, EAST CAPE NEWS, (Oct. 16, 2003), http://allafrica.com/stories/printable/200310160282.html (last visited Oct. 27, 2003) (observing that greater coordination between government and NGOs is necessary in order to develop an integrated response to domestic violence).
intimacy of the relationship between the aggressor and the abused.\(^6\) However, an additional explanation for this schism is that the law cannot address something that has been inaccurately conceptualized.

‘Domestic violence’ is a term that applies to a miscellany of harm but by using a single, undifferentiated term of ‘domestic violence,’ current legislation fails to grasp the mélange of harm produced by battering.\(^5\) If domestic violence is properly defined to reflect the divergence of harm committed against women, it may become easier to identify effective, appropriate, and direct tools to minimize this phenomenon.

Currently, falling within the one composite term of ‘domestic violence’ are acts as diverse as shoving, pushing, or verbal denigration (“category one”) on the one hand, and battering, breaking bones, burning, raping, and torturing (“category two”) on the other. While all these forms of harm do constitute intimate violence, there is an apparent distinction between them: intuitively we need to separate shoving-slapping-shouting, from the more physically extreme, battering-breaking-raping. This separation is not to attribute a lesser status to category one, but rather to carve out a more extreme physical form of violence so that each category has the appropriate mechanism to combat its occurrence. It is category two, extreme acts of domestic violence, which I seek to address as ‘private torture.’ It is this category of violence that, notwithstanding its extremity and widespread occurrence, continues rampant, literally throughout the world. And it is this category that I propose be addressed by international law as an international

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\(^6\) ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 13 (2000) (explaining that long after courts rejected the notion that a man had a right to beat his wife, formal and informal barriers to prosecution persisted, largely driven by a perceived need to protect familial privacy and “domestic harmony”). See Levi, supra note 5 (reporting that in South Africa “police still view domestic violence as a private matter”).

\(^7\) I use the term “battering” interchangeably with domestic violence. An example of successful conceptual reformulation for the purposes of the law, is the conceptualization of sexual harassment as an actionable offense. See Ann Scales, Law and Feminism: Together in Struggle, 51 U. KAN. L. REV. 291, 294 (2003). Prior to this relatively new concept, women in the workplace were forced to endure sexually-invasive conduct without redress. See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979). Women’s options were to tolerate the abuse or leave the workplace. See id. The reformulation of this conduct as the actionable offense of sexual harassment gave women the recourse needed to address this form of gender discrimination. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing that conduct may be prohibited as “sexual harassment” even when it is not “directly linked to the grant or denial of an economic quid pro quo”). However, it is noted that the reformulation of domestic violence is but one part of a much larger multi-disciplinary approach to this phenomenon.
human rights violation.

The semantics of definition, however, are not the sole objective of this article. The value of re-conceptualizing extreme forms of domestic violence is the revelation that private torture is as acute and harmful as official torture. Consequently, private torture is not only a national issue: it has universal dimensions since it is internationalized by various qualitative components. The misconception of domestic violence as a purely national issue is part of the failure of most countries to address effectively the quandary of violence against women. Due to the social, financial, and political inequalities between men and women, women predominantly occupy the private realm where violence tends to be perceived as less objectionable and more commonplace than other crimes. The result is that legal infrastructures, designed to distinguish between public and private law (and life), are unable to assist many battered women.\(^8\) Through an appropriate conceptualization of extreme forms of domestic violence as a crime in international law that is distinctive, it may be possible, in conjunction with grass-roots activists and other professional disciplines, to trigger a refashioning of the legal response both internationally and nationally.

I do not turn lightly to international law as a remedy.\(^9\) International law imposes obligations on bound States and, through international pressure, such obligations may be enforced. The proposal that private torture constitutes a contravention of international law is rooted in the notion that international law contributes to “a whole arsenal of methods and techniques by which policy is projected and implemented.”\(^10\) The manner in which international law effects, and is affected by, domestic law is addressed by Harold Hongju Koh who maintains that the

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\(^8\) Schneider, supra note 6, at 95 (“Although battered women now have remedies that are available to them ‘on the books,’ they have no assured access to lawyers to represent them. Many battered women cannot afford to hire a lawyer. Moreover, few lawyers are sensitive to their particular problems.”).

\(^9\) The efficacy of international law in domestic legal structures is a debate, the examination of which exceeds the ambit of this article. In summary, a common mistrust of international law stems from the perception that the individual is too removed from international law to benefit from its precepts. Others hold that international human rights law particularly augments domestic structures thereby providing greater legal redress for victims of human rights violations. See Mark W. Janis, An Introduction to International Law, 174 (1988) (“International human rights law posits the direct application of international law to individuals and in some instances even gives individuals direct access to international legal machinery.”).

internalization of international law into domestic law is a:

process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation’s domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.\(^{11}\)

Most international human rights law is implemented by and through domestic courts.\(^ {12}\) Where there is a supra-standard that criminalizes private torture, the tenets of such standard may be applied nationally through legislation and court decisions. However, if there is no enunciated universal standard regarding private torture, the development of national legal systems loses a source of law that has become most relevant in the human rights context.\(^ {13}\) It is for this reason that I turn to international law as a supplement to domestic law for a possible solution to private torture.\(^ {14}\)

In Part I of this article I consider the problem of domestic violence by focusing on the instances where domestic law is unable to protect victims and apprehend perpetrators of domestic violence.\(^ {15}\) This is closely connected firstly, to the incorrect legal categorization of all forms of intimate violence under the rubric of ‘domestic violence.’ The second reason for the deficiencies of domestic law is that the private realm within which domestic violence takes place precludes the effective intervention of the law. For several reasons women continue to operate primarily in the private realm, with the result that harm against women in this context is not easily curtailed by existing domestic legal infrastructures. Because of these factors I propose the re-conceptualization of extreme forms of domestic


\(^{14}\) Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 Yale L.J. 619, 623 (2001) (“State, federal, and transnational laws are all likely to be relevant [to pursuing women’s rights to safety].”). The question of whether international law ‘works’ is widely debated. See Harold Hongju Koh, How Is International Human Rights Law Enforced?, 74 Ind. L.J. 1397, 1401 (1999) (proposing that the relationship between enforcement and obedience is premised on the notion “that the most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience”).

\(^{15}\) See infra notes 23–96 and accompanying text.
violence as private torture.\textsuperscript{16} While intimate abuse falls within the ambit of domestic violence law, private torture has international characteristics and therefore requires the application of both domestic and international law.\textsuperscript{17}

In Part II, I turn to international law as a suitable and necessary supplement to domestic law.\textsuperscript{18} Academics and activists have compared battering to torture and other international human rights violations.\textsuperscript{19} The concurrent development of international legal instruments and agencies focusing on women’s rights over the past decade, presents a natural juncture to explore the explicit legal consequences emanating from these analogies. While it is possible to investigate the establishment of private torture as an independent human rights violation in international law,\textsuperscript{20} for the purposes of this article I proffer the possibility of delineating private torture as an actionable offence under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention against Torture”).\textsuperscript{21} Due to the severity, the isolation, and the discrimination inherent in private torture, this form of violence against women is an international issue and one that should generate the application of the Convention against Torture.\textsuperscript{22}

\textsuperscript{16} See Celina Romany, Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, 6 Harv. Hum. Rts. J. 87 (1993). Romany formulates the benefits of legal re-conceptualization or evaluation as revealing “the diverse layers of coercion embedded in legal discourse and aims at rehabilitating reflection as a category of valid knowledge which enables individuals to assess and assert their true interests against those which are deemed objective.” Id. at 98–99.

\textsuperscript{17} See id. at 101–02 (finding that the “enshrinement of family in conventional human rights law” has advanced the notion that the patriarchal family is beyond the reach of the State, and the entrenchment of this fiction has “contributed to the general condoning of the abuse of women within the privacy of the family”).

\textsuperscript{18} See infra notes 97–254 and accompanying text.


\textsuperscript{20} The author is developing this concept as part of a broader project.


\textsuperscript{22} See Amnesty International, Human Rights Are Women's Rights 85 (1995) (“No country in the world treats its women as well as men.”); Kathleen Mahoney, Theoretical Perspectives on Women’s Human Rights and Strategies for their Implementation, 21 Brook. J. Int’l L. 799, 799 & n.1 (1996); see also Dworkin, supra note 19, at 65 (opining that men protect “men who hurt women because ‘any man’ will or might or can [hurt women]”).
I. THE PROBLEM

A. Language

In understanding ‘domestic violence,’ it is necessary, briefly, to consider the language used to describe both the acts of violence and those who suffer from its application. One of the most progressive definitions of domestic violence appears in the South African Domestic Violence Act of 1998 (“the Act”).23 The Act is a relatively recent and, arguably, liberal piece of domestic violence legislation and serves as a useful working instrument for the purposes of understanding the current definition of domestic violence. The Act defines domestic violence as:

(a) physical abuse; (b) sexual abuse; (c) emotional, verbal and psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property; (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.24

‘Domestic violence’ predominantly refers to acts of violence between adults. While children suffer from such harm, I have not included them within the ambit of this form of family violence.25 The focus of this analysis will be on women who suffer extreme forms of domestic violence as a manifestation of gender-based crimes.26 I seek to explain the absence of private torture as a specific crime from both domestic and international law with

24 Id. § 1. Section 1 of the Act defines physical abuse as “any act or threatened act of physical violence towards a complainant;” sexual abuse as “any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant;” and economic abuse as including “the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity . . . .” Id.
25 See MARYLAND INST. FOR CONTINUING PROF’L EDUC. OF LAWYERS, INC., DOMESTIC VIOLENCE CASES: HANDLING THEM EFFECTIVELY IN CIRCUIT AND DISTRICT COURT 5–6 (2001) [hereinafter DOMESTIC VIOLENCE CASES]. While the plight of children who suffer indescribable harm remains a reality, its recognition in international law has been achieved and as such the discussion falls outside the purview of this article.
26 SCHNEIDER, supra note 6, at 25 (“That women are sometimes violent in intimate relationships does not diminish the importance of discerning the role gender plays . . . [when considering the make-up of domestic violence].”).
reference to sex and gender discrimination, highlighting “the role gender plays in the etiology of domestic violence.”

As such, I acknowledge, but will not focus on, the numerous other groups that suffer similar forms of abuse, such as the disabled and the elderly.

The clear distinction between the type of harm under examination and the many other types of violence within any society is the mooring of ‘domestic violence’ in “its historical roots of gender subordination and feminist activism.”

I use the term ‘private torture’ to refer to extreme forms of domestic violence. These acts of harm that constitute private torture usually incapacitate the victim. Because of physical restraint, psychological/financial control, or threats of violence (either to the victim or third parties) the victim is literally unable to escape. In this way the victim is imprisoned under the control of the abuser. Private torture involves repeated harm or the repetition of threats of harmful incidences that have taken place in the past. As the name suggests, the acts of violence inherent in private torture are at once extreme and methodical. The distinction between domestic violence and private torture is discussed in greater detail below.

A common question is whether the term ‘victim’ or the term ‘survivor’ should be used when referring to a woman who suffers abuse. A concern is that the word ‘victim’ imposes on women a

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27 Id.
28 See id. at 70–71 (noting that elder abuse is “vastly underreported”).
29 Id. at 28. Some academics have denounced this connection, arguing that “[o]ne should not assume that a special explanation is required when men hit women. The study of violence against women belongs under the study of violence, not gender.” Richard B. Felson, Violence & Gender Reexamined 4 (2002). I hope to demonstrate that indeed there is a special component to violence against women that distinguishes it from non-gender-based violence. In making this distinction, however, I do not attempt to minimize the cruelty of other forms of social violence. My purpose simply is to focus on the violence that affects women because of their gender and why the laws of their countries fail adequately to protect them.
30 The forms of violence which would fall into the category of private torture are not limited to the location of the home but are defined with reference to the perpetrator and victim of the harm. The words domestic or home are used to import the characteristic of intimacy or privacy.
31 See infra Part I.E.
pernicious perception of weakness and vulnerability, which perpetuates the subjugated status inherent within domestic violence. On the other hand, the word ‘survivor’ is problematic in its implied commentary on those women who either kill or are killed as a result of the abuse. The implication of the term ‘survivor’ may be that women who do not escape the abuse are failures, weak, or that in some way they consented to the abuse. I propose that a woman who does not flee and ‘survive’ is no more weak than the one who does. Therefore, I choose to refer to women in domestic violence situations as victims and to the process of harm as victimization. In no way is the term ‘victim’ used to suggest inferiority or weakness. Where necessary, I refer to ‘survivors’ of domestic violence and torture to denote that the cycle of violence is over.

B. The Lacuna

Many domestic legal systems are notoriously unable to protect women from private torture. In some countries, the official

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33 Cf. SCHNEIDER, supra note 6, at 60–62 (grappling with the use of the phrase “battered woman” to describe a survivor of domestic violence); see FELSON, supra note 29, at 136, 190 (allowing that in the case of rape, a trend has developed which labels women “rape survivor[s],” thus obviating a sense of passivity which necessarily accompanies the term “victim”).

34 Lenora Ledwon, Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure, 73 TEMP. L. REV. 1185, 1188–89 & n.23 (2000) (opting for use of the term “‘victim’” rather than “‘survivor’” in a study dealing, in part, with the use of battered women’s diaries in court and explaining that this is because “many of the women involved in these cases do not, in fact, survive”).

35 If any significant inroad is to be made into the occurrence of private torture, it is necessary to avoid superimposing guilt onto or deflecting responsibility towards the innocent.


37 CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 1031 (2001): The World Health Organization asserted that violence against women causes more death and disability among women aged fifteen to forty-four than cancer, malaria, traffic accidents, and war. . . . In Kenya, for example, the U.N. estimated that 42 percent of women were battered by husbands or partners. Kenyan laws do not specifically criminalize domestic violence, and offenders were seldom punished. In Pakistan, estimates of spousal abuse ranged as high as 90 percent of all married women. Despite occasional signs of progress . . . everyday violence and discrimination against women remained among the most flagrant and overlooked of human rights abuses.
structures are conducive to or supportive of violence as a means of subduing female family members. In almost all countries, at each stage of the legal process women encounter impediments to their call for protection. This alienates victims of private torture from the law, and the law from such victims.

The police or court clerks are usually a victim’s first point of contact with authority. Predominantly, the gender of the officials and their treatment of female victims of violence constitute a disincentive to pursue a complaint. The police often fail to respond to domestic violence calls and court clerks or lower level administrative personnel are repeatedly reported as aggressive, accusatory, disinterested, and/or hostile. In many instances, “[a]bused women frequently survive their situation by avoiding adversarial encounters and by actively shunning legal assistance.” If a case does proceed to court, the relevant actors may “reinforc[e] the power of . . . [the] batter[er] . . . thus furthering women’s entrapment.” By distinguishing between public and private

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39. SCHNEIDER, supra note 6, at 92 (“Yet, on the level of practice, it is questionable which remedies, if any, are likely to provide real protection for those women who are abused . . . .”).
41. Resnik, supra note 14, at 627 (“Data produced by some twenty states’ judiciaries documented widespread discriminatory practices against female victims of violence by police, prosecutors, judges, and jurors.”).
42. The fact that both officials and abusers are predominantly male reinforces the mantra of the abuser that the law will never help the abused. See SCHNEIDER, supra note 6, at 91 (“The reports of the many state task forces on gender bias in the courts have painstakingly recorded judicial attitudes of denial.”). See, e.g., JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 169–70 (1999). Ptacek describes how a protection or restraining order is viewed as “just a piece of paper” that can be ripped up. Id. at 169. This is a view held by the abusers and often court officials. Id. at 170.
43. Ironically, the police often fail to pursue domestic violence calls precisely because these situations are too dangerous and rarely result in a conviction. This underscores the inefficacy of domestic legal structures to address this form of violence.
44. SCHNEIDER, supra note 6, at 91.
45. Traditionally, battering was viewed as within the private sphere of the family, and therefore unprotected by law . . . . “When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence. . . . Some police officers refuse to respond to domestic violence . . . .”
46. Id. at 91–92.
47. Fedler, supra note 40, at 235.
48. PTACEK, supra note 42, at 173.
violence—the latter predominantly viewed as a “lovers’ quarrel”—judicial officers minimize the harm, relegating it to a non-justiciable status. Finally, government funding for domestic violence projects is usually insufficient or the first to be reduced in economic decline.

This is not to say that no domestic laws address domestic violence. However, the current structures of many laws operate most effectively against a so-called ideal abuser: a sober, law-abiding, reputable man, who is classified as lower to middle class, attends a religious institution, is insightful, remorseful and preferably employed. These characteristics indicate that the abuser has some type of reputation to protect and to some degree is concerned about his society. However, where the batterer has served prison time, has increased the intensity of the beatings, has raped his partner, suffers from a “God-complex,” is connected to “friends in high places,” and/or has threatened to kidnap/hurt the children or other family members, “[l]awyers can never assure a woman whose abuser fits this profile that she will be safe from him. Legal solutions in this case will often only inflame an already volatile situation.” Moreover, notwithstanding the nature of the harm committed against women in intimate contexts, as of 2000, only “44 countries . . . have adopted specific legislation to address domestic violence.”

The number of incidences where domestic law has failed is sufficiently high to reveal the chasm that exists between the current theoretical domestic laws created to assist women and the implementation of such laws in times of necessity. Both the privacy and severity of this type of harm have caused law makers and

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47 Id. at 175.

The judge says that her husband hit her without permission and fines him $200 and tells him he can’t hit her for a year . . . . Her sister asks if she will be going home now. She says she has no choice. It was awful being hit and screamed at by one person, but by a town, it’s much worse.

Id. at 87.
49 This occurred in South Africa and Russia. See DALTON & SCHNEIDER, supra note 37, at 1031–32 (citing HUMAN RIGHTS WATCH, WOMEN’S HUMAN RIGHTS, WORLD REPORT 2000).
50 Fedler, supra note 40, at 250. This is a generalized statement. Not all abusers who match these characteristics would be apprehended by the law. The corollary is also true and abusers who do not fit this personality may in fact be apprehended by the law. Id. However, the predominant view is that this statement reflects a constant reality.
51 Id. at 250–51 & n.77.
52 UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, supra note 2, at 1.
officials to underestimate private torture. In order to counteract this perpetual lacuna, it is necessary to review the status of private torture within domestic law and reveal the manner in which all forms of intimate violence against women are not the same.

C. “A locked room denotes a safe space, a home.”

The phenomenon of private torture poses a dilemma not only in law but to the human psyche. Inherent in domestic violence is the dichotomy between love and hate. Generally, it is an incomprehensible thought that within the boundaries of an ostensibly loving relationship exists one of the most acute manifestations of violence.

One of the prevalent misconceptions is that domestic violence is a private affair that does not warrant state interference. It is only recently that the law has actively begun to accept “domestic violence” as “a serious social evil,” understanding that “[a] psychological rationale is not sufficient to explain such a prevalent problem.” However, in most societies, citizens, neighbors, and the police continue to turn away from and not toward the victims of domestic violence. This is because the violence is deemed to be neither extreme nor without justification.

This perception has had a disturbing impact on the translation of private torture by national legislators. The term ‘domestic violence’ evokes an image of restrained and domesticated or tame conduct, the type of which is suitably designated to family law

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53 Resnik, supra note 14, at 633.
56 Raoul Felder & Barbara Victor, Getting Away with Murder: Weapons for the War Against Domestic Violence 13–17 (1996). The authors describe the abuse inflicted upon Tracey Thurman by her estranged husband Charles. Id. Due to the failure of the police to take her pleas for help seriously, Tracey “ended up partially paralyzed and permanently disfigured,” sustaining her worst injuries in the yard of her home while the police waited in their vehicle on the street. Id. at 17.
57 This view is typical of many sex-based crimes. For example, in various parts of India—and in many other countries throughout the world—girls who are raped refuse to report the crime since the act is deemed to shame the victim and her family, not the rapist. Indira Jaising, Violence Against Women: The Indian Perspective, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 51, 52 (Julie Peters & Andrea Wolper eds., 1995).
58 See, e.g., Resnik, supra note 14, at 635 (making the point that violence against women is perceived by some courts as falling within “a sphere of human activity inappropriate for national legislation”).
rather than criminal law.\textsuperscript{59} This is compounded by the fact that the conduct between intimates is not open to examination or intervention.\textsuperscript{60} For decades women have suffered private torture silently, believing perversely that this was a characteristic requirement of the marital institution or intimate relationship into which they had entered.\textsuperscript{61} According to academics, “[f]amily violence usually takes place in secret” and “[t]he sufferings of its victims take place in silence.”\textsuperscript{62}

There is a reason for this. The structures of judicial decision- and law-making serve as a mechanism to filter the facts of a conflict, rejecting those facts that are irrelevant and retaining the ones that are relevant. Historically, this legal mechanism was based on certain assumptions that directed the outcome of the legal process. While the broad structure of the legal mechanism may have changed in some societies, the assumptions on which it is based have not. These assumptions subliminally continue to inform the outcome of the mechanism notwithstanding its structural alteration.\textsuperscript{63} The result is that the mechanism of law may appear to have changed but its composite assumptions survive and continue to pervade legal decisions. Therefore, under the guise of an egalitarian legal system, discriminatory decisions persist.\textsuperscript{64} In the case of law and gender, the distinction between the public and the private sphere historically has correlated with the role differentiation between genders—the public sphere being male dominated; the private sphere allocated to women.\textsuperscript{65} Indeed, the role distinctions between men and women were explicitly linked to a separation between the public and private spheres in the past.

\textsuperscript{59} See id. at 654.
\textsuperscript{60} Donna Sullivan, The Public/Private Distinction in International Human Rights Law, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995). The statistics and nature of domestic violence throughout the world are controversial and unreliable given “the extent to which the state and society conceal domestic violence.” Id. at 132.
\textsuperscript{61} A vast array of cultures relegates the role of housekeeper and child-minder to women. This role is associated with subservience and dependency.
\textsuperscript{64} See id.
\textsuperscript{65} See id. at 9. Boyd describes the various manifestations of the public/private dyad and refers to the example of “the state's failure to deal with men's violence against women in the 'private' sphere of family relations” that rests “on a ratification of unequal power relations between men and women in heterosexual families.” Id. at 10.
Judith Resnik points out that while “[b]oundaries of role are . . . shifting, . . . [g]ender systems work through assumptions about the intelligibility of the categories of ‘women’ and ‘men,’ which in turn depend upon demarcations of ‘the family’ from ‘the market’ and of ‘the private’ from ‘the public.”

Although gender differentiation may be denied in many legal systems today, the public/private distinction endures and thus informs the reconstruction of facts after they have passed through the apparently neutral filtering process of the legal mechanism.

The resistance to regulating private matters stems in part from the difficulty in penetrating the private realm which continues to be guarded by these “invisible” assumptions. Progressive legislation (where such exists) still meets the difficulties imposed by the division in many societies between private and public and the concomitant allocation of gendered roles to the two spheres. This departmentalizing reflects a well-documented stratification that places women throughout the world in a weaker, vilified, and vulnerable position. It is tempting to discount this phenomenon as a characteristic of the past, an abandoned mode of living that exited societies when inclusive and transparent governance entered.

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66 Resnik, supra note 14, at 620–21.

67 Where States have taken legislative and policy steps to counteract gender inequality, a distinction is drawn between protection of equality between genders on a public level and the enforcement of equality in the privacy of the home. The former is easier to regulate and therefore better addressed by domestic law. However, to focus merely on the public realm of equality between genders, such as employment equity, equal opportunity or public violence is to pronounce and denounce domestic inequality to a category of harm that falls within family law but not criminal law. See generally Celina Romany, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85, 99 (Rebecca J. Cook ed., 1994; Jo Dixon The Nexus of Sex, Spousal Violence, and the State, 29 LAW & SOC. REV. 359 (1995) (demonstrating the “silence of the social and legal system” by quoting one court’s sentiments on spousal violence, “if no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forgive and forget”).

68 Resnik, supra note 14, at 649 (indicating that in early Federal family policy, “[f]athers were identified as the primary wage earners; mothers were situated as caregivers”). Resnik also cites Ruth Bader Ginsburg and Deborah Jones Merritt who explain that “for every one man who is illiterate around the world, two women are, and seventy percent of the world’s poor are women. Women’s risk of violence, their poverty, and their high illiteracy rates relate to women’s roles within families.” Id. at 658.

69 See CATHERINE A. MACKINNON, SEX EQUALITY 20–24, 888–94 (2001):

The notion that women and men are defined as gendered by their differences from one another, and the equation of women’s so-called differences with inferiority or naturally lower status, has pervaded philosophy and law. . . . Gender in most societies has defined women as such in terms of differences, real and imagined, from men—usually to women’s detriment in resources, roles, respect, and rights.

Id. at 20.
However, true equality, meaningful choice, and a sophisticated equivalency between men and women does not exist, even in the most “egalitarian” of societies. This is evidenced by a decision on November 3, 2003, in Sweden where the Stockholm appeals court acquitted four men accused of gang raping a woman for five hours on the basis that the victim’s “prior sexual experiences led the men to believe that she was game for their sexual advances.”

The result is that there is weak intervention by the police, public, and other legal authorities in instances of private torture, which accentuates the isolation of such victims and further eliminates the information of battering from the public eye.

D. The Current Meaning of ‘Domestic Violence’

One day Jim came home and caught Molly in the backyard talking to a neighbor woman. He began hitting Molly with his fists, throwing her against cabinets and appliances, knocking her to the floor, pulling her up, and hitting her again. He threw everything in the kitchen that was moveable, saying over and over, “I can’t trust you.” Then Jim dragged Molly into the living room and demanded that she take off all her clothes. He burned them together with her clothes from the closet, saying she wouldn’t be needing them if she was going to be a whore. He yelled and yelled at her about being outside, screaming, biting, pinching, pulling hair, kicking her in the legs and back. Molly held her breath and prayed it would be over soon. This time she thought she might die. After about an hour, Jim seemed to wear out. Molly pulled herself to the bathroom and tried to stop shaking. But Jim burst in and accused her of trying to hide something, saying this proved she had been unfaithful. He


Even if it would be very strange for a woman to want to subject herself to this kind of treatment, it is still not so abnormal that the men would have had to realize that . . . .

Given the circumstances, we came to the conclusion that it was not clear that the men realized that the woman was in a helpless state.


71 SCHNEIDER, supra note 6, at 12. Schneider remarks how a colleague of hers, “after seeing a televised public service announcement on battering featuring photographs of women bruised and beaten, said to [her]: ‘I didn’t know this is what they looked like.’” Id.
pushed her forward over the sink and raped her anally, pounding her head against the mirror as he did so. Molly started throwing up, but he continued. Then he grabbed the scissors and began shearing off Molly’s long dark beautiful hair, scraping her scalp with the blades, ripping out handfuls, shaking her violently, saying, “How do you like how you look now? No one will look at you now, will they? No one will ever want you now!”

‘Domestic violence’ is a term that has come to refer to a broad array of harm committed against members of a family or intimate unit by other members of such family or intimate unit. Defining and delineating the concept of domestic violence has been a challenge undertaken by lawyers, sociologists, and psychologists and its precise definition remains an uncertain and controversial social subject. In drawing a legal distinction between intimate violence and private torture, it is first necessary to understand the current legal concept of ‘domestic violence.’ This understanding will provide the tools to distinguish between the types of violence that should be addressed by domestic law autonomously and those that require the application of both domestic and international law.

Generally domestic violence is defined as abuse, either physical or emotional, between adult intimates or members of the same household. Most jurisdictions that recognize domestic violence understand that there are two components to the abuse. The first is emotional and the second is physical. In addition, it is widely understood that these two components may operate separately but are generally combined to spin a web of abuse in which the exigency of violence escalates.

Emotional abuse may take the form of verbal abuse, insults,

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72 Copelon, supra note 19, at 119.
73 The intimacy of the relationship—not the formal structure of the relationship—is one of the key components of domestic violence. Even women in unofficial relationships, from dating to cohabitation, are potential victims of private torture. This definition finds general support. See, e.g., DOMESTIC VIOLENCE CASES, supra note 25, at 5. (defining domestic violence as “a pattern of assaultive and controlling behavior that one adult intimate does to another”).
74 See, e.g., SCHNEIDER, supra note 6, at 59 (discussing the difficulties that arise when defining domestic violence, particularly for feminists).
75 See DOMESTIC VIOLENCE CASES, supra note 25, at 5 (recognizing that domestic violence encompasses both physical and psychological behavior that occurs in various types of adult intimate relationships).
76 See SCHNEIDER, supra note 6, at 65–66. See also Copelon, supra note 19, at 116–33. Copelon deftly parallels the physical and mental harm caused by domestic violence to the combination of physical and mental harm used in official torture. Id. at 121.
77 See SCHNEIDER, supra note 6, at 65–66.
derision, threats of harm, intimidation, and isolation.\textsuperscript{78} This non-physical component of domestic violence includes financial abuse, stalking, jealousy, fits of outrage, and unrelenting insults.\textsuperscript{79} The recognition of this type of behavior as domestic violence is a significant achievement of the battered women's movement. Progressive legislation typically prohibits both non-physical and physical abuse in all its forms.\textsuperscript{80}

As for physical violence, there is no closed list of the forms of abuse. The broad range of physical acts of aggression includes shoving or pushing a person in the heat of an argument to breaking fingers or mutilating parts of the body.\textsuperscript{81} Typically, however, domestic violence is associated with punching, slapping, and vocal aggression that, in turn, is associated with the aggressor's loss of control. This perception is not a complete representation of the types of violence and the control with which it may be executed.

While emotional abuse may exist independently of physical abuse, they are often combined. Theorists have identified the so-called cycle of abuse as containing instances of violence, followed by apologies, gifts, and expressions of remorse.\textsuperscript{82} Slowly, the tension intensifies and rebuilds itself—first in the form of verbal denigration and ultimately resulting in another episode of anger and physical violence.\textsuperscript{83} As the cycle repeats itself, the severity of the violence intensifies and there are fewer and shorter periods of remorse.\textsuperscript{84} The emotional stress caused by this cycle “often produces anxiety, depression, and sleeplessness. It can produce extreme states of dependency, debility, and dread as well as the same


\textsuperscript{79} See SCHNEIDER, supra note 6, at 65.


\textsuperscript{81} Many women experience some form of sexual aggression. See SCHNEIDER, supra note 6, at 66 (“It is now widely recognized that within intimate relationships there is a significant overlap between physical abuse and sexual abuse.”).

\textsuperscript{82} The cycle is described as having three components, namely, tension-building, followed by an incident of violence, and then seduction, which ultimately leads to a renewed period of tension. See LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42–47 (1989) (providing a detailed analysis of the “cycle of violence”); see also Cybergrrl.com, Cycle of Domestic Violence, at http://www.cybergrrl.com/views/dv/book/lovewheel.html (last visited Nov. 16, 2003).

\textsuperscript{83} WALKER, supra note 82, at 42–45.

\textsuperscript{84} Id. at 46.
intense symptoms that comprise the post-traumatic stress disorders experienced by victims of official violence as well as by victims of rape.\textsuperscript{85}

In summary, acts of ‘domestic violence’ include battery, biting, burning, hacking, electrocuting, starvation, sleep deprivation, forced sexual encounters, non-consensual sexual touching, rape, forced sexual activities with third parties, poisoning, exposure, property destruction, murder, the withholding of medical care, threats of harm, threats of harm to third parties, threats of removing children, psychological abuse, financial deprivation, stalking, shouting, accusations of infidelity, isolation, and threats of suicide.\textsuperscript{86} These actions form part of a pattern of continued abuse which is termed ‘domestic violence.’

\textbf{E. Two Categories of Domestic Violence}

The broad definition of ‘domestic violence’ referred to above in the South African Domestic Violence Act\textsuperscript{87} was a triumph. Legal action could be taken against an array of activity that previously constituted intimate private conduct, which was not regulated by the State.\textsuperscript{88} However, the mistake is in associating all forms of domestic violence with each other, assuming that all necessitate one form of legal redress. This is much like providing a uniform legal approach to, on the one hand, a motorist who causes the death of another human being through negligent driving and, on the other hand, a killer who causes the death of his or her victims through precise and systematic planning. The various forms of ‘domestic violence’ simply do not conform to such an all encompassing scheme.

The division of violence into categories is intuitively problematic. However, this is the very nature of the work conducted by the United Nations Committee against Torture, established to monitor and enforce the provisions of the Convention against Torture.\textsuperscript{89}

\footnotesize
\textsuperscript{85} Copelon, \textit{supra} note 19, at 125. Often women find the psychological terror the most unbearable and will “precipitate battering as opposed to enduring the fear.” \textit{Id.} at 124.
\textsuperscript{86} Many academic and research sources describe various acts of reported abuse. The author gathered the instances of abuse cited above from legal consultations with domestic violence clients at the South African NGO, People Opposing Woman Abuse (POWA) over a period of one year.
\textsuperscript{88} Examples of this type of conduct include stalking, financial abuse, and verbal abuse. See \textit{supra} notes 23–24 and accompanying text (providing the Act’s definition of domestic violence).
Before embarking on this process, it is necessary to caveat that the purpose of this categorization is to allocate types of violence to specific areas of law and not to rank the harm according to some qualitative hierarchy.

How does one begin to grade levels of harm? There are three factors—repetition, power, and severity—that I propose facilitate the division of violence into two categories, namely, ‘intimate abuse’ and ‘private torture.’

The first factor relates to repetition. Violence that has a characteristic of systematic and repeated intensity is distinct from violence that occurs infrequently and which is not sufficiently severe to cause either long-term physical damage or to induce an environment of fear and apprehension regarding the recurrence of the violence. 90 The repetitive component does not only relate to the act of harm itself. The threat of violence may be as destructive as the act of violence. 91

The second distinction is one of controlling power. Private torture is composed of violence which incapacitates the victim. This is significantly different from violence which causes immediate harm but which has a definitive end allowing the victim to envisage healing. The perpetual threat of private torture feeds off a power imbalance, whereby the abuser is more powerful than his victim. Moreover, legal support structures, from the police to the judiciary, are largely insensitive to and/or ignorant of the permutations of intimate violence for women. 92 The victim’s access to legal assistance is compromised by the prejudice she will endure when she seeks assistance in the public realm, thereby augmenting the power of the abuser, who appears to be above the law. 93

The Committee monitors compliance with the United Nations standards of what constitutes torture and other inhuman behavior. 90 Indeed, this is the notion underpinning crimes against humanity. Crimes against humanity are crimes that take place on a scale that transcends individuals and isolated incidents and relate to violence that is systematic, repeated, and/or of such large proportions that its commission exceeds the ambit of domestic laws in their current forms. 91 SCHNEIDER, supra note 6, at 65 (“What he did wasn’t exactly battering but it was the threat. I remember one night I spent the whole night in a state of terror, nothing less than terror all night. . . . And that was worse to me than getting whacked.”).

92 See generally Report of the Special Rapporteur on violence against women, supra note 2, at 33 (indicating that while there is increased recognition of violence against women, legal relief continues to be underdeveloped in most jurisdictions).

93 See Johanna E. Bond, International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations 52 EMORY L.J. 71, 111 (2003). This is particularly true for women from minority groups. For example, German police reportedly fail to assist Muslim women on the grounds that the tenets of Islam “permit men to discipline their wives.” Id. Apart from the racial prejudice, this also reveals how
disparity, both within and without the home, accentuates the degree of terror.\textsuperscript{94}

The third distinction is the \textit{severity} of the harm itself. This component is inextricably linked to the regularity of the violence since extreme acts of violence are acutely pernicious as a collective and together constitute a debilitating and destructive environment. This type of severe violence would generally involve methodological battering, the breaking of skin—either through cutting, stabbing, or burning—breaking of bones, rape, and other forms of sexual abuse.

This categorization can be pictorially represented through the tabulation of acts which would constitute ‘intimate abuse’ (which can be addressed by domestic law) and those which would constitute ‘private torture’ (which should also be addressed in international law).\textsuperscript{95}

<table>
<thead>
<tr>
<th>INTIMATE ABUSE</th>
<th>PRIVATE TORTURE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-physical abuse which is infrequent and not associated with or threatening of physical harm</td>
<td>Repeated accusations and other forms of verbal vilifying abuse as justifications for battering</td>
</tr>
<tr>
<td>Castigating</td>
<td>Threats of harm to other family members including children</td>
</tr>
<tr>
<td>Slapping or punching</td>
<td>Repeated hitting with the fist or other instrument which causes bruising and/ or the breaking of the skin; breaking bones</td>
</tr>
<tr>
<td>Insisting on sexual intercourse without force or violence</td>
<td>Rape, sexual abuse with other objects or animals, or forced prostitution</td>
</tr>
<tr>
<td>Pushing or cornering</td>
<td>Binding or imprisoning</td>
</tr>
</tbody>
</table>

The tabulation is a tentative exposition of the types of violence that would constitute category one (‘intimate abuse’) and those

\textsuperscript{94} “socially constructed perceptions of power and privilege” compromise women’s access to safety through the law. \textit{Id}.  

\textsuperscript{95} See \textsc{Dalton & Schneider, supra} note 37, at 209 (explaining that “the struggle for power and control is at the heart of the battering relationship. At the moment of separation or attempted separation—for many women the first encounter with the authority of law—the batterer’s quest for control often becomes acutely violent and potentially lethal”).  

The table is not definitive. While it is counter-intuitive to categorize degrees of violence, it is necessary tentatively to delineate the scope of private torture in this specific manner. Moreover, the categorization of violence is a necessary component of international law. For example, academics, politicians, and practitioners are required to distinguish between acts of torture and cruel, inhuman, and degrading treatment or between genocide and mass killings.
which would constitute category two (‘private torture’). This is not an ideal method of categorizing abuse since harm committed against a person remains painful and unlawful irrespective of the degree of violence: however, I emphasize that the tabulated categorization is useful only for reshaping our understanding of and approach to the classic phenomenon of ‘domestic violence’ in international law.

‘Domestic violence,’ as it is currently understood as a legal concept, betrays a social and legal tendency to demarcate acts of harm committed against women by their intimate partners into a state of quasi-law. The persistent marginalization of women and the private context of the violence militate against the effective criminalization of domestic violence. These factors lay the foundation for the separation of ‘private torture’ (which I propose should be addressed by both international and domestic law) from the remainder of ‘domestic violence’ (which may be addressed at a domestic level as other domestic crimes). Private torture can be distinguished from other forms of domestic violence based on the three factors I propose, namely, repetition, power, and severity.

It is necessary to raise two caveats. The first is that the distinction which I seek to draw between ‘domestic violence’ and private torture is not to minimize or reduce the status of category one abuse—namely, ‘intimate abuse.’ It is in and of itself a debilitating social blight. Second, I do not suggest that ‘domestic violence,’ even without ‘private torture’ included in its definition, is necessarily properly or otherwise comprehensively addressed and further work is still needed to address this form of harm. Both forms of violence are difficult to apprehend: however, they have different consequences that require the application of different areas of the law. I simply propose that intimate abuse alone would not fall under international law. Private torture, however, has specific components that serve to internationalize it. These components are discussed in Part II below.

96 See Emilio C. Viano, Violence Among Intimates: Major Issues and Approaches, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 3–5 (Emilio C. Viano ed., 1992). Viano explains that a violent act, perpetrated by someone perceived to be a legitimate user of violence, will not be condemned. Id. at 3. These ‘legitimate’ users include the police and military, but also parents and spouses. Id. Acts by these ‘legitimate agents’ against people under their control, which would ordinarily be criminal, are tolerated or only lightly punished. Id. at 4. Applying this to the family, which comprises a traditionally dominant or public male role and traditionally subordinate or private female role, transforms the abuser into a ‘legitimate’ user of violence over those under his control, including his partner. See id. at 4–5.
II. A SOLUTION?

Private torture, when properly understood, constitutes a human rights violation of criminal dimensions, falling within the scope of international law. First, it is necessary to place this claim within the international human rights framework. Thereafter, I examine the application of the Convention against Torture to private torture.

A. Violence against Women in International Law

Notwithstanding the fact that scholars have repeatedly cited the inhumanity of the pain, humiliation, and fear caused by ‘domestic violence,’ there is no international law treaty that views the abuse of women as a mainstream human rights violation or as a violation of the human rights of women.97 This is not to say that there has been no development in international law regarding violence against women. The women’s movement has had remarkable success. The creation of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) in 1979,98 the CEDAW adoption of General Recommendation 19 addressing violence against women,99 and the consequent Optional Protocol100 created the structure of women’s rights and the foundation for the development thereof in international law. The incorporation of the human rights of women in the Vienna Declaration and Programme of Action101 led, inter alia, to the emergence of Female Genital

97 Most international instruments have non-discrimination provisions. See supra note 4. However, this is insufficient to focus on the magnitude of private torture. See UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, supra note 2, at 1 (recognizing that despite the greater recognition of violence against women in international instruments, attitudes enabling domestic violence are entrenched in legal and social systems). Judith Resnik cites the Innocenti Digest and points out that while “most countries prohibit such violence, the report finds that violations are common” and often state-sanctioned. See Resnik, supra note 14, at 657.
Cutting/Mutilation as an international human rights violation.  

In 1989, the U.N. issued the report on Violence against Women in the Family.  

In 1994 the U.N. Declaration on the Elimination of Violence against Women defined “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” This helped to focus international attention on domestic violence. The Beijing Declaration and Platform for Action, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women also verify that domestic violence is in fact a violation of the human rights of women. In 1993, the Commission on Human Rights appointed the first Special Rapporteur on Violence against Women to investigate the extent of violence against women throughout the world. Her report contained a remarkable condemnation of the profligacy of domestic violence worldwide.

During the 1990s, following the genocides committed in the Former Yugoslavia and Rwanda, the decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda confirmed that violence against women, especially rape, is, inter alia, a form of torture and a crime in international law.

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103 U.N., VIOLENCE AGAINST WOMEN IN THE FAMILY, supra note 32.

104 See Declaration on the Elimination of Violence against Women, supra note 102, at 217.


108 See generally id. (detailing the extent of violence against women, the inadequacy of governmental and societal response, and providing recommendations for reform).


110 See Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, 39 I.L.M. 557, 570 (ICTR 1999) (identifying, inter alia, rape and torture as crimes against humanity).

111 See supra notes 109–10.
The Rome Statute of the International Criminal Court (the “Rome Statute”) was adopted on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.\(^{112}\) Article 7 of the Rome Statute includes in its definition of “crimes against humanity:”

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,\(^{113}\) . . . [p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law;\(^{114}\) and . . . [o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\(^{115}\)

In March 2000, the U.N. Human Rights Committee adopted General Comment No. 28 regarding the equality of rights between men and women and highlighted the debilitating impact of severe violence against women.\(^{116}\)

However, with the exceptions of CEDAW (which makes no reference to violence against women), the Rome Statute, and the regional Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, none of the aforementioned instruments is a binding treaty. Moreover, several of the instruments that refer to violence against women tend to give a timid account of domestic violence. The 1989 U.N. report on Violence against Women described the use of violence by men against women within the family structure as “coercive.”\(^{117}\) This understatement received minimal improvement in 1992 by the Committee on the Elimination of Discrimination Against Women in General Recommendation No. 19, which states that violence against women “is a form of discrimination that seriously inhibits womens’


\(^{113}\) Id. art. 7 § 1(g).

\(^{114}\) Id. art. 7 § 1(h).

\(^{115}\) Id. art. 7 § 1(k).


[sic] ability to enjoy rights and freedoms on a basis of equality with men.”

While this is undoubtedly true, it is merely a symptom of private torture and falls short of attributing to private torture the serious status ascribed to its public counterpart, official torture. Extreme forms of domestic violence not only inhibit a woman’s ability to enjoy rights and freedoms equally with men; they amount to a dehumanization process which shares with torture the characteristic of the methodical breakdown—physically, emotionally, and mentally—of one human being by another.

The previous African Charter on Human and Peoples’ Rights took positive strides in imposing on member States the obligation of actively ensuring that women enjoy a safe home environment. However, both the formulation of the right, coupled with the rights of the child, and the implementation of the right are highly problematic. The right is a sub-right, forming part of the total right to have a family unit based on “traditional values recognized by the community.” The practical outcome of this right does not afford a woman any real benefit or elevation in status especially where such “traditional values” espouse patriarchal views of male dominion and entitlement.

For this reason it is necessary to turn to mainstream international instruments and to demonstrate that within the current international legal framework, private torture is a violation of women’s human rights and, therefore, should be recognized as a distinct crime in international law. In particular, I refer to the mainstream international crime of torture.

The analogy between domestic violence and torture is one that emanated more than a decade ago from activists working with

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118 General Recommendation 19, supra note 99, at 5.
120 Id. at 61.
121 See Jennifer Nedelsky, Violence Against Women: Challenges to the Liberal State and Relational Feminism, in POLITICAL ORDER 454, 457–58, 472–73, 479–80 (Ian Shapiro & Russell Hardin eds., 1996). Nedelsky, in writing about the patriarchal structure of a liberal State, raises the question as to how fundamental change can be effected within a system, the foundation of which is based on tradition, especially when the precepts of that tradition are at odds with basic egalitarian values. Id. at 484–85. A statement made at the Beijing Platform for Action recognizes that the empowerment of women may well conflict with “regional particularities” and cultural norms but insists that these norms must be disregarded if they resist promotion and protection of fundamental rights and freedoms. Beijing Declaration, supra note 105, at 11. See also O’CONNELL, supra note 117, at 9.
battered women. In 1993, scholars began to analyze the reasons for the marginalization of violence against women in international law. Authors such as Celina Romany identified the negative effect on women arising from the distinction drawn by international law between public and private conduct, with the former being addressed by the law and the latter left largely unregulated. In 1994, Rhonda Copelon framed the comparison between intimate violence and torture as defined by the Convention against Torture. Other authors have engaged the torture terminology in their discussion of violence against women, comparing battery to physical torture and prison life.

The struggle for international recognition of violence against women developed through a range of literature, with a focus on Female Genital Cutting/Mutilation, harmful practices against women, and rape as a weapon of war and genocide. The culmination of these developments was thoroughly addressed by Elizabeth Schneider in her examination of the law regarding battered women from the feminist perspective, where the various motivations for and implications of battery as an international human rights violation are garnered.

Copelon's parallel between intimate violence and torture was part of the initiation of the discussion in the international domain which seriously considered the possibility that violence at home could be

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122 See, e.g., Copelon, supra note 19, at 117. See, e.g., UNICEF, DOMESTIC VIOLENCE AGAINST WOMEN AND GIRLS, supra note 2, at 10.

123 See Romany, supra note 16, at 98–99 (identifying “the diverse layers of coercion embedded in legal discourse”). See also Eekelaar & Katz, supra note 62, at iii (observing that unlike racial conflict, family violence does not take place in public, and the silent suffering of its victims has only recently been recognized).

124 See Copelon, supra note 19, at 117.

125 See Dworkin, supra note 19, at 153–55.

When you look at what happens to women in battery, the only other place where you can see the same kind of systematic physical and psychological injuries is in prisons in which people are tortured.... When you are battered, over time, you are physically tortured.... Sometimes they use degrees of force so unconscionable as to be impossible to believe: for instance, hitting a woman with a big wooden beam; using knives on a woman; using a baseball bat on a woman. Sometimes the woman is tied up and tortured and it is called sex when she is hurt. She is often sleep deprived, purposefully, the way she would be if she were in a prison. He takes her life and he messes with it in order to fracture it, to break it into little pieces so that she has no life left.

Id. See also Copelon, supra note 19, at 122–39.

126 See FEMALE GENITAL MUTILATION: A GUIDE TO LAWS & POLICIES WORLDWIDE (Anika Rahman & Nahid Tubia eds., 2000). See generally Askin, supra note 3 (discussing the jurisprudence on rape as a weapon of war/genocide or as a crime against humanity).

127 See generally SCHNEIDER, supra note 6.
as egregious as violence in public.\textsuperscript{128} However, criticism continues to be leveled against the inclusion of domestic violence in international human rights law since many see ‘domestic violence’ as isolated incidents of harm by individuals against individuals, with no state or structural component.\textsuperscript{129} Therefore, while authors have highlighted the similarities between frequent forms of extreme domestic violence and the acts contemplated by the drafters of the Convention against Torture and other international instruments,\textsuperscript{130} the explicit legal consequences emanating from this analogy still need to be explored. What is required is a careful step by step analysis delineating the circumstances in which and the types of domestic violence that may fall under the Convention against Torture in its current form. Once this is done it is necessary to assess whether the Convention against Torture is an adequate instrument to address private torture or whether either amendments or a new instrument are required to do justice to the factual similarity between torture and extreme forms of domestic violence.\textsuperscript{131}

B. The Internationalizing Components of Private Torture

When no war has been declared, and life goes on in a state of everyday hostilities, women are beaten by men to whom we are close. . . . When a woman is tortured in an Argentine prison cell . . . it is seen that her human rights are violated because what is done to her is also done to men. Her suffering has the dignity, and her death the honor, of a crime against humanity. But when a woman is tortured by her husband in her home, humanity is not violated. Here she is a woman—but only a woman.\textsuperscript{132}

1. The Purpose of Applying the International Standards of the Convention against Torture

The comparison between extreme acts of domestic violence on the

\textsuperscript{128} See generally Copelon, supra note 19.

\textsuperscript{129} See \textit{Felson}, supra note 29, at 3–5.

\textsuperscript{130} See, \textit{e.g.}, \textit{Schneider}, supra note 6, at 48; \textit{Dworkin}, supra note 19, at 115 (referring to Amnesty International in the context of domestic violence). See Copelon, supra note 19, at 120–39.

\textsuperscript{131} This analysis forms part of a larger work in progress conducted by the author.

one hand, and official torture on the other, has the following purposes:

First, it demonstrates by analogy the severity and extremity of the type of violence that occurs within domesticity. The fact that the violence is between intimate citizens does not make it less cruel, painful, or degrading—indeed, the familiarity of the abuser may intensify the level of fear, pain, and humiliation.

Second, the analogy serves to demonstrate the inadequacies of the current nation-based legal systems vis-à-vis private torture. Historically, ‘domestic violence’ was a permissible activity. It is a common characteristic of a hegemonic society that gender stratification within and without the home retards State interference with domestic activities. As a result, violence within the home was considered acceptable behavior, at times necessary to enforce the stricture of discipline. This is an alarming and

133 See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989). In DeShaney, the United States Supreme Court held that “nothing in the language of the Due Process Clause [of the United States Constitution] requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” Id. at 195. This case demonstrates the absence of a State obligation to eradicate violence against individuals. If this is not required under domestic law, there needs to be another motivating force to generate such protection. This is addressed in greater detail below.

134 See Bruno v. Codd, 396 N.Y. Supp.2d 974, 975 (1977), rev’d 64 A.D.2d 582 (1978) (“For too long, Anglo-American law treated a man’s physical abuse of his wife as different from any other assault, and, indeed, as an acceptable practice . . . .”); Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2118 (1996) (noting that under Anglo-American common law, a husband could beat his wife as long as he caused no permanent injury). According to Sir William Blackstone, this practice had its origins in the practice of making a husband responsible for his wife’s misbehavior, and thus he was entitled to some “power of correction.” See J.W. Ehrlich, Ehrlich’s Blackstone 85 (1973).

135 It should also be noted that domestic violence has the potential to occur within all intimate relationships. It is not limited to heterosexual marriage and includes formal and informal, heterosexual, lesbian, and homosexual relationships. See, e.g., Evelyn C. White, Chain Chain Change: For Black Women in Abusive Relationships 75 (1994) (“[W]omen involved in same-sex relationships are not immune to battering.”). The reference to this type of abuse within a footnote rather than within the body of the text is not to diminish the importance or severity of this type of violence, but simply to acknowledge it as a serious manifestation of violence, but one that falls outside the limited scope of this project.

136 This is based on the oft-quoted and now outdated law of England and the British colonies that a man could beat his wife with a stick which was no wider than his thumb. See A. Mechele Dickerson, Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, 67 FORDHAM L. REV. 69, 77 n.46 (1998) (citing 1 William Blackstone, Commentaries 430); Mary C. Carty, Comment, Doe v. Doe and the Violence Against Women Act: A Post-Lopez Commerce Clause Analysis, 71 ST. JOHN’S L. REV. 465, 465 n.2 (1997). While this law is no longer in force, various degrees of physical violation remain acceptable in the family, for example, slapping, pushing and shoving do not meet with the same social outrage as other more extreme forms of force such as stabbing or punching. See Murray A. Strauss, Wife-Beating: How Common and Why, in FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY 34–37 (John M, Eekelaar & Sanford N. Katz eds., 1978) (noting the perception that there is a certain amount
continuing characteristic of many societies in many regions and “[w]hile the legal and cultural embodiments of patriarchal thinking vary among different cultures, there is an astounding convergence in regard to the basic tenets of patriarchy and the legitimacy, if not necessity, of violence as a mechanism of enforcing that system.”

As a result, the laws which developed around domestic violence were few, ineffective, and rarely implemented. The impenetrability of domesticity was compounded by the democratic development of the right to privacy and freedom from state interference.

Therefore, it is possible to conclude that in most instances, battering “is an act facilitated and made possible by societal gender inequalities” coupled, at least in certain constitutional democracies, with a constitutional respect for privacy. In addition, the normalizing or perceived “tameness” of domestic violence perpetuates the assumption that private torture is somehow different from public violence, warranting little, if any, state intervention. Addressing extreme forms of domestic violence as private torture, analogous to official torture, imports “transnational understandings . . . that reflect the degree of transformation needed” to arrest the private torture of women.

Thirdly, the Convention against Torture enjoins states to take “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” State parties are required to criminalize all acts of official torture and to impose penalties both for the commission of torture and for the complicity with and participation in torture. In instances of “normal violence” that is allowable in the family without State interference, and that actions such as throwing things at a spouse, pushing, grabbing, or slapping are not generally considered extreme enough to constitute “wife-beating”.

See, e.g., Felder & Victor, supra note 56, at 116–17 (stating that “[v]iolence in the home has always been accorded a low priority because it has limited visibility, [and] occurs within a sphere that is traditionally considered private in any democracy . . .”); See also Romany, supra note 16, at 100:

The categories of equality are elaborated in abstract and formalistic conceptualizations of gender relations which do not deal with oppressive conditions in the real world. The dispensation of fairness in the human rights discourse is based on the abstract construction of women envisioned by the forefathers, [who] . . . saw the world through the lens of privileged patriarchy.

Id.


Resnik, supra note 14, at 663 (calling for such “understandings” in the broader struggle for women’s equality).

Convention against Torture, supra note 21, art. 2(1).

Convention against Torture, supra note 21, art. 4. Articles 5, 6, 10, 11, and 12 describe
where states do not prosecute private torture, it may be argued that official acquiescence contributes to the continued commission of such torture.

Fourthly, the qualitative synergy between private torture and official torture triggers a range of laws, obligations and standards with which states should comply and that national legal systems could adopt internally. Aligning private torture with its official counterpart serves to extract this form of violence against women from its familial context that is “sheltered from government[al] intrusion” and deposit it in the category of international human rights law. 143

Finally, the analogy by-passes an oft-heard objection, namely, that categorizing new rights as international human rights violations denudes the relevance and dilutes the impact of the current human rights structure. 144 While this argument itself is contestable on many levels, I submit that it is not necessary to engage it in the first place as not all domestic violence is or should be considered an international human rights violation. Therefore, the designation of private torture as an international human rights violation avoids the imputed threat of compromising the reverence of the human rights definition.

2. The Internationalizing Components of Private Torture

Drawing on the conclusion that there is a distinction between general domestic violence and private torture, I turn now to distil three components of private torture, which justify the attention of international law and the creation of a concomitant right to State protection from such violence. The first is the extremity of the violence. The second is the isolation inherent in private torture. The third is the vicissitude of discrimination and differentiation—the preferentiality that benefits men in the public sphere to the detriment of women. 145 This demarcates women as a category which

the steps States are required to take when an incident of torture arises and to prevent torture from occurring. Id. arts. 5, 6, 10–12. Articles 13–15 protect the right of an individual who has been a victim of torture to have a prompt and impartial examination of his or her case. Id. arts. 13–15.

143 Resnik, supra note 14, at 625 (demonstrating the importance of jurisdictional expansion as “a means of protest against subordination; alternative governing authorities offer the possibility of changing rules”).


145 See Convention on the Elimination of All Forms of Discrimination against Women, supra note 98, at art. 5. Article 5 of CEDAW acknowledges “the social and cultural patterns
is marginalized, disadvantaged, and vulnerable.

These three components reveal that private torture is a form of torture as designated by the Convention against Torture and other international instruments, such as the Rome Statute. This confirms the internationalizing character of private torture and underscores the claim that extreme forms of domestic violence should and can be addressed within the rubric of international human rights law.

Copelon argues that the physical and psychological components of intimate violence are the same as those of official torture and therefore domestic violence should be treated with the same reverence and absolutism. It is this analogy, together with the disquieting rate of incidence of private torture, that demonstrates that private torture is not only a domestic concern, peculiar to a particular country and fitting into the framework of domestic law; rather, it is a widespread human rights violation, taking place under an unwritten and never vocalized color of policy where the ravages are waged not against ethnic groups but by one gender against the other.

The comparison between the concept of official torture in international law (which is a criminal act) and the concept of private torture (which may be combated through family law but is largely condoned) necessitates a discussion of the definition of torture in international law. I refer to the Convention against Torture primarily and to the Rome Statute as a supplemental definition.

Article 1 of the Convention against Torture defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, 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 of conduct of men and women” that are “based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Id. In terms of article 5, State Parties are obliged to take steps to mitigate the effect of such stereotypes in the quest to bring meaningful equality to women. Id.

Copelon, supra note 19, at 122–26.

147 Battering of women has occurred for centuries and has been excused and legitimated through a series of social structures which both permit violence by men against women and justify its occurrence. For a detailed explanation of the history and pervasiveness of battering, see Schneider, supra note 6, at 13. See generally Siegel, supra note 134, at 2118–19.

See generally MacKinnon, supra note 132.
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.\footnote{\textsuperscript{149} Convention against Torture, \textit{supra} note 21, pt. I, art. 1.}

Article 7 of the Rome Statute defines torture as:

[T]he intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.\footnote{\textsuperscript{150} \textit{ROME STATUTE}, \textit{supra} note 112, art. 7(2)(e).}

I now turn to address each internationalizing component of private torture, namely, severity, isolation, and discrimination within the definitional context of the Convention against Torture.

\textbf{a. The Severe Nature of Private Torture}

Most instances of private torture comprise acts which cause "severe pain or suffering, whether physical or mental." These acts are "intentionally inflicted"\footnote{\textsuperscript{151} There are instances where abusers are intoxicated or high when carrying out acts of abuse; however, in most instances the abuse is not limited to these periods of insobriety. Moreover, the abuser is aware of his propensity for belligerence and aggression when inebriated and such foresight could constitute the intent element envisaged by the Convention against Torture.} and the abuser has full emotional, psychological, and physical control over his or her victim.\footnote{\textsuperscript{152} Isolating one's intimate partner from family, friends, society and, most importantly, State authorities, is one of the key characteristics of domestic torture. \textit{See} Joyce McCarl Nielson ET AL., \textit{Social Isolation and Wife Abuse: A Research Report}, in \textit{INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES} 49 (Emilio C. Viano ed., 1992) (providing a detailed discussion and analysis of isolation and domestic violence).} The purpose of the infliction of pain differs widely and includes theories of social inferiority,\footnote{\textsuperscript{153} \textit{See} WHITE, \textit{supra} note 135, at 20–21. White explains that African-American men are so demoralized in the public world that violence against their intimate partners is sought as an outlet for suppressed anger and humiliation. \textit{Id.}} psychology,\footnote{\textsuperscript{154} \textit{See}, e.g., Fedler, \textit{supra} note 40, at 250–51 & n.77. The first two categories of abusers—type "A" and "B"—generally possess some fear of the law or have a social profile which they wish to protect. The third, or type "C", abuser is one who has no fear of the police or the law and as such will have no respect for any court order which may be made. In such a case the victim's only alternative is suicide or murder of the abuser. \textit{Id. See also} Renata Vaselle-Augenstein & Annette Ehrlich, \textit{Male Batterers: Evidence for Psychopathology}, in \textit{INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES} 139 (Emilio C. Viano ed., 1992) (developing a psychological profile that is believed to be common to many batterers based upon the responses of batterers in psychological testing).} and sexism.\footnote{\textsuperscript{155}} Finally, it is well
documented that the perpetuation of private torture involves either the omission or acquiescence of public officials or persons acting in an official capacity.\textsuperscript{156}

The Rome Statute speaks of crimes against humanity as instances of torture, murder, enslavement, deportation, deprivation of liberty, rape, forced prostitution, and imprisonment.\textsuperscript{157} Victims of extreme forms of domestic violence report instances of torture, murder, enslavement, forced prostitution, rape, deportation, imprisonment, starvation, and the withholding of medical attention.\textsuperscript{158} For the purpose of demonstrating the severity of private torture as an internationalizing component, I discuss each part of the definition of torture below.

i. Severe Pain or Suffering that is Intentionally Inflicted

In terms of actual acts, the severity of the harm and the intent with which it is executed, mirrors official torture. This is evident from the following accounts. Survivors of official torture have described how guards discuss whether or not they will rape (male) prisoners:

\begin{quote}
I was lying on the floor, two guards held my legs while another kicked me in the testicles. I would lose consciousness and come to, I lost consciousness four times. They hit me around the head, there was blood. They would beat me unconscious and wait until I came round: “He’s woken up,” and they would come in and beat me [again].\textsuperscript{159}
\end{quote}

A survivor of private torture has a similar description:

\begin{quote}
From the moment Rodi Adalí Alvorada Peña married a
\end{quote}

\textsuperscript{153} See Walker, supra note 82, at 71. See also Noel A. Cazenave & Margaret A. Zahn, Women, Murder, and Male Domination: Police Reports of Domestic Violence in Chicago and Philadelphia, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 83, 85 (Emilio C. Viano ed., 1992) (arguing that the ultimate cause of battering is sexual inequality).

\textsuperscript{156} Report of the Special Rapporteur on violence against women, supra note 2, at 12 (“Torture, as defined in international human rights law, generally involves four critical elements: (a) it causes severe physical and/or mental pain, it is (b) intentionally inflicted, (c) for specified purposes and (d) with some form of official involvement, whether active or passive.”).

\textsuperscript{157} ROME STATUTE, supra note 112, art. 7(1).

\textsuperscript{158} See, e.g., Copelon, supra note 19, at 122–23. Most acts of torture are committed by officials with ordinary tools such as knives and body parts—with the exception, for example, of electrocution. So too, the acts of private torture are committed with the use of ordinary, commonplace and everyday “tools” such as kitchen utensils, hand guns or parts of the body used for kicking, punching, biting, scratching, raping. See id.

Guatemalan army officer at the age of 16, she was subjected to intensive abuse, and all her efforts to get help were unsuccessful. Her husband raped her repeatedly, attempted to abort their second child by kicking her in the spine, dislocated her jaw, tried to cut off her hands with a machete, kicked her in the vagina and used her head to break windows.\footnote{Brooken Bodies, Shattered Minds, supra note 2, at 23.}

A victim of official torture provides the following description:

\begin{quote}
[F]irst they would beat you and then you would have to lie down on the floor and crawl to them. You would have to say, “Request permission to crawl.” Me personally, they beat me on the knees, with clubs, and on the kidneys.\footnote{Human Rights Watch, “Welcome to Hell,” supra note 159, at 39.}
\end{quote}

A survivor of private torture has a similar description:

\begin{quote}
He was sittin’ on the bed. Had this .357 Magnum. He said, “June, you get down on this floor right now. You crawl to me.” And when I got to his feet he took that pistol and hit me right alongside of the head. I thought I was gonna die. I still got the knot from it. He said, “if you even act like you’re gonna run I’ll blow your brains all over this wall.”\footnote{Neil Websdale, Rural Woman Battering and the Justice System: An Ethnography 10 (1998).}
\end{quote}

It is clear that in extreme cases of domestic violence the degree of harm and the lucidity with which it is executed are indisputably torturous.

ii. Physical Control

The victim of private torture, as in cases of official torture, is subject to the complete control of the abuser and is either physically unable to escape or is imprisoned by the threat of harm to her or third parties.\footnote{See Report of the Special Rapporteur on violence against women, supra note 2, at 15.} While it appears that the battered woman has the freedom to leave, this is a myth. Flight is a fallacy: escape may precipitate deadly violence against the woman or her children,\footnote{Schneider, supra note 6, at 77 (“Leaving provides battered women no assurance of separation or safety; the stories of battered women who have been hunted down across state lines and harassed or killed are legion.”). See also Brooken Bodies, Shattered Minds, supra note 2, at 1 (“When she was 20, she ran away with her two children, but her parents and husband found her, and her mother held her down while her husband beat her with a stick. He took the children, whom she has not seen since.”).} in many instances a battered woman will lack the “resources, legal and
community support and alternative means to survive"; and psychologically, a battered woman is shamed, hopeless and manipulated into believing that she deserves this treatment. This combination forms a barrier to liberation that can be as restrictive as prison walls.

iii. Purpose

As in official torture, there is a purpose to private torture. The general purpose is the attainment of control. This is often explained by a social hierarchy theory: some abusers commit acts of egregious harm as a manifestation of their own marginalization from society. This rationale is an oft-cited explanation for high levels of abuse in impoverished communities. This is compounded in neighborhoods which are vilified for their racial, ethnic, or religious composition. In harming an intimate partner, abusers engage in a process of regaining the potency which is nullified in their interaction with the public world. However, the social or economic standing of the abuser is not a nexus to private torture. Abusers will explain that the purpose of the battery was to discipline the abused or punish her for some deviation from a set of rules that have no objective rationale. As with official torture, the purpose is a warped objective that has credibility predominantly in

166 Id.
167 See DALTON & SCHNEIDER, supra note 37, at 209 ("[T]he struggle for power and control is at the heart of the battering relationship.").
168 See WHITE, supra note 135, at 10 (describing how some men batter to cope with vulnerabilities and insecurities they experience as a result of their racial minority status).
169 See generally Bond, supra note 93, at 110–12. Bond argues that “[i]n the context of domestic violence . . . minority women around the world may have more difficulty accessing the legal system and may face additional challenges in attempting to escape a violent situation.” Id. at 110.
170 See, e.g., Ruth Jones, Guardianship for Coercively Controlled Battered Women Breaking the Control of the Abuser, 88 GEO. L.J. 605 (2000). Take for example the case of Hedda Nussbaum, whose daughter died at the hands of her abusive partner, Joel Steinberg. Id. at 607. The ensuing trial revealed that imprisonment, rape, torture, and an array of battering could take place within an affluent neighborhood in Manhattan. Id. at 606. See also Mark A. Uhlig, Breaking Through a Murderous Silence, N.Y. TIMES, Nov. 15, 1987, at 9, LEXIS, NYT File. The fact that Steinberg and Nussbaum were professionals and constituted a so-called middle class Jewish family confirmed the omnipresence of domestic violence. See Uhlig, supra.
171 Women are battered for talking out of turn, for being away from home for too long, for cooking badly, or not having completed all the housework. See Copelon, supra note 19, at 132. "Indeed, with the ‘home as his castle,’ the domestic aggressor may operate with even fewer external constraints than the official torturer." Id. at 133.
the mind of the abuser.\textsuperscript{172} The purpose for many abusers is to break the spirit of the abused and to ensure that the individual becomes dependent for her survival on the altruism of the abuser.

In addition to these purposes, there are a variety of reasons why men batter women, which reveal a pattern of intimidation, coercion, and discrimination. One explanation is a socio-psychological reason.\textsuperscript{173} Academics have categorized abusers into three personality types.\textsuperscript{174} The first two abusers generally possess some fear of the law or have a social profile which they wish to protect.\textsuperscript{175} The third, or type “C” abuser, is one who has no fear of the police or the law and as such will have no respect for any court order which may be made.\textsuperscript{176} In such cases many victim’s see suicide as their only alternative.\textsuperscript{177}

The understanding of the purpose and reason for committing acts of private torture is a separate study that extends beyond the borders of law into disciplines such as psychology, sociology, criminology, and gender studies. My objective in summarizing the purposes and reasons for private torture is to highlight that this component of the definition of official torture, namely that the violence should achieve some purpose or rationale, applies to cases of private torture.

iv. Official Consent or Acquiescence

States notoriously fail to implement policies and procedures that properly address private torture. Where such deficiency exists (as is described below), I propose that this constitutes a level of acquiescence, which triggers the definition of the Convention against Torture.

State inaction manifests itself in inadequate preventative measures, police indifference to abuses, police and judicial ignorance of the exigency of intimate violence, failure to criminalize

\textsuperscript{172} See id. at 128 (“The intentional infliction of excruciating pain and suffering for its own sake, whatever the subjective state of mind or goal of the torturer, mocks all pretense of civilization and thereby demands the most severe condemnation.”).

\textsuperscript{173} This term is my own phraseology. I have avoided making reference to the purely psychological component for two reasons. First, this is an analysis of the law and I could not do justice to the deep and pressing questions inherent in the psychological factor of battery. Second, battery is rarely explained solely by the psychological make-up of the abuser. To do so ignores the social responsibility of the broader community.

\textsuperscript{174} Fedler, supra note 40, at 250 n.77.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 251 n.77.
intimate violence, gender bias in the court system and legal/administrative proceedings where women experience hostility from the moment the case is reported to the final hearing—if one indeed occurs—and poor medical services.178

It is evident that private torture is not committed directly by the state or state officials acting in their official capacity. However, state structures and agencies play a pivotal role in the perpetuation of private torture. States often do not succeed in protecting women from private torture. This accentuates the severity and frequency of the harm. If there is no meaningful prevention and punishment of private torture, the level of violence escalates: the lack of proscription becomes an implied sanction. The result is that “a [s]tate’s lack of exercising due diligence in preventing, investigating, prosecuting and punishing violence against women at the hands of private actors can result in finding a [s]tate responsible for torture, and when less severe, ill-treatment.”179

Traditionally, the norm against torture has only been applied to the conduct of official actors.180 The crime of torture was developed in response to the torture of prisoners by state or government officials. However, this original construction does not preclude the extension of the definition to private torture.181 In the case of Tel-Oren v. Libyan Arab Republic, the United States Court of Appeals for the District of Columbia considered the jurisdictional basis for a claim of torture against non-state officials under the Alien Tort Claims Act.182 While the court held that the act of torture could not be committed by a non-state actor “acting under color of state law,”183 it asserted that “[e]ven in the truly private arena there is support for the concept of individual responsibility [in international

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178 A South African survivor of rape described how she had taken her underwear, smeared with semen and blood, to the police station as evidence of the rape. The underwear was taken by the police to be placed in the docket. The underwear went missing and was never found. The client’s distress was so acute that she abandoned the proceedings. This information was obtained informally during the author’s work with People Opposing Woman Abuse (POWA), a South African NGO in 2001–2002.

179 BENNINGER-BUDEL, supra note 116, at 10.

180 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984). In this case, the court limited the definition of torture to acts perpetrated by State officials. Id.

181 Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (holding that the Law of Nations should be interpreted in the changing context of the times).

182 Tel-Oren, 726 F.2d at 775.

183 Id. at 792. This holding pertained for the purposes of founding jurisdiction in the United States courts. The court recognized that such an investigation begs an “assessment of the extent to which international law imposes not only rights but also obligations on individuals” and that such an assessment appears to have “no obvious stopping point.” Id.
This underscores the possibility of triggering state responsibility for the acts of private individuals. Furthermore, this case was decided in 1984 and the change in the nature of the discussion of international law and its application to individual actors since has been significant.

However, even prior to the Tel-Oren case, international human rights law was tending toward liability for individual actions. In 1982 the United Nations Human Rights Committee, when interpreting article 7 of the International Covenant on Civil and Political Rights, which prohibits torture or cruel, inhuman, or degrading treatment or punishment, stated that:

[The scope of protection required goes far beyond torture as normally understood. . . . The prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. . . . Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.]

Increasingly, states are being held responsible for certain harmful conduct of their citizens. In this sense, the requirement of official involvement for international human rights violations has been
broadened to include state compliance, complicity, or acquiescence. Such state liability for failure “to take reasonable steps to prevent or respond to an abuse” has been framed as a “failure to exercise due diligence and to provide equal protection in preventing and punishing such abuses by private individuals.”

The due diligence standard was firmly established in 1988 by the Inter-American Court of Human Rights which held that:

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person . . . ) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights].

The Special Rapporteur on Violence against Women, Radhika Coomaraswamy, has incorporated the due diligence standard in her final report, stating that “a state can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights.” To determine whether a state has abrogated its responsibilities, Coomaraswamy articulated the due diligence standard as follows:

The standard for establishing state complicity in violations committed by private actors is more relative. Complicity must be demonstrated by establishing that the state condones a pattern of abuse through pervasive non-action. Where states do not actively engage in acts of domestic violence or routinely disregard evidence of murder, rape or assault of women by their intimate partners, states generally fail to take the minimum steps necessary to protect their female citizens’ rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished. To avoid such complicity, states must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.

This is echoed by the Special Rapporteur on State Responsibility,

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188 Broken Bodies, Shattered Minds, supra note 2, at 6.
190 Report of the Special Rapporteur on violence against women, supra note 2, at 9.
191 Id. at 9–10.
James Crawford, who stated that "under the ICCPR and its regional equivalents, the state has a positive duty not to authorize or allow torture, and this does much to attenuate the impact of the public/private distinction in that field."\(^{192}\)

In light of this development, I propose that international law can and should impute liability on states for the unlawful actions of individuals where states fail to prevent such actions. The impotency of many women who are victims of private torture, demonstrates that while their abusers may be private individuals, the conduct itself takes place within a structure of domination which mirrors the power disparity between the state and its citizens. Where a state has the ability to assist torture victims and does not, for any range of reasons, then it is acquiescing to the torture and therefore the Convention against Torture is triggered. The nature of the harm, the degree of control exercised by the abuser, and persistent state inaction confirm that simply because "domestic violence is privately, as opposed to officially, inflicted does not diminish its atrociousness nor the need for international sanction."\(^{193}\)

b. Isolation

Here goes.

Broken nose. Loose teeth. Cracked ribs. Broken finger. Black eyes. I don't know how many; I once had two at the same time, one fading, the other new. Shoulders, elbows, knees, wrists. Stitches in my mouth. Stitches in my chin. A ruptured eardrum. Burns. Cigarettes on my arms and legs. Thumped me, kicked me, burned me. He butted me with his head. He held me and still butted me; I couldn't believe it. He dragged me around the house by my clothes and by my hair. He kicked me up and he kicked me down the stairs. Bruised me, scalded me, threatened me. For seventeen years. Hit me, thumped me, raped me. Seventeen years. He threw me into the garden. He threw me out of the attic. Fists, boots, knee, head. Bread knife, saucepan, brush. He

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\(^{193}\) Copelon, *supra* note 19, at 117. *See* MacKinnon, *supra* note 132, at 5 (describing the contradiction in elevating violence perpetrated against men (ethnic violence) to the level of a human rights violation, but not when it is perpetrated against women by an imposing power structure (gender violence)).
tore out clumps of my hair. Cigarettes, lighter, ashtray. He set fire to my clothes. He locked me out and he locked me in. He hurt me and hurt me and hurt me. He killed all of me. Bruised, burnt and broken. Bewitched, bothered and bewildered. Seventeen years of it. He never gave up. Months went by and nothing happened, but it was always there—the promise of it. . . . He demolished me. He destroyed me. And I never stopped loving him. I adored him when he stopped. I was grateful, so grateful, I'd have done anything for him. I loved him. And he loved me. 194

In this section I consider the isolation of victims of private torture and the way in which this component internationalizes private torture. The isolation inherent in private torture is both a conceptual and descriptive component, which renders victims of private torture vulnerable to this form of rights violation.

Private torture is a nebulous crime within the law: its borders and definition are amorphous simply because it takes place within a sanctioned and often, although certainly not always, legal union. And yet it is the very intimacy of the violence which forms part of the exigency of the crime. The privacy and isolation of the home in many respects is analogous to the isolation of a prison cell.

Firstly, the isolation of private torture has an important impact on the psychology of the victim. Much like official torture or the crime of disappearances, the isolating component of the act of harm serves an important psychological purpose, which accentuates the harm and intensifies the fear. Abusers typically implement a procession of isolating factors. The abuser's intimate partner is initially dissuaded from contact with family, friends, neighbors, and society in general. 195 Many women “frequently survive their situation by avoiding adversarial encounters and by actively shunning legal assistance.” 196 This serves to estrange the partner's family and social support structure with the result that the very people, who would usually provide assistance, are alienated. As the level of abuse intensifies, the abuser will physically restrain his intimate partner from interaction through threats of harm to the abused and/or her children or through physical detention and

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194 Schneider, supra note 6, at 11 (quoting Roddy Doyle, The Woman Who Walked into Doors, 175 (1996)).
195 Abusers will accuse their intimate partner of infidelity for merely talking to other people, men or women.
196 Fedler, supra note 40, at 235.
Shut off from the outside world, the wave of physical abuse intensifies and progresses without the impediment of social or communal accountability.

Secondly, isolation also contributes to the physical severity of the violence. In light of the domestic context of private torture, the nature of the violence has been subsumed into the intimacy of relationships. Privacy has been used as a veneer that either hides the violence itself or distorts its severe nature.

Given the degree of violence and the isolating effect of the action conducted within the realm of intimacy, private torture emerges as a crime akin to those that have been cast as torture and other internationally criminalized acts, simply because domestic law allows them to disappear behind the shroud of privacy.

The analogy between extreme forms of domestic violence and torture reveals that the literal removal of the abused from her community and her isolating imprisonment are disquietingly synonymous with the structure of official torture, which uses isolation both to mask the ferine effects of its execution and as a psychological weapon against the tortured. It is arguable that within a domestic setting, the abused is attacked in isolation, much as a state’s “enemy” is tortured behind official doors.

In the darkness and detachment of such isolation, acts of violence are carried out, implemented, and executed in silence. The silence effectively removes the existence of the harm from the realm of reality. The abuse disappears.

c. Discrimination

i. Discrimination and Vulnerability

[T]here is no simple explanation for violence against women in the home. Certainly, any explanation must go beyond the individual characteristics of the man, the woman and the family and look to the . . . role of society in underpinning that structure. In the end analysis, it is perhaps best to conclude

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197 Telephones are disconnected and windows are often sealed. One POWA client could only communicate to her sister through the letter opening in the front door. See also DWORKIN, supra note 19, at 115–16 (“When you look at what happened to these women, you want to say, ‘Amnesty International, where are you?’—because the prisons for women are our homes. We live under martial law. We live in a rape culture. Men have to be sent to prison to live in a culture that is as rapist as the normal home in North America.”).
that violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.\textsuperscript{198}

The third internationalizing component of private torture is sex-discrimination. The prodigious impact of discrimination is a factor that has led to the enumeration of many human rights standards, especially where discrimination against a group constitutes a justification for harm to that group.

As described above, in this analysis of domestic violence, the abuser is generally male and the victim generally female. It is conceded immediately that such binaries are not always an accurate reflection of the complexity of violence that is perpetrated by both genders against both genders of various ages, from children to the elderly. However, the gendered duality is a seminal part of the narration of harm that reveals the intersection between sexism and violence against women specifically by men in communities in which women are subordinated or occupy an inferior status.\textsuperscript{199} This leads to the inescapable and alarming conclusion that “[d]omestic violence is not gender-neutral.”\textsuperscript{200}

The battery of women by men is arguably a group struggle and where there is a group struggle against an oppressive system, the rules and laws of the international order are triggered. The fact that abusers are not technically organized (although the commonality of abuse and the frequent state acquiescence thereto arguably creates a structure of male potency) does not denude or change or minimize the harm suffered by women with alarming consistency and gravity.

The correlation between violence and sex-discrimination is universal.\textsuperscript{201} This type of harm against women is not a case by case

\textsuperscript{198} U.N., \textit{VIOLENCE AGAINST WOMEN IN THE FAMILY}, \textit{supra} note 32, at 33.

\textsuperscript{199} \textit{See Harvard Law Review, Developments in the Law: Legal Responses to Domestic Violence}, 106 \textit{Harv. L. Rev.} 1498, 1501 n.1 (1993). The gendered dyad does not “reflect a particular bias; rather, it simply reflects the statistical reality of domestic violence.” \textit{Id.} This assumption is based on studies which “indicate that women are more than ten times as likely as men to be the victims of domestic violence.” \textit{Id.} In reality, the discrepancy may be narrower as the reporting of domestic violence by men is undermined by the overwhelming humiliation associated with the social stigma of male weakness.

\textsuperscript{200} Copelon, \textit{supra} note 19, at 120. \textit{See MASON}, \textit{supra} note 32, at 621 n.4 (using feminine pronouns to refer to survivors of domestic violence in recognition of the fact that almost always such victims are women).

\textsuperscript{201} In reality, women remain second class citizens in many communities. This disparity is manifested into extreme and often sanctioned physical violence. \textit{See generally} Julie Peters &
peculiarity but in many ways is a manifestation of views, perceptions, priorities, and social importance. It is “systemic and structural . . . built on . . . [the] economic, social, and political predominance of men and dependency of women.” This is especially true of post-conflict or transitional regions with high levels of crime and desensitization to violence in general. In such societies, women “are disproportionately likely to be victims of that violence” and ninety-five to ninety-eight percent of reported spousal abuse cases involve men attacking women. UNICEF has concluded that the ubervous incidence of violence against women by men is “predicated upon economic dependency, acculturation to sex roles, and legal and political inequality.” Authorities suggest that in America between two and four million women are battered each year and that spouse abuse occurs once every eighteen seconds. Fourteen thousand women die in Russia every year—one woman dies of domestic violence every forty minutes.

The social abasement of women has been diluted. As the feminist movement, particularly in America, France and the United Kingdom, developed and grew, women obtained greater civil liberties and individual freedoms. The feminist movements were responsible for the progression from disenfranchisement and the


Women are the victims of widespread personal and systemic violence . . . . The sweep of violence—overt or subtle—is striking: common in North America and elsewhere are sexual assault and rape, wife battering, sexual harassment, prostitution, sadistic pornography, and sexual exploitation by medical personnel. Cultures beyond these shores add their own forms of violence such as dowry death and female genital mutilation . . . . [Violence against women] knows neither racial nor ethnic limitations—only cultural variations, such as female genital mutilation or dowry burnings.

Id. See also Resnik, supra note 14, at 641 (recognizing that legal change is required to “achieve a categorical shift of women from dependent householders to physically secure equal citizens”). See generally Benninger-Budel, supra note 116.

Copelon, supra note 19, at 120.


Mason, supra note 32, at 640 n.117; see also Dixon, supra note 67, at 367.

Resnik, supra note 14, at 658. See also UNICEF, Domestic Violence Against Women and Girls, supra note 2, at 7–8.

Mason, supra note 32, at 640.


legal incompetence of women,\textsuperscript{209} to access for women to political processes, economic forums, and public life in general.\textsuperscript{210} However, the residue of inequality lingers in the shadows of the home and work. Feminists have made strides but society has lagged behind, continuing to denigrate the role of women within domesticity and as a satellite to men.\textsuperscript{211} The social inferiority of women has manifested itself in various communal structures. In the workplace, women face sexual harassment, prejudice, lower pay, harder work, and little concern for the duality of roles many women experience as both workers and mothers.\textsuperscript{212} Politically, women are striving ahead as First Ladies, Ministers, and Cabinet Members but few countries boast female presidents.\textsuperscript{213} Socially, women continue to be the predominant gender responsible for child rearing and concomitant household responsibilities, irrespective of whether such women hold other jobs or pursue other careers.\textsuperscript{214}

While the social, political, and economic equality and equivalency of women has been achieved to varying degrees throughout the world, true choice regarding personal priorities and life ambition, 

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\textsuperscript{209} See Siegel, supra note 134, at 2127–30 (discussing the role of the women’s movement in the repudiation of the right of chastisement).

\textsuperscript{210} SCHNEIDER, supra note 6, at 4–5.

\textsuperscript{211} Charlotte Bunch, Transforming Human Rights from a Feminist Perspective, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 58, at 12. “The exclusion of any group—whether on the basis of gender, class, sexual orientation, religion, or race—involves cultural definitions of the members of that group as less than fully human.” Id. at 12.

\textsuperscript{212} Vicki Schultz, Life’s Work, 100 COLUM. L. REV. 1881, 1883 (2000). “[U]nless we pay attention to the institutional contexts through which housework is valued and individual choice realized, stubborn patterns of gender inequality will continue to reassert themselves—including the gender-based distribution of work that is at the root of women’s disadvantage.” Id. at 1883. There are many authors currently addressing this issue but Professor Schultz provides one of the most recent accounts of the work/family divide.

\textsuperscript{213} Notable exceptions to the male domination of leadership include Margaret Thatcher of England, Mary Robinson of Ireland, Golda Meir of Israel, Acting Head of State, SühBaataryn Yanjmaa of Mongolia, Acting Head of State, Song Qingling of China, President Maria Estella Martinez Cartas de Perón of Argentina, President Chandrika Bandaranaike Kumaratunga of Sri Lanka, and Lydia Gueiler Tejada of Bolivia. Worldwide Guide to Women in Leadership, available at http://www.guide2womenleaders.com/Presidents.htm (last visited Oct. 29, 2003).

\textsuperscript{214} See Gwendolyn Mikell, Introduction, AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA 1 (Gwendolyn Mikell ed., 1997). The link between gender and family has minimized the importance of female education, particularly in developing regions.

African women’s struggle against gender asymmetry and inequality is often described in terms of the relationship between public and private spheres, or what we may call the “domestic versus public” distinctions in gender roles in Africa. Female subordination, often implemented through this domestic-public dichotomy, tends to be linked with sex roles and relationships in most parts of the world . . . [and] were exaggerated by colonial, Western, and hegemonic contacts.

\textsuperscript{214} Id. at 3. See also Sullivan, supra note 60, at 133–34 for an examination of the intersection between the inferior treatment of women in society and the greater degree of exposure to violence for such women.
unfettered equality, and de-gendered expectations remain an objective and not an achievement, thus perpetuating the social and legal abjection of women.\textsuperscript{215}

ii. Discrimination and the Legal Consequences

Sex-discrimination, either in the form of state antagonism or state disinterest, reveals the myth that domestic laws are suitable in their current form to address the private torture of women. National laws are neither the result, nor the reflection, of universal needs: they are the result, and reflection, of a culture, an order, a way of life.\textsuperscript{216} Therefore, an adherence to law in its current form may constitute “our deepest political myth,”\textsuperscript{217} which allows us to ignore the “invisible’ pattern of order in law,”\textsuperscript{218} a pattern that facilitates a resonance between factual inequality and legal redress for violence against women. To many theorists, this “pattern of order” is hierarchical, placing the empowered in positions to retain power and the disempowered in a correspondingly weak and non-threatening position. According to Paul Kahn, when embarking on a rejection of legal doctrine, it is necessary to “examin[e] . . . the rule of law as an expression of our political culture.”\textsuperscript{219} It is my contention that the current, and exclusive, rule of national law in private affairs stems from a “political culture” in which, for a host of reasons, the parity of male and female citizens is still to be realized. The reality of sex-discrimination exists. Moreover, it exists in largely every society. Sex-discrimination, at some point and in some way, has infiltrated, affected and, perhaps, corrupted

\textsuperscript{215} See BENNINGER-BUDEL, supra note 116, at 279. “Moreover, women victims of violence in general, and of domestic violence in particular, are still reported to face hostility when dealing with the police as well as discriminatory and sexist assumptions when dealing with the judicial system.” Id. See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN ix-xxiii (1991).

\textsuperscript{216} See Anthony V. Alfieri, Retrying Race, 101 MICH. L. REV. 1141, 1145 (2003) (demonstrating that race as a social factor, “colors law, crime, and community. It shadows the performance of public and private roles. It shades the meaning of relationships. And it stains the operating norms of institutions.”). I propose that the same infiltrating tendency exists with respect to gender.


\textsuperscript{218} Bernhard Grossfeld & Edward J. Eberle, Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers, 38 TEX. INT’L L.J. 291, 294 (2003) (maintaining that invisible phenomena that influence the path of law include a range of tangible, intangible, intuitional, or rational factors).

\textsuperscript{219} KAHN, supra note 217, at x–xi.
many domestic laws vis-à-vis women. The result is that we find ourselves asking “[w]hy are we so worried as women?” The answer appears to be that the discrimination that segregates men and women also separates male needs and female needs; where the lawmakers are men:

The development of programs, services and policies for handling domestic violence has been placed in the hands of men. Has it resulted in a reduction of this kind of violence? Is a woman or a child safe in their own home . . . ? The statistics show this is not the case.

The deficiency in domestic law is evidenced by three decisions of the United States courts, namely DeShaney v. Winnebago County Dep’t of Soc. Serv., Riss v. City of New York, and U.S. v. Morrison.

In DeShaney, the United States Supreme Court adjudicated whether a state has a duty to intervene in a case of acute child abuse that resulted in the brain damage of a minor child. The Supreme Court held that the failure of the Winnebago County Department of Social Services to protect a minor child from severe beatings by his father did not constitute an actionable claim under the due process provisions of the 14th Amendment of the United States Constitution. The department knew of the beatings; the hospitals knew of the beatings; the parents knew of the beatings. Everyone who could have prevented the brain damage of a young child was informed. Notwithstanding this information, there was no legal obligation on the department to assist the minor child nor was the department, or any other institution, held liable for the omission to prevent the battering of a minor child to the point of brain damage.

See, e.g., Peters & Wolper, supra note 201, at 1, 2. “While men may care about reproductive freedom, their lives are not actually threatened by its absence . . . .” Id. at 2.

Native Women’s Ass’n. of Canada v. Canada, [1992] 3 F.C. 192 (Ottawa), 1992 CarswellNat 114; ¶ 91 (Appellant’s Concerns) (quoting from Appellant’s address to Chiefs in Assembly, Exhibit “W”).

This article uses the United States as an example of a sophisticated legal jurisdiction. A fortiori, other jurisdictions may provide considerably less protection for women. 489 U.S. 189 (1989) (hereinafter referred to as the “DeShaney case”).

22 N.Y.2d 579 (1968) (hereinafter referred to as the “Riss case”).


DeShaney, 489 U.S. at 191.

Id. at 192–93.

Id. at 196–97. The essential rationale of the court was that socio-economic rights are not positive rights with a concomitant positive obligation on government to deliver associated
The court held:

[N]othing in the language of the Due Process Clause itself requires the [s]tate to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the [s]tate’s power to act, not as a guarantee of certain minimal levels of safety and security.\(^{230}\)

This case demonstrates a judicial reticence to impose a positive duty on states to intervene in the family or private sphere.

In *Riss*, Linda Riss had been stalked and threatened by a former suitor. Notwithstanding repeated complaints to the police, the aggressor was never apprehended and he ultimately hired a “thug [to] throw lye in Linda’s face.”\(^{231}\) The court held that it could afford Linda sympathy but not legal redress.\(^{232}\) It based its decision on resource scarcity, holding that “[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed.”\(^{233}\) However, as Judge Keating pointed out in his dissent, if there is a scarcity of resources then liability should be imposed on public officials for failing to provide a minimum level of protection for the more vulnerable members of society.\(^{234}\)

This case raises the speculation that the reticence of governments to provide a core minimum content to preventing violence against women is not only due to resource scarcity; it appears that the entrenched hierarchy within both law and society which places women on a lower wrung of the social ladder, with lesser needs and arguably, with less relevance in the public realm, may also play a role in the allocation of limited resources.\(^{235}\)

\(^{230}\) *Id.*

\(^{231}\) *Riss v. City of New York*, 22 N.Y.2d 579, 584 (1968). It is interesting to note that the court refers to the complainant as “Linda” whereas judicial bodies generally—and especially those dealing with mainstream human rights issues, such as the International Criminal Tribunal for the Former Yugoslavia—refer to the parties not by their first names but rather by their legal position as either appellants or defendants. *See*, e.g., Prosecutor v. Dusko Tadic, 36 I.L.M. 908 (ICTY 1997).

\(^{232}\) *Riss*, 22 N.Y.2d. at 581.

\(^{233}\) *Id.* at 581–82.

\(^{234}\) *Id.* at 589 (Keating, J. dissenting).


This issue is critically important, because health care providers are often in the best position to help victims of abuse and their children, if they are trained to screen for domestic violence, to recognize signs of abuse, and to intervene effectively. States can
Perhaps the most telling case is that of *U.S. v. Morrison* where the United States Supreme Court held that the United States Congress did not have the authority to enact the civil law remedy in the Violence against Women Act.\(^{236}\) The basis of this decision was, inter alia, that gender-motivated crimes of violence are not "economic activity" nor do they affect interstate commerce for the purposes of the commerce clause in the United States Constitution.\(^{237}\) Of course, if women are deemed to be on the margins of public life, their abuse would not constitute a retardation of the economy. Because women are not perceived as pivotal public or economic players, they do not warrant the same status and consideration as men by public structures. The United States Supreme Court revealed that women are not relevant to the public sphere: that violence against women, and therefore women themselves (as what could be a greater curtailment of an individual's commercial participation than violence) cannot and do not fall within the purview of a commercial conversation.\(^{238}\) This case further highlights the failure of the domestic legal system to take steps towards curing private torture and perhaps amounts to a "parochial refusal to permit innovations aimed at altering gender roles in the face of a national and growing worldwide consensus that all social institutions require reconsideration . . . ."\(^{239}\)

The cases cited are at the very least indicative of the inadequacy of domestic law within the United States to address gender-based crimes. While the United States is one example of a domestic legal system which is unable to cope with the exigency of private torture, other regions and countries with far less accessible and transparent legal systems may provide even less effective legal redress for women. According to feminist theorist Gwendolyn Mikell, many developing states within Africa stand indicted for the systematic disregard of and opposition to women.\(^{240}\)

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\(^{237}\) *Id.* at 613.

\(^{238}\) See Resnik, *supra* note 14, at 631–33. This was the decision of the Supreme Court notwithstanding overwhelming evidence demonstrating that "violence targeted against women *qua* women limited their economic options." *Id.* at 627.

\(^{239}\) *Id.* at 664.

\(^{240}\) See MIKELL, *supra* note 214, at 1 (describing how African women suffer lower education levels and higher levels of malnutrition).
With the support of a society which empowers men and not women, the battering continues, repeating itself, normalizing itself. The veil of privacy coupled with the overtly male structures of authority has made the law one of the very last ports of call for women who suffer private torture with the result that the “prevalence of wife-battering unmasks the prevailing concepts of normalcy and functionality” of gender inequality within social and legal structures.\footnote{Copelon, supra note 19, at 120.} In this way, sex-discrimination is one of the prevailing factors that internationalizes the private torture of women.

iii. The Universality of Discrimination against Women.

In India, a ten-year-old girl boards a flight for Saudi Arabia; her companion is a sixty-year-old businessman who has married the girl after purchasing her from her parents. In a U.S. suburb, a woman kept under “house arrest” is beaten if she tries to contact friends or relatives; her “jailer” is her husband. In a Sudanese village, a group of little girls is taken to an unfamiliar place where a woman cuts away their genitalia using an unsterilized piece of broken glass. In Peru, a woman is arrested after inquiring about her husband, who has not been seen since he was questioned by soldiers several days earlier. In Burma, a twenty-two-year-old woman and her eleven-year-old niece are taken into custody as they hurry home just after curfew; the young woman is raped by six soldiers, the eleven-year-old by seven—including the unit commander.\footnote{Peters & Wolper, supra note 201, at 1.}

Disparate treatment of women has manifested itself in almost every society in the world.\footnote{See, e.g., Jaising, supra note 57, at 51 (“The persistence in India of cultural practices that discriminate against girls and women means not only the abuse of but, finally, the deaths of countless women.”).} Almost all communities from almost all regions have transgressed and continue to transgress the rights of women \textit{qua} women.\footnote{See The Human Rights Watch, World Report of 2002: Women’s Human Rights (2002), available at http://www.hrw.org/wr2k2/women.html#Violence%20Against%20Women (last visited Oct. 25, 2003) (citing Zimbabwe, the United States, Uzbekistan, Turkey, and Jordan as examples in which women’s physical and sexual integrity is at risk).} One can only conclude that no matter how progressive a society, country, or region may deem itself to be, women, at the very least, continue to receive lesser benefits, status,
and respect in the public sphere. The harm committed against women is not peculiar to a particular place. It is an active practice throughout the world. Against this backdrop of universal social imparity, the inadequacy of current domestic legal structures in addressing private torture comes a little more clearly into focus. Indeed, in many jurisdictions private torture or domestic violence is not, in and of itself, a crime.\textsuperscript{245}

The prohibition against torture in international law arguably is rooted in the power imbalance between the state and individuals. The vertical structure of the powerful state arching over and controlling an impotent citizen triggers the need for greater regulation of state conduct.\textsuperscript{246} Scholars have claimed that the same discrepancy exists between men and women and that it is therefore artificial to draw a distinction between official and private torture on this basis.\textsuperscript{247} In most societies, when violence is committed between intimates, notwithstanding its reprehensibility, it does not elicit the same kind of outrage as official torture. It is not condemned and its perpetrators are neither ostracized nor punished.\textsuperscript{248} Even instances of dire physical harm are often justified on the basis that they occur between intimate partners in a private realm which excludes state interference. For these reasons, in the same way that international law pertains to official torture, it ought to apply in instances of private torture.

The spotlight needs to be focused both on the perpetrator and the structures which create “the traditional complicity of law and custom in giving license to violent ‘impulses’ against women.”\textsuperscript{249} This is especially true where such violence is identical in form and nature to that which is committed by state actors. Therefore, while

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\item \textsuperscript{245} In many jurisdictions domestic violence may be prohibited in terms of legislation; however, a criminal offence only arises where a victim has obtained a protection order, which is breached by the aggressor. In such instances, the aggressor will be guilty for contempt of court but not for the battery of his intimate partner.
\item \textsuperscript{246} This is one of the explanations for the requirement that the burden of proof for criminal cases is the more stringent one of “beyond a reasonable doubt.”
\item \textsuperscript{247} See Schneider, \textit{ supra} note 6, at 90–97. See also Broken Bodies, Shattered Minds, \textit{ supra} note 2, at 3 (2001) (reporting that “much of the violence faced by women in everyday life is at the hands of the people with whom they share their lives”); Dorothy Q. Thomas & Michele E. Beasley, Domestic Violence as a Human Rights Issue, 58 \textit{Alb. L. Rev.} 1119, 1129 (1995) (“If violence against women in the home is inherent in all societies, then it can no longer be dismissed as something private and beyond the scope of state responsibility.”).
\item \textsuperscript{248} Moreover, acts of private torture are not criminal activities in and of themselves in several jurisdictions. In many States, it is only when domestic conduct transforms into an identifiable crime, such as murder or contempt of court for the contravention of a protection order, that police intervention is considered necessary.
\item \textsuperscript{249} Copelon, \textit{ supra} note 19, at 129.
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international legal institutions tend to apply the Rome Statute and the Convention against Torture clearly to state officials, and while private torture is perpetrated by private individuals, the public/private distinction is both artificial in light of the severity of the harm and incorrect in light of the duty of states to prevent cruel, inhumane, and degrading treatment.

Where the laws of a country have developed to provide a legal structure to address ‘domestic violence,’ the enforcement agencies are negligent—if not indeed reticent—to implement such laws. While laudable, a sophisticated statute is a nullity when the law is not enforced.  

This is evidenced by a South African case in 1995:

[A] batterer who allegedly threw his girlfriend through a plate-glass window causing her permanent disfigurement was acquitted by the magistrate on the ground that it was ‘reasonably possible that she had tripped over a potplant and fallen through the window.’ The fact that he had a history of abusing her was, of course, inadmissible. [The] client said ‘It’s as if the magistrate gave him [the accused] a handshake.’  

The social stratification caused by gender hierarchies is remarkably similar to that of ethnic hierarchies. In many societies, this hegemony supports the powerlessness of women with the result that one group suffers at the hands of another group.  

In Pakistan, the mother of a rape victim whose perpetrators were not prosecuted or even charged stated that “[t]hese men who have ruined my daughter’s life should be hanged. Instead, they went totally unpunished. Why is there one justice for men and another justice for women?”  

Group delineation exists; the remaining question is whether it will be acknowledged by the very people who benefit from it.

The extent of the problem is summarized as follows:

Intimate partner violence is increasingly seen as an

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251 Fedler, supra note 40, at 236 n.21.

252 See JAN GOODWIN, PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD 54 (Plume 1994) (examining the oppression and subordination of Muslim women by Muslim men).

253 See id. at 54.
important public health problem.
− In 48 population-based surveys from around the world, 10-69% of women reported being physically assaulted by an intimate male partner at some point in their lives.
− In large national studies, the range is between 10-34%.
− Most victims of physical aggression are subjected to multiple acts of violence over extended periods of time.
− Physical violence in intimate relationships is often accompanied by psychological abuse, and in a third to over a half of cases by sexual abuse.
− Partner violence also accounts for a significant number of deaths among women. Studies from a range of countries show that 40-70% of female murder victims were killed by their husband or boyfriend, often during an ongoing abusive relationship. 254

These figures evince that the current structure of domestic laws is deficient. A new approach is necessary and I propose that approach is best found in international human rights law.

III. CONCLUSION

How does newness come into the world? How is it born?
Of what fusions, translations, conjoinings is it made?
How does it survive, extreme and dangerous as it is? What compromises, what deals, what betrayals of its secret nature must it make to stave off the wrecking crew, the exterminating angel, the guillotine?
Is birth always a fall?
Do angels have wings? Can men fly? 255

A foundational principle of human rights law is that violent and extreme harm should never be justified. 256 If the harm caused by private torture is such that it constitutes an invasion into the humanness inherent in the definition of torture in international law, it may be possible to argue that dire instances of ‘domestic violence’ meet the requirements of the revered status of

254 See Intimate Partner Violence Fact Sheet, supra note 250.
international human rights violations.\textsuperscript{257} Moreover, the right to be free from such violence is not simply part of the broad plethora of rights which has developed within the international human rights world. Given its extreme violation and its prolific execution, private torture is akin to the newly developing realm of rights which stands alone in human rights discourse by virtue of the fact that its violation is too terrible to comprehend and its violators too inhumane to escape punishment.

Clearly this violence is not only prolific, but common in widely different regions. As such, it needs to be redefined and addressed by the international community as the concept it is in reality, namely, private torture.

A seminal question is who would be responsible for the violation of the right to be free from private torture. The right should be enforced by nation states via proper policing, policy and legislation in domestic law. Ultimately, the need for the internationalization of private torture is to galvanize states to enact better and more accurate legislation to target private torture.

It has been proposed that the state “shares responsibility for the suffering these women have endured, whether the perpetrator was a soldier, a police officer or a violent husband.”\textsuperscript{258} Only when countries perceive this phenomenon as an international human rights violation, will there be a standard against which domestic legislation can be tested and improved to combat the true nature of private torture.

From the above discussion it is evident that private torture is severe. The analogies between private torture and the cast of definitions of torture contained in the Rome Statute and the Convention against Torture are disquieting; the reticence of a world order to see it as such, resounding.

The distinction between domestic violence and private torture allows for a clearer application of domestic and international law respectively. Private torture, like official torture, is an international human rights violation and its remedy should be addressed by international committees, tribunals and, potentially, by international courts.\textsuperscript{259} The facts of private torture, the structure

\begin{itemize}
\item \textsuperscript{257} This will be developed as part of a broader project constituting the author’s J.S.D. dissertation.
\item \textsuperscript{258} BROKEN BODIES, SHATTERED MINDS, supra note 2, at 2.
\item \textsuperscript{259} The viability of holding States liable for private torture in domestic, regional, and international courts is a question that is being considered as part of the author’s J.S.D. dissertation.
\end{itemize}
of international law and the growing body of precedent provide a foundation from which the alleviation of the terror of private torture can become a priority, and, perhaps, a reality.