

UNIVERSITY OF ESSEX
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DISSERTATION

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| LLM/MA IN: International Human Rights Law |
| STUDENT'S NAME: Marie Krizel Patolot Malabanan |
| SUPERVISORS'S NAME: Emily Jones |
| DISSERTATION TITLE A feminist critique of the adjudication of the HRC and the CAT in cases filed by women asylum seekers involving the principle of non-refoulement |

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2018-2019

Supervisor: Emily Jones

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I. Introduction

Refugees and asylum seekers are vulnerable persons *per se*—they are forced to flee their home, are left without their familiar sources of support, and then face several obstacles concerning their asylum claims. However, among those seeking asylum, there are those more exposed to increased risks of harm and thus require special protection. These include survivors of torture, sexual or gender-based violence or other harm.

At the national level, when filing an asylum case, women asylum seekers face cultural barriers, such as post-traumatic stress disorder and psychological difficulties, like the deeply ingrained idea of shame, which prohibit them from providing decisionmakers with the personal narratives of the harms they have experienced in their countries of origin. Women asylum seekers are often averse to divulging to their male family members, certain harms they have suffered from, including rape.¹ Such specific state of vulnerability is singled out by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) which specifically highlights women asylum seekers as being at an increased risk of gender-based violence.²

At the international level, on the other hand, as this paper would demonstrate, the decisions of international human rights treaty bodies reflect a tendency towards disbelief in terms of the gravity of women's pain and suffering and towards viewing women within the context of their roles within the family. Because of this bias against women complainants, mostly those seeking asylum in a country other than their country of origin, it becomes even more difficult for them to counter this narrative. This is despite the adjudicators' awareness that returning women asylum countries to their countries of origin is tantamount "to having told a Jew in the 1930s to return to Germany and accept his or her legal discrimination."³

¹ Aubra Fletcher, 'The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law' (2006) 21 Berkeley J. Gender L. & Just. 114.

² Council of Europe, 'The Convention in Brief' <[https://www.coe.int/en/web/istanbul-convention/the-convention-in-brief#%2211642301%22:\[1\]](https://www.coe.int/en/web/istanbul-convention/the-convention-in-brief#%2211642301%22:[1])> accessed 20 September 2019.

³ See Mary Williams Walsh, 'Battered Women as Refugees: Female Asylum-Seekers in Canada Say They're Being Persecuted in their Homelands on the Basis of their Sex. Should Balkan Rape Victims and Feminists in Islamic States Qualify as Political Refugees?' *L.A. TIMES* (Feb. 23, 1993) < <https://www.latimes.com/archives/la-xpm-1993-02-23-mn-448-story.html>> accessed 20 September 2019. This story involved a Saudi Arabian woman who refused to wear a veil and wanted to pursue a university degree. The male

This paper examines the extent to which the two primary international treaty bodies mainly concerned with torture and other cruel, inhuman or degrading treatment or punishment—the Committee Against Torture (CAT) and the Human Rights Committee (HRC) acknowledge the vulnerabilities of women asylum seekers. I do this by conducting a feminist analysis of how the HRC and the CAT have adjudicated the claims of women asylum seekers based on the Committees’ mandate over Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁴ and Article 3 of the UN Convention Against Torture (UNCAT)⁵ respectively. Throughout the paper, decisions of the HRC and the CAT on cases filed by women asylum seekers⁶ were selected because of their reasoning, mostly because of the bias against women the cases illustrate.

Analysis of the ‘views’ or decisions made by the HRC and the CAT reveals that these treaty bodies are gender-biased because they fail to consider women as individual human beings with independent rights and interests. Based on an in-depth analysis of selected decisions involving the principle of *non-refoulement*, the HRC and the CAT have failed to fully capture the human rights violations experienced by women asylum seekers. In doing so, they have rendered the claims of women asylum seekers invisible in various ways—(1) by jointly adjudicating women’s claims with their spouses’ claims (2) by overly relying on the women’s family support network (3) by misunderstanding women’s different threshold of harm.

Indeed, most cases involving violence against women do not reach the treaty bodies, and thus, may have limited direct impact in providing remedies to human rights violations against women.⁷ However, because of their persuasive authority, there is still much to be gained in closely analyzing the cases and in attempting to uncover the gender biases ingrained in the system in an attempt to address them. As quasi-judicial

panellists of the Canadian refugee board told the woman “to go home, observe her country’s laws and ‘show consideration for the feelings of her father’”.

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter ICCPR].

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 [hereinafter UNCAT].

⁶ This paper will use the terms ‘women asylum seekers’ and ‘women complainants’ interchangeably.

⁷ Byrnes, A. ‘Using International Human Rights Law and Procedures to Advance Women’s Human Rights’ in Kelly D. Askin & Dorean M. Koenig (eds), *Women and International Human Rights Law* (1st edn, Transnational Pub 2000) 83.

bodies considered as the authoritative legal interpreter of the ICCPR and the UNCAT,⁸ the HRC and the CAT respectively, have been playing essentially important role in creating a space wherein to develop a more comprehensive understanding of how human rights are translated into practice—the materials produced by the treaty bodies have been used by activists as a basis from which to frame their rights-based arguments on,⁹ in a manner whereby states would be more willing to hear.¹⁰

Part II begins with a discussion on the definition of the principle of *non-refoulement* and discussing the scope of protection guaranteed under Article 7 of the ICCPR and Article 3 of the UNCAT. Part III then outlines feminist critiques of international law, including a discussion on the patriarchal structures of international law and how international law is gendered. Part IV then is a feminist critique of decisions made by the HRC and the CAT. Part V makes recommendations derived from the case studies. Finally, I conclude that unless the HRC and the CAT transform their understanding of the individuality of women complainants, the Committees will continue to ingrain gender bias in their decisions.

II. The principle of *non-refoulement*

This Section will define the principle of *non-refoulement* as enshrined in the Convention Relating to the Status of Refugees (Refugee Convention),¹¹ the UNCAT, and the ICCPR. Under the UNCAT and the ICCPR, I will outline the scope of protection these treaties accord to individuals and how the CAT and HRC have interpreted what would constitute as ‘substantial grounds’ for believing that the complainants would be at risk of torture or ill-treatment.

The principle of *non-refoulement* is the “cornerstone of asylum and of international refugee law,” reflecting the commitment to guarantee human rights to all individuals, particularly, the rights to life as well as to

⁸ See Kerstin Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 Vanderbilt Journal of Transnational Law 905, 913–14, 917–19, 924–6.

⁹ See Byrnes (n7) 79, 108-109.

¹⁰ Rachael Lorna Johnstone, ‘Feminist Influences on the United Nations Human Rights Treaty Bodies’ (2006) 28 HUM. RTS. Q. 148, 185.

¹¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 [hereinafter Refugee Convention].

freedom from torture or cruel, inhuman or degrading treatment or punishment.¹² These, together with other rights, are put at risk when individuals are returned to another State.

International law establishes a normative framework on the principle of *non-refoulement*. First expressed in Article 33 of the Refugee Convention,¹³ the principle of *non-refoulement* prohibits States Parties from expelling or returning a refugee, defined to be any person who:

...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or unwilling to return to it.¹⁴

The principle of *non-refoulement* likewise applies to an asylum seeker, defined to be an individual who is seeking international protection but whose claim for refugee status has yet to be decided on by the country where he or she has submitted his/her claim.¹⁵ All refugees are initially asylum seekers, but not all asylum seekers will be recognized as refugees.¹⁶

Following the Refugee Convention, subsequent international human rights treaties have incorporated the principle of *non-refoulement* in their texts.¹⁷ Because of the lack of a mechanism under the Refugee

¹² UN High Commissioner for Refugees (UNHCR), 'UNHCR Note on the Principle of Non-Refoulement' (*Refworld*, November 1997) <<https://www.refworld.org/docid/438c6d972.html>> accessed 16 September 2019.

¹³ Refugee Convention, art 33.

¹⁴ *Id.*, art 1a(2).

¹⁵ Frances Nicholson and Judith Kumin, 'A guide to international refugee protection and building state asylum systems' (*United Nations High Commissioner for Refugees and Inter-Parliamentary Union*, 2017) 17 <<https://www.unhcr.org/3d4aba564.pdf>> accessed 4 October 2019.

¹⁶ *Ibid.*

¹⁷ David Weissbrodt and Isabel Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 *Buff. Hum. Rts. L. Rev.* 2.

Convention, refugees and asylum seekers have increasingly been resorting to human rights treaty monitoring mechanisms, such as the CAT and the HRC.¹⁸

i. Convention Against Torture

a. Scope of protection

CAT has a mandate over Article 3 of the UNCAT, which prohibits the transfer of a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture”.¹⁹ The principle of *non-refoulement* is “an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment”.²⁰

Article 3 of the UNCAT reads:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²¹

¹⁸ Alice Edwards, 'Human Rights, Refugees, and the Right to Enjoy Asylum' (2005) 17 Int'l J. Refugee L. 298.

¹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 [hereinafter UNCAT] art 3 (1).

²⁰ United Nations General Assembly 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (1 September 2004) UN Doc. A/59/324, para. 28.

²¹ UNCAT, art 1.

Three elements are required to demonstrate a finding of 'torture'. First, the person must be subjected to severe pain or suffering. As explicitly defined in UNCAT, pain can be inflicted either by physical or mental means. Examples of recognized psychological harm include "anguish, humiliation, debilitation and fear caused by physical brutality, rape and sexual abuse and abuse of children, partners, other family members or associates; by threats of such brutalities and of death; and by methods of sensory deprivation, stress and manipulation designed to break the will of the tortured".²² Rhonda Capelon cited the work of Amnesty International in describing the context of the psychological stress and manipulation prisoners of war suffer from. According to Amnesty International, torturers used a variety of techniques "designed to induce dependency, debilitation and dread and thereby destroy the personality and break the will".²³ It added that:

conditioning techniques used by interrogators make it evident that gross acts of torture (such as electric shock, rape or tearing out fingernails) are situated within a coercive context of which such methods are merely an extension... Biderman[']s [chart of coercion] ... is by no means exhaustive of coercive methods, and it does not include the excessive physical abuse which many forms of torture employ; however, it demonstrates the essential character of stress manipulation and may perhaps, by virtue of its more "benign" content, reveal the intentions and results of torture f that is almost impossible to achieve when dealing with those massive assaults in which pain and disorientation are compressed.²⁴

Second, the purpose of the act must be for a certain intent. Article 1 enumerates the list of the most common purposes—(1) to obtain information or a confession (2) to punish someone for an act he or a third person has committed or is suspected of having committed (3) to intimidate or coerce him or a third person or (4) for any reason based on discrimination of any kind. However, this list is not exhaustive.²⁵

²² Rhonda Copelon, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 Colum Hum Rts L Rev 313.

²³ Id., 314.

²⁴ Id., 52.

²⁵ Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers 1988) 118.

Third, the acts must have been committed by or with the consent or acquiescence of government officials.

Acknowledging the seriousness of the problem of torture as well as the government's duty to not acquiesce or consent in the torture, protection from *non-refoulement* is non-derogable, i.e. it is absolute, no exception or derogation is allowed, but only in cases involving those in danger of becoming victims of torture.²⁶

While the CAT itself has recognized that the “the definitional threshold between ill-treatment and torture is often not clear”,²⁷ the UN Special Rapporteur on Torture explained that “the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.”²⁸ Those in danger of cruel, inhuman or degrading treatment are not entitled to protection from *non-refoulement*.²⁹

b. Substantial grounds for believing that the applicant would be at risk of torture upon return

The standard of proof as indicated in the CAT requires “substantial grounds” for believing that one would be in danger of torture.³⁰ The test to assess whether these substantial grounds exist contains subjective and objective criteria.³¹ The subjective criterion reflects the perspective of the CAT on whether there are substantial grounds for *believing* that the applicant would be at risk of being tortured and not a certainty of whether the applicant *would be tortured* if returned.³²

²⁶ Weissbrodt and Hortreiter (n17) 8.

²⁷ UN Committee Against Torture ‘General Comment No. 2: Implementation of Article 2 by States Parties’ (2008) UN Doc CAT/C/GC/2, para 3.

²⁸ United Nations Commission on Human Rights ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’ (2005) UN Doc. E/CN.4/2006/6, paras. 39-40.

²⁹ Kristen Rosati, ‘The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers’ (1997) 74 Interpreter Releases 1773, 1774).

³⁰ UNCAT, art 3(1).

³¹ Weissbrodt and Hortreiter (n17) 12.

³² *Id.*, 14.

On the other hand, such belief must be objectively based on substantial grounds.³³ CAT must make this assessment based on ‘all relevant considerations’ including evidence of a “consistent pattern of gross, flagrant or mass violations of human rights”.³⁴ However, such evidence is not determinative; additional grounds must be adduced indicating that the individual concerned would be personally at risk.³⁵ Conversely, the absence of a pattern of gross, flagrant or mass violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.³⁶

Other considerations may include the individual’s membership in a persecuted minority or opposition group as well as a history of detention and torture.³⁷ Moreover, while the CAT focuses on the possibility of future harm, past torture would also be considered as strong evidence of a risk of torture.³⁸

CAT attempts to determine whether the risk of torture is ‘foreseeable, present, personal and real’.³⁹ The burden of proof is upon the applicant⁴⁰ who also has to show that the risk of torture goes “beyond mere theory or suspicion. However the risk does not have to meet the test of being highly probable.”⁴¹

ii. The International Covenant on Civil and Political Rights

a. Scope of protection

Article 7 of the ICCPR provides a prohibition on torture and cruel, inhuman or degrading treatment or punishment.⁴² The decisions of the HRC demonstrate that family members with a close relationship to the

³³ Weissbrodt and Hortreiter (n17) 13.

³⁴ UNCAT, art 3(2).

³⁵ *M.S. v Denmark* (14 October 2015) Communication No. 571/2013 CAT/C/55/D/571/2013, para. 7.3; *MAK v. Germany* (17 May 2004) Communication No. 214/2002 CAT/C/32/D/214/2002.

³⁶ *Id.*, para. 7.3.

³⁷ UNCAT, art 3(2); Committee Against Torture (CAT), ‘CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications) (1997) CAT A/53/44, annex IX.

³⁸ Deborah E. Anker, ‘An Introduction to Relief Under Article 3 of the Torture Convention’, in Paul T. Lufkin (ed), *Law of Asylum in the United States* (3d ed. Refugee Law Center 1999).

³⁹ UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018.

⁴⁰ *Id.*, para.6, para. 38.

⁴¹ CAT General Comment No. 1 (n37).

⁴² ICCPR, art 7.

victim may be entitled to reparation as indirect victims for the anguish and stress they have suffered because of the ill-treatment of the direct victims. In *Quinteros v Uruguay*, Almeda de Quinteros filed a case on behalf of her daughter Elena Quinteros and her behalf. Elena was arrested by the Uruguayan police force in the grounds of the Venezuelan Embassy. It was alleged that Elena was held in a military detention centre and was tortured. Almeda de Quinteros claimed that she was also a victim of a violation of Article 7 of the ICCPR after being subjected to psychological torture from not knowing the whereabouts of her daughter and Article 17 for interference with her family life. In this case, the HRC stated that:

the Committee... understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.9.⁴³

i. Substantial grounds for believing that the applicant would be at risk of irreparable harm upon return

While the ICCPR does not explicitly provide for the principle of *non-refoulement*, the HRC has interpreted that States Parties to the ICCPR may not:

remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed".⁴⁴

⁴³ *María del Carmen Almeida de Quinteros et al. v. Uruguay* (21 July 1983) Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), para. 14.

⁴⁴ HRC, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, para. 12; Human Rights Committee, 'General comment no. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*' (2004) CCPR/C/21/Rev.1/Add.13, para. 9.

The HRC further stated that States Parties must not expose individuals to the risk of torture or cruel, inhuman or degrading treatment or punishment upon deportation to another country.⁴⁵ Thus, the protection accorded by the ICCPR is wider than that of the UNCAT.⁴⁶ As mentioned earlier, UNCAT only prohibits return to another country where there is a danger of torture.

In the assessment of 'real risk', the HRC relies on "all the circumstances such as the duration and manner of the treatment, its physical or mental effects, as well as the sex, age, and mental health" of the complainant.⁴⁷

In the past, the HRC has also considered whether the complainant would have an "internal flight alternative", i.e. whether the complainant would be able to easily relocate to another part of the country where chances of persecution may be lower.⁴⁸ However, it acknowledged that the internal flight alternative is not always a reliable or effective remedy.⁴⁹

The HRC has made clear that the burden of proof in establishing torture cannot rest alone with the author of the communication, considering that the individual and the State party "do not always have equal access to the evidence and that frequent the State party alone has access to the relevant information."⁵⁰

In summary, the standard of proof as stated in the UNCAT and the ICCPR requires 'substantial grounds' for believing that the complainant would be at risk of torture or irreparable harm. For a complainant to receive protection from the principle of *non-refoulement*, s/he must prove that there are substantial grounds to believe that s/he would be at risk of torture or irreparable if deported to another country. The HRC has recognized the psychological torture suffered by the victim's family members because of the anguish and stress they had to suffer from because of the treatment that the direct victims have received.

⁴⁵ General Comment No. 20 (n44), para. 9.

⁴⁶ Sarah Joseph, Katie Mitchell and Linda Gyorki, 'Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies' (*World Organisation Against Torture*, 2014) 189 <https://www.omct.org/files/2014/11/22956/v4_web_onusien_en_omc14.pdf> accessed 4 October 2019.

⁴⁷ *Vuolanne v. Finland* (2 May 1989) Communication No. 265/1987 CCPR/C/35/D/265/1987, at para. 9.2.

⁴⁸ *Ms. Diene Kaba v. Canada* (21 May 2010) Communication No. 1465/2006, UN Doc CCPR/C/98/D/1465/2006.

⁴⁹ General comment No. 4 (n39) para. 47.

⁵⁰ *Womah Mukong v. Cameroon* (10 August 1994) Communication No. 458/1991, UN Doc CCPR/C/51/D/458/1991, para. 9.2.

III. Feminist critiques of international law

To be able to properly examine the decisions of the HRC and the CAT, it is best to outline first the feminist critiques of international law that will serve as the background of the arguments in the next Section. Considering the limitations on space, the following discussion will not be exhaustive but will pertain more to issues that will be further elaborated upon in the succeeding sections of this paper. This Section will discuss the lack of gender balance in the HRC and the CAT, which reinforces the patriarchal structures present in international law. This Section also discusses the implications of the persistence of the male-defined norms resulting from these patriarchal structures.

Lack of gender balance in the HRC and the CAT

At the international level, feminist scholars have lamented the lack of gender balance in human rights treaty bodies.⁵¹ A focus on the male point of view in the law then entails preoccupation of international legal instruments with the rights of men.⁵² As a result, as Charlesworth, Chinkin and Wright posited, because of such patriarchal structure, international law remains insensitive to issues relating to women.⁵³ As demonstrated by CAT, which has only four female members out of its ten members,⁵⁴ such lack of gender balance has resulted in it paying "...little attention to the question of whether women may be subjected to torture or other ill treatment in a manner or under circumstances that differ from the experiences of men".⁵⁵ It is also not surprising that scholars have described the work of the CAT, particularly in relation to torture of women, as "myopic".⁵⁶

⁵¹ H. Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) *Harv. Hum. Rts. J.* 18, 1-18.

⁵² Charlesworth, C. Chinkin, S. Wright, *Feminist Approaches to International Law*, 85 *AJIL*, (1991), 625.

⁵³ *Id.*, 621.

⁵⁴ Office for the High Commission for Human Rights, 'Treaty Body Database: Committee Members' (25 June 2004), <<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>>

⁵⁵ Andrew Byrnes, 'The Convention Against Torture' in Kelly D. Askin & Dorean M. Koenig (eds), *Women and International Human Rights Law* (1st edn, Transnational Pub 2000).

⁵⁶ *Id.*, 214.

Organizational structures in international law dominated by men and defined by male norms has various implications including: (1) the identification of human rights as men's rights (2) a misunderstanding of women's harms (3) the essentializing of women and (4) the relegation of women's issues to the private sphere.

(1) Human rights as men's rights

The main feminist criticism in international law is that it overwhelmingly addresses violations committed in the public sphere (as opposed to the private sphere of the family)⁵⁷. Because the structures of international law are 'thoroughly gendered',⁵⁸ issues traditionally concerning men are perceived as human rights issues. In short, as some feminist scholars have argued, the image of the rights-bearer in international law is implicitly masculine.⁵⁹ Women have, thus, been produced as the 'other'. In the words of Celina Romany, "[w]omen are the paradigmatic alien subjects of international law. To be an alien is to be an other, an outsider. Women are aliens within their states and aliens within an exclusive international club of states which constitutes international society."⁶⁰ International law then does not deal with issues that accommodate the experiences of women⁶¹—issues concerning women, such as domestic violence and sexual abuse, are relegated to a separate sphere, where they are largely ignored⁶² and are considered secondary or trivial.⁶³

With the rights-bearer being envisaged as masculine, the male view is adopted as the standard in international law. At the onset, the use of a masculine pronoun in international human rights instruments, 'even if it is intended to be generic',⁶⁴ including in the UNCAT, affirms and reinforces sexual hierarchy and

⁵⁷ Id., 184.

⁵⁸ Charlesworth, Chinkin, and Wright (n52) 613, 621-25.

⁵⁹ D Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005).

⁶⁰ C. Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 HARV. HUM. RTS. J. 87.

⁶¹ Charlesworth, Chinkin, and Wright (n52) 613, 628.

⁶² Id., 613, 625.

⁶³ See Charlotte Bunch, 'Feminist Visions of Human Rights in the Twenty-First Century', in Kathleen E. Mahoney & Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Springer Netherlands, 1993) 967-969.

⁶⁴ Charlesworth, Chinkin, and Wright (n52) 628-30.

supports the exclusion of women in human rights law.⁶⁵ Following the definition of torture as previously discussed in the preceding section, the form of torture prohibited under international law traditionally involves a male perpetrator, be it the military forces or the police, and a male victim, often a political dissident or an imprisoned male criminal.⁶⁶

Because rights and the interpretation of those rights fail to reflect the nature and extent of violations faced by women in the public sphere,⁶⁷ using men as a yardstick⁶⁸ becomes all the more problematic especially in instances when men are not suffering from the same disadvantages as the women are.⁶⁹ International law imposes an additional burden on women to try to fit in gender-neutral categories to receive protection from the State. However, fitting in gender-neutral categories is often not viable since certain violations of the human rights of women take place because of their sex/gender, i.e. rape, domestic violence and female genital mutilation. Interpreted with a male yardstick, women's claims will most likely be rejected.⁷⁰ For instance, sexual violence committed against a woman during interrogation by the government may be considered only as a private act, and not as torture committed by state actors.⁷¹

In another instance, in refugee law, it is difficult for women to meet the seemingly neutral eligibility criteria for refugee status because the enumerated grounds— race, religion, nationality, membership of a particular social group or political opinion—“often do not reflect the private reality of women's lives”.⁷² As a reflection of the lack of awareness of the gender issues in pre-1970s,⁷³ the Refugee Convention has been “interpreted through a framework of male experience. The main problem facing women as asylum seekers is the failure of decision-makers to incorporate the gender-related claims of women into their interpretation of the existing

⁶⁵ H. Charlesworth, 'What are "Women's International Human Rights"?', in Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) at 58, 68.

⁶⁶ Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law' *Leiden Journal of International Law* 349.

⁶⁷ Byrnes, A. 'The Convention Against Torture' (n55) 184.

⁶⁸ Dianne Otto, Women's Rights, in *International Human Rights Law* 345, 354–55 (Daniel Moeckli, Sangeeta Shah, & Sandesh Sivakumaran eds., 2010); Darren Rosenblum, Unisex CEDAW or What's Wrong with Women's Rights, 20 *Colum. J. Gender & I.* 98, 193 (2012).

⁶⁹ Otto (n68) 318; Kathleen E. Mahoney, 'International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts' 1 *Austl Feminist L J* (1993) 121

⁷⁰ Thomas Spijkerboer, *Gender and Refugee Status* (Routledge 2000) 5-6.

⁷¹ *Id.*, 128-129.

⁷² Felicite Stairs and Lori Pope, 'No Place like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds' (1990) 6 *J.L. & SOC. POL'Y* 150.

⁷³ Marisa Silenzi Cianciarulo, 'Batters as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims' (2012) 35 *Harv. J.L. & Gender* 139.

enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.”⁷⁴

This is not to say that violence against women has been completely unrecognized as falling under the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. The HRC, under article 7 of the ICCPR, “has condemned domestic violence, rape and sexual violence, female genital mutilation, clandestine abortions, unequal treatment in relation to punishment for adultery, the failure to outlaw marital rape or levirate, honour crimes, and early marriage”.⁷⁵ The CAT, on the other hand, has referred to particular experiences of torture faced by women. It has regularly expressed its concern in issues involving the sexual violence and assault experienced by female detainees and prisoners in the hands of law-enforcement personnel for the purpose of extracting information on the whereabouts of their husbands or other relatives.⁷⁶ Despite all this, as will be demonstrated by the next Section’s analysis of the views or decisions by the HRC and the CAT, still, women’s experiences are largely ignored.

(2) Misapprehension of women’s harms

According to Robin West’s work on ‘gender-specified injuries’, what defines women apart from men is that women do not exist as separate autonomous individuals but in connection with others.⁷⁷ Thus, West suggests that women suffer more than men, and importantly, women suffer in ways that men do not.⁷⁸ Because of this, the pain women feel is not understood by the larger community and thus, women’s pain still fails to receive adequate attention or be provided with a legal remedy:

[W]omen's distinctive, gender-specific injuries are now or have in the recent past been variously dismissed as trivial (sexual harassment on the street); consensual (sexual

⁷⁴ Rodger Haines, ‘Gender-Related Persecution’ in Erika Feller et al. (eds.), *Refugee Protection in International Law* (Cambridge University Press 2003) 319, 327; See also Deborah E. Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harv. Hum. Rts. J.* 133, 138-39.

⁷⁵ Edwards, A. *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011) 217.

⁷⁶ *Ibid.*

⁷⁷ West, R. ‘The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory’ (1987) 3 *Wisconsin Women’s Law Journal* 81, 93..

⁷⁸ *Id.* 123.

harassment on the job); humorous (non-violent marital rape); participatory, subconsciously wanted, or self-induced (father/daughter incest); natural or biological, and therefore inevitable (childbirth); sporadic, and conceptually continuous with gender-neutral pain (rape, viewed as a crime of violence); deserved or private (domestic violence); non-existent (pornography); incomprehensible (unpleasant and unwanted consensual sex); or legally predetermined (marital rape, in states with the marital exemption).⁷⁹

However, men fail to understand the gender-specific injuries of women.⁸⁰ On the other hand, men's pain is usually validated because it is widely recognized as wrong, and not trivialized.⁸¹ As West highlighted in another context, men do not have to remain under threat of sexual abuse throughout their lives in the way women do.⁸²

As discussed in the previous section, the HRC has made some progress in recognizing how women experience pain differently, as demonstrated by the case of *Quinteros v Uruguay*. Indeed, by recognizing both the mother and daughter as victims of the State's actions, HRC has acknowledged the difference between the harm women feel from the harm suffered by those connected to them. Despite this progress in acknowledging the anguish women suffer from the experiences of their husbands or male relatives, women remain recognized in cases of torture only because of their familial relationship with the victim, i.e. when they are recognized as the wives, mothers, or daughters of the male victims.⁸³ In this sense, "women gain access to the protective scope of the torture provisions on male-defined terms".⁸⁴

On the other hand, the emotional harm women experience because of the physical and non-physical harm they suffer from in the hands of government authorities continue to not be recognized. In tort law, such is described as the "dichotomy...between physical harm and emotional harm", whereby physical injury weighs

⁷⁹ Id., 82

⁸⁰ Id., 94-95.

⁸¹ Id., 1, 123.

⁸² Id., 107.

⁸³ Edwards (n66) 349.

⁸⁴ Ibid.

more than emotional and relational injury.⁸⁵ As a result, women become more disadvantaged “because important and recurring injuries in women’s lives are more often classified as lower-ranked emotional or relational harms.”⁸⁶

(3) *Essentializing women*

a. *Failure to identify the complex structural and intersectional causes of human rights violations against women*

After discussing the differences in the way men and women suffer from pain, the next step would be to appreciate the differences amongst women. The next major part of the feminist critique to be discussed in this section highlights how international human rights law fails to address the intersectional causes of the marginalization of women’s rights. This is because international human rights law is based on individual human rights claims, which “risk universalizing the complex and hugely varied experiences of the world’s women, and essentializing the causes of their oppression”.⁸⁷ In this sense, international human rights law fails to recognize that women’s subordination does not result from gender alone and more so, that women are not a homogenous category.⁸⁸ As a result, the possibility of identifying the causes of women’s oppression becomes close to nil and thus, women continue to be vulnerable.

Kimberly Crenshaw has argued in her work on the theory of intersectionality: “Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which [women of colour] are

⁸⁵ Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109, 1110 (2009).

⁸⁶ *Ibid.*

⁸⁷ V. Spike Peterson, ‘Whose Rights? A Critique of the “Givens” of Human Rights Discourse’ (1990) 15 *Alternatives* 306; Rosa Ehrenreich Brooks, ‘Feminism and International Law: An Opportunity for Transformation’ (2002) 14 *YALE J.L. & FEMINISIM* 345, 353-54; Karen Engle, ‘International Human Rights and Feminisms: When Discourses Keep Meeting in Doris Buss & Ambreen Manji (eds), *International Law: Modern Feminist Approaches* (Har Publishing 2005) 59-60; Radhika Coomaraswamy, ‘To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights’ in Rebecca J. Cook (ed.) *Human Rights of Women* (University of Pennsylvania Press, Inc. 1994) 39, 47.

⁸⁸ Bond, J. ‘International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations’ (2003) 52 *EMORY L. J.* 73-74.

subordinated.”⁸⁹ In Crenshaw’s work, she explained that various groups of people encounter different forms of discriminatory behaviour because of the intersection of two or more categories.⁹⁰ Other than gender, intersectional considerations include class, race, immigration status, sexual orientation, and religion. Power and privilege, like disadvantage and discrimination, differ depending on one’s location in the interlocking spectrums of identity. For instance, because the identities of black men and women vary along the axis of race and sex, black women would have unique vulnerabilities and thus, may suffer from a different kind of violence and discrimination as opposed to black men.⁹¹ While Crenshaw’s theory of intersectionality was focused on the unique way black women are oppressed, her theory may be applied to other vulnerable groups in a discussion of the complexity of discrimination and oppression along multiple axes.⁹²

In the case of asylum seekers, they balance multiple identities as they suffer from a range of varying degrees of oppression. Women asylum seekers are oppressed because they are women, they are immigrants, and they are women of colour. They are also from a non-English speaking background and thus they often can communicate only in their own language and do not and cannot speak the national language of the State where they are applying asylum from. Often, they are victims or survivors of gender-specific violence. In short, women asylum seekers exemplify the interrelated vulnerabilities of migration and refugee status, race, and poverty, among others. The convergence of these factors makes their sufferings distinct from male asylum seekers.

In recent years, the HRC and the CAT have begun to mention intersectionality in their work. The CAT has, in General Comment No. 2, emphasized the value of intersectionality:

⁸⁹ Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) U. CHI. LEGAL F. 140.

⁹⁰ Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 STAN. L. REV. 1241, 1242-43. See also Crenshaw, K. ‘Transcript, Panel Presentation on Cultural Battery, Speaker: Kimberly Williams Crenshaw’ (1995) 25 U. TOL. L. REV. 891, 892. See also Carbado, D. & Gulati M., ‘The Law and Economics of Critical Race Theory, (2003) 112 YALE L.J. 1757, 1775.

⁹¹ Mapping the Margins (n90) at 1242-43.

⁹² Emily M.S. Houh, ‘Toward Praxis; (2006) 39 U.C. Davis L. REV. 905, 924-38; Gowri Ramachandran, ‘Intersectionality as “Catch-22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable’ (2005) 69 ALB. L. Rev. 299, 301.

The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status, etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof.⁹³

The HRC has also issued General Comment No. 28 on the equality of rights between men and women, stating that discrimination on the basis of gender is often 'intertwined' with discrimination on the basis of other grounds.⁹⁴ However, as will be discussed in the next Section, the HRC and the CAT have rendered views or decisions without much analysis of the intersectional vulnerabilities that women asylum seekers are facing or may face. Still, the HRC and the CAT continue to view women as a unitary category.

b. *Men as protectors and defenders of women*

Dianne Otto highlighted that women, especially in early legal instruments,

were valued for their chastity, their prioritization of mother hood and domesticity, their acceptance of the heterosexual family hierarchy and the paternal protection of the state, its laws and its wars. In contradistinction, **male figures were produced as women's defenders and moral superiors** (apart from the racialized criminals who trafficked them) and the active, public protecting masculine subject was fashioned as the marker of full humanity, autonomous and self-determining, and in no need of special rules for his protection.⁹⁵

⁹³ General Comment No. 2, (n27).

⁹⁴ Human Rights Committee, 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (2000) CCPR/C/21/Rev.1/Add.10, para 30.

⁹⁵ Dianne Otto, *Lost in translation: re-scripting the sexed subjects of international human rights law* (Cambridge University Press 2006) 325.

In characterizing men as ‘women’s defenders and moral superiors’, women’s role becomes restricted in that their primary role is limited to being wives and mothers in the family’s home.⁹⁶ In turn, this promotes a negative stereotype of women being vulnerable and dependent—socially, politically, economically, and personally—on men, specifically on their male relatives, while men are considered autonomous. At the same time, women’s perspective becomes invisible because of this assumed dependency.

Such dependence of women on men is best exemplified by the common law doctrine of coverture, under which a woman’s legal existence is merged with that of the husband upon marriage. In common law, the husband owns his wife and thus, he controls all aspects of her existence.⁹⁷ Along with this obligation is a corresponding right to “give his wife moderate correction” or “restrain a wife of her liberty, in case of any gross misbehavior.”⁹⁸

(4) The relegation of women’s issues to the private sphere

The invisibility of women’s experiences is further reinforced by the public/private distinction. A feminist critique of the public/private dichotomy relevant to the succeeding section of this paper questions the extent to which the State can regulate matters that are not considered to be within the public sphere. As Hilary Charlesworth, Christine Chinkin, and Shelley Wright have noted, “[b]ecause men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored”,⁹⁹ i.e., what Rhonda Copelon calls as the “persistent trivialization of violations against women”.¹⁰⁰ While this characterization reflects only one aspect of the public/private dichotomy, it provides an important way of identifying the gendered nature of the law. Moreover, it is widely believed that the family, being a realm filled with love and harmony of

⁹⁶ Natalie Kaufman Hevener, ‘International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women’ (1978) 1 Harvard Women’s Law Journal 131 at 133-40.

⁹⁷ See Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 561

⁹⁸ Kelly Weisberg, *Domestic Violence: Legal and Social Reality* (Wolters Kluwer Law & Business 2019) 17.

⁹⁹ Charlesworth, Chinkin and Wright (n52) 622.

¹⁰⁰ Copelon (n22) at 295-6.

interests, does not require legal interference. Thus, 'natural' familial instincts will ensure everyone's welfare.¹⁰¹

In the context of women asylum seekers specifically, scholars have pointed out that the main problem they face is the failure of decisionmakers "to recognize the political nature of seemingly private acts of harm to women".¹⁰² Regardless of its nature, violence against women is rarely considered "as a political act, as a method for one group to exert control over another, as a symbol of power dominance, or as a direct result of the discriminatory denial of human rights."¹⁰³ As a result, applications from women asylum seekers are often rejected.¹⁰⁴

Slowly, international law has expanded the doctrine of state responsibility to include complicity of state agents with the conduct of the non-state actors as well as the failure of the State to exercise 'due diligence' in preventing or remedying actions of non-state actors.¹⁰⁵ In the context of torture, as one scholar highlighted, "[Article 1 of the UNCAT] includes state 'acquiescence' as a mechanism of state responsibility. Not only does such language grant the [CAT] license to consider information about domestic violence in which state acquiescence has been persuasively demonstrated; it compels the Committee to do so".¹⁰⁶ Thus, even if the perpetrator is a non-State actor, a State will remain to be responsible for protecting and respecting human rights. In its work, CAT has also addressed trafficking.¹⁰⁷ It also has explicitly ruled that "[female genital mutilation] causes permanent physical harm and severe psychological pain to the victims which may last for the rest of their lives, and considers that the practice of subjecting a woman to FGM is contrary to the obligations enshrined in the [UNCAT]."¹⁰⁸ The HRC has demonstrated a similar understanding concerning violence committed against women in the private sphere: "In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it

¹⁰¹ Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 STAN. L. REV. 1, 46.

¹⁰² Aftab Alam, 'Towards Gender Sensitive International Refugee Law' (2008) 8 ISIL YB Int'l Human & Refugee L 105.

¹⁰³ *Ibid.*

¹⁰⁴ Erin Patrick, 'Gender-Related Persecution and International Protection' (*Migration Policy Institute*, 1 April 2004) <<https://www.migrationpolicy.org/article/gender-related-persecution-and-international-protection>> accessed 20 September 2019.

¹⁰⁵ *Velasquez-Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, 172 (Jul.29, 1988).

¹⁰⁶ Lisa M. Kois, 'Dance, Sister, Dance!' in Duner (ed.) *An End To Torture* (Zed Books, 1988) 85 at 104.

¹⁰⁷ Report of the Committee Against Torture (*Twenty-Seventh & Twenty-Eighth Sess.*), U.N. GAOR, 57th Sess., Supp. No. 44, 91 123-95, U.N. Doc. A/57/44 (2002), para. 58(m).

¹⁰⁸ *F.B. v. Netherlands* (15 December 2015) Communication No. 613/2014 CAT/C/56/D/613/201, par. 8.7.

should be provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.”¹⁰⁹ However, there is still much work to be done. As will be further discussed in the next section, the HRC and the CAT tend to focus more on relegating gender-specific harms into the realm of the private sphere, i.e. in the hands of the women asylum seekers’ family, instead of assessing whether the women asylum seekers’ country of origin is willing or able to protect them from such harms.

This Section examined the patriarchal structures oppressing women, which are well-entrenched in international law. The language used in different international human rights treaties shows that men are still used as the universal standard, while women’s experiences are considered as the exception to the norm. Because of this, issues relating to women have still not been given much attention in international law and continue to be relegated to the private sphere, absent any interference from the State because the family is expected to serve as a bastion of love and harmony. The dominance of male norms also results in the failure to identify the intersectional causes of human rights violations, in the misunderstanding of women’s harms, and the essentializing of women.

IV. Examination of communications filed with the HRC and the CAT

This Article argues that in communications decided by the HRC and the CAT, women asylum seekers are not considered as individual human beings with an identity separate from their role in the family. In arguing so, I will discuss the patterns I have identified in the HRC and the CAT’s assessment of these communications. First, there is an overreliance on the woman asylum seeker’s family protection network. It seems that the HRC and the CAT assume that the presence of the family support network in the woman asylum seeker’s country of origin negates and addresses the risk of torture that the women might face there. Second, when a woman asylum seeker is part of a family unit, her husband or male relative is usually the primary complainant and she and any children are secondary complainants. Therefore, any individual claims she may have are often overlooked and not assessed. Finally, the focus of the HRC and the CAT

¹⁰⁹ CCPR General Comment No. 28 (n94) para. 11.

on sexual violence, to the neglect of women asylum seekers' emotional and psychological pain results in not fully capturing the experience and suffering of women.

(1) There is too much dependence on the presence or absence of women asylum seekers' support network in the form of male protection in determining whether a woman would be at risk of torture or irreparable harm.

The majority of the cases filed with the HRC and the CAT have repeatedly emphasized that women asylum seekers could return to their country of origin because they could rely on a support network for protection there. In this subsection, I selected two cases filed with the HRC and the CAT to illustrate various reasons why a support network in their countries of origin must not be a determining factor in an assessment of women asylum seekers' claims.

In the case of *M.J.S. v the Netherlands*,¹¹⁰ the woman asylum seeker claimed that her deportation to Côte d'Ivoire by the Netherlands would put her at risk of female genital mutilation, in violation of her rights under article 3 of the UNCAT. The CAT ruled that the complainant has not discharged her burden of proof for the it to believe that she would run a real, foreseeable, personal and present risk of being subjected to torture upon her return to her country of origin because it found that "the complainant has failed to show that someone in her family specifically will pressure her mother, who is clearly against female genital mutilation, into practicing the procedure, which will put her at real and personal risk of being subjected to such mutilation."¹¹¹

CAT's decision presented a lopsided analysis between the State's duty to protect, on one hand, and the presence or absence of a woman asylum seeker's family protection network, on the other hand—with a superficial analysis of the State's compliance with its duty to protect and an overreliance on the family protection network. In examining whether 'substantial grounds' exist to believe that the woman asylum

¹¹⁰ *M.J.S. v. The Netherlands* (14 June 2016) Communication No. 757/2016 CAT/C/66/D/757/2016.

¹¹¹ *Id.*, para. 8.8

seeker would be in danger of being tortured if deported, CAT made an inadequate assessment on whether the woman asylum seeker's country of origin effectively protects against female genital mutilation. CAT simply took note of the reports submitted by the Netherlands stating that the percentage of women who have undergone female genital mutilation within the country in general is falling, with 80 percent opposed to female genital mutilation.¹¹² It further noted that the prevalence of female genital mutilation among women aged 45-49 is merely at 46.9 percent, among 15-19 year old at 31.3 percent and among girls under 15 years of age at 11 percent.¹¹³ However, these figures are not persuasive and do not, in any way, reflect the commitment of the State to protect women and girls from female genital mutilation.

While the State party the Netherlands acknowledged that in the north-west, where the complainant's mother's tribe is from, 88 percent of women and girls have undergone the procedure, it argued on the "successful prosecution by the Government of Côte d'Ivoire in *some* female genital mutilation cases in 2017" [emphasis added]¹¹⁴. However, as declared by the State Party itself, between January and September 2013, "the government of Côte d'Ivoire intervened in initiation ceremonies on 10 occasions, including in Touba, the region where the complainant's mother is from."¹¹⁵ It is not understandable how the government's intervention in only 10 initiation rites in over 10 months is particularly laudable. If anything, these figures even show further proof that the government had not prioritized the fight against female genital mutilation.

As to the analysis of the complainant's family protection network, the CAT relied on the strength of complainant's mother, who was assumed to be able to resist any pressure for complainant to be subjected to female genital mutilation. According to this approach, in cases where there the female complainant would have someone who would protect her when returned to her home country, which in this case was identified to be the complainant.'s mother or their extended family, there would be no substantial ground to believe that she would be at a risk of torture.

¹¹² *Id.*, para. 8.8.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Id.*, para. 4.5.

This approach demonstrates one of the problems associated with the public/private distinction as discussed in the previous Section—identifying something as ‘private’ to support a claim of non-interference. States may be unwilling or unable to make any legal interference, particularly in cases involving traditional practices, because they are considered to be family matters.¹¹⁶ As discussed in the previous section, there is an assumption that “because the family realm is one of love and harmony of interests, there is no need for legal interference.”¹¹⁷ Moreover, such reasoning is based on the premise that ‘free and equal adults’ within the family have agreed to have such arrangements and that in order to respect that autonomy, the State must suspend its interference.¹¹⁸ Thus, the solution for the problem women asylum seekers are facing may be found in the private sphere rather than the public sphere. In other words, it is supposed that it would be best to leave the problems of the women asylum seekers in the hands of their families, without any external interference of states. As discussed earlier, the family is not necessarily a refuge of safety and affection; the fact is that family members’ interests often conflict. When conflicts take place, they are resolved not by a “benevolent consideration of everyone’s interests”, but by power.¹¹⁹

The CAT took note of the State Party’s argument “that the complainant’s mother can live independently and care for her children; the fact that she is a single parent does not alter this, as she is more highly educated than the average Ivorian woman and she was able to avoid her own re-cutting, leave her family and community and flee to Europe.”¹²⁰ CAT’s decision was based on an underlying presumption that the complainant’s mother would be strong enough to resist any kind of pressure for her daughter to undergo female genital mutilation, despite what their extended family might say. How could the female complainant have “failed to show that someone in her family specifically will pressure her mother who is clearly against female genital mutilation, into practicing the procedure” when she had repeatedly argued that her mother was forced to undergo female genital mutilation herself? Indeed, her mother was able to flee Europe to avoid her re-cutting, but what about the first female genital mutilation that the complainant’s mother did not

¹¹⁶ Annemarie Middelburg and Alina Balta, Female Genital Mutilation/Cutting as a Ground for Asylum in Europe, 28(3) *International Journal of Refugee Law* (2016), 446.

¹¹⁷ Gavison (n101) 23.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *M.J.S. v. The Netherlands* (n110), para. 8.6.

manage to avoid? The complainant's mother had to be circumcised at 19 years old after her parents, who were against female genital mutilation, died.¹²¹ Not only was the complainant's mother forced into being subjected to female genital mutilation, her aunt also married the complainant's mother off to two different wealthy men in exchange for money.¹²² The complainant's mother fled Côte d'Ivoire because her husband did not believe that she had undergone a proper female genital mutilation and demanded a more extensive procedure (re-cutting).¹²³ Moreover, CAT's decision overlooks the fact that the complainant's mother was suffering from severe psychiatric disorders. She was diagnosed with post-traumatic stress disorder and even attempted to commit suicide.¹²⁴

Contrary to what the CAT argued, the complainant's extended family could or would have influence on the decision for her to go through female genital mutilation especially since, upon the deportation of the complainant and her mother, they might need to stay with members of her extended family.¹²⁵ If the extended family managed to force the complainant's mother to undergo circumcision, there is no indication that they would not do the same with the female complainant. The CAT's conclusion was without consideration of the fact that it would be difficult for them to resettle in another part of her country of origin and start a new life without the help of their extended family who previously pressured complainant's mother to undergo circumcision.

The HRC made the same mistake of highlighting family protection much more than the State's duty to protect in the case of *K.S. and M.S. vs Denmark*.¹²⁶ In this case, M.S. is a 68-year old single Afghan mother who was diagnosed as suffering from depression, post-traumatic stress disorder and personality change. She argued that she would be subjected to torture or to cruel, inhuman or degrading treatment or punishment if returned to Afghanistan because of her status as "an extremely vulnerable individual, i.e. a single woman with health issues."¹²⁷ Her application for a resident permit was rejected mainly because "she

¹²¹ *Id.*, para. 2.1.

¹²² *Id.*, para. 4.3.

¹²³ *Id.*, para. 4.3.

¹²⁴ *Id.*, para. 2.5.

¹²⁵ *Id.*, para. 2.6.

¹²⁶ *K.S. and M.S. v. Denmark* (4 December 2017) Communication No. 2594/2015 CCPR/C/121/D/2594/2015.

¹²⁷ *Id.*, para. 3.3.

would be returning with her adult son, K.S., who has lived in Afghanistan for many years, and therefore she could not be considered as not having a “support network”.¹²⁸ The Committee ruled that complainant M.S.’ removal to Afghanistan would not constitute a violation of her rights under article 7 of the ICCPR.

The HRC’s approach, once again, highlights family protection as the focal point of discussion rather than the State’s duty to protect.¹²⁹ Far from being the bastion of love and harmony that treaty bodies claim it to be, the family as a social unit is not necessarily a safe haven for women asylum seekers in their country of origin.¹³⁰ Such decision lacks normativity. Is the complainant’s son under any obligation to protect his mother? Is the complainant, as the mother, entitled to protection by her son? The HRC simply assumes that M.S.’ son will protect her without indicating any reason for it.

Moreover, the HRC’s rationale makes it seem as if women’s risk of torture stems from the women’s lack of male protectors rather than the societal context in which the women are operating in—a society where single women are subjected to hostility.¹³¹ In reality, the presence or absence of a support network does not necessarily pre-empt the occurrence of any human rights violation against women. As Charlesworth and Chinkin argued, violence must be reconceptualized and must be seen as part of the structure of the universal subordination of women.¹³² Thus, violence against women cannot be considered as purely ‘private’ or a mere aberrant behavior. Returning to a society hostile to her status, would put M.S., as a single woman, at risk of torture or cruel, inhuman or degrading treatment, regardless of the family protection network she has and regardless of whether or not she has male members to protect her.

The case of *K.S. and M.S. vs Denmark* also reinforces stereotypes. Instead of recognizing women as intrinsic bearer of human rights, the focus on having a ‘male protection network’ subscribes to the traditional narrative of the weakness and vulnerability of women who need protection from men.¹³³ Dianne Otto has

¹²⁸ *Id.*, para. 7.5.

¹²⁹ Middelburg and Balta (n116).

¹³⁰ Lourdes Peroni, ‘The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm’ (2018) 18(2) Human Rights Law Review 365.

¹³¹ *Ibid.*

¹³² Charlesworth H and Chinkin C, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 235.

¹³³ Otto, ‘The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade’ (2009) 10 Melbourne Journal of International Law 11.

highlighted that by emphasizing the figure of the wife and mother who needs 'protection', women are rendered more as objects than full legal subjects of international law.¹³⁴ On the other hand, men are portrayed as the defenders of women. Such representation of men and women reconstitute the traditional gender hierarchies as 'natural'.¹³⁵ Refugee law scholars have likewise criticized the notion of having a male protector for reinforcing "perceptions of women as inferior, vulnerable on the basis of their sex, and unable to survive without male family members".¹³⁶

This kind of reasoning works under the premise that all men, by virtue of being men, are considered physically powerful. However, there is no factual indication that her son can care for her and support her financially at the same time. The HRC ignored the fact that her adult son himself has not been to Afghanistan since he was seven years old,¹³⁷ and thus might not be able to carry out the presumption that he would take care of his mother.

This paper does not undermine the value of having a strong family support upon a woman asylum seeker's return to her country origin. What is problematic, however, is, as cases here demonstrate, "reliance on these assumptions or generalizations may distort the risk assessment in the individual case".¹³⁸

In summary, in overly relying on the presence or absence of family support, the HRC and the CAT, at times, forget to examine whether or not the women asylum seekers' countries of origin demonstrated that they were willing or able to make any legal interference. It seems that the suggestion of the HRC and the CAT is that the obligation to protect human rights could be discharged by the complainants' family members and the State may thus be, absolved of such responsibility. Finally, in doing so, the HRC and the CAT reinforce the stereotype that men are women's defenders. When this happens, it becomes easier to automatically equate maleness with capacity to protect, and as a result, easier to overlook the possibility that male relatives probably will not and cannot care and support the women complainants.

¹³⁴ Otto (n95) 320, 322.

¹³⁵ Ibid.

¹³⁶ Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010' (2010) 29 *Refugee Survey Quarterly* 22–3.

¹³⁷ *K.S. and M.S. v. Denmark* (n126), para. 2.10.

¹³⁸ Peroni (n130).

(2) Individual claims of women asylum seekers are often overlooked and not assessed when a joint complaint is lodged.

This subsection will argue that when a female complainant files a joint complaint with the HRC or CAT as a dependent of their husbands or male relatives, any separate gender-specific aspect of their claims is often rendered invisible and is not assessed by the said Committees. Thus, the HRC and the CAT may fail to consider that a female complainant could be at risk of torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm, independently of her relationship with her husband or male relative. This can have significant negative consequences for the female complainant, including being sent back to her home country where she will be at risk of harm. Independently assessing the claims of the female complainants in joint applications is necessary to ensure this does not happen, particularly where the husband's claims fall short of meeting the necessary protection standard.

Different countries apply different rules of procedure concerning asylum applications of immediate family members jointly applying for asylum, such as a husband and wife.¹³⁹ Some states require refugee claims of spouses to be heard jointly unless one of the spouses wants to file a separate case for a valid reason (e.g. divorce).¹⁴⁰ The primary advantage of this rule is that even if only one family member is found to have met the asylum standard, all family members would be deemed to be eligible for refugee status, therein following the principle of family unity.¹⁴¹ As highlighted by this subsection, spouses file their communications in the same manner with the HRC and the CAT.

A drawback of this approach is the tendency in joint asylum applications for all family members for the husband or male relative's claim to overshadow the claims of the women asylum seekers in the family,

¹³⁹ European Commission, 'EMN Ad-Hoc Query on immediate family members applying for asylum at the same time' (2017) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2017.1190_sk_on_immediate_family_members_applying_for_asylum_at_the_same_time.pdf> accessed 20 September 2019.

¹⁴⁰ Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Hum Rts Q 251.

¹⁴¹ European Commission (n139).

regardless of the gender-specific nature of the violence committed against them. Thus, the success or failure of the claim becomes dependent on the husband or male relative's claim.¹⁴²

As will be further demonstrated by different examples later on, from an analysis of communications filed with the HRC and the CAT, it is apparent that the HRC and the CAT treat married female asylum seekers as appendages of their husbands rather than as autonomous individuals with distinct and separate claims. This limitation aligns with the principle behind the doctrine of coverture as discussed earlier, conceiving women as passive objects in contrast with their husbands as active rights bearer. The problem with this is that it works on the premise that the facts of the case impact the victims in the same way. Based on the intersectional theory as discussed in the previous section, this does not hold. Intersectional gender theory requires that each person must be adjudicated upon individually because male experiences are distinct from those of women. Human rights violations are simply experienced differently.

In *R.G. et. al., vs Sweden*, R.G, formerly an active resistance fighter in the 1994-96 conflict in Chechnya¹⁴³, filed a communication at the CAT together with his wife L.G. and their four minor children.¹⁴⁴ While in this case, the CAT ruled that the complainant's removal to the Russian Federation would constitute a breach of Article 3 of the UNCAT¹⁴⁵, it is a good example to show how the CAT determines joint communications. In the decision, the CAT stated "[a]s the cases of R.G.'s wife and their four children, who were under age at the time of the family's asylum application in Sweden, are largely dependent upon his case, the Committee does not find it necessary to consider these cases individually."¹⁴⁶ It would be interesting to see how the CAT would have decided the cases of L.G. and the four children had it decided that R.G. failed to establish a foreseeable, real and personal risk of being tortured. Following the CAT's reasoning of the case, it would not be difficult to imagine that if the communication failed, it would have likely led to a failure of the case of the whole family.

¹⁴² Macklin (n140) 252.

¹⁴³ *R.G. et. al. v. Sweden* (28 January 2016) Communication No. 586/2014 CAT/C/56/D/586/2014, para. 2.1.

¹⁴⁴ *Id.*, para. 1.1.

¹⁴⁵ *Id.*, para. 11.

¹⁴⁶ *Id.*, para. 10.

In another communication where the CAT rejected the complainants' claims, a woman asylum seeker could have potentially succeeded on her claims had she been the primary applicant or had she raised her claims separately or had her claims been examined properly. The case of *P.S.B. and T.K. vs Canada* involved the first complainant, a male leader of a village's Sikh community and the second complainant, being the first complainant's wife.¹⁴⁷ The first complainant had travelled to Thailand to raise money for the Sikh temple in his village. Upon his return, the Indian police interrogated him and accused him of raising funds for Sikh militants.¹⁴⁸ Afterwards, he sought judicial recourse against police harassment.¹⁴⁹ When the police found out about this, the two complainants were arrested and subjected to torture.¹⁵⁰ The second complainant alleged that she was raped while in detention.¹⁵¹ The complainants claimed that the circumstances surrounding their situation in Punjab before their departure from India to Canada put them at risk of torture or cruel or other inhuman or degrading treatment.¹⁵² They also claimed that their expulsion to India would constitute a violation of Canada's obligation under Article 3 of the UNCAT.¹⁵³ The CAT found that the complainants did not adduce sufficient grounds to demonstrate that they would run a real, foreseeable, personal and present risk of being subjected to torture upon return to India.¹⁵⁴

In this case, it is significant that the CAT did not directly comment on the rape of the second complainant while in police custody. Examination of her allegation of rape is completely absent from the CAT's consideration of the merits, demonstrating that the CAT can be blind towards gender issues and lack acknowledgement of violence against women. The CAT did not decide the case in the same manner as it would have, had it been a communication solely filed by a woman. Had the CAT acknowledged the sexual violence that T.K. had experienced, this could potentially have been considered as strong evidence of a possibility of future torture.

¹⁴⁷ *P.S.B. and T.K. v. Canada* (1 October 2015) Communication No. 505/2012 CAT/C/55/D/505/2012.

¹⁴⁸ *Id.*, para. 2.4.

¹⁴⁹ *Id.*, para. 2.4.

¹⁵⁰ *Id.*, para. 2.4.

¹⁵¹ *Id.*, para. 2.4.

¹⁵² *Id.*, para. 3.1.

¹⁵³ *Id.*, para. 3.1.

¹⁵⁴ *Id.*, para. 8.7.

Further absent from this decision is a consideration of the theory of intersectionality whereby a woman asylum seeker's claim must be examined in a way in which categories including gender, culture, religion, and class intersect and how these intersections result in her subordination. While indeed it is true that the burden of proof is on the complainant, this paper recommends, as will be further elaborated on in section V of this paper, that the HRC and the CAT be more proactive in ensuring the claims of women complainants are assessed in an intersectional manner, particularly, given the vulnerabilities they face as a female. Thus, I argue that, recognizing the fact that the women asylum seeker bore the burden of proof in this case,¹⁵⁵ the CAT should have considered whether it was safe for a female Sikh to live in Punjab, and how India handles rape cases involving female Sikhs.

As explained by Crenshaw, when women's experiences are viewed along a "single-axis analysis that distorts' the multidimensionality of...women's experiences", women's discrimination claims often fail.¹⁵⁶ This is because it becomes difficult for women to pursue discrimination based on sex alone or based on race alone, for instance, as there are many inextricable factors to be taken into consideration, which constitute women's multiple identities.¹⁵⁷ Not only is T.K., the second complainant, a woman, she is also a Sikh. Neither did the Committee delve into the context of where T.K. will be deported to. How safe is it for female active Sikh to live in Punjab? How does India handle rape cases involving female Sikhs? The CAT failed to resolve these questions.

The case of *P.S.B. and T.K. vs Canada* clearly shows that women's claims, when subsumed within the principal claim of a male head of household, become invisible and become tied to the outcome of the male complainant's claim. In determining communications in this manner, the CAT reinforces the stereotype of women as dependents, whose rights are of secondary consideration.

Procedurally, another problem arises concerning the extent of the influence the husband or male relative has in the women's presentation of their cases. In practice, in cases where women asylum seekers apply

¹⁵⁵ *General Comment No. 4* (n39) para.6, para. 38.

¹⁵⁶ Crenshaw (n89) 139.

¹⁵⁷ *Ibid.*

jointly with their husbands or male relatives, the latter may control communication with the family's lawyer or prepare the application themselves without input from the women asylum seekers.¹⁵⁸ Moreover, the male relatives or husbands would often prepare the application of the whole family, without having the women complainants involved or would always accompany the women complainants when they visit the lawyer's office.¹⁵⁹

In cases where women asylum seekers allege sexual violence, whether by their husband or by others, they will often be unwilling to disclose it in a joint hearing either because they fear their husband or fear being 'shamed'.¹⁶⁰ Canada, for instance, has recognized that "women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their sad experiences of sexual violence to keep their 'shame' to themselves alone and not dishonor their family or community."¹⁶¹

Said reluctance is demonstrated in the case of *V.L. vs Switzerland* where the complainant, together with her husband, submitted a joint application for asylum in Switzerland on 19 December 2002, which was rejected on 14 August 2003, and once again rejected on appeal on 15 September 2004.¹⁶² On 11 October 2004, the female complainant had to request the Swiss authorities to reconsider her asylum application in its own right, rather than as part of her husband's claims, since they had already separated.¹⁶³ It was only then that the female complainant alleged that she suffered from sexual abuses by members of the police for the first time. She claimed that she had not raised this previously because when her husband had found out about the sexual abuses she suffered, "[he reacted with insults and humiliating remarks and forbade her to mention the sexual abuses to the Swiss authorities."¹⁶⁴ In short, the psychological pressure she received from her husband prevented her from reporting and mentioning the sexual abuses during their joint asylum applications.¹⁶⁵ As justifiably noted by the CAT, the delay in the female complainant providing

¹⁵⁸ Fletcher (n1) 113-114.

¹⁵⁹ Ibid.

¹⁶⁰ Macklin (n140) 251.

¹⁶¹ Canada: Immigration and Refugee Board of Canada, 'Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution' (13 November 1996) <<https://www.refworld.org/docid/3ae6b31c98.html>> accessed 20 September 2019.

¹⁶² *V.L. v. Switzerland* (22 January 2007) Communication No. 262/2005 CAT/C/37/D/262/2005, Par. 2.2.

¹⁶³ Id., Para. 2.3.

¹⁶⁴ Id., para. 2.3.

¹⁶⁵ Id., para. 2.5.

a medical report in the domestic proceedings which supported the allegations of sexual abuse did not affect her credibility. The CAT recognized “that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members.”¹⁶⁶

In summary, when the claims of women asylum seekers are jointly heard with their other family members’ claims, the gender-specific aspect of their claim is often ignored. This echoes the invisibility of the women’s interests and women are not recognized as individual human beings but as dependents. This adversely affects women asylum seekers as it impedes access to justice for women who seek protection from the HRC and the CAT in their own right. It also affirms that women are defined by their roles as a subpart of a family and not as members of society. In this framing, the human rights of women asylum seekers are thus derived from their husbands. Moreover, while it is more expedient to merge the claims of women asylum seekers with the claims of their husbands or male relatives, it must be considered that in doing so, women are less likely to bring forward allegations of sexual abuses for fear of dishonouring their husbands and/or family.

(3) The HRC and the CAT accord secondary status to the psychological violence women asylum seekers suffer from, thereby not fully capturing their experiences and suffering.

This Section will illustrate how the HRC and the CAT minimize the suffering of women in a way that physical pain is considered more serious than emotional and psychological pain.

In the case of *V.L. vs Switzerland*,¹⁶⁷ as discussed in the previous section, the complainant was a Belarusian woman who was interrogated and raped by three police officers who wanted to obtain information about her husband’s whereabouts.¹⁶⁸ In the said case, the CAT recognized that even when the complainant is

¹⁶⁶ *Id.*, para. 8.8.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*, para. 2.3.

already separated from her husband, she remains vulnerable to harms that authorities might once again inflict on her as “she remains a source of contact and a means of pressuring him.”¹⁶⁹ The CAT ruled that:

The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities.

In this case, without analysing whether the existence of ‘severe pain and suffering’ and ‘purpose’ as elements of torture are present in the case, the CAT concluded that the sexual violence committed against the complainant by the police officers constituted torture. In other words, “severe pain or suffering is satisfied *per se* by rapes carried out by police officers or agents, even when this is outside of detention facilities.”¹⁷⁰ Indeed, this recognition of rape as constituting torture is considered an advancement for the human rights of women.

However, it would be interesting to compare and contrast the rationale of this case with two cases, which mostly involve the mental suffering of women asylum seekers.

In the case of *Y vs Switzerland*,¹⁷¹ the complainant claimed that her deportation to Turkey would constitute a violation by the Swiss authorities of article 3 of the UNCAT.¹⁷² The complainant shares an extraordinary resemblance with her elder sister who was very active politically.¹⁷³ Since 1995 when her sister was arrested, authorities had put the complainant under surveillance, regularly following her and tapping her

¹⁶⁹ *Id.*, para. 8.7.

¹⁷⁰ Teresa Fernandez-Paredes, ‘The Importance of Investigating Torture Against Women and Girls by Non-State Actors: Applicable Legal Standards from International Human Rights Law’ in Macarena Saez (ed), *Gender Perspectives on Torture: Law and Practice* (Center for Human Rights and Humanitarian Law: Anti-Torture Initiative 2016).

¹⁷¹ *Y. v. Switzerland* (12 July 2013) Communication No. 431/2010, UN Doc. CAT/C/50/D/431/2010.

¹⁷² *Id.*, para. 1.1.

¹⁷³ *Id.*, para. 2.2.

telephone, because of suspicions of her engagement in the same activities as her sister and of her taking over her activities in the political underground movement.¹⁷⁴ In February 1998, the police raided her house, arrested her and took her into custody for seven days.¹⁷⁵ Her sister managed to escape in 2002 and flee to Turkey, which even intensified the police's surveillance of the complainant.¹⁷⁶ Because of being subjected to constant surveillance and intimidation, she developed severe mental health problems.¹⁷⁷ In 2008, the complainant felt that she could no longer live under these circumstances, and thus arranged her illegal departure for Switzerland where she applied for asylum.¹⁷⁸

The State Party argued that it "finds exaggerated the alleged uninterrupted harassment and surveillance by Turkish authorities for years, including after the complainant's sister fled the country in 2002, and argues that the authorities would have taken other measures had she been of interest to them."¹⁷⁹ The CAT ruled that the facts as presented do not permit it to conclude that the complainant's return to Turkey would expose her to a foreseeable, real and personal risk of torture. It said that the complainant failed to provide elements to demonstrate that the continuous surveillance, harassment, short-term arrests and persecution in Turkey would amount to torture. It further explained that "it is uncontested that the complainant herself has not been sentenced, prosecuted for, or accused of, any crime in Turkey; that she has not been politically active in Switzerland; and that she has not been cooperating with members of the PKK either in Turkey or in Switzerland."¹⁸⁰ The CAT did not take into account the emotional and psychological pain that the woman asylum seeker would suffer from should she be returned to her country of origin.

In *S.Z. v Denmark*, on the other hand, the complainant argued that if she were deported to the Russian Federation, she would be at risk of torture because she is considered a rebel sympathizer and her son was actively involved with the rebels.¹⁸¹ Thus, she argued that her deportation would violate article 7 of the

¹⁷⁴ Id., para. 2.4.

¹⁷⁵ Id., para. 2.5.

¹⁷⁶ Id., para. 2.6.

¹⁷⁷ Id., para. 2.7.

¹⁷⁸ Id., para. 2.8, 2.9.

¹⁷⁹ Id., para. 7.4.

¹⁸⁰ Id., para. 7.7.

¹⁸¹ Id., para. 3.

ICCPR.¹⁸² The HRC held that her removal to the Russian Federation would not violate her rights under article 7 of the ICCPR.¹⁸³ This ruling is untenable.

The woman asylum seeker, in this case, had established that she would be at risk of being subjected to torture and cruel, inhuman or degrading treatment or punishment because of said relationship with her son, a rebel who was able to seek asylum elsewhere. She alleged that the police authorities beat her with a baton and gave her electrical shocks through wires on her fingers until she lost consciousness. After the incident, she fled to Nazran, Ingushetia but the authorities continued to look for her, visiting and searching her house four to five times a month.¹⁸⁴ She also claimed that in one instance, authorities detained her for about a week because her son helped the rebels and thus, she probably helped them too.

The State Party recognized that government authorities have contacted the complainant since her eldest son's departure from Chechnya and have visited her house on many occasions inquiring about his whereabouts, but noted that this was "without, however, exposing her to abuse on those occasions".¹⁸⁵ The HRC further took note of the argument of the State Party that "the author's medical records did not indicate that she had been tortured but that she had trouble sleeping, suffered from nightmares and headaches, was worried and wanted to see a psychologist".¹⁸⁶

The HRC adjudicated the case by completely ruling out the possibility that the constant surveillance and threats the complainant suffered from, could have potentially reached the level of severity enough to constitute torture. This is despite the clear intent of the physical and psychological harm brought about by the authorities on the woman asylum seeker in the case, which is to extract information about her son's whereabouts. The HRC, without providing any reason, agreed with Denmark's allegation that the nightmares and headaches, as well as her difficulty in sleeping, are no indication of torture.

¹⁸² Id, para. 3.

¹⁸³ Id., para. 10.

¹⁸⁴ Id., para. 2.2.

¹⁸⁵ Id., para. 2.2, para. 9.6.

¹⁸⁶ Id., para. 9.8.

The difference in the Committees' treatment of the first case involving sexual violence against women and the two cases involving mental suffering could potentially be attributed to the predominant focus of the discourse on sexual violence, while other gendered harms remain excluded. In both cases, the HRC and the CAT failed to consider the cumulative significance of harmful events and likewise failed to consider the non-physical harms of government authorities against the women asylum seekers. Indeed, in these two cases, the HRC and the CAT dismissed the women asylum seekers as hysterical or debased their emotions as unimportant. These decisions fail to value the psychological violence the women asylum seekers had been through. What is absent from the analyses is an examination of whether the cumulative harms, including the psychological suffering, would reach the threshold of severity sufficient to constitute torture. This way, the HRC and the CAT minimized the suffering of the women asylum seekers.

The cases indicate that the HRC and the CAT require seriously bodily injury for harm to reach the level of torture. Such kinds of rulings exemplify the feminist critique in international law as discussed in the previous section, whereby law is set up in a way that physical pain is considered more serious than emotional and psychological pain.¹⁸⁷ Scholars have argued that adjudicators are more likely to underestimate the likelihood of non-physical harms, including psychological harm, which are difficult to visualize, as compared to the vividness that can be brought about by an image of physical mutilations in female genital mutilations.¹⁸⁸ Therefore, it is much easier to show scars to demonstrate pain or suffering than when one is frightened.

Women, in general, are put at a disadvantage in this scenario because there is a tendency towards disbelief when it comes to recognizing women's pain stemming from the stereotype that women are more emotional, i.e. women are inclined to exaggerate. As a result, the abuses women suffer from are often considered as "exaggerated, hysterical or untrue".¹⁸⁹ The law and its interpretation by treaty bodies then fail to fully account

¹⁸⁷ Chamallas (n85) 1109, 1110.

¹⁸⁸ Fatma E Marouf, 'The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm' (2011) 22 *Colum J Gender & L* 116.

¹⁸⁹ Scutt, J., "Sexism and Psychology: An Analysis of the "Scientific" Basis of the Corroboration Rule in Rape' in Scutt, J. A. (ed.) *The Sexual Gerrymander* (Spinifex Press 1994) 139-160; Kaspiew, R., 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20 *Melbourne University Law Review* 350-382; Hunter, C., 'Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why Narrowing the Definition of a Refugee Discriminates against Gender-related Claims' (2002) *Australian Journal of Human Rights*.

for the traumatic events women suffer from, and therefore, fail to fully capture the harms women are subjected to. Ultimately, the HRC and the CAT considered psychological violence suffered by women as secondary in status, if not wholly absent,¹⁹⁰ failing to take into account that threats “may cause the recipient to live in a constant state of fear that the threat will be acted on. The level of distress may in turn lead the recipients to alter their lifestyle or routine to try and avoid the threatened harm.”¹⁹¹

Albeit in the context of international criminal law, feminists have identified the danger in focusing too much emphasis on sexual violence, “creating a perception that the ‘gender’ aspect has been covered, thus marginalizing other experiences”.¹⁹² This ignores the fact that “violence against women is about domination and control, and can include verbal violence, threats, coercion and economic control along with physical trauma”.¹⁹³ Moreover, the concentration of the HRC and the CAT on sexual violence against women “essentializes the woman’s experience to victimhood only, and primarily to that of sexual victim, resulting in the emergence of a particular kind of sexual stereotype...”¹⁹⁴

To summarize, harms on women are often misunderstood because sexual violence is considered more serious as compared to psychological violence. Because women are considered more emotional, women’s expression of pain or suffering often considered exaggerated or untrue and are thus, not taken seriously. This subsection argued that in the adjudication of claims of women asylum seekers, the HRC and the CAT must examine whether the cumulative harms they suffer from, including the psychological violence, would rise to the threshold of severity required to constitute torture.

V. Recommendations

Scholars emphasize that international human rights law must be inclusive enough “to accommodate the diversity of women and women’s lives without compromising its strength that lies in its appeal to universality

¹⁹⁰ Aolain, F. ‘Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies’ (2009) 35 Queen’s Law Journal 234, 241.

¹⁹¹ See Scott Rempell, ‘Defining Persecution’ (2013) UTAH. L. REV. 289-299.

¹⁹² Aolain (n190) 240.

¹⁹³ *Id.*, 241.

¹⁹⁴ *Id.*, 240.

and the promotion of gender equality.”¹⁹⁵ To do this, international human rights law must be able to fully recognize the harms committed against women and grant relief following such recognition. This section will present recommendations on how the HRC and the CAT can integrate a feminist critique into its adjudication to protect women asylum seekers from future harm.

Recommendation 1: Increase the representation of women in human rights treaty bodies

Institutionally, one important goal that needs to be pursued is to increase the representation of women in the HRC and the CAT, as well as in the rest of the human rights treaty bodies.¹⁹⁶ As discussed in Section III, the organizational structures in the HRC and the CAT had created problems where the Committees have paid little attention to the question on various ways in which women’s experience of torture are different from men’s.

Recommendation 2: Proactively consider factors not raised by women complainants

In assessing whether State Parties have violated their obligations under human rights treaties, the HRC and the CAT, must, at all times, proactively employ intersectionality in their adjudication, regardless of whether or not such intersectional vulnerabilities were raised in the communication. As previously discussed, women asylum seekers’ claims are often subsumed within the claims of their husbands or relatives, that their gender-specific claims become ignored or absent in the views or decisions by the HRC and the CAT. Thus, while the onus of raising arguments is on the woman asylum seeker, it is important to acknowledge that in many cases, women asylum seekers might be incapable of effectively representing themselves, unable to afford a lawyer, do not understand the process for filing a communication, do not speak the necessary languages, and are often traumatized. Thus, the HRC and the CAT must be required to take these into account independently to them being raised by complainants. Also, the HRC and the CAT

¹⁹⁵ Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011) 79.

¹⁹⁶ Byrnes (n7) 111.

must consider that harm affects women in different ways depending on the how they are positioned along the several axes of various factors such as race, religion, and immigration status.

Recommendation 3: Conduct a case-by-case analysis of the factual circumstances surrounding the women asylum seekers' claims, on their own merit, separate from the claims of their husbands or male relatives

While having women asylum seekers file a joint claim with their husbands or male relatives is arguably more efficient, there is a danger that the gender-specific aspect of the women asylum seekers' claims will be overlooked. Accordingly, I reiterate the recommendation of feminist scholars to ask 'the woman question'.¹⁹⁷ The HRC and the CAT must ask questions to ascertain sex-specific information and not assume that women's experiences, given the same set of facts, are the same as those of men.¹⁹⁸ Without taking into consideration the distinctive aspects of women's experiences, appropriate services and programs, appropriate relief cannot be granted to women.¹⁹⁹

I agree with the recommendation of David Matas to implement a rule of automatic severance of claims, both at the international and domestic level, with the option of joinder to protect women asylum seekers who are married.²⁰⁰

Other than assessing the claims separately from the claim of their husbands or male relatives, a fair assessment of women asylum seekers' claims also requires not giving primary consideration to family support network as a major determining factor in deciding on the women asylum seekers' return to their countries of origin. As discussed in section IV, in principle, it is not considered problematic for the HRC and the CAT to question whether women asylum seekers have a family who can support her in her home country. However, in its decisions, it is my recommendation that the HRC and the CAT must acknowledge

¹⁹⁷ Byrnes (n55) 205.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Macklin (n140) 251.

that family and community may not be able to protect women asylum seekers. For example, in cases where women are at risk of female genital mutilation, the HRC and the CAT must consider the risk that family and community may exert pressure on them if they return to their home country.

Recommendation 4: Appreciate the structural and institutional factors underpinning the vulnerability of women asylum seekers.

More than being mere victims, women asylum seekers are forced to flee due to the structural and institutional forces in their countries of origin.²⁰¹ Thus, the focus of the HRC and the CAT must be on the willingness or capability of the asylum seekers' countries of origin to protect women from human rights violations as well as the societal context in which the women operate.²⁰² Scholars propose that, in examining the State's inability to protect, it is necessary to assess (1) whether a certain form of torture or ill-treatment is banned in the women asylum seekers' countries of origin and (2) whether state protection is suffering from serious institutional deficits (i.e. whether the authorities actually examined the allegations of the women asylum seekers, which may be culled from country reports).²⁰³

In addition to looking at a State's willingness and capacity to protect, the HRC and the CAT must also assess the societal context in which women complainants exist. Instead of asking whether women asylum seekers have a family protection network in their countries of origin, the HRC and the CAT must ask what are the reasons they would need a 'male protector'. These reasons can include "discrimination against women, social rejection of single women, social stigma attached to their status and social restrictions on women living alone."²⁰⁴ This recommendation not only traces the root causes of the torture that women asylum seekers have faced or would face, but it also avoids attributing their suffering to women asylum seekers' personal failures or limitations.²⁰⁵ As a result, the individual risks faced by women asylum seekers will not be attributed to stereotypes such as women being weak and vulnerable.

²⁰¹ Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-2009) 20 Yale Journal of Law and Feminism 18.

²⁰² Peroni (n130) 367.

²⁰³ Ibid.

²⁰⁴ Id., 368.

²⁰⁵ Id., 367.

Recommendation 5: Assess whether mental suffering meets the standard of severity required by torture, even when serious bodily injury is alleged or not

This recommendation will make it possible for the HRC and the CAT to be able to fully grasp the harm women asylum seekers actually experience.²⁰⁶ The HRC and the CAT must evaluate “all aspects of the harm in a cohesive manner”,²⁰⁷ including non-physical harms such as surveillance, unauthorized searches of places and persons, and psychological harm such as death threats.²⁰⁸ In legal terms, the HRC and the CAT must bear in mind that mental pain and suffering may constitute torture. While the HRC and the CAT do acknowledge the psychological harm, they do not link such harm with mental torture. As demonstrated in the previous section, the HRC and the CAT tend to completely ignore psychological harm when serious bodily injury is not present, ignoring the fact that psychological harms are typically an amalgamation of different types of harms.²⁰⁹

Other than States, it is important to acknowledge the role that women’s human rights groups and other non-governmental organizations must play in calling for a re-interpretation of the UNCAT and the ICCPR in a gender-sensitive manner.²¹⁰ Non-governmental organizations must continue to pressure treaty bodies to take cognizance of the gendered nature of the violence committed against women and incorporate this into the implementation and enforcement of the UNCAT and the ICCPR,²¹¹ as well as into international human rights treaties, in general. Non-governmental organizations should take the lead in providing treaty bodies with gender-specific information in a systematic manner.²¹²

In summary, under the approach that this paper is proposing, there are several changes that the HRC and CAT should implement to ensure a gender-sensitive approach to the adjudication of women asylum

²⁰⁶ Rempell (n191) 297.

²⁰⁷ Marouf (n188) 168.

²⁰⁸ Scott Rempell, 'Asylum Discord: Disparities in Persecution Assessments' (2014) 15 Nev LJ 169.

²⁰⁹ Rempell (n191) 297.

²¹⁰ Byrnes (n55) 208.

²¹¹ Ibid.

²¹² Ibid.

seeker's claims at the HRC and the CAT. First, there must be more women Committee members in the HRC and the CAT. Second, the HRC and the CAT must proactively assess the intersectional claims of women asylum seekers and women complainants in general. Third, the HRC and the CAT must individually assess the claims of women asylum seekers based on their own merit, separate from the claims of their husbands or male relatives, and without having the family protection network as the primary consideration in determining whether they would be at a risk of torture upon return to their countries of origin. This paper echoes the proposal of David Matas for an automatic severance of claims with the option of joinder. It likewise recommends for the HRC and the CAT to focus on the structural problems concerning the States Parties' failure or unwillingness to respond to human rights violations committed against women. Finally, to fully capture the experiences of women, the HRC and CAT must consider all aspects of the harm experienced, including the psychological harms on women asylum seekers, to determine whether their severity is severe enough to constitute torture.

VI. Conclusion

The decisions by the HRC and the CAT demonstrate how the human rights of women complainants, particularly the women asylum seekers, have been marginalized in international human rights law. Analysis of the views or decisions of the HRC and the CAT reveals that the legal protection offered by these treaty bodies to women asylum seekers remains limited, as they continue to employ a conceptual framework that is gender-biased.

The HRC and the CAT have failed to capture the full experiences of women, i.e. they have largely failed to appreciate or accommodate the unique circumstances faced by women victims. A misunderstanding about how women experience pain and suffering differently accounts for this insensitivity to the different ways in which women experience pain or suffering. This is particularly evident when the HRC and the CAT decide the cases filed by the woman complainant and her husband jointly, resulting in the absence of an analysis of women's gender-specific claim.

The public/private distinction has likewise served as an obstacle in the protection of the human rights of women asylum seekers. International human rights law is still focused on the public sphere. As a result, States relegate to the family protection network the duty to protect women complainants from the risk of torture or cruel, inhuman or degrading treatment. A common reason that the HRC and the CAT use to dismiss a claim is the presence of a family protection network. Reliance on women's family protection in their country of origin effectively shifts the burden from the public sphere (State) to the private sphere (family).

Finally, the HRC and the CAT have failed to recognize the psychological violence suffered by women complainants, if serious bodily injury cannot be proven. This becomes a disadvantage for women whose pain and suffering are often considered an exaggeration and tend to be met with disbelief.

In light of these shortcomings, this paper calls for a feminist analysis of the decisions on complaints filed by women asylum seekers, not just with respect to torture, but in general. A feminist approach requires reconceptualizing the way cases filed by women complainants are viewed, in a way that would recognize women's experiences using the intersectionality theory in the interpretation of rights. Moreover, the HRC and the CAT could more fairly adjudicate the communications filed by women asylum seekers by assessing whether state protection in the complainant's country of origin is effective, instead of concluding that women complainants can safely return to their country because of the presence of their family members there. Another way to address the gendered consequences that flow from a narrow interpretation of the UNCAT and the ICCPR would be through an acknowledgement of psychological violence women suffer from.

These discussions suggest that the HRC and the CAT must fully re-conceptualize the assessment of the principle of *non-refoulement* to fully include the experiences of women asylum seekers. While this paper focuses specifically on women asylum seekers as victims of torture, there is a clear spill over of both the theoretical observations and the practical recommendations to other issues which opens up the possibility of diverse application and augmentation of the ideas presented in this paper.

Table of Authorities

Treaties and Agreements

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Cases

A. P. Johannes Vos v. The Netherlands (29 July 1999) Communication No. 786/1997, U.N. Doc. CCPR/C/66/D/786/1997.

A.R.J. v. Australia (28 July 1997) Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996.

Balabou Mutombo v. Switzerland (27 April 1994) Communication No. 13/1993 CAT/C/12/D/013/1993.

F.B. v. Netherlands (15 December 2015) Communication No. 613/2014 CAT/C/56/D/613/2014.

G.T. v. Australia (4 December 1997) Communication No. 7061/1996 CCPR/C/61/D/706/1996.

K.S. and M.S. v. Denmark (4 December 2017) Communication No. 2594/2015 CCPR/C/121/D/2594/2015.

MAK v. Germany (17 May 2004) Communication No. 214/2002 CAT/C/32/D/214/2002.

M.S. v. Denmark (14 October 2015) Communication No. 571/2013 CAT/C/55/D/571/2013.

M.J.S. v. The Netherlands (14 June 2016) Communication No. 757/2016 CAT/C/66/D/757/2016.

Ms. Diene Kaba v. Canada (21 May 2010) Communication No. 1465/2006 CCPR/C/98/D/1465/2006.

María del Carmen Almeida de Quinteros et al. v. Uruguay (21 July 1983) Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990).

P.S.B. and T.K. v. Canada (1 October 2015) Communication No. 505/2012 CAT/C/55/D/505/2012.

R.G. et. al. v. Sweden (28 January 2016) Communication No. 586/2014 CAT/C/56/D/586/2014.

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

V.L. v. Switzerland (22 January 2007) Communication No. 262/2005 CAT/C/37/D/262/2005.

Vuolanne v. Finland (2 May 1989) Communication No. 265/1987 CCPR/C/35/D/265/1987.

Warda Osman Jasin v. Denmark (25 September 2015) Communication No. 2360/2014 CCPR/C/114/D/2360/2014.

Womah Mukong v. Cameroon (10 August 1994) Communication No. 458/1991, UN Doc CCPR/C/51/D/458/1991

X v. Denmark (12 May 2014) Communication No. 2007/2010 U.N. Doc. CCPR/C/110/D/2007/2010.

X v. Sweden (17 January 2012) Communication No. 1833/2008 CCPR/C/103/D/1833/2008.

Y. v. Switzerland (12 July 2013) Communication No. 431/2010, UN Doc. CAT/C/50/D/431/2010.

Bibliography

Official materials

Committee Against Torture (CAT), '*CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*' (1997) CAT A/53/44, annex IX.

Committee Against Torture (CAT), '*General Comment No. 2: Implementation of Article 2 by States Parties*' (2008) CAT/C/GC/2.

Committee Against Torture (CAT), '*General Comment No. 3 of the Committee against Torture Implementation of article 14 by States parties*' (2012) CAT/C/GC/3.

Committee Against Torture (CAT), '*General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*' (2017) CAT/C/GC/4.

U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (Mar. 20, 2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/II/Rev.7 (May 12, 2004),

Human Rights Committee, '*CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*' (2001) CCPR/C/21/Rev.1/Add.11.

Human Rights Committee, '*General Comment No. 20, Article 7 (replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment)*' (1992) UN Doc. HRI/GEN/1/Rev.1.

Human Rights Committee, '*CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*' (2000) CCPR/C/21/Rev.1/Add.10.

Human Rights Committee, '*General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*' (2004) CCPR/C/21/Rev.1/Add.13.

Report of the Committee Against Torture (*Twenty-Seventh & Twenty-Eighth Sess.*), U.N. GAOR, 57th Sess., Supp. No. 44, 91 123-95, U.N. Doc. A/57/44 (2002).

United Nations Commission on Human Rights '*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*' (2005) UN Doc. E/CN.4/2006/6.

United Nations General Assembly '*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*' (1 September 2004) UN Doc. A/59/324.

Books

Burgers, H. and Danelius, H. *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers 1988).

Edwards, A. *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011).

Kesby, A. *The Right to Have Rights, Citizenship, Humanity, and International Law* (Oxford Scholarship Online 2012).

Kimerling, R., Ouimette, P. & Wolfe, J. eds., *Gender and PTSD* (New York: Guilford Press, 2002).

MacKinnon, C. *Toward a Feminist Theory of the State* (The Harvard University Press 1989).

Otto, D. *Lost in translation: re-scripting the sexed subjects of international human rights law* (Cambridge University Press 2006).

Spijkerboer, T. *Gender and Refugee Status* (Routledge 2000).

Weisberg, K. *Domestic Violence: Legal and Social Reality* (Wolters Kluwer Law & Business 2019).

Book chapters

Anker, D. 'An Introduction to Relief Under Article 3 of the Torture Convention', in Paul T. Lufkin (ed), *Law of Asylum in the United States* (3d ed. Refugee Law Center 1999).

Bunch, C. 'Feminist Visions of Human Rights in the Twenty-First Century', in Kathleen E. Mahoney & Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Springer Netherlands, 1993) 967-969.

Byrnes, A. 'The Convention Against Torture' in Kelly D. Askin & Dorean M. Koenig (eds), *Women and International Human Rights Law* (1st edn, Transnational Pub 2000).

Byrnes, A. 'Using International Human Rights Law and Procedures to Advance Women's Human Rights' in Kelly D. Askin & Dorean M. Koenig (eds), *Women and International Human Rights Law* (1st edn, Transnational Pub 2000).

Charlesworth, H. 'What are "Women's International Human Rights"?', in Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994).

Coomaraswamy, R. 'To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights' in Rebecca J. Cook (ed.) *Human Rights of Women* (University of Pennsylvania Press, Inc. 1994).

Engle, K. 'International Human Rights and Feminisms: When Discourses Keep Meeting in Doris Buss & Ambreen Manji (eds), *International Law: Modern Feminist Approaches* (Har Publishing 2005).

Fernandez-Paredes, T., 'The Importance of Investigating Torture Against Women and Girls by Non-State Actors: Applicable Legal Standards from International Human Rights Law' in Macarena Saez (ed), *Gender Perspectives on Torture: Law and Practice* (Center for Human Rights and Humanitarian Law: Anti-Torture Initiative 2016).

Haines, R. 'Gender-Related Persecution' in Erika Feller et al. (eds.), *Refugee Protection in International Law* (Cambridge University Press 2003).

Kois, L. 'Dance, Sister, Dance!' in Duner (ed.) *An End To Torture* (Zed Books, 1988) 85 at 104.

Otto, D. 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005).

Otto D, Women's Rights' in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law*, 3rd edn (Oxford University Press 2018).

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

Scutt, J., "Sexism and Psychology: An Analysis of the "Scientific" Basis of the Corroboration Rule in Rape' in Scutt, J. A. (ed.) *The Sexual Gerrymander* (Spinifex Press 1994) 139-160.

Journals

Alam, A. 'Towards Gender Sensitive International Refugee Law' (2008) 8 ISIL YB Int'l Human & Refugee L 105.

Anker, D 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harv. Hum. Rts. J. 133, 138-39.

Aolain, F. 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 Queen's Law Journal 219-244.

Binion, G. 'Human Rights: A Feminist Perspective' (1995) 17 HuM. RTS. Q. 509, 514.

Bond, J. 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 EMORY L. J. 71, 78.

Brooks, R. 'Feminism and International Law: An Opportunity for Transformation' (2002) 14 YALE J.L. & FEMINISIM 345, 353-54.

Carbado, D. & Gulati M., 'The Law and Economics of Critical Race Theory, (2003) 112 YALE L.J. 1757, 1775.

Chamallas, M., Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights, 44 WAKE FOREST L. REV. 1109, 1110 (2009).

Charlesworth, H. 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) *Harv. Hum. Rts. J.* 18, 1-18.

Charlesworth H and Chinkin C, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000)

Charlesworth H, Chinkin C, and Wright S, 'Feminist Approaches to International Law,' *American Journal of International Law* 85 (1991): 613-645.

Cianciarulo, M. 'Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims' (2012) 35 Harv. J.L. & Gender 139.

Copelon, R. 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 Colum Hum Rts L Rev 313.

Copelon, R. 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 Hastings Women's Law Journal 243, 264.

Crenshaw, K. 'Demarginalizing the Intersection of Race and Sex A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) U. CHI. LEGAL F. 140.

Crenshaw, K. 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 STAN. L. REV. 1241, 1242-43.

Crenshaw, K. 'Transcript, Panel Presentation on Cultural Battery, Speaker: Kimberly Williams Crenshaw' (1995) 25 U. TOL. L. REV. 891, 892

Edwards, A. 'Human Rights, Refugees, and the Right to Enjoy Asylum' (2005) 17 Int'l J. Refugee L. 293-330.

Edwards, A. 'The 'Feminizing' of Torture under International Human Rights Law' Leiden Journal of International Law 81, 356-7.

Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010' (2010) 29 Refugee Survey Quarterly 21.

Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-2009) 20 Yale Journal of Law and Feminism 18.

Fletcher, A. 'The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law' (2006) 21 Berkeley J. Gender L. & Just. 114.

Gallagher, A. 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System' (1997) 19 HUM. RTS. Q. 283, 290

Gavison, R. 'Feminism and the Public/Private Distinction' (1992) 45 STAN. L. REV. 1, 46.

Hevener, N. 'International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women' (1978) 1 Harvard Women's Law Journal 131.

Houh, E. 'Toward Praxis; (2006) 39 U.C. Davis L. REV. 905, 924-38.

Hunter, C., 'Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why Narrowing the Definition of a Refugee Discriminates against Gender-related Claims' (2002) Australian Journal of Human Rights.

Johnstone, R. 'Feminist Influences on the United Nations Human Rights Treaty Bodies' (2006) 28 HUM. RTS. Q. 148.

Jones, C. 'Human Rights: Rights of Relatives of Victims-Views of the Human Rights Committee in the Quinteros Communication' (1984) 25 Harv. Int'l L.J. 470 at 476.

Kaspiew, R., 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20 Melbourne University Law Review 350-382.

Kelly, L. *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 561

MacKinnon C, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 (4) Signs 635, 645

Macklin, A. 'Refugee Women and the Imperative of Categories' (1995) 17 Hum Rts Q 251.

Mahoney, K. 'International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts' 1 Austl Feminist L J (1993) 121.

Marouf, F. 'The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm' (2011) 22 Colum J Gender & L 116.

Mechlem, K. 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905.

Middelburg, A. and Balta, A. 'FGM/C as a Ground for Asylum in Europe' (2016) 28(3) International Journal of Refugee Law 416-452.

Norris, F. et al, "Sex Difference in Symptoms of Posttraumatic Stress: Does Culture Play A Role" (2001) 14 Journal of Traumatic Stress 24.

Oosterveld, V. 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution' (2006) 17 Duke Journal of Comparative & International Law 49-90.

Otto, D. 'The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade' (2009) 10 Melbourne Journal of International Law 11.

Peroni, L. 'The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm' (2018) 18(2) Human Rights Law Review.

Peterson, V. 'Whose Rights? A Critique of the "Givens" of Human Rights Discourse' (1990) 15 Alternatives 306.

Radacic, I. 'Feminism and Human Rights: The Inclusive Approach to Interpreting International Human Rights Law' (2008) 14 UCL Jurisprudence Rev 238.

Ramachandran, G. 'Intersectionality as "Catch-22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable' (2005) 69 ALB. L. Rev. 299, 301.

Rempell, S. 'Asylum Discord: Disparities in Persecution Assessments' (2014) 15 Nev LJ 169.

Rempell, S. 'Defining Persecution' (2013) UTAH. L. Rev. 289.

Romany, C. 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 HARV. HUM. RTS. J. 87-125.

Rosati, K. 'The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers' (1997) 74 Interpreter Releases 1773, 1774).

Rosenblum D. Unisex CEDAW or What's Wrong with Women's Rights, 20 Colum. J. Gender & I. 98, 193 (2012).

Simmons, C. & Granvold, K. "A Cognitive Model to Explain Gender Differences in Rate of PTSD Diagnosis" (2005) 5 Brief Treatment & Crisis Intervention 290.

Stairs F. and Pope L. 'No Place like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds' (1990) 6 J.L. & SOC. POL'Y 150.

Weissbrodt, D. and Hortreiter, I. 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 Buff. Hum. Rts. L. Rev. 2.

West, R. 'Jurisprudence and Gender' (1988) 55 U. Chicago L. Rev. 1.

West, R. 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (1987) 3 Wisconsin Women's Law Journal 81, 93.

Newspaper Article

Walsh, M. 'Battered Women as Refugees: Female Asylum-Seekers in Canada Say They're Being Persecuted in their Homelands on the Basis of their Sex. Should Balkan Rape Victims and Feminists in Islamic States Qualify as Political Refugees?' *L.A. TIMES* (Feb. 23, 1993) <<https://www.latimes.com/archives/la-xpm-1993-02-23-mn-448-story.html>>.

Internet Sources

Canada: Immigration and Refugee Board of Canada, 'Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution' (13 November 1996) < <https://www.refworld.org/docid/3ae6b31c98.html>> accessed 20 September 2019.

Council of Europe, 'The Convention in Brief' <[https://www.coe.int/en/web/istanbul-convention/the-convention-in-brief#{%2211642301%22:\[1\]}](https://www.coe.int/en/web/istanbul-convention/the-convention-in-brief#{%2211642301%22:[1]})>.

European Commission, 'EMN Ad-Hoc Query on immediate family members applying for asylum at the same time' (2017) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2017.1190_sk_on_immediate_family_members_applying_for_asylum_at_the_same_time.pdf>.

Joseph, S., Mitchell, K. and Gyorki, L., 'Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies' (*World Organisation Against Torture*, 2014) 189 <https://www.omct.org/files/2014/11/22956/v4_web_onusien_en_omc14.pdf>.

Nicholson, F. and Kumin, J. 'A guide to international refugee protection and building state asylum systems' (*United Nations High Commissioner for Refugees and Inter-Parliamentary Union*, 2017) 17 <<https://www.unhcr.org/3d4aba564.pdf>>.

Office for the High Commission for Human Rights, 'Treaty Body Database: Committee Members' (25 June 2004), <<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>>

Patrick, E. 'Gender-Related Persecution and International Protection' (*Migration Policy Institute*, 1 April 2004) <<https://www.migrationpolicy.org/article/gender-related-persecution-and-international-protection>>

UN High Commissioner for Refugees (UNHCR), 'UNHCR Note on the Principle of Non-Refoulement' (*Refworld*, November 1997) < <https://www.refworld.org/docid/438c6d972.html>>.