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**HUMAN RIGHTS, INTERNATIONAL PROTECTION AND  
CONCEPT OF GENDER**

**A THESIS SUBMITTED TO  
THE GRADUATE SCHOOL OF SOCIAL SCIENCE  
OF  
THE MIDDLE EAST TECHNICAL UNIVERSITY**

**BY**

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**IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR  
THE DEGREE OF MASTER OF SCIENCE  
IN  
THE DEPARTMENT OF GENDER AND WOMAN STUDIES**

**JUNE 1996**

Approval of the Graduate School



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This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Arts.

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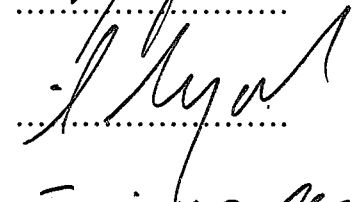
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## ABSTRACT

### HUMAN RIGHTS, INTERNATIONAL PROTECTION AND CONCEPT OF GENDER

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M.S., Gender and Women Studies

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June 1996, 127 pages

This thesis analyzes the concept of human rights under the light of the gender perspective: how the concept of human rights was initially determined; feminist critiques towards the human rights concept; women's human rights and gross human rights violations related with gender issues.

Keywords: Gender, Human Rights

ÖZ

İNSAN HAKLARI, ULUSLARARASI KORUMA VE  
CİNSİYET KAVRAMI

Akbatur, Fahrunnisa

Master, Kadın Çalışmaları

Tez Yöneticisi: Prof.Dr.Ayşe Ayata

Haziran 1996, 127 sayfa

Bu tez insan hakları kavramlarını cinsiyet perspektifinin ışığı altında incelemektedir: İnsan hakları kavramları nasıl kurulmuştur; insan hakları kavramlarına karşı yöneltilen feminist eleştiriler nelerdir; kadınların insan hakları ve cinsiyetle ilgili alanlarda insan hakları ihlalleri inceleme konularıdır.

Anahtar Kelimeler: Cinsiyet, İnsan Hakları

To my mother, Duriye, Mahsa and Zeliha  
without these women there would be no thesis



## ACKNOWLEDGEMENTS

I express my sincere appreciation to each and every woman who has taken part in the realization of the Gender and Women Studies Master Program at the Middle East Technical University. I learned and benefitted from it very much and it enlightened my life. It is a great experience of learning together with women. I express my special thanks to my supervisor Prof.Dr.Ayşe Ayata for her guidance and insight throughout my study. I want to thank UNHCR Branch Office Ankara for providing special photographs which helped my thesis visually. I would like to present my thanks to my dear friends Gaye Dincel, Duriye Namal, Seda Kuzucu, Mahsa Parangi, and Zeliha Unaldi and also the Iraqi Defence Committee of Women's Rights and the Iranian Defence Committee of Women's Rights. I offer sincere thanks to my mother Ulku and my children Volkan Sarp and Deniz Can for their patience concerning my endless work in front of the computer.

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*A philosopher who is not an activist in a struggle ends up as an empty shell: as a shelf of books in academia. S/he struggles in closed rooms, using words to fence with other users of words. S/he has a love-hate relationship with poor oppressed women and men who are struggling to live. S/he worship them, calls them the 'subaltern', glorifies their authentic identity or culture, but at the same time looks down on them, considers them as docile or struggling bodies unable to produce philosophy or as local activists but not global thinkers. S/he abolishes subaltern philosophies and replaces them on the global intellectual scene; s/he becomes the philosopher of the subaltern who knows more about them than they know about themselves. (Nawal El Saadawi, 1995; 12)*



## CHAPTER 1

### INTRODUCTION

This is a study on rights and violation of rights. Mainly, this thesis will examine what "rights" are according to international law and how they are applied. One can easily claim that "rights" discourse is male-centered considering women's disadvantaged position in the social structure offers few rights to women. Moreover, rights may vary from one woman to another and one culture to another. Yet, as Rebecca Cook states "while the nature of subordination and thus the means to combat it may vary, we must not lose sight of fact that we are subordinated because we are women and that the goal of elimination of all forms of subordination of women remains universal" (Charlesworth, 1994; 75).

First, this thesis will discuss international human rights instruments. There are many international human rights instruments which have been ratified. The rights addressed in conventions have been organized into a hierarchical order. The first generation rights address social and political rights and they have been given the most credence by Western countries. Second generation rights include mainly economic, social and cultural rights.

The third generation rights are concerned with issues such as collective and group rights. The primary concern of collective rights is meeting the needs of the community over the needs of an individual. For example, there

is a right to "self determination, allowing 'all peoples' to freely determine their political status and freely pursue their economic, social and cultural development" (Charlesworth, 1994; 75). It is true that there are also international women's conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) which specifically address women's issues. Yet these international women's conventions are regarded as peripheral in the hierarchical order of conventions.

Feminist critics have challenged all these instruments as they are institutionally understood. The process by which these instruments define and apply human rights law is brought under examination. Various feminist approaches are concerned mainly with the issue of whether these instruments adequately address the needs of women and take into account women's experiences.

As Charlesworth puts it there are three feminist approaches that might serve to recharacterize rights in order to make them more universal applicable by better accommodating women's pervasive experience of injustice: the first one is liberal attempts to realized the equal treatment guaranteed by existing law. The second one is cultural feminism which celebrates the differences between masculine and feminine ways of reasoning. The third one is radical feminism aims to transform the masculine world where inequality is based on systemic domination and subordination of women by men. Mix of these approaches might be useful in recharacterizing international human rights law.

These feminist approaches questions the adequacy and application of human rights law as it exists today and as Gayle Binion points out "[w]hile the feminist critics are mainly concerned with women's experiences, a feminist approach may also have immediate implications for the rights of all disempowered people and questions about social organizations generally" (Binion, 1995; 75).

In accordance with a gender-sensitive approach, this thesis will take from women's experience in order to evaluate the adequacy of international human rights standards. In many instances analyzing women's cases individually and seeing if women's ultimate human rights are upheld can serve as a test of the adequacy of international conventions.



## CHAPTER 2

### INTERNATIONAL HUMAN RIGHTS LAW

This section will provide an overview of the ethics, conceptual framework and history of international human rights law. This discussion is particularly helpful as background information prior to specific examination of the various conventions and human rights instruments.

#### 2.1. Ethics of International Human Rights Law

International human rights law, in its current form, is a product of the post World War II order. International human rights law "gives individuals and groups, otherwise without access to the international legal system, the possibility of making international legal claims and thus expands the state-centered discourse of international law" (Charlesworth, 1994; 58). Yet the history of international human rights law can be traced to developments toward a liberal state. As Carlos Santiago points out:

Notwithstanding precedents as remote as the Spanish *fueros*, the English charters, the North American declarations, etc., it was the Declaration of the Rights of the Man and Citizen of 1789 that made explicit two basic ideas: that the mere will of the strong is not a final justification for actions which affect the vital interests of individuals, and that the mere fact of being human is enough title for claiming goods which are necessary for an autonomous and dignified life. (Nino, 1993; 73)

As Tom Farer points out, "the French Revolution restored the principle of citizenship" (Farer, February 1995; 74). It introduced of the notion the sovereignty of the nation-state as opposed to the initial principle of sovereignty of princes.

The declaration of common citizenship was a declaration of shared rights, shared not promiscuously however, shared among the people of France... But while, in transforming the French from subjects of the King to citizens of the nation, the Revolution implied a hierarchy of rights defined by citizenship, like the American Declaration of Independence it so quickly followed, the Revolution insisted that the rights central to a dignified existence were the common proper of all people everywhere. (Farer, February 1995; 74)

At the core of the liberal model is the notion of personal autonomy. The principle of personal autonomy generally includes two aspects. First, individuals in society should be given choices with the opportunity to make their life plans based upon their choices and have the "freedom to perform any act which does not cause harm to other people" (Nino, 1993; 130). Secondly, the state may not unjustly intrude upon the right of individuals to exercise their autonomy. Indeed, if one examines many of the current rights guaranteed in international human rights instruments, they generally provide positive rights, namely, the right to do certain things such as "to profess or not to profess a religion, to undertake any job or enterprise, to associate with others, to move one place or another" (Nino, 1993; 130). These rights are again based on the notion that an individual has the right to practice any activity as long as it brings no harm upon others living in the society. Within this model, individuals have the right to choose different lifestyles or models of living especially with reference to their sexual and family life thus "the

principle of personal autonomy supports a broad liberty for developing private life and intimate relations" (Nino, 1993; 146).

Of course, a basic question posed about the principle of personal autonomy and personal choice is what if individuals do not have the resources to carry out the life plan of their choice." If persons do not have the means to actually carry out their choices, then their "choices" become meaningless. This problem has found articulation in other human rights instruments which attempt to guarantee certain cultural, economic, and social rights. Yet, it can be properly said that international human rights has the notion of personal autonomy at its core.

Allowing individuals to live by their own life choices and proscribing the state from unduly interfering upon these choices enhances the lifestyles of individual persons. Yet it is not this personal dimension which necessarily makes this system desirable, but the fact that by allowing this type of mutual and interactive autonomy, one gets a desirable and ideal society allowing for the peaceful coexistence of individuals within a state. Thus,

international law adopts the social contract discourse of the liberal state, and its values as well. Within international law, states are the individuals in a position of equality, freedom and independence towards each other. International society can thus be viewed as a blown-up liberal state that legislates in accordance with liberal humanistic values and that accepts as part of such a contract those values that refer to the essential dignity and freedom of human beings. (Romany, 1994; 87)



The international human rights law framework lacks an adequate enforcement mechanism. Even with the development of international law and international human rights law, state sovereignty remains predominant in the operation of international relations. It is not sufficient for individual states to give legal recognition to human rights and it cannot be guaranteed that states will enforce human rights through their state mechanisms. Therefore, a legalistic international enforcement mechanism has slowly developed which concentrates increasingly on the establishment of international covenants which define rights and institute external sanctions for their violation, as well as regional courts, monitoring procedures. etc. It is clear that this is another decisive step towards the enforcement of basic human rights, since it makes them relatively independent of the internal contingencies of each country (Nino, 1993). However, as Carlos Santiago further points out:

The incorporation of human rights into the international legal order, while necessary, has two limitations. One arises from the fact that the ideological divergence among governing powers in different countries allows such incorporation to be effected only at the level of a lowest common denominator, leaving aside rights which are disputed. The other and more serious limitation is that the still current conception of the sovereignty of states imposes severe restrictions on the obligations that governments accept by their commitment and on the forms of intervention available to external organs for investigating and punishing human-rights violations. (Nino, 1993; 3)

On the international level, the issues of law and politics become increasingly intertwined. Therefore, through law, the international legal order attempts to claim autonomy from politics and political influence. Celina Romany correctly points out that:

In international human rights law the links between law and politics are more blurred than in other fields since raising questions of human rights touches on the very foundations of a regime, on its sources and exercises of power. Nonetheless the appearance of autonomy is maintained in international law by a methodological framework called "legal reasoning" which purports to derive objective rules and principles. (Romany, 1994; 88)

Feminist critics have pointed out that this legal- centered and methodological approach has served to silence the voices of women's experiences which have not found a place in international discourse.

## **2.2. International Conventions**

This section based on main international conventions, gives the general idea of what the internationally recognized human rights are. The rights recognized in these conventions are classified in a hierarchical order.

### **2.2.1. The First Generation Rights**

Guarantees of social and political rights make up "first" generation human rights. These social and political rights have been given primacy by Western countries and Western international human rights lawyers. Based upon the liberal state model, these first generation rights encompass the rights that the individual can assert against the state. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment will be discussed in the following chapter.

The Universal Declaration of Human Rights defines the fundamental human rights. The following conventions such as the International Covenant on Civil and Political Rights specify the limits and application on defined rights. Article 5th of the UDHR and article 7th of the ICCPR are related with the Convention Against Torture. The Convention Against Torture defines in detail the state's responsibility for its acts in the case of a misuse of their authority.

### **2.2.1.a. The Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) created by the United Nations General Assembly Resolution 217 AIII passed on December 10, 1948 is one of the earliest and most important human rights instruments. Due to the primacy and credence given to civil and political rights, the Universal Declaration of Human Rights and the rights set out in this human rights instrument warrant detailed discussion.

The Preamble of the UDHR conveys the message that respect for human rights will lead to "foundation of freedom, justice and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people." The preamble also states "that human rights should be protected by the rule of law."

The General Assembly in the UDHR,

[p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.

The specific rights provided in various UDHR articles have two aspects: (1) some articles clearly reflect the notion of protection of man from the state and protection of the private sphere of individuals' lives; (2) other articles set out positive rights that persons are entitled to assert.

The UDHR, in its various articles, delineates specific rights and freedoms of individuals. Article 1 of the UDHR encompasses the notion that all persons are born with equal rights and should act towards one another "in a spirit of brotherhood."<sup>1</sup> The main idea encompassed in the UDHR is that persons have equal rights not that they are equal. Individuals are not entitled to resources equally, but they are entitled to certain "rights" which they can assert on an equal basis "without distinction of any kind such as race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status" (Article 2 of the UDHR).

The UDHR guarantees the most basic rights of right to life, liberty and security of person (Art. 3), right to equal recognition before the law

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<sup>1</sup> Article 1 of the UDHR states " All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

(Art.6), right to equal protection of the law.<sup>2</sup> The proper functioning of the rule of law is emphasized. "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (Art. 8). "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" (Art. 10). "Persons have the right to be presumed innocent until proved guilty" (Art. 11).

The UDHR also provides rights, such as freedom of thought and religion,<sup>3</sup> freedom of opinion and expression,<sup>4</sup> and freedom of peaceful assembly and association.<sup>5</sup> Everyone is given the right to participate in their government either "directly or through freely chosen representatives." Article 21 requires periodic and genuine elections in order to express the will of the people. There are certain rights given with relation to property, education,

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<sup>2</sup> Article 7 states "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

<sup>3</sup> Article 18 states "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

<sup>4</sup> Article 19 states "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

<sup>5</sup> Article 20 states "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."

employment. Persons have the right to own property and the right to free education at the elementary level (Art's 17 & 26) and everyone without discrimination has the right to equal pay for equal work (Art. 23). Article 25 of the UDHR states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care" and "[m]otherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."

The UDHR also protects individuals in society from certain actions presumably carried out by the state or other individuals in the society. "No one shall be subjected to slavery or servitude" (Art. 4); "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Art. 5); "[n]o one shall be subjected to arbitrary arrest, detention or exile (Art. 9)."

The right to privacy and noninterference from the state is set out in Article 12 of the UDHR which in relevant part states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

This notion of the existence of a private sphere encompassing one's family, home and correspondence which warrants protection is coupled with the right to marry and create a family stated in Article 16 of the UDHR.

Article 16, in relevant part states:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

It is interesting that the UDHR specifically refers to the family as the "natural and fundamental group unit of society" and the fact that the family is the unit which "is entitled to protection from the society and the state." Article 16 of the UDHR, in effect, relegates the family to the private sphere of society in which the state cannot intrude.

The UDHR concludes in Article 29 by pointing out that everyone "in the exercise of his rights and freedoms, shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others."

#### **2.2.1.b. The International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR), passed by United Nations General Assembly on December 16, 1966, is the subsequent human rights instrument which elaborates upon first generation



"civil and political rights."<sup>6</sup> The international covenant on civil and political rights better explains and in certain instances qualifies certain rights which were set out in the Universal Declaration of Human Rights. It also contains some new ideas which were introduced in the area of civil and political rights in international human rights law.

Interestingly, the preamble to the Covenant also makes reference to economic, social and cultural rights. In relevant part, the Covenant states, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. Article 1 of the Covenant introduces the notion of self-determination by stating that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and pursue their economic, social and cultural development. Article 3 of the Covenant makes specific reference to the equal rights of men and women to enjoy all civil and political rights referred to in the Covenant.<sup>7</sup>

Therefore, the Covenant provides some elaboration on the rights originally set forth in the Universal Declaration of Human Rights, yet the Covenant is not absolute in the rights it provides and adds some qualifying statements to the rights set forth in it. For instance, Article 4 of the Covenant

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<sup>6</sup> See The International Covenant on Civil And Political Rights (ICCPR66) The United Nations General Assembly Resolution 2200 A(XXI) of 16 December 1966.

<sup>7</sup> Article 3 states that "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."



allows states to derogate from the terms set forth in the Covenant in times of public emergency which threatens the life of the nation.<sup>8</sup> Of course, no derogation can be made from articles referring to the right of life, the right not to be subjected to torture, or cruel or inhuman treatment or the prohibition on slavery or indentured servitude. But the fact that derogation from other articles of the Convention is tolerated demonstrates that some exceptions or perhaps some compromises were made in the drafting of the Covenant.

Article 6 of the Covenant presents the idea that every person has a right to life. This idea was not overtly stated in the Universal Declaration of Human Rights. Article 6 of the Covenant states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." But again, the Covenant addresses the exceptions to this right and makes reference to the states that have not

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<sup>8</sup> Article 4 of the Covenant states:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

abolished the death penalty. In these countries, "sentences of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime" and "[t]his penalty can only be carried out pursuant to a final judgment rendered by a competent court." The article also states that the death penalty shall not be imposed upon persons below eighteen years of age or pregnant woman.<sup>9</sup>

Similar to the Universal Declaration of Human Rights, the Covenant makes reference to the fact that "everyone has the right to liberty and security of person." But again, the Covenant addresses certain exceptions such as when persons are arrested on criminal charges. The rule of law is

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<sup>9</sup> Article 6 in relevant part states:

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

emphasized as a the person can be deprived of his liberty "on such grounds and in accordance with such procedure as are established by law" such as the right to be informed of the charges against him and the right to be "brought promptly before a judge or other officer authorized by law to exercise judicial power (Art. 9). The Covenant appears more realistic than the UDHR in certain aspects as it addresses the common practices of states and places limitations on these practices in accordance with human rights law. Yet with reference to the right of privacy and family, Article 22 of the Covenant is exactly the same as its predecessor article, Article 12 of the UDHR. Article 22 states, as the UDHR does, that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

It is interesting that with reference to the right of privacy and family, the absolute character of the article originally presented in the UDHR is maintained. No attempt is made to provide more detailed descriptions or add exceptions or qualifying statements to this article.

This practice also holds true for the Article 23 of the Covenant which makes reference to family as the "natural and fundamental group unit of society" and also addresses the issue of marriage. Again, with the exception of the ordering of the sentences, Article 23 of the Covenant remains essentially the same as Article 16 of the UDHR. Article 23 of the Covenant states, as did the UDHR that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

The only additional reference in the Covenant is made to the fact that in case of dissolution of marriage provisions should be made to protect the children. Again, there is made no references made to new developments since the drafting of the UDHR or any further descriptions or detailed explanations.

Article 28 of the Covenant establishes a Human Rights Committee composed of eighteen members and nationals of the State Parties. The Committee's task is to monitor compliance with the ICCPR. The Human Rights Committee has issued General Comments on respective articles of the Covenant and what measures states have taken to implement the various articles. The Human Rights Committee's General Comment 3 "stresses that the obligation under the Covenant is not confined to the respect of human rights, but that state parties have also undertaken rights to all individuals under their jurisdiction. This aspect calls states parties to enable individuals to enjoy their rights." (Cook, 1994; 231)

### 2.2.1.c. The Convention Against Torture

Historically, torture is a widely practiced phenomenon containing the most heinous forms of violence. Torture has not died out in the 20th century but has been recognized in new forms and definitions. Particular revulsion against Nazi atrocities led to prohibition of torture, inhuman or degrading treatment and punishment in the above mentioned Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Most recently, prohibition of torture can be found in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, passed in 1984 by the General Assembly of the United Nations.<sup>10</sup>

The issue of whether these binding instruments can be applied to gender-based violence requires more detailed examination of how these conventions, especially the UN Torture Convention, define torture and how the issue of state responsibility is addressed in this convention. Article 1 of the UN Torture Convention defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or for any reason based on discrimination of any kind.<sup>11</sup>

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<sup>10</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Assembly of The United Nations, 10 December 1984, Date of Entry into Force: 26 June 1987.

<sup>11</sup> Torture Convention Article 1:

1. For the purposes of this Convention, the term "torture" means any act by

The issue of state responsibility is also addressed in Article 1 of the Convention. The drafters of the Convention included private acts of torture only "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." Article 1, therefore, requires some form of official involvement.

As Rhonda Copelon has pointed out, when torture is defined in binding instruments such as the UN Torture Convention, "it generally involves four critical elements: (1) severe physical and/or mental pain and suffering; (2) intentionally inflicted; (3) for specified purposes; (4) with some form of official involvement, whether active or passive" (Copelon, 1994; 122).

Article 2(1) of the UN Torture Convention requires that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Also, Article 4(1) of the Convention requires that "[e]ach State Party shall

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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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.



ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by *any person* which constitutes complicity or participation in torture."<sup>12</sup>

Article 11 of the UN Torture Convention requires that "each state party review its interrogation rules as well its arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction in order to prevent cases of torture."<sup>13</sup> Article 12, 13 and 14 of the UN Torture Convention provide certain procedural guarantees, (a) that states conduct a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed (Art. 12); (b) that a proper complaints procedure be established for persons who allege that they have been subjected to torture;<sup>14</sup> and (c) that victims of torture and their families have fair and

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<sup>12</sup> The full text of Article 4 of the Torture Convention States:

1. Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.

<sup>13</sup> The full text of Article 11 states:

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

<sup>14</sup> The full text of Articles 13 states:

Each State Party shall ensure that any individual who alleges he has been

adequate compensation (Article 14).<sup>15</sup>

The UN Torture Convention also created a Committee against Torture composed of ten experts in the field of human rights elected by secret ballot by state parties biannually. The task of the Committee is to monitor the implementation of articles stated in the UN Torture Conventions, state parties must submit reports every four years on any new measures taken and as the Committee may request. The Committee against Torture can make decisions and has its own rules of procedure. Decisions are made by majority vote.

### **2.2.2. The Second Generation Rights**

The second generation rights set in the Covenant on Economic, Social and Cultural Rights covers economic, social and cultural rights. This Covenant defines the right to work, right to food, and also religious rights.

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subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

<sup>15</sup> The full text of Article 14 states:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.



### **2.2.2.a. The International Covenant on Economic, Social, and Cultural Rights**

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was passed by the General Assembly on December 16, 1966.<sup>16</sup> This covenant moves away from the liberal state model of protecting the individual from the state and providing certain positive rights to individuals. Thus, the fact that these rights do not fit into the 'individual versus state' paradigm has contributed to their more controversial status and to weaker methods of implementation in international law (Charlesworth, 1994). But with reference to economic rights, the covenant does assume that all effective power to bring change rests with the state. In fact, the state does not necessarily have direct relations with certain sectors of society, namely women of which a significant percentage may be relegated to the private sphere. Article 3 of the Covenant does state that "the State Parties to the Present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

Many of the rights discussed in the ICESCR are also touched upon in the Covenant on Civil and Political Rights, such as right to education. Article 13 states that "primary education shall be compulsory and available free to all."

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<sup>16</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR66) The United Nations General Assembly Resolution 2200 A(XXI) of 16 December 1966, Date of Entry into Force: 03 January 1976.

The ICESCR specifically addresses the issue of workers rights in Article 7. Article 7 "recognizes the right of everyone to the enjoyment of just and favourable conditions of work" and the Article makes specific reference to women. State parties have a duty to ensure "[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."<sup>17</sup> Article 7 refers to work in the public sphere without reference to the work which most women perform which often is unpaid work within the private and domestic sphere.

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<sup>17</sup> The full text of Article 7 states:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 1 of the ICESCR addresses the right to self-determination. By virtue of that right all people freely determine their political status and freely pursue their economic, social and cultural development. According to the Article 2(1) of the ICESCR, each state party to take steps towards achieving the full realization of the rights recognized in the Covenant. Article 2(2) guarantees that the rights discussed in the Covenant will be exercised without discrimination of any kind such as gender. Article 5(2) clearly acknowledges that:

No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

The ICESCR guarantees the right of everyone to the highest attainable standard of physical and mental health; to enjoy the benefits of scientific progress and its applications; to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author; to have social security, including social insurance. Article 11(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Article 11(2) recognizes that it is a fundamental right of everyone to be free from hunger and obliges states to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

Similar to the UDHR and the Covenant on Civil and Political Rights, the Covenant on Economic, Social, and Cultural Rights, makes reference to the family as the fundamental unit of society. Article 10 of the Covenant on Economic, Social and Cultural Rights states:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 10 differs from the UDHR and the Covenant on Civil and Political with regard to the extent that it protects children's rights. The ICESCR also makes reference to guarantees of cultural and religious rights.<sup>18</sup> These rights to culture and religion can often reinforce a distinction between the public and private sphere that operates to the disadvantage of women: cultural and religion can be seen as spheres protected from legal regulation even though they allow for the oppression of women by men (Charlesworth, 1994).

### **2.2.3. Third Generation Rights**

Third generation rights refer to collective or group rights as opposed to rights of individuals championed in the liberal model and expressed in the first generation right conventions. "The philosophical basis of group rests on a primary commitment to the welfare of the community over and above the interests of particular individuals" (Charlesworth, 1994; 75). The right to development and self-determination is defined in the third generation rights. Group or people rights have been the particular concern of many of the developing nations which have more recently joined the international community.

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<sup>18</sup> Article 27 states: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Included in third generation rights is the right of minorities which includes their right to freedom of thought, conscience religion as well as cultural rights. The formulation of these rights can be found in Article 18 of the ICCPR<sup>19</sup> and Article 18 of the UDHR. These articles must also be read in the context of the 1982 UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination. An important contemporary right included in third generation rights is minority rights. Article 27 of the ICCPR states that "[i]n those States in which, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

This article emphasized the idea that persons belonging to ethnic, religious, or linguistic minorities shall not be denied the right to enjoy their

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<sup>19</sup> The full text of Article 18 of the ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

own culture, to profess and practice their own religion or to use their own languages. The International Law Association's (ILA) formulation of minority rights covers aspect of minority rights discussed in Article 27 in broad terms. It also incorporates the provision of Article 20(2) of the ICCPR which makes it mandatory for every state to prohibit by law any propaganda of national, racial or religious hatred. Although none of these rights is a non-derogable right under the ICCPR, the ILA expressed the view that these rights should be a non-derogable right in view of the experiences of states that have taken exceptions to these articles and the negative experiences, atrocities which have resulted.

The issue of minority rights and group rights has become particularly important in the post Cold War era and with modern day situations such as ethnic cleansing in Bosnia, Herzegovina, Armenia and Azerbaijan. Therefore, there have been recent efforts by the United Nations Commission on Human Rights and its subcommission to make the declaration of the rights of minorities and peaceful solutions to minority problems priority issues. Minority rights and collective and group rights are important because very few modern states are ethnically homogeneous: the approximately 190 independent states today contain 5,000 ethnic groups. "Yet in the international human rights law context, the protection of minority rights does not permit minorities to imperil the stability, territorial integrity and the sovereignty of the state on the pre-text of self determination" (Chowghury, 1995; 112). Therefore, group rights are of particular concern for many developing nations which have more recently joined the international community.



#### 2.2.4. The Women's Convention

Aside from the first, second, and third generation rights guaranteed in international human rights instruments and declarations, there are more recent international human rights instruments which address women's rights and children's rights and are peripheral to this hierarchical order. The main women's rights instrument is the Convention on the Elimination of All Forms of Discrimination Against Women (The Women's Convention) passed by the United Nations General Assembly on December 18, 1979.

Why was it necessary to have a separate legal instrument for women? The preamble to the Women's Convention points out that the UN Charter, the Universal Declaration for Human Rights, the two international covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and UN specialized agency resolutions, declarations, and recommendations all promote the equality of rights for men and women.<sup>20</sup> But "despite these

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<sup>20</sup> The preamble to the Women's Convention in relevant part states :

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights, Considering the international



various instruments extensive discrimination against women continues to exist." The preamble concludes with the aim "to adopt the measures required for the elimination of such discrimination in all its forms and manifestations."

The Women's Convention, like its predecessor human rights instruments, promotes sexual nondiscrimination and encourages equality between men and women. But it develops the legal norm from a gender neutral norm that requires equal treatment of men and women and is usually

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conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist, . . .

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

measured by how men are treated. It strives to recognize that the distinctive characteristics of women and their vulnerabilities to discrimination merit a specific legal response (Cook, 1994). The Women's Convention calls for the "elimination of all forms of discrimination against women" as opposed to merely calling for equal rights between men and women. It takes an important step in not making the treatment of men the ideal standard of achievement but addressing discrimination of women independently.

The drafters of the Women's Convention deemed it necessary to define "discrimination against women" This was done for the purpose of legal application and enforcement of the Convention. Article 1 states that:

'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or propose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil and any other field.

As Rebecca Cook points out, according to the definition provided by the Convention that "a law that makes no express distinction between men and women cannot be impugned under this definition despite its having a discriminatory effect" (Cook, 1994; 235). Therefore, laws that appear neutral on the surface but have a discriminatory effect may not fall under this definition. This is an important limitation to bear in mind with relation to defining discrimination as an international standard.

Article 2 of the Convention is also important for enforcement and application of the various rights recognized in Articles 5-16 of the Convention. Article 2 is known as a general undertakings article which requires states to "ensure" compliance by their government organs with the Convention and to "take all appropriate measures" to effect "the elimination of discrimination in all its forms" by "any person organization or enterprise" and "to modify or abolish existing laws, regulations, customs and practices."

Article 2 states:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 2 raises the important issues of the state's responsibility and the definition of the state's obligations, particularly with reference to private actors. As Rebecca Cook points out:

State responsibility is the fundamental principle of international law. It provides that a state is legally accountable for breaches of international obligations under customary international or treaty law that are attributable or imputable to the state. The international law of the state responsibility for human rights violations has evolved significantly in recent times. It has developed to require governments to take protective steps to protect the exercise and enjoyment of human rights, to investigate violations that are proven, and to provide effective remedies, including the provision of compensation to victims (Cook, 1994; 237).

Article 2(e) is particularly important because it requires state parties "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise." This creates an obligation by the state to eliminate discrimination by third parties such as private citizens. Under this provision, the state may be obliged to prevent and deter private acts of discrimination, to investigate and negate harmful consequences, and to provide for compensation or sanctions for the performance of such acts.

Rebecca Cook notes that the general rule is that "private individuals, corporations and unincorporated associations are not directly bound by the provisions of international law" and they are not obligated by the standards of conduct that states have agreed to under customary international law or treaty law. Although the state may not be responsible directly for a private act of discrimination, it has obligated itself to undertake the measures to eliminate or reduce and mitigate the incidence of private discrimination and to ensure that such discrimination does not recur. In fact, the state may be held responsible for facilitating an international wrong or actually partaking in its commission, when the wrong is of pervasive or persistent character (Cook, 1994). Under the Women's Convention, state parties are only liable for their failures to implement the means prescribed in the Convention. The drafters thought this would be reasonable and most likely to achieve the desired result of eliminating discrimination against women.

The Women's Convention uses terms such as "appropriate measures" when describing the means by which states should work towards eliminating discrimination against women. Yet, it is important to note that a state cannot refer to its domestic law as a justification for failure to perform a treaty (Cook, 1994).

The Vienna Convention on the Law of Treaties states that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Determining what are appropriate measures should be sensitive to "national legal political and social environments but it is not within the exclusive control of each state party" (Cook, 1994; 233). This is an important issue in the area of women's human rights as many states often

invoke cultural or religious justifications for not implementing laws or taking measures to eliminate discrimination against women.

The Women's Convention separately addresses the issue of some countries' customs and practices which are discriminatory towards women. Article 5(a) describes the duty of states to

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.

In addition, Article 2(f) of the general undertakings clause noted above requires state parties to "[t]ake all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Both Article 5(a) and Article 2(f) taken together require the parties take measures to confront practices that discriminate against women. As Rebecca Cook correctly points out:

These articles strongly reinforce the commitment to eliminate all forms of discrimination, since many pervasive forms of discrimination against women rest not on law but on legally tolerated customs and practices of national institutions (Cook, 1994; 240).

It is important to note that Article 5 of the Convention also states that "it is the responsibility of men and women in the upbringing and development of their children, its being understood that the interest of the children is the primordial consideration in all cases." This article sets the



rights of children as the most important interest to be taken into account.<sup>21</sup>

Articles 6-16 set out substantive rights which states must take appropriate measures to implement. For example, Article 10 calls for equality in the field of education. Article 11 calls for equality in the field of employment and labor rights. Article 12 calls for equality in access to health facilities and requires that "[s]tate parties take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services including family planning." Article 14 addresses the particular problems faced by rural woman and Article 15 requires that "[s]tate parties shall accord to women equality before the law." Article 16 requires that "[s]tate parties take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations." When discussing marriage, this article goes on to state that "in all cases the interests of the children shall be paramount."

The Women's Convention, through Article 17, also establishes a Committee on the Elimination of Discrimination Against Women (CEDAW) to oversee the implementation of its provisions. The Committee is composed

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<sup>21</sup> Article 5 in its full text states:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, *it being understood that the interest of the children is the primordial consideration in all cases.*

of 23 experts who are elected by secret ballot. The composition of the Committee is noticeably different from that of other human rights committees. Since its inception the Committee, has been with only one exception entirely composed of women from a wide variety of professional backgrounds. The Committee meets once a year "for a period not more than two weeks" (Art. 20 of the Women Convention).

The Committee acts as a monitoring system to oversee the implementation of the Convention by those states which have ratified or acceded to it. This is done primarily by studying reports submitted by state parties. The Committee may also invite further information from UN specialized agencies. Under Article 18 states are required to submit reports to the Secretary-General of the United Nations on legislative, judicial and other measures which they have taken in accordance with the provisions of the Convention. These reported are submitted to the Committee. A state party must submit its first report within one year after it has ratified or acceded to the Convention; subsequent reports must be submitted every four years. In ratifying or acceding to the Convention, state parties accept a legal obligation to submit timely and complete reports. But many states fail to submit timely and complete reports.<sup>22</sup>

In 1992, CEDAW made an important general recommendation stating that state parties should take steps "to overcome all forms of gender based

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<sup>22</sup> See *Discrimination Against Women: The Convention and the Committee*, Facts Sheet No. 22 issued by the United Nations p.36.



violence, whether by public or private act."<sup>23</sup>

The Women's Convention is an important instrument because international and regional human rights instruments have rarely been applied to address the issue of the violation of women's rights. It is true that "[e]gregious and pervasive violations of women's rights often go unrecognized. Moreover, when they are recognized, they go unpunished and unremedied and are all too often defended as a necessary part of culture or religion or as quality of human nature" (Cook, 1994; 228).

#### **2.2.5. The Child Convention**

The Convention on the Rights of the Child (the Child Convention) passed in 1989 is one of the most recent Conventions.<sup>24</sup> It warrants examination not only because of the children's rights it promotes, but also because of the analogies that can be drawn between the quest for women's rights and children's rights.

International human rights law has traditionally celebrated the "family" as the basic unit around which society is organized. Human rights instruments, such as the UDHR and the ICCPR, make reference to the family as the fundamental unit of society and they aim to protect the family

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<sup>23</sup> See UN GAOR, Comm. on the Elimination of Discrimination Against Women, 11th Session Agenda Item 7, at 3, UN DOC CEDAW/1992/Add.15/1992 cited in Van Bueren, *International Protection of Family Members*, p.751.

<sup>24</sup> Convention on the Rights of the Child, Resolution no. 44/25 of the United Nations General Assembly, 20 November 1989.

from the state.<sup>25</sup> As Geraldine Van Bueren notes:

The most obvious shared characteristics, as far as international human rights law is concerned, is that both women and children have been perceived as living primarily in the private sphere and therefore, have been excluded from the full protection of international human rights law. (Van Bueren, 1995; 748)

Traditionally, "international law has sought to safeguard the privacy of the family and not to regulate the quality of the relationships within the family" (Van Bueren, 1995; 741). Conversely a human rights instrument, such as the Child's rights convention, challenges this public/private distinction and enters into the private sphere. For example, Article 5 of the Child Convention, while protecting parental rights also implies that these rights are not unrestricted.<sup>26</sup> Article 12<sup>27</sup> and 13<sup>28</sup> of the Child

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<sup>25</sup> See Articles 12 and 16 of the UDHR in page 8 and Articles 22 and 23 of the ICCPR in pages 11 and 12.

<sup>26</sup> Article 5 states:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

<sup>27</sup> Article 12 states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity

Convention promote the idea of "freedom of expression" for children and call on State Parties to allow children to have a voice in judicial proceedings. By allowing some level of decision-making by children, "there is no longer a traditional area of exclusive parental or family decision-making" (Van Bueren, 1995; 742). Thus, this convention marks the call for a more democratic model of family decision-making.

The Child Convention, as the most recent convention, calls into question the traditional international human rights law concept of relegating the family to the private sphere and not interfering in the relations of family members. This instrument has no choice but to take this approach, albeit on a limited basis, because children appear almost exclusively in the private sphere. Although the Women's Convention addresses the need to change "customs and practices" and in many ways calls for altering the power relationships within the family, it does not directly address this issue of non-interference and it interestingly maintains the family as the important unit of

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to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>28</sup> Article 13:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (order public), or of public health or morals.

society and places children's interests above other interests.<sup>29</sup>

The issue then becomes whether or not international human rights law can be utilized to alter intrafamilial relations. For example, can international human rights law be used "to counter intrafamilial gender violence against women generally, at both the severest level including infanticide and dowry deaths and at the level where women survive but appear domestically battered" (Van Bueren, 1995; 750)?

The Women's Convention and the Child Convention do take different approaches to achieve equality. The Women's Convention seeks to eliminate discrimination against women primarily by raising women up to men's standards. Despite the criticism of this approach, it is nonetheless recognized as a challenge of men's power, and their's control over women. On the other hand, the Child Convention is a treaty on the rights of the child that examines human rights from the child's perspective and experience. Its approach is fundamentally different from the Women's Convention; it does not seek to equate childhood and adulthood such as in the Women Convention seeks to equate women and men. With reference to women's rights and children's rights, as Van Bueren points out:

The private sphere should not be eliminated completely in the field of international human rights law; however, states should no longer be permitted to claim noninterference as a defense to their failure to protect the victims of intrafamilial violence. (Van Bueren, 1995; 756)

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<sup>29</sup> See Article 2 of the Women's Convention.

### CHAPTER 3

## FEMINIST CRITIQUES OF HUMAN RIGHTS ISSUES

*Rights are defined by the criterion of what men fear will happen to them...* (Charlesworth, 1994; 71)

While law claims autonomy from the political framework, it still gives legitimacy to the social constructions of that framework. Therefore, it is a paradigmatic site of power (Romany, 1994). As described above through various examples in several conventions the public/ private distinction is the main obstacle to women's benefiting from full human rights. Feminist criticism targeted mainly this public/ private dichotomy and also raised questions about methods of law, the terminology of the conventions, the capacity of the right discourse, the criterion of nondiscrimination, and the essentialist approach of the legislation.

As Charlesworth puts it, there are three feminist approaches that might serve to recharacterize human rights in order to make them more universal and applicable. Each seeks to do this by better accommodating women's pervasive experience of injustice. The first one is **liberal** attempts to realize the equal treatment guaranteed by existing law which discounts intrinsic differences between sexes. This approach fails to understand the structural imbalance of power between men and women and the systemic nature of discrimination. The second one is **cultural feminism** which celebrates the

differences between masculine and feminine ways of reasoning. This approach may fall in to the trap of the marginalization of women's rights. The third one is **radical feminism**, which aims to transform the masculine world in which inequality is based on systemic domination and subordination of women by men. It may come to radically change conservative societies. Charlesworth argues that a mix of them might be useful in recharacterizing international human rights law. With in the framework of the afore mentioned approaches, the main criticisms on the rights discourse will be discussed and summarize in the following chapter.

### **3.1. Terminology of the Conventions**

Upon re-reading the Universal Declaration of Human Rights one also becomes aware from its terminology that it is an instrument created by men and for men. Words used in various articles of the Declaration include "men", "mankind", and "brotherhood." Moreover, they address the issues directly related to men and exclude issues directly concerning women. With the exception of the Child Convention, all general human rights instruments refer only men. Charlesworth states that "... the consistently masculine vocabulary of human rights law operates at both a direct and subtle level to exclude women" (Charlesworth, 1994; 68).

### **3.2. Objectivism Verses Subjectivism in the Methods of Human Rights Instruments :**

The social theory of the liberal state claims to be objective and rationalist. Feminists present various criticism concerning these approaches

and acknowledge that the social theory is not objective at all. "Feminist analysis tends to be *contextual, experimental* and *inductive*. Whereas much social theory is hierarchical, abstract, and deductive, the feminist starting point is from *actual human experience* and the implications of that experience" (Binion, 1995; 93). Therefore, feminists develop their methods with the intention of destabilizing frozen versions of social life and human association that exclude women's experience.

Bartlett states that the feminist methods need to acknowledge women's experiences and classifies the methods such as:

One method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Another method, feminist practical reasoning, expands traditional notions of legal relevance to make legal decision-making more sensitive to the features of a case not already reflected in legal doctrine. A third method, consciousness-raising, offers a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles. (Bartlett, 1991; 371)

### **3.3. Marginalization:**

Charlesworth asks, "How is the term 'women's international human rights' to be understood?" She argues that it can simply refer to those international instruments that deal specifically with women. She points out that the most of the international instruments are elaborations of the norms of formal nondiscrimination, providing that, in particular or general contexts, women should be treated the same as men. While this development in



international law has been valuable, it has not been adequate to address the subordination of women worldwide. "Apart from the limited promise of formal equality, the creation of a specialized branch of human rights law has allowed its marginalization: "mainstream" human rights bodies have tended to ignore the application of human rights norms to women" (Byrnes, 1992; 205).

Charlesworth further criticizes that the structure and institutions of women's international human rights law as being more fragile than their apparently more generally applicable counterparts: international instruments dealing with women have weaker implementation obligations and procedures; the institutions designed to draft and monitor them are underfunded and their roles are often bordered compared to other human rights bodies; the widespread practice of states in making reservations to fundamental provisions in the instruments is apparently tolerated, as is the failure of states generally to fulfill their obligations under the instruments (Charlesworth, 1994).

#### **3.4. Limited Capacity:**

Some feminists argue that while the other human rights instruments merely address the issue of gender discrimination, the Women's Convention is wholly dedicated to the issue of the elimination of gender discrimination. It sets forth the legal norm of nondiscrimination from a woman's perspective. This instrument moves from a gender-neutral norm that requires equal treatment of men and women to one that recognizes that the particular nature of discrimination against women merits a legal response beyond merely



demanding equal treatment. The Women's Convention moves beyond demanding equal treatment between men and women and attempts to confront the social causes of women's inequality by addressing "all forms of discrimination that women suffer." The Women's Convention progresses beyond the earlier human rights conventions by addressing the pervasive and systemic nature of discrimination against women.

Other feminists have a more critical view on the issue. As Coomaraswamy points out, "the personality that is privileged in such documents is a free, independent woman as an individual endowed with rights and rational agency. It is, in fact, the culmination of the enlightenment project, the 'rights of man' now being enjoyment by women" (Coomaraswamy, 1994; 42). Therefore, even the Women's Convention has limited capacity to satisfy the women's rights as it leaves various experiences of women unaddressed.

Though the Women's Convention's emphasis is on the principle of nondiscrimination, and not on the principle of empowerment, there is the assumption that it privileges the free, independent, and empowered woman. The only female differences accepted by the Women's Convention relate to a woman's condition of maternity within the context of labor laws and to special rights related to the redressing of historical grievances. The highlighting of these differences is only to ensure that the state take necessary measurements to ensure that a woman is given the opportunity to develop her individual identity, rooted in an enlightenment view of the human personality, a personality without fetters or community context. However, to work toward this enlightenment ideal, it is important to expose the ideologies

of power that sustain counter-ideologies, which view women as inferior (Coomaraswamy, 1994).

### **3.5. Nondiscrimination:**

Although, states do not agree upon what constitutes it, gender discrimination is prohibited in the first, second, and third generation instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (The Political Covenant), the International Covenant on Economic, Social, and Cultural Rights (The Economic Covenant) as well as three regional human rights conventions. These three regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention), the American Convention on Human Rights (The American Convention), and the African Charter on Human and People's Rights (The African Charter). In addition, the Convention on the Elimination of All Forms of Discrimination (Cook, 1994) also prohibits gender discrimination.

To provide an example, the Universal Declaration of Human Rights addresses the issue of gender discrimination from a non-discrimination perspective demanding the equal treatment of men and women. As detailed above Article 2 of the UDHR demands equal treatment and states,

everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status.

Feminist critics, such as Kathleen Mahoney have criticized *the similarity and difference type of model* claiming that it is based upon the liberal theory of feminism. Under this model, women are called upon to become like their male counterparts. Kathleen Mahoney points out that this model causes women to argue either that

they are the same as men or should be treated the same, or that they are different but should be treated as if they were the same, or that, they are different and should be accorded special treatment. The model does not allow for any questioning about the ways in which laws, cultures, or religious traditions have constructed and maintained the disadvantage of women, or the extent to which the institutions are male-defined and built on male conceptions of challenges and harms. (Cook, 1994; 11)

Charlesworth criticized this approach. She states that systemic discrimination or inequality of condition, the most damaging form of discrimination, cannot be addressed via the rule-based sameness of treatment approach. Indeed, the use of this model makes systemic disadvantage virtually invisible.

**Positive discrimination:**

The Human Rights Committee established to monitor state compliance with the Political Covenant, has issued General Comment 18 on discrimination based upon the "similarity and difference" model of discrimination. The General Comment states that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation of treatment will constitute discrimination, if the criteria for

such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant" (UN, 1989; #13).

### **3.6. Public/Private Dichotomy:**

The public/private dichotomy lies at the heart of public international law as almost all international instruments overtly promote the "public/private distinction." Article 12 of the UDHR states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

This statement draws a distinction between the "public" and "private" those areas which covers family life and home are private spheres. Charlesworth explains that

As described by liberal theorists, the distinction between public and private realms operates generally and neutrally with respect to individuals. However, in each and every society women are relegated to the private sphere of home, hearth, and family. The public sphere of workplace, law, economics, politics, intellectual and cultural life is regarded as the province of men. This phenomenon is explained as a matter of nature, convenience, or individual choice. One feminist response to these claims is that the public/private distinction in fact operates both to obscure and to legitimate men's domination of women." (Charlesworth, 1994; 69)

Negative conceptions of freedom in the liberal state also promote male supremacy, as he is able to do or be, without interference from other persons

and reinforces the status quo of women's social subordination. This dichotomy has a historical basis. For example, as Gayle Binion points out, "John Locke sought to deny the legitimacy of the divine rights of Kings without challenging the patriarchal familial structure." Gayle Binion further argues that the consequences for women of this dichotomous perspective are fundamental and profound. A separate spheres approach has relegated women to the home, away from the political institutions that make policy and away from a substantial role as well in other "public" institutions that determine the nature and quality of life in a community. The Lockean separate spheres approach has also rendered women subject to the control of patriarchal familial authorities, such as fathers and brothers, and therefore, beyond the scope of governmental authority and intervention. Physical and sexual abuse of wives and children, ubiquitous throughout the world, has, consequently, faced little formal challenge within a two-spheres understanding of social order (Binion, 1995). Celina Romany points out that

unlike structures of dominance and political inequalities among men, men's forms of dominance over women are accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life" (Romany, 1994; 93).

Except the Convention on the Rights of the Child, all international human rights law rests on and reinforces a distinction between public and private worlds. This distinction operates to muffle, and often completely silence, the voices of women. Feminist concern about the public/private dichotomy in legal thought has two different aspects: the first one is the way that the law has been used to exclude women from the public sphere, and the second is a more basic form of the dichotomy, between what is considered

the business of law and what is left unregulated. The dichotomy assumes a public sphere of rationality, order, and political authority in which political and legal activity take place, and a private "subjective" sphere in which regulation is not appropriate. Domestic, family life is typically regarded as the center of the private world.

Such a division of spheres, by ignoring the political character of power unequally distributed in family life, does not recognize the political nature of the so-called private life. Such a division of spheres clouds the fact that the domestic arena is itself created by the political realm where the state reserves the right to choose intervention. This division of spheres sidesteps the unit where we become gendered; it obscures the psychological and practical barriers that the social division of labor imposes upon women. When it is admitted the idea that significant differences between women and men are created by the existing division of labor within the family, it becomes increasingly obvious that the family is a political institution.

Binion further points out that the public/private dichotomy is gendered: it is a "metaphor for the social patterning of gender, a description of sociological practice, and a category grounded in experience." It is also a normative distinction because of the greater significance and power attached to the public, male world. The assignment of women to the domestic life makes women's concerns invisible and ensures preservation of the status quo. What is "public" in one society may well be "private" in another, but women's activities are consistently devalued by being construed as private (Binion, 1995). The consent of women to these forms of social and political organization is an assumption that also remains undisturbed (Romany, 1994).

### 3.7. Cultural Relativism

There are two basic positions that one can take on women's human rights: the universalist, and cultural relativist. According to the universalist position all members of the human family share the same inalienable rights. This means that the international community has the right to judge, according to international standards, the ways states treat their own citizens, it also has the right to tell states they must reform their constitutions and laws where necessary to bring them into conformity with the international norms. According to the universalist position, all women are entitled to the rights set forth in the afore mentioned international covenants and conventions.

Cultural relativists argue that members of one society may not legitimately condemn the practice of societies with different traditions. They deny that there can be valid external critiques of culturally based practice and claim that no legitimate cross-cultural standards for evaluating the treatment of human rights issues exist. Especially Islamist particularists justify the denial of civil and political rights to Middle Eastern Muslim women on the grounds that it is their culture. They argue that the international community has no right to criticize them by the ethnocentric approach to right issues, which is linked to cultural imperialism.

Selecting a way in between these two approaches is very important to the Middle Eastern women because many discriminatory features of Middle Eastern law are directly traceable to religious precepts.

Laws commonly provide that the wife must obey her husband, that wives are not allowed to work outside the home without



their husbands' permission, that men may take up to four wives, that Muslim women may not marry outside the faith, and that women are entitled to only one-half the inheritance share that men inherit in the same capacity. Depending on the country involved, one may find that women are compelled from studying certain subjects, that they are deprived of the right to vote, that their testimony in court is excluded or valued at one-half the weight of a man's, that they are not allowed to travel without the permission of a male relative or unless accompanied by a male relative, or that they are not allowed to drive cars. (Mayer, 1995; 177)

According to the Islamic rules women must be obedient. If they are disobedient men have been given right to "admonish them and send them to beds apart and beat them" (4:34). In addition to laws, there various religious interpretations which show the depth of the oppression on women. One of the interpreters named Mottahari argues that "marriage is a merely a means of providing legal sexual satisfaction for men and paying for the luxuries that women need" (Afshar, 1995; 22). Khomeini issued several treatise such as "[a] woman with a permanent marriage is not allowed to leave the house without the permission of the husband and should provide any kind of pleasure and is not allowed to refuse the intercourse without a religious excuse" (Khomeini, ; Art. 2412); "[i]f a woman disobey her husband concerning the issues stated in the previous article, she will loose the right of food, clothing, shelter and intercourse" (Khomeini, ; Art. 2413); "[i]t is allowed to join anal intercourse with a menstruating woman" (Khomeini, ; Art. 453).

Arguments by Muslim countries that Islam justifies noncompliance with international norms regarding the rights of women have been raised in connection with debates over the Women's Convention. Very few Muslim



countries ratified the Women's Convention and all have entered reservations to its substantive provisions, several on religious grounds (Mayer, 1995).<sup>30</sup>

As Mayer points out Middle Eastern governments have made deliberate attempts to stifle dissenting women's voices if they threatened to discredit the authenticity of the official constructs of Islamic Middle Eastern culture that are used to rationalize the treatment of women. For this purpose the Middle Eastern governments use Western stereotypes of Islam. Contrary to beliefs of Western supporters of cultural relativist approaches, there is no single monolithic cultural position on women's role in society in Islam. Tohidi confirms this position and states "there is no unitary definition of Islamic society, no consensus on what constitutes truly Islamic womanhood" (Tohidi, 1990; 135).

Mayer states that "[a] substantial feminist literature has been produced by Muslim women in the Middle East that seriously challenges the patriarchal biases that infect the political systems in the region as well as the readings offered by male interpreters of the Islamic sources" (Mayer, 1995; 180).

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<sup>30</sup> "Muslim countries were not alone in registering reservations that undermined the treaty; countries as diverse as Belgium, Brazil, Canada, Cyprus, Jamaica, the Republic of Korea, Mauritius, and Thailand did so as well. This is hardly surprising, given that the governmental actors in international forums consist for the most part of men, as, for instance, in most delegations sent to the UN. Therefore, the disparity between the treatment of reservations to the Convention Against Elimination of Racial Discrimination (CERD) and those to CEDAW and the greater toleration for discrimination directed at women can be linked to a prevailing pattern of the exclusion of women from real influence in the UN system as well as from real influence in the institutions shaping international law more generally." (Mayer, 1995; 179-180)

One of these Muslim women voices-Mernissi asks, "Why is it that we find some Muslim men saying that women in Muslim states cannot be granted full enjoyment of human rights?" (Mernissi, 1992; vii) She states that men have no grounds in Islam for such a claim. She calls Muslim women to "walk into the modern world with pride for full participation in the political and social affairs," by "knowing that the quest for dignity, democracy, and human rights stems from no imported Western values, but a true part of the Muslim tradition" (Mernissi, 1992; viii).

Mayer further criticizes Middle Eastern regimes for attempting to stamp out Muslim women's voices.

The brutal repression by the postrevolutionary Iranian Government of women's protests against the retrograde version of Islam, which interprets the law in its most discriminatory form, is notorious. In Pakistan in 1984 the government violently suppressed women's protests over a new law reviving elements of Islamic evidentiary law that downgraded the value of women's testimony. In Saudi Arabia, after women demonstrated in November of 1990 against the local ban on women driving-a ban that was officially justified as flowing from Islamic morality and principles- the government prohibited all future demonstrations by women. In Egypt, the suppression of the prominent Arab Women's Solidarity (AWSA), a dynamic feminist association that advocated enhanced rights for women, provided a particularly interesting example of governmental determination to ensure that opinions of progressive Muslim women would not be heard-and exploitation of Islam to justify the suppression. (Mayer, 1995; 180)

The Egyptian government dissolved AWSA in June 1991 due to "perpetual violation of the law." During the appeal the court asserted that AWSA had "offended the Islamic religion" and "threatened the peace and

political and social order of the state by spreading ideas and beliefs offensive to the rule of Islamic *shari'a*." Mayer argues that the Egyptian government issued the second order to avoid further international criticism as "Islam" would be a more effective defense to justify dissolving AWSA.

On the one hand, it is doubtful whether these states actually believe in the authoritative character of the official constructs of Islamic culture that they put forward in international forums in an effort to justify their refusal to undertake reforms to eliminate the legal barriers to women's equality. If authentic, elimination of legal barriers to equality could be taken without the risk of upsetting the status quo. States could be confident that Muslim women would react by saying that, despite the fact that it had become legally permissible, they did not want to drive, vote, study law, disobey their husbands' commands, demand an equal share of inheritance, etc., because such things would be deemed contrary to authoritative cultural norms. In reality, it seems that governments realize all too well that the cultural model they rely on to rationalize discrimination against women has shaky authority. Muslim women increasingly request to equality which is precisely why Muslim men are obliged to resort to state-sponsored legislation and rough police measures designed to try to keep women in the place to which they were once confined by the existing customs and tradition (Mayer, 1995).

On the other hand, one should not forget that the principle of equality between sexes became legitimate after the struggle of feminists in the West. There were cultural and religious resistance to feminist ideas combined with laws that subjugated women in Western countries only a few decades ago. Indeed, the notion of full equality for women is still being resisted and

denounced for being subversive of the natural order of society and incompatible with religious values. Still, the cultural relativist approach is not applied to the Western cultures. Lastly, Mayer states that:

Thus, claims from diverse states and religions that the conventions interfere with their right to culture turn out to have the same consequence-denying women equal rights. If all such "particularisms" mean that violations of women's rights are excused and perpetuated, they are nothing more than disguises for the universality of male determination to cling to power and privilege. If constructs of a supposed Islamic particularism are no more than a universal claim for the subordinate status of women, they deserve to be treated with the same degree of scepticism as the other rationales that are being invoked by men for depriving women of their full human rights. (Mayer, 1995; 185)

Halim shares the same opinion and states that "women in Sudan must take on difficult obstacles including the patriarchal interpretation of Islamic law and the corresponding resistance to the use of international human rights law" for their struggle of equality (Halim, 1994; 419). Rao raises several questions in her article such as "whose culture is this," and "who are its primary beneficiaries." She correctly points that,

without placing the very notion of culture in historical context and investigating the status of the interpreter, we cannot fully understand the ease with which women become instrumentalized in larger battles of political, economic, military, and discursive competition in the international arena. (Rao, 1995; 174)

## CHAPTER 4

### WOMEN'S EXPERIENCE AS HUMAN RIGHTS

As detailed above, international human rights and the corresponding legal instruments were developed primarily by men in a male-centered world. "[W]omen have been almost entirely excluded from the important human rights fora where standards are defined, monitored, and implemented" (Charlesworth, 1994; 63). The international human rights standards have not been interpreted in a gender-sensitive way that is responsive to women's experience of injustice. According to Rebecca Cook, "[c]ritical recharacterization of international human rights is needed in order that women's distinctive human rights will not be marginal, and implementation of such rights becomes part of the central agenda of human rights work."<sup>31</sup>

The liberal feminists identify sexual equality with equal treatment. They rejected any notion that the law should tolerate or recognize intrinsic differences between women and men. They require the law to fulfill the

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<sup>31</sup> Rebecca Cook explain the legal base of the interpretation: Treaty interpretation is not exclusively limited to treaty terms. A text may also be interpreted in a way that advances its goals in contemporaneous circumstance, even if they were not imaginable when the treaty was drafted. Interpretations shall take into account "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". (Vienna Convention on the Law of Treaties, May 23, 1969, art.31 (3 b), 1155 UNTS 331,340.) As a result, women can develop the content of treaties on human rights through the "subsequent practice" that adds a gender dimension to those rights (Cook, 1994, 10).

liberal claims for its objectivity and principle basis. Charlesworth states that such an approach characterizes much of the existing women's international human rights law. The United Nations Convention on the Political Rights of Women of 1953, the United Nations Convention of the Nationality of Married Women of 1957, the Unesco Convention on Discrimination in Education of 1960, and the norm of nondiscrimination contained in both the human rights covenants is to place women in the same position as men in the public sphere (Charlesworth, 1994). This approach has been criticized as it only gives women access to a world already constituted. Also, the attempt to improve the position of women through more generally applicable measures has allowed women's concerns to be submerged by what are regarded as more global issues.

The cultural feminist approach highlights the almost comprehensive exclusion of women's experience from the development of law and challenges its claim of neutrality and objectivity (Charlesworth, 1994). Noreen Burrows, for example, sees the definition of women's rights as the means to move beyond the limitations of the nondiscrimination focus on women's international human rights law. She identifies rights associated with reproductive choice and childbirth as central to the category of international women's rights. Other potential women's rights include the right to a minimum wage for work within the home or in subsistence farming, the right to literacy, and all rights that address particular disadvantages women face. This approach would allow the international vocabulary of rights to be employed in the private sphere, and thus respond more accurately to the reality of most women's lives than the liberal feminist strategy which seeks to prohibiting discrimination in the public sphere. A possible disadvantage is



that the formulation of women-specific rights could lead to their marginalization within the human rights system which means given less power, fewer resources, and a lower priority than mainstream human bodies. A third strategy to redress the subordinate position of women developed in feminist jurisprudence is to understand it as the product of domination of women by men: inequality as sexual in nature. Catharine MacKinnon has been the most consistent exponent of this approach. She argues that the common failing of theories associating equality with equal treatment or with different treatment is that they implicitly accepted a male yardstick: women are either the same as or different from a male norm. MacKinnon views social relations between women and men as organized so "that men may dominate and women must submit." The law, she says, keeps women "out and down" by preserving a hierarchical system based on gender. MacKinnon describes an alternative legal analysis of inequality for which the central question always is "whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status" (Charlesworth, 1994; 67). The law should support freedom from systematic subordination because of gender rather than freedom to be treated without regard to gender. MacKinnon's approach is not always easily applied because many of the relationships of subordination appear quite natural.

Because inequality has both overt and subtle forms, the international struggle against the oppression of women must use all the approaches outlined above. The model of nondiscrimination can change the formal language of power and offer particular individuals limited remedies against inequality. Attempting to balance the thoroughly gendered nature of the

international human rights system by defining a category of women's rights can alter a monolithic conception of inequality. And understanding the reasons of power and subordination endorsed by the law can suggest methods of reform that will not fall into the same trap. At the same time, it is necessary to remain realistic and somewhat skeptical about the importance of any law, national or international, in achieving social change (Charlesworth, 1994).

#### **4.1. Economic, Political and Social Exclusion**

Gender bias from birth which discriminates against women, in the areas of nutrition, education and health, amounts to violence against women. Women also have no power over her body and sexuality. The extension of exclusion from all basic human rights will be discussed in following chapter. Discussion will be on what causes women to be disadvantaged in their the right to be free from all forms of discrimination, rights to life, liberty, and security of the person, right to marry and found a family, right to private and family life, rights regarding information and education, and right to the benefits of scientific progress.

##### **4.1.a. Reproductive Rights**

Rebecca Cook states in her article "International Human Rights and Women's Reproductive Health" that:

Protection of women's reproductive health has not been a high priority in the value system of governments and the laws they have created. Ill health, influenced by early and excessive childbearing, and women's premature deaths were explained through fate, destiny, and divine will rather than through



governmental neglect of reproductive health services (Cook, 1995; 256).

Every year, approximately half a million women die from causes related to pregnancy, abortion and childbirth. According to UNICEF estimates, at least 70,000 of those women die as a result of illegal and unsafe abortions. The gap in maternal mortality between development and developing regions is extremely wide. At least 99 per cent of maternal mortality cases are in developing countries. Here, maternal mortality is responsible for one-fourth to one-third of all deaths of women of child-bearing age. Besides these women, there are several thousands more women who survive pregnancy and childbirth but remain scarred from the experience with injuries, diseases and disabilities.

As Cook puts it, women's reproductive health raises sensitive issues in many legal traditions because it is related to human sexuality and affects the moral order. The moral belief is that if women could enjoy sexual relations and have recourse to methods to prevent pregnancy and sexual transmitted diseases, sexual morality and family security would be in jeopardy. This traditional morality is reflected in laws that attempt to control women's behavior by limiting, conditioning, or denying women's access to reproductive health services.

Women's reproductive rights are related to the right to be free from all forms of discrimination, the rights to life, liberty, and security of the person, the right to marry and found a family, the right to private and family life, the rights regarding information and education, and the right to the benefits of scientific progress.

#### **4.1.b. Lesbian Rights**

Heterosexuality is the only recognized way of sexuality in most countries. Female homosexual practice is considered unnatural, abnormal, immoral, horrifying, criminal, or worse. Dorf and Perez argue that the governments restrict lesbian rights as well as produce criminal statutes that legitimize the brutal persecution of lesbians. "Lesbians are denied their basic right to freedom from torture, punitive psychiatry, arbitrary arrest, and incarceration, their right to have children, and even their basic right to life with hardly a word of public remonstrance (Dorf & Perez & Careaga, 1995; 324).

#### **4.1.c. The Feminization of Poverty/Dispossession**

The whole spectrum of social productivity, which ranges from the reproduction of human beings to the maintenance of a relationship that promotes the cohesion of the community, are ignored within the measure of the Gross National Products (GNP). Since it is the woman who does most of this 'caring and sustaining', linking productivity only with paid employment continues to render invisible the enormous amount of unpaid work that women do and that undergirds and subsidizes all other kinds of work (Somavia, 1993).

The Commonwealth Expert Group on Structural Adjustment in the Report of a Commonwealth Expert Group on Women and Structural Adjustment dated 1989 announced that women have been at the center of the economic crisis of the 1980s and have bore the brunt of adjustment efforts.

Everywhere, government cuts in social services, including food subsidies, have increased the burden of poor working women, especially for those who head households. Many have resorted to bare survival strategies, like: reducing family consumption of fundamental necessities, like food, withdrawing their children, particularly daughters, from school; or sending their children into demeaning and often dangerous work (UN, January 1995; 24).

Extreme poverty, which is distinguished by the inability to obtain adequate nutrition and essential non-food requirements, shackles more than 1.3 billion people the world over, roughly one-fifth of the global population, according to UNDP. 70 per cent of those who fall into this category are women. By the end of the 1980s, approximately 75 per cent of all poverty in the United States was concentrated among women, particularly single mothers and older African-American women, many of whom head households of grandchildren. The number of families headed by poor women is increasing by some 100,000 each year. Without welfare payments, 70 per cent of all single mothers with dependent children in the Netherlands would fall below the poverty line. In Bangladesh, women wage-earners in poor households have only 1.3 meals a day as compared to 2.4 consumed by men (UN, January 1995).

#### **4.1.d. Illiteracy**

Although the gender literacy gap has narrowed since 1970, female illiteracy still constitutes a severe barrier to equality between sexes. The data collected in the 1990 census rounds revealed that in Africa, 61 per cent of

the women are illiterate, as compared to 45 per cent of the men; in Asia and the Pacific, 34 per cent of women are illiterate, compared to 22 per cent of the male population. Eastern Europe showed the lowest illiteracy rates, 2.3 per cent for women and 0.9 per cent for men; in Western Europe and North America, 10 per cent of women and 9 per cent of men are illiterate (UN, January 1995).

#### **4.1.e. Malnutrition**

Women and girls continue to be subjected to discrimination through the differentiating of food practices, resulting in malnutrition and retarded growth. In families where food is scarce, the more nutritious food is kept for the male child (WHO, 1985). Though nutritional equality between boys and girls was recognized as a critical concern at the International Conference on Nutrition in Rome in 1992, girls often suffer disproportionately from malnutrition, especially when prevailing customs of beliefs sanction preference for boys.

In some countries, a bias in favour of males determines nutritional intake. In areas where a preference for sons is strong, girls get a smaller percentage of their food needs satisfied than boys do. Boys also tend to get the more nutritious food. The typical girl in these countries, according to UNICEF's 1989 Annual Report, receives 20 per cent fewer calories than her brother and is more likely to be malnourished. In one region of India, girls were four times more likely than boys to suffer from acute malnutrition, and 40 times less likely to be taken to hospital (UN, January 1995; 30-31).

#### **4.1.f. Exclusion from Decision-making Bodies**

With the influence of the women's movement around the world, the United Nations is placing greater emphasis on initiatives that propel women into all levels of decision-making. However, most countries are far from achieving the target of 30 per cent women in decision-making levels by 1995 as set by the United Nations Economic and Social Council. A level of at least 30 and 35 per cent in decision-making bodies is generally considered the "critical mass" necessary for qualitative change in the decision-making body (UN, January 1995; 4).

#### **4.1.g. Oppression of Nationalistic Movements**

The right to *self determination*, allowing "all peoples" to "freely determine their political status and freely pursue their economic, social and cultural development" has been invoked, and has indirectly supported, the oppression of women in recent years. Nationalist movements subordinate women in a particular definition of their role and place in a society, and enforce conformity to values that are often male-defined. However, the oppression of women within the groups claiming the right of self-determination has never been considered relevant to their validity of the self-determination; in this sense the right to self-determination is relevant only in the most public of contexts; male political life. By failing to take the phenomenon of male domination of women in both the public and private worlds into account, the right to self-determination and the very notion of statehood can in fact reinforce oppression against women through its complicity in systemic male oppression and violence.

## 4.2. Violence Against Women

The primacy traditionally given to civil and political rights by international lawyers and philosophers is directed toward protection for men within public life, their relationship with government. But these are not the harms from which women most need protection. Lack of direct state intervention in the name of protection privacy can thus disguise the inequality and domination exercised in the private sphere. In domestic legal systems, the distinction drawn between public and private supports the sexual violence on which patriarchy is based: it creates a space into which the law's ordinary protection against violence will not be allowed to penetrate. The most pervasive harm against women tends to occur right within the inner sanctum of the private realm, within the family. The deliberate policy of non-intervention by the state does not signify non-control or neutrality. On the contrary, regulation of areas such as employment, taxation, social security, and crime, has a significant, although sometimes indirect, impact on the private sphere. Such regulations reinforce a nuclear family in which there is a division of labor between men and women.

Charlesworth explains that one of the most important human rights is the right to life, a protection from the arbitrary deprivation of life through public action. Such protection is important. But this interpretation of right to live does not address how being a women can in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life. (Charlesworth, 1994).

A similar myopia can be detected also in the international prohibition on torture. A central feature of the international legal definition of torture is that it takes place in the public realm; it must be 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. Although many women are victims of torture in this public sense, by far the greatest violence against women occurs in the private non-governmental sphere (Charlesworth, 1994). However, if violence against women is understood, not just as aberrant behavior, but as part of the structure of universal subordination of women, it can never be considered a purely "private" issue. Such violence is caused by the structural relationship of power, domination and privilege between men and women in society. Violence against women is central in maintaining those political relations at home, at work and in all public spheres. These structures are supported by the patriarchal hierarchy of the nation-state. The maintenance of a legal and social system in which violence or discrimination against women is endemic and where such action is trivialized or discounted is an act of the state's.

Joan Fitzpatric states that:

Three theoretical challenges must be confronted and resolved in order to move forward with effective strategies on violence against women: (1) considering when an equality paradigm is useful and when it is counterproductive in addressing the various forms of violence against women, and whether the focus of an equality rationale should be on equal treatment or on what is sometimes called "special treatment"; (2) overcoming the state-centered tradition of international law with revised notions of state responsibility and confronting the public/private distinction as a barrier to effective international action against gender-based violence; (3) determining whether



these problems are best addressed by elaborating binding international legal standards with formal systems of supervision or by promoting cooperation among governments through giving visibility to these issues as common problems of crime control and/or social policy. (Fitzpatric, 1994; 533)

Women are at risk of various types of non-gender-specific violence such as crime, accidents, natural disasters, general risks from armed conflict. Still, women are subject of gender-based violence which is defined in the Declaration of Violence Against Women<sup>32</sup>. Article 1 of the Declaration states:

For the purpose of this declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion of arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2 of the Declaration also defines violence against women:

Violence against women shall be understood to encompass, but not be limited to, the following.

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female

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<sup>32</sup> Declaration on the Elimination of Violence Against Women, United Nations General Assembly, no. A/RES/48/104, dated 23 February 1994. Declaration notes that the rights and principles are enshrined in international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 4 of the Declaration acknowledges that "[s]tates should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination."

The international law of state responsibility makes a state legally accountable for breaches of international obligations that are attributable or imputable to the state. In other words, only a state and its agents can commit a human rights violation. Nonstate actors are not generally accountable under international human rights law, but the state may sometimes be held responsible for related human right violations. Modern development of international human rights law through state adherence to multilateral human rights conventions has enhanced prospects of state accountability and women may be able to turn these developments to their advantage.

Different types of violence against women implicate a surprisingly diverse array of international law sources and international institutions: domestic violence (murder, rape, and battery by husbands or other male

partners); genital mutilation ("female circumcision" or, even more euphemistically, "traditional practices"); gender-based violence by police and security forces, including torture of detained women; gender-based violence against women during armed conflict; gender-based violence against women refugees and asylum- seekers; violence associated with prostitution and pornography; and violence in the workplace, including sexual harassment.

#### **4.2.a. Domestic Violence**

Domestic violence has the common characteristic of involving actors who are allegedly "private" rather than "public," and who may escape severe sanctions from the criminal justice system for reasons that appear linked to gender-specific nature of their crimes. Domestic violence is gender-based, and encouraged by cultural norms in all parts of the world. Domestic violence reflects and reinforces the imbalance of power between the sexes and is selectively tolerated by state authorities.

The following statistics present the extension of domestic violence: Reports from France indicate that 95 per cent of its victims of violence are women, 51 per cent of these acts are at the hands of their husbands. In Denmark, 25 per cent of women cite violence as the reason for divorce. In England, 50 per cent of the victims are murdered by their husbands, lovers or boyfriends. In the United States, more women are injured in domestic violence incidents than in car accidents, rapes and muggings combined. Thus, for the past four years, United States Surgeon General has warned that domestic violence -not heart attacks or cancer or strokes- poses the single largest threat of injury to adult women in the United States. In a study of 80

battered women in San Jose, Costa Rica, 49 per cent reported being beaten during pregnancy. In Canada, 62 per cent of women murdered in 1987 died at the hands of their spouse. In Papua New Guinea, 67 per cent of rural women and 56 per cent of urban women have been victims of spousal abuse, according to a national survey conducted by the Papua New Guinea Law Reform Commission. In Bangladesh, the killing of women by their husbands accounts for 50 per cent of all murders.<sup>33</sup>

This form of gender-based violence seriously affects the quality of women's lives. Yet no human rights treaty explicitly requires governments to take action against this practice. General human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) contain nondiscrimination provisions and dignity guarantees that arguably pertain to these forms of violence, though the link may not be apparent to all.

Copelon explained that domestic violence against women is systemic and structural, a mechanism of the patriarchal control of women that is built on male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social, and political predominance of men and dependency of women. While the legal and cultural embodiments of

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<sup>33</sup> See Heise, Lori, L. with Jacqueline Pitanguy and Adrienne Germain, "Violence against Women: Hidden Health Burden", *World Bank Discussion Papers*, No.255,1994; MacLeod, L., *Women and Environment*, vol.12, No.10, 1990, from the UNIFEM publication *Battered Dreams*, 1992, p.5; UN Centre for Social Development and Humanitarian Affairs, Division for the Advancement of Women, "Violence against Women in the Family", 1989; Biden, Joseph R., "Domestic Violence- A Crime, Not a Quarrel", *Trial* magazine, June 1993; "From the Surgeon General", US Public Health Service, 267 JAMA 3132, 1992, cited in *Notes for Speakers on The Advancement of Women*, UN Department of Public Information, January 1995.

patriarchal thinking vary among different cultures, there is an astounding convergence of cultures in regard to the basic tenets of patriarchy and the legitimacy, if not necessity, of violence as a mechanism of enforcing that system (Copelon, 1994).

One reason for the widescale toleration of violence against women is the explicitly and implicitly held view that it was a private matter, not within the proper scope of the criminal justice system. The public/private distinction operates here at an international legal level as well as the level of state responsibility. Therefore the question is that: can a state be held accountable in international law for the actions of private individuals given that the traditional international legal rules confine state responsibility to activities by, or at the instigation of, its public officials?

If a human rights/normative approach to domestic violence is favored, use of an equality paradigm has a certain force. In many respects, the problem of domestic violence results from a failure of the legal system to treat the battery, murder, and rape of women by husbands or lovers as crimes, in the same manner and the same degree as if they had been committed strangers. Thus, victims of domestic violence are denied the equal protection of the criminal laws, contravening fundamental human rights principles of equality before law. At a deeper level, an equality paradigm might also address the root problem of domestic violence, the structures of subordination that the violence reinforces. The equality paradigm appears also to offer a solution to the problem of marital rape, which is often the subject of formal legal exemption from criminal liability. Under an equal treatment approach, all victims of forcible rape deserve to be treated alike,

regardless of status (Fitzpatrick, 1994).

A simple "equal treatment" approach to domestic violence leaves important issues unaddressed. As the UN studies on family violence note, victims of domestic violence operate under pressures not felt by other crime victims. Socialization to define oneself primarily through relationships with men and lack of economic opportunity leave many women economically, socially, and emotionally dependent on their batterers. An "equal treatment" approach (in the sense of equality of means) would try husbands who murder their wives equality before the law, as it would serve the needs of women whose assault or rape had driven them to terminate their relationship to the attacker. But it does not so satisfactorily assist those victims of battery and marital rape who are not prepared to sever their ties to their assailants.

As the recommendations of CEDAW, the UN crime control bodies, the European Parliament and the draft Inter-American Convention all suggest, forms of "special treatment" may be necessary to ameliorate the problem of domestic violence. Institutions such as battered women's shelters' and special police units to handle domestic violence complaints, must take steps to redress the economic vulnerability of battered women and the existing male-dominated police and prosecutorial apparatus which has been unresponsive to survivors of domestic violence. And even these forms of "special treatment" meet the needs only of those women who have decided to distance themselves from the batterers, sometimes temporarily.

Some women, unable or afraid to sever their ties to the batterer might achieve a minimal level of safety and dignity only through "special



treatment" of the batterer himself, in the form of rehabilitation programs that replace the imprisonment that would be meted out had he chosen a stranger as the target of his violence. CEDAW proposes such rehabilitation measures in General Recommendation No.19, without any attempt to reconcile them with the equality principle that forms the textual basis for the recommendation. But such alternate dispositions are obviously at war with an equality paradigm, effectively decriminalizing the husband's conduct because of the identity and the dependency of his victim.

Case 1:<sup>34</sup>

*Facts:*

*The applicant was a health assistant in the 1980s in Tehran. She married in 1984. Her husband was a rich businessman. He did not allow her to work. He used to lock her in when he went out. He beat her often. She was forced to give permission for the second marriage of her husband in 1988. Her husband beat her up regularly. During the pregnancy of her first child, her husband married to his second wife in 1988.*

*The applicant was raped by her husband during their marriage. She reported that she had been beaten more than ever before and even tortured after their child was born. She was in a depression. She asked for a divorce. Her husband accepted her demand on the condition that she leave everything she had. She agreed. She left all her belongings including her last clothes. She put on other clothes which her sister brought before she left. She was even asked to cut her hair, because it had grown in her husband's home, she did not cut it. They got divorced in 1989. Her husband took the custody of her daughter. She had psychological treatment for 6 months to recover from her depression. She claimed that she was not allowed to see her daughter for one and a half months after the divorce. Therefore, she went to her ex-husband's home and cried in front of the door every day until he let her see her daughter. He used to leave her daughter at a police station where the applicant (his ex-wife) would pick her up. She would have to leave the baby the same way because her husband wanted to be sure the baby was picked up and returned safely.*

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<sup>34</sup> Resource: UNHCR Branch Office Ankara. For reason of confidentiality, the names and places given have been altered.



*The applicant's ex-husband had two children from his second marriage. Therefore, he gave up the custody of their daughter. She was then able to take care of her daughter. The applicant started to work with her family at their family business. She stated that she did not receive any child support from the father. The father did not pay much attention to his daughter either.*

*The applicant was threatened by her ex-husband to either get back together with him or he would take custody of their daughter since she turned 6 years old in 1994. The applicant decided to leave her country.*

*The applicant stated that her ex-husband has a daughter from a previous marriage. She was taken care of by her mother until the age of 7. He obtained custody of her after that time. The child used to live with her step-grandmother during their marriage. Currently, she lives with her father. Therefore, the applicant believes that he will take the custody as it is his legal right. The applicant does not want to be separated from her daughter.*

#### *Legal Analysis:*

*According to Article 1169 of the Iranian Civil Law concerning divorce and custody of children, the mother is given priority in custody cases until the age of seven for daughters. According to Article 1158 ICL, a child born within marriage is the responsibility of the father. The Iranian Civil Law denies equal rights to the woman in marriage as well as divorce. Article 16/1 of the Universal Declaration of Human Rights states that both men and women "are entitled to equal rights as to marriage, during marriage and at its dissolution." This is clearly not the case under the Iranian Law, even if the husband does not insist on his rights as a father.*

*The legal rights given to the father are given not only at the expense of those of the mother but also at the expense of those of the child. In the "Declaration on the Rights of the Child" of November 1959, Principle 6 states that "a child of tender years shall not, save in exceptional circumstances, be separated from his mother." In the circumstances of this case, where the mother has had the responsibility for the care and upbringing of her daughter for the last 5 years, the tie to the mother is bound to be far stronger than to the father.*

*The possible resulting trauma for the child in being separated from her mother and, in this case most probably not having access to her mother should be taken into account. The ex-husband wants to reunite with the applicant. He expressed his intention that if the claimant rejects his offer, he will separate her daughter from her. Therefore, it is very likely that he will not allow the daughter and the mother to see each other.*

*The daughter in this case can be considered to be a co-claimant and*

*her fear of persecution is seen to be related to the forcible removal from her mother. The foreseeable and automatic consequences of the law would deprive the child of her internationally protected rights, namely the principles laid down in Articles 3 and 9 of the Convention on the Rights of the Child, that the "best interest of the child" be served.*

*Considering that the Iranian law severely discriminates against women and that, in this case, the claimant's ex-husband enjoys all his rights given by the law, the applicant and her daughter are considered to be persecuted by the Iranian authorities and their subjective fear of being separated and even being violated, has objective ground (H.B. para. 41-42). Both mother and child are seen to belong to the category of 'membership of a particular social group' namely of 'women' and 'minor' (H.B. para. 77), due to which they suffered persecution as described above.*

*Decision:*

*The claimant is recognized under Art. 1. 2(A) of the 1951 Geneva Convention as being persecuted on the grounds of her membership in a particular social group.*

#### **4.2.b. Sexual Violence**

Sexual violence is a gross violation of fundamental human rights and, when committed in the context of armed conflict, a grave breach of humanitarian law. There are various forms of sexual violence, rape being the one to which is most commonly referred. The legal definition of rape varies from country to country. In many societies, it is defined as sexual intercourse with another person without their consent. Rape is committed when the victim's resistance is overcome by fear of force or under other coercive conditions. In certain countries "statutory rape" exists as an offence. This is sexual intercourse with someone under a specified age, which is deemed to be unlawful. The victim is presumed by law to be unable to give consent by reason of his or her young age.

However, many forms of sexual violence do not fall under the strict definition of rape, such as insertion of objects into genital openings, oral and anal coitus, attempted rape and the infliction of other sexual abusive acts. Sexual violence can also involve the use or threat of force in order to have sexual acts performed by third persons.

The term "sexual violence" is used in the thesis to cover all forms of sexual threat, assault, interference and exploitation, including "statutory rape" and molestation without physical harm or penetration. Perpetrators of sexual violence are often motivated by a desire for power and domination. Given these motivating forces, rape is common in situations of armed conflict and internal strife. An act of forced sexual behavior can be life-threatening. Like other forms of torture, it is often meant to hurt, control and humiliate, violating a person's innermost physical and mental integrity. Perpetrators of sexual violence can include family members, for example a parent who sexually abuses a child.

#### **4.2.b.1. Rape**

Rape is the primary instrument of control in a patriarchal society. Clinical tests show that rapist possess very normal attributes. Most rapist are in fact known to their victims. Rape occurs in the family in the form of marital rape or incest; rape occurs in the community, as an instrument of torture by states against women in detention; and rape occurs in situations of armed conflict and in refugee camps. Rape is a form of torture inflicted by both private and public actors in violation of international human rights instruments. Rape prevents women from living in security and dignity and

therefore violates international standards set out in the International Covenants and the Universal Declaration.<sup>35</sup>

Apart from the right to life and freedom from torture, other rights in the traditional civil and political catalogue also have been interpreted in a way that offers very little freedom or protection to women. The right to liberty and security of the person in Article 9 of the Civil and Political Covenant operates only in the context of direct action by the state. It does not address the fear of sexual violence, which is a defining feature of many women's lives.

In many countries sexual assault by a husband on his own wife is not regarded as unlawful sexual intercourse and thus is not a crime. This is based on the assumption that the wife gives herself up to the husband upon entering into the contract of marriage. Thus, the lack of regulation of rape in marriage supports and legitimize the power of husbands over wives. MacKinnon demonstrates in detail that "the domestic law of rape divides women into spheres of consent according to indices of relationship to men" (MacKinnon, 1989; 175).

One of the rare decision which recognizes rape as serious bodily harm was taken by the Supreme Court of Canada.

For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise

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<sup>35</sup> UN Commission on Human Rights, E/CN.4/1995/42, 22 November 1994, p.40-41, also see chapter 2 in this text.

freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman... It is difficult if not impossible to distinguish the sexual component of the act of rape from the context of violence in which it occurs. Rape throughout the ages has been synonymous with an act of forcibly imposing the will of the more powerful assailant upon the weaker victim. Necessarily implied in the act of rape is the imposition of the assailant's will on the victim through the use of force. Whether the victim is so overcome by fear that she submits or whether she struggles violently is of no consequence in determining whether the rape has actually been committed. In both situations the victim has been forced to undergo the ultimate violation of personal privacy by unwanted sexual intercourse.<sup>36</sup>

#### **4.2.b.2. Gender-Based Violence by Police and Security Forces**

Rape and other forms of sexual violence are inflicted on women detainees in many countries. Interrogators and other government officials use rape as torture to intimidate women from pursuing activities that are viewed as subversive and to extract information or confessions (Amnesty International, 1990, 9). For example, in Iraq it has been confirmed that the regime has long operated a policy of official rape (Makiya, 1993). "Rape has been used to crush the spirit of political prisoners, to recruit women into the internal spy network, and to 'break the eyes' of families and communities" (Omar, 1994; 66). In Iran, women prisoners who are virgins are raped

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<sup>36</sup> Araya Heredio v. Minister of Employment and Immigration, Immigration Appeal Board Decision 76-1127, C.L.I.C. No.1.11, 20 March 1979, quoted in Jacqueline R.Castel, Rape, Sexual Assault and the Meaning of Persecution, International Journal of Refugee Law, Vol.4, No.1, Oxford University Press 1992, p.46.

before the execution by the security officers because the Islamic rules of the country do not allow a virgin woman to be executed. In Pakistan, women who admit to having been raped are frequently imprisoned under the country's Islamic adultery law. Once in custody, 72 per cent of the women are physically and sexually abused (Goodwin, 1994). In Peru, throughout the 12-year internal war, women have been threatened, raped and murdered by the government security forces and by the Communist Party of Peru-Shining Path (Human Rights Watch, 1992). In Middle East countries "women are raped and sexually abused by armed men intent on terrorizing civilian populations or in situations of lawlessness" (Amnesty International, 1995; 4).

As Castel points out, judges are likely to have less difficulty concluding that more blatant forms of sexual violence, such as the use of electrical currents on the sexual organs, the insertion of hot metal objects in the vagina, and other sexual directed activities, which can leave lasting physical damage, constitute persecution. In contrast, many judges have difficulty recognizing rape as persecution when rape is defined as forced sexual intercourse, or threats thereof (Castel, 1992). Moreover, judges have no difficulty recognizing any kind of mistreatment of males by officials as torture, while they are very reluctant to define the rape of females as torture.

Some of the rape cases brought to the attention of the international community will be discussed below to acknowledge the perspectives and arguments during the court procedure. Due to the nature of the violation, the cases of rape by the state agents are very rarely proceed properly, if they are brought to domestic court at all. The following cases are asylum claims in various countries and the event of 'rape' is accepted in each of them.



Contradictory to the domestic jurisprudence, whether the rape is occurred or not is not matter of discussion.

Case 2:<sup>37</sup>

*Facts:*

*Sofia Campos-Guardado is a citizen of El Salvador who entered the United States illegally in 1984. In deportation proceedings she applied for withholding of deportation and asylum. Earlier in 1984, in one incident, guerrillas had killed her uncle and four cousins and raped her, whereupon she succeeded in escaping. Later while visiting her parents, she saw one of the attackers, who had recently fled from the guerrillas. He told her that he would kill her and her family if she disclosed his identity. When guerrillas burned down her workplace, Campos fled to the United States. Her applications for withholding of deportation and asylum were denied.*

*The Board of Immigration Appeals ("BIA") affirmed the denials, and held that she was statutorily ineligible for either type of relief because her fear of returning to El Salvador was only personal in nature and not recognized as a basis for asylum by CSR51. Campos appealed to the Fifth Circuit.*

*Legal Ruling:*

*A women who witnessed the murder of her family before being raped by guerrillas did not, as an individual or in the social group of her family, have a political opinion imputed upon her by the attackers which could support an asylum claim.*

*Legal Reasoning:*

*The Court maintained the strict rule that a denial of withholding must be sustained "if supported by substantial evidence" (8 U.S.C. sec. 1105(a)(4)). Similarly, since a grant of asylum is purely at the discretion of the Attorney General, a denial of asylum must also be upheld unless it was "arbitrary, capricious, or an abuse of discretion."*

*The BIA is to be accorded complete deference to its interpretation of the*

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<sup>37</sup> Date: 10 February 1987 (19870210), Judicial Body: United States Court of Appeals, Fifth Circuit, Title: Sofia Campos-Guardado v. United States Immigration and Naturalization Service, National Legislation: Immigration and Nationality Act ("INA") secs. 101(a)(42), 208(a), 243(h), as amended, 8 U.S.C. secs. 1101(a)(42), 1158(a), 1253(h)(1), International Provisions: CSR51, arts. 1A(2).



*INA, unless there are "compelling" reasons to show that the BIA was wrong.*

*Petitioner based her claims of persecution on account of political opinion and membership in a social group. The Court's analysis centered on "political opinion" because her social group was her family, whose political opinions had allegedly been imputed to them by their attackers.*

*Agreeing with petitioner that persecution on account of political opinion can include imputed political opinion, the Court nevertheless held that the BIA had found insufficient evidence to show that she had been persecuted on account of her own political opinion or that of her family imputed to her by her attackers. Likewise, there was insufficient evidence to back her claim of fear of persecution upon a return to her home country. Noting that Congress had not defined the scope of "political opinion", the Court regarded the BIA as the appropriate body to evaluate such persecution claims. Because there was substantial evidence from the whole record to support the BIA's denials, the Court was compelled to uphold them.*

*Regarding petitioner's asylum claim, the Court emphasized the differences in degree of the requisite burden of proof, that is, a "clear probability" of persecution standard for withholding of deportation, and a "reasonable person" standard for asylum. The BIA had incorrectly assigned no meaningful difference between the two, but the error was irrelevant because the BIA had found her statutorily ineligible, owing to her failure to show fear of persecution on account of political opinion. Her fear, no matter how likely, had not met the BIA's interpretation of the statute.*

*Finally, the Court refused to consider petitioner's complaint of the BIA's abuse of discretion in granting her only 12 days to depart, rather than the customary 30, because she had failed to raise the issue on appeal to the BIA. A failure to exhaust administrative remedies precludes consideration.*

*Disposition:*

*The Court of Appeals affirmed the denials of the BIA.*

The Fifth Circuit affirmed Campos-Guardado's denial of asylum, supporting the BIA's reasoning. In rejecting her submission, the court ignored the weight of precedence, which holds that the claimant need not espouse a particular political opinion to make a successful claim of persecution on the basis of political opinion, as long as the political opinion is imputed to the complainant by the persecutor. The court concluded that the

persecutors' reasons for victimizing her were different from their political motivations behind the torture and execution of her male family members. Specifically, their reasons for persecuting Campos-Guardado were considered to be based on a 'personal relationship.' The court did not define what it meant by 'personal relationship.' In particular, no explanation was provided as to how the persecution could have been predicated on a personal relationship when the attackers had never met her before the incident. The court also did not reconcile the fact that the attackers were strangers who had no way of knowing that she was not politically active in the agrarian reform movement. While the type of torture inflicted on the men and women was clearly determined by gender, the reason for inflicting the torture would appear to have been the same. The attackers were of the belief that all those in the cooperative were politically active, and wanted to intimidate them and others from supporting the agrarian reform (Castel, 1992).

Case 3:<sup>38</sup>

*Facts:*

*Petitioner Olimpia Lazo-Majano is a native of El Salvador whose husband left El Salvador after quitting a rightist paramilitary group. A sergeant in the Salvadoran armed forces Z. hired the petitioner to do his laundry, then raped her at gunpoint. Subsequently, Z. threatened to use grenades against the petitioner. He told her that if her husband returned to El Salvador, he would kill them both, and that if she informed on him, he would say that she was a subversive, and torture and kill her. The petitioner believed the armed forces would let Z. carry out his threat, and that no one in El Salvador could stop the armed force from doing such things.*

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<sup>38</sup> Date: 02 April 1987 (19870402), Judicial Body: United States Court of Appeals, Ninth Circuit, Title: Olimpia Lazo-Majano v. United States Immigration and Naturalization Service, National Legislation: Immigration and Nationality Act ("INA") secs. 101(a)(42) (refugee definition), 208(a) (asylum), 243(h) (withholding of deportation), as amended, 8 U.S.C. secs. 1101(a)(42), 1158(a), 1253(h), International Provisions: CSR51, arts. 1A(2), 33.

*In 1982 she escaped from Z., left El Salvador and illegally entered the United States. In January 1983 she was ordered to show cause why she should not be deported for entry without inspection. She applied for political asylum based on a fear of persecution by Z. Her request was denied by an Immigration Judge, and the BIA affirmed the decision, declaring that her plight was strictly personal and did not constitute political persecution under the INA. Petitioner appealed.*

*Legal Ruling:*

*In determining whether persecution is on the basis of political belief, the political belief which the persecutor perceives or imputes upon the claimant may support a claim even where the claimant does not actually maintain the belief.*

*Legal Reasoning:*

*The Court found that the petitioner's evidence and story were uncontroverted and established a well-founded fear of persecution. The issue, according to the Court, was whether the petitioner was persecuted by a government agent (Z.) because of her political beliefs or whether the persecution was based on the personal relationship between them. Z. viewed the petitioner as a subversive because she regarded the armed forces as responsible for lawlessness, and he persecuted her on this account. Petitioner contended, moreover, that no political control existed in the armed forces to restrain Z. The Court found that under the statute, "political opinion" means the political opinion of the victim as perceived by the persecutor. Because Z. regarded the petitioner as a subversive, he persecuted her. Therefore, the petitioner suffered persecution for her political opinion as a matter of law, and the BIA order denying her asylum was an abuse of discretion.*

*Disposition:*

*The Court of Appeals reversed the decision and remanded the case to the BIA.*

Loza-Majano ultimately won an appeal in the Court of Appeals for the Ninth Circuit. This court explicitly acknowledged that rape is a form of persecution:

*Persecution is stamped on every page of this record. Olympia has been singled out to be bullied, beaten, injured, raped and enslaved. Olympia's initial acquiescence does not alter the persecutory character of her treatment. That she continued to return to Zuniga's place after his initial attack upon her presents a pattern, all too familiar, of a victim identifying with the aggressor under conditions of terror. She lacked 'sufficient ego-strength, self-confidence and will power' to 'escape or cry out help'. The persecution has been conducted by a member of the Armed Force, a military power that exercises domination over much of El Salvador despite the staunchest efforts of the Duarte government to restrain it. Zuniga had his gun, his grenades, his bombs, his authority and his hold over Olympia because he was a member of this powerful military group.*

The court then found that Lazo-Majano was persecuted by government agents because she had a political opinion, clearly rejecting the BIA's finding that the relationship of Olympia and Zuniga was purely personal. In reaching this conclusion, the court made clear that one need not be politically active or, for that matter, politically aware to suffer persecution on the basis of political opinion. "If the persecutor thinks the person is guilty of a political opinion, then the person is at risk." Thus, the fact that Lazo-Majano was a poor domestic worker who did not participate in politics would not preclude her from obtaining refugee status on the basis that she was persecuted for her political opinion, since what counted was 'the cynical imputation of political opinion to her.' The court elaborated, in terms that are unique to the case law, that Zuniga's political opinion was that men had the right to dominate women and that he perceived Lazo-Majano to have the political opinion of a subversive (Castel, 1992).

*... if the situation is seen in its social context, Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olympia through force to accept this opinion without rebellion. Zuniga told Olympia that in his treatment of her he was seeking revenge. But Olympia*

*knew of no injury she had ever done Zuniga. His statement reflects a much more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it. Olympia was not permitted by Zuniga to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion.*

Despite the fact some court decisions recognized rape as persecution they are exceptional in legislative acts. The following example, being raped by the state agents was not found satisfactory as persecution.

Case 4:<sup>39</sup>

*Facts:*

*A citizen of Poland claimed asylum and withholding of deportation due to fear of persecution by the secret police and, specifically, by the chief of security and internal affairs in her community, a man who was sexually interested in her. She alleged that this man had forced himself on her and used violence against her while threatening to destroy her career and blocking her professional advancement. Both the Immigration Judge and the Board of Immigration Appeal ("BIA") denied her application for asylum.*

*She appealed to the Sixth Circuit Court of Appeals.*

*Legal Ruling:*

*To be granted asylum, the petitioner must show a credible and well-founded fear of persecution based on race, religion, nationality, membership in particular social group, or political opinion. Harm or threats of harm based solely on sexual attraction do not constitute persecution on account of one of the five enumerated grounds.*

*Legal Reasoning:*

*The Court of Appeals reasoned that the petitioner failed to establish a*

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<sup>39</sup> Date: 29 June 1992 (19920629), Judicial Body: United States Court of Appeals, Sixth Circuit, Title: Elzbieta Klawitter v. United States Immigration and Naturalization Service, National Legislation: Immigration and Nationality Act ("INA") sec. 208(a) (asylum), as amended, 8 U.S.C. sec. 1101(a)(42)(A) (definition of refugee), International Provisions: CSR51, art. 1A(2)



*link between her fear and a qualifying ground in CSR51, such as race, religion, nationality, membership in a particular social group, or political opinion. The Court determined that sexual harassment by a police officer does not necessarily constitute persecution on account of one of these five grounds.*

*The petitioner also failed to provide sufficient evidence to support her claim of persecution by the secret police. She claimed that she was detained for questioning by the police, without cause or explanation. In addition, she alleged that drunken members of the secret police accompanied the chief of security and internal affairs to her house. However, these facts do not sustain a claim of persecution by the secret police.*

*Finally, the Court noted that the Ministry of Internal Affairs in Poland was reformed in 1990 and the secret police was abolished. Thus, the Court determined that there were insufficient objective grounds in present day Poland to support the petitioner's fear of persecution.*

*Disposition:*

*The Court of Appeals affirmed the decision of the BIA.*

Under the same circumstance a Romanian woman was granted refugee status in Germany.

Case 5:<sup>40</sup>

*Facts:*

*The applicant is a young Romanian woman, who claimed asylum in May 1990. In the spring of 1989, while she was finishing her secondary education, she started looking for a job in the town of C. In order to be eligible to work in C she needed permission from the police, so she went to see the mayor. The mayor offered his help on the condition that she would*

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<sup>40</sup> Date: 19 February 1992 (19920219) Judicial Body: Bayerisches Verwaltungsgericht (Bavarian Administrative Court), Ansbach  
Reference: AN 17 K 91.44245, National Legislation: Grundgesetz (Constitution), art. 16(2)(2) [Note: Article 16(2), second sentence, of the Constitution has been included and completed in the new article 16a on 1 July 1993.]

*have sex with him. The woman refused, whereupon she was abducted by the mayor and two policemen to the mayor's house. There she was kept for two weeks, sexually abused, and maltreated. After the two weeks she was dumped on the street. She needed hospitalization for one month and a half. The mayor of C was arrested on the occasion of the fall of the communist regime in December 1989, but was released after one month and reinstated as mayor. She then decided to leave Romania.*

*The Federal Office for the Recognition of Refugees denied asylum on the ground that the maltreatment and sexual abuse had not been acts of persecution by the state, but had been criminal acts by a private citizen, against which she could have sought protection from the Romanian state by filing a complaint.*

*Legal Ruling:*

*(1) Persecutions linked to unchangeable characteristics attached from birth to every human being --such as race, colour or gender-- are political according to article 16 of the Constitution, and as such, they are relevant to asylum.*

*(2) Legally recognized persecutions must emanate from state organs such as a mayor; whether the applicant could have filed a complaint is irrelevant.*

*Legal Reasoning:*

*(1) The decisive criterion in questions relating to political persecution as defined in article 16 of the Constitution is whether a person has suffered infringements of his/her rights beyond what is normal in a peaceful society and which are linked to the five Convention grounds.*

*Referring to a decision by the Federal Constitutional Court, the Administrative Court reasoned that persecution is "political" when it is linked to political or religious opinions, or to other unchangeable characteristics such as race or colour. As gender is also an unchangeable characteristic, gender-related persecution is "political" persecution.*

*(2) To fall within the scope of article 16 of the Constitution, persecution should emanate from the state, or be attributable to the state. The Court held that the mayor and his helpers were clearly state organs and could not be considered as having acted as private citizens.*

*In that connection, the issue whether the applicant could (or should) have filed a complaint was irrelevant. With regard to the one-year time lapse between the persecution and the flight, the Court stated that it was a well-known fact that it was very difficult to leave Romania under the Communist regime, and that the reinstatement of the mayor early in 1990 had*



*greatly contributed to the applicant's fear of (further) persecution.*

*With regard to the possibility of future persecution, the Court reasoned that the fall of the Communist regime in Romania had not brought structural changes with it. The Court considered it likely that the reinstated mayor would continue to harass the applicant to prevent her from denouncing what had occurred to her in 1989. The standard of "sufficient certainty" that no further persecution would occur had thus not been met (see CAS/DEU/93).*

*Disposition:*

*The Court held that the applicant had a right to asylum as she had been persecuted by state authorities and there was not sufficient certainty that she would not be persecuted again if returned to Romania.*

According to the Handbook on Procedures and Criteria for Determining Refugee Status, there is not a universally accepted definition of "persecution" and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom is always persecution. Other serious violations of human rights -for the same reasons- would also constitute persecution.<sup>41</sup>

Goodwin-Gill details the fundamental human rights in his book and adds

measures, taken on the basis of one or more of the stated grounds, which threaten; deprivation of life or liberty; torture or cruel, inhuman or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual's life, liberty, livelihood, security or integrity); and oppression, discrimination or harassment of a person in his or her private home or family (Goodwill-Gill, 1983; 40).

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<sup>41</sup> Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1988, p.14.

Article 3(1) of the Convention Against Torture states, "No party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." Therefore, the 1951 Refugee Convention and the Convention Against Torture are in cooperation on the principle of non-refoulement. "To have a well-founded fear of persecution, within the meaning of the Convention, one need not actually have been tortured; threats of torture (or of other forms of persecution) are sufficient" (Castel, 1992; 45).

As the definition of torture was examine in detail above <sup>42</sup> it is clear that rape is a form of torture. Affidavit of the Legal Education and Action Fund (LEAF) in Gayme states that rape violates women physically and mentally, humiliates them, devastates their sense of self-respect, undermines their dignity, and often leaves them with a sense of inferior status in the community which may never be undone. Threat of rape makes threat of such violation a permanent feature of the landscape of women's lives (Castel, 1992). That rape involves mental and physical pain has been well documented by mental health professionals who treat women who have sexually assaulted. Women who have been sexually assaulted experience a consistent pattern of symptoms which have come to be known as Rape Trauma Syndrome.

Case 6:

*Facts:*

*Aurora Nazario Arrieta is 15 years old. On 2 November 1995, she was raped by three police officers near her home in Cuetzalan in the state of Puebla. Aurora Nazario, a member of the Nahuatl indigenous community of*

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<sup>42</sup> See Chapter 2.2.1.c.

*San Miguel Tziniacapan, was walking past the town's police station when four police officers, including the police commander, dragged her inside. They told her to get undressed and when she refused one of the officers forcefully undressed her. Then they drenched her with water and took her to a cell, where she was raped by three officers, including the police commander. The fourth stood guard outside. She suffered multiple bruising and lacerations. Afterwards, Aurora Nazario was threatened with death and retaliation against her family if she told anyone what happened. She was then allowed to go.*

*Later that evening, the woman for whom Aurora Nazario worked as a housemaid presented a complaint before the public ministry official in Cuetzalan, and the rape was certified by a doctor. On 3 November the three officers offered Aurora Nazario's family money to withdraw the allegations. Despite the officers still being in town on 3 November, they were not arrested. They remain at large but their whereabouts are unknown (Amnesty International News, April 1996, 7).*

This is an example of domestic measures against the rape of a woman by the security forces. As is obvious, no serious measure has ever been adopted by the authorities on such kind of charges. Mulligan states that "if there is no effective prosecutorial system available to a woman in the country where the rape has occurred, or if her life is endangered by bringing the issue to the attention of the authorities, then the applicant has a well-founded fear of persecution on account of political opinion" (Mulligan, 1990; 380).

#### **4.2.b.3. Violence in the Refugee Context**

Although the previous section covers the main argument of violence in the refugee context, a summary of the issue is necessary for the full picture of violence against female refugees. According to the 1951 United Nations Refugee Convention, any person who owing to well-founded fear of

being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is a refugee. The "gender" is not included as a category to the refugee definition. The Executive Committee Conclusion No 73 recognizes that the widespread occurrence of sexual violence is in violation of the fundamental right to personal security as recognized in international human rights and humanitarian law. Such violations inflict serious harm and injury to the victims, their families and communities and have been a cause of coerced displacement including refugee movements in some areas of the world.

When rape or other forms of sexual violence are committed for reasons of race, religion, nationality, membership of a particular social group or political opinion, it may be considered persecution under the definition of the term "refugee" in the Statute of the Office (paragraph 6.A (ii)) and the 1951 Convention relating to the Status of Refugees (Article 1 A (2)) if it is perpetrated or "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection".<sup>43</sup>

The UNHCR Executive Committee, in the Conclusion No.39, recognizes that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment, due to a transgressing the social mores of the society in which they live may be considered as a "particular social group" within the meaning

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<sup>43</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), paragraph 65); Executive Committee Conclusion No 73 (XLIV) (1993), paragraph (d) Refugee Protection and Sexual Violence; Sexual Violence against Refugees, Guidelines on Prevention and Response, UNHCR, Geneva 1995, p.67.

of Article 1 A(2) of the 1951 United Nations Refugee Convention.

A well-founded fear of sexual violence in such circumstance can thus provide the basis for a claim to refugee status. The experience of rape or sexual torture as a form of persecution might also constitute "compelling reasons arising out of previous persecution" for not applying the cessation clauses in Article 1 C(5) and (6) of the 1951 Convention.

In certain societies, a rape victim may be killed or banished, or considered to have no alternative but to marry her attacker or become a prostitute - all additional human rights violations. Where the return to the country of origin would have one of these results, and where no other basis for her recognition has been identified, she may be considered a refugee *sur place*<sup>44</sup>.

#### **4.2.b.4. Gender-Based Violence Against Women During Armed Conflict**

Rape of women and girls in situations of armed conflict, whether civil or international, constitutes by definition a grave breach of international human rights and humanitarian law (UN Commission on Human Rights, 1994; 63).<sup>45</sup>

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<sup>44</sup> Sexual Violence against Refugees, Guidelines on Prevention and Response, UNHCR, Geneva 1995, p.68.

<sup>45</sup> It is very interesting to see a huge gap of recognizing between the rape under custody and rape during the armed conflict in the UN Commission on Human Rights. Paragraph 248 of the UN Commission on Human Rights report states: "Custodial violence against women is a widespread and troubling phenomenon. Abuse of power by government agents, usually police or military personnel, under non-transparent and highly unequal conditions, together with the impunity

Gender-based violence against women during the armed conflict raises many issues in common with violence against detained women, such as direct state responsibility and the tension between nondiscrimination norms and special preventive/ protective measures in recognition of special risks faced by women because of gender and maternity.

Sexual assault against women civilians during armed conflict may be part of an intentional strategy to suppress or punish the civilian population, or it may result from a failure by commanders to exercise proper discipline over their troops. However, it is never a "private" matter; humanitarian law requires occupying powers to protect the civilian population, and soldiers who rape may be punished as war criminals (Fitzpatrick, 1994).

Humanitarian law addresses a number of distinct issues relating to gender-based violence against women: (1) humane treatment of female combatants, especially as prisoners of war; (2) protection of female internees and civilians accused of offenses against an occupying power; (3) protection of female civilians from sexual abuse and degrading treatment; and (4) provisions for the special physical needs of pregnant women and mothers of young children.

Women are entitled to the general protection of humanitarian law on a nondiscriminatory basis as well as to certain gender-specific protection. The

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accorded to such agents, constitute the bases on which custodial violence ferments and grows. (UN Commission on Human Rights report p.60) Same report states in the paragraph 261: "Rape of women and girls in situations of armed conflict constitutes by definition a **grave breach of international human rights and humanitarian law.**" It is obvious that "rape during the armed conflict" gains its legitimacy through the national and ethnic consideration.



four 1949 Conventions and the two Additional Protocols all contain an identical prohibition on "any adverse distinction founded on sex." The nondiscrimination norms are frequently supplemented by provisions requiring that "women shall be treated with all the regard due to their sex."

1949 Geneva Convention, Part III, Section 1, Article 27 states that:

Protected persons are entitled, in all circumstance, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, forced prostitution, or any form of indecent assault.

The solicitude for the maternal role of women runs as a thread throughout humanitarian law. While it might seem churlish to quarrel with efforts to make the conduct of war more humane, the maternity-oriented provisions of humanitarian law can be criticized for reflecting rather Victorian views of women as being the equivalent of children in their weakness and in need of special care. It is a reinforcement of traditional role definitions.

#### **4.2.b.5. Sexual Harassment**

The definition of sexual harassment will vary with cultural values and norms. There are two vital ingredients to such conduct. First, it is conduct which is unwanted by the recipient, in other words, unwelcome sexual



attention. Second, it is conduct which from the recipient's point of view is offensive or threatening. Fitzpatrick suggests that the approach of analyzing sexual harassment as a form of discrimination helps the offending conduct be broadly defined. Emphasizing sexual harassment as a form of "violence" might lead to a narrowing of its definition (Fitzpatrick, 1994).

#### **4.2.c. Traditional (Social) Forms of Violence**

The notion of cultural and religious rights can often reinforce the distinction between the public and private worlds that operates to the disadvantage of women; culture and religion can be seen as spheres protected from legal regulation even though they allow oppression of women by men. While the right to gender equality on the one hand and religious and cultural rights on the other can be reconciled by limiting the latter, cultural and religious freedom are accorded a much higher priority in political practice nationally and internationally.

In many societies, women are subject to violence because of traditional practices. Among such practices which violate women's human rights are female genital mutilation, son preference, gender difference in nutrition, early childhood marriage, violence related to dowry, widow burning and virginity tests. All these practices have received international attention as aspects of the problem (UN Commission on Human Rights, 1994; 35).

#### **4.2.c.1. Widow Burning**

Coomaraswamy cited the case of Roop Kanwar, a university student who was burned alive on her husband's funeral pyre in Deorala, Rajasthan, as an example of the dissonance between women's rights and ethnic identity. The Rajasthanis claimed that the right to commit *sati* was part of their culture. Coomaraswamy asks:

What is the point of all these if the people do not believe that putting an eighteen-year-old woman on a funeral pyre and denying her life is not a violation of the most basic fundamental right - the *right to life*? What is the point of all the Constitutional protection if "*ethnic identity*" is an acceptable justification for reducing the status of women according to diverse cultural practice (Coomaraswamy, 1994, 50)?

#### **4.2.c.2. Dowry Related Violence**

In many societies the payment of a dowry is required for the groom to marry (Mertus, 1995). In addition, the expenses for the marriage are also borne by the bride's family. Failure to provide the agreed amount of dowry could mark the beginning of violence within the family for the woman. She may be verbally abused, mentally and physically tortured, starved and, in certain communities, even burnt alive by the husband and/or his family members (UN Commission on Human Rights, 1994; 38).

#### **4.2.c.3. Early Marriage**

Early marriage is intended to guarantee a woman's virginity, relieve her family of burden of a mouth to feed and ensure a long cycle of fertility to produce a number of sons. Yet early marriage generally leads to early childhood/teenage pregnancy, which in turn, lessens the life expectancy of girls, adversely affects their health, nutrition, education and employment opportunities and lowers their rate of economic participation. Furthermore, maternal and child mortality rates are found to be extremely high in areas such as South Asia, where the use of traditional birth practices has been recorded (UN Commission on Human Rights, 1994; 39).

#### **4.2.c.4. Forced Abortion/Sterilization and Female Infanticide**

The prevalence of son preference, more marked in Asian societies and historically rooted in the patriarchal system, cannot be ignored. Son preference has been found to be directly associated with a high mortality rate for women. Saying such as, "To have a son is good economics and good politics, whereas bringing up a girl is like watering the neighbour's garden" illustrate the attitude in societies where son preference is prevalent (UN Commission on Human Rights, 1994; 37-38). Already at the fetal stage, amniocentesis tests, sonography and increasingly developed technological methods for sex determination often lead to the abortion of the female fetus in such societies like China, Nepal, India and Pakistan.

Women, have suffered violations of their most fundamental rights as a result of China's birth control policy. Birth control has been compulsory

since 1979 and a quota system is enforced. Some women who become pregnant outside the plan have been abducted and forced to have abortions or undergo sterilization. "Above-quota" new-born babies have reportedly been killed by doctors under pressure from officials and some couples who have refused to obey the child quotas have had their homes demolished. Relatives of those who could not pay fines imposed for having had too many children have been held hostage until the money was paid. Those helping families to have "above-quota" children have been severely punished.

An unmarried woman in Hebei province who had adopted one of her brother's children was detained several times, in an attempt to force her brother to pay fines for having had too many children. In November 1994 she was held for seven days with a dozen other men and women. She was reportedly blindfolded, stripped naked, tied and beaten with an electric baton (Amnesty International News, April 1996; 5).

#### **4.2.c.5. Traditional Laws**

Certain traditional practices and sanctions which are violent towards women are justified by special legislation. The public stoning and lashing of women serve to institutionalize violence against women. Women are whipped, raped and disfigured for failing to strictly adhere to the dress code; some are even stoned for committing adultery in Iran (Kelley. 1990).

Moghissi states "the harassment and persecution of Iranian women reached an all-time high in summer of 1993" and "a teenage girl was shot dead by police in a telephone booth in Tehran for defying the *hejab* code"

(Moghissi, 1995; 254). Women who attempt to work outside their home faced harassment and surveillance (Kelley, 1990).

Case 7:<sup>46</sup>

*Facts:*

*Laila is an Iranian woman age of 30, who is married and the mother of a child. She had worked for three years after her graduation in the 1990s in Iran. During these years she was forced to wear a headcovering inside the workplace, and not to use make-up or perfumes. She wanted her insurance to cover her child also but her request was denied. She was taken from her responsibilities when she objected to receive lower salary than a male worker.*

*Laila went on a mission with her supervisor. When they returned from the mission she was questioned about her trip by the Islamic Committee of the company. The Islamic Committee told her that according to the Islamic rules she should not travel alone with a man who is not her husband. The Committee was not satisfied with her response that it was her duty to go on mission. They called in her husband. He defended his wife. The Committee sent a letter to her father that her husband was not a reliable man to protect his wife from sin. Laila's father and uncle called her later. Her uncle threatened her with death because she dishonored her family. She was obliged to resign from her work.*

*Legal Analysis:*

*The imposition of the "Hijab" in Iran in March 1979 Ayatollah Khomeini first advised women to wear a veil, since unveiled woman represented the negative influence of Western values on indigenous culture (Background Paper On Refugees and Asylum Seekers From Iran/CDR Oct.1995). Contravention of the dress code are punishable by either a verbal reprimand, a fine or 74 strokes of the lash, or a prison term of one month to one year. This could be counted as a violation of fundamental beliefs and thus persecution. In this case the claimant was mistreated in her job because of the implementation of "Hijab" which included requesting from her veil. After she went to mission, the Islamic Committee started an investigation and as a result, her behavior was considered an "honor problem" by her family*

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<sup>46</sup> Resource: UNHCR Branch Office Ankara. For reason of confidentiality, the names and places given have been altered.

*like she was a shame for the family. Regarding that point, in Middle East culture, the family has a right to kill this person in order to clean their honor. In addition to that, according to the Excom No: 39/1995 "women asylum-seekers who face harsh of inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" (Handbook Para. 45).*

*Decision:*

*The elements given by the applicant justify a well-founded fear of persecution on the ground of particular social group.*

#### **4.2.c.6. Virginty Tests**

In many societies, women are subject to virginty tests on their marriage night or as part of a prosecution for rape or sexual abuse. A recent report by Human Rights Watch highlighted this practice in Turkey (Human Rights Watch Women's Project, June 1994). Also, women are often harshly persecuted for losing their virginty before marriage in Lebanon, Egypt, Syria and Algeria (Kelley, 1990). Virginty is required from a young woman and ascertained on her wedding day. If she is not a virgin, regardless of whether it is her fault, her husband may repudiate her and send her back to her family who invariably disown the girl and commonly kill her to defend their honour.

#### **4.2.c.7. Honor Killing**

Formal or customary legal rules that permit men to murder their wives on suspicion of infidelity or because they do not otherwise conform to the husband's demands, coupled with the lack of defense not available to women who resort to violence against unfaithful husbands would also logically be invalidated under an equality rationale mandating that spouses have equal

rights in marriage. CEDAW's General Recommendation No.19 explicitly calls for the abolition of the "defence of honor."

In February 1990 the tribal practice of killing women for "honor crimes" was reinforced and legitimized by the Iraqi regime. Decision 1110 of the RCC, signed by Saddam Hussain, exempted from punishment or legal questioning men who murdered their mothers, daughters, sisters, paternal aunts, brothers' daughters or father's brothers' daughters, if they were deemed guilty of an "honor crime" (Omar, 1994).

The Independent Women Organization has identified over 300 murder of women by male members of their families in Northern Iraq between 1992 and 1995. They also found 30 unidentified bodies of women at the hospitals of the region. Families force young women to marry men whom they think to be proper husbands. To want to marry a man who is not the family's choice is a clear reason to be killed.

Case 8:<sup>47</sup>

*Facts:*

*Najma is an Iraqi from Erbil, she is twenty-three years old. She claims to belong to a tribal and a traditional family which imposes strict rules on her. In regard to her relation with her family, she states that the traditions and rules of the tribe were dominant. Accordingly the girls were supposed to obey their family and their decisions. Najma states that she has always opposed to her family as she had the will to determine her life by making her own decisions. For instance she pursued her right to go to High School. Having completed her studies, she claims to have been under the pressure of her family in her decisions; she was hardly even allowed to go out from her*

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<sup>47</sup> Resource: UNHCR Branch Office Ankara. For reason of confidentiality, the names and places given have been altered.



*house. That is why she has always been in conflict with her family.*

*Upon the decision of her family, Najma was engaged when she was seven years old. She states that this engagement was based on a deal done between the two families. When her brother got married to a girl from Juf tribe, it was decided by the two families that Najma would be married to a son from that family in the future. Thereupon she was engaged to a person without her will when she was just seven years old.*

*Najma claims that she started dating someone whom he met two years ago through a friend. She could rarely meet her boyfriend as her family was very strict about her going out from the house. She claims to have been seen by her brother when she was with her boyfriend. Having been seen by her brother at the park, she was taken by her brother to the house and was severely beaten by her brothers. She was prohibited by her family from seeing her boyfriend in the future. She opposed her family and tried to defend her right to make her own decisions. Najma's family beat her severely whenever she tried to defend her right to determine her future and she was told that she did not have the right to choose her husband, and that she is supposed to marry her fiance.*

*Najma claims to have a sister who was not allowed by her family to go to the school and who was later forced by her family to marry a person proposed by her family.*

*Najma also claims to have been threatened with death by her family. Owing to this deal made between the families, she was forced by her family marry to that man and she was threatened with death by her brother as her brother was threatened by his wife's family that his wife and his children would have been taken away unless he would convince Najma to marry to their son.*

*Najma states that if she had stayed in her home country, she would definitely have refused to marry that person as she was already in love with someone else and as she believed that she had the right to determine her life. She claims that her life would have been at risk if she continued to oppose to her family and that she would have committed suicide rather than marrying him.*

#### *Legal Analysis:*

*The claimant alleges to have been at risk of persecution by her family because of her opposition to her family's decision on her marriage and because of having a relationship with another person without her family's approval. Owing to the fact that she refuses to marry the person proposed by her family and insists on marrying the person she loves, Najma is scared that her family will threaten her life as they consider this marriage a matter*

of family honor.

*In assessing the applicant's claim there are two questions to be dealt with: firstly whether she is at risk of being persecuted in her home country and secondly whether this claim is based on one of the five grounds defined in refugee definition.*

*The applicant has a subjective fear which is supported by an objective fear because the country of origin information concerning Iraq/Northern Iraq strongly suggests that men kill female family members if they transgress social norms. According to the decision of an Iraqi Court published in the Court Decision Journal (General Commission/Decision Number 150.240.304/Decision Date 13 October 1979/Al-Ahkam Al-Adliya - Court Decision Journal/Forth Issue/Volume 10) when a brother kills his sister, this crime is considered as an act which is done for an honorable motive because of the infamy which she brings to her family. Another court decision (Crime/Decision Number 342/Decision Date 18 September 1979/Al-Ahkam Al-Adliya - Court Decision Journal/Third Issue/Volume 10) assessed the case when the accused killed his cousin when she ran away from her family home. This crime is considered as an act which is done for an honorable motive because of the infamy which she brings to her family according to the dominant traditions. (Source: The Penal Code Number 111 of 1969 and its amendments, printed in 1982). In addition, the government of Iraq shows its unwillingness to prevent the killing of woman with an the "honorable motive."*

*As mentioned above the country of origin information on Iraq/Northern Iraq suggests that killing of women with an "honorable motive" is a widely recognized act and that neither the Iraqi authorities nor the Kurdish authorities in Northern Iraq show willingness to prevent these killings. Judging from her statements the applicant can be considered as a woman who has transgressed the social norms of the society as she opposes the marriage arranged for her by her family and wants to marry her boyfriend. Furthermore, in the case of the applicant, her family can be seen as an agent of persecution as paragraph 65 of the Handbook states that "persecution can be committed by the local populace if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection". As the country of origin information suggest the authorities are either unable or unwilling to prevent such incidents and provide protection; that is why the applicant receives protection neither from her family nor the authorities. Therefore it can be concluded that the IC is at risk of being persecuted in her home country and her subjective fear is supported by an objective fear.*

*Regarding the second question on the ground of persecution, the*

*applicant's claim can be viewed in the context of belonging to a particular social group, women who transgress social mores.*

*Considering the UNHCR Executive Committee Conclusion NO 39 of 1985, on Refugee Women and International Protection which provides that "States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group within the meaning of Article 1 A (2) of the United Nations Refugee Convention." It is therefore acceptable to base the IC's claim on grounds of belonging to a social group, namely women who have transgressed social mores. Furthermore, it should be kept in mind that her situation is aggravated by her flight to Turkey as her family will "punish" her for her departure, very probably by killing her.*

**Decision:**

*The elements given by the applicant justify a well-founded fear of persecution on the ground of particular social group. (Handbook Procedures and Criteria for Determining Refugee Status, prg 77,78,79).*

**Case 9:<sup>48</sup>**

**Facts:**

*Esma and her husband lived in Kirkuk. She has worked as a clerk in a state office since 1980, and her husband had a shop selling spare parts. Her husband came from a religious Kurdish family in Kirkuk. Her marriage to him was approved by her family because of his beliefs and respectability. In 1993, her husband was arrested by Security officials at his shop. Esma was informed of this by her parents-in-law and her brother-in-law. Her brother-in-law used to work in the same shop as her husband. Her brother-in-law was told by Security, when he tried to find out what had happened to her husband, that he had been accused of being a member in the "Islamic Movement."*

*In 1995, Esma started having an affair with the supervisor of her department at work, Mahmood. On one occasion, when Mahmood drove her home, he stayed for a meal. Her brother-in-law knocked on the door and burst in shouting and asking what this man was doing there. Esma threw him*

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<sup>48</sup> Resource: UNHCR Branch Office Ankara. For reason of confidentiality, the names and places given have been altered.

*out. Her brother-in-law went to her home accusing her of being guilty of adultery. Her family came to her house immediately and confronted her with this accusation - which she denied. Mahmood stopped visiting her at home. Two months later, Mahmood asked her to join him on a trip to Baghdad. The applicant told her parents that it was related to work. She took three days leave and they drove together to Baghdad.*

*The day they returned, her brother-in-law and the brother came to her home. They had found out that the trip was not related to work. Her brother began beating and insulting her. He told her that she was disloyal to her husband and her family and threatened to kill her. Her brother tried to strangle her but then neighbours intervened. She left her country.*

#### *Legal Analysis:*

*According to the Handbook para 65 "persecution is normally related to action by the authorities of a country." However, "where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." The state therefore carries the duty not only not to violate her rights but also the duty to protect her from transgressions by others. In this respect, it should be noted that most violence against women occurs in the social sphere and is perpetrated by husbands, boyfriends, in-laws etc. Most women will experience state subjection indirectly through direct subjection to individual men or groups of men, as is the case with the IC. Para 65 of the Handbook supports the argument that "states are accountable for a failure to protect women from "private" violations as they are for the "public" violations that states themselves commit." In cases where such violations result in the killing of a woman, the state is put under the obligation of actively taking measures to protect the woman in question, in order not to be regarded as implicitly responsible for its perpetration.*

*It should also be noted in this respect that she should not be put in a position where she would have to rebut the presumption that local protection is a genuine option, as that it not feasible in the claimant's current situation. Taking into consideration the social customs of the society in which the applicant was living and the lack of evidence that would clearly support the genuine existence of local protection, it must be concluded that any state protection afforded to her would be clearly ineffective.*

*The applicant being a woman and having committed adultery, was facing persecution by the male members of her family as a result. This persecution is clearly based on her gender. She is a woman who has dared to transgress accepted social norms. According to UNHCR EXCOM*



*Conclusion No.39 of 1985, on Refugee Women and International Protection, "States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live many be considered as a particular social group within the meaning of Article 1 A(2) of the United Nations Refugee Convention." As she faces the possibility of being killed by her brother on return to Iraq, she should be considered as a member of a particular social group, namely that of women who have transgressed social mores.*

*Decision:*

*The claimant is recognized as a refugee under UNHCR's mandate on the grounds of her membership to a particular social group.*

In Egypt and West Jordan it is common for the family of the girl to encourage her to set herself on fire or jump from a balcony when she becomes pregnant out of wedlock. If she is reluctant, the family may do it themselves and report it as a suicide. Generally these deaths occur with impunity (Kelley, 1990).

Romany states that at least 400 women were murdered by their husbands or lovers in the Pernambuco state of Brazil between 1987 and 1989. Overall, 70 per cent of reported incidents of violence against women occurred in "private" homes, almost all of them committed by a husband or lover.

In the face of this pervasive violence, the Brazilian criminal system sanctions defenses that either reduce the punishment for such violence or absolve perpetrators altogether. The most pernicious such defence is the "defence of honor." which absolves wife-murderers who can prove that they acted spontaneously in legitimate self-defence against an imminent aggression against their honor. Honor is broadly defined to

include perceived adulterous conduct-any activity by the woman outside of the conjugal norm is deemed an attack of the man himself legitimating violence response. (Romany, 1994; 103)

In Iran, a husband, father, or brother has right to kill his wife, daughter, or sister without being punished, "if he finds her committing an 'immoral' or 'unchaste' act" such as having sex with a man who is not her husband (Mirhosseini, 1995; 173)

#### **4.2.c.8. Female Genital Mutilation**

Female genital mutilation is arguably the most dramatic form of gender-specific violence. Female genital mutilation involves the use of dangerous and frightening weapons, causes permanent physical damage and sometimes death, and is targeted in the most gender-specific way possible at the female genitalia. Although the practice is increasingly performed on infants and small children, rather than as a puberty rite, the issue of "consent" does not mask the element of violence. Female genital mutilation bears a powerful but complex relation to the principle of equality. The development and persistence of the practice of female genital mutilation seems deeply linked to the denigration of women as inferior beings and to a desire to subordinate women, especially to control their sexuality.

There are at least four types of practices, varying in severity. They are the ceremonial cutting of the prepuce of clitoris, sunna involving the removal of the prepuce (thus analogous in some respects to male circumcision), excision which involves removal of the clitoris and the labia minora, and infibulation which involves removal of all the outer female genitalia and

sewing the remnants of the labia majora together so as to leave only a small opening for the passage of urine and menstrual blood. Female genital mutilation is violence against women which has become an increasing concern to the international community. Legal prohibition of such a practice, accompanied by criminal sanctions and educational programs need to be taken.

Case 10:<sup>49</sup>

*Facts:*

*The claimants are Somalian citizens, a mother and her two minor children. Khadra Hassan Fadrah, 30, her daughter Hodan Dahir Buraleh, 10, and her son Mahad Dahir Buraleh, 7, belong to the Isaaq tribe. The mother lived in Burao, a northern Somalian city, until she moved to Saudi Arabia with her parents in 1980. When she reached the age of sixteen her father arranged her marriage to a man, Dahir Buraleh Ibrahim, twenty years older than she was. The couple lived in Saudi Arabia and had three children. Two of them are the co-claimants in this case. After three years of the marriage the claimant asked for divorce which was opposed by her parents and led to both physical as well as verbal abuse by her husband. In 1983 the husband took the first-born son out of the home when he was one year old. The whole family, except the oldest son, travelled to the US in 1989 and stayed until 1991.*

*In March 1991 the wife, together with her two children, left her husband and went to Canada claiming refugee status. The abduction of the son was seen by the applicant as a retribution for her divorce plans as well as her independence efforts. As a reaction to a phone conversation between the claimant and her husband in 1992, he removed the oldest son from the house of the claimant's grandmother and denied both of them any contact to*

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<sup>49</sup> Date: 13th July 1994 (19940713) Judicial Body: Immigration and Refugee Board, Refugee Division (Toronto, Ontario) Title: Case of Khadra Hassan Farah, Mahad Dahir Buraleh and Hodan Dahir Buraleh, National Legislation: Section 69.1; 2(1) of the Immigration Act, International Provisions: Arts. 3, 7, 16 of the Universal Declaration of Human Rights (UDHR); arts. 15, 16 of the UN Convention on the Elimination of All Forms of Discrimination Against Women; arts. 3, 9, 12, 19, 24, 37 of the UN Convention on the Rights of the Child



*the child. On the 6th June 1992, the husband finally divorced her. She stated that the father had never played any role in the children's lives, except financial support, never assuming any educational responsibility. He now lives in Somaliland and is involved into the Isaaq Somali National Movement (SNM) as well as the current government of Somaliland. The mother fears that, if returned to Somalia, she would lose her two remaining children like she lost her first one. Her daughter had to face the danger of being subjected to the custom of female genital mutilation (FGM). Her son would be forcibly returned to his father who could not be considered a parent to him. To both children the mother was the only parental figure.*

*(1) A divorced mother, subjected to the jurisdiction of the Sharia law, as applied in Somalia, does not sufficiently enjoy her rights as a parent or her right to personal security as required by the human rights instruments. In this context, being a member of the social group of women entitles to Convention refugee status.*

*(2) Forcing a minor female to undergo female genital mutilation would grossly infringe upon her rights as secured in international human rights instruments. The Somalian state does not protect minor females from suffering this treatment. Being a minor female from Somalia therefore qualifies for Convention refugee status.*

*(3) According to international human rights a minor child of divorced parents must be given the chance to have his wishes taken into account concerning the parent with whom he wants to live. If this chance is categorically denied by a certain law or custom, e.g. the Sharia law in Somalia, the rights of the child are violated. Being a minor under that circumstances fulfills refugee status requirements.*

#### *Legal Reasoning:*

*(1) According to evidence raised by the Board, Somaliland applies the hardline Islamic Sharia law. Apart from that Somali culture is extremely patriarchally oriented. Under this law a divorced woman has to give back her children to the father. Children belong to the clan of their father. And even though Somaliland has incorporated the Universal Declaration of Human Rights into its "National Charter", it has violated it frequently in practice by accepting that women automatically lose custody of their children on divorce.*

*Arts. 7 and 16 of the UDHR but also, and more specifically, Arts. 15 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women clearly safeguard, inter alia, equal rights for men and women during marriage as well as in divorce. The Sharia law therefore does not conform with international provisions. Thus in this case the prerogative of the claimant's husband to take the children and refuse further contact is a*

*violation of internationally protected rights of the claimant.*

*This fact is considered even more serious as the mother has virtually solely raised her children. The loss of her children would therefore "destroy" her. She would further be unable to seek protection from her ex-husband in Somaliland because of his bonds to the government and the police. None of her relatives are remaining in Somalia. It seems to be likely that the ex-husband having beaten and threatened her repeatedly before her flight, would do so again without any chance of protection for her. According to the Supreme Court's decision in Ward, the membership in a social group may be defined by an "innate and unchangeable" characteristic such as gender. A divorced mother under Sharia law may thus well fear persecution on account of being a member of the social group of women.*

*(2) The minor female claimant's fear of persecution clearly relates to female genital mutilation. According to evidence raised by the Board an estimated 98 per cent of all Somalian women have undergone this procedure, although it has been outlawed since 1947. FGM is practiced as an old Somalian custom on young women varying in age between infancy and adolescence. It involves cutting away certain parts of the genital organs as well as stitching together the two sides of the vulva. In Somalia the harshest form of FGM is used. Because the way the operation is performed is an archaic tradition, it often leads to serious health related consequences both psychological and physical (infertility, AIDS, etc.). The Board held that it grossly infringes minor female's rights contained in Art. 3 of the UDHR to be subjected to FGM.*

*Treatment of that kind also violates the more specific rights included in Arts. 19, 24 and 37 of the Convention on the Rights of the Child. FGM may be seen as a torturous custom which is dealt with in the mentioned provisions. The governments concerned, particularly the Somalian government, have shown very little action to prevent FGM.*

*The panel therefore assumes that the claimant will not be protected by any Somalian authority from the disastrous damage done by FGM. Even her father, who will claim custody of her in Somalia, will surely not protect her from this treatment, rather enforce the custom. It is thus highly likely that she would have to face an infringement of her internationally protected rights if returned to Somalia. The claimant belongs to the two social groups of minors and women according to the categories set up in Ward. She may therefore well fear persecution because of being a member of these groups.*

*(3) The minor male claimant's fear of persecution is related to a forcible removal from his mother. The panel understands that he feels deeply for her, even more since he witnessed his father's violence against her at a very early age. After the child is returned to Somalia, his father would*

*exercise his prerogative on him as explained above. This would clearly not conform to the boy's wishes.*

*The overriding principle in international human rights law is to serve the "best interest of the child" as laid down in Arts. 3 and 9 of the Convention on the Rights of the Child. More specifically Art. 12 of the Convention declares that the wishes of a child in matters affecting it should be taken into account in accordance to his age and maturity. Returning the child to Somalia and thus exposing him to his father's prerogative cannot be considered in the child's best interest or in accordance to his wishes. The foreseeable and automatic consequences of the Sharia law would deprive the child of his internationally protected rights. This analysis also applies to the boy's sister.*

*According to the categories in Ward the boy is a member of the social group of minors. His fear of persecution is well-founded on grounds of his membership to this group.*

*Disposition:*

*The Board found that all three claimants were Convention refugees on grounds of their membership to particular social groups. In each case their fear of persecution was considered well-founded.*

#### **4.2.c.9. Death Threats**

Women who defy traditional practices and related legislation such as authors Taslime Nasreen of Bangladesh and Asma Jehangir of Pakistan often receive death threats and are victims of violence. This tradition of violence against women who do not conform to cultural norms is frequent in many societies.

Case 11:<sup>50</sup>

*Facts:*

*An Iraqi woman, named Runak, age 25, is married and lives in Northern Iraq. She has been politically active since 1993. She has prepared*

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<sup>50</sup> Resource: UNHCR Branch Office Ankara. For reason of confidentiality, the names and places given have been altered.

*several reports on social life in Iraqi Kurdistan. She defended the workers rights against employees in the Private Workers Union. During her actions, she has had to stand against the ruling power of the region- the Patriotic Union of Kurdistan (PUK), many times. She was able to solve many problems of workers through negotiation with employees and the PUK.*

*She wanted to defend the rights of another worker who was raped by her employer. But this time the PUK was not willing to investigate or negotiate the issue because the accused was an important PUK member. The applicant was threatened with death by the PUK if she continued her involvement. After she announced the event during a conference, the threats became more severe and serious, and she was forced to leave her country to save herself from future persecution. As she described, her actions, which came to the notice of the authorities, were taken as serious threats to the regime and the social order which she had not been able to imagine until that time. Her intention was to defend the rights of a worker but she was accused of promoting opposition ideas against the regime and threatened to be killed.*

As MacKinnon demonstrates in her work, these experiences have been silenced out of the difference definition of sex equality largely because they happen almost exclusively to women. MacKinnon further states that "[w]hen they are sexually violated, it is not simply tolerated or found entertaining or defended as the necessary structure of the family, the price of civilization, or a constitutional right" (MacKinnon, 1987; 41).

### **Last Words About Gender-Based Violence**

Gender-based violence is not the only form of human rights abuse that women suffer, but it is one in which the gendered aspect of such abuse is often the most clear. Domestic violence, for example, is a form of torture that often includes imprisonment in the home, whether enforced physically or psychologically through fear and terrorization.

Rape is a human rights violation even when it is performed by private actors. Rape has been recognized as a form of torture when it is performed by police or by other agents of the government, and has begun to be understood as a war-crime in war situations. Rape, like other forms of torture and terrorism, is used to keep women out of certain places.

Female infanticide and malnutrition of girls are forms of female genocide. Compulsory pregnancy both kills women and forces them into involuntary labor; arranged marriages and enforced heterosexuality deny women's physical integrity and their right to marriage by choice. Recent researches show that somewhere between 80 to 100 million women are missing in the world today.

In many societies, women are subject to violence because of traditional practices. Among such practices which violate women's human rights are female genital mutilation, violence related to dowry, widow burning, virginity tests, certain traditional sanctions such as public stoning and lashing, and also wife murdering on honorary motive serve justification and institutionalization of gender-based violence. .



## CHAPTER 5

### CONCLUSION

The transforming of human rights from a feminist perspective is critical to addressing global challenges to human rights in the twenty-first century (Bunch, 1995). This should be seen in the context of **the growth and evolution of women's movements internationally** in the past two decades. Women are taking leading roles in redefining social concepts and global policy issues in areas such as development, democracy, human rights, world security, and the environment. This means more than just looking at what have been called "women's issues"; it means moving women from the margins to the center by questioning the most fundamental concepts of our social order so that they take better account of women's lives.

**Examining female life experiences** show us that women's issues are not separated but are neglected aspects of the global agendas. Feminist analysis begins with the recognition that each of us views societal concepts and institutions from a different point of view depending on our conscience and our place in society. Gender must also be analyzed in relation to other factors such as nationality, race, and class in order to discern the multiple forms of human rights abuse that women suffer.

In this thesis, the human rights abuses where gender is a primary factor, have been examined because they have been the most invisible and

offer the greatest challenge to the human rights movement. As discussed above, women's human rights are violated in a variety of ways. Most women's experiences of human rights violations are gendered and many forms of discrimination of abuse occur because the victim is female. Women whose rights are being violated for reasons other than gender such as political prisoners or members of persecuted ethnic groups, often also experience a particular form of abuse based on gender.

Human rights are not static, nor are they the property of any one group. These concepts began in a particular historical moment and were defined in terms of needs of a limited sector of the population. Still, their dynamism and ongoing relevance stem from the fact that more people are claiming them and, in the process, expanding the meaning of "rights" to incorporate their own hopes and needs.

Much of the creativity of the human rights movement over the past forty years has come from expanding the concept to address additional areas. Among them are racial discrimination, disappearances, socio-economic rights, and the collective right to a sustainable environment, take place as well as women's transforming human rights.

This thesis addresses the public/private dichotomy which is the main obstacle to the realization of human rights for women. It also exposes that the public/private dichotomy is identified politically. Therefore, none of the human rights violations of women should be exempted from the state responsibility by considering it "private matter". As Pateman correctly points out "the abstract character of the individual" is in theory a male figure.



Women are found lacking the capacity necessary for the political life as "they pose a threat to political order so [they] must be excluded from the public world" (Pateman, 1989; 4). Yet, men make politics over women's bodies. Throughout this thesis, the power relation between men and women becomes obvious. As a result, **empowerment** is the correct aim for women in the coming future.

This thesis explores various human rights violations which women experienced. Some other forms of human rights violations such as pornography, forced prostitution, violence against immigrant female workers, discriminatory domestic law related with the right of nationality, personal rights, and equal rights within the family law have not been discussed in this thesis. Still, it is obvious that gross human rights violation occur in the context of the women's experience which cause women to be excluded from the public realm. Therefore, the public civil rights are certainly important to women to **become full legal subjects**.

It is acknowledged that gender-based violence is a gross human rights violation which effects the lives and deaths of hundreds of women every day and everywhere. As is recognized by the international community, it is time to ask for and work further to achieve that **concrete actions against violence against women** are taken.

It has also been shown that much of the abuse of women is part of a larger socio-economic and cultural web that entraps women, making them vulnerable to abuses. Therefore, it is vital to **address women's concerns in the second generation human rights** such as food, shelter, and work.

In order to respond to the brutal and systematic violation of women's rights globally, governments and the human rights community must move beyond male-defined norms, a move that requires the examination of gender biases and acknowledgement of the rights of women as human rights. Governments must seek to end the politically and culturally constructed wars on women, rather than continuing to perpetuate them. **Every state has the responsibility to intervene in the abuse of women's rights within its borders and to end its collusion with the forces that perpetrate such violations in other countries.**

And of course it is necessary to keep in mind as Kunnemann states "[t]o avoid false generalizations, human rights must only taken for what they are: not a dream of paradise, but **a tool to limit and regulate the power of the state** (Kunnemann, 1995; 326)."

**HUMAN RIGHTS!**  
**GAINING IS ALL**  
**IN**  
**OUR**  
**HANDS**



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